

Uniform Code of Military Justice

Subject: Appointment of Trial Judge Advocates and Counsel. A.W. 11.

I. Army Provisions

1. Articles of War

"ART. 11. Appointment of Trial Judge Advocates and Counsel.--For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and for each general court-martial one or more assistant trial judge advocates and one or more assistant defense counsel when necessary: Provided, however, That no officer who has acted as member, trial judge advocate, assistant trial judge advocate, defense counsel, or assistant defense counsel in any case shall subsequently act as staff judge advocate to the reviewing or confirming authority upon the same case."

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

"ART. 11. Appointment of Trial Judge Advocates and Counsel.--For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and one or more assistant trial judge advocates and one or more assistant defense counsel when necessary: Provided, That the trial judge advocate and defense counsel of each general court-martial shall, if available, be members of the Judge Advocate General's Department or officers who are members of the bar of a Federal court or of the highest court of a State of the United States: Provided further, That in all cases in which the officer appointed as trial judge advocate shall be a member 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, the officer appointed as defense counsel shall likewise be a member 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: Provided further, That when the accused is represented by counsel of his own selection and does not desire the presence of the regularly appointed defense counsel or assistant defense counsel, the latter may be excused by the president of the court: Provided further, That no person who has acted as member, trial judge advocate, assistant trial judge advocate or investigating officer in any case shall subsequently act in the same case as

defense counsel or assistant defense counsel unless expressly requested by the accused: Provided further, That no person who has acted as member, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act in the same case as a member of the prosecution: Provided further, That no person who has acted as member, trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act as a staff judge advocate to the reviewing or confirming authority upon the same case."

II. Navy Provisions

1. Articles for the Government of the United States Navy

- a. There is no similar provision in the A.G.N. for the appointment of the judge advocate for the general court martial. Such authority is implied in the provisions for the appointment of the court itself. A.G.N. 40 provides for oaths for a judge advocate and for the judge advocate "or person officiating as such" to administer the oaths to the court.
- b. A.G.N. 27 "Constitution of summary courts martial.--A summary court martial shall consist of three officers not below the rank of ensign, as members, and of a recorder. The commander of a ship may order any officer under his command to act as such recorder."

2. Naval Courts and Boards

- a. NC&B section 350, page 198: "The authority to convene a general court martial implies the power to appoint the judge advocate. The authority to appoint the recorder of a summary court martial is specifically given by the 27th A.G.N.; of a deck court by the 64th A.G.N., subsection (c). When, therefore, it is decided to assemble a general court martial, the convening authority shall select a competent commissioned officer who shall, if possible, not be liable to summons as a material witness in the case, to perform the duties of judge advocate, and shall name him as such in the precept. Similarly, in the case of a summary court martial, a commissioned or warrant officer shall be named; and in the case of a deck court a competent enlisted man. The judge advocate is in his military character responsible for the proper discharge of his duty to the convening authority."

- b. MC&B section 356, page 200: "The accused is entitled to counsel as a right; and whenever practicable to counsel of his choice. The court can not properly deny him the assistance of a professional or other adviser. Enlisted men to be tried shall be advised particularly of their rights and should be represented by counsel, if practicable, unless they explicitly state in open court that they do not desire such assistance. Should the accused state that he does not desire counsel he shall be informed by the court that counsel will be assigned him should he so desire, and he shall be advised to consult counsel before deciding to proceed with the case without counsel. A statement that this section has been complied with shall be entered upon the record of proceedings. It should be borne in mind, however, that the convening authority has no power to force counsel upon an accused unless the accused is mentally incompetent and thereby unable to look after his own interests. In such a case, when mental incompetency becomes known, the case becomes one for a doctor rather than a court. Failure to comply with request of accused that counsel be provided him is a fatal error."

3. Proposed Navy Bill

- a. "ART. 18 (b) For every summary court martial, the convening authority shall appoint a prosecutor and a defense counsel, who shall be persons qualified to perform such duties. This shall not affect the right of the accused to counsel of his own choice."
- b. "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 * * *."

III. Differences

1. The Army uses the title "trial judge advocate." The Navy bill uses "prosecutor."

2. P.L. 759 provides for assistant trial judge advocates and assistant defense counsel. The Navy has no provision for such offices. (CJO 174-1918, 16; CJO 2-1925, 9; CJO 3-1944, 439).
3. P.L. 759 provides that the trial judge advocate and defense counsel shall, if available, be members of the JAGD or officers who are members of a bar. The Navy Bill provides that these officers shall be "persons qualified to perform such duties" in the SCM and "certified by the Judge Advocate General as persons qualified to perform such duties" in the GCM.
4. P.L. 759 provides for the excuse by the president of the court of the defense counsel when accused has other counsel of his own selection and does not desire the appointed counsel. The Navy makes no provision for such excuse.
5. P.L. 759 provides that no person who has acted as member, trial judge advocate or assistant trial judge advocate, or investigating officer shall subsequently act as defense counsel in the same case except by express request by the accused; that no person who has acted as member, defense counsel, assistant defense counsel, or investigating officer shall subsequently act as member of the prosecution; and that no person who has acted as member, trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, or investigating officer shall subsequently act as staff judge advocate to the reviewing or confirming authority upon the same case. The Navy has no similar provisions but has held it fatal error for the convening authority to sit on SCM and then review the proceedings. (CJO 9-1932, 12; CJO 9-1932, 15).
6. The defense counsel shall have equal professional qualifications to the trial judge advocate. The Navy does not specifically provide for this.

IV. Recommended Provisions

1. The Keefe Report, page 92, 93, & 94 contains the following recommendations:
 - "(1) Qualified officers who are lawyers should be provided to act as prosecuting lawyers and defense counsel for every general court martial, and, when practicable, for every summary court martial.

- "(2) Both prosecuting attorney and defense counsel should be officers whose qualifications have been approved by the Judge Advocate General, either by virtue of his being a Legal Duty Specialist or as otherwise having the requisite legal training and experience.
- "(3) Both prosecuting attorney and defense counsel should be subject only to the supervision of the Judge Advocate General in the performance of their duties as such.
- "(4) In selecting officers for these positions the Judge Advocate General should do his best to see to it that defense and prosecution lawyers are of equal ability.
- "(7) The above recommendations should not affect in any way the present right (N.C.&B., Section 356), of an accused to counsel of his own choice, civilian or naval, when such is available, to conduct his trial or appeal.

2.

The Ballantine Report, 1946, page 8, comments "The recommended change in the status of the judge advocate pre-supposes the appointment of another qualified individual to act as prosecutor. It is also assumed that provision for the counsel for the defense will be continued." The Ballantine Report, 1943, page 12, recommended that a defense counsel should be appointed for each general court martial, to represent all accused men who are not otherwise represented and to assist, if requested to do so, other counsel selected by accused men.

JEC

Uniform Code of Military Justice

Subject: Jurisdiction of General Courts-Martial. A.W. 12.

I. Army Provisions

1. Articles of War

"ART. 12. General Courts-Martial.--General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals; Provided, That no officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy: Provided further, That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interest of the service shall so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses set out in Article 13; but the limitations upon jurisdiction as to persons and upon punishing power set out in said Articles shall be observed."

2. Manual for Courts-Martial

Adds nothing.

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

"SEC. 209. Article 12 is amended to read as follows:

"ART. 12. GENERAL COURTS-MARTIAL.--General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: Provided, That general courts-martial shall have power to adjudge any punishment authorized by law or the custom of the service including a bad-conduct discharge."

II. Navy Provisions

1. Articles for the Government of the United States Navy

There is no specific provision stating jurisdiction of general courts-martial.

"ART. 22. (a) Offense not specified.--All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court martial may direct."

"ART. 35. Authority to inflict summary court-martial punishments.--Any punishment which a summary court martial is authorized to inflict may be inflicted by a general court martial."

2. Naval Courts and Boards

Has no section defining jurisdiction of general courts-martial.

3. Proposed Navy Bill

"SEC. 47.

"ART. 23. A general court martial shall have jurisdiction to try and punish any person subject to the Articles for the Government of the Navy for any offense against said Articles."

"SEC. 25.

"ART. 35 is renumbered as article 30."

"SEC. 47.

"ART. 5 (d) The following shall be offense against the Articles for the Government of the Navy:

"First. Violations of the criminal laws of the United States, whenever enacted, during the time such laws are in force; and any limitation as to Territorial jurisdiction shall not apply.

"Second. Violations of the treaties or conventions of the United States, whenever adopted, during the time such treaties or conventions are in force.

"Third. Violations of such criminal laws of a State, Territory, District, or possession of the United States, or any political subdivision thereof, in which the acts or omissions occurred, as are in force at the date of the passage of this Act and at the time they occurred.

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"Fourth. Violations of the laws, orders, regulations, or customs of the naval service.

"Fifth. Violations of the law of war."

III. Differences

1. As to Persons

Both Army and Navy general courts-martial have jurisdiction to try any person subject to military law or the A.G.N. respectively. Army general courts-martial also have jurisdiction to try any other person for offenses against the law of war, while the Navy general court does not. Apparently, other offenders against the law of war, are tried by Navy extraordinary tribunals not covered in the A.G.N. (See proposed A.G.N. Art. 5 (f)).

For persons subject to military law, see C.S., A.W. 2.

2. As to Offenses

Both Army and Navy general court-martial have power to try persons for all offenses against the Articles of War or A.G.N. respectively.

See C.S., A.W. 96 for violations of state and federal criminal laws of treaties and conventions of the U.S., and of the laws of war.

