

Uniform Code of Military Justice

Subject: Cruel and Unusual Punishments Prohibited

I. Army Provisions

1. Articles of War.

"ART. 41. Cruel and Unusual Punishments Prohibited.-- Cruel and unusual punishments of every kind, including flogging, branding, marking, or tattooing on the body are prohibited."

2. Manual for Courts-Martial.

"PAR. 102. Courts-Martial -- Punishments -- General Limitations.--
.....

"Courts-martial will not impose any punishment not sanctioned by the custom of the service, such as carrying a loaded knapsack, wearing of irons, shaving the head, placarding, pillory, stocks, and tying up by the thumbs. Military duties, such as guard duty, drills, the sounding of calls, will not be degraded by imposing them as punishments. Solitary confinement, a bread-and-water diet, loss of good-conduct time, and the placing of a prisoner in irons will not be imposed as punishments by a court-martial."

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

Article of War 41 was not changed by P.L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 49. Prohibited punishments.-- In no case shall punishment by flogging, or by branding, marking, or tattooing on the body be adjudged by any court martial or be inflicted upon any person in the Navy. The use of irons, single or double, is abolished, except for the purpose of safe custody, or when part of a sentence imposed by a general court martial."

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

".....

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

(General courts-martial and deck courts martial are also authorized to inflict a punishment of solitary confinement on bread-and-water Cf. A.G.N. 35, 64b).

"ART. 24. Punishments by order of commander.-- No commander of a vessel shall inflict upon a commissioned or warrant officer; nor shall he inflict.....upon any petty officer, or person of inferior rating, or marine, for a single offense, or at any one time, any other than one of the following punishments, namely:

"....."

"Third. Solitary confinement, on bread and water, not exceeding five days....."

2. Proposed Navy Bill.

"SEC. 36. Article 49 is renumbered as article 31 and amended to read as follows:

'ART. 31. In no case shall punishment by flogging, or by branding, marking, or tattooing on the body be adjudged by any court martial or be inflicted upon any person in the naval service. The use of irons, single or double, is abolished, except for the purpose of safe custody.'

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

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

'.....'

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

"SEC. 47....."

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

'.....'

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

(General courts-martial can still inflict all punishments that a summary court may).

"SEC. 16. Article 24 is renumbered as article 14 and amended to read as follows:"

(Punishment by commanding officer at Captain's Mast still includes sentence of solitary confinement on bread and water not exceeding five days, to run consecutively).

III. Differences

1. Navy provisions do not have a general clause prohibiting cruel and unusual punishments of every kind.
2. Army provisions prohibit punishments of solitary confinement, or of a bread and water diet (AMCM, Paragraph 102). Navy provisions permit any court-martial, or a commanding officer at Captain's Mast, to impose a sentence of solitary confinement on bread and water for a stated period, to run consecutively, with a full ration every third day.

Uniform Code of Military Justice

Subject: Places of Confinement--When Lawful.

I. Army Provisions

1. Articles of War.

"ART. 42. Places of Confinement-- When Lawful.-- Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is more than one year: Provided, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions, any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: Provided further, That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States: Provided further, That persons sentenced to dishonorable discharge and to confinement, not in a penitentiary, shall be confined in the United States Disciplinary Barracks or elsewhere as the Secretary of War or the reviewing authority may direct, but not in a penitentiary."

2. Army Manual of Courts-Martial.

"PAR. 90. Courts-Martial--Action--Place of Confinement

"(a) Penitentiary.-- A penitentiary may be designated as the place of confinement for the whole period of confinement imposed by the sentence as ordered executed, provided such period exceeds one year, and provided also that such sentence is wholly or partly based on one or more of the offenses listed below or was imposed by way of commutation of a death sentence:

Desertion in time of war.

Repeated desertion in time of peace.

Mutiny.

An offense involving an act or omission recognized as

an offense of a civil nature and made punishable by penitentiary confinement for more than one year by some statute of the United States of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, whether statutory or common. Sodomy, being recognized as an offense by the common law in force in the District of Columbia, is included.

"A penitentiary will not be designated as the place of confinement except as authorized above in this paragraph..... Instructions as to the particular penitentiary to be designated will be issued from time to time by the War Department.

"It is the policy of the War Department to separate, so far as practicable, general prisoners convicted of offenses punishable by penitentiary confinement from general prisoners convicted of purely military offenses or of misdemeanors in addition to purely military offenses. In furtherance of this policy, reviewing authorities should designate a penitentiary as the place of confinement in every case when such action is authorized, unless it appears that the holding of the prisoner in association with misdemeanants and military offenders will not be to the detriment of such misdemeanants and military offenders, and that the purposes of punishment do not demand penitentiary confinement."

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

Art. 42, A. W., is not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy.

Articles 4, 5, and 6 list offenses which are punishable by death, or such other punishment as a court martial may adjudge.

Article 14 lists offenses which are punishable by fine and imprisonment, or such other punishment as a court martial may adjudge.

Articles 1, 3, 8, 16, 17, 19, 20 and 21 list offenses for which such punishment as a court martial may adjudge can be inflicted.

"ART. 7. Imprisonment in lieu of death.-- A naval court martial may adjudge the punishment of imprisonment for life, or for a stated term, at hard labor, in any case where it is authorized

to adjudge the punishment of death; and such sentences of imprisonment and hard labor may be carried into execution in any prison or penitentiary under the control of the United States, or which the United States may be allowed, by the legislature of any State, to use; and persons so imprisoned in the prison or penitentiary of any State or Territory shall be subject, in all respects, to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which the same may be situated (R. S., sec. 1624, Art. 7.)."

"ART. 51. Adequate punishment; recommendation to mercy.-- It shall be the duty of a court martial, in all cases of conviction, to adjudge a punishment adequate to the nature of the offense; but the members thereof may recommend the person convicted as deserving of clemency, and state, on the record, their reasons for so doing (R. S., Sec. 1624, Art. 51)."

"ART. 63. Punishment for offenses in time of peace.-- Whenever, by any of the Articles for the Government of the Navy of the United States, the punishment on conviction of an offense is left to the discretion of the court martial, the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe (R. S., Sec. 1624, Art. 63; Feb. 27, 1895, c. 137, 28 Stat. 689)."

2. Naval Courts and Boards.

"SEC. 642 (footnote (65)). Disignation of prison.-- Officers authorized to convene general courts-martial are empowered to designate prisons for the confinement of persons sentenced thereby. Prisons will be designated in accordance with instructions issued from time to time by the Secretary of the Navy.

"Where sentences as approved include confinement for six months or less, such confinement should be executed on the station in such place as may be suitable....."

Sec. 457 is a schedule of offenses and the limits of punishment for them, promulgated under the authority of Art. 63.

3. Proposed Navy Bill.

Arts 5 and 6 are repealed; Art. 4 is renumbered as Art. 8 and amended to include all offenses for which a punishment of death, or such other punishment as a court martial may adjudge, may be inflicted.

Art. 14 is renumbered as Art. 9 and amended to include all offenses for which such punishment other than death as a court martial may adjudge may be inflicted.

Arts. 1, 20, and 21 are amended; they no longer provide specifically for a punishment. Arts. 3, 8, 16, 17, 19, and 22 are repealed.

Art. 7 is renumbered as Art. 32; its text is unamended.

Arts 51 and 63 are repealed.

"ART. 28(b) It shall be the duty of a court martial, in all cases of conviction, to adjudge a punishment adequate to the nature of the offense; but the members thereof may recommend the person convicted as deserving of clemency, and state, on the record, their reasons for so doing."

"ART. 33(b) The President is authorized to prescribe a limitation of the punishment which may be inflicted under any of these Articles; and thereafter, such limitation while in force shall not be exceeded."

4. Laws Relating to the Navy, Annotated, in force January 1, 1945.

A case note found in Volume 1, P. 447, states that a person convicted of a violation of art. 8 and art. 22, A.G.N., may be sentenced to imprisonment at hard labor for a stated term. Article 7, A.G.N. does not preclude a sentence of imprisonment at hard labor in cases where the death penalty is not authorized.

A case note found in Volume 1, P. 449, states that the inclusion in art. 14, A.G.N. of the words "fine and imprisonment" does not preclude a court from imposing a sentence of imprisonment for an offense under art. 8.

III. Differences

1. A. Army: A Federal penitentiary may be designated as the place of confinement in the following cases only:

1). Where the period of confinement authorized and adjudged by the court is more than one year, and,

- a) the offense is desertion in time of war.
- b) the offense is repeated desertion in time of peace.

c) the offense is mutiny.

d) the offense is an act or omission which is also an offense of a civil nature and is made punishable by

penitentiary confinement for more than one year by a Federal statute of general application throughout the United States, excepting Sec. 289, Penal Code of the United States, 1910 (Sec. 289 relates to the adoption of penal laws of a State, territory or District to punish acts not made penal by Federal statute, when the acts are committed on a Federal reservation within the territorial limits of the State, territory, or District); or by the law of the District of Columbia, whether statutory or common.

2). Where a sentence of death has been commuted by the President.

Whether or not a penitentiary is designated as the place of confinement is within the discretion of the reviewing authority; it is not mandatory in any case, except insofar as Department of the Army policy makes it so. (Cf. AMCM, Par. 90a.)

B. Navy: There are no statutory limitations of any kind which restrict the cases where a Federal prison may be designated as the place of confinement for a Naval prisoner. The language of present Art. 7 (Art. 32 under the proposed Navy bill) seems to limit the power of a court martial to adjudge a punishment of imprisonment to cases where it is authorized to adjudge the punishment of death, but Art. 7 has been construed otherwise. Cf. par. 4 of Sec. II of this paper.

As a matter of practice, the Navy itself limits its power to designate a Federal prison as a place of confinement. Sec. 642, footnote (65), NC&B, provides that where a sentence as approved includes confinement for six months or less, such confinement should be executed on the station where the court martial was held. Arts. 51 and 63 of the present A.G.N. (Arts. 28(b) and 33(b) under the proposed Navy bill) restrict the court in the sentences it can impose; insofar as these Articles serve to prevent sentences of over six months confinement they would prevent imprisonment in a Federal prison.

(The Navy actually goes beyond the above provisions in its practice. A man is not usually sent to a Federal prison in any case where the sentence adjudged is less than a year's confinement, or in any case where the offense was not a serious civil offense).

The power to designate a prison as the place of confinement is given to the convening authority of a general court-martial (NC&B, Sec. 642, fn (65)), but its exercise is actually controlled by BuPers. Current practice is to send all prisoners to a Retraining Command initially; after an investigation is made

of each case by BuPers, the permanent place of confinement is designated.

IV. Recommendations

None.

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ARTICLE OF W.R. 43

See C.S., A.W. 31.

Uniform Code of Military Justice

Subject: Reduction to Ranks - Officers. A.W. 44

I. Army Provisions

1. Articles of War.

(A.W. 44 deals with the publication of the conviction of an officer of cowardice or fraud, but has been repealed by P.L. 759).

2. Manual Courts-Martial

(Par. 103h) "Only provision for loss of rank is that an officer may be reduced a certain number of files or he be placed at foot of list of officers of his grade." No mention is made of reduction in grade. These punishments are no longer to be adjudged. 6 Bull. JAG 280-1 (Dec. 1947).

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

"SEC. 221. Article 44 is amended to read as follows:

"ART. 44. OFFICERS--REDUCTION TO RANKS.-- When a sentence to dismissal may lawfully be adjudged in the case of an officer the sentence may in time of war, under such regulations as the President may prescribe, adjudge in lieu thereof reduction to the grade of private."

II. Navy Provisions

1. Articles for the Government of the United States Navy.

"ART. 9. Any officer who absents himself from his command without leave may, by the sentence of a court-martial, be reduced to the rating of seaman, second class."

2. Naval Courts and Boards.

Does not mention loss of rank, other than loss of file numbers. Loss of numbers is the maximum punishment prescribed for officers for a number of offenses. N.C.&B. Sec. 457.

3. The Military Justice Division of the Army JAG held that a court-martial has no authority to impose a sentence reducing an officer from a higher temporary grade to a lower grade in the Regular Army or otherwise. (SPJGJ 1943/10454, 16 July 1943 noted in Bulletin of JAG of Army, Vol. II, No. 11 (Nov. 43) p. 425.)

The President also disapproved a sentence of a court-martial reducing an Army officer to a lower grade and rank because it could not be carried into effect by the Executive

alone, but would require a nomination by the President and confirmation by the Senate, and then only in the case of an existing vacancy. (Swain v. U.S. 165 U.S. 553, 563 1 Mar. 1897--noted in Laws Relating to Navy, Supplement 1/1/45, Vol. I, p. 457).

Held also that reduction to rank of officers under A.G.N. 9 applied only to the offense therein stated (A.W.O.L.) and to no other. (CMO 34-1918--noted in Laws Relating to Navy (1929) p. 988).

4. Proposed Navy Bill.

SEC. 7. Changes "without leave" to "without authority" and renumbers Art. 9 as Art. 10.

III. Differences

1. Differences in Army and Navy provisions.

Under the amended Articles of War, an officer may be reduced to grade of private in lieu of dismissal in time of war under such regulations as the president may prescribe. The only Navy provision relating to reduction in rank is that an officer who absents himself without authority may be reduced to seamen second class.

IV. Recommendations

2. Discussion.

The House Armed Services Report (1034) infers that this provision was inserted to provide greater equality in the treatment of officers and enlisted men.

The Vanderbilt Report recommended:

"In time of war a general court-martial should be authorized in its discretion to inflict as officer punishment, loss of commission, and reduction to the ranks. In numerous instances officers would prefer it and we see no reason why this should not be left to the discretion of the general court."

The Keeffe, McGuire, and Ballantine Reports do not make any recommendation as to reduction in rank of officers.

ADDENDA

Uniform Code of Military Justice

Subject: Pay of Suspended Officer. AGN 34.

I. Army Provisions

1. Articles of War.

No similar provision.

2. AR 35-1800

Par. 11a. When an officer is under stoppage of all pay by sentence of general court-martial or otherwise, or is suspended from rank and pay, it is to be understood as depriving him of all his salary and increase for the time.

II. Navy Provisions

1. Articles for the Government of the Navy.

"Article 48. Suspension of pay.--

"Whenever a court martial sentences an officer to be suspended, it may suspend his pay and emoluments for the whole or any part of the time of his suspension."

2. Naval Courts and Boards.

Sec. 622, n.24, states that sentences of suspension, with full or reduced pay, are not favored.

3. Proposed Navy Bill.

Article 48 is renumbered as Article 34.

III. Differences

There is no similar Article of War. However, an Army general court-martial can of course sentence an officer to suspension from command, duty or rank, and to forfeiture of pay during such suspension.

There is no provision in either service that provides that a suspended officer shall not receive pay.

IV. Recommendations

The McGuire, White, Ballantine, Keefe, and Vanderbilt Reports make no recommendations on this provision.

Uniform Code of Military Justice

Subject: Maximum Limits of Punishment. A. W. 45.

I. Army Provisions

1. Articles of War

"ART. 45. Maximum Limits.--Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not exceed such limit or limits as the President may from time to time prescribe: Provided, That in time of peace the period of confinement in a penitentiary shall in no case exceed the maximum period prescribed by the law which, under article 42 of these articles, permits confinement in a penitentiary, unless in addition to the offense so punishable under such law the accused shall have been convicted at the same time of one or more other offenses."

2. Manual for Courts-Martial

Sets forth limitations as prescribed by the President.
Par. 104.

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

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 63. Punishment for offenses in time of peace.--

"Whenever, by any of the articles for the government of the Navy of the United States, the punishment on conviction of an offense is left to the discretion of the court-martial, the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe."

2. Naval Courts and Boards

Sets out limits as prescribed by the President. Sec.
451-457.

