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# UNIFORM CODE ————— of ————— MILITARY JUSTICE



Text, References and Commentary  
based on the Report of the  
Committee on a Uniform Code of  
Military Justice to  
The Secretary of Defense

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### Abbreviations

The following abbreviations are used in the references and commentaries to this Code:

"AW" refers to the Articles of War, 41 Stat. 787 to 811 as amended, 10 U.S.C. §§ 1471-1593 (1946) as amended by Pub. L. 759, 80th Cong., 2nd Sess, (1948).

"AGN" refers to the Articles for the Government of the Navy, Rev. Stat. § 1624 as amended, 34 U.S.C. § 1200 (1946).

"Proposed AGN" refers to S.1338, 80th Cong., 1st Sess. (1947).

"MCM" refers to The Manual for Courts-Martial, U.S. Army (1949).

"NC&B" refers to Naval Courts and Boards, U.S. Navy (1937).

"Naval Justice" refers to Naval Justice, U.S. Navy (1945).

"Keeffe Report" refers to the Report of the General Court-Martial Sentence Review Board to the Secretary of the Navy, U.S. Navy (1945).

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## Part. I. General Provisions

"ART. 1. Definitions.

The following terms when used in this Code shall be construed in the sense indicated in this Article, unless the context shows that a different sense is intended, namely:

(1) "Department" shall be construed to refer, severally, to the Department of the Army, the Department of the Navy, and the Department of the Air Force, and, except when the Coast Guard is operating as a part of the Navy, the Treasury Department;

(2) "Armed force" shall be construed to refer, severally, to the Army, the Navy, the Air Force, and except when operating as a part of the Navy, the Coast Guard;

(3) "Navy" shall be construed to include the Marine Corps and, when operating as a part of the Navy, the Coast Guard;

(4) "The Judge Advocate General" shall be construed to refer, severally, to The Judge Advocates General of the Army, Navy, and Air Force, and, except when the Coast Guard is operating as a part of the Navy, the General Counsel of the Treasury Department;

(5) "Officer" shall be construed to refer to a commissioned officer including a commissioned warrant officer;

(6) "Superior officer" shall be construed to refer to an officer superior in rank or command;

(7) "Cadet" shall be construed to refer to a cadet of the United States Military Academy or of the United States Coast Guard Academy;

(8) "Midshipman" shall be construed to refer to a midshipman at the United States Naval Academy and any other midshipman on active duty in the naval service;

(9) "Enlisted person" shall be construed to refer to any person who is serving in an enlisted grade in any armed force;

(10) "Military" shall be construed to refer to any or all of the armed forces;

(11) "Accuser" shall be construed to refer to a person who signs and swears to the charges and to any other person who has an interest other than an official interest in the prosecution of the accused;

(12) "Law officer" shall be construed to refer to an official of a general court-martial detailed in accordance with Article 26;

(13) "Law specialist" shall be construed to refer to an officer of the Navy or Coast Guard designated for special duty (law);

(14) "Legal officer" shall be construed to refer to any officer in the Navy or Coast Guard designated to perform legal duties for a command."

References:

AW 1  
Title 1 U.S.C. § 1 (1946), (words imparting singular  
number, masculine gender).  
NC&B, App. B-73

Commentary:

The definitions in this Article pertain only to this Code. In the interest of economy of draftsmanship certain words, such as "The Judge Advocate General," have been given special meanings.

For the purpose of this Code the Marine Corps and, when operating as part of the Navy, the Coast Guard, are considered part of the naval armed force. The term armed force includes all components.

A provision as to masculine and feminine gender is unnecessary in light of 1 U.S.C. § 1.

\* \* \* \* \*

"ART. 2. Persons Subject to the Code.

The following persons are subject to this Code:

(1) All persons belonging to a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; all volunteers and inductees, from the dates of their muster or acceptance into the armed forces of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty in or for training in, the armed forces, from the dates they are required by the terms of the call, draft, or order to obey the same;

- (2) Cadets, aviation cadets, and midshipmen;
- (3) Reserve personnel who are voluntarily on inactive duty training authorized by written orders;
- (4) Retired personnel of a regular component of the armed forces who are entitled to receive pay;
- (5) Retired personnel of a reserve component who are receiving hospital benefits from an armed force;
- (6) Members of the Fleet Reserve and Fleet Marine Corps Reserve;
- (7) All persons in custody of the armed forces serving a sentence imposed by a court-martial;
- (8) Personnel of the Coast and Geodetic Survey, Public Health Service, and other organizations, when serving with the armed forces of the United States;
- (9) Prisoners of war in custody of the armed forces;
- (10) In time of war, all persons serving with or accompanying an armed force in the field;
- (11) All persons serving with, employed by, accompanying, or under the supervision of the armed forces without the continental limits of the United States and the following territories: that part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands;

(12) All persons within an area leased by the United States which is under the control of the Secretary of a Department and which is without the continental limits of the United States and the following territories: that part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands."

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References:

AW 2  
 Proposed AGN, Art. 5(a)  
 R.S. § 1256 (1875), 10 U.S.C. § 1023 (1946),  
 (retired army officers)  
 40 Stat. 87 (1917), 33 U.S.C. § 855 (1946),  
 (Coast and Geodetic Survey)  
 R.S. § 1457 (1875), 34 U.S.C. § 389 (1946),  
 (retired naval officers)  
 52 Stat. 1180 (1938), 34 U.S.C. § 855 (1946),  
 (naval reserves)  
 52 Stat. 1176 (1938), 34 U.S.C. § 853d (1946),  
 (Fleet Reserve and retired reserves)  
 57 Stat. 41 (1943), 34 U.S.C. § 1201 (1946),  
 (non-military persons outside of the U.S.)  
 58 Stat. 690 (1944), 42 U.S.C. § 217 (1946),  
 (Public Health Service)

Commentary:

Paragraph (1) is an adaptation of AW 2(a). The term "inductees" has been added to make the paragraph consistent with Sec. 12 of P.L. 759, "Selective Service Act of 1948", 80th Cong., 2d Sess. (June 24, 1948), which provides: "No person shall be tried by court-martial in any case arising under this title unless such person has been actually inducted for training and service prescribed under this title . . . ."

Paragraph (2) is an adaptation of AW 2(b). See Article 1 for definitions of "cadet" and "midshipman."

Paragraph (3) is adapted from 34 U.S.C. § 855. The requirement that there be written orders is added for two reasons. First, the applicability of this Code to personnel on inactive duty training is desirable only with respect to certain types of training, such as weekend flight training, and the written orders will be used to distinguish the types. Secondly, the orders will be notice to the personnel concerned.

Paragraphs (4) and (5) have their sources in 10 U.S.C. § 1023 and 34 U.S.C. §§ 389, 853d. The power of the Navy over retired reserves has been reduced.

Paragraph (6) is the present law. See 34 U.S.C. § 853d.

Paragraph (7) is a slight modification of AW 2(e). It follows Art. 5(a) of the Proposed AGN by limiting applicability to those persons who are in custody of the armed forces.

Paragraph (8) is drawn from 33 U.S.C. § 855 and 42 U.S.C. § 217.

Paragraph (9) is consistent with Articles 45 and 64 of the Geneva Convention on Prisoners of War, 47 Stat. 2046, 2052 (July 27, 1929), in that the prisoners of war are subject to this Code and thereby have the same right of appeal as members of the armed forces.

Paragraph (10) is taken from AW 2(d). The phrase "in the field" has been construed to refer to any place, whether on land or water, apart from permanent encampments or fortifications, where military operations are being conducted. See In re Berue, 54 F. Supp. 252, 255 (S.D. Ohio 1944).

Paragraphs (11) and (12) are adapted from 34 U.S.C. § 1201, but are applicable in time of peace as well as war. Paragraph (11) is somewhat broader in scope than AW 2(d) in that the Code is made applicable to persons employed by or under the supervision of the armed forces as well as those serving with or accompanying the same and the territorial limitations during peace time have been reduced to include territories where a civil court system is not readily available.

Personnel of the Coast Guard are subject to this Code at all times as members of an armed force.

"ART. 3. Jurisdiction to Try Certain Personnel.

(a) Reserve personnel of the armed forces who are charged with having committed, while in a status in which they are subject to this Code, any offense against this Code may be retained in such status or, whether or not such status has terminated, placed in an active duty status for disciplinary action, without their consent, but not for a longer period of time than may be required for such action.

(b) All persons discharged from the armed forces subsequently charged with having fraudulently obtained said discharge shall be subject to trial by court-martial on said charge and shall be subject to this Code while in the custody of the armed forces for such trial. Upon conviction of said charge they shall be subject to trial by court-martial for all offenses under this Code committed prior to the fraudulent discharge.

(c) Any person who has deserted from the armed forces shall not be relieved from amenability to the jurisdiction of this Code by virtue of a separation from any subsequent period of service."

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References:

Proposed AGN, Art. 5(a)  
52 Stat. 1180 (1938), 34 U.S.C. § 855 (1946)  
MCM, par. 10  
NC&B, sec. 334

Commentary:

Subdivision (a) is substantially a reenactment of the present Navy law as set forth in 34 U.S.C. § 855. A similar provision is found in Art. 5(a) of the Proposed AGN.

Subdivision (b) is the statutory expression of the law as set out in MCM, par. 10 and NC&B, sec. 334. It differs from a similar provision in Art. 5(a) of the Proposed AGN in that it provides that a person who obtains a fraudulent discharge is not subject to this Code during the period between the discharge and later apprehension for trial of the issue.

Subdivision (c) is prompted by Ex parte Drainer, 65 F. Supp. 410 (N. D. Cal. 1946), which held that a discharge from the naval service barred prosecution of a person for desertion from the Marine Corps at a period prior to his enlistment in the Navy. See Art. 5(a) of the Proposed AGN.

\* \* \* \* \*

"ART. 4. Dismissed Officer's Right to Trial by Court-Martial.

(a) When any officer, dismissed by order of the President, makes a written application for trial by court-martial, setting forth, under oath, that he has been wrongfully dismissed, the President, as soon as practicable, shall convene a general court-martial to try such officer on the charges on which he was dismissed. A court-martial so convened shall have jurisdiction to try the dismissed officer on such charges, and he shall be held to have waived the right to plead any statute of limitations applicable to any offense with which he is charged. The court-martial may, as part of its sentence, adjudge the affirmance of the dismissal, but if the court-martial acquits the accused or if the sentence adjudged, as finally approved or affirmed, does not include

dismissal or death, the Secretary of the Department shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issuance.

(b) If the President fails to convene a general court-martial within six months from the presentation of an application for trial under this Article, the Secretary of the Department shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issuance.

(c) Where a discharge is substituted for a dismissal under the authority of this Article, the President alone may reappoint the officer to such commissioned rank and precedence as in the opinion of the President such former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to position vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and such reappointment shall be considered as actual service for all purposes, including the right to receive pay and allowances.

(d) When an officer is discharged from any armed force by administrative action or is dropped from the rolls by order of the President, there shall not be a right to trial under this Article."

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References:

AGN Art. 37  
R.S. § 1230 (1875), 10 U.S.C. § 573 (1946)

Commentary:

This Article should be read in conjunction with the provision being re-enacted in Sec. 10 of this Act. The right to trial will apply only in the case of a summary dismissal by order of the President in time of war. (Sec. 10 covers the provisions now found in AW 118 and AGN Art. 36)

If the President fails to convene a court-martial where there has been an application for trial, or if the court-martial convened does not adjudge dismissal or death as a sentence, the procedure followed will be the same as that prescribed in Article 75(d) where a previously executed sentence of dismissal is not sustained on a new trial. This changes the present statutory provisions set out in the references. The change is made because of the doubt, expressed by Winthrop and other commentators, as to the constitutionality of the present provision declaring that an order of dismissal, lawfully issued by the President, shall be void under certain circumstances. Under the proposed procedure it will be possible to achieve the same result -- that of restoring the officer.

No time limit has been set on when an application for trial must be submitted. The present statutory provision has been construed to require that the application be made within a reasonable time, which will vary according to circumstances. See Winthrop, Military Law and Precedents, 1920 Ed., p. 64; Digest of Opinions, Judge Advocate General of the Army, 1912-1940, Sec. 227.

\* \* \* \* \*

"Art. 5. Territorial Applicability of the Code.

This Code shall be applicable in all places."

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References:

Preamble, Articles of War  
Proposed AGN, Art. 5(c)

Commentary:

This Article re-enacts the present Army provision. It is not in conflict with the provisions in Art. 2(11) and 2(12) of this Code, which make certain persons subject to the Code only when they are outside the United States and also outside certain areas. The Code is applicable in all places as to other persons subject to it. Previous restrictive provisions on this subject in the AGN have given rise to jurisdictional problems which this language will correct. (See Keeffe Report, p. 262 ff.)

\* \* \* \* \*

"ART. 6. Judge Advocates and Legal Officers.

(a) The assignment for duty of all judge advocates of the Army and Air Force and law specialists of the Navy and Coast Guard shall be subject to the approval of The Judge Advocate General of the armed force of which they are members. The Judge Advocate General or senior members of his staff shall make frequent inspections in the field in supervision of the administration of military justice.

(b) Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is authorized to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with The Judge Advocate General.

(c) No person who has acted as member, law officer, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any

case shall subsequently act as a staff judge advocate or legal officer to any reviewing authority upon the same case."

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References:

AW 11, 47a

Commentary:

Subdivisions (a) and (b) are derived from AW 47a. There are no similar provisions in present Navy law. Subdivision (a) differs from AW 47a in order to make clear that orders assigning judge advocates do not have to be actually issued by The Judge Advocate General but shall be subject to his approval, although issued by the Adjutant General or Bureau of Naval Personnel.

The purpose of subdivision (a) is to place judge advocates and law specialists under the control of The Judge Advocate General. Subdivision (b) not only authorizes direct communication within military justice channels but also enhances the position of staff judge advocates and legal officers by requiring direct communication between such officers and their commanding officers.

Subdivision (c) which is based on the sixth proviso of AW 11, is designed to secure review by an impartial staff judge advocate or legal officer.

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## Part. II. Apprehension and Restraint

"ART. 7. Apprehension.

(a) Apprehension is the taking into custody of a person.

(b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this Code may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it.

(c) All officers, warrant officers, petty officers, and noncommissioned officers shall have authority to quell all quarrels, frays, and disorders among persons subject to this Code and to apprehend persons subject to this Code who take part in the same."

References:

AW 68  
Naval Justice, Chap. 6

Commentary:

This Article should be read in conjunction with Articles 8-14, which codify and enact present practice as to apprehension and restraint of persons subject to the Code.

Subdivisions (a) and (b) are new and relate in particular to military police. Subdivision (c) is derived from AW 68.

\* \* \* \* \*

"ART. 8. Apprehension of Deserters.

It shall be lawful for any civil officer having authority to apprehend offenders under the laws of the United States or of any State, District, Territory or possession of the United States summarily to apprehend a deserter from the armed forces of the United States and deliver him into the custody of the armed forces of the United States."

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References:

AW 106  
35 Stat. 622 (1909), 34 U.S.C. § 1011 (1946),  
(Arrest of Deserters)

Commentary:

This Article incorporates references with minor changes of language.

\* \* \* \* \*

"ART. 9. Imposition of Restraint.

(a) Arrest is the restraint of a person by an order directing him to remain within certain specified limits not imposed as a punishment for an offense. Confinement is the physical restraint of a person.

(b) An enlisted person may be ordered into arrest or confinement by any officer by an order delivered in person or through other persons subject to this Code. A commanding

officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted persons of his command or subject to his authority into arrest or confinement.

(c) An officer, a warrant officer, or a civilian subject to this Code may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated.

(d) No person shall be ordered into arrest or confinement except for probable cause.

(e) Nothing in this Article shall be construed to limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified."

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References:

AGN Arts. 43, 44  
MCM, par. 19, 20,  
Naval Justice, Chap. 7

Commentary:

Subdivision (a) clarifies the meaning of terms used by the armed forces. In present Army practice "arrest" refers both to apprehension and to a type of restraint. In Navy practice "close arrest" would fall within the definition of confinement.

Subdivisions (b), (c), and (d) incorporate present Army and Navy practice. See Article 97 for offense of unlawful detention.

Subdivision (e) is included to provide for custody of persons apprehended until proper authority is notified.

\* \* \* \* \*

"ART. 10. Restraint of Persons Charged with Offenses.

Any person subject to this Code charged with an offense under this Code shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, such person shall not ordinarily be placed in confinement. When any person subject to this Code is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."

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References:

AW 69, 70  
AGN Art. 43, 44.  
Naval Justice, p. 77-78.

Commentary:

This Article is derived from AW 69 and 70, and conforms to present naval practice. The provision as to notification of the accused is new.

"ART. 11. Reports and Receiving of Prisoners.

(a) No provost marshal, commander of a guard, or master at arms shall refuse to receive or keep any prisoner committed to his charge by an officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner.

