

# COURTS MARTIAL LEGISLATION

A STUDY OF THE PROPOSED LEGISLA-  
TION TO AMEND THE ARTICLES OF  
WAR (H. R. 2575); AND TO AMEND THE  
ARTICLES FOR THE GOVERNMENT OF  
THE NAVY (H. R. 3687; S. 1338)

JANUARY 20, 1948



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*Hon - Rec*

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## COURTS MARTIAL LEGISLATION

*A study of the proposed legislation to amend the Articles of War (H. R. 2575); and to amend the Articles for the Government of the Navy (H. R. 3687; S. 1338)*

### I. INTRODUCTION

At the conclusion of World War II it was only natural, in a free nation, that a military establishment which embraced a high percentage of the male adult population of the Nation should come in for criticism from certain groups. As a result of discussions and criticisms of the justice systems of the Army and Navy, both of the Departments decided, during and immediately subsequent to the war, to create certain independent committees to study their military justice systems. In March of 1946 the Secretary of War appointed a committee headed by Dean Arthur T. Vanderbilt, which was known as the Advisory Committee on Military Justice, and which was composed of eminent members of the American Bar Association. Similarly, there were certain committees appointed by the Navy Department for study of the Articles for the Government of the Navy. The first of these committees was the Ballentine committee, composed of Mr. Arthur A. Ballantine, an eminent New York attorney, and Prof. Noel T. Dowling, Nash professor of law at Columbia University. It was appointed in 1943 and reported that same year. Mr. Ballentine later headed a new and expanded board, composed of officers and civilians, which rendered a comprehensive report in 1946. Further, three other committees reported to the Navy Department on the same subject during 1946 and 1947. They were the McGuire committee, the White report, and the Keffe board.

After considering the report of the Vanderbilt Board, the War Department forwarded to the Congress a proposed bill to make changes in its system of military justice and the Navy Department, after studying the reports of its various boards, also submitted a bill to Congress to revise its system of military justice. The Army bill is known as S. 903 (H. R. 2575). The Navy bill is known as S. 1338 (H. R. 3687). No action has been taken in the Senate on either the Army or the Navy bill. However, hearings have been held before the Legal Subcommittee of the House Armed Services Committee on H. R. 2575, the Army bill. This subcommittee approved the bill with certain amendment.

The Legal Subcommittee reported the bill with amendment to the full committee, which, in turn, favorably reported the bill, as amended, to the House of Representatives, after debate, and the inclusion of two minor amendments, the House on January 15 passed H. R. 2575, and it is now before the Armed Services Committee of the Senate.

Concurrently, early in the Eightieth Congress, Senate Resolution 38, which proposed an investigation of military discipline and justice, was introduced into the Senate by Senator Kilgore and, shortly

thereafter, Senate Resolution 56, which proposed to investigate the operation of the courts-martial systems of the Army and Navy, was introduced into the Senate by Senator Morse and Senator Young. No action has yet been taken on either of these resolutions.

## II. BACKGROUND

When the Congress in the early days of the Republic took up the question of establishing a system of military justice for the Army, John Adams and Thomas Jefferson stated that there was extant one system of Articles of War which had carried two Empires, the Roman and the British, to the head of mankind. They decided that it would be vain for them to seek in their own inventions or in the records of war-like nations for a more complete system of military justice and discipline. On their recommendations, the Congress adopted the Roman and the British notions on this matter. As a result, the system of military justice in effect in the United States at the present time is an evolution of the laws of Caesar, just as the present system of American civil justice has evolved from the principles enunciated in the British and Roman laws as developed through the centuries.

At the time these original notions were enacted into law by the American Congress, it was pointed out that the objective of an army was wholly different from the objective of a civilian society; that the objective of military law differs from that of civilian law. These objectives were stated to be as wide apart as the poles, with each requiring its own separate system of laws. The function of an army or a military organization was then, as it remains today, not only to fight wars, but to win them. It is an organization which sends men obediently to their death, and which is designed for only that purpose. It is a collection of armed men obliged to obey one man. It is a hierarchy, and the men at the bottom cannot be treated or regarded as the military equal of those at the top, whatever their individual qualifications. This fundamental tenet was the basis of the rules governing the legions of Caesar, Charles Martel, Napoleon, and Pershing. And it was the governing factor in the control of the armies of Patton and Montgomery, the fleets of Nimitz and Cunningham, and the air forces of Spaatz and Tedder.

The Keffe board, in its report to the Secretary of the Navy, stated that in order to make intelligent reforms in the Navy court-martial system it was essential to consider some of the basic differences between the Army system and the Navy system. The following are quoted from pages 40 and 41 of this report:

Among others, the following differences are important:

(a) As we have seen, ultimate responsibility for the administration of naval justice is vested in the President, as Commander in Chief, and in the Secretary of the Navy. Under the present law (art. 54b, Articles for the Government of the Navy) the Secretary of the Navy possesses full power to set aside, remit, or mitigate any sentence of a Navy court martial appointed by him or by any Navy or Marine Corps officer. As a result, there is removed from controversy at the outset one of the principal objections to the Army system as it existed prior to 1920, namely, that the action of the reviewing or confirming authority was final. Proposals to change this, so as to vest full reserve power over sentences in the President or Secretary of War were not adopted. In lieu thereof a complicated system of review was established by Article of War 50½. In the Navy system, whatever proposals are made for a board of review can be readily fitted into the

present flexible structure in which the Secretary of the Navy presently possesses broad power over sentences.

(b) One of the principal objections to the Army system has been that too much power is vested in commanders in the field. This was not so true of the Navy, before and during the recent war. In peacetime, and during the early part of the war, all courts within the continental United States were convened by the Secretary of the Navy. As a result, the administration of naval justice in the United States was completely centralized, and the objection that local commands wielded arbitrary powers could not be made, as far as trial by general court martial was concerned. Even after the general court-martial system was decentralized in 1943, policies as to the type of court, the length of sentence, and so forth, at least for absence and desertion offenses, were established by the Department, and local commands were expected to adhere to these policies. Presumably, it is intended that this will still be true under the permanent decentralization established by the recent amendment to article 38, Articles for the Government of the Navy. Furthermore, the important power to order executed a dishonorable or bad-conduct discharge has been, since May 25, 1945, reserved to the Department. While the practice of conferring broad powers and then limiting their free exercise is debatable from many standpoints, this system does have the merit of centralizing in one quarter responsibility for all basic court-martial policies and decisions.

### III. DIFFERING OBJECTIVES

The difference between a military and a civilian organization was recognized in the fifth amendment of the Constitution, which specifically excepts from its guaranty of indictment by a grand jury "cases arising in the land and naval forces." By judicial interpretation the same exception has been held applicable to the guaranty of jury trial recognized in the sixth amendment. This exception was considered so obvious by the founding fathers that it did not call for a single word of discussion as it passed through the first session of the First Congress.

The objective of a democratic form of government is to enable people to live together in peace and in reasonable happiness. The object of criminal law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The civilian community is content simply to restrain assaults, while letting its members go on about their several businesses, whereas the military not only wants its men to refrain from striking each other, it wants them all to march in a prearranged direction. The Military Establishment needs obedience; must have it. The civilian community does not need it in the same degree, nor for the same purpose. While an army composed of literate, free men can be led in a large measure by precept, example, and exhortation, there is always a large indifferent segment, and always an irreducible minimum who respond only to the fear of the consequences of disobedience. It is only through punishment and the fear of punishment that this last group can be made to obey. An armed expedition of 2,000,000 men is a totalitarian organization which must in the final analysis obey implicitly the decision of one man and, by a natural evolution of command, every man must immediately and without question obey his immediate superior, even if it means his death. The commander cannot obtain this obedience unless such obedience can be made preferable to the alternative fate in store for those who malingers.