The proposed Navy bill contains a general provision as to jurisdiction of the A.G.N. as to offenses, while the amended Articles of War do not.

3. As to Punishment

The amended A.W. 12 states that a general court-martial may impose any punishment authorized by law or the custom of the service, while the corresponding A.G.N. article states that a general courts-martial may impose any punishment authorized for a summary (Navy) court-martial. As the punishment authorized to be adjudged by a summary court-martial (Navy) are very limited, the authority for a Navy general court-martial to impose greater punishments is inferred from the provisions that a Navy general court-martial has the power to punish any offense against the A.G.N. and that the court shall impose an adequate punishment.

As to punishments which general courts may impose, see Appendix to this comparative study.

A.W. 12 as amended gives authority for Army general courts-martial to adjudge bad-conduct discharges. This is the only punishment specifically stated in this article and might be placed elsewhere.

The Navy already has a bad-conduct discharge. As to discharge, see C.S., A.W. 108 and Appendix to C.S., A.W. 54.

IV. Recommendations

1. As to Persons

None of the reports contain any recommendation as to change the jurisdiction of general courts-martial as to persons.

As to persons subject to military law in general, see C.S., A.W. 2.

2. As to Offenses

As to general discussion of offenses, see Appendix to C.S., A.W. 54.

3. As to Punishments

There are no recommendations to limit the power of general courts-martial to impose punishment.

As to limitation on punishments, see C.S., A.W. 45.

See Appendix this article for authorized punishments.

Appendix

A.W. 12
P. A

Permissible Punishments Army and Navy Courts-Martial
(P.L. 759 and Proposed A.G.N.)

X Indicates Court May Impose Punishment

KIND	NAVY		ARMY		SUMMARY
	GENERAL	SUMMARY DECK	GENERAL	SPECIAL	
(1) Death	X ¹		X ^{1,2}		
(2) Dismissal (officer)	X ⁴		X ^{3,4}		
(3) Dishonorable Discharge	X		X ⁵		
(4) Bad Conduct Discharge	X	X	X	X	
(5) Confinement at Hard Labor	X ^{4,6}	6 MONTHS 1 MONTH	X ^{4,5,6}	6 MONTHS	1 MONTH
(5a) Hard Labor W/O Confinement (MCM 103:)			X ^{4,6}	3 MONTHS 3 MONTHS	1 MONTH
(6) Restriction	X ¹⁰	6 MONTHS 3 MONTHS	3 MONTHS 3 MONTHS (MCM 103f)		3 MONTHS
(7) Deprivation Shore Liberty	X	3 MONTHS			
(8) Loss of Pay	X	6 MONTHS ⁷ $\frac{1}{2}$ for 1 MONTH	X ⁸	2/3 for 6 MONTHS	2/3 for 1 MONTH
(9) Detention of Pay (EM Only)			2/3 for 3 MONTHS	2/3 for 3 MONTHS	2/3 for 1 MONTH
(10) Fine			X	X	X
(11) Reprimand & Admonition	X ⁹		X	X	
(12) Reduce in Rank (EM) ⁶	X	To next inferior	To private only (MCM 104c)	To private only	To private only
(13) Loss Numbers (Officer)	X	(NC&B 622 n.24)	X (MCM 103h)	X	
(14) Reduction to private (Officer)			in lieu of dismissal only		
(15) Suspension (Officer)	X ⁹	(NC&B 622 n.24)	X	X (MCM 103h)	

Appendix (Cont'd)

Permissible Punishments Army and Navy Courts-Martial
(P.L. 759 and Proposed A.G.N.)

X Indicates Court May Impose Punishment

<u>KIND</u>	<u>NAVY</u>		<u>ARMY</u>	
	GENERAL	SUMMARY DECK	GENERAL	SPECIAL SUMMARY
(16) Loss Seniority (Warrant O.)	X	(NC&B 622 n.24)	Warrant O., Nurses, etc.	treated as officers.
(17) Solitary Confinement on Bread and Water with Full Ration Every 3rd Day	X	30 DAYS	20 DAYS	

Cruel and Unusual

PROHIBITED - SEE C.S., A.W. 41.

NOTES

1. Death can be adjudged only for an offense which specifically provides for it.
2. Under A.W. death is mandatory in case of spies (A.W. 82) and either death or life imprisonment is mandatory for premeditated murder (A.W. 92). Navy has no mandatory punishments.
3. Dismissal is mandatory under A.W. 95, conduct unbecoming an officer; A.W.56 false muster; A.W. 57, false returns; and A.W. 87 personal interest in sale of provisions.
4. Officer must be dismissed if sentenced to confinement or hard labor. N.C.&B. 622 n.24, MCM 103c .
5. Army enlisted man must be given dishonorable discharge if more than six months' confinement. MCM 104b. Vanderbilt Report disapproves.
6. When Navy enlisted man is sentenced to more than three months' confinement, he should be reduced to lowest rating. N.C.&B. 622 n.21, MCM 104c.

Appendix (cont'd)

7. Navy summary court-martial may not adjudge more than loss of $\frac{1}{2}$ pay per month unless also bad conduct discharge. N.C.&B. 446.
8. May not adjudge loss of more than $\frac{2}{3}$ pay per month unless dishonorable discharge. HCM 104b.
9. Not favored N.C.&B. 622 n. 24.
10. Only confinement or restriction may be imposed.

COMBINATIONS

General courts - not restricted except as noted above.

Army special not restricted except as noted above.

Navy summary - No combinations except 3 months' confinement, and loss of pay not to exceed 3 months may be imposed in addition to bad conduct discharge; and loss of pay not to exceed 3 months may be imposed in addition to solitary confinement on bread and water, or confinement or restriction, or deprivation of shore liberty.

Army summary - not restricted except as noted above and where both confinement and restriction are imposed, both must be appor-tioned.

Navy deck - no combination except loss of pay in addition to solitary confinement on bread and water, or confinement or restriction, or deprivation of shore liberty.

Uniform Code of Military Justice

Subject: Jurisdiction of Special Courts-Martial. A.W. 13.

I. Army Provisions

1. Articles of War

"ART. 13. Special Courts-Martial.--Special courts-martial shall have power to try any person subject to military law for any crime or offense not capital made punishable by these articles: Provided, That the President may, by regulations, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law.

"Special courts-martial shall not have power to adjudge confinement in excess of six months, nor to adjudge forfeiture of more than two-thirds pay per month for a period of not exceeding six months."

"ART. 12. General Courts-Martial.Provided further, That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interest of the service shall so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses set out in Article 13; but the limitations upon jurisdiction as to persons and upon punishing power set out in said article shall be observed."

2. Manual for Courts-Martial

Par. 14. Excepts officers from trial by special courts-martial under authority of proviso.

A crime is not capital in meaning of A.W. 13 when limitation on punishment prescribed by President is less than death and even though a crime is capital, it may be tried by a special court under the first proviso of Art. 12. But no crime or offense, capital or otherwise, may be tried by a special courts-martial if a mandatory punishment is prescribed which is beyond the power of the court to assess.

Nor can a special court-martial adjudge death, dishonorable discharge of an enlisted man or dismissal of an officer.

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

"SEC. 210. Article 13 is amended to read as follows:

"ART. 13. SPECIAL COURTS-MARTIAL.--Special courts-martial shall have power to try any person subject to military law for any crime or offense not capital made punishable by these articles: Provided, That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interests of the service so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses herein prescribed.

"Special courts-martial shall not have power to adjudge dishonorable discharge or dismissal, or confinement in excess of six months, nor to adjudge forfeiture of more than two-thirds pay per month for a period of not exceeding six months: Provided, That subject to approval of the sentence by an officer exercising general court-martial jurisdiction and subject to appellate review by The Judge Advocate General and appellate agencies in his office, a special court-martial may adjudge a bad-conduct discharge in addition to other authorized punishment: Provided further, That a bad-conduct discharge shall not be adjudged by a special court-martial unless a complete record of the proceedings of and testimony taken by the court is taken in the case."

Proviso in A.W. 12 repealed.

II. Navy Provisions

1. Articles for the Government of the United States Navy

"ART. 26. Summary courts-martial may be ordered upon petty officers and enlisted men in the naval service..... 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."

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"ART. 30. Punishments by summary courts-martial.-- Summary courts martial may sentence petty officers and persons of inferior ratings to either a part or the whole, as may be appropriate, of any one of the following punishments, namely:

"First. Discharge from the service with bad conduct discharge; but the sentence shall not be carried into effect in a foreign country.

"Second. Solitary confinement, not exceeding thirty days, on bread and water, or on diminished rations.

"Third. Solitary confinement not exceeding thirty days.

"Fourth. Confinement not exceeding two months.

"Fifth. Reduction to next inferior rating.

"Sixth. Deprivation of liberty on shore on foreign station.

"Seventh. Extra police duties, and loss of pay, not to exceed three months, may be added to any of the above-mentioned punishments."

"ART. 31. Disrating for incompetency.--A summary court martial may disrate any rated person for incompetency."

2. Naval Courts and Boards

SEC. 652, n.11. When an offense charged is of such character that the punishment which a summary court martial is authorized to inflict is not adequate, the offender should be brought to trial before a general court unless it is impracticable to do so.

3. 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

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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 by general court martial."

"SEC. 22. Article 30 is renumbered as article 20 and amended to read as follows:

"ART. 20. (a) A summary court martial shall have power to impose either a part or the whole of any one of the following punishments:

"First. Discharge with a bad-conduct discharge;

"Second. Reduction to the next inferior rank or rating;

"Third. Solitary confinement on bread and water with full ration every third day for a period not exceeding thirty day, to run consecutively;

"Fourth. Confinement, or restriction within stated limits, for a period not exceeding six months, to run consecutively;

"Fifth. Deprivation of liberty on shore for a period not exceeding three months, to run consecutively;

"Sixth. Loss of pay not to exceed six months' pay.