3. Proposed Navy Bill

"SEC. 47.

"ART. 33. (a) No court martial shall adjudge a sentence of imprisonment upon conviction of an offense under the laws specified in article 5 (d), First, of these Articles, in excess of the period prescribed for that offense in such laws, but such limitations upon the period of imprisonment shall not affect the power to impose additional or other types of punishment authorized by these Articles.

"(b) The President is authorized to prescribe a limitation of the punishment which may be inflicted under any of these Articles; and thereafter, such limitation while in force shall not be exceeded."

III. Differences

Both A.W. 45 and proposed A.G.N. 33 give the President authority to prescribe the maximum punishment for offenses under the respective articles during both times of war and peace. The Articles of War, however, except the punishments for certain offenses, which are mandatory. The proposed A.G.N. have no mandatory punishments.

Both Articles also restrict sentences of imprisonment for offenses which are also offenses against the civil laws of the United States, to the maximum prescribed by such federal laws. However, this latter restriction under the Articles of War only applies to times of peace, while under the proposed Navy bill, there is no such limitation.

The Navy bill adds that such limitation on the period of imprisonment shall not affect the power to impose additional or other types of punishment authorized by the articles, while A.W. 45 does not contain such a provision.

Present provisions as to maximum punishments are found in Manual for Courts-Martial, Par. 104 (applies only to enlisted personnel) and Naval Courts and Boards, Sec. 457 (applies only in time of peace.)

IV. Recommendations

The first Ballantine, McGuire, White, and Koeffe Reports and the Navy JAG recommend establishment of limitations in time of war as well as peace.

The McGuire Articles recommend changes in the capital crimes and that all offenses punishable by death under federal criminal laws be declared punishable by death by courts-martial.

The Keeffe Report contains the following discussion:

"MAXIMUM PUNISHMENTS.

"The present Articles do not make any sentence mandatory. Article 63 provides that whenever, by any Article, the punishment on conviction of an offense is left to the discretion of the court martial, the punishment shall not, in time of peace, '.....be in excess of a limit which the President shall prescribe.' Pursuant to Article 63, the President has prescribed a schedule of offenses and limitations of punishment applicable, in time of peace, to both officers and enlisted men. The schedule includes punishment for military offenses and also lists punishments which are prescribed by statute for the more common offenses against the United States Criminal Code.

"Article 63, by its own terms, has no application in time of war and therefore the schedule prescribed by the President is inapplicable in war time. As a result, naval courts during World War II were, for the most part, without any official guidance as to sentences. In a report submitted to the Secretary of the Navy, by the Disciplinary Policy Review Board, dated 1 May 1945, that Board found that many inequalities existed in punishments awarded in different commands for comparable offenses, particularly in cases involving unauthorized absence, which then comprised over 80% of all disciplinary infractions. In the present review of general court martial cases this Board has found some disparity in sentences, especially as originally imposed by courts. However, substantial uniformity has been achieved by the processes of review.

"Prior to the 1920 revision, the Articles of War provided that, in time of peace, maximum punishments for offenses would be as prescribed by the President, whenever by the Articles, punishment was left to the discretion of courts martial. A table of maximum punishments was prescribed by the President, applicable only in time of peace. During World War I, the fact that Army courts were without substantial guidance as to sentences resulted in wide disparities. After World War I there was much criticism of the severity of the sentence of Army courts martial. As a result, the Articles of War were amended to provide for limitations upon punishments,

to be prescribed by the President, for offenses committed either in time of war or peace, whenever the Articles provided for punishment at the discretion of courts martial.

"The Manual for Courts-Martial sets forth a Table of Maximum Punishments for both military and civil offenses, applicable in both peace and war, but limited to offenses by enlisted men. Punishment of officers, where not made mandatory by the Articles, is left to the discretion of courts martial. Certain offenses which carry mandatory punishment are not mentioned in the Table. Even though by the Articles of War certain offenses may be punished by death or such other punishment as a court martial may direct, the death penalty may not be imposed if the President has made the maximum limit less than death. Certain offenses not provided for in the Table remain punishable as authorized by statute or by customs of the service.

"Shortly after the entry of the United States into World War II, the President, by Executive Order, suspended the Army limitations upon punishment for desertion and certain offenses by sentinels. In November 1942, the maximum punishment for absence without leave was suspended. Subsequently, the War Department issued policy directives on uniformity of sentences, applicable in the United States, which, in general, established a term of 10 years confinement for desertion and 5 years for serious cases of absence without leave.

"Certain revisions of the Army rules of maximum punishments have been recommended since the cessation of hostilities. It has been suggested that Article of War 92 providing a mandatory punishment of death or life imprisonment for murder or rape, should be amended to provide for 'death or such other punishment as a court martial may direct.' It has been claimed that in some cases courts acquitted soldiers charged with murder or rape because they were unwilling to impose such severe punishment. The fact that the Army Table of Maximum Punishment applies only to enlisted men, and that officers escaped with lighter sentences than enlisted men for the same offenses, has been criticized.

"In combat zone desertion cases, the Army adopted a policy of imposing long sentences so as to punish severely 'slackers' who sought to avoid combat by short sentences of confinement, and to deter others who might be tempted to desert. The USFET General Report has suggested that in all such cases, the Table of Maximum Punishments should permit a sentence of confinement 'for the Duration' plus a term of years thereafter.

"The existence of discrepancies in the sentences of naval courts-martial in various commands for like offenses is not of itself a criticism of courts-martial or of naval justice. The Board does not consider that, in general, sentences have been excessive. A penal code which permits variance in sentences is desirable. Individual circumstances vary so widely that variation in sentences is perfectly natural. Sentences in civil jurisdiction vary according to the circumstances of each case, as well as according to the particular attitudes in the jurisdiction itself. It is well known for example, that sentences for certain offenses committed in some states will be substantially less than like offenses committed in other states. In early times, virtually every criminal code was noteworthy for the fixed rigidity of the punishment for various offenders. One of the great steps forward has been the introduction of greater variation in sentences. This has permitted courts greater freedom in adapting their sentences to the particular circumstances of each case. This approach is believed to be more just than one of fixed rigidity. This is not to say, however, there should be no maximum limits to the punishment which a court can impose, but rather that variation within limits is desirable and necessary. Nearly all civil penal codes place limits on punishments which courts may decree for various offenses.

"The first Ballantine Report noted that naval courts were substantially without the benefit of guidance in imposing sentences in time of war, and recommended the promulgation, as a matter of policy, of limitations upon punishments effective in time of war.

"In an attempt to obtain greater uniformity of sentences in absence cases, the Navy Department has issued several policy letters. These letters established policy as to appropriate sentences for absence cases. They did not establish maximum limits of punishment nor did they refer to other offenses, military or civil. Since these directives merely suggested appropriate sentences, courts were still free to impose longer terms of confinement.

"The articles proposed by the McGuire Committee recognize the weakness of present Article 63 and provide:

'Article 4 (c) (6): Limits of Punishment. The punishment imposed by a court-martial shall not exceed such limit or limits as the President may from time to time prescribe.

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Provided: The period of confinement shall in no event exceed the limits prescribed by an applicable federal criminal statute. The limits prescribed by such statute shall not affect the power to impose additional or alternative types of punishment.'

"Commodore White has recommended a provision to accomplish the same purpose, but in more specific language:

'Limitation of Punishment. Whenever the punishment for a crime or offense made punishable under these Articles is left to the discretion of the court-martial or if not specified, the punishment shall not exceed such limit or limits as the President may from time to time prescribe. Provided, the period of confinement shall in no event exceed the limitation prescribed by law. The limitation prescribed by law shall not effect the power to impose the additional or exclusive punishment or punishments of dismissal, discharge, loss of pay and loss of numbers in appropriate cases.'

"The Judge Advocate General has recommended the following articles:

'(6) Limitation of Punishment. Whenever the punishment for a crime or offense made punishable under these Articles is not otherwise limited or specified, the punishment shall not exceed such limit or limits as the President may from time to time prescribe. Limitations proscribed by law shall not affect the power to impose the additional or exclusive punishment or punishments of dismissal, discharge, loss of pay and loss of numbers in appropriate cases.'

"All these proposals have the merit of providing for limitations upon punishments, to be prescribed by the President, applicable in time of war as well as peace. The McGuire Articles specifically cover the subject of confinement in a federal penitentiary, restricting such confinement to offenses against the U.S. Criminal Code and limiting its duration to the maximum period provided therein for such offenses. This follows Article of War 45 and appears to be sound. The White and Judge Advocate General Articles, while intended to accomplish the same result, refer merely to limitations 'prescribed by law', which might be construed to refer to state, as well as federal, penal code.

"Specific reference, in all three proposals, to alternative punishments, other than as prescribed, is desirable in order to avoid doubt as to whether the punishments stated are exclusive.

"The Board is of the opinion that any of the proposed articles would result in improvement over the present situation. If, during time of war, it becomes desirable to suspend the limit of punishment for any offense, this can be accomplished by Executive Order. This was done during World War II in the case of certain offenses against the Articles of War.

"Great care should be exercised, however, in the preparation of a table of maximum punishments. The tables now used by the Army and Navy are objectionable in that some of the differences in the punishment for various offenses appear to be purely arbitrary. Many of the offenses listed are rarely alleged in practice. An eminent authority on military law, Colonel Winthrop, has criticized the fixing of maximum punishments by schedule of 'artificial, complicated, and embarrassing in practice,' and has suggested that such schedule 'would preferable be amended and restricted to acts of desertion and a few other perhaps of the great offenses.' It is believed that there is much merit in this criticism and that consideration should be given to the inclusion, in any such schedule, of only the more serious military and civil offenses, with punishment for other offenses left to the discretion of the courts, as guided by departmental policy.

"It is believed that punishment should not be made mandatory for any offense. The policy of the present Articles, in this regard, should be continued so as to avoid the situation presently faced by the Army in connection with offenses against the 92nd Article of War.

"The Board does not concur in a proposal, currently being made with regard to the Articles of War, that certain maximum punishment for civil offenses be limited to that prescribed by local law, even in foreign countries. For a time the Army, while in England, punished the offense of statutory rape according to English law. This practice was abandoned as a result of a ruling by the Assistant Judge Advocate General that Army courts could not judicially notice foreign law; that such law could not be applied, and that the penalty prescribed by the U.S. Criminal Code should be applied. American naval forces on foreign soil when tried by naval courts should not be subject to punishments prescribed by foreign penal codes. Foreign codes, ideas of justice, and moral concepts may, and do, differ from our own and should not be regarded as controlling in the administration of naval justice.

"On the other hand, consideration should be given to punishments authorized by the penal codes of the states of the United States, since the offenses against state penal laws may violate the Articles as well. If such an offense is not otherwise mentioned in the Articles, it is not an offense against the U.S. Criminal Code, and is not mentioned in the Table of Maximum Punishments, the punishment authorized by the State for that offence should at least be used by the court as a guide in imposing sentence. A naval court should not be bound by state limitations, however. A relatively trivial offense, by state standards of punishment could be a far more serious naval offense because of the discredit it might bring to the uniform of the naval service.

"RECOMMENDATIONS

"The Advisory Council should review the problem of maximum punishments. For purposes of such review, the following suggestions are made:

- "(1) Article 63 should be repealed. In its stead, a new article such as proposed by the McGuire Committee, Commodore White, or the Judge Advocate General draft articles in time of peace and war, in all cases where the Articles provide for punishment at the discretion of courts-martial.
- "(2) Such table of maximum punishments should include only the more serious military and civil offenses, punishment for other offenses to be limited only by departmental policy to be announced from time to time.
- "(3) Punishment for offenses against state laws should not be limited by the law of the particular state, but courts should use such law as a guide in determination of sentence. Punishments prescribed by foreign law should not be binding on courts-martial."

The Navy JAG also recommended:

"2. Limitations of punishment:

- "a. Where the offense committed consists of the violation of a federal statute, the period of confinement shall not exceed the maximum period of imprisonment provided for in that statute.
- "b. Where the offense committed consists of the violation of a state statute, the period of confinement provided for in that statute, if any, should serve as a guide and shall be exceeded only for special reasons."

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The Vanderbilt Report recommended further consideration of the elimination of all mandatory minimum punishments specified in the Articles of War or regulations so as to give wider discretion in passing sentences.

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Uniform Code of Military Justice

Subject: Action by Convening Authority.

See C.S., A.W. 70.

Uniform Code of Military Justice

Subject: Non-departmental Review.

I. Army Provisions

1. Articles of War

"ART. 46. Action by Convening Authority.--Under such regulations as may be prescribed by the President every record of trial by general court-martial or military commission received by a reviewing or confirming authority shall be referred by him, before he acts thereon, to his staff judge advocate or to the Judge Advocate General. No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being."

"ART. 47. Powers Incident to Power to Approve.--The power to approve the sentence of a court-martial shall be held to include:

"(a) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilty; and

"(b) The power to approve or disapprove the whole or any part of the sentence.

"(c) The power to remand a case for rehearing, under the provisions of article 50 $\frac{1}{2}$."

"ART. 48. Confirmation--When Required....."

"When the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is necessary."

"ART. 50. Mitigation or Remission of Sentences.--The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence.

"Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the person

under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority; but no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority, and no approved sentence of loss of files by an officer shall be remitted or mitigated by any authority inferior to the President, except as provided in the fifty-second article.....

"The power of remission or mitigation shall extend to all uncollected forfeitures adjudged by sentence of court-martial."

"ART. 51. Suspension of Sentences of Dismissal or Death.--The authority competent to order the execution of a sentence of dismissal of an officer or a sentence of death may suspend such sentence until the pleasure of the President be known, and in case of such suspension a copy of the order of suspension, together with a copy of the record of trial, shall immediately be transmitted to the President."

"ART. 52. Suspension of Sentences.--The authority competent to order the execution of the sentence of a court-martial may, at the time of the approval of such sentence, suspend the execution, in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension; and the the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks in which the person under sentence is held, a court of the kind that imposed the sentence; may at any time hereafter, while the sentence is being served, suspend the execution, in whole or in part, of the balance of such sentence and restore the person under sentence to duty during such suspension...."

2. Manual for Courts-Martial

"Par. 87. COURTS-MARTIAL--ACTION--Reviewing Authority.

"a. Who is reviewing authority.--The reviewing authority is the officer to whom the record is transmitted as provided in 85 and 86. The appointing authority In his absence, however, or where the command has been otherwise changed, 'the officer commanding for the time being.' (A.W. 46) is the reviewing authority.

"The 'officer commanding for the time being' is the officer who has succeeded to the command of the appointing authority by assignment or otherwise.....

"A reviewing authority can not delegate his functions as such to anyone.

"b. Powers and Duties.--General.--Approval of a sentence by the reviewing authority is one of the actions which must precede the execution thereof (A. W. 46), and such approval must be express, an approval of the findings only, for instance, not being sufficient. An approval of the findings and proceedings is unnecessary.....

"Where a sentence in excess of the legal limit is divisible, such part as is legal may be approved.....Neither the reviewing authority nor any other officer is authorized to add to the punishment imposed by a court-martial.....Upon a rehearing no sentence in excess of or more severe than the original sentence shall be enforced, unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceedings. (A.W. 50 $\frac{1}{2}$). Where only so much of a finding of guilty of desertion as involves a finding of guilty of absence without leave is approved, and it appears from the record that punishment for such absence is barred by A. W. 39, the reviewing authority should not consider any such absence as a basis of punishment, although he may disapprove the sentence and order a rehearing. In this connection it should be remembered that absence without leave is not a continuing offense.

".....The effect of a particular error within the purview of A. W. 37 should be weighed by him in the light of all the facts as shown by the record, and, unless it appears to him that the substantial rights of the accused were injuriously affected, he should disregard the error as a basis for holding the proceedings invalid, or for disapproving a finding or the sentence.....

