GENERAL COURT-MARTIAL SENTENCE REVIEW BOARD

SYNOPSIS OF REPORT ON COURT-MARTIAL PROCEDURES AND POLICIES

INTRODUCTION

The introduction sets forth the purposes and scope of the report along with the general considerations taken into account by the Board in making its recommendations. This report does not furnish the basis for a comprehensive revision of the Articles for the Government of the Navy, nor does it purport to be a complete critique of the Court-Martial System. It attempts rather to demonstrate the need for a comprehensive reform coupled with a discussion of the advantages and disadvantages of the proposals for change which have been suggested by previous studies which the Board believes merit consideration.

The Board contemplates the creation of an Advisory Council patterned after the highly successful agencies performing similar functions in our state and national judicial systems. This council would be a permanent organization to carry on indefinitely the work which this Board has started in this report. The Advisory Council would exhaustively study the Naval Court-Martial system and recommend, from time to time, such changes as its studies indicated were necessary to keep the Naval Court-Martial system up to date and adequate to perform its function.

The Board feels that such an Advisory Council would be very beneficial to the members of the Naval service as a clearing house for justified criticism of abuses or inadequacies in the court-martial system and would be an excellent source of reliable recommendations for improvement for those responsible for the operation of the Naval court-martial system.

The Board recommends that the Advisory Council be composed of a civilian lawyer as president, representatives of the Judge Advocate's Office, Bureau of Naval Personnel, Commandants of the Marine Corps and the Coast Guard, civilian lawyers, a naval psychiatrist and a civilian penologist.

In many sections of the report there are discussions relating to problems which the Board felt were important and deserving of immediate attention; but these problems were of such a character that this Board was neither qualified to solve them nor, in many cases, did it have the time or facilities to formulate adequately a solution. However, the Board has discussed these problems and in some cases suggested a solution which it believes adequate or at least an improvement over the existing procedure. In all of these cases the Board has recommended further study by the proposed Advisory Council which is referred to throughout the report. In general the Board has made specific recommendations to meet specific problems.

SECTION I

The report starts out with a brief historical sketch of the court-

martial system, tracing the present naval system back to the early British and Continental systems. Both the British Army and Navy Systems and the American Army and Navy Systems are traced from their inception to date.

SECTION II

Following this historical survey, the traditional view of the court-martial system as related to the command function is presented purely from an historical viewpoint. This shows that the court-martial, while created by statute, functions and operates strictly within the naval chain of command and is, in the final analysis, an arm of the executive power.

SECTION III

The next section of the report outlines the reforms that have been suggested and, in some cases, adopted in the past. The favorite panacea for allegedabuses has been to turn the administration of military and naval justice over to the civil courts. Almost invariably this has proved unworkable.

In 1919 and 1920 criticism of the administration of military justice by the Army during the previous war years resulted in the adoption of many reforms which were incorporated into the Articles of War of 1920. Most of the various proposals for reform of the Army system offered at that time are set forth in this section for consideration, and the various arguments in support of these proposals advanced by the critics of the

Army system, as well as the answering arguments, are set forth in an appendix (Exhibit C). Certain differences exist between the Army system and the Navy system and are set forth, and because an understanding of these differences is essential to an intelligent consideration of the proposals, the distinguishing features are mentioned in this section.

Sections I, II, and III, previously mentioned have been prepared as background material for the rest of the report. Because of the greater importance of the General Court-Martial, and because the Board's activities have been limited to a review of general court-martial cases, the following sections of the report are limited principally to a consideration of the General Court-Martial.

Section IV

Beginning with Section Four which deals with the appointment and qualification of courts and ending with Section VII which is a survey of the final review of the findings and sentence, and subsequent clemency review, the present Naval court-martial procedure is broken down into its important subdivisions which have been extensively investigated and the findings set forth in the report. The more important recommendations and conclusions of the Board based on these detailed studies are as follows.

The Board approves of the recent amendment to Article 38 of the Articles for the Government of the Navy as to who has the power to convene a General Court-Martial.

One of the most important problems is to secure competent court members. The underlying factor essential to the success of any court system is experienced personnel. Therefore, the Board recommends that all junior and senior officers be required to study naval law and if practicable attend the School of Naval Justice at Port Hueneme, California. All court members should have had at least two years in the service before becoming eligible to sit as court members in wartime as well as in time of peace. Experience for prospective court members could be obtained by requiring officers to sit in on a prescribed number of trials before being eligible for appointment to a court.

The Board believes that the inclusion of enlisted men on Court-Martial Boards would be against the best interests of enlisted men; but in view of the recent willingness of the Army to allow them to sit on Army courts, and the widespread public criticism of this feature of the court-martial system, the Board suggests that this problem should be given further study. If permitted, the Secretary should insist on these minimum safeguards.

1. Enlisted men used on courts should have a high school education and two years of service; and,
2. It should be optional and not compulsory upon an enlisted man to elect to be tried by a court composed in part of enlisted men; and,
3. If used, the percentage of the court composed of enlisted men should be limited to a full minority.

The efficiency of a legal system requires that expert advice on legal problems arising during a trial be available to avoid prejudicial errors and to cut down the number of reversals on review. The Board feels that this advice could best be obtained by assigning a highly trained Judge Advocate to each General Court-Martial and, when practicable, to each Summary Court-Martial. This contemplates the formation of a group of Judge Advocate Specialists from which would be selected an officer qualified by the Judge Advocate General and subject to his supervision and control rather than that of the convening authority. His instructions on legal matters should be made in open court and set forth in the record. He would advise the court, but he would have no right to vote. His rulings on the admissibility of evidence and on interlocutory questions should be binding on the court.

To insure a fair and adequate trial, the Judge Advocate General should provide a panel of qualified naval lawyers to act as prosecuting and defense counsel from this group of Judge Advocate Specialists. They should be responsible to the Judge Advocate General insofar as the performance of their duties in this capacity is concerned. It should be a part of the duty of the defense counsel to attach to the record of each case a brief or appeal raising such legal points as he deems appropriate or a statement over his signature that in his judgment no such brief is necessary. We owe the same duty of protecting the rights of naval personnel as that accorded enemy defendants during the War Crimes Trials. In those cases defense counsel, themselves military personnel, took every step to present the full case of the accused to the United States Supreme

Court for final adjudication.

SECTION V

Considerable time and effort can be saved by a thorough, unbiased pre-trial investigation. The following recommendations are made to insure that the emphasis during the pre-trial investigation be placed on the fair determination of a probable cause for prosecution rather than on the building up of a case for the prosecution.

The commanding officer should appoint a qualified officer to investigate the charges. When possible this officer should have been specially trained for such duties. The accused should have the advice of counsel to help him make any statements, cross-examine any witnesses, and to present witnesses in his own behalf. Pre-trial psychiatric examination, whenever practicable, should be encouraged by departmental policy to dispose of the issue of sanity at the outset by indicating the case in which such defense is apt to be raised and thereby eliminating unnecessary trials. The results of this examination would also be of great assistance to the convening authority in making proper disposition of the charges.

The investigating officer should submit a written report summarizing the investigation along with his recommendation to the convening authority. If, later, the charges and specifications are materially changed, a new investigation should be ordered.

Although the number of cases referred to General Court-Martial by the Navy during the war compares very favorably with the Army rate, they could be substantially reduced without impairing discipline by eliminating

cases involving relatively minor offenses. These cases are referred to General Court-Martial rather than inferior courts because of the limitations on the sentencing power of the Summary Court-Martial, and because of the limitation on the discretion of the convening authority by the declared policy of the Department. Therefore, the Board recommends that the Advisory Council study this problem and consider a substantial increase in the sentencing power of the Summary Court-Martial so that only the most serious charges need be referred to trial by General Court-Martial.

Also the Advisory Council should consider enlarging the discretion of the convening authority in disposing of charges, for to categorize all offenses and to prescribe their disposition in advance without regard to varying factors of age, education, civilian background, previous record, or other mitigating circumstances is an archaic approach to law enforcement. There is a special need for a clarification and re-emphasis of the present department policy that cases should not be referred to trial by General Court-Martial unless they can be disposed of in no other manner consistent with the requirements of discipline.

Although the interval between the return of the accused to naval control and the time of trial was substantially reduced by the decentralization recommended by the First Ballantine Report and enacted in Article 38 of the Articles for the Government of the Navy, the Board has noticed that in a number of specific cases which it reviewed the time delay was excessive. The failure of the accused's service record to arrive on time is a large contributing factor to this delay. A provision for the

making of duly authenticated extracts at the time the accused's records are forwarded to Washington upon his initial absence would cut down the delay when the accused is tried at his own station. This has worked successfully in the Army Court-Martial system.

While delay is to be avoided, any speed which prejudices the rights of the accused must be discouraged. The accused should be given a reasonable time to prepare his case, and ample time should be taken for a thorough pre-trial investigation. Therefore, the Board recommends for study by the Advisory Council the adoption in Rules of Procedure or Naval Courts and Boards provisions to the effect that:

1. Upon arrest, complaint be filed or investigation commenced within 24 hours.
2. The investigation be completed within 72 hours when practicable.
3. Report of investigation be forwarded to convening authority within 8 days of arrest.
4. The accused be granted 5 days between service of charges and trial.

SECTION VI

The procedure on trial has been considered under numerous subtopics in the report. The first of these is the subject of challenges. The Board believes that a provision for challenging, substantially as contained in Rule 5 of the McGuire Rules, should be adopted in the Rules of

Procedure. The grounds for challenges are substantially the same as are presently available except that each challenge is to be determined by the judge advocate and the inference is that the judge advocate is not subject to challenge. The Board also suggests that the Advisory Council study the following problems: First, who should pass on challenges -- the Judge Advocate or the Court; Second, the feasibility of peremptory challenges; Third, the right to petition for disqualification of the Judge Advocate, and if allowed, who should pass on the petition.

The provisions for administering the oath to the court should provide that oaths administered at the first session of the court be applicable to all subsequent trials unless the personnel of the court or the judge advocate be changed. The present practice of administering oaths before each trial is time consuming without serving any useful purpose, so long as the right of each accused to challenge is preserved.

The Board recommends that the Advisory Council consider changing the procedure of accepting a plea of guilty so that such a plea would not be accepted in the following instances: When the death sentence may be imposed, when the accused has not consulted counsel, or when the Judge Advocate has not explained to the accused the meaning and effect of such a plea. The Board does not believe that the present warning to the accused that "...he thereby precludes himself from the benefits of a regular defense" goes far enough to insure an understanding of the ramifications and full effect of such a plea. The Board also believes that the Judge Advocate is the logical person to rule on the acceptance of a plea of guilty

since this is essentially a legal matter.

The Board was handicapped in its review by the brevity of the record in cases with a plea of guilty. The record was found especially inadequate when subsequent protestation of innocence was made by the accused. To remedy this the Board recommends that the Advisory Council consider including in the record of guilty cases, first, the complainant's testimony taken under oath before sentence, and second, the pre-trial report of investigation. The defense counsel should have an opportunity to object to the inclusion of the pre-trial report of investigation, in whole or in part, as prejudicial to the accused or for any other reason.

Where the testimony of a civilian witness is essential in a trial by Naval Court-Martial, injustice may result because the court has no power to compel the attendance of civilian witnesses. Under the present law a subpoena to a civilian witness to appear and testify before any Summary Court-Martial is a mere request. A General Court-Martial can only compel attendance of civilian witnesses served in the same state that the court sits. Therefore, the Board recommends that compulsory process be extended throughout the United States and the power to punish for contempt be extended to General and Summary Courts-Martial and to all Naval Courts of Inquiry. Failure to comply when served with process should be punishable as a misdemeanor. The Judge Advocate should be authorized to transport at government expense witnesses for the defense where the defendant is without means.

In order to avoid unnecessary delays during trial, the Board recommends that rulings on evidence and interlocutory questions be made

in open court, and that the court be closed only for deliberation on findings and sentence and when deemed necessary by the senior member.

The Board believes it is unrealistic and illogical to allow the accused to make unsworn statements on trial without being subject to cross-examination, and then to require sworn statements in extenuation or mitigation after the findings subject to cross-examination. Therefore, the Board recommends that these rules be reconsidered.

The Board recommends that the Advisory Council consider a provision granting the accused the right at the close of the prosecution's case to make a motion for a finding of not guilty as to any or all of the charges and specifications. The Judge Advocate would rule on the motion subject to reversal by a majority vote of the court. This would result in saving the time of all concerned where the evidence was legally insufficient to support any charge or specification which such motion has been directed.

Although the Board is convinced that Naval Courts have administered true justice in their vote on findings, it is important that everyone in the service, and the general public as well, be convinced that they do so. Consequently, the Advisory Council should consider the following changes to insure the continuance of just findings: First, a provision for a secret ballot in voting rather than the signed ballot; second, the desirability of a two-thirds vote to convict and a unanimous vote when death is the penalty; and third, the announcement of the findings in open court.

In order to determine a fair sentence after conviction, it is important to have as much information about the accused's previous convictions

as is practicable from an administrative viewpoint. It is just as unfair to give a persistent law breaker a light sentence because of ignorance of his past anti-social conduct, as to give an excessively long sentence to a first offender. The Board recommends that the Advisory Council consider the practicability of admitting in evidence, after the finding, convictions of prior enlistments and also matters in extenuation and mitigation which the accused may lay before the court, for the purposes of fixing a fair sentence.

The importance of psychiatry in the field of criminology is generally conceded. Therefore, the Board believes that the Advisory Council should study the practicability of requiring a psychiatric report after the findings of the General Court-Martial but before the sentence is determined by the court.

Statistics indicate that under the present system the court's function of imposing a sentence is reduced to a mere formality, while actually the sentence is fixed by the convening authority who neither saw nor heard any of the witnesses or the accused. The Board does not believe that this is conducive to fair and adequate sentences, and recommends that the courts rather than the convening authority be given discretion to fix a fair sentence taking into account matters of aggravation, mitigation, and extenuation.

The Board has considered the proposal that the sentencing power be given to the Judge Advocate rather than the court, thus making the court-martial resemble the civilian criminal courts. After a discussion of the advantages and disadvantages the Board believes the proposal represents

a radical break from tradition without sufficiently compelling reasons to justify the change. Nevertheless, the matter does deserve careful consideration. In any event the advice of the Judge Advocate, because of his unique position, should be very helpful to the court in arriving at a fair sentence in accordance with departmental policies.

The court should be free, when feasible to do so, to postpone sentence for a reasonable time after conviction for the purpose of studying the various factors involved in reaching a fair sentence. It is suggested that the findings be announced immediately after trial and the sentence announced immediately after the court has agreed upon it. The Board also suggests that some credit should be given in determining the sentence, for the time spent in confinement by the accused during and awaiting trial.

SECTION VII

The Board believes that the greatest defects in the Naval Court-Martial system exist in the procedure for review of the court proceedings. In the existing procedure the review is made by the same officer who convened the court and referred the case to trial. Since the accused rarely submits a brief and oral argument is not permitted, the convening authority will find it difficult to avoid the effect of an unconscious bias in favor of upholding a conviction. It is inevitable that he has formed a prior opinion. The Board does not believe that subsequent departmental review would overcome the presumption of correctness and regularity of the initial

proceedings. Therefore, the remedy is to correct defects in the initial review. The Board recommends that control of the convening authority over the court-martial cease upon reference of charges to trial, thus placing the responsibility upon the court itself, whose sentence would be self-executory subject only to departmental review. The sentence of an inferior court-martial would be subject to review by the next higher authority other than the convening authority. These recommendations would bring a simpler and more expeditious procedure without impairing discipline or the rights of the accused. It would eliminate the patent inequity of the same authority passing upon the pre-trial charges and the review.

Every record is reviewed as to legality in the Office of the Judge Advocate General and as to disciplinary features in the Bureau of Naval Personnel. The review in the Judge Advocate's Office tends to be merely routine for the accused rarely submits a brief. The internal organization of the Judge Advocate's Office does not permit a uniform and adequate review. In most cases, only if the initial reviewer believes the case legally insufficient will it be subject to review by superior officers and, if found such by them, to review by the Board of Review. Thus, one case might receive the full attention and consideration of several officers plus an exhaustive study by the Board of Review, while another involving an equally difficult question of law might be passed on the recommendation of a single officer, who failed to notice the point involved.

The Bureau of Naval Personnel, although well equipped to pass upon sentences from a purely disciplinary standpoint, lacks the staff and resources to view each sentence giving due regard to environment, education, training, and medical and psychiatric conditions, all of which are involved in a fair sentence. Justice will suffer unless sentences are also regarded as highly punitive in nature.

When the case is sent to the Secretary of the Navy for review, it is not accompanied by any comprehensive written report and he has no one central agency to assist him in his review.

The various studies on Naval Court-Martial Procedure have generally recognized these defects and have recommended provisions for a statutory board or boards to review all convictions by Naval Court-Martials. After studying these proposals, the Board suggests the creation of two statutory Boards of Review -- the Board of Legal Review to test the legal sufficiency of all convictions by general court-martial and those of inferior courts appealed to it -- and the Sentence Review Board to review all sentences of death, dismissal, discharge, confinement for more than a year, or any other case appealed to it.

The Board of Legal Review would be composed of three members with a civilian as the presiding officer appointed by the president for a term of six years. Its decisions would be final, subject to the Secretary's power to set aside a conviction. After the legal sufficiency has been established, the case would proceed to the Sentence Review Board, composed of a representative of the Bureau of Naval Personnel, a Marine officer, a

Naval line officer, a psychiatrist, a civilian penologist, and a civilian as presiding officer appointed by the President for a term of six years. The decisions of this Board would be advisory to the Secretary, providing him with a complete record on review. It would be unnecessary for him to seek further advice. The Board does not contemplate change in the power of the President and the Secretary to exercise clemency.

The details of relationship of these boards to the Judge Advocate General's Office is a matter of administration to be more effectively worked out by the Judge Advocate General. He is the head of Naval Justice and responsible for its administration. He would be responsible for the preparation of cases for review by the boards and for the selection of competent Naval lawyers to argue both sides of cases before the Boards of Review. The Board suggests that the Secretary create an office of Defense Counsel with a chief Defense Counsel to follow all cases on review, and if he feels that the Board of Legal Review has made a wrong decision, he should effect an appeal to the Supreme Court.

Civil review from the Board of Legal Review should be direct to the Supreme Court of the United States. With this system of review, collateral attack by lower civilian courts in the form of habeas corpus proceedings would not be justified; the Navy will have provided greater protection for the accused than is found in an civilian jurisdiction.

SECTION VIII

The last part of the report, starting with Section VIII and ending with Section XI, survey the following general subjects: Jurisdiction,

Offenses and Punishments, Discharges, and Officer Cases.

As to jurisdiction, there is general agreement that the present Articles for the Government of the Navy covering this subject need clarification. While the Board concurs generally with the recommendations which have been made by the McGuire Committee, by Commodore White, and by the Draft Articles of The Judge Advocate General, it submits however, certain suggestions which it believes may be of aid in a detailed consideration of the problem and in the drafting of corrective legislation.

Statutory provisions governing persons subject to Naval Court-Martial jurisdiction are not only scattered throughout the Articles for the Government of the Navy, but are also found in other Titles of the U.S. Code. Certain classes of persons who should logically be within the jurisdiction of the Navy Court-Martial are nowhere mentioned. The Board approves of the suggested Drafts which set forth the law relating to jurisdiction over the person in a single article, and the Board believes that all other provisions for jurisdiction should be eliminated.

There is no territorial limitation on the jurisdiction of Naval Courts except in the case of murder. A person subject to the Articles for the Government of the Navy can only be tried by court-martial for murder if the offense has been committed without the territorial jurisdiction of any particular State or the District of Columbia. The Board is convinced, and sets forth examples to show, that jurisdictional limitations, however carefully they may be worded, often produce undesirable and unforeseen results. It recommends that the Advisory Council consider removing

all statutory limitations on jurisdiction as to place, and, in lieu thereof, provide in Naval Courts and Boards for reference of certain offenses to civil courts when authorized by the Secretary of the Navy. This would effectuate departmental policy without operating as a jurisdictional limitation.

The Board approves of the proposed article of the McGuire Committee or the article proposed by Commodore White which abolishes the defense of the Statute of Limitations in the cases of wartime desertion, murder, and mutiny and applies a two year statute to peace time desertion without mention of the term of enlistment. These proposals would cure the anomalous situation which exists in the present articles which provide that in the case of peace time desertion the period of limitation does not begin until the end of the offender's term of enlistment, while in the case of wartime desertion, the statute begins to run from the time the offense was committed.

Under the present law the statute of limitations can be tolled by issuing an order for trial whether the accused is present or not. The purpose of the statute is defeated by this device. The various proposals which others have made would not effect a material change. The Advisory Council should consider changing the present article to conform to the Army rule which provides that the period is to run until the accused is arraigned -- this means that the accused must be physically present. The need for a device to toll the period of limitation would be eliminated by abolishing the defense of the statute of limitations in the cases of war time desertion, mutiny, and murder.

Under the present law, if an act constitutes an offense against the law of a state or foreign country, as well as against the Articles for the Government of the Navy, the offender may be tried and convicted by both the Naval Court and the courts of the State or foreign country. Technically this does not constitute double jeopardy, but both policy and justice are against a double punishment. The Board recommends clarification of departmental policy barring trial by court-martial after a conviction or an acquittal by a civilian court. The device of labeling the offense by a different name should not be allowed to defeat the basic intent of this policy.

The Board believes it is unfair to impose disciplinary punishment on an offender and then proceed to try him by court-martial; therefore, it recommends that the Advisory Council consider a proposal that punishment imposed by a Commanding Officer be a bar to trial by court-martial for the same offense.

SECTION IX

The present Articles fail to specify the various civil offenses and many of the military offenses for which persons subject to the Articles are answerable. Also the provisions which specify punishments for various offenses are scattered throughout the articles in a confusing manner. Therefore, the Board recommends that all punitive provisions be grouped together according to the punishment authorized. All offenses both civil and military, including offenses against the customs of the service, should be specifically listed.

A general clause is necessary to cover any offenses which have

been omitted, but it should be more specific than the present vague phraseology of Article 22. In its stead, a subdivision should specifically state that offenses against the Articles include: (1) violations of the criminal laws, or of the treaties or conventions of the United States, (2) violations of the regulations and customs of the Naval Service, and (3) violations of the laws of war. Certain general provisions for offenses punishable at the discretion of the court-martial should be included, such as a provision prohibiting conduct to the prejudice of good order and discipline.

The offenses specified should not be defined by statute, but instead, this should be done in Naval Courts and Boards. In defining offenses, clearer tests for distinguishing between desertion and unauthorized absence offenses should be established. The present tests place too much emphasis on the length of absence. If an arbitrary length of absence is used to distinguish the offenses, such a great difference in the punishments authorized is not justified.

Where the Articles provide for punishment at the discretion of the Courts-Martial, maximum limitations on punishments are prescribed by the President during times of peace. In time of war the punishment is left to the discretion of the court as guided by departmental policy. The various committees proposing changes to the Article for the Government of the Navy have provided that punishment shall not exceed such limits as the President may from time to time prescribe both in war and peace. The Board concurs in these proposals but suggests that such a schedule include only

the more serious offenses and that punishment for offenses against state laws should not be limited by the laws of that particular state. The Articles for the Government of the Navy do not make any sentence mandatory and the Board believes this is more desirable than the opposite Army practice.

SECTION X

Under present Departmental Policy sentences of general and summary courts-martial can be mitigated by the convening or reviewing authority and the offender placed on probation for a period of time. After an offender is restored to duty on probation, his commanding officer may terminate the probation, which automatically restores the sentence of the court-martial. The Board was severely handicapped in its review of cases involving termination of probation because there was no adequate record of the termination proceedings. The Board disagrees with any proposal which would take away the power of the commanding officer to terminate probation; but the Board does not believe that this should have the effect of automatically reinstating the sentence of the court-martial, especially where this involves the serious penalty of a discharge from the service. The Board believes that there should be a sufficient record for review which would require written statements of witnesses, of the offender, and the investigating officer with a written order by the commanding officer setting forth his reasons for the termination. This would prevent the alteration or fabrication of statements at a later time before a reviewing authority when their contradiction would be hard to prove.

The Board has experienced great difficulty in understanding the legal effect of the various Naval discharges, and consequently has hesitated to recommend immediate discharge in many cases, or a change in the form of discharge in others. The Board was unable to find any practical distinction between a dishonorable discharge and a bad conduct discharge resulting from conviction by a general court-martial. Both discharges deprive the recipient of public employment and benefits under the G.I. Bill, but neither results in loss of citizenship except in desertion cases. Because the distinctions between the various naval discharges are little understood by the general public and, apparently, by the members of the naval service, and because there is no place, which this Board has been able to discover, where the legal effects of the various discharges are described in detail, the Board recommends that the Advisory Council make a study of the whole subject of discharges, both disciplinary and administrative. The Board also believes that the Advisory Council should re-consider the wisdom of permitting a summary court-martial to give such a severe penalty as a bad conduct discharge.

SECTION XI

One of the most frequent criticisms of the Army and Navy court-martial systems is that there is a double standard of justice, one for enlisted men and one for officers. Of the 2115 cases reviewed by the Board only 3 cases were those of officers; therefore, it is not possible for the Board to draw any conclusions as to alleged disparity in sentences from its review experience. However, the Board does believe there is an urgent need for a study to determine whether the criticism is warranted.

OUTLINE OF

REPORT AND RECOMMENDATIONS OF THE

GENERAL COURT MARTIAL SENTENCE REVIEW BOARD

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INTRODUCTION

By amendment to the precept convening the General Court-Martial Sentence Review Board, dated 24 June 1946, the Board was directed to submit a report of the cases considered and the sentences reviewed by it, and to include in its report such recommendations as it deemed appropriate with respect to court-martial procedures and policies. In the form of an Interim Report, the Board has heretofore submitted to the Secretary an analytical study of the cases reviewed by the Board to 1 July 1946. That report described the policy of the Board with regard to its treatment of cases and showed the results obtained. A final analytical report of all the cases considered by the Board accompanies this report.

The report here presented by the Board is submitted pursuant to its secondary mission, which is to make appropriate recommendations with respect to court-martial procedures and policies. For the purpose of preparing this report, the Board authorized a special section of its staff, under the supervision of the President and Vice-President of the Board, to make a study of the cases reviewed by it and to conduct research work on problems suggested by the Board with a view to making appropriate recommendations concerning the naval court-martial system. In making the study, this staff has carefully reviewed the prior reports of the Ballantine Committee, the McGuire Committee, the proposal made by the Judge Advocate General, the proposal by Commodore White for amendment

of the Articles for the Government of the Navy, various studies made by the Army in connection with its court-martial system, and, so far as information has been available to it, the court-martial systems of Great Britain, France, Germany, Russia, and other countries.

The attention of the Board has been primarily directed to the review of sentences in specific cases coming before it. With regard to the court-martial system in general, the Board has not held hearings, interviewed witnesses, or taken some of the other steps which would be necessary for an exhaustive study of the naval court-martial system. The Board feels, however, that its review of a large number of sentences imposed by general courts-martial during the war, including of necessity a study of the record in each case, has placed it in an unusual position to view the court-martial system as a whole, both from the point of view of legal theory and of practical results.

The Board has concluded from its study that a thorough re-examination and comprehensive reform of the naval court-martial system is needed. The McGuire and Ballantine Reports have pointed the way toward such reform.

The Board makes no claim, however, that this report is a complete critique of the court-martial system or that it furnished the basis for a comprehensive revision of the Articles for the Government of the Navy. While it is as complete a study as time permitted, the Board believes that a complete examination of the court-martial system should be undertaken. It is the Board's recommendation that such examination can best be made by a permanent Advisory Committee. The Board suggests that the Secretary appoint such a committee to consider the instant study and thereafter to

study continuously the operation of the naval court-martial system and make recommendations from time to time for changes on the basis of their study.

Many states have created such advisory bodies to aid their civil courts and their performance has been highly satisfactory.* Mr. Justice Benjamin L. Cardozo, the principal advocate of their creation, in a celebrated law review article, explains the reason for their existence:

> "The duty must be cast on some man or group of men to watch the law in action, observe the manner of its functioning, and report the changes needed when function is deranged..... Recommendations would come with much greater authority, would command more general acquiescence on the part of legislative bodies, if those who made them were charged with the responsibilities of office.....Such a board would not only observe for itself the workings of the law as administered day by day. It would enlighten itself constantly through all available sources of guidance and instruction; through consultation with scholars; through study of the law reviews, the journals of social science, the publications of the learned generally; and through investigation of remedies and methods in other jurisdictions, foreign and domestic.....Reforms that now get themselves made by chance or after long and vexatious agitation, will have the assurance of considerate and speedy hearing. Scattered and uncoordinated forces will have a rallying point and focus." **

As a result of the recommendations of Judge Cardozo and other prominent members of the legal profession, the New York State Law Revision Commission was created to advise the New York Legislature on suggested changes in substantive law and the Judicial Council was created to advise that legislature on matters of procedure.***

Both the Law Revision Commission and the Judicial Council make exhaustive studies each year and annually report to the legislature suggested

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* Sunderland, The Judicial Council as an Aid to the Administration of Justice, (1941) Am. Pol. Sci. Rev. 933.

** Cardozo, A Ministry of Justice (1921) 35 Harv. L. Rev. 113, 114-125.

*** For a detailed study of the purpose and objective of these New York agencies, see: Report of the Commission on the Administration of Justice in New York State (1934), Legislative Document No. 50, pp. 36 and 53; Sass, The Judicial Council of the State of New York; its Objectives, Methods, and Accomplishments (1941) 35 Am. Pol. Sci. Rev. 933.

changes of substantive law and procedure. In addition, the Judicial Council makes a statistical analysis of cases passing through each of the New York courts. The creation of these agencies has had a salutory effect on the development of New York law,* and many other states have created similar bodies to perform this necessary function.

The recent revision of the procedural law of the federal courts, both civil and criminal, has been similarly accomplished with the aid of such an advisory committee appointed by the Supreme Court.**

A similar board established by the Navy could recommend changes in the court-martial system from time to time, based on its observation of the practicability and workability of the court-martial system in operation and based on its appraisal of current trends in civilian criminology. If the legislatures of New York and other states and the Supreme Court of the United States have found such advisory bodies helpful, there is every reason to believe that the Secretary of the Navy and the Congress would find such an advisory committee of great value in passing on proposals for the reform of the naval court-martial system.

The composition of such an Advisory Committee with respect to the naval court-martial system, warrants careful study. In general, the composition can be patterned after the above-mentioned successful advisory bodies. It would seem wise to have membership made up partly of persons outside the regular navy service, so as to bring to their task an independent outside view, and of course, a representative of the Judge Advocate General,

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* See Saxe, The Renascence of Civil Practice in New York (1938), 7 Fordham L. Rev. 45.

** The Advisory Committee was appointed by orders of the court dated June 3, 1935 (295 U.S. 774) and February 17, 1936 (297 U.S. 731) pursuant to S. 2 of the Act of June 19, 1934, c. 651, 48 Stat. 1064. It was designated as a continuing Advisory Committee to advise the court with respect to proposed amendments or additions to the Rules of Civil Procedure for the District Courts of the United States on January 5, 1942 (308 U.S. 645).

a representative of the Bureau of Naval Personnel, and at least one officer with general line experience. It would also be advisable to have on such committee both a penologist and a psychiatrist.

It is believed that such a Board will serve a twofold purpose:

1. It will be in a position to make a complete examination of the naval court-martial system;
2. It will provide a means of keeping the naval court-martial system up-to-date and obviate the necessity of a periodic comprehensive reform every twenty-five or fifty years.

The fact that some of the suggestions made herein are of a sweeping nature should not be regarded as an indictment of the naval court-martial system. The Board believes that the system has functioned well, and that an honest and conscientious effort has been made to secure justice to all. This is demonstrated by the Board's recommendations on the sentences reviewed by it. In approximately 55% of all the cases, the Board has approved the existing sentence. Of the remainder, the Board has recommended restoration on probation in about a third of the cases, so that in only about 30% of the cases has the Board recommended modification of the sentence as such. In less than 1% of the cases reviewed by it has the Board raised a question as to the legality of the conviction. But no human institution is static, none can exist unchanged over a long period of time, especially in a dynamic society such as ours. The Articles for the Government of the Navy have not been substantially changed since the Civil War, and there has been no real change since the original articles were copied from those used in the British Navy of Cromwell's time. Meanwhile this country has fought two major wars, has witnessed a revolution in technology and in the art of warfare, has seen a tremendous expansion in

its armed services, and has undergone many profound and far-reaching changes in its population, industry, institutions, and mode of life.

At the same time, it must be remembered that the court-martial deals primarily with matters of human conduct. Human nature does not change, and the problems which confront our generation in this field are essentailly the same as those of earlier generations. Hence the innate tendency of the law to be conservative. But as new techniques and new approaches arise, in law and justice as elsewhere, changes and reforms often become necessary, and the need therefor cannot be ignored.

The Board is constrained to emphasize one feature of the court-martial system which considers most important, i.e., that feature concerning personnel. A system of jurisprudence and justice cannot operate efficiently without trained personnel. The present system of court-martial with experienced lawyers would undoubtedly be superior to any ideal system which might be proposed but not properly staffed. The Board notes that the second Ballantine Report recommends a staff of approximately 400 lawyers. Of this number not more than 135 could be assigned to court-martial work. Since it is estimated that there will be approximately 900 general courts-martial and summary courts-martial per month, it is submitted that the minimum number of lawyers assigned to court-martial work be 300. This would raise the Ballantine Committee estimate to a legal staff of at least 600. The Board unreservedly recommends that this number be provided at once.

In general, the suggestions and recommendations which follow are based upon the following considerations:

1. The Navy is no longer a small body of professional, volunteer sailors. During the war it has expanded to a tremendous force, including

large numbers of drafted civilians. It promises to continue large, even though restored to a volunteer basis.

2. The Navy is no longer a body of general line officers and men, qualified to do any and all tasks assigned. It has become, to a great extent, a Navy of specialists, in technology, ordnance, medicine and hundreds of other fields. It can no longer be expected that its legal affairs can be handled competently except by qualified, full-time experts.

3. The court-martial, especially the general court-martial, can no longer be regarded as a mere instrument for the enforcement of discipline. While it is this, it is also much more; it is a criminal court, enforcing a penal code, and applying highly punitive sanctions. Offenses against naval law, warranting trail by court-martial, are more than mere infractions of discipline, just as serious offenses against the civil law are more than mere violations of civil order and regularity.

There is no desire, on the part of this Board or its staff, to interfere with Naval discipline, or to impair the effectiveness of the Navy as a fighting force. On the contrary, the Board believes, and it has so recommended, that the disciplinary powers of commanders, and their discretionary power to dispose of charges prior to trial should be substantially increased. But by the same token, the Board believes that when a case is serious enough to warrant trial by court-martial, especially general court-martial, considerations of law and justice become paramount. The Board believes that this can be fully recognized, and that discipline will not suffer thereby. On the contrary, it will be enhanced through the realization by all concerned that nothing short of full justice is being accomplished in every case.

4. It goes without saying that no reform is worth anything if it will not work. The life of the Navy centers around the ship. The Navy's vessels are scattered all over the world. Some are isolated; some grouped together in task forces and divisions. But essentially each is a self-contained unit, often out of touch with the outside world for months at a time. The naval court-martial system must be flexible enough so that it will work everywhere, on the smallest vessel as well as on the largest shore installation.

5. Considerations relating to possible unification of the armed services have been eschewed. The assumption has been that the Navy will, in any case, continue to be governed by its own law and will continue to have its own system of courts. True, an attempt has been made to suggest reconciliation of minor differences in law and procedure as between the two services, where no substantial reason for such difference has been perceived. Moreover, if any degree of unification is deemed desirable, it is believed that most of the Board's proposals can be readily coordinated with any proposals for reform of the Army court-martial system. In this connection, it is strongly recommended that the board which is appointed to make a review of the naval court-martial system cooperate to the fullest extent possible with any agencies examining the Army system.

In presenting this report, the following general outline has been employed:

1. Sections I, II, and III are a preliminary survey of the court-martial system generally, its historical genesis, its underlying theories, and proposals for reform thereof.

2. Sections IV, V, VI and VII present a detailed survey of court-martial procedure, commencing with appointment of courts and pre-trial procedure, and ending with a final review of the proceedings, findings and sentence, and subsequent clemency review.

3. Sections VIII, IX and X and XI present a survey of jurisdiction, offenses, punishments, discharges and officer cases.

For convenience, each section and the general topics have been further broken down into sections and sub-sections. In each sub-section the discussion includes:

(a) A description of present procedure;

(b) An analysis of proposals for change of this procedure;

(c) A description of the comparable Army procedure;

(d) The analysis of various proposals which have been made for the modification of the Army procedure;

(e) To the extent of information available, a description of comparable procedure in other countries, the court-martial systems of others, with particular emphasis on Great Britain;

(f) Recommendations and suggestions.

SECTION I

HISTORY OF THE COURT-MARTIAL SYSTEM

Introduction:

Historians have traced the origin of military law[1] to the armies of the Greeks and the Romans. The latter recognized many of the military offenses known to present-day law, such as desertion and disobedience of orders, and some of the punishments which were imposed by them, for example, dishonorable discharge and hard labor, have survived to our own day. The early Germans are known to have administered military justice by means of summary punishment, imposed by commanders through the priests. The first European codes, such as the Salic code of the fifth century, prescribed systems of military as well as civil law.

Our own military and naval codes derive ultimately from Greco-Roman sources, but more immediately from Western European procedures, as developed in England and on the continent. Continental influence has been strong, and as a consequence our military law has always borne many striking resemblances to the civil law, as contrasted with the Anglo-American common law.[2] This is still true, in spite of the fact that many rules and practices

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1. The term is used here in the broad sense, to include both military and naval law.

2. For an interesting discussion of this, see Page, A Study in Comparative Law, (1919) 32 Harv. L. Rev. 349.

have been brought over from the common law, such as the presumption of innocence, the privilege against self-incrimination, and the common-law rules of evidence. But, whatever the continental influence has been on military and naval law generally, our own codes derive directly from the British. Accordingly, the history of the British systems of military and naval law, and of the American systems based thereon, will be outlined briefly.

2. British Military (Army) Law:

In early times, military law existed in England only in time of war. Upon the outbreak of war, ordinances for the government of the troops, or Articles of War, were issued by the Crown, or by the commander-in-chief of the army as the representative of the Crown. Upon the conclusion of peace, these articles ceased to operate. Among the earliest of such articles was the Ordinance of Richard I, of 1190,[3] which, since it "was chiefly meant to prevent disputes between the soldiers and sailors in their voyage to the holy land,"[4] may be regarded as the ancestor of both our military and our naval codes. The earliest complete military code is found in the "Statutes, Ordonnances and Customs" of Richard II, of 1385.[5]

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3. Reprinted in Winthrop, Military Law and Precedents, (1895 ed., 1920 reprint), 903.

4. 2 Grose, History of the English Army, (63).

5. Reprinted in Winthrop, op. cit., supra note 3, at 904.

Subsequent ordinances were issued by later sovereigns, and these in turn were succeeded by more extensive precepts promulgated by the Crown, or by army commanders under the authority of the Crown, until the period of the English Civil War. During the Civil War one set of articles was promulgated in 1640 under authority of the Crown by the Royalist General, the Earl of Northumberland, another in 1642 with the sanction of Parliament by the Earl of Essex as commander of the Parliamentary forces. After the Civil War, Articles of War were promulgated by Charles II and James IV in 1662-3, 1666, 1672, 1685, and 1686.[6]

The British Articles of War published after 1639 were largely modeled after the Code of Gustavus Adolphus of 1621,[7] which in turn was based upon the penal code of Emperor Charles V, of 1532. Since the present British and American codes are traceable directly to the Articles of War of the Stuarts, notably those of Charles II of 1672 (the Prince Rupert Articles), and of James II of 1686, the Code of Gustavus Adolphus has had a profound influence on our own military and naval law.

The power to promulgate Articles of War under the direct authority of the Crown continued until 1803. However, this method of administering military law was gradually supplanted by the Mutiny Acts, the first of which was passed in 1689. With the passage of these acts, British military law

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6. The Articles of War of James II (1686) are reprinted in Winthrop, op. cit. supra, note 3, at 920.

7. Id. at 907.

for the first time assumed the form of statute, as distinguished from royal or executive decree.

For occasion of the passage of the first Mutiny Act was the famous Ipswich Mutiny of 1689. The background of this was as follows: As we have seen, the early British Articles of War had legal effect only in time of war, and even then the military courts did not have jurisdiction over civilians.[8] While the British sovereigns did not always observe these limitations,[9] Parliament and people were extremely jealous of any extensions of the royal power, and protested against exercise of peace-time jurisdiction by military courts in the Petition of Right, of 1628, which was approved by the Crown. In the Bill of Rights (1688) maintenance of a standing army in time of peace, without consent of Parliament, was declared illegal. The effect of these two measures was to abolish standing armies, recruited by the Crown without Parliamentary consent, and to prohibit the enforcement of military of martial law by military courts in time of peace, and as against civilians even in time of war. Then in 1689 occurred the Ipswich Mutiny. Certain troops, loyal to the cause of the Stuarts, refused to obey an order of William III to embark for Holland, but instead marched in the opposite direction. Under existing law, as recognized and declared in the Petition

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8. 1 Hale, History of the Common Law of England (Runnington's ed. 1820), 55.

9. See Maitland, Constitutional History of England (1911), 267; 1 Holdsworth, History of English Law (3d ed. 1922) 575.

of Right and the Bill of Rights, the mutineers could be tried only at the assizes by a petty jury, upon indictment by a grand jury. Proceedings were cumbersome, conviction was uncertain, and punishment, if it came at all, was administered by agencies outside the armed forces.

King and Parliament were agreed, after this experience, that military discipline could not be adequately enforced through the civil tribunals, and that a stringent military code was needed, administered by the authority responsible for military operations. The result was the enactment of the Mutiny Act of 1689.[10] This act, to be in force for seven months, prescribed the death penalty, or such other punishment as "by a Court-Martial shall be inflicted," for desertion and mutiny, provided for the convening of courts-martial by Their Majesties, or by the General of their Army, and by other officers commissioned to that end, and defined the composition of such courts. Successive Mutiny Acts, with the exception of short intervals, were passed in the years 1690 through 1878.[11]

The Mutiny Acts did not supersede any existing Articles of War, nor did they impair the prerogative of the sovereign to promulgate Articles of War for offenses committed abroad or to prescribe the death penalty therefor. They did, however, preclude infliction of the death penalty for any military

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10. 1 Wm. & Mary, c. 5; Statutes of the Realm, 55. Reprinted in Winthrop, op. cit. supra note 3, at 929.

11. See Hoover, Army Courts-Martial, in Legal Essays in Tribute to Orrin Kip McMurray (1935), 165, at 167-8; Carbaugh, Military Law and Wartime Legislation, (War Dept. 1919), "Historical Note" 1; Winthrop, op. cit. supra note 3 at 8-9; Davis, Treatise on Military Law, 3.

offenses committed at home, except for those specifically designated.[12] During the period from 1689 to 1718 Mutiny Acts were adopted for time of war and allowed to lapse during the brief intervals of peace. Until 1712 the Mutiny Acts did not extend abroad. The principal offenses punishable were mutiny and desertion. However, the nation was at war during most of this period and the troops on active service were governed by special articles issued by the Crown under the royal prerogative.

In 1712, after the Peace of Utrecht, statutory power was given the Crown to promulgate Articles of War for troops in the dominions in time of peace, while at home the Mutiny Acts superseded all articles issued under the royal prerogative. Punishments under the statutory articles issued for the dominions were much more severe than under the Mutiny Act for troops at home. However, upon the outbreak of a domestic rebellion in 1715, the death penalty was restored for the offenses of mutiny, desertion and fraudulent enlistment, committed in Great Britain or Ireland.

During this period there were thus two systems of military law in operation, that established by the Mutiny Acts and the Articles of War issued thereunder, and that established by Articles of War issued under the royal prerogative. Gradually the two systems were combined. The Act of 1718 for the first time had authorized the promulgation of Articles of War operative both in the Kingdom and in the dominions and had provided for courts-martial at home

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12. Winthrop, op. cit. supra note 3, at 20.

and in the dominions. It authorized the death penalty for specified offences and was applicable both in peace and war. But even this Act had no force outside of the United Kingdom and the dominions. Articles of War to govern the armies in foreign countries in time of war were still issued by the Crown under its royal prerogative. It was not until 1803 that the exercise of this prerogative was superseded by statute, and the Mutiny Act extended to authorize the promulgation of Articles of War, effective within or without the Kingdom and the dominions, in peace and in war.

Finally, the step was taken of consolidating the Mutiny Act and the Articles of War issued thereunder into one statute, the Army Discipline and Regulation Act of 1879,[13] which was superseded by the Army Act of 1881.[14] This act remains the basic statute for the government of the British Army.

3. American Military Law:

On 14 June 1775, the second Continental Congress appointed a committee, headed by George Washington, to prepare rules and regulations for the government of the Army. The articles reported by this committee, and adopted by the Congress on 30 June 1775,[15] were copied from the British Articles of 1765,[16] and from the Articles of War which had been adopted in

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13. 42 & 43 Victoria, c. 33.

14. 44 & 45 Victoria, c. 58.

15. Reprinted in Winthrop, op. cit. supra note 3, at 953.

16. Reprinted in Winthrop, id. at 931.

April 1775 by the Provisional Congress of Massachusetts Bay.[17] These Articles were supplanted a year later by the Code of 1776,[18] which was an enlargement, with slight modifications, of the 1775 Code, and followed the British arrangement.

The drafting of the Code of 1776 was largely the work of John Adams. He had explained his approach as follows:

> "There was extant one system of articles of war which had carried two empires to the head of mankind, the Roman and the British; for the British Articles of War were only a literal translation of the Roman. It would be vain for us to seek in our own investions, or the records of warlike nations, for a more complete system of military discipline..... I was, therefore, for reporting the British Articles of War, totidem verbis." 19

Nevertheless, in view of the rigorous character of the British articles, Adams was surprised that they should be adopted without substantial change, as he confessed years later:

> "So undigested were the notions of liberty prevalent among the majority of the members most zealously attached to the public cause, that to this day I scarcely know how it was possible that those articles could have carried. They were adopted, however, and they have governed our armies with little variation to this day." 20

The Articles of 1776 continued in force until after the adoption of the Constitution. Although these Articles were amended from time to time,

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17. Reprinted in Winthrop, id. at 947.

18. Reprinted in Winthrop, id. at 961.

19. 3 Works of John Adams (1851), 68.

20. Id. at 83.

none of the amendments substantially changed the nature or character of the Articles. In 1806 Congress enacted Articles of War,[21] pursuant to the authority conferred upon it by Article I, Section 8 (14), of the Constitution. These Articles were for all practical purposes a reenactment of the existing code.

There was thereafter no formal revision of the Articles of War until 1874,[22] and this was more a rearrangement and clarification of the exisiting code with a few exceptions added, than an actual revision. In 1916 the Articles were completely revised to eliminate obsolete matter and to bring about a more orderly and logical arrangment.[23] It is generally conceded, however, that neither the 1874 Code nor the 1916 Code was radically different in content than the original Code of 1776.

In 1920, following a searching inquiry by Congress into the administration of military justice by the Army during the first World War, the Articles of War were completely revised.[24] Many radical changes were made to meet the objections of those who had criticized the existing code. The Articles of 1920, as amended in 1931, 1937 and 1942, constitute the law of the United States Army today.

4. British Naval Law:

During the Middle Ages, England had no regular navy. In time of war the Crown would create a fleet by impressing merchant vessels. The personnel of such vessels were governed by general maritime law and the ancient customs

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21. Reprinted in Winthrop, op. cit. supra note 3, at p. 976.

22. Reprinted in Winthrop, op. cit. supra note 3, at p. 986.

23. Act of August 29, 1916, 39 Stat. 619.

24. 41 Stat. 787.

and usages of the sea, such as those set forth in the Laws of Oleron and the Consolate del Maro. The first code specifically intended to enforce discipline on naval vessels was the Ordinance of Richard I, of 1190, which is referred to above in the section on the history of British military law. As we have seen, this was intended to apply to soldiers as well as to sailors, and therefore may be regarded as the common ancestor of our military and naval codes.

The first code applicable to the navy as such was the "Black Book of the Admiralty," prepared in 1351.[25] This text outlined the administration of justice "According to the Law and Ancient Customs of the Sea," enumerated offenses, and prescribed punishments, which were severe. Historians regard the "Black Book" as the basis of all subsequent British naval codes.

The British Navy was first established as a permanent organization by Henry VIII, and reached a high state of development under Elizabeth. However, the law of the sea remained as before, with no special code promulgated by the State. Occasionally power was given to an admiral by patent under the great seal to publish ordinances for the good government of the fleet. Many such admiral's codes were promulgated, based largely on existing law and custom. These admiral's codes were the models after which later statutory codes were patterned.

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25. 5 Holdsworth, History of English Law (3d ed. 1922) 125 ff. The Black Book of the Admiralty, ed. by Sir Travers Twiss, was published at London in 1871, with a historical introduction.

The first statute authorizing naval courts-martial appears to have been the "ordinance and Article of Martial Law for the Government of the Navy," enacted by Parliament in 1645.[26] The first statute providing for the general government of the Navy was passed by Parliament in 1649, and subsequently amended in 1652. Known as "Cromwell's Articles," this code merely restated naval law as it had been administered for some time past. Admirals continued to issue supplemental disciplinary codes, but the Articles of Cromwell remained the basic naval law until 1749. In that year Parliament enacted a new code, known as the Articles of 1749, which, however, did not differ greatly from Cromwell's Articles. The Articles of 1749 were in force at the time of the American Revolution and formed the basis for the first American articles.

In 1866 Parliament passed the Naval Discipline Act.[27] Although it has been amended considerably since its first passage, this law has remained the basic British naval code until today. It still retains some of the phraseology found in Cromwell's Articles, and still authorizes punishments "according to the laws and customs used at sea."

5. American Naval Law:

As stated above, the first American naval articles were based upon the British Articles of 1749. As was the case with the first American Articles of War, these articles were compiled by John Adams, who took from the British

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26. Lovette, Naval Customs, Traditions and Usages (3rd ed. 1939), 66.

27. 29 & 30 Victoria, c. 109.

Articles those provisions which he considered applicable to the new American Navy. They were approved by the Continental Congress on November 28, 1775, and entitled "Rules for the Regulation of the Navy of the United Colonies."

The present "Articles for the Government of the U. S. Navy" were enacted by Congress on July 17, 1862.[28] This statute consisted of the 1775 Articles, revised and brought down to date, and including the act of 1855 creating summary court-martials.[29] In fact, the phraseology of many of the present articles is directly traceable to the British Articles of 1749.

The Articles for the Government of the Navy have been amended several times since 1862, some of the most important amendments having been in 1893, 1895, 1909, 1916 and 1946. Forty-five Articles have been added since 1862. However, none of these amendments or additions have greatly modified the administration of naval justice.[30]

6. In General:

No attempt has been made in the foregoing outline to trace the development of any of the substantive or procedural provisions of our military or naval law. From time to time, some of these will be discussed in later

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28. Rev. Stat., Sec. 1624; 12 Stat. 600.

29. In 1797 Congress had readopted the 1775 Articles (1 Stat. 525). Between 1797 and 1862 various Acts of Congress relating to the Naval Articles were passed but did not greatly change the original articles.

30. One of the more important amendments was that which provided for the establishment of deck courts. Act of 16 February 1909, ch. 131, 35 Stat. 621 and Act of 29 August 1916, ch. 417, 39 Stat. 556, 586.

sections of this report. For the present, it suffices to say that our present military and naval codes have their origin in the rules and practices of the Roman and Continental armies and in the articles and ordinances promulgated for the government of the British armies and the British fleet. If allowance is made for certain fundamental differences between the two services, it may be said that our military and naval law are remarkably similar to each other in theory, substance, and administration, and that both stand in marked constrast to Anglo-American common law, which was the creation of the British courts and evolved more or less independently of Roman and continental influences. Furthermore, it may be asserted, with fair accuracy, that the present naval code is substantially similar, at least in respect to the provisions relating to the organization and powers of courts-martial, to the Army code as it existed prior to the 1916 re-arrangement and the 1920 amendments.

7. Other Countries:

Nothing would be gained by a detailed account of the court-martial systems of foreign countries, other than Great Britain. It is enough to say that, so far as European codes are concerned, they all go back directly or indirectly to the penal code of 1532 of the Emperor Charles V and to the Articles of Gustavus Adolphus of 1621, and have many points in common, both with each other and with our own codes. From time to time reference will be made to features of these foreign systems for comparative purposes.[31]

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31. In this connection, the work of the Board's staff has been greatly assisted by certain studies of the British, French, and Russian court-martial systems, prepared by Brigadier General Edwin C. McNeil, USA, which have been available to the Board through the courtesy of General McNeil.

However, some knowledge of the British Army and Navy court-martial systems is fundamental to an understanding of our own systems, whether from the standpoint of their historical development or from the point of view of possible reform. Accordingly, certain studies of the British Army and Navy Court-martial systems have been prepared by the Board's staff, and are attached hereto as Appendices A and B. Reference to these studies will be made from time to time.

SECTION II

HISTORICAL RELATIONSHIP OF NAVAL COURTS-MARTIAL TO COMMAND

The traditional view of the service is that the court-martial is primarily an instrument for the maintenance of discipline.[32] Even though it is recognized that the court-martial is also a criminal court enforcing a penal code, its function as an instrument for the maintenance of discipline is still regarded as paramount. Thus, it is stated in Naval Courts and Boards with reference to naval courts-martial:

> "The jurisdiction thus conferred is exclusively criminal in character, being solely for the purpose of the maintanance of naval discipline." 33

Writing at an earlier date, Colonel Winthrop said of Army courts-martial:

> "Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives.

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32. Courts-martial are not a part of the federal judiciary within the constitution, but are rather instrumentalities of the executive power. Dynes v. Hoover (1857), 20 How. 65, 79, 15 L. Ed. 838.

33. N. C. & B., (1937 ed., 1945 reprint), Sec. 327 at p. 189.

"Thus indeed, strictly, a court-martial is not a court in the full sense of the term, or as the same is understood in the civil phraseology.*** It is indeed a creature of orders, and except in so far as an independent discretion may be given it by statute, it is as much subject to the orders of a competent superior as if any military body or person." 34

The same point of view is expressed in the Navy Digest:

"The essence of all military proceedings is summary and vigorous action, since the certainty of prompt punishment is more conducive to discipline than punishment deferred long after the offense. Naval courts-martial are no part of the judiciary of the United States, are not even courts in the full sense of the term, but are, in peace as well as in war, simply bodies of officers of the naval service ordered to investigate accusations, arrive at facts, and, where just, recommend a punishment." 35

Since discipline is a function of command, it is natural that the court-martial should have developed historically as an extension of the authority of the commander. We have seen that the early British articles were executive decrees promulgated by the Crown, by generals of the army, and admirals of the fleet. The first Parliamentary statutes simply gave legislative sanction to the promulgation of such articles by the executive. While gradually the articles themselves were incorporated into statute, the basic concept that such articles were to be enforced by commanders through courts-martial appointed by them for that purpose, was never changed. So also, the Articles of War and the Articles for the Government of the Navy,

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34. Winthrop, op. cit. supra note 3, at 49.

35. Naval Digest, 1916, p. 125.

while enacted by Congress, recognize, by implication if not expressly, the proposition that a court-martial is fundamentally an agency of the commander to aid him in the maintenance of discipline.

This relationship of courts-martial to command has been emphasized at the outset because, with minor exceptions, the whole system of military and naval justice is built around it. Whatever their historical origin, most of those features of military and naval justice which differ radically from the civilian judicial system bear a direct relationship to the exercise of command. Some of the more important features of the naval court-martial system, and their relation to command, are summarized below:

1. Convening of Courts:

A court-martial owes its existence and derives its powers from the precept issued by a competent commanding officer. The authorities competent to convene naval courts-martial are specified in Article 38 (general courts-martial), Article 26 (summary courts-martial) and Articles 64 (a), (deck courts) of the Articles for the Government of the Navy. Unless properly convened, a court-martial has no authority whatever, and its proceedings are void. A court-martial thus convened is not a permanent institution. The convening authority may add members, up to the maximum number permitted by law, he may remove or replace members, and he may dissolve the court at any time. He may appoint any number of courts, at the same time or in succession.

2. Reference of Cases to Trial:

A commanding officer has no authority to have a case tried by general court-martial until he has referred the case to the convening authority. The normal procedure, in a case in which trial by general court is desired, is for the immediate commander of the accused, after preliminary investigation, to forward the papers in the case, with his recommendation, to the next higher command exercising general court-martial jurisdiction.[36] The latter has power to return the case for trial by an inferior court, direct summary punishment, or direct that the case be dropped. If, however, he considers trial by general court-martial to be appropriate, he issues the charges and specifications, and forwards them to the judge advocate with the direction that they be brought to trial. In most instances the convening authority has a legal officer, to whom the case is first referred and who draws the charges and specifications for signature. The convening authority, however, is not legally obligated to refer cases to the legal officer and is not obligated to follow his opinion with respect to either convening or not convening a general court.

3. Initial Review of Cases:

The findings and sentence of a court-martial are not effective until approved by the convening authority.[37] The power of the convening authority to

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36. N. C. & B., App. F, p. 501, 502.

37. That is to say, in the ordinary case. In certain types of cases, discussed below, the sentence may not be ordered executed until it has been confirmed by higher authority, in addition to being approved by the convening authority.

approve a sentence includes the power to remit, or mitigate (but not commute) the sentence, to remit all or part of it conditionally upon probation, or to disapprove of it in its entirety. It also includes the power to disapprove any or all of the findings. Upon disapproval, the convening authority may, if the disapproval was based upon absence of jurisdiction, order a new trial, and in other cases may offer the accused a new trial.[38]

The convening authority has the power to return a case to the court for revision,[39] but he is not permitted to return a case for reconsideration of an acquittal, or a finding of not guilty of any specifications, or with a view to increasing the sentence, without the prior authority of the Secretary of the Navy, granted in the particular case.[40] In practice, reconsideration of an acquittal, or increase of a sentence, is very rare.[40a]

Prior to approving the sentence, the convening authority considers the trial record, passes upon the sufficiency of the evidence before the court, considers all objections to rulings of the court on evidence and other points, and reviews all other matters pertaining to the legality of the proceedings and the findings, or to the legality and appropriateness of the sentence. He is not, however, required to disapprove the findings or sentence because of mere technical errors or defects which do not affect the substantial rights of

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38. N. C. & B., Secs. 475-478.

39. Id., Secs. 458-468.

40. Id., Sec. 474.

40a. For revision of an inadequate sentence, see C.M.O. 4-1938, pp. 3, 4. As to disapproval of an acquittal, see C.M.O. 2-1939, pp. 136-137.

the accused.[41] In making his review, as in drawing the original charges, the convening authority may, and normally does, refer the case to his legal officer for his opinion and recommendations, but he is not legally required to do so, nor is he bound to follow his legal officer's recommendations.

The review by the convening authority is often referred to as an automatic appeal. However, it is not an appeal in the true sense, and the analogy, if pressed too far, is misleading.[42] Rather, the review is an integral part of the initial proceedings, since it is a condition precedent to the effectiveness of the court's findings and sentence. It is a procedure peculiar to our military and naval law, deriving directly from the concept that the court is the arm or agency of the commander, and it has no real counterpart in Anglo-American civil law.

4. Confirmation by the President or Secretary:

In cases involving the death penalty, or the dismissal of an officer, the sentence may not be executed until it has been confirmed by the President.[43] During the war, the power to confirm dismissal cases has been delegated by the President to the Secretary or Under-Secretary of the Navy.[44] Such cases are first reviewed by the convening authority, who may approve or

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41. N. C. & B., Sec. 472.

42. See Morgan, The Existing Court-Martial System and the Ansell Articles, (1919) 29 Yale L. J. 52, 61, n. 34.

43. A.G.N. 53.

44. Executive Order No. 9556, dated 26 May 1945.

disapprove but may not otherwise modify them.[45] After the convening authority acts upon the sentence, he forwards the case to the confirming authority, who has all the powers of the convening authority in an ordinary case, plus the power of commutation.

5. Power of the Secretary of the Navy:

Article 54(b) confers upon the Secretary of the Navy the power to set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court-martial convened by his order of that of any officer of the Navy or Marine Corps. This includes the power to commute a sentence of death or dismissal of an officer.[46] This section gives the Secretary of the Navy almost complete reserve power over the sentences of all naval courts-martial, except those appointed directly by the President.

To aid him in the exercise of this power, the Secretary of the Navy depends upon the following offices to advise him with respect to each individual case:

a. Office of the Judge Advocate General:

Every record of trial by general court-martial is reviewed in the Office of the Judge Advocate General. Such review is limited to the legality of the proceedings and to the legal sufficiency of the record to support the

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45. C.M.O. 1-1944, pp. 63, 64.

46. N. C. & B., Sec., 481.

findings and sentence. Normally, the review is made in Section A, Military Law Division, by an officer, who examines the record and submits his review to the chief of the section, who approves it for the Judge Advocate General. More difficult cases, cases in which the reviewing officer has some doubts as to legality, or cases involving controversial issues of fact or law, are, after initial review in Section A, and after review by the chief of its Military Law Section and by the Assistant Judge Advocate General, referred to a board of review, which has been established within the Office of the Judge Advocate General. This board reviews the case, much as a civilian court of appeal would do, and submits its conclusions and recommendations to the Judge Advocate General. However, it is not created by statute, and its recommendations are not binding upon the Judge Advocate General. The final responsibility for the legal sufficiency of every case rests upon the Judge Advocate General himself.

If the Judge Advocate General believes that the proceedings, findings, or sentence, in a case should be set aside for legal insufficiency, or the findings or sentence modified or set aside on legal grounds, he makes a recommendation to that effect to the Secretary. The

Secretary is not bound to follow this recommendation, but normally he does so. If the proceedings are to be set aside, or the findings or sentence modified, it is then done by order of the Secretary.

If the Judge Advocate General finds the record legally sufficient, it is transmitted to the Chief of Naval Personnel (or to the Commandant of the Marine Corps) for comment and recommendations on the disciplinary features of the sentences. In thus transmitting the record, the Judge Advocate General sometimes invites attention to mitigating circumstances disclosed by the record.

It should be remarked here that in cases requiring confirmation, the Judge Advocate General reviews the record prior to its submission to the confirming authority. In such cases he acts as the legal advisor to the President or Secretary in his capacity as the final confirming authority, rather than as the authority having power to set aside sentences which have already been approved and ordered executed. While the legal theory is different, the practical effect is much the same.

b. Review of Sentence by Chief of Naval Personnel:

The sentence is reviewed in the Bureau of Naval Personnel from the standpoint of uniformity with other sentences in like cases and conformity with department policy. The record is then returned to the Judge Advocate General with appropriate recommendations. If no change is recommended in the sentence, the record is placed in the file and is not submitted to the Secretary. If a reduction or other modification is recommended, such recommendation is submitted to the Secretary for his action. He need not follow the recommendation, but normally does so.[47]

c. Clemency Review:

An important aspect of the Secretary's reserve power over sentences is his power to exercise clemency. A sentence which is legal and in accord with department policy at the time it is promulgated may nevertheless seem severe in the light of post-war conditions. In another case, the accused may have earned clemency or

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47. This is the normal procedure, in cases convened by commanders at sea or in the various Naval Districts. In any case where the Secretary is himself the convening authority, the record will of course be submitted to him for his action. In such cases the record is accompanied by the recommendations of the Judge Advocate General and the Chief of Naval Personnel.

restoration to duty by his good conduct in prison. To assist him in the exercise of his clemency powers, the Secretary appointed, on 25 August 1943, the Naval Clemency and Prison Inspection Board. This Board reviews the sentences of all naval prisoners periodically, and at least once a year. In making is recommendations it considers the report of the prison psychiatrist, who has interviewed the prisoner, the recommendation of a local prison clemency board, before whom the prisoner has appeared personally, the recommendation of the commanding officer of the prison, and the recommendation of the Bureau of Naval Personnel (or Marine Corps). It may, in appropriate cases, recommend reduction of the sentence, remission of the unexecuted portion of the confinement and immediate discharge, reduction of a dishonorable discharge to a bad conduct discharge, or restoration to duty on probation. Its recommendations are not binding upon the Secretary, but are normally followed by him.

d. Other Review:

Since the Secretary has the power to review the proceedings and sentence of any naval court-martial appointed by him or by an officer of the Navy or Marine Corps, he is free to appointsuch agencies to advise him in this respect

as he deems proper. The present Board has been so appointed to "consider the approved sentences of all prisoners serving sentences of confinement imposed by general court-martial," and to "make appropriate recommendations to the Secretary of the Navy concerning such reduction in the approved sentences of such prisoners as may be considered warranted."[48] Because of limitations of time, the Board has not attempted to review every sentence imposed by general court-martial during the war, but has limited itself, from its organization in April down to 1 July, the review of sentences of men presently in confinement which have been reviewed at least once by the Naval Clemency and Prison Inspection Board, and after 1 July, when such cases were exhausted, to other cases of men presently confined under general courts-martial convened down to one month after V-J Day, to wit, September 15, 1945. In making its recommendations and review, the Board has not limited itself to the sentence, but has reviewed the entire record in each case, has considered the nature of the offense, the trial proceedings, the prisoner's prior civilian

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48. Precept convening General Court-Martial Sentence Review Board, dated 9 April 1946.

and service record, his record in prison, the report of the prison psychiatrist and the recommendations of the prison authorities, and any other facts of importance which are known to the Board.

e. Review by Secretary's Staff:

In taking final action on any case, the Secretary may also consider the opinion and advice of his personal legal aides, and usually does so.

As a matter of practice, during the war and at the present time, responsibility for matters pertaining to courts-martial has been largely delegated to the Under-Secretary, or to one of the Assistant Secretaries. Whatever has been said above with reference to the Secretary should be understood as referring equally to the Under-Secretary or Assistant Secretary to whom such responsibility has been delegated.

Records of trial by deck courts and summary courts-martial are similarly reviewed, first by the convening authority, and, in the case of summary courts-martial, next by the immediate superior in command, unless the convening authority is the senior officer present, and then by the Judge Advocate General. Upon the advice of

the latter, the Secretary of the Navy has the power to direct correction of technical defects in records, to set aside illegal convictions, to direct the remission of excessive sentences, and the like.