"(b) Confinement for a period not exceeding three months, to run consecutively, and loss of pay not to exceed three months' pay may be imposed in addition to a bad conduct discharge; and loss of pay not to exceed six months' pay may be imposed in addition to any one of the punishments enumerated under (Third), (Fourth), and (Fifth) of section (a) of this article."

ART. 31 is repealed.

III. Differences

1. As to Persons

Under the Amended Articles of War, special courts-martial may try any persons subject to military law, while under the Navy bill, only enlisted persons under

the command of the convening authority, may be tried by Navy summary courts-martial.

As to trial of officers by special court-martial, see C.S., A.W. 16.

2. As to Offenses

Under the interpretation of A.W. 13 in the Manual for Courts-Martial, the only offenses that an Army special court-martial may not try are, (1) murder (A.W. 92) as the mandatory sentence for premeditated murder is death or life imprisonment; (2) false muster (A.W. 56), false returns (A.W. 57); personal interest in sale of provisions (A.W. 87), and conduct unbecoming an officer (A.W. 95) which offenses carry a mandatory sentence of dismissal; and (3) spying (A.W. 82) which must be tried by a general court by statute.

According to proposed article 17 of the A.G.N., a summary court-martial could try any offense. There is no specification in N.C.&B. as to which crimes are triable by summary courts except that the convening authority may exercise his discretion. However, Navy Department letters state Navy policy in this regard.

3. As to Punishment

See Appendix to C.S., A.W. 12.

As to bad conduct discharge, see Appendix to C.S., A.W. 54.

IV. Recommendations

1. As to Persons

See C.S., A.W. 16 as to trial of officers by special courts-martial.

There are no comments in Ballantine, McGuire, Keoffe, or Vanderbilt Reports or Navy JAG recommendations on trial of other persons by special courts-martial.

2. As to Offenses

As offenses triable by special courts-martial are more or less dependent on punishment authorized, see following section.

3. As to Punishment

The McGuire Articles recommend that:

A Summary (Navy) court-martial shall have power to impose:

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

The First Ballantine Report recommended that Navy summary courts should be given power to adjudge confinement and loss of pay not exceeding six months and that bad conduct discharges should not be adjudged by special courts-martial unless the offense involves moral turpitude, or where the accused is neither presently nor prospectively of any value to the service.

The Second Ballantine Report recommends:

"Increase in Powers of Summary Courts-Martial.

Under the present Articles for the Government of the Navy, a Summary Court-Martial is authorized to award sentences of confinement not exceeding two months and loss of pay not exceeding three months. For the reasons stated below, the Board believes that the powers of punishment by Summary Courts-Martial should be increased. A Summary Court-Martial may try any enlisted person subject to naval law. The sentence which it may impose is limited to 'any one of several punishments, including discharge from the service with a bad conduct discharge,' to which may be added extra police duties and loss of pay not to exceed three months. Where a bad conduct discharge is awarded by such a court, and is later mitigated, the result under present provisions is that there is ordinarily no punishment. As a matter of practice, General Courts-Martial are prone to regard their minimum punishment of confinement as six months, thus there is a gap in the punishment scale which the Board feels should be closed. The Board recommends an increase in the powers of Summary Courts-Martial as follows:

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- "1. Discharge with a bad conduct discharge.
- "2. Confinement for a period not exceeding six months, to run consecutively.
- "3. Solitary confinement for a period not exceeding 50 days.
- "4. Reduction to the next inferior rating.
- "5. Deprivation of liberty on shore for a period not exceeding sixty days, to run consecutively.
- "6. Confinement for a period not exceeding three months, to run consecutively, and loss of pay not exceeding three months may be adjudged in addition to a bad conduct discharge. No bad conduct discharge shall be executed in a foreign country.

"Adoption of the above scale of punishments will, in the opinion of the Board, reduce the number of General Courts-Martial. Additional safeguards provided for the rights of the accused (detail of a judge advocate is one) are believed to be commensurate with the increase of the limitations of Summary Court-Martial punishments as recommended. It is to be noted that the foregoing permits a combination of confinement, loss of pay, and bad conduct discharge. In the opinion of the Board, this flexibility is desirable, in that it makes it possible for a man to be sentenced to a bad conduct discharge to be placed on probation without his escaping punishment entirely."

The Keoffe Report states:

"Nevertheless, the Board feels that the rate of trial by general court-martial could be reduced even further without impairing discipline. The Board was impressed by the number of cases reviewed by it what appeared to be relatively minor offenses had been referred to trial by general courts-martial....."

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

- "a. The limited sentencing power of the summary court-martial;
- "b. The limitations which have been placed on the discretion of convening authorities in referring cases to trial.

"These reasons will be discussed severally.

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

"The obvious solution is to increase the dignity and power of the summary court-martial so that it can handle cases of this nature without the necessity of resorting to trial by general court-martial. Such a recommendation has been made both by the McGuire Committee and by the Ballantine Committee. This recommendation is implemented in Article 4 (c) of the proposed McGuire Articles, with which the White and Judge Advocate General draft articles concur generally.

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

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

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

"(1) First Offense:

Absence over leave for over 30 days: General court.

Absence without leave for over 20 days: General court.

"(2) Second absence offenses:

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

"(3) Third Absence Offenses:

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

"(4) Repeated Absence Offenses:

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

"(5) Missing Ship or Mobile Unit:

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

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

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

"The Board realizes that these letters were rendered necessary by certain serious disciplinary problems which arose during the war. This was particularly so with respect to missing ship, which during the war was tantamount to desertion. Even after V-J Day, prolonged absences and cases of missing ship interfered seriously with the demobilization program. The Board also realizes that it is highly desirable to establish uniform policies in court-martial matters and that the Navy, by prescribing uniform centralized policies, has achieved a very commendable result in the direction of uniform justice.

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

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

"The attempt to categorize all offenses and to prescribe their disposition in advance, with little or no regard to the varying factors of age, education, civilian background, previous service, combat record, domestic conditions, hardship, and other mitigating circumstances is an archaic approach to law enforcement, completely at variance with modern notions of penology and criminology. Even from a purely military and disciplinary standpoint, it is less advance than the Army's more flexible approach to the same subject.

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

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

"In the Army the policy is announced that:

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

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

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

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

The Vanderbilt Report recommends the abolition of all mandatory minimum sentences. This would make all offenses triable by special courts-martial under present criteria.

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The Navy JAG recommends:

1. "Punishments:
 - "a. BCD;
 - "b. Reduction to the next inferior rating.
 - "c. Confinement not exceeding 6 months;
 - "d. Solitary confinement on bread and water or diminished rations, with a full ration every third day, not exceeding 30 days.
 - "e. Deprivation of liberty, not exceeding 3 months.
 - "f. Loss of pay, not exceeding 6 months' pay (which punishment may be imposed independently or in addition to any punishment other than BCD).
 - "g. Confinement not exceeding 3 months, and loss of pay not exceeding 3 months' pay, may be imposed in addition to a BCD.
2. "Abolish solitary confinement and extra police duty.
3. "A SCM confinement sentence--even where it extends to the recommended maximum of 6 months--shall not carry with it the "accessories."
4. "Retain present practice that no good conduct credit is given in SCM confinement cases."

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Uniform Code of Military Justice

Subject: Jurisdiction of Summary (Army) Courts-Martial and Deck Courts. A.W. 14.

I. Army Provisions

1. Articles of War

"ART. 14. Summary Courts-Martial.--Summary courts-martial shall have power to try any person subject to military law, except an officer, a member of the Army Nurse Corps, a warrant officer, an Army field clerk, a field clerk Quartermaster Corps, a cadet, or a soldier holding the privileges of a certificate of eligibility to promotion, for any crime or offense not capital made punishable by these articles: Provided, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring to trial before a general court-martial. Provided further, That the President may, by regulations, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law."

"Summary courts-martial shall not have power to adjudge confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of one month's pay."

2. Manual for Courts-Martial

Par. 16. :....."Under the authority of A.W. 14, persons of actual, relative, or assimilated rank above that of private, first class, in the Army are hereby excepted from the jurisdiction of summary courts-martial, provided that noncommissioned officers of actual, relative, or assimilated rank below that of technical sergeant in the Army may be tried by summary court-martial, either if they do not object, or if such trial is authorized by the officer competent to bring them to trial before a general court-martial."

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

"SEC. 211. Article 14 is amended to read as follows:

"ART. 14. SUMMARY COURTS-MARTIAL.--Summary courts-martial shall have power to try any person subject to military law, except an officer, a warrant officer, or

a cadet, for any crime or offense not capital made punishable by these articles: Provided, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a special court-martial: Provided further, That the President may, by regulations, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law.

"Summary courts-martial shall not have power to adjudge confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of one month's pay."

II. Navy Provisions

I. 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 not triable by summary court martial (Aug. 29, 1916, c. 417, 39 Stat. 586).

"(b) Constitution and powers.--Deck courts shall consist of one commissioned officer only, who, while serving in such capacity, shall have power to administer oaths, to hear and determine cases, and to impose either a part or the whole, as may be appropriate, of any one of the punishments prescribed by article 30 of the Articles for the Government of the Navy: Provided, That in no case shall such courts adjudge discharge from the service or adjudge confinement or forfeiture of pay for a longer period than twenty days (Feb. 16, 1909, c. 131, sec. 2, 35 Stat. 621.)

