

## Navy Court Martial Proposals for Its Reform

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# THE NAVY COURT MARTIAL: PROPOSALS FOR ITS REFORM

ROBERT S. PASLEY, JR. AND FELIX E. LARKIN

## *Introduction*

During World War II, the court-martial systems of both services were subjected to the most severe test of their history. Some ten million men made the sudden transition from civilian to service life and found themselves living in an entirely new community, with its own law and its own courts. Inevitably, a certain percentage of these men came into conflict with the law. A system of justice which had its origin in the disciplinary needs of a small volunteer Army and Navy was suddenly called upon by two tremendous wartime organizations to meet, not only their disciplinary requirements in the strict military sense, but also to enforce the criminal law as it is ordinarily understood in the civilian community. It would be remarkable if any judicial system could survive such a test without substantial revision.

In the two years since V-J Day, the Articles of War and the Articles for the Government of the Navy have been subjected to the most searching analysis and criticism which they have ever received. Several studies have been made of the Army court-martial system, by the Army itself, by the War Department Advisory Committee on Military Justice, the membership of which was nominated by the American Bar Association, and which was headed by Arthur T. Vanderbilt, Dean of the New York University School of Law,<sup>1</sup> and by the House Military Affairs Committee of the 79th Congress.<sup>2</sup> A bill to amend the Articles of War (S. 903, H. R. 2575) has been introduced in the 80th Congress, and, after extensive hearings, has been reported, with amendments, by the Armed Services Committee of the House of Representatives to the Committee of the Whole.<sup>3</sup>

In the Navy, there has been a parallel development. No less than four separate groups have, at the request of the Secretary of the Navy, reviewed the Navy court-martial system and have made recommendations for its modification. A committee, headed by Mr. Arthur A. Ballantine, former Under-Secretary of the Treasury and prominent New York attorney, has submitted two reports—one in 1943, and the other in 1946.<sup>4</sup> Another com-

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<sup>1</sup>See REPORT OF WAR DEPT. ADVISORY COMM. ON MILITARY JUSTICE TO THE SEC'Y OF WAR (Dec. 1946).

<sup>2</sup>See H. R. REP. No. 2722, 79th Cong., 2d Sess. (1946).

<sup>3</sup>H. R. REP. No. 1034, 80th Cong., 1st Sess. (1947). See also Royall, *Revision of the Military Justice Process as Proposed by the War Department*, 33 VA. L. REV. 269 (1947).

<sup>4</sup>REPORT OF BALLANTINE COMM. TO THE SEC'Y OF THE NAVY (Sept. 1943); REPORT

mittee, headed by Hon. Matthew F. McGuire, United States District Judge for the District of Columbia, submitted a report in 1945 which recommended a complete revision of the Articles for the Government of the Navy, and included the text thereof as well as proposed rules for court-martial procedure.<sup>5</sup> Father Robert J. White, Dean of Catholic University Law School and a Commodore in the Navy during the war, has made several studies of the Articles for the Government of the Navy, and has conducted a survey of the Navy prison system. His final report contained a number of recommendations for reform of the Navy court-martial system.<sup>6</sup> Finally, the General Court Martial Sentence Review Board, headed by Professor Arthur John Keeffe of the Cornell Law School, has submitted a comprehensive report on the naval court-martial system which contains numerous recommendations for reform.<sup>7</sup> Meanwhile, the Navy Department had been making its own studies, and on the basis of all these surveys has proposed a bill for amendment of the Articles for the Government of the Navy, which has been introduced in Congress.<sup>8</sup> It is expected that hearings on this bill will commence in the near future.

It is the purpose of this article to review briefly some of the more important features of the Navy court-martial system, the recommendations made by the above Committees, and the extent to which the Navy court-martial bill implements or fails to implement these recommendations.

### *Historical Survey*

The American system of naval justice derives directly from the British. In early times England had no regular Navy but in time of war impressed

OF BALLANTINE COMM. TO THE SEC'Y OF THE NAVY (April 1946). The latter report was signed by all members of the Ballantine Committee, but was accompanied by a special report by one member, Hon. Matthew F. McGuire, and a minority report by two other members, Lt. Cmdr. Richard L. Tedrow, USNR, and Lt. John J. Finn, USNR. The other members of the Ballantine Committee were: Professor Noel T. Dowling, of Columbia Law School, Major General Thomas E. Watson, USMC, Rear Adm. George L. Russell, USN, (Assistant Judge Advocate General of the Navy), Rear Admiral John E. Gingrich, USN, Rear Admiral George C. Dyer, USN and Captain Leon H. Morine, USCG.

<sup>5</sup>REPORT OF THE MCGUIRE COMM. TO THE SEC'Y OF THE NAVY (Nov. 1945). The other members of the McGuire Committee were Hon. Alexander Holtzoff, U. S. District Judge for the District of Columbia, and Colonel James M. Snedeker, USMC.

<sup>6</sup>WHITE, A STUDY OF 500 NAVAL PRISONERS AND NAVAL JUSTICE (Jan. 1947).

<sup>7</sup>REPORT OF THE GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY (Jan. 1947). The other members of this board, at the time its final report was submitted, were: Felix E. Larkin, Vice-President, Admiral C. P. Snyder, USN, Captain Hunter Wood, Jr., USN, Captain John A. Glynn, USCG, Captain Clifford B. Hines, USN, Lt. Col. E. N. Murray, USMC, and Commander A. W. Dickinson, USNR.

<sup>8</sup>S. 1338 (starred version), H. R. 3687, 80th Cong., 1st Sess. (1947).

merchant vessels in order to form one. The personnel of these vessels were governed by the general maritime law, and by the ancient customs and usages of the sea. The first code specifically intended to enforce discipline on naval vessels was the Ordinance of Richard I, of 1190,<sup>9</sup> which applied to soldiers, as well as to sailors, and may therefore be regarded as the common ancestor of our military and naval codes. The first code specifically applicable to the Navy was the *Black Book of the Admiralty*, prepared in 1351,<sup>10</sup> which may be regarded as the basis of all later British naval codes.

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

The first statute which specifically authorized naval courts martial appears to have been the Ordinance and Articles of Martial Law for the Government of the Navy, enacted in 1645.<sup>11</sup> The first statute which provided for the general government of the Navy was passed in 1649, and amended in 1652, and was known as Cromwell's Articles. This code was a mere restatement of naval law as it had been administered for some time past, but it remained the basic naval law until 1749. In that year a new code was enacted which, however, did not differ greatly from Cromwell's Articles. The Articles of 1749 were in force at the time of the American Revolution.

The first American naval articles were compiled by John Adams, who took from the British Articles of 1749 those provisions which he considered suitable. They were approved by the Continental Congress on November 28, 1775, and entitled Rules for the Regulation of the Navy of the United Colonies.

The present Articles for the Government of the United States Navy were enacted by Congress on July 17, 1862.<sup>12</sup> This statute consisted of the 1775 Articles revised and brought down to date, with certain additions. There have been a number of amendments since that date, and forty-five articles

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<sup>9</sup>Reprinted in WINTHROP, *MILITARY LAW AND PRECEDENTS* 903 (1895 ed., 1920 reprint).

<sup>10</sup>HOLDSWORTH, *HISTORY OF ENGLISH LAW* 125 *et seq.* (3d ed. 1922). *THE BLACK BOOK OF THE ADMIRALTY*, edited by Sir Travers Twiss, was republished in London in 1871, with a historical introduction.

<sup>11</sup>LOVETTE, *NAVAL CUSTOMS, TRADITIONS AND USAGES* 66 (3d ed. 1939).

<sup>12</sup>REV. STAT. § 1624 (1875), 34 U. S. C. A. § 591 (1928).

have been added. However, aside from the amendments which created summary courts martial,<sup>13</sup> and deck courts,<sup>14</sup> the present Articles for the Government of the Navy are not far removed, in content and phraseology, from the British Articles of 1749, which in turn were substantially Cromwell's Articles of 1649. It is fair to say then that the proposed naval court-martial bill represents the first really substantial revision of the Naval Code in almost 300 years.

### *Jurisdiction*

Since a court martial is a court of limited jurisdiction, the question of its power to act is of paramount importance. Generally speaking, a naval court martial has power to try any person in the naval service for any offense against the Articles, wherever committed. This simple rule is, however, subject to numerous qualifications, and the present Articles include a wide variety of provisions relating to jurisdiction over persons and to territorial jurisdiction.

#### (a) *Jurisdiction As To Persons*

Jurisdiction as to persons is presently covered in several different and widely separated Articles, which do not themselves purport to deal with the subject of jurisdiction, and conversely, articles which appear to be jurisdictional, in fact are not. For example, AGN 4, although headed "Persons to Whom Applicable," actually deals with offenses which carry the death penalty. Scattered throughout the Articles are such terms as "any person in the Naval Service" (AGN 4), "any person in the Navy" (AGN 8), "any officer" (AGN 9), "any commissioned officer of the Navy or Marine Corps" (AGN 10), "person connected with the Navy" (AGN 12), "persons belonging to the Navy" (AGN 22(a), 23). Furthermore, it is necessary to go outside the Articles and to consult other federal statutes to determine what persons are subject to naval law. Certain classes of persons are nowhere included, for example: Army personnel attached for duty with naval units, and persons serving sentences of courts martial whose enlistments have expired or who have been discharged from the service.

All four of the committees referred to above agreed that this confusing picture should be clarified. The present Navy bill attempts to do this by bringing together in one place all the provisions relating to jurisdiction over persons, and by specifying in detail what persons are subject to the jurisdiction of naval courts martial.<sup>15</sup>

<sup>13</sup>10 STAT. 627 (1855).

<sup>14</sup>35 STAT. 621 (1909), and 39 STAT. 586 (1916).

<sup>15</sup>S. 1338, H. R. 3687, 80th Cong., 1st Sess., § 47, Arts. 5(a), 6, 7 (1947).

(b) *Territorial Jurisdiction*

At the present time, the general rule that the jurisdiction of naval courts martial is not limited as to place has one important exception. Naval courts have authority to try persons charged with murder only if the offense has been committed outside the territorial jurisdiction of the United States, this limitation being applicable in time of war, as well as peace.<sup>16</sup> This rule is of ancient origin and is comparable to similar limitations contained in the British Army and Navy Codes, as well as in the Articles of War.<sup>17</sup>

This limitation has, however, led to unfortunate results. For example, prior to 1945, AGN 6 provided that a naval court martial had jurisdiction to try murder only if the offense had been committed by a "person belonging to a public vessel of the United States" without the territorial jurisdiction thereof. In the important case of *Rosborough v. Rossell*,<sup>18</sup> the accused, who had been tried for an alleged murder committed outside the United States and had been convicted of manslaughter, brought habeas corpus proceedings on the ground that he did not belong to a public vessel of the United States and was therefore not properly charged with murder in proceedings before a naval court martial. The accused was a member of the naval service but had been assigned to armed guard duty on a vessel of Panamanian registry, under the command of a naval officer. The district court upheld the conviction,<sup>19</sup> but the circuit court of appeals reversed and granted the writ, sustaining the contention of the accused. Although this result may be justified by a literal reading of the statute, it had unfortunate consequences. The Navy was compelled to set aside a number of murder convictions, to grant

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<sup>16</sup>REV. STAT. § 1624, Art. 6 (1878), as amended, 59 STAT. 595, 34 U. S. C. § 1200 (1945).

