

OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON

March 1, 1949

MEMORANDUM FOR: Professor Edmund M. Morgan, Jr. ←

Honorable Gordon Gray
Assistant Secretary of the Army

Honorable W. John Kenney
Under Secretary of the Navy

Honorable Eugene M. Zuckert
Assistant Secretary of the Air Force

SUBJECT: Uniform Code of Military Justice

I attach, for your information, a list of questions posed by Mr. Smart of the House Armed Services Committee in connection with the Uniform Code.

To expedite research on this matter, I have requested the views of the Departments from the Working Group by memorandum, a copy of which is attached.

F. E. Larkin
FELIX E. LARKIN
Assistant General Counsel

Attachments (2)
FEL:ls

OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON

March 1, 1949

MEMORANDUM FOR: Colonel John P. Dinsmore
Department of the Army

Colonel John E. Curry (USMC)
Department of the Navy

Colonel Stewart S. Haxey
Department of the Air Force

SUBJECT: Uniform Code of Military Justice

Mr. Robert Smart of the House Armed Services Committee has submitted to me a list of questions on various individual Articles in the Code, as set forth in the attached memorandum. This memorandum supersedes an earlier memorandum which I sent to you under date of February 24, 1949.

The questions outlined in the memorandum are those which Mr. Smart expects the Chairman and members of the Committee to ask witnesses of the National Military Establishment during the course of the hearings. It is, therefore, necessary to prepare background material and answers on the various questions. Inasmuch as the hearings are scheduled to start before Subcommittee No. 1 of the House Armed Services Committee on Monday, March 7, 1949, it is necessary that your views on these questions be submitted to this Office not later than Friday, March 4. The staff of this Office will work on the questions concurrently and, in view of the shortness of time, it is requested that particular attention be given to certain questions by different Services, since the information is more readily available within different Services. Therefore, if you are unable to answer all the questions by Friday, it would be appreciated if each Department would submit information as follows:

<u>Army-Air Force</u>		<u>Army-Air Force</u>		<u>Navy</u>		<u>Navy</u>	
Art. 2	Subsec. 10	Art. 42		Art. 2	Subsec. 12	Art. 51	
" 3		" 44		" 3		" 54	
" 7		" 48		" 6		" 58	
" 15	" G	" 49		" 7		" 62	
" 19		" 51		" 15	" C&D	" 66	
" 25	" C	" 54		" 26	" B		
" 26	" A&B	" 58		" 37			
" 30		" 61		" 42			
" 34	" A&B	" 62		" 44			
" 37		" 66		" 49			

Except for Secretary Forrester and Professor Morgan, no official witnesses have been designated to testify on behalf of the National Military Establishment. In the event there are witnesses from the Departments, the statements used should not include or attempt to answer the questions asked. They were given to me by Mr. Smart with that understanding.

FELIX E. LARKIN
Assistant General Counsel

Attachment

FEL:ls

cc: Professor Edmund H. Morgan, Jr. ←
Honorable Gordon Gray
Honorable W. John Kenney
Honorable Eugene M. Luckert

QUESTIONS PERTAINING TO
H. R. 2496, UNIFORM CODE
OF MILITARY JUSTICE

ARTICLE 2

SUBSECTION (3).

The provisions of Section (3) apparently go much farther than existing law in subjecting Reserve personnel who are on voluntary inactive duty training to military law. Please specify the persons who would be subject to this provision and to what extent, if any, this provision is broader than existing law for any of the Armed Services.

expensive equipment and undue orders

SUBSECTION (5).

It is apparent that retired Reserve Naval officers will be excluded from the provision of this Code unless they are receiving hospital benefits from an Armed Force; whereas, under existing law, they are subject to the Articles for the Government of the Navy because they are on the Retired List of the Navy, are paid from Naval appropriations and are subject to recall to active duty. This is not true of Reserve Army officers who are drawing disability retirement compensation from the Veterans Administration even if such Army Reserve officers should be admitted in Army hospitals for treatment.