In a military organization, because of its nature, justice cannot be based solely upon the crime that the man has committed. It must be based to some extent upon the effect the punishment will have on the morale of the remainder of the command.

Therefore, it seems a reasonable conclusion that, since the objectives of civil and military justice are wide apart, each requires its own separate system of laws—statute and common. And because an army or a navy is a collection of armed men obliged to obey one man, every enactment, every change of rule which impairs this principle weakens the army, impairs its value, and defeats the very object of its existence. All the traditions of civilian lawyers are antagonistic to this vital principle, and it is here that the argument has raged, with military men defending their position on the grounds above stated, and the civilian-turned soldier attacking this position because of its basic differences from the laws of his civil society.

The tradition of civil justice and the traditions behind military justice are different. The military man believes that his concept of military justice is vital, and that, if it is not applied, an army will become demoralized by grafting onto the military code the deductions obtained by considering only the civil code and practices. This is the crucial point which must be decided by the Congress in the consideration of this pending legislation.

#### IV. CIVILIAN POINT OF VIEW

The civilian point of view is best exemplified by the resolution which was adopted by the American Bar Association at its convention in Cleveland, Ohio, on September 26, 1947, and forwarded to the President pro tempore of the United States Senate on October 29, 1947. The bar association's letter and the accompanying resolution are quoted below:

AMERICAN BAR ASSOCIATION,  
*Chicago 11, Ill., October 29, 1947.*

HON. ARTHUR H. VANDENBERG,  
*President pro tempore, United States Senate,  
Senate Office Building, Washington, D. C.*

DEAR SENATOR VANDENBERG: At the annual meeting of the American Bar Association held in Cleveland, Ohio, the week of September 22 last, a resolution submitted by John McI. Smith of Pennsylvania was adopted by the assembly and the house of delegates of the association, recommending the passage by Congress, and approval by the President, of legislation separating military justice from command and vesting final reviewing authority in the Judge Advocate General's Department.

A copy of the resolution is transmitted herewith.

Sincerely yours,

JOSEPH D. STECHER, *Secretary.*

#### RESOLUTION ADOPTED BY THE ASSEMBLY AND THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION, CLEVELAND, OHIO, SEPTEMBER 26, 1947

Whereas at the request of the Secretary of War the president of this association nominated and the Secretary of War in 1946 appointed a War Department advisory committee to determine what changes in existing laws, regulations, and practices are necessary or appropriate to improve the administration of military justice in the Army, and the committee so appointed after full committee and regional public hearings and with the benefit of personal interviews and replies to questionnaires and after exhaustive studies in due course filed with the Secretary of War its report dated December 13, 1946; and

Whereas the House Committee on Military Affairs had previously on August 1, 1946, pursuant to House Resolution 20, Seventy-ninth Congress, authorizing the committee to investigate the war effort, made certain recommendations (Rept. No. 2722) based on a careful examination of the court-martial procedure and the entire judicial system of the Army; and

Whereas the House Committee on Armed Services after extensive hearings by the Legal Subcommittee thereof and further hearings by the full committee

on H. R. 2575, to amend the Articles of War to improve the administration of justice, to provide for more effective appellate review, to insure the equalization of sentences, and for other purposes, on July 22, 1947, reported favorably thereon with amendments: Now, therefore, be it

*Resolved, That the American Bar Association urgently recommends the passage by the Congress and the approval by the President of legislation separating military justice from command and vesting final reviewing authority by the military and final authority to mitigate, to remit, and to suspend sentences in the Judge Advocate General's Department without in any way limiting other existing powers to mitigate, remit, or suspend sentences; and be it further*

*Resolved, That a copy of this resolution be sent to the President of the United States, the President of the Senate, the Speaker of the House of Representatives of the United States.*

## V. JUSTICE TO WHOM? SEVERITY OF SENTENCES

During hearings before the House Armed Services Committee on July 15, 1947, General Eisenhower attempted to present the problem from the field commander's point of view. He discussed problems concerning sentences which appear to those who stay at home to be fantastically severe.

He recalled to the committee's memory the circumstances of his operations in Europe at the time when an entire railway-operating battalion was under suspicion of black marketing, and which resulted in the trial of scores of soldiers on various charges of diverting cigarettes intended for the front-line troops to the European black markets. In this case some officers were dismissed from the service, and over a score of enlisted men received sentences ranging from 10 to 75 years' imprisonment for their offenses.

The charges against the men were actually only larceny; in some cases the proved thefts had amounted to less than \$50. In civil courts this would be called petty larceny. In most cases, where the thefts exceeded that amount, it would still appear to the families of the convicted soldiers that there was a gross miscarriage of justice.

General Eisenhower then explained to the committee how, immediately after these sentences had been given, he had personally gone into that group of convicted soldiers accompanied by his Judge Advocate, and by General Lear, his deputy, and how he had offered each of them the opportunity of exoneration if he would volunteer for front-line duty with combat troops. He then made the point to the committee that 14 of these convicted soldiers who had been sentenced to less than 15 years of imprisonment refused this offer of clemency. They preferred up to 15 years in prison to the risking of their lives in combat. What he was trying to point out to the committee in this case was that a very delicate and important subject of morale for his whole fighting force was involved in the sentences administered. He was attempting to show how the military courts charged with the responsibility of trying soldiers in the battle areas were responsible only secondarily for incarcerating felons, and primarily for maintaining the morale of the men who fought. The rifleman in the Infantry Division was satisfied in this particular instance that his supreme commander recognized the great sacrifice which he was daily facing and valued it as he himself valued his life.

If these military courts had used the standards of justice which prevail in civilian courts in evaluating these crimes, and had imposed extremely light punishment or suspended sentences, General Eisenhower's expedition might have become an undisciplined mob instead

of the fighting force with high morale which eventually defeated the Germans.

## VI. PRESENT SITUATION

The bill submitted by the War Department and now pending before the Senate committee as H. R. 2575 is different from the recommendations made by the Vanderbilt committee in the following respects:

The provisions recommended by the Vanderbilt board which were not contained in the bill as submitted by the Army, and over which considerable difference of opinion still exists, are as follows:

1. The creation of a separate Judge Advocate General's Corps with a special promotion list, independent power of assignments, and certain other uncontrolled powers vested in the Judge Advocate General.

2. Authorizing the Judge Advocate General and the Assistant Judge Advocate General of a theater of operations to mitigate sentences and to order new trials, as well as authorizing him to review all cases as to weight of evidence, and to pass upon the legal sufficiency of the record. It was the recommendation of the Vanderbilt committee that this authority should be final in the hands of the judge advocates without the check rein of command control at any echelon, and without authority of such control in the Office of the Secretary of War.

There were three other Vanderbilt committee recommendations which appear to have been minor in nature, and which were not accepted by the War Department. They are discussed in the following three paragraphs.