<sup>17</sup>The other rules are not identical, however. The Articles of War provide that, in time of peace, an accused shall not be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia. 41 STAT. 805 (1920), 10 U. S. C. A. § 1564 (1927), ARTICLE OF WAR 92. The British Army Act prevents British Army courts martial from trying cases of treason, murder, manslaughter, treason, felony, or rape, if these offenses can, with reasonable convenience, be tried by a civil court. A court-martial is consequently prohibited from trying any such offense if it is committed in the United Kingdom, or anywhere else in the Dominions (except Gibraltar), within 100 miles from the place where the offender can be tried by a civil court, unless the offense is committed on active service. Army Act, 44 and 45 Victoria, c. 58, § 41 (1881); MANUAL OF MILITARY LAW 103 (1929 ed., 1939 reprint). The British Naval Discipline Act limits the jurisdiction of naval courts martial so that, as to most civil offenses, jurisdiction is limited to acts committed outside the United Kingdom, or on naval shore establishments, harbors, rivers, and so forth, within the United Kingdom. Naval Discipline Act, 29 and 30 Victoria, c. 109, Art. 46 (1866).

<sup>18</sup>150 F. 2d 809 (C. C. A. 1st 1945).

<sup>19</sup>56 F. Supp. 347 (D. C. Me. 1944).

new trials in some cases, to turn other offenders over to local civil courts, and in still other cases to declare itself powerless to do anything.<sup>20</sup>

As a result of the *Rosborough* case, Article 6 has been amended so that, instead of reading:

"If any person belonging to any public vessel of the United States commits the crime of murder without the territorial jurisdiction thereof, he may be tried by court-martial and punished with death."<sup>21</sup>

it now reads:

"If any person subject to the Articles for the Government of the Navy commits the crime of murder without the territorial jurisdiction of any particular State, or the District of Columbia, he may be tried by court martial and punished with death."<sup>22</sup>

Although this amendment cures the specific difficulties raised by the *Rosborough* and other cases, it does not solve the real problem, which is that, so long as any limitation on territorial jurisdiction remains, some kind of confusion and difficulty will probably arise.

For this reason, the General Court Martial Sentence Review Board recommended that all jurisdictional limitations based on place be eliminated, even in the case of murder.<sup>23</sup> There is no reason in logic for the rule that a court martial can try the offense of murder only when committed overseas, but can try all other offenses wherever committed. If courts martial cannot be trusted to try serious offenses, the remedy is not to deprive them of jurisdiction, but to improve their processes and method of trial and review so that the grounds for such mistrust are removed. This was the approach adopted by the General Court Martial Sentence Review Board throughout its report.

It was recognized by the Board that considerations of policy might well lead to the decision that certain civil offenses of a serious nature should be tried by civilian courts, especially in peacetime, but it was felt that to accomplish this it was not necessary to place *jurisdictional* limitations on courts-martial. All that would be required would be to vest in the Secretary of the Navy the power, by regulation, to refer to the civil authorities such civilian offenses as policy required should be handled by them, leaving courts

<sup>20</sup>See Snedeker, *Significant Developments in Naval Law Since Pearl Harbor*, 73 U. S. NAVAL INST. PROC. 663 (1943).

<sup>21</sup>REV. STAT. § 1624, Art. 6 (1875), 34 U. S. C. § 1200, Art. 6 (1940).

<sup>22</sup>As amended Dec. 4, 1945, c. 554, 59 STAT. 595 (1945), 34 U. S. C. A. § 1200, Art. 6 (Supp. 1946).

<sup>23</sup>REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, Sec. VIII (3), pp. 260-265 (Jan. 1947).

martial free to try such cases when necessary, without being haunted by the specter of jurisdiction. This recommendation, while completely novel, is implemented in Section 47 of the Navy Bill, which provides simply that "The Articles for the Government of the Navy shall extend to all places."<sup>24</sup> No similar change has been suggested by anyone with respect to the Articles of War, or, so far as is known, even considered. The pending bill to amend the Articles of War, specifically retains the limitation presently contained in AW 92.<sup>25</sup>

### Offenses

It is a fundamental principle of Anglo-American law that no one should be punished for an offense which the law does not prohibit in so many words. The maxim, *nulla poena sine lege*, is a familiar statement of this principle. Unfortunately, the present Articles for the Government of the Navy are woefully lacking in this respect. Some offenses are specifically provided against, but are scattered throughout some eighteen different articles. The remaining offenses are covered by one broad provision, Article 22(a), which provides for the punishment of "All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles." Many important civil offenses, such as manslaughter, rape, robbery, and assault, are nowhere mentioned, although Article 22(a) has been construed as comprehending common law crimes, provided they are injurious to the order and discipline of the Navy.<sup>26</sup> Many common law offenses and various military offenses are also punishable under Article 8(1), which makes punishable "any other scandalous conduct tending to the destruction of good morals."<sup>27</sup> One of the most common complaints voiced in naval circles is that the present Articles fail to tell anyone in language which the ordinary person can understand what acts are punishable offenses and what are not.

All the above named committees agreed that this situation was in need of correction, although their actual recommendations on the subject differed widely. The McGuire Committee recommended that the Articles incorporate by reference violations of (1) the criminal laws, treaties, or covenants of the United States, (2) the criminal laws of a state, territory, or United

<sup>24</sup>S. 1338, H. R. 3687, 80th Cong., 1st Sess. § 47, Art. 5(c) (1947).

<sup>25</sup>S. 903, H. R. 2575, 80th Cong., 1st Sess. § 35, Art. 92 (1947).

<sup>26</sup>See *Carter v. McClaughry*, 183 U. S. 365, 397, 22 Sup. Ct. 181, 193 (1901); *Ops. ATT'Y GEN.* 579 (1880). See also *WINTHROP, MILITARY LAW AND PRECEDENTS* 721 (2d ed., 1920 reprint) on the corresponding provision of the Articles of War.

<sup>27</sup>*NAVAL COURTS AND BOARDS* § 59 (1937 ed., 1945 reprint); *Ex parte Dickey*, 204 Fed. 322 (D. C. Me. 1913).

States possession, (3) the lawful orders and regulations of the Secretary of the Navy, and (4) the customs of the Naval Service, or of the laws of war, and recommended that they also include (5) "recognized military offenses, as defined by the Secretary of the Navy." No further details were given, except that offenses punishable by death were specifically listed, and it was provided that the definition of offenses and the measure and mode of proof were to be those prevailing in the courts of the United States.<sup>28</sup>

Commodore White submitted several drafts containing provisions similar to those of the McGuire Committee draft, but listing, without defining them, some thirty-two specific military and common law offenses.<sup>29</sup> The majority report of the Ballantine Committee did not go into the question in detail. Judge McGuire's statement and the minority recommendations proposed adoption of the McGuire Committee draft articles, with some minor revisions.<sup>30</sup>

The General Court Martial Sentence Review Board made the following recommendations: (1) That all punitive provisions be grouped together under one general heading, but be divided into two classes—capital offenses, and those not capital; (2) That the several offenses most likely to occur in the naval service be specifically listed under one or the other of these two classes; (3) That the most common military offenses be similarly listed; and (4) That Article 22(a) be deleted, and that in its stead it be stated that offenses against the Articles include violations of the criminal laws, treaties, and covenants of the United States, violations of the regulations and customs of the service, and violations of the laws of war. The Board also recommended that there be included a general provision making punishable all disorders and neglects to the prejudice of good order and discipline, all conduct of a nature to bring discredit to the naval service, and all offenses not capital.<sup>31</sup>

The proposed Navy Bill represents a compromise among these various recommendations. All military offenses are brought together and classified under two headings: Article 8,<sup>32</sup> which includes capital offenses, specifically listed, and Article 9,<sup>33</sup> which includes non-capital offenses, also specifically

<sup>28</sup>Articles 2(d) and 4(c) (4) of draft Articles submitted with REPORT OF MCGUIRE COMM. TO THE SEC'Y OF THE NAVY (Nov. 1945).

<sup>29</sup>STUDIES 1, 2, AND 3, by Commodore Robert J. White, of the ARTICLES FOR THE GOVERNMENT OF THE NAVY (undated).

<sup>30</sup>REPORT OF THE BALLANTINE COMM. TO THE SEC'Y OF THE NAVY (April 1946).

<sup>31</sup>REPORT OF THE GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY 301, Sec. IX(A) (Jan. 1947).

<sup>32</sup>S. 1338, H. R. 3687, 80th Cong., 1st Sess. § 3, Art. 8 (1947).

<sup>33</sup>*Id.* at § 11, Art. 9.

listed. Article 5(d)<sup>34</sup> incorporates by reference violations of the criminal laws of the United States, treaties and covenants of the United States, the criminal laws of a state, territory, district or possession, violations of naval regulations and customs, and violations of the laws of war. There is also a general provision, Article 9(61),<sup>35</sup> which covers "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." Some common law offenses, such as forgery, burglary, housebreaking, seduction, embezzlement, and extortion, are specifically mentioned, but others, such as murder and manslaughter, seem to have been omitted from the offenses enumerated. Nevertheless, the bill has the merit of listing most of the offenses made punishable by the Articles and making it clear to any one who reads them, or hears them read, what is and what is not prohibited. This is a reform long overdue.

#### *Composition of Courts*

Of prime importance in any judicial system is the caliber of the personnel who man the courts. In civilian life, we have attempted to solve this problem by the jury system. Most Americans and Englishmen believe that a court comprised of a professional judge and a jury of fellow citizens, who are selected by lot, with full opportunity of challenge, together with a public prosecutor and defense counsel of the accused's choice, both professional lawyers, will, by and large, administer justice as well as is humanly possible.

In the court-martial system all this is changed. There is no judge and no jury. The right of challenge is, in the Navy, limited to challenges for cause. In the naval court martial, an officer who is called the judge advocate serves both as prosecutor for the government and as legal adviser to the court. A defense counsel is designated by the convening authority, but his services may be declined by the accused. An accused has a right to counsel of his choice, but the right is exercised in only a small percentage of cases. There is no statutory requirement that either the judge advocate or the defense counsel be professionally qualified.

#### (a) *Appointment of Courts Martial*

A court martial itself is appointed by a "convening authority" (usually the commander of a fleet, a marine division, a naval district, or the like), either for the trial of a specific case or a series of cases. The only statutory

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<sup>34</sup>*Id.* at § 47, Art. 5(d).

<sup>35</sup>*Id.* at § 11, Art. 9(61).

requirement for membership is that those appointed be commissioned officers. By administrative rule, members must be of the rank of lieutenant (or captain in the Marine Corps), if available.<sup>36</sup> The senior officer present automatically assumes the office of president of the court.

Before the war, general courts martial could be appointed only by the President or the Secretary of the Navy, the commander in chief of a fleet or squadron, or the commanding officer of an overseas station. Shortly after Pearl Harbor, the Secretary, pursuant to statutory authority,<sup>37</sup> empowered all flag officers commanding a division, squadron, flotilla, or larger naval force afloat to convene general courts martial.<sup>38</sup> But the centralization in Washington of the power to appoint most general courts martial led to such delay in the trial and review of cases that in July 1943 the Ballantine Committee recommended that, pursuant to AGN 38, the commandants of the naval districts in the United States be empowered to convene general courts martial. This recommendation was immediately adopted. The Ballantine Committee pointed out, however, in its 1943 report, that the power of the Secretary to authorize commanders within the United States to convene general courts existed only in wartime, and recommended that this power be made permanent.<sup>39</sup> The McGuire Committee, in 1945, made a similar recommendation.<sup>40</sup> In 1946, Article 38 was amended by Congress to carry these recommendations into effect.<sup>41</sup> The present Navy Bill makes no change in this Article, as thus amended, except to renumber it Article 22.<sup>42</sup>

#### (b) *Permanency of Courts*

Under existing Army and Navy procedures, there is no permanency about a court martial. A court may be appointed to try a single case, or a series of cases; it may cease to function the following day, or it may continue as originally constituted for months, or even years. The composition of a court may be changed at any time by the convening authority.<sup>43</sup> The con-

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<sup>36</sup>NAVAL COURTS AND BOARDS § 346 (1945 reprint).

