Uniform Code of Military Justice

Subject: Refusal or Failure to Plead. A.W. 21.

I. Army Provisions

1. Articles of War

"ART. 21. Refusal or Failure to Plead.-- When an accused arraigned before a court-martial fails or refuses to plead, or answers foreign to the purpose, or after a plea of guilty makes a statement inconsistent with the plea, or when it appears to the court that he entered a plea of guilty improvidently or through lack of understanding of its meaning and effect, the court shall proceed to trial and judgment as if he had pleaded not guilty."

2. P.L. 759, 80th Congress, Chapter 625, 2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

There is no Article for the Government of the Navy which corresponds to A.W. 21.

2. Naval Courts and Boards

Sec. 413, 416, 417, and 420 provide substantially the same rules concerning "refusal or failure to plead" as is contained in A.W. 21.

3. Proposed Navy Bill

"ART. 48. The Secretary of the Navy is authorized to prescribe and to modify from time to time the rules of pleading and procedure before naval courts martial and other naval tribunals....."

III. Differences

Other than the fact that the Army is bound by A.W. 21 in this matter, there are no material differences between the Army rule and those promulgated by the Secretary of the Navy, and embodied in N.C.B.

IV. Recommended Provisions

1. White Report, 1946.

ART. 18. Rules and Procedure. Substantially the same as is presented in ART. 48, proposed Navy Bill.

2. Keeffe Report.

Submits the following recommendation for adoption either in the Rules of Procedure or N.C.B.:

(a) Plea of guilty shall not be received in capital cases.

(b) Plea of guilty to be accepted only after accused has conferred with counsel.

(c) Judge Advocate to explain effect of guilty plea to the accused.

(d) Judge Advocate to determine whether a guilty plea should be accepted.

FEL-2

Uniform Code of Military Justice

Subject: Process to Obtain Witnesses

I. Army Provisions

1. Articles of War

"ART. 22. Process to Obtain Witnesses.--Every trial judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue; but such process shall run to any part of the United States, its territories, and possessions."

"ART. 101. Powers; Procedure.--A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to courts-martial and the trial judge advocate thereof.".....

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

SEC. 213. Article 22 is amended to read as follows:

"ART. 22. Process to Obtain Witnesses.--Every trial judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States having criminal jurisdiction may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions. Witnesses for the defense shall be subpenaed, upon request by the defense counsel, through process issued by the trial judge advocate, in the same manner as witnesses for the prosecution."

II. Navy Provisions

1. Articles for the Government of the United States Navy

"ART. 42. (b) Witnesses; process for.--A naval court martial or court of inquiry shall have power to issue like process to compel witnesses to appear and testify which United States courts of criminal jurisdiction within the State, Territory, or District where such naval court shall be ordered to sit may lawfully issue (Feb. 16, 1909, c. 131, sec. 11, 35 Stat. 621)."

2. Proposed Navy Bill

SEC. 32. Article 42 is renumbered as article 35 and amended to read as follows:

"ART. 35: (a) A general court martial, a summary court martial, and a court of inquiry shall have power to issue like process to compel witnesses to appear and testify which United States Courts of criminal jurisdiction within the State, Territory, District, or possession where such naval court shall be ordered to sit may lawfully issue. Such process shall run to any part of the United States, its Territories, and possessions."

III. Differences

A.W. 22 as it will be amended by Public Law 759 provides for the issue of process by general, special, or summary courts-martial, in the same manner as courts of the United States having criminal jurisdiction. The proposed A.G.N. would differ in that the lowest court would not have the power to issue such process, and the assimilation is to United States courts of criminal jurisdiction within the State, Territory, or District where the naval court-martial is ordered to sit.

The new A.W. 22 will also provide that defense witnesses shall be subpenaed in the same manner as prosecution witnesses. The proposed Navy bill is silent on this point, but Navy general courts-martial at the present time have the authority to subpena witnesses for the defense, and the judge advocate is specifically charged with this duty (N.C. and B. sec. 245).

IV. Recommended Provision

Follow the wording of A.W. Art. 22 as it will be amended by Public Law 759, making only the necessary changes in wording to adapt it to all the armed forces.

H.J.W.