The above is necessarily a very brief and summary outline of a complicated procedure. It should suffice to show, however, that courts-martial, while created by statute enacted by Congress, function and operate strictly within the naval chain of command, from the President and Secretary of the Navy down. The appointment of courts, the reference of cases for trial, and the review of sentences, whether from the legal, disciplinary, or clemency aspect, are all acts of command. Although courts-martial do have a degree of independence, and are free to exercise their judicial function and responsibility, they are in the final analysis, arms of the executive power. Neither military nor naval law possesses a truly independent judiciary, co-ordinate with and free from the control of the executive, such as exists on the civil side of the law. Whether such an independent judiciary should be created, and to what extent, will be discussed at some length in the following sections of this report.

SECTION III

HISTORY OF REFORMS IN THE COURT-MARTIAL SYSTEM

Agitation for reform of the court-martial system is not new. As we have seen, the exercise of military jurisdiction was one of the matters raised in the Petition of Right, in 1628. Since enactment of the first statute authorizing naval courts-martial in 1645, and the first Mutiny Act in 1689, the British systems of military and naval justice have been gradually modified and improved. French military law has undergone constant study, revision, and improvment, from the time of the French Revolution to the present day.[49] After the last war, as a result of alleged injustices, substantial changes were made in the court-martial systems of France, Germany, and the United States. In this country, those reforms were limited to the Articles of War, the Articles for the Government of the Navy remaining unchanged.

A favorite panacea for alleged abuses has been the administration of military and naval justice over to the civil courts. Almost invariably, this has proved unworkable. In the first place, this reform has usually been limited to peace-time. Obviously, this fails to solve the problem, because it is in time of war, when large bodies of men are drafted from civil life, that the court-martial system is subjected to its greatest strain. Secondly, even

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49. Angell, The French System of Military Law, (1921) 15 III. L.R. 545, 546.

though limited in operation to peace-time, the system of administering military justice through the civilian courts has nearly always been swept aside in time of real or supposed emergency, and the old processes reinstated or even extended. We have already seen what happened in seventeenth century England, when the traditional prohibition of the exercise of military jurisdiction in peace-time, affirmed in the Petition of Right, was, after the Ipswich Mutiny of 1688, supplanted by the annual Mutiny Acts.

In France, the Revolution of 1789 swept away most of the existing military tribunals and substituted a system of courts-martial with a jury d'accusation and a jury de jugement, corresponding to our grand and petit jury. Jurisdiction was based solely on the nature of the offense, military courts having jurisdiction over military offenses only (whether committed by soldiers or civilians), and civil courts having exclusive jurisdiction over civil crimes, even when committed by the military. But this system did not last. In 1796-1797 conseils de guerre (corresponding to our courts-martial) were introduced, and in 1806 Napoleon suppressed juries entirely as subversive of military discipline.[50] After World War I, the peace-time jurisdiction of French military courts was once again limited to strictly military offenses and to crimes committed in barracks and army camps.[51] The outcome of this

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50. Angell, The French System of Military Law (1921) 15 III. L. Rev. 544-545.

51. Law of 9 March 1928, amending the Code of Military Justice of the Army, Journal Officiel, March 15, 1928, pg. 2830; Bulletin legislative Dalloz, 1938, p. 98; Recueil periodique Dalloz, IV (1928), 193; see Rheinstein, Military Justice, in "War and the Law" (Puttkammer ed. 1944), at 159.

experiment is not known.

A similar development occurred in Germany after the last war. Under the Weimar Republic, peace-time jurisdiction over serious crimes of soldiers, both military and civil, was transferred to the civilian courts, the membership of which was reinforced in such cases by army officers.[52] But the system did not find favor with the Army and it was abolished shortly after Hitler came to power.[53]

The reasons for the breakdown of reforms of this nature are apparent. Among others are:

(1) The delay and the cumbersome procedures incident to trials in the civilian courts;

(2) The fact that civilian courts and juries do not understand the disciplinary problems which confront an army or a navy; and

(3) The fact that no practical method has been devised for submitting to civilian courts offenses which occur overseas, outside the normal jurisdiction of such courts and beyond convenient reach of their process.

Whether the English experience in 1688, the French in 1789 and the German after World War I conclusively demonstrates the impossibility of civilian administration of military and naval justice to be handled may be debatable. At least, it is the only evidence and it is compelling. However, it seems

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52. Constitution of the German Reich, 11 August 1919, (Reichsgesetzblatt, 1919, p. 1383), Art. 106; Law concerning the Abolition of Military Justice, of 17 August 1920, (Reichsgetsetzblatt, 1920, p. 1579), See Rheinstein, op. cit. supra, note 51.

53. Law concerning the Reconstruction of Military Justice, of 12 May 1933, (Reichsgesetsblatt, 1933, Part I, p. 264); Rheinstein, op. cit. supra., note 52, at 159.

obvious that it is neither feasible nor practical for administration of military justice to be handled by either the Federal or any of the State Judiciaries, as presently constituted. Whether benefits might accrue from the creation of a military court as a division of the Federal courts, staffed by military personnel and administered by the Federal system is a possible subject of inquiry for a board making a comprehensive study of military justice.

The better approach to reform of the court-martial system has been to seek modification from within. The necessity for a special system of military and naval justice has been recognized, and an attempt has been made to modify such system in the interest of greater fairness and a more even-handed justice. Usually, though not always, this has taken the form of restricting somewhat the free exercise of command control over the processes of courts-martial. In this connection, the reform of the United States Army court-martial system after the last war is especially interesting.

In 1919 and 1920 criticism of the administration of military justice by the Army during the war was widespread.[54] Partly as a result of this criticism, a bill, drafted by General Ansell, formerly of the Judge Advocate General's Office, and known as the Chamberlain Bill, providing for many sweeping

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54. For examples of opposing points of view in this matter by high ranking officers of the Judge Advocate General's Department, reference is made to Ansell, Military Justice, (1919), 5 Cornell L.Q.1, and to "Military Justice During the War, a letter from the Judge Advocate General of the Army to the Secretary of War," War Department, Washington, D.C., 1919.

reforms of the Army court-martial system, was introduced into Congress.[55]

In view of the widespread criticism of military justice, and the pending Chamberlain Bill, a board of officers, headed by Major General Francis J. Kernan, was appointed by the Secretary of War to investigate the administration of military justice by the Army. The Board's report concluded that the system was fundamentally sound, but recommended some minor changes.[56] A committee of civilian lawyers was appointed by the President of the American Bar Association, to examine the Army system. This committee recommended a number of reforms, but on the whole reached the same conclusions as had the Kernan Board. A minority report, signed by two of the five members of the committee, recommended more sweeping changes.[57] Both the Army report and the majority Bar Association report rejected the more radical reforms of the Chamberlain Bill. Meanwhile, the Judge Advocate General of the Army, while disagreeing with most of the criticisms voiced by General Ansell and others, had recommended certain specific reforms.[58]

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55. Sen. Bill 64, 66th Cong., 1st Sess., 1919; H.R. 367, 66th Cong. 1st Sess., 1919. The principal features of this bill are discussed by Professor Edmund M. Morgan, who had served as an officer in the Judge Advocate General's Department during the war, in an article entitled "The Existing Court-Martial System and the Ansell Articles." (1919) 29 Yale L.J. 52.

56. Proceedings and Report of Special War Department Board on Courts-Martial and Their Procedure, War Department, Washington, D.C., 1919.

57. Report of the Committee on Military Law, filed with the Secretary of the Executive Committee of the American Bar Association, July, 1919.

58. "Military Justice During the War," A letter from the Judge Advocate General of the Army to the Secretary of War, War Department, Washington, D.C., 1919.

As a result of this controversy and discussion, the Articles of War of 1920 were enacted.[59] The new code adopted many of the provisions of the Chamberlain Bill, and many of the recommendations of the Judge Advocate General and of the Bar Association Committee, although some in modified form. The most important changes may be summarized as follows:

(1) Enlisted men were allowed to prefer charges, and charges were required to be verified on oath.[60]

(2) Commanding officers were authorized to dispose of minor offenses without resort to trial.[61]

(3) Inferior courts were to be preferred to general courts, and their jurisdiction was restated for that purpose. The special court-martial was given the power to impose sentences up to six months' confinement and forfeitures.[62]

(4) A thorough pre-trial investigation by an impartial officer was required in all cases of trial by general court-martial. At this investigation the accused

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59. Act of 4 June 1920; 41 Stat. 759, 802.

60. AW 70.

61. AW 104.

62. AW 12, 13, 14; MCM 1921, par. 336a, 76a, now MCM, 1928, par. 34.

was to have the right to be present, to call witnesses in his own behalf, and to cross-examine witnesses against him.[63]

(5) Before trial by general court-martial could be ordered, the convening authority was required to submit the charges and expected evidence to his staff judge advocate for the latter's consideration and advice.[64]

(6) The convening authority was required to appoint on courts-martial "those officers best qualified by reason of age, training, experience and judicial temperament." The act further provided that officers having less than two years' service should not, if it could be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof.[65]

(7) It was provided that a general court-martial should consist of at least five officers and a special court-martial of at least three. No maximum number was prescribed.[66]

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63. AW 70.

64. AW 70.

65. AW 4.

66. AW 5, 6.

(8) A "law member" was provided for every general court-martial, with power to rule upon all interlocutory questions, subject to being overruled by the other members of the court on all but questions of evidence, as to which his rulings were to be final. He was to be a member of the Judge Advocate General's Department, when available, otherwise, an officer specially qualified to act as law member.[67]

(9) A defense counsel was required to be appointed to each general and special court-martial, with provision for one or more assistants in the case of general courts-martial when necessary. Civil counsel, or military counsel of the accused's choice, if reasonably available, was also authorized.[68]

(10) One peremptory challenge for the prosecution and one for each accused (or for each side in a joint trial) was provided. The law member was not to be subject to peremptory challenge.[69]

(11) A two-thirds vote for the findings and the sentence was required, except that a unanimous vote was required

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67. AW 8, 31.

68. AW 11, 17.

69. AW 18.

for the death sentence, and a three-fourths vote for the sentence of confinement to more than ten years. Where the death penalty was mandatory (e.g. for spying), a unanimous vote on both findings and sentence was required.[70]

(12) Reconsideration of an acquittal and increase of a sentence (unless below a mandatory standard fixed by law), were prohibited.[71]

(13) Provision was made for a Board or Boards of Review, in the Office of the Judge Advocate General, to review certain types of serious cases, and for review of all other records of trial by general court-martial in the Office of the Judge Advocate General.[72]

(14) Offenses were defined in somewhat greater detail, punishments limited, and the President given the power to prescribe maximum punishments in time of war as well as peace.[73]

(15) Punishment was prescribed for non-compliance with these provisions by those in authority, especially for unnecessarily holding an accused in arrest or confinement awaiting trial, or for directing trial without the required preliminary investigation.[74]

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70. AW 43.

71. AW 40.

72. AW 50½.

73. AW 45, 42, 41.

74. AW 70.

On the other hand, the following proposals, which had been advanced by one or more of the persons or groups mentioned above, were not adopted:

(1) Enlisted men and warrant officers were not authorized to sit on courts.

(2) An independent judge advocate to preside over trials was not provided, but a "law member," to be appointed by the convening authority.

(3) Courts were still to be appointed by the convening authority, rather than selected by the judge advocate from a panel of qualified persons designated by the convening authority.

(4) Challenges to the array, and more than one peremptory challenge, were not authorized.

(5) A civilian court of military appeals was not established, but in its place, a Board of Review, composed of officers, in the Office of the Judge Advocate General.

(6) Retrospective jurisdiction, to review and revise cases which had already been decided, was not conferred upon the Board of Review.

(7) Except in a limited class of cases, coming within certain of the provisions of AW 50½, and except in those cases which required confirmation, neither the President nor the Secretary of War was granted any reserve power

over sentences imposed by courts-martial (similar to that exercised by the Secretary of the Navy), as had been recommended by The Judge Advocate General and by the Bar Association Committee.

It should be pointed out that many of the new provisions of the 1920 Articles of War were merely statutory enactments of existing administrative procedures within the Office of the Judge Advocate General.[75]

It is not proposed to set forth in detail the arguments advanced by either side to the 1919 controversy on the Articles of War. However, they should be carefully considered in connection with any reform of the Naval court-martial system, both because of the similarities between the Navy system of today and the Army system prior to 1920, and because many of the same arguments and proposals are reappearing today. See for example, Report of the McGuire Committee to the Secretary of the Navy on the Articles for the Government of the Navy and Courts-Martial Procedure, dated 21 November 1945, and Report of the Ballantine Committee to the Secretary of the Navy, dated 24 April 1946.

Before proceeding to a consideration of specific reforms in the present Naval court-martial system, mention should be made of certain features of that system which distinguish it from the Army system, both as it existed prior to

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75. In this connection, reference is made to the above mentioned letter from The Judge Advocate General of the Army to The Secretary of War, Washington, D.C., March 10, 1919, pp 14-18, 22, 34, 62-64. For a discussion of the new law, and a criticism of its administration by the War Department, reference is made to General Ansell's article, Some Reforms in Our System of Military Justice, (1922), 32 Yale L.J. 146.

1920, and as it exists today. While we have referred to the similarity of the two systems, we should not overlook those distinctions, because an understanding thereof is essential to intelligent consideration of proposals to reform. Among others, the following differences are important:

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

(b) One of the principal objections to the Army system has been that too much power is vested in commanders in

the field. This was not so true of the Navy, before and during the recent war. In peace-time, and during the early past of the war, all courts within the continental United States were convened by the Secretary of the Navy. As a result, administration of Naval justice in the United States was completely centralized, and the objection that local commands wielded arbitrary powers could not be made, as far as trial by general court-martial was concerned. Even after the general court-martial system was decentralized in 1943, policies as to the type of court, the length of sentence, and so forth, at least for absence and desertion offenses, were established by the Department, and local commands were expected to adhere to these policies. Presumably, it is intended that this will still be true under the permanent decentralization established by the recent amendment to Art. 38, AGN.[76] Furthermore, the important power to order executed a dishonorable or bad conduct discharge has been, since 25 May 1945, reserved to the Department. While the practice of conferring broad powers and then limiting their free exercise is debatable from many standpoints, this system does have the merit of centralizing in one quarter responsibility for all basic court-martial policies and decisions.

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76. Public Law 297, 79th Congress, c 5, 2d Sess., Feb. 12, 1946.

In short, existing Navy policies and procedures have resulted both in a greater uniformity of action and in a greater flexibility of administration. Thus, an admirable framework is furnished for improvement and modernization of the Naval court-martial system. In the ensuing sections of this report, more detailed problems and suggested reforms will be taken up.

SECTION IV

APPOINTMENT AND QUALIFICATION OF COURTS

The first important question is whether the present system of appointing courts martial should be modified. This question will be considered under several headings:

(1) Who should have authority to appoint courts?

(2) Who should be eligible to sit on courts?

(3) How should members be selected?

(4) Should a maximum number of members be specified?

(5) What provisions should be made for a legal officer to sit at a trial?

(6) What changes, if any, should be made in the appointment and function of the judge advocate (i.e. prosecutor) and defense counsel?

(In view of the greater importance of the general court martial, and because the Board's activities have been limited to a review of general court martial cases, this section of the report will be limited, in the main, to consideration of the general court martial.)

1. Convening Authorities:

Prior to and during the war the power to convene general courts martial was vested by law in the President, the Secretary of the Navy, the commander in chief of a fleet or squadron, the commanding officer of an overseas

naval station, and, when empowered by the Secretary of the Navy, the commanding officer of certain other forces afloat and certain marine or shore commands serving beyond the continental limits. In time of war the commandant of any navy yard or naval station and certain other marine or shore commands could be empowered by the Secretary of the Navy to convene general courts martial.[77]

In January 1942 the Secretary of the Navy empowered all flag officers commanding a division, squadron, flotilla, or larger naval force afloat to convene general courts martial.[78] In July 1943 the Secretary empowered the commandants of the various Naval Districts within the continental United States to convene general courts martial.[79] Similar authority has been conferred from time to time upon the commanding generals of the Marine Divisions and of other Marine commands.

The effect of these orders was to decentralize greatly the administration of naval justice, which before the war was centralized in the Department. This centralization had imposed a heavy administrative burden upon the Department and had resulted in considerable delay in the processing of charges. Accordingly, in July 1943, the Ballantine Committee recommended that the commandants of the naval districts in the United States be empowered to convene general courts

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77. A.G.N. 38; 34 U.S.C. Sec. 1200, Art. 38.

78. Letter from the Secretary of the Navy to The Commander in Chief, U.S. Fleet, (Navy Department's file A17-11 (1)/A17-20 (420108), dated 8 January 1942.)

79. See, e.g., Letter from The Secretary of the Navy to The Commandant, Eleventh Naval District and Naval Operating Base, San Diego, California, (Navy Department's file A17-11(1)/A17-20), dated 24 July 1943.)

martial, and it was this recommendation which led to the above mentioned orders of 24 July 1943. The vast majority of sentences reviewed by this Board were imposed by courts appointed by commandants of the various naval districts.

It was pointed out in the first Ballantine Report, dated 24 September 1943, that the power of the Secretary to authorize commands within the United States to convene general courts existed only in time of war. Under the law, as it then existed, the authority of commandants of naval districts to appoint general courts martial would have ceased upon the legal end of the war. This would have resulted once again in a heavy administrative burden on the Department, with attendant delay. The Ballantine Report accordingly recommended that the law be amended to permit the Secretary to empower such commandants or similar local commanders to appoint courts in peacetime.

On February 12, 1946, by Public Law No. 297, 79th Congress, 2d. Sess., Article 38 was amended to read as follows:

> "Art. 38. Convening Authority - General courts-martial may be convened:
>
> 'First. By the President, the Secretary of the Navy, the commander in chief of a fleet, and the commanding officer of a naval station or larger shore activity beyond the continental limits of the United States; and
>
> 'Second. When empowered by the Secretary of the Navy, by the commanding officer of a division, squadron, flotilla, or other naval force afloat, and by the commandant or commanding officer of any naval district, naval base, or naval station, and by the commandant, commanding officer, or chief of any other force or activity of the Navy or Marine Corps, not attached to a naval district, naval base, or naval station."

The proposed articles drafted by the McGuire Committee, which were prepared before the passage of Public Law 297, included the following provi-

sions:[80]

> "(a) Convening Authority - The President, the Secretary of the Navy, the Commander in chief of a fleet, and when empowered by the Secretary of the Navy, any commandant or commanding officer of the naval service, or of an organization serving as a part of the Navy, may convene general courts-martial for the trial of offenses committed by any person subject to the Articles for the Government of the Navy."

Colonel Snedeker in his Notes to the McGuire Articles[81] explained the provisions of the proposed amendment and argued its superiority over Public Law 297, which was then pending as Senate Bill 1545.

The Judge Advocate General and Commodore White had proposed a substantially similar amendment, with slightly different wording, viz:

> "(a) Convening Authority - The President, the Secretary of the Navy, or any officer in command when empowered by the Secretary of the Navy, may convene general courts-martial for the trial of offenses committed by any person subject to the Articles for the Government of the Navy."

RECOMMENDATION:

In view of the enactment of Public Law 297 the necessity of amending Article 38 has been removed. If, however, the Articles are to be revised in toto, consideration might well be given to adopting the language either of the McGuire proposed article, or of the White and Judge Advocate General proposed articles, which in each case is simpler and more direct than the wording of Public Law 297.

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80. Proposed Article 4(a).

81. At pages 26-28.

2. Personnel for Courts Martial:

The only present requirement for eligibility to sit on a general court martial is that the members be commissioned officers and of the rank of lieutenant or higher if available.[82] There is a further provision that in no case where it can be avoided without injury to the service shall more than one-half the members, exclusive of the president, be junior to an officer who is being tried.[83] In practice, it is unusual for any member to be junior to an officer who is being tried.

Sitting as a member of a court martial is one of the most serious and solemn duties which an officer can be called upon to perform. It is the tradition of the service that only those officers who are best qualified by reason of age, training, experience, and judicial temperament should be detailed to courts martial. It was almost inevitable, however, that during wartime many inexperienced officers should have been appointed to courts. An officer who comes to a court with a limited naval background, no knowledge of the law, and little experience in human affairs cannot be expected to make a good court member. Neither can it be expected that officers passed over for promotion and about to be retired will make good court members. It is doubtful whether this situation has been greatly alleviated by the termination of hostilities. The post-war Navy is still large; it still includes large numbers of officers without specific training in law and with limited experience in administering

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82. N. C. & B., Sec. 346, p. 196 (1945).

83. A. G. N. 39.

discipline.

The Board realizes that this is a very difficult problem to solve. It believes, however, that the following suggestions will be helpful:

(a) Education:

Provision should be made to give every naval officer training in naval justice. The program of post-war legal education should be so planned that every officer, including senior officers, will take a course in the elements of naval law and naval justice. The Board understands that it is proposed to send as many officers and enlisted men as possible to the new Naval Justice School in Port Hueneme, California, for at least an introductory course in naval justice. This is a salutary development, with which the Board is wholly in accord.

(b) Training:

In is commonplace that experience is a better teacher than any amount of formal instruction. In this connection consideration might well be given to a feature of the British Army system pursuant to which young officers are often detailed to sit with a court for purposes of instruction, without the right to vote or otherwise participate, but with the privilege of asking questions of the court. The British practice before World War I was that new officers were required to attend all regimental courts martial and such general and district courts martial as their commanding officer should designate for at least one year, and they were not considered qualified to sit, except where inevitable, unless they had previously attended

court proceedings as supernumeraries at least 25 times.[84] The present British Army regulations provide:

"In addition, an officer is not to be detailed to sit on a court-martial unless and until his C.O. deems him, after repeated attendances at courts-martial for instructional purposes, competent to perform so important a duty." 85

(c) Service:

Another step which should be considered would be a requirement that the members, or a certain proportion of them, have a minimum period of service. Present naval law does contain such a requirement in peacetime, not by express provision, but by virtue of the rule that court members be of the rank of lieutenant or higher. In practice this meant, in the Regular Navy in time of peace, that officers had had at least ten years' commissioned service before they were eligible to sit on courts. Meanwhile they had been getting court martial experience by acting as defense counsel and as judge advocate. But during the war, when temporary promotions were relatively rapid and many officers had received direct commissions as lieutenants, this rule did not operate as it had in peacetime. Consequently, many officers sat on courts who had had very little service and no previous court martial experience.

A service requirement was introduced in the Army system by the

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84. Winfield, Courts-Martial from the Lawyer's Point of View (1918) 34 L.Q.R 143, 145.

85. K.R., 638; Manual of Military Law (The War Office, 1929 ed., 1939 reprint) p. 629, n. 4.

1920 amendments to the Articles of War. Article 4, as amended, provided that "officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof." It must be admitted that the requirement was frequently not met during the war, apparently because enough officers with the required period of service could not be found.

British law requires that all members of an Army general court martial have at least three years' commissioned service, and that members of a district court martial have two years' service. Members of a field general court martial, which is the court commonly used in war time, are supposed to have had one year of service. There is apparently no service requirement for members of a British Naval court martial, but it is required that all members be at least 21 years of age. These requirements of British law are mandatory, except in the case of the field general court, where it has been ruled that the presence of members with less than a year's service will not invalidate the proceedings. However, even in the case of the field general court, officers with three or more years' service, when available, are detailed in preference to others.

(d) Rank:

The requirement of the present regulations with respect to rank are that members of a general court martial must be of the rank of lieutenant (or captain in the Marine Corps) if available,[86] and that

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86. N. C. & B., Sec. 346, p. 196 (1945).

In no case, where it can be avoided without injury to the service, shall more than one-half the members, exclusive of the president, be junior to an officer to be tried.[87] The Army rule is that in no case where it can be avoided shall any member of a court be inferior in rank to an officer to be tried.[88]

The president of a British Army general court martial must be a general officer or colonel, if available.[89] Four of the members must be of a rank not below captain. The president of a field general court and of a district court should be a field officer, if available, otherwise a captain. There is also a requirement that no member of a general court martial be of a rank lower than that of the accused, if members of the same or higher rank are available.

The president of a British Naval general court martial must be at least a captain. For the trial of a captain the other members must be of the rank of commander or higher, and for the trial of a commander at least two other members must be of the rank of lieutenant or higher. Furthermore, (although this does not affect the regularity of the proceedings), no commander, lieutenant commander, or lieutenant is required to sit as a member of a general court martial when four officers of higher rank, and

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87. A.G.N. 39.

88. A.W. 16.

89. K. R., 642(a); Manual of Military Law (The War Office, 1929 ed., 1939 reprint), p. 628.

junior to the President, can be assembled. If an officer of one of these ranks, sits, the size of the court is limited to five.[90]

Under the Imperiol German system membership of an army general court martial was divided into five classes, with a field officer as president, two captains, two lieutenants, three non-commissioned officers, and three privates (for the trial of a private). As the rank of the accused went up, the rank of the classes increased. A regimental court, convened for the trial of enlisted men only and corresponding more or less to the Navy summary court and the Army special court, also comprised five classes. under the presidency of a captain. The members consulted and voted by classes.[91] Under the Third Reich a somewhat similar system prevailed; a general court in serious cases consisted of one judge advocate as president, two officers of field grade, and two privates (for the trial of a private). As the rank of the accused went up, the rank of the latter class increased correspondingly.

The McGuire, White, and Judge Advocate General proposed articles all retain, in substance, the provision that in no case where it can be avoided shall more than one-half the members be junior to an officer to be tried, but make no other provision for

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90. See Appendix B., pp. B2, B3.

91. Stephens, English and Continental Military Codes, 5 J. Comp. Leg. (N.S.) (1903) 244, 251.

the rank of court members.

As previously indicated no officer below the rank of lieutenant is permitted to sit on a naval court martial. The complete exclusion of lieutenants junior grade and of ensigns seems hardly necessary. The important consideration is that whatever policies of this nature are adopted be so framed as to insure that members of rank, judgment, and experience sit on courts martial.

(e) Enlisted Men as Court Members:

This is probably the most controversial question which has arisen in connection with proposed reforms of the court martial system. It is not necessarily the most important. It must be admitted that, on the average, enlisted men, both in the Army and in the Navy, have less experience, education, and training than commissioned officers.

But the question cannot be lightly dismissed. It appears that many enlisted men, at least in the Army, feel that it is unfair for them to be tried before courts composed of officers. A great deal of publicity has been given to this matter, and it is probable that a large section of the public shares this view. Of course, a good deal of this criticism has come from enlisted men drafted into the service during the war. With the return of the peacetime Navy to a volunteer basis, it can be expected that criticism from this source will cease.

The proposal is not a new one. In 1819, in England, an anonymous pamphleteer suggested that a jury be introduced, consisting

of twelve officers in the case of officers being tried and of twelve non-commissioned officers in the case of other ranks.[92] Almost the same recommendation was made in the minority report of the Bar Association Committee which investigated the Army court martial system after the last war.[93]

The Chamberlain Bill provided that in the trial of an enlisted man three members of a general court martial should be enlisted men and one member of a special court.[94] The majority report of the American Bar Association condemned this provision on several grounds:

(1) It would be destructive of discipline, particularly in the case of officers tried by courts composed of enlisted men;

(2) Enlisted men did not really desire such a change; and

(3) Enlisted men looked to their officers for directions, considered them the "trustees of the law," and on the whole trusted and respected them.

(Parenthetically, it should be remarked that the Chamberlain Bill did not contemplate that enlisted men should sit at the trial of officers and that, to this extent, objection (1) was without basis.)

The Kernan Board was also opposed to the change for similar reasons.

There is attached to this report, as Exhibit D, a study prepared by Brigadier General Edwin M. McNeil, of the Office of The Judge Advocate General of the Army, outlining some of the comments which

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92. The Pamphleteer, vol XIV, London, 1819, pp 263, 265, cited in Winfield, Courts-Martial from the Lawyer's Point of View, (1918) 34 L.Q.R. 143, 150.

93. Proceedings and Report of Special War Department Board on Courts-Martial and Their Procedure, Washington, D.C., July 17, 1919, p. 95.

94. Sen. Bill 64, 66th Cong., 1st Sess., Arts. 4, 5, 6; see H.R. 367, 66th Cong., 1st Sess. (1919).

have been made on this proposal, both after the last war and at the present time, including the comments of the Bar Association Committee and of the Kernan Board. It is interesting to note from this study that, of officers who have served in World War II, General Jacob L. Devers, Commanding General of the Army Ground Forces, is opposed to such a change, whereas Lt. Gen. Ira C. Eaker, Deputy Commander, Army Air Forces, favors it.

The General Board, United States Forces, European Theater, in its report on the administration of military justice in the European Theater, prepared at the close of World War II, has recommended that a Board of Officers be constituted to consider necessary changes in the Articles of War and, among others, to consider the desirability of

> "the detailing of qualified enlisted men to courts-martial and as trial judge advocates, defense counsel and investigators to conduct investigations required by the 70th Article of War." 95

This report was based, in part, upon replies to questionnaires submitted by 59 judge advocate officers who had served in the European Theater during World War II. 56% of these who expressed an opinion believed that qualified enlisted men should be detailed for duty as members of courts martial; a majority thought that they should not be trial judge advocates but that they should be appointed defense counsel. 96

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95. Report of the General Board, USFET, "Military Justice Administration in Theater of Operations," file: 250/1, Study No. 83, p. 58.

96. Id. at p. 45.

The same report discloses that an informal sampling was made of enlisted men of Headquarters Fifteenth U. S. Army on this question. They were asked: "Do you think enlisted men would have more confidence in courts martial if enlisted men were included on the court?" About 25% answered with an unqualified "yes." The majority answered "yes," with the qualification that the enlisted men be carefully chosen. A very few answered "no," some with the qualification that officers, carefully chosen, would be more satisfactory. A similar survey conducted among the enlisted men of Headquarters, Seine Section, Theater Service Forces, European Theater, produced practically the same result, except that no enlisted men voted in the negative.[97] So far as known, there has been no such general expression of opinion by Navy enlisted men during this war. A survey of naval prisoners conducted by Commodore White, in which the men were asked whether they thought they had received fair trials and in which nearly all said that they had, failed to disclose any prisoners who complained that they had been tried by courts composed of officers only.

The House Committee on Military Affairs in its recent report on the administration of military justice by the Army has recommended that the Articles of War be amended to provide that, at the election of the accused, one-third of the court members shall be enlisted men.[98] The Army has expressed itself as not opposed to this change, if satisfied that the public and enlisted men generally really desire it.[99]

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97. Id. at p. 45, note 13.

98. House Committee on Military Affairs Report #2722 to the 79th Congress, 2nd Session.

99. Army and Navy Bulletin, Vol. 2, No. 30, 27 July 1946, p. 2.

The practice of other countries is interesting in this regard. So far as is known, the British have never detailed enlisted men to courts martial. While it has been difficult to obtain accurate information on the Russian system, it appears that neither under the Imperial regime nor under the present Soviet gogernment have enlisted men been detailed to military courts, although they were for a brief period after the 1917 Revolution.[100] Canada, Holland, Belgium, Italy, and Japan appoint only officers to their courts martial.

So far as is known, only three countries have actually used enlisted men on military courts. The French appoint one non-commissioned officer, usually of the highest grade, to a court for the trial of an enlisted man. The Swiss military court has six judges, three of whom are selected from the non-commissioned officers and privates of the division. The Germans had one or two court members of the same rank as the accused. Thus, for the trial of a German private at least one court member had to be a private, and in serious cases there were at least two. It is sometimes said that this was an innovation introduced My Hitler, and it has been suggested that one of the purposes was "to inject into the court martial system elements of proved loyalty to the National Socialist party, which one was not so certain to find among the army officers."[101]

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100. "Russian Courts-Martial", Study prepared by Brigadier General Edwin C. McNeil, USA, WDAMJ, 15 May 1946.

101. Rheinstein, Military Justice, in "War and the Law" (ed. Puttkammer, U.of Chicago, 1943), p. 155, at 171.

This conjecture is without basis in fact. Enlisted men sat on courts martial in Imperial Germany.[102]

The foreign examples just cited are interesting in that they demonstrate that one fear of opponents of this change, that it would be destructive of discipline, has not materialized. Certainly, few armies in history have been governed with such iron disdpline as those of the Kaiser and of the Third Reich. As Rheinstein has said:[103]

> "In this country suggestions to have privates or sergeants on the bench of a court-martial have been regarded as incompatible with military discipline. The army of totalitarian Germany does not seem to share such apprehensions. Some or perhaps a good many of the German privates-judges may be so awed by the presence of their superiors that they do not take too great a share in the actual decision. Probably, one of the purposes of the Hitler decree was to inject into the court-martial system elements of proved loyalty to the National Socialist party, which one was not so certain to find among the army officers. It can hardly be denied, however, that the presence of privates on a bench introduces into the machinery of military justice a factor of camaraderie and even of democracy, such as is also expressed by the presence of privates upon the reviewing stand in German military parades. An accused private may also feel a greater confidence in the fairness of the court when he knows that there are among his judges some who understand his own outlook upon military life. Certain, there are some features in the foreign systems of court-martial organization which will deserve serious attention with the plans that are made for the future American peacetime establishment."

In fact, it is possible that enlisted men sitting on courts would judge their fellow soldiers more severely than officers do now. Such a fear has been expressed by at least one writer, speaking

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102. See Stephens, English and Continental Military Codes (1903) 5 J. Comp. Leg. (N.S.) 244, 251.

103. Op. Cit. supra note 97, at p. 155.

of the proposal to introduce into the British system a jury of twelve non-commissioned officers for the trial of an enlisted man:

"As for the men, a worse suggestion could hardly be made. N.C.O.'s are the backbone of the Army, but on points of discipline they are far less likely to lean in the accused's favor than a court of officers is. This is not to say they would ever be deliberately unfair; but an unconscious bias in favor of discipline would be almost inevitable." 104

There is much merit in this point of view. Certainly few enlisted men would voluntarily choose to be tried by a court composed entirely of first sergeants or chief petty officers.

There are other important considerations here. In the Navy far more than in the Army enlisted men are thrown together for long periods of time. Serving together on a vessel they develop a feeling of comradeship which, to say the least, is hardly compatible with their sitting on courts for the trial of each other. The situation is entirely different from that of the civilian criminal trial, where the defendant is unknown to the juror and they to him. Furthermore, it is the officer who gives orders and enforces discipline. It is the commanding officer who administers disciplinary punishment at mast. If this relationship is to be maintained, and of course it must be in any Army or Navy, the presence of enlisted men on courts martial presents certain real difficulties and anomalies.

The whole question deserves far more careful and thoughtful consideration than it has thus far received. It must be considered in the list of the post-war organization of the Navy and the changes, if

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104. Winfield, Courts-Martial from the Lawyer's Point of View, (1912) 34 L.Q.R 143, 150.

any, which may be made in the officer-enlisted man relationship in response to criticism of the so-called "caste system." It must be weighed in the light of the power which the court martial is to exercise, its sentencing power for example, and the final solution must be sought in the demands of true justice, and not on grounds of expediency.

If, despite these views, enlisted men are to be allowed to serve on courts martial, they should of course have certain minimum requirements, such as a high school education or its equivalent, and at least two years of service. Furthermore, it should be optional with an accused enlisted man to ask that a full minority of his court be composed of enlisted men. On this basis the opinion is ventured that few enlisted men would request it.

RECOMMENDATIONS:

(1) All Naval officers, senior as well as junior, should be required to take a course in naval law, and, if practicable, attend the School of Naval Justice at Port Hueneme, California.

(2) A minimum period of two years' service should be required for members of courts martial, in time of war as well as in time of peace.

(3) Prospective members of courts martial should be required to attend a prescribed number of trials for purposes of instruction.

(4) The Advisory Council should study the present provision (346 N.C. & B.) making Lieutenants junior grade and Ensigns ineligible to sit on courts martial.

(5) Because the Board believes it is against their own best interests, enlisted men should not be allowed to sit on naval courts martial but the problem should be studied further by the Advisory Council in the light of the recommendation of the House Committee and the attitude of the Army. However, if it should be decided not to interpose any objection to enlisted men's serving as a full minority of the court if they wish to do so, it should be insisted:

(a) That such enlisted men have certain minimum qualifications, such as a high school education or its equivalent, and at least two years of service, and

(b) That the presence of enlisted men on the court should be optional with the accused enlisted man and should not be in excess of a full minority of the court.

3. Selection of Court Members:

Under the present law the selection of members for courts martial is entirely within the control of the convening authority, who appoints members by name from officers under his command. In practice, however, the convening authority usually appoints to a court officers who are proposed by the commanding officer of the vessel on which the trial is to take place and who are personally unknown to him. In case of the permanent or semi-permanent courts which sit in the various naval districts, the convening authority

appoints officers whose names are furnished by the Bureau of Naval Personnel and who are detailed for that purpose.

The convening authority may remove, replace, or add members at any time, although he normally does so only when necessary to replace the vacancies. He may even replace officers during the course of a trial, although the practice is condemned and the power is rarely exercised.[105]

A similar system of appointment to courts martial prevails in the Army. In each case this derives directly from the concept of the court martial as the agency of the convening authority. While this is a practice which is consistent with the basic theory of military and naval organization, certain objections can be, and have been, made to it. For example, it has been asserted that: (a) a court so appointed is a mere creature of the convening authority, appointed to do his bidding, and that (b) courts so appointed are transitory and impermanent, and consequently lack the stability, experience and wisdom of civilian courts, which are permanent institutions.

With respect to the first of these contentions the Board cannot accept the extreme views of those who say that courts martial thus appointed have no independence whatever and are mere creatures of the convening authority. Certainly this is not true of the general court martial, and it

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105. N. C. & B., Secs. 348, 375, 376-380, 393, 463, (1945).

is with the general court martial that the Board has been chiefly concerned. Nevertheless, the Board recognizes the validity of more reasoned criticisms, such as the following by Professor Rheinstein and Professor Morgan, respectively, in writing of the Army court martial system:

> "In court-martial proceedings we have already seen that the court is not a permanent institution but is convened ad hoc for every single case. Thus the convening officer determines the composition of the court. He even has the power of withdrawing judges and appointing others during the course of a trial. Theoretically, a commanding general might change the entire composition of a court-martial during the pendency of a trial. When, in 1937, the President of the United States asked Congress to enable him to appoint new judges to the Supreme Court, his proposal was denounced as an attempt to 'pack the Court' and as a monstrous scheme to subvert one of the most sacred principles of Anglo-American justice. Under his bill the President would not have had the power of determining ad hoc the composition of the Supreme Court for every single case; still less would he have been able to change the personnel of a federal court during the pendency of a trial. Yet both these powers pertain to a commanding general in the Army. Naturally, these provisions have been criticized and, if military law had met with the greater interest among the lawyers and the public of this country, the criticism would probably have been more outspoken." 106

> "The control of the appointing and other superior military authorities over the court and its findings is to the civilian the most astonishing and confusing characteristic of the court-martial system. The number of officers, between the statutory maximum and the statutory minimum, to be detailed to a general or special court is determined by the appointing authority, whose decision thereon is final. Even during the trial of a case, either he or superior military authority may relieve an officer from service with the court and order him to other duty. So long as the court is not thereby reduced below the required minimum, it may continue to function, so that a general court might begin the consideration of a case with thirteen members and end with five. The appointing authority may, during the trial, add new members, if the membership of the court is not thereby increased beyond the statutory maximum. Even though the court is reduced

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106. Rheinstein, Op. cit. supra, note 97 at p. 167.

below the minimum, it is not thereby dissolved, and the appointing authority may add sufficient members to constitute a legal court. Although this practice of adding new members is discountenanced by the Manual for Courts-Martial and by some military writers, the validity of the proceedings are not affected by such addition, if opportunity is given the accused to challenge the new members, and the proceedings theretofore had are read over to them in open court. Conceivably, therefore, the entire membership of the court might be changed by the appointing authority during the progress of the trial, so that not a single member of the original court would participate in the finding and sentence. Thus the membership of the court, both as to numbers within statutory limits and as to personnel, is entirely within the control of the appointing or superior military authority at all times." 107

The other criticism that since courts martial are transitory and impermanent they lack the professional competence of civilian courts also has some validity. Thus, Rheinstein says:

"In addition to numerous minor differences, there is one aspect which may seem the strangest of all: while an ordinary criminal court is a standing institution, established once and for all to hear all cases which may arise within its jurisdiction and staffed with a permanent personnel, a court-martial is no standing institution at all. Whenever a case occurs which, in the opinion of a military commander, ought to be tried by a military court, he willconvene a court martial to hear this one particular case. There is no court martial in existence before the individual officers ordered to hear that particular case have convened, and the court goes out of existence as soon as that particular case has been closed. (Footnote: A commanding officer, may of course, convene a panel of officers to hear a whole series of cases. In the larger Army camps a panel is ordinarily convened to hear all cases which may come up within that camp, and traveling panels have been established in the various service commands to hear the more serious cases. These panels have a certain permanent character. Changes in personnel are not made until a member of the panel is ordered away from the camp or service command. Legally, however, the panel does not constitute a court until it has been specifically ordered and sworn in to hear an individual case.)" 108

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107. Morgan, The Existing Court-Martial System and the Anzell Articles, (1919), 29 Yale L.J. 52, 60.

108. Rheinstein, op. cit. supra, note 97, at p. 162.

Before the war general courts martial which were more or less permanent in character had been appointed at a number of naval bases within the United States,[109] and to a large extent during the war the Navy has used a system of permanent courts. Thus, the general courts martial established for each of the naval districts within the United States were composed of more or less permanent personnel.

A few proposals have been put forward to remedy this situation. For example, the Chamberlain Bill provided that the convening authority, instead of selecting a court by direct appointment, should designate a panel of qualified court members, and that for each trial the judge advocate, who was to be independent of the convening authority, should select the members of the court from this panel. This proposal was not adopted in the 1920 Articles of War.

No provision which would change the present method of selecting court members is proposed in the McGuire, White, or Judge Advocate General drafts of amended articles, except with respect to the designation of the judge advocate.

The Report of the General Board, United States Forces, European Theater, on "Military Justice Administration in Theaters of Operations," did not discuss the question of convening officers selecting personnel for courts, but did make the following comments on permanent courts:

> "Permanent courts. Some commands utilized relatively permanent courts when and where it was possible to do so and report that the procedure contributed to a better administration of military justice. The system is criticized by some, for it is said that such courts are inclined to become callous and impose unconscionable sentences. This was true

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109. See McNemar, Administration of Naval Discipline (1925) 13 Georgetown L.J. 89, at 119, fn 82.

in some cases. The sentences imposed by a court established in Western Base Section for trial of First U. S. Army and other combat troops shortly before D-Day (6 June 1944) were so severe that almost all of them were reduced at least 50 percent by the reviewing authority. Relatively permanent courts appointed by the Commanding General, Seine Section, Communicasions Zone and sitting in Paris, France, imposed death penalties for desertion, none of which were executed, on 11 accused between 8 March 1945 and 27 April 1945. Nevertheless, the great majority of judge advocates who expressed an opinion favor permanent courts. A few others approved partial permanency, to be attained by detail of a permanent president, law member, trial judge advocate and defense counsel. To circumvent the tendency towards harsh sentences, some propose that the permanent personnel shift and interchange, from court to court. The suggestion that general courts-martial move in circuits is not generally favored although it has strong support. One infantry division judge advocate favors abolishing courts within or for an organization and establishing them by arbitrary theater-wide geographical districts. All troops within the area would come under the jurisdiction of the courts of the district irrespective of their organizations." 110

Except with respect to the appointment of the judge advocate, the British Army and Navy use the same method of selecting court members as we do, that is, the convening authority selects members by name for the trial of a particular case. However, the British Army law prhhibits the appointment of a new member after an accused has been arraigned.[111] "Waiting" members are frequently appointed to British Army and Naval courts martial, that is, alternates to take the place of absent or challenged members (except the president).[112]

French military courts, the so-called counseils de guerre, one for each of the 21 military regions into which France is divided, are permanent courts,

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110. File: 250/1, Study No. 83, p. 46.

111. Army Act, Sec. 53(1); Rules of Procedure, Rule 68; Manual of Military Law, pp. 52, 629 (n.&), 663. The Naval Discipline Act is silent on this point.

112. Rules of Procedure, Rule 17(d); Manual of Military Law, p. 627; Naval Court Martial Regulations (Canada, 1943), Art. 438 a(ii).

each having jurisdiction of all military offenses committed within its region, as well as over all persons subject to military law who are found within such region. Each counseil has sever judges, six of whom are officers, the seventh a non-commissioned officer (for the trial of an enlisted man). The general commanding the region appoints the judges for a term of six months in rotation from among the officers on duty in the region. In time of war, and extraordinarily in time of peace, conseils de guerre aux armees may be appointed, erdinarily by the commanding general of a division or higher army unit. The conseil de guerre aux armees consists of a president and four judges, and its jurisdiction is not territorial.[113]

Russian military tribunals are composed of permanently detailed professional military judges of officer rank. In peacetime these tribunals are established at the headquarters of divisions, corps, and military areas (fronts, separate armies, fleets). However, these tribunals are independent of the commanders of these units, and unit commanders are neither appointing nor reviewing authorities. Instead, the Soviet court martial system is linked at the top with the civilian judicial system through a Court Martial Division of the Federal Supreme Court, which directs the activities and administration of the military tribunals. This tribunal, consisting of a president, his deputy, and four judges, acts as a court of last resort in military cases and occasionally as a court of original jurisdiction, appoints and transfers the personnel of these tribunals, supervises their activities, and issues instructions and directives. There is

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113. "French Courts-Martial," a study prepared by Brigadier General Edwin C. McNeil, USA, WD AC MJ, 15 May 1946.

also an Attorney General of the Army, who is in charge of military prosecutions.

RECOMMENDATION:

It is apparent from the practices of other nations that there is nothing of inherent necessity in the present American method of selecting named members ad hoc for the trial of each case or series of cases. The system is difficult to reconcile with established ideals of independent and responsible courts. The following suggestions are submitted for consideration by the Advisory Council:

(a) Whether the present system of appointing relatively permanent courts, which prevails in the various naval districts in the United States cannot be strengthened and extended, so that general courts martial convened by the Secretary of the Navy and by the commandants of the various naval districts would be organized as permanent tribunals, with members detailed for definite periods of time, subject to transfer out of the district or detail to other duties of paramount military importance.

(b) Whether, so far as compatible with military and naval operations, courts convened at sea, in overseas commands, marine divisions, and so on should be on a similar permanent basis.

(c) Whether the provisions for appointing courts should be changed or that convening authorities would not detail named officers to specific courts for particular trials, but would detail qualified personnel within their commands to court martial panels from which

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114. "Russian Courts-Martial," a study prepared by Brig. Gen. Edwin C. McNeil, USA, WD ACJ, 15 May 1946.

members of a court would be taken from time to time to fill vacancies and to replace relieved members on some impersonal method. If this could be done, it would tend to obviate the objection that members of courts martial can be handpicked, an objection which was of course not met by the proposal of the Chamberlain Bill that court members be selected from the approved panel by the judge advocate.

(d) Whether the appointment of a new member to a court after the arraignment of an accused should be prohibited, except where necessary to complete the minimum membership.

4. Number of Members:

Present Naval law requires that a general court martial shall consist of not more than thirteen nor less than five commissioned officers as members, and that "as many members, not exceeding thirteen, as can be convened without injury to the service shall be summoned on every such court."[115] In practice, the full complement of thirteen members is rarely appointed and in nearly every case the precept convening a court contains a recital to the effect that more officers cannot be detailed without injury to the service.

The requirement of a maximum number of members is a heritage from the British Naval practice which has outlived its usefulness. The recital in the precept that additional members cannot be detailed has become an empty formula.

Although recommendations have been made to reduce the maximum number

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115. A.G.N. 39.

to nine,[116] (the present British Naval requirement) or to seven,[117] there seems to be no real reason for continuing the requirement of any maximum number. No maximum number is specified for the United States Army special court martial, or for the British Army general, district, or field general court martial.

The McGuire Committee proposes that a general court martial shall consist of not less than five commissioned officers, and a summary court of not less than three.[118] No maximum number is prescribed in either case. Colonel Snedeker's notes on the McGuire Articles point out that adoption of the proposals therein contained would make the Navy system analogous to that of the Army. Commodore White and the Judge Advocate General propose a minimum membership of five and a maximum of seven for the general court martial, and a minimum of three, with no maximum, for the summary court martial.[119]

RECOMMENDATIONS:

It is recommended that a general court martial consist of not less than five, and a summary court martial of not less than three members, with no designated maximum, as proposed by the McGuire Committee. It should be observed here that if the panel method of selecting court members, suggested above, were to be adopted, some procedure would have to be developed for determining the number of members to be chosen for a particular court. (This of course would be true

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116. Ballantine Report, 24 April 1946, p. 7.

117. Id. at p. 25 (Recommendations submitted by Tedrow-Finn p. 5).

118. Proposed Articles 4(b), and 3(b).

119. Proposed Articles 9(b)(1), 10(b)(1).

under the panel method even if a maximum requirement should be retained.)

5. The Judge Advocate:

The present Naval court martial system does not provide for any official whose primary obligation is to rule on questions of law arising during a trial and to instruct the members of the court in the applicable law. The judge advocate presently has the duty of advising the members of the court on legal questions, but since his principal duty is to prosecute, this is an additional duty imposed upon him subordinate to, and to a certain extent inconsistent with, his obligation to prosecute.

Prior to 1920 the Army system was the same. Since 1920, however, the Articles of War have provided that for each general court martial there shall be a "law member", designated by the appointing authority. He is preferably a member of the Judge Advocate General's Department, when one is available, otherwise he is an officer who is deemed by the appointing authority to be specifically qualified to act as law member. He is a member of the court, with the same right and duty to vote on the findings and sentence as any other member. In addition, it is his duty to rule upon all interlocutory questions, other than challenges, arising during a trial. His rulings on admissibility or exclusion of evidence are final; on other questions he may be overruled by a majority of the court. He customarily advises the court, during its closed sessions, on the law applicable to the case, instructs the court on the meaning of reasonable doubt, comments on the evidence, and answers any questions on the law or facts put to him by other members. These instructions and comments are not,

however, binding on the other members, nor do they become part of the record. The law member does not issue any formal instructions, comparable to a civilian judge's charge to the jury.[120]

It is generally agreed that a similar official should be provided for Naval courts martial. Most of the current proposals, however, do not contemplate a "law member", but a "judge advocate" as found in the British Army and Navy court martial systems, who instructs the court on the applicable law, but is not a member of the court and does not vote on the findings and sentence.

Thus, the McGuire Committee proposes:

> "(4). For every general court martial, the convening authority shall, in addition, appoint a judge advocate, who shall be an officer certified by the Judge Advocate General as qualified to perform the duties of such office. The judge advocate shall, under such rules of practice, pleading and procedure as the Secretary of the Navy may prescribe, (1) summon all witnesses; (2) rule with finality on all questions of admissibility of evidence; (3) give impartial advice on matters of law and procedure to the prosecutor, to the accused and his counsel, and to the court; (4) question such witnesses as may, in his discretion, be necessary to a full exposition of the facts; (5) instruct the court, prior to its deliberation on findings, upon the law of the case; and (6) keep, with the assistance of a duly designated clerk, the record of proceedings." 121

The McGuire Articles further provide that in reaching its findings, the court

> "shall accept and be bound by the instructions of the judge advocate as to the law of the case, and it shall determine the guilt or innocence of the accused in accordance therewith." 122

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120. A.W. 8, 31; MCM (1928), pars. 40, 51d.

121. Proposed Article 4(b)(4).

122. Proposed Article 4(c).

The McGuire Articles also provide that the convening authority of a summary court martial shall appoint a qualified officer as judge advocate, whose duties shall be the same as those of a judge advocate of a general court martial.[123]

Colonel Snedeker, in his notes to the McGuire Articles, explains that these provisions are derived from the British Naval court martial system and, to a less extent, from the British and American Army systems.[124]

The White Articles contain the same provisions relating to the judge advocate, except that the words "who shall be an officer certified by the Judge Advocate General as qualified to perform the duties of such office" are omitted. The Judge Advocate General's proposed Articles follows White except that the judge advocate is to "advise" rather than rule with finality on questions of admissibility of evidence and is to "advise" rather than "instruct" the court on the applicable law. The Judge Advocate General proposal adds the following paragraphs:

> "(5). Whenever the court rejects the advice of the judge advocate on questions of law, the reasons advanced by the judge advocate and the reasons for the court's ruling shall be noted upon the records."

The White proposal agrees with that of the McGuire Committee upon the binding effect of the judge advocate's instructions to the court as to the law of the case.[125]

The Judge Advocate General's proposal provides merely that the court "shall give due regard to the advice of the judge advocate as to the law."[126]

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123. Proposed Article 3(b)(2).

124. At 30, 31.

125. White proposed Article 10(c)(1).

126. JAG Article 10(c)(1).

Both the White Articles and the Judge Advocate General's proposed Articles follow the McGuire proposals with respect to the appointment of a judge advocate for summary courts martial.[127]

The BallantineReport has recommended the designation of a judge advocate for a general court martial and, when the circumstances permit, for a summary court martial. He would be an officer specially trained under the supervision of the Judge Advocate General and certified by the latter as qualified. His rulings are to be advisory only, but in any case in which the court does not follow his advice with respect to matters of law and procedure the rejection of such advice and the reason therefor is to be noted in the record.[128]

The special recommendations of the minority members of the Ballantine Committee recommended adoption of the McGuire Articles in revised form. Under the revised draft of these articles the judge advocate is to be an officer "designated" (rather than "certified") by the Judge Advocate General as qualified: he is to advise the court on the admissibility of evidence (rather than rule finally thereon), and he is to "advise" (rather than "instruct") the court on the law of the case.[129] The court is to "consider" his instructions on the law, rather than to be bound by it, but it is still to determine the guilt or innocence of the

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127. White Article 9 (b)(2). JAG Article 9 (b)(2).

128. Report of Ballantine Committee, 24 April 1946, p. 6.

129. Tedrow-Finn Articles, Article 5(b)(4).

accused "in accordance therewith". These proposals further provide:

> "In any case where the court does not follow the advice of the judge advocate with respect to matters of law and procedure, the reason therefor shall be spread on the record of proceedings." 131

The difference in these various proposals are not so great that they could not be readily reconciled by the Advisory Council recommended in the Introduction hereof. All are agreed that there should be a judge advocate, trained in the law, to assist the court in arriving at its findings and sentence. All are agreed that he should not be a member of the court and should not vote. The only controversial questions are:

(1) Should the judge advocate be designated (or certified) by the Judge Advocate General as qualified?

(2) Should his rulings and instructions be binding or advisory?

(3) Should a judge advocate be provided for the summary court martial?

These questions will be taken up in order.

(1) It seems obvious that there should be some assurance that the judge advocate be qualified to perform his duties. The McGuire and White draft articles require that he be certified or designated as qualified by the Judge Advocate General. This seems to be a reasonable solution and preferable to the Judge Advocate General's draft, which includes no such requirement. The Ballan-

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130. Id. Art. 5 (c)(1).

131. Id. Art. 5 (b)(4).

Report concurs with the McGuire and White drafts in this respect.

Under the Articles of War the law member of a general court martial is supposed to be a member of the Judge Advocate General's Department, when available.[132] As a matter of practice, especially during the war, Judge Advocate officers in the Army were nearly all assigned to staff judge advocate positions or other full time legal assignments, and it was the exception rather than the rule to find one available for detail as law member, despite the fact that they were very commonly used as trial judge advocates. That this represents a failure to carry out the statutory intention was recognized as far back as 1922.[133] It is now recommended by responsible Army authorities that the actual presence of the law member be made a jurisdictional requirement in all cases tried by general courts martial and that it be further required that he be a member of the Judge Advocate General's Department.[134] The House Military Affairs Committee, studying the Army system, has recommended that the law member be required to be a lawyer, sum up cases, but have no vote on findings or sentence. The War Department opposes the denial of the law member's vote.[135]

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132. A.W. 8.

133. See Ansell, Some Reforms in Our System of Military Justice, (1922) 32 Yale 146, 155.

134. Report of the General Board, USFET, Military Justice Administration in Theater of Operations, File: 250/1, Study No. 83, p. 56, par. 76j. The same report noted that some of the judge advocate officers who made recommendations believed that the law member should not have a vote on the findings and sentences, should act as president of the court, and should be responsible directly to the Assistant Judge Advocate General of the Theater rather than to the convening authority. (Report cited, pp. 44, 86).

135. Army and Navy Bulletin, Vol. 2, No. 30, 27 July 1946, p. 2.

Since the Navy has established a group of legal specialist officers, pursuant to the recommendations of the Ballantine Committee, this problem could be solved by requiring that the judge advocate be a member of such group, just as it is now proposed that the law member of the Army general court be a member of the Army Judge Advocate General Corps. Inasmuch as provisions are now being made for the training of a greater number of legally qualified officers,[136] it should be practical for the Judge Advocate General to designate qualified officers to sit as judge advocates, and a statutory requirement that the judge advocate be an officer so designated would appear to be feasible.

In this connection it is interesting to note that in 1919 the Judge Advocate General of the Navy strongly recommended the formation of a "permanent corps of judges advocate for the naval service." He also recommended that the law be amended to require that a "law member sit on every general court martial, whose advice upon legal questions arising in connection with the hearing shall be binding upon the court, but who should have no vote upon questions of fact."[137] Although these recommendations were noted with approval by the Secretary of the Navy,[138] apparently no action was taken on them at the time.

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136. Ballantine Report, 27 April 1946, pp. 10-15.

137. Annual Report of The Judge Advocate General to The Secretary of the Navy, 1 September 1919, p. 323, in Report of the Secretary of the Navy (Misc. Reports, 1919).

138. Report of the Secretary of the Navy, (Miscellaneous Reports, 1919), p. 130.

General. A further discussion of this, and the question of who should prepare the judge advocate's fitness reports, appears in the minutes of the hearings of the Ballantine Committee. The Committee's Report recommended that:

> "The Judge Advocate General shall be the officer to report upon the fitness of each judge advocate in so far as his performance of duty as such is concerned." 139

It is believed that this suggestion is sound and should be adopted. The judge advocate should be granted complete freedom in the performance of his important function, and this can be insured only by eliminating at the outset even the possibility that his actions may be subject to the control of the convening authority. The Judge Advocate General, rather than the convening authority, should therefore make out his fitness report. But this can be accomplished by appropriate department regulation; a statutory directive is not necessary.

(2) The question of whether the judge advocate's rulings should be binding, or advisory only, should next be considered.

In the Army the law member's rulings on admissibility of evidence are final. No difficulty has been experienced in administering this rule. His rulings on other interlocutory questions are subject to being overruled by majority vote of the remaining members of the court, but in practice they rarely are. He does not rule on challenges, which are determined by majority vote, when not disposed of summarily. 140 It is now suggested by experienced Army judges advocate that the rulings of the law member be made final on "all interlocutory questions except the sanity or insanity of the accused, challenges,

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139. Ballantine Report, 37 April 1946, p. 6.

140. A.W. 31; Manual for Courts Martial (1928), pars. 51, 58.

motions for a finding of not guilty and rulings in cases involving military strategy or tactics or correct military action."[141]

There are certain practical difficulties in making the rulings of the proposed judge advocate of a naval court martial on the admissibility of evidence and other interlocutory questions binding on the court. He will not be a member of the court and will usually be junior in rank to many of its members. The difficult question of which of the two officers is to control the proceedings in the court room, the judge advocate or the senior officer present, arises. Nevertheless, it seems reasonable that the technical legal points which arise during a trial should be disposed of by the legal expert at the trial. The alternative, having the judge advocate's rulings on these questions advisory only, would result either (a) in courts automatically accepting the advice of the judge advocate, which would bring about the same result in practice, or (b) in the perpetuation of the present unsatisfactory system with the court closing for a vote on every objection to evidence and every interlocutory question, with attendant delay and confusion. The question requires careful consideration by the proposed Advisory Council.

Although it is not always distinguished from the preceding, the question whether the judge advocate's instructions on the law applicable to the case should be binding on the court in its deliberations on the findings is really quite different. It would be difficult to determine, in any given case, whether the members of the court have in fact accepted the interpretation of the judge advocate on a matter of law. The finding of guilt or innocence is usually a "mixed question of law and fact," and there are so many factors which enter into

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141. Report of the General Board, USFET, on Military Justice Administration in Theater of Operations, File: 250/1, Study 83, p. 57, par. 78b(1).

it that it would be impossible to say in many cases whether a court reached its findings because of the weight it attached to a certain piece of testimony, because of its findings that a certain fact did or did not exist, or because of a rule which it applied. On the other hand, the proposal that the instructions of the judge advocate on the law of the case be advisory only with a provision that the record contain an explanation if the court declines to follow it, seems equally impractical. For again we are confronted with the difficulty of determining whether the court's finding of guilt or innocence was, or was not, based in fact upon the judge advocate's instructions.

On the whole the most sensible solution would be to avoid the use of the word "binding" altogether and to provide simply that the court shall determine the guilt or innocence of the accused on the basis of the facts found by it, in accordance with the instructions of the judge advocate on the law. The judge advocate's instructions should be given in open court and set forth in the record. On review it would be assumed that they were followed by the court, and if they were found to be erroneous in substantial prejudice to the rights of the accused this could constitute ground for setting aside the conviction. It is not contemplated, however, that the judge advocate's instructions should be as detailed and lengthy as the charges of a civilian judge or that opposing counsel would have the right to submit requested charges, as in a civilian court. A brief statement of the applicable law should be enough in all but the most complex cases.

It is believed that this proposal would, in effect, make the judge advocate's instructions on the law binding, without imposing impractical procedural requirements and without fettering the honest exercise of its judgment by the court.

(3) Whether a judge advocate should be appointed for a summary court is a question which this Board is not prepared to discuss at length, on the basis of its experience. Although the McGuire, White, and Judge Advocate General proposals all provided for this, it was realized that certain practical difficulties stand in the way. Accordingly, the Ballantine Report has recommended only that a judge advocate be appointed for a summary court martial "when the circumstances permit."[142] The minority report of the Ballantine Committee recommended the language, "whenever practicable."[143]

The USFET Report noted, with respect to the Army special court martial, that the most recurring suggestion from judge advocate officers in the field was that there should be a lawyer either in the court or in a position of immediate supervision, such as a legal officer at regimental level.[144] The Report recommended consideration of a proposal to place at least one legally trained officer on each inferior court martial.[145]

A brief review of the practice of other nations with respect to legal officers on courts martial follows:

Great Britain:

(a) Army: The general court martial has a judge advocate, who sits with the court as president in open and closed session, but does not vote. He may be an officer of the Judge Advocate General's Department, a barrister (usually with prior military experience) who has been temporarily commissioned

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142. Ballantine Report, 27 April 1946, p. 6.

143. Id. at p. 25. (Recommendations submitted by Tedrow-Finn, p. 5.)

144. Report of the General Board, USFET, on Military Justice Administration in Theatre of Operations, File: 250/1, Study 83, pp 43-44, par. 53a.

145. Id. at p. 57, par. 78a(4).

or a civilian judge. He is not appointed by the convening authority in cases arising in the United Kingdom; instead, application is made to the Judge Advocate General for designation of a judge advocate. Overseas, the warrant empowering an officer to convene courts martial may authorize him to appoint the judge advocate. The duties of the British Army judge advocate are set forth in Exhibit A, Pages A6-A7. His opinion on questions of law and procedure arising during the trial are not binding on the court, but the court is admonished not to disregard them except for very weighty reasons.

A judge advocate may, but need not, be appointed for a district court martial, but it is unusual to have one except in cases involving indecency. In the case of a field general court martial the convening authority may appoint a fit officer to act as judge advocate, but he is not required to do so.

(b) Navy: Each naval general court martial has a judge advocate. Normally, there is present within the command a duly appointed Judge Advocate of the Fleet or his Deputy, who will sit on the court. If no such officer is available, the convening authority appoints a deputy judge advocate to officiate at the trial. In default of such appointment, the president of the court may appoint a deputy judge advocate. The duties of the judge advocate are set forth in detail in Exhibit B, pp B5-B7, ad passim. As in the case of the Army court martial, the judge advocate's opinions are advisory only.

There is no judge advocate for a Naval disciplinary court, but the convening authority appoints an experienced officer as clerk of the court who performs the duties normally assigned to the judge advocate of the general court martial.

France:

Army: In peacetime every court martial in a serious case must count among its members a judge of the regular civilian appellate court of the district, who presides over the court with the full authority of a chief justice.[146]

Germany:

Army: In Germany a member of what corresponds to the Judge Advocate General's Department belongs to, and presides over, every court martial in time of peace and over most courts martial in time of war. Known as the Kreigegerichtarat, he is a judge specializing in court martial matters, who has entered the hierarchy of military justice as a life career.[147]

Russia:

As stated above, Russian military tribunals are permanent bodies, composed of professional military judges of officer rank, appointed by the Court-Martial Division of the Federal Supreme Court. The available

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146. Art. 10 of Law of March 9, 1928, amending Code of Military Justice of the Army, Journal officiel, March 15, 1928, p. 2830; Bulletin legislative Dalloz, 1938, p. 98; Recueil periodique Dalloz IV, (1928); cited in Rheinstein, Military Justice in "Law and War" (ed. Puttkammer 1944), p. 170.

147. Code of Military Procedure, of September 29, 1936, Rheichegesetzblatt, 1936, Part I, p. 755, as 24-26; 45; Decree on Military Procedure in Time of War, of August 17, 1938; Reichegesetzblatt, 1939, Part I, p. 1455, as 9, 10; cited in Rheinstein, op. cit. supra, note 143, at p. 171. For the former German practice, see Stephens, English and Continental Military Codes, 5 J. Comp. Leg. (NS), (1903), 244, 251.

material does not disclose whether there is a judge advocate or law member as such, but since all members of the tribunal are professional military judges, presumably the president of the court exercises comparable functions.

RECOMMENDATIONS:

(1) That a judge advocate be provided for every general court martial, and, when practicable, for every summary court martial.

(2) That he be an officer whose qualifications have been approved by the Judge Advocate General, either by virtue of his being a Legal Duty Specialist or as otherwise having the requisite legal training.

(3) That he be subject only to the supervision of the Judge Advocate General, and not of the convening authority, in the performance of his duties as judge advocate.