(b) Every commander of a guard or master at arms to whose charge a prisoner is committed shall, within twenty-four hours after such commitment or as soon as he is relieved from guard, report to the commanding officer the name of such prisoner, the offense charged against him, and the name of the person who ordered or authorized the commitment."

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References:

AW 71, 72

Commentary:

This Article is derived from AW 71 and 72. See Articles 95-97 dealing with restraint.

\* \* \* \* \*

"ART. 12. Confinement with Enemy Prisoners Prohibited.

No member of the armed forces of the United States shall be placed in confinement in immediate association with

enemy prisoners or other foreign nationals not members of the armed forces of the United States."

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References:

AW 16

Commentary:

AW 16 could be interpreted to prohibit the confinement of members of the armed forces in a brig or building which contains prisoners of war. Such construction would prohibit putting naval personnel in the brig of a ship if the brig contained prisoners from an enemy vessel. This Article is intended to permit confinement in the same guardhouse or brig, but would require segregation.

\* \* \* \* \*

"ART. 13. Punishment Prohibited Before Trial.

Subject to the provisions of Article 57, no person, while being held for trial or the results of trial, shall be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to punishment during such period for minor infractions of discipline."

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References:

AW 16  
MCM; par. 19  
Naval Justice, p. 78

Commentary:

This Article is derived from AW 16. The reference to Article 57 clarifies the relation of this Article to the effective date of sentences. AW 16 has been interpreted to prohibit the enforcement of any sentence until after final approval even though the accused is in confinement after the sentence is adjudged. It is felt that a person who has been sentenced by a court-martial and is in confinement which counts against the sentence should not draw full pay for the period between the date of sentence and the date of final approval.

The provision as to the rigor of restraint is derived from present Army and Navy practice. The Article also makes clear that a person being held for trial may be punished for offenses not warranting trial by court-martial.

\* \* \* \* \*

"ART. 14. Delivery of Offenders to Civil Authorities.

(a) Under such regulations as the Secretary of the Department may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.

(b) When delivery under this Article is made to any civil authority of a person undergoing sentence of a court-martial, such delivery, if followed by conviction in a civil tribunal, shall be held to interrupt the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for his offense shall,

upon request, be returned to military custody for the completion of the said court-martial sentence."

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References:

AW 74  
NC&B, App. C

Commentary:

Subdivision (a) is an adoption of present Navy practice. The present Army practice was adopted at a time when the Army did not have authority to try its personnel for civil offenses in time of peace so that if a man were not delivered up he would not be tried at all. Since the armed forces now have such authority, the mandatory feature of AW 74 is felt to be unnecessary. Under the Navy practice, which has worked very satisfactorily, the Secretary of the Navy has given broad authority to commanding officers to effect deliveries of enlisted personnel without reference to the Navy Department. (See Alnav 145 of 26 June 1947).

Subdivision (b) adopts present Army practice.

Attention is invited to the provisions in Appendix C, Naval Courts and Boards which deal with the procedure for delivering offenders, and related matters. It is contemplated that these matters will be covered by uniform regulations for the armed forces.

\* \* \* \* \*

## Part. III. Non-Judicial Punishment

"ART. 15. Commanding Officer's Non-Judicial Punishment.

(a) Under such regulations as the President may prescribe any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one of the following disciplinary punishments for minor offenses without the intervention of a court-martial -

(1) upon officers and warrant officers of his command:

(A) withholding of privileges for a period not to exceed two consecutive weeks; or

(B) restriction to certain specified limits, with or without suspension from duty, for a period not to exceed two consecutive weeks; or

(C) if imposed by an officer exercising general court-martial jurisdiction, forfeiture of one-half of his pay per month for a period not exceeding three months.

(2) upon other military personnel of his command:

(A) withholding of privileges for a period not to exceed two consecutive weeks; or

(B) restriction to certain specified limits, with or without suspension from duty, for a period not to exceed two consecutive weeks; or

(C) extra duties for a period not to exceed two consecutive weeks, and not to exceed two hours per day, holidays included; or

(D) reduction to next inferior grade if the grade from which demoted was established by the command or an equivalent or lower command; or

(E) confinement for a period not to exceed seven consecutive days; or

(F) confinement on bread and water or diminished rations for a period not to exceed five consecutive days; or

(G) if imposed by an officer exercising special court-martial jurisdiction, forfeiture of one-half of his pay for a period not exceeding one month.

(b) The Secretary of a Department may, by regulation, place limitations on the powers granted by this Article with respect to the kind and amount of punishment authorized, the categories of commanding officers authorized to exercise such powers, and the applicability of this Article to an accused who demands trial by court-martial.

(c) An officer in charge may, for minor offenses, impose on enlisted persons assigned to the unit of which he is in charge, such of the punishments authorized to be imposed by commanding officers as the Secretary of the Department may by regulation specifically prescribe.

(d) A person punished under authority of this Article who deems his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The officer who imposes the punishment, his successor in command, and superior authority shall have power to suspend, set aside, or remit any part or amount of the punishment and to restore all rights, privileges, and property affected.

(e) The imposition and enforcement of disciplinary punishment under authority of this Article for any act or omission shall not be a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this Article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty."

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References:

AW 104  
AGN Arts. 24, 25  
Proposed AGN, Art. 14

Commentary:

This Article is a combination and revision of AW 104 and Proposed AGN, Art. 14. The punishments authorized by these

two provisions are combined in subdivision (a), while subdivision (b) empowers the Secretary of the Department to place limitations on their imposition. This recognizes the fact that the authority to administer all the punishments specified may be necessary in one armed force and needlessly broad in another. The problem can be illustrated by reference to one punishment, namely, restriction to specified limits. This punishment would be an effective sanction at a camp or post, but would carry little weight on a ship at sea.

Subdivision (b) also empowers the Secretary of the Department to permit members of the armed force to elect trial by court-martial in place of proceedings under this Article. This recognizes a difference in present practice among the armed forces. The Navy allows no election on the theory that the commanding officer's punishment relates entirely to discipline, not crime; furthermore, in the Navy the officer who has summary court-martial jurisdiction is the same officer who imposes punishment under this Article. In the Army, on the other hand, a company commander with power under this Article ordinarily will not have summary court-martial jurisdiction.

Subdivision (c) permits the Secretary of a Department to authorize officers in charge to impose certain punishments under this Article. The status and authority of officers in charge differs according to the command of which they are in charge.

Subdivision (d) incorporates and strengthens the provisions of AW 104 as to appeal and review. Appeals are to be promptly forwarded and decided. In addition reviewing authorities are permitted not only to remit the unexecuted portion of the punishment, but also to restore all rights adversely affected by the punishment previously executed.

This subdivision is new to the Navy and Coast Guard.

Subdivision (e) is derived from AW 104. Under present Navy practice, punishment by a commanding officer is never a bar to trial by court-martial although evidence of such punishment may be introduced in mitigation.

\* \* \* \* \*

## Part. IV. Courts-Martial Classified

"ART. 16. Courts-Martial Classified.

There shall be three kinds of courts-martial in each of the armed forces, namely:

(1) General courts-martial, which shall consist of a law officer and any number of members not less than five;

(2) Special courts-martial, which shall consist of any number of members not less than three; and

(3) Summary courts-martial, which shall consist of one officer."

- - - - -

References:

AW 3, 5, 6, 7  
AGN Arts. 27, 39, 64

Commentary:

This Article consolidates provisions as to types of courts-martial and number of members. As the term "summary" is felt to be more appropriate for a court of one member than for a court of three members, present Army and Air Force terminology is retained. Maximum limits are believed unnecessary. The law officer of a general court-martial replaces the law member under the present Articles of War. The law officer is specified in paragraph (1) to show that he is not a "member". See also Articles 26, 39, and 51.

\* \* \* \* \*

"ART. 17. Jurisdiction of Courts-Martial in General.

(a) Each armed force shall have court-martial jurisdiction over all persons subject to this Code. The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President.

(b) In all cases, departmental review subsequent to that by the officer with authority to convene a general court-martial for the command which held the trial, where such review is required under the provisions of this Code, shall be carried out by the armed force of which the accused is a member."

References:

None

Commentary:

Subdivision (a) authorizes reciprocal jurisdiction among the armed forces, but makes the exercise of such jurisdiction by any force subject to regulations prescribed by the President. Such regulations will enumerate those situations in which one armed force may try personnel of another armed force. This method of providing for the exercise of reciprocal jurisdiction permits flexibility, in that new situations for which the exercise of such jurisdiction may be desirable, can be provided for as they arise.

The provision in subdivision (b) is particularly applicable to cases where reciprocal jurisdiction has been exercised and is therefore placed in this Article. The same practice will be followed in all court-martial cases, however.

The disposition of records under Article 65 is controlled by this subdivision.

\* \* \* \* \*

"ART. 18. Jurisdiction of General Courts-Martial.

Subject to Article 17, general courts-martial shall have jurisdiction to try persons subject to this Code for any offense made punishable by this Code and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this Code. General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."

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References:

AW 12  
Proposed AGN, Art. 23

Commentary:

This Article is derived from AW 12. The punishments which may be adjudged are changed from those "authorized by law or the customs of the service" to those "not forbidden by this Code" because the law and customs of each of the services differ. Cruel and unusual punishments are forbidden in the Code; other punishments which may be adjudged will be made uniform by the regulations prescribed by the President under Article 56.

\* \* \* \* \*

"ART. 19. Jurisdiction of Special Courts-Martial.

Subject to Article 17, special courts-martial shall have jurisdiction to try persons subject to this Code for any non-capital offense made punishable by this Code and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this Code except death, dishonorable discharge, dismissal, confinement in excess of six months, hard labor without confinement in excess of three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for a period exceeding six months. A bad conduct discharge shall not be adjudged unless a complete record of the proceedings and testimony before the court has been made."

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References:

AW 13  
Proposed AGN, Arts. 17, 20

Commentary:

This Article is derived from AW 13. Special courts-martial are given the authority to try capital cases under such regulations as the President may prescribe instead of when the officer with general court-martial jurisdiction over the case authorizes it. The Navy proposes this procedure so that prior blanket authority may be obtained for capital offenses to be tried by special courts aboard ship where circumstances make

it desirable, since it is not practicable to refer such a case to the officer with general court-martial jurisdiction. Death is added to the list of punishments which a special court-martial may not adjudge, to cover the cases where a special court tries what would otherwise be a capital case. Other restrictions on punishment are adopted from AW 13. It is intended that special courts-martial shall not have jurisdiction to try offenses for which a mandatory punishment has been prescribed by this Code.

The provision in AW 13 that a bad conduct discharge adjudged by a special court-martial is subject to approval by an officer with general court-martial jurisdiction has been deleted from this Article. The review of special courts-martial records and the execution of sentences are covered in Articles 65, 66, and 71 of this Code.

\* \* \* \* \*

"ART. 20. Jurisdiction of Summary Courts-Martial.

Subject to Article 17, summary courts-martial shall have jurisdiction to try persons subject to this Code except officers, warrant officers, cadets, aviation cadets, and midshipmen for any non-capital offense made punishable by this Code, but no person who objects thereto shall be brought to trial before a summary court-martial unless he has been permitted to refuse punishment under Article 15. Where such objection is made by the accused, trial shall be ordered by special or general court-martial, as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this Code except death, dismissal, dishonorable or bad conduct discharge, confinement in excess of one month, hard labor

without confinement in excess of forty-five days, restriction to certain specified limits in excess of two months, or forfeiture of pay in excess of two-thirds of one month's pay."

- - - - -

References:

AW 14  
Proposed AGN, Art. 15, 16

Commentary:

This Article is derived from AW 14. The right to refuse trial by summary court-martial is made absolute, except for the case where the person has been permitted to refuse punishment under Article 15.

\* \* \* \* \*

"ART. 21. Jurisdiction of Courts-Martial Not Exclusive.

The provisions of this Code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals."

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References:

AW 15  
Proposed AGN, Art. 5(f)

Commentary:

The language of AW 15 has been preserved because it has been construed by the Supreme Court. See Ex Parte Quirin, 317 U.S. 1 (1942).

\* \* \* \* \*

## Part V. Appointment and Composition of Courts-Martial.

"ART. 22. Who May Convene General Courts-Martial.

(a) General courts-martial may be convened by --

(1) the President of the United States;

(2) the Secretary of a Department;

(3) the commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army;

(4) the Commander in Chief of a Fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the continental limits of the United States;

(5) the commanding officer of an Air Command, an Air Force, an air division, or a separate wing of the Air Force;

(6) such other commanding officers as may be designated by the Secretary of a Department; or

(7) any other commanding officer in any of the armed forces when empowered by the President.

(b) When any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority when deemed desirable by him."

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References:

AW 8  
AGN Art. 38

Commentary:

This Article is derived from AW 8. Provisions for Navy, Coast Guard, and Air Force convening authorities are added. Paragraphs (6) and (7) permit the President and the Secretaries of the Army, Navy, Air Force, and Treasury (for the Coast Guard in peacetime) to empower other commanding officers to convene general courts-martial. See Article 1 for definition of "Department."

Subdivision (b) is derived from AW 8. The word "accuser" is used in place of "accuser or prosecutor", and "accuser" is defined in Article 1 in order to clarify its meaning.

\* \* \* \* \*

"ART. 23. Who May Convene Special Courts-Martial.

- (a) Special courts-martial may be convened by --
- (1) any person who may convene a general court-martial;
  - (2) the commanding officer of a district, garrison, fort, camp, station, Air Force base, auxiliary airfield, or other place where members of the Army or Air Force are on duty;
  - (3) the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;
  - (4) the commanding officer of a wing, group, or separate squadron of the Air Force;
  - (5) the commanding officer of any naval or Coast Guard vessel, shipyard, base, or station; or of any marine brigade, regiment or barracks;
  - (6) the commanding officer of any separate or detached command or group of detached units

of any of the armed forces placed under a single commander for this purpose; or

(7) the commanding officer or officer in charge of any other command when empowered by the Secretary of a Department.

(b) When any such officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority when deemed advisable by him."

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References:

AW 9  
AGN Art. 26

Commentary:

This Article is derived from AW 9. Provisions for all the armed forces have been added. An "officer in charge" is an officer of the naval service or Coast Guard who is not known by the title of "commanding officer" but exercises similar authority. Subdivision (b) conforms to Article 22.

\* \* \* \* \*

"ART. 24. Who May Convene Summary Courts-Martial.

(a) Summary courts-martial may be convened by --

(1) any person who may convene a general or special court-martial;

(2) the commanding officer of a detached company, or other detachment of the Army;

(3) the commanding officer of a detached

squadron or other detachment of the Air Force;  
or

(4) the commanding officer or officer in charge of any other command when empowered by the Secretary of a Department.

(b) When but one officer is present with a command or detachment he shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases brought before him. Summary courts-martial may, however, be convened in any case by superior competent authority when deemed desirable by him."

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References:

AW 10  
AGN Art. 64  
Proposed AGN, Art. 15

Commentary:

This Article is derived from AW 10. Provisions for all the armed forces have been added. It is felt appropriate that all persons empowered to convene superior courts-martial should also have power to convene inferior courts-martial.

\* \* \* \* \*

"ART. 25. Who May Serve on Courts-Martial.

(a) Any officer on active duty with the armed forces shall be competent to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty with the armed forces shall be competent to serve on general and special courts-martial for the trial of any person, other than an officer, who may lawfully be brought before such courts for trial.

(c) Any enlisted person on active duty with the armed forces who is not a member of the same unit as the accused shall be competent to serve on general and special courts-martial for the trial of any enlisted person who may lawfully be brought before such courts for trial, but he shall be appointed as a member of a court only if, prior to the convening of such court, the accused has requested in writing that enlisted persons serve on it. After such a request, no enlisted person shall be tried by a general or special court-martial the membership of which does not include enlisted persons in a number comprising at least one-third of the total membership of the court, unless competent enlisted persons cannot be obtained on account of physical conditions or military exigencies. Where such persons cannot be obtained, the court may be convened and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

For the purposes of this Article, the word "unit"

shall mean any regularly organized body as defined by the Secretary of the Department, but in no case shall it be a body larger than a company, a squadron, or a ship's crew, or than a body corresponding to one of them.

(d)(1) When it can be avoided, no person in the armed forces shall be tried by a court-martial any member of which is junior to him in rank or grade.

(2) When convening a court-martial, the convening authority shall appoint as members thereof such persons as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. 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 or has acted as investigating officer or as counsel in the same case."

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References:

AW 4, 16  
AGN Art. 39  
Proposed AGN, Art. 24(a)

Commentary:

Subdivisions (a), (b), and (c) make officers, warrant officers, and enlisted persons competent to sit on the courts-martial of any armed force, without regard to whether they are members of the same armed force as the convening authority, or of the same armed force as the accused. Placing no limitation on competency in this respect will give the convening authority a maximum number of persons to draw on for membership of a court-martial in a situation where he is in command over several

small units of different armed forces, or will permit the appointment to a court of persons belonging to the same armed force as the accused in a case in which reciprocal jurisdiction is being exercised. In such cases it is contemplated that the President's regulations on reciprocal jurisdiction will specify what percentage of members will be from the same armed force as the accused. (See Article 17). As a practical matter, the appointment of mixed courts will not be a common practice.

