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**SYNOPSIS OF RECOMMENDATIONS
FOR THE IMPROVEMENT
OF NAVAL JUSTICE**

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FOR THE IMPROVEMENT OF NAVAL JUSTICE

OFFICE OF THE JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

1947

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SYNOPSIS OF RECOMMENDATIONS
FOR THE IMPROVEMENT OF NAVAL JUSTICE

Comprising Summaries of

1. Existing Law,
2. Ballantine Report 1943,
3. McGuire Committee 1940,
4. White Report 1946,
5. Ballantine Board 1946,
6. Keefe Board 1947,

With References to the

- a. Articles of War,
- b. Vanderbilt Report 1946,
- c. SecW Press Release 1947

and Indicating

JAG Recommendations.

ABBREVIATIONS

AGN Articles for the Government
of the Navy
AW Articles of War
B'43 Ballantine Report 1943
B'46 Ballantine Report 1946
K Keeffe Board 1947
McG McGuire Committee 1946
SecW Press Release of the Sec-
retary of War, 2-20-47
V Vanderbilt report 1946
W white Report 1946

ECD Bad Conduct Discharge
BuPers Bureau of Naval Personnel
CA Convening Authority
CMO Court-Martial Order
CO Commanding Officer, Officer in
Charge, etc.
C.of I. Court of Inquiry
Conf. Confinement
C.to P. Conduct to the prejudice of good
order and discipline
DC Deck Court
DD Disnonorable Discharge
DiscSec Discipline Section
Exos Executive Office of the Secretary
(of the Navy)
GCM General Court Martial
Gen.Staff General Staff (Army)
JA Judge Advocate
JAG Judge Advocate General (of the
Navy, unless indicated other-
wise)
JAGD Judge Advocate General's
Department (U.S. Army)
MarCorps Marine Corps
Mo's months
NC&B Naval Courts and Boards
N.Reg. Navy Regulations

Plc Private first class
Rep. Representative
RevAuth Reviewing Authority(ies)
SCM Summary Court Martial
SecNav Secretary of the Navy
SOP Senior officer present
SO Superior Officer
TJA Trial Judge Advocate
Wk Week

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1. JURISDICTION OF AGN:

a. As to Persons:

(At present, dispersed in several acts, Naval Courts and Boards and decisions, not collected as a list in AGN)

- (1) Regular Navy, active and retired; midshipmen.
- (2) Naval Reserve and Marine Corps Reserve, while on active duty, training duty, or equivalent, or authorized travel, or while wearing uniform.
- (3) Enlisted personnel of the Fleet Naval Reserve or Fleet Marine Corps Reserve or retired list with pay and officers on the retired list of the Naval Reserve or the Marine Corps Reserve with pay.
- (4) Marine Corps when not detached for duty with the Army.
- (5) Coast Guard, Coast and Geodetic Survey, and Public Health Service, while serving as part of the Navy, in war or national emergency.
- (6) In time of war, spies and persons who endeavor to corrupt any person in the Navy.
- (7) Persons awaiting discharge after expiration of enlistment.
- (8) Persons who re-enter the naval service for offenses committed during their prior service.
- (9) Dismissed or discharged persons who defrauded the Government while in the naval service, for such frauds.

- McG: 1. List all classes in AGN.
2. Add in class (5): "and any other similar organization".
 3. Add saboteurs to class (b).
 4. Class (11) is obsolete in view of proposed change of statute of limitations (see, below, 1d).
 5. Add class: persons serving a sentence of court martial.
 6. State that jurisdiction of courts martial does not exclude jurisdiction of extra-ordinary military tribunals.

W: Follow McG.

B'46: Restate and recast law.

K: Follow McG.

Follow all McG recommendations, and

1. Omit class (9).

(Reason: Winthrop doubted, and Federal District Court (Feb. '46) denied, constitutionality of identical AW provision.)

2. Add clause that discharge does not terminate jurisdiction over the person for an offense committed during a prior period of active service from which this person deserted.

- (10) Naval officers dismissed in wartime by order of the President if they demand trial.
- (11) Deserters in time of peace, for two years after expiration of enlistment, for trial for desertion.
- (12) Prisoners of war in naval custody (under special safeguards, set forth in the Geneva Convention).
- (13) Civilians accompanying Navy, Marine Corps, etc. in war or emergency outside continental U.S.
- (14) Civilians within area outside U.S., leased by U.S. and under SecNav control, in war or emergency.
- (15) De facto enlisted persons (for certain limitations as to offenses, see below 1(d)).
- (16) Persons who obtained a discharge fraudulently.

b. As to time:

(Statute of limitations) Two-year period between offense and order for trial unless offender has absented himself or is for some other manifest impediment not amenable to justice. In cases of desertion in time of peace, the two-year period shall begin to run with the expiration of the man's enlistment period.

(AW: Two and three-year periods, except for desertion in time of war, mutiny, and murder.)

Follow McG--but omit "or naval service"--and follow V # 1.

(McG: Two-year period between offense and filing of charge, except for desertion in time of war, mutiny and murder, and excepting period of fleeing from justice, absence from U.S. or naval service, or being held in civil jail.

W: Follow McG recommendation.

B'46: Restate and recast law relating to jurisdiction as to time.

K: Follow McG recommendation but consider period to extend from offense to actual arraignment, in accordance with Army rule (rather than "John Doe" method of present practice and McG and W recommendations).

(V: 1. Except also unauthorized absence in time of war from statute of limitations.

2. Extend doctrine of condonation to soldiers committed to actual combat with knowledge of pending charges.)

(SecW: Follow V #1.)

c. As to place:

Not positively stated except that murder committed within territorial limits of State or D.C. is expressly excluded.

(Additional rules of policy:

- (1) SecNav to decide whether a person who committed a felony together with civilian(s) should be tried by court martial or civil court.
- (2) Surrender of offender to civil courts (State and Federal) whenever request is made.)

McG: State expressly that jurisdiction extends to all places where offenses against AGN are committed by persons subject to AGN, except murder committed within State, Territory, or D. C.

W: Follow McG recommendation.

B'46: Restate and recast law relating to jurisdiction as to place.

K: Remove all statutory limitations of jurisdiction as to place, including murder, and provide in Manual for referring certain types of offenses, therein specified, committed within territorial jurisdiction of U.S. to civilian courts when authorized by SecNav (expressly provide that this does not affect jurisdiction of naval courts).

(AW: Jurisdiction does not, in general, depend on where the offense was committed, except that no person shall be tried for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.)

Follow K recommendation.

EXISTING LAW AND PRACTICE

VARIOUS RECOMMENDATIONS

JAG RECOMMENDATIONS

d. As to offenses:

(1) All offenses listed specifically in AGN and, by virtue of Art. 22 AGN, those which are recognized as military offenses by the "usages" of the naval service, tending to bring disgrace or reproach upon the service. This has been understood to include all offenses against Federal laws, state laws, local ordinances, standing orders, and customs of the service.

(2) For exception in case of murder, see, above, lc.

(3) Fraudulent enlistment is punishable only if the offender received pay or allowances unless the offender was at the time of enlisting still under old contract of enlistment.

(4) Foreign laws unless they violate public policy of U.S.

McG: 1. AGN jurisdiction shall extend to all offenses which are

- a. violations of the Federal criminal laws without their territorial restrictions;
- b. violations of the treaties or conventions of the United States;
- c. violations of criminal laws of a State, Territory, or possession of the United States in which the offenses were committed;
- d. violations of any lawful general order or regulation issued by SecNav;
- e. recognized military offenses, as may be defined by SecNav;
- f. violations of the customs of the naval service or of the laws of war.

W: 1. Same as McG except: usages included as well as customs.

2. AGN to cover certain enumerated offenses, like assault, desertion, maiming, scandalous conduct tending to the destruction of good morals, conduct to the prejudice of good order and discipline, and conduct unbecoming an officer and a gentleman (but omitting battery, disobedience, sleeping on watch, mutiny, etc.).

K: 1. Present punitive articles should be retained in substance (and language as far as possible) except those which are obsolete or too involved.

2. All punitive articles should be grouped together under a general head of "Offenses and punishments".

3. Punitive articles should be grouped according to the punishment authorized, one covering capital offenses; the other covering offenses punishable as a court martial may direct.

4. Civil offenses most likely to occur in the naval service should be specifically listed.

1. Follow McG and K, especially K # 6 (K # 6a as modified by McG # 1a) and 7.

2. Take care that common civil offenses which are not covered in federal criminal statutes, like private embezzlement, are covered.

3. Unify and simplify AOL and AWOL by providing for one offense of unauthorized absence (similar to AW) instead of these two offenses.

5. The most common naval offenses should be specifically listed.
 6. Art. 22 AGN should be deleted and in its stead substitute a general clause in one or both of the articles described in 3. It should be specifically stated that the articles include:
 - a. violation of criminal law or of the treaties or conventions of the U.S.
 - b. violation of regulations or customs (not usage) of the naval service.
 - c. violation of the laws of war.
 - d. Include under "at discretion of courts martial" a provision to read substantially as follows: "Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and discipline, all conduct of a nature to bring discredit to the naval service, and all offenses not capital, of which persons subject to these articles may be guilty".
 7. No attempt, either directly or by reference, should be made to define by statute the offenses specified. Manual should emphasize definition of offense and the elements and necessary proof thereunder.
 8. Clearer tests for distinction between desertion and unauthorized absence should be established.
- (V: 1. Repeal, inter alia, obsolete AW provisions against dueling and interest of commanding officers in sale of victuals or other necessaries of life.)
- (SecW: 1. Retain AW provisions mentioned in V #1.)

2. THE CONSTITUTIONAL GUARANTEES IN THEIR APPLICATION TO NAVAL JUSTICE.

- a. Since CMO 48-1920, 10-17, court martial orders referred to, and declared applicable, the constitutional guarantees except indictment by grand jury and trial by jury; e.g., CMO 1-1946, 25, refers to the Fourth and Fifth Amendments (Protection against unreasonable search and seizure, etc.)
- b. Departmental policy has even extended the protection against double jeopardy for the same offense to protection against double punishment for the same act as follows: "Aside from any legal question, as a matter of policy; a person in the naval service should not be tried a second time for the same act for which he once has been punished as a result of conviction in a civil court." (CMO 5-1945, 203).

McG: Punishment (including private reprimand) imposed by a commanding officer shall be a bar to trial by court martial of offender for offense or offenses for which punishment imposed.

W: Insert into AGN a catalogue of "Constitutional Guarantees",

1. against
 - a. Self-incrimination,
 - b. Double jeopardy,
 - c. Deprivation of life, liberty, or property without due process of military law,
 - d. Cruel and unusual punishment, and
2. giving every person brought to trial a right to
 - a. Speedy trial before impartial court,
 - b. True copy of charges and specifications,
 - c. Be confronted with witnesses against him except as otherwise provided in AGN,
 - d. Compulsory process to obtain witnesses in his favor,
 - e. Defense counsel of his own choice.

K: 1. Double jeopardy.

- a. Clarify departmental policy as to desirability for trying persons by court martial for offenses for which they have been tried in state or foreign civil court; prior acquittal to be a bar to trial by naval court martial for same offense however described.
- b. Make CO's punishment bar to trial by court martial for same offense but not for another offense growing out of same act or omission.

1. Put catalogue of constitutional rights into the Naval Law Manual.
2. A CO can not order a person under his command tried by court martial for the same offense for which he has punished him at mast; Provided, that superior of CO may direct that offender be brought to trial by court martial in which event, in case of conviction, the court shall receive and consider the previously inflicted mast punishment, prior to imposing sentence.

3. INVESTIGATION AND MAST

a. Complaint:

may be made to CO by any person ("report" if made by naval personnel or police) without oath.

b. Investigation:

- (1) pre-mast (see, c below)
- (2) mast (see, d below)
- (3) pre-trial (see, page 9 below)

Accused is, at no stage of investigation compelled to make statement; should be warned that it may be used against him.

c. Pre-Mast Investigation:

Without being recognized by AGN, N. Reg's, or NC&B--the latter two require thorough examination by CO himself--there is in most cases a preliminary investigation by shore patrol, MAA, provost marshal, other officer, or civil police. Accused often not present during examination of witnesses (sometimes his identity is not yet known or he is not yet apprehended); regularly without defense counsel.

