

OGC Has Reviewed

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U. S. MILITARY JURISDICTION OVER CIVILIANS

1. General

This general field has been one of legal and political contention in the English-speaking world since back before Magna Carta. It has recently come into public focus through the confusion generated by the Supreme Court's decision in the Covert and Krueger cases.¹ Aside from the private advocacy of personal rights, it is an area of particular interest to those agencies of the Government whose activities are related in any fashion to the military. This is intended to be a short summary for purposes of immediate administrative guidance as well as an understanding of future judicial opinion. At the moment, the lower federal courts seem to be pointing up issues that will enable the Supreme Court to expand the limited guidance it has given in Covert-Krueger. Reduced to its barest form, it's a matter of constitutional conflict between certain personal rights of the individual and the operation and regulation of the armed forces. Mechanically, the particular cases have come up on the jurisdictional question of courts-martial or civil trial by jury. The broader ramifications, of course, reach into wartime as well as peace, affect aliens as well as U. S. citizens, and have a predictable impact on the status-of-forces agreements around the world.

2. Constitution

The legal bedrock here is the Constitution itself. From the individual's standpoint, the provisions so jealously asserted are found mainly in art. III, and the Fifth and Sixth amendments. In art. III, § 2, cl. 3 we find:

"The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

This petit or trial jury guarantee must be read in conjunction with the Sixth amendment which states in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * ."

¹Reid v. Covert, 354 U.S. 1 (1957).

And this section, in turn, is affected by the Fifth amendment which confers the right of grand jury indictment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * * ."

We should note here that there are no common law offenses against the United States.² Further, what determines a "crime" or its "infamous" nature depends upon the severity of the punishment as well as the inherent qualities of the act. Two phrases in particular are important: "except in cases arising in the land or naval forces" does not appear in the Sixth amendment, but it has been read into it and also the art. III provision; the limitation "when in actual service in time of War or public danger" applies only to the militia.³ In passing, the exception touching the "land or naval forces" was not aimed at the laws of war but was designed rather to permit the military to try crimes otherwise only cognizable by civil courts.⁴ So together, these constitutional provisions seem to mean that an individual who is neither a member of the armed forces nor a wartime member of the militia is entitled to a grand jury indictment and a petit jury trial. Whether these rights apply only in the United States or extend overseas is one of the current issues. We should also note that the language of the Fifth amendment refers to "cases arising in" rather than "members of" the military forces.

On the other side of the ledger is the authority to regulate and control the armed forces. This appears principally in art. I, § 8, with main reliance placed on cl. 14, stating:

(The Congress shall have Power)

"To make Rules for the Government and Regulation of the land and naval Forces;"

In conjunction with this, however, there are the other powers in § 8:

(cl. 1, in part) "provide for the common Defense and general Welfare of the United States;"

(cl. 10) "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;"

(cl. 11) "To declare War, * * * and make Rules concerning Captures on Land and Water;"

(cl. 12) "To raise and support Armies, * * *;"

(cl. 13) "To provide and maintain a Navy;"

²United States v. Hudson, 7 Cr. 29 (1812).

³Johnson v. Sayre, 158 U.S. 114 (1895).

⁴Ex parte Quirin, 317 U.S. 1 (1942).

(cl. 15) "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;"

(cl. 16) "To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;"

and cl. 18 with the celebrated quote from M'Culloch v. Maryland,⁵ defining what other laws are necessary and proper to do these things. Finally, under the executive powers (art. II, § 2, cl. 1), "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; * * * ."

3. Statutes

The governing statute at present is the Uniform Code of Military Justice (UCMJ) (50 U.S.C. 551 (1951)). Under art. 2, persons subject to the Code include:

"(10) In time of war, all persons serving with or accompanying an armed force in the field;

"(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following Territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, Guam and the Virgin Islands;

"(12) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary of a Department and which is without the continental limits of the United States and without the following Territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, Guam and the Virgin Islands." (My emphasis.)

The legislative history of the Code tells us that paragraph (10) is taken from AW 2 (d). The phrase "in the field" has been construed to refer to any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted.⁶

⁵4 Wheat. 316 (1819). "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

⁶In re Berke, 34 F. Supp. 232, 235 (S.D. Cal. 1942).

Paragraphs (11) and (12), on the other hand, are adapted from 34 U.S.C. 1201, but are applicable in peace as well as wartime. Both are subject to the supervening provisions of any treaty or agreement made by the United States or to accepted rules of international law. Paragraph (11) is somewhat broader in scope than (10) in that it covers persons "employed" by the armed forces as well as those "serving with" or "accompanying" them. The territorial limitations have been reduced to include only those areas where civil court systems are not readily available.

4. Covert and Krueger Cases

At this point, let's review the action of the Supreme Court in these two cases. After certain preliminary developments which are not important here, the two cases were considered as one, which for simplicity, we'll call "Covert." Each involved the overseas murder of a serviceman by his dependent, each defendant was tried and convicted by a military court-martial, each appealed by habeas corpus to the Supreme Court. In each instance, art. 2 (11) of the UCMJ was alleged to be unconstitutional.

The case was first decided in 1956 with an opinion by Clark, J., that the article was constitutional. He was joined by four other justices. Warren, Ch. J., and Black and Douglas, J.J., dissented. Frankfurter, J., reserved an expression. On rehearing, the Court then held the article unconstitutional with regard to the present case. Warren, Ch. J., and Douglas and Brennan, J.J., joined in an opinion by Black, J., finding the military trial of civilians in peacetime inconsistent with the Constitution. Frankfurter, J., and Harlan, J., in separate opinions concurred but limited themselves to capital cases. Clark and Burton, J.J., dissented, adhering to the majority views of the original opinion.

What does this case - which must be accepted as the latest milestone - stand for? In the first place, there is no majority opinion as such. You have, rather, a position taken on military jurisdiction over United States civilians who commit a capital offense overseas in peacetime. Frankfurter and Harlan, J.J., in their opinions are clearly affected by the capital nature of the crime.⁷ The Black opinion, on the other hand, shows in its scope a deep concern for personal liberties, uncompromised by any military necessities. It is helpful as a harbinger of future stands by these four members. The dissenters, Clark and Burton, J.J., find ample constitutional support for military jurisdiction over civilians who are part of the armed forces. They are concerned with the practicalities of the situation from both the deterrent aspect and the submission of United States citizens to foreign courts. Whittaker, J., did not participate.

⁷Reid v. Covert, supra at 77 (Harlan, J.): "Where, if at all, the dividing line should be drawn among cases not capital, need not now be decided. * * * and it seems to me particularly unwise now to decide more than we have to." Id. at 45 (Frankfurter, J.): "I must emphasize that it is only the trial of civilian dependents in a capital case in time of peace that is in question."

The main points in the "majority" opinion should be examined. The first of these overcomes the old doctrine of the Ross⁸ case that the Constitution does not follow the citizen overseas. This doctrine, incidentally, was the keystone of the majority opinion in the first hearing and receives further comment from Harlan in his concurring views.⁹ Its historical foundation in the consular and territorial courts is carefully reviewed by Frankfurter. That it may still have some vitality is a further point that Harlan makes and he suggests that¹⁰ "in view of Ross and the Insular cases, we have before us a question analogous, ultimately, to issues of due process; one can say, in fact, that the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case." The "majority" view, however, is that the Ross case cannot be lifted out of its setting and that it "should be left as a relic from a different era."¹¹ And Frankfurter observes that Ross "was decided with reference to a very particular, practical problem with a long history."¹² Read into the context of its time, Ross stands for extraterritorial support in days when our sovereignty reached over "barbarian" lands but failed to carry the constitutional protections beyond the territorial limits.

Conceding that the constitutional restraints followed the individual overseas, it was argued that these restraints might nevertheless be overcome by statute or treaty. In other words, it was suggested that art. 2 (11) of the Uniform Code was "necessary and proper to carry out the United States' obligations under the international agreements made with" Great Britain and Japan. The "majority" struck this down without a moment's pause.

⁸Ross v. McIntyre 140 U.S. 453 (1891). Jurisdiction of an American Consular Court in Japan over an American seaman (though a British subject) was validated and the constitutional provision for indictment and trial by jury was held to apply only to persons within the United States.

⁹Reid v. Covert, supra at 67 (Harlan, J.): "I also think that we were mistaken in interpreting Ross and the Insular Cases as standing for the sweeping proposition that the safeguards of Article 3 and the Fifth and Sixth Amendments automatically have no application to the trial of American citizens outside the United States, no matter what the circumstances. Aside from the questionable wisdom of mortgaging the future by such a broad pronouncement, I am satisfied that our June holding swept too lightly over the historical context in which this Court upheld the jurisdiction of the old consular and territorial courts in those cases. I shall not repeat what my brother Frankfurter has written on this subject, with which I agree. But I do not go as far as my brother Black seems to go on this score. His opinion, if I understand it correctly, in effect discards Ross and the Insular Cases as historical anomalies. I believe that those cases, properly understood, still have vitality, and that, for reasons suggested later, which differ from those given in our June opinion, they have an important bearing on the question now before us."

¹⁰Id. at 75.

¹¹Id. at 12.

¹²Id. at 56.

There was still a question of what was meant by the "land and naval forces," the phrase used in the rules and regulation part of art. I of the Constitution as well as in the exception of the Fifth amendment. The opinion does not suggest that members of the military may not be subjected to military law, with all its inherent restrictions and limitations, but it does ask whether civilian dependents are "in" the military service and therefore subject to these limitations. It finds that they are not.

The court observed that the broadest military jurisdiction over civilians was historically supported only for those serving with or accompanying the forces in the field in time of war. It added that even during wartime, the Constitution must be observed, and agreed "with Col. Winthrop, an expert on military jurisdiction, who declared: 'a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.' (Emphasis not supplied.)"¹³

The opinion closes on the traditional conflict between the military and the civil, quoting Lord Coke: "'God send me never to live under the Law of Conueniency or Discretion. Shall the Souldier and Justice Sit on one Bench, the Trumpet will not let the Cryer speak in Westminster Hall.'"¹⁴

The dissenting views of Clark and Burton, J.J., generally take a position that dependents are a part of the armed forces, and if extraterritorial courts and trial by jury are precluded, subjection of these people to foreign prosecution is an "unhappy prospect."

Thus the case leaves unsettled a number of questions. It does not disclose the court's attitude toward: dependents committing non-capital crimes; employers, contractors or sutler-type persons; or dependents of the latter group. Furthermore, while it seems more than reasonably clear what jurisdiction would be supported in wartime in the field, this itself will be affected by the meaning of "in the field" and a definition of the extent of a given theatre of war.

5. Historical

Military jurisdiction has expanded slowly over a long period of time, the result of necessity and propitious chance. As an area sui generis, it was applied first to soldiers in wartime, then to soldiers in peacetime; later it extended over certain civil crimes committed by soldiers in peace, and, finally, it was made to cover civilians who were part of the armed forces, or who were in an area of war or who were directly under military control. Underlying the independent area of military jurisdiction, however, were all the ancient legal systems based on military organization - in times when a state of war was more normal than peace. As one recent authority explains:

¹³Id. at 35.

¹⁴Id. at 41.

"The feudal law was made known to the Romans in the first century B.C. by the Teutons and was utilized by the Roman Emperor, Alexander Severus. Upon the decline of the Roman Empire, the Goths, Huns, Franks, Vandals and Lombards borrowed the feudal law and carried it into Europe as an instrument of their military policy. It became the 'law of nations' of the western world of that time. * * * By the eleventh century, feudal law had been codified in Lombardy as the Libri Feudorum. This well-developed continental feudal system was brought to England by William The Conqueror in 1066 and imposed upon the simpler feudal system already existing in Britain."¹⁵

Some authorities consider Magna Carta a product of the barons' effort to save their feudal rights rather than a stand for freedom of the common man.¹⁶

Thus, the codes brought down from the Salians of the Fifth Century into the Fourteenth were almost indistinguishable between the civil and military aspects. The first French military law is dated as 1378; the first German - 1487. The codes of particular note are those of: the Free Netherlands (1590), Louis XIV (1651 and 1665), Czar Peter The Great (1715), Maria Theresa (1768), but in particular, the celebrated "Carolina" (Constitutio Carolina Criminalis) of Gustavus Adolphus (1621) which probably shaped much of the succeeding British articles and was therefore directly reflected in the original American Articles of War.¹⁷

The law was administered by the military magistrates of the Romans, the German priests, and ultimately by special military courts which first made their appearance in the France of about 1650. In our direct inheritance, it comes down through the Courts of Chivalry, the Constable's Court (the Constable was commander of the Army from William The Conqueror to Henry VIII), the courts of the Earl Marshal (next in rank to the Constable) from which the term "court martial" is derived, and then by military officers under Crown commissions. First created by royal fiat, English military courts were not a matter of legislative sanction until the first Mutiny Act of 1689. A statutory sanction to the King to make articles operative both at home and abroad was authorized by Parliament in 1718. The Act and the Articles were finally consolidated by Parliament in 1881 into the Army Annual Act.

Unlike the British, our Articles have always devolved from a legislative action. The first Articles drafted in this country were those adopted by the Massachusetts Bay Colony in 1775. The first set of Articles adopted by the Continental Congress in 1775 were quickly enlarged to become the Code of 1776. After adoption of the Constitution these were amended in 1786 and by the new code of 1806 which survived until the revision of 1874. A later revision became effective in 1917, was amended in 1920, and went through substantial change in 1948. The present code dates from May 31, 1951.

¹⁵AYCOCK AND WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE, 4 (1955).

¹⁶RADIN, ANGLO-AMERICAN LEGAL HISTORY, 152-155 (1936).

¹⁷See WINTHROP, MILITARY LAWS AND PRECEDENTS, 17 (2d ed., 1896) for a more detailed discussion. (The author has been styled "The Blackstone of military law.")

6. Application in Theory and Practice

With some impression of the background, history and legislative mandate, how has the problem been handled?

a. The term "Military Jurisdiction."

The term "military jurisdiction" should first be clear. In the much-cited case of Ex parte Milligan¹⁸ Chief Justice Chase said that:

"There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adherence to the national government, when the public danger requires its exercise. The first of these may be called jurisdiction under military law, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superceding, as far as may be deemed expedient, the local law, and exercised by the military commander, under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated martial law proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights."