The Vanderbilt committee recommended that all defense counsels before courts martial be trained lawyers. This was not concurred in by the War Department because of the impracticability of providing trained lawyers in all cases, and because in many simple military cases line officers are equally effective. The War Department proposed as an alternative that where the trial judge advocate is a lawyer, the defense counsel must also be a lawyer. This proposal appears to have been satisfactory to the bar association's representatives, and no disagreement was apparent in the matter in the hearing before the House committee.

The Vanderbilt committee further recommended that special courts martial be administered as far as possible by the rules governing general courts martial. The War Department concurred in this recommendation in part only. It stated that the Manual for Courts Martial now provides that the procedure before special or summary courts martial will, as far as practical, be the same as that prescribed for general courts martial. The new proposal, which will forbid reprimand, censure, or attempts to influence decisions, also refers to special courts martial. Again, no objection was evidenced by the bar associations to these proposals as contained in the legislation submitted to the House, and it therefore appears that this difference has been satisfactorily resolved.

The Vanderbilt committee recommended the outright repeal of articles of war 87 and 91, relating to personal interest in the sale of provisions (article of war 87) and dueling (article of war 91). This was not concurred in by the War Department for the reason that it felt that although these articles are in some respects

obsolete, they would have the effect of fixing certain standards of conduct for officers which are of continuing value to the service. Again, it appeared that no objection was offered to the War Department decision in this matter.

The bill H. R. 2575, as passed by the House of Representatives, with respect to the two items which were most exhaustively discussed, is as follows:

Article 51 (a) of the bill, H. R. 2575, as reported, on page 30, lines 11 to 20, inclusive, provides that the power to mitigate or remit sentences shall be exercised by the Judge Advocate General *under the direction of the Secretary of the Army*.

On pages 45 to 47, inclusive, the bill includes a committee amendment which established a Judge Advocate General's Corps, states its strength, authorizes a separate promotion list for it, and frees it of command control in any echelon in the field, centralizing in the Judge Advocate General in Washington the power of promotion, transfer, and assignment without the requirement of consultation with the Secretary of the Army, the Chief of Staff, or field commander. This amendment is reproduced in this study on page 16.

Two attempts were made in committee to amend the committee amendment. The first one was by Mr. Kilday, who proposed that the Secretary of the Army be authorized to determine the commissioned officer strength of various grades within the Judge Advocate General's Corps. If the amendment had been adopted, it would have had the effect of eliminating from the committee amendment the provision for Congress to fix the strength of the Judge Advocate General's Corps as a percentage of the total.

The second proposal also was by Mr. Kilday. This proposal provided that the promotion of officers on the Judge Advocate General's promotion list should be no faster than the officers whose names were on the Army promotion list. The intention of this proposed amendment was to guarantee that the officers of the Judge Advocate General's Corps would not be promoted either faster or slower than officers on the Regular Army promotion list, and is similar in principle to the promotion system for staff corps in the Navy, where what is known as the "running mate" system is used.

The committee preferred the committee amendment as previously adopted, rejecting both of these proposals.

During the House subcommittee hearings, when it appeared that the provision for a separate Judge Advocate General's Corps was being considered, the War Department asked for permission for its representative to appear in opposition to the matter. This request was granted, and Lt. Gen. J. Lawton Collins and Under Secretary Kenneth C. Royall both appeared before the subcommittee in opposition to the proposal. After the subcommittee had reported the amendment favorably to the full committee, the War Department again requested that it be permitted to oppose the amendment before the full committee. This request was granted, and General Eisenhower and Secretary Patterson appeared together in opposition to this amendment.

## VII. INTEGRATION—DIFFERENCE BETWEEN LINE AND STAFF

General Eisenhower pointed out to the committee that the objective of the field commander and of the Secretary of War was to win the

war; that if the war was lost finally, it would be charged up to them; that they had staff officers who were specialists upon whom they could call for advice, but that these staff officers had no responsibility for the winning of the war. In a military organization, the difference between the functions of staff and line officers must be clearly delineated, and the staff officers who have no responsibility must, to a great extent, be under the direction of the commander of the armed forces. Many writers on the subject have pointed out that in order to have an effective and efficient military organization, it is not essential to have a great many specialists, but that what is needed is an integration of the specialists into one fighting organization.

The then Secretary of War, Mr. Patterson, himself a soldier, lawyer, and jurist, as well as a Cabinet member, in discussing a separate promotion list for the officers of the Judge Advocate General's Corps, called the attention of the House Armed Services Committee to the fact that the Army, previous to 1920, had separate promotion lists for various technical services. He reminded the committee of the great confusion which existed, and of the constant maneuvering which took place among officers who transferred from one branch which was stagnated to a more attractive and fast-moving list, which activity was disruptive of good order. The National Defense Act of 1920 abolished separate promotion lists in favor of a single promotion list, with the two exceptions of the Medical and Chaplain Corps. This is the present situation in the Army, and was confirmed by the armed services promotion bill, which the Senate passed in its closing hours of the first session of the Eightieth Congress. It was Mr. Patterson's opinion that this confirming legislation was proper and sound. He argued that if we returned again to separate promotion lists, we would be asking again for the troubles which we had prior to 1920 when, what he called, "the great reform" was enacted.

He strongly urged against a separate list, although he admitted that such recommendation was contrary to recommendations made to the War Department by the advisory committee for the American Bar Association. With regard to that recommendation he said that the fact remains that the American Bar Association was not composed of people who were familiar with the history of the Army and with its experience under separate promotion lists.

#### VIII. SOME SUGGESTED ALTERNATIVE SOLUTIONS

Before final action is taken on the Army bill (H. R. 2575) it might be well to consider some of the suggestions made by the Keffe board, in view of the fact that the board made a comprehensive study, not only of the Navy system, but also of the Army system, and of the courts-martial systems of other nations. Some of their suggestions and recommendations which might be applicable to the present bill are as follows:

1. 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.

(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. (See p. 206.)

2. The board recommends the creation of an advisory council patterned after the highly successful agencies performing similar functions in our State and National judicial systems. This council would be a permanent organization to carry on indefinitely the work which this board has started in this report. The advisory council would exhaustively study the naval court-martial system and recommend, from time to time, such changes as its studies indicated were necessary to keep the naval court-martial system up to date and adequate to perform its function.

3. The board recommends that a board of legal review be set up to review sentences only from the standpoint of their legal sufficiency, reserving matters of appropriateness of the sentence and clemency to another authority. (See p. 230.)

4. The board recommends that a board of sentence review be set up, and that this board's recommendations be made directly to the Secretary or Under Secretary of the Navy, but not be binding on him. (See p. 232.)

## IX. THE ARMY BILL AS PASSED BY THE HOUSE OF REPRESENTATIVES (H. R. 2575)

The main accomplishments of the bill as passed by the House of Representatives may be outlined as follows:

1. Enlisted men have been authorized to sit as members of a court martial.
2. It subjects officers to trial by special courts martial.
3. It prohibits the unlawful influence of courts martial or the members thereof.
4. Warrant officers are authorized to sit as members of a court martial.

5. An accused, if he so desires, may have counsel at the pretrial investigation.

6. Authority to grant a bad-conduct discharge has been granted to a general and special courts martial.

7. The review and appellate provisions have been strengthened.

8. A lesser punishment than death or life imprisonment for murder or rape has been provided.

9. A lesser punishment than dismissal from service for officers drunk during time of war has been provided.

10. The authority of commanding officers under the one hundred and fourth article of war has been increased so far as it pertains to officers but not to enlisted men.

