

WILL DRAFT RULES FOR ARMED FORCES

Group Named by Forrestal to
Unify Justice Code Is Headed
by Harvard Law Professor

Special to THE NEW YORK TIMES.

WASHINGTON, July 31—James Forrestal, Secretary of Defense, announced today that Edmund Morris Morgan Jr., professor at the Harvard Law School, had been named chairman of a committee to prepare a modern and uniform code of military justice for the armed services.

The code is to be prepared in time for submission to the Eighty-first Congress. It will be designed to supersede the Army's Articles of War and the Articles for the Government of the Navy.

In addition to Professor Morgan, the members of the committee are W. John Kenney, Under-Secretary of the Navy; Gordon Gray, Assistant Secretary of the Army, and Eugene M. Zuckert, Assistant Secretary of the Air Force.

Born in Mineral Ridge, Ohio, Professor Morgan is regarded as one of the country's foremost au-

thorities on the law of evidence. He served in the Judge Advocate General's Department of the Army during the first World War.

A study of the military justice systems of the armed forces has been under consideration and preliminary study for some time, and was taken up early in May by Senator Chan Gurney, Republican, of South Dakota, chairman of the Senate Armed Services Committee, in a letter to Secretary Forrestal.

Senator Gurney pointed out in the letter that bills were then pending before Congress to revise the Articles of War and make changes in the Articles for the Government of the Navy. He noted, however, that none of these bills provided a uniform system of military justice for all three services and he suggested that such a code be prepared.

OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON

August 12, 1948

MEMORANDUM FOR: Professor Edmund M. Morgan ←
Chairman
Committee on a Uniform Code of Military Justice

Honorable Gordon Gray
Department of the Army Member
Committee on a Uniform Code of Military Justice

Honorable W. John Kenney
Department of the Navy Member
Committee on a Uniform Code of Military Justice

Honorable Eugene M. Zuckert
Department of the Air Force Member
Committee on a Uniform Code of Military Justice

SUBJECT: Agenda for the meeting of the Committee on a Uniform Code of Military Justice on WEDNESDAY, AUGUST 18, 1948, at 2:30 p.m., in Room 3-E-689 of the Pentagon.

1. Report by Felix E. Larkin, Chairman of the Working Group:

Mr. Larkin will report on the organization of the Working Group and the progress to date of the research being conducted.

2. Method of Reporting to the Secretary of Defense:

There will be a discussion of the method which the Committee desires to adopt in reporting the results of the study to the Secretary of Defense. The problem, in this connection, has to do with whether or not the members of the Committee intend to speak for their Departments and obviate the necessity for the Secretary of Defense submitting the proposed uniform code to the Departmental Secretaries.

3. Public Hearings:

There will be a discussion of whether or not public hearings will be held for the purpose of hearing witnesses from veterans' groups, bar associations, and other interested organizations. Mr. Larkin has discussed this problem with Professor Morgan, and it is Professor Morgan's tentative view that the Committee should not hold public hearings if it can be avoided. He feels that a letter to various interested groups, soliciting their views in writing, would be sufficient for this purpose. Attached is a draft of a suggested letter of this type.

4. Codification of Articles:

A format, setting forth in outline form the substantive and procedural provisions to be covered in the new uniform code, will be submitted by the Working Group to the Committee for its approval.

Felix E. Larkin

FELIX E. LARKIN
Chairman
Working Group
Committee on a Uniform Code of
Military Justice

Attachment
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OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON

August 12, 1948

MEMORANDUM FOR: Professor Edmund M. Morgan ←
Honorable Gordon Gray
Honorable W. John Kenney
Honorable Eugene M. Zuckert

I had intended to forward the format which is mentioned in Item No. 4 of the attached agenda. The job of drawing it up is not finished as yet, but I will send the proposed format to you as far in advance of the meeting as I can. In the event it is not finished in time, we could just disregard that item.

F. E. Larkin
Felix E. Larkin

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DRAFT OF A PROPOSED LETTER TO BE ADDRESSED TO
VETERANS' GROUPS, BAR ASSOCIATIONS, AND OTHER
ORGANIZATIONS INTERESTED IN A UNIFORM CODE OF
MILITARY JUSTICE.

Gentlemen:

As you know, Secretary Forrestal has recently appointed an ad hoc Committee to draft a uniform code of military justice for the Departments of the Army, Navy and Air Force. The Committee and its staff have been studying background material on this subject for some time and are giving careful consideration to the various reports and studies which have been made in recent years on this subject. In addition, the various hearings held by the House Armed Services Committee and all pertinent literature on the subject are being taken into consideration.

The Committee is aware that your organization has expressed an interest in military justice in the past, and would welcome any views or recommendations you may have on this subject.

Inasmuch as the Committee intends to complete a draft of a uniform code of military justice in time for submission to the 81st Congress, it would be appreciated if you would submit your views in writing before _____, 1948.

Very truly yours,

EDMUND M. MORGAN
Chairman
Committee on a Uniform Code of
Military Justice

Committee on a Uniform Code of Military Justice
Minutes of Meeting
18 August 1948 - Room 3E-689 - 1:45 p.m.

Present:

Professor Edmund Morris Morgan, Jr., Chairman
Honorable W. John Kenney, Under Secretary of the Navy
Honorable Gordon Gray, Assistant Secretary of the Army
Honorable Eugene M. Zuckert, Assistant Secretary of
the Air Force

Mr. Felix E. Larkin, Executive Secretary

Others in Attendance:

Mr. Charles H. Mayer, Special Assistant to Mr. Kenney, Navy
Mr. J. Joseph Whelan, Office of the Secretary of Defense

The first meeting of the Military Justice Committee was largely concerned with organizational and procedural matters.

At the Chairman's request, Mr. Larkin opened the meeting with an explanation of the work and progress of the Research and Working Groups. Notebooks containing the studies thus far prepared by these two groups were distributed. Designated as articles and tantamount to briefs, the studies set forth the articles of war including the provisions of the Selective Service Act; pertinent material from the Army Manual; the articles for the Government of the Navy; provisions of the Navy bill and pertinent material from Naval Courts and Boards. In addition, there is described the important differences between the Army and Navy articles. The briefs also contain digests of and quotations from the various reports and studies made for the Departments in recent years.

Following are the matters considered and resolved by the Committee:

1. It was the unanimous opinion of the Committee that verbatim minutes of its meetings were unnecessary but that its decisions and conclusions should be recorded;
2. The briefs prepared by the Research and Working Groups, supplemented by the recommendations of the Working Group and where possible, by proposed language of uniform provisions, are to serve as a basis for the Committee's deliberations. Professor Morgan requested that the language of the suggested uniform provisions be first submitted for his consideration so that the text as distributed to other members of the Committee will reflect his views. Also, he suggested that the deliberations of the Committee should be directed initially to those articles which are basic to the entire code;

3. Distribution of the articles scheduled for the Committee's deliberations should be made one week in advance of a meeting to enable the members to obtain the views of their respective departments and to provide time for their own study;

4. While it was estimated that 60% of the articles would be of a non-controversial nature, the Committee nevertheless felt that it should consider the text of every article;

5. While recognizing the possibility of extensions of time, it was felt advisable to consider January 1 as the target date for completion of the Code;

6. Meetings of the Committee, of one to two days' duration, will be held every two or three weeks and scheduled for Thursdays or Fridays;

7. Mr. Larkin was designated to act as Executive Secretary and empowered to acknowledge correspondence. He was requested to distribute copies of the more important letters to members of the Committee. The Committee recognized the fact that subsequent to the acknowledgment by Mr. Larkin, some matters would require additional letters signed by the Chairman;

8. In accordance with Mr. Kenney's request, the Executive Secretary will have sufficient staff available to prepare spot studies required by the Committee members;

9. The members of the Committee will reflect to the extent they desire the viewpoint of their respective departments and have authority to bind them.

10. It was agreed that interested organizations and individuals should have an opportunity to submit their written observations to the Committee. Mr. Zuckert thought it might be helpful to have the views of key representatives of the services on certain controversial issues. It was agreed that they would be invited to appear personally before the Committee in that event. Further, it was recognized that it may be necessary to hold public hearings but because of limitations of time, they should be held to a minimum and discouraged where possible;

11. The Committee agreed to the issuance of a press release following its first meeting. In accordance with Mr. Gray's suggestion, it was the sentiment of the Committee members that relations with the press should be handled by the Chairman and the Executive Secretary;

12. With modification, the draft of the proposed terms of reference for the Committee was approved. In this connection, the members engaged in a lengthy discussion concerning the completed code and its application to the services. It was agreed that, in the absence of complete unification, the code should be drafted so as to be uniform in substance and uniform in interpretation and application;

13. Copies of a suggested completed outline reflecting the format for the code will be distributed in advance of the next meeting.

The Committee will again meet on or about 16 September 1948.

Whereupon the Committee adjourned.

Felix E. Larkin
Executive Secretary
Military Justice Committee

PRECEPT AND TERMS OF REFERENCE

COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE

The task of the Committee is to draft, in time for submission to the 81st Congress, a uniform code of military justice applicable to the Departments of the Army, Navy and Air Force.

The code should be drawn to satisfy three principal objectives:

First, it should integrate the military justice systems of the three services. To this end, provisions of the code should apply to the three services on as uniform a basis as possible.

Second, modernization of the existing systems should be undertaken with a view to protecting the rights of those subject to the code and increasing public confidence in military justice, without impairing the performance of military functions.

Third, the new code should represent an improvement in the arrangement and draftsmanship of the resultant articles, as compared with the present Articles of War and Articles for the Government of the Navy.

In drafting the new code, the Committee is authorized to consult with such persons in the armed forces as it may wish and to invite the views of such individuals and organizations from outside the National Military Establishment as it may desire. The Committee is further authorized to call upon the Departments and Agencies of the National Military Establishment for such information and assistance as it may require, and to arrange for the appointment

of such subcommittees as it may feel are necessary to carry out its work. My own Office will cooperate in every way in providing assistance and service which the Committee may require.

James Forrestal

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OFFICE OF THE SECRETARY OF DEFENSE

Sept 11 - 1948

Memo. for

Professor Morgan.

The recommendations mentioned
in item 2 of the agenda will
be forwarded to you on Monday.

W. Harkin.

P.S. The agenda sets the meeting for Sept 17 -
as I suggested on the phone it
may be necessary to put on the
18th as well. JEL.

OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON

September 11, 1948

MEMORANDUM FOR: Professor Edmund M. Morgan
Chairman
Committee on a Uniform Code of Military Justice

Honorable Gordon Gray
Department of the Army Member
Committee on a Uniform Code of Military Justice

Honorable W. John Kenney
Department of the Navy Member
Committee on a Uniform Code of Military Justice

Honorable Eugene M. Zuckert
Department of the Air Force Member
Committee on a Uniform Code of Military Justice

SUBJECT: Agenda for the meeting of the Committee on a Uniform Code of Military Justice on FRIDAY, SEPTEMBER 17, 1948, at 2:30 p.m., in Room 3-E-689 of the Pentagon.

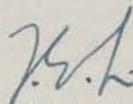
1. Outline of Uniform Articles:

There will be a discussion of the proposed outline for the uniform articles, a copy of which is enclosed. This outline has been prepared and approved by the Working Group. It is recognized that when the Board reaches decisions on the various provisions that the drafting of specific provisions will indicate the necessity for some change in the outline. It is felt necessary, however, that an approved outline, even in tentative form, be available for working purposes.

2. Consideration of the Subject Matter of Articles of War 3, 4, 5, 6, 7, 8, 9, 10, 11, 16, and 31:

The members of the Committee have briefs of the text of the above articles and the comparable Navy provisions. The general subject

matter of these articles concerns the composition and jurisdiction of the different types of courts-marshal. The recommendations of the Working Group on the above articles is attached herewith.



FELIX E. LARKIN
Chairman
Working Group
Committee on a Uniform Code of
Military Justice

Attachments

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MILITARY JUSTICE CODE

For The

ARMED SERVICES

Of The

UNITED STATES

DRAFT of 18 August 1948

MILITARY JUSTICE CODETABLE OF CONTENTSGENERAL PROVISIONS

- Art. 1. Definitions and Table of Comparable Army, Air Force and Naval Service Units.
- a. Armed Service;
 - b. Naval Service;
 - c. Officer;
 - d. Enlisted Person;
 - e. Term of Enlistment;
 - f. Vehicle;
 - g. War;
 - h. Enemy;
 - i. Cadet;
 - j. Table of Comparable Units.
- Art. 2. Persons Subject to Military Justice Code.
- a. Personnel of Regular Components of the Armed Services;
 - b. Cadets and Flying Cadets;
 - c. Reserve Personnel;
 - d. Retired Personnel;
 - e. Certain Discharged Personnel;
 - f. Prisoners under Court-Martial Sentence;
 - g. Personnel of Coast Guard, Coast and Geodetic Survey and Public Health Service;
 - h. Prisoners of War;
 - i. Spies and Saboteurs;
 - j. Persons Employed by the Armed Services Outside the United States.
- Art. 3. Assignment of Judge Advocates; Channels of Communication.
- Art. 4. Territorial Applicability of this Code.
- Art. 5. Offenses under this Code.

Table of Contents (continued)

APPREHENSION AND RESTRAINT

Art. 6. Apprehension.

Art. 7. Types of Restraint.

- a. Arrest;
- b. Restriction;
- c. Confinement.

Art. 8. Places of Confinement.

- a. United States Penitentiary or other Federal Institution;
- b. United States Disciplinary Barracks;
- c. Other Penal or Correctional Institutions prescribed by the Secretaries of the Army, Navy or Air Force.

Art. 9. Confinement with Enemy Prisoners or other Foreign Nationals.

Art. 10. No Punishment While in Confinement Prior to Sentence.

Art. 11. Delivery of Offenders to Civil Authorities.

Art. 12. Refusal to Receive and Keep Prisoners.

Art. 13. Report of Prisoners Received.

Art. 14. Releasing Prisoner Without Proper Authority.

COMMANDER'S NONJUDICIAL PUNISHMENT

Art. 15. Disciplinary Powers of Commanding Officers.

- a. Who may Impose;
- b. Authorized Punishments;
- c. Appeal;
- d. Subsequent Trial by Court-Martial.

COURTS-MARTIAL

Art. 16. Courts-Martial Classified.

- a. General. - not less than five members.
- b. Special. - not less than three members.
- c. Summary. - one officer.

A. COMPOSITION OF COURTS-MARTIAL.

Art. 17. Who May Serve on Courts-Martial.

- a. Commissioned officers;
- b. Warrant Officers, in certain cases;
- c. Enlisted Persons, in certain cases;
- d. Qualification of members of Courts-Martial

Art. 18. Law Member of General Courts-Martial.

B. APPOINTMENT OF COURTS-MARTIAL.

Art. 19. General Courts-Martial.

Art. 20. Special Courts-Martial.

Art. 21. Summary Courts-Martial.

Art. 22. General provisions re: Trial Judge Advocates and Defense Counsel.

C. JURISDICTION OF COURTS-MARTIAL.

Art. 23. General Courts-Martial.

Art. 24. Special Courts-Martial.

Art. 25. Summary Courts-Martial.

Art. 26. Reciprocal Jurisdiction of Armed Services Courts-Martial.