Uniform Code of Military Justice

Subject: Civilians -- (1) Refusal to Appear or Testify, (2) Compensation of Witnesses, (3) Offenses Against Public Justice - A.W. 23.

I. Army Provisions

1. Articles of War

"ART. 23. Refusal to Appear or Testify.--Every person not subject to military law who, being duly subpoenaed to appear as a witness before any military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, wilfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may have been legally subpoenaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and 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, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than $500 or imprisonment not to exceed six months, or both, at the discretion of the court: Provided, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses: Provided further, That every person not subject to military law, who before any court-martial, military tribunal, or military board, or in connection with, or in relation to any proceedings or investigation before it or had under any of the provisions of this Act, is guilty of any of the acts made punishable as offenses against public justice by any provision of chapter 6 of the Act of March 4, 1909, entitled 'An Act to codify, revise, and amend the penal laws of the United States' (volume 35, United States Statutes at Large, p. 1088), or any amendment thereof, shall be punished as therein provided."

2. Other statutory provisions.

Relevant provisions of Chapter 6 of the Act of March 4, 1909, (referred to in 2nd proviso above) as amended, codified and reenacted in Title 18, USC, by Public Law No. 772, 80th Congress, Second Session. (June 25, 1948):

Criminal Code (Section)	Title 18, USC (Section)	New Heading
125	1621	Perjury generally.
126	1622	Subornation of perjury.
127	1506*	Theft or alteration of record or process, false bail.
128,129	2071	Concealment, removal, or mutilation [of records] generally.
130	505	Seals of courts; signatures of judges or court officers.
131	206	Offer to judge or judicial officer.
134	210	Acceptance [of bribe] by witness
135	1503*	Influencing or injuring officer, juror or witness generally.
137	1504*	Influencing juror by writing.
140	1501*	Assault on process server.
141	1071	Concealing person from arrest.
141,143	752	Instigating or assisting escape.
142	753	Rescue to prevent execution.
144	754	Rescue of body of executed offender.
145	873	Blackmail
146	4	Misprision of felony.

*These sections are grouped under Chapter 73 - Obstruction of Justice.

3. Manual for Courts-Martial.

"PAR. 97 - Attendance of Witnesses.--

"In order to maintain a prosecution under the part of A.N. 23 referred to, a person must not only be duly subpoenaed but be

paid or tendered fees, including fee for one day's actual attendance, and mileage both ways 'at the rates allowed to witnesses attending the courts of the United States.' (A.W. 23.) Whenever such action appears to be advisable, appropriate steps will be taken by the trial judge advocate with a view to such payment or tender at the time of the service of the subpoena. See AR 35-4120. If an officer, charged with serving a subpoena, pays the necessary fees and mileage to a witness, taking receipt therefor, he is entitled to reimbursement."

"PAR. 99 - Employment of Experts.--

"When the employment of an expert is necessary during a trial by court-martial, the trial judge advocate, in advance of the employment, will, on the order or permission of the court, request the appointing authority to authorize such employment and to fix the limit of compensation to be paid the expert. The request should, if practicable, state the compensation that is recommended by the prosecution and the defense. Where in advance of trial the prosecution or the defense knows that the employment of an expert will be necessary, application should be made to the appointing authority for authority to employ the expert, stating the necessity therefor and probable cost thereof."

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

No change.

II. Navy Provisions

1. Articles for the Government of the Navy.

"ART. 42(c).--Refusal of witness to appear or testify; privilege.--

"Any person duly subpoenaed to appear as a witness before a general court martial or court of inquiry of the Navy, who willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or produce documentary evidence, which such person may have been legally subpoenaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States; and it shall be the duty of the United States district attorney, on the certification of the facts to him by such naval court to file an information against and prosecute the person so offending, and the punishment of such person, on

conviction, shall be a fine of not more than $500 or imprisonment not to exceed six months, or both, at the discretion of the court: Provided, That this shall not apply to persons residing beyond the State, Territory, or District in which such naval court is held, and that the fees of such witness and his mileage at the rates provided for witnesses in the United States district court for said State, Territory, or District shall be duly paid or tendered said witness, such amounts to be paid by the Bureau of Supplies and Accounts out of the appropriation for compensation of witnesses: Provided further, That no witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate or degrade him (Feb. 16, 1909, c. 131, sec. 12, 35 Stat. 622)."

