

Uniform Code of Military Justice

Subject: Mitigation, Remission, and Suspension of
Sentences by Departmental Reviewing
Agencies, A. W. 51.

I. Army Provisions

1. Articles of War.

"ART. 51. Suspension of Sentences of Dismissal or Death.-- The authority competent to order the execution of a sentence of dismissal of an officer or a sentence of death may suspend such sentence until the pleasure of the President be known, and in case of such suspension a copy of the order of suspension, together with a copy of the record of trial, shall immediately be transmitted to the President."

"ART. 52. Suspension of Sentences.-- The authority competent to order the execution of the sentence of a court-martial may, at the time of the approval of such sentence, suspend the execution, in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension; and the Secretary of War, the commanding officer holding general court-martial over any such offender, or the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks in which the person under sentence is held, a court of the kind that imposed the sentence, may at any time hereafter, while the sentence is being served, suspend the execution, in whole or in part, of the balance of such sentence and restore the person under sentence to duty during such suspension. A sentence, or any part thereof, which has been so suspended may be remitted, in whole or in part, except in cases of persons confined in the United States Disciplinary Barracks or its branches, by the officer who suspended the same, by his successor in office, or by any officer exercising appropriate court-martial jurisdiction over the command in which the person under sentence may be serving at the time, and, subject to the foregoing exceptions, the same authority may vacate the order of suspension at any time and order the execution of the sentence or the suspended part thereof in so far as the same shall not have been previously remitted, subject to like power of suspension. The death or honorable discharge of a person under a suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence."

"ART. 53. Execution or Remission--Confinement in Disciplinary Barracks.-- When a sentence of dishonorable discharge has been suspended until the soldier's release from confinement, the execution or remission of any part of his sentence shall, if the soldier be confined in the United States Disciplinary Barracks, or any branch thereof, be directed by the Secretary of War."

2. Manual for Courts-Martial.

"Par. 87b. Powers and duties of Reviewing Authority.....

"The power to order the execution of the sentence includes the power to mitigate or remit the whole or any part of the sentence (A. W. 50); but in any case the punishment imposed by the sentence as mitigated or remitted must be included in the sentence as imposed by the court and should be one that the court might have imposed in the case. Thus a sentence as mitigated should not provide for confinement in excess of six months without dishonorable discharge.

"To mitigate a punishment is to reduce it in quantity or quality, the general nature of the punishment remaining the same. A sentence can not be commuted except by the President or by a commanding general empowered by the President under A. W. 50.

"A sentence imposing dishonorable discharge only can not be mitigated. Forfeiture of pay may be mitigated to detention of pay for a like period, or less. Confinement at hard labor may be mitigated to hard labor without confinement for a like period, or less. A sentence of dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for a definite period may be mitigated to a lesser punishment, for example, to confinement at hard labor and a forfeiture of a specified portion, for example, two-thirds of the soldier's pay per month for a period not exceeding that prescribed in the sentence, or to hard labor without confinement for a definite period not exceeding the period prescribed in the sentence, and forfeiture of any portion not exceeding two-thirds of the soldier's pay per month for a period not exceeding that prescribed in the sentence.

"The action of a reviewing authority in approving a sentence and simultaneously remitting a part thereof is legally equivalent to approving only the sentence as reduced.

"The authority competent to order the execution of a sentence of dismissal of an officer, or a sentence of death, may suspend such sentence until the pleasure of the President be known. (A.W. 51).

"The authority competent to order the execution of the sentence of a court-martial may, at the time of the approval of such sentence, suspend the execution, in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension. (A.W. 52.) The reviewing authority should suspend the whole of a sentence when it appears to him that such action will promote the discipline of his command.

"As to penitentiary confinement, see 90a." (This applies to the convening authority, but presumably would also apply to superior authority as well.)

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

"ART. 51. MITIGATION, REMISSION, AND SUSPENSION OF SENTENCES.--

"a. At the Time Ordered Executed.-- The power of the President, the Secretary of the Department of the Army, and any reviewing authority to order the execution of a sentence of a court-martial shall include the power to mitigate, remit, or suspend the whole or any part thereof, except that a death sentence may not be suspended. The Judge Advocate General shall have the power to mitigate, remit, or suspend the whole or any part of a sentence in any case requiring appellate review under article 50 and not requiring approval or confirmation by the President, but the power to mitigate or remit shall be exercised by the Judge Advocate General under the direction of the Secretary of the Department of the Army. The authority which suspends the execution of a sentence may restore the person under sentence to duty during such suspension; and the death or honorable discharge of a person under suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence.

"b. Subsequent to the Time Ordered Executed.--

"(1) Any unexecuted portion of a sentence other than a sentence of death, including all uncollected forfeitures, adjudged by court-martial may be mitigated, remitted or suspended and any order of suspension may be vacated, in whole or in part, by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States disciplinary barracks, in which the person under sentence may be, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority or by the Judge Advocate General under the direction of the Secretary of the Department of the Army; Provided, That no sentence approved or confirmed by the President, shall be mitigated, remitted, or suspended by any authority inferior to the President: And provided further, that no order of suspension of a sentence to dishonorable discharge or bad conduct discharges shall be vacated unless and until confirming or appellate action on the sentence has been completed as required by articles 48 and 50.

"(2) The power to suspend a sentence shall include the power to restore the person affected to duty during such suspension.

"(3) The power to mitigate, remit or suspend the sentence or any part thereof in the case of a person confined in the United States disciplinary barracks or in a

penitentiary shall be exercised by the Secretary of the Department of the Army or by the Judge Advocate General under the direction of the Secretary of the Department of the Army."

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 54(b) Power of Secretary of Navy over proceedings and sentences of courts martial.--

"The Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court martial convened by his order or by that of any officer of the Navy or Marine Corps (Feb. 16, 1909, c. 131, sec. 9, 35 Stat. 621)."

2. Naval Courts and Boards.

No discussion of mitigation, remission, or suspension by other than convening or reviewing authority.

3. Other.

Once the Secretary of the Navy has taken definite action on a case, that case is closed and may not be subsequently reopened. Opinion Atty. Gen. 137(1865).

However, such a case may be reopened on the ground that new evidence has been discovered. CMO 1-1944, p. 92.

4. Proposed Navy Bill.

"ART. 39 (f) The sentence of every general court martial and of such other courts martial as may be designated by the Secretary of the Navy, shall, under such regulations as the Secretary of the Navy may prescribe, be reviewed by a clemency board appointed by the Secretary of the Navy: Provided, That such clemency boards shall have the power to remit, mitigate, or commute the sentence, in whole or in part, imposed by any naval court martial except a court martial convened by the Secretary of the Navy or by the President, in which case like power shall repose in the convening authority.

"....."

"(h) The Secretary of the Navy shall have the power to set aside the proceedings, findings, and sentence, or to remit, or mitigate, or commute the sentence, in whole or in part, imposed by any naval court martial except a court martial convened by the President, in which case like power shall repose in the President....."

III. Differences

(As to powers of convening or "reviewing authority" to mitigate, remit, or suspend, see C.S., A.W. 47.)

1. At the Time the Sentence is Ordered Executed.

The departmental reviewing agencies with the power to mitigate, remit, or suspend under the amended Articles of War are the confirming authority or the JAG under the direction of the Secretary of the Army, while under the proposed Navy bill, the clemency board or the Secretary of the Navy may mitigate, remit, or commute.