<sup>37</sup>REV. STAT. § 1624 (1875), as amended, 35 STAT. 621 (1909), 39 STAT. 586 (1916), 34 U. S. C. A. § 1200 (1928), A. G. N. 38.

<sup>38</sup>See, e.g., Letter from the Sec'y of the Navy to the Commander in Chief, U. S. Fleet, (Navy Dept. file A17-11 (i)/A17-20 (420108), dated 8 January, 1942).

<sup>39</sup>REPORT OF THE BALLANTINE COMM. TO THE SEC'Y OF THE NAVY, Recommendation 1, pp. 3, 14-16 (Sept. 1943).

<sup>40</sup>REPORT OF THE MCGUIRE COMM. TO THE SEC'Y OF THE NAVY, Article 4(a) of Proposed Revised Articles (Nov. 1945).

<sup>41</sup>60 STAT. 4, 34 U. S. C. A. § 1200, Art. 38 (1946).

<sup>42</sup>S. 1338, H. R. 3687, 80th Cong., 1st Sess. § 28, Art. 22 (1947).

<sup>43</sup>See comments on this by RHEINSTEIN, MILITARY JUSTICE IN WAR AND THE LAW 155, 162, 167 (ed. Puttkamer, 1943), and by Morgan, *The Existing Court Martial System and the Ansell Articles*, 29 YALE L. J. 52, 60 (1919).

vening authority of a naval court martial may even replace members during the course of a trial, although this practice is condemned.<sup>44</sup>

Before the war, general courts martial which were more or less permanent in character had been appointed at a number of naval bases within the United States.<sup>45</sup> Even during the war, the general courts martial established for the naval districts in the United States were relatively permanent. Overseas, of course, this was not so feasible.

There are certain obvious advantages in having courts martial comprised of experienced, relatively permanent personnel, although it must be conceded that occasionally such courts tend to become callous and to impose unconscionable sentences.<sup>46</sup> A few tentative suggestions in this direction have been made. The Chamberlain Bill to amend the Articles of War, introduced in 1919, provided that, instead of the convening authority appointing the members in each case, he should designate a panel of qualified court members, and that for each trial the judge advocate, who was to be independent of the convening authority, should select the members of the court from this panel.<sup>47</sup> This proposal was not adopted in the 1920 revision of the Articles of War.<sup>48</sup> No comparable proposal is made in the pending Army bill.<sup>49</sup>

The Report of the General Board, United States Forces, European Theater, on *Military Justice Administration in the Theater of Operations*, gave some attention to proposals to establish permanent courts martial.<sup>50</sup> Permanent courts are used, at least in peacetime, in the court-martial systems of France<sup>51</sup> and of Russia.<sup>52</sup>

The McGuire, White, and Ballantine Reports had no recommendations to make with respect to permanent courts, or panels for courts. The General Court Martial Sentence Review Board considered this question at some length. Its recommendations were that:

(1) The system of appointing relatively permanent courts within the United States be strengthened and extended.

<sup>44</sup>NAVAL COURTS AND BOARDS §§ 348, 380 (1937 ed., 1945 reprint).

<sup>45</sup>McNemar, *Administration of Naval Discipline*, 13 GEO. L. J. 89, 119 n. 82 (1925).

<sup>46</sup>REPORT OF THE GENERAL BOARD, UNITED STATES FORCES, EUROPEAN THEATER, ON MILITARY JUSTICE ADMINISTRATION IN THEATERS OF OPERATION, W. D. File, 250/1, Study No. 83, p. 46 (1946).

<sup>47</sup>S. 64, H. R. 367, 66th Cong., 1st Sess. (1919).

<sup>48</sup>41 STAT. 787 (1920); 10 U. S. C. §§ 1471-1593 (1940).

<sup>49</sup>S. 903, H. R. 2575, 80th Cong., 1st Sess. (1947).

<sup>50</sup>War Department File 250/1, Study No. 83, p. 46 (1946).

<sup>51</sup>McNeil, *French Courts Martial*, W. D. A. M. J., May 15, 1946.

<sup>52</sup>McNeil, *Russian Courts Martial*, W. D. A. M. J., May 15, 1946.

(2) So far as compatible with operations, overseas courts be appointed on a permanent basis.

(3) Consideration be given to a panel system of selecting court members.

(4) Appointment of a new member to a court after arraignment be prohibited, except where necessary to complete the minimum membership.<sup>53</sup>

Recommendation (4) is adopted, at least in part, in the pending Navy Bill.<sup>54</sup> Recommendations (1) and (2) have, it is understood, been approved for administrative adoption. Recommendation (3) is not implemented by the Navy Bill, nor, so far as known, has it been approved for administrative adoption.

(c) *Number of Members*

A relatively minor change in the Navy system relates to the number of members required for a general court martial. At present the Navy follows the rather archaic rule that "as many members, not exceeding thirteen, as can be convened without injury to the service shall be summoned on every such court," although the only strict requirement is that there be five.<sup>55</sup> In practice, the full complement of thirteen is rarely appointed.

The Ballantine Committee recommended that the maximum number be reduced to nine.<sup>56</sup> The McGuire Committee proposed adoption of the Army rule, that a minimum of five, with no maximum, be set. The General Court Martial Sentence Review Board concurred with this recommendation,<sup>57</sup> and it is adopted in the Navy Bill.<sup>58</sup>

(d) *Qualifications of Court Members*

The General Court Martial Sentence Review Board was the only one of the above named committees to consider at any length the important question of the qualifications of court members. Its recommendations were, briefly:

(1) That all officers be required to take a course in naval law;

(2) That a minimum period of two years' service be required for membership on a court martial;

<sup>53</sup>REPORT OF THE GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, Sec. IV (3), p. 68 (Jan. 1947).

<sup>54</sup>S. 1338, H. R. 3687, 80th Cong., 1st Sess. § 34, Art. 27 (1947).

<sup>55</sup>REV. STAT. § 1624, Art. 39 (1875), 34 U. S. C. § 1200, Art. 39 (1940), A. G. N. 39.

<sup>56</sup>REPORT OF THE BALLANTINE COMM. TO THE SEC'Y OF THE NAVY, p. 4, Recommendation 4 (Sept. 1943); REPORT OF THE BALLANTINE COMM. TO THE SEC'Y OF THE NAVY, p. 7, Recommendation D (April 1946). The minority report recommended a maximum of 7. *Id.* at 25.

<sup>57</sup>REPORT OF THE GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, Sec. IV (4), p. 70 (Jan. 1947).

<sup>58</sup>S. 1338, H. R. 3687, 80th Cong., 1st Sess. § 29, Art. 24(a), (1947).

(3) That prospective members of courts martial be required to attend a prescribed number of trials for purposes of instruction;

(4) That the rule making ensigns and lieutenants junior grade ineligible to sit on courts martial be reconsidered.<sup>59</sup>

None of these recommendations would require statutory implementation, and none are covered in the Navy Bill. It is understood, however, that (1), (2) and (3) will be put into effect administratively, and that, as to (4), specially qualified ensigns and lieutenants junior grade will be made eligible.

(e) *Enlisted Men as Court Members*

The General Court Martial Sentence Review Board was the only Navy committee to give any consideration to the controversial question whether enlisted men should be eligible to sit on courts martial. After reviewing the arguments, the Board concluded that such a step would probably not improve the caliber of courts, would not be in the interest of enlisted men themselves, and might create more problems than it solved. The Board suggested, however, that the question be given very careful consideration before being dropped finally, and recommended that, if the rule were to be changed, the following safeguards should be imposed:

- (a) Certain minimum qualifications of education and service should be required;
- (b) The presence of enlisted men on a court should be optional with an accused; and
- (c) Enlisted men should not be appointed to a court in excess of a full minority thereof.<sup>60</sup>

The present Navy Bill follows the recommendations of the General Court Martial Sentence Review Board in not making enlisted men eligible for membership on courts martial. In this, it differs from the Army Bill, which, following the recommendations of the Vanderbilt Report, provides that warrant officers and enlisted men shall be eligible to serve on courts martial, the former where deemed proper by the appointing authority, the latter when requested by an accused in writing, and provides further that no enlisted man who has made such a request shall, without his consent, be tried by a court which does not have at least one-third of its members enlisted men.<sup>61</sup>

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<sup>59</sup>REPORT OF THE GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, Sec. IV (2), p. 60 (Jan. 1947).

<sup>60</sup>*Id.* at Sec. IV (2), pp. 53-61.

<sup>61</sup>S. 903, H. R. 2575, 80th Cong., 1st Sess. § 2, Art. 4 (1947).

(f) *Provision for Independent Judge Advocate*

It has been recognized by all who have studied the naval court-martial system that one of its greatest deficiencies has been the absence of any requirement that there be present on the court a legally qualified expert to pass on questions of evidence and procedure. Since 1920, the Army general court martial has had a "law member," who is specially designated by the appointing authority to perform these functions.<sup>62</sup> He is a full fledged member of the court, with the right to vote and otherwise participate in the proceedings. He is required to be a member of the Judge Advocate General's Department, except that when a member thereof is not available for this purpose, the appointing authority shall detail instead an officer of some other branch, selected as specially qualified.<sup>63</sup> During World War II, because of the shortage of judge advocate officers, it was the exception rather than the rule for one to be appointed as law member, (the exceptions usually being cases of especial complexity or seriousness), although judge advocate officers were frequently detailed as trial judge advocate. Under the proposed amendments to the Articles of War, it is required that the law member be an officer of the Judge Advocate General's Department, or an officer who is a member of the bar of a federal court or of the highest court of a state, and certified by the Judge Advocate General to be qualified for such detail. It is further required by the pending bill that the law member be actually present during the entire trial and during the voting.<sup>64</sup>

The committees which studied the naval system were unanimous in recommending a similar requirement for the naval general court martial.<sup>65</sup> In lieu of the Army system, however, these committees recommended that the British system be followed, under which an independent officer, known as the judge advocate, is appointed, who rules on all legal matters arising during the trial, but who is not a member of the court as such, and has no vote. It was felt that, by leaving the judge advocate free to perform his duties in a wholly impartial manner, without being required to participate in the actual judgment of the accused, a greater measure of justice could be achieved. It was further recommended that the present judge advocate, who is required

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<sup>62</sup>41 STAT. 788 (1920); 10 U. S. C. § 1479 (1946), ARTICLE OF WAR 8.

<sup>63</sup>*Ibid.*

<sup>64</sup>S. 903, H. R. 2575, 80th Cong., 1st Sess. § 6, Art. 8 (1947).

<sup>65</sup>REPORT OF THE BALLANTINE COMM. TO THE SEC'Y OF THE NAVY, p. 4, Recommendation 5 (Sept. 1943); REPORT OF BALLANTINE COMMITTEE TO THE SEC'Y OF THE NAVY, Recommendation B, p. 6 (April 1946); REPORT OF MCGUIRE COMM. TO THE SEC'Y OF THE NAVY 5-6 (Nov. 1945); WHITE DRAFT ARTICLES, Art. 10(b)(4); REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, Sec. IV(4), pp. 71-85 (Jan. 1947).

to fill the dual function of prosecutor and of legal adviser to the court, be abolished, and his duties divided between the new judge advocate and the prosecutor.