2. Naval Courts and Boards

"SEC. 247. The word 'District' applies to the District of Columbia only.

" . . . a subpoena issued by a naval court to compel the attendance of witnesses will run throughout the United States but . . . the penalties provided in article 42(c), do not attach where the person resides beyond the State."

"SEC. 248. Authority of the judge advocate in summoning civilian witnesses.—

"The judge advocate is authorized to subpoena as a witness any civilian who is to be a material witness as to facts, and who is within the State, Territory, or District in which a naval court sits and can compel attendance.

"The judge advocate is not authorized to subpoena as a witness, at the expense of the United States, any civilian who is not within the territorial limits in which the court can compel attendance, even though such witness be considered a material one and be willing to attend. In such cases the judge advocate shall forward the subpoena to the Secretary of the Navy, together with the information and in the manner required when forwarding a summons for a naval witness who is not present at the station where the court-martial is convened."

"SEC. 249. Same: Witnesses as to character or as experts not to be summoned or subpoenaed at Government expense.—

"The general rule is that a witness will neither be summoned nor subpoenaed at Government expense when it does

not appear that such witness has personal knowledge of the facts at issue before the court, but rather that his testimony is desired merely as to character or as an expert.

"When expressly authorized by the Secretary of the Navy, however, such a witness may be summoned or subpoenaed, and, in the case of a civilian expert witness, if special compensation is authorized by the Secretary of the Navy, this compensation will be paid, as provided in section 257, either in lieu of or in addition to the fees therein authorized, as directed by the Secretary."

3. Proposed Navy Bill

"ART. 35.

"(b) Any person, not subject to the Articles for the Government of the Navy, duly subpoenaed to appear as a witness before a general court martial, summary court martial, or court of inquiry, who fails to appear or refuses to qualify as a witness or to testify or produce documentary evidence, which such person may have been legally subpoenaed to produce, or who refuses to give his evidence or to give it in the manner provided by these Articles, or behaves with contempt to the court, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States; and it shall be the duty of the United States district attorney, on the certification of the facts to him by such naval court to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than $500 or imprisonment not to exceed six months, or both, at the discretion of the court: Provided, That the fees of such witness and his mileage in the rates provided for witnesses in the United States district court for said State, Territory, District, or possession shall be duly paid or tendered said witness, such amounts to be paid by the Navy Department out of the appropriations made therefor."

III. Differences

1. A.W. 23 applies to witnesses before any military court, commission; court of inquiry or board, or officer designated, by one of these, to take a deposition. Proposed AGN 35(b) applies only to witnesses subpoenaed to appear before a general or summary court-martial or court of inquiry.

2. A. W. 23 makes it a misdemeanor to wilfully neglect or refuse to appear. Proposed AGN 35(b) makes it a misdemeanor to fail to appear. Furthermore, the proposed articles make it a misdemeanor to refuse to give evidence or give it in a manner provided by the AGN. (For contempts see C.S., A.W. 32.)

3. Proposed AGN 35(b) does not contain the provision in A.W. 23 giving territorial courts jurisdiction.

4. Proposed AGN 35(b) does not contain the provision in A.W. 23 which brings within the scope of chapter 6 of the Act of March 4, 1909, acts committed either before or in relation to proceedings of a military tribunal or board. Most of the provisions of that chapter have reference to acts committed in relation to "any court of the United States." There is some doubt that a court-martial is included in the quoted phrase (Winthrop, Military Law and Precedents, Reprint 1920, p. 49). Certain provisions of the chapter, however, are broader in scope and (in the writer's opinion) encompass acts related to both Army and Navy courts-martial. They include:

   Perjury
   Subornation of perjury
   Offer to judges or judicial officer
   Acceptance [of bribe] by witness
   Blackmail
   Misprision of felony

5. Expert witnesses. -- The employment of expert witnesses must be authorized by the Army convening authority as opposed to the Secretary of the Navy.