"Par. 64a.....If the reviewing authority disagrees with the court, he may return the record to the court with a statement of his reasons for disagreeing and with instructions to reconvene and reconsider its action with respect to the matters as to which he is not in accord with the court. To the extent that the court and reviewing authority differ as to a question which is merely one of law, such as a question as to the jurisdiction of the court, the court will accede to the views of the reviewing authority; and the court may properly defer to such views in any case. The order returning the record should include an appropriate direction with respect to proceeding with the trial. If the reviewing authority does not wish to return the record he will take other appropriate action....."

"The disapproval of a sentence puts an end to it as a basis of punishment, and confirmation of a disapproval is not required in any case. A disapproval should be express. Neither an acquittal nor a finding of 'not guilty' requires approval or confirmation; and neither should be disapproved.....

"The staff judge advocate will submit a written review of the case. The review will include his opinion, both as to the weight of evidence and any error or irregularity and a specific recommendation of the action to be taken together with his reasons for such opinion and recommendation.....

"Revision and Correction of Record.-- A record of trial, which by reason of some apparent omission, error, or other defect appears to be substantially incomplete or incorrect, or which in the opinion of the reviewing authority shows improper action by the court as to a finding or sentence, may be returned to the president of the court (or to the summary court), directing that the court reconvene for such action as may be appropriate. See A. W. 40 for matters as to which a return of a record of trial for reconsideration is prohibited. [A. W. 40 'a. An acquittal; or (b) a finding of not guilty of any specification; or (c) a finding or not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some Article of War; or (d) the sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.....']

"Miscellaneous and Advisory Instructions.--Appropriate action should be taken where the court has imposed an unwarranted though legal punishment.....In every case the punishment should be graded according to the circumstances of the offense.....

"The reviewing authority may properly consider as a basis for mitigation or remission not only matters relating solely to clemency (e.g., long confinement pending trial or the fact that an accomplice turned State's evidence), but any factors which properly should have been, but apparently were not, considered by the court in fixing the punishment.....

"The reviewing authority may properly weigh the evidence in determining his action.

"Ordering Execution of Sentence; Mitigation; Remission; Suspensions.--Upon approval of a sentence the reviewing authority may, subject to the provisions of A. W. 50 $\frac{1}{2}$, order the execution thereof unless confirmation is required. [However, 'when the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is required.' (A.W. 48)] The fact that a sentence involves a loss of files or rank or other punishment described in 103h [including loss promotion; suspension from rank, command or duty] does not of itself prevent the reviewing authority from ordering execution.....

"The power to order the execution of the sentence includes the power to mitigate or remit the whole or any part of the sentence (A. W. 50); but in any case the punishment imposed by the sentence as mitigated or remitted must be included in the sentence as imposed by the court and should be one that the court might have imposed in the case.....

"To mitigate a punishment is to reduce it in quantity or quality, the general nature of the punishment remaining the same. A sentence can not be commuted except by the President or by a commanding general empowered by the President under A. W. 50.....

"The action of a reviewing authority in approving a sentence and simultaneously remitting a part thereof is legally equivalent to approving only the sentence as reduced.

"The authority competent to order the execution of a sentence of dismissal of an officer, or a sentence of death, may suspend such sentence until the pleasure of the President be known. (A. W. 51.).....

"As to penitentiary confinement, 'the reviewing authorities should designate a penitentiary as the place of confinement in every case when such action is authorized, unless it appears that the holding of the prisoner in association with misdemeanants and military offenders will not be to the detriment of such misdemeanants and military offenders, and that the purposes of punishment do not demand penitentiary confinement.' (90a)

"Forms of Action and Related Matters.-- The reviewing authority.....will sign in his own hand the action taken by him on the proceedings, his rank, and the fact that he is the commanding officer appearing after his signature. So also any supplementary or corrective action pursuant to a holding of the board of review and The Judge Advocate General under A. W. 50¹/₂ must be signed by the reviewing authority personally.....

"d. Orders and related matters.-- An order promulgating the result of a trial by general or special court-martial, while not necessary to the validity of the trial, will be issued whether such result was an acquittal or otherwise.....

"The order will be of the date that the reviewing or confirming authority takes final action on the case. The order will state the date upon which the sentence was adjudged by the court.

"When a rehearing is directed, neither the action of the court at the former proceeding nor the action of the reviewing or confirming authority thereon will be published in orders, but the court-martial order promulgating the final action in the case will

in a separate paragraph publish such charges and specifications at the former hearing as may not have been referred for rehearing, together with the action of the court and reviewing authority thereon."

"Par. 89. COURTS-MARTIAL--ACTION--Ordering Rehearings.-- When the President or any reviewing or confirming authority disapproves or vacates a sentence, the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court. (See A. W. 50¹.)....."

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

"SEC. 223. Article 47 is amended to read as follows:

"ART. 47. ACTION BY CONVENING AUTHORITY.--

"a. ASSIGNMENT OF JUDGE ADVOCATES; CHANNELS OF COMMUNICATION.-- All members of the Judge Advocate General's Department will be assigned as prescribed by The Judge Advocate General after appropriate consultations with commanders on whose staffs they may serve; and The Judge Advocate General or senior members of his staff will make frequent inspections in the field in supervision of the administration of military justice. Convening authorities will at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice; and the staff judge advocate of any command is authorized to communicate directly with the staff judge advocate of a superior or subordinate command, or with The Judge Advocate General.

"b. REFERENCE FOR TRIAL.-- Before directing the trial of any charge by general court-martial the convening authority will refer it to his staff judge advocate for consideration and advice; and no charge will be referred to a general court-martial for trial unless it has been found that a thorough and impartial investigation thereof has been made as prescribed in the preceding article, that such charge is legally sufficient to allege an offense under these articles, and is sustained by evidence indicated in the report of investigation.

"c. ACTION ON RECORD OF TRIAL.-- Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge

advocate or to The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.

"d. APPROVAL.-- No sentence of a court-martial shall be carried into execution until the same shall have been approved by the convening authority: Provided, That no sentence of a special court-martial including a bad-conduct discharge shall be carried into execution until in addition to the approval of the convening authority the same shall have been approved by an officer authorized to appoint a general court-martial.

"e. WHO MAY EXERCISE.-- Action by the convening authority may be taken by an officer commanding for the time being, by a successor in command, or by any officer exercising general court-martial jurisdiction.

"f. POWERS INCIDENT TO POWER TO APPROVE.-- The power to approve the sentence of a court-martial shall include--

"(1) the power to approve or disapprove a finding of guilty and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

"(2) the power to approve or disapprove the whole or any part of the sentence; and

"(3) the power to remand a case for rehearing under the provisions of article 52."

"SEC. 228. Article 51 is amended to read as follows:

"ART. 51. MITIGATION, REMISSION, AND SUSPENSION OF SENTENCES.--

"a. AT THE TIME ORDERED EXECUTED.-- The power of the President, the Secretary of the Department of the Army, and any reviewing authority to order the execution of a sentence of a court-martial shall include the power to mitigate, remit, or suspend the whole or any part thereof, except that a death sentence may not be suspended..... The authority which suspends the execution of a sentence may restore the person under sentence to duty during such suspension; and the death or honorable discharge of a person under suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence.

"b. SUBSEQUENT TO THE TIME ORDERED EXECUTED.--

"(1) Any unexecuted portion of a sentence other than a sentence of death, including all uncollected forfeitures, adjudged by court-martial may be mitigated, remitted or

suspended and any order of suspension may be vacated, in whole or in part, by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States disciplinary barracks, in which the person under sentence may be, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority or by the Judge Advocate General under the direction of the Secretary of the Department of the Army:.....

"(2) The power to suspend a sentence shall include the power to restore the person affected to duty during such suspension....."

"SEC. 229. Article 52 is amended to read as follows:

"ART. 52. REHEARINGS.--When any reviewing or confirming authority disapproves a sentence or when any sentence is vacated by action of the Board of Review or Judicial Council and the Judge Advocate General, the reviewing or confirming authority or the Judge Advocate General may authorize or direct a rehearing. Such rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding."

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

"ART. 13. SPECIAL COURTS-MARTIAL.--Provided, That subject to approval of the sentence by an officer exercising general court-martial jurisdiction and subject to appellate review by The Judge Advocate General and appellate agencies in his office, a special court-martial may adjudge a bad-conduct discharge in addition to other authorized punishment"

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 32. Execution of sentence of summary court.-- No sentence of a summary court martial shall be carried into execution until the proceedings and sentence have been approved by the officer ordering the court, or his successor in office, and by his immediate superior in command: Provided, That if the officer ordering the court, or his successor in office, be the senior officer present, such sentence may be carried into execution upon his approval thereof, subject to the provisions of article 54(b)."

"ART. 33. Remission of sentence.-- The officer ordering a summary court martial shall have power to remit, in part or altogether, but not to commute, the sentence of the court. And it shall be his duty either to remit any part or the whole of any sentence, the execution of which would, in the opinion of the surgeon or senior medical officer on board, given in writing, produce serious injury to the health of the person sentenced, or to submit the case again; without delay, to the same or to another summary court martial, which shall have power, upon the testimony already taken, to remit the former punishment and to assign some other of the authorized punishments in the place thereof"

"ART. 54. (a) Remission and mitigation of sentence.-- Every officer who is authorized to convene a general court martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm....."

"(b) Power of Secretary of Navy over proceedings and sentences of courts martial.-- The Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court martial convened by his order....."

"ART. 64. (d) Approval of sentence of deck court.-- All sentences of deck courts may be carried into effect upon approval of the convening authority or his successor in office, who shall have full power as reviewing authority to remit or mitigate, but not to commute, any such sentence and to pardon any punishment such court may adjudge; but no sentence of a deck court shall be carried into effect until it shall have been so approved or mitigated....."

"(f) Records of proceedings; filing and review.-- The records of the proceedings of deck courts shall contain such matters only as are necessary to enable the reviewing authorities to act intelligently thereon, except that if the party accused demands it within thirty days after the decision of the deck court shall become known to him, the entire record or so much as he desires shall be sent to the reviewing authority. Such records, after action thereon by the convening authority, shall be forwarded directly to, and shall be filed in, the office of the Judge Advocate General of the Navy, where they shall be reviewed, and, when necessary, submitted to the Secretary of the Navy or his action....."

2. Naval Courts and Boards

"SEC. 471. 'Reviewing authority' defined.-- Any officer to whom the proceedings of a court martial are regularly submitted for review in accordance with law is a reviewing authority."

"SEC. 458. Revision must be before same court.-- Upon the receipt of the record of a court martial the reviewing authority shall proceed at once to examine it in order that it may be returned for revision, if such course be necessary, before the dissolution of the court....."

"SEC. 459. Sentence not effective until approved.-- No sentence of a court martial may be carried into execution until the entire proceedings have been reviewed and the sentence duly approved in accordance with law.....The approval of the convening authority of a general court martial is sufficient, except for sentences extending to death or to dismissal of a commissioned or warrant officer. When the confirmation of a sentence requires the approval of higher authority, the record should be forwarded to the next higher reviewing authority by the convening authority with his approval endorsed thereon.

"Where confinement has been adjudged, it shall take effect from the date of approval of the sentence by the highest reviewing authority required by law to approve it, except that where the accused has been previously sentenced to confinement for another offense, the confinement shall not take effect until.....a former sentence has been served, nor shall a discharge, if adjudged, be executed until both sentences have been served....."

SEC. 472. Matters to be specially considered by the reviewing authority.-- In reviewing courts martial,.....the following should be considered:

- (a) Objections to jurisdiction of the court.
- (b) Objections to the charges or to the specifications unless made at the trial, except where a charge or specification fails to state an offense.
- (c) Sufficiency of evidence to sustain the findings of a court.
- (d) All objections made at the time of trial and rulings of the court thereupon, especially if adverse to the accused.
- (e) If there has been no miscarriage of justice the finding of the court should not be set aside or new trial granted because of technical errors or defects which do not affect the substantial rights of the accused.....

"SEC. 472 $\frac{1}{2}$. Action of reviewing authority on acquittal.-- No action shall be taken by a reviewing authority which purports to approve or disapprove an acquittal or finding of not guilty or not proved.....

"Where the case is deemed to be illegal because of a jurisdictional defect or a fatally defective specification, the reviewing

authority shall so state in his action upon the record for consideration of the Secretary of the Navy, who is empowered to set aside the entire proceedings."

"SEC. 473. Power of reviewing authority: Returning record.-- The power of a convening authority in returning any record to the court is limited to a revision of its findings or sentence or the correction of clerical errors or omissions in the record of proceedings, and, in the event of the court's adherence to its former conclusions, to disapproval of such action.....When the proceedings, findings, or sentence of a court are illegal, the convening authority should set them aside....."

"SEC. 474. Same: When he is not to return record.-- Unless specifically authorized by the Secretary of the Navy in each case, no authority will return a record of trial to any court for reconsideration of (a) an acquittal, (b) a finding of not guilty to any specification, or (c) the sentence originally imposed with a view to increasing its severity, and no court in any proceedings in revision shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is herein prohibited....."

"SEC. 475. Same: Remitting or mitigating sentences.-- In cases where the proceedings must be approved both by the convening authority and higher reviewing authority before the sentence becomes effective, and where the convening authority has mitigated the sentence imposed by the court, the action of the higher authority is limited to the sentence as mitigated....."

"Article 54 (a), A.G.N., extends only to such sentences as the convening officer is authorized to approve and confirm, and has no application where the punishment of dismissal or loss of life, requiring confirmation by the President, is adjudged. (Bishop v. U. S., 197 U. S. 341.)"

"SEC. 476. Same: Conditional remission [Probation].-- Sentences not involving death or dismissal may, in the discretion of the convening or reviewing authority, be conditionally remitted in lieu of being summarily executed,....."

"SEC. 477. Same: Ordering new trial.-- If the court was without jurisdiction or if none of the charges or specifications alleges an offense, the reviewing authority should disapprove the proceedings, findings, and sentence and convene a new court for the trial of the case. The new trial should be had upon the same charges and specifications, unless the disapproval is based on fatal defects therein, in which event, new charges and specifications should be drawn correctly setting forth the offenses intended to be charged at the

previous trial, provided that such new charges and specifications are not barred by the statute of limitations.

"....., if the record discloses errors to the substantial injury of the accused and timely objection was made by him at the trial, the reviewing authority before acting upon the record should afford the accused an opportunity to request a new trial, provided the record irrespective of the errors disclosed is sufficient to sustain the findings of the court.....New trial being granted, the proceedings, findings, and sentence of the previous trial should be set aside."

"SEC. 478. Effect of disapproval.-- The disapproval of the sentence of a court martial by the reviewing authority is not a mere expression of disapprobation, but has the legal effect of entirely nullifying it....."

"SEC. 479. The reviewing power, as well as the convening power, of a court martial vests in the office, not in the person, of the authority so acting. Thus, when the reviewing power is vested in the convening authority and the officer who has ordered the court has been relieved or is absent, it is competent for his successor in office, whether temporary or permanent, to act as reviewing authority."

"SEC. 480. Same: May not be delegated to inferior.-- The reviewing authority cannot delegate to an inferior or other officer his function as reviewing authority as conferred by the Articles for the Government of the Navy....."

