

1848  
Thomas Brown

28

>

June 16

Contents

# RESTRICTED

## MILITARY JUSTICE CODE

### TABLE OF CONTENTS

- PART 1 - GENERAL PROVISIONS  
Articles 1 - 5
- PART 2 - APPREHENSION AND RESTRAINT  
Articles 6 - 14
- PART 3 - COMMANDER'S NONJUDICIAL PUNISHMENT  
Article 15
- PART 4 - COURTS-MARTIAL CLASSIFIED  
Article 16
- PART 5 - COMPOSITION OF COURTS-MARTIAL  
Articles 17 - 18
- PART 6 - APPOINTMENT OF COURTS-MARTIAL  
Articles 19 - 22
- PART 7 - JURISDICTION OF COURTS-MARTIAL  
Articles 23 - 29
- PART 8 - CHARGES - ACTION UPON  
Articles 30 - 34
- PART 9 - TRIAL PROCEDURE  
Articles 35 - 53
- PART 10 - POST-TRIAL PROCEDURE  
Articles 54 - 60
- PART 11 - PUNISHMENTS  
Articles 61 - 63
- PART 12 - MILITARY OFFENSES

RESTRICTED

CROSS REFERENCES A.W. TO CODEA.W. (as amended by P.L. 759)Tentative U.C.M.J. Art.

1	1
2(a)	2(1)
2(b)	2(2)
2(c)	2(1), 23
2(d)	2(9)
2(e)	2(6)
2(f)	omitted
3	16
4	17
5	16
6	16
7	16
8	19, 18
9	20
10	21
11	22
(3rd proviso)	36(b)
(6th proviso)	3(c)
12	24
13	25
14	26
15	27
16	17(c), (d)
(2d paragraph)	12, 13
17	36
18	37

A.W. (as amended by P.L. 759)

Tentative U.C.M.J. Art.

19	38
20	39
21	40
22	41
23	42
24	43
25	44
26	44
27	45
28	Punitive Articles
29	49
30	46
31	47
32	50
33	53(a)
34	53(a)
35	53(b), 55
36	53(b), 53A
37	54(a)
(first proviso)	omitted
(2d proviso)	<u>64B</u>
38	35
39	28
40	29
(2d paragraph)	55(c)
41	61

A.W. (as amended by P.L. 759)

Tentative U.C.M.J. Art.

42	11
43	48
44	60(c)
45	62
(proviso)	omitted
46 a.	30
46 b.	31
46 c.	32, 34
47 a.	3
47 b.	33
47 c.	55(a)
47 d.	60
47 e.	<u>53b</u>
47 f.	55(e)
48	60
49	60
50 a.	56(a), 57(a)
50 b.	56(a), 57(a)
50 c.	_____
50 d., e.,	56, 57, 60(d), 53A (b)
50 f.	58
50 g.	56(c)
50 h.	_____
51 a.	60, 60B
51 b.	60B
<del>(let proviso)</del>	_____

A.W. (as amended by P.L. 759)

Tentative U.C.M.J. Art.

(2d proviso)	60C
52	55(f),(g), 53A(a), 56(d), 57(e)
53	60A
(not complete)	<u>55(g)</u>
54-96 (In general)	Punitive Articles (65-120)
68(1st sentence)	6
69(1st sentence)	9
70(1st sentence)	9
71	10A
72	10A
74	14
88	52
89(1st clause)	Preamble?
97-103	omitted
104	15
105	127
106	125
107	omitted
108	omitted
109	omitted
110	126
111	53(b)
112	omitted
113	omitted
114	<u>121</u>

A.W. (as amended by P.L. 759)

Tentative U.C.M.J. Art.

115	122
116	36
117	omitted
118	124
119	omitted
120	omitted
121	123

CROSS REFERENCESPresent AGN to Tentative CodeAGN ArticlesUniform Code of Military Justice

1	Preamble?
2	omitted
3	omitted
4-6	Punitive Articles (65-120)
7	11
8	Punitive Articles (65-120)
9	omitted
10-17	Punitive Articles
18	omitted
19	Punitive Articles
20	omitted
21	omitted
22	Punitive Articles
23	omitted
24-25	15
26	20
27	16
28	38
29	38
30-31	25
33	53A, 55
34	53
35	25
36-37	124

AGN Articles

Uniform Code of Military Justice

38	19
39	16
40	38
41	38
42	42, 50
43	9, 30, 34
44	omitted
45	39
46	omitted
47	omitted
48	omitted
49	61
50	48
51	omitted
52	53
53	60
54(a)	55, 60B
55-60	omitted
61-62	28
63	62
64(a)	21
64(b)	16, 26
64(c)	122
64(d)	53A, 55
64(e)	35
64(f)	53, 53A

AGN Articles

Uniform Code of Military Justice

64(g)	26
65	2, 17
66	omitted
67	omitted
68	44
69-70	121
Definition of Officers (71?)	2
Jurisdiction over Marines and Medical Corps attached to Marines (72, 73)?	2, 23
Jurisdiction over Pacific Islands	2

JDS

CROSS REFERENCES  
S.1338 To Tentative Code

S.1338Uniform Code of Military Justice

1	Preamble?
2	omitted
3	Preamble?
4	omitted
5(a)	2, 2A
5(b)	28
5(c)	4
5(d)	Punitive Articles
5(e)	Punitive Articles
5(f)	27
6	2, 23
7	2, 23
8-9	Punitive Articles
10	60
11-12	Punitive Articles
13	omitted
14	15
15	21
16(a)	16, 121
16(b) (c)	26
16(e)	121
16(f)	26
17	21
18(a)	16
18(b)	22, 36

S.1338

Uniform Code of Military Justice

18(c)	36
19	38
20	25
21	53
22	19
23	24
24(a)	16
24(b) (1)	22
24(b) (2)	18, 47, 37
25	38
26	38
27	omitted
28(a)	48, 51
28(b)	omitted
28(c)	48
29	53
30	24
31	61
32	11
33	62
34	omitted
35(a)	41
35(b), (c)	42, 50
36	44
37	39
38	36

S.1338

Uniform Code of Military Justice

39(a)	60
39(b)	53A, 55, 60
39(c)	60
39(d)	53A
39(e)	54-60
39(f)	60B
39(g)	60A
39(h)	60B
39(i)	55
39(j)	52
40-41	124
42-44	omitted
45	2, 17
46	omitted
47	121
48	35

JDS

Part  
1

Uniform Code of Military JusticeArt. 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, 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, Navy, Air Force, and, except when operating as a part of the Navy, the Coast Guard.

(3) "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.

(4) "Officer" shall be construed to refer to a commissioned officer including a commissioned warrant officer.

(5) "Superior officer" shall be construed to refer to a ~~commissioned~~ officer superior in rank or command, ~~to the accused.~~

(6) "Accuser" shall be construed to refer to the person

*The Navy includes the Coast Guard and the Marine Corps.*

who signs and swears to the charges, and to any other person who either originates or instigates the prosecution of the accused.

*but not to an officer who*

(7) "Armed force of which he is a member" as applied

~~to those not members of an armed force shall be construed to refer to the armed force which controls the activity of which he is a part.~~

*in relation to such persons subject to this Code*

JDS

*the*

*or who*

*for officials rather than private or personal interest refers the charges for trial*

*Member in relation*

*The act of referring the*

*Referring charges for trial after investigation does not*

*In the term armed force of which he is a member, the word member shall be construed*

*as including persons who are not members of the force*

*but not an officer who refers for official rather than personal interest*

*but who are subject to attached to*

*as applied to persons in relation persons subject to this Code who are not members*

*wherever*

11/23/48

Proposed Article 2A  
Page 1

Uniform Code of Military Justice

Art. 2A. 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. Nothing in this paragraph shall be construed to ~~interfere~~ <sup>modify any provision of</sup> with the operation of limitations under the law of war or treaties or conventions of the United States <sup>or</sup> ~~and of the limitations set forth in~~ Article 28 of this Code.

(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.

NOTES:

Sources and Comparable Provisions:

# RESTRICTED

11/23/48

Proposed Article 2A  
Page 2

- 1) A. W. 94; Manual for Courts-Martial, page 8, paragraph 10.
- 2) Article 5(a) of the proposed Navy Bill (S. 1338, 80th Congress, 1st Sess., 1947); 34 U.S.C. Sec. 855 (reserves); AGN 14 (frauds).

## B. Comments:

Subsection (a) is drawn from 34 U.S.C. Sec. 855.

Subsection (b) is related to the provisions in A. W. 94, and AGN 14 which continue after discharge from the service the liability for trial by court martial of persons who commit certain frauds before discharge. These provisions have been held unconstitutional by a District Court. The Navy does not use them and they have been eliminated from S. 1338 with the exception of Subsection (b) above.

Subsection (c) is drawn to meet a court decision to the effect that a deserter who is discharged from a subsequent term of enlistment is thereby completely discharged and cannot be tried for desertion by a court-martial.

This might be met administratively by phrasing the discharge to be from this particular term of enlistment rather than from the service.

# RESTRICTED

Uniform Code of Military Justice

Art. 3. Judge Advocates and Legal Officers.

(a) Assignment. All members ~~of the Judge Advocate General's~~<sup>S</sup> Departments of the Army and Air Force and all legal officers of the Navy and Coast Guard ~~will~~<sup>shall</sup> be assigned as prescribed by The Judge Advocate General of the armed Force of which they are members after appropriate consultations with commanders on whose staffs they may serve; and The Judge Advocate General or senior members of his staff will make frequent inspections in the field in supervision of the administration of military justice.

(b) Channels of Communication. Convening authorities ~~will~~<sup>shall</sup> 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 member, 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.

NOTES:

A. Sources and Comparable Provisions

1) A.W. 11 and 47a, P.L. 759, 80th Cong., 2d Sess. (1948).

B. Comment.

This proposed article is derived from A.W. 11 and 47a (as amended) with provision made for legal officers of the Navy and Coast Guard.

Uniform Code of Military Justice

Art. 4. Territorial Applicability of this Code

This Code shall ~~extend~~ to all places.

NOTES:

*(be applicable in) all places*

A. Sources and Comparable Provisions

a) Proposed Navy Bill, Art. 5(c).

B. Comment

a) This article is not in conflict with the provisions in Art. 2(9) and 2(11), which make certain persons subject to the Code only when they are outside the continental U.S. and also outside certain areas -- e.g. Canal Zone, Puerto Rico, etc. The Code does extend to these places as to other persons.

EMS

Part  
2

Uniform Code of Military Justice

Art. 6. Apprehension.

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

(b) Such persons as are designated by regulations of the respective armed forces shall have authority to apprehend any person subject to this Code 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.

NOTES:

A. Sources and Comparable Provisions.

1) A.W. 68

2) AGN draft of 17 Lay 1948 (Naval Law Manual Section) Art. 13

B. Comment.

Subsections(a) and (b) are new and are designed to give statutory authority for regulations pertaining to the apprehension of offenders against the Code.

Subsection (c) is derived from A.W. 68. However it was decided to give the classes of persons designated the power to "apprehend" rather than the power to order into arrest or confinement.

JDS

Uniform Code of Military Justice

Art. 7. Types of Restraint.

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

(b) Confinement is the physical restraint of a person.

NOTES:

A. Sources and Comparable Provisions.

- 1) MCM Par. 20.
- 2) Naval Justice P. 76-78.

B. Comment.

The purpose of the proposed text is to clarify the meaning of the terms used in the Code. In army practice "arrest" is a type of restraint and also refers to apprehension. The Navy has several types of "arrest" and "close arrest" would fall within the category of confinement as defined in the proposed text.

The words "not imposed as a punishment for an offense" are included to distinguish arrest from restriction and deprivation of shore liberty which are punishments.

JDS

Uniform Code of Military Justice

Art. 8. Who May Order Persons into Restraint.

(a) <sup>an</sup> Enlisted persons may be ordered into arrest or confinement by any commissioned officer by an order delivered in person or through other persons subject to this Code. A commanding officer may delegate to warrant, petty, or noncommissioned officers authority to order ~~enlisted~~ persons of his command or subject to his authority into arrest or confinement.

(b) <sup>an</sup> Officers may be ordered into arrest or confinement only <sup>to whose authority he is subject</sup> by the ~~commanding officer~~ <sup>commanding officer</sup> by an order delivered in person or through other officers. The authority to order officers into arrest or confinement may not be delegated.

(c) No person shall be ordered into arrest or confinement except for good cause.

(d) 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.

NOTES:

A. Sources and Comparable Provisions.

- 1) Manual for Courts-Martial (1928) par. 19 and 20.
- 2) AGN Art. 43 and 44.
- 3) Naval Justice p. 76-79.

B. Comment.

Subsections (a), (b), and (c) are derived from the Manual for Courts-Martial and Naval Justice and are included in the Code in order to give statutory authority for the imposition of restraint. Subsection

# RESTRICTED

Revised Draft  
12/7/48

Proposed Article 8

-2-

(d) is included in order to provide for the custody of persons apprehended until a person authorized to order restraint may be notified.

JDS

Revised Draft  
12/7/48

Proposed Article 8

-2-

(d) is included in order to provide for the custody of persons apprehended until a person authorized to order restraint may be notified.

JDS

# RESTRICTED

ADDENDA TO PROPOSED ARTICLE 9 DATED 11/23/48.

When any person subject to this Code is placed in <sup>arrest</sup> ~~restriction~~  
or confinement, <sup>prior to trial,</sup> immediate steps will be taken to try the person  
accused or to dismiss the charges and release him. (Any such person  
held in confinement for more than twenty-four hours, will be given  
a written account of the alleged facts underling the offense for  
which he is being held at the earliest time possible.)

Uniform Code of Military Justice

Art. 9. Restraint of Persons Charged with Offenses.

Any person subject to this Code charged with a serious offense under this Code shall be ordered into confinement or arrest, as circumstances may require; but when charged with a minor offense only, such persons shall not ordinarily be placed in confinement. When any person subject to this Code is placed in arrest or confinement, immediate steps <sup>shall</sup> will be taken to try <sup>him</sup> the person accused or to dismiss the charges and release him.

NOTES:

A. Sources and Comparable Provisions

- 1) A.W. 69 and 70.
- 2) AGN Art. 43, 44.
- 3) Naval Justice p. 77-78.

B. Comment

The proposed text is derived from A.W. 69 and 70. According to Naval Justice, Navy practice is the same as Army practice.

JDS

*to inform as to charge  
him of the specific  
wrong of which he  
is accused, and*

12/15/48

Proposed Article 10A  
Page 1

Uniform Code of Military Justice

Art. 10A. 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, who shall <sup>when the commanding officer</sup> sign and furnish a written statement of the offense charged against the prisoner. *signed by him*

(b) Every commander of a guard to whose charge a prisoner is committed shall within twenty-four hours after such <sup>commitment</sup> confinement, 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 <sup>person who authorized the commitment</sup> officer committing him.

NOTES:

A. Sources and Comparable Provisions

1) A.W. 71 and 72.

B. Comment

The proposed text incorporates the substance of A.W. 71 and 72 which is not included in the proposed punitive articles.

JDS

RESTRICTED  
NAVY DEPARTMENT  
BUREAU OF NAVAL PERSONNEL  
Washington 25, D. C.

C  
O  
P  
Y

Pers-52-VBC

16 December 1948

MEMORANDUM:

To: Col. John E. Curry, USMC,  
Room 2143, Main Navy.

Subj: Proposed Article 11, Places of Confinement.

Encl: (A) Draft of Proposed Article Governing Places of Con-  
finement.  
(B) Summary of Correspondence between the Attorney  
General and SecNav regarding transfer of Naval  
prisoners to Federal Institutions.  
(C) Rationale.

1. Enclosures (A), (B) and (C) are forwarded herewith.

/s/J. MAGINNIS,  
J. MAGINNIS,  
Head, Corrective Services Branch.

RESTRICTED

Proposed

Art. 11 Places of confinement.

Court martial sentences of confinement may, under such instructions as the Department of the National Military Establishment concerned will prescribe, whether or not such sentences include discharges or dismissals, and whether or not such discharges or dismissals have been executed, be carried into execution by confinement in any place of confinement under the control of any of the armed services, 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 services shall be subject to the same discipline and treatment as persons confined by the courts of the United States or of the State, Territory, District, or place in which the institution may be situated.

SUMMARY OF CORRESPONDENCE BETWEEN THE ATTORNEY GENERAL AND SECNAV  
REGARDING TRANSFER OF NAVAL PRISONERS TO FEDERAL INSTITUTIONS.

Pers-520-gaw/P13-10

20 January 1945

From: SecNav

To: Atty Gen

Subj: Proposal to transfer personality problems and long termers to Federal custody; general conditions listed, and details to be agreed upon by ChNavPers and Director, BuPris.

8 February 1945

From: Atty Gen

To: SecNav

Subj: General Agreement with proposal, and outlines status of GCMP's in Federal custody as to good time, Clemency and parole.

Pers-5212-DC/P13-10

23 March 1945

From: (Asst) ChNavPers

To: Commanding Officers, USNDB's

Subj: Transfer of GCMP to Federal custody for serious custodial and personality problems, with procedures.

Pers-5212-DC/P13-10

23 March 1945

From: SecNav

To: Atty Gen

Subj: Agreement with Atty Gen comments of 8 Feb., and transmittal of ltr. to C. O.s.

28 March 1945

From: Atty Gen

To: SecNav

Subj: Agreement with procedures promulgated in ltr. to C.O.s.

13 Jan. 1947

From: Atty Gen

To: SecNav

Subj: Suggesting that good time be computed on Navy basis, and authority for Wardens to forfeit or restore any good time allowances. (Sec Nav ltr. of 15 Jan acknowledges)

Pers-52-DC/P13-10

28 January 1947

From: SecNav

To: Atty Gen

Subj: Agreement with Atty Gen suggestions of 13 Jan regarding naval, statutory, and extra good time, parole, and conditional release supervision.

ENCLOSURE (B)

Pers-52-DC/P13-10

27 February 1947

From: ChNavPers  
To: Commanding Officers, USNDB's  
Subj: Revision of original transfer procedures, including items  
subsequently agreed upon.

Pers-52-DC/P13-10

20 March 1947

From: (Act) SecNav  
To: Atty Gen  
Subj: Transmittal of 27 Feb ltr to C.O.s.

11 April 1947

From: Atty Gen  
To: SecNav  
Subj: Request for photostatic or other copies of pertinent  
documents necessary to commitment of GCMP to Federal cus-  
tody.

Pers-52-DC/P13-10

5 May 1947

From: SecNav  
To: Atty Gen  
Subj: Agreement to furnish legal documents.

ENCLOSURE (B)

## RATIONALE

Experience has proven that the most acceptable and successful approach to the correctional process is the most nearly individual treatment that facilities can afford. In its confinement policy the Navy is committed to returning offenders to an honorable duty status where the offense and the man's attitude permit, and to return all others to civilian life better equipped to meet the demands of a free society.

The Navy is restricted in full realization of its confinement policies by the fact that personnel charged with the operation of confinement activities are not expert in penological matters. However, in the majority of prisoners dealt with this lack of expertness is not too serious a handicap inasmuch as the prisoners themselves are reasonably co-operative. The Navy's interest therefore in wide authority for selection of the place of confinement of prisoners is based on its desire to maintain its present successful program by transfer of those prisoners, committed for whatever category of offense or period of confinement, whose presence is a detriment to that program by virtue of asocial attitudes, psychopathic deviations, aggressive or rebellious tendencies, or other causes. These individuals pose problems in segregation and treatment which are actually better solved in the more professional atmosphere of the penal and correctional institutions of the Federal Bureau of Prisons and its approved affiliates. Additionally there are not infrequent cases wherein it is desirable to protect by transfer a prisoner whose offense, or other reason, makes him a target of fellow inmates resentment.

The proposed article is approved by the Navy as a sound instrument by which it may best carry out its corrective policy. It is firmly believed that the authority contained therein is, in fact, in the best interest of the Armed Services and of the individual offender.