As pointed out in C.S., A.W. 48-49, the powers of the Navy confirming authority, as such, are not stated in the proposed Navy bill.

Under the amended Articles of War, no reviewing authority, other than a confirming authority may commute a sentence, while under the proposed Navy bill, both the clemency board and Secretary may commute any sentence.

2. Subsequent to the Time Ordered Executed.

See C.S., A.W. 53 as to mitigation, etc. on the petition of accused.

The JAG of the Army, under the direction of the Secretary of the Army, is given power to suspend, remit, or mitigate a sentence after it has been ordered executed. The proposed Navy bill makes no provision for clemency action after the sentence has been ordered executed, except in that every sentence, not requiring confirmation, is executed upon announcement by the court and review is had while the sentence is being executed.

However, after review is completed in the Navy, the Secretary of the Navy, if he has not previously taken action on the case, may remit, commute, or mitigate. (The power of suspension is included as conditional remission). However, it is not clear under the proposed articles whether the Secretary may act if he had previously taken any action.

3. Vacation of Suspension.

The Army JAG, under the direction of the Secretary of the Army, is given the power to vacate the suspension of a sentence "subsequent to the time ordered executed"

The proposed Navy bill does not mention the vacating of suspension. It is also not clear whether a suspension of a sentence can be vacated by an authority other than that which originally suspended the sentence.

As to the differences between mitigation, remission, suspension, and commutation, see C.S., A.W. 47.

IV. Recommendations

See C.S., A.W. 47; C.S., A.W. 48-49; and C.S., A.W. 50.

Keeffe Report:

"RECOMMENDATIONS:

"It is recommended that the subject of termination of probation be carefully reviewed by the Advisory Council.

"The following suggestions are made:

"(1) Prior to termination of probation the commanding officer should order an investigation of the alleged violation similar to that of an investigation prior to a general court martial, including the taking of statements of witnesses, and the statement of the probation violator if he desires to make one. The alleged probation violator should be represented by counsel, if available, and if not available, by an experienced naval officer of his personal choice. The record of this hearing should be transcribed.

"(2) A hearing at mast should be held, based on the investigation previously made, at which the probation violator should be similarly represented.

"(3) Probation should be terminated by a written order based on the hearing at mast in which the commanding officer states in detail his reasons for termination.

"(4) All the above papers should be filed in the probation violator's record.

"(5) The termination of probation by the commanding officer should be effective to return the prisoner immediately to the appropriate naval prison. However, no termination of probation should be effective to give the probation violator a discharge from the service. The record of termination of probation should be sent to the Department for review by the disciplinary activity involved and by the proposed Sentence Review Board for determination, on the basis of the prisoner's entire naval record and social and psychiatric background, whether a discharge should be recommended, and if so, what form of discharge should be awarded."

Uniform Code of Military Justice

Subject: Mitigation, Remission, and Suspension
of Sentences.

See C.S., A.W. 47 -- Convening Authority -- Initial Review.

Uniform Code of Military Justice

Subject: Rehearings, A. W. 52 (in part).

I. Army Provisions

1. Articles of War

"ART. 50 $\frac{1}{2}$

"When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding: Provided, That such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial legally insufficient to support the findings or sentence or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority. After any such rehearing had on the order of the President, the record of trial shall, after examination by the board of review, be transmitted by the Judge Advocate General, with the board's opinion and his recommendations, directly to the Secretary of War for the action of the President."

"ART. 40. As to Number.-- No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case."

2. Manual for Courts-Martial.

"PAR. 89. COURTS-MARTIAL--ACTION--Ordering Rehearings.--.....

"A rehearing is not authorized where a part of the sentence has been approved.

"Where the accused is convicted at the first trial of a lesser included offense only, a rehearing on the offense originally charged can not properly be ordered; although even if convicted of the offense originally charged on such improperly ordered rehearing such conviction may be valid as far as concerns a conviction of such lesser included offense.

"The order directing a rehearing should be made at the time of disapproving or vacating the sentence and will ordinarily be included in the action on such sentence.

"When a rehearing is directed there will be referred with the charges to the trial judge advocate the record of the former proceedings and the accompanying papers which are pertinent, together with a copy of the holding of the board of review or the review by the staff judge advocate or such other holding or opinion as may inform him of the errors made at the former hearing which necessitated a rehearing."

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

"SEC. 229. Article 52 is amended to read as follows:

"ART. 52. REHEARINGS.-- When any reviewing or confirming authority disapproves a sentence or when any sentence is vacated by action of the Board of Review or Judicial Council and the Judge Advocate General, the reviewing or confirming authority or the Judge Advocate General may authorize or direct rehearing. Such rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding."

A. W. 40 was not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 54 (b). Power of Secretary of Navy over proceedings and sentence of courts martial.-- The Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court martial convened by his order or by that of any officer of the Navy or Marine Corps (Feb. 16, 1909, c. 131, Sec. 9, 35 Stat. 621)."

2. Naval Courts and Boards

"SEC. 471. 'Reviewing authority' defined.--

"Any officer to whom the proceedings of a court martial are regularly submitted for review in accordance with law is a reviewing authority. When, as is ordinarily the case, such officer is the convening authority, this latter term should, in order to avoid confusion, be used in referring to him, even while exercising the functions of a reviewing authority."

"SEC. 477. Power of Reviewing Authority: Ordering new trial.--

"If the court was without jurisdiction or if none of the charges or specifications alleges an offense, the reviewing authority should disapprove the proceedings, findings, and sentence and convene a new court for the trial of the case. The new trial should be had upon the same charges and specifications, unless the disapproval is based on fatal defects therein, in which event, new charges and specifications should be drawn correctly setting forth the offenses intended to be charged at the previous trial, provided that such new charges and specifications are not barred by the statute of limitations.

"In cases not covered by the foregoing paragraph, if the record discloses errors to the substantial injury of the accused and timely objection was made by him at the trial, the reviewing authority before acting upon the record should afford the accused an opportunity to request a new trial, provided the record irrespective of the errors disclosed is sufficient to sustain the finding of the court. Should the accused decline or fail to apply for a new trial within the time allowed by the reviewing authority, the latter should take action upon the proceedings, findings, and sentence without regard to such errors.

"If the reviewing authority grant a new trial upon petition of the accused, he should order the accused before a new court on the same charges and specifications originally preferred against him unless the reasons for retrial were based on defects in the charges or specifications, in which case new charges and specifications should be prepared correcting the pleading previously objected to, if such new charges are not barred by the statute of limitations; but the accused should not be tried for any offense of which he was found not guilty by the first court. New trial being granted, the proceedings, findings, and sentence of the previous trial should be set aside."

"SEC. 408. Former Jeopardy.--

"The fifth amendment to the Constitution of the United States provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.' A person is twice put in jeopardy if he is twice put on trial for the same offense. In order, however, to sustain a plea of former jeopardy, the accused must show that:

- "(1) Upon a former trial, he had been actually acquitted or convicted; or
- "(2) Upon a former trial, after he had been arraigned and the prosecution has rested its case, the convening authority entered a nolle prosequi (or withdrawal or discontinuance), over the objection of the accused, in order to prevent the court martial from arriving at a finding.