"(g) Objection to trial by deck court.--No person who objects thereto shall be brought to trial before a deck court. Where such objection is made by the person accused, trial shall be ordered by summary or by general court martial, as may be appropriate (Feb. 16, 1909, c. 131, sec. 7, 35 Stat. 621)."

2. Naval Courts and Boards

SEC. 692, n.4.--The jurisdiction of a deck court is expressly limited to "minor offenses."

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."

"ART. 16. (b) A deck court shall have power to impose either a part or the whole of any one of the following punishments:

"First. Reduction to the next inferior rank or rating;

"Second. Solitary confinement on bread and water with full ration every third day for a period not exceeding twenty days, to run consecutively;

"Third. Confinement, or restriction within stated limits, for a period not exceeding one month;

"Fourth. Deprivation of liberty on shore for a period not exceeding one month.

"Fifth. Loss of pay not to exceed one month's pay.

"(c) Loss of pay not to exceed one month's pay may be imposed in addition to any one of the punishments enumerated under Second, Third, and Fourth of section (b) of this article.

"(f) No person who objects thereto shall be brought to trial before a deck court martial. Where such objection is made by the person accused, trial shall be ordered by summary or general court martial, as may be appropriate."

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III. Differences

1. As to Persons

Under the amended Articles of War, any enlisted person below the rank of technical sergeant (corresponding Navy rank, Petty Officer 1st class) may be tried by summary court-martial, while Navy deck courts may try any enlisted person.

However, any Naval person may object to trial by deck court, while only Army personnel above the rank of private first class may object to trial by summary court-martial.

2. As to Offenses

Any Army summary court can try any offense triable by a special court; while Navy deck courts are limited to "minor offenses."

3. As to Punishment

As to permissible punishments, see Appendix to C.S., A.W. 12.

IV. Recommendations

1. As to Persons

The McGuire Report recommended abolition of deck courts. All other Navy Reports favored retention.

The first Ballantine Report recommended that the right to object should be eliminated as it was rarely used and of no substantial value to the accused.

The second Ballantine Report does not comment on deck courts other than favoring their retention.

The Keefe Report does not deal with deck courts.

The Vanderbilt Report recommended further study of increasing the dignity, power, and authority of summary courts.

2. As to Offenses

No other comment than as noted above.

3. As to Punishments

McGuire - abolish

The first Ballantine Report recommended:

"Authorized punishments. The powers of deck courts to adjudge punishment are set out above in the descriptive account of the disciplinary system. The powers of deck courts are circumscribed by limitations preventing the most effective use of deck courts. In the summary court martial, a proper distinction is made between mere confinement and solitary confinement on bread and water. Although solitary confinement on bread and water is not generally looked upon with favor, a deck court must resort to this punishment to exercise its maximum powers since the same time limitation is applicable both to solitary confinement on bread and water and to ordinary confinement. It would be desirable to increase the power of the deck court to impose loss of pay, so that an adequate punishment of this nature, which is frequently appropriate than confinement, could be imposed.

"Recommendation: An amendment to article 64 of the Articles for the Government of the Navy should be sought, empowering deck courts to adjudge confinement and forfeiture of pay for not more than one month."

The Second Ballantine and Keefe Reports make no comment.

The White Report recommended confinement increased from 20 to 30 days. Solitary confinement on bread and water decreased from 20 to 15 days, deprivation of shore liberty limited to 30 days, loss of pay for 30 days.

The Navy JAG recommended:

3. "Punishments:

- "a. Reduction to the next inferior rating;
- "b. Confinement not exceeding 30 days;
- "c. Solitary confinement on bread and water or diminished rations, with a full ration every third day, not exceeding 20 days;

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"d. Deprivation of liberty, not exceeding 1 month;

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

4. "Abolish solitary confinement and extra police duties."

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Uniform Code of Military Justice

Subject: Jurisdiction Not Exclusive. A.W. 15

I. Army-Air Force Provisions

1. Articles of War

"ART. 15. Jurisdiction not Exclusive.--The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war be triable by such military commissions, provost courts, or other military tribunals."

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

P.L. 759 does not change A.W. 15.

3. Offenses denounced by Articles 80; dealing in captured or abandoned property, and 82, spies, are specifically made punishable by military commission or other military tribunal.

4. "U.C.M." 1928, Section 2, provides:

"Military commissions and provost courts for the trial of offenses within the respective jurisdiction. These tribunals are summary in nature, but so far as not otherwise provided have usually been guided by the applicable rules of procedure and of evidence prescribed for courts-martial;"

II. Navy Provisions

1. No provision can be found in the present A.G.N. similar to A.W. 15.

2. The proposed Navy Articles provide in Article 5 (f) as follows:

"The provisions of these articles conferring jurisdiction upon courts martial shall not be construed as affecting the jurisdiction of extraordinary military tribunals."

3. Appendix D of U.C.M. defines "extraordinary military courts" as including the military commission, the superior provost court, and the provost court. Appendix D fully sets out the procedure of these extraordinary courts as similar to the three types of Navy courts martial.

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Study of A. 7. 15 and comparable provisions in Navy Court-Martial System.

III.

It is not considered that these matters are controversial or that any particular difficulty will be encountered drafting a uniform system.

SSM

Uniform Code of Military

Subject: Officers - How Triable. A.W. 16.

I. Army Provisions

1. Articles of War

"ART. 16. Officers; How Triable.--Officers shall be triable only by general and special courts-martial, and in no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank."

Note: "The provision as to rank is directory only on the appointing authority. The sentence of a court can not be collaterally attacked by going into an inquiry whether the trial by officers inferior in rank to the accused was or was not avoidable." (Swain v. U.S. 165 U.S. 553).

"ART. 13.the President may, by regulations, except from the jurisdiction of special courts-martial any class or classes or persons subject to military law."

2. Manual for Courts-Martial

Par. 14....."Under the authority of A.W. 13 commissioned officers are hereby excepted from the jurisdiction of special courts-martial.".....

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

"SEC. 212. Article 16 is amended to read as follows:

'Art. 16. PERSONS in the MILITARY SERVICE--HOW TRIABLE--Officers shall be triable only by general and special courts-martial and in no case shall a person in the military service, when it can be avoided, be tried by persons inferior to him in rank. No on-listed person may sit as a member of a court-martial for the trial of another enlisted person who is assigned to the same company or corresponding military unit."

SEC. 210. Repeals clause of A.W. 13 allowing President to except from jurisdiction of special courts-martial.

II. Navy Provisions

1. Articles for the Government of the United States Navy

"ART. 39.....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....." (This article pertains only to general courts as officers are only triable by general courts-martial).

ART. 64 (a) and 26 provide that only enlisted men be tried by summary and deck courts.

2. Naval Courts and Boards

"SEC. 346.....As a matter of policy in such case (trial of officer) all should be senior. The convening authority is justified in departing from this rule only under the most unusual circumstances."

3. Proposed Navy Bill

No change.

III. Differences

1. Trial by special or summary (Navy) courts-martial.

Under present practice officers in both services are triable only by general courts-martial.

Under the Amended Articles of War, Army officers are triable by both general and special courts-martial, while under the proposed Navy bill officers are still only triable by general courts-martial.

2. Trial by inferiors in rank.

Under the amended A.W., persons must be tried by superiors in rank, when available, while the A. G. W. provide that no more than half, exclusive of the president, shall be inferior in rank, where it can be avoided without injury to the service. The U. S. Supreme Court held the Army provision to be only directory and presumably the Navy provision would be interpreted in a like manner.

The Amended Articles of War also provide that no enlisted person shall sit as a member of a court martial for the trial of another enlisted person who is a member of the company or similar unit.

The proposed Navy bill does not provide for enlisted men as members of courts-martial.

As to enlisted men on courts see C.S. A.W. 4.

As to confinement and punishment prior to sentence, see C.S. A.W. 69.

IV. Recommendations

1. Trial of officers by special courts-martial

Both Ballantine Reports make no comment.
 McGuire Report makes no comment.
 The Keefe Report makes no comment.
 Navy JAG - no comment.
 The Vanderbilt Report recommended:

"The trial of officers by special courts should be authorized in order to bridge the gap between punishment under Article 104 and punishment by a general court. The existence of that gap was given by many witnesses as the reason why officers did not receive more punishment. The only court punishment available was that imposed by general court after trial and, in many instances, such a trial was considered too drastic. We see no adequate reason why an officer should not be tried by special court. Some witnesses took the position that an officer should not be tried unless conviction was to be followed by dismissal from the service, since a convicted officer is no good to the service. Records of general court-martial officer trials and conviction do not bear out that conclusion. In the European Theater there were 1737 officers tried, 1396 were convicted. Of those convicted 74 per cent were not dismissed from the service but were retained in the service and, presumably, continued to render valuable military service."

The House Armed Services Committee Report (H.R. Rep. 1034) stated:

"A greater equality in the treatment of officers and enlisted men should be provided,

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

2. Trial by inferiors in rank.

There is no comment on trial by inferiors in rank in the Ballantine, McGuire, Koeffe, or Vanderbilt Reports.

The Navy JAG recommends that if enlisted men are allowed to sit on courts, they should also be superior in rank to the accused.

FEL-1

Uniform Code of Military Justice

Subject: Duties of the Trial Judge Advocate
and Defense Counsel. A.W. 17, 116.

I. Army Provisions

1. Articles of War

"ART. 17. Trial Judge Advocate to Prosecute; Counsel to Defend.-- The trial judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article 11. Should the accused have counsel of his own selection, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel."