ENCLOSURE (C)

12/9/48

Proposed Article 12  
Page 1

Uniform Code of Military Justice

Art. 12. Confinement with Enemy Prisoners Prohibited.

No member of the armed forces of the United States shall be placed in confinement ~~outside the continental limits of the United States~~ so that he is forced to associate with enemy prisoners or other foreign nationals not members of the armed forces of the United States.

NOTES:

A. Sources and Comparable Provisions

- 1) A.W. 16 as amended by I.L. 759, 80th Cong., 2d Sess. (1948).

B. Comment.

The language of A.W. 16 (as amended) could be interpreted to prohibit the confinement of members of the armed forces in the same building or brig as contains prisoners of war. It is felt that such language might prohibit putting sailors in the brig of a ship if the brig contained prisoners from an enemy vessel. It is believed the proposed language would at least require segregation of prisoners.

JDS

12/10/48

Proposed Article 13  
Page 1

Uniform Code of Military Justice

Art. 13. Punishment Prohibited Before Trial.

No person, while being held for trial or the results of trial, shall be subjected to punishment or penalty upon the charges pending against him, nor shall the restraint or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence but he may be subject to punishment by the commanding officer during such period for minor infractions of discipline.

~~No person subject to these articles shall suffer any forfeiture of pay as an incident to confinement while waiting the results of trial prior to the date that a court-martial lawfully adjudges a sentence in his case.~~

NOTES:

A. Sources and Comparable Provisions

- 1) A.W. 16 as amended by P. L. 759, 80th Cong., 2d Sess. (1948).

B. Comment

The proposed language is to replace the provision of A.W. 16 (as amended) as it is believed the latter would prohibit punishing a person for an offense <sup>committed while</sup> for which he is not being held in confinement, while he is in such a status.

JDS

Uniform Code of Military Justice

Art. 13A. Illegal Punishment.

No punishment or penalty, other than arrest or confinement shall be imposed upon any person except by order of a commanding officer pursuant to Article 15 or by a sentence of a court-martial duly ordered executed.

NOTES:

A. Sources and Comparable Provisions

- 1) A.W. 16 as amended by P.L. 759, 80th Cong., 2d Sess.(1948).

B. Comment

The proposed text replaces the provision of A.W. 16 (as amended) which prohibited punishment prior to trial. The text prohibits all punishments unless imposed under Art. 15 (Commanders non-judicial punishment) or by sentence of a court-martial duly ordered executed in accordance with this Code.

JDS

Uniform Code of Military Justice

Art. 14. Delivery of Offenders to Civil Authorities.

(a) ~~No~~ <sup>may</sup> member of the armed forces shall be delivered up to any civil authority for detention or trial except upon the approval <sup>Under such Reg.</sup> of the Secretary of the Department concerned, or such persons as may be designated by him.

(b) <sup>under this article</sup> When delivery 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 shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence.

NOTES:

A. Sources and Comparable Provisions

- a) A. W. 74.
- b) NC&B, App. C.

B. Comments

(a) The first paragraph of the article adopts present Navy practice. It is felt that commanding officers should have the power to resist a demand by a civil authority under some circumstance, as where military exigencies make it advisable that control be retained of all personnel, or where it appears that a man might not receive fair treatment because of an abnormal local situation. The present Army practice seems to have been 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 provision of A. W. 74 is not necessary. The Navy has had no trouble in administering its provision to the satisfaction of civil authorities.

(b) Adopted from A. W. 74. This differs from the present Navy practice, but the Navy agrees to the changed procedure.

(c) Attention is invited to the provisions in Appendix C, Naval Courts and Boards, which are not covered by this article. It is suggested that these matters be covered by uniform regulations for the armed forces.

EMS

Part

3

7 December 1948

MEMORANDUM FOR MR. LARKIN

Subject: Commanding Officer's Nonjudicial Punishment

1. Conferences with the Army, Navy, and Air Force have resulted in compromises on all points relating to Commanding Officer's Nonjudicial Punishment except (1) the question of whether an enlisted man should have the privilege to refuse such punishment and (2) the question of whether such punishment should be jeopardy sufficient to prevent trial by court-martial for the same offense.
2. In regard to the greater punishments the Navy finds necessary to request, as compared with existing Article 104 of the Articles of War, the Army and Air Force do not desire them but are satisfied to have such punishments written in provided provision is made whereby each Secretary may limit the punishment for his own armed force (see Subsection (c) of attached draft).
3. In light of the new compromises arrived at the attached draft of Article 15 is submitted as the final resolution of this matter by the Working Group. Of course the question of privilege to refuse such punishment, and the question of former jeopardy could not be resolved. If the Committee decides that enlisted men should be extended the privilege to refuse commanding officers' punishments in any situation, another subsection will be necessary. If the Committee decides that the statute should make it clear that commanding officer's punishment is not jeopardy, another subsection covering that point will be necessary.
4. This draft assumes that the terms "commanding officer" and "officer in charge" will be defined in the section on definitions.

H. J. WEBB  
Commander, USCG

Uniform Code of Military Justice

Art. 15. Commanding Officer's Nonjudicial Punishment

(a) Under such regulations as the President may prescribe any commanding officer may, for minor offenses, impose any one of the following disciplinary punishments upon commissioned and warrant officers of his command without the intervention of a court-martial:

- ~~(1) admonition or reprimand;~~
- 1 (2) withholding of privileges for a period not to exceed two weeks, to run consecutively;
- 2 (3) restriction to certain specified limits, with or without suspension from duty, for a period not to exceed <sup>consecutive</sup> two weeks, ~~to run consecutively;~~
- 3 (4) forfeiture of one-half of his pay per month for a period not exceeding three months providing such forfeiture is imposed by an officer exercising general court-martial jurisdiction.

(b) Under such regulations as the President may prescribe any commanding officer may, for minor offenses, impose any one <sup>admonition or reprimand</sup> or more of the following disciplinary punishments upon enlisted men of his command without the intervention of a court-martial:

- 1 (1) admonition or reprimand;
- 1 (2) withholding of privileges for a period not to exceed two weeks, to run consecutively;
- 7 (3) restriction to certain specified limits, with or without suspension from duty, for a period not to exceed two weeks, to run consecutively;

## P.2

(4) extra duties for a period not to exceed two weeks, and not to exceed two hours per day, holidays included, to run consecutively;

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

(6) Confinement for a period not to exceed ~~one week~~ <sup>seven consecutive days</sup> to run consecutively;

(7) confinement on bread and water or diminished rations for a period not to exceed <sup>consecutive</sup> five days, to run consecutively; and

(8) forfeiture for a period not exceeding one-half of one month's pay, providing such forfeiture is imposed by an officer exercising special courts-martial jurisdiction.

(c) The punishments authorized by this article may be limited further for any one of the armed forces, or for any class of commanding officers of any one of the armed forces, by the Secretary concerned,

(d) ~~Officer~~ in charge may, for minor offenses, impose on enlisted men assigned to the unit of which <sup>he is</sup> they are in charge, such punishments <sup>of the foregoing</sup> ~~prescribed~~ for commanding officers as the Secretary concerned may by regulation specifically prescribe.

(e) The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to ~~mitigate or remit~~ <sup>in whole or in part</sup> any unexecuted portion of the punishment.

(f) 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

12-17-48

Proposed Article 15

P.3

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.

Part  
4

**RESTRICTED**

TABLE OF CONTENTS - PART 4

COURTS-MARTIAL CLASSIFIED

- Art. 16.   a. General - not less than five members.  
          b. Special - not less than three members.  
          c. Summary - one officer.

**RESTRICTED**

Uniform Code of Military Justice

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 any number of members not less than five;
- (2) Special courts-martial, which shall consist of any number of members not less than three;
- (3) Summary courts-martial, which shall consist of one officer.

NOTES:

A. Sources and Comparable Provisions

- a) A. W. 3, 5, 6, and 7.
- b) A.G.N., Articles 39, 27, and 64.

B. Comment.

a) The proposed text consolidates the provisions of A. W. 3 (Classification of Courts-Martial), A. W. 5 (Number of Members for General Courts-Martial), A. W. 6 (Number of Members for Special Courts-Martial), and A. W. 7 (Number of Members for Summary Courts-Martial). The present A. G. N. has no provision classifying Navy courts-martial. The Navy provisions as to number of members are in A.G.N. Articles 39, 27, and 64, dealing with each type of court-martial.

The proposed text reduces the number of articles and classifies the various kinds of courts-martial. It is believed that this is a logical arrangement of subject matter as this proposed article would serve to introduce the articles which deal with the composition, appointment, jurisdiction, and procedures of courts-martial.

P. 2

b) The proposed text adopts a uniform terminology for courts-martial in each of the armed services. The names "general", "special", and "summary" courts-martial are adopted for the superior, intermediate, and inferior courts, respectively.

At present all services use the name "general" for the court-martial of greatest jurisdiction. As this term is descriptively appropriate and has been used by the services for many years, it is believed this name should be retained.

At present the Army-Air Force court of intermediate jurisdiction is named "special", while the Navy uses the title of "summary" for the corresponding court. As the term "summary" is believed more appropriate for a court of one member than for a court of three members, it is proposed to use the term "special" for the intermediate court. This proposal also has the advantage of retaining the present Army and Air Force terminology.

Under the Articles of War, the Army and Air Force use the term "summary" to denote the court-martial of inferior jurisdiction, while the Navy uses the term "deck court". Inasmuch as the term "deck" is inappropriate for all services and the term "summary" is appropriate for a court-martial of one member, it is proposed to retain the present Army and Air Force terminology.

c) The proposed text does not change the provisions of the Articles of War as to number of members. The A.G.N. provides for a maximum of thirteen members for general courts-martial and three members for summary (now to be called special) courts-martial. It is believed that these

RESTRICTED

Revised Draft  
10/28/48

Proposed Article 16

P. 3

limitations are unnecessary and <sup>they</sup> are omitted from the proposed text for the purpose of uniformity. S.1338 80th Congress, 1st Session, a proposed Navy bill had omitted the maximum limitation on the number of members of a general court-martial.

JDS

RESTRICTED

Uniform Code of Military JusticeArt. 16. Courts-Martial Classified.

(a) There shall be three kinds of courts-martial in each of the armed services, namely,

(1) General courts-martial, which shall consist of any number of members not less than five.

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

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

Sources

- a) A. W. 3, 5, 6, and 7.
- b) A.G.N., Articles 39, 27, and 64.

Comment

a) The proposed text consolidates the provisions of A. W. 3 (Classification of Courts-Martial), A. W. 5 (Number of Members for General Courts-Martials), A. W. 6 (Number of Members for Special Courts-Martial), and A. W. 7 (Number of Members for Summary Courts-Martial). The present A.G.N. has no provision classifying Navy courts-martial. The Navy provisions as to number of members are in A.G.N. Articles 39, 27, and 64, dealing with each type of court-martial.

The proposed text reduces the number of articles and classifies the various kinds of courts-martial. It is believed that this is a logical arrangement of subject matter as this

**RESTRICTED**

10/19/48

Proposed Article 16

P. 2

proposed article would serve to introduce the articles which deal with the composition, appointment, jurisdiction, and procedures of courts-martial.

b) The proposed text adopts a uniform terminology for courts-martial in each of the armed services. The names "general", "special", and "summary" courts-martial are adopted for the superior, intermediate, and inferior courts, respectively.

At present all services use the name "general" for the court-martial of greatest jurisdiction. As this term is descriptively appropriate and has been used by the services for many years, it is believed this name should be retained.

At present the Army-Air Force court of intermediate jurisdiction is named "special", while the Navy uses the title of "summary" for the corresponding court. As the term "summary" is believed more appropriate for a court of one member than for a court of three members, it is proposed to use the term "special" for the intermediate court. This proposal also has the advantage of retaining the present Army and Air Force terminology.

Under the Articles of War, the Army and Air Force use the term "summary" to denote the court-martial of inferior jurisdiction, while the Navy uses the term "deck court". Inasmuch as the term "deck" is inappropriate for all services and the term "summary" is appropriate for a court-martial of one member, it is proposed to retain the present Army and Air Force terminology.

**RESTRICTED**

**RESTRICTED**

10/19/48

Proposed Article 16

P. 3

c) The proposed text does not change the provisions of the Articles of War as to number of members. The A.G.N. provides for a maximum of thirteen members for general courts-martial and three members for summary (now to be called special) courts-martial. It is believed that these limitations are unnecessary and are omitted from the proposed text for the purpose of uniformity. S.1338 80th Congress, 1st Session, a proposed Navy bill had omitted the maximum limitation on the number of members of a general court-martial.

JDS

**RESTRICTED**

Part  
5

Uniform Code of Military Justice

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

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

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

(c) Enlisted Persons. Any enlisted person on active duty in 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 persons 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 are not available. Where such persons are not available, the court may be convened and the trial held without them, but the

convening authority shall then make a written statement, to be appended to the record, why they are not available.

For the purposes of this subsection, the word "unit" shall mean any regularly organized body as defined by the Secretary of the Department concerned, but in no case shall it be a body larger than a company, an aviation squadron, or a ship's crew, or than a body corresponding to them.

(d) Qualifications of Members of Courts-Martial.

(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 appointing courts-martial, the convening authority shall detail 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.

NOTES:

A. Sources and Comparable Provisions

- a) A. W. 4, as amended; A. W. 16, as amended.
- b) Art. 39, AGN; Art. 24(a), proposed Navy Bill.

B. Comments

a) Subsections (a), (b), and (c) make officers, warrant officers, and enlisted persons competent to sit on the courts-martial of any force, without regard to whether they are members

- 3 -

of the same force as the convening authority, or of the same force as the accused. As a practical matter, in almost all cases the persons appointed to the court will be of the same force as the convening authority and the accused; subsection (d)(2) would require this as a matter of discretion by the convening authority of an intra force court. In cases where reciprocal jurisdiction between forces is exercised, however, it will be desirable to have a mixed court, with members from the force holding the court, and from the force to which the accused belongs. The subsections are written to permit this, and beyond this to permit the appointment of members from a third force, since that might also be desirable in certain cases, as when the convening authority is in command over several small units of different forces, which might occur at a MATS installation. Placing no restriction on competency in this respect would give the convening authority a maximum number of persons to draw on for membership on a court martial. Since reciprocal jurisdiction will be exercised only by agreement among the forces, as expressed in regulations prescribed by the President, the appointment of mixed courts will be subject to whatever control is believed to be necessary.

b) Subsection (c) limits competency of enlisted persons to cases where they are not members of the same unit as the accused. "Unit" is defined for the purposes of subsection (c). Since the Secretary of the Navy is authorized to declare that all members of a ship's crew shall be considered to be members of the same

unit it is felt unnecessary to make any further provision for the case where a court-martial is convened aboard a ship.

c) The last sentence of the first paragraph of subsection (c) was added to make it possible to proceed with a trial where competent enlisted persons are not available. A. W. 16, as amended, also provides that enlisted members of the same unit as the accused shall not sit on the court trying him, but A. W. 4, as amended, does not provide what may be done if members of other units are not available. It is believed that unless some provision qualifying the mandatory nature of the subsection is included, cases will arise where it will be impossible to try a man except by summary court-martial, or by obtaining a competent person at great expense to the government, as for example, where there is a single "unit" of any force, which is isolated geographically. "Not available" is intended to cover only those cases where it is impracticable physically or from military exigencies to obtain a man from another unit. It will not cover cases where it is merely inconvenient. Adding the requirement that the convening authority must make a written statement, to be appended to the record, why they are not available, will make it difficult to circumvent the general requirement that enlisted persons must be appointed to the court when they have been requested.

EMS

12/6/48

Proposed Article 18  
Page 1

Uniform Code of Military Justice

Art. 18. Law Member of General Courts-Martial

(a) The authority appointing a general court-martial shall detail as (law member) thereof <sup>for</sup> 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 by the Judge Advocate General of one of the armed forces to be qualified for such detail.

*What a charge by law member*

(b) No general court-martial shall hold any proceedings in open <sup>session</sup> court in the absence of the law member regularly detailed.

(c) The law member shall not vote with the court nor shall he consult with the court <sup>except open</sup> in closed session.

*2-2*

NOTES:

A. Sources and Comparable Provisions

- 1) A.W. 8 as amended by P. L. 759, 80th Cong., 2d Sess. (1948).
- 2) S.1338, 80th Cong., 1st Sess. (1947), Art. 24(b).

B. Comment.

(a) The proposed text is derived from A.W. 8 (as amended). The law member is required to a member of the bar as it is believed that he should normally be more qualified than counsel.

(b) Subsection (b) is to assure that the law member shall be present except when the court is in closed session.

(c) Subsection (c) is added in order to show the changed position of the law member. He is to function in a manner similar to that of a judge sitting with a jury and is not to be a "member".

JDS

Part

6

**RESTRICTED**

TABLE OF CONTENTS - PART 6

APPOINTMENT OF COURTS-MARTIAL

- Art. 19. General Courts-Martial
- Art. 20. Special Courts-Martial
- Art. 21. Summary Courts-Martial
- Art. 22. General provisions re: Trial Judge  
Advocates and Defense Counsel

**RESTRICTED**

Uniform Code of Military Justice

Art. 19. General Courts-Martial

(a) General courts-martial may be appointed by

(1) The President of the United States,

(2) The Secretary of the Army, Navy, or Air Force,

(3) The commanding officer of a Territorial Department, an Army Group, 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 a Major Air Command, an Air Force, a Division, or a separate wing of the Air Force,

(6) Such other commanding officers of their respective forces as may be designated by the Secretary of the Army, Navy, or Air Force,

(7) Any other commanding officer in any of the Armed Forces empowered by the President.

(b) When any such commanding officer is the accuser or the complainant of the person or persons to be tried, the court shall be appointed by superior competent authority and may in any case be appointed by superior authority when by the latter deemed desirable.

NOTES

A. Sources and Comparable Provisions

a) A. W. 8 as amended by P.L. 759, 80th Congress, 2d Session

b) A.G.N., Art. 38.

# RESTRICTED

Proposed Article 19

P. 2

## B. Comment

a) The proposed text includes the provisions of A. W. 8 as amended by P.L. 759 and in addition includes similar provisions for the Air Force, Navy, and Coast Guard. The provisions as to law member are to be found in proposed Article 18.

b) The Secretary of the Army and Air Force are here given powers to designate convening authorities similar to the power heretofore provided for the Secretary of the Navy. The Navy is in favor of retaining the present exercise of this power by the Secretary of the Navy.

c) The authority of the President is extended to empower officers of the Navy, Coast Guard, and Marine Corps to appoint general courts-martial similar to the authority which he has under A. W. 8 (as amended) to empower Army and Air Force officers to convene such courts.

d) As units of the Navy, Air Force, and Coast Guard corresponding to the Army units designated in A. W. 8 were difficult to determine, each service was allowed to designate the units which it thought should be designated by statute. Specific units are named in the statute for the purpose of informing commanding officers in the field of their power to convene general courts-martial, since such officers will have copies of the statute, but may not have all the orders and regulations of the Secretary of their service.

e) No provision is made for the appointment of general courts-martial by the Superintendents of the various service academies. A. W. 8 presently provides for such statutory authority for the Superintendent of the Military Academy. The Navy and Coast Guard

# RESTRICTED

P. 3

do not wish to grant this authority by statute, while the Air Force has no service academy. Therefore, in the interest of uniformity, statutory provision for any such Superintendent has been omitted.

f) The present provision of A. U. 8 granting commanding officers to whom there is assigned a staff judge advocate the power to convene general courts-martial is omitted as it is felt that these officers could be provided for by being designated by the Secretary of their respective service.

g) Paragraph (b) is taken from A. U. 8 as amended by Public Law 759. The Navy is opposed to the inclusion of this provision as causing delay in the administering of discipline, especially on ships at sea. The word "prosecutor" in A. U. 8 is changed to "complainant" as the word "prosecutor" is used in this Code to mean the officer who acts as attorney for the United States.