Why expensive equipment - Present says pay for Navy.

What are the reasons for excluding Navy Reserves from this Code and including certain Army Reserves in the Code?

SUBSECTION (10).

Please designate the classes of persons who would become subject to the Code in time of war.

SUBSECTION (11).

The provisions apparently subject dependents and many others to the Code. Is it considered desirable to subject such persons to the Code rather than giving jurisdiction of such persons to other types of military courts and treaty courts?

SUBSECTION (12).

Enumerate the persons or classes of persons who would be subject to the Code.

ARTICLE 3

How broad is the intent of the Services in providing that Reserves may be placed in an active duty status for disciplinary action, without their consent?

*Unusual for army
Navy has it. During on terminal leave:
It says if leave had terminated. No chance*

ARTICLE 4

This article relates to a dismissed officer's right to trial by court-martial. Please explain all of the implications in this section and point out whether or not it is more liberal or more restrictive than existing law for officers of each of the Services.

This overrules Court of Claims which held that A.W. 118 amended the

ARTICLE 6

SUBSECTION (a)

It is provided that the assignment of judge advocates and law specialists shall be subject to the approval of The Judge Advocate General of the Armed Force of which they are members. The House Armed Services Committee provided, in the 80th Congress, that the assignment of judge advocates would be accomplished by The Judge Advocate General. For what reason is a different provision made in this Code?

ARTICLE 7

SUBSECTION (b)

What persons or classes of persons are presently authorized to apprehend persons subject to military law and is it intended to extend this authority under this section to any other person or classes of persons?

ARTICLE 12

This article is somewhat different than present AW 16. I presume that this revised language is intended to overcome some undesirable possibilities which could result from AW 16. Would you please explain the difference in the language?

ARTICLE 15

It is readily apparent that this article greatly increases not only the types but the amounts of disciplinary punishments for minor offenses which may be given by a commanding officer.

SUBSECTION (1)(A)

Why is the withholding of privileges extended to a period of two consecutive weeks rather than one week under existing law?

SUBSECTION (1) (B)

Why is restriction to specified limits increased to two consecutive weeks in lieu of one week under existing law?

SUBSECTION (2) (relating to enlisted personnel)

Why is the period for withholding privileges, restriction to limits and extra duty extended to two weeks rather than one week under existing law?

Why is it considered necessary to authorize confinement for seven consecutive days or confinement on bread and water for not to exceed five consecutive days in C

company commanders' punishment?

SUBSECTION (b).

The Secretary of a Department may limit the kind and amount of punishment authorized in this article. The Army has never authorized confinement, with or without bread and water, under such powers. Is it the intent of this section to permit the Secretary of the Army to withdraw these powers from Army commanding officers and let the Navy continue to exercise them?

I realize that such determinations involve matters of policy which have been in operation in the respective Services for a long period of time. However, I cannot escape the feeling that it would probably be better for the Congress to determine the powers that commanding officers should exercise rather than to provide a possible list of those powers and then let the respective Secretaries select the particular ones which they choose to have exercised within that particular Service.

SUBSECTION (c).

What is the definition of an officer in charge? Since the Coast Guard is included within the provisions of this bill, I would like to know if the Coast Guard has a different definition for an officer in charge than the Navy.

SUBSECTION (d).

Explain the meaning of "next superior authority" in line 4.

What is the Navy's view as to authorizing an appeal from commanding officers' punishment?

ARTICLE 19

This section renews the same criticism which was made of Article of War 13 during the hearings on H. R. 2575 in the 80th Congress. Under present procedure, the Navy prepares a complete record of the proceedings and testimony of its summary court, which is the equivalent of the Army special court. The Air Force is providing a reporter at each special court trial but is furnishing only a narrative statement of the proceedings unless some question arises which will require a copy of the complete transcript of testimony. Under present AW 13, the Army cannot adjudge a bad-conduct discharge unless a complete record of the proceedings and testimony has been made. It is apparent that none of the three Services are handling the question of a complete record in special court-martial cases in the same manner. Unless the Army can find it possible to provide a reporter for every special court-martial case, it is apparent that the presence of a reporter at some special court-martial trials and his absence at others may very well develop into a situation which is prejudicial to the rights of the accused.