Minor differences developed among the committees as to the exact scope of the duties of the judge advocate, the finality of his rulings, his responsibility to higher command, and the like. The recommendations of the General Court Martial Sentence Review Board on this subject were:

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

(2) That he be an officer whose qualifications have been approved by the Judge Advocate General.

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

(4) That his instructions on the law applicable to the case be made in open court and be set forth in the record, that the court determine guilt or innocence in accordance therewith and on the basis of the facts found by it, and that on review prejudicial error in the instructions of the judge advocate be ground for reversal.

(5) That careful consideration be given to the question whether the rulings of the judge advocate on evidence and interlocutory questions should be made binding on the court.<sup>66</sup>

The Navy Bill implements recommendations (1), (2), and (3), so far as the general court martial is concerned.<sup>67</sup> With respect to recommendations (4) and (5), the bill provides that the duties of the judge advocate shall be:

“(1) to advise the court on all matters of law arising during the trial of the case; (2) to rule on interlocutory questions except challenges; (3) in open court, to instruct the court upon the law of the case; and (4) to perform such other duties as the Secretary of the Navy may prescribe: *Provided*, That the judge advocate may be overruled by a majority vote of the court, in which case the reasons therefor shall be spread upon the record. . . .”<sup>68</sup>

The Navy's reasons for inserting the last proviso are understood to be based upon the feeling that an anomalous situation would be created if the judge advocate, who might be a junior officer, could impose his judgment

<sup>66</sup>REPORT OF THE GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, 84-85 (Jan. 1947).

<sup>67</sup>S. 1338, H. R. 3687, 80th Cong., 1st Sess. § 29, Art. 24(6) (1947).

<sup>68</sup>*Ibid.*

on the rest of the court, who might all be senior to him. The Navy believes that, as a practical matter, the judge advocate will rarely be overruled, because of the requirement that in any case where he is overruled, the reasons therefor be spread upon the record.

Whatever may be thought of the proviso, the introduction of an independent judge advocate is a salutary reform, and one of the most important reforms contained in the entire bill.

(g) *Prosecutor and Defense Counsel*

Parallel with the introduction of the judge advocate as law officer of the court would, of course, be a change in the status of the present judge advocate. The latter at present occupies the anomalous position of both prosecutor and legal adviser to the court. All of the committees have recommended that this be changed, the present judge advocate be confined to his duties as a prosecutor, and that, to avoid confusion, his name be changed to prosecutor.

The draft articles submitted by the McGuire Committee and by Commodore White proposed merely that the prosecutor be a person qualified to perform his office.<sup>69</sup> The General Court Martial Sentence Review Board went further and recommended that the prosecutor's qualifications be approved by the Judge Advocate General, that he be a lawyer whenever practicable, and that he be subject only to the supervision of the Judge Advocate General in the performance of his duties as prosecutor.<sup>70</sup> The Navy Bill carries out this recommendation, in part, by providing that for every general court martial the convening authority shall appoint a prosecutor who shall be certified by the Judge Advocate General as a person qualified to perform his duties as such.<sup>71</sup> The Bill also provides that for every summary court martial the convening authority shall appoint a prosecutor who shall be qualified to perform his duties as such.<sup>72</sup>

One of the weakest features of the present court martial system is the method of providing defense counsel. There is no requirement in the present articles that a defense counsel be appointed by the convening authority. However, Naval Courts and Boards provides that the convening authority, or the commanding officer of the command in which the trial is held, shall designate

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<sup>69</sup>REPORT OF THE MCGUIRE COMM. TO THE SEC'Y OF THE NAVY, PROPOSED REVISED ARTICLES, 4(b) (3) (Nov. 1945); WHITE DRAFT ARTICLES, § 10 (b) (3).

<sup>70</sup>REPORT OF THE GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, Sec. IV (6), pp. 92-93 (Jan. 1947).

<sup>71</sup>S. 1338, H. R. 3687, 80th Cong., 1st Sess. § 29, Art. 24(b) (1947).

<sup>72</sup>*Id.* at § 19, Art. 18(b).

a defense counsel, unless the accused selects his own or declines to be represented by counsel.<sup>73</sup>

The General Court Martial Sentence Review Board made a statistical analysis of the first 413 cases reviewed by it, and concluded that a creditable effort had been made to assign qualified lawyers as prosecutors and as defense counsel. Nevertheless, the Board felt that the system could be strengthened considerably. Accordingly, along with its recommendations as to appointment of the prosecutor, it recommended that a defense counsel be appointed for every general court martial and, where practicable, for every summary court martial. This was not to affect the present right of an accused to counsel of his own choice, civilian or naval. It was, however, strongly recommended that the practice of allowing a man to go to trial before a general court martial without being represented by any counsel be eliminated. The Board also recommended that the qualifications of the defense counsel be approved by the Judge Advocate General, that he be subject only to the supervision of the Judge Advocate General in the performance of his duties as defense counsel, and that the Judge Advocate General make every effort to see that the defense counsel was of equal ability with the prosecutor. The Board further recommended that it be required in each case that the defense counsel attach to the record a brief on appeal respecting such legal points as he deemed appropriate, or a statement over his signature that in his judgment no such brief was necessary, and also that it be a part of his duty in appropriate cases to take all necessary steps to present substantial jurisdictional or similar questions to the proper civil tribunal.<sup>74</sup>

The Navy Bill adopts these recommendations, in part, by providing that for every general court martial the convening authority shall appoint a defense counsel, who shall be certified by the Judge Advocate General as a person qualified to perform his duties as such, but that the appointment of such defense counsel shall not affect the right of the person accused to counsel of his own choice.<sup>75</sup> The Bill also provides that for every summary court martial the convening authority shall appoint a defense counsel, who shall be a person qualified to perform his duties as such, but that this shall not affect the right of the accused to counsel of his own choice.<sup>76</sup> The Bill further provides as follows:

"In every court-martial proceeding in which the accused pleads not

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<sup>73</sup>NAVAL COURTS AND BOARDS § 357 (1937 ed., 1945 reprint).

<sup>74</sup>REPORT OF THE GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, Sec. IV(6), pp. 85-94 (Jan. 1947).

<sup>75</sup>S. 1338, H. R. 3687, 80th Cong., 1st Sess. § 29, Art. 24(b) (1947).

<sup>76</sup>*Id.* at § 19, Art. 18(b).

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."<sup>77</sup>

### *Challenges*

Present Navy court martial procedure provides for challenges for cause, to be determined by a majority vote of the court, but makes no provision for peremptory challenges.<sup>78</sup> In this respect, it differs somewhat from the Army procedure, which permits one peremptory challenge to each side (except that the law member of a general court-martial may be challenged only for cause).<sup>79</sup> In the British Army and Navy, challenges for cause are allowed, but there is no provision for peremptory challenges. In neither system is the judge advocate subject to challenge.<sup>80</sup>

The McGuire Committee recommended that the prosecution and the accused each be given the right to challenge any member for cause, with a provision that each challenge should be determined by the judge advocate.<sup>81</sup> No provision was made for challenging the judge advocate himself. The General Court Martial Sentence Review Board followed this recommendation, but suggested that the prosecution and the defense counsel each be allowed one peremptory challenge, and that provision be made for a petition for disqualification of the judge advocate.<sup>82</sup>

The Navy Bill makes no change in the present procedure, except to make it statutory, and to provide that the judge advocate shall be subject to challenge. Challenges are not to be determined by the judge advocate, but by the majority vote of the court, as at present.<sup>83</sup> Thus, even under the Navy Bill, there remains a difference between the Army and Navy systems, in that one peremptory challenge is allowed to each side under the former, but not under the latter.

### *Rules of Evidence*

At the present time there is no statutory requirement that naval courts

<sup>77</sup>*Id.* at § 47, Art. 38.

<sup>78</sup>NAVAL COURTS AND BOARDS, §§ 387-392 (1937 ed., 1945 reprint).

<sup>79</sup>41 STAT. 790 (1920), 10 U. S. C. § 1489 (1940), ARTICLE OF WAR 18.

<sup>80</sup>British Army Act, 44-5 VICT., c. 58, § 51 (1881); BRITISH RULES OF PROCEDURE, Rule 25; BRITISH MANUAL OF MILITARY LAW 478, 633; British Naval Discipline Act 29-30 VICT., c. 109, § 62 (1866); BRITISH NAVAL COURT-MARTIAL REGULATIONS, Art. 446.

<sup>81</sup>REPORT OF MCGUIRE COMM. TO THE SEC'Y OF THE NAVY, PROPOSED RULES OF PROCEDURE, Rule 5 (Nov. 1945).

<sup>82</sup>REPORT OF THE GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, Sec. VI(1), pp. 133-137 (Jan. 1945).

<sup>83</sup>S. 1338, H. R. 3687, 80th Cong., 1st Sess. § 29, Art. 24(b) (1947).

martial are bound by any particular rules of evidence. Naval Courts and Boards does set forth some of the more common rules of evidence which are declared binding on courts martial, but its presentation of this subject is far from complete.<sup>84</sup> In actual practice, confusion often arises in trials when opposing counsel argue for conflicting rules, each citing state court precedent to support his view. The court has no standard or guide to which to turn.

The McGuire Committee felt strongly that this situation should be corrected and that rules of evidence should be clearly set forth in a revised edition of Naval Courts and Boards, and that such rules should, so far as practicable, follow the rules of evidence of the United States district courts.<sup>85</sup>

The present Navy Bill implements this recommendation by providing that the "Secretary of the Navy is authorized to prescribe, and to modify from time to time, the rules of pleading and procedure, including modes of proof, in proceedings before naval courts martial, other naval tribunals, and fact finding bodies as will insure the enforcement of discipline and the fair and impartial administration of justice in the United States Naval Service, *provided*, that, insofar as applicable, such modes of proof shall follow the law of evidence prevailing in the district courts of the United States in the trial of criminal cases. . . ."<sup>86</sup>

This provision is similar to the present provision of Article 38 of the Articles of War, which authorizes the President to prescribe rules of evidence for Army courts-martial, "which regulations shall, insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States."<sup>87</sup> An admirably concise statement of these rules, the work of the late Professor John H. Wigmore, is contained in the Manual for Courts-Martial.<sup>88</sup>

#### *Vote on Findings and Sentence*

Under present Navy court-martial procedure, the vote on findings and on the sentence is determined by a simple majority, a tie being resolved in favor of the accused, except that a two-thirds vote is required for imposition of the death sentence.<sup>89</sup> In this, the practice differs from the Army, where a two-thirds vote is required for a finding of guilty (except where the death penalty is mandatory, in which case unanimity is required), and for deter-

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<sup>84</sup>NAVAL COURTS AND BOARDS, c. III (1937 ed., 1945 reprint).

<sup>85</sup>REPORT OF MCGUIRE COMM. TO THE SEC'Y OF THE NAVY, PROPOSED RULES OF PROCEDURE, p. 8, Rule 10 (Nov. 1945).

<sup>86</sup>S. 1338, H. R. 3687, 80th Cong., 1st Sess. § 47, Art. 48 (1947).

<sup>87</sup>41 STAT. 794 (1920), 10 U. S. C. § 1509 (1940).

<sup>88</sup>MANUAL FOR COURTS-MARTIAL, c. XXV (1928).