Art. 27. Jurisdiction of other tribunals of the Armed Services not affected by these articles.

Table of Contents (continued)

Art. 28. Statute of Limitations.

not under juries

Art. 29. Double Jeopardy.

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D. CHARGES - ACTION UPON

Art. 30. Signatures; Oath.

Art. 31. Investigation.

- a. Mandatory but not jurisdictional for General Courts-Martial;
- b. Rights to Counsel and to cross-examine witnesses.

Art. 32. Forwarding and Service of Charges.

Art. 33. Advice of Staff Judge Advocate.

Art. 34. Unnecessary Delay.

E. TRIAL PROCEDURE

Art. 35. President May Prescribe Rules.

Art. 36. Trial Judge Advocate to Prosecute; Counsel to Defend.

Art. 37. Challenges.

- a. For Cause;
- b. Peremptory.

Art. 38. Oaths.

- a. Court;
- b. Trial Judge Advocate;
- c. Reporter;
- d. Witness;
- e. Interpreter.

Art. 39. Continuances.

Art. 40. Refusal or Failure to Plead.

Table of Contents (continued)

- Art. 41. Process to Obtain Witnesses.
- Art. 42. Refusal to Appear or Testify.
- Art. 43. Compulsory Self-Incrimination Prohibited: Degradation.
- Art. 44. Depositions.
- a. When Admissible;
 - b. Before Whom Taken.
- Art. 45. Records of Courts of Inquiry - When Admissible.
- Art. 46. Closed Sessions.
- Art. 47. Method of Voting.
- a. On Challenges, Findings and Sentence;
 - b. On Interlocutory Questions;
 - c. Rulings by Law Member;
 - d. Duty of Law Member re: Presumption of Innocence and Burden of Proof.
- Art. 48. Number of Votes Required.
- a. To Convict of Spying - All;
 - b. To Sentence to Death - All;
 - c. Life Imprisonment - Three-fourths;
 - d. Confinement Over Ten Years - Three-fourths;
 - e. Convictions ~~except spying~~ ~~Two-thirds;~~ ~~Two-thirds;~~
 - f. Confinement Under Ten Years - Two-thirds;
 - g. All Other Questions - Majority.
- Art. 49. Court to Announce Action.
- Art. 50. Contempts.
- Art. 51. Errors and Irregularities - Effect of.
- Art. 52. Unlawfully Influencing Action of Court.

Table of Contents (continued)

Art. 53. Records of Trial.

- a. Records Required;
 - (1) General Courts-Martial,
 - (2) Special and Summary Courts-Martial.
- b. Disposition of Records.
 - (1) General Courts-Martial,
 - (2) Special and Summary Courts-Martial.

F. POST-TRIAL PROCEDURE

Art. 54. Action by Convening Authority.

- a. Review of Record and Advice of Staff Judge Advocate;
- b. Approval of Sentence;
- c. Who May Exercise Power of Approval;
- d. Powers Incident to Power to Approve;
 - (1) Relating to Findings,
 - (2) Relating to Sentence,
 - (3) Demand for Rehearing.

Art. 55. Appellate Review.

- a. Board of Review; Judicial Council;
- b. Additional Boards and Councils;
- c. Branch Offices for Distant Commands;
- d. Action by Board of Review when Approval by President or Confirming Action is Required;
 - (1) When Action by President is Required;
 - (2) When record of trial legally sufficient and confirmation required by Judicial Council;
 - (3) When record of trial legally insufficient or contains prejudicial errors, and Judge Advocate General of accused's service concurs;
 - (4) When record of trial legally insufficient and Judge Advocate General of accused's service does not concur.
- e. Action by Board of Review in Cases Involving Dishonorable or Bad-Conduct Discharges or Confinement in Penitentiary;

Table of Contents (continued)

- (1) Record of trial legally sufficient and no confirming action necessary;
- (2) Record of trial legally sufficient, but modification deemed necessary to the ends of justice;
- (3) Record of trial legally insufficient and Judge Advocate General of accused's service concurs with Board's holding;
- (4) Record of trial legally insufficient and Judge Advocate General of accused's service does not concur with Board's holding.

f. Appellate Action in Other Cases.

g. Judge Advocate General and Appellate Agencies May Weigh Evidence, Judge Credibility of Witnesses and Determine Controverted Questions of Fact.

h. Finality of Court-Martial Judgments.

Art. 56. Confirmation.

- a. By President;
 - (1) Sentence of Death,
 - (2) Sentence Involving General Officer.
- b. By Secretary of Accused's Service when sentence does not require approval or confirmation by the President and the appropriate Judge Advocate General does not concur in action of Judicial Council;
- c. By Judicial Council, with concurrence of appropriate Judge Advocate General, with respect to any sentence;
 - (1) When confirming action of Judicial Council is not unanimous;
 - (2) When by direction of the appropriate Judge Advocate General his participation in the confirming action is required;
 - (3) Involving imprisonment for life;
 - (4) Involving dismissal of an officer other than a general officer;
 - (5) Involving dismissal or suspension of a cadet.
- d. By Judicial Council with respect to any sentence transmitted under Article 45 for confirming action.

Table of Contents (continued)

Art. 57. Powers Incident to Power to Confirm.

- a. Relating to Findings;
- b. Relating to Sentence;
- c. Restoration of rights, privileges and property;
- d. Order execution of Sentence;
- e. Remand for Rehearing.

Art. 58. Mitigation, Remission, and Suspension of Sentences.

- a. At the Time Ordered Executed;
- b. Subsequent to the Time Ordered Executed.

Art. 59. Rehearings.

Art. 60. Petition for New Trial Within One Year From Initial Appellate Review.

PUNITIVE ARTICLES

A. PUNISHMENTS.

Art. 61. Cruel and Unusual Punishments Prohibited.

Art. 62. Maximum Limits.

Art. 63. Officers - Reduction to Ranks.

B. MILITARY OFFENSES.

Committee on a Uniform Code of Military Justice
Minutes of Meetings

17 September 1948 - Room 3E-689 - 3:30 p.m.

18 September 1948 - Room 3E-689 - 10:00 am.

Members in Attendance:

Professor Edmund M. Morgan, Jr., Chairman
Honorable Gordon Gray, Assistant Secretary of the Army
Honorable W. John Kenney, Under Secretary of the Navy

Alternate:

Mr. Brackley Shaw, General Counsel, Department of the
Air Force, representing Honorable Eugene M. Zuckert

Mr. Felix E. Larkin, Executive Secretary

Others in Attendance:

Mr. James F. King, Special Assistant to Mr. Gray
Mr. Charles H. Mayer, Special Assistant to Mr. Kenney
Mr. Robert S. Pasley, Counsel, Office of Naval Research
Mr. J. Joseph Whelan, Office of the Secretary of Defense

The Committee had for its consideration Articles of War 3, 4, 5, 6, 7, 8, 9, 10, 11, 16 and 31, and the related Articles for the Government of the Navy. The general subject matter of these articles concern the composition and jurisdiction of the different types of courts-martial. Mr. Larkin explained, in relation to each article, the background and the reasoning and decisions of the Working Group.

Following are the matters considered and acted upon by the Committee:

1. It adopted the recommendations of the Working Group which designated the nomenclature of the courts-martial as general, special and summary and specified the minimum membership of each.

2. After a lengthy discussion, approved the principle of reciprocal jurisdiction. The members were unanimous in their belief that appellate review in such cases should be the responsibility of the individual's own service. The Committee was concerned over the implications of the words "assigned or attached" and felt that the Working Group, in drafting an article on definitions, should fully explore and carefully define their meaning.

3. Mr. Kenney disagreed with the views of the Army and Air Force in connection with the provision allowing enlisted men to serve on the courts even though their participation was limited to courts convened on land. He felt that their inclusion should not be predicated on the basis of expediency and on speculations as to the Congressional intent. The majority of the Committee favored their inclusion but instructed that a statement be included in its report to the Secretary of Defense and in the annotations to the Code to the effect that the Committee questions the advisability and benefit of including enlisted men on the courts but that it was making provision for them in view of Congressional action in Public Law 759 (80th Congress) and in view of the representations of the Department of the Army before the House Committee, that it was willing to give this provision a trial.

4. Subject to a revision of language, it approved provisions relating to the qualifications of members of courts-martial.

5. Agreed with the conclusions of the Working Group relative to the statutory designation of persons empowered to convene courts-martial. These include the President, the Secretaries of the Army, the Navy and the Air Force, such persons as are designated by the Secretaries, and an enumeration of major commands which are to be furnished by the Working Group. It further agreed that the convening authority of a superior court should have authority to convene the inferior courts.

6. In connection with the position of the law member, the Committee

(a) agreed to have the law member rule with finality on all questions of evidence;

(b) agreed that the court should rule on challenges;

(c) agreed that the law member should rule subject to veto on motions directing a finding of not guilty and on the question of the accused's sanity; and

(d) deferred until the next meeting the matter of voting on whether the law member should act in the capacity of a judge or participate as a voting member.

The Committee will again meet on or about September 30 and October 1.

Whereupon the Committee adjourned at 6:15 p.m. on September 17 and at 12:20 p.m. on September 18.

Felix E. Barkin

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OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON

25 September 1948

MEMORANDUM FOR: Professor Edmund M. Morgan ←
Chairman
Committee on a Uniform Code of Military Justice

Honorable Gordon Gray
Department of the Army Member
Committee on a Uniform Code of Military Justice

Honorable W. John Kenney
Department of the Navy Member
Committee on a Uniform Code of Military Justice

Honorable Eugene M. Zuckert
Department of the Air Force Member
Committee on a Uniform Code of Military Justice

SUBJECT: Agenda for the meeting of the Committee on a Uniform Code of Military Justice on THURSDAY, SEPTEMBER 30, 1948, at 2:30 p.m., and FRIDAY, OCTOBER 1, 1948, at 2:30 p.m., in Room 3E689 of The Pentagon.

1. Unfinished Business:

There will be further consideration of the position of the law member for the proposed uniform code. Discussion will concern the question of whether there should be a law member on the courts martial or whether there should be a judge who instructs the jury on the record and who does not vote with the court on the proceedings, findings, and sentence.

2. Possible Need for further Interim Legislation for the Air Force.

The recently enacted law (Public Law 775 — 80th Congress) which conferred statutory authority upon the Air Force to conduct its own court martial system presents a serious question of construction. This Law

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adopted for the Air Force the Articles of War and all other laws "as they are now in effect." However, the Act was signed a day after the Selective Service Act, which enacted the amended Articles of War as a rider. These amended Articles of War, by the terms of the Selective Service Act, do not go into effect until eight months after the passage of the Selective Service Act, which means the latter part of February, 1949. The question arises as to whether the amended Articles of War, when they go into effect in February, will also apply to the Air Force. The Air Force tells me that it is their opinion that the amended Articles of War do ~~not~~ apply to them but that they have submitted the question to the Attorney General. I am informed by the Attorney General that the question is one of such legal doubt that they may not be willing to write an opinion on this subject. The Attorney General says, further, that they fear that any opinion given by them will not prevent a great number of writs of habeas corpus and also a large number of actions in the Court of Claims. For these reasons they are of the opinion that we should obtain interim legislation in the form of a concurrent resolution wherein Congress may state the intent they had when they passed the Air Force bill. In point of time, the Air Force bill was passed by the Congress before the amended Articles of War.

3. Considerations of the Subject Matter of Articles of War 11, 12, 13, 14 and 50.

a) Pending determination by the committee of the appropriateness of discussing the question of a legal corps in AW 11, the working committee considered the provisions of AW 11 with a view of recommending a uniform provision without reference to the question of a corps for the Judge Advocate General's Departments. Mr. Larkin suggested to the group that the provisions of AW 11 covering the qualifications of the trial judge advocate and the defense counsel might be handled on a uniform basis by providing that officers assigned to such positions be certified by the respective Judge Advocates. The Departments of the Army and Air Force were not in favor of this method and pointed out that they preferred the provision in the amended Articles of War wherein qualifications of trial judge advocates and defense counsels are set forth and provide that such officers, if available, be members of the Judge Advocate General's Department or members of the Federal Bar, etc. The Army and Air Force pointed out that this provision was contributed by them in the amended Articles of War and that they felt it presented an advance in qualifications, and they were reluctant to change the provision. Inasmuch as the Navy does not have a Judge Advocate General's Department (and since it is not possible to forecast whether the Navy will have a Judge Advocate General's Department or a Corps), the Army provision cannot be made to apply to them. It was further suggested, therefore, that the qualifications of trial judge advocates and defense counsels be provided in a uniform code by preserving

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the present language of the Army and by providing that the language applying to the Navy make eligible those who are either legal specialists or who are certified by the Navy Judge Advocate General, and by further providing in the uniform provision that the language for the Air Force qualify those officers who are judge advocates or who are members of the Federal Bar, etc. The above suggestion was tentatively approved subject to clearance by the Navy of that portion of the language which would make legal specialists qualified.

The working group further considered the question of qualifications to the extent that they apply to law members, as distinguished from trial judge advocates and defense counsels. The current provision covering law members is found in AW 8 which provision has been heretofore considered by the committee insofar as its other provisions are concerned. The working group, in the same tentative fashion, approved the use of the same language as used for trial judge advocates and defense counsels in the setting forth of the qualifications for law members, with the modification that the law member should always be a person of such qualifications, as distinct from the provisions in AW 11, which states that the trial judge advocates and defense counsels should have such qualifications "if available".

A brief discussion was held by the working group on the question of the renaming of the law member, trial judge advocate, and defense counsel. No decision could be made on the question of law member in the absence of the decision by the committee on the question of his functions and on the question of whether he is to be a judge or a law member. It was felt that the term "defense counsel" was descriptive and should be retained but that the term "trial judge advocate" was criticized as being not descriptive and confusing. The suggestion was made that the term "prosecuting attorney" or "prosecutor" be substituted for the term "trial judge advocate". The discussion was not completed, however, in view of the uncertainty of the law member problem.

b) In considering AW 12, the working group discussed the difference between its provisions and the proposed provision in the Navy bill set forth in AGN 23. It was noted that the proposed Navy provision does not provide jurisdiction for a general court martial of persons who, by Law of War, are subject to trial by military tribunals. AW 12 and the amendment to it both make such provision. The Army and Air Force were of the opinion that it was appropriate to give general courts martial such jurisdiction and pointed out that incorporation of the Law of War by reference should not be provided in such a way that aliens would become subject to the entire code of military justice. In exploring this idea, they further pointed out that the amendment to AW 48 improperly obliterates this distinction. It is recommended that the discussion of the distinction be

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postponed until the committee formally considers AW 48. The question of whether or not the uniform provision should include jurisdiction over those subject to the Law of War was not finally decided by the working group pending advice from the Navy as to its position on this question.

c) The working group was in favor of adopting the provisions of AW 13 as they now stand, with the exception of the provision which grants special courts martial jurisdiction over the trial of officers. On this question, the Army and Air Force favored the provision as it now appears in the amended Articles and stated that this extension of jurisdiction was recommended by the Army itself. The Navy tentatively objects to this provision and the working group awaits the official position of the Navy.

d) The working group's discussion of the subject matter of AW 14, Section 211 of the amended Public Law 759, and AGN 64 bearing on the question of whether or not the option that is granted enlisted men in the Navy to refuse a deck court should be adopted, or whether or not the Army Regulations which gives the right to refuse a summary court to certain personnel only should be adopted. The Services desired to consult their Departments on this question.

e) AW 50, as contained in the amended Articles of War and which supersedes AW 50 $\frac{1}{2}$ in the present Articles of War, was discussed by the working group for the purposes of isolating the differences between the two and also in connection with the differences that exist between the Army system, both present and proposed, and the Navy system. The working group started on this problem because of its general difficulty and controversial nature, and in view of the committee's desire to consider the more difficult problems first. It is not expected that the working group will have recommended a uniform provision on this whole subject matter of appellate review by the time the committee meets. It is recommended, however, that the committee consider the present format of both systems in an exploratory fashion for the same reasons that the working group is considering it.