11. A separate Judge Advocate General's Corps has been established.

The following excerpts from House Report No. 1034 set forth the views of the Armed Services Committee of the House on certain features of the bill:

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

The War Department agrees that they should, at the option of the appointing authority. Our committee agrees that they should, at the option of the defendant and has amended section 3 accordingly. We seriously doubt that the inclusion of enlisted men as members of the court will benefit enlisted men who are defendants, however, the choice is properly a right of the defendant. Once having exercised that right he must assume the responsibility for the results of his choice.

2. Should the trial judge advocate and defense counsel be attorneys, if available?

There is unanimous agreement that such personnel must be attorneys and the War Department has so provided in section 8, pages 5 and 6.

3. A greater equality in the treatment of officers and enlisted men should be provided.

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

Section 21, page 16, provides that, in time of war, an officer, in lieu of a dishonorable discharge, may be reduced to the grade of private.

Since a commanding officer's authority under the one hundred and fourth article of war has been increased in this bill so that he may forfeit one-half of an officer's pay for 3 months, rather than 1 month, a far greater restraint on officers will be the inevitable result. Enlisted men are not subject to this increased power of forfeiture.

4. Should the pretrial investigation be made mandatory and should accused be furnished counsel at such investigation?

This question presents a more difficult problem than is apparent. In our consideration of the subject of military justice we have been guided by the principle that the basic rights of an accused should be protected without encumbering the military system in such a maze of technicalities that it fails in its purpose. Upon this premise we have concluded that an investigation should precede every general courts-martial trial but that the investigation should be considered sufficient if it has substantially protected the rights of the accused. To hold otherwise would subject every general courts-martial case to reversal for jurisdictional error on purely technical grounds.

Our committee has added another safeguard in amending section 22 by providing counsel in every pretrial investigation upon the request of the accused. As a matter of custom the Army already provides such counsel in serious cases. It now becomes a matter of right, at the option of the accused.

5. A more adequate review should be provided.

Any system of judicial review is complicated, technical, and difficult to understand. The principal provisions of judicial review are presently contained in articles of war 50 and 50½. In an attempt to clarify these sections they have been rewritten by the War Department in section 26 of the bill. The new section provides for a new judicial council of three general officers, in addition to the present board of review, and defines the action to be taken upon cases examined. The section makes explicit the finality of sentences of court martial, and, for the first time, authorizes reviewing authorities to weigh the evidence in addition to determining the law. Absence of this authority heretofore has been a common cause of criticism.

Under the present Army system it is possible for a defendant to be convicted and dishonorably discharged without having had an appellate review of the dishonorable discharge portion of his sentence. Not only is it possible, there have been many such cases, resulting in extensive criticism of the Army system. The War Department has corrected this situation in section 26 (e) of the bill.

## X. SECTIONAL ANALYSIS OF THE BILLS

### A. THE ARMY BILL, S. 903 (H. R. 2575)

A section-by-section analysis of the bill as it affects the existing Articles of War is summarized as follows:

Section 1 amends article 1 to modernize nomenclature and to include certain Air Force and other units.

Section 2 amends subparagraph (a) of article 2 to cover warrant officers and flight officers and to delete field clerks.

*Section 2, as reported to the House, amends subparagraph (a) of article 2 to cover warrant officers, delete flight officers and delete members of the Army Nurse Corps.*

Section 3 amends article 4 to authorize appointment of enlisted personnel on general and special courts martial. It also changes the articles to incorporate present provisions of articles 8 and 9 making an accuser or witness for the prosecution ineligible as members.

*Section 3, as reported to the House, amends article 4 to authorize appointment of warrant officers on general and special courts martial for the trial of warrant officers and enlisted persons. It also authorizes the appointment of enlisted personnel on general and special courts martial for the trial of enlisted persons when the accused requests in writing that enlisted persons be members of the court. It provides that no enlisted person shall without his consent be tried by court if the membership does not include enlisted persons to the number of at least one-third of the total membership of the court.*

It also changes the articles to incorporate present provisions of articles 8 and 9, making an accuser or witness for the prosecution ineligible as members.

Sections 4 and 5 amend articles 5 and 6 to clarify authority for enlisted personnel to sit as members of courts.

Section 6 amends article 8 to authorize appointment of general courts martial in certain additional categories. In addition to units specifically mentioned the changes authorize appointment of general courts martial by the commanding officer of any command to which a member of the Judge Advocate General's Department is regularly assigned as staff judge advocate. The changes also relate to the qualifications of law members and the necessity for their presence at trials.

*Section 6, as reported to the House, amends the bill to change the qualifications with respect to the law member of the court. It provides*

that such law member shall be an officer of the Judge Advocate General's Department or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States, whereas the original language as submitted by the War Department had made the requirement "admitted to practice law in a court of the judicial system of the United States."

Section 7 amends article 9 to include additional units the commanding officers of which are authorized to appoint special courts martial.

Section 8 amends article 11 with respect to the appointment and services of defense counsel.

Section 8, as reported to the House, amends the bill to change the qualifications of the defense counsel. It provides that the defense counsel shall have the same legal qualifications as the trial judge advocate. Further, the final proviso of article 11 was amended by the House committee to provide that no person who had acted as a member, trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act in any capacity as a member of the prosecution or defense or act as a staff judge advocate to the reviewing authority upon the same case.

By letter dated August 4, 1947 the Secretary of War recommended that the word "likewise" in the second proviso should be deleted. The reason given was that it was not intended that the defense counsel must be of the same category of legally trained officers as the trial judge advocate. The desired result will be reached if the defense counsel is a trained lawyer of either category.

Section 9 amends article 12 specifically to authorize general courts martial to adjudge bad-conduct discharges.

Section 10 amends article 13 to authorize special courts martial to adjudge bad-conduct discharges.

Section 10, as reported to the House, amends the bill by providing that a bad-conduct discharge shall not be adjudged by a special court martial unless a complete record of the proceedings of and testimony taken by the court is taken in the case. It also deletes the provisions that the President may, by regulation, except from the jurisdiction of special courts martial any class or classes of persons subject to military law and the language which states that "the limitations upon jurisdiction as to persons and upon punishing power herein prescribed shall be observed."

Section 11 amends article 14 to omit obsolete classifications of persons subject to trial by summary courts martial.

Section 11, as amended by the House, strikes out the following words: "a member of the Army Nurse Corps" and "flight officer".

Section 12 amends article 16 to make it applicable to enlisted personnel serving as members of courts and to provide that enlisted persons shall not sit as members of courts martial if assigned to the same company as the accused.

An amendment on the House floor was made to this section to assure that when confined in prisons outside of the United States, soldiers would not be confined with enemy prisoners.

Section 13 amends article 22 to clarify the right of the defense to secure the attendance of witnesses in behalf of accused.

Section 14 amends article 24 to add a prohibition against coercion in obtaining confessions and other damaging statements.

*In passing this bill, the House added a sentence and deleted a phrase from the original language. The purpose of these amendments was to make more sure the protection of the rights of the accused.*

Section 15 amends article 25 to authorize the use of depositions in capital cases where a sentence of death is not to be adjudged and to authorize the taking of depositions after charges have been preferred but prior to reference for trial.