Subdivision (c) limits the competency of enlisted persons to cases where they are not members of the same unit as the accused. By Section 212 of Public Law 759, 80th Congress, 2d Session (1948) (see AW 16) Congress similarly limited competency to enlisted persons not assigned to the same company or corresponding military unit. A corresponding military unit aboard a ship is felt to be the ship's crew, which, though it may in some cases be a larger group than the Army company, is the same kind of integrated body, living and working in close association.

The last sentence of the first paragraph of subdivision (c) was added to make it possible to proceed with a trial where competent enlisted persons cannot be obtained. This is to avoid long delays in the administration of justice and the expensive process, which might otherwise be necessary, of transporting witnesses or court members great distances. Such delays and expenses would arise in connection with offenses committed on ships at sea or in isolated units ashore, such as remote weather stations. The language of the subdivision makes it clear that mere inconvenience is no ground for proceeding with a trial without enlisted persons on the court, and the requirement of a detailed written statement of the ground insures that the purpose of the subdivision will be complied with.

\* \* \* \* \*

"ART. 26. Law Officer of a General Court-Martial.

(a) The authority convening a general court-martial shall appoint as law officer thereof an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States and who is certified to be qualified for such duty by The Judge

Advocate General of the armed force of which he is a member. No person shall be eligible to act as law officer in a case when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(b) The law officer shall not consult with the members of the court, other than on the form of the findings as provided in Article 39, except in the presence of the accused, trial counsel, and defense counsel, nor shall he vote with the members of the court."

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References:

AW 8  
Proposed AGN, Art. 24(b)

Commentary:

This Article is derived from AW 8 with modifications. The law officer is required to be a member of the bar whether or not he is a judge advocate or law specialist. The change in the position of the law officer is reflected in subdivision (b) which requires the accused and counsel to be present when the law officer consults with the court, other than on the form of the findings, and states that the law officer shall not be a voting member of the court. See Article 51 as to rulings and duties of the law officer and Article 39 as to when the law officer must be present.

\* \* \* \* \*

"ART. 27. Appointment of Trial Counsel and Defense Counsel.

(a) For each general and special court-martial the authority convening the court shall appoint a trial counsel and a defense counsel, together with such assistants as he deems necessary or appropriate. No person who

has acted as investigating officer, law officer, or court member in any case shall act subsequently as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant defense counsel in the same case. No person who has acted for the prosecution shall act subsequently in the same case for the defense, nor shall any person who has acted for the defense act subsequently in the same case for the prosecution.

(b) Any person who is appointed as trial counsel or defense counsel in the case of a general court-martial --

(1) shall be a judge advocate of the Army or the Air Force, or a law specialist of the Navy or Coast Guard, or a person who is a member of the bar of a Federal court or of the highest court of a State; and

(2) shall be certified as competent to perform such duties by The Judge Advocate General of the armed force of which he is a member.

(c) In the case of a special court-martial --

(1) if the trial counsel is certified as competent to act as counsel before a general court-martial by The Judge Advocate General of the armed force of which he is a member, the

defense counsel appointed by the convening authority shall be a person similarly certified; and

(2) if the trial counsel is a judge advocate, or a law specialist, or a member of the bar of a Federal court or the highest court of a State, the defense counsel appointed by the convening authority shall be one of the foregoing."

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References:

AW 11  
Proposed AGN, Arts. 18(b), 24(b)

Commentary:

Subdivision (a) of this Article incorporates the opening clause and the fourth and fifth provisos of AW 11. The trial judge advocate is renamed the trial counsel, and the right of the accused to have a person requested by him act as defense counsel is subject to the availability of that person. See Article 38.

Paragraph (1) of subdivision (b) incorporates the first proviso of AW 11, but the requirement that counsel be qualified as set forth therein is no longer subject to the exception allowed where such qualified persons are not available. Paragraph (2) of this subdivision, the requirement that counsel be certified by The Judge Advocate General, is drawn from Art. 24(b) of the Proposed AGN.

Subdivision (c) is based on the second proviso of AW 11. It is made applicable only to special courts-martial, since the qualification requirements in subdivision (b) with respect to counsel for general courts-martial are not subject to exception.

The third proviso of AW 11, which has to do with the right of the accused to counsel of his own selection, is covered in Article 38, while the sixth proviso, which limits who may act as the staff judge advocate of the reviewing authority, is found in Article 6.

\* \* \* \* \*

"ART. 28. Appointment of Reporters and Interpreters.

Under such regulations as the Secretary of the Department may prescribe, the convening authority of a court-martial or military commission or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission. Under like regulations the convening authority of a court-martial, military commission, or court of inquiry may appoint an interpreter who shall interpret for the court or commission."

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References:

AW 115  
NC&B, sec. 361

Commentary:

This Article is derived from AW 115. The power to appoint, however, has been shifted from the president of the court to the convening authority since the latter will have control of the available personnel.

\* \* \* \* \*

"ART. 29. Absent and Additional Members.

(a) No member of a general or special court-martial shall be absent or excused after the accused has

been arraigned except for physical disability or as a result of a challenge or by order of the convening authority for good cause.

(b) Whenever a general court-martial is reduced below five members, the trial shall not proceed unless the convening authority appoints new members sufficient in number to provide not less than five members. When such new members have been sworn, the trial may proceed after the recorded testimony of each witness previously examined has been read to the court in the presence of the law officer, the accused, and counsel.

(c) Whenever a special court-martial is reduced below three members, the trial shall not proceed unless the convening authority appoints new members sufficient in number to provide not less than three members. When such new members have been sworn, the trial shall proceed as if no evidence had previously been introduced, unless a verbatim record of the testimony of previously examined witnesses or a stipulation thereof is read to the court in the presence of the accused and counsel."

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References:

AGN Art. 46  
Proposed AGN, Art. 27  
MCM, par. 38  
NC&B, sec. 375-8

Commentary:

This Article is based on Proposed AGN, Art. 27 and limits the reasons for excusing members of general and special courts-martial.

Subdivisions (b) and (c) specify the procedure for replacing absent members of general and special courts-martial. Where a complete transcript of the testimony is kept, only the record need be read to the new members. However, in special court-martial cases where a complete record is not kept, only such previous evidence as is stipulated by the parties may be deemed to have been introduced.

New members are subject to challenge for cause and if the parties have not used their peremptory challenges, are subject to peremptory challenge.

\* \* \* \* \*

Part VI. Pre-Trial Procedure

"ART. 30. Charges and Specifications.

(a) Charges and specifications shall be signed by a person subject to this Code under oath before an officer of the armed forces authorized to administer oaths and shall state -

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(2) that the same are true in fact to the best of his knowledge and belief.

(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable."

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References:

AW 46a  
AGN Art. 43

Commentary:

This Article should be read in conjunction with Articles 31-35 which deal with procedures before trial.

Subdivision (a) is derived from AW 46a and is new for the Navy. Subdivision (b) requires disposition

of the charges as soon as possible and provides for the notification of the accused. Article 98 makes it an offense to unnecessarily delay the disposition of a case.

\* \* \* \* \*

"ART. 31. Compulsory Self-Incrimination Prohibited.

(a) No person subject to this Code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this Code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement at all regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this Code shall compel any person to make a statement or produce evidence before or for use before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this Article or by any unlawful inducement shall be received in evidence against him in a trial by court-martial."

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References:

AW 24  
AGN Art. 42(c)

Commentary:

Subdivision (a) extends the privilege against self-incrimination to all persons under all circumstances. Under present Army and Navy provisions only persons who are witnesses are specifically granted the privilege. Subdivision (b) broadens the comparable provision in AW 24 to protect not only persons who are accused of an offense but also those who are suspected of one. Subdivision (c) is similar to AW 24 in that the privilege against self-degradation is granted to witnesses before a military tribunal and persons who make depositions for use before a military tribunal. It is made clear that this privilege cannot be invoked where the evidence is material to the issue -- where it might be crucial in the determination of the guilt or innocence of an accused. Subdivision (d) makes statements or evidence obtained in violation of the first three subdivisions inadmissible only against the person from whom they were obtained. This conforms with the theory that the privilege against self-incrimination and self-degradation is a personal one.

The intentional violation of any of the provisions of this Article constitutes an offense punishable under Article 98.

It is unnecessary to provide in this Article that the failure of an accused to testify does not create a presumption against him. See Title 18, U.S.C. § 3481.

\* \* \* \* \*

"ART. 32. Investigation.

(a) No charge or specification shall be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiries as to the truth of the matter set forth in the charges, form of charges, and the

disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and shall be permitted, upon his own request, to be represented at such investigation by civilian counsel if provided by him, or military counsel of his own selection if such counsel be reasonably available, or by counsel appointed by the officer exercising general court-martial jurisdiction over the command. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted prior to the time the accused is charged with the offense, and if the accused was present at such investigation and afforded the opportunities for representation, cross-examination and presentation prescribed in subdivision

(b) of this Article, no further investigation of that charge is necessary under this Article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

(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."

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References:

AW 46b

Commentary:

This Article is derived from AW 46b and is new to the Navy. Subdivision (c) is added to provide for a case where a court of inquiry or other investigation has been held wherein the accused was afforded the rights required by subdivision (b).

Subdivision (d) is added to prevent this Article from being construed as jurisdictional in a habeas corpus proceeding. Failure to conduct an investigation required by this Article would be grounds for reversal by a reviewing authority under the Code and an intentional failure to do so would be an offense under Article 98.

\* \* \* \* \*

"ART. 33. Forwarding of Charges.

When a person is held for trial by general court-martial, the commanding officer shall, within

eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If the same is not practicable, he shall report to such officer the reasons for delay."

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References:

AW 46c

Commentary:

This Article is derived from AW 46c.

\* \* \* \* \*

"ART. 34. Advice of Staff Judge Advocate and Reference for Trial.

(a) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate or legal officer for consideration and advice. The convening authority shall not refer a charge to a general court-martial for trial unless it has been found that the charge alleges an offense under this Code and is warranted by evidence indicated in the report of investigation.

(b) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the

charges and specifications as are needed to make them conform to the evidence may be made."

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References:

AW 47b  
MCM, Par. 34(d)

Commentary:

This Article is derived from AW 47b. Subdivision (b) makes clear that in addition to formal corrections, changes in the charges may be made in order to make them conform to the evidence brought out in the investigation without requiring that new charges be drawn and sworn to. The MCM provides that if an essentially different offense is charged as a result of the investigation, the convening authority should direct a new investigation to allow the accused to exercise his privileges with respect to new or different matter alleged.

\* \* \* \* \*

"ART. 35. Service of Charges.

The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of the charges upon him, or before a special court-martial within a period of three days subsequent to the service of the charges upon him."

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References:

AW 46(c)  
AGN Art. 43  
Proposed AGN, Art. 37

Commentary:

This Article is derived from AW 46(c) and is in accordance with present Navy practice. The period of three days between service of charges and trial by special court-martial is derived from Proposed AGN, Art. 37.

\* \* \* \* \*

## Part VII. Trial Procedure.

"ART. 36. President May Prescribe Rules.

(a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States District Courts, but which shall not be contrary to or inconsistent with this Code.

(b) All rules and regulations made in pursuance of this Article shall be reported to the Congress."

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References:

AW 38  
AGN Arts. 34, 64(e)  
Proposed AGN, Art. 48

Commentary:

This Article is derived from AW 38. Proposed AGN, Art. 48 is similar except that the Secretary of the Navy would be authorized to prescribe rules instead of the President.

\* \* \* \* \*

"ART. 37. Unlawfully Influencing Action of Court.

No authority convening a general, special, or summary court-martial, nor any other commanding officer,

shall censure, reprimand, or admonish such court or any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this Code shall attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts."

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References:

AW 88  
Proposed AGN, Arts. 9(45), 39(j)

Commentary:

This Article incorporates the provisions of AW 88. In addition it prohibits the convening authority from influencing the law officer or counsel. This is similar to the Proposed AGN except that the Secretary of the Navy would control such coercion by regulation.

This Article is not intended to preclude a reviewing authority from making fair comment on errors of the court in an opinion which is made in the course of review, or from returning a record for revision of errors, or from taking appropriate action when a member of a court has so misbehaved as to abandon his judicial responsibilities or duties.

Article 98 of this Code would make violations of this Article an offense.

\* \* \* \* \*

"ART. 38. Duties of Trial Counsel and Defense Counsel.

(a) The trial counsel of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of the proceedings.

(b) The accused shall have the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel duly appointed pursuant to Article 27. Should the accused have counsel of his own selection, the duly appointed defense counsel, and assistant defense counsel, if any, shall, if the accused so desires, act as his associate counsel; otherwise they shall be excused by the president of the court.

(c) In every court-martial proceeding, the defense counsel may, in the event of conviction, forward for attachment to the record of proceedings a brief of such matters as he feels should be considered in behalf of the accused on review, including any objection to the contents of the record which he may deem appropriate.

(d) An assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when he is qualified to be a trial counsel as required by Article 27, perform any duty imposed by law, regulation, or the custom of the service upon the

trial counsel of the court. An assistant trial counsel of a special court-martial may perform any duty of the trial counsel.

(e) An assistant defense counsel of a general or special court-martial may, under the direction of the defense counsel or when he is qualified to be the defense counsel as required by Article 27, perform any duty imposed by law, regulation, or the custom of the service upon counsel for the accused."

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References:

AW 11, 17, 116.  
Proposed AGN, Arts. 18(b), 18(c), 24(b), 38

Commentary:

Subdivisions (a) and (b) are derived from AW 17 and AW 11.

Subdivision (c): A similar provision appearing in the proposed AGN, Art. 78, made it mandatory for defense counsel either to submit a brief of such matters as he felt should be considered on review or a statement setting forth his reasons for not so doing. This provision was not adopted because it was felt that if the latter alternative were chosen it might actually prejudice the accused on review. The permissive provision is inserted in the Code to encourage defense counsel to submit briefs in appropriate cases.

Subdivisions (d) and (e) are derived from AW 116. Stricter requirements governing the circumstances under which assistant counsel may act independently of the trial counsel or defense counsel are imposed in order to maintain the quality of counsel and to protect the accused.

\* \* \* \* \*

"ART. 39. Sessions.

Whenever a general or special court-martial is to deliberate or vote, only the members of the court shall be present. After a general court-martial has finally voted on the findings, the court may request the law officer and the reporter to appear before the court to put the findings in proper form, and such proceedings shall be on the record. All other proceedings, including any other consultation of the court with counsel or the law officer shall be made a part of the record and be in the presence of the accused, the defense counsel, the trial counsel, and in general court-martial cases, the law officer."

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References:

AW 8, 30  
NC&B, secs. 373, 402

Commentary:

This Article expands the provisions of AW 30 to require the presence of all parties and the law officer except when the members of the court retire to vote or deliberate, or when the law officer is to record the findings. In the latter case, the reporter is to accompany the law officer and a verbatim transcript of the proceedings is to be kept. The Article also prohibits the court from consulting with either the trial counsel, counsel for the accused, or the law officer in the absence of the others. The requirement of AW 8 that no evidence be received in the absence of the law officer is extended in that the law officer must be present at all times except when the members are to vote or deliberate. The law officer is not a "member" of the court and is not to be present during deliberations or voting. See Article 26.

\* \* \* \* \*

"ART. 40. Continuances.

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

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References:

AW 20  
Proposed AGN, Art. 37

Commentary:

This Article follows the present Army and Navy provisions.

\* \* \* \* \*

"ART. 41. Challenges.

(a) Members of a general or special court-martial and the law officer of a general court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The court shall determine the relevancy and validity of challenges for cause, and shall not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

(b) The accused and trial counsel shall each be entitled to one peremptory challenge, but the law officer shall not be challenged except for cause."

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References:

AW 18  
Proposed AGN, Arts. 19, 24(b), 25

Commentary:

This Article adopts present Army and Navy provisions except that the Navy has not heretofore permitted a peremptory challenge.

\* \* \* \* \*

"ART. 42. Oaths.

(a) The law officer, all interpreters, and, in general and special courts-martial, the members, the trial counsel, assistant trial counsel, the defense counsel, assistant defense counsel, and the reporter shall take an oath or affirmation in the presence of the accused to perform their duties faithfully.

(b) All witnesses before courts-martial shall be examined on oath or affirmation."

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References:

AW 19  
AGN Arts. 28, 40, 41  
Proposed AGN, Arts. 19, 25

Commentary:

This Article requires that officials and clerical assistants of general and special courts-martial be sworn. The oaths are not specified in the Code as it is felt that the language of the oaths is suitable matter for regulations.