N. Reg's require that CO--where naval personnel has been reported to him "for grave misconduct"--give accused opportunity to make counter-statement and name witnesses.

McG: Preliminary Investigation.

1. Charges intended to be submitted to GCM or SCM shall first be investigated by qualified officer appointed by CA.
2. Investigating officer shall examine witnesses in presence of accused who may cross-examine them.
3. Accused to be warned that anything he may say may be used against him.
4. Investigating officer shall make recommendation for disposition to CA who may then order trial or dismiss the case.

- K:
1. Allow any person in service to initiate complaint against another to his CO, but charges to be preferred by appropriate authority. (Oath to charges should not be required.)
 2. Adopt McG Rule 2 with following modifications:
 - a. Investigating officer should be appointed by CO rather than CA.
 - b. The accused shall be entitled to counsel.
 - c. The rule shall apply to all cases where GCM charges are intended and whenever practicable to SCM cases.
 3. If trial ordered, accused to be given pre-trial psychiatric examination where practicable.
 4. CO to be required to set forth in detail any reason why counsel not available at pre-trial investigation and the qualifications of officer assigned in lieu thereof.
 5. Material change in charges and specifications after first investigation to require a new investigation.
 6. Manual should emphasize impartial purpose of investigation. If trial ordered by SCM rather than GCM all provisions to apply where practicable.

1. In all cases in which trial by summary or general court martial is indicated by the seriousness of the offense alleged in the arrest report or by other circumstances,

- a. the accused shall, as soon as practicable, be informed of his right to counsel, and, at his request a qualified officer shall be assigned as counselor.
 - b. The accused should not be called upon to make a statement before he has had an opportunity to consult his counselor.
 - c. Accused should be entitled to be present and cross-examine witnesses at the time of the pre-trial investigation.
2. Any deviation from principles a-c should be explained by CO in forwarding file to CA and incorporated in the latter's ultimate action on the record.
 3. Accused's counselor should go with the accused to mast.
 4. Pre-trial investigating officer should be appointed by CO, but this shall not hinder the CA to appoint a pre-trial investigating officer as soon as the file reaches the CA.
 5. The opinion of the staff legal officer of the CA (or, in case that officer is to be JA of court, then the officer who reviews the pre-trial investigation record and recommends action to CA; cf., infra, p. 41, JAG recommendation # 2)--especially as to the sufficiency of the expected testimony--may be appended to the record of the case. (Not to be submitted to the court, but to reviewing authorities.)

AGN do not require a pre-trial investigation, but NC&B and Navy Regulations require careful inquiry by officer recommending GCM.

Convening authority may order board of investigation or court of inquiry if further development of facts is needed.

Convening authority of Navy or Army GCM may return file to subordinate command for trial by lower court.

The investigation made by Navy JA in preparation of his case is, in effect, a pre-trial investigation. If he finds no adequate basis for trial, or for certain charges, he recommends to convening authority that charges be dropped.

7. CA must first refer case to staff legal officer for his opinion as to sufficiency of expected evidence and as to disposition.
8. Investigating Officer's report, report of any pre-trial psychiatric examination, statements relating to the accused's civilian and past naval background, and staff legal officer's advice should become part of the permanent file in the case to facilitate subsequent review.

- (AW: 1. Accuser prefers charges and specifications on "Charge sheet"--swearing that personal knowledge or personally investigated--if possible within 48 hours. Charge sheet to be accompanied by summary of evidence (signed by witnesses if possible) and letter of transmittal recommending mode of disposal. The 48-hour period, however; is often exceeded and the summary of evidence omitted.
2. Accuser may be any person in military service; sometimes identical with the immediate commanding officer of the accused. If accuser is not immediate commanding officer, submitted to latter.
 3. Immediate commanding officer may dispose of case according to AW 104 ("Company punishment"); otherwise he forwards charge sheet to officer with summary court jurisdiction (regularly, regimental or post commander).
 4. Latter selects course of action; if summary or special court martial, his adjutant signs first indorsement. If general court martial, referred to pre-trial investigating officer.
 5. Pre-trial investigating officer hears prosecution and defense witnesses under oath; accused may cross-examine but is not entitled to counsel. Investigation should be completed within 48 hours and result be submitted to officer who ordered investigation. If he still regards GCM trial called for, he should forward file within 24 hours to GCM convening authority with 1st indorsement signed personally by him and give accused copy of charges. Not more than 8 days should elapse between arrest of accused and this step.
 6. General court-martial authority should hear advice of his staff JA and refer file for trial to TJA within 48 hours (example of other disposal: ordering trial by special court martial).

- u. A reasonable time schedule should be prepared as a guide, but the accused need not be released if the time schedule is exceeded; Provided, that every record is to be accompanied by a chronology sheet in which the reasons for delays are to be explained.

7. TJA checks all papers as soon as received. May correct clerical and slight technical errors; but reports serious irregularities, if discovered by him, to the appointing authority. Copy of final charges is served by TJA on accused. Latter may examine letter of transmittal, summaries of testimony of witnesses, record of investigation, and other related papers. Contents of these papers are not evidence and are not seen by the court.
8. Interval between serving of final charges and trial, 5 days or more (if less, consent of accused necessary).

(V: AW 70--impartial investigation--should be enforced.)

- (SecW: 1. Follow V recommendation #1.
2. Pre-trial investigator should be trained and mature officer.
 3. Forbid coercion to obtain admissions and confessions; declare such coercion a punishable offense.
 4. JAG appoints Staff JA after consultation with commander in field; direct communication between Staff JA and CA.)

d. Mast:

(1) is personal investigation--the day after report has been made--by CO of ship or officer authorized to convene SCM or GCM, giving impartial hearing to accuser and accused.

(2) Accused is without counsel; has no right to demand trial by court-martial instead of mast punishment, nor can he appeal such mast punishment.

(3) Possible mast and related administrative actions:

(a) dismissing complaint or warning.

(b) administrative action, as

(i) termination of probation

(ii) disrating

(iii) recommending admin. discharge

(c) further informal investigation medical (incl. psychiatric.) examination

(d) recommending formal investigation by court of inquiry, etc.

(e) imposing mast punishment, any one of the following:

McG: Every officer of the naval service or organization serving as part of navy who is authorized to convene General or Summary courts martial may, after an impartial hearing, impose on personnel regularly or temporarily under his command, for the commission of one or more offenses against these articles, such punishments, and none other, as are specified in this article.

Accused may demand trial by court martial before mast punishment is imposed.

(AW: Accused has a legal right to trial by court martial in lieu of commanding officer's punishment.

Accused has a right of appeal to next superior authority on ground of unjust or disproportionate punishment.)

(V: The right of an officer to appeal to the next higher commander should be preserved.)

Proposed changes in mast punishments:

1. Upon officers:

McG: Allow 10 days loss of pay.

2. Upon enlisted men:

B'43: Allow 10 days loss of pay.

McG: 1. Reduction in rating should not be limited to rating established by the command.

2. Allow 15 days confinement, 10 days solitary confinement, but abolish solitary confinement on bread and water.

3. Limit deprivation of liberty and extra duty to 30 days and state that the latter should not involve deprivation of liberty.

4. Allow 15 days loss of pay.

W: 1. Abolish solitary confinement, but retain solitary confinement on bread and water.

1. When the accused appears at mast, he should be accompanied by his division officer and, in serious cases--as mentioned on page 8, JAG recommendation # 1--, by his counselor.

2. Changes in present mast punishments upon enlisted personnel:

a. The CO may inflict the punishment of reduction to the next inferior rating, whether or not the rating was established by that command.

b. Abolish solitary confinement (but retain solitary confinement on bread and water).

c. Limit "deprivation of liberty" to 1 month.

d. Limit "extra duties" to 1 month; the performance of such extra duties shall not involve "deprivation of liberty" beyond the hours required for the performance of the day by day portion of the "extra duties."

3. As an alternative to a mast punishment, loss of pay not exceeding 1/2 month's pay may be imposed, in time of war, national emergency, or, if specially authorized by SecNav, in time of peace,

a. upon officers by a GCM CA
b. upon enlisted personnel by a SCM CA

Provided, that a full report be made

a. by GCM CA to SecNav (BuPers)
b. by SCM CA to next senior in chain of command.

- (1) upon officers: private reprimand, or, not exceeding 10 days, suspension from duty, arrest or confinement.
- (11) upon enlisted men: reduction in rating established by that command, confinement not exceeding 10 days, solitary confinement not exceeding 7 days, solitary confinement on bread and water not exceeding 5 days, deprivation of liberty on shore, extra duties.
- (f) ordering DC or SCM (for enl. men only),
- (g) ordering or recommending GCM trial.
- (4) No officer who commands by accident or in the absence of the CO-- except when the CO is absent by leave--shall inflict any other punishment than confinement.
- (5) If accused's immediate commanding officer has no authority to hold mast, he transfers accused to next higher officer having such authority; but actions (a) thru (d) and (g) can be taken by immediate commanding officer in any case.
2. Limit deprivation of liberty to 30, and extra duty to 15 days.
3. Allow 10 days loss of pay.
- (AW: 1. Upon commiss. officers below major in war or emerg'y by brigadier gen. or above: $\frac{1}{2}$ of 1-month pay.
2. Upon enlisted men and officers: restriction to limits, 1 wk; withhold. of privileges, 1 wk; admonition; reprimand.
3. Extra fatigue, 1 week (not upon non-com. or above); hard labor, 1 week (not upon person above Plc).)
- (V: 1. Make flight officers etc. punishable under AW 10⁴.
2. Punishment may be imposed by officer not below brigadier gen. or officer with GCM jurisdiction.
3. Increase maximum fine to $\frac{1}{2}$ month pay for 3 months.)
- (SecW: 1. Allow loss of pay upon flight and warrant officers and all officers below brigadier gen. of $\frac{1}{2}$ month pay for 3 months, in peace and war.)
- W: Acting CO shall also be authorized to inflict suspension.
- W: Give mast punishment power to every "officer in command."
- McG: 1. Consideration might be given to provide that a commanding officer (similar to AW 105) may convene a board of investigation to investigate damage done to, or wrongful taking of, the property of any persons, by persons (including officers) subject to military law and assess such damage. Upon approval of CO this assessment would become a stoppage of pay of the offenders, and disbursing officer be required to pay it to the injured parties.
2. CO or successor in office shall have power to mitigate or remit any unexecuted portion of Mast punishment.
- Follow W recommendation.
- The mast punishment power should be linked with SCM convening authority, Provided, that such SCM CA may delegate his mast authority to officers on detached or separate duty (but such delegation shall not extend to the authority to inflict loss of pay.)

EXISTING LAW AND PRACTICE

VARIOUS RECOMMENDATIONS

JAG RECOMMENDATIONS

e. Details concerning termination of probation (involving period of confinement or BCD or DD or other punishment):

- (1) is not a mast punishment but administrative action;
- (2) no BuPers directives required to carry into execution any punishment upon termination of probation;
- (3) but CO has to make report stating circumstances to JAG with copy to BuPers.
- (4) Announced policy: Commission of a petty offense should not be regarded as unsatisfactory conduct warranting termination of probation; but several petty offenses or commission of an offense which would warrant SCM or GCM trial does.

f. Classification of discharges:

- (1) honorable
- (2) under honorable conditions
- (3) undesirable
- (4) bad conduct
- (5) dishonorable

g. Reasons of discharge:

- (1) expiration of enlistment
- (2) medical survey
- (3) convenience of Government
- (4) own convenience

K: On termination (cancellation) of probation and on discharges:

1. Prior to termination of probation, CO should order investigation of alleged violation similar to formal investigation prior to GCM, including taking statements of witnesses and the statement of the probation violator if he desires to make one. The alleged probation violator should be represented by counsel, if available, and if not, by experienced naval officer of his choice. The record of this hearing should be transcribed.
2. At mast, a hearing should be held, based on investigations previously made, at which probation violator should be similarly represented. This record should also be transcribed.
3. Probation should be terminated by a written order based on the hearing at mast in which CO states in detail his reasons for termination.
4. All the above papers should be filed in probation violator's record.
5. Termination of probation by CO should be effective to return prisoner immediately to appropriate naval prison; but not to give probation violator discharge from service. Record of termination should be sent to department for review by disciplinary activity involved and by proposed Sentence Review Board, on basis of prisoner's entire naval record and social and psychiatric background, for determination as to whether a discharge should be recommended, and if so, what form of discharge should be awarded.
6. Consideration should be given to whole subject of discharges, disciplinary and administrative, to determine distinctions and utility.