JDS

*now "trial counsel"*

Uniform Code of Military Justice

Art. 20. Special Courts-Martial

(a) Special courts-martial may be appointed by

(1) Any person who may appoint a general court-martial,

(2) The commanding officer of a district, garrison, fort, camp, station, 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 vessel, brigade, regiment, marine barracks, or the commandant of a naval shipyard or naval station,

(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) Any other commanding officer empowered by the Secretary of the Army, Navy, Air Force, or Treasury.

(b) When any such commanding officer is the accuser or the complainant of the person or persons to be tried, the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed advisable.

NOTES

A. Sources and Comparable Provisions

P. 2

- a) A. W. 9 as amended by P. L. 759, 80th Congress, 2D Session
- b) A.G.N., Art. 26.

B. Comment

a) The proposed text is drawn from A. W. 9, as amended by P. L. 759 and A.G.N. Art. 26.

b) Subsection (a)(1) reflects the Committee's determination that authorities having power to appoint general courts should have the power to appoint inferior courts as well, in order to avoid the trial of persons by general courts-martial when a special court-martial would be sufficient.

c) Subsections (a) (2) and (3) embody present provisions of A. W. 8.

d) Subsection (a) (4) designates Air Force selected by the Air Force as corresponding to those names in (a) (3).

e) Subsection (a) (5) contains additional appointing authorities named in the present A.G.N.

f) The Secretary of the Army, and of the Air Force, are given the power to designate additional appointing authorities equal to that given the Secretary of the Navy under the present A.G.N.

g) The Navy objections to paragraph (b) of proposed Article 19 also apply to paragraph (b) of this proposed article. The word "prosecutor" is changed to "complainant" to conform to proposed article 19.

JDS

Uniform Code of Military JusticeArt. 21. Summary Courts-Martial.

- (a) Summary courts-martial may be appointed by
- (1) Any person who may appoint a general or special courts-martial,
  - (2) The commanding officer of a detached company, or other detachment of the Army, or
  - (3) The commanding officer of a squadron or other detachment of the Air Force.

(b) Summary courts-martial may be appointed by superior authority when by the latter deemed desirable. 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.

NOTES

## A. Sources and Comparable Provisions

- a) A. W. 10
- b) A.G.N. 64 (a)
- c) S.1338, 80th Congress, 1st Session (Proposed Navy bill).

## B. Comments

- a) The wording of the proposed text is mainly derived from A. W. 10.
- b) Persons who are empowered to appoint general or special courts-martial are given authority to appoint summary courts-martial

10/19/48

**RESTRICTED**

Proposed Article 21

P. 2

as the Committee believed this to be desirable. Under the present A.G.N., such officers have this power.

c) The Air Force designated a squadron as corresponding to the designated Army units. The Navy retains present practice.

d) Paragraph (b), which is derived from A. W. 10, is deemed desirable, although the A.G.N. does not contain a similar provision.

JDS

**RESTRICTED**

Article 22 -

It was agreed that we would not use "prosecutor" and "prosecution" but "trial counsel" or which we agreed will hardly do. When we have a law member - particularly if he is to be a judge, the trial counsel should not be the adviser of the court or of the defence. ∴ if we are not to use prosecutor, we should use trial counsel for the Government and Counsel for accused respectively.

Uniform Code of Military Justice

*Has to be revised*

Art. 22. Appointment of Prosecutors and Defense Counsel.

(a) For each general and special court martial the authority convening the court shall appoint a qualified prosecutor and a defense counsel of at least equal qualifications, together with such assistants as he may deem necessary or appropriate. No person who has acted as investigating officer or court member in any case shall act in the same case as a member of the prosecution or defense. No member of the prosecution shall act subsequently in the same case as a member of the defense, nor shall any member of the defense act subsequently in the same case as a member of the prosecution.

*trial counsel for the government*

*for the accused*

*counsel for the government*

*counsel for the accused*

(b) The persons acting as prosecutor and defense counsel

*counsel for govt*

*for accused*

in the case of a general court martial shall each be a member of the bar of a Federal court or of the highest court of a State, Territory, District, or Insular Possession of the United States, and shall be certified by the Judge Advocate General (or the Chief Counsel of the Coast Guard) of the service concerned as having the requisite legal training to perform his duties.

*of the J.A.G. or legal specialist or a member*

NOTES

A. Sources and Comparable Provisions

- a) A. W. 11 now in effect
- b) A. W. 11 as amended by P. L. 759
- c) A. G. N. 18(b) and A. G. N. 24 (b) as amended by the proposed Navy

## B. Comment

This Proposed Article is a re-arrangement of the language in A.W. 11 (as amended by P.L. 759) with certain modifications. In the interest of clarity and accuracy, the trial judge advocate is renamed the prosecutor. The question of whether or not the wording of A.W. 11 includes lawyers who are members of the bar of a territorial court is also clarified.

Note that both the trial judge advocate and the defense counsel for a general court martial not only must be lawyers, but must be certified as well. Certification by the Judge Advocate General has been substituted for the requirement of membership in a Judge Advocate General's Department to broaden the application of the Article to the other armed forces, which do not have such a department.

The provision prohibiting the prosecutor or defense counsel from acting as staff judge advocate is transferred to Proposed Article 3. The provision re excusing defense counsel when the accused has his own counsel is eliminated, since this subject is covered in Proposed Article 36.

The proviso that where the prosecutor is a member of the Judge Advocate General's Department or of a bar, defense counsel shall likewise be a member, is eliminated. Such a proviso is unnecessary with respect to a general court martial (see sub-section (b) ) and the language "of at least equal qualifications" in sub-section (a) gives sufficient protection to the accused with respect to special courts martial.

Uniform Code of Military Justice

Art. 23. Jurisdiction of Courts-Martial. In General.

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

(b) In all cases, 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 force to which the accused belongs.

NOTES:

A. Sources and Comparable Provisions

None

B. Comments

a) Subsection (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. It is contemplated that such regulations will enumerate those situations in which one armed force can try personnel of another 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

# RESTRICTED

Revised Draft  
11/29/48

Proposed Article 23

- 2 -

they arise. The exercise of jurisdiction over other persons subject to the Code, who are not members of any armed force, shall also be subject to regulations prescribed by the President.

b) Subsection (b) is particularly applicable to cases where reciprocal jurisdiction has been exercised, and is therefore placed in Art. 23. But general courts-martial records in every case will go from the convening authority to the JAG of the force to which the accused belongs. Special courts-martial records will go from the convening authority to the officer with authority to convene a general court-martial for the command which held the trial. In some cases this officer might be of the same force as the accused, while in others he might be of the same force as the convening authority; in either event he would be the reviewing authority for the convening command in all special courts-martial cases. Thereafter, if review on the departmental level was required, it would be carried out in the department of the force to which the accused belongs.

EMS

# RESTRICTED

Uniform Code of Military Justice

Art. 25. Jurisdiction of Courts-Martial. Special Courts-Martial.

Subject to Art. 23, special courts-martial shall have jurisdiction to try persons subject to this Code for any non-capital offense made punishable by this Code, and for capital offenses under such regulations as may be prescribed by the President.

Special courts-martial may adjudge any punishment authorized by law or the customs of the service except death, dishonorable discharge or dismissal, confinement in excess of six 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.

NOTES:

A. Sources and Comparable Provisions

- a) A. W. 13, as amended by P. L. 759.
- b) Proposed Navy Bill, Art. 17, Art. 20.

B. Comments

a) The proposed text follows the sense of A. W. 13, as amended, with alterations in language to eliminate the use of provisos, and to make it consistent with the form followed in proposed Art. 24. Special courts are given the authority to try capital cases under such regulations as may be prescribed by the President. The Navy proposes this procedure so that prior blanket

# RESTRICTED

Revised Draft  
11/29/48

Proposed Article 25

- 2 -

authority may be obtained for capital offenses to be tried by special courts aboard ship. Death is added to the list of punishments which a special court may not adjudge, to cover the case where a special court tries a capital case.

b) The provision in A. W. 13, as amended, that a BCD adjudged by a special court-martial is subject to approval by an officer with GCM jurisdiction and review by the J.A.G. is cut out of this article. This provision will be dealt with in Art. 60, Execution of Sentences, and in the proposed article dealing with review of special court-martial cases.

EMS

# RESTRICTED

Part  
7

TABLE OF CONTENTS - PART 7

JURISDICTION OF COURTS-MARTIAL

- Art. 23. General Courts-Martial.
- Art. 24. Special Courts-Martial.
- Art. 25. Summary Courts-Martial.
- Art. 26. Reciprocal Jurisdiction of Armed Services  
Courts-Martial.
- Art. 27. Jurisdiction of other tribunals of the Armed  
Services not affected by these articles.
- Art. 28. Statute of Limitations.
- Art. 29. Double Jeopardy.

Uniform Code of Military Justice

Art. 23. Jurisdiction of Courts Martial. In General.

(a) Each armed force shall have court martial jurisdiction over its own personnel, and over <sup>all</sup> other persons subject to this Code. The exercise of jurisdiction over such other persons (~~subject to this Code~~) shall be in accordance with regulations prescribed by the President.

*omit.*

(b) In any case where a member of one armed force has been tried by a court martial of another armed force, any review subsequent to that by the officer with authority to convene a general court martial for the <sup>in</sup> command <sup>was</sup> which held the trial, shall be in the force of which the accused is a member.

*What is the meaning of command*

Sources and Comparable Provisions

None

Comments

a) Subsection (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. It is contemplated that such regulations will enumerate those situations in which one armed force can try personnel of another 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 exercise of jurisdiction over other persons subject

- 2 -

to the Code, who are not members of any armed force, shall also be subject to regulations prescribed by the President.

b) Subsection (b) is particularly applicable to cases where one force holds a special court martial on a person belonging to another force. Review in these cases will be by the convening authority and by the officer having general court martial jurisdiction over the command which held the trial; any review subsequent to this will be by the accused's own force. Thus a BCD adjudged by a special court will not be executed until it has been approved by the force of which the accused is a member, but sentences which do not require approval on the departmental level may be executed on approval by the officer with GCM jurisdiction.

In GCM cases, review will be by the convening authority, and then by the force to which the accused belongs.

EMS

# RESTRICTED

## Uniform Code of Military Justice

### Art. 24. Jurisdiction of Courts-Martial. General Courts-Martial

Subject to Art. 23, general courts-martial shall have jurisdiction to try persons subject to this Code for any offense made punishable by this Code, and may adjudge any punishment authorized by law or ~~the customs of the service~~, including a bad conduct discharge. 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 authorized by the law of war.

#### NOTES:

##### A. Sources and Comparable Provisions

- a) A.W. 12, as amended.
- b) Proposed Navy Bill, Art. 23.

##### B. Comments

a) The proposed text follows A.W. 12, as amended, substantially. The word "jurisdiction" is substituted for "power" as more appropriate. The punishments the court may adjudge when it tries a person subject to the law of war are made those authorized by the law of war rather than those authorized by law or the customs of the service.

EMS

Uniform Code of Military Justice

Art. 26. Jurisdiction of Courts-Martial. Summary Courts-Martial.

Subject to Art. 23, summary courts-martial shall have jurisdiction to try persons subject to this Code, except officers, warrant officers, cadets, aviation cadets, and midshipmen at the Naval Academy, for non-capital offenses made punishable by this Code, but no person who objects thereto shall be brought to trial before a summary court-martial. 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 adjudge any punishment which a general court-martial is authorized to adjudge, except death, dismissal, discharge, confinement in excess of one month, restriction to certain specified limits in excess of two months, or forfeiture of pay in excess of two-thirds of one month's pay.

NOTES:

A. Sources and Comparable Provisions

- a) A. W. 14, as amended.
- b) P.N.B., Art. 15, 16.

B. Comments

a) First Paragraph: The proposed text follows the form used in Arts. 24 and 25, U.C.M.J. The clause beginning "but no person who objects thereto" to the end of the paragraph is taken from Art. 16(f), proposed Navy bill. The Army limits the right to object to trial by summary court to n.e.e.'s., and provides that

*Hand labor w.o. confinement in excess of forty five days.*

*Hard labor, deprivation of privileges, detention, pay, fine, restriction in grade, etc.*

they may be tried by such a court anyway, if the officer with special court-martial jurisdiction over the man authorizes it. It is the Army recommendation that this provision be adopted. The Navy wishes to make the right absolute, provided there is no right to refuse C.O. punishment. An objection to the Army provision is that in the case of a summary court convened aboard a ship, the officer with special court-martial jurisdiction is the same person. This would make the man's right to object meaningless.

b) Second Paragraph: Text follows the form used in Art<sup>s</sup> 24 and 25, U.C.M.J. The maximum time for restriction, two months, is a compromise between the Army provision of three months and the Navy provision of one month.

EMS

Uniform Code of Military Justice

Art. 27. Jurisdiction of Courts-Martial. Jurisdiction 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 <sup>may</sup> be triable by such military commissions, provost courts, or other military tribunals.

*Want to avoid*

NOTES:

A. Sources and Comparable Provisions

- a) A. W. 15
- b) Proposed Navy bill, Art. 5(b)

B. Comments

a) The language of A.W. 15 has been adopted, with the words "this Code" substituted for "these articles." The simpler provision found in Art. 5(b), proposed Navy bill was not adopted because of the importance attached to the contents of A.W. 15 in Ex Parte Quirin, 317, U.S. 1 (1942).

*shall not be construed as in any way affecting the concurrent jurisdiction of military commissions provost etc or other military tribunals*

EMS

Uniform Code of Military Justice

Art. 28. Statute of Limitations

*Charges, trial and punishment of offenses*  
(a) A person charged with desertion or absence without leave in time of war, or with treason, mutiny, or murder, may be tried and punished at any time without limitation.

(b) A person charged with desertion in time of peace, rape, or any of the offenses punishable under Art. \_\_\_ (i.e., those now in A.W. 93) shall not be liable to be tried or punished by a court-martial if the offense was committed more than three years (before he was arraigned *before the signing of charges and specifications to be preferred against him.*)

The period of limitation for the trial or punishment of frauds against the government shall (also) be three years, [but the provisions of Title 18 U.S.C., Sec. 3287 shall apply to such offenses in addition.

(c) A person charged with any other offense shall not be liable to be tried or punished by a court-martial if the offense was committed more than two years (before he was arraigned (before the signing of charges and specifications to be preferred against him.

(d) In the case of any offense the trial of which in time of war shall be certified by the Secretary of the ~~respective~~ armed force concerned to be detrimental to the prosecution of the war or inimical to the Nation's security, the period of limitation shall be extended to six months after the termination of hostilities

*prosecuted, tried or punished shall be tried by court-martial for any of the following offenses unless the charges have been signed and he has been arraigned within 3 years after this year has been committed: desertion in time of peace, rape, fraud vs the U.S., any offense punishable under Art. of the Code. Nothing here shall apply to 3287.*

*Nothing here shall apply to 3287.*

as proclaimed by the President or by a concurrent resolution of Congress.

(e) Periods in which the accused was absent from the jurisdiction of the U.S., or was in the custody of civil authorities, or in the hands of the enemy, or was fleeing from justice, *??* or by reason of any other manifest impediment was not amenable to military justice, *]* shall be excluded in computing the period of limitation for trial or punishment.

(f) Where a rehearing or a new trial for the same offense is ordered or granted, the Statute of Limitations shall not be a bar unless it would have been a bar to the original trial. *expiration of the period*  
*to a new trial*

(g) This article shall not be construed to authorize the trial or punishment of any person whose trial or punishment is barred by the provisions of existing law.

NOTES:

A. Sources and Comparable Provisions

- a) A.W. 39, as amended.
- b) Proposed Navy bill, Art. 5(b).

B. Comments

a) This article includes all of the provisions in A.W. 39, as amended, and all the provisions in Art. 5(b), proposed Navy bill, except that contained in the second proviso. That provision has been covered in Art. 40(c).

b) The offense of treason has been added to the list of offenses which may be tried and punished at any time without

limitations.

c) Subsections (b) and (c) contain alternative provisions for when the Statute of Limitations shall stop running. A.W. 39 makes it the time of arraignment; Art. 5(b) makes it the time charges and specifications are signed. Arraignment requires the presence of the accused; signing of charges and specifications does not. The Navy provision is consistent with the rule for Federal crimes. Title 18, U.S.C., Sec. 3282 provides the Statute shall stop running at the time the indictment is found or the information is instituted.

d) The statement in subsection (b) that the provisions of Title 18, U.S.C., Sec. 3287, shall apply to frauds against the government is an adoption of the provision in Navy Art. 5(b), first proviso. The Act of August 24, 1942, and its amendments, were incorporated into Sec. 3287, which reads as follows:

"§ 3287. Wartime suspension of limitations  
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 the 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, subcontract, 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

RESTRICTED

11/20/48

Proposed Article 28

-4-

termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

Definitions of terms in section 103 of Title 41 shall apply to similar terms used in this section."

e) Subsection (e) incorporates all of the conditions set out in both the Army and the Navy articles. "In the hands of the enemy" was taken from the proposed amendments to the proposed Navy bill, dated 5/17/48.

f) Subsection (f) is new.

g) It is suggested that this Article be moved from its present place in the U.C.M.J. and put in Part 9, following Art. 40, since it has more to do with a plea of the accused than with the jurisdiction of the court.

EMS

RESTRICTED

Uniform Code of Military Justice

Art. 28. Statute of Limitations.

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

(b) A person charged with desertion in time of peace, rape, or any of the offenses punishable under Articles \_\_\_\_ and \_\_\_\_ (i.e. those now in A. W. 93 and A. W. 94) shall not be liable to be tried or punished ~~XXXXXXXXXXXXXXXXXXXX~~ if the offense was committed more than three years before the signing of charges and specifications to be preferred against him, or before the imposition of punishment under Art. 15.

(c) A person charged with any other offense shall not be liable to be tried or punished ~~XXXXXXXXXXXXXXXXXXXX~~ if the offense was committed more than two years before the signing of charges and specifications to be preferred against him, or before the imposition of punishment under Art. 15.

(d) In the case of any offense the trial of which in time of war shall be certified by the Secretary of the Department concerned to be detrimental to the prosecution of the war or inimical to the Nation's security, the period of limitation shall be extended to six months after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

(e) Periods in which the accused was absent from the jurisdiction of the U.S., or was in the custody of civil authorities, or in the hands of the enemy, shall be excluded in computing

*Except as otherwise in this article provided*

*Other than those specified in (c) and (d) of this article*

*(d)*

the period of limitation for trial or punishment.

(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 the 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, subcontract, 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 concurrent resolution of Congress.

~~(g) Where a rehearing or a new trial for the same offense is ordered or granted, the Statute of Limitations shall not be a bar unless it would have been a bar to the original trial.~~

*deletion of the period prescribed in* (unnecessary)  
2

(h) This article shall not be construed to authorize the trial or punishment of any person whose trial or punishment is barred by the provisions of existing law.

NOTES:

A. Sources and Comparable Provisions

- a) A. W. 39, as amended.
- b) Proposed Navy Bill, Art. 5(b).

B. Comments

a) Subsection (a) is adopted from A. W. 39, as amended, and Art. 5(b), proposed Navy bill. Treason is added as an offense for which there is no Statute of Limitations.

b) Subsection (b) is adopted from A. W. 39, as amended, except for the provision that the Statute shall stop running at the time charges and specifications are signed, which is adopted from the Navy bill. The words "by a court-martial" <sup>have been deleted,</sup> ~~XXXXXXXXXX~~ so the period of limitation will apply equally to C.O. punishment. ~~XXXXXXXXXX with a view to deleting these words if they were deleted the~~ The final clause is added to emphasize this.

