

Uniform Code of Military Justice
Subject: Definitions - A.W. 1

I. Army Provisions

1. Articles of War

"ART. 1. Definitions.--The following words when used in these articles shall be construed in the sense indicated in this article, unless the context shows that a different sense is intended, namely:

(a) The word "officer" shall be construed to refer to a commissioned officer;

(b) The word "soldier" shall be construed as including a noncommissioned officer, a private, or any other enlisted man;

(c) The word "company" shall be understood as including a troop or battery; and

(d) The word "battalion" shall be understood as including a squadron.

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

"Article 1 is amended to read as follows:

"(a) The word 'officer' shall be construed to refer to a commissioned officer.

"(b) The word 'soldier' shall be construed as including a noncommissioned officer, a private, or any other enlisted man or woman.

"(c) The word 'company' shall be construed as including a troop, battery, or corresponding unit of the ground or air forces.

"(d) The word 'battalion' shall be construed as including a squadron or corresponding unit of the ground or air forces.

"(e) The word 'cadet' shall be construed to refer to a cadet of the United States Military Academy."

II Navy Provisions

1. Articles for the Government of the United States Navy

"B.73. Meaning of 'officers' and 'superior officers' as used in the Articles for the Government of the Navy.-- Within the meaning of the Articles for the Government of the Navy, unless there be something in the context or subject matter repugnant to or inconsistent with such construction, o f f i c e r s shall mean commissioned and warrant officers; s u p e r i o r o f f i c e r s shall be held to include petty officers of the Navy and noncommissioned officers of the Marine Corps in addition to the officers enumerated."

2. Proposed Navy Bill

"5(e) Whoever aids, abets, counsels, commands, induces, or procures the commission of any offense by another is a principal."

"ART. 48. The following words when used in these Articles shall be construed in the sense indicated in this article, unless the context indicates that a different sense is intended.

"(a) The word 'officer' shall be construed to refer to commissioned officer and warrant officer, male or female.

"(b) The words 'commanding officer' and 'officer in command' shall be construed to mean only an officer regularly ordered, detailed, or designated to command duty.

"(c) The words 'officer in charge' shall be construed to mean only an officer regularly ordered, detailed, or designated as officer in charge.

"(d) The words 'commissioned officer' shall be construed to include commissioned warrant officers, in addition to commissioned officers.

"(e) The words 'superior officer' shall be construed to include superior petty officers and superior non-commissioned officers of the naval service, in addition to superior officers of the naval service.

"(f) The words 'enlist', 'enlisted', 'enlistment', and 'enlisted person' shall be construed to include induct, inducted, induction, and inducted person, respectively, in addition to enlist, enlisted, enlistment, and enlisted person, respectively.

"(g) The words 'term of enlistment' shall be construed to include term of induction, in addition to term of enlistment.

"(h) Words used in the masculine gender shall be construed to include females as well as males."

III. Differences

Article of War 1 now in force defines the words "officer", "soldier", "company", and "battalion", and Public Law 759 enlarges two of these definitions and defines the word "cadet".

The present Articles for the Government of the Navy define the words "officers" and "superior officers."

Under a proposed revision, A. G. N. No. 48 would define the words "officer", "commanding officer", "officer in charge", "commissioned officer", "superior officer," "enlisted person" and allied terms, "term of enlistment," and provide that masculine terms shall include females.

The proposed naval bill also defines the word "principal" which is not defined in Articles of War.

The differences between the Articles of War, as amended, and the suggested amendment of the Articles for the Government of the Navy are these:

A. W. defines "officer" as a commissioned officer. The A. G. N. definition includes commissioned officers, warrant officers and females. Under established Army practice warrant officers are

not commissioned officers, and the Army has no counterpart for the Navy's commissioned warrant officer.

A. G. N. does and A. W. does not define the term "commanding officer", "officer in charge" and "superior officer." (But note that A. W. 46 provides for action by the "officer commanding for the time being").

A. W. defines "soldier" as including noncommissioned officers, privates and all other enlisted men or women. A. G. N. defines "enlisted" and allied terms as including inductees.

A. W. defines "company" as including a troop, battery, or corresponding unit. A. G. N. contains no such definition.

A. W. defines the word "cadet" (U. S. M. A.). A. G. N. contains no comparable definition.

As pointed out above, A. G. N. does and A. W. does not define the word "principal".

IV. Recommended Provision

The Army considers that the definitions contained in A. W. 1 serve a useful purpose and the proposal to include definitions in A. G. N. seems to recognize their value.

Modern penal codes seek to set forth clearly and concisely who are offenders and what are offenses without resort to judicial interpretation. Inclusion of needed definitions of terms would conform to this trend.

Unless warrant officers are given similar status in the Army, Navy, and Air Force, it will be necessary to treat them separately in formulating uniform definitions.

No great difficulty should be encountered in preparing a uniform definition of "commanding officer" and allied terms.

It seems obvious that the Navy proposal to include inductees in the definition of "enlisted men" is both appropriate and desirable.

Because of differences in organization some difficulty may be encountered in preparing a uniform definition applicable to all units, e.g. "company".

A definition of the word "cadet" for the Army and Air Force would seem to be practicable, but the corresponding Navy term is "midshipman".

No valid objection appears to a uniform definition of the word "principal".

V. Further Comment

Article of War 1, as now in force, provides that: "The following words when used in these articles shall be construed in the sense indicated in this Article unless the context shows that a different sense is intended, namely,:"

Then follow sub-paragraphs (a), (b), (c), (d), which define certain terms.

H. R. 2575, as reported to the House of Representatives by the House Committee on Armed Services, retains the introductory paragraph in A. W. 1, as quoted above (Report No. 1034, H. R. 80th Congress, 1st Session, page 14).

Apparently through an administrative oversight H. R. 2575, as passed by the House of Representatives on 15 January 1948, omitted

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the introductory paragraph in A. W. 1, as now in force and quoted above, and P.L. 759, 80th Congress, Title II perpetuates this omission. Therefore the effect of P. L. 759 is to eliminate the introductory paragraph from the present A. W. 1.

The Department of the Army believes that this language should be retained.

Uniform Code of Military Justice

Subject: Persons Subject to Military or Naval Law.
A. W. 2

I. Army Provisions

1. Articles of War.

a. "ART. 2. Persons Subject to Military Law.-- The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law', or 'persons subject to military law', whenever used in these articles: Provided, That nothing contained in this Act, except as specifically provided in Article 2, subparagraph (c), shall be construed to apply to any person under the United States Naval jurisdiction unless otherwise specifically provided by law.

"(a) All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same;

"(b) Cadets;

"(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: Provided, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

"(e) All persons under sentence adjudged by courts-martial;

"(f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia.

"Patients in the Army and Navy General Hospital, Hot Springs, Ark. (act of March 3, 1909; 35 Stat. 748.)*

"Personnel of the Coast and Geodetic Survey transferred to the service of the War Department. (Sec. 16, act of May 22, 1917: 40 Stat. 88.)

"Personnel of the Lighthouse Service transferred to the service of the War Department. (Act of August 29, 1916: 39 Stat. 602.)

"Inmates of the National Home for Disabled Volunteer Soldiers. (R. S. 4835.)**

"Personnel of the Public Health Service detailed in time of war for duty with the Army. (J. R. No. 9, July 9, 1917: 40 Stat. 242.)

"Inmates of the Soldiers' Home. (R. S. 4824.)***

"Civilian employees, Dig. J. A. G., February, 1918, p. 7; Dig. J. A. G. 1918, pp. 79, 195; Dig. J. A. G. 1919, pp. 13, 339.

"Members of Red Cross, Dig. J. A. G. April-December, 1917, p. 98; Dig. J. A. G. 1919, p. 96." (M.C.M., U.S. Army, 1928, p. 204.)

*For further legislative references see 24 U.S.C. 20.

**R. S. 4835 has been repealed; see 24 U.S.C. 137.

***This category of persons is covered by A.W. 2 (f); see 24 U.S.C. 54.

b. Additional statutory references influencing the jurisdiction over persons:

- (1) Inductees: Sec. 11, Selective Training and Service Act of 1940, 50 U.S.C., App. §311, construed in *Billings v. Truesdell*, 321 U.S. 542, 559, 1944; and Sec. 12, Selective Service Act of 1948 (P.L. 759 of 24 June 1948.)
- (2) Personnel of the Medical Department of the Navy serving with a body of Marines detached for service with the Army by order of the President: Act of 29 Aug. 1916, ch. 417, 39 Stat. 573, 34 U.S.C. 716; cf. sec. 8, M.C.M., U.S. Army, 1928, p. 8.
- (3) Lighthouse Service: Transferred to the Coast Guard by Reorganization Plan No. II, Sec. 2, 53 Stat. 1432, effective 1 July 1939, set out under 5 U.S.C. 133t; cf. also Act of 5 Aug. 1939, ch. 477, 53 Stat. 1216-12-17, and Act of 11 July 1941, ch. 290, 55 Stat. 585. Cf. 33 U.S.C. 757-758.
- (4) Commissioned corps of the Public Health Service when constituting a branch of the Army in time of war: Act of 1 July 1944, ch. 373, title II, Sec. 216, 58 Stat. 690, 42 U.S.C. 217.