By letter dated August 4, 1947, the Secretary of War recommended that the words "for the prosecution" should be inserted after the word "deposition" in the second proviso. The reason given was that the Secretary felt that there was a possibility that the present language of the bill might be construed to limit the use of depositions by the defense.

Section 16 amends article 31 to define the powers of law members.

*A sentence was added to the section on the House floor. Its purpose was to assure that the court was instructed to presume the defendant innocent until proved guilty beyond a reasonable doubt; to assure that reasonable doubt is resolved in the favor of the accused; and to establish the burden of proof upon the Government.*

Section 17 amends article 26 to define the method of forwarding records of trial by special courts martial involving sentences including bad-conduct discharges.

Section 18 amends article 38 to require the submission of rules and regulations (Manual for Courts Martial) to the Congress only once instead of annually.

Section 19 amends article 39 to remove the bar of the statute of limitations for absence without leave in time of war and to authorize the Secretary of War to extend the statute of limitations in time of war where prosecution of the case would be contrary to the public interest.

Section 20 amends article 43 to clarify the votes required with respect to all findings and sentences by courts martial.

Section 21 amends article 44 by deleting the old punitive provision covering publication of convictions for cowardice or fraud and by substituting authorization for courts martial to adjudge reduction to the grade of private in officers' cases.

Section 22 amends article 46 by removing the present contents of that article to article 47 and substituting the present requirements of article 70 with respect to signatures, oaths, and investigation of charges and delays in forwarding charges.

*Section 22, as reported to the House, under the heading "B. Investigation," contains an additional sentence as follows:*

*The accused shall be permitted, upon his request, to be represented at such investigation by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general courts-martial jurisdiction over the command.*

Section 23 amends article 47 to add clauses covering the assignment of members of the Judge Advocate General's Department and references to staff judge advocates prior to and after trial. A clause is also added covering action upon sentences now included in article 46.

*Section 23, as reported to the House, under the title "d. Approval," contains additional language which provides that the sentence of a special court martial including a bad-conduct discharge shall not 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.*

Section 24 amends article 48 to place the confirming power in the Judge Advocate General and in a judicial council in his office with respect to sentences to dismissal of officers below general officer grade, dismissal or suspension of a cadet, or sentences involving imprisonment for life, and providing for confirming action in certain other cases referred to the judicial council for confirming action.

Section 25 amends article 49 to define more explicitly the powers incident to the power to confirm.

Section 26 amends article 50 by removing the present contents to article 51 and by substituting therefor the contents of present article 50½, relating to appellate review. The new article provides for constitution of the judicial council, prescribes methods of procedure by the board of review, and defines action to be taken upon cases examined. It authorizes the weighing of evidence on appellate review. It amends the present provisions of article 50½ to make explicit the finality of sentences of courts martial.

By letter dated August 4, 1947, the Secretary of the Army recommended that the last sentence of article 50 (a) should be deleted with the substitution as follows:

He shall also constitute, in his office, a judicial council composed of three officers of the Judge Advocate General's Department, general officers if available.

The reason given was that he felt that the rigidity of the clause as then appearing in the bill was undesirable and might in practice impede the appellate proceedings.

Further, he recommended that the words in article 50 (a), "who shall be a general officer of the Judge Advocate General's Department," should be deleted for the same reason as indicated in the last preceding paragraph.

*Section 26, as reported to the House, under the heading of "c. Branch Offices," changes the word "may" to the word "shall" to make it mandatory that certain types of cases be forwarded to the Judge Advocate General with appropriate recommendation.*

Section 27 rescinds article 50½ as a numbered article.

Section 28 amends article 51 to include the contents of articles 51, 52, and 53 with respect to the mitigation, remission, and suspension of sentences. It gives the Judge Advocate General authority to mitigate and remit, under the direction of the Secretary of the Army. The system of confirmation provided in the amended articles eliminates the necessity for the provision of article 51 authorizing suspensions of sentence to dismissal "until the pleasure of the President be known."

Section 29 amends article 52 by removing the substance of the present article to article 51 and substituting the substance of the clauses of present article 50½ relating to rehearings ordered at the time of final action on sentences.

Section 30 amends article 53 by removing the substance of the present article to article 51 and substituting authorization for the Judge Advocate General to grant new trials within one year after final action is taken.

By letter of August 4, 1947, the Secretary of War recommended that the words "under the direction of the Secretary of War" should

be inserted after the words "The Judge Advocate General" in the second and third lines. The reason given was that it was intended that the ultimate responsibility with respect to the granting of new trials and exercise of the powers incident thereto shall rest in the Secretary of War.

Section 31 amends article 70 by retaining the present punitive provisions with respect to delays and removing the administrative provisions relating to the preferring of charges and investigation thereof to article 46.

Section 32 amends article 85 to remove the mandatory punishment of dismissal of an officer for being drunk on duty in time of war.

Section 33 amends article 88 by rescinding the present punitive provisions concerning abuse of, or wrongful interference with, persons bringing provisions and other supplies into camp and substitutes punitive provisions in respect to coercion or unlawful influence in court-martial cases.

*Section 33, as reported to the House, amends article 88 to provide that commanding officers and other authorities appointing any general, special, and summary courts martial shall not censure, reprimand, or admonish such court, or any member thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise by such court or any member thereof of its or his judicial responsibility.*

Section 34 amends article 89 by substituting the word "wrongfully" for "willfully" and eliminating the clause "(unless by order of his commanding officer)" with respect to the destruction of property.

Section 35 amends article 92 to make discretionary the punishment for murder without premeditation, and to make the punishment for rape, death, or such other punishment as a court martial may direct.

Section 36 amends article 93 to authorize regulations to merge the offenses of larceny and embezzlement.

Section 37 amends article 94 to delete the particularized description of various frauds against the United States, and to substitute language assimilating similar provisions of the Criminal Code of the United States.

*Section 37, as reported to the House, and which amends article 94, has been completely reworded by the House committee for the apparent purpose of making the language more exact.*

Section 38 amends article 104 to authorize disciplinary punishment by forfeiture of pay of warrant officers, flight officers, and officers below the grade of brigadier general.

*Section 38, as reported to the House, strikes out the following words, "or flight officer".*

Section 39 amends article 108 to recognize discharge by sentence of special court martial (bad-conduct discharge).

Section 40 amends article 110 by adding to the articles to be read and explained to soldiers articles 24, 28, 97, and 121. It also requires that a text of the Articles of War and the Manual for Courts Martial shall be made available to soldiers upon request for personal examination.

Section 41 amends article 116 defining the powers of assistant trial judge advocates and assistant defense counsel by including within its scope the personnel of special courts martial.

*Section 41, as reported to the House, strikes out the word "council" and inserts in lieu thereof the word "counsel" to correct a clerical error.*

Section 42 amends article 117 to delete a specific and awkward reference to the act of March 3, 1911, and to substitute therefor a general reference to the law on the subject.

Section 43 amends the first section of article 121 to permit the submission of complaints of wrongs to officers exercising general court-martial jurisdiction over an officer against whom the complaint is made.