"ART. 116. Powers of Assistant Trial Judge Advocate and of Assistant Defense Counsel.-- An assistant trial judge advocate of a general court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the trial judge advocate of the court. An assistant defense counsel shall be competent likewise to perform any duty devolved by law, regulation, or the custom of the service upon counsel for the accused."

2. Manual for Courts-Martial

"SEC. 41. Courts-Martial -- Personnel -- Trial Judge Advocate

"b. Duties in general

"When charges are referred to him for trial, it is his duty to bring them promptly to trial before the court indicated in the reference for trial.....

"Unless otherwise directed by the appointing authority, he will submit a weekly report to the latter through the president of the court..... This report will include a statement of the reasons for the delay in finally disposing of cases that have been on hand for over two weeks.

"Immediately upon any final adjournment of a court in a case, and irrespective of whether any announcement in open court was made concerning the result, the trial judge advocate will notify the proper commanding officer in writing of the result, including any findings reached and any sentence imposed by the court.

"Subject to the provisions of this manual, he should be left free by the court to introduce his evidence in such order as he sees fit. In general, he may bring cases to trial in such order as he

deems expedient. He will be given ample opportunity properly to prepare the prosecution of each case. With a view to saving time, labor, and expense, he should join in appropriate stipulations as to unimportant or uncontested matters.

"c. Duties prior to trial.--

"He will report to the appointing authority any substantial irregularity in the order appointing the court or in the charges or accompanying papers. Ordinarily he will correct and initial slight errors or obvious mistakes in the charges, but will not without authority make any substantial change therein. He will take proper action to the end that the data as to service, etc., and any evidence of previous convictions may be complete and free from errors of substance or form.

"Unless otherwise directed by the president or unless obviously unnecessary, he will send a timely notice to the members of the court and to all others concerned, including the officer, if any, whose duty it is to see that the accused attends, of the date, hour, and exact place of any meeting of the court.....

..... "As to each offense charged, the burden is on the prosecution to prove beyond a reasonable doubt by relevant evidence that the offense was committed, that the accused committed it, that he had the requisite criminal intent at the time, and that the accused is within the jurisdiction of the court, except to the extent that such burden is relieved by a plea of guilty. Whatever the defense may be, this burden never changes.....

"If, while preparing a case for trial, he discovers a matter, which in his opinion makes it inadvisable to bring the case to trial, he will at once bring such matter to the attention of the appointing authority, provided it is reasonably apparent that such matter was not known to the appointing authority when the charges were referred for trial. Such action would be appropriate where, for example, the trial judge advocate discovers evidence that the accused was or is insane, or finds that the only witness to an essential fact has disappeared or repudiates the substance of the testimony expected from him.

"d. Duties during trial.-- He executes all orders of the court. Under the direction of the court he keeps or superintends the keeping of the required record of the proceedings. He signs the record of each day's proceedings.

"While his primary duty is to prosecute, any act (such as the conscious suppression of evidence favorable to the defense) inconsistent with a genuine desire to have the whole truth revealed is prohibited.

"While the court is in open session, he should respectfully call its attention to any apparent illegalities or irregularities in its action or in the proceedings.

"He will take care that any papers in his possession which relate to a case referred to him for trial and which are not in evidence, are not exposed to any risk of inadvertent examination by members of the court.

"Aside from opinions expressed in the proper discharge of his duty to prosecute (e. g., in an argument on the admissibility of evidence), he should not give the court his opinion upon any point of law arising during the trial except when it is asked for by the court in open court. When he addresses the court he will rise. The court may require him to reduce his arguments to writing.

"e. Relations to the accused and his counsel.--Except to the extent that this manual may otherwise require, it is not his duty to assist or advise the defense.

"Immediately on receipt of charges referred to him for trial he will serve a copy of the charge sheet as received and corrected by him on the accused and will inform the defense counsel of the court that such copy has been so served. Except as otherwise directed by the appointing authority, he will permit the defense to examine from time to time any papers accompanying the charges, including papers sent with charges on a rehearing. He will also permit the defense to examine from time to time the orders appointing the court and all modifying orders.

"Ordinarily his dealings with the defense will be through any counsel the accused may have. Thus if he desires to know how the accused intends to plead he will ask the defense counsel or other counsel, if any, of the accused. He should not attempt to induce a plea of guilty.

"The defense will be allowed to read the record as it is written up, except unannounced findings and sentence; and the trial judge advocate of a general court-martial will furnish every person tried by the court who desires one a copy of the record of trial, less unannounced findings and sentence and exhibits not copied."

"SEC. 42. Courts-Martial -- Personnel -- Assistant Trial Judge Advocate.--

"a. Duties in general..... He will perform such duties as the trial judge advocate may designate.

"b. Term 'trial judge advocate' includes assistant.--Wherever in this manual the trial judge advocate of a general court-martial is mentioned the term will be understood to include assistant trial judge advocates, if any, unless the context shows clearly

that a different sense is intended."

"SEC. 43. Courts-Martial -- Personnel -- Defense Counsel.--

"b. Duties--When the defense is not in charge of a counsel of the accused's own selection, the duties, etc., of the defense counsel are those of a military counsel of the accused's own selection. (See 45.) When the defense is in charge of a counsel of the accused's own selection, civil or military, the duties of the defense counsel as associate counsel are such as the selected counsel may designate.

"Immediately upon charges being referred for trial to the court he will inform the accused of that fact and of his rights as to counsel, and will render the accused any desired assistance in securing and in consulting counsel of his own selection. Unless the accused otherwise desires the defense counsel will undertake the defense without waiting for the appointment or the retaining of any individual counsel.

"c. Term 'counsel for the accused.'--Whenever the phrase 'counsel for the accused,' or any similar phrase, is used in this manual it is to be understood, unless the context indicates otherwise, as including the defense counsel of the court and any individual counsel."

"SEC. 44. Courts-Martial -- Personnel -- Assistant Defense Counsel.--

"a. Duties.-- Unless in charge of the defense, he will perform such duties in connection with the trial as the counsel in charge of the defense may designate.

"b. Term 'defense counsel' includes assistant.--Whenever in this manual the defense counsel of a general court-martial is mentioned, the term will be understood to include an assistant defense counsel, if any, unless the context shows clearly that a different sense is intended."

"SEC. 45. Courts-Martial -- Personnel -- Individual Counsel for the Accused.--

"b. Duties in general; freedom in conducting defense.--An officer, or other military person, acting as individual counsel for the accused before a general or special court-martial, will perform such duties as usually devolve upon the counsel for a defendant before civil courts in a criminal case. He will guard the interests of the accused by all honorable and legitimate means known to the law. It is his duty to undertake the defense regardless of his personal opinion as to the guilt of the accused; to disclose to the accused any interest he may have in or in connection with the case which might influence the accused in the selection of counsel; to represent the accused with undivided fidelity, and not to divulge his secrets or confidence. It is improper for him to assert in argument his personal belief in the accused's innocence or to tolerate any manner of fraud or chicanery.

"With a view to saving time, labor, and expense, he should join in appropriate stipulations as to unimportant or uncontested matters.

"Before the trial he will explain to the accused the meaning and effect of a plea of guilty and his right to introduce evidence after such plea; his right to testify or to remain silent; his right to make a statement; his right to introduce in extenuation; and, in an appropriate case, his right to plead the statute of limitations. These explanations will be made regardless of the intentions of the accused as to testifying, making a statement, or as to how he will plead.

"His preparation for trial should include a consideration of the essential elements of each offense charged and of the pertinent rules of evidence, to the end that such evidence as he proposes to introduce in defense may be confined to relevant evidence, and that he may be ready to make appropriate objection to any irrelevant evidence that might be offered by the prosecution. In determining the order in which he proposes to introduce evidence for the defense, he should observe the general principle stated in the third subparagraph of 4lc.

".....

"He will examine the record of the proceedings of the court before it is authenticated.

"The court will avoid any unwarranted interference in his conduct of the defense, but may require him to reduce his arguments to writing. When he addresses the court he will rise.

"Ample opportunity will be given him and the accused properly to prepare the defense, including opportunities to interview each other and any other person.

"Where the trial proceeds after the accused has escaped, the individual counsel continues to represent him."

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

ART. 17, A. W., is not changed by P.L. 759.

"SEC. 241. Article 116 is amended to read as follows:

'ART. 116. Powers of Assistant Trial Judge Advocate and of Assistant Defense Counsel.-- An assistant trial judge advocate of a general or special court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the trial judge advocate of the court. An assistant defense counsel shall be competent likewise to perform any duty devolved by law, regulation, or the custom of the service upon counsel for the accused.'

II. Navy Provisions

1. Articles for the Government of the Navy

There is no provision in A. G. N. which corresponds to Art. 17 of the Articles of War.

Art. 27, A. G. N. provides that a summary court martial shall consist of three officers, as members, and of a recorder. (The duties of the recorder are essentially those of the Army's trial judge advocate). The commander of a ship may order any officer under his command to act as recorder. Art. 28, A. G. N., deals with the oath to be taken by the recorder; the oath taken does not indicate that the recorder acts as prosecuting counsel.

Art. 40, A. G. N., provides for the administering of an oath by the president of a general court martial to the judge advocate or person officiating as such. The oath administered does not indicate that the judge advocate acts as prosecuting counsel.