- (5) Persons triable under law of war by military tribunals, including, but not limited to, spies: A.W. 12, cf. also A.W. 15 and 82.
- (6) Persons who, while in the Army, committed an offense against A.W. 94, and were then separated from the Army: A.W. 94.
- (7) Officers dismissed in time of war by order of the President and requesting trial by court martial: Sec. 1230 R.S., 10 U.S.C. 573. Cf. Military Laws of the United States, 8th ed., 1939, Sec. 227, p. 111.
- (8) Prisoners of war in Army custody: The law of war and the Geneva Convention of 27 July 1929 relative to the Treatment of Prisoners of War, Treaty Series No. 846, 47 Stat. 2021. Cf. Enemy Prisoners of War, War Department Technical Manual TM 19-500.
- (9) Persons in contempt of court: A.W. 32.

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

Title II, Sec. 202:

"SEC. 202. Article 2, subparagraph (a), is amended to read as follows:

"(a) All officers, warrant officers, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same;"

II. Navy Provisions

1. Articles for the Government of the Navy.

There is no statutory provision closely comparable to A.W. 2, except the following:

a. Retired officers of the regular Navy:

Sec. 1457 R. S., 34 U.S.C. 389.

b. Midshipmen:

Acts of

23 June 1874, ch. 453, 18 Stat. 203,
2 March 1895, ch. 186, 28 Stat. 838,
1 July 1902, ch. 1368, 32 Stat. 686,

3 March 1903, ch. 1010, 32 Stat. 1198,
 9 April 1906, ch. 1370, 34 Stat. 104-105,
 11 Dec. 1945, ch. 562, 59 Stat. 605,
 34 U.S.C. 1061 et seq.;
 see also Act of 14 July 1941, ch. 292, 55
 Stat. 589, (34 USC 1036-1), as amended
 by P.L. 564 of 1 June 1948; and P.L. 752
 of 24 June 1948.

c. Members of Naval Reserve and Marine Corps Reserve when employed on active duty, etc.: Sec. 301, Naval Reserve Act of 1938, 52 Stat. 1180, ch. 690, title III, 34 USC 855; cf. also Sec. 2 of the Naval Reserve Act of 1938, 52 Stat. 1175, ch. 690, title I, 34 USC 853a.

Limited Service Marine Corps Reserve, Act of 20 Jan. 1942, ch. 12, 56 Stat. 10, 34 USC 853 a-1.

d. Members of the Fleet Reserve and Fleet Marine Corps Reserve; and officers and enlisted men transferred to the retired list of the Naval Reserve Force or the Naval Reserve or the honorary retired list with pay: Sec. 6, Naval Reserve Act of 1938, 52 Stat. 1176, ch. 690, title I, 34 USC 853 d; cf. also Sec. 2, Naval Reserve Act of 1938, 52 Stat. 1175, ch. 690, title I, 34 USC 853 a.

e. The Marine Corps (except members of the Marine Corps when detached for duty with the Army by order of the President): Sec. 1621 R. S., 34 USC 715.

f. The Coast Guard while serving as a part of the Navy in time of war: Act of 29 Aug. 1916, ch. 417, 39 Stat. 600, 14 USC 3.

(By Act of 29 Aug. 1916, 39 Stat. 602, ch. 417, also personnel of the Lighthouse Service when transferred in national emergency to the Navy; but the Lighthouse Service has been consolidated with the Coast Guard by Reorganization Plan No. II, sec. 2, 53 Stat. 1432, effective 1 July 1939, (cf. 5 USC 133t) and Act of 5 Aug. 1939, ch. 477, 53 Stat. 1216-1217; cf. also Act of 11 July 1941, ch. 290, 55 Stat. 585; cf. 33 USC 757-758.)

g. The Coast and Geodetic Survey when transferred in national emergency to the Navy: Act of 22 May 1917, ch. 20, §16, 40 Stat. 87, 33 USC 855.

h. The Public Health Service when a branch of the naval forces in time of war or emergency: Act of 1 July 1944, ch. 373, title II, § 216, 58 Stat. 690, 42 USC 217.

i. All persons

(1) who, in time of war, or of rebellion against the supreme authority of the United States, come or are found in the capacity of spies, or

(2) who (a) bring or deliver any seducing letter or message from an enemy or rebel, or (2) endeavor to corrupt any person in the Navy to betray his trust: AGN 5 (Sec. 1624, art. 5, R. S., 34 USC 1200, art. 5).

j. Any person who committed, while in the naval service, any of the offenses described in AGN 14 and then received his discharge or was dismissed from the service: AGN 14, last paragraph.

k. Any officer, dismissed, in time of war, by order of the President and applying for trial: AGN 37.

l. Any enlisted person whose term of enlistment ended and who deserted prior thereto in time of peace: AGN 62.

m. Prisoners of war in naval custody: The law of war and the Geneva Convention of 27 July 1929, relative to the Treatment of Prisoners of War, 47 Stat. 2021.

n. All persons other than persons in the military service

(1) outside the continental limits of the United states in time of war or national emergency accompanying or serving with the United States Navy, the Marine Corps, or the Coast Guard when serving as a part of the Navy, including officers, members of crews, and passengers on board merchant ships of the United States, and including those employed by the Government, or by contractors and subcontractors engaged on naval projects;

(2) within an area leased to the United States which is without the territorial jurisdiction thereof and which is under the control of the Secretary of the Navy, in time of war or national emergency;

Act of 22 March 1943, ch. 18, 57 Stat. 41, 34 USC 1201. Cf. Sec. 333 NC&B, 1937, as amended.

o. Enlisted persons awaiting discharge after expiration of their enlistment: Sec. 1422 R. S., as amended by Act of 3 March 1875, ch. 155, 18 Stat. 484, 34 USC 201.

2. Proposed Navy Bill.

"ART. 5 (a) The following persons shall be subject to the articles for the Government of the Navy:

"First. Except as provided in articles 6 and 7, all persons on active duty in the naval service, including those, not unlawfully detained, awaiting discharge after expiration of their terms of enlistment, and any such person alleged to have committed any offense

against these Articles during a prior period of service: Provided, That any person who deserted and subsequently reentered and was discharged from the naval service shall continue to be subject to the Articles for any offense committed during the period of service from which he deserted.

"Second. All reserve personnel of the naval service when employed on authorized training or drill duty, with or without pay, or other equivalent instruction or duty, or when employed in authorized travel to or from such duty, or appropriate duty, drill or instruction, or during such time as they may by law be required to perform active duty, or while wearing a uniform prescribed for reserve personnel of the naval service: Provided, That release from such duty status shall not terminate jurisdiction for offenses theretofore committed; and in such cases, reserve personnel of the naval service may be retained on or returned to a duty status without their consent, but not for a longer period of time than may be required therefor.

"Third. All retired naval personnel entitled to receive pay.

"Fourth. All persons discharged from the naval service subsequently charged with having fraudulently obtained said discharge: Provided, That upon conviction of this offense, said discharge shall be null and void ab initio.

"Fifth. All persons in naval custody serving a sentence adjudged by a court martial.

"Sixth. All former officers of the naval service dismissed by order of the President who make written application for trial, setting forth under oath that they have been wrongfully dismissed.

"Seventh. Personnel of the Coast Guard, Coast and Geodetic Survey, Public Health Service, and other organizations, when actively serving under the Navy Department, pursuant to law, as a part of the naval forces of the United States.

"In time of war or national emergency, in addition to the foregoing, the following persons shall be subject to the Articles for the Government of the Navy:

"Eighth. Prisoners of war in naval custody.

"Ninth. All persons alleged to be spies or saboteurs, or to have brought or delivered, or to have attempted to bring or deliver, any seducing letter or message from an enemy or rebel, or to have endeavored to corrupt any person subject to these Articles to betray his trust.

"Tenth. All persons, other than persons in the military service of the United States, outside the continental limits of the United States accompanying or serving with the United States Navy, the Marine Corps, or the Coast Guard when serving as a part of the Navy, including but not limited to persons employed by the Government directly, or by contractors or subcontractors engaged in naval projects, and all persons, other than persons in the military service of the United States, within an area leased by the United States which is without the territorial jurisdiction thereof and which is under the control of the Secretary of the Navy: Provided, That the jurisdiction herein conferred shall not extend to Alaska, the Canal Zone, the Hawaiian Islands, Puerto Rico, or the Virgin Islands, except the Islands of Palmyra, Midway, Johnston, and that part of the Aleutian Islands west of longitude one hundred and seventy-two degrees west."