*Section 44, as reported to the House, strikes out the word "fourth" and inserts in lieu thereof the word "eighth" to provide that the act shall become effective on the first day of the eighth calendar month after its approval.*

The bill as passed the House contains four new sections, the purposes of which are to establish a separate Judge Advocate General's Corps. These new sections are as follows:

*SEC. 46. Section 8 of the National Defense Act, as amended (10 U. S. C. 61), is amended to read as follows:*

*"SEC. 8. JUDGE ADVOCATE GENERAL'S CORPS.—The Judge Advocate General's Corps shall consist of one Judge Advocate General with the rank of major general, one assistant with the rank of major general, three officers with the rank of brigadier general, and an active list commissioned officer strength to be determined by the Secretary of the Army, but such strength shall not be less than 1½ per centum of the authorized active list commissioned officer strength of the Regular Army, and in addition warrant officers and enlisted men in such numbers as the Secretary of the Army shall determine."*

*SEC. 47. Regular Army officers shall be permanently appointed by the President, by and with the advice and consent of the Senate, in the Judge Advocate General's Corps in the commissioned officer grades of major general, brigadier general, colonel, lieutenant colonel, major, captain, and first lieutenant. The names of commissioned officers of the Judge Advocate General's Corps below the grade of brigadier general shall be carried on the Judge Advocate's promotion list. The Judge Advocate's promotion list shall be established by entering thereon the names of the officers concerned without change in their order of precedence on the existing promotion list. The authorized numbers in each of the several grades in the Judge Advocate's promotion list shall be prescribed by the Secretary of the Army, but the numbers thus authorized shall not exceed the following percentages of the total strength authorized for that list: 8 per centum in the grade of colonel; 14 per centum in the grade of lieutenant colonel; 19 per centum in the grade of major; 23 per centum in the grade of captain; and 36 per centum in the grade of first lieutenant: Provided, That numbers may be authorized for any grade in lieu of authorization in higher grades: Provided further, That this provision shall not operate to require a reduction in permanent grade of any officer now holding permanent appointment.*

*Officers whose names are carried on the Judge Advocate's promotion list shall be promoted to the several grades as now or hereafter prescribed for promotion of promotion-list officers generally and the authorized numbers in grades below colonel on such list shall be temporarily increased from time to time in order to give effect to the promotion system now or hereafter prescribed by law for promotion-list officers.*

*Within the authorized strength of the Judge Advocate General's Corps additional officers may be appointed by transfer of qualified officers from other branches of the Army, by appointment of Reserve judge advocates or qualified civilian graduates of accredited law schools. Those originally appointed in the Regular Army in the Judge Advocate General's Corps shall be credited with an amount of service for the purpose of determining grade, position on promotion list, permanent-grade seniority, and eligibility for promotion as now or hereafter prescribed by law.*

*SEC. 48. The Judge Advocate General shall, in addition to such other duties as may be prescribed by law, be the legal adviser of the Secretary of the Army and of all officers and agencies of the Army Department; and all members of the Judge Advocate General's Corps shall perform their duties under the direction of the Judge Advocate General.*

*SEC. 49. Notwithstanding any other provisions of law, the Judge Advocate General, the Assistant Judge Advocate General and general officers of the Judge Advocate General's Corps shall be appointed by the President, by and with the advice and consent of the Senate, from among officers of the Judge Advocate General's Corps who are recommended for such positions by the Secretary of the Army. Upon the appoint-*

*ment of an officer to be the Judge Advocate General or Assistant Judge Advocate General with the rank of major general, he shall at the same time if not then holding permanent appointment in such grade be appointed a permanent major general of the Regular Army.*

B. THE NAVY BILL, S. 1338 (H. R. 3687)

A section-by-section analysis of the bill as it affects existing laws for the government of the Navy is summarized as follows:

Article 1 retains existing law except that the penal clause of this as well as other articles is transferred to articles 8 (capital offenses) and 9 (other offenses) of the proposed text. The result of this arrangement is shown in the following tabulation:

Present AGN contain penal clauses in articles 1, 3, 4, 5, 6, 8, 9, 14, 16, 17, 19, 20, 21, 22, 31, 42 (a), 44, 46, and 57.	Proposed legislation centralizes penal clauses in articles 8, 9, and 35 (c).
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Article 2 remains unchanged.

Articles 3 and 4 retain existing law except that the latter article is expanded to include aircraft as well as vessels.

Article 5 states the jurisdiction of the Articles for the Government of the Navy as to persons, time, place, and offenses:

(a) As to persons, it consolidates existing law with the following two changes:

(1) Present article 14 (11) extends the jurisdiction of courts martial over persons to dismissed or discharged persons who defrauded the Government while in the naval service and whose fraud is discovered after their discharge or dismissal. But by reason of their discharge or dismissal such persons become civilians and should be tried by Federal civil courts under United States Code, chapter 5. Paragraph 11 of present article 14 is proposed to be repealed.

(2) On the other hand, it is proposed to provide that a discharge from the naval service shall not operate to terminate the jurisdiction of naval courts martial over a person for a crime committed in a previous enlistment from which he deserted. If such a person enlists again under a false name and receives a discharge from the latter enlistment, such discharge terminates this last enlistment only. His previous enlistment from which he deserted was never terminated and he may be tried during the statutory period, if any, for that desertion and other crimes committed in that enlistment period.

(b) As to time, the present statute of limitations providing for a 2-year period is retained; the four exceptions (unauthorized absence in time of war, desertion in time of war, mutiny, and murder) are identical with the exceptions in section 19 of the Army bills (S. 903 and H. R. 2575).

(c) As to place, it is proposed to remove statutory restrictions. The only specific restriction, contained in present article 6 concerning murder, should be removed to avoid a defeat of justice in certain cases. As a rule of policy, persons in the naval service charged with the commission of a common civil crime (as murder, rape, robbery, etc.) within the continental limits of the United States, will be turned over—at least, in time of peace—for trial

by civil courts whenever the interest of the civilian community is deemed paramount.

(d) As to offenses, it is proposed to incorporate into the Articles for the Government of the Navy, by reference, all criminal laws of the United States, without such Territorial restrictions as are contained in 18 United States Code 451 and 511. At present, if a person in the naval service commits "statutory rape" at a foreign station or on an island in the Pacific which is not under the jurisdiction of the United States, 18 United States Code 458 does not apply (in view of 18 U. S. C. 451). The effect of the proposed incorporation, renders 18 United States Code 458 applicable in such case.

Articles 6 and 7 follow existing law relating to marines and medical personnel serving with the Army.

Article 8 enumerates all serious offenses for which the maximum penalty is mandatory in no case. Furthermore, the President would be empowered to prescribe limitations of punishment in war as well as in peace. The proposed article 8 excludes several categories of offenses which, under existing law, are capital offenses.

Article 9 enumerates all offenses which are not capital. The offenses fall chiefly into two categories: (a) Offenses of an exclusively military character (as disobedience, desertion in time of peace, absence from the place of duty, etc.), and (b) the most common of felonies and misdemeanors. The somewhat indefinite "catch-all" clause of present article 22 ("all offenses not specified in the foregoing articles") has been replaced by express provisions against conduct to the prejudice of good order and discipline (16 Op. Atty. Gen. 578, 580 (1880)) and other recognized military and naval offenses (*Dynes v. Hoover*, 20 How. 65 (1857)) and including, by reference, the provisions of Federal and State criminal laws.

Articles 10-13 retain existing law.

Article 14, dealing with the so-called mast punishment, retains existing law to the effect that only commanding officers of naval vessels and other officers who have authority to convene a summary court martial may inflict mast punishment upon officers and men under their command.