IV. Recommendations

1. Keeffe Report

"Where the testimony of a civilian witness is essential in a trial by naval court-martial, injustice may result from lack of power to require attendance. A general court-martial should have statutory power running throughout the United States, its territories and possessions, to issue process to compel the attendance of civilian witnesses. Any such witness who wilfully

neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person has been legally subpoenaed to produce should be deemed guilty of a misdemeanor. This power to punish should not be limited to persons residing in the State, Territory, Possession, or District where in the court is held." (p. 148)

"Where the defendant cannot afford to pay the expenses of his own witnesses, and the judge advocate is satisfied as to this and their need, the government should assume the financial burden. A special fund is necessary to remove this fund from the regular Navy budget. If Congress appropriates money directly year by year to the use of the Judge Advocate General for the purpose, there is no danger that budget difficulties will prevent a defendant having needed witnesses." (p. 149)

"RECOMMENDATIONS:

* * * * * *

"(2) Article 42 (c) should be repealed, and in its stead a new article should be enacted, provided that any person subpoenaed to appear as a witness before a general court-martial, a summary court-martial, or a court of inquiry of the naval service, who wilfully neglects or refuses to appear, to testify or to produce documentary evidence which such person may have been subpoenaed to produce shall be deemed guilty of a misdemeanor.

* * * * * *

"(4) The judge advocate in his discretion should be authorized to order transportation at government expense of witnesses for defense where it appears that the defendant is without means, and Congress should be asked to appropriate a special fund outside the regular Navy budget upon which the Judge Advocate General may draw for this purpose." (p. 150)

2. White Draft

There is no provision penalizing failure to comply with a subpoena in the White Articles.

3. McGuire Draft

"Article 9. Witnesses.

"(a) Process for. A summary court-martial, a general court-martial, and a court of inquiry of the naval service shall have

power to issue like process to compel witnesses to appear and testify which United States courts of criminal jurisdiction within the State, Territory, or insular possession where such naval court shall be ordered to sit may lawfully issue. Such process shall run to any part of the United States, its Territories and possessions.

"(b) Refusal of witness to appear or testify. Any person subpoenaed to appear as a witness before a summary court-martial, a general court-martial or court of inquiry of the naval service, who wilfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce documentary evidence, which such person may have been subpoenaed to produce, shall be deemed guilty of a misdemeanor, for which such person may be prosecuted in the district court of the United States and may be punished by a fine of not more than $500 or imprisonment for not exceeding six months, or both, at the discretion of the court: Provided, that the fees of such witness and his mileage at the rates provided for witnesses in the United States district court for said State, Territory or insular possession shall be duly paid or tendered said witness."

4. First Ballantine Report

"Recommendation: An amendment of paragraph (c) of Article 42 of the Articles for the Government of the Navy should be sought making the provisions now applicable in respect of witnesses subpoenaed by general courts martial applicable to witnesses subpoenaed by summary courts martial." (p. 27)

5. Colonel Curry recommends the following change in proposed AGN 35(b):

"Any person, not subject to the Articles for the Government of the Navy, who, duly subpoenaed to appear as a witness before a general court martial, summary court martial, or an officer of the armed services or a civil official designated to take his deposition, or court of inquiry, fails to appear or refuses to quality as a witness or to testify or to give his evidence or to give it in the manner provided by these Articles, or who, duly subpoenaed to produce documentary or real evidence before a general court martial, summary court martial, or an officer of the armed services or a civil official designated to take his deposition, or court of inquiry, fails or refuses to produce such evidence, or who behaves with contempt to the court, shall be deemed guilty of a misdemeanor * * *."

V. Comment

1. By its terms A. W. 23 applies to persons not subject to military law and proposed AGN 35(b) applies to persons not subject to the AGN. It should be considered whether or not these provisions should be separate from a code of military justice.

2. In light of 18 U.S.C., Section 1, it is unnecessary to designate the crime of refusing to appear or testify as a misdemeanor.

FEL - 4

Uniform Code of Military Justice
Subject: Compulsory Self-Incrimination Prohibited, A.W. 24

I. Army Provisions

1. Articles of War

"ART. 24. Compulsory Self-Incrimination Prohibited. No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him."

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

"SEC. 14. Article 24 is amended to read as follows:

"ART. 24. Compulsory Self-Incrimination Prohibited.-- No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him or to answer any question not material to the issue or when such answer might tend to degrade him.

"The use of coercion or unlawful influence in any manner whatsoever by any person subject to military law to obtain any statement, admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission, or confession shall be received in evidence by any court-martial. It shall be the duty of any person in obtaining any statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, and that any statement by the accused may be used as evidence against him in a trial by court-martial."