Each of these: military law, military government, and martial law, have some application, but for the most part we are concerned with "military law." What exactly do we mean by this term? In its beginning it often fell within the loose generic category of "martial law." It devolved into "military law proper" and then to its present designation. It consists of the principles and doctrines found in the military articles or codes: the written law; and the principles and usages peculiar to war itself: a sort of unwritten military common law. This latter is made up of the customs of the service and the unwritten laws and customs of war.¹⁹ Customs and usages today are to a large extent merely amplifications of the written law or evidence of its intent, but they may on occasion serve as more. The written law - the code provision - however, is the controlling point of interest for us. The present language of the UCMJ comes down, as already mentioned, from the articles of the Massachusetts Bay Colony:

¹⁸71 U.S. 107 (1866).

¹⁹WINTHROP, op. cit. supra, note 17, at 41.

"Article 31st. All sellers and retailers to a camp, and all persons whatsoever serving with the Massachusetts Army in the field, though not enlisted Soldiers, are to be subject to the Articles, Rules and Regulations of the Massachusetts Army."

The word "retainers" (to a camp) first appears in the American Articles of War of 1776 (Sec. XIII, Art. 23). No substantial change appears through the various revisions noted above and the Articles of 1916, which remained until 1951 state (Art. 2 (d)):

"All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles."

A brief word on the other two elements of "military jurisdiction": "military government" is distinguished from "martial law" by Winthrop²⁰ as "a government exercised over the belligerent or other inhabitants of an enemy's country in war foreign or civil; martial law over our own immediate fellow citizens, who, though perhaps disaffected or in sympathy with the public enemy, are not themselves belligerents or, legally enemies. The occasion of military government is war; the occasion of martial law is simply public exigency which, though more commonly growing out of pending war, may yet present itself in time of peace. The field of military government is enemy's country; the field of martial law our own country or such portion of it as is involved in the exigency." Under military government, the civil laws and functionaries may be left in force within the discretion of the military commander. "Martial law" is not necessarily limited to war but may be exercised during periods of "public danger" and the bare fact that civil courts are open does not control when their function is disturbed by existing conditions.²¹ Without congressional sanction, the suspension of the writ of habeas corpus cannot be supported. The same would seem to be true of indictment and jury trial where the offense is not directed at the military. Whether or not Congress might later ratify actions it had not previously approved would depend of course on the particular facts at hand.

The geographical boundaries added in the present code have been devised to restrict military jurisdiction over civilians to those areas where civil courts are not available in peacetime. The basis of jurisdiction itself, of course, depends not only on "place," but also on "time," "persons," and "offenses." This varies somewhat, too, with the nature of the tribunal. Col. Winthrop covers the jurisdiction of military courts in the following fashion:²²

²⁰Id. at 799.

²¹Id. at 817.

²²Id. at 86 et seq.

(a) Place:

- (1) Entire United States;
- (2) Area of military occupation in war;
- (3) Friendly foreign area where our armed forces are present with host's consent;
- (4) Friendly foreign area, present without host's consent;
- (5) Foreign area, over persons not present in a military capacity, for military offenses.

(b) Time: This depends on the current statute of limitations (see art. 43 of the UCMJ.)

(c) Persons:

- (1) Regular armed forces of the U.S. (including volunteers and draftees);
- (2) Militia when called into active service;
- (3) Civilians in wartime;
- (4) Civilians under statutory jurisdiction in peace as well as war.

(d) Offenses: See the current articles of war, code or other statutes.

For "military commissions," Winthrop defines the following jurisdiction:

(a) Place: (except by statute) only of offenses in the field under the convening commander and for trial in the same area.²³

(b) Time: only during a period of war, military government or martial law.

(c) Persons:

- (1) Enemy soldiers violating laws of war;
- (2) Inhabitants of an occupied enemy country;
- (3) Inhabitant areas under martial law;
- (4) Members of our armed forces "or persons serving with" these forces in the field, who, in time of war, are charged "with crimes or offenses not cognizable, or triable, by the criminal courts or under the Articles of War."

²³Note, 29 VA. L.R. 317 (1942). The author questions the jurisdiction over saboteurs in the matter of place when the offense occurs in the United States although he raises the doubt of availability of the constitutional safeguards to enemy aliens. He suggests the possible solution of Ex parte Quirin (supra.): the Constitution did not enlarge common-law rights and the latter did not include such offenses.

(In elaboration of this last group, he adds: "Besides officers and soldiers, there are comprised in this category camp-followers and other civilians employed by the government in connection with the army in war." And among those tried in the Civil War by military commission were: "sutlers, officers' servants, teamsters, persons employed on government steamers and transports, or otherwise in the quartermaster, provost marshal and other staff corps, as also individuals serving in such capacities as veterinary surgeons, government detective, medical cadet, lieutenant in the revenue service, special agent of the revenue service, special agent of the Treasury, newspaper correspondent, etc.")²⁴

We might dwell a moment on the military commission. Its authority stems from the constitutional powers "to declare war" and "raise armies" - with everything necessary and proper to these ends - and the implicit authority of the President as Commander-in-Chief of the armed forces. The occasion for its development were those crimes not otherwise defined in a written code committed by persons not members of the military forces. It is exclusively a war-court. In the beginning, there was little difference between it and the court-martial and we find in 1780, a special court-martial convened for the trial of Joshua Hett Smith for his collaboration with Gen. Arnold. It was not until the Mexican War that the military commission, as such, appeared. Acts punishable by it were mainly those criminal offenses cognizable by civil courts in peacetime. Gen. Scott set up councils of war for violations of the laws of war. These two functions were finally combined in the military commission of the Civil War. The tribunal is called by the President or his military commanders and there is no fixed rule for its composition, although normally the military serve. Nor is there a fixed rule for its procedure unless stipulated by statute.

b. General Legal Principles.

Beyond the matter of jurisdiction, there are some other principles of law that are generally pertinent for reference. In the first place, the criminal law of the United States is wholly statutory. It was decided early in the history of our courts that criminal jurisdiction in common-law cases was not within the implied power of the courts (aside from matters affecting contempt, enforcement of its own orders, contumacy of witnesses, etc.).²⁵ However, the statutory effect has been applied not only in this country but also overseas when the penal or controlling force can still be applied within the United States.²⁶ In the absence of treaty, the law of the local sovereign applies. This is clear as to its own nationals.²⁷ And it covers, as well, all persons

²⁴WINTHROP, op. cit. supra at 838.

²⁵United States v. Hudson, supra.

²⁶Blackmer v. U.S., 284 U.S. 421 (1932). (A U.S. citizen resident in France had property seized in the U.S. for failure to answer a subpoena as a Government witness.)

²⁷WILSON, INTERNATIONAL LAW, § 48 (3d Ed., 1939).

within the jurisdiction.²⁸ On the nature of the act, the Supreme Court has said that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."²⁹ All of which may naturally be modified by treaty,³⁰ although our courts have held that certain constitutional rights of the individual cannot be alienated by treaty, which has no more than statutory effect.³¹ And, as "a rule nationals of a foreign state cannot claim greater rights than the subjects of the state in which they are for the time."³² However, where there is no treaty and jurisdiction is not asserted by the foreign sovereign, a crime may go unpunished.³³ Thus we find that while the sovereign has jurisdiction over all within his domain for offenses against his law, he may concede certain rights (provided they don't enhance the position of aliens over his own subjects) and he may, of course, decline to exercise jurisdiction at all if he pleases. In the absence of treaty, we may extend our criminal jurisdiction beyond our shores by act of Congress but we can enforce it only within our shores and only when the offense is one against the U.S. The current

²⁸Note the classic comments of Chief Justice Marshall in *The Schooner Exchange v. M'Faddon and Others*, 7 Cranch 116, 136 (1812).

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

"All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

"This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory."

²⁹*Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). However, an offense against the sovereign may be punishable even though committed outside the jurisdiction. *United States v. Bowman*, 260 U.S. 94 (1922).

³⁰WILSON, *op. cit. supra* at 143. "The rights of a national of one state in another state are usually specified in treaty agreement."

³¹*Reid v. Covert (supra)*.

³²WILSON, *op. cit. supra*, note 30, § 51.

³³20 Ops. Att'y. Gen. 590 (1893). Here was a situation where no foreign sovereign existed (the New Hebrides Islands at the time). The federal statute provides for trial in the district in which the offender is found or into which he is first brought for "offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district" but this was construed to apply only to a crime against the United States.

position of the Supreme Court is that constitutional protections of the individual extend throughout the world. We have seen that by international law and custom military forces have certain rights of jurisdiction over their members.³⁴ And the personal rights of individuals are modified by the Constitution itself when the person becomes a member of these forces.³⁵ Whether certain classes of individuals are "in" the forces becomes a matter of judicial interpretation and whether the rights of the military to regulate itself can be expanded by Congress to cover those who are not in uniform has depended on a number of variable criteria: whether it was war or peacetime, whether the force was "in the field," whether the function was military, etc. The cases are myriad and review of a few will be illustrative.

On the procedural aspects, it seems established that a civil court cannot review a court-martial,³⁶ although there may be concurrent jurisdiction creating both civil and military offenses.³⁷ While, on the other hand, the consent or voluntary appearance of the accused cannot confer jurisdiction where it does not exist.³⁸ For the concurrent jurisdiction of court-martial and military commission, see the Madsen case.³⁹ Generally, the action takes the form of habeas corpus and proceedings can be brought in the District of Columbia for persons imprisoned overseas (provided, of course, that there is otherwise U.S. jurisdiction).⁴⁰ It has been held that aliens imprisoned overseas after court-martial conviction cannot test due process by habeas corpus,⁴¹ although citizens can.⁴²

c. The Individual's Relationship to the Armed Forces.

We come finally, then, to the question of the civilian's relationship to the armed forces. In what instances has the court-martial jurisdiction been supported and how have the courts reacted to the varying conditions of fact? There are a few landmark cases that are constantly cited. In World War I, several appear. A civilian employed by the quartermaster department and assigned to a vessel transporting army supplies attempted to leave the ship before it sailed from Brooklyn. He was held to be

³⁴Ex parte Johnson, 3 F. 2d 705 (Kan. 1925) - The military has an implicit power to regulate itself.

³⁵United States ex rel. Roberson v. Keating, 121 F. Supp. 477 (N.D., Ill. 1949).

³⁶Ex parte Vallandigham, 68 U.S. 243 (1864).

³⁷United States ex rel. Wessels v. McDonald, 265 Fed. 754 (E.D.N.Y. 1920).

³⁸McClaghry v. Deming, 186 U.S. 49 (1902).

³⁹Madsen v. Kinsella, 343 U.S. 341 (1952).

⁴⁰Reid v. Covert (supra).

⁴¹Johnson v. Eisentrager, 339 U.S. 763 (1950).

⁴²In re Bush, 84 F. Supp. 873 (D.C. 1949).

serving with the armies in the field.⁴³ Still more clearly, a civilian mate on a military transport was discharged overseas and was returning to the U.S. on an army transport. After volunteering to stand watches, he refused to continue. He was held to be "accompanying" and "serving with" the armies of the U.S. "in the field."⁴⁴ Another civilian doing quartermaster work with the army on the Mexican border was held to be accompanying a force "in the field." The continual imminence of actual conflict was a factor the court considered controlling.⁴⁵ However, some limits are drawn and a civilian employee of a contractor building a camp in the U.S. was held not to be accompanying the forces, nor was he a "retainer." In this instance, he was apparently engaged in the transportation of certain government employees in the audit department. The question of whether or not the individual was "in the field" was not discussed by the court.⁴⁶ Among other civilians of this period who were held properly under military jurisdiction, we find: a field auditor in a quartermaster office in South Carolina; laborers employed by civilian contractors engaged by the American Expeditionary Force in France; a scout in Texas; laborers on docks at ports of embarkation; members of a labor unit in France; stevedores employed by the army in France; Red Cross personnel serving with the army overseas; the captain of an army transport in the Port of New York; merchant seamen on army transports at sea or in English, French, or American ports; a telephone operator employed by the army in France; secretaries, and other employees of the YMCA and Knights of Columbus in France.⁴⁷

Winthrop suggests that "retainers to the camp" are officers' servants or camp followers, and among the latter, subject to court-martial, he mentions sutlers, sutlers' employees, newspaper correspondents, telegraph operators and "some others." Among the more numerous class of those serving with the armies in the field (this, the Civil War, of course) were: civilian clerks, teamsters, laborers and other employees of the "different staff departments," hospital officials and attendants, veterinaries, interpreters, guides, scouts and spies.⁴⁸

In World War II, the ship's cook again appeared in a situation quite similar to the Falls case of World War I. The merchant seaman here was once more held to be "in the field" even though the ship, under charter to the government, was standing at a Norfolk dock.⁴⁹ Two instances of civilians employed by U. S. contractors overseas are worth noting. Both occurred in Eritrea, former enemy-held territory.

⁴³Ex parte Falls, 251 Fed. 415 (N.J. 1918).

⁴⁴Ex parte Gerlach, 247 Fed. 616 (S.D.N.Y. 1917).

⁴⁵Ex parte Jochen, 257 Fed. 200 (S.D. Tex. 1919).

⁴⁶Ex parte Weitz, 256 Fed. 58 (Mass. 1919).

⁴⁷AYCOCK & WURFEL op. cit. supra at 55.

⁴⁸WINTHROP op. cit. supra at 99-100.

⁴⁹McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943).

In the earlier case, the individual was employed by Douglas Aircraft in the operation of an aircraft depot. A conviction of theft by a court-martial was upheld⁵⁰ although the case was criticized on the basis that connection with the armed services was too remote.⁵¹ In the second and later case, the facts were essentially the same.⁵² In each instance, the defendant was held to be "accompanying" the armed forces, and the fact that employment had in fact terminated either prior to the crime or prior to trial was not considered relevant.

Other instances in World War II in which military jurisdiction over civilians was exercised either outside the territorial U.S. or in the field were: employees of the Board of Economic Warfare sent overseas at the Theater Commander's request to feed and clothe the civilian population; electricians employed by the Corps of Engineers; mechanics at overseas bases; USO entertainers; American newspaper correspondents officially accredited to the Army; civilian passengers on army transports or commercial vessels under army control carrying military cargo; post exchange employees at camps in the U.S.; agents of the Treasury Department on foreign fund control work in North Africa; Civil Service pilots of the Air Corps Ferrying Command; Civil Air Patrol pilots under orders of Army Theater Commanders; police and guards at important installations both in the U.S. and overseas; civilian seamen and employees of vessels operated by or under army control; and messmen and cooks on private ships carrying military cargo.⁵³

On the other hand, certain classes of persons have been determined - at least, by the Judge Advocate General of the Army - not to be subject to military law: laborers, mechanics or professional personnel at industrial establishments in the U.S.; employees engaged by an independent contractor on the Inter-American highway under the direction of Army Engineer officers, but where no troops were present; clerical employees in the U.S. not at military camps; civilian guards of overseas OSS installations.⁵⁴

These were all in wartime. However, the UCMJ extends jurisdiction not only to persons "serving or accompanying an armed force in the field" in time of war, but also to those "serving with, employed by, or accompanying the armed forces" outside certain territorial limits without regard to whether it is war or peace. Thus, civilians who are not "in the field" in wartime would also be covered by the second portion, but generally it applies to peacetime rather than war. Civilian employees who are part of the armed forces have been held properly subject to court-martial jurisdiction. In one instance, the individual took an oath of office and was "in" the naval service. (The crime itself occurred aboard a naval vessel at Norfolk.)⁵⁵

⁵⁰In re Di Bartolo, 50 F. Supp. 929 (S.D.N.Y 1943).