(AW: 1. DD is the only recognized punitive discharge (by GCM sentence.)

(V: 1. An additional type of discharge for unfitness should be introduced, and DD reserved for exceptionally grave offenses.)

(SecW: 1. Introduce BCD as new type of discharge, which may be imposed by GCM and Special Court Martial; provide for appellate review by Board of Review in JAGD before execution.)

1. Where it appears to the CO, at mast, that termination of probation involving confinement or discharge might be appropriate, K recommendations # 1-4 should be followed as to hearing, recording, etc, before the CO actually terminates the probation.
2. K recommendation # 5 should be followed.
 - a. as to termination of probation involving confinement: as recommended
 - b. as to termination of probation involving discharge: in time of peace, in this respect that no discharge should be effected prior to receiving directives from BuPers (but man may be sent to shore station in the meantime awaiting BuPers directives); in time of war, as far as SecNav finds it practicable to adhere to peace time practice in this respect.

EXISTING LAW AND PRACTICE

VARIOUS RECOMMENDATIONS

JAG RECOMMENDATIONS

- (5) dependency
- (6) enlistment of minor without consent
- (7) under age of authorized enlistment
- (8) unsuitability
- (9) inaptitude
- (10) unfitness
- (11) desertion without trial
- (12) trial and conviction by civil authorities
- (13) fraudulent enlistment
- (14) sentence of court martial.

4. TRIAL AND PUNISHMENT POLICIES

a. In general:

- (1) to insure speed and efficiency, most punishment is preferable to court martial, and lower court to higher wherever such action will accomplish the ends of justice.
- (2) officer offenders shall be tried by GCM only if the seriousness of the offense demands - at least - that he be dismissed; otherwise case should be disposed of by CO's punishment.

b. As to speed:

- (1) speed shall not reduce accuracy, nor cause trial by a court lower than empowered to inflict adequate punishment.
- (2) mast shall be deferred until the day after the report; but longer delay should be avoided.
- (3) DC trial should be held within 48 hours after apprehension; in all other cases (incl. GCM) within 10 days.
- (4) in guilty-plea cases, the period between apprehension and publication of sentence shall not exceed: 5 days in DC cases
10 days in SCM cases
20 days in continental GCM cases.*
- (5) where an absentee, after surrender or apprehension, is being returned to his former ship or station, he should be enroute immediately, at least within 3 days.

* (Note: the average SCM case took 12.1 days until publication; the average GCM case 31.1 days, by August 1945; 27 days by Jan. '46.)

- B'43: 1. As matter of policy, bad conduct discharges should not be adjudged except where offense involves moral turpitude or accused neither presently nor prospectively of any value to the service.
2. Prepare and distribute a table of recommended war-time punishments for more common offenses as an advisory guide for courts and reviewing authorities.

McG: 1. Every case shall be tried without unnecessary delay.

- K: 1. Broaden discretion of C.A. in disposing of charges subject to broad department policy directives.
2. Re-emphasize GCM not to be used unless other alternatives eliminated.

3. Delays in trial:

- a. stress department policy of expediting cases.
- b. prepare and publish reasonable time schedule
- c. chronology of each GCM, with all delays explained, to be submitted with each record.
- d. Manual should provide:
 - (1) file complaint or commence investigation within 24 hours after accused restrained;
 - (2) complete investigation, where practicable, within 72 hours;
 - (3) forward investigation report to CA within 8 days of initial restraint or explain delay;
 - (4) grant accused 5 days after service, unless waived or military exigencies render it absolutely unavoidable. Record should state reason.
- e. Manual to provide that avoidance of delay is subordinate to thorough investigation, preparation of accused's defense and full justice.
- f. Present practice of maintaining statistics of the rate of trial by GCM be continued and periodically

1. Collect and publish all basic rules in systematic arrangement in the Manual; they are now dispersed in numerous publications (Manual, Alnavs, Circular Letters, etc).
2. Follow all recommendations in substance.
3. As to McG recommendation and K recommendations # 3 a-f, see, supra, page 9, item 6. (JAG recommendations).

(6) in no case should a man be tried by GCM without his service record; by a SCM only if the delay to obtain his service record would exceed 20 days.

(7) accused should be granted reasonable time to prepare his defense; court should grant liberally requests of prosecution or defense for postponement or continuance.

c. As to particular offenses:

(1) care should be taken to distinguish between petty pilfering and theft; thieves should be separated from the service; therefore to be tried by SCM or GCM.

(2) trial by GCM is considered appropriate, e. g., in cases:

(a) of deliberately missing ship regardless of length of absence.

(b) where absentee, after surrender (or apprehension) is ordered to return to his former ship or station "in his own custody" but fails to comply with orders.

(3) numerous details for handling absence offenses stated in BuPers CirLtr 12-47 and references cited therein.

(4) consolidation principle: a person should not be tried for an offense which was known to the convening authority so early that he could have charged the offender therewith at an earlier trial held on other charges (restricting Art. 43 AGN).

d. As to types of punishments:

(1) solitary confinement on bread and water should be imposed upon insubordinate and recalcitrant offenders only, not upon petty officers.

reviewed by Advisory Council and that where rate appears too high steps be taken to correct hardship, morale, etc. (As to Advisory Council, see below p.51)

4. Officer Cases:

(a) No person, regardless of rank, should escape punishment for offenses against AGN.

(b) There should be no disparity in punishment, wherever avoidable, regardless whether offender is officer (commissioned or warrant) or enlisted man.

(V: 1. Provide that it is unlawful to attempt to influence CA or court in reaching its verdict or sentence.

2. Prohibit reprimand of court or members and letter stating non-concurrence in acquittal.)

(SecW: 1. Prohibition against influencing the court in particular cases; but informing the court as to prevailing conditions allowed.

2. Reprimands of members of court forbidden; also notification of non-concurrence in acquittals; but permissible to instruct, and offensive conduct of members punishable.)

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- (2) SCM and DC sentences involving a combination of reduction in rating and loss of pay not favored.
- (3) SCM and DC sentences involving loss of pay should not extend to more than one half of the accused's monthly pay per month.
- (4) Confinement should not be inflicted as punishment for the offense of failure to pay just debts.
- (5) Sentences involving extra police duties are, as a general rule, undesirable on board ships.

5. COURT-MARTIAL PERSONNEL IN GENERAL

a. Selection and Responsibility.

Selected by, and responsible to,
CA.

- K: 1. Selection of members.
- Avoid hand-picked courts; establish instead:
- relatively permanent courts where possible, or
 - use of panels, and
 - no new member of court after arraignment except to complete minimum membership.
2. Qualifications of JA
Prosecutor
Defense counsel
should be certified by JAG; they should be responsible to him and under his supervision.

b. Impartial Legal Adviser of Court-Martial is not provided for in existing law. The judge advocate of a GCM and the recorder of a SCM, i.e. the prosecuting party, has the dual or even triple function, in addition to his principal duty of prosecuting, to advise the court on questions of law (substantive, procedure, and rules of evidence) and also to protect the interests of the accused where there is no defense counsel.

McG: 1. Judge Advocate

For every GCM and SCM the CA shall appoint a JA; the JA for a GCM is to be certified as qualified by JAG.

2. JA under rules of practice, pleading, and procedure prescribed by Secretary shall:
- Summon all witnesses.
 - Rule with finality on all questions of admissibility of evidence.
 - Give impartial advice on matters of law and procedure to the prosecutor, to the accused and his counsel, and to the court.
 - Question such witnesses as may in his discretion be necessary to a full exposition of the facts.
 - Instruct the court, prior to its deliberations on findings, upon law of the case.
 - Keep, with the assistance of a duly designated clerk, the record of proceedings.

- Follow K recommendation # 1c.
- Follow K recommendation # 1a when practicable.
- Follow K recommendation # 2 in regard to the JA only, and only insofar as his law duties are concerned.

- For every GCM, the CA shall appoint a JA, whose qualifications are approved by JAG and who is under supervision of JAG, insofar as his law duties are concerned. JA shall not be a member of court, nor vote on either findings to the general issues or sentence.
- Follow McG recommendations # 2a and f.
- The JA shall rule on all interlocutory questions, except challenges; also on admissibility of evidence and privileges of witnesses; his rulings may be overruled by the court. The reasons of JA's rulings--and court's rulings where overruling the JA--shall appear on the record. The rulings shall be in open court unless the court is closed upon motion of member. The rulings may be changed at any time during the trial.
- The JA may question witnesses under the same limitations under which, at present, the court should question witnesses.

W: Follow McG recommendations 1 and 2 which are to be regarded as great progress.

B⁴6: Follow McG recommendations 1 and 2 except that JA's rulings under 2b should not be binding upon court; substitute therefor: In any case where the court does not follow the advice of the JA with respect to matters of law and procedure, the rejection of such advice and reason therefor shall be noted in the record of proceedings.

The JAG shall report upon the fitness of each JA's performance of duty.

K: A Judge Advocate

1. shall be appointed for every GCM and when practicable for every SCM.
2. Qualifications approved by JAG.
3. Under supervision of JAG.
4. Instructions of law applicable to case to be made in open court and set forth in record; that court determine guilt or innocence in accordance therewith and on basis of facts found by it; on review, prejudicial error in JA's instructions to be grounds for setting aside conviction.
5. JA should decide on admissibility of evidence and on interlocutory questions of law, except challenges.

(AW: Law member:

Should be officer of JAG Dept. if available. Otherwise, a specially qualified officer.

Rules on interlocutory questions, except challenges.
Acts as legal adviser to the court.

The ruling of Army law member on admissibility of evidence is final and not subject to being overruled by court.

Remains with other members in closed court. Has equal voice and vote with other members.)

- (V: 1. Law member should be trained lawyer, and commissioned officer of JAGD, and his fitness reports should be made by JAG.
2. Law member must be present during entire trial and his rulings on legal questions other than sufficiency of evidence should be binding on the court.)

5. Before the prosecution begins, the JA shall read to the court the elements of the offenses charged, of lesser and included offenses, and the elements of proof required, as set forth in the Naval Law Manual. The JA may, on his own motion, and shall, upon request by any member of the court, repeat such reading, in whole or in part, at any time during the trial, especially after a motion for dismissal and prior to the deliberations of the court on the findings.

6. The JA shall be subject to disqualification on similar grounds as members of the court are subject to challenge. He may declare himself disqualified; on the second level, the question of his disqualification should be decided by the CA.

7. In SCM cases, the duties performed by the JA of a GCM during the trial, devolve upon the court.

8. The pre-trial duties of a JA (summoning witnesses) devolve, in SCM cases, upon the prosecutor.

9. The functions of pre-trial investigator or officer, preparing charges and specifications on the one hand, and of JA on the other, are incompatible.

- (SecW: 1. Law member of GCM is JAGD member or trained lawyer designated by JAG.
2. Rulings of law member of GCM on all interlocutory questions final, except challenges.
3. Law member of GCM must be present during trial.)

c. Prosecutor.

- (1) Name: Judge advocate (in GCM).
Recorder (in SCM).
- (2) Appointed by: Convening authority.
- (3) Responsible to: Convening authority.
- (4) Qualifications: Judge advocate should be an officer skilled in the law. Where none such is available, any officer may be designated. Recorder needs no special qualifications.
- (5) Duties: Prosecutes case. Summons and examines witnesses. Gives court opinion on form and law. Sums up case for prosecution. Withdraws when court is cleared. Keeps record.
- (6) Relation to accused: Behaves impartially. Gives to accused and counsel opinion on law, in or out of court, on request. Protects interests of accused when he is without counsel. Makes no comment on failure of accused to testify.

McG: For every GCM, the CA shall appoint a qualified prosecutor.