II. Navy Provisions

1. Articles for the Government of the United States Navy

There is no provision in the Articles for the Government of the Navy corresponding to A. W. 24. The 29th, 60th and 68th Articles for the Government of the Navy lay down rules of evidence for naval courts and boards. In none of these is "self-incrimination" involved.

By Executive Order of the President, approved 5 March 1937, "Naval Courts and Boards, 1937" was issued for the government of all persons attached to the Naval service. It was required that such persons make themselves acquainted with, observe, and comply with the provisions contained therein.

Section 235 of "Naval Courts and Boards, 1937" contains the following provision:

> "The Constitution provides that no person shall be compelled to give any evidence against himself. The prohibition of the fifth amendment against compelling a man to give evidence against himself is a prohibition of the use of physical or moral compulsion to extort communications from him and not an exclusion of his body as evidence when it is material."

2. Proposed Navy Bill:

> ART. 49. The Secretary of the Navy is authorized to prescribe, and to modify from time to time, the rules of pleading and procedure, including modes of proof, in proceedings before naval courts martial, other naval tribunals, and fact-finding bodies as will insure the enforcement of discipline and the fair and impartial administration of justice in the United States naval service: Provided, That, insofar as applicable, such modes of proof shall follow the law of evidence prevailing in the district courts of the United States in the trial of criminal cases: Provided further, That nothing contrary to or inconsistent with these Articles shall be so prescribed.

III. Differences

Public Law 759 carries forward in statutory form the fundamental right against compulsory self-incrimination guaranteed by the 5th Amendment to the Federal Constitution. It goes further and provides that a witness may not be called upon to answer a question that

is degrading, whether or not it is material to the issues. But for such statutory provision, the rule would be otherwise. As said in 70 Corpus Juris, in paragraph 894 on page 740:

> "Although it has been asserted in a number of cases that a witness may refuse to give answers disgracing him or exposing him to infamy, the general rule is that unless excused by statute, (not 5th Amendment to Constitution) a witness will not be excused from answering a question on the sole ground that his answer will disgrace him or bring him into disrepute, where it concerns a matter material or relevant to the issues,"

citing Brown v Walker (U.S. Sup Ct) 161 U.S. 591; U. S. v Thomas (Dist Ct) 49 Fed Supp 547. The states which follow the above rule are: Arkansas, Indiana, Delaware, Illinois, Kentucky, Michigan, Missouri, Nevada, New York, Ohio, Pennsylvania, Utah.

The proposed Navy bill authorizes the Secretary of the Department of the Navy to prescribe rules of pleading and procedure, including rules of proof, "that, insofar as applicable shall follow the laws of evidence in the United States District Court".

But the rule against self-incrimination is more than a rule of pleading or procedure or a rule of evidence; it is a constitutional guarantee. Not so are questions that tend to degrade. Under the proposed Navy bill the Secretary of the Department of the Navy might lawfully prescribe regulations as to questions which tend to degrade.

IV. Recommended Provision

That any provision on this subject follow the language of the present Article of War 24 by providing that no witness shall be compelled to answer any question not material to the issue when such answer might tend to degrade him.

V. Comment

The practice of including in state codes relevant constitutional provisions in the form of statutes might well be followed in a code for the Government of the Armed Forces. In operations overseas, in time of war, a paucity of reference material on courts martial usually prevails. The code should speak out clearly in every respect, including within its provisions basic constitutional guarantees and limitations. Many who are called upon to administer such law are unlearned in the law. Unless constitutional provisions are reflected within the code, the natural tendency is to not to venture beyond the exact language of the code. Reversals by courts and criticisms from the war may be avoided by resort to such a device.

J.P.D.

Uniform Code of Military Justice

Subject: Depositions - when admissible and before whom taken, A.W. 25-26.

I. Army Provisions

1. Articles of War

a. "ART. 25. Depositions - When Admissible.- A duly authenticated deposition taken upon reasonable notice to the opposite party 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 a military board, if such deposition be taken when the witness resides, is found, or is about to go 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 when it appears to the satisfaction of the court, commission, board or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: Provided, That testimony by deposition may be adduced for the defense in capital cases."