Art. 64 (c) provides that any person in the Navy under the command of the officer appointing a deck court may be detailed to act as recorder. (The duties of the recorder of a deck court are only to keep a record of proceedings; he does not act as counsel. Cf. N.C.B., Sec. 698, Fn.(9))

2. Naval Courts and Boards

"SEC. 351. Duties of judge advocate before trial.--
The judge advocate should confer with the accused as soon as practicable after the latter has received a copy of the charges and specifications. He should scrupulously avoid even the slightest suggestion to the accused that he plead guilty to anything charged against him. He should inform the accused that he is entitled to counsel; that he may have a reasonable time in which to prepare his defense; and of his rights in regard to having witnesses summoned for the defense. The judge advocate should inform the accused as to the probable witnesses to be called for the prosecution, although it is unnecessary to inform him as to the testimony expected from them. In many cases the accused will not know whether he wants or needs counsel. In that event the judge advocate must explain to him the general duties of counsel for the defense. If, in discussing the case with the accused, it develops that he might have any good defense whatever, or the accused believes he has, discussion of the merits of the case should be terminated at once and the accused advised to plead not guilty and secure counsel. The judge advocate should endeavor to ascertain what statement, if any, the accused contemplates making at the trial, as this will enable the judge advocate to determine whether the accused has or believes he has any defense to offer. Whenever an accused has secured counsel, all negotiations by the judge advocate must be conducted through counsel."

"....."

(Other duties described in section correspond to those of Army trial judge advocate. Cf. also Sects. 352, 353, and 354.)

"SEC. 400. Duties of judge advocate during trial.-- During the trial the judge advocate conducts the case for the Government. He executes all orders of the court; reads the convening order; administers the oath to the members, reporter, and interpreter; arraigns the accused; examines witnesses; and is responsible for the keeping of a complete and accurate record of the proceedings.
.....

"The accused and his counsel have a right to the opinion of the judge advocate, in or out of court, upon any question of law arising out of the proceedings....."

"SEC. 355. Counsel for judge advocate.-- In order that a counsel for the judge advocate may have standing before a court, it is necessary that he be detailed or authorized by the convening authority. If so detailed the court shall give him equal facilities with the counsel for the accused in the performance of his duties."

"SEC. 385. Counsel for judge advocate.-- If counsel be detailed or authorized by the convening authority to assist the judge advocate, the court shall give him equal facilities with the counsel for the accused in the performance of his duties. Such counsel should be present when the court first meets, or, if detailed after the trial has begun, he should report as soon as possible thereafter."

"SEC. 356. Accused entitled to counsel.-- The accused is entitled to counsel as a right, and whenever practicable to counsel of his choice. The court can not properly deny him the assistance of a professional or other adviser. Enlisted men to be tried shall be advised particularly of their rights, and should be represented by counsel, if practicable, unless they explicitly state in open court that they do not desire such assistance. Should the accused state that he does not desire counsel he shall be informed by the court that counsel will be assigned him should he so desire, and he shall be advised to consult counsel before deciding to proceed with the case without counsel. A statement that this section has been complied with shall be entered upon the record of proceedings. It should be borne in mind, however, that the convening authority has no power to force counsel upon an accused unless the accused is mentally incompetent and thereby unable to look after his own interests. In such a case, when mental incompetency becomes known, the case becomes one for a doctor rather than a court. Failure to comply with request of accused that counsel be provided him is a fatal error."

"SEC. 357. Officer detailed as counsel.-- When the accused before a court martial has no legal adviser, the commandant of the Navy yard or station, the convening authority, or the senior officer

present within whose jurisdiction the court sits shall, if the accused so requests, detail a suitable officer to act as his counsel..... An officer so detailed shall perform such duties as usually devolve upon the counsel for the defense before civil courts in criminal cases. As such counsel he shall use all legal means to protect the interests of the accused and to present to the court such defense as the accused may have, and to offer such evidence in extenuation, mitigation, etc., as he may be able to obtain. Ordinarily, when so requested by the accused, counsel should be detailed a sufficient time in advance of trial to enable him properly to prepare the accused's case. He should, so far as practicable, be relieved of all other duties which interfere with this. If accused does not request counsel until he enters court, the court is powerless to appoint one, but should adjourn from day to day until the appointment is made by one of the officers named above. It is never proper in such case to detail the judge advocate as counsel."

"SEC. 359. Accused to be informed of his rights.-- The counsel for the accused or, in case there is no counsel, the judge advocate, should before trial carefully explain to the accused that he may, besides introducing witnesses in his behalf, either (1) take the stand and testify under oath, or (2) make a statement not under oath; that should he take the stand, he may be subjected to a rigorous cross-examination as set forth in chapter III; and that should he not under oath make a statement which contains averments of material facts, such averments can not be considered as evidence or accorded evidentiary weight by the court. In advising the accused as to his right to take the stand, the judge advocate should carefully refrain from influencing the accused in this respect except as set out by section 401.

"Where the accused has made a statement to the court not under oath, the judge advocate (if there be no counsel) will, upon the completion of such statement, inform the court that the provisions of this section have been complied with."

"SEC. 384. Counsel for accused.-- Immediately after the accused is brought before the court he should be asked if he desires counsel, and if he does, counsel should take seat as such. If the counsel for the accused is absent at any stage of the proceedings, the record should show affirmatively that the accused waived the privilege of having counsel present at that time. Otherwise the court should adjourn for a reasonable time, if it appear that the counsel will then be present, or until the convening authority appoint another counsel.

"Permission to address the court should be granted by the court to counsel for the accused, and the latter should be allowed to use all legal means to protect the interests of the accused, but shall not be permitted to interfere in any manner with the court's proceedings.

"Counsel for the accused shall, when he so requests, be allowed to examine the record of proceedings, exclusive of the findings and sentence, as it is prepared."

"SEC. 401. Duties of judge advocate during trial: To protect interests of accused who does not have counsel.-- In the event that the accused has no counsel, the judge advocate shall protect his interests, having in mind, however, at all times his duties as prosecutor. Under such circumstances he shall not fail to advise the accused against advancing anything which may tend either to criminate him or prejudice his cause; he shall see that no illegal evidence is brought against the accused, and shall assist him in presenting to the court in proper form the facts upon which his defense is based, including such evidence as there may be in extenuation or in mitigation as well as evidence of previous good conduct and character.

"If, during the progress of the trial of an accused without counsel, evidence is adduced that develops that he might have a good defense which could be better presented by counsel, the judge advocate should strongly advise the accused to get counsel, and the court should do the same. The judge advocate should scrupulously avoid questioning an accused in an improper manner in court, as by asking him if he will admit he is the accused, as this savors of making him give evidence against himself."

3. Proposed Navy Bill

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

'ART. 18 (b) For every summary court martial, the convening authority shall appoint a prosecutor and a defense counsel, who shall be persons qualified to perform such duties. This shall not affect the right of the accused to counsel of his own choice.

'(c) It shall be the duty of the prosecutor, under such rules of practice, pleading, and procedure as the Secretary of the Navy may prescribe, (1) to summon all witnesses and (2) to keep the record of proceedings.'"

"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

"SEC. 47.

'ART. 16 (d) Any person in the naval service under command of the officer by whose order a deck court martial is convened may be detailed to act as clerk thereof.

'ART. 38. In every court-martial proceeding in which the accused pleads not guilty, defense counsel, if there be one, shall, in the event of conviction, attach to the record of proceedings either a brief of such matters as he feels should be considered on behalf of the accused on review or a signed statement setting forth his reasons for not so doing.'"

ART. 36, under the proposed Navy bill, will deal with depositions.-- A proviso is that the defense shall be given an opportunity to be present and to cross-examine the deponent.

III. Differences

There are no substantial differences between the Articles of War and the provisions of the proposed Navy bill. These minor points may be noted, however:

1) The proposed Navy articles do not state who shall keep the record of a general court-martial proceeding. (Cf. C.S., A.W. 33-34).

2) There is no provision in the present A.G.N., the proposed A.G.N., or in N.C.B., which requires the court to permit the accused to have civilian counsel if he provides it.

3) The proposed A.G.N. do not specify that the defense counsel appointed shall act as associate counsel if the accused has counsel of his own selection, and desires it. (A.W. 11, as amended, provides for the dismissal of the defense counsel appointed if the accused has counsel of his own selection and does not desire the presence of the regularly appointed defense counsel as assistant defense counsel. There is no similar provision in the proposed Navy articles.)

4) There is no provision in the proposed Navy articles for the appointment of an assistant prosecutor or assistant defense counsel. Sec. 355, N.C.B., provides for the appointment of counsel for the present judge advocate. Such counsel assists the judge advocate but is not an "assistant judge advocate" as that title is defined by A. W. 116. That he is not competent to perform any duty devolving upon the judge advocate is indicated by Sec. 379, N.C.B., which provides that the court must adjourn from day to day in case of the absence of the judge advocate.

However, Sec. 542, N.C.B., Fn. (12), states that one or more judge advocates may be appointed for a general court martial. The duties and competency of a second judge advocate are not covered in N.C.B. or A.G.N., but it appears that they function separately, at different trials held by the court. See Sec. 542, N.C.B.

UNIFORM CODE OF MILITARY JUSTICE

Subject: Court-Martial Procedure, Challenges. A. W. 18

I - ARMY PROVISIONS

1. Articles of War.

Article 18. Challenges. - Members of a general or special court-martial may be challenged by the accused or the trial judge advocate for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time. Challenges by the trial judge advocate shall ordinarily be presented and decided before those by the accused are offered. Each side shall be entitled to one peremptory challenge; but the law member of the court shall not be challenged except for cause.