⁵¹Comment 13 FORDHAM L.R. 122 (1944).

⁵²Perlstein v. United States, 151 F. 2d 167 (3d Cir. 1945).

⁵³AYCOCK & WURFEL op. cit. supra at 56-57.

⁵⁴Id at 58.

⁵⁵Johnson v. Sayre, 158 U.S. 114 (1895).

Where, however, the independent civilian status is distinct, it would seem that - except in wartime where the "field" is inside the limits - the act must take place outside the stipulated territorial boundaries. When it does, military jurisdiction over civilian employees has been upheld. The Court of Military Appeals has affirmed it for a civilian employee superintending operation of a plant by the army under contract with a local corporation in Japan.⁵⁶ And a federal district court in California reached the same result for another civilian employee of the army in Japan. The case is useful for a review of the problem but it was decided before Covert and holds that the Constitution does not extend overseas.⁵⁷ In a prosecution after Covert, the D.C. district court supported court-martial jurisdiction over a civilian employee of the Air Force who was convicted of larceny at the installation in Nouasseur, Morocco. Judge Holtzoff distinguished Covert by the difference between service-men's dependents and civilian employees, a difference he found recognized in principle by Mr. Justice Black.⁵⁸ (On the other hand, this distinction was not followed by the majority opinion on appeal, although it was advocated in the strong dissent to reversal of the district court.⁵⁹) And again in a recent decision of a federal district court, a civilian employee of the army in France was found to be "in" the forces even though not inducted and not in uniform. It seems clear in this instance that the judge was pointing an issue for the Supreme Court in an unresolved area.⁶⁰ The case is under appeal and perhaps the effort will be successful.

In the matter of dependents who commit less-than-capital crimes, a federal district court in the only case so far reported has followed Covert "much as I may disagree with it." (The charge was involuntary manslaughter and the USCMA had already decided in favor of military jurisdiction.)⁶¹

⁵⁶United States v. Marker, 1 U.S.C.M.A. 393; 3 C.M.R. 127 (1952).

⁵⁷In re Varney's Petition, 141 F. Supp. 190 (S.D. Cal. 1956).

⁵⁸United States ex rel. Guagliardo v. McElroy, 158 F. Supp. 171 (D.C. 1958).

⁵⁹Id. 27 U.S. L. Week 2117 (D.C. Cir. No. 14304, Sept. 12, 1958). The circuit court considered the provisions of art. 2 (11) of the UCMJ non-severable and applied Covert. It observed that legislation bringing some civilians under military jurisdiction for some offenses would not necessarily be unconstitutional. In a dissenting opinion that expressly did not "reach the question of capital cases of those serving with or employed by the military". Judge Burger found no real problem of statutory construction. The provisions of the UCMJ were easily severable and presumptions of constitutionality should not be "so quickly cast aside." Black's distinction of "in" the forces clearly suggested a difference between dependents and employees (in non-capital cases). (This seems much clearer reasoning than the majority point that the "wisdom of refraining from avoidable constitutional pronouncements" lead it to decide on non-severability. It's either severable or it isn't.)

⁶⁰Grisham v. Taylor, 161 F. Supp. 112 (M.D. Pa. 1958).

⁶¹Singleton v. Kinsella, 27 U.S. L. Week 2118 (S.W. Va. 1958).

Another group of civilians tried by court-martial are the ex-servicemen who were on active duty when the crime was committed. The traditional attitude may be found in a case where, while the defendant was not a civilian at the time of trial, the civilian rights were observed. In an Illinois federal district court, a sailor who was honorably discharged - without deceit or misrepresentation on his part - re-enlisted and was then tried for an offense committed in his previous period of service. The court observed that members of the military forfeit certain constitutional rights when they don the uniform but that these rights become immediately available again when the service ends. It held that the discharge ended the court-martial jurisdiction for the prior period.⁶² This was precisely the situation that Congress sought to change by art. 3(a) of the UCMJ. The Supreme Court met the question in United States ex rel. Toth v. Quarles.⁶³ A serviceman who had been honorably discharged was subsequently charged with a murder committed during his tour in Korea, arrested and returned overseas for military trial. The court found that the constitutional protections prevailed and that the statute was in conflict.

Although the serviceman returned to civilian is usually beyond the military area, the serviceman dishonorably discharged and confined under military control does not recover his constitutional rights. Thus, the court found that there was no denial of due process for an ex-soldier who murdered a fellow prisoner in a military establishment.⁶⁴ Similarly in Lee v. Madigan⁶⁵ the district court rejected the argument that a military prisoner attained a civilian status as the result of a dishonorable discharge. The language of the present Code (art. 2(7)) is explicit although as yet untested. It would seem reasonable to assume that military jurisdiction in this situation would be supported on the theory that civilian status has not been reacquired. The fact that it might be peacetime should not affect the conclusion.

We have been considering persons who have some voluntary connection with the military through service, occupational attachment or domestic relationship. There are other classes where jurisdiction arises as the result of belligerency or a state of emergency. The characteristics of martial law have been described above. Its essential provocation is emergency and while military jurisdiction covers all within its cognizance, it can be applied to civilians only where the civil courts are not "open" and functioning in the normal fashion,⁶⁶ and may continue only until the civil courts resume.⁶⁷ As a result of belligerency, we find spies, saboteurs and "fifth columnists" brought to trial before

⁶²Roberson v. Keating (supra).

⁶³350 U.S. 11 (1955).

⁶⁴Kahn v. Anderson, 255 U.S. 1 (1920).

⁶⁵148 F. Supp. 23 (N.D. Cal. 1957).

⁶⁶Ex parte Milligan (supra).

⁶⁷Duncan v. Kahanamoku, 327 U.S. 304 (1946).

military tribunals. There are ample instances in the Revolutionary and Civil Wars but two recent examples of World War II should suffice. In each, the individuals were trained by the enemy and apprehended inside the U.S. And in each the trial was by military commission. The most significant point from our view is a challenge to jurisdiction based on the U.S. citizenship of one of the defendants. In neither case did the court find the objection valid and ruled in effect that U.S. citizenship did not confer any rights not otherwise accorded a defendant in this position. (It should be noted that any question of treason, however, was either overcome or avoided.)⁶⁸ Still other groups affected by military jurisdiction are prisoners of war and beyond the usage and custom of war are various international understandings concerning them that we won't go into here.⁶⁹

7. Conclusions

Covert decided the narrow point that dependents of servicemen ^{not} may be tried under military jurisdiction for capital offenses committed overseas in peacetime. We have taken a look at military jurisdiction, its background and development. Particular principles of law have been noted, and cases limning the limits of fact have been mentioned. In brief, the problem of military jurisdiction is the conflict between the needs of the armed forces to preserve order and discipline - the marrow of their existence - and the personal rights preserved for the individual by the Constitution. We've found that many of these rights are suspended when the citizen becomes a part of the armed forces. Notably - and mainly for this review - there is no longer an entitlement to indictment and trial by jury. The question then is whether a given class of persons becomes such a "part" of the services. There is no doubt about the man who takes his oath and climbs into uniform. He falls within military jurisdiction with all its limitations. And he remains under this jurisdiction as long as he stays under military control even though he may have been dishonorably discharged from his service. Once, however, he again becomes a civilian without trick or collusion, military jurisdiction for all previous crimes is lost. Who else might be considered "part" of the forces? The myriad types of camp-followers or retainers have now been codified to include all those: (1) "serving with" or "accompanying" an armed force in the field in wartime; (2) "serving with", "employed by," or "accompanying" the armed forces outside certain territorial limits in either war or peace and (3) on leased bases outside certain territorial limits. While the cases give considerable guidance on the nature of the connection with the forces, there will almost certainly be some further argument over the interpretation of "in the field" and even "in time of war." But the connection with the services is still the crux

⁶⁸Ex parte Quirin, 317 U.S. 1 (1942); Colepaugh v. Looney, 235 F. 2d 429 (10th Cir. 1956).

⁶⁹See: Geneva Convention on Prisoners of War, July, 1929, 47 Stat. 2030, 2058; Geneva Convention on the Sick and Wounded, July, 1929, 47 Stat. 2074; Hague Convention on Laws and Customs of War on Land, 1907 (note: "Spies" arts. 29 et seq.); as well as WILSON, RULES OF LAND WARFARE, U.S., Ch. 15, (1914).

of the question. Certainly the dependents in Covert were "accompanying" the forces. Yet the court felt that they should have their constitutional protection in a capital case in peacetime. The extent to which the military may exert its own cohesion probably has to be limited at the moment to these exact considerations. Both Harlan and Frankfurter were specific on the capital aspect and Black agreed with Winthrop's emphatic assertion that "a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace." The Covert case, of course, stands as an overturning of the Ross doctrine - the continental limitation on constitutional rights. Now the court feels the Constitution follows the citizen around the world and has its effect in war as well as peace. To take the Winthrop quote at its exact face value is probably ante-bellum in every sense. The ranging area of military occupation today has brought problems and purposes certainly not applicable prior to World War I. The court has seemed to say that if a person is "in" the forces, the constitutional rights are beyond his reach, regardless of where he is or whether it is war or peace. If he is not "in" the forces, then it would seem to follow that the rights may be available. But what is being "in"? The code says "accompanying" (which the dependents were), yet their rights prevailed in capital cases. What will happen for: dependents in less-than-capital cases, civilians employed either directly or indirectly by the forces, dependents of the latter group? The lower federal judiciary have shown their thought by upholding military jurisdiction over civilian employees in both capital and lesser offenses. We should hasten to add "in peacetime." Whether the code is constitutional for a given class of people, depending on whether their service, employment or accompaniment makes them in effect a part of the services, should probably depend on the balanced view. Rather than flatly concluding that no peacetime statute is constitutional or that personal rights are always subordinate to the military need - no matter how remote, some middle ground seems preferable. Mr. Justice Harlan suggests this in Covert on the basis "of what process is 'due' a defendant in the particular circumstances of a particular case." This recognizes the private constitutional safeguards but it relates them directly to the needs and demands of the military organization. It does not draw at once a sharp clear line, but there is nothing to suggest that this cannot be developed by certain well-defined issues. One of these seems to be already on its way. We suggest that the matter of employees can be decided on the relationship theory ("in" or not "in" the forces) or by a "due process" rationale. If the "due process" approach is taken - as it could compatibly be - even military jurisdiction over dependents for less-than-capital offenses could be upheld without clouding stare decisis. This would seem the more realistic conclusion, and particularly so when we remember that most of this discussion has pertained to peacetime conditions. Very likely, most of the limitations on military jurisdiction that apply in peace would not apply in time of war. However, this, again, is simply a factor to be fed into the thinking of what process may or may not be "due" a given class of persons.

As what should probably be a final footnote, one aspect of this problem deserves a passing comment. In a number of instances, the courts have shown some degree of influence by the alternatives that would exist when military

jurisdiction was not available. We were led to the consular courts by a real concern over the justice that might be meted out to our citizens overseas in the "pagan" countries under civilizations that we thought completely inimical to our own. The waiver of local sovereignty was accomplished, of course, by treaty. In the absence of a court of our own overseas - the waiver still available - we were faced with the difficulties of returning the person to this country for trial with appropriate witnesses. An extra-territorial court, assuming the Ross doctrine is completely repudiated, still poses the matter of finding proper jurors. One solution offered from time to time is a court that would extend the so-called "Article III" jurisdiction overseas.⁷⁰ Done independently of the military, this naturally would require new waivers of jurisdiction. Within the military framework, however, special provisions might be made for civil jurors in certain situations, or constitutional safeguards might be provided through appellate procedures. Thus the overall effect of the Status-of-Forces Agreements (SOFA) would be untouched. Just a word on these. Under the form of the NATO SOFA, jurisdiction is exclusive for offenses punishable by the laws of one state and not of the other. The host country has primary jurisdiction in all cases other than those where the offense is against the property or security of the United States or the person or property of another member of the U.S. forces, or where the offense occurs in the course of official duty. The state with primary rights shall give "sympathetic consideration" to a request for waiver. (There are miscellaneous provisions for mutual assistance and certain procedural safeguards.) A further concession has been made by incorporation of the so-called "Netherlands addendum" - whereby primary rights are automatically waived by the host except in instances regarded as of "particular importance." The language leaves dependents subject to the local jurisdiction, but primary jurisdiction has never been claimed by the foreign governments. The situation could change overnight and if it did the United States would "be in no position to argue the point."⁷¹ One effect of restricting military jurisdiction is to broaden the area subject to foreign control. Bringing dependents and employees more closely within the military fold will narrow the foreign jurisdiction. Since it seems likely that renascent nationalism abroad will tend to limit concessions in the future, this would be a fair argument for preserving constitutional safeguards within the military structure already protected by the international agreements now in force. Whether, of course, even this "bringing within" the present agreements would be tolerated by the host countries is problematical. At the moment there seems to be no clear-cut and consentaneous solution, and all of the proposals have some drawbacks.⁷²

⁷⁰See a comprehensive note on this whole topic: 71 HARVARD L. R. 712 (1958). Also 6 CATHOLIC UNIV. L.R. 65 (1956).

⁷¹CRIMINAL JURISDICTION IN OVERSEAS AREAS - an analytical report by the Rand Corporation (March 18, 1958).

⁷²See the dissent of Judge Burger in *Guagliardo v. McElroy*, supra note 59.

OGC: CWP: JEM

Subject

Original

Chromo

[PUBLIC LAW 506—81ST CONGRESS]

[CHAPTER 169—2D SESSION]

[H. R. 4080]

AN ACT

To unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a Uniform Code of Military Justice for the government of the armed forces of the United States, unifying, consolidating, revising, and codifying the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, is hereby enacted as follows, and the articles in this section may be cited as "Uniform Code of Military Justice, Article _____".

UNIFORM CODE OF MILITARY JUSTICE

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PART I—GENERAL PROVISIONS

Article

1. Definitions.
2. Persons subject to the code.
3. Jurisdiction to try certain personnel.
4. Dismissed officer's right to trial by court-martial.
5. Territorial applicability of the code.
6. Judge advocates and legal officers.

