Notre Dame Law Review

Volume 23 | Issue 1 Article 1

11-1-1947

Developments in the Law of Naval Justice

James Snedeker

NOTRE DAME LAWYER

A Quarterly Law Review

VOL. XXIII NOVEMBER, 1947 No. 1

DEVELOPMENTS IN THE LAW OF NAVAL JUSTICE*

LIKE all other branches of law, that portion of naval law which controls naval justice was subjected to change during the war years. It is proposed to deal with these developments under two main heads: (1) the changes consummated, and (2) the changes contemplated.

I. CHANGES CONSUMMATED

A. *Jurisdiction Over Murder*

Jurisdiction of naval courts over the crime of murder was restricted both as to persons and as to places. Article 6 of the Articles for the Government of the Navy,[1] at the beginning of World War II, read:

> 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.

In 1942, a seaman named Rosborough was serving on detached duty as a member of the armed guard crew in the Motor Ship *Baltic,* under the command of a lieutenant of

*The opinions or assertions contained in this article are the private ones of the author and are not to be construed as official or reflecting the views of the Navy Department or the naval service at large.

1 Revised Statutes, sec. 1624.

our naval reserve. The ship was under Panamanian registry, and on June 30th of that year was moored to a dock at Montevideo, Uruguay. Rosborough, while intoxicated, shot and killed the chief officer of the ship. He was first detained by the local police, but was later released to the custody of the U. S. Navy. He was returned to New York, and was tried by a general court martial on a charge of murder. The Navy's theory of this case [2] was that Article 6 was not exclusive, but merely limited the murder cases in which the death penalty might be imposed, and that Rosborough's offense could be tried under the general article,[3] although life imprisonment was the maximum under that article.[4] He was found guilty of voluntary manslaughter, as a lesser and included offense of murder. On a writ of habeas corpus in 1944, the United States District Court in Maine sustained the Navy's theory, [5] but on appeal the following year the decision was reversed.[6] The First Circuit Court of Appeals held that where any Specific offense was enumerated in the articles preceding the general article, jurisdiction over that offense must be determined exclusively by the applicable article. This decision was not further contested by the government, and Rosborough was released. The two-year statute of limitations [7] having already run, he could not be tried again.[8]

Just three months before the final determination of the Rosborough case, three enlisted men of the Navy who were based on shore on the captured Japanese island of Saipan stalked an Army nurse with intent to rape her. The nurse was strolling along a beach with an Army officer. When

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2 Navy Court-martial Order (hereafter cited CMO) 1-1942, 187-189.

3 Article 22 (a) of the Articles for the Government of the Navy (hereafter cited AGN), providing for "all offenses . . . not specified in the foregoing articles".

4 AGN 50 states that the death penalty is limited to the offenses for which it is expressly provided in AGN.

5 Rosborough v. Rossell, 56 F. Supp. 347 (1944); CMO 3-1944, 518.

6 Rosborough v. Rossell, 150 F. (2d) 809 (1945); CMO 9-1945, 399.

7 AGN 61.

8 CMO 3-1946, 95.

they were intercepted, the officer defended the nurse, firing a pistol bullet into the leg of one of the attackers. Another of the attackers then unlimbered a sub-machine gun and murdered both the officer and the nurse. These three criminals, although they were not attached to a public vessel, were tried by a court martial for murder and sentenced to life imprisonment, in accord with the Navy's theory in the Rosborough trial. Upon review of the case, following the mandate of the Circuit Court in the Rosborough appeal, the conviction had to be set aside.[9] They were subsequently convicted by another court martial for voluntary manslaughter, to which offense the restriction relating to their belonging to a public vessel did not apply. It was apparent that this restriction as to a murder charge should be removed.

The interpretation of federal "territorial jurisdiction" gave some trouble, too. It was for many years the opinion that territories and possessions acquired after the enactment of Article 6 in 1862, were excluded from consideration in deducing the intent of Congress in using the words "territorial jurisdiction." At that time, the United States had no outlying possessions beyond the seas. It was therefore believed that the Territory of Hawaii was "without" the federal jurisdiction intended by the article, and therefore within court martial jurisdiction.[10] In 1946, however, a murder on a vessel in Honolulu harbor was held to have been committed within federal territorial jurisdiction, and the conviction was set aside on jurisdictional grounds.[11] Murder on a public vessel at Midway Island in the Pacific, however, has been held within court-martial jurisdiction.[12]

Congress late in 1945 amended Article 6 to read: [13]

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9 CMO 4-1946, 144.

10 While the draft opinion dated Nov. 1, 1945, file A17/20, JAG, Navy, in the case of Ensign Matthew Wrublewski, expressly so held, the final opinion signed Nov. 9, 1945, did so only by implication, the murder conviction being set aside solely upon the ground that the accused did not belong to a public vessel.

11 JAG, Navy, file MM—Cleo Boyd, A17/20, dated Jan. 3, 1946.

12 JAG, Navy, file MM—Clark, Manual L., A17/20, dated Jan. 29, 1946.

13 Act of Dec. 4, 1945, c. 554, 54 Stat. 595, Title 34 U. S. C. A. 1200, Art. 6.

> 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.

This language completely clarified jurisdiction as to persons, and changed the test of jurisdiction as to place from non-federal to non-state.

B. *Jurisdiction Over Civilians*

The jurisdiction over civilians was, prior to World War II, vague and indefinite. The Navy had always claimed jurisdiction over civilians attached to or on duty with naval forces in a theater of war, but refrained from laying down any general rule.[14] The assertion of military control over such civilians seemed to have the support of the federal courts,[15] but a trial in the naval service had to be by an exceptional military court, such as a military commission.[16] A naval court martial had no jurisdiction over such civilians.