W & B'46: Follow McG recommendations.

- K: 1. Qualified officer-lawyer for prosecution for every GCM and wherever possible, for SCM.
2. Qualifications should be approved by JAG.
3. Should be subject only to JAG.

(AW: Trial judge advocate (in GCM and Special Court Martial).

Appointed by: Convening authority.

Responsible to: Convening authority.

Should be member of JAG's Dept. May be disqualified for bias, prejudice or hostility.

Prosecutes case. Summons and examines witnesses. Does not give court opinion on law unless so requested by court. Sums up case for prosecution. Withdraws when court is cleared. Keeps record; signs each day's proceedings. Does not assist or advise the defense. Must not suppress evidence favorable to defense. Makes no comment of failure to testify on part of accused.)

- (V: 1. Right of the command to control the prosecution and name a TJA should be retained.
2. TJA should be a trained lawyer and member of JAGD, and his fitness report, duty assignments, and promotions should be made by JAG.)

1. For every GCM and SCM, the convening authority shall appoint a qualified prosecutor, a lawyer if practicable. His duties shall be similar to the prosecuting duties of the present JA of a GCM or recorder of a SCM, but without the additional duties of the present JA or recorder, such as impartial advice on questions of law, protection of the accused's interests, etc; Provided, that the prosecutor of a SCM shall have the additional duty of summoning witnesses for both sides.
2. The functions of pre-trial investigator or officer, preparing charges and specifications, and prosecutor are compatible.

d. Defense counsel:

- (1) Accused entitled to counsel in any court martial.
- (2) Accused may select any person, including--at accused's own expense--civilian lawyer.
- (3) If accused wishes counsel but does not select one, designated by CA.
- (4) Counsel should be lieutenant or above.

- B'43: 1. A defense counsel should be appointed for each general court martial.
2. Accused should be represented by defense counsel in all cases, subject to his right to have counsel of his own choice.

McG: The convening authority or the court shall assign a qualified officer or officers to act as counsel for the accused. In addition, the accused may retain service of civilian counsel, or officer, if available, of his own choosing.

B'46: Continue present practice.

K: Defense Counsel:

1. Qualified officer-lawyer for every GCM and, if possible, SCM.
2. Qualification be approved by JAG.
3. Subject only to JAG.
4. Equal ability compared with prosecutor, if possible.
5. Require defense counsel attach brief appeal to each case or signed statement that no brief necessary.
6. Defense counsel to have duty to present substantial jurisdictional or similar questions to appropriate civil tribunals.
7. Accused to retain right to choice of civil or naval counsel at trial and on appeal.

(SecW: 1. If TJA of GCM is lawyer, defense counsel must be lawyer; same rule for Special Court Martial.

1. The CA shall appoint a defense counsel for every GCM and SCM; he should be a lawyer if practicable. For DC, upon request of accused, defense counsel shall be appointed.
2. Similar to Army practice, the defense counsel shall exercise his functions in every GCM and SCM case--no request of accused to have counsel being necessary; Provided, that accused may reject the defense counsel regularly appointed.
3. The accused may, in addition to or instead of the regularly appointed defense counsel, select his own counsel, civilian or, if available, any person in the armed forces.
4. In every not guilty case resulting in conviction, the defense counsel shall attach to the record either an appeal brief or a statement (with reasons) that such appeal brief is not regarded necessary or possible.

6. DECK COURT

a. Convening authority:

Any GCM or SCM convening authority.

McG: Abolish DC.

b. Constitution:

One officer. Should be Lt. or above CO, if commissioned officer, may act as DC officer.

W & Retain DC.
B'46:

DC officer is court and prosecutor and, if accused--as in most cases--without counsel, also defense counsel. (The accused before a naval DC may be represented by counsel if he so desires.)

B'43: 1. Empower to adjudge sentences of greater severity. Confinement and forfeiture of pay for not more than one month.

2. Consent of accused should not be required.

W: 1. In general follows present AGN. CA enlarged to include "any officer in command".

2. Confinement increased from 20 to 30 days. Solitary confinement on bread and water decreased from 20 to 15 days. Deprivation of liberty on shore limited to 30 days and "on foreign station" deleted. Extra duties limited to 30 days instead of 3 months. Loss of pay increased from 20 to 30 days. Confinements, etc. to run consecutively.

c. Jurisdiction:

All enlisted persons under command of convening authority who consent to trial by DC. Tries very minor offenses.

(AW: 1. Name of court: Summary court-martial.

2. Convening authority: CO of a garrison, fort, camp, etc., or CO of a regiment or detached smaller command. CO, if only officer present, is the summary court-martial.

Different from other Army courts: accuser or prosecutor may be convening authority.

3. Personnel of court: One officer. Should have 2 or more years' service, if possible. No defense counsel allowed; summary court officer is court, prosecutor and defense counsel.

4. Jurisdiction:

a. Privates, first class, and below. Also non-commissioned officers below technical sergeant, if they do not object or unless their trial is ordered by an officer competent to convene a GCM.

1. The deck court officer should be lieutenant or above.

2. For every deck court, the CA shall appoint a defense counsel upon request of accused; but no prosecutor.

3. Punishments:

a. Reduction to the next inferior rating;

b. Confinement not exceeding 30 days;

c. Solitary confinement on bread and water or diminished rations, with a full ration every third day, not exceeding 20 days;

d. Deprivation of liberty, not exceeding 1 month;

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

4. Abolish solitary confinement and extra police duty.

(6) Extra police duty, not exceeding 3 months, and 20 days' loss of pay, which may be added to any of the foregoing punishments.

e. DC Trial preparation:

- (1) DC card prepared by convening authority with assistance of his legal officer then delivered to DC officer.
- (2) DC officer checks correctness of card; summons witnesses for both sides, but does not examine them before the trial.
- (3) At outset of trial, accused's rights are explained to him.
- (4) Counsel is assigned to him if he so desires.
- (5) If he does not consent to trial by DC, CA usually orders trial by SCM.

b. It may not try capital offenses.

c. It cannot impose dishonorable discharge, confinement in excess of one month, restriction to limits for more than 3 months, or loss of pay of more than 2/3 of one month's pay.)

- (V:
1. Summary court officer should be selected from captains or officers of field grade. Junior and unexperienced officers should not be selected.
 2. The accused should be allowed to have counsel of his own selection before a summary court; but appointment should not be mandatory.
 3. The power, authority, and dignity of summary courts should be increased.)

(SecW: 1. Follow V recommendation #1.

2. Counsel for accused, if requested, before Army summary court martial.)

7. SUMMARY COURT MARTIAL

a. Convening authority:

SCM may be ordered for the trial of enlisted men under his command by:

- (1) the CO of any vessel, or
- (2) the commandant of any navy yard or station, the CO of any brigade, regiment, or separate or detached command, or marine barracks, or
- (3) when empowered by SecNav, by any other CO.

b. Constitution:

- (1) Three commissioned officers; senior member should be at least lieutenant or above.

CA, material witness, and an officer reasonably subject to challenge should not be appointed members. No member may later act as reviewing authority of a court of which he was a member.

- (2) Recorder is warrant or commissioned officer, should be skilled; prosecutes case; advises court and accused on questions of law; protects accused's rights if no defense counsel.

c. Jurisdiction:

- (1) Persons: All enlisted persons under command of CA.
- (2) Offenses: Minor offenses warranting punishments of medium severity.

McG: Any commandant or CO designated by the SecNav may convene SCM.

W: Any officer in command designated by the SecNav.

- (AW: 1. Name of court: Special court martial.
2. An accuser or prosecutor cannot convene the court.
 3. Number of members: Any number not less than 3.
 4. Qualifications: Majority should have 2 or more years' service, if possible. Senior in rank is president. Legal quorum: 3.
 5. Restrictions: An accuser, witness for prosecution, and an officer suspended in rank cannot sit as members.
 6. Jurisdiction: All persons, except commissioned officers, subject to military law.
 7. Offenses: Any offenses except capital offenses and those carrying a mandatory punishment which is beyond the power of the court to impose. But GCM CA may authorize trial by Special court martial for capital offenses.)

- (V: 1. Trial of officers by special court martial should be authorized to bridge between commanding officer's punishments (AW104) and GCM.
2. Special courts martial should be governed as far as practicable by the same requirements as GC's M.)

(SecW: 1. Follow V recommendation # 1.

2. Not regarded appropriate to make law member mandatory for special court martial.)

1. The CA shall appoint a prosecutor and a defense counsel for every SCM, Provided, that the accused--as in a GCM case--may reject the defense counsel regularly appointed.

2. The accused may, in addition to or instead of the regularly appointed defense counsel, select his own counsel, civilian or, if available, any person in the armed forces.

3. At least one of the members of the SCM shall be especially qualified in naval law, where practicable.

EXISTING LAW AND PRACTICE

VARIOUS RECOMMENDATIONS

JAG RECOMMENDATIONS

d. SCM may impose any one of the following punishments:

- (1) BCD
- (2) Reduction to next inferior rating.
- (3) Confinement, not exceeding 2 months.
- (4) Solitary confinement not exceeding 30 days.
- (5) Solitary confinement on bread and water or diminished rations, not exceeding 30 days.
- (6) Deprivation of liberty on shore on foreign station, not exceeding 3 months.
- (7) Extra police duties, not exceeding 3 months may be added to any of the above, or imposed independently and loss of pay, not exceeding 3 months' pay.

B'43: Empower to adjudge sentences of greater severity. Adjudge confinement and loss of pay for not more than 6 months.

McG: A SCM shall have power to impose:

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

W: Powers:

Loss of pay increased from 3 to 6 months. Extra duties reduced from 3 months to 60 days with no deprivation of liberty on shore. Confinement increased from 2 to 6 months. Deprivation of liberty on shore limited to 30 days and "on foreign shore" deleted. Confinement for 3 months and loss of pay may be given with BCD. BCD executed only after approval of SecNav or duly designated representative.

B'46: Summary courts martial may award:

1. Discharge with a BCD.
2. Confinement for a period not exceeding 6 months to run consecutively.
3. Solitary confinement for a period not exceeding 30 days to run consecutively, or solitary confinement on bread and water with full ration every third day for a period not exceeding 20 days, to run consecutively.

1. Punishments:

- a. BCD;
 - b. Reduction to the next inferior rating;
 - c. Confinement not exceeding 6 months;
 - d. Solitary confinement on bread and water or diminished rations, with a full ration every third day, not exceeding 30 days.
 - e. Deprivation of liberty, not exceeding 3 months.
 - f. Loss of pay, not exceeding 6 months pay (which punishment may be imposed independently or in addition to any punishment other than BCD.)
 - g. Confinement not exceeding 3 months, and loss of pay not exceeding 3 months' pay, may be imposed in addition to a BCD.
2. Abolish solitary confinement and extra police duty.
 3. A SCM confinement sentence--even where it extends to the recommended maximum of 6 months--shall not carry with it the "accessories."
 4. Retain present practice that no good-conduct credit is given in SCM confinement cases.
 5. GCM confinement sentences which do not exceed 6 months or are reduced on review (incl. clemency) to 6 months or less do not carry with them "accessories" and, on the other hand, do not carry "good conduct" allowance.
 6. GCM confinement which still exceeds 6 months after any reduction on review (incl. clemency) shall not be reduced, by operation of "good conduct" allowance, below 6 months.

4. Reduction to the next inferior rating.
5. Deprivation of liberty on shore for a period not exceeding 60 days, to run consecutively.
6. Confinement for a period not exceeding 3 months, to run consecutively, and loss of pay not exceeding 3 months may be adjudged in addition to a BCD. No BCD shall be executed in a foreign country.

K: Increase sentencing power of SCM to relieve GCM.

(AW: The Army special court martial can adjudge: confinement for not more than 6 months; forfeiture of 2/3 pay per month for 6 months; restriction to limits; detention of pay; hard labor without confinement for 3 months; reprimand, admonition, and reduction of a noncommissioned officer or private first class.)