ARTICLE 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, the Navy, the Air Force, and, except when operating as a part of the Navy, the Coast Guard;

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

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

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

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

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

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

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

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

(11) "Accuser" shall be construed to refer to a person who signs and swears to charges, to any person who directs that charges nominally be signed and sworn by another, and to any other person who has an interest other than an official interest in the prosecution of the accused;

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

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

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

ART. 2. Persons subject to the code.

The following persons are subject to this code:

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

(2) Cadets, aviation cadets, and midshipmen;

(3) Reserve personnel while they are on inactive duty training authorized by written orders which are voluntarily accepted by them, which orders specify that they are subject to this code;

(4) Retired personnel of a regular component of the armed forces who are entitled to receive pay;

(5) Retired personnel of a reserve component who are receiving hospitalization from an armed force;

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve;

(7) All persons in custody of the armed forces serving a sentence imposed by a court-martial;

(8) Personnel of the Coast and Geodetic Survey, Public Health Service, and other organizations, when assigned to and serving with the armed forces of the United States;

(9) Prisoners of war in custody of the armed forces;

(10) In time of war, all persons serving with or accompanying an armed force in the field;

(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands; * Guam

(12) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary of a Department and which is without the continental limits of the United States and without the following Territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands. * Guam

ART. 3. Jurisdiction to try certain personnel.

(a) Subject to the provisions of article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by court-martial by reason of the termination of said status.

(b) All persons discharged from the armed forces subsequently charged with having fraudulently obtained said discharge shall, subject to the provisions of article 43, be subject to trial by court-martial on said charge and shall after apprehension 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.

ART. 4. Dismissed officer's right to trial by court-martial.

(a) When any officer, dismissed by order of the President, makes a written application for trial by court-martial, setting forth, under oath, that he has been wrongfully dismissed, the President, as soon as practicable, shall convene a general court-martial to try such officer on the charges on which he was dismissed. A court-martial so convened shall have jurisdiction to try the dismissed officer on such charges, and he shall be held to have waived the right to plead any statute of limitations applicable to any offense with which he is charged. The court-martial may, as part of its sentence, adjudge the affirmance of the dismissal, but if the court-martial acquits the accused

* 1956 Amend.

or if the sentence adjudged, as finally approved or affirmed, does not include dismissal or death, the Secretary of the Department shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issuance.

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

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

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

ART. 5. Territorial applicability of the code.

This code shall be applicable in all places.

ART. 6. Judge advocates and legal officers.

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

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

(c) No person who has acted as member, law officer, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act as a staff judge advocate or legal officer to any reviewing authority upon the same case.

PART II—APPREHENSION AND RESTRAINT

Article

7. Apprehension.
8. Apprehension of deserters.
9. Imposition of restraint.
10. Restraint of persons charged with offenses.
11. Reports and receiving of prisoners.
12. Confinement with enemy prisoners prohibited.
13. Punishment prohibited before trial.
14. Delivery of offenders to civil authorities.

ART. 7. Apprehension.

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

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

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

Art. 8. Apprehension of deserters.

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

Art. 9. Imposition of restraint.

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

(b) An enlisted person may be ordered into arrest or confinement by any officer by an order, oral or written, delivered in person or through other persons subject to this code. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted persons of his command or subject to his authority into arrest or confinement.

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

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

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

Art. 10. Restraint of persons charged with offenses.

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

Art. 11. Reports and receiving of prisoners.

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

(b) Every commander of a guard or master at arms to whose charge a prisoner is committed shall, within twenty-four hours after

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such commitment or as soon as he is relieved from guard, report to the commanding officer the name of such prisoner, the offense charged against him, and the name of the person who ordered or authorized the commitment.

ART. 12. Confinement with enemy prisoners prohibited.

No member of the armed forces of the United States shall be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces of the United States.

ART. 13. Punishment prohibited before trial.

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

ART. 14. Delivery of offenders to civil authorities.

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

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

PART III—NON-JUDICIAL PUNISHMENT

Article

15. Commanding officer's non-judicial punishment.

ART. 15. Commanding officer's non-judicial punishment.

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

- (1) upon officers and warrant officers of his command:
 - (A) withholding of privileges for a period not to exceed two consecutive weeks; or
 - (B) restriction to certain specified limits, with or without suspension from duty, for a period not to exceed two consecutive weeks; or
 - (C) if imposed by an officer exercising general court-martial jurisdiction, forfeiture of not to exceed one-half of his pay per month for a period not exceeding one month;
- (2) upon other military personnel of his command:
 - (A) withholding of privileges for a period not to exceed two consecutive weeks; or

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

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

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

(E) if imposed upon a person attached to or embarked in a vessel, confinement for a period not to exceed seven consecutive days; or

(F) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for a period not to exceed three consecutive days.

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

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

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

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

PART IV—COURTS-MARTIAL JURISDICTION

Article

16. Courts-martial classified.
17. Jurisdiction of courts-martial in general.
18. Jurisdiction of general courts-martial.
19. Jurisdiction of special courts-martial.
20. Jurisdiction of summary courts-martial.
21. Jurisdiction of courts-martial not exclusive.

ART. 16. Courts-martial classified.

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

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

ART. 17. Jurisdiction of courts-martial in general.

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

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

ART. 18. Jurisdiction of general courts-martial.

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

ART. 19. Jurisdiction of special courts-martial.

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

ART. 20. Jurisdiction of summary courts-martial.

Subject to article 17, summary courts-martial shall have jurisdiction to try persons subject to this code except officers, warrant officers, cadets, aviation cadets, and midshipmen for any noncapital offense made punishable by this code. No person with respect to whom summary courts-martial have jurisdiction shall be brought to trial before a summary court-martial if he objects thereto, unless under the provisions of article 15 he has been permitted and has elected to refuse punishment under such article. Where objection to trial by summary court-martial is made by an accused who has not been permitted to refuse punishment under article 15, trial shall be ordered by special or general court-martial, as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe,

adjudge any punishment not forbidden by this code except death, dismissal, dishonorable or bad-conduct discharge, confinement in excess of one month, hard labor without confinement in excess of forty-five days, restriction to certain specified limits in excess of two months, or forfeiture of pay in excess of two-thirds of one month's pay.

ART. 21. Jurisdiction of courts-martial not exclusive.

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

PART V—APPOINTMENT AND COMPOSITION OF COURTS-MARTIAL

Article

22. Who may convene general courts-martial.
23. Who may convene special courts-martial.
24. Who may convene summary courts-martial.
25. Who may serve on courts-martial.
26. Law officer of a general court-martial.
27. Appointment of trial counsel and defense counsel.
28. Appointment of reporters and interpreters.
29. Absent and additional members.

ART. 22. Who may convene general courts-martial.

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

- (1) the President of the United States;
- (2) the Secretary of a Department;
- (3) the commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps;
- (4) the commander in chief of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the continental limits of the United States;
- (5) the commanding officer of an air command, an air force, an air division, or a separate wing of the Air Force or Marine Corps;
- (6) such other commanding officers as may be designated by the Secretary of a Department; or
- (7) any other commanding officer in any of the armed forces when empowered by the President.

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

ART. 23. Who may convene special courts-martial.

(a) Special courts-martial may be convened by—

- (1) any person who may convene a general court-martial;
- (2) the commanding officer of a district, garrison, fort, camp, station, Air Force base, auxiliary air field, or other place where members of the Army or Air Force are on duty;
- (3) the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;
- (4) the commanding officer of a wing, group, or separate squadron of the Air Force;

(5) the commanding officer of any naval or Coast Guard vessel, shipyard, base, or station; the commanding officer of any Marine brigade, regiment, detached battalion, or corresponding unit; the commanding officer of any Marine barracks, wing, group, separate squadron, station, base, auxiliary airfield, or other place where members of the Marine Corps are on duty;

(6) the commanding officer of any separate or detached command or group of detached units of any of the armed forces placed under a single commander for this purpose; or

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

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

ART. 24. Who may convene summary courts-martial.

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

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

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

(3) the commanding officer of a detached squadron or other detachment of the Air Force; or

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

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

ART. 25. Who may serve on courts-martial.

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

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

(c) (1) Any enlisted person on active duty with the armed forces who is not a member of the same unit as the accused shall be eligible to serve on general and special courts-martial for the trial of any enlisted person who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, prior to the convening of such court, the accused personally 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 eligible enlisted persons cannot be obtained on account of physical conditions or military exigencies. Where such persons cannot be obtained, the court may be convened and the trial held without them, but the convening authority shall make a detailed written statement, to be

appended to the record, stating why they could not be obtained.

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

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

(2) When convening a court-martial, the convening authority shall appoint as members thereof such persons as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No person shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

ART. 26. Law officer of a general court-martial.

(a) The authority convening a general court-martial shall appoint as law officer thereof an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States and who is certified to be qualified for such duty by The Judge Advocate General of the armed force of which he is a member. No person shall be eligible to act as law officer in a case when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

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

ART. 27. Appointment of trial counsel and defense counsel.

(a) For each general and special court-martial the authority convening the court shall appoint a trial counsel and a defense counsel, together with such assistants as he deems necessary or appropriate. No person who has acted as investigating officer, law officer, or court member in any case shall act subsequently as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant defense counsel in the same case. No person who has acted for the prosecution shall act subsequently in the same case for the defense, nor shall any person who has acted for the defense act subsequently in the same case for the prosecution.

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

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

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

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

(1) if the trial counsel is qualified to act as counsel before a

general court-martial, the defense counsel appointed by the convening authority shall be a person similarly qualified; and

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

ART. 28. Appointment of reporters and interpreters.

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

ART. 29. Absent and additional members.

(a) No member of a general or special court-martial shall be absent or excused after the accused has been arraigned except for physical disability or as a result of a challenge or by order of the convening authority for good cause.

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

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

PART VI—PRETRIAL PROCEDURE

Article

- 30. Charges and specifications.
- 31. Compulsory self-incrimination prohibited.
- 32. Investigation.
- 33. Forwarding of charges.
- 34. Advice of staff judge advocate and reference for trial.
- 35. Service of charges.

ART. 30. Charges and specifications.

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

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

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

(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof

in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

ART. 31. Compulsory self-incrimination prohibited.

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

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

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

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement shall be received in evidence against him in a trial by court-martial.

ART. 32. Investigation.

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

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

(c) If an investigation of the subject matter of an offense has been conducted prior to the time the accused is charged with the offense, and if the accused was present at such investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subdivision (b) of this article, no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

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

ART. 33. Forwarding of charges.

When a person is held for trial by general court-martial, the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If the same is not practicable, he shall report in writing to such officer the reasons for delay.

ART. 34. Advice of staff judge advocate and reference for trial.

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

(b) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence may be made.

ART. 35. Service of charges.

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

PART VII—TRIAL PROCEDURE

Article

36. President may prescribe rules.
37. Unlawfully influencing action of court.
38. Duties of trial counsel and defense counsel.
39. Sessions.
40. Continuances.
41. Challenges.
42. Oaths.
43. Statute of limitations.
44. Former jeopardy.
45. Pleas of the accused.
46. Opportunity to obtain witnesses and other evidence.
47. Refusal to appear or testify.
48. Contempts.
49. Depositions.
50. Admissibility of records of courts of inquiry.
51. Voting and rulings.
52. Number of votes required.
53. Court to announce action.
54. Record of trial.

ART. 36. President may prescribe rules.

(a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of

criminal cases in the United States district courts, but which shall not be contrary to or inconsistent with this code.

(b) All rules and regulations made in pursuance of this article shall be uniform insofar as practicable and shall be reported to the Congress.

ART. 37. Unlawfully influencing action of court.

No authority convening a general, special, or summary court-martial, nor any other commanding officer, shall censure, reprimand, or admonish such court or any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this code shall attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

ART. 38. Duties of trial counsel and defense counsel.

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

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

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

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

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

ART. 39. Sessions.

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

presence of the accused, the defense counsel, the trial counsel, and in general court-martial cases, the law officer.

Art. 40. Continuances.

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

Art. 41. Challenges.

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

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

Art. 42. Oaths.

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

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

Art. 43. Statute of limitations.

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

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

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

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

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

(f) When the United States is at war, the running of any statute of limitations applicable to any offense under this code—

(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 joint resolution of Congress.

ART. 44. Former jeopardy.

(a) No person shall, without his consent, be tried a second time for the same offense.

(b) No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.

(c) A proceeding which, subsequent to the introduction of evidence but prior to a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused shall be a trial in the sense of this article.

ART. 45. Pleas of the accused.

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

(b) A plea of guilty by the accused shall not be received to any charge or specification alleging an offense for which the death penalty may be adjudged.

ART. 46. Opportunity to obtain witnesses and other evidence.

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

ART. 47. Refusal to appear or testify.

(a) Every person not subject to this code who—

(1) has been duly subpoenaed to appear as a witness before any

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

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

(3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which such person may have been legally subpoenaed to produce; shall be deemed guilty of an offense against the United States.

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

(c) It shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, upon the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute any person violating this article.

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

ARR. 48. Contempts.

A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder. Such punishment shall not exceed confinement for thirty days or a fine of \$100, or both.

ARR. 49. Depositions.

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

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

(c) Depositions may be taken before and authenticated by any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

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

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

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

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

(e) Subject to the requirements of subdivision (d) of this article, testimony by deposition may be adduced by the defense in capital cases.

(f) Subject to the requirements of subdivision (d) of this article, a deposition may be read in evidence in any case in which the death penalty is authorized by law but is not mandatory, whenever the convening authority shall have directed that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial.

ART. 50. Admissibility of records of courts of inquiry.

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

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

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

ART. 51. Voting and rulings.

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

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

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

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

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

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

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

ART. 52. Number of votes required.

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

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

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

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

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

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

ART. 53. Court to announce action.

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

ART. 54. Record of trial.

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

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

(c) A copy of the record of the proceedings of each general and

special court-martial shall be given to the accused as soon as authenticated.

PART VIII—SENTENCES

Article

- 55. Cruel and unusual punishments prohibited.
- 56. Maximum limits.
- 57. Effective date of sentences.
- 58. Execution of confinement.

ART. 55. Cruel and unusual punishments prohibited.

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

ART. 56. Maximum limits.

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

ART. 57. Effective date of sentences.

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

(b) Any period of confinement included in a sentence of a court-martial shall begin to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended shall be excluded in computing the service of the term of confinement.

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

ART. 58. Execution of confinement.

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

(b) The omission of the words "hard labor" in any sentence of a court-martial adjudging confinement shall not be construed as depriving the authority executing such sentence of the power to require hard labor as a part of the punishment.