~~XXXXXXXXXX will apply equally to C.O. punishment. This would conform with the present A.W. and the proposed amendments to the proposed Navy bill dated 5/17/48 the proposed Navy bill itself contains the words "by a court-martial".~~

c) Subsection (c) conforms with present Army and Navy provisions with the exceptions noted above.

d) Subsection (d) is adopted from A. W. 39, as amended.

e) The first provision in subsection (e) is adopted from A. W. 39, as amended; the second provision is from Art. 5(b), proposed Navy bill; the third provision is from Art. 5(b)(3) of the proposed amendments to the proposed Navy bill, dated 5/17/48. ~~(Other provisions holding the Statute were eliminated by deletion of the A.W. Code.)~~

f) Subsection (f) incorporates Title 18, U.S.C. Sec. 3287. If Sec. 3287 is not incorporated into the U.C.M.J., either directly or by reference, the effect is probably to make it

- 4 -

inapplicable in court-martial cases. This would be contrary to the intent expressed by Congress when it enacted Sec. 3287 recently as permanent legislation. The section has been inserted directly because of the undesirability of citing statutes in the Code which may not be available to persons working with the Code.

g) Subsection (g) is new.

h) Subsection (h) is adopted from A. W. 39, as amended.

In connection with this provision it should be noted that this Article makes the period of limitation longer for certain offenses than what it is under present law - e.g. treason, or, for the Navy, all the offenses in subsection (b). The question may arise whether the period of limitation to be applied to these offenses, when they are committed before the U.C.M.J. goes into effect but have not yet been tried, shall be the period under this Article or the period applicable under present law. Subsection (g) would settle this question in all situations which could arise except two: where prosecution is not yet barred by the period of limitation under existing law, and prosecution under the U.C.M.J. would (1) not be barred at any time (treason) or (2) would be lengthened (rape case in the Navy). If it is desired to have present law apply to offenses committed before the U.C.M.J. goes into effect these two situations can be covered by a savings clause of the type enacted in Sec. 245 of the P. L. 759 or Sec. 50 of the proposed Navy bill. They could also be covered by regulations issued by the armed forces. Subsection (g) would not be contra to either of these solutions.

- 5 -

1) It is suggested that this Article be moved from its present place in the U.C.M.J. and put in Part 9, following Art. 40, since it has more to do with a plea of the accused than with the jurisdiction of the court.

EMS

Uniform Code of Military Justice

Art. 29. 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 <sup>the burden of guilty has become final after</sup> review of the case has been fully completed.

*review  
rehearing is  
not the*

NOTES:

A. Sources and Comparable Provisions

- a) A. W. 40.
- b) NC&B Sec. 408.

B. Comments

a) The proposed text follows the first paragraph of A. W. 40. (The second paragraph of A. W. 40 is covered in Art. 55, U.C.M.J.) The second clause changes A. W. 40 so that a trial will be held to be complete when the final reviewing authority has acted in the case. This change makes this article consistent with Arts. 55, 56, and 57, U.C.M.J., in that the trial will be complete when the final authority with power to order a rehearing has acted in the case. The second clause conflicts with the present Navy rule, but the Navy has agreed to adopt the Army provision.

27

b) It is suggested that this Article be moved from its present place in the U.C.M.J. and put in Part 9, following Art. 40, since it has more to do with a plea of the accused than with the jurisdiction of the court.

Part  
8

Uniform Code of Military Justice

Art. 30. Preliminary Charges.

(a) ~~Preliminary~~ charges and specifications must be signed <sup>by a person subject to this Code</sup> under oath before an officer of the armed forces and must state <sup>authorized by administrative oath</sup>

(1) that the complainant 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 swearing of preliminary charges, immediate <sup>the have been sworn to</sup> steps shall be taken <sup>the proper authority immediate steps</sup> 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.

NOTES:

A. Sources and Comparable Provisions

1) P. L. 759, 80th Cong., 2d Sess. (1948), Art. 46a amending

A. W. 70.

2) AGN 43.

B. Comment

(a) Subsection (a) is derived from A. W. 46 (as amended).

The word "preliminary" is added to make clear that these charges and specifications need not be formal in form or substance although they must state facts which, allege an offense against this Code.

However, the preliminary charges and specifications may be formal

in form and substance and may be the charges and specifications on which an accused is actually tried. This is to make clear that charges may be changed after investigation both as to form and substance without a further oath, subject to the requirements of Article 31.

The text allows any person to swear to a complaint. This would not only allow a member of the armed forces to sign charges, but a civilian as well. The purpose of this proposal is to allow the real party in interest to swear to the charges when he is available.

(b) The purpose of subsection (b) is to assure that charges will be speedily disposed of and that the person accused will be informed of the charges so that he may prepare a defense.

JDS

Uniform Code of Military Justice

Art. 31. Investigation

(a) No charge or specification <sup>shall</sup> will be referred to a general court-martial for trial until after a thorough and impartial investigation of all the matters set forth therein shall have been made.

~~This investigation is mandatory, but not jurisdictional, and will include~~ <sup>shall</sup> inquiries as to the truth of the matter set forth in the charges, form of charges, and what disposition of the case should be made 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. <sup>a statement of the substance of the oral statement furnished the accused</sup> If the charges are <sup>shall be forwarded with the charges if forwarded etc.</sup> forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

NOTES:

A. Sources and Comparable Provisions

1) P.L. 759, 80th Cong. 2d Sess. (1948), Art. 46b amending A.W. 70.

B. Comment

The proposed text is derived from A.W. 46 (as amended). The second sentence in subsection (a) is added in order to make clear that this

-2-

second sentence in subsection (a) is added in order to make clear that this provision is not jurisdictional. In connection with proposed Article 30, it is proposed that formal charges may be drawn after the investigation. However no charge or specification may be referred to a general court-martial for trial, unless all the statements of fact therein have been thoroughly and impartially investigated.

JDS

Uniform Code of Military Justice

Art. 32. Forwarding of Charges.

When a person is held for trial by general court-martial the commanding officer will, 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 be not practicable, he will report to superior authority the reasons for delay.

NOTES:

A. Sources and Comparable Provisions

- 1) P.L. 759, 80th Cong. 2d Sess. (1948), Art. 46c amending A.W. 70.

B. Comment

The proposed text is A.W. 46c (as amended) with the omission of service of charges which is incorporated in proposed Article 34.

JDS

Uniform Code of Military Justice

Art. 33. Advice of Staff Judge Advocate and Reference for Trial.

Before directing the trial of any charge by general court-martial, the convening authority will refer it to his staff judge advocate or legal officer for consideration and advice; and no charge will be referred to a general court-martial for trial unless it has been found that a thorough and impartial investigation thereof has been made as prescribed in Article 31, that such charge is legally sufficient to allege an offense under these articles, and is sustained by evidence indicated in the report of investigation. If the charges or specifications are not formally correct or do not conform to the evidence indicated in the report of the investigating officer, the convening authority may make such formal corrections and change the charges and specifications to conform to such evidence. *maybe made*

NOTES:

A. Sources and Comparable Provisions

- 1) P.L. 759, 80th Cong., 2d Sess. (1948), Art. 47b.

B. Comment

The proposed text incorporates A.W. 47b (as amended). The last sentence is added to allow informal preliminary charges to be put in formal form and to allow the charges to be changed to conform to the evidence.

Uniform Code of Military Justice

Art. 34. Service of Charges

The trial counsel to whom court-martial charges are referred for trial will 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 charges upon him, nor before a special court-martial within a period of three days subsequent to the service of charges upon him.

NOTES:

A. Sources and Comparable Provisions

- 1) A. W. 46c as amended by P. L. 759, 80th Cong., 2d Sess. (1948).
- 2) AGN Art. 43.
- 3) S.1338 (Proposed Navy Bill), 80th Cong., 1st Sess. (1947), Art. 33 and 37.

B. Comment

Service of charges is placed after reference to trial instead of in the article on forwarding charges as there is no need to serve charges until it has been finally determined that there will be a court-martial. The requirement of three days between service of charges and trial by special court-martial in time of peace is derived from proposed AGN Art. 37.

OFFICE OF THE SECRETARY OF DEFENSE  
WASHINGTON

RESTRICTED

December 11, 1948

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

Professor Edmund M. Morgan ←  
Chairman

Honorable Gordon Gray  
Department of the Army Member

Honorable W. John Kenney  
Department of the Navy Member

Honorable Eugene M. Zuckert  
Department of the Air Force Member

SUBJECT: Agenda for the meeting of the Committee on a Uniform Code of Military Justice on THURSDAY, DECEMBER 16, 1948, at 2:00 p.m., and FRIDAY, DECEMBER 17, 1948, at 10:00 a.m., in Room 3-E-689 of The Pentagon.

There will be consideration of the proposed text of the following

Articles:

<u>Proposed Article Number</u>	<u>Subject</u>	<u>Comparative Study Number</u>
1-3	Assignment of Judge Advocates, etc.	AW-47
4	Territorial Applicability	None
2-12	Confinement with Enemy Prisoners, etc.	AW-16 (amended)
13	Punishment Prohibited Before Trial	AW-16 (amended)
3-15	Disciplinary Powers of Commanding Officer	AW-104
18	Law Member of General Courts Martial	AW-8 (amended)
6-28	Statute of Limitations	AW-39 (amended)
7-30	Preliminary Charges	AW-70
31	Investigation	AW-70
8-32	Forwarding of Charges	AW-70
33	Advice of Staff Judge Advocate	AW-47
34	Service of Charges	AW-70
9-51	Lesser Included Offenses	None
53	Records of Trial	AW-33 and AW-35
10-60(a)	Petition for a New Trial	AW-53
60(b)	Clemency	AW-51
60(c)	Vacating Suspended Sentence	None

RESTRICTED

RESTRICTED

It is contemplated that a number of the punitive Articles will be submitted for consideration. Proposed drafts will be supplied during the course of the week.

*Felix E. Larkin*

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

Attachments  
FEL:ls

RESTRICTED



# RESTRICTED

## TABLE OF CONTENTS - PART 9

### TRIAL PROCEDURE

- Art. 35. President May Prescribe Rules.
- Art. 36. Trial Judge Advocate to Prosecute; Counsel to Defend
- Art. 37. Challenges.
- a. For Cause;
  - b. Peremptory.
- Art. 38. Oaths.
- a. Court;
  - b. Trial Judge Advocate;
  - c. Reporter;
  - d. Witness;
  - e. Interpreter.
- Art. 39. Continuances.
- Art. 40. Refusal or Failure to Plead.
- Art. 41. Process to Obtain Witnesses.
- Art. 42. Refusal to Appear or Testify.
- Art. 43. Compulsory Self-Incrimination Prohibited; Degradation.
- Art. 44. Depositions.
- a. When Admissible;
  - b. Before Whom Taken.
- Art. 45. Records of Courts of Inquiry - When Admissible.
- Art. 46. Closed Sessions.
- Art. 47. Method of Voting.
- a. On Challenges, Findings and Sentence;
  - b. On Interlocutory Questions;
  - c. Rulings by Law Member;
  - d. Duty of Law Member re: Presumption of Innocence and Burden of Proof.

RESTRICTED

# RESTRICTED

P. 2

Art. 48. Number of Votes Required.

- a. To Convict of Spying - All;
- b. To Sentence to Death - All;
- c. Life Imprisonment - Three-fourths;
- d. Confinement Over Ten Years - Three-fourths;
- e. Convictions except spyings - Two-thirds;
- f. Confinement Under Ten Years - Two-thirds;
- g. All Other Questions - Majority.

Art. 49. Court to Announce Action.

Art. 50. Contempts.

Art. 51. Errors and Irregularities - Effect of.

Art. 52. Unlawfully Influencing Action of Court.

Art. 53. Records of Trial.

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

*Acquittal with honor.*

RESTRICTED

Uniform Code of Military Justice

*Approved*

Art. 35. President May Prescribe Rules.

(a) The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, insofar as (he shall deem) practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States.

(b) Nothing contrary to or inconsistent with this Code shall be so prescribed.

(c) All rules and regulations made in pursuance of this Article shall be laid before the Congress.

NOTES:

A. Sources and Comparable Provisions.

- 1) A.W. 38 as amended by Pub. L. 759, 80th Cong., 2D Sess. (1948).
- 2) AGN Art. 34 and 64(e).
- 3) S.1338, 80th Cong., 1st Sess. (1947) Art. 48.

B. Comment.

(a) The language of the proposed text is drawn from A.W. 38 as amended by P.L. 759. This provision differs from the proposed Navy bill in that:

- 1) The president instead of the Secretary of the Navy is to prescribe rules. The Navy has no objection to this.

# RESTRICTED

Revised Draft  
11/1/48

Proposed article 35

P. 2

2) S.1338 uses the term "pleading and procedure" instead of "procedure." Pleading is included in procedure.

3) The proposed Navy bill has the expression "as will insure the enforcement of discipline and the fair and impartial administration of justice." This language has not been deemed necessary to include in this article.

4) The text includes "principles of law", while the proposed Navy bill does not. As the language of A.W. 38 is broader, it is retained.

5) The proposed Navy bill uses the language: "naval courts-martial, other military tribunals, and fact finding bodies." The Army and Air Force believe this language too inclusive and therefore the language of P.L. 759 is used.

(b) Both A.W. 38 and proposed AGN Art. 46 agree on this provision.

(c) As P. L. 759 included this subsection, it is included in the proposed text.

JDS

# RESTRICTED

*Approved*

Uniform Code of Military Justice

Art. 36. 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 such counsel be reasonably available, or by the defense counsel duly appointed for the court pursuant to Article 22. Should the accused have counsel of his own selection, the <sup>*duly appointed*</sup> defense counsel, and assistant defense counsel, if any, ~~of the court,~~ shall, if the accused so desires, act as his associate counsel, otherwise they may be excused by the president of the court.

(c) In every court-martial proceeding, the defense counsel may, in the event of conviction, attach to the record of proceedings a brief of such matters as he feels should be considered in behalf of the accused on review.

(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 22, perform any duty devolved 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 22, perform any duty devolved

. 11/17/48

**RESTRICTED**

-2-

by law, regulation, or the custom of the service upon counsel for the accused.

NOTES:

A. Sources and Comparable Provisions:

- 1) A.W. 11, 17 and 116 as amended by P.L. 759, 80th Cong., 2d Sess., (1948).
- 2) S.1338 (Proposed Navy Bill), 80th Cong., 1st Sess. (1947); Art. 18(b), 18(c), 24(b), and 38.

B. Comments:

- (a) The text of subsection (a) is taken from A.W. 17.
- (b) Subsection (b) which guarantees the right of the accused to have counsel of his own choice, is taken from A.W. 17. Even though the accused desires to have counsel of his own selection, the appointing authority will appoint a defense counsel as required by Article 22.
- (c) Subsection (c) is taken from Art. 38 of the proposed Navy bill. Although there is no similar provision in the Articles of War, it is deemed appropriate to be included in the Code, in order to encourage defense counsels to submit briefs.

The proposed Navy bill would require that the defense counsel be required to state his reasons for not submitting a brief. However, it is felt that this would put the defense counsel in an anomalous position of stating reasons why the accused should not receive clemency and of vouching for the legality of the trial.

- (d) The provisions of subsections (d) and (e) are taken from A.W. 116. The Navy has no similar provision. The purpose of these subsections is to allow the assistants to help counsel, but not to permit them to act independently unless they are qualified as prescribed in Article 22.

JDS

**RESTRICTED**

**RESTRICTED**

*Approved*

Revised Draft  
11/1/48

Destroy Prior Drafts

Proposed Article 37  
Page 1

Uniform Code of Military Justice

Art. 37. Challenges.

(a) Members and the law member of a general or special court-martial may be challenged by the accused or the trial counsel <sup>for the Government</sup> for cause stated to the court. The court shall determine the relevancy and validity thereof, 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 <sup>for the Government</sup> shall each be entitled to one <sup>of</sup> peremptory challenge, but the law member of the court shall not be challenged except for cause.

NOTES:

A. Sources and Comparable Provisions.

- 1) A.W. 18.
- 2) S.1338 (Proposed Navy Bill), 80th Cong., 1st Sess. (1947)

Art. 24(b).

B. Comment.

(a) The proposed language is drawn from A.W. 18. The Navy does not stipulate the order of challenges, but the A. W. provision is included as it gives some additional protection to the accused.

(b) The text allows each side one peremptory challenge as in A.W. 16. Although the Navy has no such provision, this provision is included for discussion and decision.

JDS

**RESTRICTED**

Uniform Code of Military Justice

Art. 38. Oaths.

(a) Each member, including the law member, if any, of a general or special court-martial shall, before entering upon his duties, take the following oath or affirmation:

"You, A. B., do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armed forces of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority or duly announced by the court, (except to the trial judge <sup>counsel</sup> advocate and assistant trial judge <sup>counsel</sup> advocate;) neither will you disclose or discover the vote or opinion of any particular member of the court-martial upon a challenge or upon the findings or sentence, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God."

X ??

(b) When the members of the court have been sworn, the trial counsel, and assistant trial counsel, if any, shall take the following oath or affirmation:

"You, A. B., do swear (or affirm) that you will faithfully and impartially perform the duties of a trial counsel, and will not divulge

the findings or sentence of the court to any but the proper authority until they shall be duly disclosed. So help you God."

(c) All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form:

"You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God."

(d) Every reporter of the proceedings of a court-martial shall, before entering on his duties, make the following oath or affirmation:

"You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God,"

(e) Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make the following oath or affirmation:

"You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God."

(f) In case of affirmation the closing sentence of adjuration shall be omitted.

NOTES:

A. Sources and Comparable Provisions

- 1) A.W. 19
- 2) A.G.N. Art. 40, 41, 28
- 3) S.1338 (Proposed Navy Bill), 80th Cong., 1st Sess. (1947), Art. 19 and 25.

Comment

In general, the proposed text is taken from A.W. 19. The language is

11/17/48

**RESTRICTED**

Proposed Article 38

-3-

left open so that regulations may be prescribed as to the persons administering the oaths and as to whether it shall be necessary to swear the court at every trial.

JDS

**RESTRICTED**

**RESTRICTED**

Revised Draft  
12/6/48

Proposed Article 43  
Page 1

Uniform Code of Military Justice

Art. 43. Compulsory Self-Incrimination Prohibited

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

(b) No person subject to this code shall ~~examine~~ <sup>interrogate</sup> or obtain <sup>request</sup> any statement from, an ~~accused~~ <sup>a person suspected of an offense</sup> 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 being investigated and that any statement made by him may be used as evidence against him in a trial by court-martial. OK

(c) A statement obtained by unlawful compulsion from any person <sup>in violation of this article by any unlawful</sup> or ~~obtained from an accused without proper notice of his privilege~~ against self-incrimination shall not be received in evidence against such person or ~~accused~~ in a trial by court-martial. OK

(d) No person subject to this code shall compel any other person to make a statement or produce evidence before or for use before any military tribunal which statement or evidence is not relevant to the issue and may tend to degrade him. OK

NOTES:

A. Sources and Comparable Provisions

- (e) I would require defense counsel to inform accused of this privilege.
- a) A. W. 24; A.W. 24, as amended by P.L. 759.
  - b) NC&B Secs. 174, 181, 182, 234, 235, 261, 262.

**RESTRICTED**

RESTRICTED

B. Comments

Subsection (a) is a redraft of subsection (1) of the revised draft of Proposed Article 43 dated 11/10/48. Subsection (1) was approved by the Committee. The provision relating to degrading testimony has been placed in subsection (d) where it is made applicable to witnesses before courts-martial rather than to "any person". This brings it into conformity with A. W. 24. The other change is that subsection (a) is put in the active voice. It is felt that this makes it even clearer that any person who compels self-incrimination will be subject to punishment under the proposed punitive article which makes violation of the procedural articles an offense under the code.

Subsection (4) in the draft of 11/10/48 has been omitted. It provided as follows: "The accused should be permitted to testify in his own defense whenever he requests to do so, but he shall not be asked if he desires to testify, nor shall his failure to request to testify be commented upon in any way." In this connection it should be noted that 18 U. S. C. Sec. 3481 provides, "In the trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts-martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him." It is suggested that this rule be stated in the courts-martial manual.