(4) That his instructions on the law applicable to the case be made in open court and be set forth in the record; that the court determine guilt or innocence in accordance therewith and on the basis of the facts found by it; and that on review prejudicial error in the judge advocate's instructions be grounds for setting aside a conviction.

(5) That the Advisory Council recommend in the Introduction to this Report give careful consideration to the question whether the judge advocate's rulings on admissibility of evidence and on interlocutory questions arising during the trial be made binding on the court.

6. Prosecutor and Defense Counsel:

Although the Articles for the Government of the Navy do not set forth the qualifications or duties of the present judge advocate, regulations require that he be a commissioned officer and that he be designated in the precept.[148] The defense counsel is not designated in the precept, but, unless the accused furnishes his own counsel or declines counsel, the convening authority, or the commanding officer of the command in which the trial is held, appoints an officer to represent him.[149]

A study of the cases reviewed by the Board reveals that the Navy has made a most creditable effort to assign to these positions officers with legal training. A statistical study of the first 413 cases considered by the Board discloses the following:

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148. N. C. & B., Sec. 350, p. 198 (1945).

149. N. C. & B., Sec. 357, p. 201 (1945). See also Navy Department Bulletin, May 1945, pp. 9, 11.

	Judge Advocate	Defense Counsel
Lawyers (law degree, admitted to practice, or both)	306	268
Non-lawyers	8	14
Not Known	99	84
Civilian Counsel		5 *
Enlisted Counsel		5 **
Defense counsel declined by accused	—	37
Total	413	413

* Civilian counsel also participated in two other cases in which the accused were represented by officers who were lawyers.

** It is not known whether these enlisted men were lawyers. Presumably they were, or they would not have been requested by the accused.

Only 22, or less than 4% of those whose background could be obtained, were non-lawyers. Of these 22, at least 20 had attended law school for some period of time, or had had prior experience in Naval legal offices or on courts martial, or a combination of these. It should be noted, however, that in one very serious case, in which the accused was convicted of murder (R.B. #65), the defense counsel, a lieutenant junior grade, was not a lawyer (although he was a college graduate), whereas the judge advocate was a lieutenant commander with a JD degree from Northwestern University who had had civilian trial experience. This can probably be attributed to the fact that another officer with legal training was not available at the overseas station where the trial took place, but it is regrettable that in such a serious case there should have been such a

disparity in the rank and training of the two officers. However, there was no indication that the accused was not adequately defended. The accused received a 30 year sentence, subsequently reduced, on the recommendation of the clemency board, to 10 years. This Board recommended a further reduction to 6 years, on the theory that the offense more closely resembled manslaughter.

In another serious overseas case (R.B. #8), involving charges of desertion and of deserting duty station in time of battle, the accused was represented by a dental officer, who admitted in his closing argument that he had spent little time in preparing the case and stated that he was not as well qualified as the judge advocate. This Board's reviewer, an experienced Navy legal officer, was of the opinion from his study of the record that the accused was pporly defended. The accused was found not guilty of desertion, but guilty of absence without leave and of deserting his station in time of battle, and was sentenced to 25 years. Upon the recommendation of the Commandant of the Marine Corps the Secretary reduced the sentence to 5 years. This Board recommended a further reduction to 3 years and restoration on 12 months' probation.

The Navy has not followed the Army policy of requiring, wherever possible, that the defense counsel be of equal rank with or higher than the judge advocate. While this policy appears on the surface to be a good one, experience has shown that the actual protection it affords an accused is doubtful. Ability as counsel depends on so many factors other than rank that the adoption of the Army policy would probably not represent any real improvement. In fact, it might well result in the notion that superiority in rank

compensates for inferiority in legal ability, a result which should certainly not be encouraged.

It is noteworthy that in 37 cases, or approximately 9% of the cases considered, the accused declined to be represented by counsel. While most of these involved charges of simple absence to which the accused pleaded guilty, nevertheless 9% is a high average. The policy of permitting an accused to go before a general court martial without benefit of counsel and plead guilty is a dubious one, even though the accused could have had counsel had he so desired. The Board feels strongly that it should be eliminated.[150]

The Articles of War, since the 1920 amendments, have required the convening authority to appoint both a trial judge advocate and a defense counsel, with such assistance as he may deem necessary, to every general and special court martial. At the same time the accused has the privilege of introducing counsel of his choice, whether civilian or military, (the latter to the extent that the officer requested may be available.)

The McGuire, White, and Judge Advocate General proposed articles all provide that for every general and summary court martial the convening authority shall appoint a prosecutor and a defense counsel, who shall be persons qualified to perform such offices. The appointment of such defense counsel is not to affect the right of the accused to counsel of his own choice.[151]

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150. See discussion of pleas of guilty in Section VI, infra.

151. McGuire Articles 3(b)(2), 4(b)(3); White and JAG Articles 10(3).

(The change of title from "judge advocate" to "prosecutor" is made necessary because of the new office of the judge advocate, proposed in all three drafts).

The USFET Report suggests consideration of a proposal to maintain trained judge advocates and defense counsel permanently assigned to their respective duties.[152] Such a proposal would fit in with that made above, that Naval general courts martial be, so far as practicable, permanent organizations.

The British Committee of 1938 considered the question of defense counsel for courts martial. After commenting upon the fact that the comparative inefficiency of defending officers had been stressed by witnesses appearing before them and after noting the complaint, which they "felt was not without substance," that when an accused asked for a particular officer to defend him he was too often told that the services of that officer were not available, the Committee stated:

> "There is in the opinion of the Committee a real demand for skilled professional assistance for accused persons in cases of difficulty, where they are not in a position by reason of lack of means to provide this for themselves. We recommend that in proper cases legal aid should be provided on lines similar to and with safeguards comparable with the cases in which such legal aid as now provided for civilians who are prosecuted. It may be possible to defray the cost out of funds provided by fines if our recommendation in that direction is adopted; if not, it should be borne by the public purse." [153]

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152. Report cited, supra, note 140, at par. 78a(1), p. 57.

153. Report cited, supra, 1938, p. 15.

The system of furnishing defense counsel is one of the weakest points of the court martial system and has been subjected to the most criticism. Even though, as pointed out above, the Navy has made a creditable effort to assign lawyers to the position of defense counsel in every general court martial case, it is generally conceded that in most cases the judge advocate is the more experienced court martial lawyer. There seems to be good reason to require that both the defense and prosecuting counsel be qualified lawyers. Just as in the case of the judge advocate, so in their case, the Judge Advocate General atWashington should be personally responsible to see to it that each of the lawyers trying the case is qualified. Accordingly, the Judge Advocate General should be directed to establish in each naval district panels of prosecutors and defense counsel. The Judge Advocate General should, and to the extent practicable, at overseas installations, in fleets, divisions, etcetera, sign the fitness reports of each of these officers, so far as the performance of their duties in this capacity is concerned.

There is a further consideration here. In the average case the defense counsel's functions cease upon the conclusion of the trial. Although he has the right to submit a brief to the convening authority to higher authority, as a matter of practice he does not often do so. The result is that proceedings on review have an ex parte character and the accused is to all intents and purposes without counsel once his trial is over. It is believed that at the conclusion of each general court martial trial the defense counsel

should prepare and attach to the record a brief or appeal, raising such legal points as he deems appropriate, or a statement over his signature that in his judgment the written argument set forth in the record is sufficient and that no appellate brief is necessary. Apart from the advantages to an accused in having his case briefed and argued on review, whenever there is occasion therefor, such a brief and argument can be of inestimable value to the Board of Review. Civilian appellate courts in most cases require briefs, as pointing up for them the important points involved, citing the pertinent authorities, and generally simplifying their task. Of course in any case in which such a brief is submitted on behalf of the accused, it would be understood that an answering brief could be submitted by the prosecutor.

Furthermore, in cases where substantial jurisdictional or constitutional questions are involved, the law should insure that such questions be presented, on behalf of an accused, to the appropriate civil tribunal. A number of cases reviewed by the Board in which such questions were presented are mentioned else-where in this report. The convictions in these cases, if presented to the civilian courts, might have been invalidated. But they were not presented, and the Judge Advocate General, in the course of regular departmental review, has upheld them. The accused were apparently not advised of the questions involved, nor did their defense counsel carry the cases beyond the trial proceedings. The probabilities are that the accused in these cases are not aware that these questions exist and can still be raised by petition for writ of habeas corpus. If they are so aware, in most cases they lack the funds and the opportunity.

The Board believes that this represents a failure to do full justice. The situation is in marked contrast to that presented in the recent cases of the German saboteurs and the Japanese generals who were tried by military tribunals for violations of the laws of war. In these cases defense counsel, themselves military personnel, took every step to present the full case of the accused to the United States Supreme Court for final adjudication. Apparently they did so because, with their high rank and greater experience, they were more aware of the avenues of appeal open to them than is the average defense counsel, and also because of the great public interest and national and international importance of the cases. That their efforts were unsuccessful, from the immediate point of view of the accused, is unimportant. What is important is that these defense counsel secured for the accused whom they represented, every right and privilege known to our law. If this can be done for our enemies, provision should be made to insure that it is done for our own military and naval personnel, not merely as a matter of theoretical right, but as a matter of deed and of fact.

RECOMMENDATIONS:

(1) Qualified officers who are lawyers should be provided to act as prosecuting lawyers and defense counsel for every general court martial, and, when practicable, for every summary court martial.

(2) Both prosecuting attorney and defense counsel should be officers whose qualifications have been approved by the Judge Advocate General, either by virtue of his being a Legal Duty Specialist or as otherwise having the requisite legal training and experience.

(3) Both prosecuting attorney and defense counsel should be subject only to the supervision of the Judge Advocate General in the performance of their duties as such.

(4) In selecting officers for these ppsitions the Judge Advocate General should do his best to see to it that defense and prosecution lawyers are of equal ability.

(5) It should be required that each defense counsel attach to the record in each case a brief or appeal raising such legal points as he deems appropriate or a statement over his signature that in his judgment no such brief is necessary.

(6) It should be part of the duty of defense counsel in appropriate cases to take all necessary steps to present substantial jurisdictional or similar questions to the appropriate civil tribunal.

(7) The above recommendations should not affect in any way the present right (N. C. & B., Section 356), of an accused to counsel of his own choice, civilian or naval, when such is available, to conduct his trial or appeal.

SECTION V

PRE-TRIAL PROCEDURE

1. Preferring of Charges:

Under present Naval practice formal charges and specifications are prepared and signed by the convening authority on the basis of a report made by the accused's commanding officer, after an investigation of a complaint lodged with him.[154] The common practice is for the convening authority's legal officer to draft the charges and specifications, subject to the approval of the convening authority.

The Army procedure is different. Under the Articles of War, any person subject to military law may prefer charges.[155] As we have seen, this rule was introduced as one of the 1920 reforms, chiefly for the purpose of enabling enlisted men, as well as officers, to prefer charges. As a matter of practice, however, charges are nearly always preferred by the accused's immediate commander, and enlisted men, and even other officers, rarely take

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154. N.C. & B., Sec. 13,551; C.M.O. 7, 1927, pp. 6-7.

155. A.W. 70; 10 U.S.C. Sec. 1542.

advantage of their privilege of preferring charges. In contrast to Naval procedure, the convening authority is the one person who may not prefer charges, except in the case of a summary court.[156]

In general, the British Army and Navy court-martial systems follow the U.S. Army procedure.[157]

Neither the McGuire nor the White-Judge Advocate General draft articles cover the matter of preferring charges. Rules 2 and 3 of the McGuire Committee's proposed Rules of Procedure adopts the present Navy practice. The Board believes that this is sound, for the following reasons:

a. This is essentially a procedural matter, which should be incorporated in separate rules of procedure, rather than embodied in a statute.

b. Although hailed as a great reform in 1920, the privilege granted to Army enlisted men to prefer charges has been but little exercised by them.

c. The protection afforded to an accused by the Army rule that the person who prefers the charges may not appoint the court is more apparent than real. Although charges are initiated by subordinate commander, the appointing authority frequently

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156. A.W. 8,9; 10 U.S.C. Sec. 1479, 1480; M.C.M. par. 5, pp. 4-6.

157. See Exhibits A and B.

redrafts them or directs the preferring of different or additional charges, in accordance with facts disclosed by the report of investigation. Frequently appointing authorities, cognizant of certain facts which in their opinion indicate the advisability of trial, direct subordinates to prefer appropriate charges.

It is believed that the Navy rule is more in accord with the realities of the situation. However. if Rules of Procedure are adopted, they should embody the substance of Article 197 of Naval Regulations to the effect that any person in the Naval service may initiate a complaint against another to his commanding officer, with a view to the ultimate preferring of charges, if deemed proper by the appropriate authority.

RECOMMENDATIONS:

A. That Rules 2 and 3 of the Rules of Procedure as proposed by the McGuire Committee be adopted.

B. That Rule 3 of the same rules embody the substance of Article 197 of Naval Regulations to the effect that any person subject to Naval law may initiate a complaint against any other person so subject, view a view to the preferring of charges or the taking of such other disciplinary action, as may be deemed proper, by the appropriate authority.

This should be under oath

2. Oath to Charges.

Naval Law does not require that charges and specifications be sworn to. In this it differs from Army law which requires that charges must be preferred under oath, except that charges need not be sworn to if

the person signing them believes the accused innocent, but deems trial advisable in the interest of the service as well as for the protection of the accused. However, the Army rules provide that no accused should be tried on unsworn charges over his objection.[158]

The McGuire rules do not propose any change in this respect. It is believed that no change is necessary. Under the present procedure, whereby the convening authority signs the formal charges and specifications, after study of the investigation report from the accused's commanding officer, the preferring of frivolous or ill-founded charges is not to be expected. Again, it is felt that the protection afforded by the Army rule is more apparent than real, for the following reasons:

a. Charges may be, and usually are, sworn to on the basis of investigation rather than personal knowledge. This often means no more than that the person signing them has read certain statements on which the charges are based.

b. The oath administered by an adjutant or other officer in the form of a printed affidavit tends to become a matter of routine and lacks the solemnity of an oath administered to a witness in a court of law.

RECOMMENDATION:

That no change be made in the present rule with respect to swearing to charges and specifications.

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158. A.W. 70; U.S.C. Sec. 1542; M.C.M. par. 31, p. 21.

3. Pre-Trial Investigation:

Pre-trial investigation takes one of several forms:

a. Preliminary investigation to gather evidence and ascertain the principal facts. Such investigation may be conducted by anyone, but normally the duty is delegated to a subordinate officer.

b. Formal investigation before the commanding officer at mast. The purpose of this investigation is to determine whether trial or other disciplinary action is necessary. The commanding officer inquires into the circumstances upon which the complaint is founded, examines the statements and documents submitted by the complainant, questions such witnesses as he deems necessary, and calls upon the accused for such statement as he may wish to make and for a list of persons who he desires questioned in his behalf.

c. In important cases where the facts are complicated and there is reason for suspecting criminality, or in cases where a crime has been committed but there is uncertainty as to its perpetration, a court of inquiry or board of investigation may be convened to ascertain the facts. If it appears on such inquiry or investigation that a person in the service is involved, he is informed that he has been made an interested party and that he may have counsel.

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159. N.P., Art. 197; Naval Justice (1945) pars. 8-3, pp. 95-99.

cross-examine witnesses, and call witnesses in his own behalf.[160]

The Articles of War provide for an impartial investigation of charges before trial by general court-martial is ordered. The investigation officer is usually appointed by the officer exercising special court-martial jurisdiction, who forwards the report of investigation, with his own recommendation, to the officer exercising general court-martial jurisdiction. It may happen that the investigating officer is directly appointed by the latter. The accused has a right to be present at this investigation, to cross-examine witnesses against him, to have witnesses questioned in his behalf, and to submit a sworn or unsworn statement on his behalf, if he so desires.[161] Although the requirement of a pre-trial investigation is statutory, it is not a jurisdictional requirement and failure to observe it is not a fatal defect.

The USFET Report has made the following comments and recommendations concerning A.W. 70 investigations in the European Theater:

The majority of judge advocates who submitted opinions felt that A.W. 70 investigations in the Theater were inadequate. Among the causes assigned were that investigating officers were junior in rank, inexperienced, burdened with other duties, and were hampered by the scarcity of qualified interpreters. Frequently investigations were perfunctory, witnesses whose

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160. A.G.N. 56-60; 34 U.S.C. Sec. 1200; N.C. & B. Secs. 720-830. See McNemar, Administration of Naval Discipline (1925) 13 Georgetown L.J. 89, 115-117.

161. A.W. 70; 10 U.S.C. Sec. 1542; M.C.M. par. 35a, pp. 24-26.

statements had already been obtained where not interviewed further, and insufficient attention was devoted to channels of inquiry inconsistent with an accused's innocence.[162] Most judge advocates felt that these investigations should have been conducted by permanent trained investigators at regimental or equivalent level.

It was almost unanimously felt by judge advocates that A.W. 70 investigations in cases to be referred to special courts-martial should not be required.

The USFET Report has recommended:

a. That A.W. 70 be amended to make investigation mandatory, initially, in all cases to be tried by general court-martial, and subsequently if the charges and specifications are changed materially;[163]

b. That trained personnel be maintained and assigned to duty as investigating officers;[164]

c. That the detail of qualified enlisted men as investigators under A.W. 70 be given consideration.[165]

Under British Army procedure the immediate commander of the accused must immediately conduct an investigation in any case in which a person subject to military law has been placed under arrest. This investigation must be conducted in the presence of the accused, who must be

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162. See Hicks v. Hiatt, 64 F. Supp. 238 (DCMD Pa. 1946)

163. Report of the General Board, USFET, Military Justice Administration in Theatre of Operations, par. 76 b, p. 56.

164. Id., par. 78(a)1, p. 57.

165. Id., par. 78(b)7, p. 58.

given an opportunity to speak in his own defense and to call any witnesses he may desire. The commanding officer then decides whether to dismiss the case, deal with it summarily, or adjourn it for the purpose of having the evidence reduced to writing with a view to trial by court-martial.[166] The conduct of the investigation is regulated by Rules of Procedure.

The French pre-trial procedure is quite formal. After preliminary inquiry by a rapporteur or an officer of the gendarmerie, a formal investigation, called an instruction, is held. A proces-verbal is first prepared, with documents and exhibits attached, and forwarded with the plainte or denonciation to the commanding general. The latter refers the charges to his legal officer (chef de justice militaire) for advice. If he decides to proceed with the case, he forwards the papers to the rapoorteur, who conducts the instruction and prepares the case for trial. The rapporteur reads the entire proces-verbal to the accused and interviews the accused and the witnesses. The accused has the right to be represented by counsel of his own choice, or in default thereof by counsel designated by the conseil de guerre, which is to hear the case. The report of the instruction is then submitted to the commanding general, who may either order trial or drop the charges. If he orders trial, the report is submitted in advance to the president of the court, who prepares interrogatories along the lines developed at the instruction. Thus, the court itself, as well as the prosecutor and

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166. Rules of Procedure, Rules 2-5; M.M.L. pp. 616-617. See also Exhibit A at page A.

the defense counsel, are fully familiar with the case in advance of trial, and the trial itself becomes much more of a formality than with us, the instruction being the really important step in the proceedings.

Where the case is tried before a territorial conseil de guerre, at least three days must intervene between the instruction and the trial, and 24 hours where the case is tried before a conseil de guerre aux armees. The right to have counsel at the instruction is permitted except in time of war under trial at the front, and even then the accused is entitled to choose his counsel and communicate with him in advance of trial.[167]

The articles proposed by the McGuire Committee provide for the convening of courts of inquiry by persons authorized to convene general courts-martial.[168] and for investigation, to be conducted under rules prescribed by the Secretary.[169] These provisions embody the present provisions of A.G.N. 55. The Judge Advocate General and White draft articles are in agreement with the McGuire articles on this.

The proposed McGuire Rules of Procedure require a mandatory pre-trial investigation by a qualified officer designated by the convening authority, such investigation to be had in all cases intended to be submitted to a general or a summary court-martial. The language of the proposed rule follows, in general, the wording of A.W. 70.[170] It is believed that the

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167. "French Courts-Martial," a study prepared by Brig. Gen. Edwin C. McNeil, USA: See also Angell, The French System of Military Law, (1919) 15 III. L. Rev. 545, 551-552.

168. Proposed Article 7.

169. Proposed Article 8.

170. Rule 2, proposed Rules of Procedure.

procedure recommended is sound and should be adopted. As pointed out above with respect to the preferring of charges, this is essentially a procedural matter which should be incorporated in rules rather than in a basic statute. To include it in the statute might make it more permanent, but otherwise little advantage is seen. Having a similar rule incorporated in A.W 70 has not prevented a ruling that failure to comply with the statutory requirement does not invalidate a trial.

However, on the basis of the Army experience and the above comparative study, the following suggestions are made:

a. The requirement of the McGuire rules that the convening officer appoint the investigating officer seems too rigid. It is suggested that the words "commanding officer of the accused or superior authority" be substituted.

b. Likewise, the requirement that charges intended to be submitted to a summary court-martial be investigated first seems too rigid. Desirable though this might be, it would not in all cases be practical. Army experience is against imposing such a requirement. It is suggested that in the case of the summary court, the requirement be limited to those cases where investigation is practical.

c. The rules should incorporate a provision that in any case where the charges and specifications are materially changed after the first investigation, a new investigation would be required.

d. Provision should be made, wherever possible, to have pre-trial investigations conducted by personnel specially trained for that purpose.

e. The policy should be clearly affirmed, in Naval Courts and Boards and elsewhere, that the purpose of the investigation is to establish the facts, as far as possible, and to determine whether there is probably cause for prosecution; that its purpose is not to build up a case for the prosecution; and that the investigating officer is under a duty to be impartial and to bring out all available evidence for either side.

f. Pre-trial psychiatric examination, wherever practicable, should be encouraged by departmental policy. This has been tried with success in many Army and Navy commands. Such examination disposes of the issue of sanity at the outset by indicating in what cases such defense is apt to be raised. In such cases a thorough inquiry into the accused's sanity can be ordered, thereby eliminating unnecessary trials. In all cases the results of such pre-trial psychiatric examination would be of great assistance to the convening authority in making proper disposition of the charges.

g. The Rules of Procedure should include a provision that an accused, wherever possible, would be entitled to counsel during the pre-trial investigation. At the present time, the accused is frequently represented at mast or advised beforehand by some officer. However, such advice is not always sound and in many cases, the defense counsel finds, too late, that the accused has insured his own conviction by his statements to the investigating officer. In the great majority of cases coming before courts-martial, the pre-trial procedure determines the final outcome. If the right to

is to have any meaning, it is right there that it should be made effective. The French have recognized this by granting the right of counsel during the instruction, at least in peace-time and as early as practicable in wartime. Although the relative importance of the French instruction and judement is different from that of our investigation and trial, the essential elements of the situation are the same, and certainly we should be no less generous in protecting the rights of an accused.

RECOMMENDATION:

1. That the proposed Advisory Council consider for adoption Rule 2 of the McGuire Rules of Procedure in the following modified form:

Rule 2. Preliminary Investigation.

(a) Charges intended to be submitted to a general court martial shall first be investigated by a qualified officer designated for that purpose by the commanding officer of the accused or superior authority. The investigating officer, wherever possible, shall be specially trained in investigative procedure. He shall inform the accused of the charge against him, that he is under no obligation to make a statement, that any statement made by him may be used against him, and that he is entitled to counsel. All available witnesses who appear to be reasonably necessary for a thorough and impartial investigation shall be examined in the presence of the accused, who shall have the right to cross-examine available witnesses requested by the accused. The accused may present anything he may desire in his own behalf in defense or in mitigation.

(b) If from the evidence it appears to the investigating officer that there is probably cause to believe that an offense has been committed and that the accused has committed it, the investigating officer may recommend to the convening authority that a trial by court-martial be ordered. Otherwise, he shall recommend that the charges be dismissed. The investigating officer shall attach to his recommendation a summary of the testimony taken by him. On receiving the recommendation of the investigating officer, the convening authority may either dismiss the complaint or direct it to be tried by an appropriate court-martial.

(c) If trial by court-martial is ordered, the accused shall be given a pre-trial psychiatric examination, wherever practicable.

(d) When it is found impossible to furnish counsel to the accused on the pre-trial investigation, the commanding officer shall be required to state in detail the reasons why counsel was not available and the qualifications of the officer assigned to advise the accused in lieu of counsel.

(e) In any case where the charges and specifications are materially changed after the first investigation, a new investigation shall be required.

(f) If trial by summary court-martial is ordered rather than by general court-martial, the above provisions shall be applicable whenever practicable.

2. That the policy should be clearly affirmed in Naval Courts and Boards and elsewhere, that the purpose of the investigation is to establish the facts, as far as possible, and to determine whether there is probably cause for prosecution that its purpose is not to build a case for the prosecution; and that the investigating officer is under a duty to be impartial and to bring out all available evidence for either side.

4. Review of Charges Before Reference to Trial:

Under present procedure the convening officer, upon receipt of the accuser's statement, the report of investigation, and the related papers, studies the case and decides whether to order trial by general court-martial, return the case for trial by inferior court, direct disciplinary punishment, or drop the charges.[171] If he orders trial, he causes the charges and specifications to be preferred and forwards them with the other papers to the judge advocate for trial. In making his decision, the convening authority although not technically required to do so, invariably confers with his legal officer, and it is this officer who always draws the charges and specifications.

The Army system is similar, except that under the Articles of War, the appointing authority is required to obtain the advice of his staff judge advocate before referring a case to trial by general court-martial.[172] Although the requirement is not jurisdictional, it is nearly always followed. The staff judge advocate reviews the charges and expected testimony, states his opinion whether a prima facie case is established, and makes a recommendation

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171. Naval Regulations 197; N.C. & B., Sec. 13, p. 5.

172. A.W. 70; 10 U.S.C. Sec. 1542.

as to the form of trial or other disposition of the charges. His advice is in writing and becomes a part of the permanent file in the case.

The practice of Army appointing authorities in acting upon the advice of their staff judge advocate differs widely in most cases the staff judge advocate's advice is followed without question. In some commands the commanding general never actually sees the charges but authorizes his staff judge advocate to dispose of them as he see fit. In other commands the commanding general or chief of staff takes final action in all cases and, on occasion, overrules his staff judge advocate. Some judge advocates will admit that they shape their recommendations to meet what they know to be the commander's policies and wishes; perhaps nearly all do so unconsciously. However, most recommendations are made in the light of well-known standards established by the War Department.

The present Army rule represents a compromise between the original proposal of the Chamberlain Bill (Article 20), that no charge be referred to trial by a general court unless an officer of the Judge Advocate General's department, charged with such duty, had endorsed on it his opinion that the charge stated an offense against the accused and that there was prima facie proof of the accused's guilt, and the prior procedure, which was substantially the same as the present Navy rule. This provision of the Chamberlain Bill would have made the legal officer's opinion binding upon the question of law involved, but it was opposed by the Army and was not adopted.

The USFET Report does not specifically discuss this question and does not recommend any change in the present Army method.

Under British Army procedure the convening authority, before sending charges to trial, refers them to his legal officer for his opinion, by which he is usually guided. In cases of fraud, indecency, or theft, arising within the United Kingdom, the charge and a summary of the evidence must be submitted to the Judge Advocate General before reference to trial. The latter's opinion is advisory only, but is nearly always followed.[173]

British Navy procedure requires that the complaining officer (usually the Captain of the ship) shall draft the charges and forward them to the convening authority together with a "Circumstantial Letter," which reports the circumstances on which the charge or charges are founded.[174] The convening authority is required to ascertain that the charges are correct and sufficient, properly drawn and carefully framed.[175] There is no requirement that a legal officer assist in the framing of the charges or in the determination of a proper tribunal.

In France, at least during World War I, the procedure was similar to the present British Army rule. The convening authority had full power to order a case to trial, or not, as he saw fit. In making his decision he was advised by his legal officer or Chief of the Bureau of Military Justice, who was appointed on the recommendation of the Under-Secretary of State for Military

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173. See Exhibit A, pp. 4-5; Hearings before the Subcommittee on Military Affairs on S. 64; U.S. Senate, 66th Cong., 1st Sess., 1919, Part 1, p. 542.

174. Naval Court-Martial Regulations, Arts. 434, 434a, 435.

175. Id., Article 438.

Justice. This official was usually also the commissaire du gouvernement of the court, that is, the prosecutor. The convening authority was not bound by his legal officer's advice, but usually followed it.[176]

Neither the proposed McGuire Articles nor the McGuire Rules of Procedure make any provision for legal review of the charges prior to trial. The Ballantine Report does not discuss the problem. Nevertheless, it is felt that the matter is important and that it should be covered in any Rules of Procedure which are adopted. The present practice required in Army cases, and usually followed in the Navy, of having the convening authority's legal officer review the case before reference to trial by general court-martial is believed to be sound. The only question requiring consideration is whether the opinion of the legal officer should be binding. This really divides itself into two parts:

a. Whether his opinion as to the legal sufficiency of the charges and specifications and his opinion whether a prima facie case is presented should be final; and

b. Whether his recommendation as to the actual disposition of the charges, that is, whether they should go to trial and, if so, before what type of court, should be final.

Since (a) involves only legal matters, to make the legal officer's opinion thereon final would be sound. But assuming that the legal officer has found the charges legally sufficient and that a prima facie case exists, the

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175. Hearings cited supra, note 167 at p. 543-4; Angell, The French System of Military Law, (1919) 15 Ill. L. Rev. 545, 550-1. The present French rule, in this regard, is not known.

actual disposition of the case is really a question of policy rather than law. It would not be consistent with a sound theory of command responsibility to make the legal officer's recommendation thereon binding. This, raises the further question whether it would be wise to attempt to divide the legal officer's opinion into two parts, and make one binding, the other advisory. It is apparent that this would lead to confusion. Furthermore, as a practical matter, it is extremely doubtful whether any convening officer would refer charges to trial in the face of an opinion from his legal officer that the charges were in no proper form or the expected evidence legally insufficient.

The papers referred to the legal officer should include a statement of the accused's background, education, civilian employment, marital status and status as to dependents, service history, disciplinary record, and conduct ratings, so far as these items can be obtained from his service record or are known to his commanding officer. There should also be included the report of any pre-trial psychiatric examination. All these papers, together with the investigating officer's report and legal officer's advice, should become part of the permanent file in the case to facilitate subsequent review.

RECOMMENDATION:

That the proposed Advisory Council give consideration to the inclusion in Rules of Procedure to be adopted of a provision that, before any case is referred to trial by general court-martial, the convening authority must refer the case to his legal officer for his opinion as to the legal sufficiency of the expected evidence and for his recommendation as to the disposition thereof; such opinion to be in writing and to become a part of the permanent file in the case; such opinion, however, not to be binding on

the convening authority.

5. Reference of Cases to General Courts-Martial.

The number of Naval General Court-Martial cases tried during the war compares very favorably with the Army rate. For the entire period of the war, from 1 December 1941 to 30 September 1945, there were approximately 53,870 trials by Naval General courts-martial. The aggregate population of the Navy, Marine Corps, and Coast Guard during this period was over 4,7500,000. By comparison during the period from 1 December 1941 to 28 February 1946, the Army tried 93,216 general court-martial cases. The maximum strength of the Army during this period was approximately 8,300,000.[177] In each case the rate is a little over 1% of the maximum strength, for the 4 year period, with the Navy figures running a trifle higher. Of course this percentage is not accurate, because it is taken by comparing the total number of trials over a 4 year period with an aggregate Navy strength and a maximum Army strength taken at one time. Accurate statistical study would require a month by month comparison of the number of trials with the average strength during each month, followed by an attempt to arrive at a weighted average for the entire period. The Board's staff has not attempted any such detailed statistical analysis. Furthermore, the Army's aggregate population during this period was considerably more than 8,300,000. Without attempting to analyze these figures further, the Board is satisfied that the rate of trial by general court-martial, as between the two services, has been reasonably parallel.

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177. As of 31 May 1945.

During World War I the maximum strength of the Navy, Marine Corps, Coast Guard, and other elements was 615,735. During the fiscal years 1917, 1918, and 1919 there were 13,099 trials by Naval general court-martial. This comes to approximately 2% of the maximum strength or almost twice as high an aggregate percentage for the 3 years between 1 July 1916 and 1 July 1919, as for the 4 years between 1 December 1941 and 30 September 1945. 178

A study of year by year percentages is even more illuminating as showing a steady decline in the rate of trial by general court-martial. The figures show the following percentage of men tried by naval general court-martial as compared with the average number of men subject to naval jurisdiction:

	Year	Percent of trial by G.C.M.
Before and During World War I. 179	(Fiscal year 1916	2.36
	(Fiscal year 1917	1.75
	(Fiscal year 1918	1.17
	(Fiscal year 1919	1.244
World War II. 180	(Period - 1 December 1941 to 31 August 1945. (Population: 4,758,215. GCM Trials: 52,120	1.09

Nevertheless, the Board believes that the rate of trial by general court-martial could be reduced even further without impairing discipline. The

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178. Figures obtained from Report of the JAG, 1 September 1919, in Report of the Secretary of the Navy (Miscellaneous Reports, 1919), pp. 321, 325.

179. Id. at p. 326.

180. Report on a Survey of Wartime Naval Courts, by Military Law Division, Navy JAG, 10 April 1946.

Board was impressed by the number of cases reviewed by it where what appeared to be relatively minor offenses had been referred to trial by general court-martial. The following are among many such cases:

1. R. B. No. 212: The accused, who was 20, overstayed his leave 13 days, then surrendered at his base. He had enlisted at 17 and had had one prior conviction by summary court for absence over leave of 19 days. The present offense took place after V-J Day.

The accused was found guilty of absence over leave and sentenced to a reduction of rating, 18 months' confinement and a bad conduct discharge. The convening authority reduced the confinement to 7 months. The Board recommended mitigation of the reduction in rating and restoration to duty on 6 months' probation.

2. R. B. No. 206: The accused, who was 21, absented himself without leave for 21 days, then surrendered. The offense took place after V-J Day. There was a delay of over three months between the accused's surrender and his trial. The accused had served overseas, though not in combat. He had had three prior deck courts, two for short absences, one for shirking duty, and several captain's masts.

The accused was found guilty and sentenced to 9 months and a bad conduct discharge. The Board recommended restoration on six months' probation.

3. R. B. No. 221: The accused, who was 18, overstayed his leave two days, missed ship, then surrendered. The offense took place after V-J Day. Although the accused pleaded guilty, the record showed that there was some doubt whether he intended to miss his ship. He had one prior conviction by deck court for six days' absence over leave, and a conviction by summary court for breach of arrest, and a captain's mast for absence from duty station.

The accused was sentenced to 10 months and a bad conduct discharge. The Board recommended restoration on six months' probation.

4. R. B. No. 368: The accused, who was 23, overstayed his leave three days, then surrendered on board his ship. The offense occurred V-J Day. The accused had had 24 months of sea duty and had participated in 5 major engagements. The present offense took place immediately after his return from Japan. The accused had had one prior conviction by deck court, and one by summary court, both for short absences.

The accused was sentenced to 12 months' confinement and a bad conduct discharge. The court made a unanimous recommendation of clemency and the convening authority reduced the confinement to 8 months. The Board recommended complete remission of the sentence and restoration to duty.

5. R. B. No. 354: The accused, 18 years old, overstayed his leave 11 days, and was then apprehended. The offense occurred after V-E Day, before V-J Day. The accused had been discharged from a prior enlistment because of immaturity. During his prior enlistment he had had one summary court and during his current enlistment one deck court and three captain's masts.

The accused was sentenced to 17 months' confinement and a bad conduct discharge. The convening authority reduced the confinement to 14 months. The Board recommended restoration on six months' probation.

6. R. B. No. 463: The accused, who was 19, overstayed his leave 11 days, then turned himself into the shore patrol. The offense took place after V-J Day. The accused had had one prior deck court for a short absence, and two captain's masts.

The accused was sentenced to 8 months' confinement and a bad conduct discharge. The period of confinement was subsequently reduced to 7 months. The Board recommended restoration to duty on six months' probation.

The above cases are typical of a great many which have been reviewed by the Board. They have been taken, more or less at random, from the records of a few days' hearings, and by no means represent a careful calling of the most extreme cases which have been considered.

The Board is of the opinion that cases of this type, and they seem to be numerous, should not go before general court-martial. The reasons they have gone before general courts are, beside the special conditions presented by wartime:

a. The limited sentencing power of the summary court-martial;

b. The limitations which have been placed on the discretion of convening authorities in referring cases to trial.

These reasons will be discussed severally.

a. As has been pointed out both by the McGuire Committee and the Ballantine Committee, the limitations on the sentencing powers of the summary court have resulted in too great a gap between the sentence of the general court, which by custom nearly always imposes a sentence including discharge and a fairly substantial period of confinement, and the summary court-martial, whose powers are severely limited by law.

The obvious solution is to increase the dignity and power of the summary court-martial so that it can handle minor cases of this nature without the necessity of resorting to trial by general court-martial. Such a

recommendation has been made both by the McGuire Committee and by the Ballantine Committee.[181] This recommendation is implemented in Article 4(c) of the proposed McGuire Articles, with which the White and Judge Advocate General draft articles concur generally. As Colonel Snedeker has said:

> "The enlargement of the powers of a summary court-martial is a prerequisite to the retention of the prestige formerly attained by ghe general court-martial. Trial by the latter type of court should be reserved for the most serious of military offenses and for felonies." 182

The nature of the increased powers which should be granted to the summary court-martial is a matter which the Advisory Council will have to consider. The McGuire, White and Judge Advocate General draft articles recommend an increase of its powers to include sentence to six months' confinement, plus forfeiture. This is the present power of the Army special court. It should be pointed out here that the USFET Report has recommended that the powers of the Army special court-martial, already greater than those of the Navy summary court-martial (except that an Army special court may not impose a discharge), be still further increased to authorize confinement up to one year, with appropriate forfeitures, but without dishonorable discharge (the bad conduct discharge is unknown to the Army).[183] If the Navy summary court possessed this power, many of the cases referred to above could have been tried thereby, even in wartime.

The British Army district court-martial has power to impose sentences up to two years' confinement. However, this court was but little used during the war, most cases being referred to the field general court-martial. This court has all the powers of the general court-martial, unless

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181. Report of the McGuire Committee to the Secretary of the Navy, 21 November 1945, p. 7; Report of the Ballantine Committee to the Secretary of the Navy, 27 April 1946, p. 8.

182. Snedeker's Notes, p. 3.

183. USFET Report, op. cit. supra, note 158, par. 78(b) (2), at p. 57.

it consists of only two officers, in which case its powers are limited to "field punishment", or two years' imprisonment. We may then say, that the British Army knows two broad types of court-martial: (a) the general and the field general, with board sentencing powers, for the most serious offenses, and (b) the district court-martial and the two-officer field general court, with power to impose sentences up to two years, for other offenses.

The British Navy knows only one type of court in peace time; the general court-martial. However, the disciplinary powers of the commanding officer are much greater than in the American Navy, and in time of war there also exists the Disciplinary Court for the trial of officers, with power to impose various punishments, but not confinement.

b. Although in theory the convening authority has full control over the disposition of charges, his powers and discretion in this respect are severely limited by Department policy. A series of letters on court-martial policies have been promulgated by the Secretary of the Navy, establishing policies in regard to absence offenses. The latest of these letters, dated 12 October 1945, one months after V-J Day, prescribes, as a matter of policy, that absence offenses will be disposed of as follows:

(1) First Offense:

Absence over leave for over 30 days: General court.

Absence without leave for over 20 days: General court.

(2) Second absence Offenses:

All offenders who were convicted by summary court for their first absence offense, unless the second was less than 8 days.

(3) Third Absence Offenses:

All offenders with at least one prior conviction by general or summary court, unless the third absence was less than 4 days.

(4) Repeated Absence Offenses:

In the discretion of the convening authorities, regardless of the length of absence.

(5) Missing Ship or Mobile Unit:

All cases, regardless of the length of absence, in the absence of extenuating circumstances, or unless the ship has merely moved from one pier or anchorage to another, or had only gone on a trial or port repair run or local shakedown.

The letter also provided that all men more than 45 days absent should be charged with desertion. Policies as to sentences, confinement, and other matters were also set forth. Exceptions to these policies could be made when special circumstances so indicated, but in all such cases the convening authority was required to state his reasons in his action.

The Board understands that a subsequent letter relaxing these policies considerably has recently been published.

The Board realizes that these letters were rendered necessary by certain serious disciplinary problems which arose during the war. This was particularly so with respect to missing ship, which during the war was tantamount to desertion. Even after V-J Day, prolonged absences and cases of missing ship interferred seriously with the demoblization program. The Board also realizes that it is highly desirable to establish uniform policies in

court-martial matters and that the Navy, by prescribing uniform centralized policies, has achieved a very commendable result in the direction of uniform justice.

Nevertheless, the effect of the policies just cited was to deprive local commanders of most of their discretion over court-martial matters, prior to trial. If the proper theory is that the convening authority is responsible for all matters of discipline within his command, nothing could be further removed from this policy than to prescribe in advance just what he is to do in each and every case which comes before him. The escape clause, providing that these policies need not be followed when the circumstances indicate otherwise, is largely nullified by the requirement that in every such case the convening authority must state in his action his reasons for departure from policy. It is obvious that only in very exceptional cases will a convening authority take this trouble.

Furthermore, the policies laid down seem much too restrictive, especially since the termination of hostilities. They are at variance with Army policies, which prescribe that no case of absence without leave should be referred to trial by general court-martial unless it approached desertion in seriousness. Consequently, an absence offense of less than 30 days was nearly always tried by inferior court-martial and most absences of from 30 to 60 days were thus disposed of, except of course, in actual combat areas. Even where an offender had prior convictions, trial by general court-martial was not ordinarily regarded as necessary because of one or two prior convictions by inferior court.

The attempt to categorize all offenses and to prescribe their disposition in advance, with little or no regard to the varying factors of age, education, civilian background, previous service, combat record, domestic

conditions, hardship, and other mitigating circumstances is an archaic approach to law enforcement, completely at variance with modern notions of penology and criminology. Even from a purely military and disciplinary standpoint, it is less advance than the Army's more flexible approach to the same subject.

Finally, to lay down, even as a statement of policy, the rule that all absences in excess of 30 days shall be charged as desertion comes dangerously close to legislation.

The official policy of the Department is that trial by general court-martial shall not be resorted to unnecessarily, where trial by summary court-martial or other action will accomplish the ends of discipline.

In the Army the policy is announced that:

> "With due regard to the policies of the War Department and other superiors and subject to jurisdictional limitations, charges, if tried at all, should be tried by the lowest court that has power to adjudge an appropriate and adequate punishment." 184

Investigating officers, commanding officers, and appointing authorities are enjoined by Army directives to bear this policy in mind and are further reminded that charges should not be referred to trial by general court-martial unless they can be disposed of in no other manner consistent with military discipline.

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184. M.C.M. 1928, par. 34, p. 23.

British Army policy is similar. Thus, the Manual of Military Law provides as follows:

> "The powers of district courts-martial are sufficient to deal with all ordinary offenses committed by non-commissioned officers and soldiers. In the case of aggravated offenses however, a general court-martial may properly be convened. (KR 634).
>
> "A case should not, as a rule, be sent for trial unless there is reasonable probability that the accused person will be convicted. At the same time there may be cases where disgraceful charges have been preferred and where a court-martial affords the only means to the accused of clearing his character." 185

It must be conceded that during the war the district court was rarely used, the field general court taking its place, even within the United Kingdom. But the results have been, whether in peace or war, that only the most serious cases, and cases involving officers have gone to a general court-martial, all others having been referred to district or field general courts or disposed of summarily.

British Naval procedure is otherwise, since the British Navy knows only the general court-martial, plus the disciplinary court, for officers only, in time of war. However, the disciplinary powers of the commanding officer are very extensive, consequently it is possible to dispose of many offenses summarily which would require at least a summary court under our procedure.

The Navy's official policy on resorting to trial by general court-martial, cited above, is sound. However, because of the limited sentencing power of the summary court and because of the grave problems of wartime discipline, it became necessary to resort to trial by general court-martial in

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185. At p. 48.

the case of a large number of purely military offenses which should not have to be tried before the highest type of court available. It is believed that if the sentencing power of the summary court is increased and if convening authorities are given greater discretion to dispose of charges, the rate of trial by general court-martial can be still further reduced. However, the present desirable policy of uniformity in similar cases, so far as compatible with the requirements of individual cases, should be maintained.

RECOMMENDATION:

1. It is recommended that the Advisory Council give consideration to the following:

(a) A substantial increase in the sentencing power of the summary court-martial, so that only the most serious charges need be referred to trial by general court-martial.

(b) The advisability of broadening the discretion of convening authorities in disposing of charges, subject, however, to broad statements of Department policy so that desirable uniformity can be maintained.

(c) Clarification and re-emphasis of the present Department policy that cases should not be referred to trial by general court-martial unless they can be disposed of in no other manner consistent with the requirements of discipline.

2. It is also recommended that the present practice of maintaining statistics of the rate of trial by general court-martial within each command be continued, that such statistics be periodically reviewed by the Advisory Council, and that

whenever this rate seems too high in any command, positive action be taken to correct whatever defects in hardship, discipline, training, and morale exist in such command.

6. Delays in Trial:

One of the purposes of the decentralization recommended in the first Ballantine Report was a reduction of the time interval between the offense and the trial and between the trial and promulgation of the sentence. It was pointed out in that Report that the average elapsed time between the accusation and promulgation of the sentence in general court-martial cases had been in excess of 100 days, of which approximately 60 had elapsed before trial. It was estimated that decentralization would reduce this elapsed time by at least 60%.[186] As a result of decentralization, it is now stated that elapsed time averages 27 days.[187]

It is not known whether this figure takes into account the time elapsed between the offense (or return to naval control in absence cases) and the preferring of charges. This is an important factor, which must be considered in looking at the question of time delay. Figures compiled by the Board's staff of the cases reviewed by it prior to 1 July 1946 show the following averages:

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186. First Ballantine Report, p. 7.

187. Hearing on S. 1545, to amend Article 38 of the Articles for the Government of the Navy, 79th Cong., 1st Sess., H.R., Committee on Naval Affairs, 17 January 1946, p. 2360.

Number of Days between offense (or return to Naval Control) and trial	Number of Days between Trial and Action of Convening Authority	Total Elapsed Time
37.5	7.8	45.3

In a number of specific cases the time delay seems excessive. The following are cited, but there are many others:

(1) R. B. No. 6: 148 days elapsed between return to naval control and trial. 11 days elapsed between trial and action of convening authority or a total of 159 days between the time accused was returned to naval control and final action by the convening authority. In the meantime, while in the brig, accused committed another offense (oral coition) for which he was also tried. The offense took place in the United States, and no reason for the delay is seen.

(2) R. B. Nos. 3-4: (joinder): 40 days elapsed between return to naval control and trial. 27 days elapsed between trial and action of convening authority or a total of 67 days between the time accused was returned to naval control and final action by the convening authority. Although the offenses took place in Australia, the trial was held in Australia, and no reason for this delay is seen.

(3) R. B. No. 185: 163 days elapsed between return to naval control and trial. 22 days elapsed between trial and action of convening authority or a total of 185 days between the time accused was returned to naval control and final action by the convening authority. It is to be noted however, that the convening authority considered this amount of confinement and reduced the sentence from 18 months to 7 months, nevertheless the offense and trial both took place in the United States and no reason was given for this delay.

(4) R. B. No. 116: 72 days elapsed between return to naval control and trial. 7 days elapsed between trial and action of convening authority or a total of 79 days between the time accused was returned to naval control and final action by the conveing authority. From the time schedule attached to the review by the Legal Officer it is apparent that waiting for the service record delayed the case 43 days; after this delay, and charges had been submitted, it took 29 days to bring the case to trial.

(5) R. B. No. 299: The accused was returned to naval control on 25 September 1945 after 20 days' absence without leave. After being held 69 days without trial, he broke arrest. He was apprehended the next day, re-confined, and not tried until 35 days more had elapsed. Total delay from original return to trial, after deducting the one day of escape, was 104, to action, 107. Accused stated that he asked why he was not tried and was told that "they were getting new evidence." On the trial he pleaded guilty to both the absence and the breach of arrest. The offenses and the trial took place within the United States.

(6) R. B. No. 458: 66 days elapsed between return to naval control and trial. 6 days between trial and action of convening authority or a total of 72 days between the time accused was returned to naval control and final action by the convening authority. It is apparent from the record that some of this delay was caused by difficulty in obtaining the accused's service record.

Even though these cases appear to be the exception rather than the rule, the delays shown are excessive. It is believed that much could still be done toward reducing delay. Apparently the greatest single cause of delay has

failure of the accused's service record to arrive on time.[188] It is believed that this could be greatly reduced as a source of delay if provision were made for the making of duly authenticated extracts at the time accused's records were forwarded to Washington upon his initial absence.[189] Then, at least in those cases where the accused is tried at his own station, these extracts could be offered in evidence. This procedure has been successfully followed in many Army commands.

The Army has conducted a vigorous campaign toward reduction of delay in general court-martial cases. A chronology is required to be kept and attached to each record of trial by general court-martial, with all excessive delays explained. The policy in the European Theater has been to regard 30 days as the maximum time between initial confinement or arrest (or the offense, if no restraint was imposed) and the trial, and 15 days between the trial and the action of the reviewing authority, a total of 45 days. In some of the service commands in this country, 15 and 15, a total of 30 days have been regarded as the maximum periods.

Concededly, the Army went too far in this direction. An undignified "race" developed among the various service commands to see which one could turn in the best time record, with considerations of justice, thoroughness,

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188. The Navy has tried to correct this situation and by directive has provided that disciplinary action should not be delayed more than 20 days by the lack of service record. BuPers Circular Letter 45-817, dated 12 July 1945.

189. Naval Regulations provide that in absence cases, when the deserter entry is made in the service record, that record will be forwarded to Washington, BuPers Manual, Article D-8005.

and fairness to the accused playing a subordinate rule. There is no thought to encourage such a result in the Navy.

The Articles of War provide that when a person subject to military law is placed in arrest or confinement immediate steps will be taken to try him or to dismiss the charges. A maximum of 8 days is to elapse between initial restraint and the forwarding of charges to the officer exercising general court-martial jurisdiction. If this is not practicable, the reason for the delay is to be reported. Provision is made for the punishment by court-martial of an officer responsible for unnecessary delay in investigating or carrying a case to final conclusion.[190] The Articles of War and the Manual for Courts-Martial further provide that persons shall not ordinarily be placed in confinement prior to trial when charged with a minor offense only.[191]

British Military Law also discourages delay. It is required that charges be preferred within 24 hours of initial restraint. If at the end of 48 hours superior authority has not been furnished with evidence sufficient to justify retention of the accused in custody, he must order him released.[192] The investigation and report to the convening authority is to be made within 48 hours. If eight days elapse without disposition of the case by summary punishment or by ordering the court to assemble, a special report must be made by the commanding officer to the convening authority and weekly thereafter.

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190. A.W. 70; U.S.C. Sec. 1542.

191. A.W. 69; M.C.M., 1928, par. 19, p. 13.

192. K. R. 536; M.M.L., 468.

However, this report is not required on active service.[193] There is further requirement that if more than 15 days (30 days outside the British Islands) elapse between the time when the convening authority receives the case for trial and the time the case is disposed of, either by assembly of a court-martial or otherwise, the convening authority must report the case and the reason for the delay to higher authority.[194]

While expedition in handling charges is highly desirable, any speed which deprives the accused of time to prepare his case is to be deprecated. The Board has noticed that in a number of cases reviewed by it, the charges were served on the accused one day prior to trial. It is realized that in many cases the accused was aware of the charged pending against him and defense counsel had ample opportunity to prepare the case prior to the actual service of charges. However, it is impossible to tell this from the record in most cases. It is hard to avoid drawing an unfavorable inference when the record shows that only one or two days elapsed between service of the charges and the trial. This is even more glaring in those cases in which there has been long delay prior to trial. The mere formal recital in the record that the accused was ready to go to trial does little to alleviate the suspicion that the accused in fact may not have been ready. It is true that the accused has the right to request a postponement, and the courts are directed to be liberal in granting such a request,[195] but it is better to insure in advance that no such request will be necessary.

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193. Army Act 45; R.P. 1; M.M.L., pp. 468, 616.

194. R.P. 17(c), M.M.L., p. 627.

195. N. C. & B., Sec. 399, p. 214.

The Articles of War require that, in peacetime, five days elapse between service of the charges and trial, unless the accused consents to trial within a shorter period.[196] While this requirement is not applicable during wartime, it was found necessary to institute it as a matter of policy during World War II (unless military exigencies made immediate trial unavoidable) because it was discovered that too many accused were being tried without having had adequate opportunity to prepare their defense.

British Army law requires that the accused receive a copy of the summary, or abstract, of the evidence as soon as practicable after he has been remanded for trial, and at least 24 hours before trial. He must be afforded proper opportunity to prepare his defense. Charges must be served on him at least 24 hours prior to trial. The officer serving the charges must, if necessary, explain them to him and must inform him of his rights in connection with the securing of witnesses on his behalf.[197] In extreme cases, where military exigencies or requirements of discipline render it necessary, the convening officer may dispense with these requirements,[198] but this power is to be exercised only when absolutely necessary.

RECOMMENDATIONS:

1. The present department policy of expediting the processing of cases should be re-emphasized and constantly stressed.

2. Reasonable time schedules should be prepared and published.

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196. A.W. 70; 10 U.S.C., Sec. 1542.

197. R.P. 14, 15; Manual of Military Law, p. 48.

198. R.P. 104; Manual of Military Law, p. 679.

3. A chronology of each general court-martial should be prepared with all delays explained, and submitted with the record.

4. The Advisory Council should consider the adoption, either in the Rules of Procedure or in Naval Courts and Boards of provisions to the effect:

a. That when an accused is placed under restraint immediate steps be taken to dispose of the charges against him, and that a complaint be filed, or investigation commenced within 24 hours;

b. That such investigation be completed, where practicable, within 72 hours of its commencement;

c. That the report of investigation be forwarded to the convening authority within 8 days of the initial restraint or the delay explained;

d. That the accused be granted 5 days between service of charges and trial, unless he waives this time or unless military exigencies render immediate trial absolutely unavoidable, in which case the record shall so state.

5. The Rules of Procedure or Naval Courts and Boards shall clearly state that the avoidance of delay shall be subordinate to thorough investigation, the right of the accused to prepare his defense, and the accomplishing of full justice in each case.

SECTION VI

PROCEDURE ON TRIAL

1. Challenges:

Present Naval practice permits the accused and the judge advocate an equal right to challenge any member of the court for cause. No peremptory challenge or challenge to the array is permitted. If the challenge is based upon any of the seven grounds set forth in Naval Courts and Boards[196] and is properly supported by the facts it must be sustained.[197] Naval Courts and Boards states that if the challenged member makes no response or makes a response unsatisfactory to the challenger, the challenger may offer testimony in support of the challenge or may examine the challenged member under oath.[198] The court must vote on each challenge, unless the challenged member excuses himself. The vote is normally taken in closed court, the challenged member taking no part therein. A majority vote will sustain the challenge. In the event of a tie, the challenge is not sustained.

Army court-martial practice on challenges is substantially the same, except that the accused and the trial judge advocate are permitted one peremptory challenge each.[199] The law member may be challenged only for cause.[200]

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196. N. C. & B., Section 388, 389.

197. Id., Section 390.

198. Id., Section 391.

199. Manual for Courts-Martial, pp. 44-47, (1928).

200. Article of War 18, 10 U.S.C., Sec. 1489.

British Army practice permits the accused to challenge any member, including the president, for cause. An objection to the president is first disposed of and may be allowed by a vote of one-third of the members; if allowed, the court is adjourned until the convening authority appoints a new president. Objections to other members may be allowed by a majority vote, the member to whom objection has been raised not voting. The accused may not object to the judge advocate or to the prosecutor for any reason. No peremptory challenge is authorized. A challenge to the panel is not authorized, but if the accused persists in such an objection it is treated as an objection to the jurisdiction of the court. There is no provision in the Army Act or Rules of Procedure for objections by the prosecutor to members of the court.[201]

British Navy procedure permits both the prosecutor and the accused to challenge any member for cause. Neither may object to the judge advocate. There is no provision for peremptory challenges. Each challenge is decided separately, all the members voting, whether they have been previously objected to or not.[202]

The Rules of Procedure for Naval courts-martial, proposed by the McGuire Committee, provide an equal right to the prosecutor and to the accused to challenge any member for cause.[203] Grounds for challenge are substantially the same as are presently available. The Rules differ from present procedure mainly in that each challenge is to be determined by the judge advocate. Although the proposed rule that the judge advocate shall determine challenges is a simple one,

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201. As regards challenges generally, see Army Act, Sec. 51 and Rule 25, Rules of Procedure; M.M.L. pp. 478, 633.

202. Naval Discipline Act, Sec. 62; Naval Court-Martial Regulations, Article 446.

203. Rule 5.

consistent with his independent position, there are certain difficulties involved. Where a challenged member declines to withdraw voluntarily, it is less embarrassing to all concerned, and probably of greater benefit to the accused, to have the matter decided by the court in closed session, the challenged member not participating, than to have a ruling in open court by the judge advocate. This would be especially true where the challenged member was of higher rank than the judge advocate. The matter is not of great consequence in any event and probably either method would be satisfactory.

Although the McGuire Rules do not mention the point, it may be inferred from them that the judge advocate is not to be subject to challenge. This Board concurs in this and agrees with the McGuire Committee that the judge advocate should not be subject to challenge. As noted above, this is the rule in British Military and Naval Law. However, consideration might be given by the Advisory Council to a provision enabling either the prosecutor or the accused to file a petition and affidavit of disqualification as to the judge advocate of a general court-martial. This procedure is followed in the Federal Courts, although the right is rarely exercised against Federal judges and there is no doubt but that Naval court-martial experience would prove to be the same. A more difficult question is presented concerning the determination of such a petition, if provided for. There is no substantial reason why the judge advocate should not be permitted to rule upon the petition himself. The court should not rule upon it, for the judge advocate is to be independent of the court. If it is considered unwise to permit the judge advocate to rule upon the petition, it could be provided that the legal officer on the staff of the convening authority

pass upon the petition and affidavit. It seems impractical to have the judge advocate send such a petition to the Judge Advocate General in Washington for a ruling. Disqualification of a judge advocate depends more upon his own sensibilities and no judge advocate is likely to remain in the case if the objections have merit. Civilian judges act every day in similar situations.

It is also suggested that consideration be given to permitting the prosecutor and the accused each a peremptory challenge. This is the current Army practice. It has support in civil codes of procedure, where prospective jury members are subject to a number of such challenges. Although members of a court-martial who are objectionable to either side can usually be removed by challenge for cause, there are occasions when a member is felt to be prejudiced, yet legal grounds for challenge cannot be proved, or it is embarrassing for all concerned if the attempt is made. In such a situation, a peremptory challenge serves a just purpose and helps to insure an impartial court. One peremptory challenge for either side is recommended, rather than two or more, because the number of members is usually small compared with a civil jury panel.

RECOMMENDATIONS:

It is recommended:

(1) That provisions for challenging, substantially as contained in Rule 5 of the McGuire Rules, be included in Rules of Procedure to be adopted;

(2) That the Advisory Council consider the following problems:

(a) Whether the judge advocate on the court should pass upon challenges for cause;

(b) Whether the prosecution and the defense should each be allowed one peremptory challenge;

(c) Whether the prosecution and the defense should each be allowed to petition for disqualification of the judge advocate;

(d) If such a petition is allowed, who should pass upon it.

2. Oaths.

Under present procedure the oaths prescribed by the Articles for the Government of the Navy[204] for members of the court and the judge advocate must be administered in each case.[205] Thus, if a general court hears five cases in one day, the oaths must be administered at the beginning of each case, even though the personnel of the court and the judge advocate remain the same. Failure to do so constitutes fatal error from a jurisdictional standpoint.[206]

The Army Manual for Courts-Martial also requires that oaths be administered for each case and that the proceedings be complete without reference to any other case.[207]

The theory of this requirement is that, since a court-martial is a court of limited jurisdiction, the record in each case must show that all jurisdictional requirements have been fulfilled. The British Army, however, does not impose such a requirement, although their courts-martial are also courts of limited jurisdiction. A British court-martial may be sworn at one time to try

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204. A.G.N., Article 40; 34 U.S.C., S. 1200, and 40.

205. N.C. & B., App. E-3, p. 494.

206. N.C. & B., App. E-3 and Sec. 394, p. 213.

207. Par. 49b, p. 38.

several persons in succession, provided such persons are present when the oath is taken and have been given the opportunity to object to members.[208]

Obviously, the present requirement is time-consuming. The first Ballantine Report pointed out that it served no useful purpose, and recommended that the oath be administered at the first session of the court, and that it not be repeated for each subsequent trial.[209] The McGuire Committee has also proposed that repeated administration of the oaths be dispensed with.[210]

It is believed that these recommendations are sound and should be adopted. The jurisdictional requirement can be satisfeid by providing that proper entry be made in the record of each case that the original oaths had been duly administered to the court. This is essentially the present practice with respect to the reading of the precept.[211] This procedure requires, as a safeguard, a provision that all persons to be tried by the court be present at the time the oath is administered and have an opportunity to challenge, or in the alternative, a provision that the accused's right to challenge after the members have been sworn is not waived if he was not present at the time.

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208. Rules of Procedure, Rule 71; M.M.L., p. 664.

209. Report of the Ballantine Committee, 24 September 1943, p. 8.

210. McGuire Rules of Procedure, Rule 18.

211. N.C. & B., Sec. 386.

RECOMMENDATION:

(1) Rules of Procedure for Naval courts-martial should provide that the required oaths be administered to the members of the court and the judge advocate at the first session of the court, such oaths to be applicable to all subsequent trials before that court, and that the oaths need not be readministered unless the personnel of the court, or the judge advocate, are changed.

(2) The rules should also provide that the different persons to be tried should either be present at the administration of the oath and have a right to challenge or if not present, that their right to challenge is preserved.

3. Pleas of Guilty.

A Naval court-martial may legally accept a plea of guilty to any offense, but present departmental policy prohibits acceptance of a plea of guilty to desertion in time of war.[212] There is no rule in Army practice against accepting a plea of guilty, except that it is not considered appropriate in capital cases. The British Army Rules of Procedure provide that a plea of guilty will not be accepted if the charge or charges upon which an accused is arraigned render him liable, on conviction, to sentence to death. If such a plea is offered, the court will enter a plea of not guilty and proceed with the trial.[213] This is in accord with the practice of English civilian courts and that of many of the states,

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212. SecNav Cir. Ltr. 45-529.

213. Rules of Procedure, Rule 35. Manual of Military Law, p. 638.

including New York state,[214] and is intended to insure that an accused person charged with an offense for which the death penalty can be imposed not be convicted without a full trial.[215] It is believed that this rule is sound and that, in view of the serious consequence involved, the departmental policy against accepting pleas of guilty in certain cases should be extended to all cases in which the death sentence may be imposed. This would preclude the possibility of an unjust conviction of a serious offense on a plea of guilty by an accused who was inadequately represented by counsel, or who had no counsel, and who did not full understand the nature of the charges against him.

A plea of guilty to a criminal offense is in no sense unusual. A large number of cases in the civilian courts are disposed of in this manner and, as a practical matter, most civil jurisdictions could not handle the volume of cases coming before them if each case had to go to trial. Under normal circumstances, a plea of guilty is a satisfactory disposition of the case, at least as to the essential question of built or innocence. Generally speaking, no one should know better than the accused whether he has committed the offense charged. This, however, presumes that the accused is fully aware of the consequences of his plea and that he has entered it after consultation with competent counsel.

The Board has noticed that in a large number of cases received by it, the accused had pleaded guilty to some or all of the charges against him. In some cases,[216] this plea was entered after the accused had declined counsel.

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214. New York Code of Criminal Procedure, Sec. 332.

215. See People v. La Barbera, 274 N.Y. 339, 343; 8 N.E. (2d) 884, 885 (1937).

216. See, e.g., R.B. #20, R.B. #17, R.B. #37.

An accused, particularly when very young, may be ignorant of a legal defense which he may have, or may be unaware that the offense charged is not made out by the acts he committed. For this reason the Board believes that a plea of guilty should never be accepted by a general court-martial when the accused is not represented by counsel. The Board has also observed that in most of the cases in which pleas of guilty were accepted, the accused pleaded guilty to the offense charged, rather than to a lesser included offense, which is the common practice in civilian courts. If the accused had elected to go to trial, he could not have been convicted of a greater offense than that charged, and the only effect of his plea is to make trial unnecessary. The Board does not make this observation in criticism of the practice of accepting a plea of guilty to the offense charged, nor does it mean to be understood as suggesting the practice of "bargaining" for pleas. The Board merely wishes to point out the seriousness of a plea of guilty in a trial by court-martial and to emphasize the necessity that pleas of guilty be received only when the accused is fully aware of the nature and effect thereof, and only after consultation with counsel.

The Board believes also that even where the accused is represented by counsel, the results of a plea of guilty should be clearly explained by the Judge Advocate. The only requirement at present is that the president warn the accused "...he thereby precludes himself from the benefits of a regular defense and ask if he persists in such a plea."[217] The Board believes that this does not go far enough. The judge advocate should be required to advise the accused:

(a) That the plea admits the offense as charged and makes conviction mandatory;

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217. N.C. & B., Sec. 414, p. 218.

(b) As to the permissible sentence which may be imposed. He should also explain to the accused that a plea of guilty will not be accepted if the accused claims a defense, nor will it be accepted unless the accused admits the actions in question.

The Board further believes that the explanation of the plea of guilty made by the judge advocate and the accused's reply thereto should be set forth in the record of trial exactly as given. This was prescribed procedure in Army General Courts-Martial in the European Theater. The use of a printed form, containing a stereotyped recital that the required warning was given, is not good practice. It always raises a question whether any warning was in fact given, and if so, whether it was adequate.

At the present time the court decides whether to accept a plea of guilty. The court also rules on special pleas. The Rules of Procedure recommended by the McGuire Committee propose that these functions be given to the judge advocate.[218] Since disposition of such matters is essentially a legal matter, this recommendation appears to be sound.

