To: The Honorable,
The Secretary of the Navy

From: Matthew F. McGuire, Chairman; Alexander Holtzoff and Col. James M. Snedeker, USMC, Committee

Subject: Articles for the Government of the Navy and Courts-Martial Procedure.

Date: 21 November 1945.

REPORT

First of all it may be stated categorically that the present system of naval justice is not only antiquated, but outmoded, - a conclusion concurred in by everyone in or out of the Navy who has had anything to do with it and is competent to judge.

It has its genesis and its roots in the traditions of the British Navy and is based procedurally upon the structure of a legal system which it, and the civilian courts of both countries, have long since discarded.

Originally designed for the Navy of the Civil War era[1] when traditionally and in fact the ship was the thing, - when

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[1] R.S.§. 1624 derived from Act July 17, 1862, C. 204 § 1, 12 Stat. 600

bread and water was routine, and flogging a not unusual occurrence - it fails to meet the demands of a modern Navy made up as it is of ships of sea and air running into thousands, with monster shore installations and a personnel stationed around the world which is numbered in the millions - with more ashore than afloat.

Obviously of course, having in mind the primary function of the Navy, our civilian system of justice cannot become that of the Navy. But certain basic rights vital in our viewpoint as a people, and by virtue of that fact inherent in, and essentially a part of any system, naval or otherwise that purports to do justice, must be accepted and safeguarded.

The present system fails, it is submitted, to do that; - the new, it is suggested, does.

To be specific, "Naval Courts and Boards" provides that a court-martial is a criminal court[2] and, again, that in a Court-martial the court sits and functions as a court of equity. But it is to be remembered the judge of an equity court is presumed to know the law, a presumption that experience has taught cannot be indulged in with reference to a Court-martial. Factually, members of such courts take, in effect, what may be said to be a juror's oath and, in reality, function as jurors.

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[2]N.C.B. § 327; id. § 148

Although under the present system it is the duty of the trial Judge Advocate to inform the Court as to the law, his position is a decidedly contradictory one, as he is told in the same breath that he must never forget he is the prosecutor[3] - two positions diametrically opposed and mutually exclusive.

Nowhere is there any provision made for instructing the Court as to the essential elements of an offense that must be proved to support a finding of guilty; what is meant by reasonable doubt; the burden of proof; presumption of innocence; nor is it given any instruction with reference to the credibility of witnesses; the interest of the defendant as a witness; or the effect of their belief in the fact that a witness or witnesses may have committed perjury; or that the case must be tried solely on the evidence admitted, and the law. These are essentials of due process and Americans, called upon to fight for their preservation, expect to find them in their Navy. True, as indicated, although it is part of the trial Judge Advocate's function "..to advise the Court in all matters of form and law .."[4] it is advice with no sanction - it is not binding - and coming from one whose primary function is so completely diverse emphasizes the

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[3]N. C. B. § 401

[4]N. C. B. § 400

necessity of change. Humanity simply does not admit of such perfection.

These, as has been said, are basic requirements inherent in our system of justice and most certainly should apply to naval as well as to civilian courts, and grave miscarriages of justice can follow where this fundamental prerequisite is found lacking. Nor can it be argued with any degree of persuasion or cogency that provision for such instruction interferes in any way with the function of command, and the maintenance of discipline. It simply means that if there are to be trials for violation of naval law, the rights of the individual accused are to be scrupulously respected and safeguarded - as they ought to be - which is emphatically not done under the present system of naval justice.

Nor can it be assumed that a court of laymen becomes suddenly illumed as a body, with a knowledge its individual members never had no matter how expert they may be in other fields. This is a definite and dangerous defect in the present system and strongly outweighed against, plus that of the reported attitude of regarding lawyers as surplus, and the consequent appointment of incompetents to act as defense counsel in serious cases.

Again there is a strong feeling shared by both officers and men, that with the convening authority making out the fitness

reports of the members of the Court, the trial Judge Advocate, and the defense counsel, absolute impartiality and independence upon the part of those charged with those functions in a given case is unattainable - which is a fact.

It is plain that trial by jury is not a guarantee that applies to the Navy, but millions of civilians who find themselves in it in time of war, and the thousands who make up its personnel in time of peace, should most certainly be made to feel that in its courts the scales are not weighted in advance.

This has been found to be the most serious criticism against the administration of naval justice, because the thought has been expressed with considerable acerbity, that the verdict or finding in a large number of cases strangely comports to what is felt is the desire of the convening authority. There is more than a modicum of truth here. A fair system of justice can only be had where the judges and other officers of the court are <u>outside</u> the reach and influence of either party.

It has been sought to obviate this vicious defect, in the new Articles, by making the function of the Judge Advocate conform to what the term itself connotes. He would act <u>in fact</u> as a <u>Judge</u> - thus making certain the protection of those fundamental concepts of justice referred to and with the added certitude that as a consequence they will be given something more than a nod.

But more than that - and most important, he would under the proposal referred to supra be, from the standpoint of function, under the sole and exclusive jurisdiction of the Judge Advocate General - thus making him as independent as is conceivably possible, and outside the control and the influence of the convening authority.