"In either case set out above, the jeopardy is complete and it matters not whether any action, or, if any, what action has been taken upon the proceedings by the reviewing authority. But the proceedings upon a 'fatally defective' specification do not constitute former jeopardy.

"Likewise, to constitute former jeopardy, the court before which the former proceedings have been conducted must have been a duly constituted and legally competent court. A commanding officer is not a court martial and punishment inflicted by him is not a bar to trial."

3. Proposed Navy Bill

"SEC. 39. Article 53 is renumbered as Art. 39 and amended to read as follows:

'ART. 39. (b) The convening authority of any court martial shall have the power to remit or mitigate, but not to commute, the punishment imposed by the sentence of any court martial convened by him.

'(d) The officer empowered to convene general courts martial who is next senior in the chain of command to any convening authority of a summary or deck courts martial shall be the reviewing authority as to legality of the proceedings, findings, and sentences thereof, if such reviewing authority be present or found by the convening authority to be reasonably available: Provided, That if such reviewing authority be not present or found to be so available, the convening authority shall review the records of such courts as to legality: Provided further,

That the reviewing authority shall have the power to set aside the proceedings, findings, and sentence or to remit or mitigate, but not to commute, the punishment imposed by the sentence of any such summary or deck court martial:

.....

'(e) The proceedings, findings, and sentence of every general court martial shall, and of any other court martial may, be reviewed as to legality in the Office of the Judge Advocate General of the Navy: Provided, That the Judge Advocate General of the Navy shall have the power to set aside the proceedings, findings, and sentence of any court martial:.....

'(h) The Secretary of the Navy shall have the power to set aside the proceedings, findings, and sentence, or to remit, or mitigate, or commute the sentence, in whole or in part, imposed by any naval court martial except a court martial convened by the President, in which case like power shall repose in the President:.....'"

III. Differences

1. Under the present A.G.N., the convening authority may disapprove the proceedings, findings, and sentence of any court martial and order a new trial* if he finds on review that the court lacked jurisdiction, that the charges or specifications were defective, or that the record discloses errors to the substantial injury of the accused and timely objection was made by him at the trial, and the accused requests a new trial when it is offered to him. Under the proposed Navy bill, the convening authority (where he is other than the President or SecNav; see Par. 2 below) could not disapprove or set aside the proceedings, findings and sentence in acting originally in a case; therefore, he could not order a new trial directly. However, the JAG may set aside the proceedings, findings and sentence of any case he reviews, and the officer empowered to convene general courts martial who is next senior in the chain of command to the convening authority may set aside the proceedings, findings and sentence of any summary or deck court-martial case he reviews. If either of these two reviewing authorities

* The term "new trial" is used in NC&B, Sec. 477 to describe the retrial ordered by a reviewing authority. A. W. 52 uses the term "rehearing" to describe the retrial ordered by a reviewing or confirming authority, or by the JAG where the sentence has been vacated by action of the Board of Review or Judicial Council and the JAG. The proceeding in either case is the same. For the proceeding called a "new trial" under Army provisions, see C.S., A. W. 53, Petition for a New Trial.

set aside on grounds of lack of jurisdiction in the court, or a fatally defective specification, they could authorize the convening authority to order a new trial. If the record was found legally sufficient but containing errors prejudicial to the accused to which the accused had excepted at the trial, they could direct the convening authority to ascertain if the accused wanted a new trial; if he assented, the proceedings would be set aside by the reviewing authority and a new trial ordered by the convening authority.

2. Where either the President or SecNav is the convening authority, the procedure under the proposed bill will be for JAG to review for legality before the record goes to them. His power to set aside and to recommend a new trial is the same as in Par. 1 above. In addition, even though the JAG found the proceedings legal, the President or SecNav could set them aside for courts they convened and order or offer a new trial (Art. 39(h)). Also, under new Art. 39(h), SecNav may set aside the proceedings of any court martial in any case except one convened by the President, in which case the President has a like power. Under this provision, SecNav could take the same action the JAG could in Par. 1 above, in cases where he was not the convening authority, even where the JAG had already found the proceedings legal.
3. In either 1 or 2 above, the question of whether a man could plead former jeopardy in a new trial would affect the exercise of the power to authorize or order one. The Navy rule for former jeopardy makes the jeopardy complete when there has been a conviction or an acquittal unless the court was without jurisdiction or the specifications under which he was tried were fatally defective (Sec. 408, NC&B.) Thus, where the proceedings were set aside on the ground that the evidence was insufficient to support a finding of guilty, a new trial could not be authorized. Where the record was found legally sufficient, but containing prejudicial errors, the accused could not be tried again without his consent. In these cases, however, the proceedings would not be set aside until the offer of a new trial had been made and assented to. Under the Army rule there is no problem of double jeopardy arising where a rehearing is ordered or authorized, since jeopardy is not complete until the reviewing authority, and if there be one, the confirming authority, has taken final action upon the case (A. W. 40).
4. A. W. 53 provides that any confirming authority may authorize or direct a rehearing. Under the proposed Navy bill, such a power is not an incident to the power of confirmation. (The President, for example, could not set aside a case, and

authorize a rehearing, where he was the confirming but not the convening authority. He could only refuse to confirm. This case would probably never occur, however, since SedNav would set it aside before it reached the President.)

5. Navy provisions are silent on whether, if there is a new trial, a man can be given a sentence in excess of or more severe than the original sentence unless the sentence is to be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding.

IV. Recommendations

Keefe Report, page 230: The Secretary's power to order a new trial, in any case which has been held legally insufficient, should be clearly conferred by statute. The Keefe Board believes this can be done without violating the rule against former jeopardy.

Uniform Code of Military Justice

Subject: Rehearings.

See C.S., A.W. 47 -- Convening Authority -- Initial Review.

Uniform Code of Military Justice

Subject: Petition for New Trial.
A.W. 53.

I. Army Provisions

1. Articles of War

"ART. 53....." (The subject matter of present A. W. 53 is unrelated to A. W. 53, as amended by P. L. 759).

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

"SEC. 230. Article 53 is amended to read as follows:

"ART. 53. PETITION FOR NEW TRIAL.-- Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: Provided, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the latter: Provided, That only one such application for a new trial may be entertained with regard to any one case: And provided further, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under Articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States."

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 54 (b) Power of Secretary of Navy over proceedings and sentences of courts martial.-- The Secretary of the Navy may

set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court martial convened by his order or by that of any officer of the Navy or Marine Corps (Feb. 16, 1909, c. 131, Sec. 9, 35 Stat. 621)."

2. Court-Martial Orders, Navy Department.

CMO No. 2-1943, page 145: Held, ".....Where the sentence of a legally constituted court martial in a case which is within its jurisdiction has been approved by the reviewing authority and carried into execution, the proceedings are then at an end and the action then had upon the sentence is, in contemplation of law, final. In such case there is no power by which such sentence can be rescinded, annulled, or modified. Furthermore, when the sentence, as in this case, has been lawfully confirmed and executed, the proceedings in the case are no longer subject to review by the President, or any lesser administrative officer; they have passed beyond supervision and are at an end. Therefore, the petition was denied. (File: 00- Aroff, Maurice N./A17-20, Apr. 26, 1943.)."

CMO No. 1-1944, page 92: Hold, where new evidence is produced, a case may be reopened although SecNav has previously approved the sentence.