8. GENERAL COURT MARTIAL

a. May be convened by:

- (1) President, SecNav, C. in C. of a fleet, and, beyond the continental limits of U.S., CO of naval station or larger shore activity;
- (2) When empowered by SecNav, CO of division, squadron, flotilla, or other naval force afloat, or CO of naval district, base, station, or chief or CO of other force or activity not attached to a naval district, base or station.

b. Members:

- (1) Number: 5-13.

McG: Convening authority: President, SecNav, C. in C. of a fleet, and when empowered by SecNav any commandant or CO.

W: Convening authority: President, SecNav or any officer in command empowered by SecNav.

K: Convening authority: President, SecNav, or any officer in command when empowered by SecNav.

(AW: An accuser or prosecutor cannot convene the court.)

- (V: 1. Permanent GC'sM for territorial units, to be used as rotating courts, should be created.
2. The JAGD should become the appointing authority independent of the command.
3. Attempt to influence court or reviewing authority should be made a court-martial offense.)

B'43: Reduce maximum to 9.
& 46:

McG: Not less than 5.
& K:

W: 5 - 7.

(AW: Not less than 5.)

McG: Once a qualified member is absent during examination of witnesses he is disqualified from sitting in the case. If membership below quorum thereby, court may proceed with less members if prosecutor and accused consent.

W: Follow this McG recommendation but only consent of accused should be needed.

- K: 1. Use Lt(jg) and Ens's in appropriate cases.
2. Enlisted men should not be allowed as members; but if this question be decided otherwise, they should be members upon option of accused only (high school education or equivalent; 2 yrs service; not in excess of full minority).
3. No new member of court after arraignment except to complete minimum membership.

- (2) Rank:

(a) Lieutenant or above.

(b) Should be senior to accused officer.

1. Retain present Art. 38 AGN.

2. A GCM shall consist of not less than 5 members. If the court, after the arraignment of accused, is reduced to less than the quorum of 5, the reduced court may proceed with the consent of the accused. If the accused does not consent, the CA may fill up the court (subject to challenge, acknowledging of evidence, etc.), and this shall be the only situation in which the CA may appoint new members after the arraignment of the accused (see, supra, page 18, item 1 of JAG recommendations). Once a qualified member is absent during examination of a witness he shall be disqualified.

3. Rank of members: Retain present law and policies, Provided, that officers below the rank of lieutenant may be appointed where especially qualified.

4. Enlisted men should not be eligible for membership on courts martial.

5. If this question (item 4) be decided otherwise, follow K 2 as to two year service requirement. Enlisted members should be senior to accused, and number expressly provided for; no discretion to be given to CA, and no option to accused.

(AW: Should not be inferior to officer accused and majority should have 2 years experience.)

(V: Qualified enlisted men should be appointed at discretion of CA.)

(SecW: Enlisted men qualified as members of GCM; appointed by CA; senior to accused; from other units; receive indoctrination.)

(3) Qualifications: President should be line officer. 1/3 of same branch or corps as accused officer.

B'43: Wherever possible, one member should be skilled in law.

K: Minimum of 2 years experience; preferably taken course in law and attended prescribed number of trials for instruction

Continue present regulation that 1/3 be of same branch as accused. Follow K on qualification of all members.

c. GCM may impose any punishment but:

(1) death only where expressly provided for in AGN.

(2) No cruel or unusual punishments.

(3) Limited in peace time by Presidential limitations.

B'43: Establish legal limitations of punishment in time of war as well as in time of peace.

McG: 1. Follow B'43 recommendation.

2. Omit from the list of offenses punishable by death the following:

a. Making a mutinous assembly and other similar offenses except mutiny itself for which the death penalty has been retained.

b. Disobedience toward a SO.

c. Assaulting or striking a SO while in the execution of duties of office.

d. Having intercourse with the enemy.

e. Failing to inform CO of enemy message.

f. Leaving station before relieved.

g. Unlawful destruction of public property except willful stranding etc. of a vessel for which offense the death penalty has been retained.

h. Deserting duty or station in battle.

1. Follow B'43 recommendation.

2. Revise present list of offenses punishable by death, so as to reduce number and to better define such offenses. In reducing follow McG, except 2a., d., h., Delete McG # 3.

3. No death sentence should be mandatory.

3. The death penalty for sleeping on watch is expressly limited to cases in time of war.

4. All offenses punishable by death under federal criminal laws are declared punishable by death by court martial, which adds treason and rape to the list of offenses so punishable.

W: Follows substantially McG recommendations but does not add item No. 4.

K: 1. Art. 63, AGN, should be repealed. New statute providing for limitations upon punishments to be prescribed by President, or by SecNav with approval of President, both in time of peace and war, in all cases where AGN provides for punishment at discretion of courts martial should be adopted.

2. Such tables of maximum punishments should include only the more serious civilian and military offenses. Punishments for other offenses should 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 laws as a guide in determination of sentence. Punishments prescribed by foreign laws should not be binding on courts martial.

4. Wherever possible, consistent with discipline and requirements of the service, there should be no disparity in the form of punishments for the same type of military offense, whether the offender be a commissioned officer, warrant officer, or an enlisted man. As to punishment for serious civil crimes, no disparity is warranted.

1. Follow K # 1.

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.

3. Follow K # 4, taking into consideration that there are intangibles which render an apparently equal punishment unequal in its consequences upon the future of enlisted men and officers, and therefore inequitable.

Examples of present limitations of punishment (sec. 457 NC&B):

Falsehood:

Officer: dismissal
Enlisted: 6 mos conf. and DD.

Fraud:

Officer: dismissal
Enlisted: 6 mos conf. and DD.

Cruelty:

Officer: dismissal
Enlisted: 6 mos conf. and DD.

Striking another person in the naval service on duty:

Officer: dismissal
Enlisted: 1 yr. conf. and DD.

EXISTING LAW AND PRACTICE

Not using best exertions to prevent
destruction of public property:

Officer: dismissal
Enlisted: 2 yrs. conf. and DD.

Violation of Gen. Order or Navy Regs:

Officer: dismissal
Enlisted: 2 yrs. conf. and DD.

VARIOUS RECOMMENDATIONS

- (V: 1. Manual should provide that a court martial should exercise its own judgment, and not give maximum sentence where excessive, relying upon the reviewing authority to reduce it.
2. In time of war, GCM should have power to inflict upon officers loss of commission and reduction to ranks.
3. Trial of officers by special court martial should be authorized to bridge between commanding officer's punishments (AW 104) and GCM.)

(AW: Authorized special court martial to try officers, but they are exempted by executive order of the President.)

- (Sec: 1. Follow V recommendation # 1.
2. GCM will be authorized to punish officers with loss of commission and reduction to ranks.
3. Follow V recommendation # 3.
4. Offense by officer of being drunk on duty, in war, no longer requiring mandatory dismissal; punishment is discretionary.
5. No mandatory death or life imprisonment for rape or murder without premeditation; punishment is discretionary.
6. Limitations of punishment for officers and enlisted men in war and peace and at all places.
7. GCM may impose more than 6 but not exceeding 12 months confinement without DD.)

JAG RECOMMENDATIONS

As to V recommendation # 1, see, below,
pp. 38-39.

9. TRIAL PROCEDURE

(for GCM and SCM unless indicated otherwise).

a. Assembling: At the opening of the court, the accused is asked whether he desires counsel. If he answers in the affirmative, defense counsel takes seat as such (either selected by accused--officer or, at accused's own expense, civilian lawyer--or designated by CA.)

b. The JA and accused may challenge any member of the court for cause. (No officer who may reasonably be expected to be challenged should be appointed a member of the court.) Express policy that rulings on challenges should be liberal; e.g., subject to challenge any member who previously sat as member of a court trying other accused persons for offenses arising out of the same incident. Challenge sustained on majority vote.

(AW: The regularly appointed defense counsel and, if any, ass't. defense counsel are present automatically. The accused may select other person (officer, civilian, etc. in addition or in lieu of appointed counsel.)

K: Accused to be represented by counsel in every case.

Follow K recommendation.

(AW: TJA and accused, each has one peremptory challenge and an undetermined number of challenges for cause. The law member can be challenged for cause only. (In joint trial, all accused together have only one peremptory challenge; but each accused has such challenge in a common trial.*) Challenges are decided by majority ruling of the court. TJA and defense counsel may be reported to the appointing authority if it appears to the president, or TJA or defense counsel himself, that he is disqualified for any reason (incl. bias, hostility) properly to perform their respective duties.)

McG: Codify present law as rule of procedure, but let JA determine each challenge.

K: 1. Follow McG, but;

a. court should pass on all challenges.

b. Allow one peremptory challenge for each side.

2. Allow petition for disqualification of JA to be decided initially by JA and if rejected, appeal to Legal Officer on staff of CA.

1. Follow K # 1a (i.e., retain present law and practice).

2. Follow K # 2, except that appeal on matter of disqualification of JA shall be made to, and decided by, CA, and use restrictive language so as to keep the disqualification of the JA within firm bounds.

* Types of trial in naval court martial procedure: A single accused or two or more accused tried in joinder; "common" trial is unknown.

EXISTING LAW AND PRACTICE

VARIOUS RECOMMENDATIONS

JAG RECOMMENDATIONS

c. Court sworn: After challenges, if any, have been disposed of, the president swears the JA and the court is sworn by JA. (In SCM procedure recorder swears members before he is sworn in by senior member.) The administration of oaths is repeated in each trial even if there is no change in the membership.

d. Accused is asked whether and when he received a copy of the charges and specifications; (if necessary, the JA proves the date in an interlocutory proceeding.) At a later stage, i.e., just prior to the start of the trial proper, the accused is asked whether he is ready for trial. The court should be liberal in granting any reasonable request for postponement if needed to prepare defense.

e. Continuance: (at any time during trial). Unless expressly authorized in the precept, a court martial is enjoined to sit from day to day, Sundays and holidays excepted. If a longer continuance seems to be warranted the court has to request the CA to authorize such action.

f. Objections to charges and specifications by accused (e.g. for vagueness, etc.) and examination of charges and specifications by the court. For any technical error or error in substance, the court returns charges and specifications to CA for correction. The CA can not order or compel the court to continue with trial regardless of objections.

B'43: Oaths administered to members and JA when court assembles at its first session, but not repeated at beginning of trial of each case.

McG: Follow B'43, and make sequence of oaths uniform in SCM and GCM.

K: Follow B'43 and McG and make sure that accused can exercise right of challenge either when oath was given, or later when his case is tried.

(AW: If less than 5 days elapsed between serving accused with copy of charges and specifications, a continuance must be granted unless the accused expressly waives his right.)

K: Adopt Army 5-day rule.

(AW: The court is empowered to grant a reasonable continuance.)

McG: JA may grant continuance for cause at any time.

K: Adopt Army rule.

McG: Such objections should be determined by the JA before proceeding further.

B'46: Court should decide without being bound by JA.

K: Follow McG, but ruling should be in open court unless member of court moves that court be closed.

(AW: 1. The accused may move to strike out a defective specification or make another kind of motion, e.g. to sever a joint trial.)

Follow K re oaths, provided accused was present when court was initially sworn.

Adopt Army rule for GCM; 3 days for SCM, and 24 hours for DC.

Follow K recommendations

1. Rulings on objections to charges and specifications shall be made by JA, subject to being overruled by the court. Rulings shall be in open court, but, upon motion by any member, court shall be closed for deliberations. Reasons for rulings of JA-- and of court, if any-- shall appear on the record.
2. If objections are sustained, record is to be referred to CA as under present law.
3. Objections may be made by accused or any member. JA may also, on his own motion, find charge(s) or specification(s) not in due form or technically correct, subject to being overruled by court.

g. Special pleas: The accused may object to the jurisdiction of the court or claim former jeopardy, the statute of limitations, etc.

McG: Let JA decide special pleas.

B'46: Court should decide and not be bound by JA.

K: Follow McG, but ruling should be in open court unless member of court moves that court be closed.

(AW: The ruling of the law member is not binding upon the court.)

h. Pleas to the general issues: The accused may plead guilty or not guilty to any charge. Standing mute amounts to a plea of not guilty. Nolo contendere is practically a plea of guilty.

(AW: Even after a plea of guilty, "some" evidence is suggested.)

McG: The JA may refuse to accept a plea of guilty; and it should not be accepted before determining that it was made voluntarily and with understanding of its meaning and consequences.