"SEC. 481. Commutation of sentences.-- The power to commute sentences, that is, to change the nature of the punishment, is vested in.....the Secretary of the Navy by Article 54 (b), AGN..... In summary courts-martial cases, the immediate superior in command has the same power as that vested in the convening authority by Article 33, AGN, which is in terms confined to remitting the whole or a part of the sentence adjudged by the court and does not include the power to commute a sentence;"

"SEC. 483. Superior authority may return record for revision, provided court has not been dissolved.-- The court cannot, after it has once duly completed and forwarded the record, recall it for modification, nor can the convening authority, after he has acted upon the record and forwarded it. But a superior authority, required by law to review the proceedings, may return the record to the convening authority, requesting that the court be reconvened. This may not be done, however, in contravention of Sec. 474."

3. Proposed Navy Bill

"SEC. 39. Article 53 is renumbered as Article 39 and amended to read as follows:

"ART: 39. (a) Every punishment, except death, dismissal, discharge, or reduction in rank or rating, imposed by the sentence of a general court martial shall be executed upon announcement of the sentence by the court: Provided, That reduction in rank or rating shall be effective upon the date of the forwarding of the record of proceedings by the convening authority to the Navy Department without having remitted or suspended the reduction in rank or rating: Provided further, That a discharge shall be executed only after confirmation by the Secretary of the Navy or of other authority duly appointed by him; that a dismissal shall be executed only after confirmation by the President or, when empowered by the President, by the Secretary of the Navy; and that a punishment of death shall be executed only after confirmation by the President.

"(b) The convening authority of any court martial shall have the power to remit or mitigate, but not to commute, the punishment imposed by the sentence of any court martial convened by him.

"(c) Every punishment imposed by the sentence of a summary court martial, except discharge or reduction in rank or rating; or of a deck court martial, except reduction in rank or rating, shall be executed upon announcement of the sentence by the court: Provided, That a discharge shall be executed only after confirmation by the Secretary of the Navy or of other authority duly appointed by him: Provided further, That reduction in rank or rating shall be executed upon the date of forwarding of the record of proceedings by the authority exercising the power of legal review to the Navy Department without having remitted or suspended the reduction in rank or rating.

"(d) The officer empowered to convene general courts martial who is next senior in the chain of command to any convening authority of summary or deck courts martial shall be the reviewing authority as to legality of the proceedings, findings, and sentences thereof, if such reviewing authority be present or found by the convening authority to be reasonably available: Provided, That if such reviewing authority be not present or found to be so available, the convening authority shall review the records of such courts as to legality: Provided further, That the reviewing authority shall have the power to set aside the proceedings, findings, and sentence or to remit or mitigate, but not to commute, the punishment imposed by the sentence of any such summary or deck court martial: And provided further, That the power to set aside shall include the power to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of an offense of which the accused might have been

convicted under Art. 28 (a) (2). [Lesser and included offense, or attempt of either or lesser but not included offense.]

"(e) The proceedings, findings, and sentence of every general court martial shall, and of any other court martial may, be reviewed as to legality in the Office of the Judge Advocate General of the Navy: Provided, That the Judge Advocate General of the Navy shall have the power to set aside the proceedings, findings, and sentence of any court martial: Provided further, That the power to set aside shall include the power to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of an offense of which the accused might have been convicted under Art. 28 (a) (2).

"(f) The sentence of every general court martial and of such other courts martial as may be designated by the Secretary of the Navy, shall, under such regulations as the Secretary of the Navy may prescribe, be reviewed by a clemency board appointed by the Secretary of the Navy: Provided, That such clemency boards shall have the power to remit, mitigate or commute the sentence, in whole or in part, imposed by any naval court martial except a court martial convened by the Secretary of the Navy or by the President, in which case like power shall repose in the convening authority.

"(i) No record of proceedings of a court martial shall be returned to the court for the purpose of reconsidering a finding of 'not proved' or 'not guilty' or for reconsideration of a sentence with a view to increasing its severity."

Articles 32, 33, 54, 64(d), and 64(f) are repealed.

III. Differences

1. Duties of The Judge Advocate General

Assignment of Staff Judge Advocates; Channels of Communications.

There is no provision in the Navy bill comparable to A.W. 47(a) which provides for the assignment of staff judge advocates by the Judge Advocate General and authorizes direct communications between the staff judge advocate and the convening authority, the staff judge advocate of a superior or subordinate command, or with The Judge Advocate General.

2. Action by the Convening or Legal Reviewing Authority

A. Who May Exercise Reviewing Power

i. Distinction Between Clemency and Legal Review

The basic power vested by the new Articles of War in the convening

authority to review any case as to legality or clemency has remained substantially the same, except that no sentence of a special court martial including a bad-conduct discharge shall be executed until in addition to the approval by the convening authority the same shall have been approved by an officer exercising general courts martial jurisdiction who shall be vested with the same power as the convening authority to act upon the sentence. (A.W. 47 (d) (f)). Under the proposed Navy bill, the convening authority is divested of his power of legal review, but retains his right to clemency review. As proposed, the power to review the legality of all general courts martial sentences is vested in The Office of The Judge Advocate General; and in summary and deck courts martial cases, it is vested in the officer senior to the convening authority who exercises general courts martial jurisdiction. The latter's power includes clemency review. However, when the President or Secretary of the Navy is the convening authority, each shall also exercise the power of legal review.

ii. Absence of Reviewing Authority

Under the provisions of A.W. 47(e), any action that may be exercised by the convening authority may be taken by his successor in office, whether temporary or permanent, or by any person exercising general court-martial jurisdiction. Although there is no comparable provision in the Navy bill, Sec. 479, NC&B, provides a similar rule. However, when the legal reviewing authority of a summary or or deck cases is absent or unavailable, the convening authority shall also exercise the power of legal review. (Art. 39d.)

B. Pre-Trial Procedure

Action on Charges

It is provided in A.W. 47 (b) that before any charge will be certified to a general court martial for trial, the convening authority will refer the matter to his staff judge advocate for advice and consideration; ascertain that an investigation has been performed as prescribed by law, and that the report of the investigation establishes a prima facie case. There is no corresponding provision in the Navy bill. With respect to pre-trial investigations, Sec. 342, NC&B, requires a careful inquiry prior to any court martial proceeding. (See C.S., A.W. 70.) There is no requirement, however, that the charge shall be referred to a legal officer for advice.

C. Predepartmental Review

i. Action on Record of Trial

A.W. 47 (c) requires that no sentence shall be approved unless the conviction is established beyond a reasonable doubt and the

record has been found legally sufficient; nor shall the reviewing authority act upon any trial record of a general court martial, military commission, or a special court-martial in which a bad-conduct discharge has been approved by the appointing authority until he has referred the case to his staff judge advocate or The Judge Advocate General for consideration and advice.

Although there is no corresponding provision in the Navy bill, Art. 39 (d) and (e) requires legal review of all court martial sentences. Legal review, as herein required, may include review as to legal sufficiency of the trial record as well as examination of the record as to whether the evidence is sufficient to sustain the finding of the court. However, there is no requirement that the record shall be referred to a legal officer.

ii. Approval of Sentence

Under the new Army code, (A.W. 47 d), all sentences that do not require confirmation shall be carried into execution upon approval of the convening authority except that no sentence of a special court martial which includes a bad-conduct discharge shall be executed until, in addition to the approval by the convening authority, the same shall have been approved by an officer exercising general courts martial jurisdiction, and reviewed by The Judge Advocate General and appellate agencies in his office. (Art. 13.)

On the other hand, it is provided in Navy bill (Art. 39 (a) (c)), that all sentences shall be self-executory except in cases requiring confirmation or where a reduction in rank or rating has been adjudged; the latter shall take effect when the record is forwarded to the Navy Department by the proper authority.

iii. Powers Incident to the Power to Review

(a) Power to Approve

The power to approve or disapprove any sentence prior to departmental review rests solely in the convening authority, except that where a bad-conduct discharge has been adjudged by a special courts martial, additional approval shall be required by an officer exercising general court martial jurisdiction. Under the provisions of the proposed Navy bill, (Art. 39 (d) (e)), there is no substantial difference in how the power is exercised. However, it is not generally exercised by the convening authority. (See par. 2i above.)

(b) Power to Order a Rehearing

Under the provisions of A.W. 52, a rehearing may be ordered by the convening authority when he disapproves the sentence or when the sentence has been vacated by a superior power; and where a

bad-conduct discharge has been adjudged by a special court martial, the power to order a rehearing shall also vest in an officer exercising general courts martial jurisdiction. Although there is no comparable provision in the Navy bill exactly in point, it is presumed that the ability of the legal reviewing authority (Art. 39 (d) (e)) to "set aside the proceedings, findings, and sentence" includes the power to vacate the proceedings for the purpose of granting a new trial.

There is no substantial difference between an Army "rehearing" or a Navy "new trial", except that in the Navy, jeopardy may attach after the proceedings in a former trial have been carried to an acquittal or conviction, notwithstanding any action by the reviewing authority; whereas in the Army, jeopardy does not attach until the reviewing authority, and, if there be one, confirming authority shall have taken final action. (See C.S., A.W. 52.)

(c) Clemency Power

(1) Who may exercise

In the Army, the convening authority is empowered to grant clemency. However, it is believed that the power is limited to those cases not requiring confirmation. In the Navy, the power may be exercised by the convening authority and the initial legal reviewing authority of a summary or deck court martial. However, it is not clear whether clemency may be granted in cases requiring confirmation by the President or Secretary of the Navy. (39. (a) (d)).

(2) Mitigation, Remission, and Suspension of Sentence

Except as above stated, both systems provide that the power of clemency extends to mitigation, remission, and suspension of sentences, but does not include the power to commute except in cases wherein the President or Secretary of the Navy is the convening authority. However, neither the President nor any authority in the Army may suspend (probation) a sentence of death. This rule is probably true in the Navy, notwithstanding there is no provision to the contrary. (Sec. 476, NC&B.)

(3) When Clemency May be Exercised

In the Army, the authority competent to exercise clemency may do so at any time providing the person convicted has remained subject to the command of the person so acting. In the Navy, clemency may be exercised only when the trial record is in the possession of the authority competent to act in this regard. However, there are differences of opinion whether this rule is applicable to the Secretary of the Navy after he has acted upon the record. (33 Cornell Law Journal 226.)

(d) Revision of Proceedings

See C.S., A.W. 40 as to when proceedings of a court martial may or may not be returned for reconsideration.

Chart A

GENERAL COURTS MARTIAL

Predepartmental Review

CONVENING AUTHORITY

A.	<u>Action</u>	<u>Army</u>	<u>Navy</u>
1.	Charge	Orders trial; requires pre-trial investigation and advice from SJA prior to trial. SJA appointed by JAG.	Orders trial; does not require pre-trial investigation or advice from legal officer.
2.	Approval of Sentence	May approve or disapprove all or part; requires advice from SJA or JAG prior to acting on the record.	No power to set aside.
3.	Execution of Sentence	Upon approval unless confirmation required.	Self-executory unless confirmation required.
4.	Clemency	May mitigate, remit, or suspend, except suspend death sentence, at any time subject to retention of jurisdiction over person convicted. (?) whether he can do so when sentence requires confirmation.	May mitigate or remit only when in possession of record. (?) whether he can do so when sentence requires confirmation by President or SecNav.
5.	Rehearing; New Trial	Rehearing may be granted upon vacation or disapproval of sentence by C.A. or higher authority. Jeopardy may attach upon completion of final review.	No power to award new trial.

B.	<u>Action</u>	<u>REVIEWING AUTHORITY</u>	
1.	Who reviews	Usually convening authority.	J.A.G.
2.	Approval of Sentence	As above.	May set aside or approve all or part.
3.	Clemency	As above.	No power.
4.	Rehearing or New Trial	As above.	Substantially same, except entitled "new trial." Jeopardy may attach upon acquittal or conviction.

Chart B

SPECIAL, SUMMARY AND DECK COURTS-MARTIAL

Predepartmental Review

CONVENING AUTHORITY

A. <u>Action</u>	<u>Army</u>	<u>Navy</u>
1. Charge	Orders trial.	Orders trial.
2. Approval of Sentence	May approve or disapprove all or part. Will refer trial record of BCD to SJA prior to approval.	No power to set aside.
3. Execution of Sentence	Upon approval except sentence including BCD.	Self-executory except when sentence includes reduction in rank or rating, or BCD.
4. Clemency	May mitigate, remit or suspend, at any time subject to retention of jurisdiction over person convicted.	May mitigate or remit only when in possession of record. (?) whether he can do so when sentence requires confirmation by SecNav.
5. Rehearing; New Trial	Rehearing may be granted upon vacation or disapproval of sentence by C.A. or higher authority. Jeopardy may attach upon final review.	No power to award new trial.

B. <u>Action</u>	<u>REVIEWING AUTHORITY</u>	
1. Who reviews	The convening authority. When sentence includes BCD additional approval required by an officer exercising GCM jurisdiction.	Officer senior to C.A. exercising GCM jurisdiction.
2. Approval of Sentence	As above.	May set aside or approve all or part.
3. Clemency	As above.	As above.
4. Rehearing; New Trial	As above.	Substantially same, except entitled "new trial." Jeopardy may attach upon acquittal or conviction.

IV. Recommendations

The McGuire, White, Navy JAG, and Ballantine recommendations are covered by the Keefe Report.

Keefe Report:

"B. Comments on Present Procedure:

"Without question, the review by the convening authority under the present system affords substantial protection to the accused. It provides a means of detecting errors in the trial and of correcting excessive sentences. If the errors are substantially prejudicial, the proceedings can be disapproved or set aside and a new trial granted or offered. If the sentence is not excessive, the convening authority can reduce it by way of clemency, or he can extend clemency in other ways, such as by remitting the sentence conditionally on probation. If the sentence is excessive, the convening authority can reduce it. Furthermore, the review is obligatory and is therefore in the nature of an automatic appeal granted to every accused, regardless of whether he requests it.

"On the other hand, there are certain objections to the system of initial review by the convening authority which must be considered. These may be summarized as follows:

"(i) The reviewing authority is usually the same officer who convened the court and referred the case to trial. There is a certain anomaly in having the same officer review a case which he has considered at some length before it went to trial. It is humanly impossible for a person, no matter how high his purpose, to dissociate himself from his prior actions and opinions on a particular matter and to view it later as though he were seeing it for the first time. This is recognized in the rules which prescribe the qualifications for members of courts-martial, and in the rules followed everywhere with respect to disqualification of judges in civilian appellate courts. It is anomalous not to recognize it in the single case of the authority who reviews court-martial cases.

"This is not to imply that convening authorities in reviewing cases have acted unfairly. In over 2,000 cases reviewed by it, the Board found no evidence or indication that this was the case. If anything, naval reviewing authorities have probably leaned over backward in their desire to be scrupulously fair to the accused whose cases they reviewed. But it is a difficult position in which to place anyone, especially one who is in the position of a judge administering justice.

"The difficulty is not cured by requiring that the case be referred to a legal officer for his opinion. For exactly the same problem presents itself. The legal officer who reviews the case is usually the same officer who studied the case beforehand, drafted the charges, and recommended trial in the first place.

"(ii) The review of a court-martial case is not really analogous to an appeal. Although counsel for the accused has the privilege of submitting a brief, he does not often do so, and rarely, if ever, resorts to oral presentation of the case to the convening authority or his legal officer. Although theoretically each objection to evidence and rulings of the court is weighed as though on appeal, and the record is carefully scrutinized for jurisdictional or other error, it is difficult, on such a procedure, to detect all the errors which may exist, sometimes serious ones.

"(iii) The practical result of the present system is that the reviewing authority, rather than the court, fixes the sentence. Theoretically, the court can impose whatever sentence it deems fit. But it is directed to impose a sentence 'commensurate with the offense' and to leave matters of clemency to the reviewing authority. Of course the members of the court may, and frequently do, recommend clemency. Occasionally a court invades the reviewing authority's prerogative of clemency. But in the vast majority of cases the court merely fixes a maximum limit to the sentence, and the sentence is actually set by the reviewing authority, within that maximum. The clemency extended by the reviewing authority in most cases consists merely in reducing the sentence to something approaching what it should have been in the first place.