FELIX E. LARKIN
Chairman
Working Group
Committee on a Uniform Code of
Military Justice

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Committee on a Uniform Code of Military Justice

Minutes of Meetings

30 September 1948 - Room 3E-689 - 2:30 p.m.

1 October 1948 - Room 3E-689 - 2:30 p.m.

Members in Attendance:

Professor Edmund H. Morgan, Jr., Chairman
Honorable Gordon Gray, Assistant Secretary of the Army
Honorable W. John Kenney, Under Secretary of the Navy
Honorable Eugene M. Zuckert, Assistant Secretary of the
Air Force

Mr. Felix E. Larkin, Executive Secretary

Others in Attendance:

Colonel John P. Dinsmore, Army Member, Working Group
Mr. Robert Haydock, Office of the Secretary of Defense
(October 1 meeting)
Mr. James F. King, Special Assistant to Mr. Gray
Mr. Charles H. Mayer, Special Assistant to Mr. Kenney
Mr. Robert S. Pasley, Counsel, Office of Naval Research
Mr. J. Joseph Whelan, Office of the Secretary of Defense

After witnessing films showing the procedure employed by Navy Deck and Summary Courts and Army General Courts, the Committee met for its scheduled meeting. The agenda provided for the consideration of (a) unfinished business, (b) need for interim legislation on behalf of the Department of the Air Force, and (c) Articles of War 11, 12, 13, 14 and 50 and the related Articles for the Government of the Navy.

Following are the matters considered by the Committee and the action taken:

1. It concluded its discussion on the position of the law member on general courts. The Army and the Air Force adhered to their position that there should be a law member who participates in the voting. Professor Morgan and Mr. Kenney subscribed to the Navy position which proposes to have the law member act in the capacity of a judge who instructs the jury on the record and who does not vote with the court on the proceedings, findings and sentence.

While the Committee's vote was split, the members reserved the right to change their respective decisions as work progresses on the code. There was a feeling that it might be possible to avoid forwarding a split decision to the Secretary of Defense for resolution.

2. Mr. Larkin called the Committee's attention to his discussion with representatives of the Attorney General's office relative to Public Law 775 of the 80th Congress which confers authority upon the Department of the Air Force to conduct its own court-martial system and makes the Articles of War and all other laws "as they are now in effect" applicable to the Air Force. The Selective Service Act, enacting the amending Articles of War as a rider, was signed by the President a day prior to Public Law 775. This raises the question of whether the Articles of War as amended by the Selective Service Act are applicable on February 1, 1949 to the Air Force in view of the subsequent passage of the Air Force Act. The Department of Justice is of the opinion, regardless of the construction which is placed upon the Act, that it will result in a great many writs of habeas corpus. It is also of the opinion that interim legislation in the form of a concurrent resolution should be obtained from the Congress to indicate its intent at the time of the passage of the Air Force bill. The members of the Committee were of the unanimous opinion that the situation should be corrected and agreed with Mr. Zuckert that it be considered a matter of urgent legislation to be taken up with the Armed Services Committee. As a result of this decision, representatives of the Department of the Air Force and of the legal staff of the Office of the Secretary of Defense will take the necessary steps to place the decision of the Committee into effect.

3. Following an explanation by Mr. Larkin of the Working Group's approach and thinking with respect to Article of War 11, relative to the qualifications of members of general courts-martial, the Committee conducted a full discussion on the ramifications involved in this Article. It was of the opinion, and so resolved the issue, that the law member, the prosecutor, and the defense counsel, should be lawyers, members of the bar, and certified by the Judge Advocate Generals. This decision embraces two considerations: (1) that these officers must be lawyers, and (2) in addition, they must be certified as qualified by the Judge Advocate Generals. The Committee agreed with Professor Morgan that no qualifying language such as "if available" should be inserted in the uniform code with respect to Trial Judge Advocates and Defense Counsel. The Committee felt this provision accomplished the objectives sought in the "corp" provision of the amended Articles of War and hence decided to eliminate the provision for a corp. All Services may utilize certified officers (lawyers) for duties other than for courts-martial to insure maximum utilization of personnel.

The Committee felt differently about the qualifications of such personnel on special courts-martial and saw fit not to specify

legal requirements except in an instance where the trial Judge Advocate is certified. In such a case the defense counsel should also be a certified officer.

The Committee was of the opinion that the term "trial Judge Advocate" was confusing and not sufficiently descriptive of the duties of this position. It agreed that such an officer should be called a "prosecutor."

4. The next matter called to the Committee's attention concerned the advisability of inserting in the uniform code a provision allowing for jurisdiction by general courts-martial over persons subject to the law of war. Mr. Larkin pointed out that such a provision is contained in Article of War 12, but that no mention is made of it in the Articles for the Government of the Navy. The Committee believed that it was advisable to have such a provision although the Navy member felt that the possibility of its use by the Department of the Navy was remote. This matter also relates itself to Article of War 48, discussion of which was postponed until a subsequent date.

5. At the present time, Article of War 13 provides for special courts-martial jurisdiction over "any persons subject to military law," thus conferring jurisdiction over officers. Article 26 of the Articles for the Government of the Navy limits the summary court-martial jurisdiction to petty officers and enlisted men. The Committee was of the opinion, in the interest of uniformity, that officers should be subject to the jurisdiction of special and summary courts-martial but that the wording of the code in this respect should be of a permissive nature. Mr. Kenney expressed an opinion that officer punishment could also be dealt with by increasing the disciplinary action provided for in Article of War 104 and instructed the Working Group to study this aspect of the problem.

6. On the question of whether or not the option that is granted enlisted men in the Navy to refuse a deck court should be adopted, or whether or not the Army provision (Article of War 14) allowing non-commissioned officers to refuse a summary court should be adopted, the Committee felt that the matter should be referred back to the Working Group for further study. Mr. Gray felt that there was some merit in extending the privilege of the option of a trial by a summary court to non-commissioned officers. It was noted that, in connection with Articles of War 13 and 14, personnel of the Navy must submit to mast punishment while Army personnel can exercise an option to refuse company punishment. The Working Group was requested to consider Articles of War 13 and 14 from the standpoint of (a) option of refusing summary courts-martial, (b) option of refusing company punishment and (c) increasing company punishment under Article of War 104.

7. By way of preparation for the Committee's discussion of appellate review at its next meeting, Mr. Larkin explained in detail, by use of charts, the appellate systems of the Army and the Navy. The members were impressed by the complexity of the review procedures and Mr. Zuckert expressed the opinion that it would be very helpful if the Services would prepare statistics showing the total number of cases appealed, percentage of reversals, average time necessary to process cases and like information. The members will advance their ideas on possible ways to improve the systems at the next meeting. Professor Morgan indicated that he had given considerable thought to this very important problem and, after additional thought, will reduce his ideas to writing for distribution to the members of the Committee.

The Committee will again meet on October 14 and 15. The meeting on Friday, October 15 will be held in the morning.

Whereupon the Committee adjourned at 5:20 p.m. on September 30, and at 4:40 p.m. on October 1.

FELIX E. LARKIN

Articles of War 3-11, 16, 31

Recommendations of the Working Group

In considering the problems in the above articles, the Working Group decided initially to consider them as a whole and felt the two most important problems concerned (1) the question of enlisted men on the courts, and (2) the position and functions of the law members.

In connection with the problem of the enlisted men on the court, it was decided by the Working Group that the provision in Public Law 759 - 80th Congress, which is the recent amendment to the Articles of War, should be adopted for the uniform code.

The members of the Working Group were unanimous in their feeling that the inclusion of enlisted men on courts-martial would not result in an improved verdict. It was felt that there was a possibility that the verdict might be adversely affected, but it was conceded that this view is speculative. The representatives of the Army and Air Force and Mr. Larkin voted to include enlisted men in the uniform code despite the above opinion, because they felt to eliminate it would be borrowing an unwarranted amount of trouble before the Congress. The Congress has strongly indicated its belief that the inclusion of enlisted men is necessary, and the Departments of the Army and Air Force represented that they were willing to give the idea a trial. In addition, the inclusion of the enlisted men on the courts and other amendments in the recent law have been widely hailed by the press and the public as a substantial advance of the court-martial system. Therefore, in the absence of compelling arguments

which would demonstrate a definite danger to the court-martial system, it was felt that the uniform code should include enlisted men on the same basis as was agreed to by the Army and Air Force, that is, that the procedure should be given a trial.

The representative of the Department of Navy dissented from this view and registered the objection of the Department of the Navy to the inclusion of enlisted men on the courts. The Navy feels that there is no merit to putting an enlisted man on a court and that to accede to the present public clamour is to adopt the provision on the basis of expediency rather than on the basis of merit. The Navy further pointed out that having enlisted men on courts would raise a serious question aboard ship and recommended that if the enlisted mans provision was to be included over their objection, that it should be limited to trials on land. This latter suggestion was adopted by the other members of the Working Group.

Your attention is drawn to the text of the provision in Public Law 759 which includes enlisted men on special courts as well as on general courts. In this connection, it was pointed out that the presence of an enlisted man creates a greater hazard than his presence on the general court, because no law member is provided for the special courts. In addition, the number of special courts greatly outnumber the number of general courts and hence would call for a much greater number of enlisted men to act as members. The Departments of the Army and Air Force conceded that the absence of a law member constituted at least a difference of degree in the courts and that the presence of the enlisted man on the

special court was more objectionable than his presence on the general court. However, they did not feel that the difference was substantial enough to warrant modifying the amendment as written by Congress. The Department of the Navy had the same and unequivocal objection to the enlisted man on the special court as they have to his presence on the general court. They felt in addition, that his presence on the special court was considerably more objectionable. Mr. Larkin favored the Navy's viewpoint, but recommended that the provision for the special court be preserved and that the Committee bring to the attention of the Congress the fact that it is considered more objectionable to have an enlisted man on a special court because of the lack of a law member. All members of the Working Group agreed to this suggestion.

In connection with the question of keeping the enlisted man off the special court, Mr. Smart, from the House Armed Services Committee (who sits with the Working Group as an unofficial observer) stated that Congress had not considered in any detail the difference between the special and general courts to the extent that a special court does not have a law member. It was his forecast that the Congress might be persuaded that the difference was substantial enough to warrant eliminating the enlisted man from the special court. In this event, however, he stated that the Congress would also take away from the special court the power to impose a Bad Conduct Discharge. The members of the Working Group agreed that this would not be a trade that they would be willing to make. Consideration of whether or not the enlisted man should be on the special court should be made in the light of the possible attitude of Congress in connection with the Bad Conduct Discharge.

The second major problem in connection with the whole subject of the composition of the courts is the position and function of the law members. Under the present Army and Air Force system the law member rules have finality (with few exceptions) on interlocutory questions and on questions of evidence. The present Navy system does not provide for a law member, but the new Navy bill (not passed by Congress) provided for a law member whose rulings would be subject to a veto by the court. The Army and Air Force favor their system as does Mr. Larkin, while the Navy continues to favor the system whereby the law member would be subject to a veto. The Navy pointed out, however, that in the event enlisted men were to be permitted on the courts they would, on that condition, agree that the law member shall rule with finality.

An additional function of the law member concerns the fact that under the Army system he is, in addition to being a judge, also a member of the court with a vote on the findings and the sentence. The Army and Air Force strongly support a continuation of this phase of his functions and state that his position as a member of the court has worked well since its adoption in 1920. Under the Army system he instructs the court on the law after the court is closed and while it is deliberating and he also, as stated above, votes on the findings and on the sentence.

The proposed Navy bill provides a judge as distinguished from a law member in that he would judge the court on the record and would not participate as a voting member. The Department of the Navy continues to favor this type of judge. Mr. Larkin also favors this type and the result

is that the Working Group is split with the Army and Air Force favoring a law member and the Navy and Mr. Larkin favoring a judge.

Mr. Larkin and the Navy's position is that it is not possible to tell whether the law member provision of the Army system has worked well or not, inasmuch as his legal advice to the court is given off the record and in closed sessions. In addition, they felt that any errors he may make in charging the jury will be reviewable if placed on the record and since instructions on the law to the jury are a source of a great number of reversible errors that they should be subject to review. They also feel that if the judge does not vote with the jury, his position as a judicial officer is more clearly established. The Army and Air Force on the other hand, believe that if the law members instructions are placed on the record it will not only be an administrative burden, but it will also make the trial of a court-martial much more technical and it will tend to complicate the trial of cases to an unwarranted extent.

Specific Recommendations and Proposed Language

In addition to the above general considerations, the Working Group also specifically considered the language of Articles of War 3 through 11, part of Article of War 16 and part of Article of War 31.

Article of War 3 states the three kinds of courts-martial in the Army. A.G.N. 38, 26 and 64 cover the same material. In addition, the number of members on the different courts-martial are provided in A.W. 5, 6 and 7 and in A.G.N. 39, 27 and 64(b).

The first difference encountered in the above provisions is the difference in nomenclature. The Army special court is equivalent to the Navy summary court and the Army summary court is equivalent to the Navy deck court. Inasmuch as the name "deck court" has significance for the Navy only, it was decided in the interest of uniformity that it should be dropped and, although all the members of the Working Group agreed that the name "special court", as now existing in the Army, is not very descriptive of its functions, in the interest of tinkering with present practice as little as possible and because the names "general court" and "summary court" are good names, it was agreed by all that the Uniform Code should provide for a general, a special and a summary court as set forth in A.W. 3. In addition, it was felt advisable to provide in this same article (which under the new outline of a Uniform Code will be Article 16) for the number of members who shall sit on these courts. The proposed language of new Article 16 would be as follows:

"Art. 16. Courts-Martial Classified. There shall be three kinds of courts-martial in each of the armed services, namely:

- a. General courts-martial, which shall consist of any number of members not less than five.
- b. Special courts-martial, which shall consist of any number of members not less than three.
- c. Summary courts-martial, which shall consist of one officer."

The effect of the above is to telescope the subject matter of A.W. 3, 5, 6, 7 and the various Articles for the Government of the Navy as set forth above.

It should be noted that the number of members on the courts vary under the present Articles of War and the present Articles for the Government of the Navy. These differences, however, are resolved in the provisions of the proposed Navy bill and hence no dispute exists.

Article of War 4

This Article of War provides for "who may serve on courts-martial," and, of course, includes the disputed question of the enlisted man. In view of the majority vote of the Working Group, the provision for the Uniform Code includes the enlisted man and the language of the article recently adopted is preserved with the modification that enlisted men will serve only on courts convened on land. The language of A.W. 4 and the comparable subject matter in A.G.N. 39 on other eligible members has been redrafted in the light of uniformity and is as follows: (It will become Article 17 of the new Uniform Code.)