"ART. 26. Depositions - Before whom taken. - Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths."

b. The Army permits introduction of deposition by opposite party when not used by the party for whom secured. (MCM p. 123; CM 280875 (1945) IV Bull. JAG, 229). Army also permits use of deposition by prosecution in capital cases where expressly consented to by the defense made or presented in court. (MCM p.123; CMO ETO 1693 (1944) III Bull.JAG, 185; CM 280875 (1945) IV Bull. JAG, 229). Depositions taken before the charges were referred to trial are to be treated as mere affidavits (CM 162743 (1944), Dig. Op. JAG 1912-1940, p. 209). AW 25 and 38 are not applicable to the trial of an enemy combatant by a military commission for violation of the laws of war. (Application of Yamashita and Yamashita v. Styer, 66 S.Ct.340).

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

a. "ART. 25. Depositions - When Admissible - A duly authenticated deposition taken upon reasonable notice to the opposite party 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 a military board, if such deposition be taken when the witness resides, is found, or is about to go 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 when it appears to the satisfaction of the court, commission, board or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to, or, in foreign places, because of nonamenability to process, refuses to, appear and testify in person at the place of trial or hearing: Provided, That testimony by deposition may be adduced for the defense in capital cases: Provided further, That 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 appointing 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: And provided further, That at any time after charges have been signed as provided in article 46, and before the charges have been referred for trial, any authority competent to appoint a court-martial for the trial of such charges may designate officers to represent the prosecution and the defense and may authorize such officers, upon due notice, to take the deposition of any witness, and such deposition may subsequently be received in evidence as in other cases."

b. Art. 26 was not amended by P.L. 759.

II. Navy Provisions

1. Articles for the Government of the United States Navy

a. "ART. 68. Depositions in naval courts.--The depositions of witnesses may be taken on reasonable notice to the opposite party, and when duly authenticated, may be put in evidence before naval courts, except in capital cases and cases where the punishment may be imprisonment or confinement for more than one year as follows:

First, depositions of civilian witnesses residing outside the State, Territory, or District in which a naval court is ordered to sit.

Second, depositions of persons in the naval or military service stationed or residing outside the State, Territory, or District in which a naval court is ordered to sit, or who are under orders to go outside of such State, Territory, or District.

Third, where such naval court is convened on board a vessel of the United States, or at a naval station not within any State, Territory, or District of the United States, the depositions of witnesses may be taken and used as herein provided whenever such witnesses reside or are stationed at such a distance from the place where said naval court is ordered to sit, or are about to go to such a distance as, in the judgment of the convening authority, would render it impracticable to secure their personal attendance."

b. Navy rule does not permit use of deposition by opposite party over objection of party for whom deposition was taken. Instead a new deposition must be taken with court's permission. (NC&B, sec. 215, p. 152). "The refusal to allow an accused an opportunity to obtain by deposition testimony regarding a material element of the case denies him the right to a full and free defense and was therefore prejudicial." (CMO 4-1945, p. 156; CMO 6-1947, p. 192). Limitation of sentence when a deposition is used by prosecution applies only to those specifications into which evidence introduced by deposition enters. (NC&B sec. 454, p. 232; CMO 2-1944, p. 272).

2. Proposed Navy Bill

a. "ART. 36. Except in trials by courts-martial of offenses in which the maximum punishment is death under Article 8 of these Articles and not excepted by the maximum limitations of punishment which the President may have prescribed under Article 33 (b) of these Articles , a duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence

before any naval court when it appears to the satisfaction of the judge advocate of the general court martial; or the senior member of the summary court martial, or the deck court-martial officer, or the president of the court of inquiry; that the witness; by reason of death, age, sickness, bodily infirmity, imprisonment, or military necessity, is unable to, or in foreign places, because of nonamenability to process, refuses to appear and testify in person at the place of trial or hearing: Provided, That the accused, or defendant, and his counsel, or a representative of the accused or defendant if so desired by the accused or defendant, shall be given an opportunity to be present and cross-examine any deponent against the accused or defendant, unless the Secretary of the Navy has, in extraordinary circumstances, expressly authorized the taking of the deposition without the granting of such opportunity."