"(iv) The convening authority's power of review carries with it a large measure of indirect control over the court and its actions. If the convening authority does not agree with the findings of the court, or believes that the sentence is inadequate, even though he may be powerless to change the result in the particular case, he can express his opinion in his action or in a letter to the court. This cannot but have its effect on subsequent cases. The mere knowledge that it can take place is apt to influence a court, without any expression of disapproval or non-concurrence ever being made by the convening authority.

"C. Proposals by Others for Modification of Procedure on Initial Review:

"It is believed that the above are defects in the present system of review by the convening authority which deserve careful attention. They are not cured by subsequent departmental review, nor would they be cured by improving that review. For of necessity, subsequent departmental review leans heavily on the action of the court and the

initial reviewing authority. They are the parties closest to the accused, the offense, and the scene. A strong presumption in favor of correctness and regularity in the initial proceedings exists, and is bound to exist, under any system of higher appellate review. The same is true of the civilian courts. It is submitted that the true solution is to improve the initial processes, and not to rely on subsequent review to correct deficiencies therein.

"Nor will palliatives solve the problem. The proposal has sometimes been made that the reviewing authority be prohibited from criticizing a court for its action in a particular case. Obviously this deals with only a surface manifestation, and fails to get at the heart of the difficulty.

"In view of the difficulties which have been pointed out above, it is proposed to review briefly some of the suggestions which have been made for modifying the system of initial review. Among these are:

"(i) Retention of the present system of requiring approval or confirmation to make a sentence effective, but moving the process up on echelon, or otherwise separating the reviewing officer from the officer ordering trial.

"(ii) Abolishing the initial review altogether, and making the court's sentence self-executory, subject however to being set aside by a Board of Review or other higher authority.

"The first method is followed to a limited extent under the present Army and Navy systems. In those cases requiring confirmation, the convening authority's recommendation of approval is not sufficient to execute the sentence, but the sentence must also be confirmed by higher authority. The result is that in this important type of case a further review by another authority is superimposed on the review by the convening authority.

"However, the effectiveness of this is limited by the fact that only a limited class of cases is subject to extra review. Even in this type of case, the record is first reviewed by the convening authority, whose recommendations necessarily carry great weight. And in those cases in which the convening authority is also the confirming authority, the same objections made to review by the convening authority are equally applicable.

"The British have gone a little further along the path of separating the convening authority from the reviewing authority. Under the British Army system, every court-martial sentence must be confirmed before it is ordered executed. In a general court-martial case, the confirming authority may, but need not, be the

same officer as the convening authority. As a rule, warrants giving power both to convene and to confirm the findings and sentence of general courts-martial are issued only to certain officers in India, the colonies, and on active service.

"The other approach to the problem is to eliminate the review by the convening authority, and to make the sentence of the court self-executory, subject however, to higher departmental review. This was the proposal of the Chamberlain Bill, but it was not adopted. It is also the rule in the French system, under which the findings and sentence of the court are final, subject to a limited right of appeal to conseils de revision.

"The Report of the General Board, European Theater, on the Administration of Military Justice does not specifically discuss the question of review by the appointing authority. It does, however, make the following observations about command control of court-martial proceedings generally:

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

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

"Neither the Ballantine Reports nor the McGuire Report mention the important question of review by the convening authority, except insofar as the first Ballantine Report touches upon it in making its recommendations for decentralization. The first Ballantine Report did recommend that greater power and responsibility for the fixing of the sentence be granted to the court, but made no corresponding recommendation with respect to the powers and function of the reviewing authority.

"The revised Articles proposed by the McGuire Committee, by Commodore White and by the Judge Advocate General all propose retention of the present system, with certain modifications. For example, Article 5 (a) of the McGuire draft articles provides that every sentence of a naval court-martial not extending to death, dismissal, or discharge may be executed upon approval of the convening authority, who shall have power to remit or mitigate, but not to commute, such sentence. The excepted cases require confirmation by the President or by the Secretary of the Navy.

"D. Suggestions Regarding Present System of Initial Review.

"For reasons stated above, it is felt that the question of review by the convening authority is a basic one, which warrants exhaustive study by the Advisory Committee, despite the failure of the McGuire Report and the Ballantine Report to discuss it. Among other problems involved are:

"(i) The function of the judge advocate: There appears to be a certain inconsistency in providing for a judge advocate, independent of the convening authority, and representing only the Judge Advocate General, and then to have the court's proceedings subject to review by the convening authority.

"(ii) Sentencing power of the court: The proposal, concurred in by the McGuire and Ballantine Reports, to give the court greater power and responsibility in the imposition of the sentence, necessarily involves a corresponding reduction in the power and responsibility of the convening authority with respect to the sentence.

"(iii) Suspension of Sentence: Under present practice, convening authorities are empowered, except in those cases requiring confirmation by higher authority, to remit all or part of a general court-martial sentence on probation, and this power is frequently exercised in appropriate cases. Similar power is exercised by Army reviewing authorities. This power is similar to that of a civil judge, who may impose sentence and at the same time suspend its operation for a probationary period. This power is very important from a disciplinary and morale standpoint. The question whether the court should have greater control over the sentence, and the reviewing authority less,

inevitably raises the question whether the power or remission on probation should be transferred from the reviewing authority to the court. The court, having heard all the evidence in the case and having reviewed all the sentence factors, would seem to be in the better position to decide whether the accused deserves a suspended sentence and will be a good probation risk. On the other hand, the convening authority may well be in a better position to review the accused's record as a whole and evaluate it against the records of other accused and in the light of disciplinary and morale problems of the command as a whole.

"(iv) Legal review: The careful scrutiny of the record by the convening authority's legal officer is a valuable safeguard to the rights of the accused, and his advice to the convening authority on all aspects of the case is perhaps the most important single step in the entire proceedings. It may be questioned whether the placing of a skilled judge advocate in the court, of and by itself, would be an adequate substitute for the function performed by the convening authority's legal officer, were this to be eliminated.

"(v) Command control: Fundamental to the whole question of the court-martial system is the problem of command. A court whose proceedings are nugatory until approved by the officer who appointed it is not an independent tribunal in any true sense. Conversely, a court whose judgments are self-executory (subject only to higher departmental legal and clemency review) would be difficult to fit into the organization and structure of the Navy, and would be at variance with the basic concept of military command, hierarchy and discipline.

"The whole problem is extraordinarily difficult and no pat solution can be put forth. Several proposals, have, however, from time to time been made, which will be briefly reviewed:

"(1) Retention of the present system in substantially the same form. This is the proposal of the Ballantine Committee, and of the McGuire, Judge Advocate General, and White draft articles.

"(2) Some modification of the present system, such as moving the process of review up to a higher command than that of the convening authority (followed to some extent in the British Army), or depriving the convening authority of his power to comment on findings and sentences.

"(3) Abolition of the review by the convening authority and making the court's findings and sentence final and self-executory, subject however to higher departmental review. This is substantially the French Army system, and was proposed by the Chamberlain Bill in 1920 for the United States Army, but not adopted.

"The recent Report of the House Military Affairs Committee seems to adopt some combination of (2) and (3), but its recommendation in this respect (which is not opposed by the Army) is not very clear.

"Proposal (3) is far-reaching and under it the court-martial system, as it has existed for centuries, would be radically altered. Nevertheless, it does have certain advantages:

"(i) The anomaly of having the same authority pass upon the charges before trial and then review the case after trial would be eliminated.

"(ii) Responsibility for the findings and sentence will be placed squarely on the court.

"(iii) Control by the convening authority over the proceedings and actions of the court would be reduced to a minimum, if not eliminated altogether.

"(iv) The procedure would be simpler and more expeditious than the present rather cumbersome system.

"(v) On the other hand, serious objections can be made to this proposal, among which are the following:

"(i) Elimination of the review by the convening authority, and the corresponding elimination of his control over the sentence, might be destructive of discipline; and

"(ii) Elimination of the review by the convening authority might impair the rights of the accused.

"These are serious objections and should be carefully weighed by the Advisory Council. If true, they would constitute persuasive reasons why the present system should not be disturbed. The extent of their validity may, however, be questioned.

"As to (i), the exact relationship and balance between 'discipline' and 'justice' can probably never be discovered. In most cases they are perhaps perfectly reconcilable. In a few, perhaps, they are not. In the latter, certainly a good case can be made for the proposition that once a case has been referred to trial, it ceases to be a mere disciplinary matter; and that from then on, the processes of law should be paramount, and command control should cease. This is well expressed in the recommendations of the minority members of the Ballantine Committee:

"There have been various statements and comments, regarding 'tempering justice with discipline' and 'discipline being an integral function of command.' We disagree with the first as there can be no degrees of justice. We agree with the second quote but point out that the function of command ceases with the determination that a trial is necessary; thereafter the problem is legal." 313

"Moreover, as a practical matter, it may be seriously questioned whether, under present Navy policies, the convening authority, in reviewing a general court-martial case, actually does possess the command control originally contemplated in the basic theory of military organization. On legal matters he is bound to follow the law. If he makes a mistake, he will presumably be overruled by the Secretary, upon the advice of The Judge Advocate General, (unless indeed he errs in favor of the accused, in which case it may be too late to correct the error). He cannot increase the sentence, without getting the Secretary's permission to send the case back to the court for reconsideration, and this is rarely granted. He may reduce it, but in doing so he is bound by Departmental policy, which prescribes appropriate sentences for nearly all offenses. The same letter which is referred to above in Section V, in connection with referring cases to trial, also prescribes appropriate sentences for desertion and absence offenses, and directs convening authorities to mitigate sentences imposed by courts accordingly. These sentences are prescribed down to the last detail, and the policies announced have resulted in such sentences as 3 years, 1 month, and 77 days, (Review Board No. 97) or 3 years, 10 months, and 295 days (Review Board No. 134). If the convening authority does not take such action, it will be taken by the Secretary, upon the recommendation of the Bureau of Naval Personnel. It is true that the convening authority is authorized to remit part or all of a sentence on probation in worthy cases, but in the same paragraph of the above-mentioned letter it is stated that the 'practice of convening authorities of directing restoration to duty on probation on completion of a part of the sentence is a duplication of the efforts of the Clemency Board and it is not looked upon with favor. Finally, the power to order executed a dishonorable discharge or a bad conduct discharge has, by Departmental Policy, been taken away from convening authorities and vested in the Navy Department or the Commandant of the Marine Corps.

"It is evident that in practice the convening authority exercises little if any 'disciplinary' control over court-martial sentences in the one type of case where military and disciplinary considerations would appear to be paramount, namely, desertion and unauthorized absence.

"The other objection, that to eliminate the review by the convening authority would impair the rights of the accused, is also a serious one. Simply because a protective device has faults is a poor reason for abolishing it. However, the following suggestions, if adopted, would tend to compensate for any impairment of the accused's rights:

"Correction of Legal Errors:

"(i) A judge advocate would be on the court, a feature which should reduce greatly the number of legal errors;

"(ii) An improved system of departmental review is contemplated.

"Clemency:

"(i) Responsibility for an appropriate sentence would be placed squarely on the court;

"(ii) The power to order executed a sentence of death, dismissal, or discharge would be reserved to the President or the Secretary;

"(iii) There would be no impairment of the present clemency powers of the Secretary.

"RECOMMENDATIONS:

"The Board is convinced that the two most serious difficulties with the court martial system are the method of review and the control by commanding officers over court proceedings, and it is right here, at the stage of initial review by the convening authority that these two difficulties come most sharply into focus. The Board believes that no amount of minor reforms of the Articles for the Government of the Navy will solve this problem, and makes the following suggestions:

"(i) Control of the convening authority of a case should cease upon reference of the charges to trial. It is felt that up to this point the command responsibility of the convening authority is paramount, and his decision as to disposition of the charges; whether by summary punishment or by trial, is a command decision, which should properly be made by him, subject to the advice of his legal officer.

"(ii) Once the case has been referred to trial the proceedings, from the arraignment to the sentence, should be the entire responsibility of the court and the judge advocate. The details of this procedure are discussed above in Section VI.

"(iii) Every sentence imposed by a general court-martial should be self-executory, subject, in the event of conviction, to review in the Navy Department by a Board of Legal Review and a Board of Sentence Review.

"(iv) Every sentence imposed by inferior court-martial should be subject to automatic review by the officer exercising general court-martial jurisdiction over the command, unless he was also the convening authority, in which case the review should be by the next higher authority.

"(v) The execution of such portion of any sentence as extends to death, dismissal of an officer, or discharge of an enlisted man, should require the action of the President, or of the Secretary or Under-Secretary of the Navy, or other officer designated by them."

Vanderbilt Report:

"6. The need to preserve the disciplinary authority of the command and at the same time to protect the independence of the court can be met in the following manner. The authority of the division or post commander to refer a charge for prompt trial to a court appointed by a judge advocate should be absolute. The commander should, of course, be furnished with a judge advocate to advise him with reference to the disposition of the charge. The right of the command to control the prosecution, and to name the trial judge advocate, who should be a trained lawyer, should be retained. The Judge Advocate General's Department, however, should become the appointing and reviewing authority independent of the command. For this purpose the present organization of the Judge Advocate General's Department may be sufficient and the power to select and review its judgment should normally rest with the Staff Judge Advocate at Army level, so that the members of the court may be selected from a wider area and the perennial problem of disparity of sentences in similar cases may be at least partially solved. It may be best in certain instances to place the authority on a higher level, or in case of war or in case of units established at a distance from the command, to delegate the authority to a division or smaller unit. We believe that the flexibility of such a system will aid in the solving of many problems and will permit the establishment of permanent courts or traveling courts if they be found desirable. Article of War 8 should be amended to accomplish this purpose.

"We realize that the officers of a division or command may have a special understanding of local conditions and be best qualified to try local offenders and also that officers must not be appointed to courts-martial duties if, in the opinion of the commander, they are unavailable. These requirements may be met by the establishment of a panel of available officers by the commander, subject to change

from time to time; from which the selection of members of the court may be made. The determination of the commander as to availability must, of course, be final. It is not meant that the selection of the members of the courts-martial shall be confined to the division or command in which the offense occurs.

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

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

"7. The special understanding that officers of a division or command have of local conditions lead us also to recommend that the general or other officer who referred the case for trial should have the power to mitigate, suspend, or set aside the sentence. In order to effectuate this recommendation the record should be first sent by the court to the officer who referred the case for trial so that he may have an opportunity to act upon the sentence and it should be his duty to act promptly and forward the record to the reviewing authority for final action. The power of the command in this respect should be limited to the question of clemency.

"10. Special courts-martial should be governed as far as practicable by the same requirements as general courts-martial."

House Report 2722, 79th Congress, 2D Session (Committee on Military Affairs):

"Recommendation 1.

"....."

"That, after a special or general court has been held, the findings and sentences shall pass directly to the Judge Advocate General's Department for all further actions of review, promulgation, and confirmation, except for such final appellate review as may be made by the Judge Advocate General of the Army in accordance with recommendation 2 below and such final confirmation as may legally require action on the part of the President;"

FEL - 1 and 2

Uniform Code of Military Justice

Subject: Confirmation, A. W. 48-49.

I. Army Provisions

1. Articles of War.

(a) Under A. W. 48 confirmation by the President is required in addition to approval by the convening authority, in the following cases:

- (i) Any sentence respecting a general officer;
- (ii) Any sentence extending to dismissal of an officer in peacetime;
- (iii) Any sentence extending to suspension or dismissal of a cadet;
- (iv) Any sentence of death in peacetime;
- (v) Any sentence of death in wartime (except for murder, rape, mutiny, desertion, or spying).