In the middle of World War II, Congress enlarged the scope of the jurisdiction of naval courts by including certain persons not in the naval service.[17] Such persons fell into two categories: (1) those not in military service who are outside continental United States accompanying or serving with the Navy, Marine Corps, or Coast Guard (when it is serving as a part of the Navy), and (2) those not in military service within an area leased by the United States which is outside United States territorial jurisdiction and under the control of the Secretary of the Navy. The first group included, but was not limited to government employees and persons employed by contractors and subcontractors engaged in naval projects.[18] This new jurisdiction cannot be

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14 Naval Courts and Boards (hereafter cited NC&B) (1923), sec. 558.

15 *Ex parte* Milligan, 4 Wall. 2, 123, 18 L. ed. 281 (1866); *Ex parte* Gerlach, 247 Fed. 616 (1917).

16 NC&B (1923), sec. 558, note 23.

17 Act of Mar. 22, 1943, c. 18, 57 Stat. 41, Title 34 U.S.C.A. 1201.

18 *Ibid.*

exercised except during war or national emergency, and even then it does not extend to Alaska, the Canal Zone, the Hawaiian Islands, Puerto Rico, or the Virgin Islands, in all of which places there are federal courts. It applies to all other places, however, specifically including the islands of Palmyra, Midway and Johnston, and that part of the Aleutian Islands west of longitude 172° West. Such civilians may be tried for all naval offenses [19] except those "of such a nature that they can be committed only by naval personnel." [20] Congress intended [21] to make this naval jurisdiction over civilians comparable to that which had been given to the Army in 1920.[22] An Army court martial can try a civilian for attempting to desert,[23] desertion,[24] disobedience of lawful and applicable orders,[25] and even for offenses under the general article,[26] as well as for civil crimes like theft.[27] It must therefore be concluded that naval courts martial now have similar power, and that the restriction in the statute refers only to violations of those laws, orders, regulations, and customs which can lawfully be applied only to persons under duties and responsibilities incident to their naval status. A civilian would not be triable for fraudulent enlistment,[28] or for enlisting an intoxicated person in the Navy,[29] or for failing to salute the quarterdeck upon coming aboard a man-o'-war.[30] The mere fact that an offense is one known

19 *See* Hearings before the Senate Naval Affairs Committee, 77th Cong., 2nd Session (1942) on S. 2899.

20 Act of Mar. 22, 1943, *loc. cit. supra* note 17.

21 See Report No. 1811, 77th Cong., 2nd Session (1942) on S. 2899.

22 By Article of War (hereafter cited AW) 2 (d).

23 *Ex parte* Falls, 251 Fed. 415 (D.C.N.J. 1918).

24 McCune v. Kilpatrick, 53 F. Supp. 80 (E. D. Va. 1943), noted 44 COL. L REV. 575-78 (1944) and 30 CORNELL L. Q. 108-11 (1944-45).

25 *Ex parte* Gerlach, *loc. cit. supra* note 15.

26 See *In re* Berue, 54 F. Supp. 252 (S. D. Ohio 1944).

27 *In re* Di Bartolo, 50 F. Supp. 929 (S.D.N.Y. 1943); Perlstein v. U. S., 57 F. Supp. 123 (M. D. Pa. 1944).

28 Because after such enlistment, the enlistee is a *de jure* member of the naval service, not a civilian. *In re* Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. ed. 636 (1890); *In re* Morrissey, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. ed. 644 (1890).

29 Because this offense can be committed only by an officer. AGN 19.

30 Because the custom applies only to servicemen.

only to the military or naval service, and not to the civil law, however, does not mean that a civilian subject to naval law cannot be tried for it by a court martial.

C. *Effect of Conviction of Desertion in Time of War*

After World War I, the Navy had held that a person convicted of desertion in time of war not only should be sentenced to be discharged with a dishonorable discharge, but that he could not be legally retained in the naval service under any conditions.[31] This was based upon a law, originally enacted during the Civil War, which provided that such deserters are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens, and that they shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof.[32] When exceptional cases arose in which these severe penalties were not deemed appropriate, the Navy Department fell back on the theory that a finding of guilty by a court martial did not legally become a conviction until it had been approved by the convening authority. It suggested that if the convening authority desired to retain the accused in the service, yet hesitated to disapprove the finding of the court martial, the proper course was to withhold all action on the case for a definite period with a view to withholding action indefinitely should the conduct of the accused warrant.[33] This course avoided the "conviction," and, in effect, placed the accused on probation, a result which was believed illegal if accomplished by the normal method of approving the finding and then conditionally suspending the sentence.[34] When, by the Nationality Act of 1940, Congress consolidated the laws relating to the acquisition and loss of nationality, the

31 CMO 280-1919, 10-11.

32 Revised Statutes, sections 1996 and 1998.

33 CMO 2-1921, 18.

34 *Op. Comp. Gen.* No. B-33539 of April 26, 1943 (unpublished).

provision for the loss of nationality through "conviction" by a court martial of desertion in time of war was retained.[35]

