MANUAL

FOR

COURTS-MARTIAL

U. S. ARMY

1949

Effective 1 February 1949

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For explanation of distribution formula, see TM 38–405.

TABLE OF CONTENTS

APPENDICES

INTRODUCTION

This manual incorporates changes prescribed in the amendment of the Articles of War on 24 June 1948 and those indicated by experience during the twenty years since the promulgation of the Manual for Courts-Martial, 1928, particularly that gained during World War II.

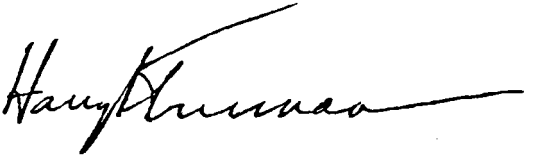
THOMAS H. GREEN
Major General, United States Army
The Judge Advocate General

EXECUTIVE ORDER 10020

PRESCRIBING THE MANUAL FOR COURTS-MARTIAL, U. S. ARMY, 1949

By virtue of the authority vested in me by Chapter II of the act of Congress entitled "An act to amend an act entitled 'An Act for making further and more effectual provision for the national defense, and for other purposes,' approved June 3, 1916, and to establish military justice," approved June 4, 1920 (41 Stat. 787), as amended by Title II of the act entitled "An act to provide for the common defense by increasing the strength of the armed forces of the United States, including the reserve components thereof, and for other purposes," approved June 24, 1948 (62 Stat. 627), and as President of the United States, I hereby prescribe the following Manual for Courts-Martial to be designated as "Manual for Courts-Martial, U. S. Army, 1949."

This manual shall be in force and effect in the Army of the United States on and after February 1, 1949, with respect to all court-martial processes taken on or after February 1, 1949: *Provided*, that nothing contained in this manual shall be construed to invalidate any investigation, trial in which arraignment has been had, or other action begun prior to February 1, 1949; and any such investigation, trial, or action so begun may be completed in accordance with the provisions of the Manual for Courts-Martial, 1928: *Provided further*, that nothing contained in this manual shall be construed to make punishable any act done or omitted prior to the effective date of this manual which was not punishable when done or omitted: *And provided further*, that the maximum punishment for an offense committed prior to February 1, 1949, shall not exceed the applicable limit in effect at the time of the commission of such offense.



THE WHITE HOUSE
December 7, 1948.

Chapter I

MILITARY JURISDICTION

SOURCES—EXERCISE

1. **SOURCES.**—The sources of military jurisdiction include the Constitution and international law. The specific provisions of the Constitution relating to military jurisdiction are found in the powers granted to Congress, in the authority vested in the President, and in a provision of the fifth amendment.

2. **EXERCISE.**—Military jurisdiction is exercised by a belligerent occupying an enemy's territory (military government); by a government temporarily governing the civil population of a locality through its military forces, without the authority of written law, as necessity may require (martial law); by a government in the execution of that branch of the municipal law which regulates its military establishment (military law); and by a government with respect to offenses against the law of war.

The agencies through which military jurisdiction is exercised include:

Military Commissions and Provost Courts for the trial of offenses within their respective jurisdictions. These tribunals are summary in nature, but so far as not otherwise provided have usually been guided by the applicable rules of procedure and of evidence prescribed for courts-martial.

Courts-martial—General, Special, and Summary for the trial of offenders against military law and, in the case of general courts-martial, of persons who by the law of war are subject to trial by military tribunals.

Commanding officers exercising disciplinary powers under Article 104.

Courts of inquiry for the examination of transactions of officers or soldiers, or accusations or imputations against them. See AR 600–300.

Chapter II

COURTS-MARTIAL

CLASSIFICATION—COMPOSITION

3. **CLASSIFICATION.**—Courts-martial are classified as general, special, and summary courts-martial (A. W. 3).

4. **COMPOSITION.**—*a.* ***Who may serve.***—All officers in the active military service of the United States shall be competent to serve on courts-martial. All warrant officers in the active military service shall be competent to serve on general and special courts-martial for the trial of warrant officers and soldiers. Soldiers in the active military service shall be competent to serve on general and special courts-martial for the trial of enlisted persons when requested in writing by the accused at any time prior to the convening of the court (A. W. 4). For the competency of Marine Corps personnel to serve on courts-martial when detached for service with the Army by order of the President, see Article 4. Members of the Navy and of the Air Force are not competent to serve on Army courts-martial.

No distinction exists between the various classes of officers or of warrant officers and soldiers in the military service of the United States, but the term "military service of the United States" as herein used refers to the Army only.

For notes as to retired, reserve, National Guard, and temporary Army of the United States officers, see the notes under Article 4, Appendix 1.