3. Proposed Navy Bill

"SEC. 39. Article 53 is renumbered as Art. 39 and amended to read as follows:

'ART. 39.....

'(e) The proceedings, findings, and sentence of every general court martial shall, and of any other court martial may, be reviewed as to legality in the Office of the Judge Advocate General of the Navy: Provided, That the Judge Advocate General of the Navy shall have the power to set aside the proceedings, findings, and sentence of any court martial.....

'(f) The sentence of every general court martial and of such other courts martial as may be designated by the Secretary of the Navy, shall, under such regulations as the Secretary of the Navy may prescribe, be reviewed by a clemency board appointed by the Secretary of the Navy: Provided, That such clemency boards shall have the power to remit, mitigate or commute the sentence, in whole or in part, imposed by any naval court martial except a court martial convened by the Secretary of the Navy or by the President, in which case like power shall repose in the convening authority.

'(g) The proceedings, findings, and sentence of every court martial shall upon request by the convicted person made within one year after such person has been informed that the review of his case has been completed and under such regulations as the Secretary of the Navy may prescribe, be reviewed by a board of appeals appointed by the Secretary of the Navy to serve in his office: Provided, That such boards of appeals shall have the power to take any action which could have been taken by the Judge Advocate General under Sec. (e) of this article and by a clemency board under Sec. (f) of this article: Provided further, That any officer dismissed shall, upon the setting aside or remission of the dismissal on such subsequent review, be restored, without further appointment or confirmation and without regard to the number of officers authorized or appropriated for, to the rank and precedence to which he would be entitled if he had not been dismissed; but no pay or allowances shall be held to have accrued from the date of his dismissal to the date of his restoration.

'(h) The Secretary of the Navy shall have the power to set aside the proceedings, findings, and sentence, or to remit, or mitigate, or commute the sentence, in whole or in part, imposed by any naval court martial except a court martial convened by the President, in which case like power shall repose in the President: Provided, That upon the request provided for in Sec. (g) of this article, in cases convened by the Secretary of the Navy or by the President, the convening authority shall have the power to revoke his former action and to take any action which he could have taken at the time the case was first presented for confirmation:.....'"

"SEC. 47....."

'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.....'"

III. Differences

1. There are no limitations on what the Army JAG may consider in acting on the petition of a convicted person. He is authorized, under new A. W. 53, to grant a new trial or take other action, "upon good cause shown." The Navy Board of Appeals established under new Art. 39(g) of the proposed Navy bill is directed to review the proceedings, findings and sentence of every court martial upon the petition of a convicted person. It is not clear whether the Board may go beyond such review, and consider other

matters outside the record, such as new evidence, or whether the intent of Art. 39(g) is to restrict it to a review of matters in the record only, except for matters which the defense counsel may have appended to the record in accordance with new Art. 38 of the proposed Navy bill.

2. Where there is a petition made to the Board of Appeals under new Art. 39(g), proposed Navy bill, the President or SecNav, for cases where they were the convening authority, may revoke their former action and take any action which they could have taken at the time the case was first presented for confirmation. (Art. 39(h)). The meaning of this proviso is not clear. Under its authority, the President or SecNav may be able to give the same kind of additional review to a case where they convened the court as the Board of Appeals is empowered to give, but whether such a power is to be exercised instead of, or concurrently with, the power of the Board of Appeals over the same cases is not certain. Or the proviso may only be intended to give the President or SecNav additional power to exercise clemency in cases they convened, either before or after the Board of Appeals has reviewed the case. It is significant that the Board of Appeals can not exercise clemency in a case it reviews on petition, where the President or SecNav was the convening authority (See Art. 39(g)(f)). On the other hand, the fact that the President or SecNav can set aside the proceedings, findings and sentence in these cases indicates a power to give additional review. In this aspect, their power is comparable to the power of the Army JAG under new A. W. 53.

3. Under the first clause of new Art. 39(h), SecNav is given the power to set aside the proceedings, findings and sentence, or to exercise clemency, in any case except one convened by the President, in which case the President has a like power. Under this power, SecNav (or the President) clearly could consider matters outside the record, and he would not be limited to taking action only if a petition was filed by the convicted person within a year. On the other hand, in construing an identical power which is given to SecNav, or the President, under Art. 54(b) of the present A.G.N., it has been held that the President or SecNav could not take additional action in a case where the sentence had previously been confirmed by the President (CMO 2-1943, page 145); also, SecNav could not reopen a case where he had previously acted, as by awarding clemency, unless the ground was that new evidence had been discovered (CMO 1-1944, page 92). Within these limitations, however, the President or SecNav could take additional action in many cases, apparently without regard to whether the Board of Appeals had already acted in the same case on petition within a year. In this respect the Navy provisions under the proposed bill are broader than Army provisions, since new

A.W. 53 provides that only one application for a new trial may be entertained in a case, and that the action taken by the JAG on such application is final. (Additional clemency action could be taken by the JAG or others under new A.W. 51b(1), however. See C.S., A.W. 51).

4. Where the Board of Appeals reviews a case, or where SecNav reviews a case for which neither he nor the President was the convening authority, the action which can be taken (apart from clemency) is limited to setting aside the proceedings, findings, and sentence. A new trial could not be ordered or granted directly. However, the Board of Appeals or SecNav, in suitable cases, could advise the convening authority that a new trial could be held, and it would be virtually mandatory that one be granted by the convening authority. This procedure contrasts with that provided for in new A.W. 53, where the JAG himself is authorized to grant a new trial, although he would not convene the new court himself. An exception to the above is where the President or SecNav review cases convened by them, where they could grant and order new trials directly.

Other kinds of relief which the Army JAG can grant directly under new A.W. 53, as, vacating a sentence, restoring rights, privileges, and property affected by such sentence and substituting an administrative discharge for a dismissal, or dishonorable or bad conduct discharge previously executed, are not provided for in Navy provisions. The effect that the setting aside or remission of the dismissal of an officer is to have is spelled out in provisos in Arts. 39(g) and (h), but the restoration to officer status, as well as other relief, would probably be handled administratively in the Navy, rather than directly by the Board of Appeals, SecNav, or the President.

5. Under new A.W. 53, JAG is authorized to act under such regulations as the President may prescribe. The Board of Appeals will act under regulations proscribed by SecNav.

6. Under new A.W. 53, the application to the JAG must be made within one year after final disposition of the case upon initial appellate review, except where the case is one involving an offense committed during World War II, for which special provision is made. Under Art. 39(g), proposed Navy bill, the request for review must be made within one year after the convicted person has been informed that the review of his case has been completed. No special provision is made for World War II cases.

7. Under NC&B, Sec. 477, the convening authority of any court-martial is given the power to order a new trial under certain circumstances. This power is more like the power given under the Articles of War to order a rehearing and has been discussed as such. See C.S., A.W. 52, in part, Rehearings.

IV. Recommendations

1. Vanderbilt Report, page 9: JAG to have power to order new trial.
2. Keeffe Report, page 230: The Secretary's power to order a new trial, in any case which has been held legally insufficient, should be clearly conferred by statute. The Keeffe Board believes this can be done without violating the rule against former jeopardy.

Page 240: Revised articles should contain a provision which should be clearly worded to authorize the President, or the Secretary, to set aside the proceedings, findings or sentence of any naval court-martial, even though previously approved, and even though the sentence has already been executed. Consideration should be given to placing some time limit on the exercise of this power.