In desertion cases, a plea of guilty is not accepted.

K: Pleas of guilty:

A plea of guilty dispenses with the necessity to prove the charge.

1. Plea of guilty shall not be received in capital cases.

2. Accused to be represented by counsel and plea of guilty be received only after opportunity to consult with counsel.

3. JA to explain effect of plea of guilty including

a. that plea admits offense and makes conviction mandatory,

b. maximum sentence which may be imposed,

c. unless accused admits to acts charged, or disclaims defense, a guilty plea will not be accepted.

4. JA to determine whether guilty plea be accepted.

5. Introduction of evidence after plea of guilty.

a. If guilty plea accepted, prosecution to perpetuate complainant's testimony under oath, prior to sentencing.

b. Attach pre-trial report of investigation to the record for review purposes after opportunity for defense counsel to object to its inclusion in whole or in part.

As in all interlocutory proceedings, the JA shall rule, subject to be overruled by the court. The reasons for the rulings of the JA--and of the court, if any--shall appear on the record.

1. Follow K # 1, 2, and 3.

2. Follow K # 4, Provided, that JA's ruling is subject to be overruled by the court.

3. Follow K # 5b, Provided, that the pre-trial report should be concise and complete in itself without attempting to incorporate any pre-trial testimony by reference as such testimony should not accompany the report when the latter is attached to the record for review purposes. Pre-trial record to be attached only in guilty-plea cases.

EXISTING LAW AND PRACTICE

VARIOUS RECOMMENDATIONS

JAG RECOMMENDATIONS

i. After plea of not guilty, prosecution begins; its initial task: to establish a prima facie case.

j. If the prosecution fails to establish beyond a reasonable doubt the charges and specifications or lesser and included offenses, neither AGN, nor NC&B, make provision for a motion to dismiss.

k. Defense begins with introducing evidence.

1. Rules of evidence:

(1) prescribed by executive regulation.

(2) rulings on evidence in closed court viva voce.

(AW: Before the court begins to hear the evidence,

1. Any party or member may request the TJA to read certain pertinent section of the Manual, etc.,
2. The TJA may make an opening statement of what he expects to prove.)

(AW: At the end of the prosecution's case, the defense may move for an acquittal. The court may require specific averments of alleged insufficiencies of proof.)

B'43: Accused, at close of prosecution's case, entitled to move for finding of not guilty on each or all specifications and charges.

K: Motion for finding of not guilty.

1. Allow accused to move for a finding of not guilty as to any or all charges and spec's at close of prosecution's case. JA to decide issue. Proviso should be added as to JA's ruling that it be subject to objection by member of court. Issue to be resolved by majority vote of court.

(AW: Defense counsel may start with making an opening statement.)

SecW: Liberalize rules; admit entries in regular course of business.)

(AW: Prescribed by President under authority delegated in AW 38 which provides that they shall, as far as practicable, be those recognized in criminal cases in U. S. district court.

McG: The admissibility of evidence and privileges of witnesses shall be governed by rules of law prevailing in trials of criminal cases in the courts of the U.S.

B'43: Rulings should be in open court.

K: In open court, unless member of court requests ruling in closed court.

(AW: Ruling of law member on question of admissibility binding.)

1. Before prosecution begins, JA shall read to court the elements of the offenses charged, of lesser and included offenses, and the elements of proof required, as set forth in Naval Law Manual. JA may, on his own motion, and shall, upon request by any member of court, repeat such reading, in whole or in part, at any time during trial, especially after a motion for dismissal by the defense and prior to deliberations of court on findings.

2. Prosecutor may make opening statement (as in Army courts martial) of what he expects to prove and how he expects to prove it.

1. Follow K recommendation as to motion for finding of not guilty.

1. Follow Army practice.

1. Naval Law Manual should set forth rules of evidence regardless of whether they can be found elsewhere, in AGN or other federal statutes.

2. Rulings on evidence shall be made by JA, subject to be overruled by the court. Rulings should be in open court. Court should be closed for deliberations, and reasons for rulings should be entered on the record.

(3) Summoning of witnesses:

(a) GCM: civilian witnesses can be subpoenaed if residing within State, Territory or District where court is convened; if outside, they can merely be requested to appear voluntarily and SecNav has to consent to Government expense involved, SCM civilian witnesses are compellable in no case; request to appear at Government's expense depends on consent of CA if residing within State, Territory or District where court convened, otherwise consent of SecNav required.

(b) Naval witnesses can be summoned by JA or Recorder but CA passes upon availability if travel, etc. at Government's expense is involved.

(4) Contempt of court:

(a) GCM may punish naval witnesses; may find civilian witnesses in contempt, but district attorney to be informed for proceedings in District Court against civilian witnesses.

(b) SCM and DC have no powers to punish for contempt.

B'43: Provisions to compel appearance of civilian witnesses should be similar for GCM and SCM.

- McG: 1. Service shall run throughout the U.S., territories and possessions.
2. Witnesses desired by accused shall be subpoenaed at his expense except that for good cause JA may in his discretion order that witness be subpoenaed at Government's expense.
3. A witness in the naval or military service may be summoned by the JA through official channels.
4. There should be identical rules for summoning and subpoenaing witnesses in GCM and SCM cases.

K: Attendance of witnesses:

1. Repeal AGN 42(b) and enact new article empowering GCM, SCM, and C. of I. to issue like process to compel witnesses to appear and testify, which U.S. courts of criminal jurisdiction may issue; to run to any part of U.S., territories and possessions.
2. Give JA discretion to authorize transportation at Government expense of witnesses for defense where it appears that the defendant is without means. Ask Congress to appropriate special funds outside regular naval budget upon which JAG may draw for this purpose.

(SecW: Equal opportunities for both parties to obtain attendance of witnesses.)

- McG: 1. GCM, SCM and C. of I. may punish any person subject to AGN who refuses to give testimony or commits contempt.
2. Punishment: 2 months' pay or 2 months confinement.
3. Person may appeal to SecNav within 10 days. Punishment suspended pending decision on appeal.
4. Follow B'43.
5. Any person duly subpoenaed who fails to appear or refuses to testify may be prosecuted in the District Court of the United States.

1. Follow K # 1 and 2 re attendance of witnesses.

GCM, SCM, and C. of I. may punish any person subject to AGN who is guilty of contempt in the presence of the court, by 2 mo's conf. Persons subject to AGN who wilfully neglect or refuse to appear or to produce documentary evidence, when duly subpoenaed may be punished under the general article for C. to P., by separate disciplinary action. Contempt of civilians should be added to offenses constituting misdemeanors under AGN 42(c).

W: Follow McG, except punishment not suspended pending appeal, and omit McG recommendation No. 5.

(AW: Direct contempt by military and civilian witnesses punishable by Army court martial.

For constructive contempt and failing to appear or refusing to testify, Army personnel are punishable under AW 96 and civilians in U.S. District Courts.)

K: Contempts:

1. Repeal AGN 42(c), enact new article making wilful neglect or refusal to appear, to testify, or produce documentary evidence (GCM, SCM, or C. of I.) a misdemeanor.

2. Repeal AGN 42(a). Enact new article empowering GCM, SCM, and C. of I. to punish any person for contempt of court.

(5) Depositions of unavailable witnesses allowed for prosecution and defense but if used by prosecution punishment for offense may not extend to death, confinement for more than one year, or dismissal.

(AW: Depositions allowed in cases not capital; in capital cases allowed for the defense; but for the prosecution in such cases only with express consent of defense.)

McG: Depositions allowed for defense only (as under Federal Rule 15).

W: No person whose conviction has been secured by deposition(s) shall suffer death or imprisonment for more than 5 years.

B'46: Make provision for proper use of depositions.

(SecW: Allow depositions in "nominal" death cases, the death penalty not actually being imposed; for prosecution and defense; insure prompt taking.)

(6) Stipulations:

(a) of facts: not favored; admissible only if they amount to admission by accused himself (stipulation between prosecution and defense counsel not recognized).

B'43: Receipt of stipulations duly entered into by JA and defense counsel, acting with consent of accused, permitted.

McG: The prosecutor and defense counsel with the consent of the accused may stipulate facts for the purposes of the trial.

(b) of testimony of unavailable witness: not recognized.

1. Subject to the provisions of paragraph 2 below, depositions shall be allowed equally to the prosecution and to the defense, Provided, that, except where absolutely impracticable, the accused, with a counsel if desired, be given an opportunity to be present at the taking of the deposition and to cross-examine the deponent; and Provided further, that, if the accused himself be denied these opportunities, they be afforded to such representative as the accused may select.

2. Depositions shall be allowed only where witness is unavailable by reason of death, age, sickness, infirmity, imprisonment, or military necessity which would prevent his personal appearance at the place of trial, or where witness can neither be compelled to appear nor is willing to appear voluntarily before the court martial.

1. Stipulations should not be permitted. (Retain present law on admissibility of judicial admissions.)

EXISTING LAW AND PRACTICE

VARIOUS RECOMMENDATIONS

JAG RECOMMENDATIONS

(7) Court may examine witnesses of either party; the purpose of such examination should be limited to clarify previous testimony; it should not be misused to elicit new items so as to make the court a second prosecutor. Under similar principles, the court may also call witnesses as witnesses of the court.

McG: The JA shall have the power to question witnesses as may, in his discretion, be necessary to a full exposition of the facts.

W: & Follow McG.
B'46:

Retain present law and policy; the JA should have the same limited power as the court to clarify testimony. (Technically, all witnesses--for prosecution, defense, court, and JA--will be subpoenaed and summoned by JA.)

m. Testimony of accused:

(1) Accused may take the stand upon his own request; failure to do so shall not work against him. If he takes the stand, he is subject to cross-examination on all matters of the charge or charges to which he selected to testify in his own behalf.

(2) The accused regardless of whether he testified in his own behalf or not--may make an unsworn statement after all evidence has been introduced, prior to the finding of the court. Such statement is not evidence; it may operate in either of two ways:

McG: Continue present law but contents of unsworn statement may be considered by the court in imposing sentence.

K: 1. Unsworn statement of accused in extenuation or mitigation, before findings, should be eliminated.
2. Allow sworn (or perhaps unsworn) statement in extenuation or mitigation, after findings.

Follow K recommendations.. All statements to be sworn.

(a) The court should reject a plea of guilty if the statement contains averments inconsistent with such plea.

(b) It may cause the court to recommend the accused to the clemency of the reviewing authorities.

n. Findings:

Deliberation by court; votes signed; simple majority sufficient for conviction as charged or lesser included

McG: Determination of finding. Court shall try all issues of fact. Court bound by instructions of JA as to law of the case, and it shall determine guilt or innocence of

Follow K recommendations # 2 and 4. Continue present rule that every finding be determined by majority vote.

offense. Acquittal on any charge or specification is announced, but not conviction.

accused in accordance therewith. Every finding determined by majority vote. In event of a tie, accused acquitted. All findings are to be announced in open court immediately after the court has ended its deliberations.

A tie vote to be a determination in favor of accused.

W: Follow McG.

B'46: The JA should advise the court, prior to its findings, upon the law of the case. If court fails to follow JA's advice, reasons to be entered in record.

(AW: Deliberation of court on findings, 2/3 majority required, but unanimous vote in case of spying. Secret unsigned ballots. President announces total acquittal.)

(V: Findings should be announced as soon as determined, and, in case of conviction, hear arguments on questions of sentence.)

K: Deliberation and vote on findings:

1. Instructions of law applicable to case to be made in open court and set forth in record; that court determine guilt or innocence in accordance therewith and on basis of facts found by it; on review, prejudicial error in JA's instructions to be grounds for setting aside conviction.
2. Secret unsigned written ballot.
3. False requirement above majority for conviction. Unanimous vote on finding to be prerequisite for imposition of death penalty.
4. Announce all findings in open court.

(SecW: Convictions require 2/3 majority; are to be unanimous in mandatory death cases.)

o. Sentence:

(1) Before court deliberates on sentence prosecution may introduce matter in aggravation if the accused has pleaded guilty; the defense may introduce matter in extenuation or mitigation in all cases. Further, personal data and record of previous convictions presented to court by JA. (Mast punishments are not considered to be convictions.)