The Article does not require the court to be resworn in every case. The language would allow a court to be sworn once a day where there is to be more than one trial, if the accused in each trial is present at the time that the court is initially sworn.

\* \* \* \* \*

"ART. 43. Statute of Limitations.

(a) A person charged with desertion or absence without leave in time of war, or with aiding the enemy, mutiny, or murder, may be tried and punished at any time without limitation.

(b) Except as otherwise provided in this Article, a person charged with desertion in time of peace or any of the offenses punishable under Articles 119 through 132 inclusive shall not be liable to be tried by court-martial if the offense was committed more than three years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

(c) Except as otherwise provided in this Article, a person charged with any offense shall not be liable to be tried by court-martial or punished under Article 15 if the offense was committed more than two years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command or before the imposition of punishment under Article 15.

(d) Periods in which the accused was absent from territory in which the United States has the authority to apprehend him, or in the custody of civil authorities, or in the hands of the enemy, shall be excluded in computing the period of limitation prescribed in this Article.

(e) In the case of any offense the trial of which in time of war is certified to the President by the Secretary of the Department to be detrimental to the prosecution of the war or inimical to the national security, the period of limitation prescribed in this Article shall be extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

(f) When the United States is at war, the running of any statute of limitations applicable to any offense --

(1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not; or

(2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of United States; or

(3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancellation, or other termination or settlement, of any contract, sub-contract or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency;

shall be suspended until three years after the termination

of hostilities as proclaimed by the President or by a joint resolution of Congress."

References:

AW 39  
 Proposed AGN, Art. 5(b)  
 Title 18, USC, § 3287 (1948), (Wartime suspension  
 of limitations)

- - - - -

Commentary:

Subdivision (a): Adopted from AW 39 and Proposed AGN, Art. 5(b). "Aiding the enemy" is added to the list of offenses which may be tried and punished at any time.

Subdivision (b): Adopted from AW 39. The time when the period of limitation will stop running is changed from the time of arraignment to the time sworn charges and specifications are received by an officer exercising summary court-martial jurisdiction over the command. This provision is considered preferable to the more indefinite provision in AW 39 that the statute is tolled when "by reason of some manifest impediment the accused shall not have been amenable to military justice."

Subdivision (c): This covers all other offenses. The period of limitation is made applicable to trials by court-martial and to punishment by a commanding officer.

Subdivision (d): The language used in the second proviso of AW 39 is changed because of its indefiniteness. The clauses "in the custody of civil authorities" and "in the hands of the enemy" are adopted from Navy proposals.

Subdivision (e): Adopted from AW 39.

Subdivision (f): Incorporates the provision in Title 18, U.S.C. § 3287, which otherwise might not be applicable to court-martial cases.

\* \* \* \* \*

"ART. 44. Former Jeopardy.

No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this Article until the finding of guilty has become final after review of the case has been fully completed."

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References:

AW 40  
NC&B, sec. 408

Commentary:

This Article is derived from the first paragraph of AW 40. The second paragraph of AW 40 is covered in Article 62 of this Code.

\* \* \* \* \*

"ART. 45. Pleas of the Accused.

(a) If an accused arraigned before a court-martial makes any irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

(b) A plea of guilty by the accused shall not be received in a capital case."

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References:

AW 21  
NC&B, secs. 413, 416, 417

Commentary:

Subdivision (a): Drawn from present Army and Navy provisions, except for the provision for entering the plea of not guilty in the record, which is new. The question whether the plea of not guilty should be entered, in the situations covered in this subdivision, will be treated as an interlocutory question, according to the procedure prescribed in Art. 51 of this Code.

It is not intended that a plea of not guilty to the offense charged, but guilty to a lesser included offense, will be an irregular pleading within the meaning of this Article.

Subdivision (b) is new but enunciates a rule now followed by the Army, and, as to certain capital offenses, by the Navy.

The provisions of this Article will be supplemented by regulations issued by the President. It is contemplated that the recommendations of the Keeffe Board as to the procedure to be followed by a court-martial when a plea of guilty is entered will be adopted. The proposed procedure is as follows (See Keeffe Report, p. 142):

(1) In general and special court-martial cases, the plea should be received only after the accused has had an opportunity to consult with counsel appointed for or selected by him. If the accused has refused counsel, the plea should not be received.

(2) In every case the meaning and effect of a plea of guilty should be explained to the accused (by the law officer of a general court-martial; by the president of a special court-martial; by the summary court), such explanation to include the following:

(a) That the plea admits the offense as charged (or in a lesser degree, if so pleaded), and makes conviction mandatory.

(b) The sentence which may be imposed.

(c) That unless the accused admits doing the acts charged, a plea of guilty will not be accepted.

(3) The question whether the plea will be received will be treated as an interlocutory question.

(4) The explanation made and the accused's reply thereto should be set forth in the record of trial exactly as given.

It is also contemplated that the regulations will provide that the law officer or the court shall explain the meaning of any special defenses or objections which may appear to be available to the accused, in any case in which he is not represented by counsel, and shall advise him of his right to make them, both as to the offense charged and lesser included offenses, before pleading to the general issue.

The provisions contained in Chapter XIII of the Manual for Courts-Martial, U. S. Army, 1949, dealing with the procedure for raising special defenses and objections by motion, were considered by the Ad Hoc Committee in connection with this Article and approved as a sound basis for similar provisions to appear in the new regulations. The Ad Hoc Committee also considered, and approved, the provisions in the 1949 Manual for Courts-Martial requiring that if it appears from the charges that the Statute of Limitations has run against an offense, or in the case of a continuing offense, a part of an offense charged, the court will bring the matter to the attention of the accused and advise him of his right to assert the statute. If the accused pleads guilty to a lesser included offense against which the Statute of Limitations has apparently run, the court will advise the accused of his right to interpose the statute in bar of trial and punishment as to that offense. Similarly, at the time the court is making its findings, if by exceptions and substitutions the accused is found guilty of a lesser included offense, to which he has not entered any plea, the court will advise him in open court of his right to avail himself of the statute in bar of punishment.

"ART. 46. Opportunity to Obtain Witnesses and Other Evidence.

The trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, its Territories, and possessions."

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References:

AW 22  
AGN Art. 42(b)  
Proposed AGN, Art. 35.

Commentary:

This Article is based on AW 22 and Proposed AGN, Art. 35. The first sentence of the Article is intended to insure equality between the parties in securing witnesses.

It is felt appropriate to leave the mechanical details as to the issuance of process to regulation.

\* \* \* \* \*

"ART. 47. Refusal to Appear or Testify.

- (a) Every person not subject to this Code who -  
(1) has been duly subpoenaed to appear as  
a witness before any court-martial, military

commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such court, commission or board; and

(2) has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the courts of the United States; and

(3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which such person may have been legally subpoenaed to produce;

shall be deemed guilty of an offense against the United States.

(b) Any person who commits an offense denounced by this Article shall be tried on information in a United States District Court or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, and jurisdiction is hereby conferred upon such courts for such purpose. Upon conviction, such persons shall be punished by a fine of not more than \$500, or imprisonment for a period not exceeding six months, or both.

(c) It shall be the duty of the United States

district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, upon the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute any person violating this Article.

(d) The fees and mileage of witnesses shall be advanced or paid out of the appropriations for the compensation of witnesses."

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References:

AW 23  
AGN Art. 42(c)  
Proposed AGN, Art. 35(b)

Commentary:

This Article is derived from AW 23. Proposed AGN, Art. 35(c) is similar. The proviso in AW 23 making certain offenses in Title 18, U.S.C. applicable to proceedings before courts-martial is omitted, since the language of Title 18 includes the important offenses against military justice, such as perjury and bribery of judicial officers. See Title 18, U.S.C. §§ 206, 210, 1621, 1622 (1948).

\* \* \* \* \*

"ART. 48. Contempts.

A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder. Such punishment shall not exceed confinement for 30 days

or a fine of \$100, or both."

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References:

AW 32  
AGN Art. 42(a)  
Proposed AGN, Art. 35

Commentary:

This Article is derived from AW 32. The Proposed AGN, Art. 35 would require contempts by persons not subject to this Code to be tried in civil courts. It is felt essential to the proper functioning of a court, however, that it have direct control over the conduct of persons appearing before it.

\* \* \* \* \*

"ART. 49. Depositions.

(a) At any time after charges have been signed as provided in Article 30, any party may take oral or written depositions unless an authority competent to convene a court-martial for the trial of such charges forbids it for good cause. If a deposition is to be taken before charges are referred for trial, such an authority may designate officers to represent the prosecution and the defense and may authorize such officers to take the deposition of any witness.

(b) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition.

(c) Depositions may be taken before and authenticated by any military or civil officer authorized by the

laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

(d) A duly authenticated deposition taken upon reasonable notice to the other party, so far as otherwise admissible under the rules of evidence, may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or military board, if it appears -

(1) that the witness resides, or is beyond the State, Territory, or District in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing; or

(2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, non-amenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing; or

(3) that the present whereabouts of the witness is unknown.

(e) Testimony by deposition may be adduced by the defense in capital cases.

(f) A deposition may be read in evidence in any case in which the death penalty is authorized by law

but is not mandatory, whenever the convening authority shall have directed that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial."

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References:

AW 25, 26  
Proposed AGN, Art. 36

Commentary:

Subdivision (a) is derived from the third proviso of AW 25. The first sentence is new in that it permits any party to take a deposition after charges are signed unless an officer with authority to convene a court-martial for the trial of such charges forbids it for good cause. When such an authority is to designate officers to take depositions, he should consult the accused prior to designating an officer to represent the accused, or if the accused has counsel representing him in other pre-trial matters, such counsel should be designated to represent the accused if available.

Subdivision (b) conforms to present practice in all services.

Subdivision (c) is derived from AW 26 and conforms to present Navy practice.

Subdivision (d) is derived from AW 25 and Proposed AGN, Art. 26. The admissibility of a deposition is made dependent upon the need for its use at the time of trial. The same rules of evidence apply to testimony in depositions as apply to oral testimony.

Subdivisions (e) and (f) are derived from AW 25. The Proposed AGN does not contain similar provisions.

\* \* \* \* \*

"ART. 50. Admissibility of Records of Courts of Inquiry.

(a). In any case not capital and not extending to the dismissal of an officer, the sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, may, if otherwise admissible, be read in evidence by any party before a court-martial or military commission if the accused was a party and was accorded the rights of an accused when before the court of inquiry or if the accused consents to the introduction of such evidence.

(b) Such testimony may be read in evidence only by the defense in capital cases or cases extending to the dismissal of an officer.

(c) Such testimony may also be read in evidence before a court of inquiry or a military board."

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References:

AW 27  
AGN, Art. 60  
Proposed AGN, Art. 44

Commentary:

This Article is derived from AW 27 and is similar to present Navy practice. As to parties before courts of inquiry, see Article 135(c).

The effect of the use of the words "not capital and not extending to the dismissal of an officer" is that if the prosecution uses the record of a court of inquiry

to prove part of the allegations in one specification, neither death nor dismissal may be adjudged as a result of a conviction under that specification. The introduction of the record of a court of inquiry by the defense shall not affect the punishment which may be adjudged.

\* \* \* \* \*

"ART. 51. Voting and Rulings.

(a) Voting by members of a general or special court-martial upon questions of challenge, on the findings, and on the sentence shall be by secret written ballot. The junior member of the court shall in each case count the votes, which count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court:

(b) The law officer of a general court-martial and the president of a special court-martial shall rule upon interlocutory questions, other than challenge, arising during the proceedings. Any such ruling made by the law officer of a general court-martial upon any interlocutory question other than a motion for a finding of not guilty, or the question of accused's sanity, shall be final and shall constitute the ruling of the court; but the law officer may change any such ruling at any time during the trial. Unless such ruling be final, if any member objects thereto, the court shall be cleared and closed and the question decided by a vote as provided in Article 52, viva voce, beginning with the junior in rank.

(c) Before a vote is taken on the findings, the law officer of a general court-martial and the president of a special court-martial shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge the court -

(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in favor of the accused and he shall be acquitted;

(3) that if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no such doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the Government."

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References:

AW 31  
Proposed AGN, Art. 24

Commentary:

This article is derived from AW 31. The provision of AW 31 allowing the law officer to consult with the court before making a ruling is deleted. In subdivision (c) the law officer and the president of a special court-martial are required to instruct the court as to the elements of the offense in addition to those matters specified in AW 31.

The Proposed AGN does not require a secret written ballot, but does require the law officer to instruct the court as to the elements of the offense.

\* \* \* \* \*

"ART. 52. Number of Votes Required.

(a)(1) No person shall be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken.

(2) No person shall be convicted of any other offense, except by the concurrence of two-thirds of the members present at the time the vote is taken.

(b)(1) No person shall be sentenced to suffer death, except by the concurrence of all the members of the court-martial present at the time the vote is taken and for an offense in this Code made expressly punishable by death.

(2) No person shall be sentenced to life imprisonment or to confinement in excess of ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.

(3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.

(c) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote. A tie vote on a challenge shall disqualify the member challenged. A tie vote on a motion for a finding of not guilty or on a question of the accused's sanity shall be a determination against the accused. A tie vote on any other question shall be a determination in favor of the accused."

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References:

AW 43  
AGN Art. 50  
Proposed AGN, Art. 28

Commentary:

This Article is derived from AW 43. Proposed AGN, Art. 28 would require only a majority vote to convict of any offense, but is the same as AW 43 as to the number of votes required for sentences.

Paragraph (3) of subdivision (b) clarifies AW 43 as to the number of votes required for a sentence which does not extend to death or imprisonment in excess of ten years.

Subdivision (c) clarifies the method for determination of issues to be decided by a majority vote when the vote is tied. It is felt that a tie vote on a challenge should disqualify the person challenged regardless of whether the challenge is by the prosecution or by the defense. It is also felt that a motion for a finding of not guilty and the question of the accused's sanity should not be decided by a tie vote as these are considered again in the vote on the findings. All other tie votes are determined in favor of the accused.

\* \* \* \* \*

"ART. 53. Court to Announce Action.

Every court-martial shall announce its findings and sentence to the parties as soon as determined."

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References:

AW 29  
Proposed AGN, Art. 28

Commentary:

This Article is derived from Proposed AGN, Art. 28 and requires the trial counsel, the accused, and the defense counsel to be informed of the findings and sentence as soon as the sentence is determined. The findings may be announced as soon as they are determined if it is believed appropriate to do so. AW 29 requires an acquittal to be announced, but leaves the announcement of the sentence and findings of guilty to the discretion of the court. It is felt appropriate, however, that the accused and his counsel be informed as to the outcome of the trial as soon as the results are determined.

\* \* \* \* \*

"ART. 54. Record of Trial.

(a) Each general court-martial shall keep a separate record of the proceedings of the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the law officer. In case the record cannot be authenticated by either the president or the law officer, by reason of the death, disability or absence of such officer, it shall be signed by a member in lieu of him. If both the president and the law officer are unavailable for such reasons, the record shall be authenticated by two members.

(b) Each special and summary court-martial shall keep a separate record of the proceedings in each case, which record shall contain such matter and be authenticated in such manner as may be required by regulations which the President may prescribe.

(c) A copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as authenticated."

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References:

AW 33, 34, 111  
 AGN Arts. 34, 64  
 Proposed AGN, Arts. 16(e), 21, 29

Commentary:

Subdivision (a) contains provision similar to those of Proposed AGN, Art. 29, but differs from AW 33 in that the law officer and the president authenticate the record of a general court-martial. AW 33 requires the trial counsel and president to authenticate the record. It is intended that records of general courts-martial shall contain a verbatim transcript of the proceedings.

Subdivision (b) is derived from AW 34. This Article is subject to the provision of Article 19 which requires a complete record to be kept in cases where a bad conduct discharge is adjudged.

Subdivision (c) is new. Under AW 111 a copy of a general court-martial record is given to the accused if he demands it. Under Navy practice, the accused is automatically given a copy of the record of a general court-martial. This Article goes further in that a copy of the record of a general or special court-martial is required to be given to the accused. It is felt to be appropriate that the accused should have a copy of such records for his personal use. If such records contain classified matter, means of safekeeping should be provided.

\* \* \* \* \*

## Part VIII. Sentences.

"ART. 55. Cruel and Unusual Punishments Prohibited.

Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, shall not be adjudged by any court-martial or inflicted upon any person subject to this Code. The use of irons, single or double, except for the purpose of safe custody, is prohibited."

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References:

AW 41  
Proposed AGN, Art. 31

Commentary:

This Article incorporates present Army and Navy provisions.

\* \* \* \* \*

"ART. 56. Maximum Limits.

The punishment which a court-martial may direct for an offense shall not exceed such limits as the President may prescribe for that offense."

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References:

AW 45  
Proposed AGN, Art. 33(b)

Commentary:

This Article authorizes the President to establish maximum limits of punishment for any offense, except one for which a mandatory punishment has been prescribed.