"Art. 17. Who May Serve on Courts-Martial.

a. Commissioned Officers. All officers on active duty in the armed services shall be competent to serve on courts-martial of the respective armed service to which they are ~~legally~~ assigned or attached for duty for the trial of any persons who may lawfully be brought before such courts for trial.

b. Warrant Officers, in certain cases. All warrant officers on active duty in the armed services shall be competent to serve on general and special courts-martial of the respective armed services to which they are legally assigned or attached for duty for the trial of any persons, other than commissioned officers, who may lawfully be brought

before such courts for trial.

c. Enlisted Persons, in certain cases. Enlisted persons on active duty in the armed services shall be competent to serve on general and special courts-martial convened on land by the respective service to which they are legally assigned or attached for duty for the trial of any enlisted persons who may lawfully be brought before such courts for trial, if, prior to the convening of the court, the accused enlisted person has requested in writing that enlisted persons serve as members of the court-martial by which he is to be tried. After such a request, no enlisted person shall, without his consent, be tried by a general or special court-martial the membership of which does not consist of at least one third, but less than one half, enlisted persons belonging to units other than the immediate company or other equivalent unit to which the accused belongs.

d. Qualification of Members of Courts-Martial.

(1) ^{When it can be avoided,} ~~Except as provided in article 15,~~ no person shall be tried by a court-martial of which less than two thirds of the members are commissioned, appointed or enlisted in the same service as the accused.

(2) When it can be avoided, no person in the armed services shall be tried by a court, any member of which is ^{superior} ~~inferior~~ to him in rank.

(3) When appointing courts-martial, the appointing authority shall detail as members thereof only ~~such~~ persons who, in his opinion, are ^{best} qualified for the duty by reason of age, education, training, experience, ^{length of service} and judicial temperament. [Members of the armed services having less

than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof. No person shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution."

It is to be noted that the above language also includes the provisions of A.W. 16 and the comparable Navy provisions.

The remaining material concerns the appointment of members to the general, special and summary courts and the position of the law member. In view of the split in vote of the Working Group, it is not possible at this time to recommend a uniform provision for the function of the law member. The provision in connection with the law member is found in A.W. 8 and in part of A.W. 31. It is expected that the recommendation of the Working Group on the first problem, that is, who appoints the members of the general, special and summary courts and also the appointment of the trial judge advocate general and defense counsel, will be decided and forwarded to the Committee before the date of the meeting.

FELIX E. LARKIN

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OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON

October 11, 1948

MEMORANDUM FOR: THE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE

✓ Professor Edmund M. Morgan
Chairman

Honorable Gordon Gray
Department of the Army Member

Honorable W. John Kenney
Department of the Navy Member

Honorable Eugene M. Zuckert
Department of the Air Force Member

SUBJECT: Agenda for the meeting of the Committee on a Uniform Code of Military Justice on THURSDAY, OCTOBER 14, 1948, at 2:30 p.m., and FRIDAY, OCTOBER 15, 1948, at 10:00 a.m., in Room 3E-689 of the Pentagon.

1. Appellate Systems:

There will be a continuation of the discussion on the above subject, with consideration of the proposal of Professor Morgan. The details of Professor Morgan's recommendations are set forth in the attached memorandum supplied me by Professor Morgan.

The discussions of the Working Group on this subject have not resulted in the resolution of the differences between the appellate systems provided in the Articles of War and the Articles for the Government of the Navy. The Department of the Army is in favor of retaining the appellate provisions in the amended Articles of War and is considering the advisability of providing for an Advisory Council in the Office of the Secretary of Defense. The Advisory Council being considered by the Army would be similar to the type of council proposed by Mr. Justice Cardoza in his law review article, "A Ministry of Justice" (1921, 35 Harvard Law Review, 113-125).

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In favoring their proposed system of appellate review, the Army, necessarily, opposes the proposals of Professor Morgan.

The Department of the Air Force also opposes the plan of Professor Morgan, and, generally, supports the Army system. The opinion of the Air Force, however, on the function of the Judicial Council as it appears in the amended Articles of War is not, as yet, firm.

The Department of the Navy, generally, favors its own system and opposes the system of the Army. They have not, as yet, formed an opinion on all the proposals provided in Professor Morgan's recommendation.

FELIX E. LARKIN
Chairman
Working Group
Committee on a Uniform Code of
Military Justice

Attachment

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GENERAL COURTS MARTIAL

1. Review by Convening Authority

The entire record, including findings and sentences of every trial by general court martial, whether sentence follows a plea of ^{not} guilty or findings after a plea of guilty, shall be forwarded to the convening authority for review. He shall have the record examined by his staff judge advocate or legal officer, and after receiving his advice,

- (a) shall set aside any proceeding, finding or sentence or part thereof, ^{which} ~~if~~ he finds legally insufficient, ^{and may} ~~with the power~~ to return the case for a ^{new trial} ~~rehearing~~, or
- (b) may remit or mitigate, but not commute, all or any part of a sentence, if he deems such action for the best interests of the service, or
- (c) may take action combining two or more of the foregoing, or
- (d) may approve the finding or sentence.

2. Review by Board of Review

If the convening authority does not set aside the entire sentence, or does not return the case for rehearing, the record including findings, sentence and action ordered by the convening authority shall be forwarded to the office of the Judge Advocate General, and shall there be reviewed by a ~~(the)~~ Board of Review if the sentence was imposed after trial upon a plea of not guilty, or if after a plea of guilty the sentence includes death, or dismissal of an officer or cadet, or dishonorable discharge or bad conduct discharge, or imprisonment in a penitentiary.

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The Board of Review shall examine the whole record to ascertain whether the ~~court has committed~~ ^{has been committed} any error which has injuriously affected the substantial rights of the accused; it shall have the authority to weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact, ^{giving due weight to the facts} ~~hearing in mind~~ that the court saw and heard the witnesses who testified before it, and the Board shall determine whether the findings or sentence or both insofar as theretofore approved by the convening authority shall be set aside in whole or in part or affirmed in whole or in part, or modified, and whether the charges shall be dismissed or ^{a new trial ordered} ~~the case reheard~~.

^{or other appropriate where a new trial is impracticable} If the Board determines that any action other than affirmance of any part of the sentence should be taken, the Judge Advocate General shall return the case to the convening authority for appropriate action, except in case where a further review by the Judicial Council is provided for.

^{and where affirm} ^{But this falls} ^{may require the Board to reconsider its decision}

3. Judicial Council

In all the following cases the entire record, including findings, sentence, action by the convening authority and the opinion of the Board of Review, shall be forwarded to the Judicial Council for further review:

- (1) All cases in which the sentence ^{as approved by this Bd of Review} affects a general officer, or in which the sentence ^{is} ~~is~~ death;
- (2) All cases which the Judge Advocate General orders forwarded to the Judicial Council for review;
- (3) All cases in which a petition for review by the Council is filed by or on behalf of the accused and in which after con-

Within ten days after a determination by the Board of Review for a sentence of death or a sentence of life imprisonment, with the consent of the Judge Advocate General, a rehearing may be ordered.

This is still to be part of the record
 and should be in the
 original file
 of the case

sidering the petition the Council determines that the petitioner has shown that there is reasonable ground to believe ~~that error prejudicial to the substantial rights of~~ injustice has been done to the accused or that the determination of the Board of Review is in conflict with that of a Board of Review of another service; or that the best interests of the service will for some other reason be furthered by a review.

That the finding in Board of Review is not all right by supporting the finding of the Board of Review

The law applied by the Board of Review

In its review the Council shall have authority to weigh evidence, judge the credibility of witnesses, determine controverted questions of fact and to order such disposition of the case as the demands of justice and the best interests of the service require.

In all cases in which the Council shall affirm any sentence or part of a sentence affecting a general officer or a sentence of death, the record shall be sent to the President, *who shall have authority to grant clemency by way of mitigation, commutation, or remission.* and the execution of the sentence shall not be ordered unless and until affirmed by the President.

At any time within one year after a sentence which includes dismissal, or dishonorable discharge or bad conduct discharge has been executed, the accused may move the Judicial Council to order a new trial on the ground of newly discovered evidence; and if such motion is made the Council shall hear and determine it in accord with the rules usually applied in such motions in the District Courts of the United States.

or is against the overwhelming weight of evidence to support the finding of the Board of Review

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of each Military Department

1. The Judge Advocate General shall constitute in his office one or more Boards of Review, each composed of not less than three officers of the Judge Advocate General's ^{office or} Department.

2. The Judge Advocate General ^{of each Military Department} shall appoint in his office one or more members of the Judge Advocate General's Department as Defense Counsel whose duty it shall be to represent the accused in all cases before the Judicial Council, and in such cases before the Board of Review as the Judge Advocate General shall direct, ^{at the request of the Defense Counsel or the Board of Review} and ^{the members of the Board of Review shall be members of the Bar of the Army, Navy, or Air Force.}

3. The Secretary of Defense shall constitute in his office a Judicial Council composed of ^{three} ~~not less than three~~ members, each of whom shall be a member of the bar admitted to practice before the Supreme Court of the

United States (and of at least ten years' experience in the practice of the profession of law). ^{One third of the members of the Council Army} Each member shall be nominated by the Secretary of Defense ^{and one third by the Secy of the Navy and one third by the Secy of the Air Force} and be appointed by the President and shall receive a salary equal to that of ^{and each member} a United States Circuit Judge. ^{Three members shall constitute a quorum for hearing and decision of any case.}

4. Provisions for additional members of the Judicial Council in emergencies. These could be designated as members for the period of the emergency or for a fixed term.

The term of a regular member should be long, probably for life.

5. Provision for Boards of Review and Judicial Councils in Branch Offices should be made.

and one or more to represent the Government. At his discretion after the any decision of the Bd of Review, the JAG may in his discretion have the Council move for a rehearing and several modifications we have after discussion

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OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON

13 October 1948

MEMORANDUM FOR: Professor Edmund M. Morgan, Jr.
Chairman, Committee on a Uniform Code of Military Justice

Honorable Gordon Gray
Department of the Army Member

Honorable W. John Kenney
Department of the Navy Member

Honorable Eugene M. Zuckert
Department of the Air Force Member

SUBJECT: Material supplemental to the agenda for the meetings of the
Committee on a Uniform Code of Military Justice, for October
14 and 15, 1948

1. Attached are working minutes covering the last two
meetings of the Committee.

2. Attached, as suggested by Mr. Zuckert at the last
meeting, is statistical information relative to appellate review
by the Services as follows:

(a) Statistics indicating frequency of departmental
(Navy) action modifying action by convening authority
(years 1941-1948 inc.);

(b) Time elapsed for completion of court-martial cases;

(c) Reports of general court-martial cases in contin-
ental United States - May 1944, May 1945;

(d) Graph showing elapsed time in general court-martial
cases (Navy); and

(e) Summary of action taken in general court-martial
cases since 1938 (Army).

FELIX E. LARKIN

Committee on a Uniform Code of Military Justice
Minutes of Meeting
14 October 1948 - Room 3E-679 - 2:30 p.m.

Members in Attendance:

Professor Edmund M. Morgan, Jr., Chairman
Honorable W. John Kenney, Under Secretary of the Navy
Honorable Eugene M. Zuckert, Assistant Secretary of
the Air Force

Mr. Felix E. Larkin, Executive Secretary

Member Absent:

Honorable Gordon Gray, Assistant Secretary of the Army

Others in Attendance:

Colonel John P. Dinsmore, Army Member, Working Group
Mr. James F. King, Special Assistant to Mr. Gray
Mr. Charles H. Mayer, Special Assistant to Mr. Kenney
Lt. Colonel Stewart S. Maxey, Air Force Member, Working Group
Mr. J. Joseph Whelan, Office of the Secretary of Defense

The Committee continued its discussion on appellate review and directed its attention primarily to the proposal of Professor Morgan, which had been distributed to the members in advance of the meeting.

Prefatory to a discussion of Professor Morgan's plan, Mr. Larkin corrected the impression which he may have left with the Committee to the effect that in the Navy system the Clemency Board supplants the review by the Bureau of Personnel. Actually, under the present system, cases are forwarded by the Judge Advocate General to the Bureau of Personnel for a review of sentence factors before being submitted to the Clemency Board. He also set forth the views of the Working Group in opposition to Professor Morgan's plan but explained that, without the text, it had proceeded under the erroneous impression that the Judicial Council could entertain appeal from the Judge Advocate General only through writs of certiorari. The Morgan plan, in fact, provides that the Judge Advocate General, in cases of disagreement with the Board of Review can, as a matter of right, have the Judicial Council hear a case. Writs of certiorari apply only to the defendant.

Mr. Larkin then proceeded to explain, with the aid of a chart, the detailed considerations involved in Professor Morgan's plan. After full discussion, the Committee tentatively adopted the plan with modifications but subject to an expression of Mr. Gray's views and a draft of the proposal.

The major modifications of the Morgan plan consist of:

(a) the Judge Advocate General would be permitted to administratively refer a case back to the Board of Review when in disagreement with its decision. This authority would be noted in the commentary to the Code;

(b) the Judicial Council would be composed of not less than three qualified civilians appointed by the Secretaries of the Departments to serve at the will of the Secretaries and paid a salary comparable to that of a judge of the circuit court;

(c) the Judicial Council would be restricted to a legal review and without authority to weigh evidence, judge the credibility of witnesses, or determine controversial questions of fact;

(d) such cases of sentences involving death or general officers would be referred by the Judicial Council to the respective Secretaries for recommendations to the President on the sentence;

(e) the Secretaries, throughout the plan, would have residual clemency powers.

During the course of the discussion, Mr. Zuckert suggested that the Committee, in its report, recommend that the Services keep a reasonable amount of statistical information regarding courts-martial.

Whereupon the Committee adjourned at 5:00 p.m.

FELIX E. LARKIN

OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON

October 22, 1948

MEMORANDUM FOR: THE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE

Professor Edmund M. Morgan
Chairman

Honorable Gordon Gray
Department of the Army Member

Honorable W. John Kenney
Department of the Navy Member

Honorable Eugene M. Zuckert
Department of the Air Force Member

SUBJECT: Agenda for the meeting of the Committee on a Uniform Code of Military Justice on THURSDAY, OCTOBER 28, 1948, at 2:30 p.m., and FRIDAY, OCTOBER 29, 1948, at 10:00 a.m., in Room 3E-689, of the Pentagon.

1. Appellate System:

There will be a continuation of the discussion of Professor Morgan's proposed uniform appellate system. Tentative agreement was reached at the last meeting of the Committee between Professor Morgan, Mr. Kenney, and Mr. Zuckert. The views of Mr. Gray, who was absent, will be considered.

In connection with this subject, there is attached proposed language and a copy of a chart which set forth the system tentatively agreed upon at the last meeting.

2. Drafts of Certain Articles for the Uniform Code:

Drafts of Articles 16, 21, 22, which incorporate the decisions of the Committee, are submitted for discussion and approval.