<sup>89</sup>REV. STAT., § 1624, Art. 50 (1875), 34 U. S. C. § 1200, Art. 50 (1940).

mination of the sentence, with the added proviso that if the sentence is longer than ten years, a three-fourths vote is required, and if the death sentence is to be imposed, a unanimous vote (on the sentence, but not on the findings) is required.<sup>90</sup> Army and Navy practice also differ in that in the former the vote is by secret, written ballot and in the latter by signed ballot, although in both cases the vote is taken in closed court.<sup>91</sup> Another important difference between the two systems is that in the Army system the results of the voting are announced at the conclusion of the trial, whereas in the Navy system no announcement is made until the sentence has been reviewed and approved, which may be several weeks or even months later. An acquittal on all charges and specifications is, however, announced immediately.<sup>92</sup>

The General Court Martial Sentence Review Board recommended that these Navy rules be reconsidered, that provision be made for a secret, written ballot, that more than a majority vote be required to convict and to impose sentence, that a unanimous vote be required for conviction and sentence if the death penalty is imposed, and that the findings and sentence be announced in open court at the conclusion of the trial.<sup>93</sup>

The Navy Court-Martial Bill provides as follows:

- (1) That every finding shall be determined by a majority vote, and that a tie vote shall result in acquittal;
- (2) That the death sentence may be imposed only by unanimous vote, that a sentence of life imprisonment or confinement for more than ten years shall require a three-fourths vote, and that all other sentences shall require a two-thirds vote;
- (3) That the court shall announce its findings and sentence, and any recommendations for clemency, in open court as soon as determined.<sup>94</sup>

There is no provision in the Bill for secret, written ballot, but it is understood that such a provision is to be adopted administratively.

#### *Sentencing Power of Courts Martial*

The sentences imposed by courts martial are perhaps the most widely publicized feature of the court martial system. They are generally regarded as

<sup>90</sup>41 STAT. 794 (1920), 10 U. S. C. § 1514 (1940), ARTICLE OF WAR 43. See Sabel, *Court Martial Decisions by Divided Courts*, 28 CORNELL L. Q. 165 (1943).

<sup>91</sup>41 STAT. 793 (1920), 10 U. S. C. § 1502 (1940), ARTICLE OF WAR 31; NAVAL COURTS AND BOARDS § 425 (1937 ed., 1945 reprint).

<sup>92</sup>NAVAL COURTS AND BOARDS § 433 (1937 ed., 1945 reprint).

<sup>93</sup>REPORT OF THE GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, Sec. VI (9, 11), pp. 158-164, 175-181 (Jan. 1947).

<sup>138</sup>S. 1338, H. R. 3687, 80th Cong., 1st Sess. § 39, Art. 39(e) (1947).

severe and as being in excess of civilian sentences for comparable offenses, although this is by no means always the case.

The conventions and rules which surround a court martial in imposing sentence are undoubtedly the cause, at least in part, of the heavy sentences which are imposed. The command function inherent in the idea of military discipline is in large measure the source of the concept that the primary sentence function of a court martial is to impose an adequate sentence, commensurate with the offense, if not the maximum allowed by law, and to leave questions of mitigation and clemency to the convening authority. Thus, Article 51 of the Articles for the Government of the Navy provides:

"It shall be the duty of a court martial, in all cases of conviction, to adjudge a punishment adequate to the nature of the offense; but the members thereof may recommend the person convicted as deserving of clemency, and state, on the record, their reasons for so doing."<sup>95</sup>

Similarly, Section 444, Naval Courts and Boards, provides:

"It is made by law the duty of courts martial, in all cases of conviction, to adjudge a punishment adequate to the nature of the offense committed. In so doing due regard must be had to the requirements of the Articles for the Government of the Navy and the limitations prescribed by the President for punishments in time of peace. In cases where there has been evidence in mitigation or extenuation, a court martial may recommend the person convicted to clemency; this clemency, however, is to be exercised only by the reviewing authorities, who are expressly clothed with the power to mitigate or remit punishment. Sentences must be neither cruel nor unusual, and must accord with the common law of the land and the customs of war. . . ."

Moreover, under present procedures, the sentence does not become effective until it has been approved by the convening authority. In most cases, the sentence is reduced at this point. Frequently, it is further reduced upon subsequent departmental review. The sentence actually served often bears little relation to the one originally imposed. Unfortunately, the result is that the ultimate sentence is determined by those far removed from the trial, and no single agency makes a comprehensive study of the sentence factors involved in a case.

The sentencing of convicted persons, whether in civilian life or in military service, is a difficult problem, and is not susceptible of scientific processes. Nevertheless, the naval sentencing procedures were criticized by the Ballantine Committee in its first report, and that Committee recommended that

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<sup>95</sup>REV. STAT., § 1624, Art. 51 (1875), 34 U. S. C. § 1200, Art. 51 (1940).

increased discretionary sentence powers be given to courts martial.<sup>96</sup> The General Court Martial Sentence Review Board concurred with the Ballantine Committee and took the position that, while subsequent clemency undoubtedly rested with higher authorities, the determination of a fair sentence, after all the facts and circumstances had been considered, was not a matter of clemency but involved the exercise by a judicial authority of impartial judgment, discretion, and justice. The Board felt that a more precise justice would be achieved if sentences were based on full consideration of the problems of the individual, in balance with the paramount social interest of protecting military discipline, efficiency and morale. The Board expressed the view that no single factor—either the individual's problems on the one hand or military necessity on the other—should be wholly controlling, and that the best method of giving recognition to the study of the sentence factors in a case was to put the responsibility in the hands of the court itself.<sup>97</sup>

The right to consider matters in mitigation and extenuation in the imposition of sentences is authorized in the British Army Manual for Military Law,<sup>98</sup> and in the British Naval Manual. The latter provides:

"In awarding sentence, the court should take into consideration former services and any other claims which the accused may lay before them with a view to his being dealt with more leniently. It is objectionable for a court to award a sentence and then to recommend a prisoner to the favorable consideration of the Admiralty. Such a course throws a responsibility upon others which properly belongs to the court."<sup>99</sup>

The Manual for Courts Martial of the United States Army provides:

". . . In the exercise of any discretion the court may have in fixing the punishment, it should consider, among other factors, the character of the accused as given on former discharges, the number and character of previous convictions, the circumstances extenuating or aggravating the offense itself, or any collateral feature thereof made material by the limitations on punishment."<sup>100</sup>

Nevertheless, the general Army view, in line with the Navy, has been to consider the exercise of clemency as essentially the prerogative of the reviewing authority, and to consider any undue leniency on the part of the court as an invasion of the reviewing authority's proper province.

<sup>96</sup>REPORT OF BALLANTINE COMM. TO THE SEC'Y OF THE NAVY, Recommendation 14, pp. 5, 23-25 (Sept. 1943).

<sup>97</sup>REPORT OF THE GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, Sec. VI (10, 11), pp. 164-181 (Jan. 1947).

<sup>98</sup>MANUAL FOR MILITARY LAW, par. 77, p. 60 (1929 ed., 1939 reprint).

<sup>99</sup>MANUAL OF NAVAL LAW AND COURT MARTIAL PROCEDURE 88-90 (4th ed. 1912).

<sup>100</sup>MANUAL FOR COURTS-MARTIAL, par. 80, p. 67 (1928).

The present Navy Bill provides :

"It shall be the duty of a court martial, in all cases of conviction, to adjudge a punishment adequate to the nature of the offense; but the members thereof may recommend the person convicted as deserving of clemency, and state, on the record, their reasons for so doing."<sup>101</sup>

This does not appear to represent any substantial change in present procedures; in fact, the language is identical with the present Article 51. However, when this section is read in connection with the changes made in the reviewing function of the convening authority, to be discussed below, it does appear that a step has been taken in the direction of imposing greater initial responsibility for the sentence on the court. The extent of any change actually made in this respect can only be determined when it is seen how the new procedures are administered in practice.

#### *Review by the Convening Authority*

The present system of reviewing naval court-martial proceedings is a complicated one, and has been subjected to perhaps as much criticism as any other part of the court-martial system. If the trial court finds an accused guilty and imposes a sentence, the first step is a review by the convening authority. In addition to reviewing the proceedings, findings, and sentence for legality, the convening authority also reviews the sentence from a clemency standpoint. As a matter of fact the sentence of a court-martial is not self executory and becomes effective only when it has been approved by the convening authority. The convening authority has the power to remit or mitigate a sentence, to remit all or part of it conditionally on probation, or to disapprove it. He also has the power to disapprove the findings in whole or in part.<sup>102</sup>

Under present naval law, the convening authority can theoretically disapprove and return a finding of not guilty, and can also direct revision of a sentence with a view to increasing its severity. It is provided in Naval Courts and Boards, however, that the convening authority shall not return a finding of not guilty, or direct revision of a sentence with a view to increasing its severity, without the prior authority of the Secretary of the Navy.<sup>103</sup> This power has been rarely used and is finally eliminated in the pending Navy Bill.<sup>104</sup> A similar step was taken, with respect to Army law,

<sup>101</sup>S. 1338, H. R. 3687, 80th Cong., 1st Sess. § 47, Art. 28 (b) (1947).

<sup>102</sup>REV. STAT. § 1624, Arts. 53, 54 (1875), 34 U. S. C. § 1200, Arts. 53, 54 (1940), A. G. N. 53, 54.

<sup>103</sup>NAVAL COURTS AND BOARDS § 477 (1937 ed., 1945 reprint).

<sup>104</sup>S. 1338, H. R. 3687, 80th Cong., 1st Sess. § 39, Art. 39 (1) (1947).

in the 1920 revision of the Articles of War.<sup>105</sup>

In reviewing a case, the convening authority normally refers it to his staff legal officer, who prepares an opinion and recommendations for his signature. The convening authority usually follows the advice of his legal officer, although he is not obliged to do so.

Without question, this initial review by the convening authority affords substantial protection to the accused. It provides a means of detecting errors in the trial and of correcting excessive sentences. If the errors are fatal, or are substantially prejudicial, the proceedings can be disapproved, or a new trial offered to the accused.<sup>106</sup> If the sentence is excessive, the convening authority can reduce it. Even if the sentence is not excessive, the convening authority can reduce it by way of clemency, or he can extend clemency in other ways, such as by remitting the sentence conditionally on probation. Furthermore, this review is obligatory and is thus in the nature of an automatic appeal granted to every accused, regardless of whether he requests it.

Despite these advantages, the practice of having an initial review by the convening authority has been criticized, and is a subject upon which observers of the court-martial system have differed violently.<sup>107</sup> The objections to an initial review by the convening authority may be summarized as follows:

(1) The reviewing authority is usually the same officer who convened the court and referred the case to trial. There is a certain anomaly in having the same officer review a case who has considered it at some length before it went to trial. It is humanly impossible for a person, no matter how high his purpose, to dissociate himself completely from his prior actions and opinions on a particular matter and to view it later as though he were seeing it for the first time. It is a difficult position in which to place anyone, especially one who is in the position of administering justice. (This observation should not, however, give rise to the inference that convening authorities, in reviewing cases, have in fact acted unfairly.)<sup>108</sup>

(2) The review of a court-martial case is not really analogous to an appeal. Rather, it is a necessary first step which must be taken before the

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<sup>105</sup>41 STAT. 795 (1920), 10 U. S. C. § 1511 (1940), ARTICLE OF WAR 40.

<sup>106</sup>NAVAL COURTS AND BOARDS § 447 (1937 ed., 1945 reprint).

<sup>107</sup>See, e.g., *Hearings before the Subcommittee of the Committee on Military Affairs of the United States Senate on S. 64*, 66th Cong., 1st Sess., 544-5 (1919); REPORT OF THE GENERAL BOARD, USFET, MILITARY JUSTICE ADMINISTRATION IN THEATER OF OPERATIONS, War Department File, 250/1, Study No. 83, par. 55, pp. 45-46.