\* \* \* \* \*

"ART. 57. Effective Date of Sentences.

(a) Whenever a sentence of a court-martial as lawfully adjudged and approved includes a forfeiture of pay or allowances in addition to confinement not suspended, the forfeiture may apply to pay or allowances becoming due on or after the date such sentence is approved by the convening authority. No forfeiture shall extend to any pay or allowances accrued before such date.

(b) Any period of confinement not suspended included in a sentence of a court-martial shall begin to run from the date the sentence is adjudged by the court-martial.

(c) All other sentences of courts-martial shall become effective on the date ordered executed."

- - - - -

References:

AW 16, 47(d)  
Proposed AGN, Art. 39

Commentary:

This Article is new. Subdivision (a) prohibits the forfeiture of pay or allowances becoming due before the date of approval by the convening authority. Formerly an Army court-martial sentence could forfeit such earnings. In addition, subdivision (a) permits the forfeiture of pay and allowances becoming due after the date of approval by the convening authority but before the date of final approval by the Secretary, where such final approval is necessary. It is felt appropriate that where an accused is sentenced to both forfeiture and confinement, the forfeiture should reach all pay becoming due while the accused is in confinement awaiting final approval of the sentence. Under Article 71 such pay cannot be taken until the sentence is ordered executed after any such required final approval.

Subdivision (b) requires a sentence of confinement to begin to run on the date that it is adjudged even though the accused is not actually in confinement, unless the sentence is suspended.

AW 16 has been held to prohibit the forfeiture of pay of an accused until the sentence has been finally approved. This has resulted in a prisoner under sentence of a court-martial drawing full pay until a dismissal or discharge is finally approved. The Proposed Navy AGN would make all sentences of forfeiture or confinement effective as soon as adjudged.

\* \* \* \* \*

"ART. 58. Execution of Confinement.

(a) Under such instructions as the Department concerned may prescribe, any sentence of confinement adjudged by a court-martial or other military tribunal, whether or not such sentence includes discharge or dismissal, and whether or not such discharge or dismissal has been executed, may be carried into execution by confinement in any place of confinement under the control of any of the armed forces, or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use; and persons so confined in a penal or correctional institution not under the control of one of the armed forces shall be subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District or place in which the institution is situated.

(b) The omission of the words "hard labor" in any sentence of a court-martial adjudging confinement

shall not be construed as depriving the authority executing such sentence of the power to require hard labor as a part of the punishment."

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References:

AW 37, 42  
AGN Art. 7

Commentary:

Subdivision (a) is derived from AGN Art. 7 which permits the Navy to transfer court-martial prisoners to institutions under the control of the Department of Justice. The Navy has found this practice to be beneficial both to the service and to the prisoner. Both the Army and Navy officers in charge of correctional policies recommend the adoption of subdivision (a). It is the policy of the armed forces to segregate youthful and rehabilitable prisoners from the hardened criminals and incorrigibles and to provide for the maximum rehabilitation of prisoners for the purpose of restoration to duty or successful adjustment in civil life. However, due to lack of facilities and personnel with long and continuous experience in the highly technical and specialized phases of penology, the armed forces have serious handicaps in dealing with prisoners with long civilian criminal records, criminal psychopaths, sex deviates, violent incorrigibles and other prisoners requiring special treatment. The Army in operating under AW 42 has met with great difficulty in segregating the varied types of prisoners and in giving them specialized treatment. It is felt that the rehabilitation of prisoners who create special problems could be expedited by transferring them to the highly specialized institutions under control of the Department of Justice, which range from training schools and reformatories to major penitentiaries and provide for the treatment of prisoners according to their needs.

From past experience, the services have found that the type of treatment suited for individuals does not depend on the type of offense or on the length of the sentence. Many of the prisoners who cause special problems in disciplinary barracks are those convicted of military offenses, such as AWOL or desertion.

Subdivision (b) incorporates the second  
proviso of AW 37 and conforms to present Navy practice.

\* \* \* \* \*

## Part IX. Review of Courts-Martial.

"ART. 59. Error of Law; Lesser Included Offense.

(a) A finding or sentence of a court-martial shall not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

(b) Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense."

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References:

AW 37, 47(f), 49(a)  
Proposed AGN, Art. 39(d), (e)  
NC&B, sec. 472

Commentary:

Subdivision (a) is adapted from AW 37. In light of certain new procedural requirements in this Code, such as the requirement that the law officer of a general court-martial instruct the court as to the elements of the offense, this subdivision is an extremely important one and should be given full force and effect. On the matter of technical errors NC&B sec. 472 contains the following statement: "If there has been no miscarriage of justice, the finding of the court should not be set aside or a new trial granted because of technical errors or defects which do not affect the substantial rights of the accused."

Subdivision (b) is taken from AW 47(f), 49(a) and Art. 39(d), (e) of the Proposed AGN. MCM par. 78(c) defines a lesser included offense as follows: "The test as to whether an offense found is necessarily included in that charged is that it is included only if it is necessary in proving the offense charged to prove all the elements of the offense found."

\* \* \* \* \*

"ART. 60. Initial Action on the Record.

After every trial by court-martial the record shall be forwarded to the convening authority, and action thereon may be taken by the officer who convened the court, an officer commanding for the time being, a successor in command, or by any officer exercising general court-martial jurisdiction."

- - - - -

References:

AW 35, 47(e)  
NC&B, sec. 479

Commentary:

This Article is taken principally from AW 47(e). There is no similar provision in the AGN, but NC&B, sec. 479 provides that the reviewing power vests in the office, not the person, of the authority so acting.

\* \* \* \* \*

"ART. 61. Same - General Court-Martial Records.

The convening authority shall refer the record of every general court-martial to his staff judge advocate or legal officer, who shall submit his written opinion thereon to the convening authority. If the final action of the court has resulted in an acquittal of all charges and specifications, the opinion shall be limited to questions of jurisdiction and shall be forwarded with the record to The Judge Advocate General of the armed force of which the accused is a member."

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References:

AW 35, 47(c)

Commentary:

This Article is drawn principally from AW 47(c). The requirement that the convening authority refer the record to his staff judge advocate or legal officer is new for the Navy. The requirement that the staff judge advocate or legal officer write an opinion on the jurisdiction of the court in cases of acquittal conforms to present Army practice. See Article 65 with reference to opinions and records in cases where there is a finding of guilty.

\* \* \* \* \*

"ART. 62. Reconsideration and Revision.

(a) If a case before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action.

(b) Where there is an apparent error or omission in the record or where the record shows improper action by a court-martial with respect to a finding or sentence which can be rectified without material prejudice to the substantial rights of the accused, the convening authority may return the record to the court for appropriate action. In no case, however, may the record be returned --

(1) for reconsideration of a finding of not guilty or a ruling which amounts to a finding of not guilty; or

(2) for increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory."

- - - - -

References:

AW 40  
 Proposed AGN, Art. 39(1)  
 MCM, pars. 64(f), 83, 87(b)  
 NC&B, secs. 410, 458-468

Commentary:

No provision similar to subdivision (a) is found in either the AW or the AGN. Under present Army, Navy and Air Force practice, however, the convening authority has the power set out in this subdivision. See MCM, par. 64(f) and NC&B, sec. 410.

Subdivision (b) is based on AW 40. Under this subdivision the convening authority may return the record where the court has failed to prescribe a mandatory punishment or where it has found the accused guilty of a specification and not guilty of a charge and the specification sufficiently alleges a violation of some Article. He may also return the record for correction of other errors, such as clerical errors.

\* \* \* \* \*

"ART. 63. Rehearings.

(a) If the convening authority disapproves the findings and sentence of a court-martial he may, except where there is lack of sufficient evidence in the record to support the findings, order a rehearing, in which case he shall state the reasons for disapproval. If he does not order a rehearing, he shall dismiss the charges.

(b) Every rehearing shall take place before a court-martial composed of members not members of the

court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be imposed unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings or unless the sentence prescribed for the offense is mandatory."

References:

AW 52  
NC&B, sec. 477

Commentary:

This Article is adopted from AW 52. The Navy has no similar statutory provision. The Army term "re-hearing" has been adopted to distinguish a proceeding under this Article from the new trial specified in Article 73.

Subdivision (a) provides, in conformance with the usual concept of double jeopardy, that the convening authority shall not order a rehearing where the prosecution has failed to establish a "prima facie case" - has failed, as a matter of law, to introduce sufficient evidence to warrant the finding. The phrase "evidence in the record" is intended to authorize rehearings where the prosecution has made its case on evidence which was improperly admitted at the trial, evidence for which there may well have been an admissible substitute.

Subdivision (b) contains the limitations on the sentence which can be adjudged by a court on rehearing, with an exception for mandatory sentences. Without this exception the court on rehearing could impose no sentence at all where the original sentence was less than that made mandatory for the offenses. For a mandatory sentence see Article 133.

A rehearing is a continuation of the former proceeding, and if the original court had no jurisdiction in the case, none of the restrictions of this Article apply to a subsequent trial on the same charges.

\* \* \* \* \*

"ART. 64. Approval by the Convening Authority.

In acting on the findings and sentence of a court-martial, the convening authority shall approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and determines should be approved. Unless he indicates otherwise, approval of the sentence shall constitute approval of the findings and sentence."

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References:

AW 47(c), (f)  
AGN Arts. 33, 54, 64(d)  
Proposed AGN, Art. 39(b)

Commentary:

This Article substantially conforms to present practice in all the armed forces. The convening authority can approve a finding only if he finds that it conforms to the weight of the evidence and that there has been no error of law which materially prejudices the substantial rights of the accused. See Article 59, Commentary. He may approve only so much of a finding as involves a finding of guilty of a lesser included offense. See Article 59. He may disapprove a finding or a sentence for any reason.

\* \* \* \* \*

"ART. 65. Disposition of Records After Review by the Convening Authority.

(a) When the convening authority has taken final action in a general court-martial case, he shall forward the entire record, including his action thereon and the opinion or opinions of the staff judge advocate or legal officer, to the appropriate Judge Advocate General.

(b) Where the sentence of a special court-martial as approved by the convening authority includes a bad conduct discharge, whether or not suspended, the record shall be forwarded to the officer exercising general court-martial jurisdiction over the command to be reviewed in the same manner as a record of trial by general court-martial or directly to the appropriate Judge Advocate General to be reviewed by a Board of Review. If the sentence as approved by an officer exercising general court-martial jurisdiction includes a bad conduct discharge, whether or not suspended, the record shall be forwarded to the appropriate Judge Advocate General to be reviewed by a Board of Review.

(c) All other special and summary court-martial records shall be reviewed by a judge advocate of the Army or Air Force, a law specialist of the Navy, or a law specialist or lawyer of the Coast Guard or Treasury Department, and shall be transmitted and disposed of as the Secretary of the Department may prescribe by regulations."

References:

AW 35, 36  
Proposed AGN, Arts. 21, 39(d), 39(e)

Commentary:

Subdivision (a) incorporates present Army practice. Navy practice is similar except that no opinion by the legal officer is required.

Subdivision (b) is derived from AW 36 except that the record may be sent directly to The Judge Advocate General. This alternative is permitted in order to provide for situations where no judge advocate or law specialist is assigned to the staff of the officer exercising general court-martial jurisdiction or where direct transmittal to The Judge Advocate General or a branch office would be more expeditious. Proposed AGN, Art. 39(d) is similar to AW 36.

Subdivision (c) permits the review of other special and summary courts-martial to be prescribed by regulations, subject to the requirement that all such records shall be reviewed by a law specialist or judge advocate (or lawyer in a Coast Guard case). The reason for this provision is that the volume of cases, the availability of law specialists and judge advocates, and the feasibility of reviewing records in the field may differ in the various armed forces.

The disposal of special and summary court-martial records is also left to regulation, because of the varying needs of the armed forces. It is intended, however, that such records shall be retained until no longer of use either to the armed force concerned or to the accused.

\* \* \* \* \*

"ART. 66. Review by the Board of Review.

(a) The Judge Advocate General of each of the armed forces shall constitute in his office one or more Boards of Review, each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal Court or of the highest court of a

State of the United States.

(b) The Judge Advocate General shall refer to a Board of Review the record in every case of trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for more than one year.

(c) In a case referred to it, the Board of Review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

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

(e) Within ten days after any decision by a Board of Review, The Judge Advocate General may refer

the case for reconsideration to the same or another Board of Review.

(f) Otherwise, The Judge Advocate General shall, unless there is to be further action by the President or the Secretary of the Department or the Judicial Council, instruct the convening authority to take action in accordance with the decision of the Board of Review. If the Board of Review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(g) The Judge Advocates General of the armed forces shall prescribe uniform rules of procedure for proceedings in and before Boards of Review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the Offices of the Judge Advocates General and by the Boards of Review."

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References:

AW 50(a), (d), (e), (g); 51, 52  
Proposed AGN, Art. 39(e), (f)

Commentary:

This Article adopts the Army system of review by a formally constituted board. Required qualifications of the members are new, however, and a provision permitting civilian members has been added for the Coast Guard. See subdivision (a).

Review of all the cases specified in subdivision (b) is automatic, whether or not the sentence is suspended. The types of cases receiving automatic review by the Board are substantially the same as those under the present Articles of War except that for sentences involving penitentiary confinement there have been substituted sentences involving confinement for more than one year. This conforms to changes in the system of confinement in Article 58. For review of other cases by a Board of Review see Article 69.

The Board of Review shall affirm a finding of guilty of an offense or a lesser included offense (see Article 59) if it determines that the finding conforms to the weight of the evidence and that there has been no error of law which materially prejudices the substantial rights of the accused. See Article 59, Commentary. The Board may set aside, on the basis of the record, any part of a sentence, either because it is illegal or because it is inappropriate. It is contemplated that this power will be exercised to establish uniformity of sentences throughout the armed forces. See Article 67(g).

Subdivision (d) deals with the power to order a rehearing. See Article 63.

\* \* \* \* \*

"ART. 67. 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. Each member of the Judicial Council shall be appointed by the President 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 and allowances equal to those paid to a judge of a United States Court of Appeals.

(b) Under rules of procedure which it shall prescribe, the Judicial Council shall review the record in the following cases:

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

(2) All cases reviewed by a Board of Review which The Judge Advocate General orders forwarded to the Judicial Council for review; and

(3) All cases reviewed by a Board of Review 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 the decision of a 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 in the record 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 action by the President, or the Secretary of the Department, The Judge Advocate General shall instruct the convening authority to take 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.

(g) The Judicial Council and The Judge Advocates General of the armed forces shall meet annually to make a comprehensive survey of the operation of this Code and report to the Secretary of Defense and the Secretaries of

the Departments any recommendations relating to uniformity of sentence policies, amendments to this Code, and any other matters deemed appropriate."

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References:

AW 48, 49, 50 (a), (c), (g); 51, 52  
Proposed AGN, Art. 39(g)

Commentary:

This Article is new although the concept of a final appellate tribunal is not. Proposed AGN, Art. 39(g) provides for a board of appeals while AW 50(a) provides for a Judicial Council. Both of these tribunals, however, are within the Department. The Judicial Council provided for in this Article is established in the National Military Establishment and is to review cases from all the armed forces. The members are to be highly qualified civilians and the compensation has been set to attract such persons.

Automatic review before the Judicial Council is provided for all cases which must be approved by the President. See AW 71. The Judge Advocate General may direct that a case be reviewed by the Council, and an accused may request review and will receive it where the Council finds good cause.

The time limits specified in subdivision (c) are necessary to eliminate undue delay in the execution of sentences.

The Judicial Council takes action only with respect to matters of law. In this it differs from the final appellate tribunals now set up in or proposed for the Departments. It may act only with respect to the findings and sentence as approved by the convening authority. If the Board of Review has set aside a finding as against the weight of the evidence this decision cannot be reconsidered by the Council. If on the other hand, the Board has set a case aside because of the improper introduction of evidence or because of other prejudicial error, the Judicial Council may reverse if it finds there has been no such error.

The Council shall affirm the findings and the sentence if it determines that, with respect to the matters which it considers, there has been no error of law which materially prejudices the substantial rights of the accused. See Article 59, Commentary. It may affirm so much of a finding of guilty as involves a finding of guilty of a lesser included offense. See Article 59. The only action which the Council may take with respect to the sentence is to determine whether or not it is within legal limits.

As to the power to order a rehearing covered in subdivision (e), see Article 63.

Subdivision (g) assures an annual review of sentence policies of the armed forces. This is provided to assure uniformity.

\* \* \* \* \*

"ART. 68. Branch Offices.

(a) Whenever the President deems such action necessary, he may direct The Judge Advocate General to establish a branch office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office one or more Boards of Review. Such Assistant Judge Advocate General and any such Board of Review shall be empowered to perform for that command, under the general supervision of The Judge Advocate General, the duties which The Judge Advocate General and a Board of Review in his office would otherwise be required to perform in respect of

all cases involving sentences not requiring approval by the President.