During World War II, a case arose in which a Marine private named Krogfus was found guilty of desertion in time of war, and the convening authority by his approval had made that finding a legal conviction. The Commandant of the Marine Corps, however, wanted to return Krogfus to duty on probation. The Judge Advocate General admitted that no action could be taken unless the Secretary of the Navy retained a reserve power to mitigate the sentence already confirmed. He reasoned that in 1909 the Secretary was given the power to set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court martial convened by his order or by that of any officer of the Navy or Marine Corps,[36] and that none of the statutes enacted since that time prohibited the retention in the naval service of a person convicted of wartime desertion, or impaired the reserve powers expressly given to the Secretary.[37] He concluded that even though Krogfus may lose his United States citizenship, he may still be required to perform military service for the United States, and that the Secretary of the Navy may use his mitigating power to retain Krogfus in the service notwithstanding the conviction.[38] This view was, in the year following, incorporated in an amendment to the Nationality Act [39] providing that loss of nationality follows, not from the mere conviction of wartime desertion, but from a dismissal or dishonorable discharge executed as a result of such conviction. The amendment further provided that the restoration to active duty during wartime or the re-enlistment or induction in time of war with permission of competent military or naval author-

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35 Act of Oct. 14, 1940, 54 Stat. 1168, Title 8 U.S.C.A. 801.

36 Act of Feb. 16, 1909, c. 131, sec. 9, 35 Stat. 621, Title 34 U.S.C.A. 1200, Art. 54(b).

37 CMO 2-1943, 92.

38 *Id.* at 95-96.

39 Act of Jan. 20, 1944, c. 2, sec. 1, 58 Stat. 4, Title 8 U.S.C.A. 801 (g).

ity has the immediate effect of restoring citizenship and all civil and political rights, and removing all disabilities so lost.[40]

D. *Mandatory Not-Guilty Plea to Wartime Desertion*

The serious results of a conviction of wartime desertion were not generally known to the rank and file of that great body of people who joined the naval service during the World War II. The naval population jumped from a peacetime strength of about 100,000 to over four millions. There were 5,344 convictions of desertion, only two of which were officer cases. A section of the Navy's court-martial manual [41] called attention to the fact that the sentence in a case of wartime desertion must provide for dismissal or dishonorable discharge, and that the convicted person would be "forever incapable of holding an office of trust or profit under the United States," but the vast majority of the men in uniform never had the time to read the manual. In March of 1942, an order was issued which required that this section of the Manual be carefully explained to the accused by the judge advocate before trial, and that an entry be made in the record of proceedings that this had been done.[42] The purpose of this requirement was to assure to the accused an opportunity to avail himself, upon the trial, of all defenses open to him, but it was not entirely effectual. Failure to conform to the order in cases where the accused's plea of guilty was accepted resulted in the offer of a new trial. Where the accused pleaded not guilty and the issue was in fact tried, the failure to comply with the order was held, upon review, non-prejudicial.[43] Later, as a matter of policy, the Secretary of the Navy directed that, in all cases of desertion, a plea of not guilty must be entered for the accused, and that

40 *Ibid.*

41 NC&B (1937), sec. 444.

42 Alnav 64 of Mar. 31, 1942.

43 CMO 1-1942, 254; CMO 1-1943, 65-67.

evidence must be taken.[44] This was the first time in naval law that a not-guilty plea was made mandatory to a charge.

E. *Pleading Unauthorized Absence*

The volume of absence offenses, about eighty per cent of all offenses tried by naval courts martial during World War II, made necessary a clarification of the theory upon which such cases rest. When a man who was absent without authority from his station reported at another station, it was held that his action in reporting, even for a temporary purpose, had the effect of terminating his period of unauthorized absence.[45] This view was changed on May 1, 1945, and the Army's view adopted, so that an unauthorized absence was considered terminated, not by any action of the absentee, but by the action of competent authority which exercised control over the absentee. Where the absentee reported, for example, to a distant naval hospital, but was not admitted as a patient, his unauthorized absence was not terminated by his visit to the hospital, and he was guilty of absence for the entire period until he returned to a station where control was exercised over him.[46]

A man may be guilty of absence from a station to which he has never reported. If he is under orders to report for duty at a new station, and becomes absent without leave enroute, he is guilty of unauthorized absence from the time he was due to report there. This normal result is not changed now by the fact that the man secretly returned to his old station and lived there without competent authority having exercised any control over him.[47] It would not be changed by the fact that his orders authorized a delay, to count as a leave of absence, enroute to the new station, because such delay would have expired prior to his scheduled

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44 Sec. Nav. letter of Oct. 17, 1946, published in Navy Department Bulletin of Oct. 31, 1946, as item 46-2041.

45 CMO 2-1943, 24-25.

46 CMO 7-1946, 239.

47 CMO 7-1946, 240.

time of arrival at the new station, and any absence beyond that time is properly chargeable as absence without leave.

F. *Fraudulent Underage Enlistments*

The Navy had long recognized the rule that a boy who was under the age of fourteen was under an absolute disability to enlist.[48] This was based upon the statute which makes penal the enlistment of such minors.[49] The only federal case on this point is *Hoskins v. Pell*,[50] which held that a statute which forbade enlistment into the Army, of minors under the age of sixteen, negatived the competency of such a minor to acquire the status of soldier while he was under sixteen. The court, in dictum, admitted, however, that by continuing in service until he reached the age which qualified him, the minor might validate his underage enlistment.[51] One of the three judges dissented from the opinion of the court. The Army has rejected the opinion,[52] and the Navy, although at first accepting it,[53] has since distinguished and limited it, following only the dictum.[54] A boy, who enlisted in the Navy when he was thirteen, committed fraud after passing his fourteenth birthday. It was held that his enlistment was validated by his continuing to serve and receive pay until and beyond the minimum age of fourteen years, and that he was triable by a court martial for an offense thereafter committed.[55]

G. *Other Changes*

A number of other changes of lesser interest to the legal profession might be briefly mentioned. The statutory au-

48 See NC&B (1937), sec. 333.

49 Revised Statutes, sec. 1624, Art. 19, as amended by Acts of May 12, 1879, c. 5, 21 Stat. 3, and Aug. 22, 1912, c. 336, sec. 2, 37 Stat. 356; Title 34 U.S.C.A. 1200, Art. 19.