III. Differences

1. The Regular Forces.

- a. There is a difference in arrangement between AW on the one hand and proposed naval legislation and AGAS draft on the other. AW 2 enumerates the regular forces (including retired personnel as well as personnel on active duty without making a distinction between the two groups expressly) and then reserve forces etc. The proposed naval legislation and the AGAS draft distinguish between personnel on active duty (including regular and reserve forces), reserve personnel on training duty etc., and retired personnel entitled to receive pay. It seems to be a disadvantage of the proposed naval legislation and the AGAS draft that "active duty" is not defined. Is a deserter on active duty? Is a person on active duty during authorized leave?
- b. In view of the distinction in naval law between retired personnel entitled to pay and retired personnel not entitled to pay, the Army method of omitting any reference to retired personnel at all may not be advisable.
- c. There are some groups of persons who - for varying reasons - do not appear specifically in any enumeration of persons subject to military or naval law existing or proposed:
 - (1) De facto enlisted persons, minors, etc. are not enumerated expressly because it is recognized and seems to be settled that a

"de facto enlisted man is subject to the jurisdiction of a court martial. A fraudulent enlistment is still an enlistment, and a man so enlisting may be tried by court martial. But where the man at the time of his enlistment was under an absolute disability to enlist, that is to say, was under

the age of fourteen years, or was insane or intoxicated, he can not be legally tried for desertion, nor for fraudulent enlistment if he received no pay or allowance." (Sec. 333 NC&B)

The subject matter is discussed in MCM, U.S. Army 1928, pp. 197-201; NC&B, pp. 482-483; 1 NLM, Tentative Draft No. 1, pp. 439-458; with further references. Cf. also Dig. Op. JAG Army 1912-1940, sec. 359(3), p. 163. The above quotation, however,

"A fraudulent enlistment is still an enlistment, and a man so enlisting may be tried by court martial."

is subject to a modification just in regard to trial for the offense of fraudulent enlistment; cf. A.W. 54 and AGN 22(b).

(2) Neither Army nor Navy legislation, existing or proposed, extends to persons discharged or otherwise separated from the service (except in case of AW 94 and AGN 14, the Navy proposing to abandon this exceptional jurisdiction). Cf. General Hoover's comments in Subcommittee Hearings on H.R. 2575 (No. 125), pp. 2131-2133; also 18 USC 652; and (1947) 35 Geo. L. J. 303-27.

2. Cadets and Midshipmen.

- a. It might be advisable to add cadets and midshipmen to the catalogue of persons subject to military and naval law in the AGAS draft. It is not too clear whether they would fall under "persons on active duty in the armed services."
- b. The USNA Regulations do not seem to clarify that midshipmen are subject to the Articles for the Government of the Navy; it may be that the new edition of the USNA Regulations contains pertinent provisions.

3. Army and Navy Nurse Corps.

- a. Under Sec. 109 of the Army-Navy Nurses Act of 1947 (P.L. 36)

"except as otherwise specifically provided, all laws now or hereafter applicable to male commissioned officers of the Regular Army * * * shall in like cases be applicable * * * to commissioned officers of any of the corps established by this Act * * *."

Sec. 115 of the Army-Navy Nurses Act contains a similar provision in regard to reserve nurses.

Cf. also Sec. 28 of Army Regulations No. 40-20 of 22 April 1948.

- b. Title II of the Army-Navy Nurses Act deals with the Navy Nurse Corps, which is established as a Staff Corps of the United States Navy. Sec. 210 of the Army-Navy Nurses Act adds a Title VI to the Naval Reserve Act of 1938 dealing with the Nurse Corps Reserve.
4. The reserve forces on active duty, etc.
- a. The AGAS grouping of the several reserve categories seems to be preferable.
- b. Sec. 12 of the Selective Service Act of 1948 and AW 2 (a) seem to differ as to the time a selectee becomes amenable to military law. Under AW 2 (a), a selectee would be amenable; but under Sec. 12, he has to be an inductee before he is amenable to military law. The proposed naval legislation and the AGAS draft do not cover this item expressly.
5. Jurisdiction over spies and other persons guilty of a violation of the law of war:
- a. The Army jurisdiction is much broader as AW 12 gives courts martial concurrent jurisdiction with military tribunals to try any person for violating the law of war. The naval legislation, existing and proposed, does not go so far.
- b. Army and naval laws define the offense of spying. It has been doubted whether such definition could establish a deviation prevailing over the international-law definition. 31 Op. Atty. Gen. 356, 1918, modified by 40 Op. Atty. Gen. No. 54. Cf. U.S. ex rel. Wessels v. McDonald, D. C. N.Y., 1920, 265 F. 754.
6. Discharged persons remaining amenable to court-martial proceedings for frauds against the government committed while in the service:
- a. Note General Hoover's statement: "The Federal district courts would not generally have jurisdiction, as I understand it, unless the offense were committed in the district, or on the high seas or on our ships in harbor." (p. 2031, Subcommittee Hearings on H.R. 2575 (No. 125)).
- b. Cf. Flannery case, 69 F. Supp. 661, denying constitutionality of this court-martial jurisdiction.
- c. Navy bill deletes court-martial jurisdiction over such persons after separation from the service as unnecessary in view of jurisdiction of federal courts; cf. 28 USC, 1946 ed., 102, re-enacted as Title 18, USC, § 3238 (P.L. 772). Federal venue might be amended if insufficient. In regard to the underlying offenses, 18 USC, 1946 ed., 80-88 (Title 18, USC, §§ 281 et seq., 371 et seq., 641 et seq., and 1001 et seq.) contain ample provisions.

7. Officers dismissed in time of war by order of the President:

- a. The Army does not seem to favor a right of such person to demand court-martial trial. Army and naval laws omit to provide for any period within which the officer would have to file his request by pain of losing his right to trial at all.
- b. The AGAS draft may offer the best solution (also uniform method in regard to officers so dismissed and officers dropped from the rolls).
- c. The statutory provisions forbidding reappointment of dropped officers etc. should be reconsidered. The further naval recommendations propose

(1) to delete the second proviso of Sec. 27, Art. 40, page 21, lines 24-25, of the Bill, which proviso would reenact the second proviso of existing AGN 36 as amended by Act of 2 April 1918, ch. 39, 40 Stat. 501, 34 USC 1200, art. 36;

(2) to repeal Sec. 1441 R. S., 34 USC 227; page 25 of the List of Proposed Amendments to H. R. 3687 and S. 1338 of 17 May 1948.

Corresponding Army provisions may be found in Military Laws of the United States, 8th ed., 1939, p. 143, no. 311.

8. Civilians

- a. Accompanying the Army or naval forces: The naval legislation, existing and proposed, controls only civilians overseas while the Army legislation controls civilians, in time of war, when accompanying the armies in the field, within and without the territorial jurisdiction of the United States.
 - b. Within an overseas area leased to the United States and being under the control of the Secretary of the Navy: The Army has no corresponding provision. But AW 12 may, in effect, subject such persons to court-martial jurisdiction.
9. Persons in contempt of court: AGN 42 has not been interpreted to allow punishment of civilians by court martial; but AW 32 has been so interpreted.

IV. Recommended Provisions

- 1. The AGN draft of 17 May 1948, Art. 5 (a), Second, proposes to add the following categories of naval reserve personnel to the reserve categories now subject to court-martial jurisdiction:
 - (a) "when in possession, custody, or control of any classified material;

- (b) "when having received knowledge or control of any classified information;
- (c) "when charged with a violation of any law, order, regulation, or custom concerning classified material, * * *."
2. Army jurisdiction shall extend not only to personnel of the Medical Department of the Navy serving with Marines detached for duty with the Army by order of the President but also to any other naval personnel serving with Marines so detached: AGN draft of 17 May 1948, Art. 7. There is no legislation, existing or proposed by bill, which would give convening authorities of naval courts martial corresponding jurisdiction over Army personnel detached for duty with naval units.
 3. Extending 18 USC 97a (Title 18, U. S. C. § 1383, effective 1 Sept. 1948) to naval areas and zones and providing for court-martial jurisdiction over persons who violate the provision so extended outside the continental limits of the United States. (Under consideration.)
 4. The Coast Guard bill (H. R. 6360, 80th Congress, 2d Session, to revise, codify, and enact into law, Title 14, U. S. Code) proposes to continue the existing principle (i.e., subjecting Coast Guard personnel to naval law when operating as a service in the Navy (§ 4 (f); as to details, cf. § 571); but § 3 of the bill expands the conditions under which the Coast Guard may be made a service in the Navy by providing: "Upon the declaration of war or when the President directs, the Coast Guard shall operate as a service in the Navy, * * *." (Cf., as to existing law, 14 USC 1 and 3.)

J.E.C.

Uniform Code of Military Justice

Subject: Types of Courts-Martial

I. Army Provisions

1. Articles of War.

"ART. 3. Courts-Martial Classified.-- Courts-martial shall be of three kinds, namely:

"First, general courts-martial:

"Second, special courts-martial; and

"Third, summary courts-martial."

2. Manual for Courts-Martial.

No comment.

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

No change.

II. Navy Provisions

1. The A.G.N. contain no Article corresponding to A.W. 3. The three types of Navy courts-martial are referred to in A.G.N. 38, General, A.G.N. 26, Summary Courts-Martial, and A.G.N. 64, Deck Courts. Various other Articles scattered through the Code prescribe membership, jurisdiction, etc.

2. The proposed amendments to the A.G.N. define General Courts-Martial in A.G.N. 24 (a), Summary Courts-Martial in A.G.N. 18 (a), and Deck Courts in A.G.N. 16 (a).

III. Differences

A. W. 3 classifies three types of courts-martial, i.e., "General", "Special", and "Summary" A.G.N. 38, 26 and 64, as proposed, provide courts-martial of substantially equivalent jurisdiction, but the courts are titled, "General", "Summary", and "Deck Courts", respectively.