(b) In time of emergency, the President may direct that one or more temporary Judicial Councils be established for the period of the emergency, each of which shall be under the general supervision of the Judicial Council."

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References:

AW 50(c)

Commentary:

Subdivision (a) incorporates AW 50(c) with modifications to conform to the review under this Code. The AGN contains no similar provision, but the Navy feels that it would be useful in times of emergency.

Subdivision (b) provides for expansion of the Judicial Council in time of emergency. Such temporary Judicial Councils are placed under the supervision of the permanent Judicial Council for the purpose of uniformity.

\* \* \* \* \*

"ART. 69. Review in the Office of the Judge Advocate General.

Every record of trial by general court-martial, in which there has been a finding of guilty and a sentence, the appellate review of which is not otherwise provided for by Article 66, shall be examined in the Office of the Judge Advocate General. If any part of the findings or

sentence is found unsupported in law, or if The Judge Advocate General so directs, the record shall be reviewed by a Board of Review in accordance with Article 66, but in such event there will be no further review by the Judicial Council."

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References:

AW 50(f)  
Proposed AGN, Art. 39(e)

Commentary:

This Article conforms to AW 50(f). Since these cases involve minor sentences, no review by the Judicial Council is felt to be appropriate.

\* \* \* \* \*

"ART. 70. Appellate Counsel.

(a) The Judge Advocate General shall appoint in his office one or more officers as Appellate Government Counsel, and one or more officers as Appellate Defense Counsel.

(b) It shall be the duty of Appellate Government Counsel to represent the United States before the Board of Review or the Judicial Council when directed to do so by The Judge Advocate General.

(c) It shall be the duty of Appellate Defense Counsel to represent the accused before the Board of Review or the Judicial Council --

(1) when he is requested to do so by the

accused; or

(2) when the United States is represented by counsel; or

(3) when The Judge Advocate General has requested the reconsideration of a case before the Board of Review or has transmitted it to the Judicial Council.

(d) The accused shall have the right to be represented before the Judicial Council or the Board of Review by civilian counsel if provided by him.

(e) The Appellate Counsel shall also perform such other functions in connection with the review of court-martial cases as The Judge Advocate General shall direct."

- - - - -

References:

None

Commentary:

This Article is new and is included in the Code in order that the accused may be represented on review. Such representation will assure that the accused's case will be thoroughly considered. Appellate counsel should have the qualifications of counsel before a general court-martial. See Article 27(b).

\* \* \* \* \*

"ART. 71. Execution of Sentence; Suspension of Sentence.

(a) No court-martial sentence extending to death or involving a general or flag officer shall be executed until approved by the President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence, as approved by him, except a death sentence.

(b) No sentence extending to the dismissal of an officer, cadet, or midshipman shall be executed until approved by the Secretary of the Department, or such Under Secretary or Assistant Secretary as may be designated by him. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of any part of the sentence as approved by him. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person who is so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

(c) No sentence which includes, unsuspended, a dishonorable or bad conduct discharge, or confinement for more than one year shall be executed until affirmed by a Board of Review and, in cases reviewed by it, the Judicial Council.

(d) All other court-martial sentences, unless suspended, may be ordered executed by the convening authority when approved by him. The convening authority may suspend the execution of any sentence, except a death sentence."

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References:

AW 44, 47(d), 48(a), 48(c), 49, 50(e)  
Proposed AGN, Art. 39(a), 39(c)

Commentary:

Subdivision (a) is derived from AW 48(a). Proposed AGN, Art. 39(a) is similar except that sentences involving a flag officer are treated in the same manner as sentences involving other officers. The words "as he sees fit" are intended to give the President absolute discretion in determining the amount of the sentence to be approved by him.

Subdivision (b) is derived from AW 48(c) and AW 44. Proposed AGN, Art. 39(a) requires a dismissal to be confirmed by the President, or by the Secretary when empowered by the President. It is felt appropriate, however, to place this power initially in the Secretary of the Department and to allow delegation of this power in order to provide for periods of expansion of the armed forces. It was felt more appropriate to place the power to change a dismissal to reduction to ranks in the Secretary rather than in a court-martial as provided in AW 44.

Subdivision (c) is derived from AW 48(c) and AW 50(e). Sentences required to be affirmed by a Board of Review may not be ordered executed until such review and any further review by the Judicial Council under Article 67 is completed. Thus, such sentences may be ordered executed 30 days after the accused has been notified of the decision of the Board of Review if he has not petitioned the Judicial Council for review within that period.

Subdivision (d) is derived from AW 47(d). The Proposed AGN would require execution of sentences not extending to punishments specified in subdivisions (a), (b), and (c) to be executed upon announcement by the court. It is felt appropriate, however, to require review by the convening authority before ordering execution of any sentence. The convening authority is given power to suspend sentences other than death sentences. See Article 74 as to the power of other officers to suspend sentences.

\* \* \* \* \*

"ART. 72. Vacation of Suspension.

(a) Prior to the vacation of the suspension of a special court-martial sentence which as approved includes a bad conduct discharge, or of any general court-martial sentence, the officer having special court-martial jurisdiction over the probationer shall hold a hearing on the alleged violation of probation. The probationer shall be represented at such hearing by counsel if he so desires.

(b) The record of the hearing and the recommendations of the officer having special court-martial jurisdiction shall be forwarded for action to the officer exercising general court-martial jurisdiction over the probationer. If he vacates the suspension, the vacation shall be effective, subject to applicable restrictions in Article 71(c), to execute any unexecuted portion of the sentence except a dismissal. The vacation of the suspension of a dismissal shall not be effective until approved by the Secretary of the Department.

(c) The suspension of any other sentence may be vacated by any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence."

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References:

AW 51(b)  
MCM, par. 94  
NC&B, sec. 476  
Keeffe Report, pp. 313-318

Commentary:

This Article is new. It applies where a sentence has been suspended pending good behavior of the accused - that is, where the accused is a probationer. Under present Navy practice, the commanding officer of a probationer has authority to vacate probation whenever he deems the conduct of the probationer unsatisfactory. Under Army practice, an officer who has the power to convene a court of the kind which adjudged the sentence may similarly vacate probation.

This Article requires that where the vacating of the suspension of a serious sentence is contemplated, a record of the facts justifying the vacating action will be made and these facts will be given consideration by two officers.

Where the original sentence includes a bad conduct or dishonorable discharge, or confinement in excess of one year, such vacation will not be effective to execute the sentence until the review provided in Articles 66 and 67 has been completed. Where the suspended sentence includes a dismissal, the Secretary of the Department must act before the dismissal may be executed, whether or not he has previously approved it.

\* \* \* \* \*

"ART. 73. Petition for a New Trial.

At any time within one year after approval by the convening authority of a court-martial sentence which extends to death, dismissal, dishonorable or bad conduct discharge, or confinement for more than one year, the accused may petition The Judge Advocate General for a new trial on grounds of newly-discovered evidence or fraud on the court. If the accused's case is pending before the Board of Review or before the Judicial Council, The Judge Advocate General shall refer the petition to the Board or Council, respectively, for action. Otherwise The Judge Advocate General shall act upon the petition."

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References:

AW 53  
Proposed AGN, Art. 39(g)

Commentary:

This Article provides for a petition for a new trial as provided in AW 53 and in Proposed AGN, Art. 39(g). Action on the petition is to be taken by a Board of Review or the Judicial Council if the case is being reviewed or is to be reviewed by such tribunal. Otherwise The Judge Advocate General shall either deny or grant the new trial. See Article 75 as to restoration of rights, privileges, and property after a new trial.

\* \* \* \* \*

"ART. 74. Remission and Suspension.

(a) The Secretary of the Department and any Under Secretary, Assistant Secretary or commanding officer

designated by the Secretary may remit or suspend any part or amount of the unexecuted portion of any sentence, including all uncollected forfeitures, other than a sentence approved by the President.

(b) The Secretary of the Department may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial."

- - - - -

References:

AW 51(b)  
Proposed AGN, Art. 39(h)

Commentary:

Under this Article the Secretary of a Department may review the sentence of any court-martial, which will give him clemency and parole powers as well as ultimate control of sentence uniformity. Action hereunder may be taken without regard to whether the person acting has previously approved the sentence.

\* \* \* \* \*

"ART. 75. Restoration.

(a) Under such regulations as the President may prescribe, all rights, privileges, and property affected by an executed portion of a court-martial sentence which has been set aside or disapproved, except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered and such executed portion is included in a sentence imposed upon the new trial or rehearing.

(b) Where a previously executed sentence of dishonorable or bad conduct discharge is not sustained on a new trial, the Secretary of the Department shall substitute therefor a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of his enlistment.

(c) Where a previously executed sentence of dismissal is not sustained on a new trial, the Secretary of the Department shall substitute therefor a form of discharge authorized for administrative issuance and the officer dismissed by such sentence may be reappointed by the President alone to such commissioned rank and precedence as in the opinion of the President such former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to position vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and such reappointment shall be considered as actual service for all purposes, including the right to receive pay and allowances."

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References:

AW 53

Commentary:

This Article is new in that restoration of rights, privileges, and property is mandatory and in that restitution of forfeitures previously collected is authorized. If a new trial or rehearing is ordered, restoration is to be made in regard to such part of the original sentence as is not adjudged upon the new trial or rehearing.

Under subdivision (b), the Secretary of the Department shall order an administrative discharge substituted for a bad conduct or dishonorable discharge which has not been sustained on a new trial unless the accused is to be restored to duty.

Subdivision (c) requires an administrative discharge to be substituted for a dismissal which is not sustained on a new trial. In addition, the President is given authority to reappoint the accused to such rank and precedence as he believes will correct the injustice of the dismissal.

This Article applies not only to new trials but also to all cases where an executed or partly executed sentence is set aside or disapproved under the provisions of this Code.

\* \* \* \* \*

"ART. 76. Finality of Court-Martial Judgments.

The appellate review of records of trials provided by this Code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this Code, and all dismissals and discharges carried into execution pursuant to sentences by courts-martial following approval, review, or affirmation as required by this Code, shall be final and conclusive, and orders publishing the proceedings of courts-martial

and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in Article 73 and to action by the Secretary of a Department as provided in Article 74."

- - - - -

References:

AW 50(h).

Commentary:

This Article is derived from AW 50(h) and is modified to conform to terminology used in this Code.

\* \* \* \* \*

## Part X. Punitive Articles.

"ART. 77. Principals.

Any person punishable under this Code who --

(1) commits an offense punishable by this Code, or aids, abets, counsels, commands, or procures its commission; or

(2) causes an act to be done, which if directly performed by him would be punishable by this Code; shall be punished with the punishment provided for the commission of the offense."

- - - - -

References:

Title 18, U.S.C. § 2 (1948)  
MCM, par. 27  
NC&B, Sec. 41

Commentary:

At present the subject matter of this provision is prescribed by regulations or provided for in individual offenses.

\* \* \* \* \*

"ART. 78. Accessory After the Fact.

Any person subject to this Code who, knowing that an offense punishable by this Code has been committed, receives, comforts, or assists the offender in order to hinder or prevent

his apprehension, trial or punishment shall be punished as a court-martial may direct."

- - - - -

References:

AGN Art. 8(17)  
 Title 18, U.S.C. § 3 (1948)  
 NC&B, sec. 41

Commentary:

The language of this Article is derived from Title 18, U.S.C. § 3 and conforms to present Army and Navy practice.

\* \* \* \* \*

"ART. 79. Conviction of Lesser Included Offense.

An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein."

- - - - -

References:

Proposed AGN, Art. 28 (a) (2)  
 Federal Rules of Criminal Procedure, Rule 31 (c)

Commentary:

At present this provision is prescribed by regulations. The language of the proposed text is derived from the Federal Rules of Criminal Procedure.

\* \* \* \* \*

"ART. 80. Attempts.

(a) An act, done with specific intent to commit an offense under this Code, amounting to more than mere preparation and tending but failing to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this Code who attempts to commit any offense punishable by this Code shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

(c) Any person subject to this Code may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated."

- - - - -

References:

AW 96  
Proposed AGN, Art. 9(62).  
NC&B, sec. 42, 43

Commentary:

An attempt to commit an offense is now punished under the general articles in cases where it is not specifically set forth.

Subdivision (c) is applicable only to a trial where the charge alleges an attempt to commit an offense, and not to a trial upon a charge for the offense itself.

\* \* \* \* \*

"ART. 81. Conspiracy.

Any person subject to this Code who conspires with any other person or persons to commit an offense under this Code shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct."

- - - - -

References:

Proposed AGN, Art. 9(62)  
Title 18, U.S.C. § 371 (1948)  
NC&B sec. 112

Commentary:

This Article is derived from Title 18, U.S.C. § 371.

\* \* \* \* \*

"ART. 82. Solicitation.

(a) Any person subject to this Code who solicits or advises another or others to desert in violation of Article 85 or mutiny in violation of Article 94 shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct.

(b) Any person subject to this Code who solicits or advises another or others to commit an act of misbehavior

before the enemy in violation of Article 99 or sedition in violation of Article 94 shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct."

- - - - -

References:

Proposed AGN, Art. 9(62)

Commentary:

Subdivision (a) makes it clear that one who solicits or advises another to violate the Articles specified shall be guilty of an offense under this Code. However, where the solicitation or advice results in the offense being consummated or attempted, the solicitor shall be punished as a principal, and the death penalty may be imposed.

In subdivision (b) where the solicitation or advice does not result in the consummated offense, the death penalty is not authorized.

\* \* \* \* \*

"ART. 83. Fraudulent Enlistment, Appointment, or Separation.

Any person who --

(1) procures his own enlistment or appointment in the armed forces by means of knowingly false representations or deliberate concealment as to his qualifications for such enlistment or appointment and receives pay or allowances thereunder; or

(2) procures his own separation from the armed forces by means of knowingly false representations or deliberate concealment as to his eligibility for such separation; shall be punished as a court-martial may direct."

- - - - -

References:

AW 54  
AGN, Art. 22 (b)  
Proposed AGN, Art. 9(34)

Commentary:

Paragraph (1) is in substance the same as AW 54, with the addition of one who procures his own "appointment" by fraudulent means, thus making it applicable to officers as well as enlisted persons.

Paragraph (2) incorporates Proposed AGN 9 (34) which relates to one who procures his own "separation" by fraudulent means.

\* \* \* \* \*

"ART. 84. Unlawful Enlistment, Appointment, or Separation.

Any person subject to this Code who effects an enlistment or appointment in or a separation from the armed forces of any person who is known to him to be ineligible for such enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct."

- - - - -

References:

AW 55  
AGN Art. 19  
Proposed AGN, Art. 9(38)

Commentary:

This Article is derived from AW 55. The scope of the Article has been enlarged to include all persons subject to the Code, instead of being limited to officers. Unlawful appointments or separations have been added to conform to Article 83.

\* \* \* \* \*

"ART. 85. Desertion.

(a) Any member of the armed forces of the United States who --

(1) without proper authority goes or remains absent from his place of service, organization, or place of duty with intent to remain away therefrom permanently; or

(2) quits his unit or organization or place of duty with intent to avoid hazardous duty or to shirk important service; or

(3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact he has not been so regularly separated, or enters any foreign armed

service except when authorized by the United States; is guilty of desertion.

(b) Any officer of the armed forces who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to remain away therefrom permanently is guilty of desertion.

(c) Any person found guilty of desertion or attempted desertion shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the desertion or attempted desertion occurs at any other time, by such punishment, other than death, as a court-martial may direct."

- - - - -

References:

AW 28, 58  
AGN Arts. 10, 4(6), 8(21)  
Proposed AGN, Arts. 8(3), 9(31), 10(b)

Commentary:

This Article consolidates all provisions relating to desertion. Paragraph (1) of subdivision (a) sets forth the elements of desertion, in order to clearly distinguish desertion from A.W.O.L. Paragraphs (2) and (3) of subdivision (a), and subdivision (b) are derived from AW 28.

AW 59 (Advising or Aiding Another to Desert) and AW 60 (Entertaining a Deserter) have been deleted, as they are now covered by Article 77 (Principals) and 78 (Accessory After the Fact), respectively.

\* \* \* \* \*

"ART. 86. Absence Without Leave.

Any person subject to this Code who, without proper authority --

- (1) fails to go to his appointed place of duty at the time prescribed; or
- (2) goes from that place; or
- (3) absents himself or remains absent from his unit, organization, or other place of duty at which he is required to be at the time prescribed;

shall be punished as a court-martial may direct."

- - - - -

References:

AW 61  
AGN Arts. 8(19), 8(46), 4(9)  
Proposed AGN, Art. 9(29)

Commentary:

This Article is based on AW 61. The words "fails to go" have been substituted for the words "fails to repair", in conformity with the policy of avoiding technical terms wherever possible.

\* \* \* \* \*

"ART. 87. Missing Movement.

Any person subject to this Code who through neglect or design misses the movement of a ship, aircraft, or unit with which he is required in the course of duty to move shall be punished as a court-martial may direct."