Uniform Code of Military Justice

Subject: Punitive Articles - Fraudulent Enlistment. A. W. 54.

I. Army Provisions

1. Articles of War

"ART. 54. Fraudulent Enlistment.—Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct."

"ART. 28.....Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein.".....

2. Manual for Courts-Martial

Par. 129 "Discussion.—

"A fraudulent enlistment is an enlistment procured by means of either a willful—i.e., intentional—misrepresentation in regard to any of the qualifications or disqualifications prescribed by law, regulation, or orders for enlistment, or a willful concealment in regard to any such disqualification.

"Misrepresentation and concealment include any act, statement, or omission, which has the effect of conveying what is known by the applicant to be an untruth or of concealing what he knows to be the truth concerning his qualifications or disqualifications for enlistment.

"Misrepresentation or concealment may be with respect to matters which, if truthfully stated or revealed, would induce an inquiry by the recruiting officer concerning the qualifications or disqualifications for enlistment, such as matters called for by questions as to previous service and previous applications for enlistment. Where a soldier again enlists without a discharge, he should be charged under A.W. 54 if he has received pay or allowances, otherwise he should be charged under A.W. 96.

"A person who procures himself to be enlisted by means of several willful misrepresentations and concealments as to his qualifications for the one enlistment so procured and receives pay and allowances under such enlistment commits but one offense under A. W. 54.

"Proof.—(a) The enlistment of the accused in the military service as alleged; (b) that the accused willfully—i.e., intentionally—misrepresented or concealed a certain material fact or facts regarding his qualifications for enlistment as alleged; (c) that his enlistment was procured by such intentional misrepresentation or concealment; and (d) that under such enlistment the accused received either pay or allowances, or both, as alleged.".....

Receipt of food and clothing is not receipt of allowances. Dig. Op. JAG (1920) p. 264.

Par. 152 "Ninety-Sixth Article of War.....

"Among the disorders herein made punishable is the fraudulent enlistment contemplated by A. W. 28, which differs from fraudulent enlistment under A. W. 54 in that the element of the receipt of pay or allowances is not present. The fact that at the time of the alleged fraudulent enlistment the accused was serving in a prior enlistment from which he had not been discharged may be proved, prima facie, by introducing authenticated records of a former unexpired enlistment. If the period of the prior enlistment has elapsed, the fact that there was no discharge from his former enlistment may be proved, prima facie, by the certificate of The Adjutant General or one of his assistants that the files and records of the office of The Adjutant General contain no record of the discharge of the accused from such enlistment."

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

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 22. (a) Offenses 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."

"(b) Fraudulent enlistment.--Fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared an offense against naval discipline and made punishable by general court-martial, under this article."

2. Naval Courts and Boards

"SEC. 103. Fraudulent enlistment.....

"Elements: The first essential of this offense is the wilful and knowing concealment of a fact which, if known to the recruiting officer, would cause the rejection of the applicant. Where the accused thus fraudulently enlists without a discharge from another enlistment in the Navy or Marine Corps, the first essential is all that is requisite. If, however, the accused has never previously been in the Navy or Marine Corps, or has been discharged therefrom, the second essential, the receipt of pay or allowances under the fraudulent enlistment is also requisite. But in either case it is a good rule, where there is any possible doubt as to the status of the accused, to allege and prove the receipt of pay and allowances.

"The misrepresentation or concealment may be in matters which are designed to open the door to inquiry concerning the qualifications or disqualifications for enlistment, such as questions as to previous service, previous applications for enlistment, etc.

"The qualifications or disqualifications may be prescribed by law, regulations, or orders.

"Answers to questions having no bearing on the applicant's qualifications for enlistment, such as questions as to the applicant's name, address, or immaterial statements as to age, are not sufficient.

"The concealment must be wilful, and thus mere mistake or forgetfulness will not make the offense.

"Lesser included offense: Conduct to the prejudice of good order and discipline."

3. Proposed Navy Bill

"SEC. 11. Article 14 is renumbered as article 9 and amended to read as follows:

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject

to the Articles for the Government of the Navy--.....

"Thirty-fourth. Or fraudulently enlists in the naval service and receives any pay or allowance thereunder, or fraudulently obtains his discharge from the naval service."

III. Differences

1. Fraudulent Enlistment in General.

A. W. 54 and proposed A.G.N., Art. 9, Thirty-fourth, are substantially the same in this respect as both concealment and receipt of pay or allowance are required.

2. Where Outstanding Enlistment in Armed Forces.

The Army provision as to fraudulent enlistment when the accused has not been discharged from a prior enlistment in the armed services is not found in the punitive articles but in A. W. 28 and is not punishable under A. W. 54 (unless he has received pay or allowances) but under General Article A. W. 96.

These various provisions should be collected in one article. Both the present Army and Navy provisions in this respect also are substantially the same as only proof of enlistment without a prior discharge is needed to prove the offense.

Query: Whether the omission of the comma in the proposed A.G.N. necessitates the proof of the receipt of pay or allowances to constitute this naval offense, except in the case of an undischarged soldier, who enlists in the naval service.

3. Fraudulent Discharge.

Neither the present A. W. or A.G.N. contain a provision for fraudulently procuring a discharge. However, this offense is punished by both services under general articles relating to offenses against the military or naval service. The proposed Navy bill includes a provision for fraudulent discharge.

IV. Recommended Provision

Art.....Such punishment as a court-martial may adjudge, may be inflicted upon any person subject to these articles,

P. 5

(a) Who procures himself to be enlisted in any component of the armed services of the United States by willful misrepresentation or concealment as to his qualifications for enlistment, and receives pay or allowances under such enlistment; or

(b) Who, without having first received a regular discharge, again enlists in the same or any other component of the armed services of the United States; or

(c) Who fraudulently obtains his discharge from the armed services of the United States.

There is no comment in Ballantine, McGuire, White, Vanderbilt, or Keeffe Reports.

FEL - 1

Uniform Code of Military Justice

Subject: Officer Making Unlawful Enlistment. A.W. 55.

I. Army Provisions

1. Articles of War

"ART. 55. Officer Making Unlawful Enlistment.-- Any officer who knowingly enlists or musters into the military service any person whose enlistment or muster in is prohibited by law, regulations, or orders shall be dismissed from the service or suffer such other punishment as a court-martial may direct."

2. Manual for Courts-Martial

The Manual does not discuss A. W. 55. Appendix 4, page 239, however, suggests the form for the preparation of charges and specifications for a violation of the Article, and lists therein persons who are not qualified by law or otherwise to be mustered into the service, i.e., persons who are insane, intoxicated, minors and have been convicted of a felony.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 19. Enlisting deserters, minors, etc.-- Any officer who knowingly enlists into the naval service any person who has deserted in time of war from the naval or military service of the United States, or any insane or intoxicated person, or any minor between the ages of fourteen and eighteen years, without the consent of his parents or guardian, or any minor under the age of fourteen years, shall be punished as a court martial may direct (R.S., sec. 1624, art. 19; May 12, 1879, c. 5, 21 Stat. 3; Aug. 22, 1912, c. 336, sec. 2, 37 Stat. 356)."