RECOMMENDATION:

It is recommended that the Advisory Council consider the adoption, either in Rules of Procedure or Naval Courts and Boards as revised, or provisions to the following effect:

(1) That the plea of guilty shall not be received in capital cases;

(2) That the accused in every case be represented by counsel appointed for or selected by him, and that a plea of guilty be received only after an accused has had an opportunity to consult with counsel;

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218. McGuire Rules of Procedure, Rules 6 and 7.

(3) That in every case the judge advocate explain to the accused the meaning and effect of a plea of guilty, such explanation to include the following:

(a) That the plea admits the offense, as charged (or in a lesser degree, if so pleaded), and makes conviction mandatory.

(b) The sentence which may be imposed.

(c) Unless the accused admits doing the acts charged, or if he claims a defense, a plea of guilty will not be accepted.

(4) That the judge advocate determine whether a plea of guilty should be accepted, and rule on all special pleas.

4. Introduction of Evidence after Plea of Guilty.

Once a plea of guilty has been accepted, the next important step is determination of the sentence. The general topic of sentence factors will be discussed later, with reference both to cases in which the accused has pleaded guilty and those in which he had been found guilty after a plea of not guilty. At this point it is proposed to discuss only the question of what evidence, if any, the court should receive after accepting a plea of guilty and before proceeding to imposition of the sentence.

Under present naval practice, evidence for the prosecution is usually not offered after a plea of guilty, except in aggravation.[219] In fact, the practice of introducing evidence, other than in aggravation, has been criticized.[220] The result is that, unless there are aggravating circumstances present or the accused makes a statement in mitigation, the court's knowledge of the offense is limited to the summary description thereof contained in the charges and specifications. This is hardly an adequate basis for intelligent imposition of an

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219. N.C. & B., Sec. 166, p. 137.

220. See, for example, CMO 2-1945, 52.

appropriate sentence.

A further consequence of the present practice is that the record of trial, in such a case, is very brief. The Board has been considerably hampered in its review of cases because of this. It has found it necessary to go outside the record to learn the facts and circumstances surrounding the commission of the offense, and consult sources such as reports of investigation, psychiatric interviews, and self-serving statements made by the prisoner while in confinement. For review purposes, this situation is unsatisfactory. It is not possible for a reviewing authority to give such cases the complete study which they deserve. Moreover, may accused, who originally pleaded guilty, subsequently contend that they are innocent and make statements to prison authorities and others of the circumstances under which they contend the offense was committed. As might be expected, most such statements are exculpatory. A plea of guilty should give rise to a final determination of guilt, and doubts based on post-trial stories of prisoners should not arise to render more difficult the task of subsequent review. If the record contained the complete story of the offense and its surrounding circumstances, there would be little occasion for such doubts.

The other side of the picutre is that many accused plead guilty in the hope that the court will be more lenient if it does not know all the circumstances of the offense, or because of the desire not to have all the details of the offense spread upon a permanent record. Both points of view are fully understandable and deserve consideration. However, the real question would appear to be: Which will greater serve the ends of justice, a sentence based upon a knowledge of all the facts and circumstances of the offense, or on the pleadings only

Under Army court-martial practice, a plea of guilty does not preclude the taking of evidence, and in the event that there are aggravating of extenuating circumstances not clearly shown by the specifications and pleas, any available and admissible evidence as to circumstances may be introduced.[221] Actually, it is the common practice for the prosecution to prove its entire case, despite a plea of guilty.

Under British Army practice, the court is required, after a plea of guilty, to read the prepared summary or abstract of evidence, and annex it to the proceedings, or, if there is no summary or abstract, to hear and record sufficient evidence to enable it to determine the sentence, and to enable the confirming officer to know all the circumstances connected with the offense.[222]

It is suggested, in order to give the court and the reviewing authorities more complete information, that naval court-martial rules of procedure include a provision that in any case where a plea of guilty is accepted, the prosecution should nevertheless, offer the evidence of the complaining witness. After the prosecution has put in its proof, the court would then receive the additional matter which is required following a finding of guilty after trial of the issues.[223]

It is also suggested that the report of pre-trial investigation be attached to the record, although it should not be received in evidence. It will often be of inestimable value to subsequent reviewing authorities in evaluating

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221. Manual for Courts-Martial, 1928, par. 70, p. 54.

222. Rules of Procedure, Rule 37. Manual of Military Law, p. 640.

223. See discussion p. 167, et. seq., infra.

an offense, especially in cases where the actual evidence introduced is scanty. However, the defense counsel should be shown the pre-trial investigation report and given the opportunity to object to its inclusion in whole or in part as either inaccurate or prejudicial or for any reason. The Judge Advocate should rule on these objections. Defense counsel should in any case be required to state that he and the defendant have read the pre-trial investigation report and that they agree with it or disagree with it in whole or in part and if so, which parts.

It is believed that adoption of these proposals would not only furnish the court a better basis for determination of the sentence, but would provide a more complete record for review and clemency purposes. Moreover, it would make it possible for reviewing authorities to give little or no credence to subsequent protestations of innocence made by an accused.

RECOMMENDATIONS:

It is recommended that the Advisory Council consider:

(1) Adoption of a provision in the Rules of Procedure that where a plea of guilty is accepted, and prior to the determination of the sentence, the prosecution shall perpetuate the complainant's testimony under oath.

(2) The advisability of attaching the pre-trial report of investigation to the record, after the verdict, for consideration on review, but not as evidence on the trial, after the defense counsel has had an opportunity to object to its inclusion in whole or in part, as prejudicial or for any other reason.

5. Attendance of Witnesses; Contempts.

Article 42(b) of the Articles for the Government of the Navy[224] provides that a naval court-martial or court of inquiry has power to issue like process

224. 34 U.S.C., Sec. 1200 and 42(b).

to compel witnesses to appear and testify "...which United States courts of criminal jurisdiction within the State, Territory, or District, where such naval court shall be ordered to sit may lawfully issue."

There is no problem concerning the summoning of naval witnesses. In the case of civilian witnesses, although the subpoena power runs throughout the United States, there is no power to punish any person residing beyond the State, Territory, or District in which the naval court is held for wilful failure to obey the subpoena. Thus, a general court-martial sitting at the Brooklyn Navy Yard may compel the attendance of civilian witnesses who reside in the State of New York and prosecute them for wilful failure to appear, but should the same court desire to hear a civil witness residing in New Jersey, it could not compel his attendance.[225]

Under Article 42(b), a summary court or deck court likewise has subpoena power which runs throughout the United States. However, these courts cannot compel the attendance of civilian witnesses, even if they reside within the State, Territory or District in which the court is held. This is because Article 42(a) authorizes punishment only for witnesses who wilfully neglect or refuse to appear at a general court-martial or court of inquiry. Consequently, as was pointed out in the first Ballantine Report,[226] a subpoena to a civilian witness to appear and testify before a summary court or deck court is, in legal effect, a mere request.

The Articles of War provide that the trial judge advocate of a general, special or summary court-martial has power to issue the like process to compel

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225. A.G.N. 42(c), 34 U.S.C., Sec. 1200, and 42(c).

226. At p. 11.

witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue; but that such process shall run to any part of the United States, its territories and possessions. A civilian witness, having been duly subpoenaed, is guilty of a misdemeanor if he wilfully neglects or refuses to appear before any court-martial.[227]

Where the testimony of a civilian witness is essential in a trial by naval court-martial, injustice may result from lack of power to require attendance. A general court-martial should have statutory power running throughout the United States, its territories and possessions, to issue process to compel the attendance of civilian witnesses. Any such witness who wilfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person has been legally subpoenaed to produce should be deemed guilty of a misdemeanor. This power to punish should not be limited to persons residing in the State, Territory, Possession, or District where in the court is held.

The revised articles proposed by Commodore White[228] and by the McGuire Committee[229] would eliminate the present restrictive provisions of Article 42(b). The McGuire Committee draft[230] and the Judge Advocate General draft[231] would also eliminate the present restrictive provisions of Article 42(c). However, the articles proposed by the Judge Advocate General do not specifically empower a summary court-martial to issue process to compel the attendance of witnesses or to punish witnesses for failure to appear before a summary court.[232] The While

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227. Article of War 22, 23; 10 U.S.C., Sec. 1493, 1494.

228. White Draft, Article 16 (a).

229. McGuire Draft, Article 9 (a).

230. McGuire Draft, Article 9 (b).

231. JAG Draft, Article 11 (b).

232. JAG Draft, Article 15 (a).

draft articles omit the provision which would penalize failure to comply with a subpoena.

Where the defendant cannot afford to pay the expenses of his own witnesses, and the judge advocate is satisfied as to this and their need, the government should assume the financial burden. A special fund is necessary to remove this fund from the regular Navy budget. If Congress appropriates money directly year by year to the use of the Judge Advocate General for the purpose, there is no danger that budget difficulties will prevent a defendant having needed witnesses.

Present Article 42 (a) deals with contempts of court. It has been construed as not extending the authority to punish for contempt to a summary court-martial or deck court.[233] In the articles proposed by Commodore White[234] and by the Judge Advocate General[235] specific provision is made for contempt proceedings in general courts-martial, summary courts-martial and courts of inquiry. The article dealing with contempts of court proposed by the McGuire Committee,[236] does not mention summary courts-martial and might be construed in the same manner as the present Article 42 (a). For this reason the former proposals are more desirable. The three proposals differ in the treatment of punishment for contempt, but the differences are not material.

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233. N.C. & B., Sec. 290, p. 180.

234. White Draft, Article 11.

235. JAG Draft, Article 11 (a).

236. McGuire Draft, Article 4 (b) (8).

RECOMMENDATIONS:

(1) Article 42 (b) should be repealed, and in its stead a new article enacted empowering a general court-martial, a summary court-martial, and a court of inquiry of the naval service to issue like process to compel witnesses to appear and testify which United States courts of criminal jurisdiction may issue, such process to run to any part of the United States, its territories and possessions.

(2) Article 42 (c) should be repealed, and in its stead a new article should be enacted, providing that any person subpoenaed to appear as a witness before a general court-martial, a summary court-martial, or a court of inquiry of the naval service, who wilfully neglects or refuses to appear, to testify or to produce documentary evidence which such person may have been subpoenaed to produce shall be deemed guilty of a misdemeanor.

(3) Article 42 (a) should be repealed, and in its stead a new article should be enacted empowering a general court-martial, a summary court-martial, and a court of inquiry to punish any person for contempt of court.

(4) The judge advocate in his discretion should be authorized to order transportation at government expens e of witnesses for defense where it appears that the defendant is without means, and Congress should be asked to appropriate a special fund outside the regular Navy budget upon which the Judge Advocate General may draw for this purpose.

6. Rulings on Evidence and Other Interlocutory Questions.

Under present naval court-martial practice the court rules on all matters pertaining to the introduction of evidence and determines all other interlocutory questions which arise. On objections to a question or to the admission of any evidence the court must determine the matter and its decision is entered in the record.[237] It is the duty of the judge advocate to advise the court on such matters.[238] If the court disregards his advice, he may enter his opinion on the record and the court may record the reasons for its decisions.[239]

In Section IV of this report there is a discussion of the present procedure on determining evidentiary and interlocutory questions, and the problem is raised whether this procedure should be modified to empower the judge advocate to rule with finality on questions involving the admissibility of evidence, competency of witnesses, and interlocutory questions generally.[240] It is unnecessary to repeat this discussion here. But the formal manner of determining such questions may well be taken up here. Under present procedure, the court is closed for deliberation upon challenges, sufficiency of the charges and specifications, pbas in bar of trial and upon the general issue, objections to questions or to preferred evidence, and upon other occasions. It has already been

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237. N.C. & B., Sec. 271, p. 173.

238. Ibid., Sec. 400, p. 214.

239. Ibid., Sec. 400.

240. See discussion in Section IV, 5 (2), supra.

pointed out by the Ballantine Committee that such procedure results in considerable loss of time.[241] The Committee recommended that the court be required to close only to deliberate upon findings not proved by plea and upon sentence. In all other instances the Committee recommended that the court close only when the president so orders, either upon his own initiative or upon motion of any member.

Generally speaking, under Army court-martial procedure, the Court closes for deliberation only on findings, sentence and challenges. All rulings on interlocutory questions (other than challenges) and on the admissibility of evidence are made by the law member, in open court. On interlocutory questions, other than an objection to the admissibility of evidence offered during the trial, if a member objects to a ruling by the law member, the court is closed and the question decided by majority vote.[242] This procedure results in fewer delays than are experienced in naval trials.

RECOMMENDATION:

The Advisory Council should consider the question of the manner of ruling on questions of evidence and interlocutory questions, in connection with their consideration of the powers to be given to the judge advocate in these matters. Whatever decision is reached on the latter point, the Rules of Procedure should provide that rulings on these matters be made in open court and that the court be closed only for deliberation on the findings and sentence and at such other times as ordered by the president, either on his own initiative or on motion of a member or of the judge advocate.

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241. Report of Ballantine Committee, September 1943, p. 9.

242. Manual for Courts-Martial (1928), Par. 51, p. 39.

7. The Accused as a Witness.

There should be no curtailment of the privilege against self-incrimination. It is a constitutional privilege and one of the most important which an accused enjoys in naval and military justice.

An accused may now refuse to testify and such refusal cannot be commented upon.[243] An accused may make an unsworn statement in extenuation or mitigation, either orally or in writing, and not be subject to cross-examination.[244] If an accused so elects, he may take the stand and testify in his own behalf, in defense or in mitigation.[245] If the accused testifies, he is subject to cross-examination as is any other witness. Although greater latitude is allowed in the cross-examination of an accused, he may not be cross-examined on matters outside the scope of the charges on which he testified on direct examination, except to test his credibility as a witness.[246] Presumably, although Naval Courts and Boards is silent on the point, an accused may take the stand to testify for certain limited purposes, such as offering testimony that an alleged confession was obtained involuntarily, and thereby subject himself to cross-examination only as to this limited issue.[247]

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243. N.C. & B., Sec. 234, p. 160.

244. N.C.& B., Sec. 419, 420, 614, and see C.M.O. 1-1942, p. 152. A sworn statement, at any stage of the proceedings, is not approved. The accused rather should take the stand and testify. N.C. & B., Sec. 419.

245. Ibid., Sec. 284, p. 178.

246. Ibid., Also see complete discussion in C.MO. 37-1918, p. 16; C.M.O. 35-1920; p. 16.

247. See Army rule in IV Bull, JAG, No. 8 (August 1945), p. 8.

After the court has made its findings an accused may offer sworn testimony in extenuation or mitigation in an appeal for leniency.[248] An unsworn statement at this stage of the proceedings will not be favorably received.[249]

Present naval procedure, as outlined above, is essentially the same as that followed by the Army and by the British Army. Long usage seems to be the only reason for continuing some phases of this procedure. For example, there appears to be little or no legal justification for permitting the accused to offer an unsworn statement in mitigation during the trial. All other witnesses must be sworn. If the accused desires to makes a statement during the trial, it should be under safeguard of an oath, the same as any other witness. Perhaps he should also be subject to cross-examination if he elects to speak.

Justice requires a fair trial to both sides and there is no real reason why the court should consider unsworn statements of the accused when the prosecutor is limited to sworn statements. Of course the rule is a traditional one, based on a desire to give the accused every "break," and like other traditions, it should not be lightly cast aside. But it is believed that the time has come for its re-examination.

Under present practice, the reverse procedure pertains when the court had made its findings. The accused may then offer sworn testimony in extenuation or mitigation in an appeal for leniency on sentence. At this time an unsworn statement is not favored. Moreover, if the accused makes a sworn statement he subjects himself to cross-examination. This practice appears to be as unrealistic

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248. C.M.O. 1-1942, p. 152, N.C. & B., Sec. 164, 165. Compare N.C. & B., Sec. 419 for statement prior to findings.

249. Idem. After findings, the accused may take the stand and testify in mitigation or extenuation, but he thereby submits himself to cross-examination. Ibid.

as the unsworn statement permitted during the trial. The logic of permitting unsworn statements during the trial when the issue of guilt or innocence hangs in the balance and that of requiring sworn testimony after the trial when only the question of clemency and mercy is involved, is difficult to perceive.

RECOMMENDATION:

It is recommended that the Advisory Council consider:

(a) Review of the present rule permitting the accused to make an unsworn statement during trial without subjecting himself to cross-examination.

(b) Revision of the present rule requiring that evidence in extenuation or mitigation, after findings, be under oath, and of the rule discountenancing unsworn statements at this time.

8. Motion for Finding of Not Guilty.

There is no provision in present naval court-martial procedure for a motion for a finding of not guilty.

The Manual for Courts-Martial provides that at the close of the case for the prosecution and before the opening of the case for the defense, the court may, on motion of the defense for findings of not guilty, consider whether the evidence before the court is legally sufficient to support a finding of guilty as to each specification designated in the motion.[250] The law member rules initially on such a motion, but if any member objects to his ruling the question is decided by a majority vote of the court.[251]

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250. Par. 71d, p. 56.

251. Pars. 71d and 51, pp. 56 and 39.

Under British Army procedure the accused or his counsel, at the close of the case for the prosecution, may submit that the evidence given for the prosecution has not established a prima facie case against him and that he should not, therefore, be called upon for his defense. The court will consider this submission in closed court and, if they are satisfied that it is well founded, must acquit the accused.[252]

Rules of criminal procedure in most civilian jurisdictions permit the defendant to move for an acquittal at the close of the prosecution's case.[253] The Federal Rules permit such a motion on behalf of the defendant and permit the court, on its own motion, to order an entry of judgment of acquittal.[254]

The first Report of the Ballantine Committee[255] recommended that provision be made for such a motion. The Rules of Procedure proposed by the McGuire Committee do not mention it.

If the evidence introduced by the prosecution is insufficient to sustain a finding of guilty as to any charge, it should not be necessary for the accused to proceed with his defense, and he should be able to test the sufficiency.

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252. Rules of Procedure, Rule 40, n. 1. Manual of Military Law, p. 644.

253. See, eg., Rule 29, Fed. Rules, Crim. Proc., 18 U.S.C., Sec. 687.

254. Idem.

255. p. 10.

of the prosecution's case before proceeding further. It would result in a saving of time for all concerned if the motion should be granted. There is no reason, however, why decision on such a motion could not be reserved in a proper case, and the prosecution permitted to reopen its case and produce further evidence.[256]

It is suggested that the initial ruling on a motion for a finding of not guilty be determined by the judge advocate, since it raises a question which is primarily one of law. However, since it might sometimes be considered a "mixed question of law and fact," it is suggested that it be provided that if any member of the court objects to the ruling of the judge advocate, the question is to be dicided by a majority vote.

RECOMMENDATION:

That the Advisory Council give consideration to inclusion in Rules of Procedure of a provision granting the accused the right at the close of the prosecution's case to make a motion for finding of not guilty as to any or all charges and specifications. If the judge advocate determines that the evidence is legally insufficient to support any charge or specification to which such motion has been directed, he would sustain the motion and direct that the accused be found not guilty as to such charge and specification. A proviso might be added that such ruling be subject to objection by any member of the court and, in the event of such objection, that the question be decided by a majority vote of the court.

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256. This is the Army procedure, M.C.M., par. 71d, p. 56.

9. Deliberation and Vote on Findings

Fundamental in any system of justice is the determination of guilt or innocence. Conviction of the innocent is fatal to justice. So deeply imbued is this notionin the Anglo-American criminal law that it is often said that it is better that 100 guilty men be set free than that one innocent man be convicted. Our system of military and naval justice has adopted this philosophy whole-heartedly. The Board believes, from its review of the cases which have come before it, that every effort has been made by the Navy to adhere to it.

The Board has seen no evidence that court members have been influenced in arriving at their findings by consideration of the real or supposed wishes of the convening authority. That a certain portion of the public or of the press does not share this view is perhaps unfortunate, but the Board sees no occasion from this for ill-founded and ill-considered attacks upon the good faith and integrity of court members.

The Board does believe it important, not only that naval courts administer true justice, but that everyone in the service, and the general public as well, be convinced that they do so. One step which the Board feels would be helpful in attaining this goal would be to affirm, in Naval Courts and Boards or elsewhere, in unmistakable language the proposition that in deliberating on and arriving at their findings members of a court-martial are bound only by their conscience and by the oath which they have taken to do justice according to law and are subject to no other influence whatsoever. The British have taken the trouble to do this, as the following quotation from the Manual of Military Law shows:

"The court, in considering their decision, must not be influenced by the consideration of any supposed intention of the convening officer in sending the accused for trial by a particular kind of court-martial. In many cases the convening officer will have decided no more than that a prima facie case against the accused is shown upon the summary of evidence and he will have formed no opinion as to the guilt of the accused. An acquittal, therefore, is not in itself a reflection upon the convening officer. Even if it were, it would afford no reason whatsoever for a court to convict, unless the evidence established the charge." 257

Under present practice the court, after deliberation, votes upon the findings for each specification beginning with the first. The manner of recording the vote is as follows: Each member writes his vote ("proved," "not proved," or "proved in part") over his signature and hands his vote to the president. The president then reads the votes aloud, without disclosing how each member voted. In a general court-martial the same procedure is followed in voting on the charges. By unanimous vote of the court the minutes of the votes may be preserved. 258

The manner of voting on findings prescribed for Army courts-martial requires secret written ballots. 259 The junior member courts the ballots. 260 The president checks the court and announces the result.

The British Army and British Navy procedure both require a voice vote on findings, in the inverse order of rank. 261

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257. Manual of Military Law, p. 58.

258. N.C. & B., Sec. 425, p. 222.

259. A Manual for Courts-Martial, par. 78d, p. 65.

260. A.W. 31; 10 U.S.C., Sec. 1502.

261. Rule 69, Rules of Procedure; Manual of Military Law, p. 663. Naval Court-Martial Regulations, Article 466, R. B. 11, Admiralty Memorandum on Naval Court-Martial Procedure, (Canada 1943), p. 63.

The present Naval practice of requiring that each member sign his vote seems to serve no useful purpose and could conceivably result in injustice. The Army system of secret written ballot gives a degree of protection and confidence to the individual members, and the Board believes that the Navy would do well to adopt the Army's procedure in this respect.

The decision of a majority of the members of a naval court-martial becomes the finding of the court. In the event of a tie vote the result is recorded in the way most favorable to the accused.[262] Thus, a tie vote can result in an acquittal.[263] British Army and Navy procedure is the same.

Prior to the 1920 revision of the Articles of War the Army rule on the number of votes required for conviction was the same as the present Navy rule, except that where conviction required a mandatory death sentence (i.e., for spying) a two-thirds vote was necessary.[264] In 1920, Article of War 43 was enacted which requires: (a) Unanimous vote on findings where conviction carries a mandatory death penalty; (b) A two-thirds vote on all other convictions.

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262. N.C. & B., Sec. 425, p. 222.

263. Army Act, Sec. 53(8); Manual of Military Law, p. 480; Naval Courts-Martial Regulations, Article 466.

264. Winthrop, op. cit. supra, note 3 at 172.

Although this rule results in greater protection to an accused, objection can be raised to it on two grounds: (1) A minority can acquit; (2) The prosecution and the accused may improve their respective positions by use of the peremptory challenge, because a fraction of a vote is required to be counted as one. For example, on a court of 12, 8 votes are required to convict and 5 to acquit. On a court of 11, 8 votes are still required to convict, but 4 will acquit. Defense counsel can take advantage of this situation by peremptory challenge of one member, thereby disturbing the chances for conviction. In other situations the prosecution can improve its chances by peremptory challenge. There is no evidence, however, that this device is commonly resorted to by counsel in Army courts-martial.

Most civil jurisdictions require that the jury reach a unanimous verdict in order to make a finding of guilty in a criminal case.[265] Some also require a unanimous vote to acquit, while others hold that if there is not a unanimous vote to convict, then the defendant must be acquitted. The requirement of unanimity has been criticized as cumbersome and has resulted in a large number of mis-trials requiring re-trial.

The Rules of Procedure proposed by the McGuire Committee propose no change in the present rule that findings shall be determined by a majority vote.[266] Nor do any of the proposed revisions of the Articles for the Government of the Navy recommend any change in this respect.

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265. See, e.g., Rule 31, Fed. Rules of Criminal Procedure.

266. Proposed Rule 12.

The Army and Navy rules on voting on the findings are compared and discussed at length in an article by Stanley Law Sabel entitled "Court-Martial Decisions by Divided Courts," appearing in 28 Cornell Law Quarterly 165 (1943). Mr. Sabel traces the historical genesis of the two rules, discusses possible alternatives, and come out unequivocally in favor of the present Navy rule, suggesting that it be re-adopted for the Army. He says (28 Corn. L. Q. 176):

> "This rule, which has prevalied throughout the history of the Navy and under which the Army has, in substance, fought all its prior wars, should be re-adopted. The Navy rule seems preferable to the older Army rule, as it removes even the limited possibility of minority acquittal inherent in the mandatory death provision of that rule. The Navy rule is clear, sensible, and logical, treating all offenses alike as to the means of establishing their violation. Its adoption would give the Army a system of court-martial better fitted to assure effective discipline."

On the other hand, the rule that a bare majority may find an accused guilty of an offense even one for which the punishment may be death, is severe. Its severity is further emphasized by comparison with the rule in many civilian courts in respect to civil cases where a vote of five-sixths is required for a verdict.

It is suggested that consideration be given to revision of the present rule so as to require a two-thirds vote for conviction. This would result in greater protection of the accused. It is also suggested that in cases where the death penalty is actually imposed, a unanimous verdict be required. The vote of even one member against guilt raises sufficient doubt to make the imposition of the death penalty unwise. Since

the Navy has not executed anyone for approximately one hundred years, this point is more or less academic, but it should be considered in any comprehensive revision of the Articles. If the conviction of a capital offense is the result of less than a unanimous vote it is suggested that the imposition of the death penalty be precluded, but conviction by less tha a unanimous vote would not preclude imposition of some other sentence.

Logically, there is no reason for permitting a different vote for an acquittal then for a conviction. A minority acquittal is an unfair, from the standpoint of justice, as a minority conviction, and is not permitted in most civilian tribunals. However, a mis-trial is an expensive and time consuming luxury, and on the whole the Army rule that a failure to get the required two-thirds results automatically in acquittal, is probably more consistent with the needs of the services, especially in time of war.

Under present practice, the court's findings are immediately announced in the case of an acquittal on all charges and specifications. In the event that some of the specifications are found "not proved" the accused is so informed.[267] Otherwise, the accused is not informed of the findings until the convening authority has promulgated his action. This is also the British Army rule.[268] However, in the U.S. Army, as well as the British Navy procedure, the court must announce the findings in open court, whether guilty or not guilty.[269] The McGuire Committee has proposed that naval courts-martial, after their findings have been determined, announce them in open court.[270] The Board concurs with this proposal of the McGuire Committee.

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267. N.C. & B., Sec. 433, pp. 224, 225 (1945).
268. Manual of Military Law, p. 59.
269. Regulations for Naval Courts-Martial, Art. 468.
270. Rule 12 (c).

RECOMMENDATIONS:

That the Advisory Council consider:

(1) Revision of the present rule requiring that members of the court, in voting upon findings, sign their ballots so as to provide that voting on findings shall be by secret, written ballot.

(2) Whether the present rule that a majority of votes will convict an accused should be revised to provide that more than a majority vote is required for a finding of guilty, and a unanimous vote to warrant imposition of the death penalty.

(3) Whether, after findings have been reached, the court should announce them in open court.

10. Matters for Consideration before Sentence.

(a) Evidence of Prior Convictions.

Under the present procedure, the judge advocate, after a finding of guilty, introduces a record of previous convictions. To be admissible, such record of previous convictions must relate to the current enlistment of the accused.[271] Punishment at Captain's Mast is not regarded as equivalent to a conviction, and proof thereof is not admissible.

The Army rule is more restrictive. Evidence of prior convictions is limited not only to convictions during the current enlistment or appointment, but to those occurring within one year prior to the offense, in the

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271. N.C. & B., Secs. 436-438, p. 226.

case of an enlisted man, or three years in the case of others. Periods of unauthorized absence are excluded in computing the one or three year periods. Prior disciplinary punishment under A.W. 104 is not admissible, but may be shown by the accused where the offense charged has grown out of the same act or omission for which punishment under A.W. 104 was imposed.[272]

The British Army rule is more broad than the present Navy rule in that evidence of prior convictions may be offered before the findings in order to rebut character witnesses called by the accused.[273] Moreover, after a finding of guilty the court may receive evidence of all prior convictions, civil or military, without regard to time or to enlistment.[274]

Colonel Winthrop, writing on this subject, opposed in practice the introducing of evidence of prior convictions, reasoning that: (1) it prejudiced the court against the accused in adjudging the sentence; (2) it violated an established rule of evidence that the previous bad character of an accused could not be proved unless the accused had offered evidence of good character; and (3) this evidence is more appropriate for the consideration of the reviewing authority than the court.[275]

It is submitted that these objections have no application to the problem under discussion. They apply and are sound only if such evidence is

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272. Manual for Courts-Martial, (1928), pars. 79c and 79e, pp. 66 and 67.

273. Manual of Military Law, p. 57.

274. Id. at p. 61, 571 and 649. Rules of Procedure, Rule 46 and Army Act, Sec. 164.

275. Winthrop, Military Law and Precedents (2ed. 1920), p. 389. At the time Winthrop wrote, a reviewing authority could send a record back for revision if he thought the sentence was inadequate.

admitted in evidence during the course of the trial without the accused taking the witness stand as a witness. It is generally conceded that an habitual offender deserves more severe punishment than an infrequent or first offender. Not the least important reason is to protect the community from the recidivist. Many civilian penal codes recognize this by increasing the maximum and minimum punishment for offenses where the defendant is a second, third, or fourth offender. Such codes generally place no time limit upon the previous convictions which should be considered.

The Naval Justice Journal has suggested, without discussion, that the Navy adopt a modification of the present Army rule by limiting evidence of previous convictions to those during the current enlistment and "not further back than two years."[276]

The present Army and Navy rules are apparently based upon two considerations: (1) An accused should not be penalized for old convictions which took place during a previous enlistment, or, in the case of the Army, more than one (or three) years prior to the instant offense; (2) there would be a serious administrative problem otherwise, for service records of prior enlistments would ordinarily be difficult to obtain. The Army rule is more favorable to an enlisted accused in that any conviction which occurred more than a year prior to the current offense may not be proved. However, this rule also acts to deprive the court of information concerning the so-called criminal tendencies of the accused. If an accused is convicted of larceny

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276. Vol. 1, No. 3, at pp. 50, 51.

from fellow soldiers it would seem that the court should know if the same accused had been convicted of the same offense 18 months before the instant offense was committed. The accused may have just been restored to duty after serving confinement for the previous offense.

On the whole the Board is of the opinion that the present rule should be liberalized and patterned after the British Army rule. The experience of examining 2115 sentences has convinced the Board that the maximum available information is necessary to properly appraise sentences. The sentencing technique is difficult enought without being handicapped by inadequate information. Very few facts of an accused's past history are as important as his past criminal conduct. The proposition that an accused should not be punished for past convictions has validity when he is on probation or parole or is trying to make a fresh start, but after he has committed additional offenses, he is not being treated unfairly if his past record is taken into conisderation. It is just as unfair to give a persistent lawbreaker a light sentence because of ignorance of his past anti-social conduct, as to give an excessively long sentence to a first offender who has committed an isolated criminal act.

Of course, the rule that evidence of convictions during prior enlistments shall not be received has good justification, both traditionally and as a practical matter. If a man reenlists and is told that his prior record will not be held against him, he has a right to rely on this promise. Conversely, such a promise can be an inducement to reenlistment. The rule should not be modified without careful review of these considerations.

In addition, consideration might be given to the question whether the present rule as to evidence of mast punishment should be retained. The convening authority may consider such evidence in determining initially whether to refer a case to trial by court-martial, and the reviewing authority may do so in reviewing the case after sentence. There is considerable weight to the argument that if an accused was punished at mast one or more times, and this did not deter him from committing a court-martial offense, the court should know about it when it imposes sentence.[277] This Board has suggested elsewhere in this report that mast punishment for a particular offense should set as a bar to trial by court-martial for the same offense.[278] For these reasons, the Board suggests that consideration be given to making evidence of prior mast punishment admissible for consideration by the court as an aid to arriving at a just sentence.

RECOMMENDATION:

That the Advisory Council consider whether the Rules of Procedure should provide that the complete record of past offenses, civilian and military, including record of mast punishments, be available after findings by the court for the purpose of sentence.

(b) Aggravation, Mitigation, and Extenuation.

Section 164, Naval Courts and Boards, states that after the findings the accused may introduce character evidence in mitigation which has for

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277. See argument to the same end in I Naval Justice Journal, No. 3, at p. 51.

278. Section VIII, p. 305 et. seq. infra.

purpose "...the lessening of punishment to be assigned by the court or the furnishing of grounds for recommendation to clemency." Section 422 provides that after the findings the accused may produce matter in mitigation or extenuation, or matter from his service record, or testimony as to past character. On the other hand, Sections 444 and 450 contain statements that evidence in mitigation or extenuation should be considered by the court only as a basis for recommendations of clemency, and that clemency should be exercised only by reviewing authorities. Section 166, in authorising the prosecution to introduce evidence in aggravation, states: "...The Court has discretionary power as to the punishment to be awarded..." It is difficult to reconcile these provisions, or to perceive why the court should, in considering matters in aggravation, have discretion as to the punishment to be awarded, but should not be allowed to consider matters in mitigation or extenuation (except to recommend clemency).

It is suggested that greater discretion be allowed the court in determining the proper punishment, within maximum limits, and that this should include the power to consider matters in mitigation and extenuation. The British Army Manual of Military Law authorizes such discretion.[279] The Manual for Courts-Martial of the U. S. Army, provides:

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279. Par. 77, at p. 60.

"....In the exercise of any discretion the court may have in fixing the punishment, it should consider, among other factors, the character of the accused as given on former discharges, the number and character of previous convictions, the circumstances extenuating or aggravating the offense itself, or any collateral feature thereof made material by the limitations of punishment." 280

The British Naval law manual says:

"In awarding sentence, the court should take into consideration the former services and any other claims which the accused may lay before them with a view to his being dealt with more leniently. It is objectionable for a court to award a sentence and then to recommend a prisoner to the favorable consideration of the Admiralty. Such a course throws a responsibility upon others which properly belongs to the court." 281

It has been pointed out elsewhere in this report that the failure to repose discretion in the courts has resulted, in certain commands, in consistently severe court sentences which were drastically reduced by the convening authority with almost automatic regularity. The First Ballantine Report discussed this unhealthy situation and recommended increased discretionary powers for courts-martial.[282] The court is in the best position to fix a fair sentence, for only the court has observed the accused and heard the testimony. While subsequent clemency no doubt rests with higher authority, the determination of a fair sentence, after all facts and circumstances have been considered, is not a matter of clemency, but merely the exercise of impartial judgment, discretion, and justice. Some of the severity of the

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280. Par. 80, p. 67.

281. Manual of Naval Law and Court-Martial Procedure (4th ed. 1912) 88-90.

282. At pp. 10, 11.

present practice is ameliorated by the fact that the sentence is not announced until it has been acted upon by the confirming authority, but this practice does not change the basic fact that the court, not the confirming authority, is in the best position to fix sentences.

RECOMMENDATION:

It is suggested that courts-martial be given greater discretion in the determination of sentences, and that to this end, courts be encouraged to consider, in arriving at proper punishment, not only the facts and circumstances of the offense, including matters in aggravation and prior convictions, but also matters in extenuation and mitigation which the accused may lay before them. Clemency and the imposition of just sentences should not be confused.

(c) Psychiatric Report

At the present time there is no requirement that the court obtain and consider a psychiatric report as one of the facts in the determination of punishment. In case a plea of insanity is made, or in the case the court entertains any doubt as to the mental capacity of the accused at any stage of the trial, the accused may be placed under medical observation. In a few cases reviewed by the Board, the court had initiated a psychiatric examination, but this was not a common practice.

The Board does not feel competent to enter upon a long discussion of the relation between criminality and psychiatry. Nevertheless, the importance of psychiatry in the field of criminology is generally conceded. The

work of the psychiatrists assigned to naval prisons and other confinement centers has been noteworthy, and the Board has found their reports exceedingly helpful in its review of cases. Consultation by other members of our Board with the member who is a psychiatrist has been invaluable. Similar reports would have been equally helpful to the courts, in the first instance, in determining the punishment to be awarded.

Many progressive civil jurisdictions now require a psychiatric examination of convicted defendants as an aid to the judge in fixing an appropriate sentence. A probation officer, or similar official, prepares a complete report of the defendant's home environment, economic status, education, employment and so forth, to which is added the report of the psychiatrist. Experience has shown the improtance of these factors in the consideration of culpability.

The Board realizes that a pre-sentence psychiatric examination will not always be possible, particularly in oversea commands and at sea. But in many cases it will be practicable, especially where the accused is confined in a large detention center in this country possessing complete medical and psychiatric facilities. In these cases pre-sentence examination would be feasible, and the Board believes that the court should have the benefit thereof in passing upon the sentence.

During the rapid expansion of the Navy in the past five years, it was natural that many men accepted for duty would prove to be psychologically incapable of adjusting themselves to the unaccustomed rigidity of naval life. While an effort has been made to eliminate such men by administrative discharge

early in their naval careers, in many instances this was not possible and as a result some of these men committed serious military or civil offenses before their psychiatric disorders were discovered. By far the most frequent offense of this nature was unauthorized absence. This is not to say that all persons convicted of unauthorized absence offenses were men with personality disorders. Quite the contrary. But the large number who were would never have adjusted themselves to naval requirements.

This raises the very difficult and controversial question whether a person proved beyond doubt to have a personality disorder should be treated in the same manner as any other offender as regards a sentence of confinement and a dishonorable or bad conduct discharge. Concededly such persons now receive special treatment in confinement, but in their sentence their personality disorders were allowed to play little or no part. There is serious doubt whether this is the proper approach. In certain types of strictly military offenses, psychiatric disorders play a very important role, for the transition from civil life to military life is not a simple one, even for stable persons, and for some types it is extremely difficult, if not impossible. In the case of civil offenses committed by naval personnel, these special considerations also apply, although perhaps not to so great a degree.

It is sometimes proposed that an accused guilty of a military offense, not involving moral turpitude who is shown to have a personality disorder, be given an immediate administrative discharge. But the matter

is not as simple as this. The position can well be taken that psychiatry has not progressed far enough to establish such matters beyond question; that in many such cases the accused may be "working for a discharge"; and that it would be unfair to others, who had exhibited normal tendencies to punish them severely while releasing their more unstable fellows. The Board has come to no final conclusion on this matter, but feels that the question demands serious consideration in any thorough examination of court-martial procedures and policies.

RECOMMENDATIONS:

(1) That the Advisory Council consider adoption of a requirement that in every general court-martial case where it is feasible, a report of psychiatric examination should be submitted to the court, after the findings, and before a sentence is fixed. Such report should be accompanied by information concerning the accused's family background, education, environment, employment and economic status.

(2) A thorough study should be made by the Advisory Council of the general problem of offenders having personality disorders, and such questions considered as whether an immediate administrative discharge should be permitted for such offenders guilty of purely military offenses.

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11. Vote on Sentences.

A. In General.

The basic approach, both of the Army and Navy court-martial systems, is that the court should impose a fair but adequate sentence, commensurate with the offense, leaving matters of clemency to the reviewing authority. Thus, Naval Courts and Boards says:

> ".....if the members of the court believe that because of good motives on the part of the accused when he committed the offense, or because of the unusual circumstances, the accused should not be severely punished, it is none the less their duty to find according to the law and evidence and to adjudge a sentence commensurate with the offense proved. In such a case, ample provision for the protection of the accused is provided in the recommendation to clemency which it becomes the duty of the members of the court to make, and the court should not presume upon the prerogative of the reviewing authority in exercising clemency. Such action would be, in effect, a reflection upon the judgment of the reviewing authority." 283

As has already been pointed out, this policy leaves little discretion with the court, and disregards the various mitigating and extenuating circumstances which should properly be regarded by the court, no less than by the reviewing authority. The result has been, in many commands, that the courts have given severe sentences, with little or no variation in the length of confinement, leaving it to the convening authority, who usually has not seen the accused, to reduce them.

For example, out of the 643 cases reviewed by the Board prior to 1 July, there were 66 cases from a particular command in which the accused was convicted of desertion in time of war. The length of absence in these cases

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283. N.C. & B., Sec. 372, pp. 206, 207.

varied from 1 day to 743 days, the average length being 118 days. The average sentence imposed by the court was 12.9 years. The convening authority reduced these sentences to an average of 3.5 years. In 37 of the 66 cases, the court's sentence was the same, 15 years confinement and a dishonorable discharge. All but eight of the sentences were 10 years or longer. In no case did the convening authority fail to reduce the sentence substantially.

It might be argued from the above figures that the sentences as reduced, were not severe when announced to the accused, and that actually the accused had benefited by the process. The real question, however, is whether it is compatible with true justice to deprive the court of discretion in the determination of an appropriate sentence. In addition, reliance on subsequent review for the correction of excessive sentences and the extension of clemency involves a technique both haphazard and unwieldly. The possibility that some offenders may be overlooked remains a constant risk. The above figures clearly demonstrate that the court took relatively little notice of the great variety of circumstances, extenuating or otherwise, which surround the commission of every offense. The very fact that in 37 out of 66 cases the court's sentences were identical is evidence of this. Obviously, what happened in these cases is that the court gave a severe enough sentence to permit the convening authority almost complete freedom, except as limited by policy directives, in determining the punishment. The result, in effect, is that the sentence is fixed by the convening authority, who heard none of the witnesses, and did not observe the witnesses or the accused. The court's function in imposing sentence is reduced to a formality. Such a result is not compatible

with a concept of due administration of justice by courts established for that purpose.

Rules for British Army courts-martial state that, in arriving at their conclusions, courts have, within statutory limits, absolute discretion as to sentence. They are directed to consider all the surrounding circumstances and other sentence factors. In conclusion, the Manual states:

> "Finally the court, having due regard to the foregoing considerations, must always award such punishment as they themselves consider to be just and proper in the circumstances of the particular case. They must not presume that the convening officer, in sending the case for trial, took a more serious view of the facts than they themselves take.
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> "In view of the discretion of the court in the matter of awarding sentence, a recommendation to mercy will be exceptional." 284

b. Method of recording vote.

Under present practice, the method of arriving at sentence is for each member to write down the punishment he deems appropriate and hand his vote to the president who, after receiving all the votes, reads them aloud. A death sentence requires a two-thirds concurrence, all others a majority vote. If the requisite number have not agreed on the punishment, the president, starting with the mildest sentence which has been proposed, reads it aloud and asks each member, beginning with the junior in rank, how he votes. Votes are given viva voce.[285] This process continues until a decision is reached.

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284. At pp. 61, 62.

285. N.C. & B., Sec. 443, pp. 227, 228.

The Army practice is the same except that all voting is by secret, written ballot, and a unanimous vote is required for the death sentence, a three-fourths vote for sentences above ten years, and a two-thirds vote for other sentences.[286] Voting is continued until a decision is reached. In reference to deliberation prior to vote, the Manual for Courts-Martial states:

> ".....The influence of superiority in rank should not be employed in any manner in an attempt to control the independence of members in the exercise of their judgment."

Although it may be assumed that the members of naval courts-martial do not require such an admonition, a similar statement in the naval manual would be appropriate.

As in the case of recording votes on the findings, the British Army and Navy procedures require vote on the sentence to be viva voce.[287]

The U.S. Army rule requiring secret, written ballots at all stages of voting on the sentence is desirable, for it tends to remove any possible influence which might be exercised over junior members. The present Navy rule does not achieve this unless a decision as to punishment is reached on the initial voice vote.

C. Percentage of Votes.

The present Navy rule as to votes required for a decision on the sentence is, as heretofore stated, two-thirds for the death penalty and a simple majority for all others. The Army rule is more strict, requiring a

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286. Manual for Courts-Martial, par. 80b, p. 68.

287. Manual of Military Law, Sec. 85, p. 62; Nav. C.M. Reg., Art. 470.

unanimous vote for the death penalty, a three-fourths vote for sentences of confinement for more than ten years, and a two-thirds for all other sentences.[288]

The British Army rule is the same as the American Navy rule.[289] The British navy rule requires only a majority for any sentence.[290]

The McGuire Committee has proposed that a unanimous vote be required before the death penalty may be imposed, all other sentences to be determined by majority vote.[291] This represents a partial adoption of the Army rule and it is believed that it should be followed. The seriousness of the death penalty should require unanimity among the members.[292] The fact that the Navy has not actually carried out a death sentence in many years does not affect the desirability for such a voting requirement. Consideration might also be given to adoption of a rule requiring more than a majority vote for sentence of confinement in excess of ten years.

D. Relation of the Judge Advocate to the Sentence:

One of the proposals of the 1920 Chamberlain Bill for reorganization of the Army court-martial system was that the judge advocate be given the power to impose the sentence, rather than the court. This proposal

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288. A.W. 43, 10 U.S.C., Sec. 1514.

289. Army Act, Sec. 48(8), R.P. 69, Manual of Military Law, pp. 475, 480, 663.

290. Navy C.M. Reg., Art. 470.

291. Proposed Rule 13.

292. See discussion supra p. 162 re: recommendation of vote on finding.

would, of course, have assimilated the court-martial very closely to the civilian criminal court, with its judge and jury. The proposal was disapproved by the Bar Association Committee, the Kernan Committee, and the Army generally, and it was never adopted by Congress.

There are several advantages to such a proposal: (1) The determination of sentence would be made by an individual whose discretion would be limited only by statutory or departmental limitations on punishments; (2) All chance of "dictation" of sentence would be eliminated since the judge advocate would not be under the command of the appointing authority; (3) The sentence would be determined by an individual trained in naval and civil law, skilled through training and experience in such matters.

On the other hand, there are several reasons for retaining the present system. Imposition of sentence, although it involves knowledge of the basic principles and purposes of naval law, is not primarily or exclusively a legal matter, and the real purpose of furnishing a judge advocate for a naval court-martial is to provide an individual skilled in legal questions. There are very valid reasons of naval organization and discipline why the sentence should continue to be imposed by the court. Finally, a greater degree of justice might be expected from a sentence imposed as a result of the combined judgment of a group of mature men, experienced in naval life, conduct and discipline, than from a sentence imposed by a single individual whose sole qualification is his legal training. For it is not to be expected that the average judge advocate on a naval court-martial will have had the training or experience of a civilian judge, usually an olderman with long years of experience behind him.

Moreover, the civilian jury system is not so perfect that it must be imitated at all costs. It has not escaped severe criticism by informal observers. It is unknown, or known only in a special form, in the countries of Europe which follow the civil law. It may be accidental, but it is interesting that the court-martial, with many of its roots in the civil law, as has been shown in Section I, should resemble in this respect, as in others, the multi-judge criminal court of European countries, rather than the common law judge and jury.

All in all, the change proposed by the Chamberlain Bill represents a radical break with tradition, for which no compelling reasons are seen. The matter is, however, deserving of consideration.

However, whatever decision is reached on this, the judge advocate because of his training, will be in a unique position to advise the court on the maximum sentence, on departmental policies, on comparable civilian standards in the case of civil offenses, and on other sentence factors, and such advice should be very helpful to the court in arriving at a proper sentence.

12. Announcement of Sentence; Effective Date; Credit for Time in Confinement Prior to Trial.

Under present practice, the sentence is not announced until after the reviewing authority has acted upon it. Meanwhile, the accused does not know what sentence the court has imposed upon him, although he is immediately informed if he has been acquitted of all charges and specifications. The theory of this rule is that the sentence is not final until the reviewing authority has acted, and that since his clemency powers may result in mitigation, revision, reduction, or remission, it would be unfair to announce the court's sentence immediately.

Prior to the 1920 revision of the Articles of War, the Army rule was the same as the present Navy rule.[293] Although the Articles of War still provide that no sentence will be carried into execution until approved by the appropriate reviewing authority,[294] the Court must announce its sentence in open court[295] unless, in the court's opinion, good reason exists for not making the findings and sentence public at that time.[296] A sentence of confinement becomes effective on, and is computed from the date of its announcement.

Under British Army Court-Martial rules of procedure, the court's sentence is not announced to the accused unless the sentence is death. Even this is not a public announcement, but consists of sending the accused a formal notice under sealed cover.[297] Otherwise, the sentence is not announced until confirmed.

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293. Former A.W. 104-109. Also See Winthrop, at pp. 464, 465.
294. A.W. 46; A.W. 48.
295. Manual for Courts-Martial, par. 80b.
296. Manual of Military Law, p. 62.
297. Id. p. 762, note (b).

The McGuire Committee has recommended that the court announce the sentence, or other disposition, in open court, immediately after the conclusion of its deliberation.[298] The Ballantine Committee has made the same recommendation, but has coupled it with a recommendation that no change be made in the effective date of the sentence.[299] No reason is given by the Ballantine Committee for the latter qualifications, which gives no consideration to the Army practice.

The Board concurs generally with the recommendations of the McGuire and Ballantine Committees that the findings and sentence be announced at the conclusion of the trial. It is pointed out, however, that adoption of the sentencing technique suggested above, involving as it does extensive review of all available sentence factors, may frequently result in some delay between the findings and the sentence. It is customary for civilian judges to adjourn sentence from two to three weeks after conviction to enable the probation department to investigate the case. Sentence is imposed only after the court has a complete report of the social, environmental, economic, and medical factors in the case. A delay of this nature would not always be practicable in the case of the court-martial, especially during combat when numbers must go back to other duties. But such time as is necessary to enable the court to obtain and evaluate all

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298. McGuire Rules of Procedure, Rule 13.

299. Ballantine Report, April 24, 1946, p. 10.

relevent and available information bearing on the sentences should be granted the court, where feasible. If in any such case a delay of over 24 hours is contemplated, it is suggested that the findings be announced upon completion of the trial of the facts, and the sentence immediately after it has been agreed upon.

Consideration should also be given to the effect upon the sentence of confinement while awaiting trial and before sentence. As has been pointed out elsewhere in this Report, there were often long delays, especially in absence cases, between the time the accused was taken into custody and the time the sentence was finally promulgated by the convening authorities. Although it has not been possible to determine accurately in each case reviewed by the Board the nature of the restraint imposed upon the accused while awaiting trial, such restraint generally fell into two categories: (1) The accused was in actual confinement in the brig during the whole period before trial, or (2) the accused was a prisoner-at-large, which permitted movement within a restricted area of the naval activity.

In some instances the record showed that the convening authority, in reducing the sentence of the court, took into consideration the time spent by the accused in restraint while awaiting trial and sentencing. In most cases, however, no credit seems to have been given for such pre-trial restraint. Naval Courts and Boards provides that if there has been an unusual time lapse between the date of confinement of the accused for trial and the date of the approval of the sentence, this period should be considered by the convening authority upon the case as a ground for mitigation.

Civil penal codes often provide that time spent in prison or jail prior to sentencing must be calculated as a part of the sentence imposed. For example, the Penal Law of the State of New York provides:

"Sec. 2193. Calculating terms of imprisonment.

1. Any time spent by a person convicted of a crime in a prison or jail prior to his conviction and before sentence has been pronounced upon him, shall become and be calculated as a part of the term of the sentence imposed upon him, whether such sentence is an indeterminate one or for a period of time; and such time shall, in addition to the discretionary reduction allowed under the provisions of the Correction Law, be deducted from the term of the sentence so imposed, under the provisions of article nine of the Correction Law."

The Manual for Courts-Martial states that the reviewing authority may properly consider the length of confinement before trial as a factor in mitigation of the sentence.[300] This, however, treats the problem as a matter of clemency and not as a matter for the court to consider in fixing sentence. It is submitted that this is not the proper approach. It is not truly a matter of clemency, but is properly one of the sentence factors that the court should consider in exercising its discretion as to length of sentence.

It is believed that time spent in actual physical confinement, prior to trial, should be calculated as a part of the sentence imposed, and that time in prisoner-at-large status should be calculated on a pro rata basis as a part of the sentence imposed. For example, one-third credit could be allowed. Thus, if an accused had spent 60 days as a prisoner-at-large, 20 days would be calculated as a part of the final sentence imposed, and considered as served.

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300. Par. 87b, p. 76.

RECOMMENDATION:

(1) The court should be furnished as much information as is available concerning the background of the accused before sentence is imposed and should be free, when it is feasible to do so, to postpone sentence for a reasonable time after conviction for the purpose of studying the various sentence factors included.

(2) Consideration should be given to a change in the present procedure so that the findings will be announced immediately after the trial and the sentence immediately after the court has agreed upon it.

(3) Consideration should also be given to the question whether time spent in confinement by the accused awaiting trial and before sentence be calculated as a part of the sentence of the court, and whether some credit on a pro rata basis should be given for time spent as a prisoner-at-large while awaiting trial.

13. Recommendation of Clemency by the Court:

It has already been pointed out in this section that evidence or statements offered by the accused in extenuation or mitigation are properly factors which should be considered by the court in passing upon the sentence. The weight to be given such evidence or statements can best be evaluated by the court. Heretofore, these matters have been regarded as matters of clemency for the consideration of the reviewing authority alone. Members of courts

have been empowered to recommend clemency in proper cases, but are not supposed to infringe upon the powers of the reviewing authority by giving weight to such matters when determining sentence.[301] The Board has suggested that discretion be given the court in the determination of sentence, with full power to consider all circumstances in extenuation or mitigation. If this suggestion is adopted, there will be no need to recommend clemency to a superior authority. Whatever clemency is indicated can be reflected by a suspension of sentence on probation.

This of course relates to exercise of clemency in the first instance. It has nothing to do with subsequent clemency, extended by the Navy Department, either upon initial review of the case, or upon periodic clemency review.

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301. N.C. & B., Sec. 372.

SECTION VII

REVIEW OF COURT-MARTIAL PROCEEDINGS

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1. Initial Review by the Convening Authority

A. Outline of Present Procedures:

A sentence of a naval court-martial is not self-executory. It is effective only when approved by the convening authority. The convening authority has the power to remit or mitigate a sentence, to remit all or part of it conditionally upon probation, or to disapprove it. He also has the power to disapprove the findings, in whole or part. Theoretically, he can disapprove and return a finding of not guilty, and can direct revision of a sentence with a view to increasing its severity, but under Naval Courts and Boards (Sec. 474), he is not permitted to do so without prior authority of the Secretary of the Navy. In practice this power is rarely, if ever, exercised. In reviewing a case, the convening authority normally refers it to his legal officer, who prepares an opinion and recommendations for signature by the convening authority. The latter usually follows the advice of his legal officer, although not obliged to do so.

The Army procedure is substantially the same, except that the reviewing authority is required by statute to refer the case to his staff judge advocate for his opinion and recommendations (AW 70). The staff judge advocate's "Review", as it is called, becomes a part of the permanent record in the case. This review, though required by statute, is advisory only, but its recommendations are normally followed by the reviewing authority. A detailed description of the Army procedure relating to the review by the staff judge advocate

is contained in an article by Colonel Connor, formerly Professor of Law at the United States Military Academy, entitled "The Judgmental Review in General Court-Martial Proceedings," in 32 Virginia Law Review, at page 39 (1945).

Another distinction between the Army and Navy systems is that under the Articles of War there is a statutory prohibition against the reviewing authority returning a case for reconsideration of an acquittal or with a view to increasing the sentence (AW 40).

Apart from these differences in the basic statutes, the procedure on initial review is essentially the same both in the Army and in the Navy. In both cases, it derives directly from the concept of the court as an agency of the reviewing authority for the maintenance of discipline: the action of the court is not final until it has been approved by the convening authority.

There is, however, a difference between the Army and Navy rules with respect to the ordering of a new trial by the reviewing authority. Under Navy procedure, if the court was without jurisdiction, or the charges and specifications did not allege an offense, the reviewing authority is required to disapprove the proceedings, findings and sentence. He may then order a new trial, by convening a new court, upon new charges and specifications, if necessary. If, on the other hand, the errors were not of this type, but caused substantial injury to the accused, and timely objection was made by him at the trial, the reviewing authority is required to afford the accused an opportunity to request a new trial. If the accused declines the new trial, the reviewing authority takes action on the proceedings, findings, and sentence without regard to such errors , provided the record irrespective of the errors is sufficient to sustain the findings, (N.C. & B., 447). Although Naval Courts

and Boards is silent on the point, the practice seems to be that where the record, irrespective of the errors, is insufficient to sustain the findings, and the accused declines a new trial, the reviewing authority would, nevertheless have to disapprove the findings and sentence.

This rule differs somewhat from the Army rule, under which errors are considered by the reviewing authority regardless of the accused's failure to object thereto, except for certain technical errors in connection with the introduction of documentary evidence, which are waived by failure to object (see MCM 1928, pars 117a). If the errors found are deemed substantially prejudicial, the reviewing authority disapproves the findings and sentence. He may or may not order a new trial, as he sees fit, but in neither event are the wishes of the accused consulted. In this respect, Navy procedure more closely resembles the usual civilian practice, under which objections must be made, and an appeal taken, if a new trial is desired.

B. Comments on Present Procedure:

Without question, the review by the convening authority under the present system affords substantial protection to the accused. It provides a means of detecting errors in the trial and of correcting excessive sentences. If the errors are substantially prejudicial, the proceedings can be disapproved or set aside and a new trial granted or offered. If the sentence is not excessive, the convening authority can reduce it by way of clemency, or he can extend clemency in other ways, such as by remitting the sentence conditionally on probation. If the sentence is excessive, the convening authority can reduce it. Furthermore, the review is obligatory and is therefore in the nature of an automatic appeal granted to every accused, regardless of whether he requests it. 302

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302. As stated above, in Section II, this analogy must not be pressed too far. But for practical purposes, it may be regarded as approximately correct.

These and other aspects of the review of court-martial cases, as compared with civil court procedure, are discussed at length by Colonel Archibald King, JAGD, in an article entitled "The Army Court-Martial System," in Wisconsin Law Review (1941) 311. Although Colonel King's article is limited to the Army system, most of his comments on review procedure are also applicable to the Navy system.

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

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

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

to place anyone, especially one who is in the position of a judge administering justice.

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

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

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

These matters are discussed at greater length in the preceding section of this report, but they are necessarily involved in a consideration of the review by the convening authority.

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

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

It is believed that the above are defects in the present system of review by the convening authority which deserve careful attention. They are not cured by subsequent departmental review, nor would they be cured by improving that review. For of necessity, subsequent departmental review leans heavily on the action of the court and the initial reviewing authority. They are the parties closest to the accused, the offense, and the scene. A strong presumption in favor of correctness and regularity in the initial proceedings exists, and is bound to exist, under any system of higher appellate review. The same is true of the civilian courts. It is submittwd that the true solution is to improve the initial processes, and not to rely on subsequent review to correct deficiencies therein.

Nor will palliatives solve the problem. The proposal has sometimes been made that the reviewing authority be prohibited from criticizing a court for its action in a particular case. Obviously this deals with only a surface

manifestation, and fails to get at the heart of the difficulty.

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

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

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

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

However, the effectiveness of this is limited by the fact that only a limited class of cases is subject to extra review. Even in this type of case, the record is first reviewed by the convening authority, whose recommendations necessarily carry great weight.

And in those cases in which the convening authority is also the confirming authority, the same objections made to review by the convening authority are equally applicable.

The British have gone a little further along the path of separating the convening authority from the reviewing authority. Under the British Army system, every court-martial sentence must be confirmed before it is ordered executed. In a general court-martial case, the confirming authority may, but need not, be the same officer as the convening authority.[303] As a rule, warrants giving power both to convene and to confirm the findings and sentence of general courts-martial are issued only to certain officers in India, the colonies and on active service.[304] In the United Kingdom, the confirming authority is the Crown, or an officer deriving authority from the Crown. Within the United Kingdom, all sentences extending to death, penal servitude, or dismissal of an officer must be confirmed by the Crown, and this limitation is sometimes placed on cases arising abroad.[305] In a district court-martial case, the convening authority is the officer empowered to convene general courts-martial, or certain specified officers to whom he is authorized to delegate his confirming power.[306] In the case of a field general court-martial, the confirming authority is: (a) when the troops are not on active service, the officer authorized to confirm general courts-martial; (b) when the troops are on active service, the senior officer if of field grade, and if the senior officer is not of field grade, the nearest available senior officer of that grade. Where a sentence of death or of

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303. Army Act, 122(2); MML, p. 536.
304. MML, p. 43.
305. MML, p. 63.
306. Army Act, 123, MML, p. 538.

peanl servitude has been imposed by a field general court, the sentence must, after confirmation, be referred to the chief commander in the field before it can be executed. In any case in which he deems it desirable, an officer authorized to confirm may reserve a finding or sentence for confirmation by superior authority.

In those cases under the British Army system in which the charges are submitted to the Judge Advocate General prior to trial (e.g., cases of fraud, indecency, and theft arising within the United Kingdom,) a further step is taken to insure separation of the two functions of pre-trial scrutiny of charges and post-trial review. The Office of The Judge Advocate General is organized into two sides, one the "military" side and the other The Judge Advocate General's Office proper. The former deals wholly with charges before trial and with the prosecution thereof, the latter with matters such as the detailing of Judge Advocates to courts, review of findings and sentences, and clemency. The reasoning is that no man who has had anything to do with the charges before trial, or the preparation for trial, should sit at the trial as judge advocate, review the record afterward, advise as to its legal sufficiency, or give advice on clemency. Just before the war, a committee appointed to study the British Army court-martial system had recommended that this organization of the Office of The Judge Advocate General be made statutory, but action on the committee's recommendations was deferred upon the outbreak of the war.[307]

On the other hand, British Naval procedure is substantially similar to the American, that is, the sentence is first reviewed by the convening authority, who may (with certain exceptions) order it executed, and then by the Admiralty. (See Appendix B).

307./ Rigby, Military Justice in the British Commonwealth, Federal Bar Journal, April 1942; Report of the Army and Air Force Courts-Martial Committee, 1938

The other approach to the problem is to eliminate the review by the convening authority, and to make the sentence of the court self-executory, subject however, to higher departmental review. This was the proposal of the Chamberlain Bill, but it was not adopted. It is also the rule in the French system, under which the findings and sentence of the court are final, subject to a limited right of appeal to conseils de revision. An interesting commentary on the attitude of commanders, during World War I, to this system is contained in the following testimony of Lieutenant Colonel Rigby, given at a Senate Hearing on the Chamberlain Bill in 1919:

> "I tried to get information, as far as I could by interviews, as to the relative value of our power of the reviewing authority to approve or disapprove the findings and sentence, instead of having the judgment of the court final as the French do, and I got very varying opinions. For instance, I had a talk with Gen. Gouroud, who, you may remember, was the commander of the French Army at Rheims on the 15th of July, 1918, who beat back the German attack and really stopped the German rush toward Rheims during their last offensive. Gen. Gouroud was also in command of the French Army in Gallipoli earlier in the war; and was, when I saw him, in command of the Fourth Army, in Alsace. I asked him the question whether in his opinion the American and British plan of having the judgment of the court-martial subject to review by the commanding general, or the French plan of having the judgment of the court-martial final, was the better system, and what he thought were the advantages and disadvantages of each, and Gen. Gouroud answered very emphatically—'I do not hesitate to say for a moment that the American system is infinitely superior,' and then he went on to tell a number of instances where he had felt the lack during the war, in emergencies, of the power to in any way control the judgments of the courts.
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> "On the other hand, Gen. Valdant, chief of staff at Paris, and Gen. Hallwin, commander at Bordeaux, believe in the French plan and the finality of the judgments; but when I asked them if they were faced with an emergency, with a lowering of morale, in an event of that sort, what would they do, they said they would discharge the court and appoint another court, or they would call up the commissaire da gouvernement, and they would find ways to bring pressure to bear on the court, and they would resort to the free use of the summary disciplinary power." 308

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308. Hearings before the Subcommittee of the Committee on Military Affairs, U.S. Senate, 66th Cong., 1st Sess., on S. 64, Part 1, pp. 544-5 (1919).

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

> "55. Command Control. Opinion of judge advocates who answered the questionnaire distributed by The General Board, or were personally interviewed, is emphatic that there was too much command interference by the appointing authority in the functioning of courts-martial in the European Theater of Operations. Control of courts-martial was attempted, and largely accomplished, by letters of non-concurrence, admonition and "instruction;" by personal discussions with the court; and by changes in the detail for the court. It was rare when, in time, courts did not reach results, particularly as to sentences, desired by the appointing authority.
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> "a. This lack of confidence in the independence of the courts contributed to cause only 39 per cent of the judge advocates who voted on the question to favor allowing courts, under the present system, to fix the sentences, and some of these would forbid comment of any kind on the findings or sentence by the appointing or other command authority. The majority of the negative 61 per cent on this question favor an independent sentencing body answerable directly and only to the theater commander or to the Assistant Judge Advocate General with the theater. About 18 per cent believe that general courts-martial should be completely separated from the command; others would have sentence fixed by the law member, whose command responsibility would be direct to the Assistant Judge Advocate General for the theater of operations instead of to the reviewing authority." 309

Neither the Ballantine Reports nor the McGuire Report mention the important question of review by the convening authority, except insofar as the first Ballantine Report touches upon it in making its recommendations for decentralization. The first Ballantine Report did recommend that greater power and responsibility for the fixing of the sentence be granted to the court, but made no corresponding recommendation with respect to the powers and function of the reviewing authority. 310

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309. Report of the General Board, USFET, "Military Justice Administration in Theater of Operations," File: 250/1, Study No. 83, par. 55, pp. 45-46.

310. Report of Ballantine Committee to The Secretary of the Navy, dated 24 Sept. 1943, pp. 10-11.

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

D. Suggestions Regarding Present System of Initial Review.

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

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

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

(iii) Suspension of Sentence: Under present practice, convening authorities are empowered, except in those cases requiring confirmation by higher authority, 311

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311. See, e.g., letter, SecNav, dated 12 October 1945, subj: Policy of Navy Department in regard to trials of offenses involving absences and desertion, and mitigation of General Court-Martial sentences.

to remit all or part of a general court-martial sentence on probation, and this power is frequently exercised in appropriate cases. Similar power is exercised by Army reviewing authorities. This power is similar to that of a civil judge, who may impose sentence and at the same time suspend its operation for a probationary period. This power is very important from a disciplinary and morale standpoint. The question whether the court should have greater control over the sentence, and the reviewing authority less, inevitably raises the question whether the power of remission on probation should be transferred from the reviewing authority to the court. The court, having heard all the evidence in the case and having reviewed all the sentence factors, would seem to be in the better position to decide whether the accused deserves a suspended sentence and will be a good probation risk. On the other hand, the convening authority may well be in a better position to review the accused's record as a whole and egaluate it against the records of other accused and in the light of disciplinary and morale problems of the command as a whole.