50 239 Fed. 279 (C.C.A. 5th, 1917), L. R. A. 1917D 1053.

51 *Ibid.*

52 1918 Op. Jag, Army, 357, Digest Jag, Army, 1912-1930, sec. 1330.

53 CMO 1-1942, 143, 144.

54 CMO 5-1945, 195.

55 *Ibid.*

thority for the convening of general courts martial has been broadened. The old law [56] specifying the persons authorized to convene these courts made the authority wider in time of war. The new law [57] eliminated the distinction between times of war and times of peace. It retained the two basic divisions of authority, the one by law, the other by delegation, but greatly increased the scope of the power of the Secretary of the Navy to delegate such authority. The result, although inevitably including what Mr. Delmar Karlen [58] calls "the dispersion of discretionary power," has so reduced the time interval between the accusation and the promulgation of the sentence as to prove its efficiency. The Secretary, who used to be forced to convene all general courts martial held in continental United States, now has to convene very few such courts.

Another change related to the pleading in fraud cases. The punishment for fraud is "fine *and* imprisonment, *or* such other punishment as a court martial may adjudge." [59] Because the "or" was read as the disjunctive, the Navy's manual specified that it was necessary to prefer two charges, Fraud, and Conduct to the Prejudice of Good Order and Discipline, the latter to allow dismissal or discharge to be added to fine and imprisonment.[60] The theory was that the one act constituted two offenses, one being a fraud on the government, the other an act tending to disrupt the administration of the Navy.[61] This theory was revised in 1946, the Judge Advocate General holding that almost any offense tends to disrupt to some extent the administration of discipline, and that the addition of the general charge was not warranted. Further, he held that the language quoted above need not be restricted to the alternative, and that the his-

56 Revised Statutes, sec. 1624, Art. 38.
57 Act of Feb. 12, 1946, 60 Stat. 4, Title 34 U.S.C.A. 1200, Art. 38.
58 Karlen, *The Personal Factor in Military Justice,* 1946 WIS. L. REV. 394, 406.
59 AGN 14 (Italics supplied).
60 NC&B (1937), sec. 80.
61 *Ibid.*

tory of the statutory offense of fraud warranted the interpretation of "or" as "and." [62] Authority cited for this interpretation was found in the Supreme Court case of *Carter v. McClaughry*.[63]

The war brought considerable confusion regarding proof of unauthorized absence by service records. Ships would sail without the absentees, leaving behind their service record books for use upon the apprehension and trial of the offenders. Frequently there was not time for the making of appropriate entries in these records prior to the sailing of the ships, and the entries were made by a shore-based commanding officer to whom the offenders were transferred *in absentia* by "staff returns." Prior to 1946, it had been held that service record entries, to be admissible in evidence, must contain facts within the personal knowledge of the officer who signed the entry,[64] despite the fact that Congress in 1936 had enacted a law providing that, for records made in the regular course of business, lack of personal knowledge may affect the weight but not the admissibility of such records.[65] This rule applied to "any court of the United States and . . . any court established by Act of Congress." [66] It seems to conflict with the right of confrontation guaranteed by the Sixth Amendment, which was a common-law right having recognized exceptions.[67] The subject matter of the 1936 statute was not one of these exceptions. An earlier attempt by Congress to restrict the right of confrontation [68] had been held to violate the Sixth Amendment.[69] But a federal court has held that the 1936 rule does not contravene that Amendment,[70] and the new Federal Rules of Criminal

62 JAG, Navy, file MM-Klaric, Martin J., dated May 9, 1946.
63 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236 (1902).
64 CMO 2-1944, 358.
65 Act of June 20, 1926, c. 640, sec. 1, 49 Stat. 1161-62, Title 28 U. S. C. A.
66 *Ibid.*
67 Salinger v. U. S., 272 U. S. 542, 548, 47 Sup. Ct. 173, 71 L. ed. 398 (1926).
68 Act of Mar. 1, 1875, 18 Stat. 479.
69 Kirby v. U. S., 174 U. S. 47, 19 Sup. Ct. 574, 43 L. ed. 890 (1899).
70 U. S. v. Leathers, 135 F. (2d) 507, 511 (C. C. A. 2d, 1943).

Procedure leave the door wide open for statutory modification of the rules of evidence.[71] The Navy, in March of 1946, abandoned the personal knowledge requirement.[72] The only requirement now is that the entry must have been made as a matter of official duty. This duty extends to the recording of facts not within personal knowledge and to the securing of authentic information with respect to such facts. The extent of the authority of the person who made the entry is the controlling factor in deciding admissibility, and it is presumed that the person signing had the requisite authority unless there is evidence which casts doubt on his qualifications or on the veracity of the entry.[73]

II. Changes Contemplated

The Navy prepared a bill containing many amendments to the Articles for the Government of the Navy, which was introduced into the Eightieth Congress as H.R. 3687 and as S. 1338 (star print). In addition, changes in the administration of naval justice which required no legislative authority were approved by the Secretary of the Navy for issuance under executive authority.