IV. Recommendation

No good reason appears why A.W. 3 should not be combined with A.W. 5, 6, and 7, which prescribe the composition of the three types of courts.

Uniform Code of Military Justice

Subject: Who May Serve on Courts-Martial. A.W. 4

I. Army Provisions

1. Articles of War-

"ART. 4. Who May Serve on Courts-Martial.--All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial. When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and 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."

2. Public Law 759 (80th Congress)-

"Amendment to ART. 4. Who May Serve on Courts-Martial.--All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial.

"All warrant officers in the active military service of the United States and warrant officers in the active military service of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on general

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and special courts martial for the trial of warrant officers and enlisted persons, and persons in this category, shall be detailed for such service when deemed proper by the appointing authority.

"Enlisted persons in the active military service of the United States or in the active military service of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on general and special courts martial for the trial of enlisted persons when requested in writing by the accused at any time prior to the convening of the court. When so requested, no enlisted person shall, without his consent, be tried by a court the membership of which does not include enlisted persons to the number of at least one third of the total membership of the court.

"When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command and when eligible those enlisted persons of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers and enlisted persons 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 minority membership thereof. No person shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution."

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II. Navy Provisions

1. Articles for the Government of the Navy:

"Article 39.--A general court-martial shall consist of not more than 13 nor less than 5 commissioned officers as members; and as many officers, not exceeding 13, as can be convened without injury to the service, shall be summoned on every such court. But in no case, where it can be avoided without injury to the service, shall more than one-half, exclusive of the president, be junior to the officer to be tried. The senior officer shall always preside and the others shall take place according to their rank."

2. Naval Courts and Boards:

"Sec. 346. Personnel of court.--Except in cases where officers of the rank of lieutenant in the Navy and captain in the Marine Corps, or above, are not available, the circumstances of which shall be reported to the department by the convening authority, no officer shall be ordered as a member of a general court martial who is below the rank of lieutenant in the Navy or captain in the Marine Corps. In case an officer is to be tried, the 39th A. G. N. requires that, except where it can not be avoided without injury to the service, at least one-half of the members be senior to the accused. As a matter of policy in such a case all should be senior. The convening authority is justified in departing from this rule only under the most unusual circumstances. It is the policy of the Navy Department to require the president to be a line officer.

In detailing officers for the trial of a staff or marine officer it is proper, if the exigencies of the service permit, that at least one-third of the court be composed of officers of the same corps as and senior to the person to be tried....."

3. Proposed Navy Bill

(Adds no personal qualification of members.)

III. Differences in Provisions

1. The Differences

(a) Training, Experience, Service

The amended Articles of War set up qualifications of age, training, experience, and judicial temperament and two years' service. By the necessity of actual practice, these qualifications are merely directory.

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The Navy regulations set up standards for general courts-martial and deck courts in terms of rank, the implication being that such officers have greater experience and training and are more mature.

(b) Enlisted men and warrant officers

Under the amended Articles of War enlisted men are allowed to sit on general and special courts-martial in the trial of an enlisted man if the accused so requests in writing prior to the convening of the court. If so requested, at least one-third of the court must consist of enlisted persons. However, no enlisted man is permitted to be a member of a courts-martial trying an enlisted man in the same company or similar unit.

The Navy Articles and regulations do not allow enlisted men to sit as members of courts-martial.

The amended Articles of War also allow warrant officers to be members of general and special courts-martial for the trial of warrant officers and enlisted men when deemed proper by the appointing authority.

The Navy regulations allow commissioned warrant officers to sit on summary courts-martial only.

(The Army has no "commissioned" warrant officers. Status of Flight O.'s in Air Force?)

2. Discussion

(a) Training, Experience, Service

The Keefe Report (dealing with Naval General Courts-martial) states that 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.

(PAR. 2. p. 47-48). "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

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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 discipline."

(PAR. 2 & 3, p. 49). (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 not 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 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."

(PAR. 1, p. 53). "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."

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The Board recommended:

- (1) All naval officers be required to take a course in naval law.
- (2) A minimum of 2 years' service for members of courts-martial, in time of war as well as in peace.
- (3) Prospective members be required to attend a prescribed number of trials for purposes of instruction.
- (4) Further study of the present provision making lieutenants junior grade and ensigns ineligible to sit on general courts-martial.

It is also pointed out that none of these recommendations require statutory implementation but could be put into effect administratively.

In regard to summary courts-martial (Army), the Vanderbilt Committee recommended that summary court officers should be selected from captain or officers of field grade, if available, and that selection of junior officers and inexperienced officers for this purpose should be avoided. This accords with the present Navy practice in selecting deck court officers.

Thus the Keefe Board recommended qualifications for Navy special and general courts-martial similar to those of the Army, while the Vanderbilt Committee made recommendations for selecting Army summary court officers, similar to the qualifications practiced in selecting Navy deck court officers.

(b) Enlisted members.

The Vanderbilt Committee (War Department Advisory Committee on Military Justice) made the following finding as regards enlisted members of courts-martials:

(PAR. 3 p. 12 Vanderbilt Committee)--"Qualified enlisted men should be eligible to serve as members of general and special courts-martial and should be appointed thereon to the extent that in the discretion of the appointing authority, it seems desirable to do so. We realize that there is a sharp division of opinion on the subject. The generals and commissioned officers generally are divided as to the desirability of the proposal, while a preponderant majority of the enlisted men favor it.

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Those opposed to it contend that since the movement of qualified men in the Army is upward, the appointment of enlisted men will lower the quality of the courts and give rise to personal antagonism and recrimination in Army units when enlisted men participate in the conviction and sentence of their fellows. We think, however, that some improvement of the morale of the enlisted men may follow from increasing their knowledge of the functioning of the Army system of justice, their confidence in its operation and their feeling of responsibility for the enforcement of Army discipline."

The Keefe Board (Navy) found:

(PAR. 2, 3, & 4, p. 53-4). "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. 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."

(PAR. 2 p. 56).—"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. The Army has

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expressed itself as not opposed to this change, if satisfied that the public and enlisted men generally really desire it." (This recommendation has been adopted in the amended Articles of War, P. L. 759, sec. 203).

(PAR. 3, p. 58, p. 59, PAR. 2, p. 60)—"In fact, it is possible that enlisted men sitting on courts judge their fellow soldiers more severely than officers do now. Such a fear has been expressed by at least one writer, speaking 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."

"There is must 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 any, which may be made in the officer-enlisted man relationship in response to criticism

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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 expedience.

"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."

The Keefe Board Recommended:

"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' 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."

The Chamberlin Bill (Senate Bill 64, 66th Congress, 1st Session, 1919), provided in trial of enlisted men, three members of general courts-martial be enlisted men and one, a member of a special court-martial. The American Bar Association opposed this provision on the ground that enlisted men considered their officers as "trusties of the law" and on the whole trusted and respected them.

The Keefe report points out that few enlisted men would voluntarily choose to be tried by a court composed entirely of first sergeants or chief petty officers. The amended Articles of War bar an enlisted man from sitting on a court trying an enlisted man from the same company or similar unit.

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It also has been objected that naval personnel, serving together on a vessel develop a feeling of comradeship which is hardly compatible with their sitting trial upon one another.

Some witnesses before the Vanderbilt Committee stated that enlisted men on courts-martial would be subject to domination.

Neither the first nor second Ballantine Report nor the McGuire Report considered enlisted men as members of courts-martial.

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In hearings before a subcommittee of the House Armed Services Committee, the VFW, Judge Advocates Association, AVC, and AMVETS approved the portion of the proposed bill making enlisted men competent to sit on general and special courts-martial, although some thought it should be mandatory instead of promissive.

The Committee report stated (H.R. Report 1034):

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

"The War Department agrees that they should, at the option of the appointing authority. Our committee agrees that they should, at the option of the defendant and has amended (Article 4) accordingly. We seriously doubt that the inclusion of enlisted men as members of the court will benefit enlisted men who are defendants, however, the choice is properly a right of the defendant. Once having exercised that right he must assume the responsibility for the results of his choice."

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ADDENDA

Uniform Code of Military Justice

Subject: Who May Serve on Courts--Marines etc.
AGN 45.

I. Army Provisions

See C.S., A. W. 4.

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 65. Courts martial; officers of auxiliary naval forces.--
When actively serving under the Navy Department in time of war
or during the existence of an emergency, pursuant to law, as
a part of the naval forces of the United States, commissioned
officers of the Naval Reserve, Marine Corps Reserve, Naval
Militia, Coast Guard, Lighthouse Service, Coast and Geodetic
Survey, and Public Health Service are empowered to serve on
naval courts martial and deck courts under such regulations
necessary for the proper administration of justice and in the
interests of the services involved, as may be prescribed by
the Secretary of the Navy (Oct. 6, 1917, c. 93, 40 Stat. 393;
July 1, 1918, c. 114, 40 Stat. 708; Feb. 28, 1925, c. 374,
Secs. 1, 28, 43 Stat. 1080, 1088)."

2. Proposed Navy Bill.

"ART. 45.