III. Differences

1. Public Law 759 and the Navy bill differ in the following respects in the provisions for the taking of depositions and their admissibility:

a. The Army rules provide for the use of depositions whenever the death penalty is authorized but not mandatory and the appointing authority has directed that the case be treated as not capital, in which case the court may not adjudge the death penalty. The Navy rules do not provide for any discretion on the part of the convening authority.

b. Under the Army rules, the court, commission, board, or appointing authority rules on the reason for the deposition. Under the Navy Bill, the judge advocate of the general court martial, the senior member of the summary court martial, the deck court-martial officer or the president of the court of inquiry will rule on the reason for the deposition.

c. The Army provides for use when the witness is beyond the distance of one hundred miles from the place of trial or hearing, or resides, is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit. The Navy bill provides among its reasons for use of deposition, death and military necessity.

d. The Army rules provide for use of depositions by the defense in capital cases. The Navy does not include this provision but in a CMO has said that the use by the defense of deposition in a capital case does not reduce the maximum sentence of death. (CMO 2-1944, p. 272).

e. P.L. 759 provides for the taking of depositions after the charges have been signed but before referral to trial under orders of the appointing authority and with representatives of the prosecution and defense present. The Navy Bill provides for the presence of the accused or a representative at the time of the taking of the deposition.

IV. Recommended Provisions

1. A proposed re-draft of Article 36 of the AGN has been considered, reading as follows:

"ART. 36 (a) (1) A deposition may be taken either:

'First. By agreement of the parties, prior to the assembling of the court, or

'Second. Upon reasonable notice to the opposite party, either prior or subsequent to the assembling of the court, if it appears to the satisfaction of the judge advocate of the general court martial, or the senior member of the summary court martial, or the deck court-martial officer, or the president of the court of inquiry, that the evidence sought is otherwise admissible, and either that the witness, by reason of death, age, sickness, bodily infirmity, imprisonment, or military necessity, is unable to, or that he is not amenable to process and refuses to appear and testify in person at the place of trial or hearing, or that he resides, is found, or is about to go beyond the distance of one hundred miles from the place of trial or hearing and his testimony does not seem to be determinative of an essential element of the case. When the request to take a deposition is made subsequent to the assembling of the court, the decision of the judge advocate of the general court martial, senior member of the summary court martial, and president of the court of inquiry shall be subject to being overruled by the court.'

"(2) The accused, or defendant, and his counsel, or a representative of the accused or defendant if so desired by the accused or defendant, shall be given an opportunity to be present and to cross-examine any deponent against the accused or defendant, unless the Secretary of the Navy has, in extraordinary circumstances, expressly authorized the taking of the deposition without the granting of such opportunity.

"(b) A deposition taken as provided for in section (a) of this article may, if duly authenticated and otherwise admissible as evidence, be received in evidence before any naval court if it appears to the satisfaction of the judge advocate of the general court martial, such judge advocate being subject to being overruled by the court, or the summary court martial, or the deck court-martial officer, or the court of inquiry that either the witness, by reason of death, age, sickness, bodily infirmity, imprisonment, or military necessity, is unable to, or that he is not amenable to process and refuses to appear and testify in person at the place of trial or hearing, or that he resides , is found, or is about to go, or went, beyond the distance of one hundred miles from the place of trial or hearing and his testimony does not seem determinative of an essential element of the case, or that the present whereabouts of the witness is unknown: Provided, That where the testimony contained in a deposition is used against an accused under the authority of his paragraph, the punishment imposed with respect to the specifications in regard to which the deposition is so used shall not extend to death."

2. The White Report, Article 16 (b), page 25, Study No. 2, provides as follows:

"(b) Use of depositions. Evidence by duly authenticated deposition taken under oath is admissible before naval courts-martial and courts of inquiry:

(1) Where the deposing witness is not available to testify in person;

(2) Where full opportunity to subject the deposing witness to cross-interrogatories has been afforded the party against whom the deposition is offered; and

(3) Provided that no person whose conviction has been secured by the use of a deposition or depositions shall suffer death or imprisonment for a period in excess of five years."

3. The McGuire Report, Rules of Procedure before Naval Courts-martial, page 5, provides that depositions may be used only by the accused and will be taken in accordance with the Federal rules of procedure in criminal trials.