3. New Business:

There will be a discussion of the subject matter contained in Comparative Study, A.W. 2, "Persons Subject to Military or Naval Law." This has been considered by the Working Group, which has reached substantial agreement on the scope of such an Article with the exception of three of its phases. These relate to: (1) the provision (34 U.S.C.A. §855) which subjects members of the Naval Reserve to the laws of the Navy when wearing the uniform; (2) the proposed provision (Comp. Study, A.W. 2, page 10) which subjects Naval Reserve personnel to the Articles for the Government of the Navy, when either in possession of classified material or charged with violation of any of the rules relating to classified material; (3) the provision (34 U.S.C.A. §1201) and the proposed provision (Comp. Study, A.W. 2, page 7) which make subject to the Articles for the Government of the Navy persons employed on naval projects outside the continental limits of the United States and all persons "within an area leased by the United States which is without the territorial jurisdiction thereof and which is under the control of the Secretary of the Navy." It was pointed out that the provisions relating to leased areas exclude those where adequate civil court systems are available and that the purpose of these provisions is to provide a system of justice for areas--in particular, small islands--where none now exists. 22

The Army is opposed to extending the application of the new Articles in any of the three ways mentioned. It was pointed out that all three raise the Constitutional question of the extent to which military law can be made to apply to civilians. It was also pointed out that inclusion of such provisions in the new Articles would not compel the Army to act contrary to the policies which are the basis of its objections.

FELIX E. LARKIN
Chairman, Working Group
Committee on a Uniform Code of
Military Justice

Committee on a Uniform Code of Military Justice
Minutes of Meetings

28 October 1948 - Room 3E-689 - 2:30 p.m.

29 October 1948 - Room 3E-689 - 10:00 a.m.

Members in Attendance:

Professor Edmund M. Morgan, Jr., Chairman
Honorable Gordon Gray, Assistant Secretary of the Army
Honorable W. John Kenney, Under Secretary of the Navy
Honorable Eugene M. Zuckert, Assistant Secretary of the
Air Force

Mr. Felix E. Larkin, Executive Secretary

Others in Attendance:

Colonel John P. Dinsmore, Department of the Army
Mr. Robert Haydock, Office of the Secretary of Defense
Mr. Charles H. Mayer, Special Assistant to Mr. Kenney
Lt. Colonel Stewart S. Maxey, Department of the Air Force
Mr. Robert S. Pasley, Counsel, Office of Naval Research
(29 October meeting)
Mr. J. Joseph Whelan, Office of the Secretary of Defense

Mr. Gray stated the opposition of the Department of the Army to the Morgan Plan for appellate review which, in his absence, was considered and tentatively agreed upon by the Committee at its meetings of 14 and 15 October 1948. He expressed the opinion that (a) under the National Security Act, the Services were to be administered as separate departments including the administration of the discipline of its military personnel, (b) the creation of a Judicial Council whose members are appointed by the three Service Secretaries rather than by the Secretary of Defense would not result in an independent court, and (c) the Judicial Council will result in a bottleneck in the administration of military justice.

Mr. Gray felt that the principle of uniformity could be served in a different way, consistent with his interpretation of the Act, and recommended a plan as follows:

- (1) He proposed that an individual, of a special assistant status, be appointed in the Office of the Secretary of Defense with cognizance, but without

command authority, over matters pertaining to military justice. This special assistant would in conjunction with the Judge Advocate Generals of the three Services constitute an advisory council. The advisory council's functions would include a periodic review of the activities of the three departments in court-martial cases with a view to determining inconsistencies of sentences, the effectiveness of appellate review, the development of statistics, and with recommending policies to bring about uniformity.

(2) The review by the Convening Authorities, the Judge Advocate Generals, the Boards of Review, and the Secretaries would be similar to the system presently used by the Department of the Army.

(3) The composition of the Boards of Review would vary from the present Army Boards in that they would include three civilians and three officers. The civilian members would be lawyers of a high caliber and appointed by the Secretaries without the usual Civil Service restrictive limitations as to salary. It was suggested that the possibility of asking the Attorney General or the Supreme Court to assign circuit court judges for rotation on the Boards of Review be explored. On these Boards of Review, the majority vote would prevail; in the event of a tie, the case would be presented by the Judge Advocate General to the respective Secretary.

(4) Mr. Gray's proposal provides for retaining the Secretaries of the Departments in the appellate review system and allows final review by the President in cases involving general officers or death sentences. The ultimate review, in cases where the Judge Advocate Generals disagree with the Boards of Review, would rest with the Secretary of the Department or his civilian designee.

Following a discussion of Mr. Gray's proposal, Professor Morgan, Mr. Kenney and Mr. Zuckert indicated that they continued to prefer the modified Morgan Plan. As previously indicated, Mr. Gray dissented.

In considering the language of Proposed Articles 54, 55, 56, 57, 58, and 59, governing the appellate review procedure, the Committee made several changes which, in effect, resulted in modifying the Morgan Plan. This language will be redrafted and distributed to members of the Committee.

The Committee then proceeded to discuss the drafts for Proposed Articles 16, 21, and 22, upon which decisions had been made earlier, and approved the Articles as written other than for minor

editorial changes. In connection with Article 22, the Committee revised its prior decision by renaming the prosecutor the trial counsel.

The Committee next considered item 3 on the agenda which concerned Article of War 2, "Persons Subject to Military or Naval Law." Mr. Larkin explained that there was substantial agreement in the Working Group over the scope of this Article, but that there was a disagreement on particular phases. The Committee discussed a few of the provisions in this Article and will continue its discussion at the next meeting. The Committee felt that the provision providing for jurisdiction over cadets and flying cadets should also include midshipmen. No decision was made on the matter of jurisdiction over reserve personnel although the sentiment seemed to be that the Code should provide jurisdiction over reserve officers when on active duty, when wearing the uniform or while in training. However, care should be exercised in drafting the language because of its possible application to National Guardsmen. The Committee questioned, without deciding, the advisability of extending jurisdiction over reserve officers because of their possession of classified material.

Mr. Larkin mentioned the applicability of the Code to the Coast Guard in peacetime. Mr. Kenney indicated that he would discuss this matter with Mr. Edward Foley, Assistant Secretary of the Treasury Department.

The Committee will again meet on November 11 and 12, 1948.

Whereupon the Committee adjourned at 6:00 p.m. on 28 October and 12:30 p.m. on 29 October.

FELIX E. LARKIN

STATEMENT TO THE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE

I should like to make the following statement for the records of this committee, particularly in reference to the meeting of 28 October 1948, and I have undertaken to prepare it in manuscript form for several reasons.

In the first place, I should like to have my thoughts recorded in a little more orderly form than as reported when I spoke extemporaneously.

In the second place, in view of the fact that the other members of the committee reached an agreement after full discussion on an occasion when I was detained by illness, I should like to present my observations in this manner, rather than have them recorded as a part of a subsequent, supplemental discussion.

My position is that regretfully but firmly I must cast a dissenting vote to the arrangement the other members of the committee agreed upon. I will try to give you some reasons to which, of course, you are entitled, and then will make a further statement about a possible alternative procedure which I am prepared to recommend for such consideration as the committee may care to give it.

In a consideration of the Morgan Plan for an appellate systems, as amended, I think that we must first take a look at the National Security Act of 1947 which provides that "the Department of the Army, the Department of the Navy, and the Department of the Air Force shall be administered as individual executive departments by their respective Secretaries" (underlining supplied).

Until such time as Congress may merge the Army, Navy and Air Force into a single Department, I believe that the Secretary of the Army has and must have independent responsibility as to all matters pertaining to the Army, including courts-martial, and that this responsibility cannot be met without commensurate review authority as to all such matters. Otherwise he cannot be held responsible for results.

I favor a uniform military code, but sincerely believe that such a code can and should be administered independently by the three respective Secretaries.

I strongly object to the plan proposed by Professor Morgan, as modified by the committee, because it violates the foregoing principle by depriving the Secretary of the Army of judicial

authority, and lodges ultimate judicial authority in a tribunal composed of members without military experience and without responsibility for results. This would constitute a radical change in Army procedure which has operated satisfactorily for many years when no necessity for such a change has been demonstrated.

I also object because the plan deprives the Army Judge Advocate General, who is the Department's senior and most experienced legal officer, of judicial authority.

Under this plan the Judicial Council created must consider all cases forwarded to it by the three Judge Advocates General of the respective Departments, and it may consider, upon good cause shown, any case arising in any of the three Departments when so requested by the accused.

I am convinced that the discharge of these duties will require more than one judicial council plus a very large organization of assistants, substantially equal to the entire number of officers and civilians now engaged on court-martial work in each of the three Departments. If more than one judicial council is required, which I consider inevitable, proper coordination of their work, and ultimate disposition of cases in which the decisions of two of the councils are in conflict, will call for the creation of an additional super-council not yet proposed.

It is not to be supposed that a person convicted by a court-martial will be content with an unfavorable decision by less than the highest authority. For this reason it may be anticipated, especially since such an application will involve no expense, that applications for review will be made in the overwhelming majority of such cases.

Although the Judicial Council may refuse any such application, it can do so intelligently and fairly only after a careful examination of the contentions presented, and this will require a very large staff, as well as the time of one or more Council members.

I very much fear that there will develop a bottleneck in this agency which may have very serious adverse consequences.

I should like also to point out that the amendment to the Morgan Plan suggested by Mr. Kenney, which would set up the Judicial Council not in the Office of the Secretary of Defense but as an agency whose members would be appointed by the service Secretaries, has some questionable aspects. I do not see the value of having the appointments made by the three Secretaries for service at the will of the three Secretaries other than as an effort to have some

sort of control exercised by the appointing authorities. That, in my opinion, would be dangerous because of the implications of lack of independence on the part of the members of the Judicial Council. Furthermore, it seems to me that it might invite political pressures upon the three Secretaries.

I have just one other fear I should like to express about this appellate system which the other members of the committee have agreed to.

One of the outstanding virtues of the Army court-martial procedure is its freedom from the technicalities which encumber and often defeat justice in the civil courts. I greatly fear that the creation of one or more judicial councils composed entirely of civilians will result in a body of technical rules and decisions upon technical grounds which will encumber the system from the trial level up. If, from the beginning of a court-martial case, everyone knew that a judicial council composed of civilian lawyers would ultimately review it on the basis of questions of law, we are likely to develop a situation similar to that which seems to me to obtain in the civil courts in criminal cases. I sincerely believe that our concern ought to be with justice rather than legal niceties.

The proposal also contemplates the creation of a group of legal officers in each Department who will act as counsel on appellate review, for the government at the instance of a Department Judge Advocate General, and for the accused in all cases before the Judicial Council and in certain cases before Boards of Review. This will require a substantial number of additional legal officers not otherwise required.

Now I take it that the Judicial Council seeks to serve two purposes -- uniformity of application and civilian participation in review of cases.

My alternative plan seeks to accomplish these two objectives. It puts civilians in the review stream and, I think, as a part of my proposal, the Advisory Council would accomplish the desired uniformity.

My plan is as follows:

I would make no change in the power presently exercised by the convening authority (reviewing authority) under the Army system.

I would create in the Office of each Department Judge Advocate General one or more Boards of Review, composed of three senior officers of the Judge Advocate General's Department (or two such

officers and one senior line officer) and three especially qualified civilian lawyers, who would be well paid. All cases involving a general officer, a death sentence, dismissal, dishonorable discharge, bad conduct discharge, or penitentiary confinement would automatically be re-reviewed by a Board of Review, which would be authorized to determine the legality of the sentence, to consider the facts and to weigh the evidence, including the credibility of the witnesses.

After consideration by the Board of Review, each such case would be forwarded to the Judge Advocate General of the Department concerned.

Except as noted below, the determination of the Board of Review with regard to legality of the record of trial to support the sentence, in whole or in part, or with regard to the illegality of the conviction, if concurred in by the Judge Advocate General, would be final; and such determination would be communicated to the reviewing authority for appropriate action.

If the Judge Advocate General should disagree with the Board of Review, the case would be forwarded to the Secretary of the Department concerned, an Under Secretary or Assistant Secretary designated for that purpose, or a civilian assistant to the Secretary so designated, and the decision of the Secretary or his designee would be final.

Cases involving a general officer or a death sentence would follow the same procedure through the Board of Review and the Judge Advocate General. If the Board of Review, with the concurrence of the Judge Advocate General, should find any such case legally insufficient to support the sentence, such action would be final and the reviewing authority would be so notified. If, on the other hand, the Board of Review should find the case legally sufficient to support the sentence, the record would be forwarded through the Judge Advocate General (who would then act as Staff Judge Advocate to the Secretary) to the Secretary of the Department concerned. If the Secretary of the Department should disapprove such a sentence, his action would be final but, if the Secretary should determine that the sentence should be approved, the record would be forwarded to the President for confirmation of the sentence, or such other action as the President may deem to be appropriate.

In order to coordinate the work of the three Departments in court-martial matters, there would be created an Advisory Council composed of the Judge Advocates General of the three Departments and a representative of the Secretary of Defense. This council

would review court-martial procedures for adequacy and results, recommend policies, improvements, and means of avoiding or correcting any important differences which may develop in the several Departments.

Uniform Code of Military JusticeArt. 57. Review by the Judicial Council.

(a) There is hereby established in the National Military Establishment a Judicial Council. The Judicial Council shall be composed of not less than three members. One-third of the membership shall be appointed by the Secretary of the Army, one-third by the Secretary of the Navy, and one-third by the Secretary of the Air Force. Each member of the Judicial Council shall be appointed from civilian life and shall be a member of the Bar admitted to practice before the Supreme Court of the United States, and each member shall receive compensation at the rate of \$15,000 per year.

(b) The Judicial Council shall review the record in the following types of cases:

(1) All cases in which the sentence, as affirmed by the Board of Review, affects a general officer or extends to death;

(2) All cases which the Judge Advocate General orders forwarded to the Judicial Council for review; and

(3) All cases in which, upon petition of the accused and on good cause shown, the Judicial Council has granted a review.

(c) The accused shall have 30 days from the time he is notified of a decision of the Board of Review to petition the Judicial Council for a grant of review. The Judicial Council shall act upon such a petition within 15 days of the receipt thereof.

(d) In any case reviewed by it, the Judicial Council shall act only with respect to the findings and sentence as approved by the Convening Authority and as affirmed or set aside as incorrect in law by the Board of Review. In a case which the Judge Advocate General orders forwarded to the Judicial Council, such action need be taken only with respect to the issues

raised by him. In a case reviewed upon petition of the accused, such action need be taken only with respect to issues specified in the grant of review. The Judicial Council shall take action only with respect to matters of law.

(e) If the Judicial Council sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence to support the findings, order a rehearing. Otherwise it shall order that the charges be dismissed.

(f) After it has acted on a case, the Judicial Council may direct the Judge Advocate General to return the record to the Board of Review for further review in accordance with the decision of the Judicial Council. Otherwise, unless there is to be further review by the President, the Judge Advocate General shall return the record to the Convening Authority for action in accordance with that decision. If the Judicial Council has ordered a rehearing, but the Convening Authority finds a rehearing impracticable, he may dismiss the charges.

OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON

RESTRICTED

November 6, 1948

MEMORANDUM FOR: THE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE

Professor Edmund M. Morgan ←
Chairman

Honorable Gordon Gray
Department of the Army Member

Honorable W. John Kenney
Department of the Navy Member

Honorable Eugene M. Zuckert
Department of the Air Force Member

SUBJECT: Agenda for the meeting of the Committee on a Uniform Code of Military Justice on THURSDAY, NOVEMBER 11, 1948, at 2:30 p.m., and FRIDAY, NOVEMBER 12, 1948, at 10:00 a.m., in Room 3-E-689 of The Pentagon.