2. Title II of Public Law 759 does not effect Article 18 of the Articles of War.

3. United States Army Courts - Martial Manual.

Only the members of a general or special court-martial are subject to challenge, and they may be challenged only by the judge advocate and the accused. Although challenges should be made before arraignment, challenges for cause may be permitted at any time provided that the challenger has exercised due diligence.

Among the grounds of challenge for cause are:

- First: That he (the challenged member) is not competent or is not eligible to serve on courts-martial.
- Second: That he is not a member of the court.
- Third: That he is the accuser as to any offense charged.
- Fourth: That he will be a witness for the prosecution.
- Fifth: That (upon a rehearing) he was a member of the court which first heard the case.

(P.-2)

- Sixth: That he personally investigated an offense charged as member of a court of inquiry or otherwise.
- Seventh: That he has formed or expressed a positive and definite opinion as to the guilt or innocence of the accused as to any offense charged.
- Eighth: That he will act as reviewing authority or staff judge advocate on the case.
- Ninth: Any other facts indicating that he should not sit as a member in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality.

II - NAVY PROVISIONS

1. Articles of the Government of the Navy.

The subject of challenges is not dealt with in the Articles of the Navy.

2. S. 1338, Proposed Navy Bill.

The following provisions deal with the subject of challenges:

Sec. 20, Article 28 is renumbered as Article 19 and amended to read as follows:

Article 19 These oaths shall not be required if the accused was present when such oaths were previously administered: Provided, That the right of the accused to challenge any member of the court shall not thereby be prejudiced.

Sec. 29, Article 39 is renumbered as Article 24 and amended to read as follows:

Article 24(b) For every general court martial, the convening authority shall appoint: . . . (2) a judge advocate, whose duties it shall be . . . (2) to rule on interlocutory questions, except challenges; And provided further, that the judge advocate shall be subject to challenge.

(P.-3)

Sec. 30, Article 40 is renumbered as Article 25 and amended to read as follows:

Article 25 These oaths shall not be required if the accused was present when such oaths were previously administered. Provided, That the right of an accused to challenge any member of the court or the judge advocate shall not thereby be prejudiced.

3. Naval Courts and Boards.

The accused and the judge advocate have equal rights of challenge. Such challenges shall generally be made before the court is sworn, but may occur at any stage in the proceedings for cause not previously known.

Challenges made upon any of the following grounds, if admitted or proved, shall be sustained:

- (a) That he (the challenged member) sat as a member of a court of inquiry or board which investigated the charges.
- (b) That he has personally investigated the charges and expressed an opinion thereon, or that he has formed a positive and definite opinion as to the guilt or innocence of the accused.
- (c) That he is the accuser. (This does not include an officer who merely refers for trial charges preferred by another, unless he has formed a definite opinion.)
- (d) That he will be a material witness for the prosecution or for the defense - except only as to the previous good character of the accused.
- (e) That he sat as a member of a court or board which tried or investigated another person upon charges based on the same transaction concerning which the accused is on trial.
- (f) That he is related by blood or marriage to the accused.
- (g) That he has a declared enmity against the accused.

(P.-4)

III - DIFFERENCES

1. Army and Navy practice on challenges is substantially the same, except that in the Army, the accused and the trial judge advocate are permitted one peremptory challenge each, while in the Navy no peremptory challenge or challenge to the array is permitted. Peremptory challenges in the Army are limited in that the law member of the court may be challenged only for cause.

Specific grounds for challenge for cause differ as between the Army and Navy, but the intent is similar.

Whereas in the Army, the subject of challenges is covered broadly by A. W. 18, in the Navy the procedure on challenges is set forth by regulations prescribed by the Secretary of the Navy.

2. Vanderbilt Report.

Subject of challenges not specifically mentioned.

3. Ballantine Report.

Subject of challenges not specifically mentioned.

4. McGuire Rules of Procedure for Navy.

The McGuire committee proposed that the prosecutor and accused should have an equal right to challenge any member for cause, and that the judge advocate should determine the challenge. Although the McGuire Rules do not mention the point, it may be inferred that they intend that the judge advocate should not be subject to challenge.

5. Keefe Report on Court Martial.

The Keefe report cites the recommendations of the McGuire Committee, and agrees with the position that the judge advocate should be a separate authority judging the case, and not subject to challenge. It endorses a provision whereby either the prosecutor or accused might file a petition and affidavit of disqualification as to the judge advocate of a general court-martial, and suggests that the judge advocate should probably be permitted to rule upon the petition itself. It further urges that the Army practice of permitting each side one peremptory challenge each be adopted unilaterally.

(P.-5)

Its specific recommendations are:

- (1) That provisions for challenging, substantially as contained in Rule 5 of the McGuire Rules, be included in Rules of Procedure to be adopted;
- (2) That the Advisory Committee consider the following problems:
 - (a) Whether the judge advocate on the court should pass upon challenges for cause;
 - (b) Whether the prosecution and defense should each be allowed one peremptory challenge;
 - (c) Whether the prosecution and defense should each be allowed to petition for disqualification of the judge advocate;
 - (d) If such a petition is allowed, who should pass upon it.

6. Comments.

Altogether, the question of challenges is a technical one which should be considered as a part of the larger problem of the degree of independence that should be granted to the Judge Advocate.

Uniform Code of Military Justice

Subject: Oaths

I. Army Provisions

1. Articles of War

"ART. 19. Oaths.-- The trial judge advocate of a general or special court-martial shall administer to the members of the court, before the proceed upon any trial, the following oath or affirmation: 'You, A.B., do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority or duly announced by the court, except to the trial judge advocate and assistant trial judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial upon a challenge or upon the findings or sentence, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God.'

"When the oath or affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the trial judge advocate and to each assistant trial judge advocate, if any, an oath or affirmation in the following form: 'You, A.B., do swear (or affirm) that you will faithfully and impartially perform the duties of a trial judge advocate, and will not divulge the findings or sentences of the court to any but the proper authority until they shall be duly disclosed. So help you God.'

"All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: 'You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God.'

"Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: 'You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God.'

"Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation

in the following form: 'You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God.'

"In case of affirmation the closing sentence of adjuration will be omitted."

"ART. 100. Oath of Members and Recorders.-- The recorder of a court of inquiry shall administer to the members the following oath: 'You, A.B., do swear (or affirm) that you will well and truly examine and inquire, according to the evidence, into the matter now before you without partiality, favor, affection, prejudice, or hope of reward. So help you God.' After which the president of the court shall administer to the recorder the following oath: 'You, A.B., do swear (or affirm) that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God.'"

"ART. 101. Powers; Procedure.-- A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to courts-martial and the trial judge advocate thereof. Such witnesses shall take the same oath of affirmation that is taken by witnesses before courts-martial. A reporter or an interpreter for a court of inquiry shall, before entering upon his duties, take the oath or affirmation required of a reporter or an interpreter for a court-martial....."

"ART. 114. Authority to Administer Oaths.-- Any officer of any component of the Army of the United States on active duty in Federal service commissioned in or assigned or detailed to duty with the Judge Advocate General's Department, any staff judge advocate or acting staff judge advocate, the President of a general or special court-martial, any summary court-martial the trial judge advocate or any assistant trial judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant, assistant adjutant or personnel adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and shall also have the general powers of a notary public in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents and all other forms of notarial acts to be executed by persons subject to military law: Provided, That no fee of any character shall be paid to any officer mentioned in this Act for the performance of any notarial act herein authorized."

2. Other Legislation

A warrant officer serving as assistant adjutant of any command has power to administer oaths for all purposes of military

administration. See sec. 4, act August 21, 1941 (55 Stat. 653).

3. Manual Courts-Martial

Paragraph 49(b) provides the required oaths must be administered in each case tried. Paragraph 95 specifies the oath to be taken by a challenged member.

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

No changes.

II. Navy Provisions

1. Articles for the Government of the United States Navy

"ART. 28. Oath of members and recorder.-- Before proceeding to trial the members of a summary court martial shall take the following oath or affirmation, which shall be administered by the recorder: 'I, A.B., do swear (or affirm) that I will well and truly try, without prejudice or partiality, the case now depending, according to the evidence which shall be adduced, the laws for the government of the Navy, and my own conscience.' After which the recorder of the court shall take the following oath or affirmation, which shall be administered by the senior member of the court: 'I, A.B., do swear (or affirm) that I will keep a true record of the evidence which shall be given before this court and of the proceedings thereof' (R. S., sec. 1624, art. 28)."

"ART. 40. Oaths of members and judge advocate.-- The President of the general court martial shall administer the following oath or affirmation to the judge advocate or person officiating as such:

'I, A.B., do swear (or affirm) that I will keep a true record of the evidence given to and the proceedings of this court; that I will not divulge or by any means disclose the sentence of the court until it shall have been approved by the proper authority; and that I will not at any time divulge or disclose the vote or opinion of any particular member of the court, unless required so to do before a court of justice in due course of law.'

"This oath or affirmation being duly administered, each member of the court, before proceeding to trial, shall take the following oath or affirmation, which shall be administered by the judge advocate or person officiating as such:

'I, A.B., do swear (or affirm) that I will truly try without prejudice or partiality, the case now depending, according to the evidence which shall come before the court, the rules for

the government of the Navy, and my own conscience; that I will not by any means divulge or disclose the sentence of the court until it shall have been approved by the proper authority; and that I will not at any time divulge or disclose the vote or opinion of any particular member of the court, unless required so to do before a court of justice in due course of law' (R. S., sec. 1624, art. 40)."