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

(v) Command control: Fundamental to the whole question of the court-martial system is the problem of command. A court whose proceedings are nugatory until approved by the officer who appointed it is not an independent tribunal in

any true sense. Conversely, a court whose judgments are self-executory (subject only to higher departmental legal and clemency review) would be difficult to fit into the organization and structure of the Navy, and would be at variance with the basic concept of military command, hierarchy and discipline.

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

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

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

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

The recent Report of the House Military Affairs Committee[312] seems to adopt some combination of (2) and (3), but its recommendation in this respect (which is not opposed by the Army) is not very clear.

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

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312. House Report No. 2722 - 79th Congress, 2nd Session.

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

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

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

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

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

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

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

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

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

of the Ballantine Committee:

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

Moreover, as a practical matter, it may be seriously questioned whether, under present Navy policies, the convening authority, in reviewing a general court-martial case, actually does possess the command control originally contemplated in the basic theory of military organization. On legal matters he is bound to follow the law. If he makes a mistake, he will presumably be overruled by the Secretary, upon the advice of The Judge Advocate General, (unless indeed he errs in favor of the accused, in which case it may be too late to correct the error). He cannot increase the sentence, without getting the Secretary's permission to send the case back to the court for reconsideration, and this is rarely granted. He may reduce it, but in doing so he is bound by Departmental policy, which prescirbes appropriate sentences for nearly all offenses. The same letter which is referred to above in Section V, in connection with referring cases to trial, also prescribes appropriate sentences for desertion and absence offenses, and directs convening authorities to mitigate sentences imposed by courts accordingly. 314 These sentences are prescribed down to the last detail, and the policies announced have resulted in such sentences as 3 years, 1 month, and 77 days. (Review Board No. 97) or 3 years, 10 months, and 295 days (Review Board No. 134). If the convening authority does not take such action, it will be taken by the Secretary, upon the recommendation of the Bureau

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313. Report of the Ballantine Committee to The Secretary of the Navy, 24 April 1946, p. 29.

314. Letter from The Secretary of the Navy to All Ships and Stations, subject: Policy of Navy Department in regard to trials of offenses involving absences and desertion, and mitigation of GCM sentences, dated 12 October 1945.

of Naval Personnel. It is true that the convening authority is authorized to remit part or all of a sentence on probation in worthy cases, but in the same paragraph of the above-mentioned letter it is stated that the "practice of convening authorities of directing restoration to duty on probation on completion of a part of the sentence is a duplication of the efforts of the Clemency Board and is not looked upon with favor.[315] Finally, the power to order executed a dishonorable discharge or a bad conduct discharge has, by Department policy, been taken away from convening authorities and vested in the Navy Department or the Commandant of the Marine Corps.[316]

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

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

Correction of Legal Errors:

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

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

Clemency:

(i) Responsibility for an appropriate sentence would be placed squarely

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315. Idem. par. 7 B.

316. Idem. par. 11; N.C. & B., par. 684, n (88).

on the court;

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

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

RECOMMENDATIONS:

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

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

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

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

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

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

2. Departmental Review

A. Present Procedure and Comments Thereon:

At present every record of trial by general court-martial is reviewed as to legality in the Office of the Judge Advocate General and as to disciplinary

features in the Bureau of Naval Personnel (or the Discipline Branch of the Marine Corps). Depending upon their recommendations, or the type of case involved, it may thereafter be reviewed by the President or the Secretary.

Both the McGuire Report and the Ballantine Report go into the question of departmental review at some length. At the risk of repeating some of the comments and recommendations made therein, it is desired to call attention to some of the features of the present system which seem to require modification.

(1) Review by The Judge Advocate General:

The initial review is in Section A of the Military Law Division of the Office, where the entire record is read, usually by one officer acting under the supervision of the Chief of the Section. If the initial reviewer believes that a case is legally sufficient, his opinion may be decisive, although the case may pass through several hands before it is finally cleared. If the first reviewing officer believes that a case is legally insufficient, his opinion is subject to being overruled by a superior officer.

At the present time, cases are referred to the Board of Review only after review by the Chief of the Military Justice Section and the Assistant Judge Advocate General. Usually only cases believed legally insufficient, or cases of great importance, or presenting difficult or controversial questions, are so referred. This Board is an informal body established by The Judge Advocate General as a matter of the internal administration of his office. It has no statutory powers, its personnel is temporary and fluctuating, it considers only those cases referred to it, and its opinions are advisory only.

The final responsibility for all decisions as to legality rests with the Judge Advocate General himself. This is in accord with usual ideas of

military and naval responsibility. But in practice the opinion of the Judge Advocate General is nearly always based upon that of his subordinates, and its merit and value in a particular case inevitably dependent upon the amount of attention given to that case by the latter. One case might receive the full attention and consideration of several officers in the General Court-Martial Section, plus an exhaustive study by the Board of Review. Another, involving an equally difficult question of law, might be passed on the recommendation of a single officer in Section A, who may not have seen the point involved. Moreover, any opinion, whether of the Section or of the Board of Review, can be overruled by the Judge Advocate General, if he disagrees therewith.

It is impossible to venture an opinion as to how effective this method of review has been in detecting legal error. As is pointed out in the Board's final report, there were a few cases reviewed by the Board in which the Legal Section of the Board's Reviewing Staff, and the President and Vice-President of the Board, felt that serious doubt of the legality of the convictions existed. In these cases the Board authorized its President to recommend to the Secretary that the records be resubmitted to The Judge Advocate General. Although these cases were few, the errors noted were serious. It is felt that, with an improved system of review in the Office of The Judge Advocate General, the possibility of an illegal conviction being approved would be eliminated.

In any event, only a small proportion of the cases reviewed by the Office of The Judge Advocate General are found legally insufficient. In this connection, some statistics which are set forth by the minority members of the Ballantine Committee, in the Special Recommendations attached to that committee's report, are of interest:

In the fiscal year 1945, of 27,861 general court-martial cases received in the Office of The Judge Advocate General, 60 or 00.21% were set aside in toto. In addition, 68 others, or 00.24%, had already been set aside in toto by convening authorities, making a total of 129, or 0.45% cases disapproved on review. The total number of cases resulting in acquittals, reversals or nolle prosequi, or in which pleas in bar were sustained, was 682, or 02.4%.[317]

In 1945 the United States Federal Courts indicted 41,653 defendants. Of these, 34,117 were convicted. 6,369 (15.2%) cases were dismissed, and 1,167 (02.8%) defendants were acquitted, making a total of 7,536, or 18%, not convicted. In appeals in criminal cases in the federal courts, 18.6% of the convictions considered were reversed.[318] It is realized that the latter comparison is not an absolutely fair one, because the Judge Advocate General reviews all convictions by general court-martial, even those based on pleas of guilty, whereas the federal circuit courts only consider those convictions which are appealed.

Out of 19,401 Army General Court-Martial records examined in the Branch Office of the Judge Advocate General for the European Theater during the period from 18 July 1942 to 15 February 1946, involving 22,214 accused, 2,123 or 9.5% of those accused were acquitted, and 307 sentences, representing 1.4% of the accused, were disapproved, either by the reviewing authority or by the Board of Review of The Theater Command.[319] In making this comparison with Navy figures, it must be remembered that many of the Navy cases represented pleas of guilty to simple absence cases, which might not have come before general courts-martial in the Army.

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317. Ballantine Report, 24 April 1946, p. 9.

318. Idem, p. 9, citing Annual Report of the Director of the Administration Office of United States courts for 1945 under the Report of the Judicial Conference of Senior Circuit Judges.

319. Figures furnished by the Office of the Judge Advocate General, U.S. Army.

These figures may be significant; they may be meaningless. It is apparent that the minority members of the Ballantine Committee felt that they constituted an indictment of the present system of review. The point might just as well be made that they indicated that naval court-martial cases are fairly tried, do not usually involve serious legal questions, and do not often have to be set aside. Certainly this Board found only a small percentage of cases in which any doubt as to the legality of the conviction was presented.

Be this as it may, both the McGuire Report and the Ballantine Report are agreed that the present system of review should be improved, and this Board concurs. It is submitted that the proper approach is to proceed, not from the assumption that the present system is defective, but rather, granting its merits, to consider whether it may not be placed on a firmer and more secure foundation, so that the greatest possible measure of justice may be attained.

2. Review of the Bureau of Naval Personnel:

All general court-martial cases, after review by the Judge Advocate General, are referred to the Chief of Naval Personnel, or the Commandant of the Marine Corps, for comment as to the disciplinary aspects of the sentence. The Bureau of Naval Personnel[320] examines the sentences from the standpoint of conformity with Department policy, and uniformity with other sentences in like cases, and also considers the mitigating or extenuating circumstances which may be present. If the Bureau believes that a sentence should be reduced, it makes an appropriate recommendation to the Secretary, who takes the necessary action. If it approves the sentance, the case is returned to the Office of The Judge Advocate General and is filed without being referred to the Secretary.

The role of the Bureau of Naval Personnel in the administration of naval justice is highly controversial. The McGuire Report calls it an anomaly (p. 6)

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320. The comments made hereinafter about the Bureau of Naval Personnel apply generally to the Discipline Branch of the Marine Corps, in cases involving Marines.

and goes on to say:

> "The Bureau of Naval Personnel, as previously indicated, should be completely divorced from the administration of naval justice--its interest being primarily post factum." 321

The McGuire draft articles and rules of procedure implement this recommendation by making no reference to the Bureau of Naval Personnel, and by providing that the Board of Review shall review all records submitted to it, both as to legality and as to disciplinary features, and shall submit recommendations thereon to the Secretary of the Navy via the Judge Advocate General (McGuire Draft, Article 6(c)(2)). The White draft makes the same recommendation, except that the words "via the Judge Advocate General" are omitted. The Judge Advocate General draft on this subject was still in the course of preparation at the time of this report.

The Ballantine Report states:

> "The Board believes that participation of the Bureau of Naval Personnel and the Commandant of the Marine Corps in review serves a useful purpose." 322

The special recommendations of the minority members of the Ballantine Committee state, with respect to the participation of the Bureau of Naval Personnel in review:

> "This participation may be useful but recommendations as to disciplinary features, in the interests of justice and comparable standards of punishment, should emanate from a single board within the Executive Office of the Secretary." 323

It is apparent that both the McGuire and the Ballantine Reports state mere conclusions. The minority recommendations of the latter report do give a reason, which the Board believes is sound from an administrative point of view, but the recommendation and the reason therefor are given in very summary form.

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321. McGuire Report, p. 9.

322. Ballantine Report, 24 April 1946, p. 9.

323. Ballantine Report, 24 April 1946, p. 25.

The Board has no desire to explore or criticize the internal organization of the Navy Department. The Board does believe, however, that the following criticisms of the present participation of the Bureau of Naval Personnel in the administration of naval justice may fairly be made:

(i) The idea that a court-martial sentence has importance principally from a disciplinary standpoint is only partially true. Sentences imposed by courts-martial are not only disciplinary, but are punitive, and highly so. If they are regarded only as factors in maintaining discipline, and this seems to be the present official approach of the Navy Department, justice in any true sense of the word is bound to suffer.

(ii) The Bureau of Naval Personnel, and the Discipline Branch of the Marine Corps, although well equipped to pass upon sentences from a purely disciplinary standpoint, are not staffed with expert lawyers or penologists, trained and equipped to view each case as a whole, giving due regard to all those factors of environment, education, training, medical and psychiatric condition and the like, which, along with purely disciplinary features, enter into the determination of an appropriate sentence, under the most modern views.

Of course, the decision whether a man should be retained in the service, and if not, the character of the discharge he should receive, is primarily a personnel problem, and should properly be decided by the authorities responsible for personnel. On the other hand, the question whether he should be confined, and for how long a time, is more than a mere personnel problem; it is, in the final analysis, a question of justice requiring expert treatment.

The question whether the Bureau of Naval Personnel should or should not review sentences presents, after all, a false issue. The real question is whether the system of sentence review can be improved, and if so, in what way.

None of the above should be taken as implying that the sentences finally arrived at are unfair, or unduly severe. A reading of the Board's Interim and Final Reports on sentences reviewed by it should dispel the notion that the Board has reached any such conclusion. But the methods used in arriving at those results are, it is submitted, in need of revision.

3. Review by the Secretary:

The discussion here will be limited to those cases which are initially presented to the Secretary after review by the Judge Advocate General and the Bureau of Naval Personnel. Confirmation cases, and clemency review, will be discussed later.

The recommendation of the Judge Advocate General and of the Chief of the Bureau of Naval Personnel on court-martial cases are purely advisory. If any action is to be taken, it must be taken by the Secretary or Under-Secretary. However, it is believed that the taking of such action by the Secretary suffers from the following handicaps:

(1) Precisely because there is no one centralized agency with power to make final recommendations on all court-martial matters, the Secretary is without the benefit of advice from one skilled and qualified agency, charged with full responsibility to aid him in making his decision. Some cases come to him from The Judge Advocate General with the recommendations that the proceedings be disapproved for legal insufficiency. Others come from the Bureau of Naval Personnel through the Judge Advocate General, after having been found legally sufficient by The Judge Advocate General, with a recommendation for mitigation of the sentence. In most cases, the Secretary cannot examine these cases personally. Consequently, he refers them to one or more members of his staff for opinion and advice. In this way a single case may be passed through the hands

of several officers, with several distinct recommendations, after it has already been passed upon by the Judge Advocate General and the Bureau of Naval Personnel. The action finally taken by the Secretary may not be the advice of the latter agencies at all, but a compromise of half a dozen views. Administratively, and from the standpoint of justice, such a result is deplorable.

(ii) Purely from a formal and mechanical point of view, the Secretary does not usually have the benefit of a comprehensive written review, either from the Judge Advocate General or from the Bureau of Naval Personnel. Cases are usually presented to him en bloc, or else with a very brief, formal recommendation and proposed action. Consequently, he is faced with the alternative of taking action without complete information, or calling for the record in each case. Obviously, this results in delay, and is poor administration beside.

(iii) Cases which are found legally sufficient and in which no action on the sentence is recommended are filed without being presented to the Secretary. The Result is that after the initial departmental review, cases which have been found legally sufficient fall into two classes:

1. Those cases in which the Secretary has never approved the proceedings, findings and sentence;
2. Those cases in which the Secretary has reduced the sentence, and in doing so has automatically approved the proceedings, findings, and sentence.

In the former class of cases the Secretary can at any time thereafter take action to set aside the proceedings, findings, and sentence, if legal error is subsequently discovered. In the latter class of case, while the Secretary can

at any time take action by way of mitigation, his power to disapprove proceedings, once approved, is open to some doubt. Although AGN 54 (b) seems to place no limitations on the Secretary's power to set aside proceedings, the Judge Advocate General, following an opinion of the Attorney General of the United States, has ruled that he may not do so where the sentence has been confirmed by the President and thereupon executed,[324] but may do so in a non-confirmation case, on the ground that new evidence has been discovered.[325] His power to take such action in a non-confirmation case which has once been approved, simply on the basis of legal error, not involving the discovery of new evidence, is doubtful.

This anomalous situation results from the wholly irrelevant consideration that in the one type of case a reduction of the sentence was not recommended, while in the other it was, and was approved by the Secretary.

B. Suggestion for Improvement of Departmental Review:

It is believed that a comprehensive study of the system of departmental review should be undertaken by the Advisory Council. The following suggestions are made in connection with such study:

(1) So far as possible, all matters pertaining to the administration of naval justice should be concentrated in one office, responsible directly to the Secretary of the Navy. Whether this office is called the Office of The Judge Advocate General, or the Bureau of Naval Justice, is immaterial, but for this discussion, it will hereafter be referred to as the Office of The Judge Advocate General. It should be under the direction of the Judge Advocate General. It is highly desirable that full power and responsibility over all

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324. CMO 2, 1943, 145.

325. CMO 1, 1944, 92.

matters pertaining to naval justice be vested in one central place, and that the present division of responsibility among the offices of the Judge Advocate General, the Bureau of Naval Personnel, the Discipline Section of the Marine Corps, and the Executive Office of the Secretary, be eliminated.

(2) The suggestion that the Judge Advocate General be a civilian is often put forth as a solution of the real or imagined ills of military or naval justice. This proposal appears to be based on the British Army system under which the Judge Advocate General is required to be a civilian. Usually, however, he is an Army officer who retires in order to assume that position. In the British Navy, the Judge Advocate of the Fleet is a naval officer.

The Board believes that this proposal, like the proposal to place enlisted men on courts, is a mere panacea, which does not solve any of the underlying problems. The true solution, the Board submits, is to see to it that the Judge Advocate General has the full power and responsibility over naval justice which is properly his, and to provide him with a staff of experts qualified to advise him on every aspect of naval justice. If this is done, it is believed that the question whether he is a naval officer or a civilian becomes of no importance.

Rank?

(3) A Board of Review should be created by statute to review all court-martial cases. All parties are agreed on the necessity for this important reform, and differ only in details. Because of the importance of this matter, it is proposed to discuss it in some detail below.

C. Board of Review:

It is generally conceded that provision should be made for a statutory board of review to review all convictions by naval general courts-martial. Some of the proposals which have been made in this regard, and the Board's own suggestions, follow:

(1) Recommendations of the McGuire Committee:

The revised Articles for the Government of the Navy, proposed by the McGuire Committee, provide for one or more Boards of Review, established in the Executive Office of the Secretary of the Navy, each board composed of three members, at least one of whom would be a civilian. The Articles provide that the Secretary of the Navy shall, prior to final action, submit to such board of review the record of every court-martial in which a conviction followed a plea of not guilty and the final action contemplated extended to death, dismissal, dishonorable discharge or bad conduct discharge, or confinement in excess of 12 months. Such board would review all records submitted to it by the Secretary of the Navy, both as to legality and as to disciplinary features, and would submit recommendations thereon (reached by majority vote) to the Secretary of the Navy via the Judge Advocate General. The Judge Advocate General would endorse thereon his concurrence, or his non-concurrence and the reason therefor, and would transmit the entire record to the Secretary for his decision (McGuire Draft Articles, Art. 6).

Col. Snedeker in his notes states that this system would be shorter and simpler than the present one and would afford better uniformity and control. Control could be better achieved, he said, if such boards were attached to the Executive Office of the Secretary. The procedure visualized was that all records would be reviewed first by the Judge Advocate General, both for legality and disciplinary features, and would then be divided. Not guilty cases, in which the recommendation of the Judge Advocate General left the punishment at death, dismissal, discharge, or confinement over 12 months, would be sent to a board of review. Other records would be sent directly to the Secretary of the Navy if his action was necessary for finality of the sentence. The Board of Review

would review each record for legality and for all disciplinary features. The record would then be returned to the Judge Advocate General, who would state either his concurrence with the Board's recommendations or his non-concurrence and the reason therefor. The record would then be sent to the Secretary for his action. Col. Snedeker stated that this procedure should reduce to days what it now took weeks to do. He also pointed out that the provision that at least one member of the Board be a civilian was in keeping with the trend of the times, that it gave the Board a broader point of view, and obviated criticism that a "brass-hat autocracy" was segerely punishing minor offenses, but he warned that the calibre of the civilian member must be such that he would be beyond reproach. He concluded by saying that such a board of review afforded an automatic appeal of severe sentences, and "constituted an impartial court of appeals in the naval service."[326]

(2) Recommendations of Commodore White and The Judge Advocate General

The White Draft Articles are substantially the same as the McGuire Articles. The Judge Advocate General revised draft does not include a provision relating to a Board of Review, but it is understood that such a provision is presently under study in the Office of the Judge Advocate General.

(3) Recommendations of the Ballantine Committee

The Ballantine Report has recommended that there be established in the Navy Department Boards of Review, each composed of at least one civilian member with legal background, one naval lawyer, and one or more general service officers of mature judgment. These Boards would review such cases as the Secretary of the Navy might deem appropriate, such as those in which heavy sentences were imposed, those which were highly complicated, and those which were appealed, by brief or

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326. Snedeker's Notes, pp. 44-45/

otherwise. Should a board disagree with the review of a case already made by the Judge Advocate General or by the disciplinary activity involved, the record should be returned for reconsideration and further recommendation before being presented to the Secretary of the Navy for final approval.[327]

In a special concurring letter, Judge McGuire stated his opinion that the powers of Boards of Review specifically set forth in the draft articles submitted by the McGuire Committee should be adopted.[328]

The minority members of the Ballantine Committee stated that they agreed with the necessity for such boards, but pointed out that the "vague and indefinite powers of review" suggested by the report did not provide for the review of any specific case, and that the report did not contemplate that such powers be provided by statute.[329] They recommended adoption of a statutory provision which followed the recommendations of the McGuire Draft Articles, with the following changes:[330]

(i) It would be provided that such boards should be "independent in function and operation.

(ii) At least two of the three members were to be civilians.

(iii) Such Boards should review all cases in which there had been a conviction after a plea of not guilty, all cases involving death, discharge, dismissal or administrative separation from the service, and such other cases as the Board of Review should determine.

(iv) If the Judge Advocate General did not concur in the finding of the Board, he should submit his independent recommendation to the Secretary for his decision.

(4) Comments on the Foregoing Recommendations:

Since provision for a Board of Review is one of the most important, if not

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327. Ballantine Report, 24 April 1946, p. 7.

328. Ballantine Report, 27 April 1946, p. 18.

329. Ballantine Report, 24 Sept. 1943, p. 25.

330. Exhibit I, Article 7. These draft articles are elsewhere referred to herein as the "Tedrow-Finn Draft Articles."

the most important, part of any reform of the Navy Court-Martial system, all these proposals merit careful scrutiny and study.

First of all, with respect to the recommendations of the majority members of the Ballantine Committee, the strictures of the minority members to the effect that the powers of review proposed are "vague and indefinite," and their criticism that the Board is not created by statute, are sound. On this most important subject, a statutory grant of power is essential, and such grant should be clear, definite, and specific.

Further criticisms may also be made:

(i) The provision that the civilian member have a "legal background" is indefinite.

(ii) The provision for "one or more general service officers of mature judgment" would permit appointment of a majority of non-lawyers to the Board. The wisdom of this is debatable.

(iii) The classes of cases suggested for review are too restricted, besides being vague and indefinite.

(iv) The limitation of the Board's powers to approval of the prior action taken in the case, or dissent therefrom with a return of the record for reconsideration by the same authority who made the original recommendation, would, in final analysis, mean that the Board had no independent powers.

The proposals of the McGuire and White draft articles are much more satisfactory. Most of the foregoing objections to the recommendations of the Ballantine Committee would be obviated by adoption of the McGuire Draft. However, the following criticisms of the McGuire Draft may fairly be made:

(i) It seems inconsistent to provide for review by a Board of Review of the disciplinary aspects of cases involving not guilty pleas, while no such review is

provided in guilty plea cases. While in the latter type of case the question of guilt or innocence has been conclusively resolved, there remains the question of the legality and appropriateness of the sentence.

(ii) By providing that the Board of Review shall have power to make recommendations only, with final action reserved in every case to the Secretary, the McGuire draft fails short of establishing the "impartial court of appeals" described by Colonel Snedeker. A Board of Review which has no power to render final judgment, even as to legal matters, is not truly a court of appeal, in any true sense. To a degree, the Army's Board of Review has power to pronounce a final judgment of legal sufficiency, at least in certain types of cases, and provided The Judge Advocate General concurs therein.[331] Limited though this power is, it is more extensive than the power proposed by the McGuire draft.

(iii) The McGuire draft does not make clear the power of the Board of Review to review facts, as well as law.

(iv) The McGuire draft does not make clear under what circumstances, if any, a new trial may be ordered upon a finding of legal insufficiency.

The Tedrow-Finn draft articles take care of the first objection by providing for review of all cases in which the sentence extends to death, discharge, or dismissal. However, it does not remove the other objection listed above. Furthermore, it may be questioned whether the recommendations of this draft do not go too far. The following criticisms are noted:

(i) As the provisions of this draft are worded, the Board would review all convictions after a plea of not guilty, even in inferior court cases. Obviously this is impractical.

(ii) Adoption of the proposal to give the Board jurisdiction to review

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331. AW 50½.

administrative separation from the service would result in a confusion of function. However, desirable such a review may be, it should be handled by a separate body, such as the Board which is now operating under the Servicemen's Readjustment Act of 1944. The Board of Review should be a court of appeal, with the duty of reviewing judgments and sentences of naval courts-martial. This, it is submitted, is enough of a task for any such body.

(iii) The language of the Tedrow-Finn draft that the Board or Boards of Review shall be "independent in function and operation" does not really mean very much.

(iv) Finally, the proposal to have a majority of civilian members is a far reaching one.

Finally, none of the proposals make any clear distinction between legal review, for legal sufficiency of the proceedings, findings, and sentence, and sentence review, for appropriateness of the sentence, clemency factors, and the like.

(5) Suggestions Relating to Board of Legal Review:

The Board believes that a Board of Legal Review should be established, and that the Advisory Council should make a careful study of the various recommendations of the McGuire Committee, the Ballantine Committee, and Commodore White with respect to such Board's functions and powers, as well as to the recommendations which it is understood the Judge Advocate General is preparing on this subject. The following discussion is intended to be of assistance to the Advisory Council in this matter, by way of clarifying the various problems which arise in connection therewith.

(i) The first question is whether such Board of Legal Review should be established by statute. The McGuire Committee, Commodore White, and the

minority members of the Ballantine Committee have recommended that it be created by statute; the Ballantine Report itself (which was, incidentally, signed by all the members of the Committee) leaves this question open. The Board inclines to the view that on an important matter of this sort, a statutory grant of power is highly desirable. The Army Board of Review is established by statute.[332]

(ii) The next question is whether the Board of Review should be established in the Executive Office of the Secretary, as recommended by the McGuire Report, or in the Office of the Judge Advocate General, as at present. The former would give the Board a greater measure of independence. (However, the McGuire Report proposes that the recommendations of the Board be submitted via the Judge Advocate General.) The latter would tend to accomplish the desirable purpose of centralizing all matters pertaining to naval justice in one place, the Office of The Judge Advocate General. The answer to this question depends on the degree of finality which it is proposed be given to the findings of the Board of Legal Review, and the powers and responsibilities which it is proposed to confer upon the Judge Advocate General. The Board believes that it would be better to establish the Board of Review in the Office of the Secretary.

(iii) Consideration should then be given to the question whether the Board of Legal Review should include one or more civilian members and if so, whether the president of the Board should be a civilian. The McGuire and Ballantine Reports both recommend at least one civilian member. The White draft articles make the same proposal. While this feature has perhaps been overemphasized, it could do not harm and would probably go a long way in convincing the general public that naval justice was as fair as civilian

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332. AW 50½.

justice. Colonel Snedeker, in his Notes to the McGuire Articles, has already expressed such a view.

The important consideration is that all the members of the Board be highly qualified for their important duties and that they be appointed on a long term, semi-permanent basis, rather than on a temporary and fluctuating basis, as at present. Any civilian member should be a well qualified civilian lawyer or judge of long experience. He should not be a naval officer or civilian official who has been retired for age. The other members of the Board should be naval or marine officers certified as qualified by the Judge Advocate General. They should also be lawyers from 8 to 10 years active legal experience.

The appointment of any civilian member of the Board should be for a term of years. A term of six years is suggested to insure that the appointment will be independent of political changes in the government. It would be desirable if he could be appointed by the President, as the Commander-in-Chief of the Navy, on the recommendation of the Secretary. This would enhance his prestige and that of the Board generally. His salary should be commensurate with the responsibility and importance of his position. There is no reason why he should receive less than a federal District of Circuit Judge. Only in this way can the highest type of civilian candidate be attracted.

The Naval members of the Board should be appointed by the Secretary, on the recommendation of the Judge Advocate General. So far as possible, their appointment should be on a semi-permanent basis. Provision should be made for the alternate retirement and succession of the various members of the Board, so as to insure continuity and the presence of experienced members at all times.

In short, the goal should be the establishment of a Board of Legal Review occupying the same place in the scheme of naval justice as the Circuit Court of Appeals does in the system of federal courts, and having the same dignity, standing, and importance.

It is generally agreed that the Board should have three members, although there seems no reason for insisting on this number. Five would be equally satisfactory. However, a membership of less than three seems inadequate to insure the full attention of several independent judges which an important case deserves, and a number above five would probably be unweildy.

(iv) Provision might be made for the temporary establishment, if necessary, of additional Boards of Legal Review in Washington or in overseas theaters. In this connection, attention is invited to AW 50½, providing for such overseas Boards of Review in the Army during time of war. Several such boards were established during the recent war, and this resulted in a great saving of time, and simplified tremendously the administration of military justice in overseas theaters. However, with trials by naval general courts-martial estimated at about 200 a month for 1947, there seems no need to establish more than one board now. Provision might also be made for the increase of the membership of the board from three to five members if the volume of business makes it necessary.

(v) The Advisory Council should carefully consider the classes of cases which should be subject to review, and the scope of such review. The McGuire and White draft are clear and specific as to the former, although not too specific as to the latter. The Ballantine Report is not at all specific as to the class or classes of cases which should be subject to review, or as to the scope of such review.

It is suggested, for consideration, that the Board review, automatically, all convictions by general court-martial, and any conviction by inferior court which is appealed to it. It is further suggested that the Board have the power to review and determine the legal sufficiency of the proceedings, findings, and sentence, in cases of not guilty pleas, and the legal sufficiency of the proceedings and sentence in cases of guilty pleas. Findings of not guilty should not be subject to review.

(vi) The Advisory Council should consider carefully whether the Board of Legal Review should be given statutory power to review facts, as well as law. The failure of AW 50½ to confer such power in unmistakable language has resulted in a series of conflicting interpretations by the Army Judge Advocate General and has finally resulted in a somewhat anamolous situation under which the facts may be reviewed in certain types of cases and not in others.[333]

It is true that ordinarily a civilian appellate court is limited to a consideration of questions of law.[334] The trend, if any, is certainly in the direction of giving finality to the findings of the initial triers of the facts, provided there is at least some evidence in support thereof. It may be questioned whether this is a healthy trend. However, this may be generally, the court-martial is a special type of tribunal, faced with special problems of proof and dealing with cases arising during the stress of war

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333. See III Bull JAG, June 1944, sec. 408(1); IV Bull JAG, July 1945, sec. 451 (10). This situation is discussed at length by Colonel Connor in an article entitled "Legal Aspects of the Determinative Review of General Court-Martial Cases Under Article of War 50½" in 31 Virginia L. Rev. 119 (1944). Colonel Connor agrues that AW 50½ was intended to confer the broad power to review facts, as well as law, and that the interpretation to the contrary, reached by The Judge Advocate General of the Army, was erroneous. See also the article by Samuel Morgan in the Atlantic Monthly for December 1946, p. 97, "Army Courts-Martial: The Double Standard."

and with matters which inevitably arouse strong public interest. It is important not only that these courts do justice, but that the public be convinced that they do. The Board further believes it is essential that the proceedings of Navy courts-martial be rendered immune from subsequent and collateral attack, such as would have been possible under a series of bills introduced in the 79th Congress, but not passed.[335] The Board believes that this can be done only by providing an exhaustive and comprehensive power of review, which should include the power to reweigh the facts. Naturally, such power would rarely be exercised, for in most cases the Board of Legal Review would defer to the court's conclusions on issues of fact. The important thing is that the power exist, be exercised if need be. As Colonel Connor has expressed it:

> "In speaking for the Board of Review in CM 195705 (1931) this writer took occasion to say that justice according to law demands more than that accused be guilty; it demands that he be proved guilty. And he now is persuaded that any form of justice which in the adjudication of general court-martial cases stops short of that full review and evaluation of the probative force of all the competent evidence of record made legally possible by the above ascertained intendment of the third and fifth paragraphs in the AW 50½ is something less than justice according to the law." 336

(vii) It is suggested that the Board of Legal Review have power to consider errors in the record, regardless of any failure on the part of the

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334. However, the New York Court of Appeals has power to reweigh the evidence in cases of first degree murder. See People v. Weiss, 200 N.Y. 160, 170, 48 N.E. (2d) 306, 311 (1943).

335. See, for example, the Allen Bill, H.R. 6387, 79th Cong., 2nd Sess., 9 May 1946, which would have subjected to further examination, and possible reversal, every discharge or dismissal awarded by sentence of an Army or Navy general court-martial during the war. Similar provisions were contained in the Bunker Bills (79th Cong., 1st Sess., H.R. 4272, 4273), the Borin Bill (79th Cong., 1st Sess., H.R. 5675), and the Knutson Bill (79th Cong., 1st Sess., H.R. 5612).

336. Connor, op. cit. 31 Va. L. Rev. 119, at 160.

accused or his counsel to object thereto. This is the current Army practice, except for minor technical defects in the form of documenting evidence, which may be waived. This rule has the advantage of tending to compensate for deficiencies in the legal knowledge of defense counsel.

(viii) Decisions and recommendations of the Board of Legal Review should be by majority vote. All concerned are agreed on this, and it seems unnecessary to develop the proposition further.

(ix) The Advisory Council should give careful consideration to the degree of finality, if any, which should be accorded the findings of the Board of Legal Review. The McGuire and White draft articles contemplate that the Board of Review's findings shall be in the form of recommendations, transmitted to the Secretary via the Judge Advocate General, who may add his comments or note his disagreement. The final decision is to be by the Secretary. The Ballantine Report contemplates that the Board should merely review the recommendations of the Judge Advocate General or the disciplinary activity involved and, in the event of disagreement therewith, return the record for reconsideration.

The Chamberlain Bill, for reform of the Army court-martial system, in 1919, would have established a Court of Military Appeals, with power to rule with finality on questions of law. In lieu of this, the 1920 amendments to the Articles of War provided for a board or boards of review, within the Office of The Judge Advocate General. In confirmation cases, the Board's opinion is submitted to The Judge Advocate General, who transmits it, with his recommendation, directly to the Secretary of War for the action of the President. In other cases which are subject to review directly by the Board of Review, the board's findings as to legal sufficiency or insufficiency are

final, if The Judge Advocate General concurs therein. If the latter dissents from the opinion of the Board of Review, the record is forwarded to the Secretary of War for the action of the President. In still a third class of cases, those not ordinarily subject to review by the Board of Review, but which are submitted to it because the Military Justice Section has found them legally insufficient, the Board of Review may overrule the Military Justice Section with finality, but if it concurs with the Military Justice Section, its opinion is transmitted, with the recommendation of the Judge Advocate General, to the Secretary of War for the action of the President.[337]

This is all very complicated, and obviously represents a compromise between a desire to give a certain measure of finality to the findings of the Board of Review, and a desire to make them advisory only. It is believed that the Advisory Council can work out a simpler system for the naval Board of Legal Review. The alternatives are:

(a) Making the Board's findings on questions of law final. This has the advantage of making it a court of appeal in the truest sense. It has the disadvantage of setting the Board above both the Judge Advocate General and the Secretary of the Navy, on questions of law. (This might not be a disadvantage. The Supreme Court is, on questions of law, superior both to the President and to Congress).

(b) Making the Board's findings on questions of law final, if the Judge Advocate General concurs therein, submitting to the Secretary only cases of disagreement.

(c) Making the Board's findings advisory only. Whatever alternative is adopted should be supplied uniformly, and the complexities of

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337. AW 50½. In overseas commands, the situation is even more complicated.

AW 50½ avoided.

The Board suggests that the Board of Legal Review's determination of matters of law should be final and conclusive, subject to the reserve power of the Secretary to set aside any conviction at a later date.

(x) Whatever decision is reached on the preceding, it is suggested that the Secretary's power to order a new trial, in any case which has been held legally insufficient, be clearly conferred by statute. It is believed that this can be done without violating the rule against double jeopardy. It has been done under AW 50½, and is accomplished by most of the civilian appellate procedures.

(xi) It is believed that the proposed Board of Legal Review should review sentences only from the standpoint of their legal sufficiency, reserving matters of appropriateness of the sentence and of clemency to another authority. The two functions are distinct, and cannot be well performed by a single body. This does not seem to have sufficiently realized in either the McGuire or the Ballantine Reports.

(6) Suggestions Relating to a Board of Sentence Review:

Once a case has been initially reviewed and found legally sufficient, the question of the appropriateness of the sentence arises. At present, this is handled by review in the Bureau of Naval Personnel or in the Discipline Branch of the Marine Corps. If any reduction or modification of the sentence is deemed appropriate, a recommendation to that effect is made to the Secretary.

As has been pointed out above, the McGuire draft articles contemplate abolition of this review by the disciplinary activity involved and the substitution therefor of a comprehensive review of the entire case, both as to legal and disciplinary aspects, by the one Board of Review. The Ballantine Report recommends that the review by the Bureau of Naval Personnel (or Marine Corps) continue, but that the new Board of Review have authority to review the recommendations

of the disciplinary activity involved and, in case of disagreement, therewith, return of the case for reconsideration.

It is believed that these proposals suffer from the following defects:

(i) There is a confusion of function between review for legal sufficiency, a purely legal matter, and review for appropriateness of the sentence, a matter which involves considerations of discipline and policy, rather than of law: and

(ii) In giving the Board of Review authority only to send a case back to the disciplinary activity involved for consideration of its recommendation, the Ballantine Report reduces the Board of Review to the position of a monitor, with no real power.

On the whole, the Board prefers the approach of the minority members of the Ballantine Committee, that initial review of the sentence continue to be a function distinct from legal review, to be handled primarily by the disciplinary activity involved, but that it be centralized in the Executive Office of the Secretary. To implement this approach, the Board has the following suggestions:

(i) The Advisory Council should consider the advisability of establishing a Sentence Review Board in the Executive Office of the Secretary, and should also consider the composition of its membership. Consideration should be given to the question whether the president of this Board should be a civilian. The decision on this will probably be in line with the decision whether to make the head of the Board of Legal Review a civilian. This Board suggests he be a civilian lawyer of similar qualifications, experience, and compensation as the head of the Board of Legal Review. It is suggested that among the other members of the

Board there be:

1. An outstanding psychiatrist, with prison experience, from the Bureau of Medicine and Surgery;

2. A representative of the Bureau of Naval Personnel;

3. A high ranking naval officer familiar with discipline problems;

4. A Marine Corps officer experienced in the discipline problems of the Marine Corps;

5. In time of war, a Coast Guard officer familiar with its discipline problems;

6. An outstanding civilian penologist familiar with the most modern treatment of prisoners.

(ii) The Advisory Council should also consider whether such a Sentence Review Board, if established, be created by statute. This might be desirable, but it does not seem as necessary as in the case of the Board of Legal Review. It could be created by order of the Secretary.

(iii) It is suggested that, if such board is established, cases be presented to it by impartial reviewers, who will study the record in each case carefully in advance. This is the method now followed by the Clemency and Prison Inspection Board, and was the method followed by the General Court-Martial Sentence Review Board. It is believed that the qualifications of such reviewers should be passed upon by the Judge Advocate General. Each such reviewer could prepare a complete and detailed review, similar in form to those presented to the General Court-Martial Sentence Review Board. Such review would naturally contain a good deal of background information which would not be pertinent to the primarily legal review by the Board of Legal Review, but would be of great importance in passing upon the sentence.

(iv) The Advisory Council should also consider the class of cases to be reviewed by the Board of Sentence Review, if established. It is suggested that all sentences imposed by general court-martial which extend to death, dismissal, or discharge, or confinement for twelve months or more, and all other sentences, whether imposed by general or by inferior court-martial, the sentence in which is appealed by the accused or his counsel, or referred to the Board by the Judge Advocate General, be so revised. Other sentences should be reviewed for appropriateness by the disciplinary activity involved, as at present.

(v) It is suggested that such Board's recommendations be made directly to the Secretary or the Under-Secretary, but not be binding on the latter. Since sentence review involves matters of discipline and policy, rather than of strict law, none of the reasons which might make it advisable to make the opinions and findings of the Board of Legal Review final, apply in the case of sentence review by the Board of Sentence Review. If no change or modification of the sentence was recommended, submission to the Secretary would not be necessary.

(vi) It is suggested, as a matter of administrative convenience, that the Board's recommendations, and the reasons therefor, take the form of an opinion attached to the formal review prepared by the reviewer in each case. This was the procedure which was followed by the General Court-Martial Sentence Review Board and found highly successful. If the formal review is carefully prepared, in most cases it is unnecessary for the Secretary to read the entire record, unless he sees reason to disagree with the recommendations of the Board.

(7) Relationship of Boards of Review to The Judge Advocate General:

The question still remains for discussion whether cases should also be reviewed in the Office of The Judge Advocate General, before being reviewed by the Board of Legal Review and Board of Sentence Review. The McGuire, White, and Tedrow-Finn Draft Articles all seem to contemplate this, and it is implicit in the review procedure contemplated by the Ballantine Report. In the Army, cases which must be referred to the Board of Review under AW 50½ are so referred in the first instance without having to undergo preliminary review by the Military Justice Section of the Office of the Judge Advocate General. The Board of Review's opinion is then reviewed by The Judge Advocate General, who either concurs or dissents. (There are of course other types of cases under AW 50½ which are referred to the Board of Review only after the Military Justice Section has found them to be legally insufficient.)

It is believed that this question is really one of sound administration. It is dependent, to some extent, upon the degree of finality which it is finally or ultimately decided be given to the findings of the Board of Legal Review. Since the Judge Advocate General is the head of naval justice, and responsible for its administration, the details of his relationship to the Boards of Review can best be worked out by him, in consultation with the Advisory Committee. The following suggestions are however made:

(i) It should be the duty of the Judge Advocate General to select and furnish qualified legal officers to prepare cases and present them to the Board of Legal Review. Where there are no controversial questions, it is suggested that such officer prepare a short summary of the facts, together with his recommendation as to the disposition of the case by the Board of Review. Where there

are arguable issues, it is suggested that legal officers be assigned to represent each side and to prepare briefs of the appropriate legal authorities, in the same manner as appellate counsel do in the civilian courts. After submission of these papers far enough in advance to permit the Board of Review to study them, the officers assigned would appear and present the case orally to the Board. Such briefs and oral presentation would be of great assistance to the Board in reaching its decision. Of course, there would be nothing to prevent the regularly assigned defense counsel, or counsel of the accused's choice, from preparing such a brief and presenting it to the Board of Legal Review.

(ii) It is suggested above that the Judge Advocate General also pass upon the qualifications of the reviewers who will present cases for consideration by the Board of Sentence Review. These reviewers could be drawn from the same staff as the legal officers who will present cases to the Board of Legal Review.

(iii) We emphasize the need of the Judge AdvocateGeneral to recruit competent personnel to prepare cases for the Boards of Review proposed herein. It is the Board's experience that the success of review of courts-martial cases depends upon the thoroughness and attention that each reviewer gives to the case at hand.

(iv) Whether cases should be reviewed by the Judge Advocate General after review by the Board of Legal Review depends, as has been said, on the degree of finality which is given to the findings of the latter. The McGuire, White and Tedrow-Finn Draft Articles all provide that the Judge Advocate General shall endorse on the recommendation of the Board of Review either his concurrence, or

his non-concurrence and the reasons therefor, and shall then transmit the entire record to the Secretary for his decision. The Board concurs with this recommendation, if the decision of the Board of Legal Review is not to be made final. The recommendation of the Ballantine Committee, that if the Board of Review should disagree with the review of the case already made by the Judge Advocate General, the record should be returned for reconsideration and further recommendation before being presented to the Secretary of the Navy for final approval,[338] may be intended to accomplish the same result. However, a single review by the Judge Advocate General, whether before or after the review by the Board of Legal Review, should be enough. To require two, which would be the effect of the McGuire and Ballantine recommendations, seems time-consuming and wasteful.

(A) Review by President and Secretary.

Under the procedure suggested above, as at present, any sentence of death or dismissal would be referred to the Secretary or Under-Secretary for action. It is believed that the best procedure from an administrative standpoint would be to forward the record in each case, with a brief abstract of opinion stating the salient facts and the opinion of the Board of Legal Review, and setting forth the recommendation of the disciplinary activity and of the Board of Sentence Review, and the reasons therefor, accompanied by a form of action or en bloc letter for signature.

In any case in which the sentence extends to death, the record would be forwarded to the Secretary, with the recommendation of the Board of Sentence Review. It is contemplated that the Secretary would have the same power which

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338. Ballantine Report, 27 April 1946, p. 7.

he now possesses to commute the sentence. If he did not commute it, he would forward the record to the President for final action.

Cases in which the sentence extended to dismissal of a commissioned or warrant officer would be handled in the same way, except that the Secretary would have the power to suspend, as well as the power to commute, the sentence. If the Secretary did not commute or suspend the sentence, he would forward the record to the President for final action. It is contemplated that in time of war, the President would have authority to delegate his power to take final action on a dismissal case to the Secretary, as was done during World War II. To remove any possible doubt as to the legality of this procedure,[339] it is recommended that the authority to delegate such power to the Secretary be clearly conferred by statute.

It is also recommended that sentences extending to discharge of an enlisted man be referred to the Secretary, or to his duly designated representative for final action before execution of the discharge.

The above recommendations are substantially those contained in the McGuire, White, Judge Advocate General and Tedrow-Finn Draft Articles, except that the White and Judge Advocate General drafts do not provide for the delegation of the power to confirm a sentence of dismissal, the authority for which at present is derived from Title I of the First War Powers Act of 1941. To a large degree these proposals codify existing practice, as set forth in the present Articles for the Government of the Navy, in Naval Courts and Boards, and in various policy directives.

It is believed, however, that the law could require the taking of such action by the President, the Secretary, or his duly constituted representatives,

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339. Compare Runkel v. United States, 122 U.S. 543.

without necessarily requiring a formal "confirmation," as at present. The present procedure on confirmation in death and dismissal cases amounts practically to a review of the case de novo. Under the procedure suggested above, a comprehensive review will already have been fully accomplished by the Board of Legal Review, and the Board of Sentence Review. The record would then come to the President, Secretary, or other authority, with a copy of the legal opinion, and the review and recommendation on the sentence, for his decision whether to remit, commute or suspend the sentence, or to order it executed. While there would be nothing to preclude the President, Secretary, or other official from giving any case as exhaustive a review as he desired, in most cases a complete review de novo, of facts and law, would not be necessary. It is believed that the procedure here suggested would simplify the present rather complicated procedure in confirmation cases, avoid duplication of work, and result in a considerable saving of time, without in any way prejudicing or compromising the substantial rights of any accused.

Other sentences, not extending to death, dismissal or discharge, would, as at present, be submitted to the Secretary only where modification or reduction of the sentence had been recommended by the disciplinary activity or the Board of Sentence Review. Even sentences extending to discharge would not have to be submitted to the Secretary until it was time to order the discharge executed, unless of course reduction or suspension of the confinement was recommended.

The powers of the Secretary to disapprove a finding of not guilty, and to direct revision of a sentence with a view to increasing its severity, have been seldom exercised. It is recommended that these powers be eliminated in the revised Articles, so as to bring the Navy procedure in this regard in line with Army procedure and civilian criminal procedure.

(B) Clemency Review.

After the initial legal and sentence review of a case, the question of subsequent clemency arises. The Board beleives that the present power of the President and the Secretary to exercise clemency should be continued. The McGuire, White, Judge Advocate General, and Tedrow-Finn Draft Articles all provide for this. With respect to the mechanics of such clemency review, the Boad suggests that the Board of Sentence Review, if created, take over the functions presently exercised by the Clemency and Prison Inspection Board and temporarily exercised by the General Court-Martial Sentence Review Board. The experience gained by the present Board, in its special and extraordinary review of war-time sentences, as well as the accumulated experience of the Clemency and Prison Inspection Board, should be of great value to the Sentence Review Board in passing upon cases from the standpoint of clemency. In this connection, reference is made to the Board's final report on sentences reviewed by it, which sets forth in detail the policies which the Board endeavored to follow in reviewing sentences.

(6) Reserve Power over Findings and Sentences:

At the present time the Secretary of the Navy possesses the power, under AGN §4(b), to set aside the proceedings, findings, and sentence of any naval court-martial convened by his order or by that of any officer of the Navy or Marine Corps. The McGuire, White, Judge Advocate General and Tedrow-Finn Draft Articles all propose that this power be continued, and propose further that similar powers be conferred upon the President with respect to any naval court-martial.[340] The Board concurs in these recommendations. Despite the comprehensive powers which it is proposed be conferred upon the Board of Legal Review

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340. See, for example, Article 5(b)(1) and 5(c) of the McGuire Draft.

and despite any degree of finality which might be given to such review, it will still be possible for mistakes to occur and injustices to arise. This was recently demonstrated in the State of New York in the well-known Campbell case, in which an innocent man was convicted of forgery and sent to prison for a crime to which another man subsequently confessed. When this happens, as occasionally it does under any legal system, the maximum clemency, an executive pardon, even an indemnity, do not remedy the wrong. The minimum which must be done in such as case to achieve justice is to invalidate the conviction and expunge it from the record. For this purpose, and to correct any other injustice which might arise, the power to set aside the proceedings, findings, and sentence of any naval court-martial should be reserved to the President and the Secretary.

It is pointed out above, however, that the present articles do not make it clear whether the proceedings may be subsequently disapproved where the Secretary or President has once acted on a case, thereby directly or indirectly approving the proceedings. Obviously, such action is not a bar where the proceedings were void, [341] ab initio, as for lack of jurisdiction.

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341. The Allen Bill (H.R. 6387, 79th Cong., 2d Sess.) would have authorized review, by departmental board of regiew, of any discharge or dismissal by reason of the sentence of a general court-martial "with full power to review and vacate in whole or part the findings and sentence of such general court-martial." The Servicemen's Readjustment Act of 1944, to which the Allen Bill would be an amendment, places a time limitation of 15 years upon such review. A number of other bills were introduced in the 79th Congress which would have authorized review of court-martial sentences, either by a specially constituted court, or by the Circuit Court of Appeals with full power to vacate or modify the proceedings, findings, or sentence. See for example, the Bunker Bills(79th Cong., 1st Sess., HR 4272, 4273) the Borin Bill (79th Cong., 1st Sess., HR 5675), and the Knutson Bill (79th Cong., 1st Sess., HR 6612). The Bunker Bills place a time limit of one year upon such review, or 60 days after the end of the war.

Apparently it is not a bar to subsequent disapproval on the ground that new evidence has been discovered.[341A] But where the proceedings, findings, and sentence have been approved by the Secretary, and the sentence confirmed by the President, and executed, it has been held that the proceedings, findings and sentence may not thereafter be questioned.[341B] None of the proposed draft articles clarify this problem.

It is felt that this situation is unsatisfactory and confused. To correct a similar situation existing under Army Law, the Judge Advocate General of the Army, in 1919, recommended that the Articles of War be amended to authorize the President, advised by the Judge Advocate General, to correct, change, reverse, or set aside the findings or sentences of any court-martial found by him to have been erroneously adjudged, whether by error of law or fact.[341C] A similar proposal was made by the American Bar Association Committee on Military Law, except that it was proposed that the exercise of such power be limited to a period of four years from the date of the "judgment" of a general court-martial.[341D] Neither proposal was adopted, however in the 1920 revision of the Articles of War.

It is believed that the proposal of the Army Judge Advocate General and of the Bar Association Committee was sound, and that the provision in question, when incorporated in a revised draft of the Articles, should be so worded as clearly to authorize the President, or the Secretary, to set aside the proceedings, findings or sentence of any naval court-martial, even though previously approved, and even though the sentence has already been executed. This extraordinary power would, of course, rarely be exercised. But the Board believes that it should exist, in reserve, as an additional safeguard to insure complete justice in court-martial cases. Consideration might well be given, however, to placing some time limit on the exercise of this power.

341A CMO 1, 1944, 92.
341B CMO 2, 1943, 145, citing 11 Op. Atty Gen. 137.
341C Military Justice during the War, a Letter from the Judge Advocate General of the Army to the Secretary of War, W.D., 1919, pp 52, 64.
341D Report of the Committee on Military Law of the American Bar Association July 1919, pp. 46, 96.

3. Review Under Other Court-Martial Systems.

It is proposed to describe briefly the methods of review followed in some of the other court-martial systems.

(1) United States Army:

The Army system under AW 50½ is well-known. It has been adverted to above, and is described at length in the above-mentioned article by Colonel Connor.[342] It should be observed, however, that the system is rather complicated. AW 50½ covers two closely printed pages in the Manual for Courts-Martial. One writer has said, of the Army system of review:

> "The details of this review procedure are complicated. As a matter of fact, they belong to the most complicated regulations that can be found anywhere in the law." [343]

The USFET Report has recommended a number of minor changes in AW 50½, in the direction of simplifying the procedure thereunder, and of giving finality to the Board of Review's findings, when concurred in by The Judge Advocate General, in a wider class of cases.[344]

(2) British Army and Navy:

The British do not have any Board of Review, as such, either under the Army or Navy systems. In the British Army, every conviction by court-martial, after confirmation, is reviewed in the Office of the Judge Advocate General. The proceedings are examined by a professional staff of legal experts for the purpose of ascertaining whether there is any defect in point of law invalidating

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342. Connor, Legal Aspects of the Determination Review of General Court-Martial Cases Under Article of War 50½ (1944) 31 Va. L. Rev. 119.

343. Rheinstein, Military Justice, op. cit. supra, at 175.

344. Report of the General Board, USFET, "Military Justice Administration in Theater of Operations," File 250/1, Study No. 83, par. 78(b)(4) and (5), pp. 57-58.

them, or any part thereof. This staff consists of civil servants, drawn from the ranks of practicing members of the bar. Judge Advocates for trials are from time to time taken from the staff, but it is an absolute rule that no one who has acted as judge advocate in any case can take part in the review. Difficult cases are reviewed ultimately by the Judge Advocate himself. As has been pointed out above, the section of the office which reviews cases is entirely separate from the section which prepares cases for trial and supplies officers for the prosecution thereof.[345]

In the British Navy, a similar review of every general court-martial case, after the confirmation thereof, is made in the Admiralty.

A committee appointed by the Secretaries of State for War and Air to investigate certain aspects of the British Army and Air Force court-martial systems, in July 1938, made the following recommendations.[346] (Because of the outbreak of the war, these recommendations were not put into effect.)

(i) The Committee recommended the complete separation of the Military and Air Force Department from even nominal control of the Judge Advocate General, and to this end recommended that:

(a) The Judge Advocate General be appointed on the recommendation of, and be responsible to, some Minister other than the Secretary of State for War and Air; and

(b) The functions exercised by the Military and Air Force Department of the Judge Advocate General's Office in connection with prosecutions and other pre-trial matters be transferred to an independent Directorate with a

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345. Report of the Army and Air Force Courts-Martial Committee, 1938, p. 7-8.

346. Idem., pp. 8-10.

1. Enlisted men - on court.
Follow Army bill 1/3 at option of the man for trial of Enlisted men.

2. Selection of members of Ct
(a) Detail qualified officers and men to a panel from which Court should be selected.
Make this like jury panel - if provision made that Law member be Judge and not have vote on guilt or sentence.
Chamberlain bill proposed selection from panel approved by Judge.

(b) If we leave command with Like institution of action - appointment of prosecutor - and personnel of Board from which selection made - Money for panel would plan fee feature to have special details selected by law member?
from such panel.
The tours of fact should be as much like jury as practicable.

(c) Not less than 5 gen'l
3 spec

1 - summary.

Note that G.B. France Germany and Russia all have legally trained member or Ct - indept of command by Exec

Prosecutor — J.A.G. or member of bar U.S.

Defense Counsel — J.A.G. " " " " bar U.S.
always — a brief of legal pts
" certs — none needed

Pretrial investigation
Accused present and warned etc
Stuff from Art 24
re self-crim
pretrial psychiatric

Legal sufficiency of charges etc and of evidence to support it

separate head known as the Director of Military and Air Force Legal Services, and responsible to the Adjutant General and Air Member for Personnel.

(ii) That the status of the Judge Advocate General's Office be raised.

The Committee said:

> "Inasmuch as the reviewing of cases in the Judge Advocate General's Office takes (if the present system is to continue) the place of all final appeals on questions of law and procedure, we think that the whole status of the Judge Advocate General and his staff should be raised. It is not in the public nor any sound interest that it should be possible to refer to him as a mere official, a servant of the authority he advises, liable (in theory at least) to be ignored or even summarily dismissed. In our view he should be in a position more in keeping with the responsibilities of his office.
>
> "If there be a weak spot in the whole system in our opinion it is that so much depends upon the individual reliability of the Judge Advocate General's staff. His subordinates should be selected with the greatest care, and this means, inter alia, that their remmeration should be sufficient to attract really promising young men who will be capable in the future of taking their places as thoroughly competent Judge Advocates."347

(iii) That the staff of the Judge Advocate General's Office be increased, and liaison established between it andthe proposed Directorate of Legal Service.

(3) French Army:

Under the French system there is an appeal, knowa as the "recourse," from a finding of guilty by a "counseil de guerre" to a "conseil de revision," and from a finding by a "conseil de guerre aux armees" to "conseil de revision aux armees." The latter "recourse" may be suspended, and was suspended in August 1914, only to be restored later on during World War I to those condemned to death, hard labor for life, or deportation. There are three permanent "conseils de revision," each comprisáng a president, who is a civilian magistrate, an

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347. Idem, p. 9.

assistant president, also a civilian magistrate, and three field officers. In addition, there is one "Conseil de revision aux armees." There is no automatic review. "Recourse" must be taken within 24 hours. It is an appeal of error only, without examination of the evidence, and it is limited to the following grounds:

(i) Legality of the composition of the conseil;

(ii) Jurisdiction over the accused;

(iii) Legality of the Sentence and its applicability to the findings or facts;

(iv) Violation or omission of substantial formalities;

(v) Failure to rule upon a demand of the accused or the prosecution based on a privilege or right accorded by law.

The judgment cannot be modified. It can only be affirmed in toto, or annulled, with or without ordering a new trial. The prosecution may appeal an acquittal, but a reversal is without prejudice to the accused: it serves merely to state the correct law applicable to the case.[348]

There is also an extraordinary appeal to the Cours de Cassation, known as the "pourvoi en cassation." This is available only to civilians tried by regional conseils and then upon the sole ground of want of jurisdiction.[349]

(4) Russian Army and Navy:

Under the Russian system, in localities which are not under martial law, a cassation appeal can be taken from sentences of military tribunals. This is an appeal by the party aggrieved by the sentence, petitioning for retrial by a higher tribunal. It can be made only because of a formal violation of the rights and interests of the party and cannot relate to the merits of the case. A sentence can be reversed in a cassation proceeding by the Court-Martial Division of the

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348. "French Courts-Martial," prepared by Brig. Gen. Edwin C. McNeil, USA, 1946, pp. 6ff.
349. Idem.

Federal Supreme Court only for:

(i) Insufficiency and incorrectness of the inquiry procedure;

(ii) Fundamental errors in procedure;

(iii) Violation of the law or error in its interpretation;

(iv) Plain injustice of the sentence.

In localities under martial law, the military tribunals have greater jurisdiction over civilians. Cases may be tried within 24 hours. Death sentences may be reviewed ex officio by the Court-Martial Division of the Federal Supreme Court on the motion of certain specified officials, who for the purpose of such motion are authorized to ask any military tribunal to forward the record in any particular case for examination. All death sentences must be reported by telegraph to those authorities and must be executed if no reply is received within 72 hours. All other sentences must be executed at once.[350]

(5) Other Countries:

The method of review followed under the court-martial systems of France, Italy, Holland, Belgium, Sweden, and Switzerland, before and during the period of World War I, and the various features thereof, are set forth in a Report of Hearings of the Committee on Military Affairs, United States Senate, 66th Congress, First Session, S. 64, 1919, Part I, pp. 546-556. The details of these various systems will not be reviewed here. Suffice it to say that they represent almost every form and composition (whether military or civilian) of board of review, or court of military appeals, with powers ranging from very

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250. "Russian Courts-Martial," a study by Brig. Gen. Edwin C. McNeil, USA, 1946.

limited to extremely broad.

4. Review by the Civil Courts:

It is well settled that, within the sphere of their jurisdiction, judgments and sentences of courts-martial, when finally approved, are as final and conclusive as those of civil tribunals of the last resort.[351] Ordinarily, there is no appeal to the civil courts. However, a court-martial is a court of limited jurisdiction, and its proceedings are always open to review in the civil courts for the purpose of determining:

(i) Whether the court was properly convened, appointed, and constituted;[352]

(ii) Whether the court had jurisdiction over the person of the accused;[353]

(iii) Whether the court had jurisdiction to try the offense charged;[354]

(iv) Whether the court exceeded its power in imposing sentence.[355]

These are the traditional grounds upon which the civil courts will review court-martial proceedings. Of late, however, the courts have shown a tendency to go further in their inquiry. They have examined proceedings to see whether basic constitutional guarantees have been afforded the accused, on the

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351. In re Grimly, 137 U.S. 147 (1890).

352. McClaughry v. Deming, 186 U.S. 49 (1902); United States v. Smith 197 U.S. 386 (1905).

353. Ex parte Reed, 1000 U.S. 13 (1879); In re Craig, 70 Fed. 959 (C.C. D. Kan., 1895); Mosher v. Hunter 143 F. (2d) 745, (C.C.A. 10th, 1944); United States v. MacDonald, 265, Fed. 695 (D.C., E.S., N.Y. 1920); McCune V. Kilpatrick 53 F. Supp. 80 (S.C., E.D. Va. 1943).

354. Dynes v. Hoover, 61 U.S. 65 (1957); Smith v. Whitney, 116 U.S. 167 (1886); Rosborough v. Rossell, 150 F. (2d) 809 (CCA 1st, 1945).

355. Ex parte Mason, 105 U.S. 695 (1881); Swaim v. United States, 165 U.S. 553 (1897). Cf. Bishop v. United States, 197 U.S. 334 (1905), holding that the Civil Courts will also look into the question whether there has been an illegal delegation of the power to pass on the sentence.

theory that if these were found violated, they would be justified in granting writs of habeas corpus on jurisdictional grounds.[356] Among the questions which have been considered on such review are:

(i) Whether the accused was afforded reasonable opportunity to obtain counsel;

(ii) Whether the accused had been placed in double jeopardy;

(iii) Whether the rule against unlawful search and seizure had been violated;

(iv) Whether the accused had been denied the privilege of confrontation of witnesses;

(v) Whether all avenues of inquiry consistent with the accused's innocence had been exhausted by the investigating officer and the court; and

(vi) Whether the accused had been denied the right of compulsory process to obtain witnesses in his own behalf.

In making such review, at least two federal courts have, in recent cases, gone over the entire record and considered all the testimony, to assure themselves that the accused had been granted his full constitutional guarantees and had been afforded due process of law.[357] The earlier view was that the federal courts would merely satisfy themselves that the recognized procedures of military law, as established by Congress and by Executive Order, had been followed, and would not inquire further into the proof introduced. But in view of the present

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356. U. S. Ex rel. Innes v. Hiatt, 141 F (3d) 664 (CCA 3d, 1944) Schita v. Cox, 133 F (2d) 971 (CCA 8th, 1944), cert. den. 322 U.S. 761, reh. den. 323 U.S. 810; Sanford v. Robbins, F (2d) 435 (CCA 5th, 1941) cert. den. 31 U.S. 679 (1941); Romero v. Squier, 133 F. (2d) 528 (CCA 9th, 1943) cert. den. 318 U.S. 875; Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa., 1946).

357. See Schita v. King, 133 F (2d) 283 (CCA 8th 1943); and Schita v. Cox, 139 F. (2d) 971 (CCA 8th, 1944), cert. den. 322 U.S. 761, reh. den. 323 U.S. 810; Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa., 1946).

tendency of the United States Supreme Court to inquiry most carefully into all questions of due process and of constitutional privileges in criminal cases, even where such cases have been approved by the highest state courts having jurisdiction, and to examine the record in detail for that purpose, the former, rather than the latter, attitude may be expected to prevail in review of court-martial proceedings, and an extension, rather than a contraction, of the scope of such review, may well be anticipated.

Review of court-martial proceedings in the civil courts normally takes the form of collateral attack, usually by petition for writ of habeas corpus, occasionally by suit in the Court of Claims for back pay. The petition for writ of habeas corpus may be made at any stage of the proceedings, or afterwards, if the accused is still in confinement. The petition for habeas corpus may be brought in any one of the federal district courts, depending upon the physical location of the petitioner. Suit in the Court of Claims can of course only be bfought after the sentence has been approved and the pay in dispute has been withheld or denied. Both types of action are subject to appeal to theCircuit Eourt of Appeal, and to the United States Supreme Court. All this causes confusion, delay, and uncertainty. In many cases, important questions are not fully decided by a court of last resort.

A good example of this is furnished by the Rosborough Case. At least three questions were presented in this case:

(a) Whether a sailor on guard duty on a merchant vessel of Panamanian registry, then under the command of a United States Naval Lieutenant,

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358. See e.g., Powell v. Alabama, 287 U.S. 45 (1932); Ashcraft v. Tennessee, 322 U.S. 1943 (1944); 327 U.S. 274 (1946); Lyons v. Oklahoma, 322 U.S. 596 (1944); Malinski v. New York, 324 U.S. 401 (1945).

belonged to a "public vessel of the United States," within the meaning of AGN 6;

(b) Whether, if the court-martial lacked jurisdiction to try the accused for murder, it nevertheless had power to find him guilty of the lesser included offense of manslaughter (as in fact it had);

(c) Whether, if the court-martial lacked jurisdiction to try the accused for murder, it nevertheless had jurisdiction to try him for a violation of AGN 22-b, based upon the same act of homocide.

The District Court had held that the court-martial had jurisdiction, and denied the petition for a writ of habeas corpus.[359]

The Circuit Court Of Appeals, however, answered all three questions in the negative, reversing the decision of the District Court.[360] The first question has now been rendered academic by the amendment of AGN 6. The two remaining questions, however, are not academic and a final answer on them from the Supreme Court would have been desirable. But no appeal was taken by the Government,[361] and consequently such final answer has not been given.

Some have proposed that a broad right of appeal to the civil courts should be granted. Thus, the minority members of the Ballantine Committee, in their Special Recommendations, have recommended that all offenses not purely military in nature should be tried in such civil courts as may have jurisdiction, and that any person convicted of any offense in the Naval Service, "administratively or by court-martial or otherwise," should have the right to petition the

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359. Rosborough v. Rossell, 56 F. Supp. 347 (D.C. Me., 1944).