2. Proposed Navy Bill

"Sec. 11. Article 14 is renumbered as Article 9 and amended to read as follows:

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--

"Thirty-eighth. Or, being an officer, knowingly and without specific authority enlists in the naval service any person who has deserted in time of war from the naval or military service of the United States, or any insane or intoxicated person, or any minor between the ages of fourteen and eighteen years, without the consent of his parents or guardian, or any minor under the age of fourteen years;"

P. 2

III. Differences

A.W. 55 authorizes an officer to be penalized for enlisting any person contrary to law, orders, or regulations, while A.G.N. 9(38), as proposed, prohibits an officer from enlisting any person cited therein. It should be pointed out, however, that an officer who enlists any person who is otherwise disqualified by reason of law, regulations, or orders may be prosecuted for an offense against the A.G.N.

IV. Recommendations

No specific recommendations.

FEL - 2

Uniform Code of Military Justice

Subject: False Muster. A.W. 56.

I. Army Provisions

1. Articles of War.

"ART. 56. False Muster.-- Any officer who knowingly makes a false muster of man or animal, or who signs or directs or allows the signing of any muster roll knowing the same to contain a false muster or false statement as to the absence or pay of an officer or soldier, or who wrongfully takes money or other consideration on mustering in a regiment, company, or other organization, or on signing muster rolls, or who knowingly musters as an officer or soldier a person who is not such officer or soldier, shall be dismissed from the service and suffer such other punishment as a court-martial may direct."

2. Manual for Courts-Martial.

No comment.

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

No change.

II. Navy Provisions

1. Articles for the Government of the United States Navy.

"ART. 8. Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy--....."

"Fourteenth (False muster).-- Or knowingly makes or signs, or aids, abets, directs, or procures the making or signing of, any false muster;....."

2. Naval Courts and Boards.

"SEC. 70.Elements: Muster is the assembling, inspecting, entering upon the formal rolls, and officially reporting as a component part of the command of persons or public animals.

"Lesser included offenses: Neglect of duty, conduct to the prejudice of good order and discipline....."

3. Proposed Navy Bill.

SEC. 11. ART. 9, Twenty-fourth: same as above.

III. Differences

The Navy provision applies to any person subject to the A.G.N., while the Army provisions apply only to officers.

The Army provision makes dismissal a mandatory punishment which makes this offense triable only by general courts-martial, while the Navy provision has no mandatory punishment.

The Army provision applies also to making false statements as to pay of a soldier or officer, while the Navy provision does not. (See false claims, C.S., A.W. 94).

The Army provision applies to wrongfully taking money on mustering an organization, while Navy provision does not.

Both provisions apply to making or signing a false muster. However, A.W. 56 uses the words "directs or allows" while proposed A.G.N. 9, twenty-fourth, uses "aids, abets, directs, or procures" the making of a false muster.

IV. Recommendations

The McGuire, White, Navy JAG, Keefe, and Ballantine studies make no comment.

The Vanderbilt Report favors abolition of all mandatory sentences.

It is questionable whether the use of the words "aids, abets, directs, or procures" in the Navy provision are necessary, as Art. 5(e) of the proposed A.G.N. provides that "whoever aids, abets, counsels, commands, induces, or procures the commission of any offense by another is a principal."

Uniform Code of Military Justice

Subject: False Returns - Omission to Render Returns. A. W. 57.

I. Army Provisions

1. Articles of War

"ART. 57. False Returns--Omission to Render Returns.--Every officer whose duty it is to render to the War Department or other superior authority a return of the state of the troops under his command or of the arms, ammunition, clothing, funds, or other property thereunto belonging, who knowingly makes a false return thereof shall be dismissed from the service and suffer such other punishment as a court-martial may direct. And any officer who, through neglect or design, omits to render such return shall be punished as a court-martial may direct."

2. Manual for Courts-Martial

No comment.

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

No change.

II. Navy Provisions

1. Articles for the Government of the Navy.

No specific article.

2. Naval Courts and Boards

Not specifically mentioned.

3. Proposed Navy Bill.

No specific article.

III. Differences

There is no similar Navy provision. However, such offenses are punishable under Art. 9 of the proposed A.G.N. in the following paragraphs:

Nineteenth: Negligence or carelessness in obeying orders or culpable inefficiency in the performance of duty;

Thirtieth: Violation or refusal of obedience to general order or regulation issued by the Secretary of the Navy; or

P. 2

Fifty-ninth: Conduct unbecoming an officer - knowingly making false statement.

Under the Articles of War, knowingly making a false return is only punishable by a general court-martial as there is a mandatory sentence of dismissal.

IV. Recommendations

There are no specific recommendations as to this offense in the Ballantine, White, McGuire, Keefe, Navy JAG, or Vanderbilt Reports.

However, the Vanderbilt Report does not favor any mandatory sentence.

Uniform Code of Military Justice

Subject: Désertion.
A. W. 58, 28.

I. Army Provisions

1. Articles of War

"ART. 58. Desertion.-- Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct."

"ART. 28. Certain Acts to Constitute Desertion.-- Any officer who, having tendered his resignation and prior to due notice of the same, quits his post or proper duties without leave and with intent to absent himself permanently therefrom shall be deemed a deserter.

"Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein.

"Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter."

2. Manual for Courts-Martial

"Par. 130. Fifty-Eighth Article of War

"a. Desertion

"Discussion.-- Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service.

"Absence without leave with intent not to return.-- Both elements are essential to the offense, which is complete when the person absents himself without authority from his place of service (which is for him 'the service of the United States') with intent not to return thereto.

"Absence without leave with intent to avoid hazardous duty or with intent to shirk important service.--.....

The 'hazardous duty' or 'important service' may include such service of troops as strike or riot duty; employment in aid of the civil power in, for example, protecting property, or quelling or preventing disorder in times of great public disaster; embarkation for foreign duty or duty beyond the continental limits of the United States; and, under some exceptional circumstances such as threatened invasion, entrainment for duty on the border. Such services as drill, target practice, maneuvers, and practice marches will not ordinarily be regarded as included.

"b. Attempting to Desert.

"Discussion.-- An attempt to desert in an overt act other than mere preparation to desert. The attempt to desert may be with the intent not to return, to avoid hazardous duty, or to shirk important service. Once the attempt is made, the fact that the soldier deserts, either of his own accord or otherwise, does not obliterate the offense."

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

A. W. 58 and A. W. 28 are not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 4.....-- The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service--....."

"Sixth. Or, in time of war, deserts.....;

"Seventh. Or, in time of war, deserts or betrays his trust,.....;"

"ART. 8.....-- Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--....."

"Twenty-first. Or, in time of peace, deserts or attempts to desert.....;"

"ART. 10. Desertion by resignation.-- Any commissioned officer of the Navy or Marine Corps, who, having tendered his resignation, quits his post or proper duties without leave, and with intent to remain permanently absent therefrom, prior to due notice of the acceptance of such resignation, shall be deemed and punished as a deserter (R.S., sec. 1624, art. 10)."

"ART. 22 (a) Offenses not specified.-- All offenses committed by persons belonging to the Navy which are not specified in the foregoing article shall be punished as a court martial may direct (R. S., sec. 1624, art. 22)....."

2. Naval Courts and Boards

"SEC. 42. How to charge attempts.-- If an attempt is not provided for as a specific charge it should be alleged under the appropriate general charge."

"SEC. 49. Desertion in time of war.--

"Elements: The elements of (this offense) are the same as for the corresponding (offense) in time of peace.