A. *Jurisdiction As to Persons*

There are two new classes of persons over which it is contemplated that naval jurisdiction be extended. One of these embodies enlisted regulars who are placed upon the retired list with pay. Such retired enlisted personnel are not now subject to naval law,[74] although retired regular officers [75] and retired reserve personnel [76] are. The other new class is that of court-martial prisoners in naval custody. Under present

71 Rule 26. See notes under this rule prepared by the Advisory Committee, as published by the New York University School of Law (1946), pages 44-45.

72 CMO 5-1946, 179.

73 *Ibid.* See NC&B (1937), sec. 199.

74 CMO 9-1922, 11; Laws Relating to the Navy, Annotated (1945), 438.

75 Revised Statutes, sec. 1457.

76 Act of June 25, 1938, c. 690, title I, sec. 6, 56 Stat. 1176, Title 34 U. S. C. A. 853d.

law, an offense committed by a court-martial prisoner while in confinement but after the term of his enlistment has expired cannot be tried by a naval court martial.[77] An officer dismissed and imprisoned is not within court-martial jurisdiction, and cannot be tried by a court martial for an offense committed while in confinement. Jurisdiction over such prisoners will give to the Navy the same power that the Army possesses over its prisoners.[78]

There is one class of persons now subject to naval law which the Navy has recommended be removed from naval jurisdiction. Present law provides that a person may be brought from civilian life before a naval court martial and tried for fraud against the government committed while he was in the naval service.[79] The practically identical provision in Army law [80] was considered by Winthrop to be of doubtful constitutionality [81] and its constitutionality was denied in an opinion in a recent federal case.[82] The Navy proposes that the present naval law on this subject be repealed, primarily upon the consideration that such a civilian can be tried in the federal courts for the fraud against the government which he allegedly committed.[83]

B. *Jurisdiction As to Place*

The Navy bill clarifies jurisdiction as to place by stating expressly the general rule that naval law extends to all places, and by providing that as to offenses named or de-

77 CMO 11-1928, 11.

78 See AW 2.

79 AGN 14, Eleventh.

80 AW 94.

81 WINTHROP, MILITARY LAW AND PRECEDENTS, 2nd ed. 1896, reprint 1920, 92-93, 105, and 710.

82 U. S. *ex. rel.* Flannery v. Commanding General, Second Service Command, 69 F. Supp. 661 (1946). The decision in this case was reversed on stipulation upon appeal, the Army releasing the accused and dropping all charges.

83 Under Chapter 5 of the Federal Criminal Code. The Army, on the other hand, proposes that the Army's corresponding court-martial jurisdiction be further extended to include persons separated from the military service subsequently charged with frauds not connected with government funds or property. H.R. 2575 and S. 903, identical bills, Eightieth Congress, sec. 37.

scribed in the Federal Criminal Code and other penal statutes, which are adopted by reference, the territorial restrictions contained therein shall not apply. Under Chapter 11 of the Code, certain acts are punishable only when committed within the admiralty, maritime, or territorial jurisdiction of the United States. Offenses under that chapter include murder, rape, and carnal knowledge. Under Chapter 12, piracy and other offenses are punishable only when committed on the high seas or on American waters. Under Chapter 13, offenses such as unlawful cohabitation are punishable only when committed in a Territory, District, or other place within exclusive federal jurisdiction. All these offenses, under the Navy bill, would be punishable by naval courts martial when committed anywhere by persons subject to naval law.

It is proposed to repeal Article 6 of the Articles for the Government of the Navy, which now limits jurisdiction over murder to murder committed outside the territorial jurisdiction of the states and of the District of Columbia. Instead, the provisions of the Federal Criminal Code [84] as to first and second degree murder will be adopted, giving to naval law for the first time a distinction between degrees of murder, and removing all statutory restrictions based upon place. As a matter of policy, the Navy intends, in time of peace, to deliver to civil authorities for trial offenders alleged to have committed murder within the jurisdiction of civil courts whenever the interest of the civilian community is paramount to that of the naval service.

C. *Jurisdiction as to Time.*

It is proposed to eliminate the double standard created by the special provision of existing law that the statute of limitations as to desertion in peacetime does not begin to run until the end of the term of enlistment.[85] The Navy bill re-

[84] Title 18 U. S. C. A. 452.
[85] AGN 62. Compare AGN 61.

tains the two-year statute of limitations, but provides uniformity in period of amenability. It further provides that four offenses be excepted from the statute of limitations. These are mutiny, murder, unauthorized absence in time of war, and desertion in time of war. As to other offenses, the statute is operative and may be tolled by the signing of charges and specifications within the statutory period. In computing this period, any time during which the accused was fleeing from justice or was in the custody of civil authorities is excluded.

The effect of a discharge is clarified by the Navy bill. It is proposed that a discharge shall not operate to relieve an offender permanently from amenability to trial by court martial. A discharge will terminate jurisdiction, subject to the reattachment of jurisdiction upon the person again becoming subject to naval law. Thus a person who re-enlists may be tried for offenses committed in the prior enlistment, if the statute of limitations has not run. So also may an officer who resigns and is later recommissioned or enlisted or inducted. The general rule remains intact, that a person must have been subject to naval law both at the time of the commission of the offense and at the time of trial. There are a few exceptions to this rule, as in regard to spies and saboteurs, who until they were charged may not have been subject to naval law. Deserters who fraudulently enlist and are subsequently discharged from the fraudulent enlistment would still be deserters from the earlier enlistment, and their intermediate discharge would not, under the proposed law, afford any immunity to them. Persons alleged to have fraudulently obtained their discharge and former officers who demand trial after having been dismissed by order of the President would be considered to be initially subject to the jurisdiction of courts martial only for the limited purpose of trial for the offenses connected with such discharges or dismissals. Their trials would, in effect, be determinations of the validity of their discharges and dismissals. If

the determination of such a trial be to invalidate the separation from the service, then the person concerned would be considered to have been continuously subject to naval law as if the separation had never occurred, and he would then be amenable to trial for any offense committed during any period in which he was thus subject to naval law.