"When actively serving under the Navy Department, pursuant
to law, as a part of the naval forces of the United States,
commissioned officers of the Naval Reserve, Marine Corps Reserve,
Coast Guard, Coast and Geodetic Survey, and Public Health
Service, and other organizations serving as a part of the naval
forces of the United States, shall be eligible to serve on
naval courts martial and fact-finding bodies."

III. Differences

See C.S., A. W. 4.

IV. Recommendations

None.

Uniform Code of Military Justice
Subject: Number of Members A.W. 5-7

I. Army Provisions

1. Articles of War

"ART. 5. General Courts-Martial.--General courts-martial may consist of any number of officers not less than five."

"ART. 6. Special Courts-Martial.--Special courts-martial may consist of any number of officers not less than three."

"ART. 7. Summary Courts-Martial.--A Summary court-martial shall consist of one officer."

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

SEC. 204. Article 5 is amended to read as follows:

"ART. 5. GENERAL COURTS-MARTIAL.--General courts-martial may consist of any number of members not less than five."

SEC. 205 Article 6 is amended to read as follows:

"ART. 6 SPECIAL COURTS-MARTIAL.--Special courts-martial may consist of any number of members not less than three."

II. Navy Provisions

1. Articles for the Government of the United States Navy

"ART. 39. A general court-martial shall consist of not more than 13 nor less than 5 commissioned officers as members; and as many officers, not exceeding 13, as can be convened without injury to the service, shall be summoned on every such court."....

"ART. 27 A summary court-martial shall consist of three officers not below the rank of ensign as members,"....

"ART. 64 (b). Deck courts shall consist of one commissioned officer only,"....

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2. Proposed Navy Bill

SEC. 29. Article 39 is renumbered as article 24 and amended to read as follows:

"ART. 24 (a) A general court martial shall consist of not less than five commissioned officers as members."....

SEC. 19. Article 27 is renumbered as article 18 and amended to read as follows:

"ART. 18 (a) A summary court martial shall consist of three commissioned officers."....

SEC. 47.

"ART. 16 (a) Deck courts martial shall consist of one commissioned officer only,"....

III. Differences

Proposed Navy bill and P.L. 759 resolve differences except than an Army special court martial may have more than three members while a Navy summary is limited to three.

IV. Recommended Provision

ART.---. Number of Members

(a) General Courts-Martial.--General courts-martial may consist of any number of members not less than five.

(b) Special Courts-Martial*--Special courts-martial may consist of any number of members not less than three.

(c) Summary Courts-Martial**--A summary court-martial shall consist of one commissioned officer.

* Army special or Navy summary courts-martial.

** Army summary court-martial or Navy deck court.

APPENDIX

Uniform Code of Military Justice

Subject: Reduction of General Court Below
Five Members. AGN 27.

I. Army Provisions

No similar provision.

II. Navy Provisions

1. Articles for the Government of the Navy.

No similar provision.

2. Proposed Navy Bill.

"ART 27 Whenever a general court martial is reduced below five members the reduced court may, with the consent of the accused, proceed to a final determination of the case being tried: Provided, That if the accused does not give his consent the convening authority may appoint new members sufficient in number to provide not less than five members, such new members to be subject to challenge: And provided further, That upon the new members taking their seats, the trial may proceed after the recorded testimony of each witness previously examined has been read to the witness in open court and verified by him and after such further examination of the witness thereon as any new member may require."

III. Differences

The Articles of War contain no similar provision and if an Army general court-martial is reduced below five members, additional members must be appointed.

IV. Recommendations

See C.S., A. W. 5-7.

ARTICLE OF WAR 6

SEE C.S., A. W. - 5.

ARTICLE OF WAR 7

SEE C.S., A. W. - 5.

Uniform Code Military Justice

Subject: General Courts-Martial - By Whom Appointed - Law Member
Appointed A. W. 8

I. Army Provisions

1. Articles of War

"ART. 8. General Courts-Martial.--The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an army, an army corps, a division, or a separate brigade, and, when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

The authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. The law member, in addition to his duties as a member, shall perform such other duties as the President may by regulations proscribe."

2. Manual Courts-Martial

(PAR. 5, p. 4, 5, & 6.). COURTS-MARTIAL--Appointing Authorities.--a. "General courts-martial.--The President of the United States, the superintendent of the Military Academy (except for the trial of an officer, A. W. 12), and the other commanding officers designated in A. W. 8 may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried the court shall be appointed by superior competent authority. (A. W. 8.)

Whether the commander who convened the court is the accuser or the prosecutor is mainly to be determined

by his personal feeling or interest in the matter. An accuser either originates the charge or adopts and becomes responsible for it; a prosecutor proposes or undertakes to have it tried and proved. See 60 (Accuser) in this connection. Action by a commander which is merely official and in the strict line of his duty can not be regarded as sufficient to disqualify him. Thus a division commander may, without becoming the accuser or prosecutor in the case, direct a subordinate to investigate an alleged offense with a view to formulating and preferring such charges as the facts may warrant, and may refer such charges for trial as in other cases.

As A. W. 8 expressly designates those who have authority to appoint general courts-martial, it follows that no one else has any such authority, and that anyone having such authority can not delegate or transfer it to another. The authority of a commanding officer to appoint general courts-martial is independent of his rank and is retained by him as long as he continues to be such commanding officer. The rules as to the devolution of command in case of the death, disability, or temporary absence of a permanent commander are stated in AR 600-20.

An officer who has power to appoint a general court-martial may determine the cases to be referred to it for trial and may dissolve it; but he can not control the exercise by the court of powers vested in it by law. He may withdraw any specification or charge at any time unless the court has reached a finding thereon."

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

SEC. 206. Article 8 is amended to read as follows:

"ART. 8. GENERAL COURTS-MARTIAL.--The President of the United States, the commanding officer of a Territorial department, the Superintendent of the Military Academy, the commanding officer of an Army group, an Army, an Army corps, a division, a separate brigade, or corresponding unit of the Ground or Air Forces, or any command to which a member of the Judge Advocate General's Department is assigned as staff

judge advocate, as prescribed in article 47, and, when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and may in any case be appointed by superior authority when by the latter deemed desirable.

"The authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Department or an officer who is a member of the bar of a Federal court, or of the highest court of a State of the United States and certified by the Judge Advocate General to be qualified for such detail: Provided, That no general court-martial shall receive evidence or vote upon its findings or sentence in the absence of the law member regularly detailed. The law member, in addition to his duties as a member, shall perform the duties prescribed in article 31 hereof and such other duties as the President may by regulations prescribe."

II. Navy Provisions

1. Articles for the Government of the United States Navy

"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 a 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." (R.S., sec. 1624, art. 38; Feb. 16, 1909, c. 131, sec. 10, 35 Stat. 621; Aug. 29, 1916, c. 417, 39 Stat. 586; Feb. 12, 1946, c. 5, 60 Stat. 4.)"

2. Naval Courts and Boards

SEC. 329. Conditions Necessary to Show Jurisdiction: Convened by an officer empowered to do so.--"The officers who are empowered to convene a general court martial are named in the articles for the government of the Navy and subsequent statutes. Where an officer is not authorized by law, but specially authorized by the Secretary of the Navy (under arts. 26, 38, and 64, A. G. N.) to convene a court martial, the precept must cite the authorization in order to show affirmatively the jurisdiction of the court. No one other than the Secretary of the Navy can give such authority."

3. Proposed Navy Bill

SEC. 28. Article 38 is renumbered as article 22.

SEC. 29. Article 39 is renumbered as article 24 and amended to read as follows:

"ART. 24. (b) For every general court martial, the convening authority shall appoint: (1) a prosecutor and a defense counsel, who shall be certified by the Judge Advocate General as persons qualified to perform such duties, but the appointment of such defense counsel shall not affect the right of the person accused to counsel of his own choice; and (2) a judge advocate, whose duties it shall be (1) to advise the court on all matters of law arising during the trial of the case; (2) to rule on interlocutory questions, except challenges; (3) in open court, to instruct the court upon the law of the case; and (4) to perform such other duties as the Secretary of the Navy may prescribe: Provided, That the judge advocate may be overruled by a majority vote of the court, in which case the reasons therefor shall be spread upon the record: Provided, further, That the judge advocate shall be an officer certified by the Judge Advocate General as qualified to perform the duties herein prescribed and who shall be responsible to the Judge Advocate General for the performance thereof: And provided further, That the judge advocate shall be subject to challenge."

III. Differences

1. Differences in Army and Navy Provisions

a. Who may appoint

The primary difference between the appointing authority of Army general courts-martial and the convening authority of Navy general courts-martial is due to the differences in names of units.

The President may appoint in both cases.

The Secretary of the Navy may appoint general courts-martial, while the Secretaries of Defense, Army, and Air Force do not have such power.

The amended Articles of War also authorize commanding officers who have a member of the Judge Advocate General's Department assigned as a staff judge advocate, to appoint general courts-martials; while the Navy does not. (Query: Do naval command staffs have judge advocates?)

Under the amended Articles of War, additional commanding officers may be empowered to appoint by the President, while under the Navy articles, additional commanding officers may be empowered to appoint by the Secretary of the Navy.