RESTRICTED

The important differences between A. W. 24 as amended by P. L. 759 and this Proposed Article are as follows:

1) Under A. W. 24 a witness may refuse to give testimony which is either degrading or not material to the issue. Proposed Article 43 allows refusal only if it is degrading and irrelevant. To allow witnesses to raise the issue of relevancy at any time would cause endless delay.

2) A. W. 24 forbids the use of coercion to obtain any statement, whether or not self-incriminating. Proposed Article 43 forbids compulsion to obtain self-incriminating statements. "Coerce" is defined as to "restrain or constrain by force, especially legally or morally". If this definition is applied, A. W. 24 obviously will hamper any legitimate investigation and could be construed to prevent ever compelling a witness to testify to anything.

3) A. W. 24 makes improperly obtained self-incriminating statements inadmissible in any court-martial. Proposed Article 43 makes them inadmissible only against the person who is compelled to make them. This is on the theory that the privilege against self-incrimination is a personal one and that the efficiency of the court-martial system should not be sacrificed as a means of creating sanctions against improper compulsion.

Art. 44. There should be provision

(d) Should come first

At any time after charge etc any authority competent to appoint a com. for the trial of such charges may, upon petition by the accused or with

~~the consent of the accused~~  
or by the prosecution ~~and~~ after ~~the~~ reasonable notice to ~~the~~ opposing ~~party~~ ~~to~~ ~~the~~ trial counsel ~~appoint~~

any officer to take the deposition of any person <sup>to be taken</sup> ~~who~~ if ~~it~~ for use before any the court-martial or other military tribunal before which the charges are to be tried, if <sup>and with consent of accused they</sup> due notice to him and opportunity to be present <sup>and X and X - for presence or by counsel</sup>

(1)

(2)

At the taking of the deposition the accused shall be present unless he has in writing waived this right to be present and both prosecutor and defence such depositions may be read in evidence for or against the accused if at the time it is offered the witness is not available for examination and cross-examination

at a time and place before any officer (as in 21);

authenticated by the officer who took the deposition

shall have the right to examine and cross-examine the witness

A person ~~the~~ subject to this Code may be charged, prosecuted, tried and punished pursuant to the provisions of <sup>this Code</sup> for any of the following offenses, namely: treason, mutiny, murder, desertion in time of war, absence without leave in time of war.

No person (subject to this Code) may be prosecuted, tried or punished pursuant to the provisions of this Code, unless the charges and specifications shall have been signed, (or he shall have been arraigned) within three years after the offense shall have been committed, namely, desertion in time of peace, rape, any offense punishable under Article - of this Code, fraud against the United States in time of peace. The provisions of Sec 3287, Title 18, U.S.C. shall be applicable to the offense of fraud against the United States committed while the United States is at war.

No person (subject to this Code) may be prosecuted, tried or punished under the provisions of this Code for any offense other than those mentioned in paragraphs (a) and (b) above unless etc. within two years after said offense shall have been committed.

Uniform Code of Military Justice

Art. 39. Continuances.

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

(b) In time of peace no person shall, against his objection, be brought to trial before a general or special court-martial within periods of five days, and two days, respectively, subsequent to the service of charges upon him.

2  
= 113  
?

NOTES:

A. Sources and Comparable provisions

- 1) A.W. 20, 46(c) as amended by P.L. 759, 80th Cong., 2D Sess. (1948).
- 2) S.1338 (Proposed Navy bill), 80th Cong., 1st Sess. (1947), Art. 37.

B. Comment

(a) The text of subsection (a) is taken from A.W. 20 which differs from proposed AGN, Art 37 only in that the words "to either party" are included.

(b) Both A.W. 46(c) and proposed AGN, Art 37 provide for a period of five days after service of charges before the beginning of a general court-martial in time of peace. The Navy bill also provides similar periods of three days and twenty-four hours for special and summary courts-martials respectively. As a compromise, it is recommended that a period of two days be provided for special courts and that no mandatory period be specified for summary courts which only have jurisdiction over minor offenses.

Uniform Code of Military Justice

Art. 40. Pleas of the Accused.

(a) If an accused arraigned before a court-martial ~~answers foreign to the purpose or makes any other irregular pleading,~~ or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he <sup>has</sup> 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 not guilty by the accused shall not be received in <sup>in</sup> capital cases.

NOTES:

A. Sources and Comparable Provisions

- a) A. W. 21.
- b) NC&B, Secs., 413, 416, 417.

B. Comments

a) Subsection (a) follows closely the provisions of A. W. 21. The phrase "or makes any other irregular (pleading)" is adopted from NC&B, Sec. 413. The clause in A. W. 21 "or after a plea of guilty makes a statement inconsistent with the plea" is changed to "..... sets up matter....." so as to include testimony by the accused or by his witness which is inconsistent with the plea. This is adopted from NC&B, Sec. 417. "To the court" in the clause "when it appears

to the court" in A. W. 21 has been deleted. The question whether the plea of not guilty should be entered, in the situations covered in subsection (a), should be treated as an interlocutory question, according to the procedure prescribed in Art. 47, U.C.M.J. The clause "a plea of not guilty shall be entered in the record" has been inserted, so the record will show what has happened. "To trial and judgment" in A. W. 21 has been deleted because the trial may already be in progress at the time the court must proceed as though the accused had pleaded not guilty.

The courts-martial manual might contain a statement that a plea of not guilty to the offense charged, but guilty to a lesser included offense, is not an irregular pleading within the meaning of subsection (a).

b) Subsection (b) is new. The Navy now prohibits a plea of guilty to desertion in time of war. The Army considers a plea of guilty inappropriate in any capital case.

c) It is proposed that provision be made in the courts-martial manual for the procedure to be followed by a court-martial wherever a plea of guilty is entered. This should include the following:

(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.

# RESTRICTED

Revised Draft  
12/2/48

Proposed Article 40

- 3 -

(2) In every case the meaning and effect of a plea of guilty should be explained to the accused (by the Judge Advocate or law member of a general or special court; if no law member on a special court, by the president; by the summary court). Such explanation should 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) Unless the accused admits doing the acts charged, a plea of guilty will not be accepted.

(3) The judge advocate or law member, where there is one, should decide whether the plea should be accepted.

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

The above is taken from Keeffe Board recommendations, page 142.)

d) The Committee considered a proposal that this Article should contain a provision that a plea of not guilty by the accused should be taken to raise automatically all defenses not theretofore raised by special plea or motion. This proposal was rejected, first, because such a procedure does not follow the practice in Federal

# RESTRICTED

courts, and second, because it would not insure that such issues would be squarely raised in the trial. The Committee agreed that instead the procedure set forth in the Army Manual for Courts-Martial, 1949 Edition, for raising these defenses, should be adopted, by regulations prescribed in the Manual prepared for use under the U.C.M.J.

The Army Manual for Courts-Martial, 1949 Edition, provides as follows:

"Par. 64. MOTIONS RAISING DEFENSES AND OBJECTIONS.

"(a) Defenses and Objections which May be Raised.-- Any defense or objection which is capable of determination without trial of the issue raised by a plea of not guilty may be raised before trial by reference to the appointing authority, or by motion to the court before a plea is entered.

"Defenses and objections such as that trial is barred by the statute of limitations, former trial, pardon, constructive condonation of desertion, former punishment, promised immunity, lack of jurisdiction, and failure of the charges to allege an offense should ordinarily be asserted by motion to dismiss before a plea is entered; but failure to assert them at that time does not constitute a waiver of the defense or objection. Unless otherwise stated, failure to assert any such defense or objection -- except lack of jurisdiction or failure of the charges to allege an offense -- before the conclusion of the hearing

# RESTRICTED

Revised Draft  
12/2/48

Proposed Article 40

- 5 -

of the case, however, constitutes a waiver.

"(b) Defenses and Objections which Must be Raised.--  
Defenses and objections based on defects in the preference of charges, reference for trial, form of the charges and specifications, investigation or other pretrial proceedings other than objections going to the jurisdiction of the court or the failure of the charges to allege an offense may be raised only by a motion for appropriate relief before a plea is entered. Failure to present any such objection prior to plea constitutes a waiver thereof, but the court for good cause shown may grant relief from the waiver.

"(c) Form and Content of a Motion.-- The motion raising a defense or objection should include all such defenses and objections then available and known to the accused. Any objection which might be asserted by such motion may, if not asserted, be brought to the attention of the accused.

"The motion should briefly and clearly set forth the nature and grounds of the defense or objection which it is intended to raise. It may be presented orally or in writing. The substance of the motion and not its form and designation will control; for instance, if an accused makes a motion which he calls a motion for appropriate relief but which in fact raises an objection to trial on jurisdictional grounds, the motion will be treated as a motion to dismiss.

# RESTRICTED

"(d) Time of Making Motions.-- The motion discussed in a and b above should be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

"Certain other motions predicated upon issues raised by the evidence in the case, such as motions for a finding of not guilty and motions to dismiss the proceedings on the grounds of res judicata, should generally be made after the prosecution has rested its case or at the conclusion of all the evidence. A motion to inquire into the mental condition of the accused or to dismiss the proceedings on the ground that the accused lacks the requisite mental capacity may be raised at any time during the trial.

"(e) Hearing on the Motion.-- A motion raising a defense or objection will be determined at the time it is made unless the court defers action on the motion until a latter time.

"Before passing on a contested motion the court will give each side an opportunity to introduce pertinent evidence and to make an argument. Except as otherwise indicated in the discussion of motions, and elsewhere the burden rests on the accused to support by a preponderance of evidence a motion raising a defense or objection. A decision on such a motion is an interlocutory matter.

"(f) Effect of Rulings on Motion.-- The denial of a motion raising a defense or objection does not prevent the

entering of another to the same specification or charge. The court may reconsider its action in denying or sustaining a motion as long as the case is before the court."

The 1949 Army Manual further provides 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.

e) It is proposed that provision should also be made in the courts-martial manual that the law member or the court explain the meaning of any special defenses and objections which might appear to be available to the accused, in any case in which he is not represented by counsel, and to advise him of his right to make them, both as to the offense charged and lesser included offenses, before pleading to the general issue. This would be an important benefit to the accused in a summary court-martial case where the defense of former jeopardy might be available to him if he had received C.O. punishment for the same offense.

Uniform Code of Military Justice

Art. 42. 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 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, 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) wilfully ~~neglects~~<sup>fails</sup> or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may <sup>have</sup> 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 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. 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,

11/19/48

Proposed Article 42

-2-

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.

NOTES:

A. Sources and Comparable Provisions

- 1) A.W. 23
- 2) AGN Art. 42(c)
- 3) S.1338 (Proposed Navy bill), 80th Cong., 1st Sess. (1947), Art. 35(b).

B. Comment

The proposed text is taken from A.W. 23 with the deletion of the proviso of A.W. 23 which made certain offenses against public justice in the Criminal Code applicable to military tribunals. The Proposed Navy bill did not contain this deleted clause.

The proposed AGN Article does not apply to military commissions or boards and does not give territorial courts jurisdiction to try these offenses.

Contempts are treated in Article 50.

JDS

RESTRICTED

Revised Draft  
11/20/48

Proposed Article 44  
Page 1

Uniform Code of Military Justice

Art. 44. Depositions

(a) 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

(1) 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 the distance of one hundred miles from the place of trial or hearing, or

*what does  
district  
mean*

(2) When it appears to the satisfaction of the court, commission, board, or appointing authority that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, or other reasonable cause, is unable to, or in foreign places, because of non-amenability to process, refuses to appear and testify in person at the place of trial or hearing, or

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

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

(c) A deposition may be read in evidence in any case in which the death penalty is authorized by law but is not mandatory,

RESTRICTED

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.

(d) At any time after charges have been signed as provided in Article \_\_\_, and before 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.

(e) Depositions 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.

NOTES:

A. Sources and Comparable Provisions

- 1) A.W. 25 as amended by P.L. 759, 80th Cong., 2d Sess. (1948).
- 2) A.W. 26
- 3) S. 1338 (Proposed Navy Bill), 80th Cong., 1st Sess. (1947), Art. 36.
- 4) Proposed AGN Art. 36 dated May 17, 1948 (Naval Law Manual Section).

B. Comments

(a) Subsection (a) is taken from A.W. 25 (as amended), with the addition of "death," "military necessity," and paragraph (3).

(b)(c) The language of subsections (b) and (c) is taken from A.W. 25 (as amended). S. 1338 provides depositions may not be used where the offense is punishable by death and not excepted by the maximum limits of punishment prescribed by the President. The Navy draft of May 17th provides that where a deposition is used against the accused, the punishment may not extend to death.

(d) Subsection (d) is derived from A.W. 25 (as amended). The Navy redraft of May 17th provides for taking of depositions prior to the convening of the court by agreement of the parties.

(e) Subsection (e) is taken from A.W. 26 with the omission of the words "to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration."

The Navy redraft of May 17, would ~~only~~ allow the taking of a deposition after the convening of the court, only on showing of necessity and with the permission of the court.

The Navy objects to the omission of the proviso of proposed AGN Article 36 which required that the accused or his representative be given an opportunity to be present at the taking of a deposition except when authorized by the Secretary of the Navy in extraordinary circumstances. (This proviso is not included in the proposed text as it is believed difficult to administer such a provision.)

*I agree and would make any exception*

Uniform Code of Military Justice

Art. 44. Depositions

(a) When Taken. At any time after charges have been signed as provided in Article 30, and before 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.

(b) Notice. 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) How Taken. Depositions 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.

(d) Use. (1) 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 to the satisfaction of the court, commission or board.

(A) that the witness resides, or is beyond the state, territory, or district in which the court, commission, or board is ordered to sit, or

# RESTRICTED

Revised Draft  
11/30/48

Proposed Article 44

-2-

beyond the distance of one hundred miles from the place of trial or hearing; or

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

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

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

(3) 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.

## NOTES:

### A. Sources and Comparable Provisions

- 1) A.W. 25 as amended by P.L. 759, 80th Cong., 2d Sess. (1948).
- 2) A.W. 26
- 3) S.1338 (Proposed Navy Bill), 80th Cong., 1st Sess. (1947), Art. 36.

# RESTRICTED

4) Proposed AGN Art. 36 dated May 17, 1948 (Naval Law Manual Section).

B. Comments

(a) Subsection (a) is derived from A.W. 25 (as amended). The Navy redraft of May 17th provides for taking of depositions prior to the convening of the court by agreement of the parties

(b) Subsection (b) is new and is derived from Rule 15 of the Federal Rules of Criminal Procedure.

(c) Subsection (c) is taken from A.W. 26 with the omission of the words "to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration."

(d) Subsection (d) is taken from A.W. 25 (as amended), with the addition of "death," "military necessity," and subparagraph (C). The words "so far as otherwise admissible under the rules of evidence" are added in order to show that the requirements of this section are not the only requirements of admissibility. S. 1338 provides depositions may not be used where the offense is punishable by death and not excepted by the maximum limits of punishment prescribed by the President. The Navy draft of May 17th provides that where a deposition is used against the accused, the punishment may not extend to death.

The Navy redraft of May 17, would allow the taking of a deposition after the convening of the court, only on a showing of necessity and with the permission of the court.

# RESTRICTED

Revised Draft  
11/30/48

Proposed Article 44

-4-

The text leaves this question open.

The Navy objects to the omission of the proviso of proposed AGN Article 36 which required that the accused or his representative be given an opportunity to be present at the taking of a deposition except when authorized by the Secretary of the Navy in extraordinary circumstances. This proviso is not included in the proposed text as it is believed difficult to administer such a provision.

JDS

RESTRICTED

Uniform Code of Military Justice

Art. 45. Admissibility of Records of Courts of Inquiry

(a) 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 be read in evidence before a court-martial or military commission in any case not capital nor extending to the dismissal of an officer, if the accused was a defendant and accorded the rights of an accused before the court of inquiry or if the accused consents to the introduction of such evidence.

X (b) Such evidence may be adduced by the defense in capital cases <sup>or</sup> ~~of~~ cases extending to the dismissal of an officer.

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

*OK*  
*No exceptions in civil cases in civilian courts*  
*Incrim only where charges are same*

NOTES:

A. Sources and Comparable Provisions

- 1) A.W. 27
- 2) AGN. Art. 60
- 3) S. 1338 ( Proposed Navy Bill), 80th Cong. 1st. Sess., (1947), Art. 44.

B. Comments

The language of the proposed text is taken from both A.W. 27 and proposed AGN Art. 44. The reason for the alternate grounds of admissibility of the evidence is due to the differences

11/20/48

RESTRICTED

Proposed Article 45

-2-

in the types of courts of inquiry. Thus it is intended to allow records of naval courts of inquiry to be admissible where the accused had the rights of a defendant before the court of inquiry, and to allow the record of Army courts of inquiry to be admissible only where the accused consents.

The proposed text differs from A.W. 27 in that only sworn testimony before courts of inquiry may be introduced.

The proposed text differs from proposed AGN Art. 44 in that such evidence is admissible before military commissions, boards, and courts of inquiry and in that such evidence is not admissible in cases extending to the dismissal of an officer.

JDS

RESTRICTED

Uniform Code of Military Justice

Art. 47. 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 member of a general court-martial or the president of a special court-martial shall rule in open court upon interlocutory questions, other than challenge, arising during the proceedings. Any such ruling made by the law member of a general court-martial upon any interlocutory question other than for 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 member may change any such ruling at any time during the trial. Unless such ruling be final, if any member object thereto, the court shall be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank.

(c) It shall be the duty of the law member of a general court-martial or the president of a special court-martial before a vote is taken on the findings to advise the court in open court *and particularly*

*special court-martial*  
*the court is closed for consultation upon the charges and specifications*

(1) that the accused must be presumed to be innocent

until his guilt is established by legal and competent evidence beyond a 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 burden of proof to establish the guilt of the accused <sup>beyond reasonable doubt</sup> is upon the Government.

## NOTES:

## A. Sources and Comparable Provisions

- 1) A.W. 31 as amended by P.L. 759, 80th Cong., 2d Sess. (1948).
- 2) S.1338 (Proposed Navy Bill), 80th Cong., 1st Sess. (1947), Art. 24(b).

## B. Comment

The proposed text is taken from A.W. 31 (as amended), with the omission of the provision allowing the law member to consult with the court in closed session before making a ruling and the deletion of all provisos.

In subsection (b) the words "unless such ruling be final" are substituted for the words "unless such ruling be made by the law member of a general court-martial" and the sentence regarding the finality of the law members rulings is placed before the quoted language instead of following the sentence containing the quoted language. The purpose of these changes is to make clear that the court may vote on motions for a finding of not guilty and upon the question as to the accused's sanity if any member objects to the ruling of the law member.

The proposed Navy bill only provides for the law member (judge advocate) to instruct the court upon the law of the case and to rule on interlocutory questions subject to being overruled by the court. The proposed Navy bill makes no provision for secret written ballots.

Uniform Code of Military Justice

Art. 48. Number of Votes Required

(a) For Conviction.

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

(2) No person shall be convicted of any ~~other~~ <sup>other than one for which the death penalty is mandatory</sup> offense by a general court-martial or of any offense by a special court-martial, except by the concurrence of two-thirds of all the members present at the time the vote is taken.

(b) For Sentence.

(1) No person shall, by a general court-martial be sentenced to suffer death, except by the concurrence of all the members of said 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, by a general court-martial be sentenced to life imprisonment or to confinement in excess of ten years, except by the concurrence of three-fourths of all the members present at the time the vote is taken.

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

(c) All Other Questions.

All other questions shall be determined by majority vote. A tie vote shall be a determination in favor of the accused.

## NOTES:

## A. Sources and Comparable Provisions.

- 1) A.W. 43 as amended by P. L. 759, 80th Cong., 1st. Sess. (1948).
- 2) AGN Art. 50.
- 3) S.1338 (Proposed Navy Bill), 80th Cong., 1st Sess. (1947), Art. 28.