As to the authorized punishments (only one punishment may be inflicted, no combinations), the offender may be reduced to the next inferior rating in all cases, while under existing law the commanding officer has such authority only where the offender has been advanced to his present rating in that command. The experience of the war has shown that no basis existed for this discrimination as between enlisted men serving under the same commanding officer. The punishment of solitary confinement is eliminated as it served no useful disciplinary purpose and therefore is almost never used. The infliction of "deprivation of liberty" and "extra duties" has been safeguarded in several aspects, e. g., by providing for maximum periods. In order to avoid recourse to courts martial in many minor cases in which a fine would be the appropriate action, and in accordance with various recommendations and Army practice, "loss of pay" not exceeding one-half month's pay has been added as a mast punishment upon officers and men. The authority, however, is to be conferred only upon general and summary court martial convening authorities, is limited to time of war, national emergency, or special

situations in time of peace, and is safeguarded by the requirement of a full report.

Articles 15-16, dealing with deck courts martial, retain the existing law in substance, but the punishments of solitary confinement and "extra police duties" are abolished, while the maximum periods of confinement and loss of pay are extended from 20 days to 1 month. This extension will reduce the number of summary courts martial. The existing safeguards are retained and will be emphasized administratively (defense counsel upon request; accused may reject deck court altogether; etc.).

Articles 17-18 provide for constitution of summary courts martial. For every summary court martial the convening authority will appoint a qualified defense counsel to represent the accused, and he will be a lawyer whenever practicable. It will be no longer necessary for the accused to make a request that counsel be assigned to him, but he may choose his own defense counsel in addition to, or in lieu of, the regularly appointed defense counsel. As far as the prosecutor is concerned, he will be limited to prosecuting functions (and to the keeping of the record) and shall no longer have the dual and inconsistent functions of prosecutor and impartial legal adviser to the court.

Article 19, relating to the oaths, retains present law but avoids unnecessary repetition in the administration of oaths.

Article 20 increases the punishment powers of a summary court martial in regard to confinement (from 2 to 6 months) and loss of pay (from 3 to 6 months). This amendment will greatly reduce the number of general courts martial and the necessity to resort to the latter courts. It closes the gap between the present 2-month maximum confinement of a summary court martial and the 6-month minimum confinement practiced by general courts martial.

Article 21 retains the substance of existing law with respect to summary court-martial records. A formal investigation prior to ordering an accused to be tried by summary or general court martial will be prescribed in the Naval Law Manual. During this investigation the accused and his counsel will be present and may cross-examine witnesses. (Counsel will be assigned to accused in no case later than at the time the investigation is ordered and the alleged offender will have opportunity to consult counsel before he is asked what statement, if any, he desires to make in reply to the accusations.) This will assure that the officer empowered to order trial by summary or general court martial will have the advice of the investigating officer as well as of his staff legal officer as to the advisability of trial, sufficiency of evidence, etc., before he decides whether the accused should be tried.

Articles 22-23 retain present law.

Article 24 provides for the constitution of a general court martial. While the judge advocate under existing law has the dual functions of prosecutor and legal adviser to the court, the proposed legislation separates the functions of prosecutor and judge advocate. Both—judge advocate and prosecutor—must be officers certified by the Judge Advocate General to be qualified to perform the functions of their respective offices.

The principal function of the judge advocate will be to advise the court on all matters of law and to rule on all interlocutory questions, including admissibility of evidence, except challenges. He could be

overruled by the court, but the reasons for such rulings must appear on the record. The judge advocate will not be a member of the court and will not vote on findings or sentence. He will be subject, however, to disqualification on grounds similar to those on which members of the court may be challenged. No officer who was in any way connected with the preparation of the charges and specifications against the accused or the investigation of the case may exercise the functions of judge advocate at the trial.

There will be also a regularly appointed defense counsel for every general court martial, who will assist all accused in the preparation of their defense and at the trial. Corresponding to the qualification requirement for general court-martial prosecutors, every such defense counsel must be an officer certified by the Judge Advocate General to be qualified to perform the functions of defense counsel. An accused may also have any other person in the armed services, if available, or, at his own expense, a civilian attorney, as defense counsel of his own choice in addition to, or instead of, the regular defense counsel.

At the trial, if the prosecution fails to establish a prima facie case, the accused shall be acquitted on motion at the end of the prosecution's case.

Articles 25-26 retain present law but endeavor to eliminate unnecessary repetitions of oaths.

Article 27 provides that the convening authority must not appoint new members after the beginning of the trial except to complete a quorum on the court.

Article 28 retains existing law and practice, but provides that the findings and sentence shall be announced in open court as soon as each is determined. The votes will be in form of secret ballots, and majorities varying with the severity of the sentence will be prescribed. A sentence of confinement will be effective upon announcement (subject to be set aside or mitigated on review) in order that the accused may not lose credit for the time between trial and completion of review. Sentences of death, dismissal, or discharge, however, require special action on review prior to execution.

Article 29 simplifies existing law, by providing that the record shall be authenticated by the signatures of the President and of the judge advocate, instead of requiring signatures by all members.

Articles 30, 31, and 32 retain existing law.

Article 33 provides for Presidential maximum limitations of punishment not only for time of peace, as under existing law, but also for time of war. If the accused is convicted of a violation of Federal criminal law, the maximum confinement prescribed in such law shall also be binding upon the court martial.

Article 34 retains existing law.

Article 35 improves existing law by providing that—

(a) Process to compel the presence of civilian witnesses shall run throughout the United States, its Territories and possessions, while existing law limits it to the State in which the court is sitting:

(b) Compulsory process may be issued in summary as well as in general court-martial cases, while existing law limits the subpoenaing power to the latter court;

(c) Contempt of court (an extremely rare occurrence) shall be punishable before summary as well as general courts martial.

Article 36 improves existing law by providing that, unless otherwise authorized by the Secretary of the Navy under extraordinary circumstances, the accused and his counsel, or his representative, shall be given the opportunity to be present at the taking of a deposition and may cross-examine the deponent. This will permit removal of the present limitations in regard to punishment in such cases, but depositions would not be allowed at all in cases in which the maximum punishment is death.

Article 37 allows a court martial to grant a continuance for good cause to either prosecution or defense. Existing law requires the permission of the convening authority.

Similar to the Army rule, there shall be a 5-day interval in general court-martial cases, a 3-day interval in summary court-martial cases, and a 24-hour interval in deck court-martial cases, between the serving of the charges upon accused and the beginning of the trial. This is a minimum period; a further period will be granted if reasonably required for preparation of the defense. A time schedule will be issued to the service to serve as a guide and to avoid unnecessary delays during investigation, trial, and review. A corresponding check-off list will accompany each record and delays will be required to be explained by the responsible officer.

Article 38 provides that the defense counsel shall inform the reviewing authorities in writing of all grievances the accused may have as to proceedings, findings, and sentence.

Article 39 contains the review system. As a substantial change of existing law, it is proposed that, whenever possible, the review for legality of proceedings, findings, and sentence be divorced from the officer who ordered that the accused be tried. Such review shall be vested in higher commands, and, in all general court-martial cases, in the Judge Advocate General of the Navy. However, the convening authority shall retain full clemency power and there shall be no restoration of originally imposed punishment once such clemency has been exercised. Authorities vested with legal review, except the Judge Advocate General, may also exercise clemency in addition to actions concerning legal features.