D. *Jurisdiction as to Offenses*

The proposed law enumerates as offenses many of the acts and omissions which, under present law, were unspecified and which were punished under the general article.[86] Thus the scope of the new general article [87] is greatly narrowed. Among the specified offenses, AWOL [88] and AOL [89] have been combined in one offense, to be known as "absence from place of duty without authority." This will avoid many embarrassing entanglements in pleading and procedure. Under present practise, proof of AOL under a charge of AWOL results in a conviction in a lesser degree than charged, whereas proof of AWOL under a charge of AOL results in a mandatory acquittal. Under the interpretation of present law, the unauthorized absence must be from naval jurisdiction and not merely from the place of duty. Actually, the fact that the absentee goes beyond the limits of his ship or station is only an aggravating circumstance, and would be so viewed if the Navy bill becomes law.

The court-martial jurisdiction over certain civilians which was given to the Navy in 1943 [90] is retained in the proposed law, but the limitation, that they cannot be tried for "offenses of such a nature that they can be committed only by naval personnel," has been deleted. The limiting clause was considered merely declaratory of the principle that a

86 AGN 22(a), making punishable "all offenses . . . not specified."
87 Proposed AGN 9, Sixty-first.
88 Absence without leave.
89 Absence over leave; technically, absence from station and duty after leave had expired.
90 See section I. B. of this article.

civilian cannot be tried for an act or omission which, by its very nature, depends upon the naval status of the offender. For example, a civilian cannot be tried for failure to salute an officer. He can be tried, however, for disobedience of lawful orders, desertion, and prejudicial conduct. Trial of civilians by Army courts martial for such offenses have been upheld,[91] and it is clear from Congressional hearings that the 1943 law was intended to give to the Navy a jurisdiction over civilians comparable to that which had been given to the Army.[92] The limitation as to offenses, which does not appear in Army law,[93] served only to confuse the scope of the jurisdiction granted.

The offenses contained in the Federal Criminal Code would, without the territorial limitations there expressed, become naval offenses under the Navy bill. The bill also contains a provision which can be likened to the Assimilative Crimes Act.[94] Under this provision, violations of such criminal laws of a State, Territory, District, or possession of the United States, or any political subdivision thereof, in which the acts or omissions occurred, as are in force at the date on which the bill becomes law and also at the time they occurred, are punishable as naval offenses. Such violations have heretofore been punished on the theory that the mere violation of a law, foreign or domestic, was a violation of a custom of the naval service.[95] The proposed law eliminates the necessity for reliance upon such a theory, and gives all the statutory jurisdiction over such violations which is within the constitutional power of the national legislature to give.[96]

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91 *Ex parte* Falls, *loc. cit. supra* note 23; McCune v. Kilpatrick, *loc. cit. supra* note 24; *Ex parte* Gerlach, *loc. cit. supra* note 25; *In re* Berue, *loc. cit. supra* note 26.

92 *Supra* notes 19 and 21.

93 See AW 2.

94 Title 18 U. S. C. A. 468.

95 CMO 30-1918, 176; NC&B (1937), sections 59 and 98.

96 An attempted adoption of future laws would be an unconstitutional delegation of purely legislative authority. U. S. v. Paul, 6 Pet. 141, 8 L. ed. 348 (1832); Franklin v. U. S., 216 U. S. 559, 568, 30 Sup. Ct. 434, 54 L. ed. 615 (1910); Washington, P. & C. Ry. Co. v. Magruder, 198 Fed. 218, 222 (D. C. Md.

The bill enumerates violations of treaties and of the law of war as offenses against naval law. This was inserted to complete the jurisdictional picture in one document, but is merely declaratory of existing international law and creates no offenses which were not already cognizable by naval courts martial. The restrictions and limitations which, under international law, apply to such offenses [97] are not abrogated.

E. *Pre-trial Investigation*

An investigation of all complaints is required by present regulations.[98] But under proposed regulations, a formal pre-trial investigation will be conducted where a complaint, if true, would warrant trial by a general or a summary court martial. The alleged offender will have defense counsel, will have the right to cross-examine available witnesses against him and to call and examine available witnesses in his behalf. The investigation will be conducted by one officer, and the testimony will be taken under oath and recorded. The alleged offender will be permitted to submit anything in his behalf that he desires, not only matter admissible as evidence, but also *ex parte* affidavits, and to make an unsworn statement. The investigating officer will make a report, which, with the record of the investigation, will be submitted to the authority empowered to convene the appropriate type of court. Prior to taking the action of ordering the trial of the alleged offender, the convening authority should obtain the written opinion of his staff legal officer as to whether such probable cause is indicated as to warrant trial. The pre-trial investigation as proposed corresponds closely to that provided by statute for the Army.[99] It is not to be a trial,

1912); Steele v. Halligan, 229 Fed. 1011, 1018 (W. D. Wash. 1916). For the history of the Assimilative Crimes Acts, see Williams v. U. S., 327 U. S. 711, 66 Sup. Ct. 778, 90 L. ed. 962 (1946).

97 Such as the requirement that a spy be found in the zone of operations (Hague Rules, Art. 29), or the immunity of a spy who succeeds in returning to his own forces but is subsequently captured. Hague Rules, Art. 31.