I. Unfinished Business

A. There will be consideration of the revised draft of the proposed text of the Articles covering the appellate system.

B. There will be consideration of the revised draft of proposed Article 22, concerning the appointment of the Trial Counsel and Defense Counsel.

C. There will be a continuation of the discussion on Article of War 2, governing jurisdiction over persons.

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II. New Business

There will be consideration of the proposed text of the following Articles:

<u>Comparative Study Number</u>	<u>Subject</u>	<u>Proposed Number</u>
AW-8	Appointment of General Courts Martial	19
AW-9 (amended)	Appointment of Special Courts Martial	20
AW-38 (amended)	Rules	35
AW-11-17	Duties of Counsel	36
AW-18	Challenges	37
AW-19	Oaths	38
AW-20-46(c)(amended)	Continuances	39
AW-21	Irregular Pleading, etc.	40
AW-22 (amended)	Process	41
AW-23	Refusal to Testify	42
AW-24 (amended)	Self-incrimination	43
AW-30	Closed Sessions	46

There will also be a consideration of the proposed text of a number of punitive articles.

The proposed text of the above-mentioned Articles has not, in every case, been mimeographed. The balance will be transmitted to the members of the Committee prior to the meeting.

Felix E. Larkin
 FELIX E. LARKIN
 Chairman
 Working Group
 Committee on a Uniform Code of
 Military Justice

Attachments
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Committee on a Uniform Code of Military Justice
Minutes of Meetings

11 November 1948 - Room 3E-689 - 2:30 p.m.

12 November 1948 - Room 3E-689 -10:00 a.m.

Members in Attendance:

Professor Edmund M. Morgan, Jr., Chairman
Honorable Gordon Gray, Assistant Secretary of the Army
Honorable W. John Kenney, Under Secretary of the Navy
Honorable Eugene M. Zuckert, Assistant Secretary of the
Air Force

Mr. Felix E. Larkin, Executive Secretary

Others in Attendance:

Colonel John P. Dinsmore, Department of the Army
Mr. Robert Haydock, Office of the Secretary of Defense
Lt. Colonel Stewart S. Maxey, Department of the Air Force
Mr. Charles H. Mayer, Special Assistant to Mr. Kenney
Mr. Robert S. Pasley, Counsel, Office of Naval Research
Mr. J. Joseph Whelan, Office of the Secretary of Defense

Mr. Kenney reported that during a recent luncheon with Mr. Edward Foley, Assistant Secretary of the Treasury Department, and Admiral Joseph Farley, Commandant of the Coast Guard, the problem of the applicability of the Judicial Council to the Coast Guard in time of peace was discussed. He advised the Committee that the Coast Guard subscribed to the views of the Navy. In this connection, Mr. Larkin indicated that Commander E. J. Webb of the Coast Guard, associate member of the Working Group, planned to discuss with Professor Morgan and himself the problem of so drafting the appellate review provisions as to make them satisfactorily applicable to the Coast Guard in time of peace.

Mr. Larkin explained that he was employing the terminology "Armed Forces" rather than "Armed Services," which was adopted by the Committee at its last meeting, because of its use in the National Security Act of 1947 and its acceptance by the Armed Services Personnel Board. He also pointed out that Congress had used the

term 'Armed Forces' in many bills including The Armed Forces Leave Act. The Committee did not insist on its previous decision.

The Committee then proceeded to discuss and resolve several of the problems contained in the Article providing for jurisdiction over persons (Comparative Study A. W. 2):

1. Insofar as jurisdiction over those wearing the uniform is concerned, the Committee, because of the National Guard complexity, decided to limit the provision to reserves "when acting under orders for specific types of training." The thought here was that the Services, by the incorporation of such language, would then be in a position to handle the problem administratively by the issuance of orders.

2. The Committee decided against including in the Code a provision conferring court-martial jurisdiction over reserves based merely on their possession of classified material.

3. Because of Mr. Kenney's desire to explore the matter further, the Committee deferred decision on the provision allowing for jurisdiction over civilians in time of peace who are employed by, accompany, or serve with the Armed Forces outside of the continental limits of the United States. This concept is accepted by all three Services but the Navy wishes to decline jurisdiction over areas without the continental limits of the United States, such as the Canal Zone, the Virgin Islands, etc., where civilian courts are established.

4. The Committee approved the provision allowing for jurisdiction over persons discharged from the Armed Forces where they are subsequently charged with having fraudulently obtained their discharge. However, it asserted that such a provision should be restricted to the fraudulent discharge itself and to acts committed prior to the discharge. Offenses committed subsequent to the discharge would not be included.

Thereafter, the Committee discussed and approved, some with modifications, the following proposed Articles. Its decisions will be reflected in revised drafts which will be distributed to all members.

- Art. 19 - Appointment of General Courts-Martial
- Art. 20 - Appointment of Special Courts-Martial
- Art. 22 - Appointment of Prosecutors and Defense Counsel
- Art. 35 - President May Prescribe Rules
- Art. 36 - Duties of Trial Counsel and Defense Counsel
- Art. 37 - Challenges

- Art. 38 - Oaths
- Art. 39 - Continuances
- Art. 40 - Irregular Pleading etc.
- Art. 41 - Process to Obtain Witnesses and Documents
- Art. 42 - Refusal to Appear or Testify
- Art. 43 - Self-Incrimination
- Art. 46 - Closed Sessions

In connection with proposed Article 19 above, Mr. Larkin related the views of representatives of the American Bar Association, New York City Bar, New York County Lawyers, Veterans of Foreign Wars, and others, as conveyed to Professor Morgan and himself on a recent trip to New York. In general, they urge the separation of command from the judicial function and propose that the convening authorities designate people to constitute a panel of eligible members for courts-martial. An area judge advocate would select members of the courts from this panel. The convening authorities would review for clemency and possibly for legality, although it would be preferable to have the legal review done by the local judge advocate. These views will be submitted in writing and later distributed to members of the Committee for their full and careful consideration.

In connection with proposed Article 35 above, Mr. Larkin indicated that the Bureau of the Budget suggested that the rules and regulations be prescribed by the Secretary of Defense rather than by the President. Despite this view, the Committee was of the opinion that such regulations should be prescribed by the President.

The Punitive Articles, and the approach taken by the Working Group, were briefly referred to and they will be the subject of discussion at a subsequent meeting. The Committee was of the opinion that there should be a consolidation of many of the Articles and a general revision to delete obsolete phraseology.

The Committee agreed to meet on Friday, 26 November 1948, for an all-day session.

Whereupon the Committee adjourned at 5:15 p.m., 11 November, and 12:15 p.m., 12 November.

FELIX E. LARKIN
Executive Secretary

OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON

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November 20, 1948

MEMORANDUM FOR: THE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE

Professor Edmund M. Morgan ←
Chairman

Honorable Gordon Gray
Department of the Army Member

Honorable W. John Kenney
Department of the Navy Member

Honorable Eugene M. Zuckert
Department of the Air Force Member

SUBJECT: Agenda for the meeting of the Committee on a Uniform Code of Military Justice on Friday, November 26, 1948, at 10:00 a.m., in Room 3-E-689 of The Pentagon.

There will be consideration of the proposed text of the following Articles:

<u>Comparative Study Number</u>	<u>Subject</u>	<u>Proposed Article Number</u>
None	Reciprocal Jurisdiction	23
AW-12 (amended)	General Courts Martial Jurisdiction	24
AW-13 (amended)	Special Courts Martial Jurisdiction	25
AW-15	Jurisdiction of Other Tribunals	27
AW-39 (amended)	Statute of Limitations	28
AW-11 & 17	Duties of the Trial Judge Advocate, etc.	36
AW-19	Oaths	38
AW-23	Refusal to Testify, etc.	42
AW-25 & 26	Depositions	44
AW-27	Records of Courts of Inquiry	45
AW-31 (amended)	Voting and Rulings	47
AW-43 (amended)	Number of Votes Required	48
AW-29	Court to Announce Action	49
AW-32	Contempts	50
AW-88	Unlawfully Influencing Court	52

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The following Articles are still being considered by the Working Group, but it is expected that they will be available for consideration by the Committee:

<u>Comparative Study Number</u>	<u>Subject</u>	<u>Proposed Article Number</u>
AW-2	Persons Subject to Code	2 - 85/1
AW-4	Who May Serve	17 - 5
AW-21	Pleas of the Accused	40
AW-24 (amended)	Compulsory Self-incrimination	43 [9]

There will also be consideration of the revised draft of the proposed text of the Articles covering the appellate system.

Felix E. Larkin

FELIX E. LARKIN
 Chairman
 Working Group
 Committee on a Uniform Code of
 Military Justice

Attachments
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COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE
MINUTES OF MEETING
26 NOVEMBER 1948 - ROOM 3E-689 - 10:00 A.M.

Members in Attendance:

Professor Edmund M. Morgan, Jr., Chairman
Honorable Gordon Gray, Assistant Secretary of the Army
Honorable W. John Kenney, Under Secretary of the Navy
Honorable Eugene M. Zuckert, Assistant Secretary of the
Air Force

Mr. Felix E. Larkin, Executive Secretary

Others in Attendance:

Colonel John P. Dinsmore, Department of the Army
Mr. Robert Haydock, Office of the Secretary of Defense
Colonel Stewart S. Maxey, Department of the Air Force
Mr. Charles H. Mayer, Special Assistant to Mr. Kenney
Mr. Robert S. Pasley, Counsel, Office of Naval Research
Commander Halmar J. Webb, U.S. Coast Guard
Mr. J. Joseph Whelan, Office of the Secretary of Defense

Mr. Gray submitted a statement for inclusion in the records of the Committee which explains his opposition to the Committee's plan for appellate review and proposes an alternative one acceptable to the Department of the Army. Mr. Gray's statement will be reproduced for distribution to the members of the Committee.

Mr. Larkin advised the Committee that the Department of the Army had requested the Office of the Secretary of Defense to give clearance on the new Army Manual for Courts-Martial. He thought it advisable to call this matter to the attention of the Committee because of the lack of complete applicability of the Manual to the Department of the Air Force. He explained that if Public Law 759 and the Manual are to be put into effect on February 1, 1949, as is presently required, considerations of time make it imperative that the Manual

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be submitted to the Government Printing Office immediately so as to have printed copies available throughout the world in advance of February 1. Discussion on this matter ensued and Mr. Zuckert was most emphatic in stating that the Department of the Air Force is of the opinion that Public Law 759 is not completely applicable to the Air Force and it should be understood that the release of the Manual in no sense implies that his Department approves the organizational features which it visualizes, i.e., Corps.

Thereafter the Committee discussed and approved, some with modifications, the following proposed articles. The detailed changes are recorded in the formal minutes of the Committee and its decisions will be reflected in revised drafts which will be distributed to all members.

Art. 2	11/23/48	Persons Subject to the Code
Art. 23	11/19/48	Reciprocal Jurisdiction
Art. 24	11/20/48	General Courts-Martial Jurisdiction
Art. 25	11/19/48	Special Courts-Martial Jurisdiction
Art. 27	11/20/48	Jurisdiction of Other Tribunals
Art. 28	11/20/48	Statute of Limitations
Art. 36	11/17/48	Duties of Trial Judge Advocate, Etc.
Art. 38	11/17/48	Oaths
Art. 40	11/23/48	Pleas of the Accused
Art. 42	11/19/48	Refusal to Appear or Testify
Art. 43	11/24/48	Self Incrimination (Deferred)
Art. 44	11/20/48	Depositions
Art. 45	11/20/48	Records of Courts of Inquiry
Art. 47	11/17/48	Voting and Ruling
Art. 48	11/17/48	Number of Votes Required
Art. 49	11/20/48	Court to Announce Action (Considered with Art. 38)
Art. 50	11/19/48	Contempts
Art. 52	11/20/48	Unlawfully Influencing Court

In its discussion of Proposed Article 47 Voting and Ruling, the Committee agreed that it should be the duty of the law member to charge in open court on (1) presumption of innocence, reasonable doubt, and burden of proof, and (2) that the charge should specify the elements of the crime. In respect to (2), Professor Morgan and Mr. Kenney were of the opinion that the law member should not retire with the Court while Mr. Gray and Mr. Zuckert were of the opinion that he should do so for purposes of voting only.

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The Committee agreed to schedule its remaining meetings as follows:

Thursday, December 9 at 2:30 p.m., and Friday, December 10
at 10:00 a.m.

Thursday, December 16 and Friday, December 17
Tuesday, December 21 and Wednesday, December 22
Tuesday, December 28 and Wednesday, December 29

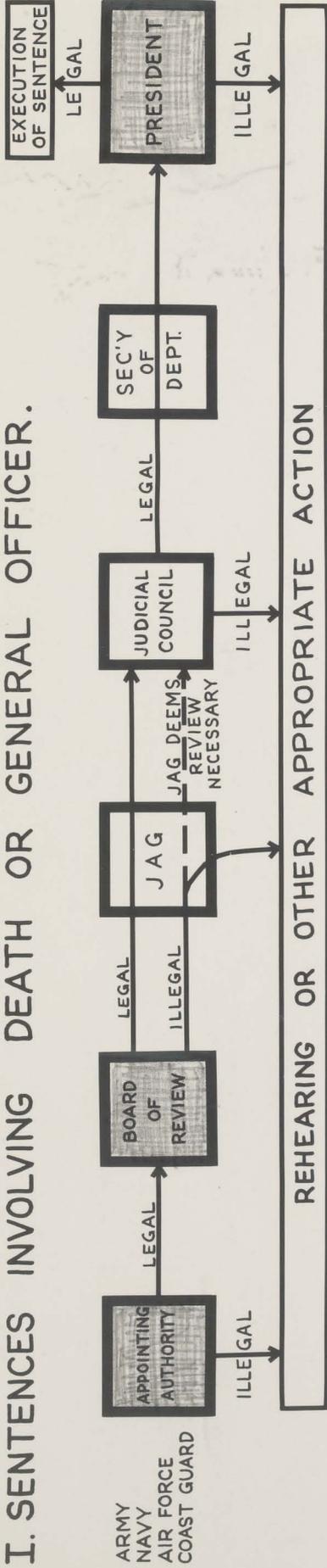
Whereupon the Committee adjourned at 6:00 p.m.