PART IX—REVIEW OF COURTS-MARTIAL

Article

- 59. Error of law; lesser included offense.
- 60. Initial action on the record.
- 61. Same—General court-martial records.
- 62. Reconsideration and revision.
- 63. Rehearings.
- 64. Approval by the convening authority.
- 65. Disposition of records after review by the convening authority.
- 66. Review by the board of review.
- 67. Review by the Court of Military Appeals.
- 68. Branch offices.
- 69. Review in the office of The Judge Advocate General.
- 70. Appellate counsel.
- 71. Execution of sentence; suspension of sentence.
- 72. Vacation of suspension.
- 73. Petition for a new trial.
- 74. Remission and suspension.
- 75. Restoration.
- 76. Finality of court-martial judgments.

ART. 59. Error of law; lesser included offense.

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

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

ART. 60. Initial action on the record.

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

ART. 61. Same—General court-martial records.

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

ART. 62. Reconsideration and revision.

(a) If a specification 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 or inconsistent action by a court-martial with respect to a finding or sentence which can be rectified without material prejudice to the substantial rights of the accused, the convening authority may return the record to the court for appropriate action. In no case, however, may the record be returned—

- (1) for reconsideration of a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty; or
- (2) for reconsideration of a finding of not guilty of any charge,

unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of this code; or

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

ART. 63. Rehearings.

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

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

ART. 64. Approval by the convening authority.

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

ART. 65. Disposition of records after review by the convening authority.

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

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

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

ART. 66. Review by the board of review.

(a) The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed

of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal court or of the highest court of a State of the United States.

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

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

(d) If the board of review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President or the Secretary of the Department or the Court of Military Appeals, instruct the convening authority to take action in accordance with the decision of the board of review. If the board of review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

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

ART. 67. Review by the Court of Military Appeals.

(a) (1) There is hereby established a Court of Military Appeals, which shall be located for administrative purposes in the Department of Defense. The Court of Military Appeals shall consist of three judges appointed from civilian life by the President, by and with the advice and consent of the Senate, for a term of fifteen years. Not more than two of the judges of such court shall be appointed from the same political party, nor shall any person be eligible for appointment to the court who is not a member of the bar of a Federal court or of the highest court of a State. Each judge shall receive a salary of \$17,500 a year and shall be eligible for reappointment. The President shall designate from time to time one of the judges to act as Chief Judge. The Court of Military Appeals shall have power to prescribe its own rules of procedure and to determine the number of judges required to constitute a quorum. A vacancy in the court shall not impair the right of the remaining judges to exercise all the powers of the court.

(2) The terms of office of the three judges first taking office after the effective date of this subdivision shall expire, as designated by the President at the time of nomination, one on May 1, 1956, one on May

1, 1961, and one on May 1, 1966. The terms of office of all successors shall expire fifteen years after the expiration of the terms for which their predecessors were appointed, but any judge appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor.

(3) Judges of the Court of Military Appeals may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, or upon the ground of mental or physical disability, but for no other cause.

(4) If any judge of the Court of Military Appeals is temporarily unable to perform his duties because of illness or other disability, the President may designate a judge of the United States Court of Appeals to fill the office for the period of disability.

(b) The Court of Military Appeals shall review the record in the following cases:

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

(2) All cases reviewed by a board of review which The Judge Advocate General orders forwarded to the Court of Military Appeals for review; and

(3) All cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.

(c) The accused shall have thirty days from the time he is notified of the decision of a board of review to petition the Court of Military Appeals for a grant of review. The court shall act upon such a petition within thirty days of the receipt thereof.

(d) In any case reviewed by it, the Court of Military Appeals 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 Court of Military Appeals, 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 Court of Military Appeals shall take action only with respect to matters of law.

(e) If the Court of Military Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing it shall order that the charges be dismissed.

(f) After it has acted on a case, the Court of Military Appeals 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 court. Otherwise, unless there is to be further action by the President, or the Secretary of the Department, The Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(g) The Court of Military Appeals and The Judge Advocates General of the armed forces shall meet annually to make a comprehensive survey of the operation of this code and report to the Com-

mittees on Armed Services of the Senate and of the House of Representatives and to the Secretary of Defense and the Secretaries of the Departments the number and status of pending cases and any recommendations relating to uniformity of sentence policies, amendments to this code, and any other matters deemed appropriate.

ART. 68. Branch offices.

Whenever the President deems such action necessary, he may direct The Judge Advocate General to establish a branch office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office one or more boards of review. Such Assistant Judge Advocate General and any such board of review shall be empowered to perform for that command, under the general supervision of The Judge Advocate General, the duties which The Judge Advocate General and a board of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval by the President.

ART. 69. Review in the office of The Judge Advocate General.

Every record of trial by general court-martial, in which there has been a finding of guilty and a sentence, the appellate review of which is not otherwise provided for by article 66, shall be examined in the office of The Judge Advocate General. If any part of the findings or sentence is found unsupported in law, or if The Judge Advocate General so directs, the record shall be reviewed by a board of review in accordance with article 66, but in such event there will be no further review by the Court of Military Appeals except pursuant to the provisions of article 67 (b) (2).

ART. 70. Appellate counsel.

(a) The Judge Advocate General shall appoint in his office one or more officers as appellate Government counsel, and one or more officers as appellate defense counsel who shall be qualified under the provisions of article 27 (b) (1).

(b) It shall be the duty of appellate Government counsel to represent the United States before the board of review or the Court of Military Appeals 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 Court of Military Appeals—

- (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 transmitted a case to the Court of Military Appeals.

(d) The accused shall have the right to be represented before the Court of Military Appeals or the board of review by civilian counsel if provided by him.

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

ART. 71. Execution of sentence; suspension of sentence.

(a) No court-martial sentence extending to death or involving a general or flag officer shall be executed until approved by the President. He shall approve the sentence or such part, amount, or com-

mutated form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence, as approved by him, except a death sentence.

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

(c) No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more shall be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals.

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

ART. 72. Vacation of suspension.

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

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

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

ART. 73. Petition for a new trial.

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

ART. 74. Remission and suspension.

(a) The Secretary of the Department and, when designated by him, any Under Secretary, Assistant Secretary, Judge Advocate Gen-

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

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

Art. 75. Restoration.

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

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

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

Art. 76. Finality of court-martial judgments.

The appellate review of records of trial provided by this code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this code, and all dismissals and discharges carried into execution pursuant to sentences by courts-martial following approval, review, or affirmation as required by this code, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73 and to action by the Secretary of a Department as provided in article 74, and the authority of the President.

PART X—PUNITIVE ARTICLES

Article

- 77. Principals.
- 78. Accessory after the fact.
- 79. Conviction of lesser included offense.
- 80. Attempts.
- 81. Conspiracy.
- 82. Solicitation.
- 83. Fraudulent enlistment, appointment, or separation.
- 84. Unlawful enlistment, appointment, or separation.

PART X—PUNITIVE ARTICLES—Continued

Article

85. Desertion.
86. Absence without leave.
87. Missing movement.
88. Contempt towards officials.
89. Disrespect towards superior officer.
90. Assaulting or willfully disobeying officer.
91. Insubordinate conduct towards noncommissioned officer.
92. Failure to obey order or regulation.
93. Cruelty and maltreatment.
94. Mutiny or sedition.
95. Arrest and confinement.
96. Releasing prisoner without proper authority.
97. Unlawful detention of another.
98. Noncompliance with procedural rules.
99. Misbehavior before the enemy.
100. Subordinate compelling surrender.
101. Improper use of countersign.
102. Forcing a safeguard.
103. Captured or abandoned property.
104. Aiding the enemy.
105. Misconduct as prisoner.
106. Spies.
107. False official statements.
108. Military property of United States—Loss, damage, destruction, or wrongful disposition.
109. Property other than military property of the United States—Waste, spoil, or destruction.
110. Improper hazarding of vessel.
111. Drunken or reckless driving.
112. Drunk on duty.
113. Misbehavior of sentinel.
114. Dueling.
115. Malingering.
116. Riot or breach of peace.
117. Provoking speeches or gestures.
118. Murder.
119. Manslaughter.
120. Rape and carnal knowledge.
121. Larceny and wrongful appropriation.
122. Robbery.
123. Forgery.
124. Maiming.
125. Sodomy.
126. Arson.
127. Extortion.
128. Assault.
129. Burglary.
130. Housebreaking.
131. Perjury.
132. Frauds against the Government.
133. Conduct unbecoming an officer and gentleman.
134. General article.

Art. 77. Principals.

Any person punishable under this code who—

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

(2) causes an act to be done which if directly performed by him would be punishable by this code;

is a principal.

Art. 78. Accessory after the fact.

Any person subject to this code who, knowing that an offense pun-

ishable by this code has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct.

ART. 79. Conviction of lesser included offense.

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

ART. 80. Attempts.

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

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

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

ART. 81. Conspiracy.

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

ART. 82. Solicitation.

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

(b) Any person subject to this code who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of article 99 or sedition in violation of article 94 shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct.

ART. 83. Fraudulent enlistment, appointment, or separation.

Any person who—

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

(2) procures his own separation from the armed forces by means of knowingly false representations or deliberate concealment as to his eligibility for such separation;

shall be punished as a court-martial may direct.

ART. 84. Unlawful enlistment, appointment, or separation.

Any person subject to this code who effects an enlistment or appointment in or a separation from the armed forces of any person who is known to him to be ineligible for such enlistment, appointment, or

separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct.

ART. 85. Desertion.

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

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

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

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

is guilty of desertion.

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

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

ART. 86. Absence without leave.

Any member of the armed forces who, without proper authority—

(1) fails to go to his appointed place of duty at the time prescribed; or

(2) goes from that place; or

(3) absents himself or remains absent from his unit, organization, or other place of duty at which he is required to be at the time prescribed;

shall be punished as a court-martial may direct.

ART. 87. Missing movement.

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

ART. 88. Contempt towards officials.

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

ART. 89. Disrespect towards superior officer.

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

ART. 90. Assaulting or willfully disobeying officer.

Any person subject to this code who—

(1) strikes his superior officer or draws or lifts up any weapon

or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior officer; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

ART. 91. Insubordinate conduct towards noncommissioned officer.

Any warrant officer or enlisted person who—

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

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

(3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while such officer is in the execution of his office; shall be punished as a court-martial may direct.

ART. 92. Failure to obey order or regulation.

Any person subject to this code who—

(1) violates or fails to obey any lawful general order or regulation; or

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the same; or

(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct.

ART. 93. Cruelty and maltreatment.

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

ART. 94. Mutiny or sedition.

(a) Any person subject to this code—

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

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

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

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

ART. 95. Arrest and confinement.

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

ART. 96. Releasing prisoner without proper authority.

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

ART. 97. Unlawful detention of another.

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

ART. 98. Noncompliance with procedural rules.

Any person subject to this code who—

- (1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this code; or
 - (2) knowingly and intentionally fails to enforce or comply with any provision of this code regulating the proceedings before, during, or after trial of an accused;
- shall be punished as a court-martial may direct.

ART. 99. Misbehavior before the enemy.

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

- (1) runs away; or
 - (2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend; or
 - (3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property; or
 - (4) casts away his arms or ammunition; or
 - (5) is guilty of cowardly conduct; or
 - (6) quits his place of duty to plunder or pillage; or
 - (7) causes false alarms in any command, unit, or place under control of the armed forces; or
 - (8) willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy; or
 - (9) does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies when engaged in battle;
- shall be punished by death or such other punishment as a court-martial may direct.

ART. 100. Subordinate compelling surrender.

Any person subject to this code who compels or attempts to compel a commander of any place, vessel, aircraft, or other military property, or of any body of members of the armed forces, to give it up to an enemy or to abandon it, or who strikes the colors or flag to an enemy

without proper authority, shall be punished by death or such other punishment as a court-martial may direct.

ART. 101. Improper use of countersign.

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

ART. 102. Forcing a safeguard.

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

ART. 103. Captured or abandoned property.

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

(b) Any person subject to this code who—

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

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

(3) engages in looting or pillaging;

shall be punished as a court-martial may direct.

ART. 104. Aiding the enemy.

Any person who—

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

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

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

ART. 105. Misconduct as a prisoner.

Any person subject to this code who, while in the hands of the enemy in time of war—

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

(2) while in a position of authority over such persons maltreats them without justifiable cause;

shall be punished as a court-martial may direct.

ART. 106. Spies.

Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces of the United States, or in

or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.

ART. 107. False official statements.

Any person subject to this code who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing the same to be false, or makes any other false official statement knowing the same to be false, shall be punished as a court-martial may direct.

ART. 108. Military property of United States—Loss, damage, destruction, or wrongful disposition.

Any person subject to this code who, without proper authority—

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

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

ART. 109. Property other than military property of United States—Waste, spoil, or destruction.

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

ART. 110. Improper hazarding of vessel.

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

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

ART. 111. Drunken or reckless driving.

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

ART. 112. Drunk on duty.

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

ART. 113. Misbehavior of sentinel.

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

ART. 114. Dueling.

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

ART. 115. Malingering.

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

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

(2) intentionally inflicts self-injury;
shall be punished as a court-martial may direct.

ART. 116. Riot or breach of peace.

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

ART. 117. Provoking speeches or gestures.

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

ART. 118. Murder.

Any person subject to this code who, without justification or excuse, unlawfully kills a human being, when he—

(1) has a premeditated design to kill; or

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

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

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;
is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under paragraph (1) or (4) of this article, he shall suffer death or imprisonment for life as a court-martial may direct.

ART. 119. Manslaughter.

(a) Any person subject to this code who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter and shall be punished as a court-martial may direct.

(b) Any person subject to this code who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being—

(1) by culpable negligence; or

(2) while perpetrating or attempting to perpetrate an offense, other than those specified in paragraph (4) of article 118, directly affecting the person;

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

ART. 120. Rape and carnal knowledge.

(a) Any person subject to this code who commits an act of sexual intercourse with a female not his wife, by force and without her con-

sent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

(b) Any person subject to this code who, under circumstances not amounting to rape, commits an act of sexual intercourse with a female not his wife who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct.

(c) Penetration, however slight, is sufficient to complete these offenses.

ART. 121. Larceny and wrongful appropriation.

(a) Any person subject to this code who 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—

(1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate the same to his own use or the use of any person other than the true owner, steals such property and is guilty of larceny; or

(2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate the same to his own use or the use of any person other than the true owner is guilty of wrongful appropriation.

(b) Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct.

ART. 122. Robbery.

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

ART. 123. Forgery.

Any person subject to this code who, with intent to defraud—

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

(2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered;

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

ART. 124. Maiming.