<sup>108</sup>The General Court Martial Sentence Review Board, in its INTERIM REPORT FOR THE PERIOD ENDING JUNE 30, 1946, reported that, after reviewing some 2,000 general court-martial trial records, it found no evidence or indication that convening authorities had acted unfairly.

findings and sentence have any effect at all. Furthermore, although counsel for the accused has the privilege of submitting a brief, he does not ordinarily do so and rarely resorts to oral presentation of the case to the convening authority or his legal officer. Although, theoretically, each objection to evidence and each ruling of the court is weighed on this review, it is difficult under such a procedure to detect all the errors which may exist.

(3) The practical result of the initial review is that the convening authority, rather than the court, ultimately determines the sentence. In a great number of the cases, the court merely fixes a maximum limit to the sentence, which is actually determined by the convening authority, within that maximum.

(4) The convening authority's power of review carries with it a certain measure of indirect control over the court and its actions. As already pointed out, the convening authority selects the members of the court and prefers the charges. If he does not agree with the findings of the court, or believes that the sentence is inadequate, he can express his opinion in his action or in a letter to the court. If he is dissatisfied with the findings of the court, he may consciously omit selecting its members for future cases. These powers cannot but have an effect, however indirect, on the action of the court.

The justification for the convening authority making the initial review is found in the traditional view of the services that the court martial is primarily an instrument for the maintenance of discipline. Thus, it is stated in *Naval Courts and Boards*, with reference to *Naval courts martial*:

"The jurisdiction thus conferred is exclusively criminal in character, being solely for the purpose of the maintenance of Naval discipline."<sup>109</sup>

Since discipline is a function of command, it is natural that the court-martial should have developed historically as an extension of the authority of the commander.

The crux of the situation occurs in trying to determine the exact relationship and balance between "discipline" on the one hand and "justice" on the other. The whole problem is extraordinarily difficult and no pat solution suggests itself. There are those who have recommended the complete elimination of the review by the convening authority. This was the proposal of the Chamberlain Bill of 1919 to amend the Articles of War.<sup>110</sup> It was, however, not adopted. In this connection, it is interesting to note that under

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<sup>109</sup>NAVAL COURTS AND BOARDS § 327 (1937 ed., 1945 reprint).

<sup>110</sup>S. 64, H. R. 367, 66th Cong., 1st Sess. (1919). See Morgan, *The Existing Court-Martial System and the Ansell Articles*, 29 YALE L. J. 52 (1919).

the French court-martial system no review by the convening authority is provided.<sup>111</sup>

An examination of the recent studies made for the Navy reveals a difference of opinion on this subject. Neither the Ballantine Reports nor the McGuire Report mentioned the question of review by the convening authority, except insofar as the first Ballantine Report touched upon it in making its recommendations for decentralization.<sup>112</sup> The revised articles proposed by the McGuire Committee and by Commodore White all proposed retention of the present system, with certain modifications. For example, Article 5(a) of the McGuire draft articles provided that every sentence of a Naval court martial not extending to death, dismissal or discharge could be executed upon approval of the convening authority, who would have power to remit or mitigate, but not to commute, such sentence. The excepted cases would require confirmation by the President or by the Secretary of the Navy.

The General Court Martial Sentence Review Board was of the opinion that the problem could not be solved by minor reforms and suggested that the review by the convening authority be eliminated. The Board was of the opinion that the command responsibility of the convening authority was paramount up to the point of selecting the members of the court and referring the charges to trial. Once the case had been referred to trial, however, it was felt that the entire responsibility for the proceedings, from the time of arraignment to the sentence, should be that of the court.<sup>113</sup>

The position of the Navy at the present time on this question is disclosed by the provisions of the pending Navy Bill. This bill provides:

"ART. 39. (a) Every punishment, except death, dismissal, discharge, or reduction in rank or rating, imposed by the sentence of a general court martial shall be executed upon announcement of the sentence by the court: *Provided*, That reduction in rank or rating shall be effective upon the date of the forwarding of the record of proceedings by the convening authority to the Navy Department without having remitted or suspended the reduction in rank or rating: *Provided further*, That a discharge shall be executed only after confirmation by the Secretary of the Navy or of other authority duly appointed by him; that a dismissal shall be executed only after confirmation by the President or, when empowered by the President, by the Secretary of the Navy; and

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<sup>111</sup>See *Hearings before Subcommittee of Committee on Military Affairs on S. 64*, 66th Cong., 1st Sess., pt. I, pp. 554-5 (1919).

<sup>112</sup>REPORT OF THE BALLANTINE COMM. TO THE SEC'Y OF THE NAVY 10, 11 (Sept. 1943).

<sup>113</sup>REPORT OF THE GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, Sec. VII (1), pp. 189-206-A (Jan. 1947).

that a punishment of death shall be executed only after confirmation by the President.

“(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.

“(c) Every punishment imposed by the sentence of a summary court martial, except discharge or reduction in rank or rating, or of a deck court martial, except reduction in rank or rating, shall be executed upon announcement of the sentence by the court: *Provided*, That a discharge shall be executed only after confirmation by the Secretary of the Navy or of other authority duly appointed by him: *Provided further*, That reduction in rank or rating shall be executed upon the date of forwarding of the record of proceedings by the authority exercising the power of legal review to the Navy Department without having remitted or suspended the reduction in rank or rating.”<sup>114</sup>

The Bill further provides:

“The Secretary of the Navy is authorized and directed to issue such regulations as may be necessary to assure that the members of every court martial shall be free to perform their sworn duties without any coercion or influence, directly or indirectly, on the part of any person in the naval service.”<sup>115</sup>

Thus, it appears that the Navy, while in no way repudiating the importance of the command function, has considered that some of the criticisms levelled against the present system of initial review by the convening authority have merit, and hence has asked Congress to eliminate a considerable portion of the authority presently exercised by him in this regard, and to restrict him to a clemency function solely. Conversely, the authority and importance of the court are enhanced, and its findings and sentence, like those of a civilian court, are made self-executory, subject only to review for clemency by the convening authority, and to review for legality and clemency by the Department, with special departmental reviews provided for sentences of death, dismissal, or discharge. This reform marks a radical break with tradition. It is hoped that it will accomplish the desired result of enhancing the prestige, dignity, and independence of the naval court martial.

In this connection, it is interesting to compare the recommendations of the Vanderbilt Committee on the subject of review by the Army appointing authority. The following excerpts state the Committee's position:

“1. The Manual for Courts-Martial, United States Army, should

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<sup>114</sup>S. 1338, H. R. 3687, 80th Cong., 1st Sess. § 39, Art. 39 (a) (b) (c) (1947).

<sup>115</sup>*Id.* at Art. 39 (j).

provide that it is improper and unlawful for any person to attempt to influence the action of an appointing or reviewing authority or the action of any court-martial, general, special, or summary, in reaching its verdict or pronouncing sentence, except persons connected with the work of the court, such as members of the court, attorneys, and witnesses; and this prohibition should be made expressly applicable to the appointing or reviewing authority.

"2. The Manual should also contain an express prohibition against the reprimand of the court or its members in any form.

"3. The Manual should contain a statement that it is the duty of courts-martial to exercise their own judgment in imposing sentences and that they should not pronounce sentences which they know to be excessive, relying on the reviewing authority to reduce them.

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"6. The need to preserve the disciplinary authority of the command and at the same time to protect the independence of the court can be met in the following manner. The authority of the division or post commander to refer a charge for prompt trial to a court appointed by a judge advocate should be absolute. The commander should, of course, be furnished with a judge advocate to advise him with reference to the disposition of the charge. The right of the command to control the prosecution, and to name the trial judge advocate, who should be a trained lawyer, should be retained. The Judge Advocate General's Department, however, should become the appointing and reviewing authority independent of the command. For this purpose the present organization of the Judge Advocate General's Department may be sufficient and the power to select and review its judgment should normally rest with the Staff Judge Advocate at Army level, so that the members of the court may be selected from a wider area and the perennial problem of disparity of sentences in similar cases may be at least partially solved. It may be best in certain instances to place the authority on a higher level, or in case of war or in case of units established at a distance from the command, to delegate the authority to a division or smaller unit. We believe that the flexibility of such a system will aid in the solving of many problems and will permit the establishment of permanent courts or travelling courts if they be found desirable. Article of War 8 should be amended to accomplish this purpose.

"7. The special understanding that officers of a division or command have of local conditions lead us also to recommend that the general or other officer who referred the case for trial should have the power to mitigate, suspend, or set aside the sentence. In order to effectuate this recommendation the record should be first sent by the court to the officer who referred the case for trial so that he may have an opportunity to act upon the sentence and it should be his duty to act promptly and forward the record to the reviewing authority for final action. The

power of the command in this respect should be limited to the question of clemency."<sup>116</sup>

However, the Army Bill to amend the Articles of War does not carry out these recommendations, except insofar as it prohibits reprimands of, and attempts to influence, courts-martial, nor are they carried out in the bill which has been reported favorably by the House Armed Services Committee.<sup>117</sup> The Navy Bill, interestingly enough, adopts them almost *in toto*, although it does not include any provision relating to reprimands.

#### *Departmental Review*

After the initial review by the convening authority, there is presently provided a departmental system of review of all court martial cases. Every record of trial by general court martial is reviewed as to legality in the Office of the Judge Advocate General. If there has been a conviction, and a sentence imposed, the case is then reviewed as to disciplinary features in the Bureau of Naval Personnel (or the Discipline Branch of the Marine Corps). In a certain number of cases, further action is taken in the Office of the Secretary of the Navy, and, in cases where accused are serving prison terms, a further periodical clemency review was formerly provided by the Clemency and Prison Inspection Board.

The legal review provided in the Office of the Judge Advocate General consists of a review of the entire record in Section A, Military Law Division, by one or more officers acting under the supervision of the Chief of the Section. Difficult cases, in which the reviewing officer has doubts as to legality, and cases involving controversial issues of law or fact are, after initial review in Section A, and after review by the Chief of the Military Law Division and by the Assistant Judge Advocate General, referred to a Board of Review which has been established within the Office of the Judge Advocate General. This board reviews the case much as a civilian court of appeal would do and submits its conclusions and recommendations to the Judge Advocate General. The Board, however, is not created by statute, and its recommendations are not binding upon the Judge Advocate General. The final responsibility for advice to the Secretary as to the legal sufficiency of every case rests upon the Judge Advocate General himself.

All general court martial cases, after review by the Judge Advocate Gen-

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<sup>116</sup>REPORT OF WAR DEPT'S. ADVISORY COMM. ON MILITARY JUSTICE TO THE SEC'Y OF WAR 7-10 (Dec. 1946).

<sup>117</sup>S. 903, H. R. 2575, 80th Cong., 1st Sess. § 23, Art. 47 (d) (e) (f) (1947); *id.* at § 33, Art. 88; H. R. REP. No. 1034, 80th Cong., 1st Sess. (1947).

eral, if found legally sufficient, and if there has been a conviction and sentence, are referred to the Chief of Naval Personnel or to the Commandant of the Marine Corps for comment as to the disciplinary aspects of the sentence. The latter examine the sentences from the standpoint of conformity with department policy and of uniformity with other sentences in like cases, and also consider any mitigating or extenuating circumstances which may be present. If the sentence is approved, the case is returned to the Office of the Judge Advocate General and is filed there.

In the event that the Judge Advocate General questions the legal sufficiency of a case, or the Chief of Naval Personnel (or Commandant of the Marine Corps) recommends reduction or other action on the sentence, the case is transmitted to the Office of the Secretary of the Navy. Although the recommendations of the Judge Advocate General and of the Chief of Naval Personnel (or Commandant of the Marine Corps) are purely advisory, they are normally followed by the Secretary.

The Secretary's power to act on court martial sentences derives from Article 54(b) of the present Articles, which gives him the authority to set aside the proceedings or to 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 the Marine Corps.<sup>118</sup> This section gives the Secretary almost complete reserve power over the sentences of all naval courts martial, except those appointed by the President.