Under the amended Articles of War, a general courts-martial may in any case be appointed by superior competent authority, instead of the designated appointing authority, when such superior authority deems it advisable. The naval articles and regulations contain no such provision.

b. Appointing authority, accuser, or prosecutor

When the Army appointing officer is the accuser or prosecutor, the court shall be appointed by superior competent authority. The Navy articles and regulations contain no such provision.

c. Law Member or Proposed "Judge Advocate" (Navy)

Under the amended Articles of War, the appointing authority shall appoint as one member of general courts-martial

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a member of the JAGD or an officer who is a member of the bar and certified by the JAGD to be qualified for such duty, as a "law member."

The present A.G.N. contain no such provision, but the proposed Navy bill provides for a "Judge Advocate". (To avoid confusion, this paper will refer to this proposed officer as the "law member"). The proposed Navy "law member" is not a member of the court but is to perform functions similar to those of a judge sitting with a jury. (Duties of law members will be discussed in connection with A.W. 31.) The other differences between these "law members" is that the proposed Navy bill provides only that this officer be certified by the Navy JAG as qualified and that he is to be responsible to the JAG for the performance of his duties.

Therefore, the questions as to the "law member" as far as this article is concerned, are (1) Whether or not he should be a member of the court and (2) What should be his qualifications.

P.L. 759 also provides that the law member may be present at all times, while the proposed Navy articles do not so provide.

- d. These differences in general apply also to special courts-martial and summary courts-martial (Navy) included under A.W. 9 and 10.

Attached is Memorandum from Colonel Curry.

2. Discussion

- a. Who may appoint

Keefe Report (SEC. IV par. 1., p. 43-46):

1. Convening Authorities:

"Prior to and during the war the power to convene general courts-martial was vested 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."

"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. In July 1943 the Secretary empowered the commandants of the various Naval Districts within the continental United States to convene general courts martial. 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 has 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 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 September 1943, that the power of the Secretary to authorize command 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."

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"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 provisions:

"(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 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 difference 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."

Keoffe Report (SEC. IV. par. 3., p. 61,62,63)

"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 command-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 vacancies. He may even replace officers during the course of a trial, although the practice is condemned and the power is rarely exercised."

"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 is with the general court martial that the Board has been chiefly concerned."

Keaffe Report (1st par. p. 64-1st par. p. 66)

"The other criticism that since courts martial are transitory and impermanent they lack the professional competence of civilian courts also has some validity. This, 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 will convene 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.)"

"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, 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 Chamberlin 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 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,

Communications 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 power. 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."

RECOMMENDATION: (p. 68-69)

"It is apparent from the practices of other nations that there is nothing of inherent necessity in the present American method of selecting names 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, as 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."

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"(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 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."

Vanderbilt Report (Army) (Par. 6, p. 9-10)

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

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smaller unit. We believe that the flexibility of such a system will aid in the solving of many problems and will permit the establishment of permanent courts or traveling courts if they be found desirable. Article of War 8 should be amended to accomplish this purpose."

"We realize that the officers of a division or command may have a special understanding of local conditions and be best qualified to try local offenders and also that officers must not be appointed to courts martial duties if, in the opinion of the commander, they are unavailable. These requirements may be met by the establishment of a panel of available officers by the commander, subject to change from time to time, from which the selection of members of the court may be made. The determination of the commander as to availability must, of course, be final. It is not meant that the selection of the members of the courts-martial shall be confined to the division or command in which the offenses occur."

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

"The need for the prompt appointment of a court and a speedy trial when the command refers to a charge for trial must be recognized. Moreover, the deterrent effect of punishment must not be overlooked and the

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

The two Ballantine Reports and the McGuire Report make no additional comment on this point.

In Hearings (No. 125) before a subcommittee of the Committee on Armed Services of the House of Representatives the following recommendations were made:

- (1) The V.F.W., New York County Lawyers' Association, War Veterans Bar Association, Judge Advocates' Association, A.V.C. and MVETS all recommended that the power of command be limited to the power to refer persons for trial, and control of prosecution.
- (2) The same organizations that courts, defense counsels, and law member be chosen by the Judge Advocate General's Department or by higher echelon.
- (3) All opposed the power to choose prosecutor, court, and law member being vested in the same person.

The Army representatives were in favor of the present provisions on the grounds that it is a function of command to control discipline and that the trial of military personnel should not be in the hands of persons who disassociated from the immediate circumstances of the accused.

The House Committee made the following statement in its report (#1034):

"Under present law "command" has an abnormal and unjustified influence over military justice. In opposing our decision the War Department stresses the necessity for preserving proper discipline and for giving line commanders authority which is commensurate with their responsibility. We fully agree that discipline is of the utmost importance and must be preserved, however, we feel equally certain that in the administration of military justice there is a point beyond which the considerations of justice are paramount to discipline. Under present law and under this bill, as amended, "command" has abundant authority to enforce discipline. It refers the charges for trial, convenes the court, appoints the trial judge advocate, law member, and defense counsel who must now be qualified personnel of the Judge Advocate General's Department and, after the trial reviews the case with full authority to approve or disapprove the whole or any part of the sentence."

"We contend that "command" should ask for nothing more in the furtherance of discipline. At the conclusion of a trial, under the present system, the same officers who conducted the case return to the command of a line officer who has full authority over their efficiency ratings, promotion recommendations, leaves, and duty assignments. These officers, many of whom have families and have chosen the Army for a career, would be less than human if they ignored the possibilities of such influence. We contend that those who are charged with the impartial administration of military justice must have sufficient freedom of judicial determination to meet the responsibility."

The question whether the convening authorities should be detailed in the statute or left to be designated by the Secretaries of the Services or by the President is an administrative question. The Navy view being that designation by the various Departments gives greater flexibility.

b. Appointing authority accuser or prosecutor

The Keefe Report (Navy) states:

"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 the subordinate commander, the appointing authority frequently re-drafts them or directs the preferring of different charges, in accordance with the 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."

The Vanderbilt Report (Army) makes no recommendation to change this provision.

The two Ballantine Reports and the McGuire Reports do not comment on this point.

c. Law Member

Keefe Report (Par. 5, p. 71-1st. par. p. 78)

"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 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 sentences 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."

"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 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."

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"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."

"The McGuire Articles 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."

"Colonel Snedeker, in his notes to the McGuire Articles, explains that these provisions are derived from the British and American Army systems."

"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."

"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."

"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."

"The Ballantine Report 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."

"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. 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 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."

"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 Ballantine 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. 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. 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. 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."

"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, 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." Although these recommendations were noted with approval by the Secretary of the Navy, apparently no action was taken on them at the time."

Keaffe Report (Recommendations, p. 84)

"(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."

Vanderbilt Report

The Vanderbilt Report recommended that it should be a jurisdictional requirement that the law members be trained lawyers and commissioned officers detailed by the J.A.G.D. and that it should be required that the law member be actually present throughout the trial. This recommendation was adopted in the amended Articles of War.

The Second Ballantine Report recommended the establishment of a judge advocate such as is not incorporated in the proposed Navy bill.

The First Ballantine Report and the McGuire Report are completely covered in the Keefe Report.

In hearings before a subcommittee of the House Armed Services Committee, all witnesses approved the qualifications of law members set forth in what is now Public Law 759.

All witnesses, except War Department representatives, recommended that a law member be appointed by the J.A.G.D. and not under influence of commanding officers.

The V.P.W. and Veterans Bar Association recommended that the law member not be entitled to vote, while the A.V.C. recommended that such a law member should be president of the court, regardless of rank.

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P. & A.

Comparison of AW 8 and
comparable provisions of AGN

I - The Article of War now in force:

Article of War 8 designates the authorities by whom general courts-martial may be appointed; provides for the detail of a law member, and prescribes the latter's qualifications.

II - The Article of War as revised:

The 1948 revision changes Article 8 in important particulars: (1) By enlarging the list of appointing authorities, (2) by providing that the law member, if not J.A.G.D., shall be a member of the bar of a Federal or highest State court, and certified by the J.A.G. as qualified for such detail, (3) by enlarging the powers of the law members, and (4) by providing that no case may be disposed of in the absence of the law members.

The revision also transfers, quite logically, the provision rendering ineligible for membership an accuser or prosecution witness from Article 8 (GCM - By Whom Appointed) to Article 4 (Who May Serve on Courts-Martial).

III - The Articles for the Government of the Navy now in force:

AGN 38 (Naval Courts and Board B-40) is limited to designation of authorities by whom general courts-martial may be convened.

IV - The Navy Article as revised:

The Navy Bill (Article 22) makes no change in this Article.

V - Differences

AW 8 provides that general courts-martial may be appointed by:

The President of the United States
(The Commanding Officer of a territorial division - deleted in 1948 revision).

The Commanding Officer of a territorial department.

The Superintendent of the Military Academy.

The Commanding Officer of an army.

The Commanding Officer of an army corps.

The Commanding Officer of a division.

The Commanding Officer of a separate brigade.

And, when empowered by the President

The Commanding Officer of any district.

The Commanding Officer of any force.

The Commanding Officer of any body of troops.

P. & B.

The 1948 revision adds, after separate brigade:

The Commanding Officer of any corresponding unit of the Ground or Air Forces,

And also adds:

The Commanding Officer of any command to which a member of the Judge Advocate General's Department is assigned as staff judge advocate.