360. 150 F. (2d) 809 (CCA 1st, 1945).

361. The Navy Department is, of course, following the law as declared by the Circuit Court of Appeals.

appropriate U. S. District Court for Review.

Two Bills which were introduced in the 79th Congress, but which were not enacted,[363] would have provided for review by the United States Circuit Court of Appeals of any "judgment" of an Army or Navy General Court-Martial, the Court of Appeals to have the same powers as in the case of an appeal from a criminal conviction in a federal district court.

The British Committee, constituted in 1938 by the Secretaries of State for War and Air, had as one of their functions the duty of considering whether it was "desirable and practicable that a person convicted by court-martial should have the right of appeal to a civil judicial tribunal against him conviction." The Board considered the method of review followed under the British court-martial system (which, as observed above, does not include a board of review), and unanimously concluded that granting such appeal to a civil court was not necessary, desirable, or practicable, for the following reasons:

(i) It would be impractical to give a right of appeal to the Court of Criminal Appeals, in every case, no matter how trivial;

(ii) Since most military offenses involve offenses against discipline, they are better handled at all stages, by persons familiar with service discipline and the general situation and surroundings of officers and men;

(iii) It would be difficult as a practical matter to give any right of appeal from a court-martial to the civil courts. It would probably be necessary to create new and untried tribunals. 364

It is believed that these reasons apply with equal force to appeals from

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362. Special Recommendations of Minority Members of Ballantine Committee, Par. 6B.

363. 79th Cong. 1st Sess., H.R. 4272, Oct. 3, 1945.

364. Report cited supra, p. 12.

United States naval courts-martial, and that our own fairly complicated system of federal courts merely adds to the difficulty. The Board believes that if the system of departmental review is improved, and particularly if a Board of Legal Review is created, comprising naval and civilian members, specializing in naval court-martial cases, and with the full dignity and standing which the federal circuit court of appeals has in civilian matters, the necessity for such appeal would, in the vast majority of cases, be obviated.

The Board does believe that the present provisions for review of certain aspects of court-martial proceedings by the civil courts is sound and should be retained. However, it is believed that this system could be simplified and made more effective if provision were made authorizing a petition for review of the findings and decision of the Board of Legal Review to be filed directly with the United States Supreme Court. It should be provided that such petition could be filed only after the Board of Review had made its decision and recommendations and final departmental action had been taken thereon. Such review should be limited to consideration of the following questions:

(i) Whether the court-martial was competent;

(ii) Whether it had jurisdiction over the accused and the offense, and had power to impose the sentence, and

(iii) Whether the accused had been denied any of his constitutional privileges and whether he had been afforded due process of law throughout the proceedings.

In other words, such review would not exceed in scope the review presently available in the civil courts. But it would take the form of a direct appeal to the highest court in the land, similar to the "cassation" appeal known in the French and Russian courts-martial systems.

It is believed that this proposal has the following advantages:

(a) A final and conclusive answer could be obtained to every difficult jurisdictional, constitutional, and due process question arising in court-martial proceedings;

(b) The necessity of petitioning the various district courts for writs of habeas corpus, and appealing their decisions through the circuit courts, to the Supreme Court, would be eliminated;

(c) The court-martial system would be tied into the federal judicial system by a definite and clear link to the highest court in the land;

(d) The process of review envisaged would be simple, orderly, and time-saving.

Naturally, such petition would be unnecessary in the vast majority of cases. The decision of the Board of Review would be final and unquestioned in nearly every case. But when an important question arises, which goes to the very heart of the court-martial system, as a question of jurisdiction, or of due process, it is important that such question be presented to the Supreme Court, and that the machinery for so presenting it be provided.

It is realized that a proposal of this nature would require changes in our system of federal procedures, which would go beyond mere amendments to the Articles for the Government of the Navy. It would probably not be welcomed by the Supreme Court, already burdened with a heavy calendar of cases. It is put forth merely as a suggestion, the adoption of which might improve and strengthen the system of naval justice.

From the standpoint of full justice, it is important that this ultimate right of appeal be granted to every accused. This is particularly so in cases involving constitutional privileges and due process. No judicial system is

perfect. Mistakes will still be made, even with the best Board of Review which can be appointed supervising the application of the law in naval courts. The recent cases in which state court convictions have been set aside by the Supreme Court on grounds of due process furnish impressive testimony to the fact that the highest civilian courts of the 48 states are not infallible. It is not to be expected that the Naval Board of Legal Review would be entirely free from error.

A final important consideration in this connection should be mentioned. When the German saboteurs were tried by military commission in 1942, an immediate test of the jurisdiction of such commissions was obtained in the United States Supreme Court.[365] Similarly, when Generals Homma and Yamashita were convicted by military tribunals of violations of the laws of war, the validity of their convictions, under international law, was passed upon by the Supreme Court without delay.[366] The granting of such an extraordinary privilege of appeal to a nation's enemies has been applauded, and properly so. But we should be no less ready to grant similar privileges to our own military and naval personnel, when substantial questions of jurisdiction and due process arise in court-martial proceedings. At present the privilege exists, but the procedure by which it can be exercised is slow and cumbersome. The Board believes that under the suggestions outlined above:

(a) Such privilege would only rarely have to be exercised, in view of the automatic and comprehensive review by the Board of Legal Review which is suggested; and

(b) In the few cases where it will be felt necessary to seek review in the civil courts, the exercise of the privilege to do so would be

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365. Ex parte Quirin, et al., 317 U.S. 1, (1942).
366. In re Yamashita, 327 U.S. 1 (1946); In re Homma, 66 Sup. Cit. 515 (1946)

swift, simple and effective.

5. Office of Chief Defense Counsel.

At the present time, the accused has the right to pursue an appeal, on the grounds outlined above under 4, to the civil courts. In most cases, however, the accused is without legal advice after his conviction. He is unaware of legal problems, is ignorant of the manner of perfecting an appeal and frequently is without financial menas. The Board feels, therefore, that one further step in review of naval court-martial cases should be taken. It suggests that the Secretary appoint a chief defense counsel, who should be a legal officer or civilian of at least 10 years active practice and with substantial court experience. The chief defense counsel could perform the following functions:

(i) It would be the duty of the Chief Defense Counsel to follow all cases having a contested legal problem when they are argued before the Board of Legal Review.

(ii) The Chief Defense Counsel would, in his discretion, assign an officer as defense counsel for the argument of a case before the Board of Legal Review.

(iii) The Chief Defense Counsel could himself argue a case before the Board of Legal Review on behalf of an accused.

(iv) If the Chief Defense Counsel believes that the Board of Legal Review has improperly decided a jurisdictional or constitutional question, it would be his duty to notify the accused of his opinion and to perfect an appeal to the United States Supreme Court, unless the accused desires hiw own counsel or withholds his consent.

6. Conclusion:

The Board believes that if the system of review is improved and strengthened, as suggested in this Section of its Report, the Navy will have provided greater protection for an accused than is found in any civilian jurisdiction. Even the mandatory review provided at present is in excess of that provided by civilian courts. It is submitted that the suggestions herein contained have the virtues of simplifying and strengthening the present system by providing a mandatory appeal to a Board of Legal Review, and, in appropriate cases, an appeal to the highest court in the country. The Board believes that adoption of the proposed system would make the Navy the leader in the field of court-martial reform and in the trial, punishment, and treatment of offenders generally.

SECTION VIII

JURISDICTION OF NAVAL COURTS MARTIAL

1. Introduction:

There is general agreement that the subject of jurisdiction, as presently covered in the Articles for the Government of the Navy, is in need of clarification. The draft articles proposed by the McGuire Committee, by Commodore White, and by the Judge Advocate General, all include revised provisions relating to jurisdiction. The Ballantine Committee has recommended that "the law relating to the jurisdiction of naval courts should be restated and recast in the interest of clarity and definiteness." The Secretary has directed the Judge Advocate General to draft legislation implementing this recommendation.[369]

The Board concurs generally with the recommendations which have been made with respect to the subject of jurisdiction. It submits herewith, however, certain suggestions which it believes may be of aid in a detailed consideration of the problem and in the drafting of corrective legislation.

2. Jurisdiction as to Persons:

At the present time it is necessary to consult several different and sometimes widely separated articles in order to determine what persons are

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369. A letter from the Secretary of the Navy to the Judge Advocate General dated 25 June 1946, Subject: Ballantine Report.

subject to the Articles for the Government of the Navy. Nor do these articles themselves deal primarily with jurisdiction per se. For example, Article 4, though headed "Persons to Whom Applicable," actually deals with offenses which carry the death penalty. Similarly, Article 8, headed in the same manner, lists offenses which are punishable at the discretion of a court martial, other than by sentence of death. Scattered through the Articles, are such terms as "any person in the naval service" (AGN 4), "any person in the Navy"(AGN 8), "any officer"(AGN 9), "any commissioned officer of the Navy or Marine Corps" (AGN 10), "person connected with the Navy" (AGN 12), and "persons belonging to the Navy" (AGN 22(a), 23).

Furthermore, it is necessary to go outside the Articles for the Government of the Navy and consult other federal statutes to determine what persons are subject to naval law. For example, Section 715, Title 34, of the United States Code states that the Marine Corps is subject to Naval Law and regulations, except when on detached service with the Army. Section 1201, 34 U.S.C., brings under the jurisdiction of the Articles "all persons .... accompanying or serving with" the Navy in certain localities," .. including but not limited to persons employed by the government directly, or by contractors or subcontractors engaged in naval projects, and all persons.....within an area....which is under the control of the Secretary of the Navy." Similar provisions relating to personnel of the Coast Guard, the Lighthouse Service, the Coast and Geodetic Survey, and the Public Health Service of the United States, while serving as a part of the Navy in time of war or national emergency, are

found in other federal statutes. Provision has been made, outside the Articles, for retired naval personnel, reserve personnel on active duty, and prisoners of war, all of whom have been subjected to naval jurisdiction.

Certain classes of persons are nowhere included, for example, Army personnel attached for duty with naval units,[368] and persons serving sentences of courts martial whose enlistments have expired or who have been discharged from the service.[369]

Jurisdiction over the person in a case of fraudulent enlistment is unnecessarily complicated by the rule which prevents a person, not otherwise subject to naval jurisdiction, from being tried for this offense unless it can be proved that he has received pay or allowances under such enlistment.[370]

This confusing picture should be clarified. It is highly desirable that the law relating to jurisdiction over persons be set forth in a single article. Others have reached the same conclusion and there is already substantial agreement on the subject. The McGuire, White, and Judge Advocate General draft articles all include a new article setting forth the law relating to jurisdiction over persons. (See, for example, McGuire Draft Article I(a).) The various drafts differ only in minor details.

RECOMMENDATIONS:

The Board recommends:

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368. Marines attached for duty with Army units are subject to the Articles of War. (AW 2).

369. See 11 C.M.O. 1928, 81.

370. A.G.N. 22(b). For complete discussion see Colonel Snedeker's Notes to McGuire Articles, pp. 6, 7.

(a) That the Articles for the Government of the Navy be amended substantially along the lines of Article I (a) of the McGuire, White, and Judge Advocate General draft articles.

(b) That all other statutory provisions relating to jurisdiction over persons be repealed.

3. Jurisdiction As to Place:

At the present time there is no territorial limitation on the jurisdiction of a naval court martial, except in the case of murder. Under Article 6 a person subject to the Articles for the Government of the Navy can be tried by court martial for murder only if the offense has been committed without the territorial jurisdiction of any particular State or the District of Columbia.[371] This limitation applies in time of war as well as peace.

Such a provision is not peculiar to the Articles for the Government of the Navy. The Articles of War provide that, in time of peace, an accused shall not be tried by court martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia.[372] Likewise, the British Army Act prevents British Army courts martial from trying cases of treason, murder, manslaughter, treason-felony, or rape, if those offenses can, with reasonable convenience, be tried by a civil court. A court martial is consequently prohibited from trying any such offense if it is

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371. AGN 6, as amended, 59 Stat. 595 (1945)

372. A. W. 92.

committed in the United Kingdom, or anywhere else in the Dominions (except Gibraltar), within 100 miles from a place where the offender can be tried by a civil court, unless the offense is committed on active service.[373] The British Naval Discipline Act[374] limits the jurisdiction of naval courts martial to offenses committed in specified places. Most military offenses, including mutiny, insubordination, desertion, absence without leave, and neglect of duty can be tried by naval court martial wherever committed. As to other offenses, including civil offenses, jurisdiction is limited to acts committed outside of the United Kingdom, except for any naval shore installations, harbors, rivers, and so forth, in the United Kingdom.

Article I (c) of the McGuire and White draft articles expressly provides that, except in the case of murder, the Articles for the Government of the Navy shall extend to all places where offenses against the Articles are committed by persons subject thereto. In the case of murder jurisdiction is limited to the offense of murder when committed without the territorial limits of any State or Territory of the United States, or of the District of Columbia. The draft articles proposed by the Judge Advocate General are the same, except that the words "or Territory" are eliminated.

In some quarters an even more restrictive limitation has been suggested. It has been proposed that in time of peace naval courts martial should not be permitted to try any so called "civil offense" committed within

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373. Army Act, Section 41. Manual of Military Law, (1929 edition, 1939 reprint), p. 103.

374. Naval Discipline Act, Article 46.

the geographical limits of the United States. By civil offenses are meant such crimes as murder, manslaughter, rape, sodomy, robbery, larceny, assault, and frauds against the United States. In time of peace courts martial would therefore have their jurisdiction limited to strictly military offenses and to civil offenses committed outside the continental United States. In time of war there would be no such limitation except in the case of murder.

Although these arguments have merit, and despite the fact that peace time limitations on the jurisdiction of courts martial have a long history behind them, it is felt that more harm may result from too many such restrictions than from too few. Jurisdictional limitations often produce undesirable and unforeseen results. For example, in Rosborough v. Russell, 150F (2d) 809 (C.C.A. 1st, 1945), a conviction of manslaughter by a naval court martial was held invalid in habeas corpus proceedings because the accused, who had been tried for murder committed outside the United States, did not belong to a public vessel of the United States, although he was a member of the naval service. After this decision Article 6 was amended to change the words "any person belonging to any public vessel of the United States" to "any person subject to the Articles for the Government of the Navy."

Despite this amendment some of the difficulties attendant on territorial limitations on jurisdiction remain. For example, in Review Board No. 758 the accused was convicted of murder committed within the Territory of Hawaii. Although the Judge Advocate General had held the conviction legal on the theory that Hawaii was not aterritory of the United States at the time

AGN 8 was enacted (See U.S. vs. Smith, 197 U.S. 386), the President and Vice President of this Board, on the basis of a careful study made by the Board's staff, disagreed and recommended to the Secretary that the conviction be set aside for lack of jurisdiction. A similar recommendation was made in Review Board No. 1347 which involved a murder at Oahu, T. H. although the President and Vice President of the Board felt compelled to make this recommendation because of the interpretation which they placed upon the law, the result is not desirable.

Another anomaly in the present naval law on this subject, which is not cured by the McGuire, White, or Judge Advocate General drafts, is that the naval rule relating to jurisdiction to try murder is different from the Army rule. Whereas AGN 6 prohibits a naval court martial from trying murder committed within the territorial jurisdiction of the United States at any time, AW 92 imposes such a limitation on Army courts martial only in peace time. Moreover the scope of the limitation is different in the two articles, AGN 6 referring to the territorial jurisdiction of the United States and AW 92 to the geographical limits of the States of the Union and the District of Columbia. Furthermore AW 92 includes rape, whereas no limitation on jurisdiction to try rape is imposed by the Articles for the Government of the Navy.

No matter how any jurisdictional limitation should be worded, difficulties of this sort could not be avoided. They are inherent in the very concept of jurisdiction, which deprives a court at the outset of all power to act except within the sphere delimited.

As a solution to this problem it is suggested that all statutory limitations on jurisdiction as to place, such as are presently in force, and are continued in the McGuire, White, and Judge Advocate General drafts be eliminated, even in the case of murder. There is no logical reason for the rule that a court martial can try the offense of murder only when committed overseas, but can try any other offense against the Articles, military or civil, wherever and whenever committed. This is not to say that every murder committed in the United States should necessarily be tried by court martial. Policy may at times require that certain civil offenses of a more serious nature be tried by civilian courts, at least in time of peace. But to put such a policy into effect it is not necessary to place jurisdictional limitations on general courts martial. All that is required is a power of discretion in the Secretary to refer certain types of serious offenses occurring within the territorial jurisdiction of the United States to the civil authorities. It is not proposed to discuss the details of such a policy in this report. But is believed that the approach to the problem here suggested is sound and workable and that it eliminates the confusion and difficulties attendant upon statutory limitations on jurisidction.

In working out a policy as to which cases should be referred to civilian tribunals in peace time, an important consideration is that if naval courts martial are to function well during wartime they must acquire experience in handling serious cases during peace time. There is a measure of inconsistency in removing from courts martial in peace time the more serious cases which they are expected to try in wartime. The naval courts martial should be recognized and trusted to try fairly all cases within its

jurisdiction at any time.

RECOMMENDATIONS:

(a) That the Advisory Council consider whether all statutory limitations on jurisdiction as to place, including that of murder, should be eliminated, and in lieu thereof Naval Courts and Boards contain a provision to the effect that certain types of offenses, therein specified, committed within the territorial jurisdiction of the United States shall re referred to trial by civil court when authorized by the Secretary of the Navy, such provision, however, not to be considered as a limitation of the jurisdiction of naval courts martial.

(b) That the Advisory Council consider, from time to time, what types of cases should be referred to civilian tribunals during peace time and advise the Secretary accordingly.

4. Jurisdiction asto Time:

Under the present articles there are a limited number of offenses which can be committed only during time of war, for example, misbehavior before the enemy. Otherwise the jurisdiction of naval courts martial is limited as to time only by the statute of limitations. Properly speaking, statute is pleaded by the accused. If not pleaded, it is deemed to have been waived:[375] Technically, therefore, the statute of limitations should be treated separately from jurisdiction. However, it is so closely related

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375. Naval Courts and Boards, Sec. 407. For the opinion that the statute of limitations is jurisdictional and need not be pleaded to bar a trial, see McNemar, Administration of Naval Discipline (1925) 13 Georgetown L. J. 89, 113.

to this subject that it will be taken up under this heading.

The present statute of limitations is found in Articles 61 and 62 of the Articles for the Government of the Navy. The former provides that no person shall be tried by court martial or otherwise punished for any offense committed more than two years before the issuing of the order for such trial or punishment, unless he has absented himself or has otherwise not been amenable to justice during the two year period. The latter deals solely with the offense of desertion in time of peace. It provides that no person shall be tried for that offense if it was committed more than two years before the issuance of the order for such trial, unless meanwhile he has absented himself from the United States or has otherwise not been amenable to justice during such period. There follows a provision that this period of limitation does not commence until the end of the term for which the person has enlisted in the service.

With respect to desertion these two articles result in an anomalous situation. In a case of peace time desertion the period of limitation does not begin until the end of the offender's term of enlistment. In the case of wartime desertion the statute begins to run from the time the offense was committed.

This anomaly would be cured by the articles proposed by the McGuire Committee and by Commodore White. These abolish the defense of the statute of limitations in the case of war time desertion and apply a two-year statute to peace time desertion, without mention of the "term of enlistment."[376] The

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376. See proposed Article 1 (b).

Judge Advocate General draft concurs generally, but adds a provision in the case of peace time desertion that the period of limitation does not commence until "the end of the term of enlistment."

Consideration of Articles 61 and 62 fails to show any compelling reason why the former should provide that the statute is tolled by "absence," while the latter refers to "absence from the United States." "Absence" in this connection has been construed to mean absence from the reach of naval authorities.[377] The Army formerly maintained a distinction between mere absence and absence from the United States, but the distinction was abolished in the code of 1920.[378] In dealing with this situation the White and Judge Advocate General draft articles, as well as the revised articles proposed by the McGuire Committee, provide that "absence from the jurisdiction of the United States," rather than "absence" alone, shall toll the statute.[379] This would correct the present awkward wording of Articles 61 and 62.

Articles 61 and 62 also provide that the statute is tolled if the accused by reason of "...some other manifest impediment....shall not have been amenable to justice within that period." This hasbeen construed as encompassing the "fleeing from justice" exception contained in 18 U.S.C. 583.[380] The essential elements of "fleeing from justice" are: leaving one's residence or usual place of abode or concealing one's self for the purpose of avoiding detection

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377. 14 Op. Atty. Gen. 26; Naval Digest 589-592.

378. Compare A. W. 39 with A. W. 88 of the Code of 1916.

379. Proposed Article 1 (b).

380. See Col. Snedeker's Notes to McGuire Report at 10, 11.

and punishment.[381] Clearer language than "not amenable to justice" is highly desirable. The articles proposed by the McGuire Committee, Commodore White and the Judge Advocate General would toll the statute during the period in which the accused was a "fugitive from justice."[382] The Judge Advocate General draft uses the language "fugitive from or not otherwise amenable to justice." Either proposal seems acceptable.

Certain offenses are of such nature that persons committing them should not be given the opportunity to plead the statute of limitations. Congress has already adopted this view in the case of Article of War 39, which specifically excepts the offenses of murder, mutiny, and desertion in time of war from the operation of the statute of limitations.[383] The British Army Code specifically excepts mutiny and all cases of desertion from the statute of limitations. Many civil codes of criminal procedure make a similar exception in the case of murder. In viewof the serious nature of the offenses of murder, mutiny, and desertion in time of war, it is suggested that they be exempted altogether from the operation of the statute of limitations. A provision to this effect is contained in the proposed McGuire Committee, White and Judge Advocate General Articles.[384]

One further question remains with reference to the statute of limitations. Articles 61 and 62 state that no person shall be tried or otherwise punished for any offense committed more than two years "before the issuing of

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381. Streep v. U. S., 160 U.S. 128; Brouse v. U.S., 68 F. (2d) 294.

382. Popposed Article 1 (b).

383. Army Act, Section 161; 17 Halsbury's Statutes of England 217 (1930).

384. Article 1 (b).

the order for such trial or punishment." The proposed McGuire Articles use the language".....before the filing of the charge against such person."[385] The White and Judge Advocate General drafts agree generally but substitute for "filing" the word "preferment." Neither amendment would substantially change the present rule.

This rule provides for a procedure similar to the "John Doe" indictment of the civilian law, under which the running of the statute of limitations may be stopped, even though the accused has not been apprehended. For this reason, it serves a useful purpose. Nevertheless, it should be pointed out that its result is to render the statute of limitations inoperative in any case in which such an order for trial is promulgated, even though the accused is then beyond naval control and is not apprehended until long afterward. If, as suggested, the statute of limitations is abolished in the case of murder, mutiny, and wartime desertion, the principal occasions for the exercise of this power will have been eliminated.

The Army rule is that no person shall be tried for an offense committed more than two (or three) years prior to the "arraignment of such person."[386] In order for a person to be arraigned he must be physically present. The Articles of War thus afford no opportunity to halt the running of the period of limitations by the issuing of an order for the trial, or by filing charges, in a case where the accused is still absent from Army control.

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385. Ibid.

386. Article of War 39.

If the period of time expires and the offender has not been arraigned, his plea in bar of trial at a later date must be sustained. Serious injustices are prevented by providing that there be no statute of limitations in the cases of war time desertion, mutiny, or murder.

The British Army Act contains a similar provision to the effect that no person can be tried or punished for an act committed more than three years....."before the date at which his trial begins,.....".[387] British naval law follows the army rule and provides that the ".....trial shall take place within three years from the commission of such offense....."[388]

RECOMMENDATIONS:

(a) That Article I(b) of the McGuire draft articles be adopted in substantially its present form.

(b) That the Advisory Council consider whether any change should be made in the rule that the issuing of the order for trial, rather than the arraignment, is the date for determining whether the statute of limitations has run.

5. Double Jeopardy:

As part of the discussion of jurisdiction of naval courts martial, it is appropriate to consider the question of double jeopardy. The law in this connection is well settled. If an act committed by a person subject to the Articles constitutes an offense only against naval law, then a naval court martial hasexclusive jurisdiction to try the offender. If the

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387. Army Act, Section 161; 17 Halsbury's Statutes of England 217 (1930).

388. Naval Discipline Act, section 54; 17 Halsbury's Statutes of England 66 (1930).

act constitutes an offense against the law of a state or foreign country as well as against the Articles, the offender may be tried both by naval court martial and the courts of the state or foreign country. This does not constitute double jeopardy, since these courts derive their jurisdiction from different sources.[389] Thus, a person subject to the Articles may be tried and convicted in a state court and then tried and convicted by court martial for the same act or omission. But when an act probhibited both by naval law and the Criminal Code of the United States is committed in a place within the jurisdiction of the federal courts, and the offenderis tried eitherby a court martial or by federal criminal court, both of which derive their jurisdiction from the same source, namely, the Federal Government, trial by either is a bar to trial by the other.[390]

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389. See Moore v. Illinois, 14 Howard 13; Fox v. Ohio, 5 Howard 410, 434; United States v. Marigold, 9 Howard 560; 569; 6 Op. Atty. Gen. 506, 511. See also C.M.O. 1-1943, pp. 51-52.

390. Grafton v. United States, 206 U.S. 333 (1906); United States v. Block, 262 Fed. 205; Naval Courts and Boards, Sec. 338, p. 194 (1945).

This discussion will not be concerned further with acts constituting offenses against the United States Criminal Code as well as the Articles, since no recent difficulties have been experienced in this regard. But a question of policy arises in ecase where a person subject to the Articles has violated a state law and has been tried by a state court. If the act also constituted an offense against the Articles, such person upon his return to naval contrel can legally be punished again by his commanding officer or by sentence of naval court martial. However, and strictly as a matter of policy, the question arises whether such an offender should be punished a second time. In several of the cases revised by this Board the prisoner was convicted of an offense for which he had already answered to state authorities. Department policy in this regard has either not been clear or has been ignored by some convening authorities. In 1945 the Navy policy was expressed asfollows:

> "Aside fron any legal questions, asa matter of policy, a person in the naval service should not be tried a second time for the same act for which he onsehas been punished as aresult of conviction in a civil court." 391

A similar policy was enunciated in 1941, but seems to have been obscured by the particular facts of the case under consideration.

The 1945 statement of policy, quoted abo ve, refers only to a case

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391 C.M.O. 5-1945, p. 203.

392 C.M.O. 1-1941, pp. 22-23.

where the offender has been ".....punished as a result of conviction in a civil court." The question arises whether a person who has received a suspended sentence has been "punished."[393] Another question is whether acquittal by a state court should bar a second trial. No department statement of policy has been discovered on these questions. Naval Courts and Boards sets forth only the law and contains no statement of policy in this regard.

Reference to some of the cases reviewed by the Board will illustrate the confusion which exists on this subject.

(i) In two cases, (Review Board Nos. 356, 362), the accused were convicted by general court martial in December 1944 for 22 days absence over leave and for unauthorized use of another's automobile. From information obtained outside the record, the Board learned that these men had already been convicted by civil court and had received suspended sentences for "joy-riding", based upon the same act.

(ii) In anothercase, (Review Board No. 136), the accused had been convicted of 125 days absence over leave and a charge of scandalous conduct, involving three specifications of homosexual acts with a 16 year old male civilian. The unauthorized absence represented 125 days which the prisoner had spent in civil confinement as the result of aconviction by the civil authorities on a charge of battery which wasbased upon the same homosexual acts. Upon release from confinement the prisoner was returned to naval control and was tried and convicted by court martial as stated above.

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393. This question has apparently been answered in the affirmative by the Judge Advocate General. See Review Board No. 272, discussed infra.

394. N. C. & B., Sec. 337, p. 193 (1945).

In all three of the above cases the Judge Advocate General found the conviction legal.

These cases should be compared with the following:

(1) Review Board No. 272: The accused was convicted by general court martial on 2 May 1945 of 114 days absence without leave and of robbery of a civilian. The record showed that he had been convicted of unarmed robbery in Suffolk County (Massachusetts) Superior Court and had been sentenced to one year's confinement. This sentence was suspended and the prisoner released on probation to the naval authorities. He was then tried by court martial. In this case the Judge Advocate General recommended that the robbery conviction to set aside on the ground that acivil court had tried, convicted, and punished the accused for the same offense. This recommendation was approved.

In civil jurisdictions there is a trend toward broadening the applicability of the principle against double jeopardy, as a matterof policy rather thanas arule of law.

One text states:

> "There is authority to support the doctrine that punishment in the courts of each jurisdiction, even though not prohibited, should not, in practice, be imposed, unless in extraordinary cases, where there are aggravating circumstances or special considerations from the standpoint of public safety justifying or requiring it." 395

The Board believes that Department policy on this subject should be clarified and the apparent inconsistencies removed.

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395. 16 A.L.R. 1243 note; 8 Ruling Case Law (Perm. supp. 1929) p. 2200.

Analogous to the problems of double jeopardy and double amenability is the question whether disciplinary punishment by acommanding officer should operate as a bar to subsequent trial by court martial for the same offense. Disciplinary punishment is presently not a bar to subsequent trial by court martial for the same offense.[396] The reason given in support of this rule is that the investigation of a commanding officer at mast does not constitute a trial, that there has been no conviction or acquittal, and that the punishment imposed is not a sentence. The action of the commanding officer has been likened to the control of "a parent over his child or of a master over his apprentice, or of a school teacher over his scholar.[397]

The Board is of the opinion that this approach is questionable and that the rule that there is no double jeopardy in such cases is a dubious one. The Articles for the Government of the Navy confer jusisdiction upon commanding officers to impose punishments for minor offenses. The procedure leading to the determination of the offense and appropriate punishment, as described in Naval Justice, includes (a) a report of misconduct by the accuser, (b) examination of witnesses, (c) examination of documentary evidence, and (d) examination of the accused if he elects to speak. Thereafter, the comman ding officer weighs the evidence and determines whether, in his opinion, an offense has been committed. If he determines that the accused has committed a minor

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396. Naval Courts and Boards, Sec. 408, p. 217 (1937), Naval Justice (1945) par. 8-15, p. 107.

397. Naval Justice(1945) par. 8-15, pp. 107, 110. No discussion is intended of the question whether the Bill of Rights and other Constitutional guarantees apply to persons in the naval forces. For the conclusion that in practice they are applied, see discussion in Vol. 1, No. 2, Naval Justice Journal (1946), pp. 43-48.

offense, he is authorized to impose punishment, including one of the following: (1) Reduction of any rating established by himself; (2) Confinement not exceeding 10 days; (3) Solitary confinement on bread and water not exceeding 5 days; (4) deprivation of liberty on shore, and (5) extra duties. The offense and punishment are recorded in the Smooth Book of Records of Reports and Punishments. It will be observed that these characteristics partake of the nature of a trial by a more formal type of court.

Wholly apart from the question whether punishment awarded as a result of such quasi-judicial proceedings should legally operate as a bar to trial by court martial for the same offense, it is believed that to impose disciplinary punishment and then proceed to trial is basically unfair. This has been pointed out in a semi-official publication:

> "However, the same fundamental principle of fairness which precludes double jeopardy should be the basis for any determination of the commanding officer asto whether he will order the convening of a court martial for the trial of a man for an offense which hasbeen properly punished by him, under Article 24, AGN." 398

From the cases it has reviewed the Board has no way of knowing in how many the prisoners had received mast punishment for the same offense for which they were later convicted by court martial. This is due to the fact that mast punishment is not considered a prior conviction and is therefore not admissible in evidence.[399] Likewise, the court itself would not necessarily know about any prior punishment at mast.

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398. Naval Justice (1945) par. 8-15, p. 110.

399. Naval Justice (1945) par. 8-15, p. 110.

Under the Articles of War disciplinary punishment cannot be imposed if the accused demands trial by court martial, and such punishment may be pleaded in bar of trial for the same offense.[400] Disciplinary punishment does not, however, bar trial for another crime or offense growing out of the same act or omission. For instance, punishment under A. W. 104 for reckless driving would not bar trial for manslaughter where the reckless driving has caused death.

In the British Army an accused may elect trial by court martial if the commanding officer proposes toaward more than "minor punishment." If an offender has been dealt with summarily by his commanding officer or the charge against him dismissed, he cannot be subsequently tried by court martial for the same offense.[401] Moreover, if a commanding officer, contrary to regulations (which require him to refer to superior authority certain offenses), through inadvertence and with full knowledge of the facts dismisses the charge or deals with the offense summarily, his action is legal and the offendercannot thereafter be tried by court martial for that offense.[402]

In a "Tentative Draft of Provisions of Articles for the Government of the Navy Revised," the School of Naval Justice, Port Hueneme, California, has proposed that punishment inflicted by a commanding officer be a bar to trial by court martial for the offenses or offense for which it was imposed.[403] This has also been proposed by the McGuire Committee,[404] although it is not

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400. A. W. 104; Manual for Courts Martial (1943) par. 69 (c), pg. 54.

401. Army Act Sec. 46(7); Manual of Military Law (1929 ed., 1939 reprint) p. 470.

402. Manual of Military Law (1929 ed., 1939 reprint), p. 471, note 13.

403. Naval Justice Journal (1946), Vol. I, No. 3, p. 18.

404. Proposed Article 2(d)(2).

covered in the Judge Advocate General, White, or Tedrow-Finn articles. The Ballantine Reports do not discuss the question.

RECOMMENDATIONS:

It is recommended that:

(1) Department policy be clarified in regard to the desirability of trying persons by court martial for offenses for which they have already been tried in state or foreign civil courts. A prior conviction, although resulting only in a suspended sentence, seems sufficient punishment and should, as a matter of policy, barsubsequent trial by court martial. A prior acquittal should ordinarily be regarded as evidence that the accused is not guilty of the offense charged and should, as a matter of policy, bar labeling the offense by a different name should not be allowed to defeat the basic intent of the policy recommended.

(2) Consideration be given by the Advisory Council to a provision that punishment imposed by acommanding officer be abar to trial by court martial for the same offense, but not a barto trial for another offense growing out of the same act or omission.

SECTION IX

OFFENSES AND MAXIMUM PUNISHMENTS

A. OFFENSES

1. In General

Some offenses against naval law are specifically provided for in the present Articles for the Government of the Navy. Some are classified according to punishments under Articles 4, 8, and 14. Others are made punishable by Articles 1, 3, 5, 6, 9, 10, 16, 17, 19, 20, 21, 22(b), 31, 42, and 44. The remaining offenses are covered by one broad provision, Article 22(a), which provides for the punishment of "all offenses not specified in the foregoing Articles."

Common civil offenses such as manslaughter, rape, assault and robbery are not specifically mentioned in the Articles. However, by interpretation,[402] Article 22(a) comprehends common law crimes. Article 22(a) has also been interpreted to include all offenses against the criminal statutes of the United States, offenses against state laws, and various military offenses.[403] The Attorney General has held that this Article is not intended to confer general criminal jurisdiction upon naval courts martial, but is

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402. See Carter v. McClaughtry, 183 U.S. 365, 397 (1901). See also Winthrop, Military Law and Precedents (2d ed. 1920) p. 721 as to the general article in the Articles of War.

403. C.M.O. 30-1918, p. 28 holds that any violation of a state law by a person in the naval service will subject him to discipline and trial by court martial. See also C.M.O. 3-1924, p. 6. On military offenses, made so by custom of the service, see Smith v. Whitney, 116 U.S. 167, 183 (1885).

limited to those offenses, not specified in the preceding articles, which are injurious to the order and discipline of the Navy.[404] But where an offense made punishable by the common law or by the statutes of the United States is directly prejudicial to good order and discipline, naval courts martial have jurisdiction to try it.[405] The more common military offenses not specifically mentioned in the Articles but which are, by reason of Article 22(a), offenses by custom of the service are broadly classified as: Neglect of duty,[406] conduct to the prejudice of good order and discipline,[407] and conduct unbecoming an officer and a gentleman.[408]

It is also possible to try common law and statutory offenses and various military offenses under Article 8(1), which makes punishable "any other scandalous conduct tending to the destruction of good morals."[409]

Definitions of the various offenses are at present based upon common law definitions as found in court opinions, statutory definitions, and the customs of the service. Chapter II of Naval Courts and Boards sets forth the offenses most likely to arise in the service, defines them and lists the essential elements thereof.

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404. 16 Op. Atty. Gen. 578, 579 (1880); See also Dynes v. Hoover, 20 How. 65 (1857)

405. Carter v. McClaughtry, 183 U.S. 365 (1901).

406. N. C. & B., Sec. 105, p. 97 (1945).

407. N. C. & B., Sec. 98, p. 83 (1945)

408. N. C. & B., Sec. 99, p. 89 (1945).

409. N. C. & B., Sec. 59, p. 29 (1945).

It is evident from the above discussion that the majority of offenses are based upon unwritten law, by virtue of interpretation of Articles 8(1) and 22 (a), and that only a few are specifically provided for in the Articles. However, most of the cases actually tried by general court martial are based upon offenses which are specifically mentioned in the Articles, that is to say, desertion and other unauthorized basence. Of the 643 cases reviewed by the Board down to 1 July 1946, at least 505 involved desertion, absence without leave, or absence over leave.

2. Proposals for Reform.[410]

In the draft articles submitted by the McGuire Committee, as also in those recommended by Commodore White and by the Judge Advocate General, a single article under the general heading of jurisdiction covers the entire subject of offenses.

(a) McGuire Committee Draft:

This draft extends the Articles to all offenses against (i) the criminal laws, treaties, or conventions of the United States; (ii) the criminal laws of a State, Territory or U.S. Possession; (iii) lawful orders or regulations of the Secretary of the Navy; (iv) the customs of the naval

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410. By letter, dated 25 June 1946, the Secretary of the Navy requested the Judge Advocate General to prepare legislation "to delineate more clearly major criminal offenses and punishment therefore." The discussion and recommendations here in are offered as an aid to achieving that goal.

service, or of the laws of war; (v) or are recognized military offenses, as the latter may be defined by the Secretary of the Navy. The definition of offenses, and the quantum and mode of proof, shall be such as prevail in the courts of the United States.

It is to be noted that this proposal would practically eliminate from the Articles for the Government of the Navy all mention of specific offenses.[411] It would authorize a penal code for the Navy which is specific only by reference to a multitude of Federal and State statutes, as well as too much unwritten law. It would not specify military offenses, but would leave the listing and definition thereof to the Secretary of the Navy. This appears to be a delegation of legislative power, the constitutionality of which is open to doubt. The fact that the article uses the words "recognized military offenses" does not completely remove the question of constitutionality, because wide discretion would still be left with the Secretary.[412]

(b) Judge Advocate General Draft:

This draft extends the Articles to offenses against (i) the criminal laws, treaties, or conventions of the United States, (ii) the laws, regulations, customs or usages of the naval service, or (iii) the laws of war.

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411. However, proposed Article 4(c) (4) specifies those offenses which are punishable by death.

412. Compare the "Standards" provided by Congress in the statutes considered by the Supreme Court in U. S. v. Grimand, 220 U. S. 506 (1910); Yakus v. U. S., 321 U. S. 414 (1944); A.L.A. Schecter Poultry Corp. v. U. S., 295 U. S. 495 (1935).

This classification includes but is not limited to 32 offenses which are specifically set forth. The latter include most of the common law crimes as well as the commonly recognized military offenses.

This proposal has the merit of specifying most of the offenses which are likely to occur in the naval service. This feature is a distinct improvement over the present Articles, which fail to specify the various civil offenses and many of the military offenses for which persons subject to the Articles are answerable. The draft fails to mention violations of State laws, presumably for the reason that if they do not fit a common law definition, they may be tried as scandalous conduct or conduct to the prejudice of good order and discipline. The proposal does not, in listing offenses, distinguish between military offenses and civil offenses, as such. Relatively minor offenses, such as gambling, receive as much notice as more serious offenses, such as murder or mutiny. Moreover, proposed Article 10(c)(4), which lists offenses punishable by death, includes some offenses which are not mentioned at all in proposed Article 6(d), dealing with offenses generally. On the other hand, desertion in time of war is specified in both Articles.

The Articles proposed by the Judge Advocate General do not mention definition of offenses. Presumably, it is intended that civil crimes such as murder, rape, or manslaughter will carry their common law definition or will be defined by the applicable federal statute and that military offenses will be defined, as at present, in accordance with the customs of the service or by reference to applicable court decisions or court martial orders. Such

treatment of the definitions and elements of offenses seems desirable. However, some of the offenses are not well stated in the proposed article. For example, one offense is specified simply as "carnal knowledge." This is strictly a statutory crime and is only an offense if the female is below a certain age limit, which varies under the laws of the different states and under the federal law. The words "carnal knowledge", standing alone, import merely sexual intercourse and seem insufficient as a description of this statutory offense.

(c) White Draft:

The Article on offenses [413] proposed by Commodore White is almost identical with that proposed by the Judge Advocate General. The White Articles, like the McGuire Articles, also include a provision covering offenses against the criminal laws of a State, Territory, or possession of the United States. The offenses specified in the White Article include all but three of those which are set forth in the Judge Advocate General's draft. The offenses omitted are: (i) neglect of duty, (ii) culpable inefficiency in the performance of duty, and (iii) suffering, through negligence, a vessel of the Navy to be hazarded, run upon a rock or shoal, or stranded.

The comments made above with respect to the Judge Advocate General draft apply equally to the White proposal, except for the inclusion in the White draft of violations of state laws.

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413. Proposed Article 6 (d).

(d) Tedrow-Finn Articles:

As stated above, these articles were submitted by the minority members of the Ballantine Committee. These articles extend to all offenses which are (i) violations of the criminal statutes, treaties, or conventions of the United States, (ii) violations of the criminal laws of a State, Territory, or possession of the United States, where committed, or (iii) violations of the customs or usages of the naval service or of the laws of war. These offenses are to be "defined and punished as prescribed in the U. S. Criminal Code and the power delegated to the President.. ..."by the articles. The Article then sets forth 11 of the most serious civil crimes or offenses.

The Tedrow-Finn proposed Articles fail to specify a single military offense. They omit mention of violations of lawful Navy regulations. Like the McGuire and White Articles, they specifically include violations of the criminal laws of States, Territories, or possessions. The comments made above with reference to the proposed Articles of the Judge Advocate General are also applicable to the Tedrow-Finn Articles.

The Board agrees that the present articles dealing with offenses are inadequate and are ineptly arranged. The more important deficiencies are:

(i) There is no specific mention of any civil offenses (other than murder) which are offenses against the Articles.

(ii) Many common military offenses, for which persons subject to the Articles are answerable, are not specified, even by a general reference to the customs of the service.

(iii) No specific mention is made of offenses against the criminal laws of the United States, its treaties, or conventions or against the laws of war.

(iv) It is not stated that violations of certain state laws may also violate the Articles as constituting scandalous conduct or conduct to the prejudice of good order and discipline.

(v) Provisions which specify punishments for various offenses are scattered throughout the Articles in a confusing manner.

(vi) Some of the punitive Articles are obsolete and might well be eliminated.

A number of offenses are defined, and their elements set forth, in Chapter II of Naval Courts and Boards. Some of these definitions have been criticized as incomplete, if not partly erroneous, and as being of little help to courts and judge advocates.[414] Much of this criticism is justified.

The Board is not disposed to recommend the adoption, in toto, of any of the proposals which have been made relating to a new article or articles to take the place of the present Articles covering offenses and punishments. However, certain features of these proposals have great merit and the Board believes that these features should be incorporated in any

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414. I Naval Justice Journal (1946), No. 2, p. 36 et sec., and id., No. 3 pp. 30-33, 47.

revision of the Articles. More specifically, the Board makes the following comments:

(a) It is considered important to list specifically the offenses against the Articles in a manner readily understandable to every person subject to naval law. The language of most of the present punitive articles should be retained, since it is, in general, satisfactory. A few of the Articles are obsolete and should not be retained,[415] but the offenses listed in the other punitive articles are of common occurrence and are clearly set forth.

(b) There is such to be said in favor of separately stating each of the military offenses now listed. The suggestion that all military offenses be left for statement and definition by the Secretary of the Navy or the President is objectionable, both because of the constitutional question involved and because much of the forcefulness and solemnity of the Articles, as a disciplinary and penal code, would be thereby lost.

(c) The punitive articles should be grouped together under the general heading of "Offenses and Punishments." Much of the clarity and force gained by enumerating and specifying offenses would be lost by including this subject under the heading of "Jurisdiction of Courts Martial," as proposed by the McGuire Committee, the Judge Advocate General, and Commodore White. The average person subject to the Articles is not inter-

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415. See comments in Minutes of Ballantine Committee, afternoon session, 6 January 1946, at pages 51-53.

ested in the legal niceties of jurisdiction, but is directly concerned with offenses and the punishment therefor.

(d) Offenses should be classified according to the punishment therefor, rather than listed under jurisdiction, with punishments set forth elsewhere. The most logical arrangement would be to list offenses in two articles, or in two parts of one article, the first enumerating all capital offenses,[416] the second all offenses not punishable by death.[417] These articles should contain both military and civil offenses, as well as a general clause. This linking of crimes and punishments will accomplish the following results, which are not accomplished by the other proposals: (1) The relative seriousness of offenses would be immediately apparent to all persons subject to the Articles; (ii) There could never be any question in the minds of members of courts martial as to the character of punishment authorized for a particular offense; and (iii) It would be unnecessary to refer to two distinct parts of the Articles to connect punishments with offenses.

The practice of classifying offenses according to their punishments is supported by long usage, not only in the United States Navy and Army codes, but also in the military and naval codes of England.[418] The present punitive articles, although scattered throughout the entire code, actually employ this

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416. Certain offenses would be capital only in time of war, e.g., Deserting or Betraying Trust. (See Art. 4, A.G.N.)

417. Present Articles 4, 8 and 14 use this arrangement but are entitled "Persons to Whom Applicable," which is misleading.

418. See Part I, Naval Discipline Act, 12 and 13 Geo. 5, c. 37; 17 Halsbury's Statutes of England (1930), p. 52, and Part I, Army Act, 44 and 45 Viot. c. 58, 17 Halsbury's Statutes of England (1930) p. 31. The arrangement of the latter noteworthy. The act is arranged into five distinct parts. Part I is entitled "Discipline - Crimes and Punishments." It is further subdivided into "Offenses in Respect of Military Service" and "Offenses against Ordinary Law."

practice.[419] The Articles of War, in general, couple offenses with punishments, although the method here proposed of separating capital offenses from others is not followed.[420] The British Army Act classified offenses according to punishments of death, penal servitude, imprisonment, cashiering and lesser punishments.[421] The British Navy code follows the same general pattern.[422] In civil penal codes offenses are usually classified as felonies or as misdemeanors.

The classification of offenses according to punishments would tend to clarify the Articles and make their reading to the men more useful and impressive than it now is. Although it has been said by some that the reading of the Articles to an assembly of naval personnel fails to accomplish its purpose, nevertheless, it is felt that something is accomplished by this reading and that it should be improved rather than abolished.

(e) These civil offenses which are most likely to occur in the naval service should be specifically stated. This would correct a serious deficiency of the present Articles, which make no mention of civil offenses, except murder. A person subject to the Articles who is charged with manslaughter will search in vain for any mention of this offense in the present Articles. There is no doubt whatsoever that civil offenses such as manslaughter, rape, larceny, and assault, are also offenses against the Articles, but the

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419. See Articles 4, 8, and 14, AGN.

420. Articles of War 54-96.

421. Army Act, Sections 4-41; see also section 44.

422. See Naval Discipline Act, Part I.

failure of the Articles to specifically mention such offenses has been much criticized.

In the Army, so far back as the Code of 1874, important civil offenses were specifically stated in the Articles of War and made punishable by court martial.[423] The present Articles follow the same procedure.[424] The British Army Act makes the offenses of treason, murder, manslaughter, and rape punishable, and refers generally to "any other offense made punishable by the law of England."[425] The British Naval Discipline Act, in referring to offenses punishable by ordinary law, enumerates murder, manslaughter, sodomy, indecent assault, robbery, theft and any other criminal offense made punishable by the law of England.[426]

In all but one of the proposed revised articles, the civil offenses which are most likely to occur in the naval service are enumerated. Article I(d) of the McGuire Articles does not mention specific civil offenses, but refers to offenses against the criminal statutes of the United States or criminal laws of the various states, territories, and possessions. The Tedrow-Finn Articles (Article I(d), follow the White and Judge Advocate General Articles and list the more common civil offenses. It is believed

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423. Revised Statutes, Secs. 1342, 1343. Article 58 made certain civil offenses punishable in time of war, insurrection or rebellion, e.g., larceny, robbery, rape, etc.

424. Articles of War 92, 93.

425. Section 41

426. Article 45.

that the McGuire draft is objectionable, in this respect, for the same reason as the present Articles. Little is done to remove this objection by merely referring to the criminal laws and statutes of various jurisdictions.

(f) The more common military offenses, now covered by interpretation of Article 22(a), should be specifically set forth. This could be done for the same reasons as have been advanced in connection with civil offenses. By interpretation of the broad provisions of Article 22(a), certain acts and omissions are presently punishable as violations of the Articles, having become recognized naval offenses by custom of the service.[427] The customs of the Navy, applied by naval courts martial to situations arising in the administration of naval discipline which are not governed by the written law of the Navy, are comparable in origin and development to the rules of the common law. But just as certain common law crimes have for practical reasons been codified by statute in most jurisdictions, the most common naval offenses should be codified in the Articles.

It is realized that all of the military offenses which might and do occur could not be specifically enumerated. But some of the more common offenses, such as breaking arrest, being drunk on duty, failing to obey orders, et cetera could and should be listed. There would still have to be general provisions, such as provisions prohibiting conduct to the prejudice of good order and discipline and conduct unbecoming an officer and gentleman.[428]

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427. Naval Courts and Boards, Sections 95, 98, 99, 105.

428. Compare A. W. 95 and A. W. 96.

Even though there are general clauses, they are more specific than the present vague phraseology of Article 22(a).

Neither the McGuire Articles nor the Tedrow-Finn Articles enumerate any military offenses. The Judge Advocate General's proposed articles (Article I(d)) list some military offenses which are presently covered by interpretation of Article 22(a). The White draft (Article I(d)) does the same.

(g) It is suggested that Article 22 be deleted and that in its stead, in a subdivision of one of the two punitive articles, it be specifically stated that offenses against the Articles include(i) violations of the criminal laws, treaties and conventions of the United States; (ii) violations of the regulations and customs of the naval service, and (iii) violations of the laws of war. Such a provision would cover all those offenses which are presently punishable by interpretation of the general language of Article 22(a). Although the language of (ii) is still very general, it is still more specific than that presently contained in Article 22(a). It is not believed possible to dispense with such general language altogether. The Articles proposed by the Judge Advocate General, Commodore White, the McGuire Committee, and the Tedrow-Finn Articles, include the three provisions recommended above.

The Board believes that the articles proposed by the Judge Advocate General, in omitting mention of violations of the criminal laws of the several states, is sound. Although no great harm would result from including such a provision, it is believed that the present practice of regarding them,

under certain circumstances, as scandalous conduct or as conduct to the prejudice of good order and discipline, has merit and should be continued. The Army holds that such violations may, but need not, constitute offenses under A.W. 96 (the general article) depending upon their seriousness and their effect on discipline.[429] To make all violations of state law automatically offenses under the Articles might result in petty offenses being tried in naval courts without any real necessity therefor. Under the present practice, offenses against the state laws (not otherwise offenses against the Articles) are tried by naval courts only if the acts which constitute the offenses are considered to be scandalous conduct or to be prejudicial to good order and discipline.[430]

It should be noted that violations of lawful naval regulations are included in this proposal. Such violations are covered in the present Articles,[431] but for reason of better arrangement, it is recommended that they be included in the general clause here suggested.

Although it is suggested that offenses against the customs of the service be specifically mentioned, the term "usuages" is not included in accordance with the proposal of the McGuire Articles. It is not believed that mere violation of naval usage should be considered an offense against the Articles, for the reason that there may be naval usages which have never become customs. For a naval usage to become acustom and be recognized as

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429. Manual for Courts Martial, (1928) p. 188; IV Bull. JAG, Jan. 1945, p. 13, sec. 454 (1); IV Bull. JAG, Feb. 1945, p. 55, sec. 454 (18).

430. Naval Courts and Boards, Sec. 98.

431. AGN, Article 8, par. 20. See also 25 Op. Atty. Gen. 270, 274; Smith v. Whitney 116 U.S. 167, 180.

applicable to the determination of cases arising in the administration of naval discipline, it must have been long continued, certain, uniform, and compelling; it must have been applied universally and consistently, and duly recognized as such; and it must not be opposed to the terms or provisions of a statute enacted by Congress or a lawful regulation or order made by proper authority pursuant thereto. Custom has the force of law, usage is merely a fact.[432]

Article 22(b) on fraudulent enlistment should be revised and the subject matter thereof included, along with other military offenses, in a subdivision of one of the two proposed punitive articles. The reasons for this recommendation are fully set forth in Colonel Snedeker's Notes to the Proposed McGuire Articles.[433]

(h) It is not believed that any attempt should be made to have the Articles define the offenses specified therein, either directly orby reference. A thorough revision of Naval Courts and Boards in this report will accomplish better results. The McGuire Articles delegate to the Secretary of the Navy power to define military offenses. Other offenses are to be as defined by the courts of the United States. The Tedrow-Finn Articles provide that offenses will be defined as prescribed in the U. S. Criminal Code and by the President under the power delegated to him by the Articles. Neither the White draft nor the Judge Advocate General draft

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432. See also 17 Corpus Juris, 446; Words and Phrases, Vol. 10, p. 727, Naval Courts and Boards (1945 reprint) section 5, p. 6.

433. Pages 6, 7.

mentions definition of offenses. In this they follow the present Articles. The Articles of War do not attempt to define offenses, (except in A. W. 28 defining "short desertion"), nor does the British Army Act or Naval Discipline Act.

The Army method is to define offenses and to set forth the elements and necessary proof thereof in the Manual for Courts Martial. The British follow the same method in the Manual of Military Law.[434] The current navy practice is along the same lines. Various sections of Naval Courts and Boards define offenses, their elements, and set forth sample charges and specifications. Providing the official manual is carefully prepared, there is much merit in this practice. There is no legal objection to a statutory provision which states that a certain offense is punishable without defining it.[435] Little is gained by setting forth in the statute the sources from which definitions of offenses may be obtained. So long as the definitions of offenses, the description of their elements, and the quantum of proof necessary to sustain a conviction are accurately and clearly described in the service manual on naval law, no more should be necessary. The authors of the manual will presumably make use of the definitions of military offenses which have been developed by custom of the service, court martial orders, and court decisions. For civil offenses, they may refer to statutory

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434. See, e.g., discussion of absence offenses, Manual of Military Law, (1939 reprint), pp. 19-21.

435. 18 U.S.C. Sec. 457 makes rape an offense but does not say what constitutes rape. It hasbeen held that such a statute is not unconstitutional for lack of a definition. Oliver v. U.S., 230 Fed. 971 (C.C.A. 9th 1916), cert. 241 U.S. 670, 36 Sup. Ct. 721.

definitions, interpretations by courts of the United States, common law definitions,[436] and authoritative texts.

The present edition of Naval Courts and Boards has been criticized in respect to its definition of offenses in the Naval Justice Journal.[437] A comparison of Naval Courts and Boards with the Manual for Courts-Martial and the British Manual of Military Law shows the need for complete revision of the Naval Courts and Boards. Additional emphasis on the elements which must be present to constitute particular offenses and which must be proved in order to sustain a conviction is needed. Some of the sample specifications set forth in the current Naval Courts and Boards[438] are ineptly worded.

In particular, careful consideration should be given to the definition of desertion, its elements and the mode of proof. Moreover, it should be clearly distinguished from absence without leave and absence over leave. These three offenses come under the general heading of unauthorized absences. However, critical analysis of these three phases of absence reveals a marked difference between desertion in time of war and absence without leave and absence over leave. Desertion in time of war is a most serious military offense and conviction may result in loss of citizenship, loss of nationality,

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436. Where a person subject to the Articles is tried by court martial for an offense under the law of the state in which it occurred, the decisions of that state are applicable and binding as in similar cases coming before the federal courts. Ex parte Mason, 105 U. S. 696, 700; 6 Op. Atty. Gen. 413, 415.

437. I Naval Justice Journal (1946) pp. 24-27; No. 2, pp. 36-41; No. 3, pp. 30-33, 47.

438. For example, N. C. & B. Sec. 127 refers to offenses provided for in 18 U.S.C. 511. These provisions are applicable only when the offense is committed in a place under exclusive U. S. jurisdiction. The sample specifications allege commission of the offense "in the city of _____," without putting the reader on guard as to the territorial limitations.

or in the death penalty. By reason of such extreme sanctions, this offense is equal to the most serious crimes of the common law. For that reason proof of a criminal intent is necessary to sustain conviction. There must be shown an unlawful intent to abandon the service and to remain away permanently.

On the other hand, absence without leave and absence over leave are offenses which require no proof of intent to sustain conviction. There is no necessity to prove criminal intent. By comparison, therefore, desertion in time of war is more than an aggravated unauthorized absence. It is an offense that is different in kind. It is similar to a felony whereas absence without leave and basence over leave are similar to a large group of petty offenses in the civilian law, commonly classified as misdemeanors.[439]

In desertion cases, the present practice, in most cases, is to prove the unauthorized absence and its length by the introduction of documentary evidence. This presents a prima facie case, since the court is authorized to presume an "intent to permanently abandon the service" from proof of unauthorized absence alone.[440] In most of the desertion cases reviewed by the Board, the prosecution had closed its case upon introduction of the documentary evidence establishing the unauthorized absence and its duration.

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439. Civilian offenses not requiring criminal intent fall roughly within some of the following groups; (1) Illegal sale of intoxicating liquors, (2) Sales of impure or adulterated food or drugs, (3) Violations of motor vehicle laws, (4) Violations of general police regulations, passed for the safety, health or wellbeing of the community, See also, Sayre, "Public Welfare Offenses" (1933), 33 Columbia Law Review 55.

440. Naval Courts and Boards, Sec. 76, p. 56 (1945).(Of course, the duration of the absence must be proved for the court to infer from it intent to desert.).

Department directives requiring that an absentee be charged with desertion after an absence of 45 days, or less when other factors are present, tend to foster the notion that a man who is gone for this period is automatically guilty of desertion.[441] If the absence were less than 45 days the accused was usually charged with absence without leave or absence over leave. Thus, an arbitrary number of days absence constitutes in most cases the dividing line between the very serious offense of desertion requiring a specific intent, and the less serious offense of unauthorized absence not requiring intent.[442]

The following cases among others reviewed by the Board, illustrate the difficulty of distinguishing between desertion and absence without leave or over leave.

Review Board #1949:

> Accused was charged with desertion based on an absence of 5 months and 9 days, terminated by apprehension. He claimed that he had absented himself in order to earn more money because his pay had been substantially reduced as a result of a prior court martial. Prior to the instant offense he has been convicted by general court martial of absence over leave (4 months, 18 days) and sentenced to 21 months' confinement and a bad conduct discharge. After 6 months he had been restored on probation. Three months later he committed the instant offense. He was found not guilty of desertion, but guilty of absence without leave, and sentenced to confinement of three years and 9 months and a bad conduct discharge. The Board recommended remission of the prior general court martial sentence and restoration to duty on 12 months' probation on 1 April 1947, provided his conduct in the meantime should be satisfactory. Since it appeared that he was a mild alcoholic the Board also recommended hospitalization.

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441. See, for example, SecNav letter, 12 Oct 1945, subj: Policy of Navy Department in Regard to trials of offenses involving absence and desertion, and mitigation of GCM sentences.

442. See also "Desertion in Time of War" by Lt. Cdr. W. P. Martin, USNR, p. 515 of U.S. Naval Institute Proceedings, May 1945.

Review Board #1917

Accused was convicted of desertion based on an absence of 2 months, terminated by surrender. It appeared that while the accused was on liberty, he had given a blood donation and subsequently became ill. After two months' illness at home, he surrendered. He was sentenced to 3 years' confinement and a dishonorable discharge. Subsequently he was restored on probation. His probation wasterminated because of another absence over leave of short duration. The accused had had one prior conviction by summary court martial and one by deck court for minor offenses. His record showed 21 months of sea duty. The Board recommended that he be restored on 12 months' probation oh 7 November 1946.

Review Board #814

Accused was convicted of desertion based on an absence of 2 months and 8 days, which involved missing ship. He surrendered in uniform on 4 December 1945. He testified that he had no intention to desert, that his wife had given birth to a child several days after his leave had expired, and that he had tried to get an extension of his leave. His record was clear. He was sentenced to 2 years' confinement and a dishonorable discharge. The Board recommended restoration to duty on three months' probation.

While the Board does not quarrel with the outcome of the last two cases, it seems difficult to reconcile with the first, which in many ways seems more serious. Of course, absolute consistency is an ideal impossible of attainment. The court must weigh each case on its own merits, and it is to be expected that different courts will reach different results on the same or similar facts. This is true in the case of civilian judges and juries. But is believed that courts are handicapped by the necessity of choosing between two offenses, the one of the utmost seriousness, the other relatively minor, the destination being based on element of supposed

intent which the court has to infer, in most cases, from the length of absence above.

It is believed thatthis problem should be carefully reviewed by the Advisory Council, and workable tests established for distinguishing between desertion and mere unauthorized absence. Specifically, it is suggested that if length of absence alone is to be the test, an intermediate offense of aggravated absence be recognized, which would permit more severe punishment than absence without or over leave, but not be a capital offense and not result in mandatory loss of citizenship. Desertion itself would be reserved for a case of unauthorized absence, coupled with other evidence (of which prolonged absence would of course be one type) showing unmistakably an intent not to return to the service. In any event, the present confusing picture should be clarified.

RECOMMENDATIONS:

The following recommendations are made for consideration in connection with any revision of the Articles for the Government of the Navy:

(a) The present punitive articles should be retained in substance, except for those which are deemed obsolete.

(b) All punitive provisions should be grouped together under a general heading of "Offenses and Punishments."

(c) The punitive provisions should be grouped according to the punishment authorized, for example, offenses which are punishable by death, or such other punishment as a court martial may direct, should be separately specified, followed by a list of offenses which are punishable as acourt martial may direct, but not by death. The language of the present punitive articles should be retained as far as possible.

(d) Civil ofenses most likely to occur in the naval service, for example, murder, manslaughter, rape, robbery, larceny, assault, and so forth, should be specifically listed under either or both of the punitive articles described in (c) above.

(e) The most common military offenses should be specifically listed under either or both of the punitive articles described in (c) above.

(f) Present Article 22 should be deleted and in its stead, in a subdivision of one of the articles described in (c), it should be specifically stated that offenses against the Articles include (i) violations of the criminal laws, or of the treaties or conventions of the United States, (ii) violations of the regulations and customs of the naval service, and (iii) violations of the laws of war. In a

subdivision under the article dealing with offenses punishable at the discretion of courts martial, a provision, worded substantially asfollows:

"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." should be included.

(g) No attempt either directly or by reference should be made to define by statute the offenses specified. Naval Courts and Boards should be revised with special emphasis upon the definition of offenses, the elements thereof and the necessary proof thereunder.

(h) Clearer tests for distinguishing between desertion and unauthcrized absence offenses should be established.

B. MAXIMUM PUNISHMENTS.

The present Articles do not make any sentence mandatory. Article 63 provides that whenever, by any Article, the punishment on conviction of an offense is left to the discretion of the court martial, the punishment shall not, in time of peace, ".... be in excess of a limit which the President shall prescribe." Pursuant to Article 63, the President has prescribed a schedule of offenses and limitations of punishment applicable, in time of peace, to both officers and enlisted men.[444] The schedule includes punishment for military offenses and also lists punishments which are prescribed by statute for the more common offenses against the United States Criminal Code.

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

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443. The powers and responsibilities of courts martial in fixing sentences have already been discussed in Sections VI and VII, supra. Discussion here is confined to limits of maximum punishment.

444. This schedule is set forth in Naval Courts and Boards, pp. 233-240.

Prior to the 1920 revision, the Articles of War provided that, in time of peace, maximum punishments for offenses would be as prescribed by the President, whenever by the Articles, punishment was left to the discretion of courts martial.[446] A table of maximum punishments was prescribed by the President, applicable only in time of peace. During World War I, the fact that Army courts were without substantial guidance as to sentences resulted in wide disparities. After World War I there was much criticism of the severity of the sentences of Army courts martial.[447] As a result, the Articles of War were amended to provide for limitations upon punishments, to be prescribed by the President, for offenses committed either in time of war or peace, whenever the Articles provided for punishment at the discretion of courts martial.[448]

The Manual for Courts-Martial sets forth a Table of Maximum Punishments for both military and civil offenses, applicable in both peace and war, but limited to offenses by enlisted men.[449] Punishment of officers, where not made mandatory by the Articles, is left to the discretion of courts martial. Certain offenses which carry mandatory punishment are not mentioned in the Table.[450] Even

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446. Article of War 45, Act of Congress., 27 September 1890.

447. General Ansell, testimony before Senate Military Affairs Committee, on S. 64, p. 85; Congressman Johnson, H.R., Feb. 27, 1919; Ansell, Military Justice, (1919), 5 Cornell L.Q. 1, at 11.

448. Article of War 45, 10 U.S.C., Sec. 1516.

449. Par. 104, pp. 97-101.

450. Death, for spying (A.W. 82, 10 U.S.C., Sec. 1554); Death or life imprisonment, for murder or rape (A.W. 92, 10 U.S.C., Sec. 1564).

though by the Articles of War certain offenses may be punished by death or such other punishment as a court martial may direct, the death penalty may not be imposed if the President has made the maximum limit less than death.[451] Certain offenses not provided for in the Table remain punishable as authorized by statute or by customs of the service.[452]

Shortly after the entry of the United States into World War II, the President, by Executive Order, suspended the Army limitations upon punishment for desertion and certain offenses by sentinels.[453] In November 1942, the maximum punishment for absence without leave was suspended.[454] Subsequently, the War Department issued policy directives on uniformity of sentences, applicable in the United States, which, in general, established a form of 10 years confinement for desertion and 5 years for serious cases of absence without leave.

Certain revisions of the Army rules of maximum punishments have been recommended since the cessation of hostilities. It hasbeen suggested that Article of War 92 providing a mandatory punishment of death or life imprisonment for murder or rape, should be amended to provide for "death or such other punishment as a court martial may direct." It hasbeen claimed that in some cases courts acquitted soldiers charged with murder or rape because they were unwilling to impose such severe punishment.[455] The fact that the Army Table of Maximum Punishment applies only

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451. Manual for Courts-Martial, par. 103 (a), p. 92.