FELIX E. LARKIN
Executive Secretary

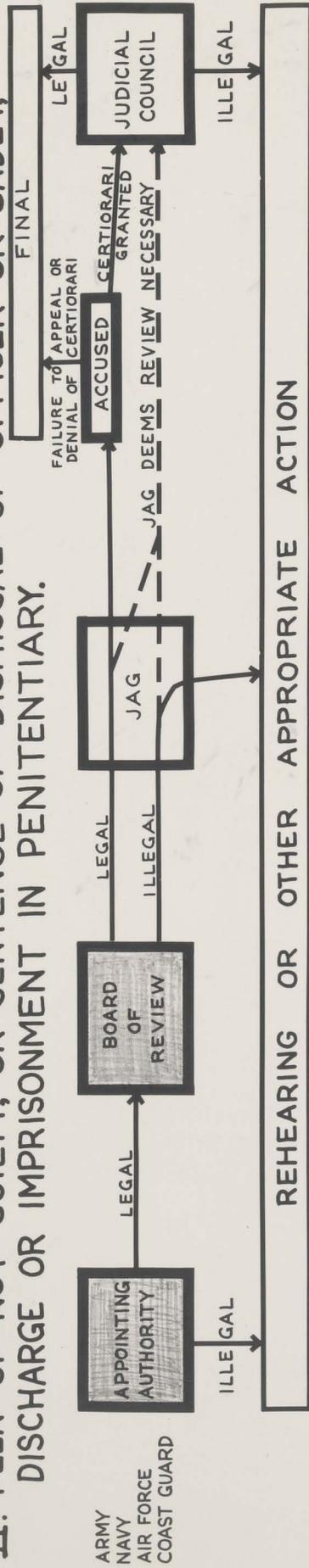
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GENERAL COURT-MARTIAL REVIEW

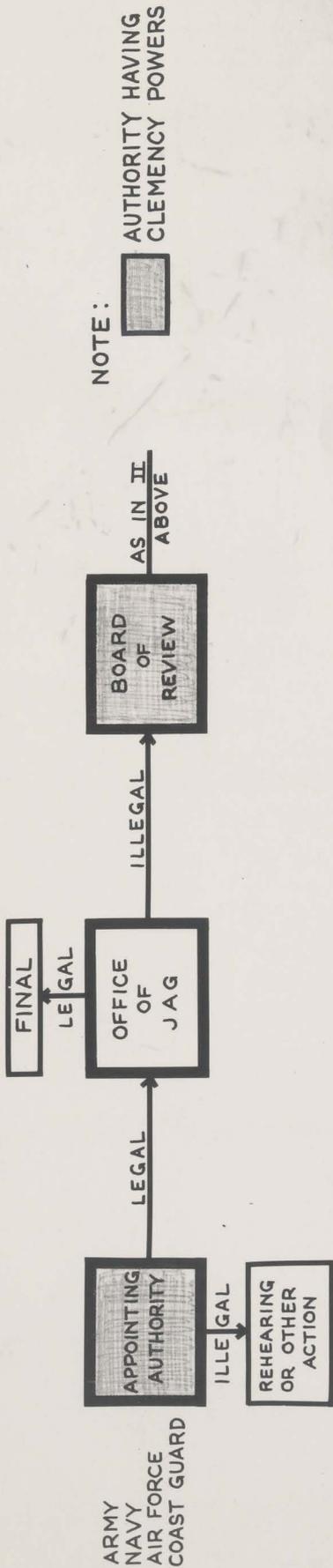
I. SENTENCES INVOLVING DEATH OR GENERAL OFFICER.



II. PLEA OF NOT GUILTY, OR SENTENCE OF DISMISSAL OF OFFICER OR CADET, DISCHARGE OR IMPRISONMENT IN PENITENTIARY.



III. ALL OTHER CASES (PLEA OF GUILTY AND MINOR PUNISHMENT).



NOTE:  AUTHORITY HAVING CLEMENCY POWERS

OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON

RESTRICTED

December 4, 1948

MEMORANDUM FOR: THE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE

Professor Edmund M. Morgan ←
Chairman

Honorable Gordon Gray
Department of the Army Member

Honorable W. John Kenney
Department of the Navy Member

Honorable Eugene M. Zuckert
Department of the Air Force Member

SUBJECT: Agenda for the meeting of the Committee on a Uniform Code of Military Justice on THURSDAY, DECEMBER 9, 1948, at 2:30 p.m., and FRIDAY, DECEMBER 10, 1948, at 10:00 a.m., in Room 3-E-689 of The Pentagon.

1. Article 2(a):

This Article is concerned with jurisdiction over certain personnel, and has been split-off from Article 2, which is the general Article on this subject. In general, Article 2(a) provides continuing jurisdiction over certain personnel, as distinguished from initial jurisdiction. It is believed that no discussion of this Article is necessary, unless members of the Committee have questions.

2. Article 17:

The substance of this Article has been discussed and approved by the Committee, and the revised draft is submitted for editorial comment. Unless language changes are suggested, it is believed that no discussion is necessary.

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3. Article 40:

This Article has to do with pleas of the accused and will incorporate language setting forth the affect of a plea of "not guilty" to the extent that it preserves the right of the accused to raise special pleas throughout the course of the trial. Except for editorial comment, it is not believed that discussion is necessary.

4. Articles 54 through 60, and Article 53:

(a) Articles 54 through 60:

✓ The above Articles cover Professor Morgan's plan for the appellate system, as modified by the majority of the Committee. In this connection, the appellate system proposed by Mr. Gray is attached. It is not believed that extensive discussion of the above subject is necessary.

(b) Article 53:

Article 53 provides for the manner of keeping records of the trial and the disposition of the records. Consideration of the question of disposition of records is connected with the question of the review of special courts martial. As provided by another section, all special courts martial are subject to review by the Board of Review if a Bad Conduct Discharge is imposed. In special courts martial cases, in which there is no Bad Conduct Discharge, the current practice of the Army and Navy differs. Under the Army system, the review is held by the authority having court martial jurisdiction and the record is kept in that command. The present Navy system provides for a review by the Examination Panel of the Judge Advocate General, and, as a result, involves the sending of the record to his office. The members of the Working Group cannot agree on a uniform system in this regard -- the Army and Navy, each, desiring to retain their own system. Discussion by the Committee is necessary to resolve this conflict.

Why keep it?
for how long?

5. Articles 61, 62 and 63:

(a) Article 61:

The outstanding question in Article 61 which remains for consideration is the extent to which the use of irons should be permitted for purposes of safe custody or safe keeping.

Bread and water

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*There under 96 in 3
expressly that prohibited
for some reason
article specifically
denominated by the group*

(b) Article 62:

Article 62 is concerned with maximum limits of punishment, and is agreed to by the Working Group.

(c) Article 63:

Article 63 is concerned with the reduction to ranks of officers by court martial sentence. This is a provision supported by the Army and found in the amended Articles of War. The Navy objects, and would give the authority to reduce an officer to the ranks to the Secretaries of the Departments only. This matter is in dispute.

6. Article 43:

This Article covers the subject of compulsory incrimination, etc., and will probably require discussion by the Committee.

7. Article 44:

This Article is concerned with depositions, and a re-draft to incorporate Professor Morgan's suggestions will be submitted.

8. AW-104:

In connection with the above Article, the problem of option of the accused at Navy Mast and Army Company punishment is still in dispute in the Working Group. Under the present Navy system, the accused has no option to refuse punishment at Mast, although he has such option in the Army system. In the next higher court, the accused has an option to refuse a summary court martial in the Navy, whereas only non-commissioned officers have that option in the Army. Both Services desire to retain their own system. In connection with this subject, Comparative Study AW-14 should be read.

*option
here*

*in
all*

9. Bar Associations' Proposals:

There will be a discussion of the proposals of the Bar Associations. In this connection, Article 19 is particularly pertinent.

10. AW-70:

The subject matter of this Article concerns charges and specifications and investigation. This matter is now before the Working Group, and, if a decision is reached in time, will be submitted to the Committee. It is anticipated that the views of the Services will not be resolved, and it is recommended that the Committee read Comparative Study AW-70.

*Query as to right to counsel etc
See Amendment by 46
by PL 759 - JWS has the
safeguards.*

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11. AW-69:

This Article covers the subject of arrest and confinement and is under consideration by the Working Group. In this connection, AW-42 should be read.

Felix E. Larkin

FELIX E. LARKIN
Executive Secretary
Committee on a Uniform Code of
Military Justice

Attachments
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COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE

MINUTES OF MEETINGS

9 DECEMBER 1948 - ROOM 3E-689 - 2:30 P.M.

10 DECEMBER 1948 - ROOM 3E-689 - 10:00 A.M.

Members in Attendance:

Professor Edmund M. Morgan, Jr., Chairman
Honorable Gordon Gray, Assistant Secretary of the Army
Honorable W. John Kenney, Under Secretary of the Navy

Mr. Felix E. Larkin, Executive Secretary

Member Absent:

Honorable Eugene M. Zuckert, Assistant Secretary of
the Air Force
Mr. Brackley Shaw, General Counsel, Depart-
ment of the Air Force, represented Mr.
Zuckert at the meetings.

Others in Attendance:

Colonel John P. Dinsmore, Department of the Army
Mr. Robert Haydock, Office of the Secretary of Defense
Colonel Stewart S. Maxey, Department of the Air Force
Mr. Charles H. Mayer, Special Assistant to Mr. Kenney
Mr. Robert S. Pasley, Counsel, Office of Naval Research
Commander Halmar J. Webb, U.S. Coast Guard (Dec. 10 meeting)
Mr. J. Joseph Whelan, Office of the Secretary of Defense
Captain Edwin E. Woods, Assistant Judge Advocate, Department
of the Navy

The Committee considered and approved, some with modifications, the text of the following proposed Articles. The detailed changes are recorded in the formal minutes of the Committee and, where necessary, in revised drafts which will be distributed to all members.

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<u>ARTICLE</u>	<u>DATE</u>	<u>SUBJECT</u>	
2A	11/23/48	Jurisdiction To Try Certain Personnel	
6	12/6/48	Apprehension	
7	12/7/48	Types of Restraint	
8	12/7/48	Who May Order Persons Into Restraint	
9	12/8/48	Restraint of Persons Charged With Offenses	
17	11/29/48	Who May Serve On Courts-Martial	Approved (Within Mr. Kenney's dissent on enlisted persons)
40	12/2/48	Pleas of the Accused	
43	12/6/48	Compulsory Self-Incrimination, Etc.	
44	11/30/48	Depositions	
53		Record of Trial	Discussed without language
54	11/26/48	Error of Law, Lesser Included Offenses	
55	11/26/48	Review of General Court-Martial Cases	
56	11/26/48	Review by Board of Review	Split Vote
57	11/26/48	Review by the Judicial Council	Approved (Within Mr. Gray's dissent)
58	11/26/48	Review in the Office of the Judge Advocate General	Approved (Within Mr. Gray's dissent)
59	11/26/48	Appellate Counsel	Approved (Within Mr. Gray's dissent)
60	12/9/48	Execution of Sentence, Etc.	Approved (Within Mr. Gray's dissent)
61	11/20/48	Cruel and Unusual Punishments Prohibited	
62	11/22/48	Maximum Limits (Punishments)	
63		Reduction of Officers	Discussed without language
A.W. 104 (Plus Art. 15)		Commanding Officer's Nonjudicial Punishments	Split Vote

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The text of proposed Article 56, above, relates to review by the Boards of Review and, among other things, specifies that the Boards shall be composed of officers or civilians. The action of the Committee on the composition of such Boards resulted in a split vote with Professor Morgan and Mr. Kenney authorizing the inclusion of civilians and with Mr. Gray and Mr. Shaw favoring officers only.

Proposed Article 57, above, concerns review by the Judicial Council and, among other things, restricts the membership of the Council to civilians. At the Thursday meeting, Mr. Kenney proposed that the inclusion of senior regular and retired officers on the Council be permitted but withdrew this suggestion at the Friday meeting. The membership of the Judicial Council will continue to be restricted to civilians.

In connection with Article 62 Maximum Limits (Punishments), Professor Morgan indicated the desirability of incorporating in the Code an article on conspiracy and attempts to commit an offense.

In its consideration of A.W. 104, the Committee discussed at length the lack of consistency in the exercise of options in the Army and Navy. Presently, enlisted personnel in the Navy cannot refuse Mast punishment while personnel in the Army can exercise an option to refuse Company punishment. Further, the accused has the option to refuse a Summary (Deck) court in the Navy, whereas only non-commissioned officers have such an option in the Army. The action of the Committee on these two points resulted in a split vote with Professor Morgan and Mr. Kenney voting for no option to refuse Mast punishment and for an option for all persons to refuse the Summary (Deck) court, while Mr. Gray and Mr. Shaw voted to allow an option at Company punishment and no extension of the option at the Summary court.

The Committee considered the recommendations of the special committees of the American Bar Association, New York County Lawyers Association, The Association of the Bar of the City of New York and War Veterans Bar Association, and it was agreed that most of their suggestions have been incorporated in the proposed Code. The Committee was of the opinion that their suggestion relative to the selection of a court from a panel designated by higher authority merits further consideration.

The Committee will again meet on Thursday, 16 December 1948 at 2:00 p.m., and Friday, 17 December 1948, at 10:00 a.m.

Whereupon the Committee adjourned at 5:25 p.m. on 9 December 1948, and at 12:30 p.m. on 10 December 1948.

FELIX E. LARKIN
Executive Secretary

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COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE MINUTES OF MEETINGS

16 DECEMBER 1948 - ROOM 3E-689 - 2:30 P.M.

17 DECEMBER 1948 - ROOM 3E-689 - 10:00 A.M.

Members in Attendance:

Professor Edmund M. Morgan, Jr., Chairman
Honorable Gordon Gray, Assistant Secretary of the Army
Honorable W. John Kenney, Under Secretary of the Navy
(Dec. 16 meeting)
Honorable Eugene M. Zuckert, Assistant Secretary of the
Air Force (Dec. 16 meeting)

Mr. Felix E. Larkin, Executive Secretary

Others in Attendance:

Colonel John P. Dinsmore, Department of the Army
Mr. Robert Haydock, Office of the Secretary of Defense
Colonel Stewart S. Maxey, Department of the Air Force
Mr. Charles H. Mayer, Special Assistant to Mr. Kenney
Mr. Robert S. Pasley, Counsel, Office of Naval Research
Mr. J. Joseph Whelan, Office of the Secretary of Defense
Captain Edwin E. Woods, Assistant Judge Advocate, Department
of the Navy

The Committee considered and approved, some with amendments and editorial changes, the text of the following proposed Articles. The detailed changes are recorded in the formal minutes of the Committee and, where necessary, in revised drafts which will be distributed to all members.

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<u>ARTICLE</u>	<u>DATE</u>	<u>SUBJECT</u>
3	12/13/48	Assignment of Judge Advocates, etc.
4	12/16/48	Territorial Applicability
12	12/9/48	Confinement with Enemy Prisoners, etc.
13	12/10/48	Punishment Prohibited Before Trial
15	12/7/48	Disciplinary Powers of Commanding Officer
18	12/6/48	Law Member of General Courts-Martial (Within previously recorded split vote on law member)
28	12/13/48	Statute of Limitations
30	12/13/48	Preliminary Charges
31	12/13/48	Investigation
32	12/13/48	Forwarding of Charges
33	12/13/48	Advice of Staff Judge Advocate, etc.
34	12/13/48	Service of Charges
51	12/7/48	Lesser Included Offenses
53	12/13/48	Records of Trial
60a	12/12/48	Petition for a New Trial
60b	12/12/48	Clemency
60c	12/13/48	Vacation of Suspended Sentences

In connection with Article 31, the Committee added new paragraphs (c) and (d) to read as follows:

"(c) In the event that an investigation of the subject matter of the offense charged has been conducted in the normal course of administration, if agreeable to the accused the requirements of this article shall be deemed satisfied if the accused was present at such investigation and afforded the opportunities for representation, cross-examination

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and presentation prescribed in sub-paragraph (b) of this Article.

"(d) The requirements of this Article shall be binding on all persons administering this Code, but failure to follow them in any case shall not constitute jurisdictional error."