And:

Superior authority.

AGN provides that general courts-martial may be convened by:

The President

The Secretary of the Navy

The Commander in Chief of a fleet

The Commanding Officer of a naval station or a larger shore activity beyond the continental limits of the United States

And, when empowered by the Secretary of the Navy:

The Commanding Officer of a division, squadron, flotilla, or other naval force afloat.

The Commanding Officer of a naval district, naval base, or naval station.

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.

Article of War 8 provides for the appointment of a law member of every general court martial who, in addition to his duties as a member of the court, shall perform such other duties as the President by regulations may prescribe. These duties are set forth in the Manual for Courts Martial (see Par. 51d, page 40).

Under its present procedure the Navy has a Judge Advocate who, in addition to acting as prosecutor, also acts as an adviser to the court on matters of law and procedure.

Proposed revision of the Articles for the Government of the Navy (Article 24(b)) would relieve the Judge Advocate of a general court martial of his duties as prosecutor and make him an adviser to the court upon all matters arising during a trial, authorize him to rule on interlocutory questions, except challenges, to instruct the court upon questions of law in open court, and to perform such other duties as the Secretary of the Navy may prescribe. The duties of this officer would correspond in many particulars to those of the Army law member, the essential differences being that the Navy Judge Advocate would not be a member of the court nor entitled to vote as is the Army law member, and that his rulings would not be final, and that the Navy Judge Advocate's rulings may be overruled by a majority vote of the court, whereas certain rulings of the Army law member are final.

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MEMORANDUM

Subject: AW 8 and comparable provisions of AGN, comments on

Reference: Memo "Comparison of AW 8 and comparable provisions of AGN", undated, unsigned

1. "A difference between AW 8 and comparable provisions of AGN which has not been mentioned in subject memorandum is the provision appearing in Public Law 759 that when any appointing authority is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and may in any case be appointed by superior authority when by the latter deemed desirable. There is no similar provision in existing or proposed AGN. Such a provision would be impracticable and make the system unwieldy. Frequent Navy practice is that the highest authority in the area convene the general court martial. Reference to superior authority would often necessitate going into another area at a great distance and often without any ready means of communication. Detached authorities would find this especially difficult.
2. The accused gains little protection by requiring his accuser to refer charges to superior authority for trial. He receives greater protection by depriving the convening authority of reviewing power.
3. The AW also includes a provision that the court shall not receive evidence or vote upon its findings or sentence in the absence of the law member. There is no similar provision in Navy law.
4. Historically, the term judge advocate was associated with the official skilled in law who performed quasi judicial functions and on occasion had authority to judge and give sentence. See Winthrop page 179. To retain the term "judge advocate" for the legal officer of the court would appear more in line with such historical precedent than to use it for designation of strictly prosecution functions."

Uniform Code of Military Justice

Subject: Special Courts-Martial - By Whom Appointed - A.W. 9

I. Army Provisions

1. Articles of War

"ART. 9. Special Courts-Martial.--The Commanding Officer of a district, garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a brigade, regiment, detached battalion, or other detached command may appoint special courts-martial; but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed desirable; and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution."

2. Manual Courts Martial

Par. 5b. Special Courts-martial.--"The commanding officer designated in A.W. 9 may appoint special courts-martial; but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried the court shall be appointed by superior authority, and may in any case, be appointed by superior authority when by the latter deemed desirable. (A. W. 9.)

The principles of the last three subparagraphs of 5a apply to special courts-martial.

A battalion or other unit is "detached" when isolated or removed from the immediate disciplinary control of a superior of the same branch of the service in such a manner as to make its commander primarily the one to be looked to by superior authority as the officer responsible for the administration of the discipline of the enlisted men composing the same. The term is used in a disciplinary sense, and is not necessarily limited to what constitutes detachment in a physical or tactical sense. For instance, the commanding officers of units that are independent, except in so far as they constitute parts of a division, who are responsible directly to the division commander for the maintenance of discipline in their respective commands, are competent to appoint special courts for the same, subject to the power of the division commander to appoint special courts for all subordinate organizations and detachments under his command if by him deemed desirable.

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The subordinate commander may exercise the power to appoint special courts-martial for his command unless a competent superior deems it "desirable" to reserve that power to himself and so notifies the subordinate."

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

SEC. 207. Article 9 is amended to read as follows:

"ART. 9. SPECIAL COURTS-MARTIAL.-- The commanding officer of a district, garrison, fort, camp, station, or other place where troops are on duty, and the commanding officer of an Army group, an Army, an Army corps, a division, brigade, regiment, detached battalion, or corresponding unit of Ground or Air Forces, and the commanding officer of any other detached command or group of detached units placed under a single commander for this purpose may appoint special courts-martial; but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed desirable."

II. Navy Provisions

1. Articles for the Government of the United States Navy

"ART. 26. Convening authority.--Summary courts martial may be ordered upon petty officers and enlisted men in the naval service under his command by the commanding officer of any vessel, the commandant of any navy yard or naval station, the commanding officer of any brigade, regiment, or separate or detached battalion, or other separate or detached command, or marine barracks, and, when empowered by the Secretary of the Navy, by the commanding officer or officer in charge of any command not specifically mentioned in the foregoing, for the trial of offenses which such commanding officer or commandant may deem deserving of greater punishment than he is authorized to inflict, but not sufficient to require trial by a general court martial (R. S., sec. 1624, art. 26; Aug. 29, 1916, c. 417, 39 Stat. 586).

2. Proposed Navy Bill

SEC. 18. Article 26 is renumbered as article 17 and amended to read as follows:

"ART. 17. Commanding officers of naval vessels and such other officers in command or in charge of naval forces or activities as may be designated by the Secretary of the Navy may convene summary courts martial for the trial of enlisted persons regularly or temporarily under their command or charge for alleged offenses deemed deserving of greater punishment than he is authorized to inflict, but not sufficient to require trial by general court martial."

III. Differences

1. Differences in Army and Navy Provisions

(a) Who may appoint.

The primary difference between the appointing authority of an Army special courts-martial under the amended A.W. and the Naval authority to convene summary courts-martial under the proposed Navy bill is that the former are enumerated and the latter are to be designated by the Secretary of the Navy.

(b) Appointing authority accuser or prosecutor

This is the same as the problem posed under A.W. 8 as to general courts-martial.

(c) Appointment by superior authority

Same as for general courts-martials. (See A.W. 8.)

2. Discussion

(a) Who may appoint

Neither the Keefe, Ballantine, McGuire, (Navy) nor the Vanderbilt Report (Army) recommends any change in appointing authority specifically for special courts-martial. (See discussion under Article of War 8.)

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(b) (See A.W. 8 for discussion on same problem with respect to general courts-martial).

(c) (See A.W. 8 for discussion on same problem with respect to general courts-martial).

IV. Other Proposed Reforms

The Keffe, Ballantine, McGuire and Vanderbilt reports all favor the appointment of a "law member" for special courts-martial where qualified officers are available on the same basis as for a general courts-martial. (See discussion under A. W. 8).

Keffe Report (Par. 1, 2, p. 81)

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." The minority report of the Ballantine Committee recommended the language, "whenever practicable."

"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. The Report recommended consideration of a proposal to place at least one legally trained officer on each inferior court martial."

All witnesses before House Armed Services Committee (other than army personnel) recommended law members for special as well as general courts-martial.

Attached is memo from Colonel Curry.

A

Comparison of A. W. 9 and comparable provisions of AGN

I The Article of War now in force:

A. W. 9 authorizes the appointment of special courts-martial by the commanding officer of a

District

Garrison

Fort

Camp

or other place where troops are on duty

Brigade

Regiment

Detached battalion

or other detached command

Provided he is not the accuser or prosecutor

or by Superior authority.

II The Article of War as revised.

The 1948 revision adds to foregoing list the commanding officer of

An army group

An army

An army corps

and deletes the commanding officer of "any other detached command."

For the reason explained in II under AW 8 the revision also deletes the provision now in AW 9 rendering ineligible for membership an accuser or prosecution witness.

III The Articles for the Government of the Navy now in force.

The Navy denominates its court which corresponds to the Army's special court as a Summary Court Martial (AGN 26, Naval Courts and Boards B-28, et seq). AGN 26 provides that Summary Courts Martial may be ordered by:

Commanding Officer of any vessel

The Commandant of any naval yard or naval station

The Commanding Officer of any brigade

The Commanding Officer of any regiment

The Commanding Officer of any separate or detached battalion

The Commanding Officer of any separate or detached command

The Commanding Officer of any Marine barrack

and when empowered by the Secretary of the Navy

The Commanding Officer or officer in charge of any other command not specifically mentioned above.

IV The Navy Article as revised.

Proposed revision of the Articles for the Government of the Navy (AGN 10 (a)) would designate the intermediate court under discussion as a Superior Court Martial.

(Note: Discussion of differences in jurisdiction between the Army Special Court Martial and the Navy Summary Court Martial are considered beyond the purview of this paper.)