- (AW: 1. Record of previous convictions and personal data introduced after finding.
2. Deliberation on sentence; unanimous vote for death, 3/4 for life or more than 10 years, 2/3 for all other sentences. Secret unsigned ballots.
 3. President announces findings and sentence (but announcement may be withheld.)

EXISTING LAW AND PRACTICE

- (2) Deliberation on sentence: simple majority sufficient, but 2/3 needed for death sentence.
- (3) Ballots are signed. Sentence is not announced by court.
- (4) Individual members of court may enter recommendation to clemency.

VARIOUS RECOMMENDATIONS

4. Defense counsel may submit matter in writing for clemency consideration.
5. Recommendation to clemency by members of court.)
- B'43: GCsM should be given larger powers and responsibilities in determining ultimate punishment.
- McG: 1. After the accused has been found guilty, he may submit statement on any matter bearing on sentence; so may also the prosecutor, incl. submitting the record of previous convictions.
2. Simple majority sufficient but unanimous vote for death sentence.
3. Sentence to be announced.
4. The court may place the accused on probation for a specified period, suspending execution of sentence.
- W: Follow McG.
- B'46: Court should announce sentence but this should not operate to change the time the sentence begins to run.
- K: 1. Matters for consideration before sentence:
- a. Desirability of court having complete record of past offenses, civilian and military, including record of past punishments.
- b. All matters for the extenuation and mitigation which the accused may present; sworn (or perhaps unsworn).
- c. Psychiatric report accompanied by information concerning the accused's family background, education, environment, employment and economic status, wherever feasible.
2. Vote on sentence:
- a. independent judgment of court;
- b. secret unsigned ballot;
- c. unanimous vote for death penalty. Consider desirability of increasing percentage of votes required with severity of sentence.

JAG RECOMMENDATIONS

1. Retain existing law (Art. 51 AGN) as to
- a. the duty of a court martial to adjudge a sentence adequate to the nature and seriousness of the offense; taking into consideration any past punishment which has been imposed for the same offense. (See supra, page 7, JAG recommendation # 2.)
- b. recommendation to clemency by members of the court, Provided, that the recommendation be specific as to reasons as well as to mitigating action recommended to be taken.
2. Prior to deliberations on sentence and recommendation to clemency, the parties should submit to the court such matters as mentioned in K recommendation # 1, Provided, that record of previous offenses be limited to the record of the current enlistment or current extension, Subject to such exceptions as provided for in existing law (sec. 438 NC&B).
3. Vote on sentence:
- a. Follow V recommendation # 1 on page 40, infra.
- b. Follow--subject to item 1a, supra, K recommendation 2a; follow also AW # 2 and K recommendation 2b.
4. In making a recommendation to clemency, the members of the court shall also take into consideration the time spent by accused in confinement awaiting trial.
5. Sentence and recommendation to clemency shall be announced by court.

- d. Consider desirability of JA sentencing.
- 3. Announcement of sentence: effective date: credit for time in confinement prior to trial.
 - a. Sentence effective immediately on announcement at trial.
 - b. Credit accused with time spent in confinement awaiting trial and before sentence either by statute or policy directive.
- 4. Recommendations of clemency by the court:
 - a. eliminate.
- (V: 1. Manual should provide that a court martial should exercise own judgment, and not give maximum sentence where excessive, relying upon the reviewing authority to reduce it.
- 2. Sentence should be announced as soon as determined.)

- 6. Follow K recommendation # 3a to extent that sentences, or portions thereof, other than death, dismissal, discharge, or reduction to the next inferior rating, be effective and executed upon announcement by court; Provided, that reduction in rating shall be effective upon the date of forwarding of the record by CA to Department without having remitted or suspended the reduction in rating.

p. Recording and authentication:

- (1) Testimony, accused's statement, and arguments on the general issue, are recorded in full. Oral arguments upon admissibility of evidence and interlocutory questions are recorded fully only for special reason, e.g., JA and court differ.
- (2) Record approved from day to day by parties and court if trial extends over more than 1 day. Entire record incl. findings and sentence authenticated by all members and JA; in addition, final adjournment clause by president and JA. In case of total acquittal separate copy of findings signed by all members and JA.
- (3) Before proceedings, findings and sentence approved and published, counsel for defense may examine record exclusive of finding and sentence.

- B'43: 1. Where a trial consumes more than one day, the reading on each successive day, of record of previous day or its salient features not required.
- 2. Findings and sentence transcribed in same manner as rest of record. Reporter sworn to secrecy.
- 3. For SCM: Provide approved printed forms, such as orders for trial, specifications of common offenses, and records of proceedings where accused pleads guilty.
- B'46: In any case where the court does not follow the advice of the JA with respect to matters of law and procedure, the rejection of such advice and reason therefor shall be noted in the record of proceedings.

- 1. Follow B'43 # 1 and 2, and--where practicable--# 3.
- 2. Provide for one authentication for each record, this authentication to consist of two signatures,--Pres. and JA, or members of court in lieu thereof in event of death, disability, or unavailability of Pres. or JA, or both.
- 3. JA shall state reasons for his rulings on interlocutory questions and admissibility of evidence; so shall the court if and when overruling the JA; all reasons shall be set forth in the record.

10. REVIEW AND EXECUTION:

a. General Court Martial Cases:

(1) Execution of sentence requires regularly:

(a) approval of proceedings, findings, and sentence by convening authority (and designation of place of confinement);

(b) dismissal of an officer or death sentence; approval by convening authority and confirmation by President (or, except in death cases, SecNav until termination of Title I, 1st War Powers Act).

(2) Approved sentences involving immediate DD or BCD (where no confinement is to be served and/or no probation was granted) are effected only on instructions from the BuPers or MarCorps.

(3) Types of action by convening authority:

(a) Acquittal is final (neither approval nor disapproval) except theoretically where set

"Liability of members" according to NC&B;

"for improper conduct as for any other offense against naval discipline"

"can not be interfered with in their proceedings by naval authority"

"yet * * * responsible in civil courts for any abuse * * *"

McG: Codify present law and provide sentence involving discharge of an enlisted man cannot be executed unless confirmed by SecNav.

W: Follow McG and provide for power of President to punish naval reserve officers on inactive duty by disenrollment for commission of offenses for which this punishment has been especially provided.

(AW: No member of court, TJA, or defense counsel may act as staff judge advocate to reviewing or confirming authority.)

(V: 1. Reviewing authority should have power to review every case as to weight of the evidence, legal sufficiency of the record, and to mitigate or set aside sentences, and to order a new trial.

2. JAGD should become the reviewing authority independent of the command.

3. The general or officer who referred case for trial should have power to mitigate, suspend, or set aside the sentence, but his power to act should be limited to clemency.

4. Provision for advising members of court of nonconurrence in an acquittal should be expunged.

5. Reprimand of members by CA should be expressly prohibited.*)

McG: Every sentence of a naval court martial not extending to death, dismissal, or discharge may be executed upon approval of the CA, who shall have power to remit or mitigate, but not to commute, such sentence.

(AW: For table of GCM review system, see Exhibit, page 41a.)

(SecNav: 1. Initial review left with CA; but final review--incl. sufficiency of evidence--with JAGD or adjuncts.
2. Execution of death sentences requires confirmation by the President.
3. All dismissals and discharges--prior to execution--reviewed by CA (who may mitigate or suspend) and Board of Review and JAG.
4. Discretion of JAG to grant new trial (and set aside old case) upon request of accused within 1 year after final disposition or end of World War II.)

1. Follow McG recommendation, but modify as follows: Sentences, or portion thereof, extending to discharge of enlisted men cannot be executed unless confirmed by SecNav or officer authorized by SecNav.

2. The functions of pre-trial investigator, preparing charges and specifications, and prosecutor are compatible; the functions of pre-trial investigator of preparing charges and specifications on the one hand, and JA on the other, are incompatible. An officer who investigated or prepared charges should not be eligible for JA.

3. Follow V recommendation # 2, leaving review for legality wholly within Department.

4. Follow V recommendation # 4.

5. Follow V recommendation # 5, but modified as follows:

a. The finding of a court martial shall not be made the basis of a reprimand under any circumstances.

b. Only SecNav can reprimand a court martial in regard to its sentence; but the CA--in forwarding the record to the Department--may recommend that such action be taken.

c. The CA or higher authority may reprimand members of a court martial for personal misconduct during the trial.

6. Follow spirit of V recommendation # 3 (changing "set aside" to "remit"), so that CA may take one or the other of the following actions:

a. follow--in whole or in part--a recommendation to clemency by members of the court;

b. take--in the absence of such recommendation--an act of clemency on his own initiative, by remitting, mitigating, or suspending any sentence, or by commuting a sentence of death to imprisonment for life or for a stated term of years;

c. forward the record to the Navy Dept. without acting favorably on a recommendation to clemency made by members of the court, endorsing on the record his reasons for failure to act favorably on the recommendation.

d. forward to Navy Dept. a record containing no recommendation to clemency, without clemency action, merely endorsing: "The record has been reviewed for disciplinary purposes."

REVIEW OF GCM SENTENCES UNDER ARTICLES OF WAR

I

1. Against General Officers
2. Dismissal of Officers in Peace
3. Suspension or Dismissal of Cadets
4. Death in Peace
5. Death in War for Other Crime Than Murder, Rape, Spying, or Desertion

II

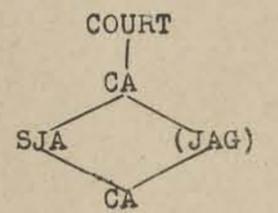
1. Dismissal of Officers in War, Below General, (Unsuspected)
2. Death in War for Murder, Rape, Spying, or Desertion

III

1. Dishonorable Discharge and - under BCD consideration (After Plea of Not Guilty)
2. Confinement in Penitentiary

IV

1. All Other GCM Sentences (incl. Suspended Dismissals and Discharges)



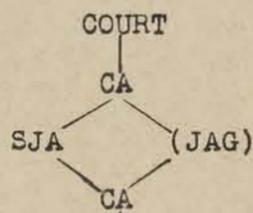
BOARD OF REVIEW

JAG

SEC WAR

PRES (confirm'g) (exc.dism'l cases under 1st WarP.A.)

for I 2 and 3: JUDICIAL COUNCIL (3 Gen'ls) takes Conf.Action (JAG concurring); stops case. Also in life imprison't cases which are in III under existing law.



CONF.A. (CG Army in field or terr.dept.or division)

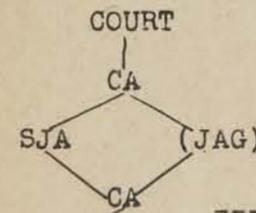
BOARD OF REVIEW

JAG agreeing leg.suffic't.

CA or CONF.A. (who may order execution)

JAG agreeing leg.insuff't

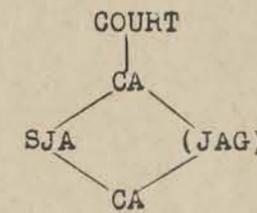
(Sentence vacated; Re-hearing may be ordered.)



1.final in DD & BCD if hold'g suffic't
2.if hold.insuff't, via JAG to JUD.C'L
3.if JAG and JUD.C'L disagree, to SEC WAR

JAG disagr'g

SEC WAR (for PRES) or: CO of distant command with JAG Branch



(may order execution, exc.dism'l)

(CONF.A.) (CG Army in field or terr.dept.or div. may confirm sent. Pres. must otherw. confirm, if he first commutes, remits or mitigates)

Office of JAG (Mil.Jus.Div.) if regard' insuffic't

BOARD OF REVIEW passing on suffic'y of sent. in suspend.dism' charge cases before CA vak. suspension.

BOARD OF REVIEW if agree'g w/MJDiv. if disagr.w/MJDiv.

JAG (with his recom'd) JAG (deciding confl't)

SEC WAR (for PRES)

NOTE Areas within broken lines indicate changes under consideration

EXISTING LAW AND PRACTICE

aside by SecNav.