(b) Confirmation is also required in the following cases, but may be made by the Commanding General of the Army in the field, or by the Commanding General of the territorial department or division:

- (i) In time of war, a sentence extending to dismissal of an officer below the grade of brigadier general;
- (ii) In time of war, any sentence of death for murder, rape, mutiny, desertion, or spying.

(c) Under A. W. 49 the power to confirm includes the power to confirm or disapprove a finding, to confirm a finding of a lesser included offense, to confirm or disapprove the whole or any part of a sentence, and to remand the case for rehearing.

(d) Under A. W. 50, the Commanding General of the Army in the field, or the Commanding General of the territorial department or division, when empowered by the President so to do, may approve or confirm and commute (but may not approve or confirm without commuting), mitigate, or remit and then order executed as commuted, mitigated, or remitted any sentence which under the articles requires the confirmation of the President before the same may be executed.

2. Manual for Courts Martial.

(a) Par. 88: The power of confirmation of certain sentences in time of war, conferred by A. W. 48 upon the Commanding General "of the territorial department or division," cannot be exercised

by the Commanding General of a corps area or Army area.

It has also been held that such power may not be exercised by the Commanding General of a foreign expeditionary force consisting of two regiments of infantry and some special units (Dig. JAG, 1919, page 46; MCM, 1928, App. 1, page 213).

(b) Par. 88: The confirming authority will be guided by the principles and provisions of MCM, par. 87, (relating to the reviewing authority), as far as applicable.

3. Executive Order 9556, dated 29 May 1945.

This Executive Order, issued under the authority of Title I of the First War Powers Act, delegated to the Secretary and the Under Secretary of War the confirmation powers vested in the President under Article of War 48, together with the power of commutation and the other powers vested in the President by Articles of War 49 and 50, in all cases of sentences except those extending to death. This Order remains in effect until the termination of Title I of the First War Powers Act (i.e., six months after end of present war).

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

(a) Under A. W. 48 confirmation is required as follows:

(i) By the President with respect to any sentence:

- (1) of death, or
- (2) involving a general officer.

(ii) By the Judicial Council, with the concurrence of the Judge Advocate General, with respect to any sentence:

- (1) when the confirming action of the Judicial Council is not unanimous, or
- (2) when by direction of the Judge Advocate General his participation in the confirming action is required, or
- (3) involving imprisonment for life, or
- (4) involving the dismissal of an officer other than a general officer, or
- (5) involving the dismissal or suspension of a cadet.

(iii) By the Judicial Council with respect to any sentence in a case transmitted to the Judicial Council under the provisions of A. W. 50. These cases are as follows:

- (1) Any case in which the Board of Review has held the record legally sufficient, but modification of the findings of guilty or of the sentence is deemed necessary to the ends of justice by the Judge Advocate General or by the Board of Review.
- (2) Any case in which the Board of Review holds the record of trial legally insufficient, in whole or in part, and the Judge Advocate General does not concur.

(b) Article 49 has been amended to read as follows:

"ART. 49. POWERS INCIDENT TO POWER TO CONFIRM.-- The power to confirm the sentence of a court-martial shall be held to include-

"a. The power to approve, confirm, or disapprove a finding of guilty, and to approve or confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

"b. The power to confirm, disapprove, vacate, commute, or reduce to legal limits the whole or any part of the sentence;

"c. The power to restore all rights, privileges, and property affected by any finding or sentence disapproved or vacated;

"d. The power to order the sentence to be carried into execution;

"e. The power to remand the case for a rehearing under the provisions of article 52."

(c) ART. 51a. "MITIGATION, REMISSION, AND SUSPENSION OF SENTENCES.-- AT THE TIME ORDERED EXECUTED.-- The power of the President, the Secretary of the Department of the Army, and any reviewing authority to order the execution of a sentence of a court-martial shall include the power to mitigate, remit, or suspend the whole or any part thereof, except that a death sentence may not be suspended..... The authority which suspends the execution of a sentence may restore the person under sentence to duty during such suspension; and the death or honorable discharge of a person under suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence."

II. Navy Provisions

1. Articles for the Government of the Navy.

(a) Article 53:

"No sentence of a court martial, extending to the loss of life, or to the dismissal of a commissioned or warrant officer, shall be carried into execution until confirmed by the President. All other sentences of a general court martial may be carried into execution on confirmation of the commander of the fleet or officer ordering the court."

(b) Article 54(b):

"The Secretary of the Navy may set aside the preceding or remit or mitigate, in whole or in part, the sentence imposed by any Naval court martial convened by his order or that of any officer of the Navy or Marine Corps."

2. Naval Courts and Boards.

(a) Page 245, Sec. 475: "In cases where the proceedings must be approved both by the convening authority and higher reviewing authority before the sentence becomes effective, and where the convening authority has mitigated the sentence imposed by the court, the action of the higher authority is limited to the sentence as mitigated. Such higher authority cannot disapprove the mitigation of the convening authority and thus restore the original sentence."

In CMO 1-1944, page 63, however, it was held that in a confirmation case the convening authority's power to remit or mitigate is limited to such portion of the sentence as does not relate to death or dismissal. In other words, if the sentence involved confinement and dismissal, the convening authority could remit or mitigate the confinement but not the dismissal. The convening authority's power over a sentence of death or dismissal is limited to approval or disapproval.

(b) Page 247, Sec. 481: States that the power of mitigation conferred upon the Secretary by AGN 54(b) includes the power to commute a death sentence to life imprisonment, and a sentence of dismissal to loss of numbers or suspension from duty on one-half pay.

3. Executive Order 9556, dated 26 May 1945.

This Executive Order, issued under Title I of the First War Powers Act, delegates to the Secretary and Under Secretary of the Navy all confirmation powers vested in the President under AGN in all cases of sentences except those extending to the loss of life. The order remains in effect until the termination

of Title I of the First War Powers Act of 1941 (i.e., six months after end of present war).

4. Proposed Navy Bill.

SEC. 39:

"Article 53 is renumbered as Article 39 and amended to read as follows:

'ART. 39. (a) Every punishment except death, dismissal, discharge or reduction in rank or rating imposed by the sentence of a general court martial shall be executed upon announcement of the sentence by the court: * * * * Provided further, That a discharge shall be executed only after confirmation by the Secretary of the Navy or of other authority duly appointed by him; that a dismissal shall be executed only after confirmation by the President or, when empowered by the President, by the Secretary of the Navy; and that a punishment of death shall be executed only after confirmation by the President.

'(b) The convening authority of any court martial shall have the power to remit or mitigate, but not to commute, the punishment imposed by the sentence of any court martial convened by him.

'(c) Every punishment imposed by the sentence of a summary court martial, except discharge or reduction in rank or rating or of a deck court martial, except reduction in rank or rating, shall be executed upon announcement of the sentence by the court: Provided, That a discharge shall be executed only after confirmation by the Secretary of the Navy or of other authority duly appointed by him: * * * * *

'(f) The sentence of every general court martial and of such other courts martial as may be designated by the Secretary of the Navy, shall, under such regulations as the Secretary of the Navy may prescribe, be reviewed by a clemency board appointed by the Secretary of the Navy: Provided, That such clemency boards shall have the power to remit, mitigate or commute the sentence, in whole or in part, imposed by any naval court martial except a court martial convened by the Secretary of the Navy or by the President, in which case like power shall repose in the convening authority.

'(h) The Secretary of the Navy shall have the power to set aside the proceedings, findings, and sentence, or to remit, or mitigate, or commute the sentence, in whole or in part, imposed by any naval court martial except a court martial convened by the President, in which case like power shall repose in the President: * * * * *'"

III. Differences

1. Cases in which confirmation is necessary:

(a) The two agree in requiring confirmation by the President in respect of the death sentence.

(b) Under the Navy bill, a sentence of dismissal may be confirmed by the President or, when empowered by the President, by the Secretary of the Navy. Under the new Army law, a sentence of dismissal of a general officer must be confirmed by the President; a sentence of dismissal of an officer other than a general officer, and a sentence of dismissal of a cadet, may be confirmed by the Judicial Council with the concurrence of the Judge Advocate General.

(c) Under the Navy bill, a sentence of discharge must be confirmed by the Secretary or other authority duly appointed by him. There is no provision in the new Army law which exactly corresponds to this.

(d) The new Army law requires confirmation by the Judicial Council of a sentence involving imprisonment for life. There is no corresponding provision in the Navy bill.

(e) Under the new Army law there are certain other cases in which confirmation by the Judicial Council is required. The Navy bill has no provisions exactly comparable to these.

The proposed Navy bill (Sec. 39, Art. 39(f)), provides for a clemency board which would perform some of the functions assigned to the Judicial Council under the new Army law. Consequently, what might be treated as a "confirmation" case under the latter, might be handled as a matter of clemency review under the former. It follows that the above statement of differences may be somewhat misleading, unless reference is had to C.S., A.W. 50.

2. Powers incident to power to confirm:

The amended Articles of War set forth in detail the powers incident to the power to confirm; while the proposed Navy bill does not state what the powers of the confirming authority as such are.

Querie: Whether the powers of the SecNav as confirming authority would be greater than his reserve powers?

IV. Recommendations

1. McGuire Report, 21 Nov. 1945:

(a) Under article 5(c)(1) of the proposed McGuire Articles,

no sentence extending to death shall be executed until confirmed by the affirmative action of the President.

(b) Under article 5(c)(2), no sentence extending to dismissal of a commissioned or warrant officer shall be executed until confirmed by the President. In time of war, however, the President may delegate this power of confirmation to the Secretary of the Navy.

(c) Under article 5(b)(2), no sentence extending to discharge of an enlisted person shall be executed until confirmed by the Secretary of the Navy or his designated representative, and such discharge shall not be executed in a foreign country.

2. Commodore White's Studies (1946):

Identical (except for numbering of sections) with proposed McGuire Articles.

3. Keefe Report:

(a) After review by the Board of Legal Review and the Board of Sentence Review, sentences extending to death, dismissal, or discharge, should be handled as follows:

- (i) Cases involving the death sentence should be forwarded to the Secretary, who would have power of commutation. If he did not commute, he would forward case to the President for final action.
- (ii) Cases extending to dismissal of a commissioned or warrant officer should be handled in the same way, except that the Secretary would have the power to suspend as well as commute. If the Secretary did not commute or suspend, he would forward the record to the President for final action. In time of war, the President would be authorized to delegate this confirming power to the Secretary.
- (iii) Sentences extending to discharge of an enlisted man should be referred to the Secretary or to his duly delegated representative for final action before execution of the discharge.

(b) Eliminate the present requirement for a complete review de novo by the President or Secretary of confirmation cases, except in extraordinary cases where such a review seems desirable. In other cases rely on comprehensive review already accomplished by the Board of Legal Review and the Board of Sentence Review.

4. JAG Navy:

Substantially follows recommendations of McGuire Report, Commodore White's Studies, and of Keefe Report.

RSP

Uniform Code of Military Justice

Subject: Powers Incident to Power to Confirm.

See C.S., A. W. 48.

Uniform Code of Military Justice

Subject: Departmental Review - A.W. 50.

I. Army Provisions

1. Articles of War

ART. 50 $\frac{1}{2}$:(a) Boards of Review

Provides for establishment, in the Office of the Judge Advocate General, of one or more boards of review, each consisting of not less than three officers of the J.A.G.D. Also authorizes the President to direct the J.A.G. to establish a branch office, under an Assistant J.A.G., in any distant command, and to establish in such office one or more boards of review.

(b) Presidential Confirmation Cases

In any case involving a sentence which requires confirmation by the President under A.W. 46, 48, or 51, the record shall first be examined by the board of review. The board shall, except as noted below, submit its opinion to the J.A.G. The J.A.G. shall transmit the record, the board's opinion, and his own recommendation directly to the Secretary of War for the action of the President. (Note: In addition to the Presidential confirmation cases discussed in C.S., A.W. 48-49, these cases include:

- (i) Cases in which the President is the convening authority, and therefore both reviewing and confirming authority. (A.W. 46);
 - (ii) Cases in which some authority other than the President is authorized to act as confirming authority, and the latter has suspended execution of the sentence until the pleasure of the President be known. (A.W. 51).
- (c) Other Cases Involving Sentence of Death, or of Dismissal or Discharge Not Suspended, or Penitentiary Confinement

(i) In any other G-C-H case; in which the sentence extends to death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, the sentence shall not be ordered executed unless the board of review, with the approval of the J.A.G., has held the record legally sufficient.

(ii) Exception: A sentence involving dishonorable discharge or penitentiary confinement may be ordered executed, without review by board of review, if based solely on a plea of guilty.

(iii) Procedure:

(A) If the board of review, with the approval of the J.A.G., holds the record legally sufficient, the J.A.G. notifies the reviewing or confirming authority, who may thereupon order the sentence executed.

(B) If the board of review, with the concurrence of the J.A.G., holds the record legally insufficient, or finds substantial error, the findings and sentence shall be vacated in whole or in part in accord with such holding and the J.A.G.'s recommendation thereon, and the record shall be transmitted to the reviewing authority for a rehearing or other appropriate action.

(C) If the J.A.G. does not concur in the holding of the board of review, he shall forward the case, including the board's opinion, and his own dissent, directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing or confirming authority below, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove, in whole or in part, any finding of guilty, and may disapprove or vacate the sentence, in whole or in part. These functions of the President may be performed by the Secretary or Acting Secretary of War. Where a branch office of the J.A.G. has been established with a distant command, with a board of review, such functions may be performed by the commanding general of such distant command, provided he is not the reviewing or confirming authority in the case, and provided the sentence does not require approval or confirmation by the President.

(d) Other GCM Cases:

All other GCM records shall be examined in the J.A.G. Office.

Procedure: (i) If found legally sufficient, the reviewing authority is so notified, and no further action need be taken. (Note: This is not expressly stated in A.W. 50 $\frac{1}{2}$).

(ii) If found legally insufficient, the record shall be examined by the board of review. If the latter also finds the record legally insufficient, it submits its written opinion to

the J.A.G., who transmits the record, the board's opinion, and his own recommendation to the Secretary of War for the action of the President, who may take the same action he could take under (c) (iii) (C) above, and, in addition, may restore the accused to all rights affected by the findings and sentence, or part thereof, held invalid. These functions of the President may be performed by the Secretary or Acting Secretary of War or by the commanding general of a distant command, under the same conditions as are set forth under (c) (iii) (C) above.

(iii) A.W. 50 $\frac{1}{2}$ is silent on the situation where the J.A.G. Office has found the record legally insufficient, and the Board of Review has found it legally sufficient. Presumably, the latter would be the final action on the case.

2. Manual for Courts-Martial, App. 1, pp. 216-7

(a) If the reviewing authority has reduced the sentence before forwarding the record for review under A.W. 50 $\frac{1}{2}$, and the Board of Review and J.A.G. has found the record legally sufficient, only the sentence as reduced can be ordered executed; the original sentence cannot be reinstated. (Dig. JAG, 1922, p. 71).

(b) If the Board of Review and the J.A.G. have held a record legally insufficient, the finding or sentence is vacated and cannot be reconsidered for the purpose of reconsidering such holding. (Dig. JAG, 1923, p. 52).

(c) Except where the President is the reviewing or confirming authority, it is not the function of the Board of Review or the J.A.G., in considering legal sufficiency under A.W. 50 $\frac{1}{2}$, to weigh evidence, judge the credibility of witnesses, or determine controversial questions of fact. (C.H. 152797).

(d) In a Presidential confirmation case, if the Board of Review and J.A.G. have held the record legally insufficient, it should not be forwarded to the Secretary of War for action of the President, but should be returned to the reviewing authority for rehearing or other appropriate action (Op. JAG, 29 Dec. 1922, CH 154185).