- - - - -

References:

AW 61  
Proposed AGN, Art. 9(57)

Commentary:

This Article is taken from Proposed AGN, Art. 9(57) and is, in effect, an aggravated form of absence without leave as set forth in AW 61.

\* \* \* \* \*

"ART. 88. Disrespect Towards Officials.

Any officer who uses contemptuous or disrespectful words against the President, Vice President, Congress, Secretary of Defense, or a Secretary of a Department, a Governor or a legislature of any State, Territory or other possession of the United States in which he is on duty or present shall be punished as a court-martial may direct."

- - - - -

References:

AW 62  
Proposed AGN, Art. 9(47)

Commentary:

This Article is derived from AW 62. The scope has been enlarged to include the Secretary of Defense and the Secretaries of the Departments. The phrase "shall be dismissed from service" has been deleted as the same punishment can be adjudged under the phrase "shall be punished as a court-martial may direct." This Article applies to officers only.

\* \* \* \* \*

"ART. 89. Disrespect Towards Superior Officer.

Any person subject to this Code who behaves with disrespect towards his superior officer shall be punished as a court-martial may direct."

- - - - -

References:

AW 63  
AGN Art. 8(6)  
Proposed AGN, Art. 9(16)

Commentary:

This Article is derived from AW 63. Superior officer shall be given the meaning set forth in Article 1.

\* \* \* \* \*

"ART. 90. Assaulting or Willfully Disobeying Officer.

Any person subject to this Code who --

(1) strikes his superior officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other

time, by such punishment, other than death, as a court-martial may direct."

- - - - -

References:

AW 64  
 AGN Arts. 4(2), 4(3), 4(15)  
 Proposed AGN, Arts. 9(13), 9(50), 8(10)

Commentary:

This Article is derived from AW 64. The punishment has been modified so that the death penalty can be imposed only when the offense is committed in time of war.

\* \* \* \* \*

"ART. 91. Insubordinate Conduct Towards Noncommissioned Officer.

Any warrant officer or enlisted person who --

(1) strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while such officer is in the execution of his office; or

(2) willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer; or

(3) treats with contempt or is disrespectful in language or deportment towards a warrant officer, noncommissioned officer, or petty officer while such officer is in the execution of his office;

shall be punished as a court-martial may direct."

- - - - -

References:

AW 65  
 AGN Art. 4(2)  
 Proposed AGN, Arts. 9(13), 9(50)

Commentary:

This Article is derived from AW 65. The scope of the provision has been enlarged to include warrant officers. The attempt provision has been deleted as it is now covered by Article 80. "Petty officer" has been added to take care of Navy terminology.

\* \* \* \* \*

"ART. 92. Failure to Obey Order or Regulation.

Any person subject to this Code who --

- (1) violates or fails to obey any lawful general order or regulation; or
- (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the same; or
- (3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct."

- - - - -

References:

AW 96  
 Proposed AGN, Art. 9(30), 9(19)

Commentary:

This Article is derived from Proposed AGN 9(30) and 9(19). Under present Army practice a violation of this provision would be charged under AW 96.

\* \* \* \* \*

"ART. 93. Cruelty and Maltreatment.

Any person subject to this Code who is guilty of cruelty toward, or oppression or maltreatment of any person subject to his orders shall be punished as a court-martial may direct."

- - - - -

References:

Proposed AGN, Art. 9(12)

Commentary:

This Article is derived from Proposed AGN 9(12). The present Army practice is to handle an offense of this nature under AW 96.

\* \* \* \* \*

"ART. 94. Mutiny or Sedition.

(a) Any person subject to this Code --

(1) who with intent to usurp or override lawful military authority refuses, in concert with any other person or persons, to obey orders or otherwise do his duty or creates any violence or disturbance is guilty of mutiny;

(2) who with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person or persons, revolt, violence, or other disturbance against such authority is guilty of sedition;

(3) who fails to do his utmost to prevent and suppress an offense of mutiny or sedition being committed in his presence, or fails to take all reasonable means to inform his superior or commanding officer of an offense of mutiny or sedition which he knows or has reason to believe is taking place, is guilty of a failure to suppress or report a mutiny or sedition.

(b) A person who is found guilty of attempted mutiny, mutiny, sedition or failure to suppress or report a mutiny or sedition shall be punished by death or such other punishment as a court-martial may direct."

- - - - -

References:

AW 66, 67  
AGN, Arts. 4(1), 8(8)  
Proposed AGN, Arts. 8(1), 9(18)

Commentary:

This Article consolidates AW 66 and 67, and sets forth the elements required to constitute the offense of mutiny or sedition.

The death penalty has been removed for the offense of "attempted sedition". The words "excites, causes, or joins" have been omitted as unnecessary because such persons are principals under Article 77.

\* \* \* \* \*

"ART. 95. Arrest and Confinement.

Any person subject to this Code who resists apprehension or breaks arrest or who escapes from custody or confinement shall be punished as a court-martial may direct."

- - - - -

References:

AW 69  
Proposed AGN, Art. 9(50)

Commentary:

This Article covers the punitive aspect of AW 69. That part omitted is now covered by Article 10.

The distinction between officers, cadets and enlisted persons has been removed. The Article now applies to all persons, and the punishment shall be as a court-martial may direct.

\* \* \* \* \*

"ART. 96. Releasing Prisoner Without Proper Authority.

Any person subject to this Code who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any such prisoner to escape, shall be punished as a court-martial may direct."

- - - - -

References:

AW 73  
Proposed AGN, Art. 9(28)

Commentary:

This Article is derived from AW 73, and is in accord with the comparable Navy provision.

\* \* \* \* \*

"ART. 97. Unlawful Detention of Another.

Any person subject to this Code who, except as provided by law, apprehends, arrests or confines any person shall be punished as a court-martial may direct."

- - - - -

References:

Proposed AGN; Art. 9(51)

Commentary:

This Article should be read in conjunction with Articles 7 and 9, wherein those persons authorized to apprehend, arrest or confine are set forth.

\* \* \* \* \*

"ART. 98. Non-Compliance with Procedural Rules.

Any person subject to this Code who --

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this Code; or

(2) knowingly and intentionally fails to enforce or comply with any provision of this Code regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct."

- - - - -

References:

AW 70.

Commentary:

Paragraph (1) of this Article embodies the substance of AW 70. The scope of AW 70 is enlarged to include persons other than officers.

Paragraph (2) is new, and is intended to enforce procedural provisions of this Code, for example, Article 37 (Unlawfully Influencing Action of Court) and Article 31 (Compulsory Self Incrimination).

\* \* \* \* \*

"ART. 99. Misbehavior Before the Enemy.

Any member of the armed forces who before or in the presence of the enemy --

- (1) runs away; or
- (2) shamefully abandons, surrenders or delivers up any command, unit, place or military property which it is his duty to defend; or
- (3) through disobedience, neglect or intentional misconduct endangers the safety of any such command,

unit, place, or military property; or

(4) casts away his arms or ammunition; or

(5) is guilty of cowardly conduct; or

(6) quits his place of duty to plunder or pillage; or

(7) causes false alarms in any command, unit, or place under control of the armed forces; or

(8) willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture or destroy; or

(9) does not afford all practicable relief and assistance to any troops, combatants, vessels or aircraft of the armed forces belonging to the United States or their allies when engaged in battle;

shall be punished by death or such other punishment as a court-martial may direct."

- - - - -

References:

AW 75  
AGN Art. 4(12-20)  
Proposed AGN, Art. 8(7-15)

Commentary:

This Article incorporates comparable Army and Navy provisions. The phrase "or speaks words inducing others" has been deleted from AW 75 as unnecessary in view of Article 77 and 82.

\* \* \* \* \*

"ART. 100. Subordinate Compelling Surrender.

Any person subject to this Code who compels or attempts to compel a commander of any place, vessel, aircraft, or other military property, or of any body of members of the armed forces to give it up to an enemy or to abandon it, or who strikes the colors or flag to an enemy without proper authority, shall be punished by death or such other punishment as a court-martial may direct."

- - - - -

References:

AW 76  
AGN Art. 4(12)  
Proposed AGN, Art. 8(7)

Commentary:

This Article consolidates AW 76 and Proposed AGN, Art. 8(7).

\* \* \* \* \*

"ART. 101. Improper Use of Countersign.

Any person subject to this Code who in time of war discloses the parole or countersign to any person not entitled to receive it or who gives to another who is entitled to receive and use the parole or countersign a different parole or countersign from that which, to his knowledge, he was authorized and required to give, shall be punished by death or such other punishment as a court-martial may direct."

- - - - -

References:

AW 77  
Proposed AGN, Art. 9(48)

Commentary:

This Article is derived from AW 77. The words "to his knowledge" have been added, to cover the situation where a person misunderstands the countersign or parole given to him.

\* \* \* \* \*

"ART. 102. Forcing a Safeguard.

Any person subject to this Code who forces a safeguard shall suffer death or such other punishment as a court-martial may direct."

- - - - -

References:

AW 78

Commentary:

This Article is derived from AW 78. The words "in time of war" have been deleted to cover the situation where it is necessary to impose a safeguard, as in circumstances amounting to a state of belligerency, but where a formal state of war does not exist.

\* \* \* \* \*

"ART. 103. Captured or Abandoned Property.

(a) All persons subject to this Code shall secure all public property taken from the enemy for the service of the United States, and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody or control.

(b) Any person subject to this Code who --

(1) fails to carry out the duties prescribed in subdivision (a) of this Article; or

(2) buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or another directly or indirectly connected with himself; or

(3) engages in looting or pillaging;

shall be punished as a court-martial may direct."

- - - - -

References:

AW 79, 80  
 Proposed AGN, Art. 9(37)  
 AGN Art. 8(16)

Commentary:

This Article consolidates AW 79 and 80. Paragraph (3) of subdivision (b) is added as it was felt that conduct of this nature should be specifically covered.

\* \* \* \* \*

"ART. 104. Aiding the Enemy.

Any person who --

(1) aids, or attempts to aid the enemy with arms, ammunition, supplies, money or other thing;

or

(2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with, or holds any intercourse with the enemy, either directly or indirectly;

shall suffer death or such other punishment as a court-martial or military commission may direct."

- - - - -

References:

AW 81  
 AGN Art. 4(5), 4(4)  
 Proposed AGN, Art. 8(2)

Commentary:

This Article is derived from AW 81. Paragraph (2) enlarges AW 81 by the addition of the phrase "holds any intercourse with the enemy."

\* \* \* \* \*

"ART. 105. Misconduct as Prisoner.

Any person subject to this Code who, while in the hands of the enemy in time of war --

(1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or

(2) while in a position of authority over such persons maltreats them without justifiable cause; shall be punished as a court-martial may direct."

- - - - -

References:

None

Commentary:

This Article is new, and stems from abuses of this nature arising out of World War II.

\* \* \* \* \*

"ART. 106 Spies.

Any person who in time of war is found lurking or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces of the United States, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death."

- - - - -

References:

AW 82  
AGN Art. 5  
Proposed AGN, Art. 8(16)

Commentary:

This Article is derived from AW 82. The scope of the Article has been enlarged in view of the importance of industrial plants, and other manufacturing units engaged in the war effort.

\* \* \* \* \*

"ART. 107. False Official Statements.

Any person subject to this Code who, with intent to deceive, signs any false record, return, regulation, order or other official document, knowing the same to be false, or makes

any other false official statement knowing the same to be false, shall be punished as a court-martial may direct."

- - - - -

References:

AW 56, 57  
AGN Art. 8(14)  
Proposed AGN, Art. 9(24)

Commentary:

This Article consolidates AW 56 and 57. It is broader in scope in that it is not limited to particular types of documents, and its application includes all persons subject to this Code.

The Article extends to oral statements, and the mandatory dismissal for officers has been deleted.

\* \* \* \* \*

"ART. 108. Military Property of United States -- Loss, Damage, Destruction, or Wrongful Disposition.

Any person subject to this Code who, without proper authority, --

- (1) sells or otherwise disposes of; or
- (2) willfully or through neglect damages, destroys, or loses; or
- (3) willfully or through neglect suffers to be lost, damaged, destroyed, sold or wrongfully disposed of;

any military property of the United States, shall be punished as a court-martial may direct."

- - - - -

References:

AW 83, 84  
AGN Art. 8(15)  
Proposed AGN, Art. 9(20), 9(21), 9(25)

Commentary:

This Article consolidates AW 83 and 84. It removes the distinction between issued and non-issued military property, and applies to all persons subject to the Code.

\* \* \* \* \*

"ART. 109. Property Other Than Military Property of United States -- Waste, Spoil, or Destruction.

Any person subject to this Code who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States shall be punished as a court-martial may direct."

- - - - -

References:

AW 89

Commentary:

This Article is derived from AW 89. The provisions relating to behavior, reparation, and riot have been deleted.

The reparation aspect is now handled by Article 139 and the riots by Article 116.

\* \* \* \* \*

"ART. 110. Improper Hazarding of Vessel.

(a) Any person subject to this Code who willfully and wrongfully hazards or suffers to be hazarded any vessel of the armed forces shall suffer death or such other punishment as a court-martial may direct.

(b) Any person subject to this Code who negligently hazards or suffers to be hazarded any vessel of the armed forces shall be punished as a court-martial may direct."

- - - - -

References:

AGN Arts. 4(10), 8(11)  
Proposed AGN, Arts. 8(6), 9(21)

Commentary:

This Article is derived from Proposed AGN, Arts. 8(6) and 9(21).

\* \* \* \* \*

"ART. 111. Drunken or Reckless Driving.

Any person subject to this Code who operates any vehicle while drunk, or in a reckless or wanton manner, shall be punished as a court-martial may direct."

- - - - -

References:

Proposed AGN, Arts. 9(53), 9(54)

Commentary:

It is intended that the word "drunk" as used in this Article, and in Articles 112 and 113, shall have the same meaning as set forth in the MCM, par. 173, to wit: "Whether the drunkenness was caused by liquor or drugs is immaterial; and any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of this Article."

\* \* \* \* \*

"ART. 112. Drunk on Duty.

Any person subject to this Code, other than a sentinel or lookout, who is found drunk on duty, shall be punished as a court-martial may direct."

- - - - -

References:

AW 85  
AGN Art. 8(1)  
Proposed AGN, Arts. 9(53), 9(55)

Commentary:

This Article is derived from AW 85. The phrase "other than a sentinel or lookout" has been added, as a sentinel or lookout found drunk on duty is guilty of a separate and distinct offense under Article 113.

\* \* \* \* \*

"ART. 113. Misbehavior of Sentinel.

Any sentinel or lookout who is found drunk or sleeping upon his post, or leaves it before he is regularly relieved shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the offense is committed at any other time, by such punishment other than death as a court-martial may direct."

- - - - -

References:

AW 86  
AGN, Arts. 4(8), 4(9)  
Proposed AGN, Arts. 8(5), 8(9), 9(29)

Commentary:

The language used in this Article is substantially that of AW 86. The word "lookout" has been added to cover Navy terminology.

\* \* \* \* \*

"ART. 114. Dueling.

Any person subject to this Code who fights or promotes, or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall be punished as a court-martial may direct."

- - - - -

References:

AW 91  
AGN Art. 8(5)  
Proposed AGN, Art. 9(15)

Commentary:

The provision regarding dismissal of officers found guilty of the offense of dueling has been deleted as superfluous.

\* \* \* \* \*

"ART. 115. Malingering.

Any person subject to this Code who for the purpose of avoiding work, duty, or service --

(1) feigns illness, physical disablement, mental lapse or derangement; or

(2) intentionally inflicts self-injury;

shall be punished as a court-martial may direct."

- - - - -

References:

Proposed AGN, Arts. 9(55), 9(56)  
NC&B, sec. 104

Commentary:

This Article consolidates Proposed AGN, Arts. 9(55) and 9(56).

\* \* \* \* \*

"ART. 116. Riot or Breach of Peace.

Any person subject to this Code who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct."

- - - - -

References:

AW 89  
AGN Art. 22(a)  
NC&B, sec. 92

Commentary:

The language of this Article is new. It is derived from AW 89, and is set forth specifically as it is not within the purview of Article 109.

\* \* \* \* \*

"ART. 117. Provoking Speeches or Gestures.

Any person subject to this Code who uses provoking or reproachful words or gestures towards any other person subject to this Code shall be punished as a court-martial may direct."

- - - - -

References:

AW 90  
Proposed AGN, Art. 9(13)

Commentary:

This Article is derived from AW 90 and Proposed AGN, Art. 9(13).

\* \* \* \* \*

"ART. 118. Murder.

Any person subject to this Code who, without justification or excuse, kills a human being, when he --

(1) has a premeditated design to kill; or

(2) intends to kill or inflict great bodily harm; or

(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson, though he has no intent to kill; is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under paragraph (1) of this Article, he shall suffer death or imprisonment for life as a court-martial may direct."