Any person subject to this code who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which—

(1) seriously disfigures his person by any mutilation thereof;

or
(2) destroys or disables any member or organ of his body; or

(3) seriously diminishes his physical vigor by the injury of any member or organ;

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

ART. 125. Sodomy.

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

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

ART. 126. Arson.

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

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

ART. 127. Extortion.

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

ART. 128. Assault.

(a) Any person subject to this code who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(b) Any person subject to this code who—

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

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

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

ART. 129. Burglary.

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

ART. 130. Housebreaking.

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

ART. 131. Perjury.

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

ART. 132. Frauds against the Government.

Any person subject to this code—

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

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

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

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

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

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

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

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

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

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

ART. 133. Conduct unbecoming an officer and gentleman.

Any officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

ART. 134. General article.

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

PART XI—MISCELLANEOUS PROVISIONS

Article

135. Courts of inquiry.

136. Authority to administer oaths and to act as notary.

137. Articles to be explained.

138. Complaints of wrongs.

139. Redress of injuries to property.

140. Delegation by the President.

ART. 135. Courts of inquiry.

(a) Courts of inquiry to investigate any matter may be convened by

any person authorized to convene a general court-martial or by any other person designated by the Secretary of a Department for that purpose whether or not the persons involved have requested such an inquiry.

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

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

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

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

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

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

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

ART. 136. Authority to administer oaths and to act as notary.

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

- (1) All judge advocates of the Army and Air Force;
- (2) All law specialists;
- (3) All summary courts-martial;
- (4) All adjutants, assistant adjutants, acting adjutants, and personnel adjutants;
- (5) All commanding officers of the Navy and Coast Guard;
- (6) All staff judge advocates and legal officers, and acting or assistant staff judge advocates and legal officers; and
- (7) All other persons designated by regulations of the armed forces or by statute.

(b) The following persons on active duty in the armed forces shall have authority to administer oaths necessary in the performance of their duties:

- (1) The president, law officer, trial counsel, and assistant trial counsel for all general and special courts-martial;
- (2) The president and the counsel for the court of any court of inquiry;
- (3) All officers designated to take a deposition;
- (4) All persons detailed to conduct an investigation;
- (5) All recruiting officers; and
- (6) All other persons designated by regulations of the armed forces or by statute.

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

(d) The signature without seal of any such person acting as notary, together with the title of his office, shall be prima facie evidence of his authority.

ART. 137. Articles to be explained.

Articles 2, 3, 7 through 15, 25, 27, 31, 37, 38, 55, 77 through 134, and 137 through 139 of this code shall be carefully explained to every enlisted person at the time of his entrance on active duty in any of the armed forces of the United States, or within six days thereafter. They shall be explained again after he has completed six months of active duty, and again at the time he reenlists. A complete text of the Uniform Code of Military Justice and of the regulations prescribed by the President thereunder shall be made available to any person on active duty in the armed forces of the United States, upon his request, for his personal examination.

ART. 138. Complaints of wrongs.

Any member of the armed forces who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to any superior officer who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. That officer shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department concerned a true statement of such complaint, with the proceedings had thereon.

ART. 139. Redress of injuries to property.

(a) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that his property has been wrongfully taken by members of the armed forces he may, subject to such regulations as the Secretary of the Department may prescribe, convene a board to investigate the complaint. The board shall consist of from one to three officers and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The order of such commanding officer directing charges herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the damages so assessed and approved.

(b) Where the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in such proportion as may be deemed just upon the individual members thereof who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board.

ART. 140. Delegation by the President.

The President is authorized to delegate any authority vested in him under this code, and to provide for the subdelegation of any such authority.

SEC. 2. If any article or part thereof, as set out in section 1 of this Act, shall be held invalid, the remainder shall not be affected thereby.

SEC. 3. No inference of a legislative construction is to be drawn by reason of the part in which any article is placed nor by reason of the catch lines of the part or the article as set out in section 1 of this Act.

SEC. 4. All offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the effective date of this Act under any law embraced in or modified, changed, or repealed by this Act may be prosecuted, punished, and enforced, and action thereon may be completed, in the same manner and with the same effect as if this Act had not been passed.

SEC. 5. This Act shall become effective on the last day of the twelfth month after approval of this Act, or on July 1, 1950, whichever date is later: *Provided*, That the provisions of article 67 (a) of this Act shall become effective on the last day of the ninth month after approval of this Act: *Provided further*, That the provisions of section 12 of this Act shall become effective on the date of the approval of this Act.

SEC. 6. Articles of War 107, 108, 112, 113, 119, and 120 (41 Stat. 809, 810, 811), as amended, are further amended as follows:

- (a) Delete from article 107, the words "Article 107."
- (b) Delete from article 108, the words "Article 108."
- (c) Delete from article 112, the words "Article 112."
- (d) Delete from article 113, the words "Article 113."
- (e) Delete from article 119, the words "Article 119."
- (f) Delete from article 120, the words "Article 120."

These provisions as amended herein shall be construed to have the same force, effect, and applicability as they now have, but shall not be known as "Articles of War".

SEC. 7. (a) AUTHORITY OF NAVAL OFFICERS AFTER LOSS OF VESSEL OR AIRCRAFT.—When the crew of any naval vessel or naval aircraft are separated from their vessel or aircraft by means of its wreck, loss, or destruction, all the command and authority given to the officer of such vessel or aircraft shall remain in full force until such crew shall be regularly discharged or reassigned by competent authority.

(b) AUTHORITY OF OFFICERS OF SEPARATE ORGANIZATION OF MARINES.—When a force of marines is embarked on a naval vessel or vessels, as a separate organization, not a part of the authorized complement thereof, the authority and powers of the officers of such separate organizations of marines shall be the same as though such organization were serving at a naval station on shore, but nothing herein shall be construed as impairing the paramount authority of the com-

manding officer of any vessel over the vessel under his command and all persons embarked thereon.

(c) **COMMANDERS' DUTIES OF EXAMPLE AND CORRECTION.**—All commanding officers and others in authority in the naval service are required to show in themselves a good example of virtue, honor, patriotism, and subordination; to be vigilant in inspecting the conduct of all persons who are placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Navy, all persons who are guilty of them; and to take all necessary and proper measures, under the laws, regulations, and customs of the naval service, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.

(d) **DIVINE SERVICE.**—The commanders of vessels and naval activities to which chaplains are attached shall cause divine service to be performed on Sunday, whenever the weather and other circumstances allow it to be done; and it is earnestly recommended to all officers, seamen, and others in the naval service diligently to attend at every performance of the worship of Almighty God.

(e) **REVERENT BEHAVIOR.**—All persons in the Navy are enjoined to behave themselves in a reverent and becoming manner during divine service.

OATH OF ENLISTMENT

SEC. 8. Every person who is enlisted in any armed force shall take the following oath or affirmation at the time of his enlistment: "I, _____, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice." This oath or affirmation may be taken before any officer.

REMOVAL OF CIVIL SUITS

SEC. 9. When any civil or criminal prosecution is commenced in any court of a State of the United States against any member of the armed forces of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the armed forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed by law, and the cause shall thereupon be entered on the docket of such district court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine said cause.

DISMISSAL OF OFFICERS

SEC. 10. No officer shall be dismissed from any of the armed forces except by sentence of a general court-martial, or in 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, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a Federal or State penitentiary or correctional institution.

SEC. 11. The proviso of section 3 of the Act of April 9, 1906 (34 Stat. 104, ch. 1370), is amended to read as follows:

“Provided, That such midshipman shall not be confined in a military or naval prison or elsewhere with men who have been convicted of crimes or misdemeanors; and such finding and sentence shall be subject to review in the manner prescribed for general court-martial cases.”

SEC. 12. Under such regulations as the President may prescribe, The Judge Advocate General of any of the armed forces is authorized upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad-conduct discharge, previously executed, a form of discharge authorized for administrative issuance, in any court-martial case involving offenses committed during World War II in which application is made within one year after termination of the war, or after its final disposition upon initial appellate review whichever is the later: *Provided*, That only one such application for a new trial may be entertained with regard to any one case: *And provided further*, Within the meaning of this section and of article of war 53, World War II shall be deemed to have ended as of the effective date of this Act.

QUALIFICATIONS OF THE JUDGE ADVOCATES GENERAL

SEC. 13. Hereafter The Judge Advocate General of an armed force, exclusive of the present incumbents and exclusive of the Coast Guard, shall be appointed from among those officers who at the time of such appointment are members of the bar of a Federal court or the highest court of a State or Territory and who have had not less than a total of eight years' experience in legal duties as commissioned officers.

SEC. 14. The following sections or parts thereof of the Revised Statutes or Statutes at Large are hereby repealed. Any substantive rights or liabilities existing under such sections or parts thereof prior to the effective date of this Act shall not be affected by this repeal, and this Act shall not be effective to authorize trial or punishment for any offense if such trial or punishment is barred by the provisions of existing law:

(a) Chapter II of the Act of June 4, 1920 (41 Stat. 759, 787-811, ch. 227), as amended, except Articles of War 107, 108, 112, 113, 119, and 120;

(b) Revised Statutes, 1228 through 1230;

(c) Act of January 19, 1911 (36 Stat. 894, ch. 22);

(d) Paragraph 2 of section 2 of the Act of March 4, 1915 (38 Stat. 1062, 1084, ch. 143);

(e) Revised Statutes 1441, 1621, and 1624, articles 1 through 14 and 16 through 63, as amended;

(f) The provision of section 1457, Revised Statutes, which subjects

officers retired from active service to the rules and articles for the government of the Navy and to trial by general court-martial;

(g) Section 2 of the Act of June 22, 1874 (18 Stat. 191, 192, ch. 392);

(h) The provision of the Act of March 3, 1893 (27 Stat. 715, 716, ch. 212), under the heading "Pay, Miscellaneous", relating to the punishment for fraudulent enlistment and receipt of any pay or allowances thereunder;

(i) Act of January 25, 1895 (28 Stat. 639, ch. 45), as amended;

(j) Provisions contained in the Act of March 2, 1895 (28 Stat. 825, 838, ch. 186), as amended, under the heading "Naval Academy", relating to the power of the Secretary of the Navy to convene general courts-martial for the trial of naval cadets (title changed to "midshipmen" by Act of July 1, 1902, 32 Stat. 662, 686, ch. 1368), his power to approve proceedings and execute sentences of such courts-martial, and the exceptional provision relating to approval, confirmation, and carrying into effect of sentences of suspension and dismissal;

(k) Sections 1 through 12 and 15 through 17 of the Act of February 16, 1909 (35 Stat. 621, 623, ch. 131);

(l) The provision of the Act of August 29, 1916 (39 Stat. 556, 573, ch. 417), under the heading "Hospital Corps", making officers and enlisted men of the Medical Department of the Navy who are serving with a body of marines detached for service with the Army subject to the rules and Articles of War while so serving;

(m) The provisions in the Act of August 29, 1916 (39 Stat. 556, 586, ch. 417), under the heading "Administration of Justice";

(n) Act of October 6, 1917 (40 Stat. 393, ch. 93);

(o) Act of April 2, 1918 (40 Stat. 501, ch. 39);

(p) Act of April 25, 1935 (49 Stat. 161, ch. 81);

(q) The provision of section 6, title I, of the Naval Reserve Act of 1938 (52 Stat. 1175, 1176, ch. 690), making members of the Fleet Reserve and officers and enlisted men who have been or may be transferred to the retired list of the Naval Reserve Force or the Naval Reserve or the honorary retired list with pay subject to the laws, regulations, and orders for the government of the Navy;

(r) Section 301, title III, of the Naval Reserve Act of 1938 (52 Stat. 1175, 1180, ch. 690);

(s) Act of March 22, 1943 (57 Stat. 41, ch. 18);

(t) Act of April 9, 1943 (57 Stat. 58, ch. 36);

(u) Title 14, United States Code, sections 4 (f) and 758;

(v) All of chapter 15 of title 14, United States Code, including the chapter number, the analysis, and the reference thereto in the table of contents to part I.

SEC. 15. Section 227 of title 14, United States Code, is amended by striking out the word "dismissal" and inserting in lieu thereof the word "discharge" in the catchline; and by striking out the word "dismiss" and inserting in lieu thereof the word "discharge" in the text.

SEC. 16. (a) Chapter 13 of title 14, United States Code is amended by adding at the end thereof the following new sections:

"§ 508. Deserters; arrest of by civil authorities; penalties.

"(a) Any civil officer having authority to arrest offenders under the laws of the United States or of any State, Territory, or District, may

arrest summarily a deserter from the Coast Guard and deliver him into the custody of Coast Guard authorities. The Commandant may, pursuant to applicable regulations, provide for reimbursement for the transportation and other necessary expenses to effectuate such delivery.

“(b) No person who is convicted by court-martial for desertion from the Coast Guard in time of war, and as the result of such conviction is dismissed or dishonorably discharged from the Coast Guard shall afterwards be enlisted, appointed, or commissioned in any military or naval service under the United States, unless the disability resulting from desertion, as established by this section, is removed by a board of commissioned officers of the Coast Guard convened for consideration of the case, and the action of the board is approved by the Secretary; or unless he is restored to duty in time of war.

“§ 509. Prisoners; allowances to; transportation.

“(a) Persons confined in prisons in pursuance of the sentence of a Coast Guard court shall, during such confinement, be allowed a reasonable sum, not to exceed \$3 per month, for necessary prison expenses, and shall upon discharge be furnished with suitable civilian clothing and paid a gratuity, not to exceed \$25. Such allowance shall be made in amounts to be fixed by, and in the discretion of, the Secretary and only in cases where the prisoners so discharged would otherwise be unprovided with suitable clothing or without funds to meet their immediate needs.

“(b) The Commandant may transport to their homes or places of enlistment, as he may designate, all discharged prisoners; the expense of such transportation shall be paid out of any money to the credit of prisoners when discharged.”

(b) The analysis of chapter 13 of said title 14, United States Code, is amended by adding at the end thereof the following new items:

“508. Deserters; arrest of by civil authorities; penalties.

“509. Prisoners; allowances to; transportation.”

SEC. 17. There is hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, such sums as may be necessary to carry out the purposes of this Act.

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LAW WEEK'S SUMMARY & ANALYSIS Of Current Law

A WEEKLY REVIEW OF SIGNIFICANT DECISIONS, REGULATIONS, INTERPRETATIONS

FTC To Regulate Grocery Chains in Meat Business

The Federal Trade Commission gets concurrent jurisdiction with the Department of Agriculture over the meat industry at the retail level; Agriculture retains sole jurisdiction over the wholesale level. (Public Law 85-909)

The new statute does not precisely determine which agency will handle which cases, but instead lays down a general scheme and method by which the two agencies are to apply it. Agriculture could take jurisdiction over the retail operations of a packer, or the FTC could take jurisdiction over the wholesale or packing operations of a large chain if, in either case, the two agencies regarded it as important that that be done.