(e) When the JAG advises the reviewing or confirming authority of the holding of the Board of Review and his concurrence therein, he may by separate communication advise such authority that he deems the sentence unnecessarily severe, or that in his opinion one or more of the findings of guilty should be disapproved.

3. Executive Order 9556, 26 May 1945.

Issued under Title I of First War Powers Act and effective until six months after end of present war. Delegates to the Secretary and Under Secretary of War the power of commutation and all functions, duties, and powers vested in the President under A.W. 50 $\frac{1}{2}$ in all cases of sentences except those extending to death.

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

Rescinds A.W. 50 $\frac{1}{2}$ and amends A.W. 50 to provide for the following:

(a) Board of Review and Judicial Council

The J.A.G. shall constitute, in his office, one or more Boards of Review, each composed of not less than three officers of the J.A.G.D., and one or more Judicial Councils, each composed of three general officers of the J.A.G.D., provided that under exigent circumstances the J.A.G. may detail to the Judicial Council officers of the J.A.G.D. below the rank of general for periods up to sixty days.

(b,c) Branch Offices

When the President deems necessary, he may direct the J.A.G. to establish with any distant command a branch office, under an Assistant JAG, who shall be a general officer of the J.A.G.D., and to establish in such office one or more Boards of Review and Judicial Councils. Such Assistant J.A.G., Board of Review, and Judicial Council, shall be empowered to perform for that command, under the general supervision of the J.A.G., the duties of the latter, and of the Board of Review and the Judicial Council in his office in all cases not requiring approval or confirmation by the President, Provided, That the power of mitigation and remission shall not be exercised by such Assistant J.A.G. or agencies in his office, but any case in which such action is deemed desirable shall be forwarded to the J.A.G.

(d) Presidential Approval or Confirmation Cases and Other Confirmation Cases

(1) In any case requiring action by the President, the Board of Review shall submit a written opinion, through the Judicial Council which shall also submit a written opinion, to the J.A.G. The J.A.G. shall transmit the record, with these opinions and his own recommendations, directly to the Secretary of the Army for the action of the President, unless the case comes under (3) below.

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(2) In any case requiring confirming action by the Judicial Council, when the Board of Review is of opinion that the record is legally sufficient, it shall submit its written opinion to the Judicial Council for appropriate action.

(3) In any case requiring confirmation by the President or the Judicial Council, in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall submit its holding to the Judge Advocate General, and

(i) if the Judge Advocate General concurs therein, such findings and sentence shall thereby be vacated in accord with such holding and the record shall be transmitted to the appropriate convening authority for a rehearing or such other action as may be proper.

(ii) if the Judge Advocate does not concur in the holding of the Board of Review, the holding and record of trial shall be transmitted to the Judicial Council for confirming action or for other appropriate action in a case in which confirmation of the sentence by the President is required.

(e) Action by Board of Review in Cases Involving Dishonorable or Bad-conduct Discharges or Confinement in Penitentiary.

No authority shall order the execution of any sentence involving dishonorable discharge not suspended, bad-conduct discharge not suspended, or confinement in a penitentiary unless and until the appellate review required by this article shall have been completed and unless and until any confirming action required shall have been completed.

Every record of trial by court-martial involving a sentence to dishonorable or bad-conduct discharge, whether suspended or not, or confinement in a penitentiary, other than those falling under (d) of this article, shall be examined by the Board of Review which shall take action as follows:

(1) (50 e) "(1) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, and confirming action is not by the Judge Advocate General or the Board of Review deemed necessary, the Judge Advocate General shall transmit the holding to the convening authority, and such holding shall be deemed final and conclusive.

(2) (50 e) "(2) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, but modification of the findings of guilty or the sentence is by the Judge Advocate General or the Board of Review deemed necessary to the ends of justice, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

(3) (50 e) "(3) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General concurs in such holding, the findings and sentence shall thereby be vacated in whole or in part in accord with such holding, and the record shall be transmitted by the Judge Advocate General to the convening authority for rehearing or such other action as may be appropriate.

(4) (50 e) "(4) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action."

(f) Appellate Action in Other General Court-Martial Cases.

(50 f) "Every record of trial by general court-martial the appellate review of which is not otherwise provided for by this article shall be examined in the Office of the Judge Advocate General and if found legally insufficient to support the findings of guilty and sentence, in whole or in part, shall be transmitted to the Board of Review for appropriate action in accord with paragraph e of this article."

Note: In any case not requiring approval or confirmation by the President, the JAG may direct that his concurrence in confirmation is required. This means that in cases where there is no provision for a confirming authority or where the confirming authority provided is the Judicial Council, the concurrence of both the JAG and the Judicial Council in the confirmation is necessary. If the JAG and Judicial Council do not concur, the Secretary of the Department of the Army becomes the confirming authority.

(50 g) "WEIGHING EVIDENCE.—In the appellate review of records of trials by courts-martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact."

(50 h) "FINALITY OF COURT-MARTIAL JUDGMENTS.--The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53."

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 54(b) Power of Secretary of Navy over proceedings and sentences of courts martial.--

"The Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court martial convened by his order or by that of any officer of the Navy or Marine Corps (Feb. 16, 1909, c. 131, sec. 9, 35 Stat. 621)."

2. Other

It shall be the duty to the JAG to receive, revise, and report upon the legal features of and have recorded the proceedings of courts-martial. 5 U.S.C. 428; Article 469 of Navy Regulations.

The records of all general courts-martial involving personnel of the Navy shall before final action be referred to the Bureau of Personnel for comment and recommendation as to disciplinary features. Art. 443, Navy Regulations.

3. Naval Courts and Boards

Does not comment on departmental review.

4. Other

"After the initial review by the convening authority, there is presently provided a departmental system of review of all court martial cases. Every record of trial by general court martial is reviewed as to legality in the Office of the Judge Advocate General. If there has been a conviction, and a sentence imposed,

the case is then reviewed as to disciplinary features in the Bureau of Naval Personnel (or the Discipline Branch of the Marine Corps). In a certain number of cases, further action is taken in the Office of the Secretary of the Navy, and, in cases where accused are serving prison terms, a further periodical clemency review was formerly provided by the Clemency and Prison Inspection Board.

"The legal review provided in the Office of the Judge Advocate General consists of a review of the entire record in Section A, Military Law Division, by one or more officers acting under the supervision of the Chief of the Section. Difficult cases, in which the reviewing officer has doubts as to legality, and cases involving controversial issues of law or fact are, after initial review in Section A, and after review by the Chief of the Military Law Division and by the Assistant Judge Advocate General, referred to a Board of Review which has been established within the Office of the Judge Advocate General. This board reviews the case much as a civilian court of appeal would do and submits its conclusions and recommendations to the Judge Advocate General. The Board, however, is not created by statute, and its recommendations are not binding upon the Judge Advocate General. The final responsibility for advice to the Secretary as to the legal sufficiency of every case rests upon the Judge Advocate General himself.

" All general court martial cases, after review by the Judge Advocate General, if found legally sufficient, and if there has been a conviction and sentence, are referred to the Chief of Naval Personnel or to the Commandant of the Marine Corps for comment as to the disciplinary aspects of the sentence. The latter examine the sentences from the standpoint of conformity with department policy and of uniformity with other sentences in like cases, and also consider any mitigating or extenuating circumstances which may be present. If the sentence is approved, the case is returned to the Office of the Judge Advocate General and is filed there.

"In the event that the Judge Advocate General questions the legal sufficiency of a case, or the Chief of Naval Personnel (or Commandant of the Marine Corps) recommends reduction or other action on the sentence, the case is transmitted to the Office of the Secretary of the Navy. Although the recommendations of the Judge Advocate General and of the Chief of Naval Personnel (or Commandant of the Marine Corps) are purely advisory, they are normally followed by the Secretary.

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"The Secretary's power to act on court martial sentences derives from Article 54(b) of the present Articles, which gives him the authority to set aside the proceedings or to remit or mitigate, in whole or in part, the sentence imposed by any naval court martial convened by his order or by that of any officer of the Navy or the Marine Corps. This section gives the Secretary almost complete reserve power over the sentences of all naval courts martial, except those appointed by the President.

"In addition, certain other cases, in which the sentence extends to death, or dismissal of a commissioned or warrant officer, require confirmation by the President before execution. During the war, the power of confirmation in dismissal cases was delegated to the Secretary and the Under-Secretary. The confirming authority has all the review powers of the convening authority, plus the power of commutation.

"The last phase of the departmental review formerly consisted of the parole function of the Naval Clemency and Prison Inspection Board. The purpose of this review was to re-appraise the records of accused who were confined in naval penal institutions. This Board, in addition to studying the record of trial, studied the recommendations of the local prison officials and examined the behavior and psychiatric reports of the accused. If the Board felt that further clemency should be extended, it so recommended to the Secretary of the Navy. Again, although its recommendations were purely advisory, they were usually followed."....
33 Cornell Law Quarterly 223-225.

5. Proposed Navy Bill

"ART. 39 (c)

"The proceedings, findings, and sentence of every general court martial shall, and of any other court martial may, be reviewed as to legality in the Office of the Judge Advocate General of the Navy: Provided, That the Judge Advocate General of the Navy shall have the power to set aside the proceedings, findings, and sentence of any court martial: Provided further, That the power to set aside shall include the power to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of an offense of which the accused might have been convicted under article 28 (a) (2)."

"(f) The sentence of every general court martial and of such other courts martial as may be designated by the Secretary of the Navy, shall, under such regulations as the Secretary of the Navy may prescribe, be reviewed by a clemency board appointed by the Secretary of the Navy: Provided; That such clemency boards shall have the power to remit, mitigate, or commute the sentence, in

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whole or in part, imposed by any naval court martial except a court martial convened by the Secretary of the Navy, or by the President, in which case like power shall repose in the convening authority."

"(h) The Secretary of the Navy shall have the power to set aside the proceedings, findings, and sentence, or to remit, or mitigate, or commute the sentence, in whole or in part, imposed by any naval court martial except a court martial convened by the President, in which case like power shall repose in the President: Provided, That upon the request provided for in section (g) of this article, in cases convened by the Secretary of the Navy or by the President, the convening authority shall have the power to revoke his former action and to take any action which he could have taken at the time the case was first presented for confirmation: Provided further, That the effect of the remission of a dismissal shall have the same effect as provided in the last proviso of section (g) of this article."

Last proviso of section (g): "Provided further, That any officer dismissed shall, upon the setting aside or remission of the dismissal on such subsequent review, be restored, without further appointment or confirmation and without regard to the number of officers authorized or appropriated for, to the rank and precedence to which he would be entitled if he had not been dismissed; but no pay or allowances shall be held to have accrued from the date of his dismissal to the date of his restoration."

III. Differences

1. Departmental Review in General

a. Details of Review.

The Amended Articles of War fully details the review of every case and the procedure and agencies to review, while the proposed Navy bill sketches an outline to be followed, allowing departmental implementation.

b. Clemency and Legality.

The departmental review under the amended Articles of War allows each reviewing agency to review both as to law and facts, while under the proposed Navy bill, the review is separated into review as to law and review as to clemency.

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c. Review in the JAG Office.

The first step of departmental review in both services is in the Office of the Judge Advocate General. However, the function of the agencies in the Navy JAG office would be to advise the JAG, as they are non-statutory and have no independent powers.

On the other hand, the Amended Articles of War closely define the powers and composition of the reviewing agencies in the JAG office - the Board of Review and the Judicial Council. However, neither of these two agencies can take any action without the concurrence or at least the acquiescence of the Judge Advocate General, for in order to return a case for lack of legal sufficiency or substantial error, the Board of Review must have the concurrence of the JAG. Similarly, the Judicial Council cannot return a case without the concurrence of the JAG except where it is the confirming authority, but in such a case the JAG may direct that his concurrence is necessary.

d. Review of by The Secretary of the Navy (Army).

The primary reviewing function of the Secretary of the Army is to settle disputes between the Judicial Council and the JAG, when they do not concur. The Secretary of the Army also has the function of controlling the mitigation, remission, and suspension powers of the JAG in cases requiring appellate review under A.W. 50 - that is, in all general court-martial cases except those involving sentences of death or of a general officer, and in special court-martial cases adjudging a bad-conduct discharge.

The Secretary of the Navy, on the other hand, has full powers as to both the clemency and legal aspects of any court-martial case except those convened by the President.

In addition, the proposed Navy bill provides for a clemency board in the Office of the Secretary of the Navy. This clemency review applies to all courts-martial cases. Such board has power to remit, mitigate, or commute the sentence, except in case of courts-martial convened by the President or Secretary of the Navy, in which cases the latter have such power.

As pointed out above, the legal and clemency reviews are not separated under the Amended Articles of War.

The proposed Navy bill does not specify the composition of the clemency board.

e. Review of Special (Navy summary) and Summary (Navy deck) Courts-martial.

The Amended Articles of War do not provide for either legal or clemency review of special or summary courts-martial, except where a bad-conduct discharge is adjudged. The proposed Navy bill, on the other hand, provides that summary and deck courts records may be reviewed as to legality in the Office of the JAG and that such deck and summary court records as are designated by the Secretary of the Navy, will be reviewed by the clemency board. However, as a summary court-martial sentence of discharge must be confirmed by the Secretary of the Navy, it presumably will be reviewed as to legality by the JAG and as to clemency by the clemency board.

f. Finality

The Amended Articles of War provide that the judgments of courts-martial after approval, review, or confirmation shall be final and binding on all agencies, departments, courts, and officers of the United States, subject only to a petition for a new trial. Presumably this would not take jurisdiction from federal courts to issue writs of habeas corpus, nor would this prevent the mitigation, remission, or suspension of a sentence under A.W. 51b. Query, whether this would preclude the reopening of a case on the merits if new evidence is discovered? As noted in C.S., A.W. 51, once the Secretary of the Navy has confirmed a case, he cannot later take different action on the same case, unless new evidence is discovered.

g. Review of Suspended Sentence

The amended Articles of War state that sentences to bad-conduct or dishonorable discharge will be reviewed, whether suspended or not, and that a death sentence may not be suspended. It is not made clear whether suspended sentences of dismissal or life imprisonment or involving general officers must be confirmed if suspended by an authority inferior to the confirming authority. Under the proposed Navy bill, the same situation exists as all sentences requiring confirmation.

The Navy bill provides (Art. 39(a)) that a discharge shall be executed only after confirmation by the Secretary of the Navy or other authority appointed by him, and that a dismissal shall be executed only after confirmation by the

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President or, when empowered by the President, by the Secretary of the Navy.

It is not clear under either bill what happens when a suspension previously made is vacated.

2. Departmental Review as to Certain Sentences.

a. Death

ARMY

NAVY

- | | |
|---|---|
| <p>(1) Board of Review - renders opinion as to legality - may return to convening authority for legal insufficiency or substantial error, if JAG concurs. Recommendation of modification of findings or sentence.</p> | <p>(1) Judge Advocate General - reviews as to legality - may set aside.</p> |
| <p>(2) Judicial Council - same as Board of Review.</p> | <p>(2) Clemency Board - reviews as to clemency - may remit, mitigate, or commute.</p> |
| <p>(3) JAG - same</p> | <p>(3) SecNavy - may remit, mitigate, commute, or set aside.</p> |
| <p>(4) President - Army confirming powers.</p> | <p>(4) President - Navy confirming powers.</p> |

b. Sentences involving general officers.

Army - same as death sentence.

Navy - no provision.

c. Dismissal of Officer or Life Imprisonment.

ARMY

NAVY

(Applies to dismissal and suspension of cadets. Query, whether applies to reduction to ranks of officers in lieu dismissal?)

(Applies to cadets and warrant o's. No Navy provision as to life imprisonment.)