- - - - -

References:

AW 92  
AGN Art. 6

Commentary:

Under paragraph (1) there must be not only an intent to kill, but there must also be a premeditated design to kill.

Under paragraph (2) intent to inflict great bodily harm has been held to satisfy the "malice aforethought" requirement.

Paragraph (3) is a codification of the well settled common law rule that, even in the absence of a specific intent to kill or inflict serious bodily harm, the homicide is murder if the offender's conduct was imminently dangerous to others and evinced a wanton disregard of human life. It is intended to cover those cases where the acts resulting in death are calculated to put human lives in jeopardy, without being aimed at any one in particular.

Paragraph (4) adopts a restricted view of the felony-murder doctrine. Its application is limited to the more serious and dangerous offenses.

It is intended that the common law "year and a day" rule shall not be applicable. In early times, when the rule originated, it was difficult to ascertain the true cause of death if a substantial period of time intervened. With modern developments in medical science the only justification for this rule no longer exists.

The territorial limitation in peace time has been removed, thus allowing the armed forces to try murder and rape cases in all places, and at all times.

\* \* \* \*

"ART. 119. Manslaughter.

Any person subject to this Code who, without a design to effect death, kills a human being --

- (1) in the heat of sudden passion; or
- (2) by culpable negligence; or
- (3) while perpetrating or attempting to perpetrate an offense, other than those specified in

paragraph (4) of Article 118, directly affecting the person;  
is guilty of manslaughter and shall be punished as a court-martial may direct."

- - - - -

References:

AW 93  
M&B. sec. 119

Commentary:

Paragraph (1) conforms to the offense which is usually labelled voluntary manslaughter. Paragraph (2) covers that type of involuntary manslaughter where the homicide results from criminal negligence. Paragraph (3) obviates the necessity of distinguishing offenses malum in se and malum prohibitum. The phrase "directly affecting the person" is intended to apply to those offenses affecting some particular person as distinguished from an offense affecting society in general, such as general safety regulations.

\* \* \* \* \*

"ART. 120. Rape.

(a) Any person subject to this Code who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of rape shall be punished by death or such other punishment as a court-martial may direct."

- - - - -

References:

AW 92  
AGN Art. 22(a)

Commentary:

The geographical limitation in time of peace contained in AW 92 has been deleted.

\* \* \* \* \*

"ART. 121. Larceny.

Any person subject to this Code who, with intent to deprive or defraud another of the use and benefit of property or to appropriate the same to his own use or the use of any person other than the true owner, wrongfully takes, obtains, or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, or article of value of any kind, steals such property and is guilty of larceny, and shall be punished as a court-martial may direct."

- - - - -

References:

AW 93  
Proposed AGN, Arts. 9(43), 9(41)

Commentary:

This Article is intended to combine the offenses of larceny by asportation, larceny by trick and device, obtaining property by false pretenses, and embezzlement. It

is desirable to eliminate the technical distinctions which have heretofore differentiated one type of theft from another and is in keeping with modern civil trends.

\* \* \* \* \*

"ART. 122. Robbery.

Any person subject to this Code who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or the person or property of a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct."

- - - - -

References:

AW 93  
NC&B, sec. 123

Commentary:

This Article conforms basically to the common law definition of robbery. The phrase "anything of value" was preferred to "property", in order to obviate the difficulties of the common law interpretations. The class of persons menaced has been enlarged.

\* \* \* \* \*

"ART. 123. Forgery.

Any person subject to this Code who, with intent to defraud, --

(1) falsely makes or alters any signature to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; or

(2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered; is guilty of forgery and shall be punished as a court-martial may direct."

- - - - -

References:

AW 93  
Proposed AGN, Art. 9(39)

Commentary:

This Article combines forgery and uttering a forged instrument. The basic common law elements have been incorporated.

\* \* \* \* \*

"ART. 124. Maiming.

Any person subject to this Code who with intent to injure, disfigure, or disable, inflicts upon the person of

another an injury which --

- (1) seriously disfigures his person by any mutilation thereof; or
- (2) destroys or disables any member or organ of his body; or
- (3) seriously diminishes his physical vigor by the injury of any member or organ;

is guilty of maiming and shall be punished as a court-martial may direct."

- - - - -

References:

AW 93  
NC&B, sec. 122

Commentary:

This Article is broader in scope than common law mayhem. It includes injuries which would not have the effect of making a person less able to fight.

\* \* \* \* \*

"ART. 125. Sodomy.

(a) Any person subject to this Code who engages in unnatural carnal copulation with another of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct."

- - - - -

References:

AW 93  
Proposed AGN, Art. 9(39)  
NC&B, sec. 108

Commentary:

This Article covers the same elements as the Army and Navy definition of this offense.

\* \* \* \* \*

"ART. 126. Arson.

(a) Any person subject to this Code who willfully and maliciously burns or sets on fire a dwelling in which there is at the time a human being, or any other structure, water craft, or movable, wherein to the knowledge of the offender there is at the time a human being is guilty of aggravated arson and shall be punished as a court-martial may direct.

(b) Any person subject to this Code who willfully and maliciously burns or sets fire to the property of another, except as provided in subdivision (a) of this Article, is guilty of simple arson and shall be punished as a court-martial may direct."

- - - - -

References:

AW 93  
NC&B, sec. 124

Commentary:

This Article divides arson into two categories. Subdivision (a) is essentially common law arson, but is enlarged to cover structures other than dwellings, in view of the fact that the essence of the offense is danger to human life. In subdivision (b) the offense is essentially one against the property of someone other than the offender.

\* \* \* \* \*

"ART. 127. Extortion.

Any person subject to this Code who communicates threats to another with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity of any description is guilty of extortion and shall be punished as a court-martial may direct."

- - - - -

References:

AW 96  
Proposed AGN, Art. 9(42)  
NC&B, sec. 93

Commentary:

This Article combines extortion and blackmail.

\* \* \* \* \*

"ART. 128. Assault.

(a) Any person subject to this Code who attempts or offers with unlawful force or violence to do bodily harm

to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(b) Any person subject to this Code who --

(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

is guilty of aggravated assault and shall be punished as a court-martial may direct."

- - - - -

References:

AW 93  
NC&B, sec. 48

Commentary:

This Article is divided into two categories. Subdivision (a) defines a simple assault. Subdivision (b) sets forth the elements of aggravated assault.

This Article differs from present service practice in that assaults with intent to commit specific crimes have been eliminated. Such assaults could be punished under Article 80 (Attempts), or, if the intent is doubtful, under this Article.

\* \* \* \* \*

"ART. 129. Burglary.

Any person subject to this Code who, with intent to commit an offense punishable under Articles 118 through 128 inclusive, breaks and enters, in the night time, the dwelling-house of another, is guilty of burglary and shall be punished as a court-martial may direct."

- - - - -

References:

AW 93  
Proposed AGN, Art. 9(39)

Commentary:

This Article includes all the elements of common law burglary. The intent to commit a felony has been limited to those offenses specified.

\* \* \* \* \*

"ART. 130. Housebreaking.

Any person subject to this Code who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct."

- - - - -

References:

AW 93  
Proposed AGN, Art. 9(39)  
MCM, par. 179(e)

Commentary:

This Article is adopted from MCM, par. 179(e). The scope has been enlarged by the inclusion of the words "or structure of another."

\* \* \* \* \*

"ART. 131. Perjury.

Any person subject to this Code who in a judicial proceeding or course of justice, willfully and corruptly gives, upon a lawful oath or in any form allowed by law to be substituted for an oath, any false testimony material to the issue or matter of inquiry is guilty of perjury and shall be punished as a court-martial may direct."

- - - - -

References:

AW 93  
MCM, par. 180(h)  
NC&B, sec. 115

Commentary:

This Article is derived from MCM, par. 180 (h), and is in substantial conformity with the Navy definition.

\* \* \* \* \*

"ART. 132. Frauds Against the Government.

Any person subject to this Code --

(1) who, knowing it to be false or fraudulent, --

(A) makes any claim against the United States or any officer thereof; or

(B) presents to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof; or

(2) who, for the purpose of obtaining the approval, allowance, or payment of any claim against the United States or any officer thereof, --

(A) makes or uses any writing or other paper knowing the same to contain any false or fraudulent statements; or

(B) makes any oath to any fact or to any writing or other paper knowing such oath to be false; or

(C) forges or counterfeits any signature upon any writing or other paper, or uses any such signature knowing the same to be forged or counterfeited; or

(3) who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the armed forces thereof, knowingly delivers to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

(4) who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, makes or delivers to any person such writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States;

shall, upon conviction, be punished as a court-martial may direct."

- - - - -

References:

AW 94  
AGN Arts. 14(1-10)  
Proposed AGN, Arts. 9(1-10)

Commentary:

This Article has revised and rearranged the comparable Army and Navy provisions to eliminate repetitious and superfluous material.

Reference to persons "causing, procuring, or advising" have been deleted in view of Article 77 (Principals). The conspiracy clause has been omitted as that offense is now covered by Article 81. It is to be noted that an overt act to effect the object of the conspiracy is now required.

The provisions relating to embezzlement, stealing, misappropriation, and pledges have been omitted as the said offenses are now covered by Article 121 (Larceny) or Article 108 (Wrongful Disposition of Military Property).

The continuing jurisdiction clause has been deleted, since a member of the armed forces who commits a fraud against the government, and who is thereafter discharged, is subject to prosecution in the Federal courts under general criminal statutes. See Title 18 U.S.C. §§ 1001 et seq (1948).

\* \* \* \* \*

"ART. 133. Conduct Unbecoming an Officer and Gentleman.

Any officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the armed forces."

- - - - -

References:

AW 95

Commentary:

This Article is derived from AW 95. The word "midshipman" has been added to cover the Navy designation.

\* \* \* \* \*

"ART. 134. General Article.

Though not specifically mentioned in this Code, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this Code may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

- - - - -

References:

AW 96

Commentary:

This Article is derived from AW 96 and corresponds to AGN Art. 22(a).

\* \* \* \* \*

## Part XI. Miscellaneous Provisions.

"ART. 135. Courts of Inquiry.

(a) Courts of inquiry to investigate any matter may be convened by any person authorized to convene a general court-martial or by any other person designated by the Secretary of a Department for that purpose whether or not the persons involved have requested such an inquiry.

(b) A court of inquiry shall consist of three or more officers. For each court of inquiry the convening authority shall also appoint counsel for the court.

(c) Any person subject to this Code whose conduct is subject to inquiry shall be designated as a party. Any person subject to this Code or employed by the National Military Establishment who has a direct interest in the subject of inquiry shall have the right to be designated as a party upon request to the court. Any person designated as a party shall be given due notice and shall have the right to be present, to be represented by counsel, to cross-examine witnesses, and to introduce evidence.

(d) Members of a court of inquiry may be challenged by a party, but only for cause stated to the court.

(e) The members, counsel, the reporter, and interpreters of courts of inquiry shall take an oath or affirmation to faithfully perform their duties.

(f) Witnesses may be summoned to appear and testify and be examined before courts of inquiry as provided for courts-martial.

(g) Courts of inquiry shall make findings of fact but shall not express opinions or make recommendations unless required to do so by the convening authority.

(h) Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signatures of the president and counsel for the court and forwarded to the convening authority. In case the record can not be authenticated by the president it shall be signed by a member in lieu of the president and in case the record can not be authenticated by the counsel for the court it shall be signed by a member in lieu of the counsel."

- - - - -

References:

AW 97-103  
Proposed AGN, Arts. 42, 43, 44

Commentary:

This Article is a combination of Army and Navy provisions as to courts of inquiry. Army courts of inquiry, at present, may only be convened at the request of the person whose conduct is to be investigated. Naval courts of inquiry, however, may be convened for any formal investigation. Subdivision (a) grants this broader power.

Subdivision (b) does not change the number of members of courts of inquiry in either service, but does provide for a counsel whose duties are to assist the court in matters of law, presentation of evidence, and in the keeping of the record.

Subdivision (c) adopts the substance of Proposed AGN, Art. 42. The provision in regard to employees of the National Military Establishment is included in order to allow employees whose conduct may be involved in the inquiry to intervene in order to protect their rights or reputations.

Subdivisions (d) and (e) conform to present Army and Navy practice.

Subdivision (f) is derived from AW 101. Under Navy practice witnesses may be but are not required to be sworn.

Subdivisions (g) and (h) conform to Army and Navy practice.

\* \* \* \* \*

"ART. 136. Authority to Administer Oaths and to Act as Notary.

(a) The following persons on active duty in the armed forces shall have authority to administer oaths for the purposes of military administration, including military justice, and shall have the general powers of a notary public and of a consul of the United States, in the performance of all notarial acts to be executed by members of any of the armed forces, wherever they may be, and by other persons subject to this Code outside the continental limits of the United States:

(1) All judge advocates of the Army and Air Force;

(2) All law specialists;

(3) All summary courts-martial;

(4) All adjutants, assistant adjutants, acting adjutants and personnel adjutants.

(5) All commanding officers of the Navy and Coast Guard;

(6) All staff judge advocates and legal officers, and acting or assistant staff judge advocates and legal officers; and

(7) All other persons designated by regulations of the armed forces or by statute.

(b) The following persons on active duty in the armed forces shall have authority to administer oaths necessary in the performance of their duties:

(1) The president, law officer, trial counsel, and assistant trial counsel of all general and special courts-martial;

(2) The president and the counsel for the court of any court of inquiry;

(3) All officers designated to take a deposition;

(4) All persons detailed to conduct an investigation;

(5) All recruiting officers; and

(6) All other persons designated by

regulations of the armed forces or by statute.

(c) No fee of any character shall be paid to or received by any person for the performance of any notarial act herein authorized.

(d) The signature without seal of any such person acting as notary, together with the title of his office, shall be prima facie evidence of his authority."

- - - - -

References:

AW 114  
AGN Art. 69  
Proposed AGN, Art. 47(a)

Commentary:

This Article is a combination and modification of AW 114 and AGN Art. 69. Only certain persons specified are given notarial powers, as it is believed inappropriate that persons having temporary powers to administer oaths should notarize legal instruments which may have drastic legal consequences if incorrectly drawn. The persons specified in subdivision (a) are believed to have legal experience or experience in personnel matters. Commanding officers of the Navy and Coast Guard are included in subdivision (a) as Navy and Coast Guard commands do not have adjutants and personnel adjutants.

\* \* \* \* \*

"ART. 137. Articles to be Explained.

Articles 2, 3, 7 through 15, 25, 27, 31, 37, 38, 55, 77 through 134, and 137 through 139 of this Code shall be carefully explained to every enlisted person at the time of his entrance on active duty in any of the armed forces of the United States, or within six days

thereafter. They shall be explained again after he has completed six months of active duty, and again at the time he re-enlists. A complete text of the Uniform Code of Military Justice and of the regulations prescribed by the President thereunder shall be made available to any person on active duty in the armed forces of the United States, upon his request, for his personal examination."

- - - - -

References:

AW 110  
AGN Art. 20 (Tenth)

Commentary:

This Article is derived from AW 110, but requires the Articles to be carefully explained instead of being read, as it is felt that a careful explanation is of more value than a mere reading. The language would also permit training films to be used to explain the Code. The requirement that the Code be read every six months is omitted as it is felt that a thorough indoctrination is more beneficial than a required reading every six months.

\* \* \* \* \*

"ART. 138. Complaints of Wrongs.

Any member of the armed forces who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to any superior officer who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it

is made. That officer shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department concerned a true statement of such complaint, with the proceedings had thereon."

- - - - -

References:

AW 121  
U. S. Navy Regulations, Art. 99

Commentary:

This Article is adopted from AW 121. The Navy has provided a similar procedure by regulation.

\* \* \* \* \*

"ART. 139. Redress of Injuries to Property.

(a) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that his property has been wrongfully taken by members of the armed forces he may, subject to such regulations as the Secretary of the Department may prescribe, convene a board to investigate the complaint. The board shall consist of from one to three officers and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the

commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The order of such commanding officer directing charges herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the damages so assessed and approved.

(b) Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, charges totalling the amount of damages assessed and approved may be made in such proportion as may be deemed just upon the individual members thereof who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board."

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References:

AW 105

Commentary:

This Article is a redraft of AW 105 with changes to permit the Secretary of the Department to prescribe the situations and procedures for redress. It is not intended to affect the provisions of 40 Stat. 705 (1918) as amended by 41 Stat. 132 (1919), 34 U.S.C. § 600 (1946), (claims for damages not occasioned by vessels) or the provisions of 28 U.S.C. § 2671 et seq. (1948), (tort claims) or similar enactments.

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"ART. 140. Delegation by President.

The President is authorized to delegate any

authority vested in him under this Code, and to provide for the subdelegation of any such authority."

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References:

Pub. L. 759, 80th Cong., 2d Sess., § 10(c)  
(June 24, 1948)

Commentary:

This Article incorporates the language of the reference.

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