"Desertion is consummated whenever the absence and the requisite intent concur....."

"There is no such charge as 'attempting to desert in time of war.' This offense should be charged as 'conduct to the prejudice of good order and discipline.'"

"SEC. 76. Desertion in time of peace.--

"Elements: Desertion consists of--intent to permanently abandon the service, or to permanently abandon the pending contract of enlistment, and A.W.O.L. or A.O.L.

"The desertion must be alleged to be from the naval service and not merely to be from a certain ship or station."

"SEC. 77. Attempting to desert.--

"Elements: To constitute an attempt to desert a specific intent must be proved."

3. Proposed Navy Bill

"SEC. 3. Article 4 is renumbered as article 8 and amended to read as follows:

'ART. 8. The punishment of death, or such other punishment as a court martial may adjudge, may be inflicted on any person subject to the Articles for the Government of the Navy--.....'

'Third. Or, in time of war, deserts.....;'

'Fourth. Or, in time of war, deserts or betrays his trust;''

"SEC. 11. Article 14 is renumbered as article 9 and amended to read as follows:

'ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--.....

'Thirty-first. Or, in time of peace, deserts or attempts to desert.....;

'Sixty-first. Or is guilty of any disorder or neglect to the prejudice of good order and discipline or any conduct of a nature to bring discredit upon the naval service other than any disorder or neglect or conduct mentioned in these Articles;

'Sixty-second. Or is guilty of an attempt, or of a conspiracy, or of a solicitation, to commit any offense against these Articles.....'"

"SEC. 6. Article 8 is repealed."

"SEC. 8. Articles 10 and 11 are renumbered as articles 11 and 12."

"SEC. 15. Articles 22 and 23 are repealed."

III. Differences

1. Desertion

a). Neither the present A.G.N. nor the proposed Navy bill has any specific provision to correspond to the third paragraph of A. W. 28: "any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter." In time of war, such an act might be deemed to be punishable under the provisions of proposed Article 8, paragraph 4 (proposed Navy bill, Section 3), in which case a punishment of death would be permissible, as it is under A. W. 58. In time of peace or of war, the act could be brought under the general provisions of proposed Article 9, paragraph 61 (Proposed Navy bill, Section 11), but in this case a sentence of death would not be permissible.

b) A.G.N. does not have a specific provision making it an offense of desertion to enlist again in a military organization without having first received a regular discharge from a prior enlistment. In practice, however, the Navy treats such

an act as a violation of its articles making desertion an offense. Section 76, NC&B, defines desertion in part as the intent to abandon permanently the pending contract of enlistment plus A.W.O.L. or A.O.L. Proof of this is absence and subsequent fraudulent enlistment.

2. Attempted Desertions.

a) Under its present articles, the Navy has no offense of attempted desertion in time of war. Such an act is now charged as "conduct to the prejudice of good order and discipline", and is tried as an offense against Art. 22(a), (NC&B, Sec. 49). Punishment under this article would not permit a sentence of death; under A. W. 58, a death sentence would be permissible for this offense.

Under the proposed Navy bill, attempted desertion is made a specific offense within new Art. 9, paragraph 62 (proposed Navy bill, Sec. 11). A sentence of death would not be permissible under this article, as it would be under A. W. 58, in time of war.

b) A. W. 28 does not cover the cases of attempted desertion in the three situations it deals with. If an attempt to commit the offenses specified in A. W. 28 is chargeable as attempted desertion, the differences already noted between the Army and Navy provisions for the offense of attempted desertion apply in these situations also. Note, however, that under either system, an attempt by a man to enlist without first having received a regular discharge from a prior enlistment is probably chargeable as desertion rather than attempted desertion. The attempt, though unsuccessful, could be used as evidence of an intent to abandon the first contract of enlistment permanently. This, plus absence without leave, constitutes desertion.

IV. Recommendations

1. Keefe Report

On pp. 269 ff., there is extensive comment on the need for better definitions of the offense of desertion, its elements and the mode of proof, and for it to be distinguished more clearly from A.W.O.L. and A.O.L. The report criticizes the tendency of courts to convict on proof of absence alone, without considering sufficiently whether the requisite intent to desert was present. This tendency was fostered by a Navy Department Directive which required that a man be charged with desertion after

an absence of 45 days; with this requirement in force, courts tended to assume that a man who had been gone for this length of time was automatically guilty of desertion. On the other hand, if absence were less than 45 days the man was usually not charged with desertion at all.

The report recommends that workable tests be established for distinguishing between desertion and mere unauthorized absence. If length of absence alone is to be the test, an intermediate offense of aggravated absence should be recognized, which would permit more severe punishment than A.W.O.L. or A.O.L., but not be a capital offense. Desertion would be reserved for a case of unauthorized absence, coupled with other evidence, of which prolonged absence would be one type, showing unmistakably an intent not to return to the service.

The report also recommends that the definition of offenses should continue to be made in Naval Courts and Boards; they should not be defined in the Articles themselves.

Uniform Code of Military Justice

Subject: Advising or Aiding Another to Desert.
A. W. 59.

I. Army Provisions

1. Articles of War

"ART. 59. Advising or Aiding Another to Desert.-- Any person subject to military law who advises or persuades or knowingly assists another to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct."

2. Manual for Courts-Martial

"Par. 131. Fifty-Ninth Article of War. ADVISING, PERSUADING, OR ASSISTING DESERTION.

"Discussion.--

"The offenses of persuading and assisting desertion are not complete unless the desertion occurs; but the offense of advising is complete when the advice is given, whether the person advised deserts or not.

"It is not necessary that the accused act alone in giving the advice or assistance or in the persuasion; and he may act through other persons in committing the offenses.

"Proof.--

"b) if charged with persuading or assisting desertion, that such certain person deserted as alleged, and, where persuasion is alleged, that he was induced to do so by such persuasion;....."

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

A. W. 59 was not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 4..... -- The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service--....."

"Sixth. Or, in time of war, deserts or entices others to desert;

"Seventh. Or, in time of war, deserts or betrays his trust, or entices or aids others to desert or betray their trust;....."

"ART. 8.....Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--....."

"Twenty-first. Or, in time of peace, deserts or attempts to desert, or aids and entices others to desert;....."

"ART. 22. (a) Offenses 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....."

2. Naval Courts and Boards

"Sec. 78. Aiding Desertion--....."

"Elements: Whereas by paragraph 6 of Article 4 of the Articles for the Government of the Navy, enticing desertion alone is an offense in time of war, in time of peace, by this article (Art. 8, paragraph 21), there must be both an aiding and an enticing. If either of these elements is lacking the offense should be laid under the general charges....."

"Sec. 22. General and specific charges.--"

"Scandalous conduct tending to the destruction of good morals, conduct to the prejudice of good order and discipline, and conduct unbecoming an officer and a gentleman constitute the general charges....."

"Sec. 41. Principals and accessories.--"

"In view of 18 U. S. Code 550 (Sec. 332, Criminal Code) no distinction is to be made in charging principals and accessories before the fact....." (Sec. 332, Criminal Code, makes any one who aids, abets, counsels, commands, induces or procures the commission of an offense a principal).

3. Proposed Navy Bill

"Sec. 3. Article 4 is renumbered as Article 8 and amended as follows:

"ART. 8. The punishment of death, or such other punishment as a court martial may adjudge, may be inflicted on any person

subject to the Articles for the Government of the Navy--.....