What procedure has the Army followed in this respect since February 1, 1949, when Public Law 799 became effective?

ARTICLE 22

This article should be amended as follows:

In Subsection (a), add a new Subsection (6) as follows:

"the Commandant of the Coast Guard;" and renumber Subsections (6) and (7) to (7) and (8) respectively.

ARTICLE 25

SUBSECTION (a).

Please explain fully the intent of Subsection (a) insofar as an officer of one Service being a member of the court of another Service.

SUBSECTION (c).

Explain the meaning of the word "unit".

Does the word "convening", in line 7, mean the actual meeting of the court for the purpose of conducting the trial, or does it refer to the act of the convening authority in ordering that a court be convened?

In line 11, does the term "enlisted persons" include warrant officers? *No*

Under what conditions do you visualize that it would be impossible to obtain competent enlisted persons to sit as members of a special or general court?

The Army, and perhaps the Air Force too, has already conducted several trials since February 1 where enlisted men served as members of the court at the request of the accused. What have been the results of those trials? Have a sufficient number of trials which included enlisted persons as members of the court been conducted in order to permit the Army to reach any conclusions as to whether or not it is advisable to continue this provision?

(At this point, the statistics on this question which were obtained from interviews with 930 enlisted men during last October should be put in the record -- Smart.)

ARTICLE 26

SUBSECTION (a).

I am sure it is not intended that lawyers of the District of Columbia be disqualified under this section. I am under the impression that lawyers of the District Bar are members of the Bar of a Federal Court. Is that your interpretation of this section?

Yes

SUBSECTION (a).

Does this section differ from existing Army law on this subject?

No

SUBSECTION (b).

For the first time in the history of military law in this country, this section makes it mandatory that trial counsel and defense counsel in a general court-martial case must be qualified lawyers and certified to be competent to perform their duties by The Judge Advocate General.

How many general courts-martial jurisdictions now exists within the Army, Navy, Air Force, Marine Corps and Coast Guard?

What is the average number of general court-martial cases per month in each of the Services over the past year?

How many officers are now on duty who can qualify with the provision of this section in each of the Services?

How many officers will be required to comply with the provisions of this bill in furnishing qualified officers in every general court case?

From what source is legal talent being obtained in order to increase the number of qualified officers on duty in each of the Services?

Do any of the Services consider that they now have an inadequate number of qualified legal officers to fill the assignments under this bill and, if so, is it anticipated that this shortage will be overcome by July of 1950?

ARTICLE 30

Why is it more desirable, in pre-trial procedure, to prepare charges and specifications before the pre-trial investigation rather than after the pre-trial investigation?

What consideration has been given to the possibility of providing that the pre-trial investigation will be based upon a written complaint, somewhat in the order of an affidavit for a State warrant rather than on charges and specifications? This would permit the drawing of charges and specifications by competent persons and would insure that such charges and specifications were based upon the findings and recommendations of the pre-trial investigation.

ARTICLE 31

SUBSECTION (b).

In line 5, delete the words "does not have to make any statement at all", and substitute the words "may refrain from making any statement."

ARTICLE 32

SUBSECTION (e).

This section is somewhat different than existing law -- explain.

SUBSECTION (d).

What effect do you consider that this section will have on the question of jurisdictional error?

ARTICLE 34

SUBSECTION (a).

Does this mean that the convening authority cannot refer a charge to a general court-martial until his staff judge advocate or legal specialist finds that the charges and specifications are proper and appear justified by the evidence adduced in the pre-trial investigation?

SUBSECTION (b).

What type of formal corrections are anticipated under this section?

ARTICLE 36

Am I correct in assuming that this article anticipates only one type of manual for all of the Services?