The effect of paragraph (c) is to recognize investigations by Courts of Inquiry, Boards of Investigation, etc. Paragraph (d) clarifies the fact that failure to properly follow the investigative process does not cause jurisdictional error.

Drafts of proposed Articles 121 through 127 were distributed to the members for their subsequent consideration. The text of these Articles, other than 124 and 127, will not be considered by the Committee unless requested to do so by one of its members or by the Working Group.

Mr. Larkin explained the different concepts of Courts of Inquiry and Boards of Investigation in the Departments of the Army, the Navy and the Air Force, and requested the advice of the Committee on how they should be treated in the Code. The Committee established the principle that such an article should be drawn for the Code in a manner so as to incorporate and preserve the existing uses, though different, of such courts and boards.

Mr. Larkin next indicated that the Committee is scheduled to consider a draft of the Punitive Articles at its next meeting. He pointed out that the present draft attempts to present a modernized version of the Articles and incorporates the results of the work of a Subcommittee of the Working Group, extensive study by the Research Group and Professor Morgan's thoughts.

Whereupon the Committee adjourned at 5:00 p.m. on 16 December and at 11:45 a.m. on 17 December.

FELIX E. LARKIN
Executive Secretary

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COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE
MINUTES OF MEETING
21 DECEMBER 1948 - ROOM 3E-689 - 2:00 P.M.

Members in Attendance:

Professor Edmund M. Morgan, Jr., Chairman
Honorable Gordon Gray, Assistant Secretary of the Army
Honorable W. John Kenney, Under Secretary of the Navy
Honorable Eugene M. Zuckert, Assistant Secretary of the
Air Force

Mr. Felix E. Larkin, Executive Secretary

Others in Attendance:

Colonel John P. Dinsmore, Department of the Army
Mr. Robert Haydock, Office of the Secretary of Defense
Colonel Stewart S. Maxey, Department of the Air Force
Mr. Charles H. Mayer, Special Assistant to Mr. Kenney
Mr. Robert S. Pasley, Counsel, Office of Naval Research
Mr. J. Joseph Whelan, Office of the Secretary of Defense
Captain Edwin E. Woods, Assistant Judge Advocate,
Department of the Navy

The Committee considered and approved, some with amendments and editorial changes, the text of those of the Punitive Articles prepared to date (Articles 65 through 92). The detailed changes are recorded in the formal minutes of the Committee and, where necessary, in revised drafts which will be distributed to all members.

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The more important decisions made by the Committee and applicable to the Punitive Articles are as follows:

1. Agreed to incorporate in the Code a definition of "attempts" patterned after the definition contained in the Penal Law of the State of New York.

2. Prescribed the following punishments:

a. Desertion and attempts to desert in time of war - death;

b. Mutiny and attempts at mutiny in time of war and in time of peace - death;

c. Sedition in time of war and in time of peace - death;

d. Misconduct before the enemy - death;

e. Subordinate compelling surrender and attempts to compel surrender in time of war - death; and

f. Aiding the enemy and attempts to aid the enemy in time of war - death.

In this connection, the Committee agreed to amend Article 69 Solicitation to embody the idea that, in cases of desertion and attempts to desert, if the solicitation results in some overt act by the solicitee or results in desertion by the solicitee, punishment should be by death in time of war.

3. Deferred decision, at Mr. Gray's request, on Article 75 Disrespect Towards Superior.

4. On recommendation of the Department of the Navy agreed to add a provision relative to the performance of duty in a culpably inefficient manner to proposed Article 78. The Committee also deleted from this Article paragraph (2) reading "fails to obey any other order which it is his duty to obey."

5. Adopted suggested language by the Navy Department for Article 85 Misconduct Before the Enemy. The Committee also suggested that this Article be broadened to include two additional war offenses which the Department of the Navy

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wishes included, i.e., failing to seek encounter and failing to afford relief in battle.

6. Deferred consideration of Article 89.

The Committee will again meet on Tuesday, 28 December 1948 at 2:00 p.m. and on Wednesday, 29 December 1948 at 10:00 a.m.

Whereupon the Committee adjourned at 5:30 p.m.

FELIX E. LARKIN
Executive Secretary

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COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE MINUTES OF MEETINGS

28 DECEMBER 1948 - ROOM 3E-689 - 2:00 P.M.

29 DECEMBER 1948 - ROOM 3E-689 - 10:00 A.M.

Members in Attendance:

Professor Edmund M. Morgan, Jr., Chairman
Honorable Gordon Gray, Assistant Secretary of the Army
(Dec. 28 meeting)
Honorable W. John Kenney, Under Secretary of the Navy
Honorable Eugene M. Zuckert, Assistant Secretary of the
Air Force

Mr. Felix E. Larkin, Executive Secretary

Others in Attendance:

Colonel John F. Dinsmore, Department of the Army
Mr. Robert Haydock, Office of the Secretary of Defense
Colonel Stewart S. Maxey, Department of the Air Force
Mr. Charles H. Mayer, Special Assistant to Mr. Kenney
Mr. Robert S. Pasley, Counsel, Office of Naval Research
(Dec. 28 meeting)
Mr. J. Joseph Whelan, Office of the Secretary of Defense
Captain Edwin E. Woods, Assistant Judge Advocate,
Department of the Navy

The Committee considered and approved, some with amendments and editorial changes, the following Articles. The particular changes are noted in the formal minutes of the Committee and, where necessary, will be reflected in revised drafts.

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<u>ARTICLE</u>	<u>DATE</u>	<u>SUBJECT</u>
10A	12/15/48	Reports and Receiving of Prisoners
11	12/27/48	Places of Confinement
14	12/23/48	Delivery of Offenders to Civil Authorities
26	12/23/48	Jurisdiction of Courts-Martial -- Summary Courts-Martial
29	12/23/48	Former Jeopardy
55	12/23/48	Who May Act As Convening Authority
55A	12/23/48	Action on General Court-Martial Records
55B	12/23/48	Revision
55C	12/23/48	Rehearings
55D	12/23/48	Approval By the Convening Authority
55E	12/23/48	Disposition of Records After Review by the Convening Authority
56A	12/22/48	Branch Offices
60D	12/20/48	Restoration
60E	12/23/48	Finality of Court-Martial Judgments
64B	12/16/48	Hard Labor Included in Confinement
124	12/9/48	Dismissal of Officers, Etc.
127	12/14/48	Redress of Injuries to Property
130	12/17/48	Courts of Inquiry

Punitive Articles (12/23/48) 93, 94, 95, 96, 97, 98, 99, 101, 105, 106

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In addition to the above, the Committee discussed Article 13A Illegal Punishment and decided that it should be deleted from the Code. The Committee observed that the objective here could be accomplished by reverting to and revising Article 13 Punishment Prohibited Before Trial (12/10/48).

In its discussion of Article 26 the Committee considered the principle of Article 63A Authorized Punishment and decided that it should be deleted. The Committee reasoned that since a general court-martial was a court of unlimited jurisdiction there was no necessity for spelling out the punishments which it may adjudge. Punishments by summary and special courts-martial will be provided for in Articles 25 and 26 by cloaking such courts with authority to adjudge any punishment which a general may adjudge but with enumerated exceptions. Articles 25 and 26 were amended to include provisions relative to hard labor without confinement.

The Committee was of the opinion that there is no necessity for providing for punishments authorized by the customs of the Services and that such language should be deleted from Articles 24 and 25.

Considerable discussion centered around the provision in Article 60D Restoration relative to the dismissal of an officer whose dismissal is set aside on subsequent review. Despite the personnel legislation which might be affected, it was decided that in such instances the officer could be re-appointed by the President in such grade and precedence as he finds appropriate to correct the injustice. This same principle will be embodied in a revision of Article 124 Dismissal of Officers, Etc.

The Committee approved the text of Article 97 Drunk On Duty but explored the implications of the word "drunk." It decided that there should be comments to the Code, similar to those contained in the Army Court-Martial Manual, to the effect that intoxication may result from Marijuanas and the like.

It was decided to define the civil crimes and, if possible, to base such definitions on the Penal Law of the State of New York.

On behalf of Mr. Gray, and in his absence, Mr. Larkin reported that Mr. Gray was of the opinion that the substance of Article of War 62, relative to the use by officers of disrespectful and contemptuous language about the President, members of

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Congress, etc., should be included in the Code with such punishment as a court-martial directs. He also indicated that Mr. Gray was of the opinion that Article 75 Disrespect For Superior should cover instances of superior officers in rank and command. The Committee assented.

The Committee will again meet on Thursday, 13 January 1949 at 2:00 p.m. and Friday, 14 January 1949 at 10:00 a.m.

Whereupon the Committee adjourned at 5:00 p.m. on 28 December and at 11:45 a.m. on 29 December.

FELIX E. LARKIN
Executive Secretary

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OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON

RESTRICTED

January 10, 1949

MEMORANDUM FOR: THE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE

Professor Edmund M. Morgan ←
Chairman

Honorable Gordon Gray
Department of the Army Member

Honorable W. John Kenney
Department of the Navy Member

Honorable Eugene M. Zuckert
Department of the Air Force Member

SUBJECT: Agenda for the meeting of the Committee on a Uniform Code of Military Justice on THURSDAY, JANUARY 13, 1949, at 2:00 p.m., and FRIDAY, JANUARY 14, 1949, at 10:00 a.m., in Room 3-E-689 of The Pentagon.

Attached is the semi-final run of the text of the Uniform Code of Military Justice, which will constitute the agenda of the Committee.

Twenty copies of this draft have been supplied to each of the Departments to enable them to reflect final comments and suggestions.

This draft contains the latest revision of language and, except for certain definitions of civil crimes, has been considered several times by the Committee. In connection with the definitions of civil crimes not heretofore presented to the Committee, all but two or three have been approved by the Working Group. They will be considered before the Committee meeting.

Inasmuch as a large number of the Articles have been heretofore approved and no further changes have been made in them, it will probably not be necessary for the Committee to go over the whole Code, Article by Article. It is contemplated that each member will bring to the attention of the Committee any Article on which he has comment.

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A certain number of purely typographical errors have crept into the present redraft, and the Research Group and Working Group are reviewing the Code for the purpose of eliminating them. It would be appreciated if errors of this type are brought to my attention.

Felix E. Larkin

FELIX E. LARKIN
Executive Secretary
Committee on a Uniform Code of
Military Justice

Attachment
FEL:ls

RESTRICTED

FEB 3 1949

Date _____

TO: ✓ Mr. Edmund M. Morgan, Jr., Chairman
Mr. Gordon Gray, 4E 808
Mr. W. John Kenney, 4E 664
Mr. Eugene M. Zuckert, 4E 856
Mr. Felix E. Larkin, 3E 732

Col. John P. Dinsmore, 3C 886

Col. John E. Curry, Rm 2143,
Main Navy Bldg.

Lt. Col. Stewart S. Maxey 5E 271

Cdr. Halmar J. Webb, Rm 2126
1300 E St. NW.

Mr. Robert S. Pasley, Rm 1813,
Navy Bldg. T-3

Mr. Robert W. Smart, Rm 313, Old
House Office Bldg.

Mr. Robert Haydock, 3D 735

Mr. Joseph D. Sullivan, 3D 739

Mr. Edward M. Shafer, 3D 739

Mr. Samuel Moskowitz, 3D 739

FOR: Information _____ ✓

Inc. in Notebooks _____

Other _____

FROM: J. Joseph Whelan
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COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE
MINUTES OF MEETING
13 JANUARY 1949 - ROOM 3E-689 - 2:00 P.M.

Members in Attendance:

Professor Edmund M. Morgan, Jr., Chairman
Honorable Gordon Gray, Assistant Secretary of the Army
Honorable W. John Kenney, Under Secretary of the Navy
Honorable Eugene M. Zuckert, Assistant Secretary of the
Air Force

Mr. Felix E. Larkin, Executive Secretary

Others in Attendance:

Colonel John P. Dinsmore, Department of the Army
Mr. Robert Haydock, Office of the Secretary of Defense
Colonel Stewart S. Maxey, Department of the Air Force
Mr. Charles H. Mayer, Special Assistant to Mr. Kenney
Mr. Robert S. Pasley, Counsel, Office of Naval Research
Captain Edwin E. Woods, Assistant Judge Advocate,
Department of the Navy

The Committee considered and approved with amendments and editorial changes, the text of the Uniform Code dated 1/7/49.

The more important decisions of the Committee are as follows:

Art. 1. Add definitions of midshipman, law officer, law specialist, and legal officer. The definition of "accuser" was amended to include a person who has other than an official interest in the prosecution.

Art. 2. Paragraph (4) was split into two sections. One dealing with retired Regulars and the other dealing with retired reserve personnel receiving hospital benefits.

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Paragraph (10) is to conform to present Army language and interpretation.

Art. 3. The second sentence of (a) was deleted as unnecessary.

Art. 4. The Secretary of the Department was substituted for the JAG and the article is to be rewritten to conform to Article 75.

Art. 6. Language of (a) was revised to make clear that JAG did not actually assign personnel.

Art. 15. Subdivision (b) is to be rewritten to allow the Secretary of a Department to give an option to refuse punishment under Article 15 by regulation.

Art. 22. Subdivision (b) is to be changed by inserting "accuser" as redefined.

Art. 23. Change (b) to conform to Article 22.

Art. 24. Add paragraph to permit Secretary to empower commanding officers and officers in charge to convene summary courts-martial.

Art. 28. Insert "convening authority" in lieu of "president". Use "convening authority" throughout Code in lieu of "appointing authority".

Art. 29. Add provision for special courts-martial and provide for action where a complete record is not kept.

Art. 32. In (c) delete "if agreeable to the accused" and revise language to allow accused to request further investigation.

Art. 38. In (c) change "attach" to "forward for attachment".

Art. 39. Article is to be redrafted to avoid use of terms "open" and "closed".

Art. 42. Oaths are to be specified by regulations.

Art. 43. Subdivision (d) is to be changed to read "absent from the power of the United States to subject him to its jurisdiction" or similar language.

Art. 51. Subdivision (b) is to be reworded as in previous draft. In (c) delete "law of the case".

Art. 54. Delete (d) and incorporate in Article 65. Reword (a) so that law officer shall authenticate general court-martial record instead of trial counsel.

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Art. 57. Working Group is permitted to make further change in Article 57.

Art. 66. Add language in (g) to allow Judge Advocates General to prescribe rules of procedure before Boards of Review.

Art. 75. Subdivisions (a) and (b) consolidated by language proposed by Professor Morgan. Last sentence of Article is modified to allow a restored officer to receive pay and allowances for period between dismissal and restoration.

Art. 99. Add "military property" in paragraphs (2) and (3).

Art. 108. Deleted.

Art. 111. Redraft to include negligent hazard and to eliminate aircraft.

Art. 117. Deleted.

Art. 136. Oaths are to be specified in regulations.

Art. 137. Add clause in (a) similar to (b) (6).

Art. 138. Deleted.

Art. 139. Delete clause requiring Articles to be read and explained every six months.

Art. 140. Article to be made discretionary and \$500 limit deleted.

Numerous other changes in phraseology were made which will be reflected in the final drafts of the Code.

The Committee adjourned at 3:30 P.M. on January 14, 1949.

FELIX E. LARKIN
Executive Secretary

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