## B. Comment.

In general, the proposed text is taken from A.W. 43 (as amended). However, the language has been changed and subdivided for the purpose of clarity.

Paragraph (b) (3) clarifies A.W. 43 (as amended) in regard to sentences not involving confinement. The provision of subsection (c) as to tie votes, is added in conformity with the practice of all the services.

The text would change the proposed AGN Art. 28 in that findings are determined by at least two-thirds vote whereas the Navy proposal would require only a majority vote.

JDS

Uniform Code of Military JusticeArt. 49. Court to Announce Action

Every court-martial shall announce in open court its findings and sentence as soon as determined.

NOTES:A. Sources and Comparable Provisions

a) A.W. 29

b) S. 1338 (Proposed Navy Bill), 80th Cong. 1st Sess.

(1947), Art. 28.

B. Comments

The proposed text is taken from proposed AGN Art. 28.

A.W. 29 provides that acquittals shall be announced and that under regulations to be prescribed by the President, other findings and the sentence may be announced.

The Army and Air Force object to this provision on the ground that it is necessary in certain circumstances to keep the findings and sentence secret.

JDS

11/19/48

Proposed Article 50  
Page 1

Uniform Code of Military Justice

Art. 50 Contempts.

A military tribunal may punish as for contempts 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 two months or a fine of \$100, or both.

NOTES:

A. Sources and Comparable Provisions

1) A.W. 32

2) AGN Art. 42(a).

3) S.1338, (Proposed Navy Bill), 80th Cong., 1st Sess. (1947),

Art. 35.

B. Comment.

The text is derived from A.W. 32. The proposed Navy article would have contempts by persons not subject to military law tried by federal courts. The proposed Navy bill would allow the court only to impose imprisonment for two months and would not apply to courts other than general and special courts-martial and courts of inquiry. A.W. 32 limits the power of the court to impose confinement to one month.

JDS

12/7/48

Proposed Article 51  
Page 1

Uniform Code of Military Justice

Art. 51. 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.

NOTES:

A. Sources and Comparable Provisions

- 1) S.1338 (Proposed AGN), 80th Cong., 1st Sess. (1947) Art. 28(a) (2).
- 2) Federal Rules Criminal Procedure(1946), Rule 31(c).

B. Comment.

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

JDS

# Prohibition

1. Civilian top - law
2. J.A.G. reviews law and facts including special b.c.f.
3. Law member - indep't.
4. Council - members of bar | mandatory
5. J.A.G. promotions, efficiency etc for J.A.G.  
J.A.G. 201 - on performance of functions  
as law members, Council and  
members of court.  
On efficiency etc.  
Direct control with J.A.G.

Convening authorities will at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice, and the staff judge advocate of any command is authorized to communicate directly with the staff j.a. of a superior or subordinate command or with the J.A.G. of his force.

(1) Additional Bd of Review  
and Temp Jud. C. in periods of  
emergency.

See art 50<sup>(b)</sup> amended by  
P.L. 759 —

Officers who are members of the  
Judge Advocate General's Department of the  
Judge Advocates of the Army or of the  
Air Force or are legal specialists  
of the Navy or Coast Guard shall have  
their records for efficiency <sup>made</sup> and  
their eligibility and fitness for  
promotion determined and their  
order on the promotion list determined  
by their respective J.A.G.'s. Officers  
Other officers <sup>or</sup> and enlisted men  
who perform duties as members of  
a court or as law member or  
as court trial counsel or defense  
counsel shall have his efficiency  
in the performance of these  
duties determined and recorded by

the J.A.G. of ~~the~~ <sup>the</sup> Armed Force of  
which he is a member,  
and this shall be considered  
in all situations in which  
his efficiency or fitness for  
promotion <sup>become</sup> is relevant.

Consider the following as  
proposed <sup>new</sup> articles or divisions of  
~~an~~ art present articles.

Art. 56(a) Add. Whenever necessary  
the Judge Advocate General shall  
constitute <sup>one or more</sup> ~~such~~ additional  
~~Bo~~ temporary Boards of Review

An officer who is a member of  
the J.A.G.'s Dept of the Army,  
or who is a J.A. of the Air Force,  
or who is a legal specialist of  
the Navy or Coast Guards

General of the Armed Force of  
which he is a member.

---

New Article in place of  
Sec 246 of P.L. 759

An officer who as a Judge Advocate  
of the Army or Air Force or a  
Legal specialist of the Navy or  
Coast Guard shall have his  
record for efficiency and ~~for~~  
fitness ~~promotion~~

An officer who is a permanent  
Commissioned as a Judge Advocate  
shall have his record for efficiency,  
his fitness ~~for~~ and order ~~of~~  
~~promotion~~ recommendation  
for promotion ~~later~~ made  
and determined by the  
Judge Advocate General of the  
Armed Force of which he is a

member. An officer who is  
detailed <sup>for a period of service</sup> as a judge advocate  
~~for~~ or legal specialist ~~for~~  
~~he~~ shall have his efficiency  
record and fitness for  
promotion as demonstrated  
during that period determined  
by the J.A.G. of the Army  
Force of which he is a  
member; and an officer  
or enlisted man <sup>or law member</sup> who  
serves as a member, J.A.  
Csm, or as a trial counsel  
or as a defense counsel  
of a court martial shall have  
his efficiency in the  
performance of this duty  
determined and recorded on  
his record by the J.A.G.  
of the

# RESTRICTED

## Uniform Code of Military Justice

*What offense?*

### Art. 52. Unlawfully Influencing Action of Court

No authority appointing a general, special, or summary court-martial nor any other commanding officer, shall censure, reprimand, or admonish such court, or any member thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise, by such court or any member thereof, or counsel, of its or his judicial responsibility. No person subject to this Code shall attempt to <sup>coerce</sup> ~~coerce~~ or <sup>by any unauthorized means</sup> ~~unlawfully~~ influence the action of a court-martial or any military court or commission, <sup>or Judicial Council in any case</sup> ~~or any member thereof~~, in reaching the findings or sentence in any case, or the action of the appointing or <sup>therein or of the</sup> ~~reviewing~~ or confirming authority with respect to his judicial acts. *Or*

#### NOTES:

##### A. Sources and Comparable Provisions

- 1) A.W. 88 as amended by P.L. 750, 80th Cong., 2d Sess. (1948).
- 2) S. 1338 (Proposed Navy Bill), 80th Cong., 1st Sess. (1947), Art. 39, Art. 9 (45).

##### B. Comments

The proposed text is A.W. 88 (as amended). The Navy bill would leave this matter to regulation, but would also make unlawfully influencing a court-martial an offense. The Navy objects to this provision as it might be construed to prevent the convening authority

RESTRICTED

52

from making fair comment on errors by the court.

The word "counsel" is added so as to prevent influencing  
counsel who are not members of the court.

JDS

RESTRICTED

Uniform Code of Military Justice

Art. 53. Record of Trial

(a) Contents and Authentication.

(1) Each general court-martial shall keep a separate record of the proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the trial counsel. In case the record cannot be authenticated by the president and the trial counsel, by reason of the death, disability or absence of either or both of them, it shall be signed by a member in lieu of the president and by an assistant trial counsel, if there be one, in lieu of the trial counsel; otherwise by another member of the court.

(2) 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 from time to time prescribe.

(b) Disposition of Records

(1) The record of each general court-martial, after having been acted upon by the convening authority, shall be transmitted to the Judge Advocate General of the appropriate armed force.

(2) The record of each special and summary court-martial after having been acted upon by the convening

authority, shall be forwarded in accordance with regulations prescribed by the President.

(3) 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.

(4) When determined to be no longer of use by the Judge Advocate General of the armed force of which the accused is a member, the records of special and summary courts-martial may be destroyed.

NOTES:

A. Sources and Comparable Provisions

1) A. W. 13, 33, 34, 35, 36 and 111 as amended by P. L. 759, 80th Cong., 2d Sess. (1948).

2) AGN Art. 34 and 64.

3) S.1338 (Proposed Navy Bill), 80th Cong., 1st Sess. (1947), Art. 21 and 39.

B. Comments

(a) (1) The text is derived from A. W. 33.

It is believed that the regulations governing the record should require that the record shall contain the original complaint against the accused, the report of the investigating officer, and all the other steps leading up to the trial as well as the proceedings of the court.

(2) The subsection is taken from A. W. 34 without change. This section is subject to proposed Art. 25 which requires a special court-martial to keep a complete record if a BCD is adjudged.

(b) (1) It is not felt necessary to include in the statute, the requirement that the trial counsel shall forward the record to the appointing authority as soon as possible. Otherwise this paragraph conforms to present statutes.

(2) This paragraph provides for records of special and summary courts-martial to be transmitted in accordance with the review of such courts-martial which is to be provided in the Manual.

(3) Present A. W. 111 entitles an accused to a copy of the record of a general court-martial if he requests it. Naval courts and Boards requires the accused to be given a copy of the record of a general court-martial. A copy of special courts-martial is required to be given to the accused in as much as the proposed provision requiring the defense counsel to authenticate the record was deleted as it was felt that this might cause undue delay.

(4) This paragraph is taken from A. W. 36 (as amended). Proposed Navy bill Art. 21 also provides that special (summary) court-martial records may be destroyed when no longer of use.

Part  
10

# RESTRICTED

## TABLE OF CONTENTS - PART 10

### POST-TRIAL PROCEDURE

#### Art. 54. Action by Convening Authority.

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

#### Art. 55. Appellate Review.

- a. Board of Review; Judicial Council;
- b. Additional Boards and Councils;
- c. Branch Offices for Distant Commands;
- d. Action by Board of Review when approval by President or Confirming Action is Required;
  - (1) When Action by President is Required;
  - (2) When record of trial legally sufficient and confirmation required by Judicial Council;
  - (3) When record of trial legally insufficient or contains prejudicial errors, and Judge Advocate General of accused's service concurs;
  - (4) When record of trial legally insufficient and Judge Advocate General of accused's service does not concur.
- e. Action by Board of Review in Cases Involving Dishonorable or Bad-Conduct Discharges or Confinement in Penitentiary;
  - (1) Record of Trial legally sufficient and no confirming action necessary;
  - (2) Record of trial legally sufficient, but modification deemed necessary to the ends of justice;
  - (3) Record of trial legally insufficient and Judge Advocate General of accused's service concurs with Board's holding;
  - (4) Record of trial legally insufficient and Judge Advocate General of accused's service does not concur with Board's holding.
- f. Appellate Action in Other Cases.
- g. Judge Advocate General and Appellate Agencies may Weigh Evidence, Judge credibility of Witnesses and Determine Controverted Questions of fact.
- h. Finality of Court-Martial Judgments.

RESTRICTED

Art. 56. Confirmation.

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

Art. 57. Powers Incident to Power to Confirm.

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

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

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

Art. 59. Rehearings.

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

REVIEW OF GENERAL COURTS MARTIALArt. 54. Review by Convening Authority:

After every trial by general court martial, the record of trial shall be forwarded to the Convening Authority, who <sup>shall</sup> will refer it to his Staff Judge Advocate or Legal Officer. If the proceedings have resulted in an acquittal of all charges and specifications, the record shall thereupon be forwarded to the Judge Advocate General. If there has been a finding of guilty on any charge or specification, the Staff Judge Advocate or Legal Officer shall review the entire record and shall submit his written opinion thereon to the Convening Authority, who shall:

- (1) approve the findings and sentence in whole or in part, or
- (2) approve only so much of the findings and sentence as he finds legally sufficient, or
- (3) disapprove the findings and sentence, in which event he may either dismiss the charges or return the case for a new trial.

As to any sentence or part thereof approved by him, the Convening Authority shall have the power, at the time he takes such action, to remit, mitigate, or <sup>the execution of</sup> suspend the same or any part thereof.

After such action by the Convening Authority, the entire record, including the opinion of the Staff Judge Advocate or Legal Officer and the action of the Convening Authority thereon, shall be forwarded directly to the Judge Advocate General.

11/26/48

Proposed Article 54  
Page 1

Uniform Code of Military Justice

Art. 54. Error of Law; Lesser Included Offense

(a) A finding or sentence of a court-martial shall not be held incorrect in law on the ground of an error of law unless the error has injuriously affected the rights of the accused.

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

RH

RESTRICTED

11/26/48

Proposed Article 54  
Page 1

Uniform Code of Military Justice

Art. 54. Error of Law; Lesser Included Offense

(a) A finding or sentence of a court-martial shall not be held incorrect ~~in law~~ on the ground of an error of law unless the error has *substantially injured* injuriously affected the rights of the accused.

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

RH

RESTRICTED

REVIEW OF GENERAL COURTS MARTIAL

Art. 55. Review by a Board of Review:

(a) The Judge Advocate General of each military Department shall constitute in his office one or more Boards of Review, each composed of not less than three officers, 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. *DK*

*[E.M.M. I would recede if member of corps must be 1st experience.]*

(b) The Judge Advocate General shall refer to a Board of Review the record in every case of trial by general court martial in which the sentence, as approved by the Convening Authority,:

(1) *affects a general officer or* extends to death, dismissal of an officer or cadet, dishonorable discharge, bad conduct discharge, or imprisonment in a penitentiary, or

*dismissal of army no*

(2) though not extending to any of the foregoing, is based upon a finding of guilty on any charge or specification as to which there has been a plea of not guilty.

*this to officer of day*

(c) The Board of Review shall examine the whole record to ascertain whether any error has been committed which has injuriously affected the substantial rights of the accused. It shall have the authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. The Board of Review shall determine whether the findings *or both* and sentence, as theretofore approved

by the Convening Authority, shall be affirmed in whole or in part, set aside in whole or in part, or otherwise modified, and whether, *OK*, in any case where the findings and sentence have been set aside, the charges shall be dismissed or a new trial ordered.

(d) If the Board of Review has ordered a new trial, the Judge Advocate General shall, unless there is to be a further review by the Judicial Council, return the record to the Convening Authority for appropriate action, *in accord with the decision of the Board of Review*. ~~In any such case, about~~ the Convening Authority finds a new trial impractical, ~~because of the unavailability of witnesses, or for other good reason,~~ *in his discretion* he may dismiss the charges.

Uniform Code of Military Justice

Art. 55. Review by the Convening Authority

(a) After every trial by general court-martial, the record of trial shall be forwarded to the Convening Authority, who shall refer it to his Staff Judge Advocate or Legal Officer.

(b) If a case 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.

(c) Where there is an apparent error or omission in the record or where the record shows improper action by the court with respect to a finding or sentence which can be rectified without prejudice to the 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 imposed.

(d) If final action by the court has resulted in an acquittal of all charges and specifications, the Convening Authority shall forward the record to the Judge Advocate General.

(e) If final action by the court has resulted in a finding of guilty on any charge or specification, the Staff Judge Advocate or Legal Officer shall submit his written opinion thereon to the Convening Authority, who 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.

(f) Any part of the findings or sentence which he does not approve, shall be deemed disapproved.

(g) If the Convening Authority disapproves the findings and sentence, he may, except where disapproval is based on lack of sufficient evidence to support the findings, order a rehearing. Otherwise he shall dismiss the charges.

(h) Such 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 enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding.

(i) When the Convening Authority has taken final approving action in a 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 Judge Advocate General.

Uniform Code of Military Justice

Art. 55. Who May Act as Convening Authority.

After every trial by court-martial the record shall be forwarded to the Convening Authority, <sup>and person</sup> Action ~~by the Convening Authority~~ may be taken by the officer who appointed the court, <sup>or in his absence by</sup> an officer commanding for the time being, a successor in command, <sup>(</sup>or by any officer exercising general court-martial jurisdiction.)

JDS

Uniform Code of Military Justice

Art. 55A. Action on General Court-Martial Records

If final action by a general court-martial has resulted in a finding of guilty on any charge or specification, the Convening Authority shall refer the record to his Staff Judge Advocate or Legal Officer, who shall submit his written opinion thereon to the Convening Authority. <sup>As to</sup> If final action by the court has resulted in an acquittal of all charges and specifications, the Convening Authority shall forward the record to the Judge Advocate General of the armed force of which the accused is a member.

JDS.

*written opinion of the Staff  
J.A. shall be limited to questions  
of jurisdiction*

Uniform Code of Military Justice

Art. 55B. 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 substantial <sup>material</sup> prejudice to the 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 lawfully imposed.

JDS

Uniform Code of Military Justice

Art. 55C. Rehearings.

(a) If the Convening Authority disapproves the findings and sentence, of a court-martial he may, [except where disapproval is based on lack of sufficient evidence to support the findings,] order a rehearing. Otherwise he shall dismiss the charges. *the record does the findings not supported by the evidence*

(b) <sup>Every</sup> ~~Such~~ 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 enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding. *Except where the original sentence was not one prescribed for the offense*

JDS

*and state the reasons therefor, for disapproving.*

**RESTRICTED**

Uniform Code of Military Justice

Art. 55D. 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.

JDS *in whole or in part only in so far as he finds it ~~is~~ correct in law or fact.*

*shall be unsupported as he finds based on unsupported evidence or otherwise incorrect in law or in fact*

**RESTRICTED**

Uniform Code of Military Justice

Art. 55E. Disposition of Records After Review by the Convening Authority.

(a) When the Convening Authority has taken final ~~approving~~ 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 Judge Advocate General of the armed force of which the accused is a member.

(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. If the sentence as approved by such officer includes a bad conduct discharge, whether or not suspended, the record shall be forwarded to The Judge Advocate General of the armed force of which the accused is a member to be reviewed in the same manner as the record of a general court-martial.

(c) All other special and summary court-martial records shall be reviewed and transmitted as provided by such regulations as the President may prescribe, but such records shall be reviewed by a judge advocate of the Army or Air Force, or a legal specialist of the Navy or Coast Guard.

JDS

Uniform Code of Military Justice

*Present Ct*  
Art. 55. Review by the Convening Authority

(a) After every trial by general court-martial, the record of trial shall be forwarded to the Convening Authority, who shall refer it to his Staff Judge Advocate or Legal Officer.

(b) If a case 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.

(c) Where there is an apparent error or omission in the record or where the record shows improper action by the court with respect to a finding or sentence which can be rectified without *Substantial* prejudice to the 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 *a* *lawfully* ~~the~~ sentence imposed.

(d) If final action by the court has resulted in an acquittal of all charges and specifications, the Convening Authority shall forward the record to the Judge Advocate General.

(e) If final action by the court has resulted in a finding of guilty on any charge or specification, the Staff Judge Advocate or Legal Officer shall submit his written opinion thereon to the Convening Authority, who 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. *the Convening Authority* 27

# RESTRICTED

11/26/48

Proposed Article 55

-2-

~~(f) Any part of the findings or sentence which he does not approve, shall be deemed disapproved.~~

(g) If the Convening Authority disapproves the findings and sentence, he may, except where disapproval is based on lack of sufficient evidence to support the findings, order a rehearing. Otherwise he shall dismiss the charges.

(h) Such 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 enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding.

(i) When the Convening Authority has taken final approving action in a 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 Judge Advocate General.

RH

# RESTRICTED

REVIEW OF GENERAL COURTS MARTIAL

*Army dissents!*

Art. 56. Review by the Judicial Council:

(a) There is hereby established in the National Military Establishment a Judicial Council. The Judicial Council shall be composed of not less than three members. One-third of the membership shall be designated by the Secretary of the Army, one-third by the Secretary of the Navy, and one-third by the Secretary of the Air Force. Each member of the Judicial Council shall be appointed from civilian life and shall be a member of the Bar admitted to practice before the Supreme Court of the United States, and each member shall receive a salary equal to that of a United States Circuit Court Judge. 1

*Court Guard*

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

- (1) All cases in which the sentence, as approved by the Board of Review, affects a general officer or extends to death;
- (2) All cases which the Judge Advocate General orders forwarded to the Judicial Council for review;
- (3) All cases in which, upon <sup>petition</sup> appeal by ~~one~~ behalf of the accused and on good cause shown, the Judicial Council has granted a review.