452. Id., par. 104 (c), p. 96.

453. Executive Order 9048, 3 February 1942.

454. Executive Order 9267, 9 November 1942. Effective 19 January 1946, these suspensions were revoked and the maximum punishments restored for offenses committed in the U.S.

455. U.S.F.E.T. Report, Military Justice Administration in Theater of Operations, p. 16. This was particularly true in cases where a soldier was charged with a rape of a foreign woman.

to enlisted men, and that officers escaped with lighter sentences than enlisted men for the same offenses, has been criticized.[456]

In combat zone desertion cases, the Army adopted a policy of imposing long sentences so as to punish severely "slackers" who sought to avoid combat by short sentences of confinement, and to deter others who might be tempted to desert. The USFET General Report has suggested that in all such cases, the Table of Maximum Punishments should permit a sentence of confinement "for the duration" plus a term of years thereafter.[457]

The existence of discrepancies in the sentences of naval courts-martial in various commands for like offenses is not of itself a criticism of courts-martial or of naval justice. The Board does not consider that, in general, sentences have been excessive.[458] A penal code which permits variance in sentences is desirable. Individual circumstances vary so widely that variation in sentences is perfectly natural. Sentences in civil jurisdictions vary according to the circumstances of each case, as well as according to the particular attitudes in the jurisdiction itself. It is well known for example, that sentences for certain offenses committed in some states will be substantially less than for like offenses committed in other states. In early times, virtually every criminal code was note-

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456. Id. at p. 37.

457. Id. at p. 20.

458. There is a feeling among many commanding officers that reviewing authorities have so reduced sentences that they become ineffective deterrents. See remarks by Vice Admiral Taussig, op. cit. at p. 6.

worthy for the fixed rigidity of the punishment for various offenders. One of the great steps forward has been the introduction of greater variation in sentences. This has permitted courts greater freedom in adapting their sentences to the particular circumstances of each case. This approach is believed to be more just than one of fixed rigidity. This is not to say, however, there should be no maximum limits to the punishment which a court can impose, but rather that variation within limits is desirable and necessary. Nearly all civil penal codes place limits on punishments which courts may decree for various offenses.

The first Ballantine Report noted that naval courts were substantially without the benefit of guidance in imposing sentences in time of war, and recommended the promulgation, as a matter of policy, of limitations upon punishments effective in time of war.[459]

In an attempt to obtain greater uniformity of sentences in absences cases, the Navy Department has issued several policy letters.[460] These letters established policy as to appropriate sentences for absence cases. They did not establish maximum limits of punishment nor did they refer to other offenses, military or civil. Since these directives merely suggested appropriate sentences, courts were still free to impose longer terms of confinement.

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459. First Ballantine Report, dated 24 September 1943, pp. 16-17.

460. See SecNav letters, this subject, dated 24 July 1943, 27 November 1944, 25 May 1945, and 12 October 1945.

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

> "Article 4(c)(6): Limits of Punishment. The punishment imposed by a court-martial shall not exceed such limit or limits as the President may from time to time prescribe. Provided: The period of confinement shall in no event exceed the limits prescribed by an applicable federal criminal statute. The limits prescribed by such statute shall not affect the power to impose additional or alternative types of punishment."

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

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

The Judge Advocate General has recommended the following articles:

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

All these proposals have the merit of providing for limitations upon punishments, to be prescribed by the President, applicable in time of war as

well as peace. The McGuire Articles specifically cover the subject of confinement in a federal penitentiary, restricting such confinement to offenses against the U.S. Criminal Code and limiting its duration to the maximum period provided therein for such offenses. This follows Article of War 45 and appears to be sound.[461] The White and Judge Advocate General Articles, while intended to accomplish the same result, refer merely to limitations "prescribed by law," which might be construed to refer to state, as well as federal, penal code.

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

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

Great care should be exercised, however, in the preparation of a table of maximum punishments. The tables now used by the Army and Navy are objectionable in that some of the differences in the punishment for various offenses appear to be purely arbitrary. Many of the offenses listed are rarely alleged in practice. An eminent authority on military law, Colonel Winthrop, has criticized the fixing of maximum punishments by

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461. See through discussion by Colonel Snedeker in his Notes, at pp. 32-35.

schedule as "artificial, complicated, and embarrassing in practice," and has suggested that such schedule "would preferably be amended and restricted to acts of desertion and a few other perhaps of the graver offenses.[462] It is believed that there is much merit in this criticism and that consideration should be given to the inclusion, in any such schedule, of only the more serious military and civil offenses, with punishment for other offenses left to the discretion of the courts, as guided by departmental policy.

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

The Board does not concur in a proposal, currently being made with regard to the Articles of War, that certain maximum punishment for civil offenses be limited to that prescribed by local law, even in foreign countries.[463] For a time the Army, while in England, punished the offense of statutory rape according to English law. This practice was abandoned as a result of a ruling by the Assistant Judge Advocate General that Army courts could not judicially notice foreign law; that such law could not be applied, and that the penalty prescribed by the U.S. Criminal Code should be applied.[464] American naval forces on foreign soil when tried by naval

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462. Winthrop, Military Law and Precedents (2 ed. 1920), p. 396.

463. See Army and Navy Bulletin, 27 July 1946, at p. 2.

464. USFET, Report, Military Justice Administration in Theatre of Operation, p. 24.

courts should not be subject to punishments prescribed by foreign penal codes. Foreign codes, ideas of justice, and moral concepts may, and do, differ from our own and should not be regarded as controlling in the administration of naval justice.

On the other hand, consideration should be given to punishments authorized by the penal codes of the states of the United States, since the offenses against state penal laws may violate the Articles as well. If such an offense is not otherwise mentioned in the Articles, is not an offense against the U.S. Criminal Code, and is not mentioned in the Table of Maximum Punishments, the punishment authorized by the State for that offense should at least be used by the court as a guide in imposing sentence.[465] A naval court should not be bound by state limitations, however. A relatively trivial offense, by state standards of punishment could be a far more serious naval offense because of the discredit it might bring to the uniform of the naval service.

RECOMMENDATIONS:

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

(1) Article 63 should be repealed. In its stead, a new article such as proposed by the McGuire Committe, Commodore White, or the Judge Advocate General draft articles

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465. The House Military Affairs subcommittee in its study of the Army system, has apparently recommended that punishment for offenses committed in this country conform to state laws, where the crime is not capital. Army and Navy Bulletin, 27 July 1946, p. 2.

in time of peace and war, in all cases where the Articles provide for punishment at the discretion of courts-martial.

(2) Such table of maximum punishments should include only the more serious military and civil offenses, punishment for other offenses to be limited only by department policy to be announced from time to time.

(3) Punishment for offenses against state laws should not be limited by the law of the particular state, but courts should use such law as a guide in determination of sentence. Punishments prescribed by foreign law should not be binding on courts-martial.

SECTION X

TERMINATION OF PROBATION: DISCHARGES

1. Termination of Probation

Under present Departmental policy sentences of general and summary courts martial can be mitigated by the convening or reviewing authority and the offender placed on probation for a period of time, generally up to six(6) months for summary courts and up to 12 months for general courts. At any time during the probationary period, if the man's conduct is not satisfactory to his commanding officer, the commanding officer may terminate the probation and restore the sentence of the court martial. This policy, as it relates to discharges, is expressly stated in Section D-9114, Bureau of Naval Personnel Manual, which says: "Approved sentences of summary court martial and general courts martial involving immediate dishonorable discharge or bad conduct discharge (no confinement to be served) will only be effected on instructions from BuPers.... However, if the sentence involving discharge of an enlisted man is remitted, subject to a probationary period, that person's commanding officer need not request the Bureau for authority to effect the discharge provided that the person's conduct during the probationary period does not justify his or her future retention. Under these circumstances, the commanding officer may himself terminate the probationary period and carry the sentence of the court martial into effect."

The Board has encountered considerable difficulty in reviewing cases where probation has been previously terminated, because of the lack of an adequate record of the offense for which the commanding officer terminated probation. The following 4 cases chosen at random from many such reviewed by the Board show graphically the need for an adequate record and careful review.

Review Board #2023

Accused, who had had 30 months overseas duty, with combat on Guam and Bougainville, was convicted of desertion, based on an absence of 64 days. Accused was given a sentence of 3 years and 3 months' confinement and a dishonorable discharge. After 6 months' confinement, he was restored on 12 months' probation. Three months thereafter his probation was terminated for being absent without leave for 40 minutes and missing bed check. The prisoner claimed that he was working as a mess cook and was lawfully in the galley at the time. The Board recommended that he be restored to duty on 6 months' probation.

Review Board #2090

Accused, who had had a lengthy tour of overseas service, including combat action at Eniwetok, was convicted of desertion, based on an absence of 3 months, 6 days. He was sentenced to 4 years' confinement and a dishonorable discharge. The sentence of confinement was subsequently reduced to 3 years, 4 months. After serving 8 months in confinement accused was restored to duty on 12 months' probation. This probation was revoked 5 months later for sending an obscene letter through the mail, and prisoner was reconfined for the balance of his sentence (31 months). The Board recommended that he be restored on 12 months' probation on 8 November 1946.

Review Board #2047

Accused, who had served 10 months at sea and had participated in two major combat operations, was convicted of absence over leave of 30 days and missing ship, breaking arrest and desertion of 8 months, and was sentenced to 5 years' confinement and a dishonorable discharge. Subsequently, sentence was reduced to 3 years and a bad conduct discharge and accused was restored to duty on 12 months' probation on 23 February 1946. On 4 April 1946 he was absent over leave for 3 hours. Facts indicate that accused, whose ship was docked in a Chinese port, had trouble finding his way back to his ship. Probation was terminated and accused was sent back to serve the remaining 2 years of his sentence. The Board recommended remission of this sentence and restoration of the accused to duty.

Review Board #2031

Accused, who had had 17 months of sea duty, was convicted of desertion, based on an absence of 3 months and 9 days. He was sentenced to 3 years' confinement and a dishonorable discharge. Subsequently accused was restored on 6 months' probation. After 5 months his probation was terminated for being absent over leave 80 minutes. At this time accused was within 3 weeks of being separated from the service with an honorable discharge. He was ordered reconfined for the balance of his sentence of 29 months. In this case the prison commander said that the probation offense was not of a character "which merits a man having to serve until 5 January 1949 and carry the hardship of a DD for the rest of his life." The Board recommended remission of the sentence and restoration of the accused to duty.

Since the close of the hearings of the Board the Bureau of Naval Personnel has, under date of September 23, 1946, issued new instructions warning against termination of probation for trivial offenses and requesting that the full facts and circumstances be amply set forth in each case.[466] The Board believes that this is a step forward.

The Board suggests, in addition, that the accused be given the opportunity to place in the record a detailed statement of any defense or excuse he has to offer. Such a statement, madeby the accused at the time, would be worth many times more than anything said in prison months later. To make such a statement, the man should be given the aid of legal counsel, if available, and if not available, the aid of an experienced officer.

It has been suggested that the commanding officer be deprived entirely of this power to terminate probation and that he be made to apply to higher authority for permission to do so in any case.

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466. Circular Letter No. 214-46, September 23, 1946.

The Board believes that this would be an unwarranted restriction on the commanding officer who should have power to terminate probation, but should be required to provide an adequate record of the facts. The captain of the ship is the person best qualified to pass on the conduct of those under his command. Giving him power to terminate a man's probation and return him to prison seems a necessary concession to the needs of discipline. It does not differ too much from the power of a civilian parole commission to terminate parole of a discharged civilian criminal.

It is felt, however, that no commanding officer should be given the power to order execution of a discharge. Such action should be taken, in every case, by the department, in accordance with the procedure suggested in Section VII of this report. If a Sentence Review Board is established, as suggested, such board would be in a better position to decide the ultimate fate of the probation violator. It would have a staff to collect all the information that is needed, i.e., the man's entire naval record, his family background, and reports from psychologists, psychiatrists and prison officials. The Captain at mast has neither thetime nor the facilities to make a study of this nature. Like the sentencing technique, the giving of a discharge should receive most careful attention. To the man, it is more important than enlistment.

The needs of discipline are satisfied if the commanding officer is given the power to remove the man from his command; the needs of justice are satisfied if the commanding officer places in the record detailed reasons for so doing and permits the accused to place in the record a similar detailed

statement in defense and the man's entire record is at a later date reviewed by the Department.

RECOMMENDATIONS:

It is recommended that the subject of termination of probation be carefully reviewed by the Advisory Council.

The following suggestions are made:

(1) Prior to termination of probation the commanding officer should order an investigation of the alleged violation similar to that of an investigation prior to a general court martial, including the taking of 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 available, by an experienced naval officer of his personal choice. The record of this hearing should be transcribed.

(2) A hearing at mast should be held, based on the investigation previously made, at which the 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 the commanding officer states in detail his reasons for termination.

(4) All the above papers should be filed in the probation violator's record.

(5) The termination of probation by the commanding officer should be effective to return the prisoner immediately to the appropriate naval prison. However, no termination of probation should be effective to give the probation violator a discharge from the service. The record of termination of probation

should be sent to the Department for review by the disciplinary activity involved and by the proposed Sentence Review Boar d for determination, on the basis of the prisoner's entire naval record and social and psychiatric background, whether a discharge should be recommended, and if so, what from of discharge should be awarded.

2. Discharges:

The types of naval discharges are numerous and the distinctions between them are but little understood by the general public, and, it would seem, by most members of the naval service.[467] This is one of the reasons the Board hesitated to recommend immediate discharge in many cases, or a change in the form of discharge, although in a very few cases its recommendation took this form.

This much seems to be true under the various statutes and regulations relating to discharges:

Under the Selective ServiceAct a man discharged from the Navy with either a dishonorable discharge or a bad conduct discharge is barred from public employment by the United States Government. It does not seem to matter, in the case of a Bad Conduct Discharge, whether it was awarded by a summary or a general court martial.

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467. The present system of discharges and separation of enlisted personnel from the naval service is discussed in detail in the Bureau of Naval Personnel Manual, Part D., Chapter 9. There are five classes of discharges, namely: (a) Honorable, (b) Under Honorable Conditions. (c) Undesirable, (d) Bad Conduct Discharge, and (e) Dishonorable.

Any dishonorable discharge or bad conduct discharge from a general court martial [468] will deprive a man of benefits under the Servicemen's Readjustment Act of 1944.[469] A Bad Conduct Discharge from a summary court if for mutiny, spying, moral turpitude or wilful and persistent misconduct may also rob a man of the benefits under this Act.[470] In certain other cases an undesirable discharge will cause loss of these benefits.

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468. 58 Stat. 286, 38 U.S.C. S.639(g), Public Law 346, 78th Congress - "Servicemen's Readjustment Act of 1944". TITLE I? Chapt. III - Reviewing Authority, Sec. 300 "The discharge or dismissal by reason of the sentence of a general court martial of any person from the military or naval services, or the discharge of any such person on the ground that he was a conscientious objector who refused to perform military duty, or refused to wear the uniform or otherwise to comply with the lawful orders of competent military authority, or as a deserter, or of an officer by the acceptance of his resignation for the good of the service, shall bar all rights of such person based upon the period of service from which he is so discharged or dismissed under any laws administered by the Veteran's Administration: Provided ****** such person was insane, he shall not be precluded ******."
58 Stat. 301, 38 U.S.C., S.697(c), TITLE I? Chapt. VI. Sec. 1503 - "A discharge or release from active service under conditions other than dishonorable shall be a prerequisite to entitlement to veterans benefits provided by this Act or Public Law Numbered 2, 73rd Congress as amended."

469. The seriousness of a discharge or dismissal of a person from the military or naval service, when separated under "other then honorable conditions," has such a far reaching effect upon the individual and his family, that Congress created Boards of Review to review such discharge or dismissal with power to change, correct or modify such discharge or dismissal when warranted, and to issue a new discharge in accord with the facts presented to the Board. Serviceman's Readjustment Act of 1944 (P.L. 346 - 78th Congress, 58 Stat. 286, 38 U.S.C., S.693(h).
While this act does not presently apply to any discharge or dismissal by reason of the sentence of a general court martial, a bill was introduced in the last Congress to amend this act to include a review of such discharge or dismissal. H.R. 6387, 79th Congress, 2nd Session; introduced by Mr. Allen of Louisiana.

470. Regulations & Procedure, Veterans Administration, Sec. 1604 (A) ******In other words benefits under Public 2, 73rd Congress, 48 Stat. 8, 38 U.S.C. 701 et. seq., Public Law 346, 78th Congress are barred where the person was discharged under dishonorable conditions. The requirement of the words "dishonorable conditions" will be deemed to have been met when it

Was shown that the discharge or separation from active military or naval service was for (1) mutiny, (2) spying, (3) for an offense involving moral turpitude or wilful and persistent misconduct; Provided however that where service was otherwise honest, faithful and meritorious a discharge or a separation other than dishonorable because of the commission of a minor offense will not be deemed to constitute discharge or separation under dishonorable conditions."

471. Regulations and Procedure, Veterans Administration, Section 1604 (C) "The acceptance of an undesirable discharge or blue discharge to escape trial by general court martial will by the terms of section 1503, Public Law 346, 78th Congress be a bar to benefits under Public Law No. 2, 73rd Congress as amended and Public Law 346, 78th Congress, as it will be considered the discharge was under dishonorable conditions." In connection with the above interpretations, a letter was sent to the Honorable Grahan A. Barden from the Solicitor, Veterans Administration: "84 Op Sol 95 1/17/46: A veteran whose discharge is neither honorable nor dishonorable, if for one of the offenses enumerated in Instructions No. 1, 2, 3; secs. 300 & 1503 Public Law 346 - 78th Congress, is denied benefits. If on the other hand the discharge not for one of the offenses enumerated in the instructions, a report of the circumstances and conditions under which discharge was given is obtained from the Service Dept. and a determination made as to whether, on the facts shown, the discharge is to be considered as under other than honorable conditions. If held to be under other than dishonorable conditions the nature of the discharge is held not a bar to the furnishing of the benefits to which the veteran is otherwise entitled." Section (d) of the above interpretations, though not pertinent, shows how far the Veterans Administration have gone in some cases.
Sec. (D) "An undesirable or blue discharge issued because of homosexual acts or tendencies generally will be considered as under dishonorable conditions and a bar to entitlement under Public Law 2, 73rd Congress as amended and Public Law 346, 78th Congress. However, the facts in a particular case may warrant a different conclusion in which event the case should be submitted for determination by the Administrator."

A collateral statute, often confused by the public with the statute relating to discharges, renders a person ineligible to become a citizen, or, if he is already a citizen, deprives him of his citizenship, and renders him incapable of holding any federal office, if he has been convicted by a court martial of desertion in time of war.[472] A recent amendment provides that restoration to active duty, or reenlistment or induction, in time of war, shall serve to restore the nationality or citizenship, and the civil and political rights, so lost.[473]

Although this statute relates to the offense, as evidenced by conviction thereof, rather than to the from of discharge, it becomes important to consider it in connection with the subject of discharges, because of the recent amendment. For, by virtue of this amendment, restoration to duty has the effect of restoring the citizenship previously lost.[474] Conversely, a failure to restore a convicted deserter, and execution of his discharge, renders permanent his loss of citizenship.

Because of the above serious consequences of a dishonorable or bad conduct discharge, and of a discharge based upon a conviction of wartime desertion, the Board has suggested, in Section VII of this Report, that a

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472. R.S. 1996, 1998, as amended Aug. 22, 1912, c. 336, sec. 1, 37 Stat. 356; 8 U.S.C. 706, 801(g).

473. Act of June 20, 1944, c. 2, sec. 1, 58 Stat. 4; 8 U.S.C. (Supp. V) 801(g).

474. The statute is not clear what happens if a deserter is restored on probation, then violates his probation, and is dishonorably discharged. It seems to say that any restoration, conditional or otherwise, has the immediate effect of restoring citizenship and civil rights, although this may not have been intended.

dishonorable or bad conduct discharge be executed only upon order of the Secretary, or his duly designated representative. Such a procedure has already been proposed by the McGuire, White, Judge Advocate General, and Tedrow-Finn draft articles. It is contemplated that execution of such a discharge would be ordered only after review by the proposed Sentence Review Board.

There is another reason why this procedure would be advisable. A dishonorable or bad conduct discharge of an enlisted men is comparable to the dismissal of an officer. Both have the same serious consequences. The latter can be carried into execution only after the case has been confirmed by the President orSecretary. To permit execution of a dishonorable or bad conduct discharge of an enlisted man without requiring a substantially equivalent review is to apply a double standard of justice. It is perhaps for this reason that all the draft articles which have been proposed provide for execution of a discharge only upon order of the Secretary, or his duly designated representative. The Board concurs in these proposals.

It is believed that the Advisory Council should review the whole subject of discharges, in the light of the above discussion. The Advisory Council should also consider whether the discharge system could be simplified, and the number of different kinds of discharges reduced. In this connection, the Council should consider whether the bad conduct discharge should be continued and whether the summary court martial should continue to have the power to impose it.

From time to time the Board's reviewers recommended that a dishonorable discharge be changed to a bad conduct discharge. The Board's reluctance to approve such recommendations was based principally upon its inability to

discover any substantial difference between the two. As stated above, each such discharge from a general court martial deprives the recipient of public employment and benefits under the Serviceman's Readjustment Act of 1944. Under these circumstances the Board felt that there was no substantial reason to recommend a change in the form of discharge.

On the question whether the summary court martial should continue to have the power to impose a bad conduct discharge, the following statistics are of interest. They indicate that summary courts martial have used this form of punishment but sparingly.

1946

Month	Trials by Summary Court Martial	Bad Conduct Discharges	Approved	Probation Granted (6 mos.)
Jan.	4417	186	109	77
Feb.	3152	167	74	93
Mar.	4516	172	92	80
Apr.	3717	148	77	71
May	3392	140	80	60
June	2319	148	81	67
July	2718	104	64	40
Aug.	3038	138	76	62
Sept.	1962	96	58	38
Totals	29,231	1299	711	588

* Figures supplied by Captain Bunter Wood of the Bureau of Naval Personnel.

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475. A dishonorable discharge can be imposed only by sentence of a general court martial. This type of discharge, though not expressly required or authorized by the Articles for the Government of the Navy, is set forth in Naval Courts and Boards, Section 457, as a penalty which general courts martial may award, and is recognized as a legal punishment for enlisted men. (Naval Courts and Boards, Section 457, Schedule of punishments). It may be imposed whenever the sentence rests within the power and in the discretion of the court.

The bad conduct discharge was first created by Act of Congress, 2 March 1855, in "An Act to Provide for a More Efficient Discipline for the Navy," as a mode of punishment to be imposed upon enlisted men by summary court martial. By the same statute a general court martial was authorized to impose any punishment which a summary court martial can impose, thus giving both courts the power to impose a bad conduct discharge. (Act of 2 March 1855, 10 Stat. 627-629).

The Army has no discharge comparable with a bad conduct discharge, only a dishonorable discharge, which may be imposed by sentence of a general court martial.

It has been suggested that the power of the summary court martial to impose confinement be substantially increased. If this is done, it might remove the reason for that court having power to give a bad conduct discharge. On the other hand, it might be a reason why such power should be continued. There might, of course, be some increase in the number of trials by general court martial if the power to give a bad conduct discharge were taken away from the summary court martial.

In any event, no bad conduct discharge, whether imposed by a general or a summary court martial should be carried into execution without review by a Sentence Review Board and the Secretary or his duly appointed representatives.

The first Ballantine Report recommended that the summary court's power to impose a bad conduct discharge should be reconsidered. The Board believes that the proposed Advisory Council should study this question.

RECOMMENDATION:

The Board recommends that the Advisory Council study the whole subject of discharges, both disciplinary and administrative. Such study will be assisted greatly by the current study of Joint Army-Navy Personnel Board which we understand is considering the recommendation of uniform types of discharges for both services.

SECTION XI

OFFICER CASES

1. In General:

One of the most frequent criticisms of the Army and Navy court-martial systems is that justice is not even-handed, insofar as officers and enlisted personnel are concerned. Critics allege that officer offenders often escape trial by court-martial for offenses for which enlisted offenders would have been tried. It is further alleged that officers convicted by court-martial receive more lenient sentences than an enlisted man would have received on conviction of the same offense. In support of such allegations, critics are prone to single out special cases as being the general rule. This alleged discrimination in favor of officers is also being currently cited as an example of the so-called "caste system" in the services. Because of the nature of this criticism and because this feeling is fairly general among former service personnel, enlisted in particular, the matter deserves careful consideration.

In its review of cases this Board has confined itself to cases of general court-martial prisoners now in confinement. Of 2161 cases reviewed by the Board only 3 cases were those of officers. Therefore, it is not possible for the Board to draw any conclusions as to alleged disparity in sentences from its review experience. Before accurate conclusions in this regard could be drawn, it would be necessary to make a complete study of all final sentences in officer cases and compare them with the final sentences of enlisted personnel convicted of the same or similar offenses. A study of

this sort has not been attempted by the Board, but should be undertaken by the Advisory Council which has heretofore been recommended. The Board, nevertheless, attaches significance to the fact that of the 2161 cases only 3 cases were those of officers.

A recent study prepared by the Office of The Judge Advocate General, Military Law Division,[476] reveals that during the war years (December 1941 through August 1945) the aggregate Naval population was 4,758,215, of whom 12 3/4 per cent were brought to trial before naval courts. Most of these persons were tried by lesser courts for relatively minor offenses and only 1 1/10 per cent, were tried by general court-martial. Officers may only be tried by general court-martial and of the 416,251 officers of the naval service, 928, or approximately 0.22 per cent, were so tried. Of the 4,341,964 enlisted personnel, 51,192 or approximately 1.3 per cent, were tried by general court-martial, and 554,966 or 12.78 per cent, were tried by summary court-martial and deck court. Although officers amounted to 8.7 per cent of the aggregate naval population, they were only 1.8 per cent of the total personnel tried by general court-martial.

The proportionate number tried by general court-martial alone, stated in another way, was that 22 of each 10,000 officers were tried, 18 were convicted and 4 acquitted. 130 of each 10,000 enlisted persons were tried; 110 were convicted and 20 acquitted. The proportion of officer to enlisted personnel so tried was 1 to 6. The ratio of convictions was also 1 to 6. As compared with the total number of enlisted personnel tried by general court-martial, summary court-martial and deck court, the total number of officers tried was approximately 3/10 of 1 per cent of the total number of

476. Report on survey Wartime Naval Courts - April 10th, 1946, pp. 20, 21.

personnel tried. Since there were approximately 9 times as many enlisted persons as officer in the naval service, the proportion of officers tried to enlisted personnel tried was 1 to 37. (This ratio is corrected to presuppose an equivalent number of officers to men).

The type of offenses for which officers and enlisted persons were convicted by general court-martial is of interest in view of the disparity in numbers tried. Whereas approximately 75 per cent of the offenses committed by enlisted personnel involved unauthorized absence or desertion, only 7 per cent of the officer offenses were of this type. 85 per cent of the offenses committed by both officer and enlisted personnel were military offenses. Whereas 35 per cent of the officer offenses were conduct to the prejudice of good order and discipline and conduct unbecoming an officer, less than 5 per cent of the offenses of enlisted personnel were of this general type.

When unauthorized absence and desertion convictions are eliminated from the total number of offences resulting in convictions by general court-martial, it is determined that proportionately officers were convicted of 46 per cent of the offenses and enlisted personnel of 54 per cent.[477] Although this proportion covers only general court-martial cases, these figures serve to emphasize the role played by absence offenses.

Disciplinary statistics obtained from the Officer Performance division, Bureau of Naval Personnel, relate to the period of 1942 through 21 September 1945, as to regular and reserve naval officers. This study did not cover officers of the Marine Corps or Coast Guard. These statistics

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477. This proportion is based upon an evaluated figure of 9 enlisted persons to 1 officer, the approximate ratio in the aggregate population.

reveal that a total of 741 officers were tried by general court-martial, of whom 151 were acquitted. Of the 590 who were convicted, 95 were dismissed from the service and 495 received other punishments (loss of pay, loss of numbers, etc.). A total of 89 officers resigned for the good of the service and 404 resigned to escape trial. Such resignations are under conditions other than honorable. The former bars the officer from all benefits and the latter from practically all benefits under the Servicemen's Readjustment Act of 1944. A total of 3001 disciplinary separations of officers were effected during the period under consideration.

A study of officer cases disclosed that a considerable number of officers were sentenced by courts to confinement and dismissal. In a great many of these cases the sentences were approved by the convening authority but the part of the sentence relating to confinement was subsequently remitted by the Secretary of the Navy, usually upon the recommendation of the Bureau of Naval Personnel. An additional Report obtained from the Bureau of Naval Personnel reveals that 668 cases of officers convicted by general court-martial 14 ultimately served sentences of confinement. In a number of cases, officers sentenced to dismissal have been restored to duty for a period of probation as to their dismissal.

2. Disciplinary Factors:

In any discussion of the disciplinary treatment afforded officers as compared with enlisted personnel in the administration of naval justice, certain factors must be considered:

(1) Officers were more carefully selected than enlisted personnel from the standpoint of methods of procurement.

(2) In general, officers had more education and broader civilian experience than enlisted personnel.

(3) The average age of officers was greater, and maturity of judgment generally increases with age.

(4) By far the enlisted offender fell into the 18-20 group. By civilian standards, many potential offenders are in this age group.

(5) Because of the factors stated in (1) through (3) above, it was to be expected that officers would commit fewer absence offenses than enlisted personnel. As noted above, such offenses resulted in the vast majority of enlisted convictions.

(6) Officers are subject to disciplinary punishment for minor offenses, without trial, for which an enlisted man would be tried and lightly punished by a lesser court. Statistics of the former are difficult to assemble. Statistics of the latter are easily obtained and have been noted herein.

(7) An officer sentenced to dismissal, with or without confinement, seldom is permitted to "work for" a more favorable type of discharge during a probationary period. Navy records reveal that thousands of enlisted personnel who received a sentence including a Dishonorable Discharge or Bad Conduct Discharge have, after a probationary period, earned a discharge under honorable conditions.

3. General Discussion:

It is probably true, as alleged, that in some instances officers committed offenses and escaped any form of punishment, yet the same would likewise be true with regard to offenses by enlisted personnel. The question

remains: Were officers, as alleged, treated more favorably in this regard than enlisted men? There are no available statistics which can answer this question, and guesswork, or the citing of isolated cases, is an interesting but unproductive process. If there has been such disparity of treatment, without sound reason, that situation demands considered attention leading to corrective action. The Board is not prepared to say that because a proportionately greater number of enlisted personnel were tried by naval courts than officer personnel, there was, ipso facto, disparity of treatment. Likewise, where an officer was dismissed from the service for a particular offense but an enlisted man was sentenced to a period of confinement and a dishonorable discharge, the Board is not prepared to say that this is an example of a "double standard" of justice. All of the factors set forth above must of necessity enter into the matter. It may well be that from a disciplinary standpoint, the same form of punishment for officers and enlisted personnel for similar offenses is neither practicable nor advisable in every case. However, for serious civil offenses ther is little justification for disparity of treatment, if it exists. For example, other factors being equal, the punishment for manslaughter should be the same for all persons convicted by naval courts, whether officer or enlisted. In regard to military offenses, other considerations may be present which require punishments to assume different forms, depending upon the status of the accused. This is so even as between petty officers and non-rated personnel. The Board cannot agree with those who contend that there must be no disparity in the form or quantum of punishment, irrespective of offense or offender.

The Board is aware of the criticism currently being directed at the Army and Navy to the effect that there is a "caste system" in the service, and

that the administration of justice is not "even handed." Moreover, the Board believes that even if this criticism turns out to be unwarranted, its widespread acceptance requires through investigation of the problem. This board has not had the personnel nor has it been authorized to undertake such a study. It believes, however, it is urgent that the Advisory Council, advocated in the introduction of this report, conduct a study of this problem. If the research reveals that the criticisms are unwarranted, the facts on which such conclusion may be based should be given wide publicity. On the other hand, if there is substance to the criticisms, recommendations to effectuate the following policy should be made:

(1) No persons, regardless of rank, should escape punishment for an offense against the Articles for the Government of the Navy.

(2) Whenever possible, consistent with discipline and the requirements of the service, there should be no disparity in the form of punishment for the same type of offense, whether the offender be a commissioned officer, a warrant officer, or and enlisted man.

Arthur John Keeffe, President

Felix E. Larkin, Vice-President

C. P. Snyder, Admiral, U.S.N.

Hunter Wood, Jr., Capt., U.S.N.

John A. Glynn, Capt., U.S.C.G.

Clifford G. Hines, Capt., (MC), U.S.N.

E. N. Murray, Lt. Col., U.S.M.C.

A. W. Dickinson, Comdr., U.S.N.R.

E X H I B I T S

EXHIBIT A

PRESENT BRITISH ARMY COURTS-MARTIAL SYSTEM*

1. INTRODUCTION

Authority for courts-martial in the British Army is found in the Army Act, Section 48 and 49. The Army Act was first passed as the Army Act of 1881, (44 and 45 Vict. c. 58), and is annually kept in force by the Army and Air Forces (Annual) Acts, thus securing the constitutional control of Parliament over the discipline without which a standing Army of Air Force cannot be maintained. These Annual Acts afford opportunity of amending the Army Act, of which considerable use is made. For example: Regimental courts-martial (similar to summary courts-martial in the U.S. Army) had fallen into such dis-use that they were abolished by the Army and Air Forces (Annual) Act of 1920. By Section 70 of the Army Act, the Crown is vested with power to make Rules of Procedure not inconsistent with the provisions of the Army Act. Such Rules have been formulated and are set forth in the Manual of Military Law.

2. DESCRIPTIONS OF COURTS-MARTIAL AND HOW CONVENED

A person subject to military law, who is to be tried by court-martial, may be brought before a district court-martial or a general court-martial. In certain circumstances trial may be by field general court-martial. The difference between a district court-martial and a general court-martial consists mainly in the composition and in the extent of punishment which each tribunal can award. The district court-martial cannot try officers. Every court-martial depends for its jurisdiction upon the order which calls it into being, namely, the convening order issued by a person authorized under the Army Act to convene it.

A district court-martial may be convened by an officer authorized to convene a general court-martial or by an officer who has received from such officer a warrant authorizing him to convene district courts-martial.

A general court-martial can be convened by His Majesty or by an officer authorized by His Majesty or by an officer holding a warrant to convene such courts from some officer authorized to delegate his power of convening them.

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* The material herein presented has been primarily taken and condensed from the Manual of Military Law (1929 ed., 1939 reprint).

At home, warrants giving officers power to convene general court-martial are usually issued by the King to the general officers, commanding-in-chief a command, to the general officers commanding the London and Northern Ireland districts, and to the general officers commanding in Guernsey and Jersey.

A warrant giving power to convene and to confirm the findings and sentences of the general courts-martial is usually issued, in India, to the Commander-in-Chief in India, and elsewhere out of the United Kingdom, to the general or other officer in chief command. Governors of colonies have in certain cases been granted such warranted.

Any such warrant, and also any warrant of delegation given by the officer so authorized, may contain reservations or special provisions, and may be addressed to an officer by name or by the designation of his office; and may give authority to a person performing the duties of an office named or to the successors in command of an officer; and may be wholly or partially revoked by a fresh warrant.

His Majesty may empower any qualified officer to delegate to any officer under his command, not below the degree of feild officer, a general authority to convene general courts-martial of such persons subject to military law who are, for the time being, under or within the territorial limits of his command.

Further, if it appears that at any place outside the United Kingdom there is no field officer for the time being in command and hardship will be inflicted on persons accused of offenses, by reason of there being no means of trying such persons for offenses, a warrant may empower an officer to delegate to an officer not below the degree of captain, power and authority to convene general courts-martial which would normally have been delegated only to a field officer. ("Qualified officer" means any officer not below the rank of field officer commanding for the time being any party or force either within or without His Majesty's Dominions.)

3. JURISDICTION

A district court-martial cannot try an officer, or a person subject to military law as an officer. It can try a warrant officer, but its powers of punishing him are limited. It has complete jurisdiction to try any military offense (except such as can only be committed by an officer), and subject to certain restrictions in the case of treason, murder, manslaughter, treason-felony, and rape, any offense, which, if committed in England, is punishable by the law of England, i.e., a civil offense. (Courts-martial are not allowed to try the most serious civil offenses —

treason, murder, manslaughter, treason-felony, and rape, - if these offenses can, with reasonable convenience, be tried by a civil court. They are, therefore, prohibited from trying any such offenses committed in the United Kingdom, or committed anywhere else in the King's Dominions except Gibralter, within 100 miles from a place where the offender can be tried by civil court, unless the offense is committed on active service.

A district court-martial cannot award a sentence higher than two (2) years imprisonment with or without hard labor; it cannot therefore, try a case of murder where the only punishment which can be awarded is death.

A general court-martial can try any person who is subject to military law, either as an officer or as a soldier. It has complete jurisdiction to try any military or civil offense, though it has the same restrictions as the district court-martial as to the offenses of treason, murder, manslaughter, treason-felony and rape. A general court-martial can award punishments of death and penal servitude as well as such punishments as a district court-martial can award.

A person cannot be tried by court-martial for any offense of which he has previously been acquitted or convicted by a court-martial or by a competent civil court; or where the charge against him has been dismissed, or the offense dealt with summarily by his commanding officer.

An offense, other than mutiny, desertion, or fraudulent enlist ment, cannot be tried by court-martial if three (3) years have elapsed since the date of its commission. Moreover, in trying civil offenses, a court-martial is bound by any prescribed Statute of Limitations which may be less than three (3) years.

4. COMPOSITION OF COURTS

A district court-martial must be composed of not less than three (3) officers, each of whom must have held commissions for not less than two (2) years. The members of the court should belong to different corps, and can only belong to the same regiment of cavalry, brigade of artillery, or battalion of infantry, if, in the opinion of the convening officer, other officers are not available. The President should not be below the rank of field officer; but a captain may preside if neither field officer nor captain is available and if the accused is not a warrant officer. Where a district court-martial is composed of three (3) officers, not more than one (1) should be a subaltern.

The provisions as to the composition of a district court-martial, referred to in the preceding paragraph, also apply to a general court-martial, except that: (1) the legal minimum of members is five (5) instead of three (3); (2) the members must have held a commission for three (3) instead of two (2) years; (3) the president should always be a general officer or colonel, if available; and (4) a subaltern cannot, under any circumstances, act as president. In addition, four (4) of the members must be of a rank not below captain; and officer below that rank cannot be a member of the court for the trial of a field officer; and no officer junior in rank to the accused officer can serve as a member if officers of equal rank or superior rank are available.

The following persons are disqualified to be members in the case of a district or general court-martial: (1) The convening officer; (2) the prosecutor; (3) a witness for the prosecution; (4) the commanding officer of the accused or the officer who investigated the charges before trial or took down the summary of evidence; (5) the company, etc., commander who made preliminary inquiry into the case; (6) an officer who has been a member of a court of inquiry into the matters on which charges against the accused are founded; (7) where the accused has been previously tried for the same offense, but the proceedings have not been confirmed, any officer who was a member of the court-martial by which the offense was tried; and (8) an officer who has a personal interest in the case.

5. DUTIES OF CONVENING OFFICER

Before granting an application for a court-martial submitted by a commanding officer, the convening authority must make sure the charge discloses an offense under the Army Act, and is properly framed and that evidence sufficient to justify trial is disclosed. If he feels that the evidence is insufficient or the charge in error, he should order the accused to be released, or if in doubt, he may refer the matter to superior authority. In any event, he may direct the commanding officer to alter the charge, or obtain further evidence. At home stations, in all cases of fraud, indecency and theft, the charge and summary of evidence must be submitted to the Judge Advocate General before trial is ordered. The convening officer may take steps to have the charge disposed of summarily instead of by court-martial if it can be legally so disposed of. If the case should be tried by court-martial, the convening authority may convene either a district or a general court-martial, depending upon the character of the offense, etc. The convening authority is cautioned against sending a case for trial unless there is a reasonable probability that the accused person will be convicted.

6. PREPARATION OF DEFENSE BY ACCUSED

As soon as is practicable, and not less than 24 hours before trial, the accused must be furnished with a summary or abstract of the

evidence and appraised of his rights in connection with the preparation of his defense. He is permitted free communication with any witnesses and with any "friend," defending officer, or legal advisor. At least 24 hours before trial, he must be furnished with a copy of the charge-sheet.

If so desired, the accused may obtain a list of the officers who have been detailed to form the court; he may arrange for the services of counsel to represent him at the trial. If he intends to be represented by counsel he must give notice to that effect so that the convening officer may, if he considers it desirable, obtain the services of counsel on behalf of the prosecution.

7. RIGHTS, DUTIES, AND FUNCTIONS OF COUNSEL.

In general, both the prosecutor and the accused are allowed to have counsel who may be either barristers-at-law, advocates, solicitors, law agents, a defending officer, or a "friend of the accused." With the exception of the "friend," counsel have the same right as the prosecutor or the accused for whom he appears, to call and orally examine, cross-examine, and re-examine witnesses, to make any objections to statements, to address the court, to offer any plea, and to inspect the proceedings. The "friend of the accused" may advise the accused on all rights and suggest questions to be put to witnesses, but he cannot examine or cross-examine the witnesses or address the court. In the event that the accused elects not to take the witness stand, he may make a sworn statement in defense, but counsel is not permitted to make such statement for him. Neither the prosecutor nor the accused has any right to make an objection to counsel, if properly qualified. In cases of real military exigency, when the accused has been unable to procure counsel, the convening authority may also dispense with assigning a defending officer.

8. ASSEMBLY OF COURT

As soon as the court has been assembled, the convening order will be examined to insure that all members are present and qualified; that the legal minimum is present; that members are of required rank; and if the accused is amenable to the jurisdiction of the court.

The convening authority may have appointed waiting members, who replace absent or challenged members except the president; if he is challenged, report must be made to the convening authority who appoints a new president. There may also be detailed members under instruction to sit with the court, but have no vote. This is a method for qualifying officers for future court duty.

Where a judge advocate has been appointed, and a judge advocate must be appointed at every general court-martial, the court must ascertain if he has been duly appointed and is not disqualified. In the United Kingdom, the Judge Advocate General appoints the judge advocate; elsewhere the convening officer makes the appointment.

9. JUDGE ADVOCATE

The warrant authorizing an officer to convene courts-martial may authorize him to appoint the judge advocate. In the case of a general court-martial held in the United Kingdom, the warrant will not give him such power, and application must be made to the Judge Advocate General. Where the warrant so authorizes, the convening officer, shall, in the case of a general court, and may in the case of a district court, by order appoint a fit person to act as judge advocate. Any officer who is disqualified from serving on a court-martial, is also disqualified to act as judge advocate.

The judge advocate sits with the court in open and closed sessions but has no vote on the findings and sentence. He may be a permanent officer of the Judge Advocate General's Department, a barrister usually with prior military experience who is given a temporary commission, or sometimes a civilian judge, who sits in wig and gown.

The powers and duties of a judge advocate are as follows:

(a) The prosecutor and the accused are entitled to his opinion on any question of law and procedure relative to the charge or the trial, whether he is in or out of court, subject, when he is in court, to the permission of the court;

(b) At a general court-martial, he represents the Judge Advocate General;

(c) He is responsible for informing the court of any informality or irregularity in the proceedings. Whether consulted or not, he will inform the convening officer and the court of any informalities or defect in the charge, or in the constitution of the court, and will give his advice on any matter before the court;

(d) At the conclusion of the case, he will, unless both he and the court consider it unnecessary, sum up the evidence and advise the court upon the law relating to the case befor the court proceeds to deliberate upon the finding;

(e) Upon any point of the law or procedure which arises upon the trial which he attends, the court should be guided by his opinion, and not disregard it, except for very weighty reasons. The court are responsible for the legality

of their decisions, but they must consider the grave consequences which may result from their disregard of the advice of the judge advocate on any legal point;

(f) The judge advocate has, equal with the president, the duty to see that the accused does not suffer any disadvantage because of his position, weakness or incapacity, to examine or cross-examine witnesses, or otherwise, and may for that purpose, advise the court that witnesses should be called or recalled for the purpose of being questioned by him on any matters which appear to be necessary or desirable for the purpose of eliciting the truth;

(g) In fulfilling his duties, the judge advocate must be careful to maintain an entirely impartial position.

10. THE PROSECUTOR

The Rules of Procedure state that the prosecutor must be a person subject to military law. The selection of the prosecutor is subject to the approval of the convening officer. The convening officer must not appoint himself as prosecutor. A prosecutor with experience and knowledge of military law should be selected and should, as far as possible, be relieved from his ordinary military duties so that he can fully administer the case. It is the duty of the prosecutor to assist the court in the administration of justice; to behave impartially; to present the whole of the facts before the court; and not to take any unfair advantage of or suppress any evidence in favor of the accused. The prosecutor may not comment at any time on the failure of the accused or his wife to give evidence. He will make no reference to any matter not relevant to the charge or not before the court. He must prove affirmatively any facts intended to show the innocence of the accused or lessen his offense. He must not introduce matters of aggravation in the evidence against the accused, nor that are irrelevant to the charge against him. The prosecutor must always inform the court if the accused has elected trial by court-martial instead of being dealt with summarily by his commanding officer. As heretofore stated, the prosecutor, in the ordinary case, is entitled to have counsel assist him at the trial.

11. OPENING OF THE COURT

The public, including the press, may be admitted to courts-martial like other courts of justice in England, but it has inherent power to sit in camera if such is considered necessary. The convening order is read by the president or the judge advocate (if any) and the accused is then asked whether he objects to be tried by the president or any of the officers whose names have been read. The Army Act and

Rules of Procedure contain elaborate provisions as to the mode of inquiring into and disposing of objections made on behalf of the accused. A successful objection to the president necessitates the adjournment of the court and a reference to the convening authority in order that a new president may be appointed or a new court convened.. If, upon successful objection to a member, no waiting member who is eligible and qualified is available to fill the vacancy, the court normally adjourns, but may possibly continue with the trial provided thare is a legal minimum of members present. If there have been successful objections to members making adjournment necessary, the convening authority may convene a new court since the trial is not considered begun until the court is sworn.

As soon as all objections are disposed of and the court is finally constituted, the members and the judge advocate will be sowrn. Likewise, any shorthand writer and interpreter will be sworn. The accused has a right to object to the shorthand writer or interpreter, but not to the judge advocate.

Any member of a court who has been absent during any part of the evidence ceases to be a member and no officer can be added to a court after the accused has been arraigned.

12. ARRAIGNMENT OF THE ACCUSED

Arraignment consists of the reading of each charge separately to the accused and asking him whether he is guilty or not guilty of it. The judge advocate or, in his absence, the president, conducts the arraignment. If there are several charges on one charge-sheet, the accused may claim separate trial on each or any of them, on the ground that unless so tried, he will be embarrassed in his defense.

If there is more than one charge-sheet, the court cannot arraign the accused on any subsequent charge-sheet until their finding on the first charge-sheet has been arrived at.

Before pleading to any charge, the accused may object to the charge as not disclosing an offense under the Army Act or as not being in accordance with the Rules of Procedure. If the court allows the objection, they mayadjourn to consult the convening authority who may amend the charge and direct that the trial be proceeded with.

The accused, before pleading to a charge, may offer a plea to the general jurisdiction of the court and give evidence in support of that plea. The objections and pleas referred to having been disposed of, the accused's plea to the charge will be recorded. This will

normally be either "guilty" or "not guilty." The accused may refuse to plead or plead unintelligently, in which case a plea of "not guilty" will be recorded. In addition, the accused may offer a plea in bar of trial, stating that he has been previously acquitted or convicted on the offenses charged, or that such offense has been previously condoned by competent military authority or that the trial is barred by lapse of time.

If the accused pleads "guilty," the president or the judge advocate (if any) must, before recording the plea, carefully explain to him the nature of the charge and the effect of his plea. He is also to be informed that he is entitled to make a statement in mitigation of punishment and call witnesses as to his character. He must also be informed that if he desires to prove provocation or extenuating circumstances, he should plead "not guilty."

The court cannot accept a plea of "guilty" in a casewhere the accused is liable, if convicted, to be sentenced to death.

When the court proceeds with a plea of "guilty," a summary or abstract of the evidence is read and sufficient evidence will be recorded to cover any deficiencies in the summary or abstract. The accused or his counsel or defending officer may make a statement in reference to the charge and in mitigation or punishment, and witnesses as to character may be called. If it appears from the above that the accused did not understand the effect of his plea, the court must enter a plea of "not guilty," and proceed with trial.

13. TRIAL ON PLEA OF NOT GUILTY

Before proceeding with the trial, the court must grant the accused an adjournment, if he requests it, in order to prepare his defense if the court considers it proper to do so.

The prosecutor should always make an opening address if the case is a complicated one, and the court should require that such address be made. He should explain the circumstances of the charge, and outline the evidence to be called in support of it.

The witnesses for the prosecution are then called. After the direct examination, a witness may be corss-examined by or on behalf of the accused, and re-examined by the prosecutor on matters raised by the cross-examination. The president, judge advocate (if any) and with the permission of the court, any member of the court, may question a witness at any time before he withdraws. (Such questions are not to be put until after the re-examination by the prosecutor.)

If witnesses testify, the evidence is taken down in narrative form unless it is believed desirable to take down question and answer verbatim.

Before a witness withdraws, the whole of his evidence as recorded must be read to him to insure its accuracy; he may then make further explanations or corrections.

After all the evidence for the prosecution has been given, the accused must be told that he may, if he wishes, give evidence as a witness, and that if he does so, he will subject himself to corss-examination and to being questioned by the court. He must also be told that he need not give sworn evidence, but can make a statement not sworn and in his defense if he desires to do so. He should be informed that sworn evidence will naturally carry more weight with the court than a statement not sworn to.

The accused will then be asked if he wishes to call witnesses in his defense, either as to facts or as to character. The correct procedure to be followed thereafter will depend upon the answers which he has given. (Note: The timing of the prosecutor's summing up, the accused's statement in defense, the testimony of the accused himself, the testimony of witnesses as to fact or as to character, depends upon the answers the accused gave to the questions outlined above. Since it is only a matter of procedure and form as to when these statements and evidence will be given, and since the rules in relation thereto are detailed and complicated, it is believed to be unnecessary to set them forth in detail.)

Where an opening address by or on behalf of the accused is permitted, the details of such address should be directed mainly towards the evidence to be called for the defense. If the accused elects to testify in his own behalf, he will be examined by his counsel or defending officer or, if not represented, will tell his story, being assisted by the court, if necessary, to present it in proper form. The accused, of course, is subject to cross-examination by the prosecutor, and may be questioned by the court.

If the accused elects to make his statement in his defense without being sworn, he cannot be cross-examined by the prosecutor or questioned by the court or any other person.

Witnesses for the defense will be examined by the accused or his counsel or defending officer, cross-examined by the prosecutor, and re-examined; they may also be questioned by the court.

An accused person is at liberty at any time to withdraw a plea of "not guilty" and plead "guilty."

When all evidence has been given and answers made, the judge advocate (if any) will sum up, unless both he and the court consider a summing up to be unnecessary. Summing up must be impartial, but the judge advocate may, at his discretion, comment on the failure of the accused to give evidence.

14. CONSIDERATION OF FINDING

The finding must be considered in closed court. The court must make a finding on every charge upon which the accused was arraigned, including any alternative charge.

The court must decide whether the facts and the particulars of each charge have been proved in evidence, and, if proved, whether they disclose the offense stated in the charge itself, or some other offense of which they may find the accused guilty.

The court having arrived at a decision as to the facts of the case, have power, in case of doubt as to the legal effect of such a decision upon the charge preferred, to refer to the confirming authority for an opinion upon the matter before recording their finding. (Note: The following notation from the Manual of Military Law, page 58, is of considerable interest: "68. The court in considering their decision must not be influenced by the conisderation of any supposed intention of the convening officer in sending the accused for trial by a particular kind of court-martial. In ordinary cases the convening authority will have decided no more than that a prima facie case against the accused is shown in support of the summary of evidence, and he will have formed no opinion as to the guilt of the accused. An acquittal, therefore, is not in itself a reflection upon the convening officer. Even if it were, it would afford no reason whatever for a court to convict, unless the evidence established the charge.")

The majority of votes will decide the issue, and the finding of the majority must be recorded as the finding of the court. If the votes given are equal, the accused will be deemed to be acquitted. The president has no second or casting vote.

A finding of acquittal is final; it cannot be revised, nor does it require confirmation by superior authority. In the case of an acquittal, the record of the proceedings must be forwarded to the officer who would have confirmed it if a conviction had resulted.

15. PROCEEDINGS ON CONVICTION

If the finding is "guilty," the court, for the purpose of determining the sentence, must, whenever possible, take and record evidence as to the character, age, service, etc., of the accused. This evidence must be given by a witness on oath. This witness may be cross-examined by the accused or his representative. Verbal evidence of bad character cannot be given by the prosecution.

The accused may offer evidence as to his good character at this time and the prosecutor may cross-examine such witnesses, even if he brings out evidence of the accused's bad character.

After all evidence as to character has been given, the accused or his counsel or defending officer, may address the court in mitigation of the punishment.

The court will then be closed and consider the sentence.

16. AWARDING OF SENTENCE

A court-martial has, in general, an absolute discretion as to its sentence. It can award the maximum punishment allowable for the particular offense charge, or such lesser punishment as is laid down on a graduated scale by the Army Act. One sentence only can be awarded in respect of all the offenses of which an accused person has been found guilty; and where an accused person has been found guilty of several charges, a sentence which can legally be awarded in respect of one of them will be valid notwithstanding that it cannot legally have been awarded in respect of the others.

If the accused has elected to be tried by a district court-martial instead of submitting to the summary jurisdiction of his commanding officer, his punishment should not, in ordinary circumstances, exceed that which the commanding officer had power to award. (The Manual points out to the court that in deliberating on a sentence they should bear in mind that the purpose in awarding punishment is for the maintenance of discipline; that the rank of an officer must be considered; that the previous convictions must be considered; and that where there is a prevalence of a certain type of offense within a particular command or territory, it might be necessary to make an example of the accused. The court must not presume that the convening authority, in sentencing the case for trial, took a more serious view of the facts than they themselves take.)

In exceptional cases, the court in awarding a sentence may make a recommendation to mercy. In voting on the sentence, an absolute majority of the members must be secured. The sentence of death may not be passed without the concurrence of at least two-thirds (2/3) of the members. In the case of an equality of votes, the president has a second or casting vote.

When the sentence has been decided upon it will be recorded upon the proceedings, and signed by the president, and the judge advocate (if any). The judge advocate, or if there is none, the president, must then forward the proceedings to the confirming authority, or the person directed in the convening order to receive them.

17. CONFIRMATION AND REVISIONS

A finding of guilty and the sentence consequent therein, are not valid until confirmed by superior authority. Until promulgation the accused will be in ignorance of the sentence awarded. (Provision is made whereby he is to be informed prior to confirmation if a sentence of death has been passed).

The finding and sentence of a district court-martial are confirmed by an officer authorized to convene general courts-martial, or deriving authority to confirm from an officer authorized to convene general courts-martial.

The finding and sentence of a general court-martial are to be confirmed by His Majesty, or by an officer deriving authority to confirm, either immediately or mediately from His Majesty. This authority, where given by the King, is given by the warrant representing power to convene courts-martial.

The warrant issued to an officer in the United Kingdom excludes power to confirm a sentence of death, penal servitude, cashiering or dismissal in the case of a commissioned officer, and a sentence of death or penal servitude in the case of a soldier, which consequently requires confirmation by the King.

The warrant issued to an officer commanding abroad usually gives authority to confirm the finding, and sentence of general courts-martial, and to delegate that power. In some cases the warrant may reserve for confirmation by the King the finding and sentence when a commissioned officer is sentenced to death, penal servitude, cashiering or dismissal.

Every officer empowered to convene general courts-martial has authority to confirm the finding and sentence of district courts-martial and to delegate that power.

Upon receipt of proceedings which require to be confirmed, the confirming authority, before confirming, may direct the re-assembly of the court for the purpose of revision of the finding or sentence or either of them. Only one revision can be ordered; the proceedings and revision must be in closed court, and no additional evidence can be taken.

If the finding is sent back for revision, and the court does not adhere to it, they must revoke it and record a new finding. If the finding is revoked, they must also revoke the sentence, and if the new finding revokes a sentence, (i.e., is not an acquittal), must pass a new sentence, which must not be more severe than the original sentence.

If the sentence only is sent back for revision, the court may not revise the finding nor pass a more severe sentence than that originally awarded.

As a conviction and sentence are not valid until confirmed, a refusal of confirmation operates to annul the whole trial. In such a case, the accused has not been convicted and may legally be tried again. In cases requiring confirmation by His Majesty and where such has been withheld, a re-trial cannot be ordered unless directions by His Majesty for such re-trial have been issued; in other cases in the United Kingdom where confirmation has been withheld, re-trial should not be ordered until the Judge Advocate General has first been consulted.

If the confirming officer considers that the proceedings of a court-martial are illegal, or involve substantial injustice to an accused person, he will withhold his confirmation. It is proper for the confirming officer to withhold a confirmation, either wholly or in part, and then refer the proceedings to a superior authority competent to confirm them.

The confirming authority has no power to alter or amend the finding, whether originally or revised, of a court-martial. After one revision, or if he does not order a revision, he can only confirm it or refuse confirmation, and any superior authority to whom he may refer the proceedings for confirmation is in the same position.

Similarly, the confirming authority cannot alter the finding of a court on a plea in bar of trial or on a finding of insanity, both of which require confirmation to support their validity.

The confirming authority may, with relation to the sentence of courts-martial, whether or not they have been revised:

a. Mitigate,

b. Remit,

c. Commute,

d. Vary a sentence informally expressed or in excess as regards its duration of punishment allowed by law,

e. Suspend the execution of the sentence, or

f. Suspend the operation or commencement of a sentence.

The stoppage of the operation of a sentence, however, can only be exercised by the confirming officer if he is a "superior military authority" and only where the sentence is one of penal servitude, imprisonment, or detention. (A "superior military authority" means the Army Council and any general or air officer or brigadier whom the Army Council may appoint for the purpose, or the officer in chief command of any force employed on active service beyond the seas and any general officer or brigadier whom he may appoint for that purpose.)

18. PROMULGATION

The charge, finding, and sentence and any recommendation to mercy must be promulgated to the accused as soon as there is confirmation or non-confirmation of the proceedings. Even after the promulgation the confirming authority may direct the record of conviction to be erased, thereby relieving all of the consequences of the trial, if he thinks that the proceedings were illegal or that circumstances have arisen which show that the accused should not have been guilty, or that the conviction involves substantial injustice to the accused.

If, after the promulgation, a sentence is found to be invalid, the authority who would have had power to commute it had it been valid, (in normal circumstances the confirming officer), may pass a valid sentence which will be executed as a valid sentence passed by the court, provided that such substituted sentence is not higher in the scale of punishments than the punishment awarded by the invalid sentence, or, in the opinion of the authority awarding such substituted sentence, in excess of the invalid sentence.

After the confirmation, the punishment awarded can only be mitigated, remitted, or commuted by the King, the Army Council, or the officer specified in the Army Act or prescribed by the Rules of Procedure for that purpose. (The general officer commanding-in-chief the command in which the trial took place; the officer in charge of administration of that command; the general officer commanding-in-chief the command where the offender may, for the time being, be; the officer in charge of administration of that command; and the general or other officer commanding the division in or with which the offender, for the time being, be.) But this power cannot be exercised by an officer inferior to the authority who confirmed the sentence. An officer in the United Kingdom has no power to mitigate, remit, or commute a sentence passed by a general court-martial in the United Kingdom except as regards sentences less than dismissal in the case of an officer, and less than penal servitude in the case of a soldier. In the case of a court-martial held elsewhere, he can only do so if his command is not inferior to that of the officer who confirmed the sentence, unless in either case, he acts under orders from superior authority.

After confirmation, all sentences of penal servitude, imprisonment, or detention can, in appropriate cases, be suspended by "superior military authority."

After promulgation, court-martial proceedings must be forwarded for safe custody to the office of the Judge Advocate General in London, or of the Judge Advocate General in India (if the trial was in India), or, in the case of trials of men who are Royal Marines, to the Admiralty, where they must be preserved for not less than seven (7) years in the case of general courts-martial, and three (3) years in the case of district courts-martial. The proceedings of a trial which has ended in an acquittal of the accused will be forwarded to the same general authority.

19. APPEALS

A right of "appeal" in the ordinary sense of that term exists only where it is expressly conferred by statute; and no such right of appeal to any court (either civil or military) is given against the decision of a court-martial. However, it is open to any officer or soldier who considers himself aggrieved by the finding or sentence of a court-martial to forward a petition to the confirming or any reviewing

authority through the usual channels. If such petition regards any question of law, it should, in the United Kingdom, be referred to the Judge Advocate General. Independent of any such petition, the proceedings of all general and district courts-martial, before being filed in the office of the Judge Advocate General, are carefully reviewed as a matter of course with a view to detecting any illegality or miscarriage of justice. In the case of illegal or unjust punishments awarded by a commanding officer or by an authority dealing summarily with a charge, the Rules of Procedure make provision for their cancellation, variation, or remission by superior military authority.

Notwithstanding the absence of a right of appeal, military tribunals are of a great extent subject to the control and supervision of their superior civil courts. Broadly speaking, the civil jurisdiction of the courts of law is exercised against a court-martial as a tribunal in applications for "prerogative" writs, (e.g. mandamus, prohibition, certiorari, and habeas corpus), and against individual officers in actions for damages.

20. FIELD GENERAL COURTS-MARTIAL

a. Convening

The foregoing discussion has primarily been confined to general and district courts-martial. It has left out an exceptional kind, termed firld general court-martial. This may be convened, without any warrant giving power to convene, by:

(1) Any officer commanding a detachment or force of troops abroad or out of the United Kingdom; or

(2) The commanding officer of any corps or portion of a corps on active service; or

(3) Any officer in immediate command of a body of forces on active service.

If troops are not on active service, the power of convening a field general court-martial is limited to cases of offenses committed out of the United Kingdom by persons under the command of the convening officer and of offenses against the person or property of some inhabitant of, or resident in, the country where the offense was alleged to have been committed. Subject to this rule, the court can try any offense but it cannot try the civil offenses of treason, murder, manslaughter, treason-felony or rape, if committed in the United Kingdom.

The court should not, as a rule, be convened for the trial of an offense not committed on active service, in any place where ordinary civil justice is being administered.

During World War II, after July, 1940, the whole British Isles were held "on active service," because of air raids and danger of invasion, and trials were held by field general courts-martial. The district court-martial was not widely used.

An officer, before convening a field general court-martial for the trial of a person, must be satisfied that it is not practicable to try the person by an ordinary court-martial, and - where the officer is below the rank of field officer and is not a commanding officer - be further satisfied that it is not practicable to delay the trial for reference to a superior officer.

b. Composition

A field general court-martial is composed of not less than three (3) officers, provided that if, in the opinion of the confirming officer, three (3) officers are not available, two (2) officers are legally sufficient. If there are not three (3) other officers available, the convening officer may appoint himself president of the court, but if he is the confirming officer, he must appoint some other officer; provided that: he (1) must not appoint as president any officer below the rank of field officer, unless he is himself below than rank, or unless a field officer is not available; and (2) where he has power to appoint the president below the rank of field officer, he must not appoint an officer below the rank of captain, unless a captain is not available.

Members should have held commissions for not less than one (1) year. The provost marshal, an assistant provost marshal, and an officer to be prosecutor, or a witness for the prosecution, must not be appointed.

The convening officer, although not authorized to appoint a judge advocate in the case of another court-martial, may, in the case of any field general court-martial, appoint a fit person to act as judge advocate. A field general court-martial of at least three (3) officers has exactly the same powers as a general court-martial. The sentence of death requires the concurrence of all the members. If the court consists of but two (2) officers, such a court cannot award a sentence in excess of field punishment, or two years imprisonment with hard labor.

c. Military Exigencies

Normally the proceedings of the court will be reported according to a form specified by the Rules of Procedure. However, if military exigencies prevent its use, the court may convene and the proceedings carried on without any writing; except that a written record stating at least the name of the offender, the offense charged, the finding, sentence, and confirmation, and any recommendation to mercy, will be kept.

d. Charge

A statement of an offense may be made briefly, or in any length sufficient to describe or disclosean offense under the Army Act. No

formal charge-sheet is necessary, but the convening officer may direct the separate trial of two or more charges; or the accused, before pleading, may apply to be tried separately on any one or more of such charges. If an accused objects, the objection will be disposed of in the manner already discussed for other courts-martial.

e. Oaths

The previous discussion relating to the administering and taking of oaths and the taking of solemn declarations for other courts-martial shall apply to every field general court-martial.

f. Arraignment

When the court are sworn, the judge advocate, (if any), or the president, will state to the accused then to be tried, the offense with which he is charged, with, if necessary, an explanation giving him full information of the act or offense of which he is charged, and will ask the accused whether he is guilty or not of the offense. The rules already discussed for other courts-martial and procedure on pleas of "guilty" or "not guilty" will apply in the case of a field general court-martial. The accused may also make a plea to the general jurisdiction of the court and, if considered by the court to be proved, it will be reported to the confirming officer.

g. Trial Procedure

The procedure to be followed in calling, or re-calling, or questioning of witnesses, or the order in which witnesses are to be examined and addresses are to be made by the prosecution, or by and on behalf of the accused, or as to the Rules of Evidence, considerations of the finding, right of accused or prosecutor to counsel, etc., will, according to the Rules of Procedure, "so far as practicable, apply as if a field general court-martial were a district court-martial."

h. Acquittal

In the case of an equality of opinions on the finding, the accused will be acquitted. The finding of acquittal requires no confirmation, and the accused will thereupon be released from custody.

i. Sentence

The court, if consisting of three or more officers, may award any sentence which a general court-martial can award; but if the court passed sentence of death, the whole court must concur. The court, if consisting of two officers, may given any sentence authorized for that offense, but not exceeding field punishment, or two years imprisonment with hard labor.

j. General Provisions - Votes and Powers

Except as heretofore noted, every question will be determined by a majority vote, and in case of equality, the president will have a second or casting vote.