98 NAVY REGULATIONS (1920), Articles 213 and 902.

99 AW 70.

but an impartial hearing to determine whether probable cause exists.

If, at the subsequent trial, the accused pleads guilty, it is intended that the pre-trial papers be attached to the record of proceedings of the trial after the trial is completed. This will not be done if the accused objects. The purpose, however, is to provide facts for the Sentence Review and Clemency Board upon which it may base clemency action. Without such facts, the record is destitute, and grounds for reducing the sentence in conformity with a policy-approved pattern, although they may exist, do not appear. The proposed regulation for attachment of the pre-trial papers is one designed to benefit the accused.

It is intended to utilize the pre-trial investigative procedure also for probation violators. Where it appears that termination of probation involving confinement or discharge might be appropriate, the investigation will be required by regulations. The proceedings will be transcribed. All pertinent papers will, in time of peace, go to the Navy Department and a discharge will not be issued until after they are reviewed. In time of war, they will go to the authority to whom the Secretary of the Navy had delegated his confirming power in such cases. This procedure will insure that persons on probation from sentences involving confinement and discharge are not deprived of their opportunity to make good by their commission of slight infractions of discipline.

F. *Mast Punishment*

A new mast punishment of loss of pay is incorporated into the Navy bill. The maximum to be imposed is one-half of one month's pay, and it is an alternative, not an additional, mast punishment. It may be imposed only in time of war, national emergency, or, by special authority of the Secretary of the Navy, in extraordinary circumstances in time of peace. It may be imposed upon officers only by high rank-

ing officers who have the authority to convene a general court martial, and upon enlisted persons only by officers who have the authority to convene summary courts martial. A full report is required in each case. This new punishment will make it unnecessary in many cases to take recourse to court martial proceedings, and the need for it in wartime has long been apparent. It will be especially useful as a punishment upon officers. Except for private reprimand, all the punishments allowed under present law deprive the commanding officer, who imposes punishment, of the services of the officer offender for the period of the punishment. The new provision for loss of pay does not have this disadvantage.

G. *Powers of Naval Courts Martial*

It is proposed to change the name of the most inferior naval court from "deck court" to "deck court martial" in order to bring it into conformity with the names of other naval judicial bodies. Its powers will, under the proposed law, be somewhat increased, so that it can impose thirty days confinement instead of twenty. The powers of the intermediate naval court, the summary court martial, will also be increased, so that it can impose six months confinement instead of two. This increase will close the present gap between the two-month maximum of a summary court martial and the six-month minimum practised by a general court martial. It will greatly reduce the number of trials by general courts martial and will obviate the necessity of resorting to that type of court for minor offenses deserving of greater punishment than a summary court martial can presently impose.

There will be no substantial change in the powers of a general court martial, but the Navy bill reduces the number of offenses for which, under existing law, the statutory maximum punishment is death. No longer will the death penalty be available for disobedience of a superior officer's orders,

striking a superior officer on duty, failure to inform authorities of the receipt of an enemy message, leaving station before being regularly relieved, or unlawful destruction of public property.

H. *Evidence*

The Navy bill provides statutory authority for the Secretary of the Navy to promulgate rules of procedure, including modes of proof, and directs 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. Express authority now exists for the prescription of procedure in deck courts [100] and summary courts martial,[101] but, if the bill becomes law, this will be the first time that express statutory authority has been given for prescribing the procedure of general courts martial, or the modes of proof. The sixty-page chapter on evidence in the present Navy manual [102] was issued with the approval of the President under the general authority of Revised Statutes, section 1547. The new provision omits the necessity of Presidential approval, and authorizes the Secretary of the Navy to promulgate the rules of procedure and modes of proof. With respect to the modes of proof, the Secretary of the Navy is bound to adopt the applicable law of evidence as practised in the federal courts in criminal trials.[103]

I. *Procedure of Courts Martial*

The procedure of naval courts martial will be greatly improved under contemplated new regulations. Opening statements will be allowed for the first time. Provision will be

100 AGN 64(e).
101 AGN 34.
102 NC&B (1937), chapter III.
103 Note the difference between this proposed provision of AGN and the corresponding provision of the Army's AW 38. The former prescribes that the federal rules of evidence be adopted "insofar as applicable" as naval law; the latter, "in so far as he (i. e., the Secretary of War) shall deem practicable" as military law.

made for a motion for a finding of not guilty, corresponding to a motion to dismiss in civil courts. In general courts martial, the judge advocate will have no prosecution duties, and will be a person certified by the Judge Advocate General as qualified to perform his legal duties, and responsible to that officer for the performance of those duties. He will have power to rule on all interlocutory questions, except challenges, subject to being overruled by a majority vote of the members of the court martial. In the event of overruling, the reasons are to be spread upon the record. There will also be a prosecutor and a defense counsel appointed for each general court martial, and these two will also be certified by and responsible to the Judge Advocate General. The accused may, of course, have counsel of his own choice, either in addition to or in lieu of the regularly appointed defense counsel. It will be required by law that defense counsel in a not-guilty-plea case resulting in conviction attach a brief of such matters as he feels should be considered on behalf of the accused on review, or, in lieu thereof, a signed statement setting out his reasons for not doing so. This requirement is a safeguard to the accused, to assure an intelligent and complete review.

In a summary court martial, the present "recorder" will become the "prosecutor", and his present duties of advising as to the law will devolve upon the three-officer court martial, one member of which will, whenever practicable, be a legally trained officer. Legal rulings will be made by the court. Defense counsel will be automatically appointed by the convening authority from among qualified personnel available.