"Third. Or, in time of war, deserts or entices others to desert;

"Fourth. Or, in time of war,, or entices or aids others to desert or betray their trust;....."

"Sec. 11. Article 14 is renumbered as Article 9 and amended to read as follows:

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--.....

"Thirty-first. Or, in time of peace,..... or aids and entices others to desert;

"Sixty-first. Or is guilty of any disorder or neglect to the prejudice of good order and discipline or any conduct of a nature to bring discredit upon the naval service other than any disorder or neglect or conduct mentioned in these Articles;

"Sixty-second. Or is guilty of an attempt, or of a conspiracy, or of a solicitation, to commit any offense against these Articles;....."

"Sec. 15. Articles 22 (and 23) are repealed."

"Sec. 47. Art. 5(e). Whoever aids, abets, counsels, commands, induces, or procures the commission of any offense by another is a principal....."

III. Differences

1. A. W. 59 can be violated by any of three offenses, either in time of peace or of war: 1) the offense of advising another to desert; 2) the offense of persuading another to desert; or 3) the offense of knowingly assisting another to desert. The offense of advising another to desert is complete when the advice is given, whether the person advised deserts or not, whereas if the offenses are persuading, or knowingly assisting another to desert, they are not complete unless the desertion actually occurs. (paragraph 131, ANCM).

a) Under Navy provisions, in time of war, it is an offense to entice another to desert, or to entice or aid another to desert

or betray his trust (Proposed Navy bill, Section 3, new Art. 8, paragraphs 3 and 4). There is no indication in Navy provisions whether the desertion must actually occur, or at least be attempted, before these offenses are complete. However, that actual or attempted desertion is an essential element to these offenses might be deduced from analysis of the meaning of the word "entice" as it is used in this context. The employment of the word is probably derived from chapter 321, section 42 of the U.S. Criminal Code (18 USCA 94), which reads in part: "whoever shall entice or procure, or attempt to entice or procure, any soldier.....or any seaman.....to desert....." From the fact that a distinction is made in the Criminal Code between "entices or procures" and "attempts to entice or procure", it might be concluded that the word "entice" when used in the Code is intended to have the same meaning that the word "persuade" has in offense number two of A. W. 59—i.e.—that the effort to entice has been successful, and the desertion has occurred or been attempted. When the same word is used in an identical context in A.G.N., the same conclusion may reasonably be drawn.

If the charge under A. W. 59 is "persuading another to desert", it must be proved that the deserter was actually induced to desert by such persuasion (AMCM, paragraph 131). Navy provisions do not contain a similar provision for proof where the charge is "enticing another to desert."

b) Navy provisions do not make it a specific offense to attempt to entice (i.e., to "advise"—cf. offense number 1 of A. W. 59) another to desert. Such an attempt might be punishable as a violation of Art. 22(a) of the present A.G.N.; or, under the proposed Navy bill, of new Art. 9, paragraph 62, as an attempt to commit an offense, or of paragraph 61, as conduct to the prejudice of good order and discipline. Under any of these Articles, the maximum punishment permissible would not include a sentence of death, whereas under A. W. 59, advising another to desert in time of war may be punished by a sentence of death. The offense would probably be complete whether or not desertion actually occurred or was attempted.

c) Navy provisions do not make it a specific offense to aid another to desert in time of war (Cf. offense number 3 of A. W. 59). However, Section 41 of NC&B provides that no distinction is to be made in charging principals and accessories before the fact. From this it appears that one who aids another to desert is chargeable as a principal to the offense. (See paragraph 2 of this section for further discussion of this point). It is implied that the offense would not be complete until desertion occurred or was attempted.

d) In time of peace, Navy provisions make it an offense to aid and entice another to desert (Proposed Navy bill, sec. 11, new Art. 9 (31)). If either of these elements is missing the

offense is laid under a general charge, as a lesser included offense (NC&B, Sec. 78). A. W. 59 makes separate offenses, which are of equal seriousness, of these two elements. Advising another to desert, also a separate offense in time of peace under A. W. 59, would probably be brought under a general charge in the Navy, again as a lesser included offense. The rules for when these offenses are complete in time of peace probably follow those for when they occur in time of war.

2. Art. 5(e), proposed Navy bill (Sec. 47) is a new article in the proposed A.G.N.; its substance is now stated as a rule of procedure in Sec. 41, NC&B. The Article is derived from Sec. 332, U.S. Criminal Code (18 USC 2). It is not clear what the effect of this article will be when the offense is being an accessory before the fact to a desertion. If a person charged with such an offense can be tried as a principal, the distinction made elsewhere in the Articles between the offense of enticing another to desert in time of war, and the offense of aiding and enticing another to desert in time of peace would not apply. However, it is probably that this article will not be invoked where there is a specific article to cover an offense.

Articles of War do not have any provision equivalent to Art. 5(e), but the principle of the Article was set forth in Army Court Martial Order 145106 (1942) as applicable to Army Courts-Martial. (Cf. JAG, Army, Digest of Opinions, 1912-1940, page 333).

IV. Recommendations

1. Proposed amendments to the proposed Navy bill, as prepared by Naval Law Manual Section, dated 17 May 1948:

The offenses of enticing another to desert in time of war, and enticing and aiding another to desert in time of peace have been eliminated. This indicates an intent either that the offender shall be tried as a principal under the authority of an Article identical to Art. 5(e) of the proposed Navy bill, or under a general article making it an offense to solicit the commission of any offense against the Articles. If the latter, the death sentence could not be imposed, although the solicitation occurred in time of war.

Uniform Code of Military Justice

Subject: Entertaining a Deserter. A. W. 60.

I. Army Provisions

1. Articles of War

"ART. 60. Entertaining a Deserter.-- Any officer who, after having discovered that a soldier in his command is a deserter from the military or naval service or from the Marine Corps, retains such deserter in his command without informing superior authority or the commander of the organization to which the deserter belongs, shall be punished as a court-martial may direct."

"ART. 96. General Article.-- Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

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

Article of War 60 and 96 were not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 8. Persons to whom applicable.-- Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--
.....

"Twenty-second (Harboring deserters).-- Or receives or entertains any deserter from any other vessel of the Navy, knowing him to be such, and does not, with all convenient speed, give notice of such deserter to the commander of the vessel to which he belongs, or to the commander in chief, or to the commander of the squadron
....."

2. Proposed Navy Bill

"Sec. 6. Article 8 is repealed."

"Sec. 11. Article 14 is renumbered as Article 9 and amended to read as follows:

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--....."

"Thirty-second. Or receives or entertains any deserter from the military or naval service, knowing him to be such, and does not, without delay, give notice of such deserter to his commanding officer or higher authority in the chain of command;"

III. Differences

1. A. W. 60 applies to officers only; new Art. 9 of the proposed A.G.N. applies to any person subject to the A.G.N. (But cf. JAG Army Opinions, 1912-40, Sec. 417, page 281 stating that the offense of knowingly and willfully harboring and concealing a deserter is a violation of A. W. 96. A. W. 96 applies to all persons subject to the Articles of War).
2. In order for A. W. 60 to be applicable to an officer, the deserter must be a soldier in his command; new Art. 9 of proposed A.G.N. would apply to any person who received or entertained any deserter from the military or naval service.

IV. Recommendations

None.