If, after commencement of the trial, the court considers that any accused person named in the schedule to the order convening the court should be tried by an ordinary court-martial, the court may strike the case of that person out of the schedule.

The proceedings shall be held in open court in the presence of the accused, except on any deliberation among the members and the judge advocate (if any), when the court may be closed. The court may adjourn from time to time and may, if necessary, view any place.

k. Confirmation

Except in the case of acquittal, the finding and sentence of the court shall be valid only insofar as they are confirmed by proper military authority.

The provost marshall or an assistant provost marshal cannot confirm the finding or sentence of the court.

The prosecutor or a member of the court cannot confirm the finding or sentence of the court except that if he is a member of the court and otherwise has power to confirm, and is of the opinion it is not practicable to delay the case for the purpose of referring it to any other officer, he may confirm the finding and sentence.

The finding and sentence of a field general court-martial will, when troops are not on active service, be confirmed by an officer authorized to convene general courts-martial. When troops are on active service, the senior officer present, if of field rank, or, if not of that rank, the senior officer not below the rank of field officer present at any other place, may confirm the finding and sentence.

If the sentence is one of death, or penal servitude, it must, after confirmation, be referred to the officer in chief command in the field where the accused is present, and the sentence must not be carried out pending his decision. But if communication with that officer is impracticable or so difficult as to cause too great a delay, a sentence of death or penal servitude may be carried into effect if confirmed by the officer (not below the rank of field officer) commanding the force with which the accused is present.

Any officer may, if he thinks it desirable, reserve any finding or sentence for confirmation by superior authority.

A confirming authority cannot send back a finding and sentence for revision more than once; nor recommend the increase of a sentence, and on any revision the court shall not take further evidence nor increase the sentence.

21. RULES OF EVIDENCE FOR COURTS-MARTIAL

The Army Act provides that the Rules of Evidence to be adopted in proceddings before courts-martial shall be the same as those followed in civil courts in England. This applies to field general courts-martial as well as to general or district courts-martial. In deciding questions of law, a court-martial should be guided by the advice of the judge advocate (if a judge advocate has been appointed), and should not disregard it except for very weighty reasons.

It is not within the province of this report to discuss the Rules of Evidence which have been adopted in the courts of ordinary criminal jurisdiction in England. For the most part, these rules are the same as those applied in state and federal courts in the United States. In the British Manual of Military Law there is set forth a chapter on the law of evidence for the guidance of members of the court, the prosecutor, the judge advocate, and the accused. The material therein is ably prepared in a readable manner so that the average officer without legal training can acquaint himself with the basic rules.

22. SUMMARY PUNISHMENT

a. Arrest

An officer or a soldier may be placed under arrest, either open or closed. As a rule this will not be done without investigation of the circumstances tending to criminate him, though cases may occur in which it would be necessary to do so. His arrest must be reported without delay to the proper superior military authority.

b. Investigation by Commanding Officer

The commanding officer (e.g. company or troop or battery commander) of the accused must immediately conduct an investigation of the case where any person subject to military law has been placed under arrest.

The case of an officer may be referred to a court of inquiry, and need not, unless the officer requires it, be formally investigated by his commanding officer; but the commanding officer, in the case of an officer as well as a soldier, is responsible for dismissing the charge if it ought not be proceeded with, and if it ought to be proceeded with, for taking the proper steps.

The investigation must be conducted in the presence of the accused. After the nature of the offense charged has been made known to the accused, the witnesses will be examined. In every case where the commanding officer has power to deal with the case summarily, the accused has a right to demand that the witnesses against him be sworn; and he will also have full liberty of cross-examination.

The commanding officer, after hearing the evidence, may be of the opinion that no offense has been made and will dismiss the charge. Otherwise, he must give the accused an opportunity to speak in his own defense and to call any witnesses he may desire. The commanding officer will then decide whether to dismiss the case or deal summarily with it himself, or adjourn it for the purpose of having the evidence reduced to writing with a view to having the case tried by court-martial.

If the accused is an officer or warrant officer, the commanding officer, being powerless to award summary punishment, must refer the matter to higher authority. (See discussion, infra).

c. Right of Soldier to Claim Court-Martial

If the commanding officer proposes to deal with the case summarily, otherwise than by awarding minor punishment, he must ask the soldier whether he desires to be dealt with summarily or to be tried by district court-martial; and the soldier may, if he chooses, thereby elect to be tried by district court-martial. Punishment becomes more than "minor punishment" when a pay forfeiture is imposed.

d. Summary of Evidence

With a view toward ultimately referring the case for court-martial, the commanding officer may determine, after hearing evidence for the accused as well as for the complainant, that it is desirable to reduce the evidence to writing. The evidence given by any witnesses will be taken down in the presence of the accused and the accused must be allowed to cross-examine within reasonable limits. When all the evidence for the prosecution has been taken, the accused, before he makes any statement, must be warned as to his right to speak or remain silent. Any statement or evidence of the accused will be taken down but he will not be cross-examined upon it.

If the commanding officer so directs, or if the accused so demands, the evidence will be taken on oath. After the summary of evidence has been taken, the commanding officer must consider it and determine whether to remand the accused for trial by court-martial. It may be that upon reading the evidence, the commanding officer will conclude that the case is one which ought to be disposed of summarily. In such a case, unless the accused has himself elected to be tried by district court-martial, the commanding officer will either re-hear the case and dispose of it summarily, or, if he is not competent to do so,

without leave from superior military authority, will refer it to the proper authority. In any other case, he will remand the accused for trial by court-martial, and send to superior authority an application for a district or general court-martial, accompanied by the summary of evidence, the charge or charges upon which the accused is to be tried, and other documents.

At home stations, in all cases of fraud, indecency and theft, the charge and summary of evidence must be submitted to the Judge Advocate General before trial is ordered.

e. Power of Punishment

(1) Soldier

The power of a commanding officer to award summary punishment to a soldier is twofold: (1) To award detention, deduction from ordinary pay, and in the case of drunkenness, a fine not exceeding two pounds, and in case of offenses committed on active service, field punishment and forfeiture of pay for not more than twenty-eight (28) days; and (2) power to award minor punishments of confinement to barracks, extra guard or piguets or admonition. Detention must not exceed twenty-eight (28) days.

Under the terms of the Army Act, a non-commissioned officer cannot be awarded field punishment of forfeiture of pay by his commanding officer, but he may be awarded summary punishment of deduction from pay (subject to the right to claim trial by court-martial) and the minor punishments of severe reprimand, reprimand, or admonition. A non-commissioned officer may be ordered to revert from an acting rank to his permanent grade, or may be removed from his appointment and reverted to his permanent grade, but this power of removal, if the non-commissioned officer's permanent rank is higher than that of corporal, shall not be exercised without reference to superior authority.

A commanding officer may delegate to company commanders the power of awarding fines for drunkenness and certain minor punishments for any offenses which he himself may deal with.

The commanding officer of a detachment, if of field rank, has, unless restricted by superior authority, the same power of awarding summary punishment as the commanding officer of a corps.

(2) Officers

A commanding officer (e.g. company, troop, battery) has no power to punish an officer or a warrant officer.

No field officer can be dealt with summarily except by a general or air officer authorized to convene a court-martial, or by an officer not under the rank of lieutenant general.

Officers below the rank of lieutenant colonel and warrant officers may be summarily dealt with by an officer authorized to convene a general court-martial, by an officer (not under the rank of major general) appointed for that purpose by the Army Council, and also in the case of a force on overseas service, the general or air officer commanding the force and any officer (not under the rank of major general) appointed for that purpose by him, provided that, subject to such restrictions as the Army Act may direct, the powers exercisable by a major general appointed for that purpose may be exercised by a brigadier if so appointed. The following punishments may be awarded to an officer:

(a) Forfeiture of seniority of rank.

(b) Forfeiture of service for promotion.

(c) Severe reprimand or reprimand.

(d) Any deduction from pay authorized by the Army Act.

In the case of a warrant officer, one or more of the following punishments may be awarded:

(a) Forfeiture of seniority of rank.

(b) Severe reprimand or reprimand.

(c) Deduction from ordinary pay as authorized by the Army Act.

If an officer having power to deal summarily with an officer or warrant officer determines that he will so deal with the case, the accused has a right to elect trial by court-martial if the proposed summary sentence is to be other than severe reprimand or reprimand. No officer can elect trial by court-martial under any other circumstances.

The authority having power to deal summarily with the case of an officer may, with or without hearing the evidence, dismiss the charge, if at his discretion, he thinks that it ought not to be proceeded with, or where he thinks the charge ought to be proceeded with, take steps to bring the offender to a court-martial. He may, after hearing the evidence, deal with the case summarily. This is, of course, subject to the right of the offender to elect trial by court-martial in the event that authority intends to award a summary punishment in excess of severe reprimand or reprimand.

f. Effect of Summary Punishment

When once an offender has been punished, or the charge has been dismissed, he cannot be tried by a court-martial for the same offense.

g. Minor Punishment

Wholly apart from the summary punishment proceedings heretofore discussed is a system of awarding "minor punishments." The award of such punishment does not give the offender a right to elect to be tried by court-martial. A commanding officer may award minor punishment in the form of a reprimand, or admonition to a non-commissioned officer, or award up to fourteen (14) days' confinement to barracks or camp to a private soldier. A commanding officer may delegate to his subordinate officers power to award minor punishment, except confinement must be limited to seven (7) days in barracks or camp.

23. FIELD EXPERIENCE

During active service in the European Theatre of Operations in World War II, the British Army military justice system maintained two types of courts, the general court-martial and the field general court-martial. Since there is no Summary Court in the British System, commanders in the field made good use of their power to award summary punishments for minor offenses.

The British corps, commanded by a lieutenant general, was the lowest level to which courts-martial jurisdiction was granted and to which judge advocate sections were assigned. In corps, the staff judge advocate held the rank of major with one assistant of the rank of captain. They were legally trained and functioned similarly to a staff judge advocate in the U. S. Army.

In armies, commanded by full generals, the staff judge advocate was a lieutenant colonel, with a major and a captain as his assistants. In a British army group, commanded by a field marshal, the staff judge advocate was a full colonel or a brigadier and he had a large staff of assistants.

After the trial of a case the record was reviewed for legal sufficiency by the judge advocate of the corps in which the case arose, but records in general court-martial cases were passed upon by the army group judge advocate, and then sent to the Judge Advocate General in London for final approval. Death sentences and long terms of confinement could be approved by army group commanders after review, but in the case of death sentences, corps commanders could exercise the privilege of obtaining the approval of the Crown.

Cases proposed for trial were investigated and passed on to the corps judge advocate for study. If he determined that there were legal grounds for trial, e.g. a prima facie case, he would advise the convening authority to appoint a court for trial.

EXHIBIT B

BRITISH NAVAL COURT-MARTIAL PROCEDURES *

1. INTRODUCTION

Authority for the establishing of British Naval Courts-Martial stems from the Naval Discipline Act of 1922 (12 and 13 Geo. 5.c.37), as amended. The procedure and practice of Naval Courts-Martial are regulated by the Act, and the rules framed thereunder, set out in the King's Regulations and Admiralty Instructions. The Naval Discipline Act of 1922 has been only briefly amended since 1922 and is modeled after a prior act, called An Act To Make Provision For The Discipline Of The Navy, passed by Parliament on 10 August 1866.

2. TYPES OF NAVAL COURTS

In time of peace, discipline in the British Navy is enforced by only one court, called the Court-Martial. In time of war, the Act provides for an additional court, called the Disciplinary Court. Both in time of peace and in time of war, there is provision made by the Act for summary punishment. (This corresponds to mast punishment in the United States Navy, as provided for under the Articles for the Government of the Navy.)

3. SUMMARY PUNISHMENT

Offenses, which are not capital, tryable under the Naval Discipline Act (with a few exceptions expressly provided for in the Act), may, if not committed by an officer, be summarily tried under such regulations as the Admiralty from time to time issue. The offender will be tried and punished by the officer in command of the ship to which the offender belongs at the time either of the commission or the trial of the offense. The commanding officer, however, does not have power to award as punishment penal servitude or imprisonment or detention for a period of longer than 3 months. Men on shore duty or in Naval barracks may be similarly tried and punished by their commanding officer. In the case of subordinate or petty officers, Section 57 of the Act provides for disciplinary measures involving forfeiture of time or seniority, disrating or dismissal from the ship to which the offender belongs, or reprimand.

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* Most of the material presented herein has been condensed from the Admiralty Memorandum on Naval Court-Martial Procedure (1937 ed.).

4. DISCIPLINARY COURT

Section 57A of the Naval Discipline Act provides that in time of war, where a Naval officer has been guilty of a disciplinary offense, the officer having power to order a Court-Martial may, if he considers that the offense is of such a character as not to necessitate trial by Court-Martial, and in lieu of ordering a Court-Martial, order a Disciplinary Court to be constituted. The constitution of and procedures for a Disciplinary Court will be set forth later in this memorandum.

5. NAVAL COURTS-MARTIAL

A Court-Martial may be held either to inquire generally into the circumstances of the loss, capture, wreck or destruction of one of His Majesty's Ships, or to investigate a specific charge.

a. Convening Authority

The Admiralty has power to order Courts-Martial to be held for trial of offenses under the Act and to grant a commission to any officer of the Navy which authorizes him to order Courts-Martial to be held. However, if such an officer with a commission to order Courts-Martial is present at a place where a Court-Martial is to be held, but there is an officer superior in rank to himself and in command of a vessel at that place, then the officer superior in rank will convene the Court-Martial, even though he holds no commission for the purpose. Moreover, if an officer holding a commission from the Admiralty to order Courts-Martial has command of a fleet or squadron and is for official reasons absent from his command, the officer upon whom the command devolved will have power to order Courts-Martial even though he holds no commission from the Admiralty.

b. Constitution of Courts-Martial

(1) A Court-Martial consists of not less than five nor more than nine officers.

(2) No officer shall sit who is under 21 years of age. No officer shall sit unless he be a flag officer, captain, commander, lieutenant commander, or lieutenant.

(3) No court for the trial of a captain is duly constituted unless the president of the court is a captain or of higher rank and the officers composing the court are commanders or officers of higher rank.

(4) In case of a trial of a person below the rank of captain, the president must be a captain or of higher

rank and in addition, if the person to be tried is a commander, two other members of the court must also hold the rank of commander or higher.

(5) The act specifically prohibits the prosecutor from sitting on any Court-Martial for the trial of a person whom he prosecutes.

(6) The convening authority shall not be empowered to sit on a Court-Martial which he had ordered.

(7) The president of the Court-Martial will be named by the convening authority.

(8) No commander, lieutenant commander, or lieutenant is required to sit as a member of any Court-Martial when four officers of higher rank and junior to the president can be assembled. (However, the regularity or validity of the Court-Martial will not be affected by the fact that any commander, lieutenant commander, or lieutenant has been required to sit). When any commander, lieutenant commander, or lieutenant sits, the members of the Court-Martial shall not exceed five in number.

(9) The convening authority will direct the president of the court to summon all officers next in seniority to himself, who are present at the place where the court is to be held, until the number of nine (9) or such number less than nine (9) but not less than five (5) as is attainable, are assembled.

(10) The convening authority also must direct that two (2) officers, lesser in seniority, who are qualified to sit or such further number as are likely to be required, shall be present as spare members when the court assembles.

(11) Each Court-Martial shall have a judge advocate. In practice there is normally present a duly appointed Judge Advocate of the Fleet or his Deputy who will sit on the court. If there is not available an official judge advocate, the convening authority must appoint a person to officiate as deputy judge advocate at the trial. In default of the appointment of a deputy by the convening authority, the president of the court may appoint a person to officiate as deputy judge advocate at the trial. (Note: There is no mention in the Act or Regulations of any legal training requirement for the judge advocate or deputy judge advocate.)

c. Place Where Trial Held

Courts-Martial will be held on board one of His Majesty's ships or vessels of war unless the Admiralty or convening authority directs that the court shall be held at a port or some other convenient place on shore.

d. Time of Sittings

Courts-Martial are required to sit from day to day with the exception of Sunday until sentence is given. However, adjournments for periods of six days may be permitted. Trials are not to be delayed by the absence of any member, providing no less than four (4) are present. No member will absent himself unless compelled to do so by sickness or other just cause and this must be approved by the other members of the court.

e. General Inquiry

In the case of a general inquiry into the loss or capture of one of His Majesty's vessels, a warrant may be issued by the convening authority without any complaint being addressed to him. No specific charge is made against anyone, and all the officers and crew can be tried by one and the same court; and all or any of them may be required to give evidence, but no one is obliged to give evidence which might tend to incriminate himself.

If the court is of the opinion that all or any of the survivors are not to blame, it must formally acquit them. If the court is of the opinion that the conduct of any person deserves censure, the finding must state in what respect blame is attributable to such person, and if the opinion that such person has committed an offense, the court must proceed in the prescribed manner (outlined hereafter) as for a person found guilty of such offense.

f. Proceedings Before Trial Where A Specific Charge is Made

(1) Circumstantial Letter

When an offense is believed to have been committed after an investigation of the facts and circumstances, a Circumstantial Letter is forwarded to the convening authority through channels. The Circumstantial Letter must report the circumstances

on which the charge or charges are founded and in sufficient detail to show the real nature and extent of the offense. Regulations point out that the letter must not refer in any way to the previous character or conduct of the offender, nor at any time to facts prejudicial to the offender other than such as bear directly on the charges. The Circumstantial Letter is the basis upon which the convening authority must decide as to the desirability of ordering the Court-Martial. Moreover, the Letter is the means by which the accused is informed of the facts which are alleged against him. Accompanying the Circumstantial Letter is a further letter outlining (a) the charge or charges drawn in accordance with the prescribed form so as to fall under the particular section of the Naval Discipline Act involved; (b) a list of witnesses for the prosecution; (c) a summary of evidence in support of the charges (the regulations point out that the evidence which each witness can offer should be set forth directly with the name of the witness); (d) various official papers pertaining to the offender's record of service.

(2) Act of Convening Authority

Upon receipt of the Circumstantial Letter and accompanying papers, the convening authority then must decide if a Court-Martial should be ordered. He must satisfy himself that the charges are correct and sufficient, are properly framed and carefully drawn, and that if not contradictory or not explained, will properly insure a conviction. If he determines that a Court-Martial should be held, he will issue a warrant to his selected president of the court directing the president to assemble a court. Once the court is assembled, he will then return to the president the Circumstantial Letter and the accompanying charge or charges. In no case will the court be furnished with a summary of the evidence. The convening authority then sends copies of the charge or charges, the Circumstantial Letter and summary of the evidence to the judge advocate or deputy judge advocate. The convening authority also will order a provost marshal to take the accused into custody and safely keep him until the trial.

Normally, it is the duty of the captain of the ship to which the accused belongs to act as prosecutor, but if for any reason, it is undesirable or impossible that he so act, the convening authority appoints a competent person to act as prosecutor. (Note: No mention is made in the Act, Regulations or Instructions of the desirability of having an officer with legal training act as prosecutor). As a general

rule, it is not desirable that the captain act as prosecutor in any complicated case in which he may be a principal witness for the prosecution or may be thought to be biased against the accused for a personal reason. (Note: Regulations are not clear as to whether a prosecutor must be appointed in every case. They state that it is desirable that a prosecutor be appointed so that the evidence may be brought before the court in the best possible manner. The Regulations further point out that in the event there is no prosecutor, the court and the judge advocate shall ask such questions of the witnesses as may be necessary to present the whole case fully before the court.)

(3) Notification of Accused.

It is the duty of the judge advocate to give notice in writing to the accused of the time and date of the trial and to tell him that it is competent for him to give evidence in his own behalf. He shall also furnish the accused a copy of the charges, Circumstantial Letter, list of witnesses for the prosecution, and a summary of evidence in support of the prosecution. He shall also inform the accused that any witnesses whom he may desire to call shall be summoned on his behalf. In communicating the summary of evidence to the accused, the judge advocate must also inform him that the document only summarises the most material points in the witnesses' evidence. If the Circumstantial Letter, charges, etc., have not been furnished to the accused twenty-four (24) hours before trial, this fact must be recorded in the minutes of the proceedings, together with a statement of the pressing circumstances which prevented their being so furnished. However, in the case of mutiny, the trial may take place immediately after commission of the offense.

The accused may have a person or persons to assist him during the trial, whether an officer, legal advisor or any other person. In case the accused is below the rank of officer, and has not obtained the help of anyone, the Regulations state that it is the ordinary duty of his commanding officer to "watch the case on his behalf and assist him should he desire it." If the accused person is an officer and is unable to obtain the help of anyone, the convening authority details a suitable officer to assist him.

(4) Notification of the Prosecutor.

It is the duty of the judge advocate, prior to trial, to inform the prosecutor of the date and time of the Court-Martial and to furnish him a copy of the charge, if the charges submitted have been amended by the convening authority. (In the normal case, the prosecutor is familiar with the charges and the evidence against the accused, since he normally is the officer who prepared the Circumstantial Letter, etc.)

(5) Summoning of Witnesses.

It is the duty of the judge advocate to take necessary steps to procure the attendance of the witnesses whom the prosecutor and the accused may desire to call and whose attendance can be reasonably procured. Witnesses not subject to the Naval Discipline Act, who are summoned, shall be paid their reasonable expenses. If it is reasonable to believe the accused will plead "guilty," the judge advocate may refrain from summoning witnesses. If the accused, contrary to expectations, pleads "not guilty," or his plea of "guilty," is not accepted by the court, the court may adjourn to enable the witnesses to be summoned to attend.

(6) Additional Duties of the Judge Advocate.

(a) Both the prosecutor and the accused are entitled to the opinion of the judge advocate on any question of law relating to the charge or trial. If the question is asked in court, the judge advocate must obtain the court's permission before rendering his opinion.

(b) Whether consulted or not, the judge advocate must inform the convening authority and the court of any informality or defect in the charge or charges or in the constitution of the court.

(c) Whether his opinion is asked or not, the judge advocate must advise the court on questions relating to Naval Law, procedure of courts-martial, common and statute law, rules of evidence, and rules and regulations of the service generally.

(d) The judge advocate must maintain an entirely impartial position. He does not act as prosecutor. He sees to it that the accused is not put at a disadvantage because of his position and if the accused is incapable of examining or cross-examining witnesses, with the approval of the court, the judge advocate may question witnesses or even call witnesses.

(e) It is the judge advocate's responsibility to see that the proceedings of the court are recorded in the prescribed form. It is the general practice to employ a court stenographer.

(f) It is also the duty of the judge advocate to administer the oath to all witnesses, as well as the members of the court.

g. Procedure at the Trial.

(1) In general.

Courts-Martial are public and open to all persons, except witnesses who have been summoned to give evidence. However, the Regulations provide that if public safety or defense of the Realm, etc., requires that the public be excluded in whole or in part, the court may so order. If such order is made, the sentence, if any, will be read in open court.

(2) Opening Court.

At the opening of the court with the accused, prosecutor, and others present, the judge advocate reads the warrant for assembling the court, the list of officers composing the court, and the names of the officers excused from attendance for official reasons.

(3) Challenges to the Court.

After the judge advocate reads the list of officers composing the court, he asks the prosecutor and the accused if either have any objections to any members of the court. The following rules apply in the case of objections both by the prosecutor and the accused: (1) Neither can object to the judge advocate; (2) Any member may be challenged on any ground which affects his competency to act as an

impartial judge; (3) Objections to members are decided separately and all members, whether objected to or not vote as to the disposal of the objection. Majority vote of the members decides the issue. (Note: Apparently even a member against whom an objection has been raised is permitted to vote on the issue of his own competency); (4) If an objection is allowed, the member at once retires and his place filled before the next objection is considered; (5) If an objection is allowed against the president, the court must adjourn until a new president has been appointed by the convening authority; (6) If a member is objected to on the ground of being summoned as a witness, and it is shown that he will give evidence as to facts and not merely as to character, the objection must be allowed; (7) After the objections to the members have been disposed of, the judge advocate must ask the accused if he has any other objections respecting the constitution of the court. If so, such objections will be decided by the court.

(4) Administration of Oaths.

As soon as all matters of objection to the court have been disposed of, the judge advocate administers the oath to the members of the court, and the president of the court administers the oath to the judge advocate. If the court has found it desirable to employ a shorthand writer, the judge advocate will administer his oath.

(5) Functions of Counsel for the Accused.

The person assisting the accused may advise him on all points. As to the examination of the accused himself, witnesses for the defense or cross-examination of witnesses for the prosecution, the "friend of the accused" may do so only if permitted by the president of the court. In the normal case, he may suggest questions to the accused which should be put to the witnesses and may read the accused's defense or statement in mitigation of punishment. Regulations advise that the president should ordinarily give the "friend of the accused" permission to examine the accused as a witness on his own behalf in complicated and difficult cases. In a simple case, it is more desirable that the accused takes the stand as a witness on his own behalf, that he give his evidence in his own words without prompting by his counsel. In general, the "friend of the accused," may address the court on behalf of the accused.

(6) Commencement of Trial.

The trial commences by the judge advocate reading the charge and the Circumstantial Letter. The accused will not be called upon to plead to the charge or charges. However , he may plead "guilty" if he so desires.

(a) Effect of plea of "guilty".

If the accused pleads "guilty," he is deemed to have admitted the accuracy of all the material statements contained in the Circumstantial Letter. Before the court proceeds to deliberate on the sentence, the accused may make a statement in mitigation of punishment. In the event that his statement amounts to a plea of "not guilty," or the court should find that the accused does not understand the effect of a plea of "guilty" or the court feels because of circumstances of the case, a proper sentence cannot be awarded unless the facts are investigated, the plea of "guilty" will not be accepted and the trial will continue as if the accused had not pleaded. Otherwise, the plea of "guilty" will be accepted and nothing further remains for the court but to determine the sentence. However, after a plea of "guilty," the court must permit the accused to call witnesses, if he desires to prove any fact, in mitigation of punishment.

(7) Examination of Witnesses.

(a) In General.

If the accused did not plead "guilty," or if the plea was not accepted, the trial proceeds with the witnesses for the prosecution being first called. No witness will be called who was not included in the original list of witnesses by the prosecution, unless the judge advocate has already given notice to the accused that such witness will be called and provided accused with a summary of the evidence the witness will offer. However, the court at any time may call any witness it desires. Witnesses will not be present in court during any part of the proceedings unless by special permission of the court, except when under examination or when the court re-opens for the reading of the findings and sentence. Each witness will be sworn or will make an affirmation if the taking of an oath is contrary to his religious belief.

(b) Competency.

The prosecutor is a competent witness. A member of the court, whether he has been previously objected ot or not, is competent but will thereafter be disqualified unless his evidence has been given after the conviction and was directed merely to the good character of the accused.

(c) Testimony.

Examination of all witnesses will be oral, except in the case of a material witness who through sickness has been unable to appear before the court. (In that case, the court will adjourn and the evidence will be taken on oath before a Magistrate or Counsul in the presence of the judge advocate, the accused, the accused's advisor and the prosecutor. Full opportunity will be given for cross-examination. This evidence, thus taken in writing, may then be presented to the court.)

(d) Order of Examination.

Witnesses are first examined by the person calling them, then they are subject to cross-examination by the opposite party. They may then be re-examined by the person calling them on matters which arose out of the cross-examination and, finally, they may be examined by the court and the judge advocate. It is permissible for the accused to postpone his cross-examination of any witness so long as it is not for the purpose of obstruction. The court and the judge advocate have power to question any witness at any time during the examination-in-chief, or cross-examination. The court also has the power to recall witnesses. The prosecutor is cautioned to do his part in the cross-examination of the accused and his witnesses so that the court does not find it necessary to ask questions of the accused or his witnesses which might tend to weaken or break down the defense. The reason for this is that it might result in the court appearing to depart from its attitude of strict impartiality.

(e) Medical Witness.

At the conclusion of the defense, the court may call a medical officer to render professional opinion as to the state of health or sanity of the accused. However, such witness should not be called to give evidence which would be in reply to the defense nor can such witness pronounce an opinion as to the guilt of the accused.

(f) Calling of Witnesses.

The prosecutor is not required to call all of the witnesses whom he has listed, but he must call any that the accused desires to be called in order that the accused may cross-examine them. Such witnesses must be called before the prosecution closes its case.

(g) Objections to Questions.

Whenever either side makes an objection to a question, the court must rule on its admissibility and it will be admitted or rejected after they have made their decision.

(h) Contempt of Court.

Whenever it appears that a witness is perjuring himself or behaving with contempt, he is warned by the president that he will be liable to imprisonment or detention for such prevarication or contempt. (Any trial for such actions in contempt of court will be separate from the main trial and at a later date).

(8) Rules of Evidence.

The rules of evidence as applied in English civil (both criminal and non-criminal) courts apply to Naval courts-martial. The function of a judge in English civil court as to the relevancy and admissibility of evidence is performed by the court in Naval Courts-Martial, upon the advice of the judge advocate; the function of the jury in an English civil court is performed by the Naval court alone. It is not within the province of this memorandum to summarize the vast rules of evidence as applied in English civil courts as well as Naval Courts-Martial. However, a few rules peculiar to the Naval Courts-Martial are as follows: (1) The "summary of evidence" which is supplied to the judge advocate is not brought by him or the prosecutor to the attention of the court; (2) Evidence cannot be given by the prosecutor of statements made by any witness at a preliminary investigation unless such statements lead up to a confession or denial on the part of the accused. (This is not to be construed so as to prevent the cross-examination of witnesses with the object of showing that the evidence they are giving to the court is inconsistent with statements made in the preliminary investigation); (3) No part

of the Circumstantial Letter can be accepted as evidence of the facts stated therein except in case the accused pleads "guilty"; (4) Evidence of previous bad conduct on the part of the accused cannot be introduced unless it involves the present charge, except that evidence of previous bad conduct may be submitted as an element of consideration when punishment is being awarded; (5) Minutes of a Court of Inquiry or any decision, statement or answer to a question made or given in such a Court of Inquiry, shall be admissible as evidence against the accused. However, if the accused neglects to give such evidence, he may be cross-examined by the prosecutor as to any statement made by him at a Court of Inquiry.

(9) Amendment of the Charge.

If at any time after the court has been sworn, but before the finding, the court is satisfied:

(a) That there is essential variance between the charge or charges and the evidence, or

(b) That a charge drawn under Section 28 of the Act would have been more appropriately drawn under Section 43;

the court may direct the judge advocate to amend the charge or charges, provided the accused will not be prejudiced and that, if the accused so requests, the adjournment is directed so that the accused may prepare to meet the amended charge.

(10) The Defense.

(a) Adjournment.

After the prosecution has closed its case and the court has examined any witnesses it had called, the accused, on his application, may obtain a reasonable time for the preparation of his defense. The court adjourns during this time and may agains adjourn from time to time upon application of the accused.

(b) Statement in Defense.

When the accused is ready to proceed with the trial and the court is assembled, the ensuing procedure depends upon whether the accused is to take the witness stand and call other witnesses.

1. Accused Elects to Testify: (No other witnesses).

The Criminal Evidence Act of 1898 applies to Courts-Martial, and neither the accused nor his wife may be called as witnesses unless they consent. If the accused elects to testify, he may do so. In a simple case, he ordinarily will testify in his own words and not in answer to questions from his counsel. In a complicated case, by permission of the court, counsel for the accused testifies, he may be cross-examined by the prosecutor. Following cross-examination, the prosecutor will then sum up orally or in writing. The accused then makes his statement in defense, orally or in writing. If oral, it may be given by his counsel. If in writing, it must be signed by the accused.

2. Accused Elects Not to Testify But Calls Witnesses.

a. Only Character Witnesses.

At the close of the case for the prosecution, the prosecutor sums up. The accused then makes his statement in defense, if any, after which he calls his character witnesses.

b. Other Defense Witnesses.

If other witnesses are to be called, but no character witnesses, the accused will open the defense by making his statement in defense, following which the defense witnesses will be examined. The accused or his "friend" may then sum up if desired. The prosecutor will then sum up. In the event accused makes no statement, the prosecutor will sum up after the close of the accused's case.

3. Accused Testifies and Calls Other Witnesses.

In the event the accused elects to testify, and also call other witnesses than merely character witnesses, the procedure is as follows:

At the close of the case for the prosecution, the prosecutor will sum up. The accused may then make his Statement in defense, after which he will himself testify. Following his own examination, the witnesses in his behalf are examined. The accused, or his "friend," may then sum up if so desired.

4. Form of Statement if Accused Does Not Testify.

Even though the accused elects not to take the witness stand, he is permitted to make a Statement in defense, either orally or in writing. This does not make him subject to cross-examination. It does give him an opportunity to put before the court his own version of the matters charged.

If the "friend of the accused" makes the Statement in defense, and the accused is not taking the witness stand or calling any witnesses, the "friend" may not state as a fact anything which has not been proved, or facts which he does not propose to prove. This limitation does not apply if the accused makes his own Statement.

(11) Close of Trial.

(a) Opinion of the Court.

Voting by the court, on any question, is oral. The junior member votes first, then the others in order of seniority to the president. The vote of the majority, except for judgment of death, decides the question. If the members disagree, and the vote is equal, the construction most favorable to the accused prevails. For judgment of death, at least four members, where the number does not exceed five, and in other cases, not less than two-thirds of the members, must concur.

(b) The Finding.

After the courtroom is cleared, the court considers the evidence, and, if so directed, the judge advocate draws up questions whereon to form a determination as to the guilt or innocence of the accused. The judge advocate then draws up the finding which all members will sign (even though some may have disagreed), and

the judge advocate will countersign. It is competent for the court (1) to find, where intent is of the essense of the charge, an intent less grave than the intent charged; (2) in certain cases to find the accused guilty of a lesser offense of the same class on a charge of a greater; (3) to find that the accused is insane; or (4) to record a verdict of acquittal.

The court is re-opened, the accused brought in, and the judge advocate reads the finding.

If the accused is found guilty, the court, before awarding punishment, may call for evidence as to the previous character of the accused, and shall consider his service record, log entries, etc. The accused may, at this time, make a statement in mitigation of punishment.

(c) The Sentence.

1. All members vote on the punishment, whether they had voted for acquittal or not.

2. The court may forward to the convening authority a recommendation that the sentence be suspended.

3. The judge advocate draws up the sentence. It is signed by all members and countersigned by the judge advocate. The court is re-opened, the accused brought in, and the judge advocate pronounces the sentence. The court is then dissolved.

(12) Report of Proceedings.

(a) The judge advocate transmits the minutes of the proceedings, all documents and the original sentence to the commander-in-chief, or senior officer, who transmits them to the Admiralty. If the accused was an officer, the commander-in-chief or senior officer upon receipt of the proceedings, makes an immediate brief report by telegraph to the Admiralty.

(b) As soon as the court is dissolved, the president sends a letter to the convening authority reporting the finding and sentence of the court.

(13) Review of Sentence.

(a) Commander-in-Chief or Senior Officer.

If, after reviewing the record, there is any doubt as to the correctness of the finding or legality of the sentence, the commander-in-chief or senior officer present will avoid putting the sentence into execution or suspending it pending reference to the Admiralty.

The commander-in-chief or senior officer present will point out to the Admiralty and portion of the sentence or proceeding generally, which may appear to him of doubtful legality.

(b) The Admiralty.

All convictions by Courts-Martial are reviewed by the Admiralty. The sentence may already have been ordered executed by the commander-in-chief, senior officer or committing authority as the case may be. (Note: Except in case of mutiny, a death sentence will not be executed until the sentence has been confirmed by the Admiralty or the commander-in-chief on foreign station.)

(14) Sentence of Penal Servitude, Imprisonment or Detention.

(a) The convening authority may, in a proper case, suspend a sentence of penal servitude, imprisonment, or detention. Further, the offender will be notified that if his subsequent conduct is such as to justify a remission, it will be cancelled. In submitting the Court-Martial papers to the commander-in-chief or the Admiralty, the officer who ordered the suspension must state his reasons for so doing.

(b) The Admiralty or commander-in-chief may order such a sentence suspended.

(c) Suspended sentences remain in a state of suspension until a committal order is issued, or until the sentence is finally remitted. It remains suspended for no longer than twelve months, unless prior bad conduct of the offender has required committal.

(d) Suspended sentences are reviewed every three months, unless they have been put into execution in the meantime. If the offender is on a ship at sea, the review will be either by the commander-in-chief, or the officer who ordered the court-martial. All other cases are reviewed by the Admiralty. At the time of review, it will be decided whether the sentence is to still continue suspended or is to be remitted.

(15) Admiralty Review Powers.

Except in case of a sentence of death, which can only be remitted by the Crown, the Admiralty has power to suspend, annul, or modify and sentence. It can substitute a lesser punishment or remit the whole or any protion of the punishment, but it cannot increase the degree or duration of any punishment. (This does not affect the right of a commander-in-chief or committing authority to suspend a sentence or remit a suspended sentence. However, it does not appear that any lesser authority than the Admiralty can otherwise modify a sentence.)

(16) Appeals.

No provision is made for appeals either on the law or on the facts from the findings of Naval Courts-Martial. In practice, the minutes of all Courts-Martial are referred to the Judge Advocate of the Fleet for his report. On this report the Admiralty acts as it may be advised. (Note: One author submits that there is an inherent right of appeal to the Crown; that the question of jurisdiction may be tested by an action for false imprisonment or by action for a writ of habeas corpus. But no instance exists of a writ of certiorari being granted to bring up the sentence of a Naval Court-Martial. Section 1158, Vol. XXVIII, HALSBURY'S LAWS OF ENGLAND, SECOND ED.)

6. DISCIPLINARY COURTS. (To be convened in time of war only, for the trial of officers for offenses mentioned in Section 57A, Naval Discipline Act.)

a. Jurisdiction.

(1) Persons.

Officers borne on the books of any of His Majesty's ships in commission.

(2) Offenses.

The following specific disciplinary offenses may be tried by Disciplinary Courts whenever an officer having power to order a Court-Martial considers the offens does not necessitate trial by Court-Martial:

(a) Desertion of post, sleeping on watch, or negligent performance of duty.

(b) Disobedience of orders or using threatening or insulting language to his superior officer.

(c) Quarrelling or using reproachful speech or gestures.

(d) Desertion.

(e) Breaking out of ship.

(f) Absence without leave.

(g) Profanity, drunkenness and other immoralities.

(h) Acts to the prejudice of good order and Naval discipline.

b. Appointment of Court.

Disciplinary courts are appointed by warrant from the convening authority who is an officer having power to order Courts-Martial. The president is named in the warrant and cannot be below the rank of commander. The court shall consist of not less than three or more than five officer. At least one officer should be of the same relative rank as the accused, unless there are strong reasons to the contrary. The warrant shall contain the names of not less than two spare members.

c. Procedure Preparatory to Trial.

(1) Application for Trial.

A Circumstantial Letter, charges, etc., are sent to the convening authority in the same manner as in the discussion of trial by Court-Martial. This is necessarily so because the convening authority above decides whether the circumstances warrant trial by Court-Martial or by Disciplinary Court.

(2) Right of Accused to Counsel.

The accused may conduct his own case and he may have a person or persons to assist him during the trial, whether an officer, legal advisor or any other person.

(3) Duty of Convening Authority.

The convening authority forwards to the president, with his warrant, a copy of the Circumstantial Letter and the charge or charges. If, for any reason, the captain of the ship cannot act as prosecutor, the convening authority appoints one. He shall also appoint an experienced officer to act as clerk of the court.

(4) Clerk of the Court.

In Disciplinary Courts, the clerk of the court assumes the duties which are carried out by the judge advocate of a Court-Martial. Those duties discussed in the explanation of the Court-Martial include giving notice and furnishing documents to the accused, summoning witnesses, render advice to the prosecutor and the accused, advise the court, protect the accused and be responsible for the minutes of the trial.

In addition, he will furnish the accused with a list of officers appointed by the convening authority as members of the court. If the accused intends to object to any members he must so notify the clerk of the court not less than 12 hours before the time appointed for the sitting of the court. If no such notice is given, any objection made at the trial to any member may be disallowed.

d. Procedure at the Trial.

Trial procedure follows the same rules already discussed for Courts-Martial. Objections to members, administration of oaths opening of trial, functions of "friend of the accused," effect of plea of guilty, calling of witnesses, etc., are governed by the same regulations as Courts-Martial.

e. Examination of Witnesses and Evidence.

The order in which witnesses shall be called, who may examine them, and the Rules of Evidence to be applied in Disciplinary Courts follow the discussion of Courts-Martial.

f. The Defense.

The accused, in Disciplinary Courts, will conduct his defense and is entitled to the same protection as in Courts-Martial proceedings.

g. Amendment of Charge, Opinion of the Court, and Finding.

Charges may be amended, where necessary, at the trial as in trials by Courts-Martial. When voting, the vote of the majority of the court will decide each question as in Courts-Martial. Since Disciplinary Courts cannot award judgment of death, that phase of Courts-Martial cannot apply. Findings by Disciplinary Courts and their procedure when there is a finding of guilty are governed by the same rules discussed for Courts-Martial.

h. Sentence.

The following punishments may be inflicted:

(1) Dismissal from the service.

(2) Forfeiture of Seniority.

(3) Dismissal from the ship.

(4) Severe reprimand, or reprimand.

(5) Forfeiture of pay, bounty, prize money, allowances, annuities, pensions, gratuities, medals and decorations.

(6) Such minor punishment as are now inflicted according to Navy custom, or may from time to time be allowed by the Admiralty.

Voting on the sentence, preparation of sentence by the clerk of the court, announcing sentence, reports to convening authority and review of the sentence follow the same procedure as has been discussed for Courts-Martial.

i. Disposal of Minutes.

Minutes of the trial by Disciplinary Court are prepared and go through the same channels to the Admiralty as in the case of trial by Courts-Martial.

EXHIBIT C

THE 1919 ARMY COURT MARTIAL CONTROVERSY

1. INTRODUCTION

The purpose of the Exhibit is to set forth, in some detail, the principal arguments of the 1919 critics and defenders of the Army court martial system. Many of the arguments made at that time are equally pertinent to the present discussion of the Navy court martial system.

2. SOURCES

The material herein presented has been principally obtained from the following sources:

a. Critical of the Army system:

(1) Ansell, Military Justice, (1919) 5 Cornell L.Q.I.

(2) Morgan, The Existing Court Martial System and the Ansell Articles, (1919) 29 Yale L. J. 52.

(3) Report of The Committee on Military Law, filed with the Executive Committee of the American Bar Association, July 1919, 94 - 102 (Report of Minority Members).

b. In Defense of the Army System

(1) Military Justice During the War, A Letter from The Judge Advocate General of the Army to the Secretary of War, War Department, Washington, D.C., 1919. (Hereinafter referred to as "JAG Letter").

(2) Proceedings and Report of Special War Department Board on Courts Martial and Their Procedure, War Department, Washington, D.C., 1919. (Hereinafter referred to as the "Kernan Report").

(3) Report of the Committee on Military Law, filed with the Secretary of the Executive Committee of the American Bar Association, July 1919, pp. 36-47. (Hereinafter referred to as the "Bar Association Report").

(4) Bogert, Courts Martial: Criticism and Proposed Reforms, (1919) 5 Cornell L. Q. 18

(5) Wigmore, Some Lessons For Civil Justice to be Learned From Federal Military Justice, (1919) Md. Bar Assoc. Reports 188, 218.

These arguments may be outlined as follows:

3. ARGUMENTS CRITICAL OF THE ARMY COURT MARTIAL SYSTEM:

a. The existing system of military justice was archaic, autocratic, and un-American. The Articles of War had been hastily adopted by Congress to meet an emergency, and been copied with very little change from the British Articles of 1774, which in turn were almost a literal translation of the Roman articles.[1]

b. The existing system arose out of and was regulated by mere power of military command rather than the law. Though a highly penal code, the Articles of War did little more than authorize a commander to do as he pleased. By adopting the Articles of War, Congress had abdicated its constitutional prerogative to make rules for the government of the Army and had authorized military command to make such rules and apply them as it pleased, restrained by no law or judge.[2]

c. Courts martial were not courts at all, but mere creatures of the appointing authority, to aid him in the enforcement of discipline. Although the convening authority selected the members of the court, whom the accused could challenge only for cause and one at a time, the challenge being determined by the other members, the guarantees of impartiality of the convening authority and the court were inadequate.[3]

d. Members of courts were not learned in the law, and had no legal adviser but the trial judge advocate, who was primarily the prosecutor, and was usually of less rank and experience than the members of the court.[4]

e. The procedure for preferring charges and bringing an accused to trial were ineffective to prevent hasty or ill-advised action by officers exercising general court martial jurisdiction, the reference of trivial or ill-founded charges to general courts, and long arrest or confinement without trial.[5]

f. The control of the convening and other superior military authority over the court and its findings was almost absolute. The convening authority could overrule any decision or ruling of the court martial and order the court to proceed in accordance with his views. He could order reconsideration of an acquittal, with the result that even the ultimate conclusion of guilt or innocence was subject to his control.[6]

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1 Ansell, Military Justice, (1919) 5 Cornell L.Q.1. Although asserted as a fact by General Ansell, the last part of this proposition is of doubtful accuracy, and ignores the long history of the British Articles prior to 1774.
2 Id. at 3.
3 Id. at 6.
4 Id. at 8.
5 Id. at 11.
6 Id. at 12.

g. The proceedings of a court martial were not subject to judicial review. The only review was by the convening or superior military authority, who might have the benefit of legal advice from officers of the Judge Advocate General's Department, but was not required to follow it. Except in a case in which the statute required confirmation, or the proceedings were void for lack of jurisdiction, the action of the reviewing authority was final, and the only subsequent relief for an accused was by way of clemency.[7]

h. As a result, the sentences imposed by court martial were "shockingly harsh" and frequently "shamefully unjust."[8] General Ansell concluded his remarks by describing military justice as a "lawless" system, which resulted in oppression, gross injustice, and discipline through terrorization, and which was totally unsuited to our citizen armies.[9] Professor Morgan's conclusions were somewhat more restrained. They are worth quoting in full:

> "It therefore seems too clear for argument that the principle at the foundation of the existing system is the supremacy of military command. To maintain that principle, military command dominates and controls the proceeding from its initiation to the final execution of the sentence. While the actual trial has the semblance of a judicial proceeding and is required to be conducted pursuant to the forms of law, in its essence it is a mere administrative investigation; for the final determination whether the trial has been legally and properly conducted lies not with a judicial body or officer but with the military. In truth and in fact, under the system as administered by the War Department, courts martial are exactly what Colonel Winthrop has asserted them to be, namely,
>
> > 'simply instrumentalities of the executive power provided by Congress for the President as Commander-in-Chief to aid him in properly commanding the army and navy and enforcing discipline therein and utilized under his orders or those of his authorized military representatives.'
>
> "To be sure, the United States Supreme Court has held otherwise, saying that a court martial is a court of special and limited jurisdiction, and approving the following statement of Attorney General Bates:
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> > 'The whole proceeding from its inception is judicial. The trial, finding and sentence are the solemn acts of a court organized and conducted under the authority of

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7 Id. at 13.
8 Id. at 7.
9 Id. at 14.

> and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged according to law. (Runkle v. United States, (1887) 122 U.S. 543, 557, 7 Sup. Ct. 1141).'

> "But so long as the court martial, which, for this purpose includes reviewing and confirming authorities, does not exceed its special and limited jurisdiction, the civil courts are without power to interfere with its proceedings, findings or sentence. Consequently the military theory prevails and will continue to prevail until changed by legislation."[10]

Professor Morgan concluded his defense of the Chamberlain Bill by saying:

> "Obviously the basic principle of this bill is the very antithesis of that of the existing court martial system. The theory upon which this bill is framed is that the tribunal erected by Congress for the determination of the guilt or innocence of a person subject to military law is a court, that is proceedings from beginning to end are judicial, and that the questions properly submitted to it are to be judicially determined. As the civil judiciary is free from the control of the executive, so the military judiciary must be untrammelled and uncontrolled in the exercise of its functions by the power of military command. The decision of questions of law and legal rights is not an attribute of military command. Which theory should prevail in a country whose soldiers are citizens and whose citizens in every war must become soldiers?"[11]

4. ARGUMENTS IN DEFENSE OF THE ARMY COURT MARTIAL SYSTEM:

a. The military code of the United States was no more archaic than the federal civil criminal code.[12]

b. Military justice was not arbitrary, but proceeded by the application of strict rules, so drawn as to give equal and fair treatment to all men, and to protect them both against mere arbitrary discretion and the inflexible rigor of automatic penalties. Every record was carefully reviewed for legal error both by the reviewing authority and by the Judge Advocate General, and in serious cases by a

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10 Morgan, The Existing Court Martial System and the Ansell Letters, (1919) 29 Yale L. J. 52, 66, citing Winthrop, Military Law and Precedents (1886) 53

11 Id. at 73

12 JAG Letter, 20-21

board of review comprised of eminent lawyers and judges. Moreover, every accused enjoyed the privilege of automatic appellate review, granted in civilian justice only to those who sought it and could afford the cost.[13]

c. Command necessarily embraced and implied, not merely the right to direct and use the military force, but the duty and authority to make and maintain this force fit and suitable to its purpose by instruction, training and discipline. Good results could not be expected if command of armies were divorced from their training and discipline, command being reposed in one set of men while the creation and maintenance of discipline was placed in other hands. Since the real purpose of court martial was to enable commanders to insure discipline in their forces, rather than to "exemplify nicely technical rules of law," it might be questioned whether this end will be better served by taking the working of this agency out of the hands of those who, as soldiers, know much of discipline and something of military law, and putting it into the hands of those who as lawyers know much of law but little of soldiering, or of the discipline indispensable to successful soldiering.[14]

d. While the right of prescribing the fundamental rules for the government of armies has been lodged in the legislature, historically the execution and administration of those rules has always been vested in the hierarchy of command. This division of powers was recognized by our Constitution, which made the President Commander-in-Chief of the Army and the Navy. To take out of the hands of those to whom command was confided, from the President down, the effective use of courts martial as instruments to enforce discipline, and vest it in an independent agency, headed by a civilian court of appeals, as was proposed by the Chamberlain Bill, was an attempt to "emasculate the legitimate and theretofore undisputed authority of the President as Commander-in-Chief." As such it was open to serious question on legal and constitutional grounds. But, even if legally competent, the proposal to deprive a commander, who had the power to order men into battle, with death and mutilation of many certain, the antecedent authority to achieve such discipline as should minimize death and multiply the chances of victory, and to put it in the hands of one whose special qualifications was law and whose knowledge of disciplinary requirements might be of the slightest, should be a new departure the unwisdom of which was startingly apparent.[15]

e. Similarly, the proposal to give the staff judge advocate, or similar legal officer, power to decide whether a prosecution should be brought at all, to fix the sentence, or to suspend, modify, or vacate it, would "operate to take the discipline of the army outside of the commanding officers and place it in the hands of those who were practically civilians, who would not understand the soldier or his problems half as well as the officers who had fought with him, but who could be entirely unconcerned with the gigantic problem of making an army efficient and making an army fight."[16]

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13 JAG letter, at p. 13-18
14 Kernan Report, 6
15 Kernan Report, at p. 6-9.
16 Bar Association Report, (1919) 41.

f. Punishment by military courts is not at all for the sake of vengeance, nor, except in a very subordinate way, is it for the amendment or reformation of the offender: its great purpose, the one to which all other purposes are secondary, is to secure an efficient fighting unit by making it a disciplined one. This being the case, the punishment must be soundly adjusted to the needs of discipline as those needs exist at the time and place of its imposition. Punishment should be light when the offense is found to be comparatively innocuous to discipline, and drastic when efficiency is imperiled. "And this furnishes the conclusive argument for keeping the administration of military justice through the court martial agency in the hands of those officers who, being assigned to command troops, are thereby vested with the chief responsibility for the discipline and fighting efficiency of those troops. Per contra, it disposes of the theory that the lawyer rather than the soldier is the one to whom, by virtue of his expert legal knowledge, courts martial, as an adjunct of armies, should be delivered for administration."[17]

g. It was not true that soldiers could be put on trial by a commander's arbitrary act, without preliminary inquiry into the probability of the charge. The requirement of the Manual for Courts Martial that there be a thorough investigation prior to trial prevented this. Commanding officers had not in fact put on trial a needlessly large number of trivial charges.[18]

h. Members of courts martial are as well equipped, by training, knowledge, and background, to pass upon the questions which come before them as was the average civilian jury. Furthermore, all officers received training in military law. There would be no advantage in having enlisted men sit on courts. It would result in friction between the men, and enlisted men were generally opposed to the idea. The trial judge advocates and defense counsel used in courts martial were, so far as possible, officers trained and skilled in military law. During the war many, if not most of them, were lawyers by profession. It was not practical, however, during the war, to have officers of as high rank as the president of the court act in these capacities. As it was, the organization of courts martial was already a serious drain on the military efficiency of combat organizations. Whatever errors may have been made from time to time by inadequate defense counsel were cured by the system of automatic appeals.[19]

i. The staff judge advocate, whose duty it was to advise the convening authority, was an officer of field grade, specially trained in military law. It was his duty to prevent the occurrence of illegalities, and to enforce the law as fully on behalf of the accused as on behalf of the Government. It was not true that

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17 Kernan Report, at pp. 12-13.
18 JAG Letter, at pp. 21-24.
19 JAG Letter, at pp. 24-30; Bar Association Report, at p. 39.

military commanders failed to follow the advice of their responsible legal officers. Of the cases received in the Office of the Judge Advocate General during the war, in which modification or disapproval had been recommended on legal grounds either to the reviewing authority or to the Secretary of War, such recommendations had been followed in all but 2.6% of the cases. The failure of the Judge Advocate General to take final action in certain cases to set aside convictions was not attributable to any unsympathetic attitude on his part, but to the nature of the law under which his office had been established and his duties defined, under which his action was purely advisory and power to act finally on sentences was left where it had always been, with the commanding officer concerned.[20]

k. The power to return a case for reconsideration of a judgment of acquittal had been sparingly exercised, and in a majority of the cases the court had adhered to its findings. However, there was no real reason why the power should not be abolished, if that was desired.[21]

~~l~~. There was, in fact, no widespread injustice during the war, as had been alleged by critics of the court martial system. Offenses which to civilians seemed trivial, such as absence without leave for a short time, or disobedience of orders, could be of the utmost seriousness under battle conditions. Nor were soldiers harshly or inhumanly punished. Those guilty of purely military offenses, nearly always served indeterminate sentences in disciplinary barracks, with the opportunity of restoration to duty.[22]

m. The objection that there was too much variation in sentences imposed by courts martial was unsound. Such variation as existed was attributable to the different disciplinary and morale condition which prevailed in different commands and in different areas, and which were best known to the court and reviewing authority originally responsible for the sentence. Similar variations existed in the sentences of the civilian courts of the various states. Moreover, an effort had been made to equalize sentences, so far as consistent with the circumstances of each case, by the exercise of the clemency power.[23]

The conclusions of the Kernan Board were:

> "From the foregoing discussion it will be apparent that, in the opinion of this board, the existing court martial system is fundamentally sound and well calculated to serve successfully the ends for which it was created. It is an evolution representing constant change and growth. No claim is made that it is a perfect system;

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20 JAG Letter, at p. 47-62.
21 JAG Letter, at p. 32-34.
22 JAG Letter, at p. 18-20; Kernan Report, at p. 10.
23 JAG Letter, at pp. 43-46; Kernan Report, at pp. 10-12.

rather it is distinctly admitted that in the light of experience changes may be made now in the direction of improvement. Under it, errors in the proceedings, the findings, and in the measure of punishment occur from time to time. This has always been so and will always be so in some measure. But this is not peculiar to the court martial; it is true of all agencies created and administered by men. Military justice is carried out at times under great urgency and stress, where the nice deliberation and finish of the civil procedure is utterly impossible. For reasons already set out, we believe it unwise to take too seriously the criticisms of those who form conclusions at a distance and in the half light of the written record, shut out from much that would give vividness and understanding if they but had it to guide them, as those who actually tried the case did have.

"Writing long after the Civil War, an author who had probably examined with greater thoroughness than any other man the detailed history of military justice in that war gave this deliberate opinion in speaking of orders issued by military commanders:

> 'In the orders in which they act upon the proceedings and sentences of courts martial they exercise an authority expressly conferred upon them by statute, though here, too, they act practically as substitutes for the Commander in Chief. The very numerous orders, especially of the latter character, issued during the late war, are a monument to the fidelity to duty and scrupulous regard for justice which have in general characterized our high commanders in war as well as in peace. In the thousands of these orders published during that period from the headquarters of the various departments, divisions, districts, brigades, armies, and army corps the errors of law discovered have been strikingly few, and the cases in which justice has not clearly been duly administered most rare.'

"This board entertains no doubt that after the present hostile criticisms, hasty and sweeping and based upon carefully selected exceptions, has cooled off, the future and final judgment, resting upon fuller knowledge and formed under the benigh influence of a just perspective, will be much like the one just quoted."[24]

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24 Kernan Report, at pp. 13-14 citing Winthrop, Military Law and Precedents, (1886) 39.

EXHIBIT "D"

ENLISTED MEN AS MEMBERS OF COURTS-MARTIAL[1]

The French have one Noncom on the court for trial of a soldier. He is usually an adjutant, the highest noncom grade. The Germans (since 1933) have one or two judges of the same grade as the accused. The Swiss Court has six judges, three selected from the noncoms and privates of the division. It is not known if a court is so composed for trial of officers, but most countries follow the rule that no one should be tried by an inferior in rank. Great Britain, Canada, Holland, Belgium, Russia, Italy, and Japan do not have enlisted personnel as members of courts-martial.

The five-man committee of the American Bar Association, appointed in 1919, divided on this question, three being definitely against it. They reported that sergeants and privates to whom they had talked did not favor it, expressing the opinion that it would be hard for him on the "company street" if he sat on a jury. The majority also thought it would create friction between officers and men and had a distinct psychological disadvantage if privates had power to overrule by their verdicts the orders of their superiors and administer an unwritten law of their own. They also thought that there should be inculcated in enlisted men a habit of mind which looks to the officer for directions and considers him the trustee of the law. They found that "as a whole the officer is trusted and respected." (Report pages 38-39.) The two-man minority recommended that a general court consist of a President-Judge Advocate and, for the trial of a soldier, the balance of the court should be soldiers if the accused so requested in writing. (Report pages 94-95.)

The Kerman Board expressed its views as follows:

"The Chamberlain bill under the proposed article makes soldiers legally competent to serve on general and special courts. The Board does not concur in this proposal. The individual experiences and results of investigation and inquiry made by the board indicate that officers who have composed courts-martial are alert in relation to the rights and interests of enlisted men. The board is of the opinion that the proposed change is out of harmony with the American conception of democracy and of our confidence in our institutions. The change would seem to be more in harmony with that form of discipline which in Europe recently resulted in the establishment of soldiers' and workmen's councils. Court membership necessitates not only the intention to be fair and impartial, but the capacity to discern the truth, the ability to weigh evidence, and the experience to fix punishments, commensurate with the offense and with the need to deter others. These qualities usually imply education and experience on the part of the court members. In our armies under our democratic institutions the class of men who possess these qualities in the fullest measure are the officers for the reason that under the democratic tests made and applied for the creation of officers, the enlisted men who possess

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such qualities in the fullest measure become officers. The enlisted men of our armies have full confidence in the fairness and ability of officers to do justice as members of courts.

"There are other objections to the proposed change. Enlisted men in close comradeship, as they are, with the enlisted personnel of their units, would at times disclose the details of trials, how one or another officer voted or viewed a particular case, with obvious embarrassment to discipline. Service by enlisted men on courts-martial would interfere with their other work. Their inclusion would amount to a proclamation that the officers are unqualified to do justice to the enlisted men. Military courts constitute an agency for the maintenance of discipline, an agency which is one of command. The proposed change is away from this sound and necessary conception of discipline. (Report page 18.)

General Charles P. Summerall, Chief of Staff of the Army, 1926-30, testifying before a Senate Subcommittee on September 23, 1919, said: "There are presented to me certain essential differences in the proposed articles from the existing articles. The first in order is the composition of a court in which it is provided that soldiers are competent to sit on courts-martial. I do not believe such a provision is wise, or that it would produce the results which perhaps are sought. I believe the sentiment is general with officers to secure fair treatment and considerate treatment to our men. In my own experience, there is every desire to minimize the punishment of men, to secure justice, to preserve their confidence in discipline, and to maintain high standards of morale, self-respect, and contentment in a command. In the first place, I do not think that our enlisted men would be qualified by training or by their duties to sit as members of a court-martial. I doubt if the effect on them or on their associates would be such as to increase the confidence that they would have in a court, or increase their happiness in the command. Like any untried thing, it would be an experiment, and it is my opinion that it would not be a successful experiment.

Senator Warren: "What is your opinion as to the desire of the men themselves, if the matter was put before them whether they should have that duty?"

General Summerall: "I think a certain class would desire it, but it is my opinion that a great many would be opposed to it. Discipline is something that is peculiar to the military service, but it is the very foundation of the military service, and I am of the opinion that we should be very conservative in making radical departures from a system which has been vindicated in many varieties of circumstances. The change might succeed, but I doubt it. * * *

"I would not say to have any portion of it so composed; but to have a court composed altogether of enlisted men would be fatal to discipline. To have a court composed partly of enlisted men would be less injurious. The proportion here recommended might not have any effect upon the procedure at all."

Senator Warren: "How large do you feel that the proportion of enlisted men could be safely made? Or should a change be made at all?"

General Summerall: "I do not think it would do any good sir. I prefer the present Articles of War to those proposed, with respect to the composition and appointment of courts-martial." (Hearings Pages 350-51)

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General John F. O'Ryan, Commander of the 27th (New York National Guard) Division, said to the same committee on September 3, 1919, in answer to Senator Warren's question - 'With relation to private soldiers, enlisted men, serving as members of courts in trials of enlisted men and noncommissioned officers, what is your judgment as to the views of the men themselves, as to whether it would be desired by the enlisted force, or whether they would prefer to have it the way it is at present, being tried by all commissioned officers?' -

"I think I can answer that: I know I can answer that positively in my own division. The men were satisfied with the system of courts-martial as practiced in the division, and I have a strong impression that the same view existed throughout the Guard divisions and the Regular Army divisions. In other words, that the men would not care for and do not seek the opportunity to serve on courts.

"The phase of this subject that appeals to me most is this: Membership on a court implies that the officer detailed possesses experience, judgment, impartiality, and knowledge of the requirements and needs of the military service at the time. Now, under our democratic system it is the fact that in war our officers come from the ranks, and necessarily they are those in the ranks, or were those in the ranks, most fitted by education and other qualifications to become officers. Hence, if we put enlisted men on courts, we go into that class of the Army - knowingly go into it - where are to be found those least qualified in relation to these qualities to perform the functions of officers, detailed to courts.

"Then, I think, too, were enlisted men to be detailed as members of courts, it would be unfortunate in a disciplinary way. I think that their comrades would ask them how they and how the officers of the court voted, and I do not think that would be in the interest of discipline." (Hearings page 321)

Mr. J. B. W. Gardner, a graduate of West Point (1905) who served as an officer and for three years as an instructor of law there, and who was very critical of the relations of officers and men of the Army, said of this proposal:

"There are a few points in connection with this proposed bill, that from such experience as I have had, I am not entirely in accord with. I do not think that general courts, or in fact any courts, should contain enlisted men. As courts-martial are at present organized, junior officers are frequently, if not invariably, influenced by the opinion of their seniors on the court. This condition would be much aggravated if enlisted men, whether privates or noncommissioned officers, were to sit in such capacity. Moreover, such a step leans toward running one department of the Army to a soviet, and is, therefore, drawing too close to Bolshevism. It is my opinion that if through a proper legal code, adopted by Congress, wise restrictions are thrown around the power of

military command, in its administration of military justice, there will be no need for such a radical and questionable change in the Constitution of the Court. I think, therefore, that in this particular the bill goes too far, (Hearings page 370)

Major J. E. Runcie, retired, also a graduate of West Point and for four years an instructor in law there, who also in general advocated the Chamberlain bill, expressed himself on this question:

Senator Warren: "You have noticed, of course, in the Chamberlain bill, the proposition that in courts-martial - you were speaking of this trouble - that there may be included, or shall be included in fact, enlisted men, in the trial of enlisted men and noncommissioned officers."

Major Runcie: "Yes."

Senator Warren: "You were speaking of the inexperience and ignorance of officers, and of course that would apply below as well as above; and I agree with you that probably there is more trouble about that than about anything else."

Major Runcie: "Yes."

Senator Warren: "Would you like to tell us what you think about that proposition?"

Major Runcie: "I think it is a very doubtful expedient, because of course, as you very justly remarked, an enlisted man would be very much less competent, in general, to pass on those questions than an officer. And, again, in the Army as it now exists - I mean in time of peace, the enlisted man will probably be entirely subordinate to his officers who are on the courts." (Hearings page 32)

In testifying before the committee on April 9, 1946, General Jacob L. Devers, Commanding General of the Army Ground Forces, and formerly in command of the 6th Army Group in Germany, said: "Enlisted men are not detailed on courts-martial because it is a responsibility of command to maintain discipline. This is true in civil life as well as in the Army. The very sinew of enforcement comes from vested authority which ultimately climbs through the chain of command to the Commander-in-Chief. This principle of enforcement by seniors is applied alike to officers and enlisted men and no one is ever tried before a court constituted of equivalents or juniors in rank. This is as it should be because experience, judgment, and breadth of view will be found amongst those who have been trained for responsibility and who have shouldered responsibility rather than among those who have never had more than limited training and responsibility.

"In the enforcement of law and regulation, it has been found all to frequently that enlisted men on guard and military police are inclined to apply the 'live and let live' rule of enforcement of regulations. They will in the final analysis be only as good as the officer over them, and who has disciplinary control over them. Such men placed in a position of inviolability as a court member and with no responsibility for the continuting administration and discipline of the command may be inclined to let sentiment overrule judgment."

Lieutenant General Ira C. Eaker, Deputy Commander, Army Air Forces, favored enlisted men on courts, and proposed that court members be detailed from a qualified eligible list. His remarks are not available.

Of letters filed with the committee, 10 out of 38 favored enlisted men on general courts; of these ten, three of the writers claimed service in this war, and two in World War I. Out of 22 letters submitted by JAGD officers in ETO in response to a letter from the Branch Office inviting suggestions, only one recommended enlisted court members and he thought the sentence should not be voted by the court, but fixed by the reviewing authority.

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