"ART. 41. Oath of witness.-- An oath or affirmation in the following form shall be administered to all witnesses, before any court martial, by the president thereof:

'You do solemnly swear (or affirm) that the evidence you shall give in the case now before this court shall be the truth, the whole truth, and nothing but the truth, and that you will state everything within your knowledge in relation to the charges. So help you God (or 'this you do under the pains and penalties of perjury')' (R. S., sec. 1624, art. 41)."

"ART. 64 (b) Deck courts shall consist of one commissioned officer.... who.....shall have power to administer oaths,....."

"ART. 57. Powers.-- Courts of inquiry shall have power to summon witnesses, administer oaths....."

"ART. 58. Oath of members and judge advocate court of inquiry.-- The judge advocate, or person officiating as such shall administer to the members the following oath or affirmation: 'You do swear (or affirm) well and truly to examine and inquire, according to the evidence, into the matter now before you, without partiality.' After which the president shall administer to the judge advocate or person officiating as such, the following oath or affirmation: 'You do swear (or affirm) truly to record the proceedings of this court and the evidence to be given in the case in hearing' (R. S., sec. 1624, art. 58)."

"ART. 69. Oaths for purpose of naval justice, etc.-- Judge advocate of naval general courts martial and courts of inquiry, and all commanders in chief of naval squadrons, commandants of navy yards and stations, officers commanding vessels of the Navy, and recruiting officers of the Navy, and the adjutant and inspector, assistants adjutant of the Marine Corps, and such other officers of the regular Navy and Marine Corps, or the Naval Reserve, and of the Marine Corps Reserve, as may be hereafter designated by the Secretary of the Navy, are authorized to administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration (Jan. 25, 1895, c. 45, 28 Stat. 639; Mar. 3, 1901, c. 834, 31 Stat. 1086; Mar. 4, 1917, c. 180, 39 Stat. 1171; July 1, 1918, c. 114, 40 Stat. 708; Feb. 28, 1925, c. 374, sec. 1, 43 Stat. 1080)."

"ART. 70. Investigations; oaths of witnesses.-- Any officer of the Navy or Marine Corps detailed to conduct an investigation, and the

recorder, and if there be none the presiding officer, of any naval board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation (R. S., Sec. 183; Feb. 13, 1911, c. 43, 36 Stat. 898)."

2. Naval Courts and Boards

References to oaths are collaterally presented in the text of the manual.

The subject matter, with respect to the forms to be utilized and procedure to be followed, is contained in Appendix E, and presents all oaths necessary for the purpose of administration of naval justice, including oaths not prescribed in the A.G.N., such as the oaths for a reporter and an interpreter and the oath on voir dire. These forms will be used, where appropriate, and must be administered in each case by one authorized to do so. Failure to administer the prescribed oath constitutes fatal error.

3. Proposed Navy Bill

"ART. 16. (a) Deck courts martial shall consist of one commissioned officer only, who, while serving in such capacity shall have power to administer oaths and to hear and determine cases."

SEC. 20. Article 28 is renumbered as article 19 and amended to read as follows:

"ART. 19. The senior member of the summary court-martial shall administer the following oath or affirmation to the prosecutor: 'I, A.B., do swear (or affirm) that I will keep a true record of the evidence which shall be given before this court and of the proceedings thereof.' This oath or affirmation being duly administered, each member of the court, before proceeding to trial, shall take the following oath or affirmation, which shall be administered by the prosecutor: 'I, A.B. do swear (or affirm) that I will truly try, without prejudice or partiality, the case (s) now depending, according to the evidence which shall be adduced, the laws for the government of the Navy, and my own conscience; and that I will not at any time divulge or disclose the vote or opinion of any particular member of the court, unless required to do so, before a court of justice in due course of law.' These oaths shall not be required if the accused was present when such oaths were previously administered: Provided, That the right of an accused to challenge any member of the court shall not thereby be prejudiced."

SEC. 30. Article 40 is renumbered as article 25 and amended to read as follows:

"ART. 25. The president of the general court martial shall administer the following oath or affirmation to the judge advocate: 'I, A.B., do swear (or affirm) that I will discharge all my duties

as judge advocate of this court without prejudice or partiality or fear of disfavor.' This oath or affirmation being duly administered, each member of the court, before proceeding to trial, shall take the following oath or affirmation, which shall be administered by the judge advocate: 'I, A.B., do swear (or affirm) that I will truly try without prejudice or partiality, the case (s) now depending, according to the evidence which shall come before the court, the rules for the government of the Navy, and my own conscience; and that I will not at any time divulge or disclose the vote or opinion of any particular member of the court, unless required so to do before a court of justice in due course of law.' These oaths shall not be required if the accused was present when such oaths were previously administered: Provided, That the right of an accused to challenge any member of the court or the judge advocate shall not thereby be prejudiced."

SEC. 31. Article 41 is renumbered as article 26 and amended to read as follows:

"ART. 26. An oath or affirmation in the following form shall be administered to all witnesses, before any court martial, by the president or senior member thereof: 'You do solemnly swear (or affirm) that the evidence you shall give in the case now before this court shall be the truth, the whole truth, and nothing but the truth. So help you God (or 'this you do under the pains and penalties of perjury')'."

SEC. 43. Article 57 is renumbered as article 43 and amended as follows:

"ART. 43. Courts of inquiry, and, when empowered by the convening authority, boards of investigation and investigations conducted by one officer shall have power to administer oaths....."

"SEC. 44. Articles 58.....repealed."

"ART. 47 (a) Such officers as may be designated by the Secretary of the Navy shall at all times have authority to administer oaths for the purpose of naval administration, including naval justice, and, shall have the general powers of a notary public and of a consul of the United States, in the performance of all notarial acts."

SEC. 48. A.G.N. 64 (b) is repealed and replaced by A.G.N. 16 (a). A.G.N. 69 is repealed and replaced by A.G.N. 47 (a).

III. Differences

The Articles of War provide the same procedure for administering the oath of office to the prosecutor and members of general and special courts-martial, and to the recorder and members of courts of inquiry in that, the recorder or prosecutor tenders the

oath to the members of the court and is, in turn, sworn by the president. In the proposed Navy bill, however, the prosecutor of a summary court and the judge advocate of a general court are sworn first and they, in turn, then administer the oaths to the members. The proposed articles do not specifically require that the prosecutor of a Navy general court take an oath. Nor is there such a requirement as to "counsel" or members of a court of inquiry, reporters, and interpreters.

The context of each oath prescribed in the Articles of War is not the same as its corresponding provision in the proposed Navy bill. However, it should be stated that, notwithstanding these differences, the purpose for which oaths are authorized and the import to be derived therefrom, are the same.

A.G.N. 19 and 25, as proposed, do not require the administration of oaths to be repeated, if the accused was present, to the prosecutor and members of a summary court-martial and to the judge advocate and members of a general courts-martial provided, that the right of the accused to challenge any member of the court or the judge advocate shall not be thereby prejudiced. The A.W. do not contain this proviso.

IV. Recommendations

1. Keefe Report

- A. Repeated administration of oaths to the proper officers of the court should be dispensed with provided personnel of said court does not change.¹
- B. That the different persons to be tried should either be present at the administration of the oath to exercise their right to challenge, or if not present, their right shall be preserved.

2. McGuire Report

- A. Rule 17, Rules of Procedure; The following oath shall be taken both by the Judge Advocate and the members of the court:²

"I,-----, do solemnly swear (or affirm) that I will administer justice without respect to persons or rank, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as -----(Judge Advocate, President, or member of court) according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God."

1. Report of the Ballantine Committee, 24 September, 1943, McGuire Rules of Procedure, Rule 18.
2. Adaptation of U.S. Judge's oath, Title 28 U.S.C. Sec. 372.

Uniform Code of Military Justice

Subject: Continuances. A.W. 20.

I. Army Provisions

1. Articles of War

"ART. 20. Continuances.--A court-martial may, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just."

"ART. 70.In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him."

2. Manual for Courts-Martial

The number of continuances which may be granted to either party is unlimited, provided such requests are reasonable. It is suggested, however, that the necessity for a continuance may often be obviated by requesting the president to postpone the assembling of the court or requesting court to adjourn or to table a recess.

In time of peace, premature arraignment of the accused before a general court martial may be ground for a continuance.

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

A.W. 20.

No changes.

A.W. 70.

Identical language now found in A.W. 46c.

II. Navy Provisions:

1. Articles for the Government of the United States Navy

None.

2. Naval Courts and Boards

Either the judge advocate or the accused may request a postponement of the trial stating his reasons therefor.

But an application to suspend proceedings of a court for a longer period than from day to day, Sundays excepted, must be referred to the officer convening the court, who alone has authority to grant such request.

3. Proposed Navy Bill

"SEC. 47.

'ART. 37. A court martial may, for reasonable cause, grant a continuance for such time and as often as may appear to be just. In time of peace no person shall, against his objection, be brought to trial before a general, summary, or deck court-martial within periods of five days, three days, and twenty-four hours, subsequent to the service of specifications upon him, respectively.'

III. Differences

Attention is invited to the opening sentence of S. 1338, Sec. 47, A.G.N. 37, wherein the Navy proposes that the subject matter herein under discussion be incorporated in the Articles for the Government of the Navy. As proposed, the language conforms to that contained in A.W. 20, except that the words "to either party" have been deleted.

It may be of interest to note that the second sentence of A.G.N. 37, hereinabove cited, is almost identical to the text found at the conclusion of A.W. 46c., as amended (P.L. 759). The Manual for Courts Martial, sec. 52b, referring to A.W. 70, states that a violation of the proviso therein, concerning premature arraignment of the accused, may be ground for a continuance.