JEC

ARTICLE OF WAR 26

SEE C.S., A.W. 25

Uniform Code of Military Justice
Subject: Courts of Inquiry--Records of, When Admissible

I. Army Provisions

1. Articles of War

"ART. 27. Courts of Inquiry--Records of, When Admissible.-- The record of the proceedings of a court of inquiry may, with the consent of the accused, be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board: Provided, That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer."

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

Does not amend this article

II. Navy Provisions

1. Articles for the Government of the Navy

"Article 60. Proceedings; authentication; use in evidence.-- The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the judge advocate, and shall, in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court martial, provided oral testimony cannot be obtained (R. S., sec. 1624, art. 60)."

2. Proposed Navy Bill

"SEC. 45. Article 60 is renumbered as article 44 and amended to read as follows:

'ART. 44. The proceedings of courts of inquiry shall be authenticated by the signatures of the president of the court and of the counsel for the court; but in case the proceedings cannot be authenticated by the signatures of the president and of the counsel, by reason of death, disability, or absence of either or both of them, they shall be signed by a member in lieu of the president and by another member in lieu of the counsel. 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, shall be evidence before a court martial of a defendent before said court of inquiry: Provided, That where such testimony is used in evidence against the accused person, other than under the general rules of evidence, the punishment imposed shall not extend to death.'"

III. Differences

A.W. provides that the record of proceedings may be read in evidence. A.G.N. provides that the sworn testimony contained in the duly authenticated record of proceedings shall be evidence.

A.W. requires consent of the accused. A.G.N. does not require consent.

A.W. prohibits the introduction of the record in cases extending to the dismissal of an officer. A.G.N. provides that death may not be inflicted as a punishment in those cases where sworn testimony from the record has been introduced other than under the general rules of evidence.

A.W. specifically provides that the record may be read in evidence before any other court of inquiry or a military board. A.G.N. has no such provisions.

IV. Recommended Provision

The sworn testimony, contained in the duly authenticated record of the proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, may be read in evidence in any proceeding before any court martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board. The defense may adduce such evidence in any case.

HJW

Uniform Code of Military Justice

Subject: Certain Acts to Constitute Desertion.

See C.S., A.W. 58 -- Desertion.

Uniform Code of Military Justice

Subject: Announcement of Action and Closed Sessions. A.W. 29-30

I. Army Provisions

1. Articles of War

"ART. 29. Court to Announce Action.--Whenever the court has acquitted the accused upon all specifications and charges, the court shall at once announce such result in open court. Under such regulations as the President may prescribe the findings and sentence in other cases may be similarly announced."

MCM 1928, par. 81: "Courts-Martial—Procedure--Announcing Sentence; Matters of, and Recommendations to, Clemency; Adjournment.--When a court-martial has sentenced an accused, the court will at once announce the findings and sentence in open court, unless, in the court's opinion, good reasons exist for not making the findings and sentence public at that time. In this latter event, the president may state in open court that the findings and sentence are not to be announced.***"

"ART. 30. Closed Sessions.--Whenever a general or special court-martial shall sit in closes session, the trial judge advocate and the assistant trial judge advocate, if any, shall withdraw; and when their assistance in referring to the recorded evidence is required, it shall be obtained in open court, and in the presence of the accused and of his counsel, of there be any."

MCM 1928 contains numerous regulations implementing this Article, particularly pars. 49, 50, 51, 78, and 80.

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

No change

II. Navy Provisions

1. Articles for the Government of the United States Navy

No A.G.N. similar to A.W. 29.

NCB, Sec. 433, requires announcement of acquittal in whole or in part.

No A.G.N. similar to A.W. 30.

NCB, Sec. 402, provides for withdrawal of accused, his counsel, and judge advocate, but provides for recall of judge advocate to record findings and sentence.

2. Proposed Navy Bill

ART. 28 (a) (1) and ART. 28 (c) "Every court shall announce in open court its finding and sentence as soon as determined."

No provision for closed sessions.

III. Differences

There is no substantial difference between present Articles of War and Proposed Navy Bill as to announcement of findings and sentence. Present and proposed A.G.N. make no provision for closing court.

IV. Recommendations

A.W. 29 - Keeffe Report - same as Proposed Navy Bill.

A.W. 30 - No comment found.

SSM

ARTICLE OF WAR 30

SEE C.S., A. W. 29