In addition, apart from the review indicated, further provision has been made for the creation by the Secretary of a Board, or Boards of Review (as the exigencies of the service may demand) consisting of three members, one of whom must be a civilian, for the review of decisions of general Courts-martial, thus relieving the Bureau of Personnel and Discipline Sections of the Coast Guard and Marine Corps of a function which presently is an anomaly, and should form no part of their activities.

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

with the antecedent right to request and receive trial by summary court-martial.

Other innovations are neither startling nor novel. The jurisdiction of both General and Summary Courts has been increased, and probation provided - for a man who stubs his toe will respond to fair treatment. The experience of our civilian courts attests this - a policy much more conducive in the end result to discipline than that of cruelly oppressive sentences which are subsequently, almost as a matter of course, mitigated. Retrainment for rehabilitative purposes is strongly suggested.

The practical result of the present practice of convening General Courts for the trial of what might be termed petty absence cases is to lower the dignity and prestige of such Courts.

The provisions with reference to jurisdiction are based on the necessities of conditions that are incident to the waging of modern war and the maintenance of a large naval establishment; old ambiguities have been clarified, and what has been hitherto thought to be implied, is made specific.

With the purpose in view of eliminating other palpable defects, the Articles themselves have been radically reduced from seventy to eleven - and under Article XI provision has been made for the establishment of rules of practice, pleading, and procedure, by the Secretary for the government of Courts-martial, in which certain major procedural and practice reforms together with others suggested in the so-called Ballentine Report (which most officers charged with the responsibility of administering naval justice

state they never heard of), and others whose wisdom is obvious, have been implemented by appropriate rule, and which upon establishment will have the force and effect of law.

For example, "read offs" or the imposition of sentence, is made contemporaneous with the conclusion of trial, rather than the present practice of keeping the accused on tenterhooks speculating as to what his punishment might possibly be - and trials made as immediate as possible. This ought also to do away with the imposition of sentences heretofore referred to that would make civilian courts blush and which sentences are imposed solely for the purpose of face-saving on the part of the convening or higher authority. Further, the law of evidence as interpreted by the United States District Courts, is made that of Courts-martial - thus providing uniformity hitherto appallingly lacking.

These proposed rules it may be said, have been adapted from and, in a large measure predicated on the new Rules of Criminal Procedure of the Courts of the United States, formulated by a Committee appointed by and acting under the authority of the Supreme Court. They will provide a ready, working, procedural manual in plain unambiguous language that can be readily understood by any intelligent and educated layman.

With reference to "Naval Courts and Boards", the present Navy legal text, unprepossessing in format, it suffers

from the same lack of modernity as the Articles on which it is based; is hopelessly inutile, and apart from decided defects of prolixity, unfortunate choice and sequence of subject matter and indexing of a most inexpert character, is more confusing and harmful than helpful.

This, of course, should be superseded by a completely new text, which with the proposed new Articles and Rules, supplemented by reference to the controlling case law on which they are based and with appropriate forms, should prove a handbook of great practical value for those concerned with the administration of justice in the Navy.

Court-martial Orders as presently published are hopelessly involved and can be followed neither logically nor chronologically, or with any hope of doing impartial justice. A thorough re-editing job is a must - this done, they can be made to be what they obviously were designed to be - a useful and living body of naval case law.

The Bureau of Naval Personnel, as previously indicated, should be completely divorced from the administration of naval justice - its interests being primarily post factum.

In conclusion, no system no matter how perfect, can work well without proper implementation. The Navy today consists no longer of a small number of ships with corresponding

complements - it is big business. Modern war embraces tremendous problems of material and supply which in themselves raise legal difficulties of a highly intricate character which must be solved with both efficiency and dispatch. Contrary to what some might think, good sea-going officers to whom the function of the fighting command is committed are neither fitted by training or experience to handle such problems, including the administration of naval justice as well, calling as both do for first-rank professional ability and skill and experience of a corresponding character.

This cannot be achieved haphazardly or by part-time study or, for that matter, accomplished by full-time attendance at a law school. There is no magic in a law degree. Lawyers and judges are not made overnight any more than the requisite skill and experience necessary to command a capital ship can be obtained in such singular fashion.

A JAG Corps in which officers will perform legal duties only, is the answer, - with promotion dependent on legal merit without any reference to sea duty. Legal and related problems are not an integral part of the command function any more than those involving medicine or engineering. Efficiency demands their separation. Nor can hope of their effective resolution be placed, in time of emergency, on the sudden recruitment of civilians. The recommendations of boards for

promotion should be based on comparative fitness for duties prescribed for them by law. In other words, and in conclusion, what is needed are officers of experience and ability who like the Navy and are willing to make it a career, provided such is made sufficiently attractive, with no impediments placed in the way of their advancement and no discrimination practiced against them because they are not officers of the line or graduates of the Academy - plus a reserve made equally alluring - with an effective synthesis of the two in time of peace. Half-way measures simply will not do.

(Col. Snedeker, as a regular officer, refrains from expressing any views with respect to the establishment of such a corps, nor has he been asked to do so, for obvious reasons.)

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COMMITTEE