In addition, certain other cases, in which the sentence extends to death, or dismissal of a commissioned or warrant officer, require confirmation by the President before execution.<sup>119</sup> During the war, the power of confirmation in dismissal cases was delegated to the Secretary and the Under-Secretary.<sup>120</sup> The confirming authority has all the review powers of the convening authority, plus the power of commutation.<sup>121</sup>

The last phase of the departmental review formerly consisted of the parole function of the Naval Clemency and Prison Inspection Board. The purpose of this review was to re-appraise the records of accused who were confined in naval penal institutions. This Board, in addition to studying the record of trial, studied the recommendations of the local prison officials and examined the behavior and psychiatric reports of the accused. If the Board felt that

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<sup>118</sup>REV. STAT. § 1624, Art. 54 (b) (1875), 34 U. S. C. § 1200, Art. 54 (b) (1940), A. G. N. 54 (b).

<sup>119</sup>REV. STAT. § 1624, Art. 53 (1875), 34 U. S. C. § 1200, Art. 53 (1940), A. G. N. 53.

<sup>120</sup>Exec. Order No. 9556, 10 FED. REG. 6151 (1945). The power to confirm a sentence of death was not delegated.

<sup>121</sup>NAVAL COURTS AND BOARDS § 481 (1937 ed., 1945 reprint).

further clemency should be extended, it so recommended to the Secretary of the Navy. Again, although its recommendations were purely advisory, they were usually followed.

This system of departmental review has been criticized as inadequate. Moreover, the moving of a case from one office to another, each of which gives a partial appraisal, has been condemned as time consuming and inefficient. In addition, specific criticisms have been made of the individual steps in this procedure. It has been alleged, for example, that the legal review in the Judge Advocate General's Office is not conducted in such a way as to be the equivalent of a comprehensive review on appeal.<sup>122</sup> Again, the role of the Bureau of Naval Personnel in the administration of naval justice has been highly controversial. The McGuire Report stated:

"The Bureau of Naval Personnel, as previously indicated, should be *completely divorced* from the administration of naval justice—its interests being primarily post factum."<sup>123</sup>

The proposed McGuire Articles implemented this recommendation by making no reference to the Bureau of Naval Personnel. On the other hand, the Ballantine Report stated:

"The Board believes that participation of the Bureau of Naval Personnel and the Commandant of the Marine Corps in review serves a useful purpose."<sup>124</sup>

With respect to review in the Office of the Secretary of the Navy, it has been felt that the action of the Secretary in reviewing the recommendations of the Judge Advocate General, the Chief of Naval Personnel (or Commandant of the Marine Corps), and the Clemency and Prison Inspection Board, suffers from a number of handicaps. In the first place, the Secretary is without benefit of advice from one centralized agency, with power to make recommendations on all court-martial matters. Some cases come to him from the Judge Advocate General with the recommendation that the proceedings be disapproved for legal insufficiency. Others come from the Bureau of Naval Personnel with a recommendation for mitigation of sentence. Some come from the Clemency and Prison Inspection Board with a recommendation for additional clemency. In most instances, the Secretary cannot examine these cases in detail and, consequently, must refer them to members of

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<sup>122</sup>See, e.g., Recommendations of Minority Member of Ballantine Committee in REPORT OF THE BALLANTINE COMM. TO THE SEC'Y OF THE NAVY 6 (April 1946).

<sup>123</sup>REPORT OF MCGUIRE COMM. TO THE SEC'Y OF THE NAVY 9 (Nov. 1945).

<sup>124</sup>REPORT OF BALLANTINE COMM. TO THE SEC'Y OF THE NAVY, Recommendation G, p. 8 (April 1946).

his staff for opinion and advice. In this way, a single case may pass through several offices, with several distinct recommendations before reaching the Secretary. The action finally taken by the Secretary in many cases may not represent any single recommendation made to him, but a compromise of a number of views.

Moreover, an anomaly is presented by the fact that, once the Secretary has taken definite action on a case, by reducing the sentence for example, that case is closed and may not be subsequently reopened.<sup>125</sup> On the other hand, if he has never taken action, for example, in a case where the original sentence was allowed to stand, the way is open for subsequent disapproval by him under Article 54(b). Yet in both cases, the arguments for reconsideration may be equally meritorious.

As a result of these criticisms, various recommendations for revision of the system of departmental review have been made by the different committees. The McGuire and Ballantine Committees and Commodore White recommended that the legal review in the office of the Judge Advocate be continued, but that there be created one or more Boards of Review, established in the Executive Office of the Secretary of the Navy.

The McGuire Committee recommended that the Secretary of the Navy, prior to final action, submit to the Board of Review the record of every court martial in which a conviction followed a plea of not guilty and in which the final action contemplated extended to death, dismissal, dishonorable discharge, bad conduct discharge, or confinement in excess of twelve months. The McGuire Committee further contemplated that the Board of Review would review all such records, both as to legality and as to disciplinary features, and would submit recommendations thereon to the Secretary of the Navy via the Judge Advocate General. The Judge Advocate General would endorse thereon his concurrence or his non-concurrence and the reason therefor, and would transmit the entire record to the Secretary for his decision.<sup>126</sup> As observed above, this procedure contemplated elimination of the Bureau of Naval Personnel. The revised articles proposed by Commodore White were substantially similar in this respect to those proposed by the McGuire Committee.<sup>127</sup>

The majority report of the Ballantine Committee recommended that a

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<sup>125</sup>11 OPS. ATT'Y GEN. 137 (1865); CMO No. 2-1943, 145. However, for a ruling that such a case may be reopened on the ground that new evidence has been discovered, see CMO No. 1-1944, 92.

<sup>126</sup>REPORT OF MCGUIRE COMM. TO THE SEC'Y OF THE NAVY, PROPOSED REVISED ARTICLES, Art. 6 (Nov. 1945).

<sup>127</sup>WHITE DRAFT ARTICLES (1st and 2d Studies), Art. 14.

Board of Review be established to consider such cases as the Secretary of the Navy deemed appropriate, and that, where the Board disagreed with the prior review of the Judge Advocate General, or of the disciplinary activity involved, the record be returned to the Judge Advocate General for reconsideration and further recommendation, before being presented to the Secretary of the Navy for final approval.<sup>128</sup> As stated above, the Ballantine Committee proposed retention of the Bureau of Naval Personnel and the Marine Corps in the review procedure.

In addition, all three committees recommended that, whatever type of Board of Review be established, there be at least one civilian member with a legal background.

The approach of the General Court Martial Sentence Review Board to this subject was to proceed, not from the assumption that the present system was defective, but rather, granting its merits, to consider whether it could not be placed on a firmer and more secure foundation. The Board concluded, however, that any comprehensive revision of the review system should eliminate participation by the Bureau of Naval Personnel, or the Marine Corps, as such. The Board stated that, in view of the highly punitive nature of many sentences, a review of a sentence extended beyond the factor of maintaining discipline, and that, while the Bureau of Naval Personnel was well equipped to pass sentences from a disciplinary standpoint, it was not staffed with expert lawyers or penologists trained and equipped to view each case as a whole, giving due regard to all the factors of environment, education, training, and medical and psychiatric condition, which, in addition to purely disciplinary features, should enter into the determination of an appropriate sentence.<sup>129</sup>

In addition to recommending the elimination of the Bureau of Naval Personnel and the Marine Corps in the review procedure, the Board also recommended the elimination of the legal review in the Office of the Judge Advocate General, and suggested that the entire departmental review be placed in two Boards of Review. The first would be for legal review only. This Board would automatically review all convictions by general courts martial, and any conviction by an inferior court which was appealed to it.

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<sup>128</sup>REPORT OF BALLANTINE COMM. TO THE SEC'Y OF THE NAVY, Recommendation C, p. 6 (April 1946). Judge McGuire and the two minority members dissented from this portion of the report of the majority, and recommended that the original recommendations of the McGuire Report on Boards of Review be adhered to.

<sup>129</sup>REPORT OF THE GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, Sec. VII, 2 A (2), pp. 210-213; Sec. VII, 2 C (6), pp. 230-233 (Jan. 1947).

It would have the power to review and determine the legal sufficiency of the proceedings, findings, and sentences in cases of not guilty pleas, and the legal sufficiency of the proceedings and sentence in cases of guilty pleas. In making its review, it would have the power to weigh the facts, as well as to pass upon the law.

The argument of the General Court Martial Sentence Review Board was that a complete and thorough going review of legal questions was the first consideration in any system of review, and that this review should be made by a Board which was similar to a court. It was further recommended that the decisions of this Board on legality should be final within the Navy Department. In this way, centralized responsibility for all decisions as to legality would be fixed. It was also suggested that a civilian lawyer be made the head of this Board.<sup>130</sup>

Once the question of legal sufficiency had been settled, and only then, was it felt that the question of appropriateness of the sentence should arise. Accordingly, the General Court Martial Sentence Review Board recommended that the sentence, in all its ramifications, including the elements of discipline and of morale, be next reviewed by a Sentence Review Board. It was recommended that the Sentence Review Board, in addition to a civilian lawyer, be composed of representatives of the different bureaus and branches of the Navy, including the Bureau of Naval Personnel and the Marine Corps. Recommendations of the Sentence Review Board would be made directly to the Secretary or Under-Secretary of the Navy, but unlike the decisions of the Board of Legal Review, would not be binding on the Secretary. It was felt that, since sentence review involved matters of discipline and policy rather than of strict law, none of the reasons which rendered it advisable to make the opinions and findings of the Board of Legal Review final applied in the case of sentence review. If no change or modification of the sentence was recommended, submission to the Secretary would not be necessary.<sup>131</sup>

The General Court Martial Sentence Review Board also made the following recommendations concerning review by the Secretary:

(1) That the provision for confirmation of sentences of death and dismissal be retained. It was felt, however, in view of the provisions for a Board of Legal Review and a Board of Sentence Review, a complete review *de novo* of these cases would not be necessary.

(2) That any sentence of discharge of an enlisted man require approval

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<sup>130</sup>*Id.* at Sec. VII, 2 C (5), pp. 222-230.

<sup>131</sup>*Id.* at § VII, 2 C (6), pp. 230-233.

of the Secretary, or of his duly designated representative, before being ordered into execution.

(3) That the periodic clemency review be retained, but that it be performed, if feasible, by the Board of Sentence Review previously recommended. (This has already been done by administrative action.)

(4) That the reserve power of the Secretary to take action at any time on the proceedings, findings, and sentence of a court martial be retained, but that prior approval by the Secretary of any case not constitute a bar to subsequent reconsideration, within a certain time limit.<sup>132</sup>

The present Navy Bill, in line with the majority of the committee recommendations, substantially changes the present system of departmental review. It retains the latter in part by providing that 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. The Bill goes much further than the present system, however, by giving the Judge Advocate General himself the power to set aside the proceedings, findings, and sentence of any court martial.<sup>133</sup> In addition, the Bill provides that 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, and that such clemency board shall have the power to remit, mitigate, or commute the sentence, in whole or in part, except a sentence imposed by a court martial convened by the Secretary of the Navy or the President of the United States, in which case like power shall repose in the convening authority.<sup>134</sup>

The Bill further provides that any convicted person may, within one year after he has been informed that review of his case has been completed, request a further review by a board of appeals appointed by the Secretary of the Navy to serve in his office. Such board of appeal shall have the power to take any action which could have been taken by the Judge Advocate General upon initial review, or by the clemency board.<sup>135</sup>

The composition of the clemency board and of the board of appeals is not defined by the Bill, but is to be determined by regulations of the Secretary. The Bill does not, however, preclude civilian membership on these boards.