Where jurisdiction is not at once obvious, the agency deciding to take the case must inform the other, which would state whether it has already instituted a proceeding.

Civilians Not Subject To Court-Martial Overseas

From two fronts the federal civilian courts mount an immediate attack on the U.S. Court of Military Appeals' restrictive interpretation, 27 LW 2101, of Reid v. Covert, 354 U.S. 1, 25 LW 4444. Decisions of the Court of Appeals for the District of Columbia Circuit and the Federal District Court for Southern West Virginia extend the Reid doctrine to noncapital as well as capital cases and to civilian employees as well as dependents accompanying the Armed Forces abroad in peacetime.

Actually, both distinguishing factors—a noncapital crime and a civilian employee—are present in the case decided by the D.C. Court. But the court of appeals is convinced that Reid v. Covert establishes the unconstitutionality of the entire Article 2(11) of the Uniform Code of Military Justice. Since Reid established that Article 2(11)'s intended broad coverage of civilians exceeds constitutional bounds, there is now no legislative

standard left for the inclusion of a civilian employee within court-martial jurisdiction. It is not the courts' function to rewrite Article 2(11) along narrower lines. (Guagliardo v. McElroy, 9/12/58)

Judge Burger dissents, taking the position that practical considerations necessitate limiting Reid to the specific problem involved there, which "does not pose as acute a problem for the administration of discipline in the Armed Forces as does the absence of any practical jurisdiction over employees for all charges."

The case before the Federal District Court for Southern West Virginia is the very one in which the Court of Military Appeals recently stated its position. Involved is a noncapital crime committed by a serviceman's wife. Somewhat reluctantly, the district court reads the Supreme Court's opinions as meaning that crimes committed in foreign countries by the Armed Forces' dependents are crimes against the United States and hence are punishable only in accordance with the Constitution. (Singleton v. Kinsella, 9/7/58)

"Clarification" Hoped For From Little Rock Opinion

Although the Supreme Court's affirmation of the Eighth Circuit's decision, 27 LW 2086, in the Little Rock school case takes the form of a per curiam order, the Court makes it clear that an opinion or opinions "will be prepared and announced in due course." And one of the aims of the opinion will probably be to furnish the "clarification" that the School Board's counsel suggested might bolster Little Rock's "moderates." (Cooper v. Aaron, 9/12/58)

Of course, when the Board's counsel made that suggestion during arguments last week, he was not anticipating the result. In fact, he made perfectly clear his position that "to make the clarification effective * * *, we must also have a delay." During the two-and-a-half-year moratorium allowed by Judge Lemley, he argued, "it is entirely likely" that a sufficient number of the people of Little Rock will change their attitude and there

will no longer be any uncertainty as to whether they * * * in the category of law defiers." Approved For Release 2002/06/25 : CIA-RDP62-00631R000300110016-1

Basically, the Board's plea was that it is caught in a federal-state conflict that it is not in a position to resolve. It was at this point that Mr. Justice Black furnished a forecast of the result with a question: "There is not any doubt about what the Constitution says about it, is there?"

The attorney for the Negro children gave special attention to his opponent's argument that this case involves the balancing of equities. He insisted that this case does not involve the question of balancing the rights of one group of children against those of another group. The school system, he explained, should teach good citizenship, as well as reading, writing, and arithmetic. The schools would not be performing that function if they told the white children "the way to get your rights is to violate the law and defy the authorities."

For the government, as amicus curiae, the Solicitor General insisted that the only difference between Little Rock and communities in which desegregation is proceeding is "the element of lawlessness. * * * There is not a single policeman who is not going to watch this Court and what it has to say about this matter."

Program Is Announced For FBA Convention

An unprecedented number of committee sessions on current legal problems are on the program for this year's convention of the Federal Bar Association at the Hotel Statler, Washington, D.C., September 26 and 27.

At the meeting of the Antitrust and Trade Regulation Law Committee, mergers will be the topic under consideration. The speakers scheduled by the Committee will discuss the business reasons for mergers, the test of the legality of mergers, the special trial problems of merger cases, and the Justice Department's techniques in investigating mergers.

"Independence of Federal Regulatory Agencies and Executive Departments" will be the theme of the convention as a whole. In line with this central theme, the two subjects listed for treatment at the Association's General Sessions are "Outside Control and Interference with Executive Departments and Independent Regulatory Agencies" and "The Separation of Powers Today."

The Committee on Taxation will undertake a description and evaluation of present Internal Revenue Service procedures for handling tax disputes. And the Administrative Law and Ethics

will no longer be any uncertainty as to whether they * * * in the category of law defiers." Approved For Release 2002/06/25 : CIA-RDP62-00631R000300110016-1

an ethical code for administrative trials and a proposed code of administrative procedure.

No Bad-Conduct Discharges For Cadets or Midshipmen

In an opinion that apparently explains the status of students at the national military academies, the U.S. Court of Military Appeals holds that a West Point cadet cannot be sentenced to a bad-conduct discharge. The only form of punitive separation applicable to cadets is dismissal from the service. (U.S. v. Ellman, 9/5/58)

Although it accepts the view expressed at 7 Atty. Gen. 323 that West Point cadets are "inchoate officers" or "future officers," the court decides that under the Uniform Code of Military Justice cadets must be bracketed with officers. The opinion points out that cadets are so bracketed in Articles 66(b), 71(b), and 133 of the Uniform Code.

Any other interpretation of the Code, the court explains, would render it confusing. While a sentence separating an officer or cadet from the service must be approved by the secretary of the department, the bad-conduct discharge of an enlisted man can be affirmed by a mere board of review. Hence a cadet disposed of by a bad-conduct discharge would be denied appellate rights granted one who is punitively separated by dismissal. "The more reasonable conclusion is that Congress intended that all cadets be treated uniformly."

Common Carrier Is Held Liable For Refusal To Service Struck Shipper

Stating that a common carrier "must insist" upon union contract terms that will permit it to fulfill its duty as such, the Federal District Court for Southern Indiana permits a struck shipper to recover damages from a common carrier that was thrust into the middle of the strike when its employees refused to cross a picket line to service the shipper. Neither the union's customary refusal to cross picket lines and handle hot cargo, the union contract's protection of rights clause, nor the published tariff's "impractical operations" clause excuses the common carrier. (Merchandise Warehouse Co. v. ABC Freight Forwarding Corp., 8/14/58)

As to the "impractical operations" clause, the court says a picket line per se is not sufficient to bring it into operation. To justify a carrier's failure to service shipper, there must be a situa-

tion at the picket line that reasonable men would consider a substantial danger. Here, there was no violence, no mass picketing, and no attempt to block the entrance to the shipper's establishment.

State Regulation—On the basis of the U.S. Supreme Court's own reasoning in *U.S. v. United Mine Workers*, 330 U.S. 258, the Tennessee Court of Appeals sticks by its affirmance of a state labor injunction that was remanded "for consideration in the light of *Teamsters v. Kerrigan Iron Works, Inc.*, 353 U.S. 968." According to the Tennessee court, the Taft Act does not deprive a state court of jurisdiction to punish unions and their officers for conspiring to violate a temporary labor injunction issued to maintain the status quo pending the court's determination of its jurisdiction. (*Aladdin Industries, Inc. v. Associated Transport Inc.*, 8/6/58)

Elections—Reaffirming the rule it stated in *Sharnay Hosiery Mills Inc.*, 120 NLRB No. 102, 42 LRRM 1036, 26 LW 2569, the National Labor Relations Board decides that pro-union election results are not invalidated by the union's distribution of preelection handbills urging the employees to vote for the union if they wanted to avoid further mistreatment by "that Jew," the plant manager. (*Paula Shoe Co. Inc.*, 8/27/58)

Withdrawal of Infringement Assertion No Bar To Ruling on Patent's Validity

A design-patent owner's withdrawal of his assertion of infringement when faced with the alleged infringer's Declaratory Judgment Act suit claiming invalidity of the patent does not deprive the court of jurisdiction to determine the patent's validity. (*Hawley Products Co. v. United States Trunk Co., Inc.*, 8/27/58)

Although the court is "not aware of any case squarely in point," it finds support in *Altwater v. Freeman*, 319 U.S. 359, 57 USPQ 285. There, the Supreme Court held that although a decision of non-infringement finally disposed of a bill and answer, it also held that it did not dispose of a counterclaim that raised the question of the patent's validity. Therefore, the Supreme Court remanded the case for consideration of the question of the invalidity of the patent, which the district court had passed upon, but the court of appeals had treated as moot.

This result was reached by the Supreme Court, the opinion explains, in spite of the statement in the opinion that: "To hold a patent valid if it is not infringed is to decide a hypothetical case."

September 16, 1958

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Thus, although it might equally well be thought that to hold a patent invalid once it had been found not infringed would also be to decide a hypothetical case, the law since *Altwater* is settled that a court retains jurisdiction to hold a patent invalid even after it has been found not infringed.

Supreme Court's Criminal Law Opinions Support States' Rights

Except for its holding that the Federal Communications Act's wiretapping ban overrides conflicting state laws, the Supreme Court's opinions in the criminal law field last Term seemed to have a definite "states' rights" flavor. Mr. Justice Frankfurter placed particular emphasis on this theme in a decision that the Fifth Amendment does not give a state court witness any privilege against giving testimony that might incriminate him under a federal statute.

Just as respectful of the sovereignty of the states were two historic opinions on the right to assistance of counsel during police questioning. A divided Court refused to hold that a state prisoner who wants a lawyer has a constitutional right to have one at any point of time he selects after the moment of his arrest. It made no difference to the Court that in one case the prisoner had already retained a lawyer to whom the police refused him access.

And in those cases where the state convictions were set aside, the factor of race was frequently present. Convictions of two teen-aged Negroes were set aside because they were obtained with the aid of confessions given after the police had warned the prisoners of the possibility of mob violence. In addition, the NAACP won a complete victory in its fight against the registration and filing requirements imposed by some southern states.

Chiropractors Given Chance To Prove Invalidity of Medical Practice Act

"Further study and deliberation" following their tentative votes in conference for dismissal convinced two judges of the Fifth Circuit that chiropractors are entitled to an opportunity to prove that Louisiana's denial of their claimed right to practice chiropractic violates the Fourteenth Amendment's Due Process and Equal Protection Clauses. (*England v. Louisiana State Board*, 9/9/58)

While the state is not bound to recognize every peculiar theory or school of medicine—it is not

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bound to recognize "witch doctors, voodoo queens, bee stingers, and various other cults" the exclusion of dentists, osteopaths, nurses, chiropodists, optometrists, pharmacists, and midwives would certainly be arbitrary. The rule is that the state cannot deny to any individual the right to exercise a reasonable choice of a method of treatment of his ills or the correlative right of practitioners to engage in the practice of a useful profession.

Without hearing the evidence, the court cannot say that the requirements of a diploma from a college approved by the American Medical Association and a knowledge of surgery and materia medica bear no reasonable relation to the practice of chiropractic.

Judge Wisdom, whose dissenting opinion was written as the majority opinion, says evidence that materia medica and surgery bear no relation to chiropractic is immaterial. The standards established in the Louisiana Medical Practice Act do not purport to bear a relation to the practice of chiropractic. The object of the law is to license those persons holding themselves out as qualified medical doctors—qualified to practice surgery and medicine generally, not chiropractic.

Tax Deduction Allowed for Return Of FHA Mortgage Loan Windfalls

The Federal Housing Authority's success in litigation to compel building-company shareholders to return "windfalls" distributed by the companies from the excess of FHA loans over building costs prompts the Internal Revenue Service to define the tax consequences of such a refund. Repayment of such windfalls to the corporation entitles the shareholders, under Section 1341 of the 1954 Internal Revenue Code, to an income tax deduction to the extent the windfall distributions were reported as capital gains in the earlier year when they were distributed. (Rev.Rul. 58-456, 9/15/58)

Of course, some courts have held that windfall distributions of this type must be treated as ordinary income, rather than as capital gains. And the Service makes it clear that, if ordinary-income treatment is required, interest runs on the deficiency for the earlier year in spite of the later repayment. And this interest is not includable in computing the decrease in tax for the later year in which the repayment occurs.

Alimony—In a belated attempt to bring its treatment of alimony under the 1939 Code more in line with the rule applied by the courts of appeals, the Service announces it will allow deduction of periodic payments made to a wife under a written

instrument incident to the "status" of divorce or separate maintenance, even though the instrument is not shown to be "in contemplation of divorce or legal separation." (Rev.Rul. 58-451, 9/15/58)

Omissions—Taking a small but logical step beyond the rule of the *Colony, Inc. v. Comr.*, 357 U.S. 28, 26 LW 4387, the Tax Court holds that a return's erroneous treatment of realty-sales profits as capital gains, with a resulting reduction of gross income by more than 25 percent, does not constitute an "omission from gross income" subjecting the taxpayer to the five-year limitations period for deficiency assessments. (*Webb Estate*, 9/10/58)

Other Important Rulings of Courts and Agencies

New York court cannot order direct payment to foreign guardian of infant remaindermen's shares in New York estate (NY SupCt NYCty: *In re Hanover Bank*, 9/3/58) . . . Employees' indebtedness to employer not subject to counterclaim in government's FLSA suit (USDC WSC; *Mitchell v. Richey*, 8/29/58) . . . Justice Department withdraws attempt to put National Lawyers' Guild on Attorney General's list of subversive organizations (Justice Dept.; Announcement, 9/12/58).

Examining officer can ask questions in exclusion proceeding (Justice Dept.; File A-642-1949, 9/5/58) . . . Mere following of struck employer's trucks no Taft Act violation (NLRB; *Warehouse Union, Local 688*, 121 NLRB No. 88, 8/29/58) . . . Regulations issued governing compliance with Voluntary Oil Import Program east of Rocky Mountains (Interior Dept.; Announcement, 9/8/58).

Railroad freight rates increased (ICC; *Increased Freight Rates, 1958*, Ex Parte 212, 9/9/58) . . . Affiliated corporations can file new elections to file separate returns (IRS; Rev. Rul. 58-471, 9/29/58, released 9/10/58) . . . Personal holding company regulations issued (IRS; T.D. 6308, 9/3/58).

Gasoline dealer considered registered "producer" despite use of small portion of gasoline in his business motor vehicles (IRS; Rev.Rul. 58-457, 9/15/58) . . . Related regulations issued governing transactions between related taxpayers (IRS; T.D. 6312, 9/8/58).