- | | |
|---|---|
| <p>(1) Board of Review - same as in <u>a</u> above.</p> | <p>(1) JAG same as in <u>a</u> above.</p> |
| <p>(2) Judicial Council - confirming powers.</p> | <p>(2) Clemency board - as in <u>a</u> above.</p> |

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JAG may direct that his concurrence necessary and if does not concur in action of Judicial Council, SecArmy becomes confirming authority.

JAG also has power under direction of SecArmy to mitigate, remit, or suspend.

(3) SecNavy - as in a above.

(4) President - as in a above or can delegate to SecNavy.

d. Discharge

ARMY

(Applies to Warrant O's)

- (1) Board of Review - review as to law and clemency. (i) Can return to convening authority for legal insufficiency or substantial error if JAG concurs. (ii) If holds legally sufficient and JAG concurs, review ends. (iii) If thinks modification or confirming action necessary or if JAG does not concur in opinion sends to Judicial Council.

- (2) Judicial Council - confirming powers.

JAG may direct his concurrence necessary and if does not concur in action of Judicial Council, SecArmy becomes confirming authority. JAG also has power under direction of SecArmy to mitigate, remit, or suspend.

NAVY

- (1) JAG - as in a above.

- (2) Clemency board - as in a above.

- (3) SecNavy - as in a above.

e. Penitentiary Confinement.

Army as for discharges.
Navy - no provision.

f. Other General Court-Martial Cases.

ARMY

- (1) JAG - if holds legally sufficient end of review; if not same as for discharges.

NAVY

- (1) JAG - same as in a above.

- (2) Clemency board - as in a above.

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- (3) SecNavy - as in a above.
(Permissive)

g. Other Court-Martial Cases.

ARMY

No provision.

NAVY

- (1) JAG - as in a above.
(Permissive)
- (2) Clemency board - as in a above for those cases designated by SecNavy.
- (3) SecNavy - as in a above.
(Permissive)

h. Cases Convened by President or Secretary of the Navy.

Under the Amended Articles of War, review of a court-martial case convened by the President is the same as in the case involving a death sentence. Under the proposed Navy bill, the review is the same as in the case of a death sentence, except that the Secretary of the Navy has no reviewing powers.

Cases convened by the Secretary of the Navy are reviewed in the same manner as a case involving a discharge. The Secretary of the Army (and Air Force) have no convening powers.

IV. RecommendationsMcGuire Articles:"Article 6. Boards of Review.

"(a) Scope. The provisions of this article are exclusive of all other provisions for review of courts-martial set out in these articles.

"(b) Constitution. (1) There shall be established in the executive office of the Secretary of the Navy one or more boards for review of courts-martial.

"(2) Each board shall be composed of three (3) members of whom at least one shall be a civilian.

"(c) Duties and Powers. (1) The Secretary of the Navy shall, prior to final action, submit to a board of review the record of

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every court-martial in which a conviction followed a plea of not guilty and the final action contemplated extends to death, dismissal, dishonorable or bad-conduct discharge, or confinement for any period in excess of twelve (12) months.

"(2) Each board of review shall review all records of cases submitted to it by the Secretary of the Navy, both as to legality and as to disciplinary features, and shall submit recommendations thereon to the Secretary of the Navy via the Judge Advocate General.

"(3) The recommendation of every board of review shall be determined by a majority vote.

"(4) Boards of review may, with the approval of the Secretary of the Navy, prescribe their own rules of procedure.

"(d) Action of Judge Advocate General. The Judge Advocate General shall, on each recommendation of a board of review, endorse his concurrence, or his non-concurrence and reasons therefor, and shall transmit the entire record to the Secretary of the Navy for his decision."

The White Articles are substantially the same as the McGuire.

First Ballantine Report:

Review procedures should be re-examined in the interest of unifying and expediting operations of office of JAG and Bureau of Personnel.

Second Ballantine Report:

"C. Boards of Review

"Review of all sentences of naval courts, particularly General and Summary Courts, in the Department is now provided for and practiced. As a further means for assuring the attainment of justice to all individual defendants the Board recommends that there be established in the Navy Department, Boards of Review, each of which would be composed of at least one civilian with legal background, one naval lawyer, and one or more general service officers of mature judgment. The function of the boards would be to review such cases as the Secretary of the Navy might deem appropriate. Such cases might be those in which heavy sentences are imposed, those which are highly complicated, those which are the subject of appeal by brief or otherwise. Should a board disagree with the review of the case already made by the Judge Advocate General or by the disciplinary activity involved, the record would be

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returned to the appropriate office for reconsideration and further recommendation before being presented to the Secretary of the Navy for final approval."

Keefe Report:

1. Departmental Review.

a. administrative control to be in Office of JAG.

All matters pertaining to the administration of naval justice should be concentrated in one office under the direction of the JAG, responsible directly to SecNav. Purpose to eliminate present division of control and responsibility among offices of JAG, BuPers (DiscSec), MarCorps and Exos in GCM cases.

- (1) whether the JAG is officer or civilian is immaterial if JAG has full responsibility in control of administration.

b. board of legal review

This board is to be created by statute to review court-martial cases; to be established in office of SecNav.

(1) membership of board

- (a) civilian member to be well-qualified lawyer or judge of long experience; not a naval officer or civilian officer who has been retired for age; appointed for term of 6 years by the President, as commander-in-chief of the Navy, on recommendation of SecNav; salary equal to or more than a Federal district or circuit judge.
- (b) officer members to be certified as qualified by JAG; 5-10 years active legal experience; appointed by SecNav on recommendation of JAG; tenure of office semipermanent; alternate retirement and succession to insure continuity and presence of experience; no less than 3 or more than 5 members.

- (2) additional boards of legal review in Washington or overseas as needed.

(3) cases to be reviewed by the board of review

- (a) all convictions by GCM, any conviction by inferior court appealed to board.

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- (4) subject matter of review by board of legal review
 - (a) legal sufficiency of proceedings, findings and sentence in cases of not guilty pleas.
 - (b) legal sufficiency of proceedings and sentence in cases of guilty pleas.
 - (c) findings of not guilty should not be subject to review.
 - (d) power to review issues of fact should be granted
 - (1) to maintain finality of decision against subsequent and collateral attack.
 - (2) to cure a case of obvious injustice.
 - (e) board should consider errors in record regardless of failure of accused or his counsel to object thereto.
 - (5) decisions of board of legal review should be by majority vote.
 - (6) board of legal review determination of matters of law should be final and conclusive, subject to the reviewing power of the SecNav to set aside any conviction at a later date within a stated time limit.
 - (7) in any event, SecNav power to order new trial in any case which has been found legally insufficient (for such reasons as a federal appellate court would remand a case for retrial) should be legally conferred by statute.
- c. Relationship of JAG to board of legal review.
- (1) JAG should select, furnish and certify from his office legal officers to prepare cases and present them to boards of legal review.
 - (2) where no controversial questions, before board of legal review, such reviewing officer prepares short summary of facts together with recommendation as to disposition by board.

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- (3) where there are arguable issues before board of legal review JAG to assign legal officers who represent each side and prepare briefs in same manner as appellate counsel do in civilian courts.
- (4) briefs should be submitted to board of legal review prior to oral arguments.
- (5) regularly assigned defense counsel, or counsel of accused's choice, if he desires, should be permitted to represent accused before the board of legal review.
- (6) If board of legal review is not to be final, and JAG disagrees with findings, both opinions should be submitted to SecNav.

d. Office of Chief Defense Counsel.

- (1) a legal officer or civilian of at least 10 years active practice with substantial court experience appointed by SecNav.
 - (a) duty to follow all cases having contested legal problems when argued before board of legal review.
 - (b) his discretion in assigning an officer for defense counsel to argue case before board of legal review.
 - (c) may argue a case himself before board of legal review on behalf of accused.
 - (d) duty to notify accused of his opinion that board of legal review has improperly decided a jurisdictional or constitutional question, and to perfect appeal to the U.S. Supreme Court unless the accused desires his own counsel or withholds his consent.

e. Board of sentence review.

This board to be established by order of SecNav in office of SecNav.

- (1) President to be a civilian lawyer with qualifications similar to head of board of legal review.

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- (2) Other members should be:
 - (a) outstanding psychiatrist with prison experience from BuMed.
 - (b) Rep. from BuPers.
 - (c) high-ranking naval officer familiar with discipline problems.
 - (d) Mar Corps officer experience in discipline problems.
 - (e) Coast Guard officer familiar with discipline problems.
 - (f) outstanding civilian penologist.
- (3) Impartial reviewers selected, furnished and certified by JAG from his office legal officers to prepare cases for consideration by board of sentence review as Clemency and Prison Inspection Board is now doing.
- (4) All sentences imposed extending to death, dismissal, or discharge, or confinement for 12 months or more, and all other sentences, whether imposed by GCM, or inferior courts appealed by accused or his counsel or referred by JAG, should be reviewed as they now are in the Navy Dept.
- (5) Recommendations to be made to SecNav or Under SecNav but not be binding on them. If no change or modification recommended, then court's action final; case filed.

2. Review by President and Secretary.

- a. as to sentence of death or dismissal unchanged.
- b. suggested that statutory authority of President to delegate power to SecNav in other than death cases be made permanent.
- c. sentences extending to discharge of enlisted men should be referred to SecNav or to duly appointed representative before execution.
- d. sentence not extending to death, dismissal or discharge to be referred to SecNav only where change in sentence is recommended.

- e. power of SecNav to disapprove a finding of not guilty or to reconvene court for imposition of more severe sentence should be eliminated.
3. Second and subsequent clemency review by President and SecNav.
 - a. power of President and SecNav as to clemency after initial Department review should be continued. Board of sentence review should take over functions presently exercised by Clemency and Prison Inspection Board and GCM sentence review board.
 4. Reserve power of SecNav over findings and sentences.
 - a. SecNav's power to set aside proceedings, findings and sentence of naval court martial convened by his order or by that of any officer of the Navy or MarCorps should be continued. A statute should provide that clemency action by SecNav does not affect his power to set aside proceedings, findings and sentence in whole or in part within a stated time limit.
 5. Statutes should authorize a petition for review of the findings and decisions of the board of legal review to be filed directly to the U.S. Supreme Court, provided that such petition be filed only after final Dept. action. Review should be limited to consideration of the following questions:
 - a. Whether the court martial was competent.
 - b. Whether it had jurisdiction over the accused and the offense, and had power to impose the sentence and
 - c. Whether the accused had been denied any of his constitutional rights and whether he had been afforded due process of law in the proceedings.

Navy JAG:

FIRST ALTERNATIVE RECOMMENDATION for Review of GCM Cases

1. Except as modified under A below, infra, retain present law and practice as to review in Navy Department of all GCM cases after they are forwarded by the CA to the Department, Provided, that after conviction, the accused shall have the right to request further review within one year.

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2. A Board of Review shall be established in Exos and its members appointed by SecNav. There shall be further established, in Exos, the Office of the Chief Defense Counsel, and the Chief Defense Counsel appointed by SecNav.
3. If the accused shall request further review within the one-year period, the Board of Review--after giving the Chief Defense Counsel an opportunity to make recommendations in this respect--shall decide whether the request appears to have merit and shall be granted.
4. If the request is granted, a hearing shall be held before the Board of Review, in which hearing the JAG and the accused are present or represented and in which the Chief Defense Counsel may support the accused.
5. The hearing may result in such actions by the Board of Review as are being taken on first review in the Navy Department, Provided, that where the otherwise appropriate action would be to grant the accused an opportunity to request a new trial, the case shall be set aside if the accused is no longer subject to naval jurisdiction.
6. After the end of this further review or after the expiration of the one-year period without request by accused for such further review or after the Board of Review has denied the accused's request, the case is legally closed.
7. Nothing that has been said heretofore shall hamper the over-all-power--as under existing law--of SecNav and President as to setting aside, pardoning, etc.

SECOND ALTERNATIVE RECOMMENDATION for Review of GCM Cases

1. Except as modified under A below, retain present law and practice as to review in Navy Department of all GCM cases after they are forwarded by the CA to the Department, Provided, that after conviction, the accused shall have the right to request further review within one year.
2. A Board of Review shall be established in the Office of the Judge Advocate General and its members be appointed by the Judge Advocate General. There shall be further established, in the Office of the Judge Advocate General, the Office of the Chief Defense Counsel, and the Chief Defense Counsel appointed by the Judge Advocate General.
3. If the accused shall request further review within the one-year period, the Board of Review--after giving the Chief Defense

Counsel an opportunity to make recommendations in this respect--shall decide whether the request appears to have merit and shall be granted. If JAG agrees with Board's decision, the decision is final; if JAG disagrees, SecNav to make decision.

4. If the request is granted, a hearing shall be held before the Board of Review, in which hearing the JAG and the accused are present or represented and in which the Chief Defense Counsel may support the accused.
 5. The hearing may result in such actions by the Board of Review as are being taken on first review in the Navy Department, Provided, that where the otherwise appropriate action would be to grant the accused an opportunity to request a new trial, the case shall be set aside if the accused is no longer subject to naval jurisdiction. If JAG agrees with Board's action, this action is final; if JAG disagrees, SecNav to make decision.
 6. After the end of this further review or after the expiration of the one-year period without request by accused for such further review or after the Board of Review or JAG have denied the accused's request, the case is legally closed.
 7. Nothing that has been said heretofore shall hamper the over-all-power--as under existing law--of SecNav and President as to setting aside, pardoning, etc.
- A. (applies to both alternatives above).

1. There shall be established under the Under Secretary of the Navy, a Discipline and Clemency Board.

2. All sentences extending to death, dismissal, discharge or confinement for one year or more, and all sentences appealed by accused or referred by JAG shall be forward to this board for clemency review. This board is to make recommendations to SecNav or Under SecNav but not to be binding. If no change or modification recommended, then court's action final. This board will take functions now exercised by Clemency and Prison Inspection Board and GCM sentence review board.

3. This board shall consist senior naval officers. JAG, Bureau Personnel, Medical Bureau, Marine Corps, Corps of Chaplains and (in time of war) the Coast Guard to appoint one member. These officers would have collateral duty of keeping their Bureau chiefs informed of the general disciplinary situation in the naval service.

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4. After re-review on appeal, record should be re-submitted to Discipline and Clemency Board.

Follow Keffe recommendations as to:

1. Review by President and Secretary of the Navy.
2. Second and subsequent clemency by President and SecNav.
3. Reserve power of SecNav over findings and sentence.

Vanderbilt Report:

"5. The final review of all general court-martial cases should be placed in the Department of the Judge Advocate General and every such review should be made by The Judge Advocate General or by the Assistant Judge Advocate General for a theater of operations, or by such board or boards as shall be designated by The Judge Advocate General or the Assistant. This reviewing authority shall have the power to review every case as to the weight of the evidence; to pass upon the legal sufficiency of the record and to mitigate, or set aside, the sentences and to order a new trial. This recommendation relates not only to checking command control but also importantly to the correction of excessive and fantastic sentences and to the correction of disparity between sentences.

"In order to make this recommendation effective, Article of War 50 $\frac{1}{2}$ should be amended. In its present form it is almost unintelligible. It should be rewritten and the procedure prescribed should be made clearer and more definite. There seems to be no good reason why cases in which dishonorable discharge is suspended should not be reviewed in the same way as are cases in which it is not suspended."

Keffe Report:

"(5) The termination of probation by the commanding officer should be effective to return the prisoner immediately to the appropriate naval prison. However, no termination of probation should be effective to give the probation violator a discharge from the service. The record of termination of probation should be sent to the Department for review by the disciplinary activity involved and by the proposed Sentence Review Board for determination, on the basis of the prisoner's entire naval record and social and psychiatric background, whether a discharge should be recommended, and if so, what form of discharge should be awarded."