- (b) Revision of record, findings, and sentence before same court; no new evidence; no increase of punishment except where such purpose authorized by SecNav.
 - (c) Disapproval (or setting aside) proceedings, findings, sentence.
 - (d) Ordering new trial:
 - (i) Where court was without jurisdiction.
 - (ii) Where specification was fatally defective.
 - (iii) Where objectionable evidence admitted in addition to sufficient good evidence.
 - (e) Approval of proceedings, findings, sentence; may be combined with remission or mitigation of sentence (mitigation of finding rare); commutation only by SecNav or President.
 - (f) Ordering probation for certain period (termination for cause within that period).
- (4) Further review and action:
- (a) Additional review for legality in JAG's office, and for disciplinary features in BuPers or MarCorps. Only cases in which SecNav action is recommended are reviewed in SecNav's office.
 - (b) SecNav has power to set aside the proceedings or to remit, mitigate, or commute the sentence.
 - (c) SecNav may offer accused opportunity to request new trial

VARIOUS RECOMMENDATIONS

K: Bypass CA for review and action on record. GCM records to be forwarded by JA of court direct to JAG, who reviews records, sends them to Board of Legal Review for final action.

B'43: Review procedures in Department should be re-examined in interest of unifying and expediting the operations of office of JAG and BuPers.

B'46: Establish Boards of Review in the Navy Department composed of one civilian with legal background, one naval lawyer, and one or more general service officers of mature judgment. The boards would review such cases as the SecNav deemed appropriate. Where a board disagrees with review made by JAG or disciplinary activity involved, the record would be returned for reconsideration

JAG RECOMMENDATIONS

1. Except as modified on page 47, 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 appeal within one year.
2. The review upon such appeal may result in such actions 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.
3. After the end of this further review or after the expiration of the one-year period without request by accused for such further review, the case is legally closed.
4. 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.

FIRST ALTERNATIVE RECOMMENDATION
for Review of GCM Cases

1. Except as modified on page 47, 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.
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

EXISTING LAW AND PRACTICE

VARIOUS RECOMMENDATIONS

JAG RECOMMENDATIONS

where record sufficient but with prejudicial error.

- (d) Unexecuted portion can be remitted, mitigated, or suspended at any time by SecNav as matter of clemency.

(5) Publication:

- (a) Notification of party and publication by convening authority.

- (b) Every command keeps docket sheets indicating the time which elapsed in each case from apprehension until publication and major steps in-between.

and further recommendation before being presented to the Secretary for final approval.

- B'46: Participation of BuPers and Commandant of the Marine Corps in review serves a useful purpose.

- B'43: The district legal officer of each naval district wholly or partly within the continental U.S. shall maintain a docket of all cases ordered tried before a GCM by any CA within such naval district.

Under system of maintenance and review of dockets, JAs of courts subject to system are relieved of duty of making regular monthly reports and reporting, as a regular practice, delays in trials.

- K: A chronology of each GCM should be prepared with all delays explained, and submitted with the record.

- McG: 1. Boards of Review.
& W:

- a. There shall be established in the executive office of the SecNav one or more boards for the review of courts-martial.
- b. Each board shall be composed of three (3) members of whom at least one shall be a civilian.

2. Duties and powers.

- a. SecNav shall, prior to final action, submit to a board of review the record of every court-martial in which a conviction followed a plea of not guilty and the final action contemplated extends to death, dismissal, dishonorable or BCD, or confinement for any period in excess of twelve (12) months.
- b. Each board of review shall review all records of cases submitted to it by the SecNav, both as to legality and as to disciplinary features, and shall submit recommendations thereon to the SecNav via the JAG.

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 on page 47, 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.
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

c. The recommendation of every board of review shall be determined by a majority vote.

d. Boards of review may, with the approval of the SecNav prescribe their own rules of procedure.

3. 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 therefore, and shall transmit the entire record to the SecNav for his decision.

K: 1. No longer any review by the C.A.

a. control by the C.A. of members of court and disposition of case should cease upon reference of the case to trial.

b. proceedings from arraignment to sentence should be the entire responsibility of the court and JA.

c. sentence should be self-executory upon conviction, subject to review in the Navy Department by a board of legal review and a board of sentence review.

d. 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 officers designated by them.

2. 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

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.

court-martial cases; to be established in office of SecNav.

(1) membership of board

(a) civilian member to be a 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 semipermanant; 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.

(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.
- (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 of 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.
- (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) MarCorps officer experienced 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

- 1. There shall be established, under the Under Secretary of the Navy, a Discipline and Clemency Board.
- 2. All records which have been sustained on legal review (see, supra, pp. 42-44) and involve sentences as described in K recommendation # 2 e (4) shall be forwarded to this board for purposes of sentence review. Follow K recommendation # 2 e (5). For further functions of this board, follow K recommendation # 4 a, 2nd sentence.
- 3. The board shall consist of senior (naval) officers; its president shall be appointed for duty under the Under Secretary; JAG, BuPers, BuMed, MarCorps, and CCh (and Coast Guard in war) shall appoint one member each for duty on the board with collateral duty of keeping their resp. Bureau Chiefs etc. informed of the general disciplinary situation in the naval service.
- 4. After re-review on appeal (see, supra, p. 42), record should be re-submitted to Discipline and Clemency Board.

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.

3. Review by President and Secretary.

Follow K recommendations 3, 4, and 5.

- 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.

4. 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.

5. Reserve power of SecNav over findings and sentences.

- a. SecNav's broad 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.

b. Review of DC and SCM cases:

DC 1. by CA (if DC officer was CA, no actual review).

2. by SecNav upon appeal within 30 days after publication of sentence.

3. in every case, DC card is checked in JAG's office for legal sufficiency of specification and record (but not as to sufficiency of evidence).

SCM 1. by CA.

2. by immediate superior in command, unless CA is SOP.

3. entire record is checked in JAG's office for legal sufficiency (including sufficiency of evidence).

B'43: 1. Review by CA final where accused pleads guilty, has no objection to procedure, qualifications of deck officer, or to sentence and does not request review within 3 days after action of CA made known to him.

2. Do not require approval of sentences of SCM by ISIC.

3. Review of SCM records by CA final in all cases in which accused, acting on advice of counsel, pleads guilty, makes no objection to proceedings, composition of court or sentence, and does not, within 3 days after action of CA is made known to him, request further review.

K: Every sentence imposed by inferior court martial should be subject to automatic review by the officer exercising GCM jurisdiction of command, unless he was also the CA, in which event review by next higher authority.

c. Review by Civil Courts?

(1) " * * * when a court martial is not legally constituted, is without jurisdiction, or adjudges an illegal sentence, its proceedings may be attacked in the proper Federal civil court either by means of a writ of habeas corpus, where there is unlawful restraint, or, in the case of illegal dismissal, by bringing suit for pay thereby withheld." (NC&B, sec. 339)

K: 1. 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

Follow K recommendation, Provided that

1. CA, before forwarding record, has same clemency powers on sentence as GCM CA under JAG recommendation # 5 on page 41;

2. officer to whom the record is to be forwarded has also such clemency power, in addition to his authority to review the case for legality and take any necessary legal action;

3. if officer to whom record to be forwarded under K recommendation be not present, forwarding requirement is relinquished and CA himself may exercise legal review and power which otherwise would vest in that officer.

4. discharges can not be executed unless confirmed by SecNav or officer authorized by SecNav.

Retain existing law and practice.

EXISTING LAW AND PRACTICE

VARIOUS RECOMMENDATIONS

JAG RECOMMENDATIONS

(2) Review as to due process of law (fundamentally fair trial):
141 F(2d) 664; 64 F. Supp. 238.

(3) The members of a * * * court martial * * * may be responsible in civil courts for any abuse of power or illegal proceedings." (NC&B, sec. 374: Liability of members).

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.

11. ORGANIZATION AND ARRANGEMENT OF NAVAL LAW

- a. AGN confer rule-making power upon President in regard to DC's and SCM procedure. Presidential rule-making power exercised as to procedure of all courts martial, mast and formal investigations.
- b. Almost no rules of evidence by statute, most of them announced by President following orthodox common law views; declaring 28 USC 695 (admissibility of entries in the regular course of business) applicable.
- c. AGN contain--besides provisions of criminal law and procedure--the following:
- (1) Art. 2: Divine Service.
 - (2) Art. 15: Prize money.

- McG: 1. The definition of offenses, and the quantum and mode of proof, where applicable, shall be such as prevail in the criminal courts of the U.S.
2. Give SecNav power to issue rules of practice, pleading, and procedure so as to insure enforcement of discipline and fair and impartial administration of justice.
3. Omit provisions which are not punitive, procedural, or relating to investigations.
- W: 1. Enumerate offenses in AGN, define them in the Manual; avoid reference to Federal laws and decisions.
2. Follow McG recommendation #2 as follows: SecNav shall have power to prescribe rules of practice, pleading and procedure, and to make such rules and regulations, with respect to any or all proceedings before naval courts-martial and investigative bodies as will insure the enforcement of discipline and the fair and impartial administration of justice in the naval service of the U.S.
3. Retain all traditional articles prescribing high standards of character and conduct; delete Art. 3.

- B'46: 1. SecNav given full rule-making power to simplify procedure, and any provisions or orders standing in way of exercise of power be eliminated.
2. Revise and simplify rules for practice, pleading and procedure for naval courts martial and adopt uniform rules of evidence.
3. Rewrite NC&B and re-edit CMOs.

- K: Create Advisory Council of a permanent character to make studies and recommend changes in naval justice.

1. Define offenses in Naval Law Manual, not in statute. (See page 5.)
2. Naval Law Manual should set out rules of evidence regardless of whether they can be found elsewhere, in AGN or other federal statutes. (See page 34.)

Follow K.

12. LEGAL EDUCATION AND TRAINING

- a. Every CO shall cause the AGN to be hung up in a public part of the ship or place and read once a month to his ship's company.
- b. Bimonthly seven-week training course at the U.S. Naval School (Naval Justice) for officers and legal yeomen assigned to take the course.

- (V: 1. Explanation of AW to enlisted men should be emphasized.
2. SecWar, GenStaff, and Army should place greater emphasis on operation of system of justice, and enlarge substantially legal staff.
3. All courts should be open, and advance public notice given to encourage spectators.
4. Information should be given out as to use of AW 104 on officers to avoid impression that they go unpunished.)

(SecW: 1. JAGD to be enlarged.

2. Commensurate promotions: officers with specialized professional background receive 3 years' service credit; but single promotion list for all officers.
3. Follow V recommendation # 3; sessions to be open except for security and other special reasons. Impressive decorum.
4. Follow V recommendation # 4.
5. Inspections in the field by JAG or senior officers of JAGD.)

1. Develop intense educational means for enlisted personnel. Example of improvement: every number of All Hands could devote some pages to disciplinary matters, not generalized, but specialized items, and contain monthly questions, to be answered in next month's issue. See also items 4, 6 and 8.
2. Follow V recommendation that enlisted personnel be encouraged to attend courts martial. Mast should be held in presence of all or at least, large section of men.
3. Legal Training: by continuing and further improving Naval School of Justice, it is considered that basic law training should start at the Naval Academy with the equivalent of a 2-week course (60 hours) distributed over 4 years.

(West Point devotes 90 one-hour sessions to Law (during the last year of instructions) broken down as follows:

- 21 Elementary Law
- 13 Constitutional Law
- 19 Criminal Law
- 17 Evidence
- 20 Military Law.

The only legal subject in the 4-year Annapolis curriculum are eleven hours on Military Law during the second term of the fourth (last) year. Curriculum was approved April 1946.)

4. As a means of information for all personnel (enlisted, officers, CO's, court members, Rev. Auth., etc.) and at the same time as a deterrent, publish regularly in All Hands--without naming the accused, but with sufficient factual background and, especially indicating past record--transcripts with punishments inflicted; at the same time serving as a method to insure uniformity.
5. Abandon present practice in publication of CMO's of naming the accused at the end. Army does not.
6. Publish monthly statistics in All Hands. This may offer a means to appeal to personnel to lower figures steadily.
7. The relation between clear record on the one hand and advancement in rating, etc., can be more publicized.
8. As a means of education, especially for all officers and legal yeomen, make use of a modernized correspondence course.
9. Provide for regular District legal conferences.