In a deck court martial, no prosecutor or defense counsel will be automatically appointed, but counsel will be assigned on request of the accused, as is the present practise.

The findings and sentence of every naval court martial will be announced in open court as soon as determined. Ex-

cept for punishments of death, dismissal, discharge, and reduction in rating, every sentence will become effective upon announcement by the court. Death and dismissal require confirmation by the President; discharge, by the Secretary of the Navy; reduction in rating, by the convening authority. The power to confirm dismissals may be delegated to the Secretary of the Navy, and the power to confirm discharges may be delegated to other naval authorities.

The independence of courts martial will be safeguarded by relieving the convening authority of his responsibility for the legal review of the record, by directing him to refrain from censuring court-martial members for any finding, sentence, or other exercise of judicial responsibility, by making the judge advocate, the prosecutor, and the defense counsel of a general court martial responsible to the Judge Advocate General of the Navy, and by regulations to be issued by the Secretary of the Navy under a statutory mandate to assure that members of courts martial shall be free to perform their duties without coercion or influence.

J. *Procedure on Initial Review*

Under the proposed law, a general court martial record is to be sent to the convening authority only for his clemency action. It is then forwarded to the Judge Advocate General who conducts the legal review and may set aside proceedings, findings, and sentence on grounds of illegality, as distinguished from his present opinion as to legality and mere recommendation as to action on the proceedings, findings, and sentence. If legal, the record goes to the Naval Sentence Review and Clemency Board, which has power to remit, mitigate, or commute the sentence, except in cases convened by the Secretary of the Navy or the President. This board notifies the accused of the result of the action in his case.

The record of a summary court martial or of a deck court martial is to be sent to the convening authority only for his

clemency action. It is then forwarded to his next senior in the chain of command who has power to convene general courts martial. This senior officer, who will normally have a legal officer on his staff, conducts the legal review and determines the question of legality. He also has clemency power. After his action, the record is returned to the convening authority, who publishes the result to the accused and sends the record to the Judge Advocate General. The record is again reveiwed for legality, and if legal and the sentence involves a discharge, goes to the clemency board. A discharge will not be executed until approved by the Secretary of the Navy or his designated representative. If no senior with general court-martial authority is present or reasonably available, the convening authority must, as a practical necessity, conduct the legal review in his stead.

The power of legal review includes the power to set aside completely, or to approve only so much of a finding of guilty of a particular offense as involves conviction of either (1) a lesser and included offense, or (2) an attempt to commit the offense charged, or (3) an attempt to commit a lesser and included offense, or (4) a lesser but not included offense. A lesser but not included offense is defined as one which is not included in the offense charged only because of proof of criminal negligence instead of criminal intent. Under the definition, involuntary manslaughter is a lesser but not included offense of murder; negligently stranding a vessel, a lesser but not included offense of wilfully stranding a vessel.

Clemency power includes the power to remit or mitigate the sentence. Suspension is a form of mitigation. In addition, the Naval Sentence Review and Clemency Board will have power to commute the sentence of any naval court martial except a court martial convened by the Secretary of the Navy or by the President, in which case all clemency power reposes in the convening authority.

The Secretary of the Navy retains a reserve power to set aside the proceedings, findings, and sentence, or to remit,

mitigate, or commute the sentence imposed by any naval court martial except one convened by the President, but unless the Secretary affirmatively exercises such power, the determinations of the Judge Advocate General as to legality and of the reviewing authorities as to clemency are, so far as the initial review is concerned, final.

The Navy bill expressly provides that no record is to be returned to a court martial for reconsideration of an acquittal or of a sentence with a view to increasing its severity. This provision makes of present Navy policy a statutory mandate.

K. *Appellate Procedure*

Under present practise, an accused may, by the submission of a legal brief or other documents, secure a re-review of his case by the Office of the Judge Advocate General. It is not technically an appeal, but, in effect, a plea, supported by argument, to the Judge Advocate General to reverse his previous opinion. Under the proposed law, a real appeal is provided for. The accused is given one year from the date on which he was informed that the initial review in his case has been completed to make his appeal. This appeal, which is to be made on briefs, is directed to a statutory Board of Appeals which serves, not under the Judge Advocate General, but in the office of the Secretary of the Navy. This board has power to take any action which could have been taken by the Judge Advocate General and by the Clemency Board upon initial consideraion of the case. This means that it may overrule former actions, and without remanding the case, take all the necessary corrective steps with finality, subject only to the possible exercise by the Secretary of the Navy of his reserve powers.

After one appeal has been made and determined, or after the passage of a year without such an appeal, the conviction becomes final. The clemency power, of course, persists as long as any part of the sentence remains unexecuted.

The Board of Appeals will be constituted as the Secretary of the Navy may prescribe. It may have as members civilians, or officers, or both. It may consist of any number of members, but three are contemplated. If the volume of appeals warrants, two or more such boards may be convened.

L. *Conclusion*

The changes contemplated will give to the Navy a better system of naval justice than it has ever had. They will afford to an accused more and greater safeguards than he now has. They will result in speedier justice, controlled in a larger measure by legally trained personnel. The officer personnel of the naval service will be indoctrinated at the School of Naval Justice at Port Hueneme, California, which has a capacity for training 200 every two months. A new Naval Law Manual, to replace the present Naval Courts and Boards (1937), is in process of preparation. Under the new Navy personnel bill, lawyers will be commissioned as legal specialists whose full time can be devoted to the Navy's legal work. All these measures are expected to culminate in the best possible administration of naval justice in the post-war future.

James Snedeker.