(c) In its review, the Judicial Council shall have authority to determine whether the record is legally sufficient to support the

*of law*

findings and sentence, and whether error injuriously affecting the substantial rights of the accused has been committed, *and to modify sentences*

(d) The Judicial Council shall determine whether, by reason of *or other error which injuriously affects the rights of the accused* legal insufficiency, the findings or sentence, as theretofore approved, shall be set aside in whole or in part, or modified, and whether ~~in~~ *such case* the charges shall be dismissed or a new trial ordered, *and whether the sentence shall be modified.*

(e) If the Judicial Council has ordered a new trial, the Judge Advocate General shall return the record to the Convening Authority for appropriate action. In any such case, where the Convening Authority finds a new trial impractical because of the unavailability of witnesses, or for other good reason, he may dismiss the charges.

(f) At any time within one year after a sentence which includes dismissal, dishonorable discharge, bad conduct discharge, or ~~penitentiary~~ *in a penitentiary,* confinement, has been finally approved, the accused may petition the Judicial Council for a new trial on the ground of newly-discovered evidence; and, if such petition is made, the Judicial Council shall hear and determine it in accordance with the rules applied in such motions in the District Courts of the United States.

*Sample as of in B of approved*

*sentences with a new sentence secured under the rights of the military establishment*

*for the purpose of securing uniformity in all steps of*

Uniform Code of Military JusticeArt. 56. 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 general court-martial in which the sentence, as approved by the Convening Authority affects a general officer or extends to death, dismissal of an officer or cadet, aviation cadet, or midshipman, dishonorable discharge, bad-conduct discharge, or imprisonment 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 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 request a reconsideration or a rehearing before such Board of Review.

(f) Otherwise, the Judge Advocate General shall, unless there is to be further review by the Secretary of the Department or the Judicial Council, return the record to the Convening Authority for 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.

Uniform Code of Military Justice

Art. 56. 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 general court-martial in which the sentence, as approved by the Convening Authority, affects a general officer or extends to death, dismissal of an officer or cadet, aviation cadet, or midshipman, dishonorable discharge, bad-conduct discharge, or imprisonment 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

11/26/48

Proposed Article 56

lack of sufficient evidence 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 request a reconsideration or a rehearing before such Board of Review.

(f) Otherwise, the Judge Advocate General shall, unless there is to be further review by <sup>the President or</sup> the Secretary of the Department or the Judicial Council, <sup>instruct</sup> return the record to the Convening Authority <sup>to take</sup> for 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.

RH

56A Branch offices.

REVIEW OF GENERAL COURTS MARTIAL

Art. 57. 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 Articles 55 or 56, shall be examined in the office of the Judge Advocate General, and, if found legally insufficient to support the findings of guilty or the sentence, in whole or in part, shall be transmitted to the Board of Review, ~~and shall thereafter be treated in accordance with the provisions of Articles 55 and 56.~~

What are these? 55 all after plea of guilty  
only after plea of guilty no w 53

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

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

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

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

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

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

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

# RESTRICTED

Draft of 11/26/48

Proposed Article 57

- 2 -

act upon such a petition within 15 days of the receipt thereof.

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

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

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

RH

# RESTRICTED

REVIEW OF GENERAL COURTS MARTIAL

Art. 58. Appellate Counsel:

(a) The Judge Advocate General shall appoint in his office one or more officers as Appellate Defense Counsel, whose duty it shall be to represent the accused, and one or more officers as Appellate Government Counsel, whose duty it shall be to represent the United States in appellate proceedings. It shall be the duty of such officers to appear in all cases before the Judicial Council. It shall be the further duty of such officers to appear before the Board of Review in the following cases:

*App Defense Coun  
and of the App. Govt Counsel shall such case  
as the  
JA G  
shall  
direct*

- (1) When the Judge Advocate General shall direct; *or the accused shall request.*
- (2) When the Board of Review shall request their appearance; and
- (3) When the Appellate Defense Counsel shall deem it necessary.

Such officers shall also perform such other functions in connection with the review of court martial cases as the Judge Advocate General shall direct.

(b) Within <sup>ten</sup> ~~thirty~~ days after any decision by a Board of Review, the ~~Appellate Government Counsel or the Appellate Defense Counsel may, with the concurrence of the Judge Advocate General,~~ request a reconsideration or a re-hearing before such Board of Review.

11/26/48

Proposed Article 58  
Page 1

Uniform Code of Military Justice

Art. 58. 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 56, 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 the Board of Review in accordance with Article 56, except that there will be no further review by the Judicial Council.

RH

11/26/48

Proposed Article 58  
Page 1

Uniform Code of Military Justice

Art. 58. Review in the Office of the Judge Advocate General.

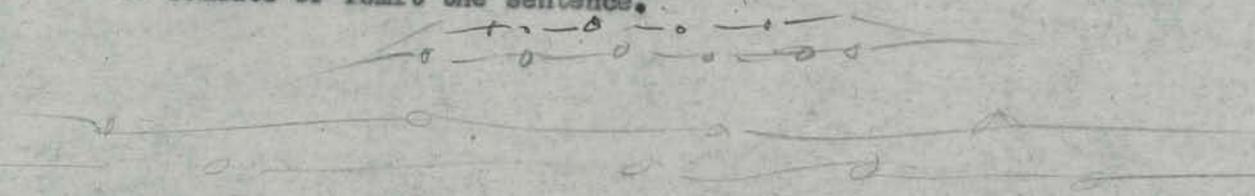
Every record of trial by general court-martial, in which there has been a finding of guilty and a sentence, the appellate review of which is not otherwise provided for by Article 56, shall be examined in the office of the Judge Advocate General. If any part of the findings or sentence is found unsupported in law, or if the Judge Advocate General so directs, the record shall be reviewed by the Board of Review in accordance with Article 56, except that there will be no further review by the Judicial Council.

RH

REVIEW OF GENERAL COURTS MARTIAL

Art. 59. Confirmation:

(a) No sentence extending to death or involving a general officer shall be executed unless and until execution of the sentence has been approved by the President. In any case in which the sentence extends to death, the President shall have the power to commute or remit the sentence.



11/26/48

Proposed Article 59  
Page 1

Uniform Code of Military Justice

Art. 59. Appellate Counsel

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

11/26/48

Proposed Article 59  
Page 1

Uniform Code of Military Justice

Art. 59. Appellate Counsel

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

RH

Uniform Code of Military Justice

Art. 60. Execution of Sentence; Suspension of Sentence

(a) No sentence extending to death or involving a general 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 any part of the sentence as approved except for a death sentence.

(b) No sentence extending to the dismissal of an officer, cadet, aviation cadet, or midshipman, a dishonorable discharge, or a bad-conduct discharge shall be executed until approved by the Secretary, the Under Secretary, or the Assistant Secretary of the Department. He shall approve the sentence or such part, amount or commuted form of the sentence as he sees fit, and may suspend any part of the sentence as approved.

(c) All other sentences shall be executed or suspended by the Convening Authority when approved by him.

Uniform Code of Military Justice

Art. 60. Execution of Sentence: Suspension of Sentence

(a) No sentence extending to death or involving a general 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 any part of the sentence as approved except for a death sentence.

(b) No sentence extending to the dismissal of an officer, cadet, aviation cadet, or midshipman, (a dishonorable discharge, or a bad-conduct discharge) shall be executed until approved by the Secretary, the Under Secretary, or the Assistant Secretary of the Department. He shall approve the sentence or such part, amount or commuted form of the sentence as he sees fit, and may suspend any part of the sentence as approved.

(c) All other sentences shall be executed or suspended by the Convening Authority when approved by him.

RH

*Add commutation by Pres by reduction to ranks*

Uniform Code of Military Justice

Art. 60. Execution of Sentence: Suspension of Sentence.

(a) No sentence extending to death or involving a general 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 any part of the sentence as approved by him except for a death sentence.

(b) No sentence extending to the dismissal of an officer, cadet, aviation cadet, or midshipman shall be executed until approved by the Secretary, <sup>or such</sup> the Under Secretary, or ~~The~~ Assistant Secretary of the Department. <sup>as may be designated by him.</sup> He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend any part of the sentence as approved by him, <sup>and</sup>

(c) In time of war or national emergency <sup>may sentence of</sup> a commuted form of dismissal <sup>may be commuted to</sup> is ~~reduction~~ to any enlisted grade, <sup>by the authority of</sup> An accused who has been so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

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

(e) All other sentences, unless suspended, shall be ordered executed by the convening authority when approved by him. The convening authority may suspend any sentence, except a death sentence.

12/12/48

Proposed Article 60(a)

Uniform Code of Military Justice

Art. 60A. Petition for a New Trial

(a) At any time within one year after approval by the convening authority of a sentence which, either as acted upon in any subsequent review or pending further review, extends to death, dismissal, dishonorable discharge, bad-conduct discharge, or confinement for more than one year, the accused may petition the Judge Advocate General for a new trial on the ground of newly-discovered evidence.

(b) If the accused's case is pending review before the Board of Review or before the Judicial Council, the Judge Advocate General shall refer any such petition to the Board or Council, respectively, for action. Otherwise the Judge Advocate General shall act upon the petition.

~~(c) Such a petition shall be granted or denied in accordance with principles applied in such motions in the District Courts of the United States.~~

NOTES:

See Comparative Study, A. W. 53, and draft of Proposed Article 56, dated October 22, 1948.

12/12/48

Proposed Article 60B

Uniform Code of Military Justice

Art. 60B. Remission and Suspension of the Unexecuted Portion of a Sentence

The Secretary of the Department and <sup>1 Unexecuted Part Secy</sup> any person or persons designated <sup>the Secy</sup> by him 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.

Commanding Officer

NOTES:

See Comparative Study, A. W. 51.

Uniform Code of Military Justice

Art. 60C. Vacation of Suspended Sentences

(a) Prior to the vacation of the suspension of a general or special court-martial sentence, ~~an investigation as prescribed by Article 31 shall be made of the violation of the probation.~~

~~(b) The officer having special court-martial jurisdiction over the probationer shall hold a hearing based upon the investigation.~~ *on the alleged violation of probation* The probationer shall be represented at such hearing by counsel if he so desires.

(c) Suspension of the sentence of a general or special court-martial may be vacated after such hearing and such vacation of probation shall be effective to execute any unexecuted portion of the sentence except a discharge or dismissal.

~~(d) The report of the investigating officer and the record of the hearing shall be forwarded to the officer exercising general court-martial jurisdiction over the probationer.~~

~~(e) The vacation of the suspension of a sentence extending to a discharge shall not be effective until such vacation shall have been approved by the Board of Review.~~ *A B R* The vacation of the suspension of a sentence extending to dismissal shall not be effective until approved by the Secretary of the Department concerned.

NOTES:

A. Sources and Comparable Provisions

- 1) P.L. 759, 80th Cong., 2d Sess. (1948), Art. 516. Amending A.W. 52.
- 2) Manual for Courts-Martial (1928), par. 94.
- 3) Naval Courts and Boards, Sec 476.
- 4) Report of the General Court-Martial Sentence Review Board to the

Secretary of the Navy (Keeffe Report, Jan. 1947) p 313-318.

B. The proposed text is derived from the recommendations of the Keeffe Report.

JDS

Uniform Code of Military Justice

*and  
subject to regulation of  
President*

Art. 60D. Restoration

(a) When any executed sentence of a court-martial is set aside, all rights, privileges, and property of the accused shall be restored, and a form of discharge authorized for administrative issuance ~~may~~ <sup>shall</sup> be substituted for a dishonorable discharge or a bad conduct discharge previously executed.

(b) Any officer dismissed by sentence of a court-martial shall, upon the setting aside of the dismissal on subsequent review, <sup>when</sup> <sup>is set aside</sup> be restored, without further appointment or confirmation and without regard to the number of officers authorized or appropriated for, to the rank and precedence to which he would be entitled if he had not been dismissed, but no other officer shall be deemed passed over by virtue of the appointment of an officer previously dismissed to a higher rank. <sup>which is set aside on subsequent review</sup>

NOTES:

A. Sources and Comparable Provisions

- 1) A. W. 53, P. L. 759, 80th Cong., 2d Sess. (1948).
- 2) S.1338 (Proposed AGN), 80th Cong., 1st Sess. (1947),

Art. 39(g), (h).

B. Comments

(a) Subsection (a) is derived from A. W. 53 (as amended). The purpose of this provision is to authorize the armed forces to restore the pay lost by an accused during the time between the effective date of the sentence and his return to civilian life.

*have been  
his appointment to a rank higher than that of an officer promoted during the period intervening period in which the dismissal was passed shall not be deemed a passing over of that officer*

# RESTRICTED

Draft of 12/20/48

Proposed Article 60D

- 2 -

Thus a court-martial prisoner whose sentence was later held illegal would be paid for all the time he spent in confinement at the rate which he was paid prior to sentence. This provision would not require the accused to be compensated for the period after he was released from confinement unless he remained in the armed forces. The section also authorizes an administrative discharge to be issued where the accused has been previously discharged with a BCD or dishonorable discharge.

(b) Subsection (b) is designed to provide for officers dismissed. Not only would the officer be restored to his former rank, but if officers junior to him have been promoted, he would be entitled to be considered by the Selection Board as soon as possible and if promoted he would be entitled to precedence in such higher grade to officers who were junior to him at the time he was dismissed. The last clause is added so that the promotion of such an officer would not have an adverse effect on those officers previously promoted.

JDS

# RESTRICTED



Uniform Code of Military Justice

Art. 61. 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 nor be inflicted upon any person subject to this Code. The use of irons, except for the purpose of safe custody, is prohibited.

NOTES:

A. Sources and Comparable Provisions.

- 1) A. W. 41.
- 2) Proposed Navy Bill, Art. 31.

B. Comments.

- 1) The proposed Article incorporates everything in the present Army and Navy provisions.

EMS

Uniform Code of Military Justice

Art. 62. Maximum Limits.

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

NOTES:

A. Sources and Comparable Provisions

- 1) A. W. 45.
- 2) Proposed Navy Bill, Art. 33(b).

B. Comments

- 1) The proviso in A. W. 45 has been included in proposed Art. // on confinement in a penitentiary.

EMS

Uniform Code of Military Justice

Art. 63A. Authorized Punishments.

Subject to the limitations prescribed in this Code and in regulations promulgated by the President, courts-martial may adjudge the following punishments:

- (1) Death where expressly authorized by this Code,
- (2) Dismissal,
- (3) Dishonorable discharge,
- (4) Bad conduct discharge,
- (5) Confinement for life, *or a specified period.*
- (6) Penitentiary confinement,
- (7) Confinement,
- (8) Solitary confinement on bread or water or on reduced rations,
- (9) Hard labor without confinement,
- (10) Restriction or deprivation of privileges, *- Extra duty*
- (11) Forfeiture of pay and allowances to become due,
- (12) Detention of pay,
- (13) Fine,
- (14) Loss of numbers or files on the promotion list of officers,
- (15) Loss of seniority of warrant officers,
- ~~(16) Suspension of officers,~~
- (17) Reduction of enlisted persons to a lower rank or grade, and
- (18) Reprimand or Admonition.

*out*

*22*  
*11*

*22*

*22*  
*Bread and*  
*Water*

*→* (14) Loss of numbers or files on the promotion list of officers, *→*  
*→* (15) Loss of seniority of warrant officers, *→ 27*



Uniform Code of Military Justice

Subject: Places of Confinement--When Lawful.

I. Army Provisions

1. Articles of War.

"ART. 42. Places of Confinement-- When Lawful.-- Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is more than one year: Provided, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions, any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: Provided further, That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States: Provided further, That persons sentenced to dishonorable discharge and to confinement, not in a penitentiary, shall be confined in the United States Disciplinary Barracks or elsewhere as the Secretary of War or the reviewing authority may direct, but not in a penitentiary."

2. Army Manual of Courts-Martial.

"PAR. 90. Courts-Martial--Action--Place of Confinement

"(a) Penitentiary.-- A penitentiary may be designated as the place of confinement for the whole period of confinement imposed by the sentence as ordered executed, provided such period exceeds one year, and provided also that such sentence is wholly or partly based on one or more of the offenses listed below or was imposed by way of commutation of a death sentence:

Desertion in time of war.

Repeated desertion in time of peace.

Mutiny.

An offense involving an act or omission recognized as

an offense of a civil nature and made punishable by penitentiary confinement for more than one year by some statute of the United States of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, whether statutory or common. Sodomy, being recognized as an offense by the common law in force in the District of Columbia, is included.

"A penitentiary will not be designated as the place of confinement except as authorized above in this paragraph..... Instructions as to the particular penitentiary to be designated will be issued from time to time by the War Department.

"It is the policy of the War Department to separate, so far as practicable, general prisoners convicted of offenses punishable by penitentiary confinement from general prisoners convicted of purely military offenses or of misdemeanors in addition to purely military offenses. In furtherance of this policy, reviewing authorities should designate a penitentiary as the place of confinement in every case when such action is authorized, unless it appears that the holding of the prisoner in association with misdemeanants and military offenders will not be to the detriment of such misdemeanants and military offenders, and that the purposes of punishment do not demand penitentiary confinement."

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

Art. 42, A. W., is not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy.

Articles 4, 5, and 6 list offenses which are punishable by death, or such other punishment as a court martial may adjudge.

Article 14 lists offenses which are punishable by fine and imprisonment, or such other punishment as a court martial may adjudge.

Articles 1, 3, 8, 16, 17, 19, 20 and 21 list offenses for which such punishment as a court martial may adjudge can be inflicted.

"ART. 7. Imprisonment in lieu of death.-- A naval court martial may adjudge the punishment of imprisonment for life, or for a stated term, at hard labor, in any case where it is authorized

to adjudge the punishment of death; and such sentences of imprisonment and hard labor may be carried into execution in any prison or penitentiary under the control of the United States, or which the United States may be allowed, by the legislature of any State, to use; and persons so imprisoned in the prison or penitentiary of any State or Territory shall be subject, in all respects, to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which the same may be situated (R. S., sec. 1624, Art. 7.)."

"ART. 51. Adequate punishment; recommendation to mercy.-- It shall be the duty of a court martial, in all cases of conviction, to adjudge a punishment adequate to the nature of the offense; but the members thereof may recommend the person convicted as deserving of clemency, and state, on the record, their reasons for so doing (R. S., Sec. 1624, Art. 51)."

"ART. 63. Punishment for offenses in time of peace.-- Whenever, by any of the Articles for the Government of the Navy of the United States, the punishment on conviction of an offense is left to the discretion of the court martial, the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe (R. S., Sec. 1624, Art. 63; Feb. 27, 1895, c. 137, 28 Stat. 689)."

## 2. Naval Courts and Boards.

"SEC. 642 (footnote (65) ). Disignation of prison.-- Officers authorized to convene general courts-martial are empowered to designate prisons for the confinement of persons sentenced thereby. Prisons will be designated in accordance with instructions issued from time to time by the Secretary of the Navy.

"Where sentences as approved include confinement for six months or less, such confinement should be executed on the station in such place as may be suitable....."

Sec. 457 is a schedule of offenses and the limits of punishment for them, promulgated under the authority of Art. 63.

## 3. Proposed Navy Bill.

Arts 5 and 6 are repealed; Art. 4 is renumbered as Art. 8 and amended to include all offenses for which a punishment of death, or such other punishment as a court martial may adjudge, may be inflicted.

Art. 14 is renumbered as Art. 9 and amended to include all offenses for which such punishment other than death as a court martial may adjudge may be inflicted.

Arts. 1, 20, and 21 are amended; they no longer provide specifically for a punishment. Arts. 3, 8, 16, 17, 19, and 22 are repealed.

Art. 7 is renumbered as Art. 32; its text is unamended.

Arts 51 and 63 are repealed.

"ART. 28(b) It shall be the duty of a court martial, in all cases of conviction, to adjudge a punishment adequate to the nature of the offense; but the members thereof may recommend the person convicted as deserving of clemency, and state, on the record, their reasons for so doing. ...."