An additional safeguard is provided in article 39. In the event the Judge Advocate General of the Navy finds the proceedings, findings, and sentence in a general court-martial case to be legal or the reviewing authority as to legality in a summary or deck court martial shall so find, the person convicted shall be informed of this decision. The convicted person shall have 1 year from the time he is so informed to file an appeal to a board of appeals appointed by the Secretary of the Navy. This board, independent by statute, is empowered to take any action which the Judge Advocate General of the Navy or a clemency board appointed by the Secretary of the Navy might have taken under the provisions of this article. Under the authority granted in this article by the Congress, the Secretary of the Navy will prescribe the procedure governing such an appeal.

Following present practice, acquittals shall be final upon announcement by the court and in no case shall a record be returned to the court for the purpose of increasing the punishment.

The reserve powers of the President and the Secretary of the Navy to set aside proceedings, findings, and sentence, or to mitigate the punishment, for any legal or clemency reason, are fully preserved.

The closing provisions of article 39 emphasize the independence of the court in the exercise of its judicial functions.

Articles 40-48 contain no substantial changes of existing law.

Article 44, providing for admissibility in courts martial of the sworn testimony contained in the record of a court of inquiry, excludes only the death penalty, whereas existing law also excludes the dismissal of an officer.

#### XI. DISCUSSION OF THE DETAILED DIFFERENCES BETWEEN THE ARTICLES OF WAR AND THE ARTICLES FOR THE GOVERNMENT OF THE NAVY

The following is a summary of the major points of difference in the Articles of War with the amendments proposed in H. R. 2575 as reported by the Armed Services Committee of the House of Representatives and the Articles for the Government of the Navy with the amendments proposed in H. R. 3687 as introduced in the Congress:

##### A. PERSONS COMPETENT TO SERVE ON COURTS MARTIAL

Articles of War (art. 4) provides that, in addition to commissioned officers, warrant officers may serve on general and special courts martial for the trial of warrant officers and enlisted persons, and that enlisted persons may serve on general and special courts martial for the trial of enlisted persons when requested by the accused.

Articles for the Government of the Navy provides only for commissioned officers, including commissioned warrant officers, as members of courts martial.

##### B. CLASSIFICATION OF COURTS MARTIAL

Articles of War (art. 4) provides for three kinds of courts martial: General, special, and summary. The three corresponding courts martial provided for by Articles for the Government of the Navy are: General, summary and deck, respectively.

##### C. JURISDICTION OF COURTS MARTIAL

Special courts martial have the power to try any persons subject to military law (art. 13, Articles of War).

Articles for the Government of the Navy (art. 17) limits the power of summary courts martial to the trial of enlisted persons.

##### D. AUTHORITY TO PRESCRIBE RULES OF PRACTICE, PLEADING, ETC.

Articles of War (art. 38) provides that the President may prescribe the procedure, including modes of proof for courts martial, courts of inquiry, and other military tribunals.

Articles for the Government of the Navy (art. 48) provides that the Secretary of the Navy is authorized to prescribe the rules of pleading and procedure, including modes of proof for similar tribunals for the Navy. There is another distinction between article of war 38 and article for the government of the Navy 48. Once a law of evidence used in Federal courts is determined to be applicable to courts martial, article for the government of the Navy 48 makes its adoption mandatory, whereas article of war 38 makes its adoption discretionary.

## E. STAFF JUDGE ADVOCATE

Articles of War (art. 47 (a), (b), and (c)) provides for the assignment to the staff of commanders of members of the Judge Advocate General's Department and for their duties.

Articles for the Government of the Navy has no similar provision.

## F. LAW MEMBER OF GENERAL COURTS MARTIAL

Articles of War (art. 8) provides that one member of a general courts martial shall be an officer of the Judge Advocate General's Department or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States and who shall be certified by the Judge Advocate General to be qualified for the detail. It shall be the duty of the law member to rule on interlocutory questions, other than challenge, arising during the proceedings (art. 31, Articles of War).

Articles for the Government of the Navy (art. 24 (b)) provides for the appointment for each general court martial of a judge advocate, not a member of the court, to advise the court on legal matters arising during the proceedings. Such officer shall be certified by the Judge Advocate General as qualified to perform the duties prescribed for him and to be responsible to the Judge Advocate General for the performance thereof. It should be noted that the judge advocate of a Navy general court martial rules on interlocutory questions, except challenges, subject to being overruled by a majority of the members of the court, in which case the reasons shall be spread upon the record.

## G. TRIAL JUDGE ADVOCATE AND COUNSEL

Articles of War (art. 11) provides that in a general or special court martial, where the trial judge advocate is a member of the Judge Advocate General's Department or a member of the bar of a Federal court or of the highest court of a State, the officer appointed as defense counsel shall have like qualifications.

Articles for the Government of the Navy (art. 18 (b)) provides for the appointment of a prosecutor and defense counsel for each summary court martial, who shall be persons qualified to perform such duties. Article 24 (b) provides that for each general court martial the prosecutor and defense counsel shall be certified by the Judge Advocate General as persons qualified to perform such duties.

## H. ACTION UPON CHARGES

Articles of War (art. 46) provides that no charge will be referred to a general court martial for trial until after a thorough and impartial investigation has been made; that the accused shall be permitted, upon his request, to be represented at such investigation by counsel and shall have full opportunity to cross-examine witnesses against him and to present anything he may desire in his own behalf; and that in time of peace, if he objects, he shall not be brought to trial within a period of 5 days subsequent to the service of charges against him. This article also provides that charges and specifications must be signed by a person subject to military law, and under oath, either that he has

personal knowledge of or has investigated the matters set forth therein and that they are true in fact to the best of his knowledge and belief.

Articles for the Government of the Navy has no similar provision.

#### I. CONFIRMATION

Articles of War (art. 48) provides for confirmation by the President of any sentence of court martial involving a general officer.

Articles for the Government of the Navy has no similar provision.

#### J. APPELLATE REVIEW

Articles of War (art. 50) provides for the appointment by the Judge Advocate General, in his office, of a board of review composed of not less than three officers of his department and for the appointment in his office of a judicial council composed of three general officers of his department. Provision is also made that when necessary he may appoint two or more boards of review and judicial councils in his office with equal powers and duties. This article also provides that when necessary the President may direct the Judge Advocate General to establish a branch office under an Assistant Judge Advocate General with any distant command, and to establish in such office one or more boards of review and judicial councils.

Articles for the Government of the Navy (art. 39 (f)) provides that the sentence of every general court martial and of such other courts martial as may be designated by the Secretary of the Navy, shall be reviewed by a clemency board appointed by the Secretary of the Navy. Provisions is also made (art. 39 (g)) that the proceedings, findings, and sentence of every court martial shall, upon request by a convicted person made within one year after such person has been informed that review of his case has been completed, be reviewed by a board of appeals appointed by the Secretary of the Navy to serve in his office.

#### K. SEPARATE PROMOTION LIST

H. R. 2575, as reported by the Armed Services Committee of the House of Representatives, establishes, as an amendment to the National Defense Act, a Judge Advocate General's Corps and provides for a separate promotion list for the officers of that corps with a distribution in grade of officers on that promotion list. Provision is also made that officers of the Judge Advocate General's Corps shall perform their duties under the direction of the Judge Advocate General.

The Officer Personnel Act of 1947 provides for the assignment of officers of the line of the Navy as legal specialists and that they shall be additional numbers in grade. Such officers are carried on the promotion lists for officers of the line of the Navy.