The Bill retains the present requirement of confirmation by the President

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<sup>132</sup>*Id.* at § VII, pp. 236-240A.

<sup>133</sup>S. 1338, H. R. 3687, 80th Cong. 1st Sess. § 39, Art. 39(e) (1947).

<sup>134</sup>*Id.* at Art. 39(f).

<sup>135</sup>*Id.* at Art. 39(g).

of sentences of death and of dismissal of an officer, with a provision that the President may empower the Secretary to confirm a sentence of dismissal.<sup>136</sup> The Bill also provides that a sentence of discharge of an enlisted man shall be executed only after confirmation by the Secretary or other authority duly appointed by him.<sup>137</sup>

The review of inferior court martial cases provided in the Bill follows the same general procedure, except that the initial review as to legality and clemency is to be made by the officer next senior in the chain of command to the convening authority, if present or reasonably available, otherwise by the convening authority.<sup>138</sup> The Bill provides that the Judge Advocate General *may* review such cases as to legality.<sup>139</sup> Review of such cases by the clemency board and by the board of appeals is made to depend upon regulations to be prescribed by the Secretary.<sup>140</sup>

The Bill goes on to retain the present reserve power of the Secretary to set aside the proceedings, or to remit or mitigate the sentence, of any naval court martial, except a court martial convened by the President, and provides that in the latter case the President shall possess such power.<sup>141</sup> The anomaly referred to above, as to when this power may and may not be exercised, is, however, not clarified.

In other words, the Bill adopts, in substance, the recommendations of the General Court Martial Sentence Review Board on the subject of departmental review, with the following exceptions:

(1) The initial legal review is left in the Office of the Judge Advocate General, instead of being placed in a Board of Legal Review.

(2) Review by the Board of Appeal is not automatic, but requires an appeal within one year by the convicted person.

(3) It is not clearly stated whether the Board of Appeal shall have the power to review facts, as well as law.

(4) A question remains as to the extent of the reserve power of the Secretary over sentences previously approved by him.

Space will not permit a detailed comparison of these provisions of the Navy Bill with the already complicated review procedure of the Army,<sup>142</sup> or with the amendments thereto which have been proposed by the Army

<sup>136</sup>*Id.* at Art. 39(a).

<sup>137</sup>*Id.* at Art. 39(a) (c).

<sup>138</sup>*Id.* at Art. 39(i).

<sup>139</sup>*Id.* at Art. 39(e).

<sup>140</sup>*Id.* at Art. 39(f) (g).

<sup>141</sup>*Id.* at Art. 39(h).

<sup>142</sup>41 STAT. 799 (1920), 10 U. S. C. A. §§ 1519-1524 (1940) ARTICLES OF WAR 48-52.

and by the House Armed Services Committee.<sup>143</sup> It is believed, however, that the system proposed by the Navy Bill is simpler, and affords a full measure of protection to an accused person.

*Judge Advocate General's Corps*

In connection with the selection of the judge advocate, the prosecutor, and the defense counsel of courts martial, and of reviewing officers, the important question arises whether the Navy should have a separate corps of officers comparable to the Judge Advocate General's Department in the Army. The Ballantine Committee considered this question at some length. Its recommendation was that such a corps should not be established in the Navy Department, but that in its stead there be created a group of legal specialist officers who would receive legal training and be assigned to perform legal duties only, but who would be available to perform certain other duties now assigned to so-called "unrestricted" line officers.<sup>144</sup> This recommendation was approved by the Secretary and has been enacted into law.<sup>145</sup> Legal specialist officers in the number of approximately 250, recruited from among lawyers in the Naval Reserve, have accepted commissions in the regular Navy.

In this connection, it is interesting to note that after World War I, the Judge Advocate General of the Navy strongly recommended the formation of a "permanent corps of judges advocate for the naval service." He also recommended that the law be amended to require that a "law member sit on every general court martial, whose advice upon legal questions arising in connection with the hearing shall be binding upon the court, but who should have no vote upon questions of fact."<sup>146</sup> Although these recommendations were noted with approval by the Secretary of the Navy,<sup>147</sup> apparently no action was taken on them at the time.

The General Court Martial Sentence Review Board took the position that the real question was whether qualified legal officers would be available to fill the necessary positions of judge advocate, prosecutor, and defense counsel,

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<sup>143</sup>H. R. REP. No. 1034, 80th Cong., 1st Sess. §§ 24-29 (Arts. 48-52) (1947).

<sup>144</sup>REPORT OF BALLANTINE COMM. TO THE SEC'Y OF THE NAVY 9 (April 1946). The special recommendations of the minority members disagreed with the majority on this point, but their recommendations are somewhat complicated and no attempt will be made to summarize them here. Judge McGuire stated that he adhered generally to the latter.

<sup>145</sup>Pub. L. No. 381, 80th Cong., 1st Sess. § 401(a) (Aug. 7, 1947).

<sup>146</sup>Annual Report of the Judge Advocate General to the Sec'y of the Navy, published in REPORT OF THE SEC'Y OF THE NAVY 323 (Sept. 1919).

<sup>147</sup>REPORT OF THE SEC'Y OF THE NAVY 130 (1919).

and to act as reviewing officers, and whether these officers would be completely independent in the performance of their duties. The Board felt that it did not matter especially whether these officers were designated as legal specialists, or as members of a Judge Advocate General's corps, so long as these essential requirements were fulfilled. Accordingly, its only recommendations were that the judge advocate, the prosecutor, and the defense counsel be lawyers, that they be certified as qualified by the Judge Advocate General, and that they be rated solely by the Judge Advocate General in respect of the performance of their duties in these capacities, and that the Judge Advocate General furnish qualified officers to present cases to the Board of Legal Review and to the Board of Sentence Review.<sup>148</sup>

The present Navy Bill does not make any provisions for a separate Judge Advocate General's Corps, and, in this respect, follows the recommendations of the Ballantine Committee. The Navy Bill thus differs from the present Army law, which provides for a Judge Advocate General's Department,<sup>149</sup> and is in marked contrast to the pending bill to amend the Articles of War, as reported favorably by the House Committee on Armed Services.<sup>150</sup> This Bill provides, in Section 46, that the Judge Advocate General's Corps shall consist of two major generals, three brigadier generals, and an active list of commissioned officer strength to be determined by the Secretary of War (but such strength to be not less than 1½ per cent of the authorized active list commissioned officer strength of the Regular Army and in addition warrant officers and enlisted men in such numbers as the Secretary of War shall determine. The Bill further provides, in Section 47, that officers shall be permanently appointed to this corps by the President, by and with the advice of the Senate, and provides for a separate promotion list of all commissioned officers below the rank of brigadier general. Provision is also made for transfer to the Judge Advocate General's Corps of qualified officers from other branches of the Army, and for appointment of reserve officers and qualified civilian graduates of accredited law schools. Section 48 provides that the Judge Advocate General shall be the legal adviser of the Secretary of War, and that all members of the Judge Advocate General's Corps shall perform their duties under the direction of the Judge Advocate General. Section 49 provides that the Judge Advocate General (who is to be a Major General), the Assistant Judge Advocate General (also a Major

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<sup>148</sup>REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY 77-78, 92-94, 232, 234-235 (Jan. 1947).

<sup>149</sup>53 STAT. 558 (1939), 10 U. S. C. A., §§ 61-64 (Supp. 1946), NATIONAL DEFENSE ACT § 8.

<sup>150</sup>H. R. REP. No. 1034, 80th Cong., 1st Sess. 46-49 (1947).

General), and the other general officers of the Judge Advocate General's Corps shall be appointed by the President, by and with the advice and consent of the Senate, from among officers of the Judge Advocate General's Corps recommended by the Secretary of War.

The stated purpose of these amendments is to establish in the Army a corps of qualified legal officers who shall be entirely free from command influence. The House Committee on Armed Services felt so strongly on this subject that it wrote these amendments into the Army Bill as originally proposed, despite the opposition of the Under-Secretary of War, Honorable Kenneth C. Royall, and of Lt. General J. Lawton Collins, and retained them in spite of "strenuous objections" of the Secretary of War, Honorable Robert P. Patterson, and of the Chief of Staff, General Dwight D. Eisenhower.<sup>151</sup> Whether the Committee will insist on the insertion of similar provisions in the Navy Bill remains to be seen.

#### *Advisory Council*

The General Court Martial Sentence Review Board recognized that no single study of the court-martial system could be regarded as complete, and that no changes could be regarded as permanent. Accordingly, it recommended the establishment of an Advisory Council to make a continuing study of the naval court-martial system and from time to time to recommend changes based on its observation of the actual operation of the system and on its appraisal of current trends in civilian criminology. It was recommended that this Council be composed partly of persons outside the naval service, partly of representatives of the Office of the Judge Advocate General and of the Bureau of Naval Personnel, and partly of officers with general line experience; and that it include at least one penologist and one psychiatrist. Such a Council, it was felt, could serve a two-fold purpose:

1. It could undertake a complete examination of the naval court-martial system in action.
2. It could provide the means of keeping the court-martial system up to date without the necessity of periodic major revisions.<sup>152</sup>

This recommendation was modeled after Mr. Justice Cardozo's original proposal for the creation of a Ministry of Justice,<sup>153</sup> as well as the actual

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<sup>151</sup>H. R. REP. No. 1034, 80th Cong., 1st Sess. 8-11 (1947).

<sup>152</sup>REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SEC'Y OF THE NAVY, Introduction 2-5 (Jan. 1947).

<sup>153</sup>Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921).

creation of the New York State Law Revision Commission,<sup>154</sup> the New York State Judicial Council,<sup>155</sup> and the United States Supreme Court's Advisory Committee on Civil and Criminal Procedure.<sup>156</sup> It is interesting to note that the Vanderbilt Committee, independently of the General Court Martial Sentence Review Board, made a similar recommendation with respect to the Army court martial system.<sup>157</sup>

The present Navy Bill does not provide for the creation of an Advisory Council, but it is understood that the Navy intends to establish one by administrative action. This will represent a salutary reform which should obviate in advance the type of criticism which the Army and Navy court martial systems have received since the close of World War II.

The combination of a completely revised set of Articles for the Government of the Navy, and a permanent Advisory Council, should mark the way to a system of naval justice which will be the equal of any other code of justice, whether military or civil. The problems are difficult; and the solutions by no means simple; but they are not beyond the capacity of a great democratic nation such as ours. The Army and Navy Bills, imperfect though they may be, are a long step toward the great goal of equal justice for all men.

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<sup>154</sup>See REPORT OF THE COMM. ON THE ADMINISTRATION OF JUSTICE IN NEW YORK STATE (1934); N. Y. STATE LEGISLATIVE DOCUMENT, No. 50, pp. 36, 53.

<sup>155</sup>See Saxe, *The Judicial Council of the State of New York: Its Objectives, Methods, and Accomplishments*, 35 AM. POL. SCI. REV. 933 (1941).

<sup>156</sup>The Advisory Committee was appointed by orders of the Court dated June 3, 1935 (295 U. S. 774) and February 17, 1936 (297 U. S. 731), pursuant to 48 STAT. 1064 (1934), 28 U. S. C. A. § 723 b, c (1941). On January 5, 1942, it was designated as a continuing Advisory Committee to advise the court with respect to proposed amendments of or additions to the Rules of Civil Procedure for the District Courts of the United States (308 U. S. 645).

<sup>157</sup>REPORT OF WAR DEP'T. ADVISORY COMM. ON MILITARY JUSTICE TO THE SEC'Y OF WAR 14-15 (Dec. 1946).