22 July 1948

MEMORANDUM

Subject: AW 9 and comparable provisions of AGN, comments on

Reference: Memo "Comparison of A.N. 9 and comparable provisions of AGN", undated, unsigned

1. Referenced memorandum in paragraph I inserts the provision of AW that the appointing authority of the special court martial may not be the accuser or prosecutor, but adds no comment to the effect that this provision appears nowhere in AGN. The restrictions of this provision appearing in AGN summary court martial authority would be even more objectionable than in general court martial authority. Navy vessels for prolonged periods are not in the presence of superior authority who might convene the court in cases. The commanding officer is probably rarely the accuser. Under naval practice he is required to investigate all disciplinary reports in person and normally comes close to fulfilling the "definition" of the prosecutor in the second sub-paragraph of par. 5(a) Manual for Courts-Martial USA (1928). On small vessels there are often too few officers to permit reference to an investigating officer and still have enough left to try the case aboard the same vessel. If the commanding officer of a naval vessel were circumscribed in his power to convene a summary court-martial it would retard the entire procedure and work a hardship on the vessel and on the accused and greatly impair administration of justice and the maintenance of discipline.

2. Public Law 759 retains the authority of the commanding officer of a detached command as appointing authority and adds "the commanding officer of any other * * * group of detached units placed under a single commander for this purpose".

3. AGN 26 includes a jurisdictional restriction that summary courts martial may be ordered only to try those enlisted persons under the command of the convening authority. While the referenced memo excludes discussion of jurisdiction, it is not clear with which AW, it will be discussed at all.

4. In paragraph IV of referenced memorandum, there is a reference to AGN 10 (a) of the "proposed revision of the Articles for the Government of the Navy". The paragraph referred to appears in the proposed Articles for the Government of the Armed Services. The proposed AGN would amend the present Article 26 by giving only the commanding officer of a vessel specific authority to convene summary courts martial. All "other officers in command or in charge of naval forces" must be designated by the Secretary of the Navy in order to have such authority. The title of summary court martial would be retained.

J. E. CURRY
Colonel, USMC

Uniform Code of Military Justice

Subject - Summary Courts-Martial (Army) and Deck Courts -
Who May Appoint. A.W. 10

I. Army Provisions

1. Articles of War

"ART. 10. Summary Courts-Martial.-- The commanding officer of a garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a regiment, detached battalion, detached company, or other may appoint summary courts-martial; but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable: Provided, That when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him."

2. Manual Courts-Martial

(Par. 5c. p, 5&6) Summary courts-martial.--"The commanding officers designated in A.W. 10 may appoint summary courts-martial; but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable: Provided, That when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him. (A. W. 10.)

Where the appointing authority of a summary court or the summary court officer is the accuser or the prosecutor of the person or persons to be tried, it is discretionary with the appointing authority whether he will forward the charges to the superior authority with a recommendation that the summary court be appointed by the latter; but the fact that the appointing authority or the summary court officer is the accuser or prosecutor in a particular case does not invalidate the trial.

When more than one officer is present, a subordinate officer will be appointed summary court-martial. When but one officer is present, no order appointing the court will be issued.

The principles of the third and fourth subparagraphs of both 5a and 5b apply to summary courts-martial."

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

No change

II. Navy Provisions

1. Articles for the Government of the United States Navy

"ART. 64. (a) Officers authorized to order.--All officers of the Navy and Marine Corps who are authorized to order either general or summary courts martial may order deck courts upon enlisted men under their command, for minor offenses now triable by summary court martial (Aug. 29, 1916, c. 417, 39 Stat. 586)."

"ART. 66. Courts martial and punishments in hospitals and hospital ships.--When empowered by the Secretary of the Navy pursuant to article 26 to order summary courts martial, the commanding officer of a naval hospital or hospital ship shall be empowered to order such courts and deck courts, and inflict the punishments which the commander of a naval vessel is authorized by law to inflict upon all enlisted men of the naval service attached thereto, whether for duty or as patients (Aug. 29, 1916, c. 417, 39 Stat. 586)."

2. Naval Courts and Boards

SEC. 692 (footnote 2) For the constitution and powers of a deck court see art. 64, A.G.N.

Who may act as deck court officer.--"Officers shall not be ordered as deck court officers who are below the rank of lieutenant in the Navy or captain in the Marine Corps, and who have had less than six years' service as a commissioned officer, except that, in cases where there is no officer of such rank or of higher rank attached to the vessel, navy yard, station, or command, the commanding officer (if a commissioned officer) may act as deck court officer. An officer empowered to order deck courts may at his discretion designate himself as deck court officer, irrespective of his rank, if commissioned, and irrespective of the rank of other officers attached to his command."

3. Proposed Navy Bill

SEC. 47

"ART. 15. All officers who are empowered to convene summary courts martial may convene deck courts martial for the trial of enlisted persons regularly or temporarily under their command or charge for minor offenses triable by summary courts martial."

III. Differences

1. Differences in Army and Navy Provisions

The principal difference between the appointing authority of Army summary courts-martial and the convening authority of Navy deck courts is that the Articles of War designate which commanding officers may appoint while the A. G. N. provide that all officers authorized to appoint general or summary courts-martial may appoint deck courts. The proposed Navy bill would change the latter provision to include only those who may appoint summary courts-martial.

The Articles of War also provide that a summary courts-martial (Army) may be appointed by superior authority when deemed desirable by such superior authority. The A. G. N. has no such provision.

2. Discussion

The McGuire Articles (Navy) would have abolished deck courts. In its report the board stated:

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

The Second Ballantine Board recommended retention of deck courts:

"The Board believes although there is some difference of opinion on the subject, and that although some officers do not make full use of Deck Courts, they are nevertheless essential in ships, particularly in time of war. Furthermore, the authority now vested in a Deck Court must, in order to preserve the scale of punishments, be vested somewhere. It appears to the Board that the only place for this authority to go would be to the Commanding Officer.

The Board does not believe his powers should be increased to that extent."

The Keeffe Report does not comment on the convening authority of deck courts.

In regard to summary courts-martial (Army) the Vanderbilt Report recommends that if necessary to get officers of sufficient rank and experience, summary court officers should be appointed from a larger area or a larger unit than is at times done at present.

The Vanderbilt Committee also recommended further study by a board of officers of the advantages of the diminution of summary courts-martial and consideration of the dangers of abuse by new and untried company commanders.

In accordance with present Navy practice, an officer empowered to appoint deck courts may at his discretion, appoint himself deck-court officer, irrespective of his rank, if commissioned, and irrespective of the rank of other officers of his command. Therefore, when there is one commissioned officer in a naval command empowered to appoint deck courts, he is deck-court officer, and thus the same result is reached as is in the proviso of A. W. 10.

Present Navy practice recommends that as the deck court must act impartially, any close personal knowledge of the man or the offense is a handicap. It is thus inadvisable to refer to a deck-court officer specifications against personnel under his immediate supervision with whom he has had close personal contact. Although there is no legal prohibition against the accusing officer serving as deck-court officer, a fairer trial will result if such cases are referred for trial to someone having no knowledge of the persons or offenses involved. Of course, in small commands, with a single officer or with a very limited number of officers present, if the maintenance of discipline requires immediate trial and punishment, the offenses may have to be tried by an officer familiar with the case, even the accusing officer. Where possible, however, such a result should be avoided.

Attached is memorandum from Colonel Curry.

A

Comparison of AW 10 and comparable provisions of AGN

I. The Article of War now in force.

AW 10 provides that summary courts-martial may be appointed by:

The commanding officer of a
Garrison
Fort
Camp
Other place where troops are on duty
Regiment
Detached battalion
Detached company
other detachment
Superior authority

And that, when only one officer is present with a command, he shall be the summary court.

II. The Article of War as revised.

No change.

III. The Articles for the Government of the Navy now in force.

The Navy equivalent of the Army Summary Court is the deck court which may be ordered (AGN 64, Naval Courts and Boards B-66) by any officer of the Navy or Marine Corps authorized to order either a general or a summary court-martial.

IV. The Navy Articles as revised.

Proposed revision of the Articles for the Government of the Navy would change the name of the present deck court to summary court.

V. Differences.

As indicated above.

(Note: Discussion of jurisdiction and punishment limitations are considered to be outside the purview of this paper.)

22 July 1948

MEMORANDUM

Subject: AW 10 and comparable provisions of AGN, comments on

Reference: Memo "Comparison of AW 10 and comparable provisions of AGN", undated, unsigned

1. AW 10 contains a provision that when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him. The AGN has no such provision for an automatic appointment. Naval Courts and Board section 692(2) provides: "Who may act as deck court officer. - Officers shall not be ordered as deck court officers who are below the rank of lieutenant in the Navy or captain in the Marine Corps, and who have had less than six years service as a commissioned officer, except that, in cases where there is no officer of such rank or of higher rank attached to the vessel, navy yard, or command, the commanding officer (if a commissioned officer) may act as deck court officer. An officer empowered to order deck courts may at his discretion designate himself as deck court officer, irrespective of his rank, if commissioned, and irrespective of the rank of other officers attached to his command."

2. Paragraph IV of referenced memorandum states that a proposed revision of AGN would change the name of the deck court to the summary court. It is the proposed Articles for the Government of the Armed Services which would make this change, not the proposed AGN, which would retain the existing Article 64.

J. E. CURRY
Colonel, USMC