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LAW WEEK'S SUMMARY & ANALYSIS Of Current Law

A WEEKLY REVIEW OF SIGNIFICANT DECISIONS, REGULATIONS, INTERPRETATIONS

Canon 35 Amendment Is Postponed by ABA

Last February, at its mid-winter meeting, the American Bar Association postponed action on proposed changes in Canon 35 (photography, telecasts, and broadcasts of courtroom proceedings) until the August Meeting in Los Angeles. The August meeting again postpones action on this controversial question. The new president of the Association will appoint a special committee to make a study and report its conclusions as soon as possible.

In other actions of general interest, the Association approves a National Interprofessional Code for Physicians and Attorneys; disapproves legislation to put automobile accident cases on a workmen's compensation basis; and opposes amendments to the social security laws that would add the costs of hospital care, nursing, and surgery to the benefits granted.

New officers are elected, including Ross L. Malone, as president.

Congress Permits Appeals From Interlocutory Orders

For the first time in the history of the federal judiciary, appeals can be taken generally from interlocutory orders. Congress passes and the President approves a bill, H. R. 6238, which, to a considerable extent, eliminates the element of finality from the question of appealability.

However, the new measure is hedged about with restrictions. First, the district court must state in its order that it involves "a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal * * * may materially advance the ultimate termination of the litigation." Secondly, the court of appeals "in its discretion" may permit the appeal if application is made within 10 days.

This measure has had support of the Judicial Conference and the American Bar Association.

Other important bills enacted into law include the "Federal Rules of Evidence, Identification Act,"

"Social Security Amendments of 1958," and the "Food Additives Amendment of 1958." Also passed is a bill to improve the opportunities of small business concerns to obtain a fair proportion of government business.

NLRB Decides to Apply Jencks Rule

"In conformity with the decision of the Court of Appeals for the Second Circuit in *Adhesive Products*," 42 LRRM 2421, 27 LW 2028, the National Labor Relations Board changes its mind and announces that it will apply the Jencks Rule, 353 U. S. 657 25 LW 4365, in unfair-labor-practice proceedings. (*Ra-Rich Mfg. Corp.*, 8/28/58)

Specifically, this conclusion means that a respondent in an unfair-practice proceeding will have a right to production, for cross-examination purposes, of pretrial statements submitted to the Board by a witness supporting the charge. "To the extent inconsistent with this holding," the A&P Case, 118 NLRB 1280, 26 LW 2123, is overruled.

The Board gives no further explanation of its decision. It relies entirely upon the reasoning of the *Adhesive Products* case, where the Second Circuit rejected a suggestion that an unfair-labor-practice proceeding must be distinguished from Jencks because such a proceeding is not criminal in nature.

Supreme Court's Scierer Rule Given Limited Scope

Mr. Justice Frankfurter's prediction that *Lambert v. California*, 355 U. S. 225, 26 LW 4059, "will turn out to be an isolated deviation from the strong current of precedents" is borne out by the narrow scope afforded the Lambert decision by the U. S. courts of appeals. Just as did the Ninth Circuit in *Reyes v. U. S.*, 27 LW 2049, the Second Circuit holds that a narcotics convict's lack of knowledge of the Narcotic Control Act's registration requirement is no constitutional bar to his con-

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viction for failing to register when he departed from the United States. (U. S. v. Juzwiak 8/25/58)

Both courts of appeals point to the emphasis the Supreme Court placed upon the fact that the conduct of Lambert violating the California ordinance was a mere passive failure to register as a convicted felon. Under the Narcotic Control Act provision involved here, on the other hand, the violation is not the mere failure to register but is the positive act of leaving or entering the United States without registering.

In his special concurring opinion, Chief Judge Clark has "more difficulty * * * in distinguishing Lambert v. California." He cannot see a more positive act by the narcotics convict—a seaman who left the country on his ship—than Lambert's continued stay in Los Angeles. However, he is convinced the courts must be slower to strike down a statute for the control of traffic in narcotics than to invalidate mere law enforcement techniques designed for the convenience of law-enforcement agencies. Also, he feels that Lambert "disclosed so sharp a division in the Court that the extension of its policy to new areas may well be thought unlikely."

Firm's Purchase of Half Its Own Stock No Dividend to Its Other Stockholder

Stressing a change in the stockholder's proportionate interest in a corporation, the U. S. Court of Appeals for the Third Circuit says that a 50 percent stockholder's assignment to the corporation of an option to purchase the remaining 50 percent of its stock, and the corporation's exercise of the option, does not constitute the constructive distribution of a taxable dividend to the stockholder. (Holsey v. Comr., 9/3/58)

The Government had been successful in convincing the U. S. Tax Court, 26 LW 2097, that the corporation's action in exercising the option was just the same as if it had paid a dividend to the stockholder who had then exercised the option. The court of appeals agrees, of course, that the taxpayer was benefited indirectly by the transaction. The value of his own stock was increased. But these benefits operated only to increase the value of his stockholdings; they could not give rise to taxable income within the meaning of the Sixteenth Amendment until the corporation made a distribution to the taxpayer or his stock was sold.

The most significant of the criteria applied to determine whether payments made by a corporation in acquiring and redeeming its own stock are essential to the corporation's business are:

distribution leaves the proportionate interest of the stockholders unchanged, as occurs when a true dividend is paid. Apply that criterion here shows, the opinion concludes, that prior to the distribution the taxpayer had a mere 50 percent interest in the company, whereas after it was over he had a 100 percent interest in it.

Judge McLaughlin, dissenting, agrees with the Tax Court that the assignment was made so that the corporation could exercise the option for the taxpayer's personal benefit. The payment secured for the taxpayer exactly what it was always intended he should get if he had exercised the option himself.

ABA Urges Changes In NLRB Procedures

The American Bar Association approves seven proposed changes in the practices and procedures of the National Labor Relations Board and also favors initial circuit court review of wage determinations under the Walsh-Healey Act.

The Board, says the Association, should be more liberal in granting requests for oral argument in representation cases; attorneys, wherever possible, should be assigned as hearing officers; and the Board should reconsider its view that its policies on such matters as jurisdictional standards do not come within the rule-making procedures of the administrative Procedure Act.

The ABA Section of Administrative Law approves in substance the draft of a code of agency conduct for adoption by federal agencies. The Association approved the proposal of the Section that the draft be completed and that it be supported by the Association before Congress.

A joint session of the Association's Section of International and Comparative Law, the Section of Real Property, Probate, and Trust Law, and the Standing Committee on Aeronautical Law discuss and consider the law and the lawyer in the coming space age.

Congress' Expatriation Power Is Upheld by Supreme Court

Despite the absence of a constitutional grant to Congress of power to legislate in the field of foreign affairs, the Supreme Court during its recent Term upheld by a 5-4 vote Congress' right to expatriate a native-born citizen for voting in a foreign election. However, the Court did not give Congress carte blanche, for the withdrawal of citizenship must be reasonably related to the end Congress seeks to reach—here the regulation of foreign affairs.

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The dissenting justices took the position that under our form of government the citizenship of the lawfully naturalized and the native-born cannot be taken from them.

However, the Court refused to go along with Congress' withdrawal of citizenship for a war-time deserter. Four justices felt that cruel and unusual punishment was being imposed, and one that there was no relevant connection between the legislation and the power under which it was enacted—the war power. The four dissenters found the necessary relationship between expatriation for desertion and the power to raise an army; they denied that punishment was being imposed.

Without deciding the extent to which freedom to travel can be curtailed by Congress, the Court held that the Secretary of State has not been authorized to condition the issuance of a passport on the applicant's furnishing of a non-Communist affidavit. The government agreed with the Court that the right to travel "is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law of the Fifth Amendment."

Again four dissenting votes were cast. The dissenters were convinced that the denial of a passport for security reasons has been both a part of the administrative practice and the purpose of legislation.

Serviceman's Wife Can Be Court-Martialed Overseas

The U. S. Court of Military Appeals has now restricted the rule of *Reid v. Covert*, 354 U. S. 1, 25 LW 4444, to the precise facts of that case—the court-martial of a serviceman's dependent for a capital offense committed while accompanying him overseas. In its most recent ruling on the subject, the court sustains the court-martial of a serviceman's wife for a noncapital crime committed while accompanying her husband at an overseas duty station. (U. S. v. Dial, 8/26/58)

Once again the court states its conviction that Congress constitutionally has the power to consider "dependents of military personnel in foreign lands, who are associated with the military in every way but for the performance of military duties," as part of the Armed Forces for the purpose of regulating their conduct.

The court displayed the same attitude in *U. S. v. Wilson*, 26 LW 2502, when it refused to apply the *Covert* doctrine to a civilian employee of the Army who committed a noncapital crime while he was employed abroad. That holding was also based upon Mr. Justice Black's statement in the *Reid* case that "there might be circumstances where a person could be 'in' the Armed Services for

purposes of Clause 14 [Section 8, Article 1, Constitution] even though he had not formally been inducted into the military."

Fifth Amendment Discharge Not Subject to Arbitration

An employee who had claimed his Fifth Amendment privilege against self-incrimination when questioned by the House Committee on Un-American Activities is not entitled to have his discharge under a union contract's 'just cause' provision submitted to arbitration. The New York Supreme Court, New York County, says that when the cause for firing is 'just cause' as a matter of law, arbitration would be pointless. A refusal to answer the questions on the ground stated creates a doubt as to the "trustworthiness and reliability" of the employee. (*Carey v. Westinghouse Electric Corp.*, 8/19/58)

The court says it is constrained to follow the California Supreme Court's reasoning in *Black v. Cutter Laboratories*, 43 Cal. 2d 788, 23 LW 2372, which held that California's public policy forbade the enforcement of an arbitration award that directed the reinstatement to employment of a Communist Party member. New York courts, the opinion asserts, are no less aware of the Communist menace to democracy. While the employee was perhaps within his constitutional rights in refusing to answer the questions and even in holding his warped political beliefs, he had no constitutional right to employment.

Court of Appeals Suggests Amendment Of Television Permit-Transfer Rules

An inconsistency between the Communications Act's comparative-hearing rule for construction-permit applications and its 1952 Amendment's much more summary proceeding for approval of permit transfers prompts the Court of Appeals for the District of Columbia Circuit to suggest an amendment of the permit-transfer provisions.

The 1952 amendment's language and history persuade the court to affirm the Federal Communications Commission's denial to an unsuccessful applicant of any right to challenge the successful applicant's transfer of the permit only a few months after it was granted. But the court expresses a fear that the amendment will "open the door to something not unlike the 'trafficking in licenses' long since disapproved." (*St. Louis Amusement Co. v. FCC*, 8/28/58)

Under Section 310(b) of the Act as amended in 1952, when a construction permittee seeks to

to consider only whether the assignee selected is qualified. It has no power to consider the comparative qualifications of prior unsuccessful applicants.

In the present case, the complaining unsuccessful applicant had dropped out of the proceeding at an early stage, correctly anticipating that the successful applicant would be found the best qualified. Later the successful permittee changed his plans, bought another station, and then contracted to assign the permit to another unsuccessful applicant.

In the court's view, this type of situation reveals a "serious gap in the statutory scheme to which congressional attention should be directed." The point made by the court may be illustrated even more forcefully by a case not mentioned in the opinion. In *In re Huffman*, 23 LW 2011, the successful applicant, selected on the basis of his local connections, had arranged for the sale of his license to an out-of-state publisher before the license had even been issued.

Company's Disability Payments to Officer Exempt From Income Tax

Broadly interpreting "accident or health insurance" benefits under Section 22(b) of the 1939 Internal Revenue Code, the U. S. Court of Appeals for the Third Circuit holds that payments received during total disability by a corporate officer whose employment contract entitled him to reduced compensation when he was unable to perform his duties are excludable from gross income as "accident or health insurance" benefits. (*Kuhn v. U. S.*, 8/28/58)

The opinion relies primarily on *Haynes v. U. S.*, 353 U. S. 81, 25 LW 4228, where the Supreme Court, after defining health insurance as an undertaking by one person, for reasons satisfactory to him, to indemnify another for losses caused by illness, gave the term its broad general meaning. The Supreme Court in *Haynes* refused to restrict the deduction of payments received as health insurance to conventional modes of insurance.

SUB Plan—Likewise, the Internal Revenue Service gives a broad reading to the words "life, sick, accident, or other benefits" in Section 501(c)(9) of the 1954 Internal Revenue Code. It holds that a trust established pursuant to a supplemental unemployment benefit plan required by a union contract is entitled to federal tax exemption since the plan and trust create an "association" to pay "life, sick, accident, or other benefits." (Rev. Rul. 58-442, 9/8/58)

Unemployment benefits qualify as "other benefits", the ruling explains, since they provide eco-

nomie benefits at a time when the personal earning power of the employee has been interrupted, and in addition, they are peculiarly adapted to the hazards of being an employee.

Expense Accounts—The Service beats a retreat from its prior position on employees' business expenses. Under the newly promulgated regulations, an employee who is required to account, and who does account, to his employer for his business expenses will not be required to report them on his tax return.

However, an employee who is not required to account for his expenses must report on his return the total amount spent for travel, transportation, entertainment, or other purposes that are incurred under a reimbursement or other arrangement with his employer.

The new regulations will be effective for taxable years beginning after December 31, 1957.

Tax Returns—Taxpayers with annual incomes up to \$10,000 can now use Form 1040A for 1958, according to the Service. (Announcement, 9/4/58)

Whiskey Bonding Period—Regulations are promulgated by the Service relating to the 20-year bonding period and the commingling of distilled spirits provisions of Title II of the Excise Tax Technical Changes Act of 1958. (T.D. 6307, 9/3/58)

The new statute extended the bonding period for distilled spirits from 8 to 20 years, and provided for limited commingling of distilled spirits of different ages.

Other Important Rulings Of Courts and Agencies

Corporation dissolution no bar to antitrust conviction (*CA 4, Melrose Distillers, Inc. v. U. S.*, 8/29/58) . . . National Firearms Act not repealed (USDC Md, *U. S. v. One 1955 Ford Sedan*, 8/29/59) . . . No federal suit for discharge violating Railway Labor Act (*CA 2, Stack v. New York Central R.R. Co.*, 8/27/58).

FPC denial of right to intervene immediately reviewable (*CA DC, Virginia Petroleum Jobbers Assn. v. FPC*, 8/29/58) . . . Veterans reinstated by intra-department appeal entitled to back pay (GAO, *Comp.Gen.Dec. B-136715*, 8/21/58) . . . CSA's right to negotiate contracts delimited (GAO, *Comp.Gen.Dec. B-135559*, 8/29/58).

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