"ART. 33(b) The President is authorized to prescribe a limitation of the punishment which may be inflicted under any of these Articles; and thereafter, such limitation while in force shall not be exceeded."

4. Laws Relating to the Navy, Annotated, in force January 1, 1945.

A case note found in Volume 1, P. 447, states that a person convicted of a violation of art. 8 and art. 22, A.G.N., may be sentenced to imprisonment at hard labor for a stated term. Article 7, A.G.N. does not preclude a sentence of imprisonment at hard labor in cases where the death penalty is not authorized.

A case note found in Volume 1, P. 449, states that the inclusion in art. 14, A.G.N. of the words "fine and imprisonment" does not preclude a court from imposing a sentence of imprisonment for an offense under art. 8.

### III. Differences

1. A. Army: A Federal penitentiary may be designated as the place of confinement in the following cases only:
  - 1). Where the period of confinement authorized and adjudged by the court is more than one year, and,
    - a) the offense is desertion in time of war.
    - b) the offense is repeated desertion in time of peace.
    - c) the offense is mutiny.
    - d) the offense is an act or omission which is also an offense of a civil nature and is made punishable by

penitentiary confinement for more than one year by a Federal statute of general application throughout the United States, excepting Sec. 289, Penal Code of the United States, 1910 (Sec. 289 relates to the adoption of penal laws of a State, territory or District to punish acts not made penal by Federal statute, when the acts are committed on a Federal reservation within the territorial limits of the State, territory, or District); or by the law of the District of Columbia, whether statutory or common.

2). Where a sentence of death has been commuted by the President.

Whether or not a penitentiary is designated as the place of confinement is within the discretion of the reviewing authority; it is not mandatory in any case, except insofar as Department of the Army policy makes it so. (Cf. AMCM, Par. 90a.)

B. Navy: There are no statutory limitations of any kind which restrict the cases where a Federal prison may be designated as the place of confinement for a Naval prisoner. The language of present Art. 7 (Art. 32 under the proposed Navy bill) seems to limit the power of a court martial to adjudge a punishment of imprisonment to cases where it is authorized to adjudge the punishment of death, but Art. 7 has been construed otherwise. Cf. par. 4 of Sec. II of this paper.

As a matter of practice, the Navy itself limits its power to designate a Federal prison as a place of confinement. Sec. 642, footnote (65), NC&B, provides that where a sentence as approved includes confinement for six months or less, such confinement should be executed on the station where the court martial was held. Arts. 51 and 63 of the present A.G.N. (Arts. 28(b) and 33(b) under the proposed Navy bill) restrict the court in the sentences it can impose; insofar as these Articles serve to prevent sentences of over six months confinement they would prevent imprisonment in a Federal prison.

(The Navy actually goes beyond the above provisions in its practice. A man is not usually sent to a Federal prison in any case where the sentence adjudged is less than a year's confinement, or in any case where the offense was not a serious civil offense).

The power to designate a prison as the place of confinement is given to the convening authority of a general court-martial (NC&B, Sec. 642, fn (65)), but its exercise is actually controlled by BuPers. Current practice is to send all prisoners to a Retraining Command initially; after an investigation is made

of each case by BuPers, the permanent place of confinement is designated.

IV. Recommendations

None.

FEL-3



Uniform Code of Military Justice

Art. 64A. Forfeitures of Pay and Allowances.

Where a sentence of a general court-martial as lawfully adjudged and approved includes the forfeiture of all pay and allowances to become due, such forfeiture shall include all pay and allowances accrued on or after the date that the sentence is adjudged by the court-martial, but no pay, allowances, or other sum accrued before the date upon which the forfeiture is adjudged by the court-martial shall be subject to forfeiture by sentence of a court-martial.

JDS

12/16/48

Proposed Article 64B  
Page 1

Uniform Code of Military Justice

Art. 64B. Hard Labor Included in Confinement.

27  
The omission of the words "hard labor in any sentence of a court-martial adjudging confinement <sup>in a prison or elsewhere</sup> shall not be construed as depriving the authority executing such sentence ~~of confinement~~ of the power to require hard labor as a part of the punishment.

229  
Confinement includes imprisonment.

The list in 63A  
does not mention  
"imprisonment"

NOTES:

A. Sources and Comparable Provisions

1) A.W. 37

B. Comment

The proposed text incorporates the second proviso of A.W. 37 and conforms to Navy practice.

JDS

Uniform Code of Military JusticeArt. 93A. 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 <sup>his own</sup> ~~the~~ use <sup>+ the use</sup> (of the taker, or of any ~~other~~ 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, <sup>steals ~~the~~ property and</sup> is guilty of larceny and shall be punished as a court-martial may direct.

Source: N. Y. Code § 1290

JLS

Uniform Code of Military Justice

Art. 93B. Robbery

Any person subject to this Code who <sup>with intent to steal</sup> unlawfully takes any thing of value, from the person or in the presence of another, against his will, by means of force or violence, or fear of ~~injury~~, immediate or future, 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.

Source N.Y. Code 2120.

JLS

-o-e-o-e-o-o-

Uniform Code of Military Justice

Art. 93C. Forgery

Any person subject to this Code who ~~with intent to defraud~~ *with intent to defraud*

(1) ~~falsely makes or alters, with intent to defraud,~~

~~any signature, or any part of any writing purporting to have legal efficacy; or~~ *apparently impose a legal liability which would if genuine*  
~~or~~ *alters, offers* ~~issues or transfers, with intent to defraud,~~ *or change*

(2) ~~issues or transfers, with intent to defraud,~~ a forged writing, known by the offender to be a forged writing.

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

Source: La. Code § 72

JLS

*his legal liability to a person or legal rights or liability to his prejudice*

*or change his legal liability to the prejudice*

*right of power*

Uniform Code of Military Justice

Art. 93D. Maiming.

Any person subject to this Code who ~~wilfully~~, 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.

Source N.Y. Code 1400.

JLS

Draft

1/6/49

Proposed Article 93F

Uniform Code of Military Justice  
Art. 93 F. Arson.

(a) Any person subject to this Code who willfully and maliciously burns or sets on fire any <sup>building,</sup> structure, water craft, or movable, wherein ~~it is foreseeable that human life might be endangered~~ <sup>to the knowledge of the offender there is, at the time, a human being,</sup> is guilty of aggravated arson and shall be punished as a court-martial may adjudge.

(b) Any person subject to this Code who willfully and maliciously burns or sets fire to the property of another without the consent of the owner, except as provided in subsection (a) of this Article, is guilty of simple arson and shall be punished as a court-martial may adjudge.

Source: La. Code Art. 51, 52.

any dwelling ~~house~~ in which there is at the time a human being, or any other structure, watercraft or other movable wherein to the knowledge of the offender there is at the time a human being,

Draft

1/6/49

Proposed Article 100A

Uniform Code of Military Justice

Art. 100A. Rape

(a) Any person subject to this Code who perpetrates an act of sexual intercourse with a female not his wife against her will or without her consent is guilty of rape. Emission is not necessary and penetration, however slight, is sufficient to complete the crime.

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

Comment: Source: N.Y. Code Secs. 2010 - 2011

La. Code Art. 41

Uniform Code of Military JusticeArt. 121. Authority to Administer Oaths.

(a) The following persons on active duty in the armed forces shall have authority to administer oaths for the purpose 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:

- (1) All officers of the Judge Advocate General's Department of the Army and Air Force;
- (2) All legal specialists of the Navy or Coast Guard;
- (3) All staff judge advocate or legal officers and acting staff judge advocates or legal officers;
- (4) The president, law member, trial counsel and assistant trial counsel of all general or special courts-martial;
- (5) All summary courts-martial;
- (6) The president and the recorder or judge advocate of all courts of inquiry and military boards;
- (7) All officers designated to take a deposition;
- (8) All officers detailed to conduct an investigation;
- (9) All adjutants, assistant adjutant and personnel adjutant of the Army, Air Force, and Marine Corps;
- (10) All commanding officers of the Navy and Coast Guard;
- (11) All recruiting officers; and
- (12) All other persons designated by regulations of the respective armed forces.

(b) No fee of any character shall be paid to or received by any person for the performance of any notarial act herein authorized.

(c) The signature without seal of any such person acting as such notary shall prima facie evidence of his authority.

NOTES:

A. Sources and Comparable Provisions

- 1) A.W. 114
- 2) AGN Art. 69
- 3) S.1338 (Proposed AGN), 80th Cong., 1st Sess. (1947), Art. 47.

B. Comments

(a) The proposed text contains the provisions of A.W. 114 and AGN Art. 69. The proposed AGN would leave this matter to regulation.

(b) Subsections (b) and (c) are taken from proposed AGN Art. 47. A.W. 114 contains a proviso similar to subsection (b).

JIS

12/10/48

Proposed Article 122  
Page 1

Uniform Code of Military Justice

Art. 122. Appointment of Reporters and Interpreters.

Under such regulations as the Secretary of the Department concerned may prescribe, the president 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 and may set down the same, in the first instance in shorthand. Under like regulations the president of a court-martial or military commission, or court of inquiry, or a summary court, may appoint an interpreter, who shall interpret for the court or commission.

NOTES:

A. Sources and Comparable Provisions

1) A.W. 115

B. Comment.

The text is A.W. 115. The Navy handles these matters by regulation.

JDS

12/10/48

Proposed Article 123  
Page 1

Uniform Code of Military Justice

Art. 123. 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 the officer exercising general court-martial jurisdiction officer against whom the complaint 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.

NOTES:

A. Sources and Comparable Provisions

- 1) A.W. 121 as amended by P.L 759, 80th Cong., 2d Sess. (1948).
- 2) Navy Regulations Art. 99.

B. Comment

The text incorporates A.W. 121 (as amended). Navy practice is similar.

JDS

Uniform Code of Military Justice

Art. 124. Dismissal of Officers. Right to Trial by Court-Martial.

(a) No officer shall be dismissed from any of the armed forces except by sentence of a general court-martial, or in mitigation or commutation thereof, or, in time of war, by order of the President; but the President may at any time drop from the rolls of any armed force any officer who has been absent without authority from his place of duty for a period of three months or more, or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction. No officer so dropped from the rolls of any armed force shall be eligible for reappointment, [or appointment as an officer in any other armed force].

(b) When any officer, dismissed by order of the President, makes, in writing, an application for trial by court-martial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as practicable, convene a general court-martial, to try such officer on the charges on which he was dismissed. If a general court-martial is not so convened within six months from the presentation of such application for trial, or if such court, having been convened, does not adjudge dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void.

## NOTES:

A. Sources and Comparable Provisions

- a) A.W. 118.
- b) 10 U.S.C. 573.
- c) AGN 36 and 37; (proposed Navy Bill, Arts 40 and 41.)

B. Comments

a) Subsection (a) follows A.W. 118 and AGN 36. The last sentence is taken from AGN 36; it does not appear in A.W. 118. The last clause of the sentence, shown in brackets, is new; it makes an officer who has been dropped ineligible to serve as an officer in any armed force.

b) Subsection (b) follows 10 U.S.C. 573 and AGN 37. Wallace v. U.S. (1920) 55 St. Cl. 396, affirmed (1922) 257 U.S. 541, held 10 U.S.C. 573 did not apply to Army officers, on the ground that subsequent enactment of A.W. 118 had superseded it. AGN 37, substantially identical to the provision in 10 U.S.C. 573, does apply to Navy and Marine Corps officers.

The proviso in AGN 37 was deleted in the proposed Navy Bill.

c) Apparently the provisions of AGN 36 and 37 apply to Navy warrant officers. A.W. 118 does not apply to Army warrant officers.

EMS

Uniform Code of Military JusticeArt. 124. Dismissal of Officers. Right to Trial by Court-Martial.

(a) No officer shall be dismissed from any of the armed forces except by sentence of a general court-martial, or in mitigation or commutation thereof, or, *by a court-martial or in mitigation of a sentence, or* in time of war, by order of the President; but the President may at any time drop from the rolls of any armed force any officer who has been absent without authority from his place of duty for a period of three months or more, or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction. No officer so dropped from the rolls of any armed force shall be eligible *later appointed in any of the armed forces,* for appointment as an officer in any other armed force.

(b) When any officer, dismissed by order of the President, makes, in writing, an application for trial by court-martial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as practicable, convene a general court-martial, to try such officer on the charges on which he was dismissed. If a general court-martial is not so convened within six months from the presentation of such application for trial, or if such court, having been convened, does not adjudge dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void.

NOTES:

A. Sources and Comparable Provisions

- a) A.W. 118.
- b) 10 U.S.C. 573.
- c) AGN 36 and 37; (proposed Navy Bill, Arts. 40 and 41.)

B. Comments

a) Subsection (a) follows A.W. 118 and AGN 36. The last sentence is taken from AGN 36; it does not appear in A.W. 118. The last clause of the sentence, shown in brackets, is new; it makes an officer who has been dropped ineligible to serve as an officer in any armed force.

b) Subsection (b) follows 10 U.S.C. 573 and AGN 37. Wallace v. U.S. (1920) 55 Ct. Cl. 396, affirmed (1922) 257 U.S. 541, held 10 U.S.C. 573 did not apply to Army officers, on the ground that subsequent enactment of A.W. 118 had superseded it. AGN 37, substantially identical to the provision in 10 U.S.C. 573, does apply to Navy and Marine Corps officers.

The proviso in AGN 37 was deleted in the proposed Navy Bill.

c) Apparently the provisions of AGN 36 and 37 apply to Navy warrant officers. A.W. 118 does not apply to Army warrant officers.

Uniform Code of Military JusticeArt. 125. Arrest of Deserters.

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

## NOTES:

A. Sources and Comparable Provision

- 1) A.W. 106
- 2) 34 USC § 1011 (1946).

B. Comment.

The text is the same as A.W. 106 and 34 USC § 1011 except for the applicability of the text to all the armed forces.

JDS

Uniform Code of Military JusticeArt. 126. Certain Articles of the Uniform Code of Military Justice  
to be Read or Explained.

The Preamble to this Code, and Arts. \_\_\_\_\_ shall be read or carefully explained to every [ ] enlisted [ ] person at the time of his entrance into any of the armed forces of the United States, [ ] or within six days thereafter [ ] and shall be read or explained once every six months to every [ ] enlisted [ ] person on active duty in the armed forces of the United States. A complete text of the Uniform Code of Military Justice and of the.....(Manual for Courts-Martial?) 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.

## NOTES:

A. Sources and Comparable Provisions

- a) A.W. 110, as amended.

B. Comments

- a) The text follows A.W. 110. At the present time it is contemplated that there will be a preamble to the Code which will contain the matter in Arts. 1-3, AGH. Articles to be read might include 1, 2, 2A, 6, 7, 8, 9, 12, 13, 15, 17, 22, 36, 43, 49, 52, 61, punitive articles, 123, 126, 127.

EMS

# RESTRICTED

12/14/48

Proposed Article 127  
Page 1

## Uniform Code of Military Justice

Art. 127. Redress of Injuries to Property.

*Under such regulations as the Secy of the Dept shall prescribe*  
Whenever complaint is made to any commanding officer that  
damage has been done to the property of any person or that his property  
has been wrongfully taken by persons subject to military law, such  
complaint shall be investigated by a board consisting of any number of  
officers from one to three, which board shall be convened by the commanding  
officer 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 stopped against the  
pay of the offenders. And the order of such commanding officer directing  
stoppages herein authorized shall be conclusive on any disbursing officer  
for the payment by him to the injured parties of the stoppages so ordered.

" Where the offenders can not be ascertained, but the organization  
or detachment to which they belong is known, stoppages to the amount of  
damages inflicted may be made and assessed in such proportion as may be  
deemed just upon the individual members thereof who are shown to have  
been present with such organization or detachment *at the scene of the damage or taking*  
~~at the time the damages~~  
~~complained of were inflicted~~ as determined by the approved findings of the  
board."

NOTES:

A. Sources and Comparable Provisions

1) A.W. 105

# RESTRICTED

RESTRICTED

12/14/48

Proposed Article 127

-2-

B. Comment

The text incorporates the provisions of A.W. 105.

JDS

RESTRICTED

Uniform Code of Military Justice

Art. 130. Courts of Inquiry.

(a) Appointment.

Courts of inquiry to investigate any occurrence, event, transaction, or incident may be appointed by any person authorized to appoint a general court-martial, <sup>or by any other person authorized by the Secy of the Dept concerned for that purpose</sup> whether or not the persons involved have requested such an inquiry.

(b) Composition.

A court of inquiry shall consist of three or more officers. For each court of inquiry the appointing authority shall <sup>also</sup> appoint counsel for the court.

(c) Parties.

Any person subject to this Code or employed by the National Military Establishment, whose conduct shall be subject to inquiry or who has an interest in the subject of inquiry, shall have the right to be present, to be represented by counsel, to cross-examine witnesses, and to introduce ~~relevant~~ evidence. Any person permitted by the court to exercise these rights shall be designated as a ~~defendant~~ <sup>party</sup>.

(d) Challenges.

Members of a court of inquiry may be challenged by a <sup>party</sup> ~~defendant~~, but only for cause stated to the court.

(e) Oaths

(1) The counsel for the court shall administer to the members the following oath:

"You, A.B., do swear (or affirm) that you will well and truly examine and inquire, according to the evidence, into the matter now before you without partiality, favor, affection, prejudice, or hope of reward. So help you God."

(2) The president of the court shall administer to the counsel for the court the following oath:

"You, A.B., do swear (or affirm) that you will faithfully and impartially perform the duties of counsel for the court. So help you God."

(3) Reporters, interpreters, and witnesses shall be sworn as in courts-martial.

(4) In case of affirmation the closing sentence of adjuration will be omitted.

(f) Witnesses and Procedure

Witnesses may be summoned to appear and testify and be examined before a court of inquiry *as provided for a* ~~in the same manner as before~~ court-martial. Insofar as applicable, courts of inquiry shall follow the rules of evidence and procedure prescribed for courts-martial.

(g) Findings.

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

(h) Court of inquiry may replace pre-trial investigation.

Subject to the requirements of Article 31, a court of inquiry may be used in place of a pre-trial investigation if the

accused was a defendant ~~before~~ the court of inquiry.

(i) Records.

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 and the counsel for the court, it shall be signed by a member in lieu of the president and by another member in lieu of the counsel for the court.

NOTES:

A. Sources and Comparable Provisions

- 1) A. W. 97-103.
- 2) AGN, Arts. 55-60.
- 3) S.1338 (Proposed AGN), 80th Cong., 1st Sess. (1947)

Art. 42-44.

B. Comments

(a) Subsection (a) indicates the changed character of Army courts of inquiry. Formerly, Army courts of inquiry could only be convened at the request of the person whose conduct was to be investigated. A. W. 97 allowed any commanding officer to appoint a court of inquiry. The proposed text is consistent with proposed AGN Art. 42(a).

(b) This provision incorporates present law except that the name "counsel for the court" is used instead of "recorder" (Army) or "judge advocate" (Navy).

(c) Subsection (c) incorporates the provisions of proposed AGN Art. 42 (c) and (d). A. W. 103 contains a similar provision.

The term "defendant" is used in order that the "defendant" be distinguished from an "accused", although a person may be both a defendant and an accused at the same time. See proposed Article 45.

(d) Subsection (d) is taken from A. W. 99. Navy practice is similar.

(e) The oath of members is taken from A. W. 100 while the oath of the counsel for the court is adapted from the oath for the trial counsel of a court-martial.

(f) Subsection (f) is derived from A. W. 101. See proposed Articles 42, 44, 45, and 50.

(g) Subsection (g) is derived from A. W. 102 and proposed AGN Art. 43.

(h) This subsection is new. It permits a court of inquiry which satisfies the requirements of Article 31 to be used in place of the pre-trial investigation required in general court-martial cases. This would permit an investigation of wider scope in complicated cases or cases involving many alleged offenders.

(i) The provisions of A. W. 103 and proposed AGN Art. 44 are incorporated in this subsection.

JDS