Do you think that this article should include a provision that all rules and regulations made in pursuance of this article shall be uniform insofar as practicable?

ARTICLE 37

What do you consider that the convening authority may properly do under this article with respect to the findings and sentence?

ARTICLE 39

Do you consider it constitutional to conduct a closed trial for any purpose unless the accused requests it or waives his right to an open trial?

ARTICLE 42

Every trial record should affirmatively show that the accused was present when the court was sworn. How will this be provided?

ARTICLE 44

At what place in the trial proceedings of courts-martial does jeopardy attach?

ARTICLE 48

Does this article anticipate that a court may summarily punish for contempt? If no, the article should be amended in line 2 to make that point clear.

ARTICLE 49

As a usual rule, what type of military personnel, as to legal qualifications, represents the defense in the taking of depositions?

SUBSECTION (d).

In line 2, does the word "party" include co-defendants who are represented by separate counsel, as well as the trial counsel?

ARTICLE 51

What are the reasons for permitting a law officer to rule on a motion for a finding of not guilty and the question of accused's sanity?

ARTICLE 52

SUBSECTION (c).

This section provides two instances where a tie vote shall be determined against the accused. What are the reasons for this?

ARTICLE 54

I understand that the Army, Navy and Air Force have different methods of preparing the record of special court-martial trials. What are the present differences and is it anticipated that there will be any changes in this procedure?

ARTICLE 58

What system is now being followed in the confinement of general prisoners -- for each of the Services?

Is study being given to any plan which will permit the confinement of all general prisoners in Federal penal or correctional institutions?

ARTICLE 61

Why is it considered necessary to provide a jurisdictional review of a record of acquittal?

ARTICLE 62

SUBSECTION (a).

This section is new. Give some examples of the types of motions and rulings which are anticipated.

SUBSECTION (b).

Explain the type of error or omission referred to in this section.

ARTICLE 66

SUBSECTION (b).

This section prescribes the actions which a Board of Review may take. Subsections (b) and (c) of Article 62 permits the convening authority to remand a case for the correction of an apparent error or omission in the record. Why isn't this authority to remand given to a Board of Review in this article?

SUBSECTION (c).

This section gives a Board of Review the authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact. Why is this considered appropriate?

ARTICLE 67

The Judicial Council created under H. R. 2575 was given the same authority as a Board of Review to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact. The Civilian Judicial Council created by this section is denied that authority, but the Board of Review will continue to have that authority under Article 66. What reasons have motivated this change?

SUBSECTION (a).

This section is silent as to the terms of members of the Judicial Council. What term does the Secretary of Defense recommend -- for life, a fixed term or staggered terms?

Is it considered desirable that such civilian appointments have some military experience in addition to their legal qualifications and experience?

SUBSECTION (b).

This section prescribes the types of cases which shall be reviewed by the Judicial Council. On the basis of the current case load in each of the Services, how many cases per month would be reviewable by the Council?

Assuming that one council of three could not review its case load, does this subsection authorize the appointment of one or two additional members rather than another council of three additional members?

Assuming that the case load was too burdensome for one council, have you considered the possibility of providing one or more commissioners to assist the council rather than new council members? Would this require statutory authorization?

Since the members of the council will perform substantially the same duties as Judge of the United States Courts of Appeal, have you considered the advisability of granting the reviewing authority of the council to the Federal Courts of Appeal?

What is the total number of officers in all Services who are now performing the duties that will be performed by the Judicial Council if this bill is enacted?

What are their total salaries?

ARTICLE 74

What is the present policy in each of the Services relating to the restoration of an enlisted person who has received a dishonorable or bad-conduct discharge, suspended, as a part of his sentence?

ARTICLE 75

Is this article more restrictive or more lenient than existing law governing restoration, both as to officers and enlisted men?

Assuming that there are adequate reasons for the provisions in this article relating to officers, why should not an acquittal on a new trial result in automatic restoration of an enlisted man?

He may not want it.