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 (59; 60; A. W. 4) or, in case of a rehearing, if he was a member of the court which first heard the case (A. W. 52). No soldier may sit as a member of a court-martial for the trial of another soldier who is assigned to the same company or corresponding military unit (see 58*e*; A. W. 16). Suspension from rank renders an officer ineligible to sit as a member of a court-martial. For other cases in which a person should not sit as a member of a general or special court-martial and for grounds of challenge, see 58*e*.

The availability of certain persons for detail may be restricted by regulations. See, for example, AR 60–5 (Chaplains).

*b. **Number of members.***—General courts-martial may consist of any number of members not less than five (A. W. 5); special courts-martial may consist of any number of members not less than three (A. W. 6); and a summary court-martial shall consist of one officer (A. W. 7).

*c. **Rank of members.***—An officer may be tried only by a court-martial composed of officers. When it can be avoided a person in the military service will not be tried by persons inferior to him in grade or relative rank (A. W. 16) nor, in the case of an officer, by those below him on the same promotion list. Relative rank is determined as indicated in AR 600–15. A soldier who has requested in writing that soldiers serve on the general or special court-martial which will try his case, shall not, without his consent, be tried by a court the membership of which does not include soldiers to the number of at least one-third of the total membership of the court (38*c*; A. W. 4).

*d. **Qualifications of members.***—When appointing courts-martial the appointing authority shall detail as members those officers of the command and, when eligible, those warrant officers and soldiers of the command who in his opinion are best qualified for the duty by reason of age, training, experience, and judicial temperament. Officers, warrant officers and soldiers having less than 2 years of service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of a minority membership (A. W. 4). A summary court-martial should be selected from field officers whenever practicable.

*e. **Law member for general court-martial.***—The authority appointing a general court-martial shall detail as one of the members a law member who shall be an officer of the Judge Advocate General's Corps or 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 certified by The Judge Advocate General to be qualified for such detail (A. W. 8).

Officers are qualified for detail as law members only if they are Regular Army officers appointed in the Judge Advocate General's Corps, or non-regular officers of any component of the Army of the United States on active Federal duty assigned to the Judge Advocate General's Corps by competent orders, or officers who have been certified by The Judge Advocate General as qualified to act as law members.

The order appointing a general court-martial will expressly state the qualification of the law member as prescribed by Article 8. See Appendix 2 for the form of statement of qualification.

Failure to appoint a law member of a general court-martial who is qualified as prescribed in Article 8 renders any proceeding of such a court void.

Chapter III

COURTS-MARTIAL

APPOINTING AUTHORITIES—APPOINTMENT OF TRIAL JUDGE ADVOCATE, DEFENSE COUNSEL, ASSISTANTS

5. **APPOINTING AUTHORITIES.**—*a. General courts-martial.*—The President of the United States, the Superintendent of the Military Academy and the commanding officers of commands of the Army designated in Article 8 may appoint general courts-martial. The mere assignment of an officer of the Judge Advocate General's Corps to a command does not alone empower the commander thereof to appoint general courts-martial. While an officer of the Judge Advocate General's Corps is assigned as staff judge advocate of a command as prescribed by The Judge Advocate General in accordance with Article 47, jurisdiction to appoint general courts-martial is vested in the commanding officer of that command.

When any commander authorized to appoint general courts-martial is the accuser or the prosecutor in a case the court shall be appointed by competent superior authority. He may appoint the court to try any case in a subordinate command if he so desires. Thus if the exigencies of the service interfere with the prompt disposition of cases, a superior competent to appoint general courts-martial properly may appoint courts for the trial of cases arising in a subordinate command.

Whether the commander who convened the court is the accuser or the prosecutor is mainly to be determined by his personal feeling or interest in the matter. An accuser either originates the charge or adopts and becomes responsible for it; a prosecutor proposes or undertakes to have it tried and proved. See 60 in this connection. Action by a commander which is merely official and in the strict line of his duty can not be regarded as sufficient to disqualify him. For example, a division commander may, without becoming the accuser or prosecutor in the case, direct a subordinate to investigate an alleged offense with a view to formulating and preferring such charges as the facts may warrant, and may refer such charges for trial as in other cases.

As Article 8 expressly designates those who have authority to appoint general courts-martial, it follows that no one else has such

authority and that anyone having such authority cannot delegate or transfer it to another. The authority of a commanding officer to appoint general courts-martial is independent of his rank and is retained by him as long as he continues to be such a commanding officer. The rules as to the devolution of command in case of the death, disability or temporary absence of a commander are stated in Army Regulations.

An officer who has power to appoint a general court-martial may determine the cases to be referred to it for trial and may dissolve it, but he cannot control the exercise by the court of the powers vested in it by law. In this connection see Article 88. He may withdraw any specification or charge at any time unless the court has reached a finding thereon.

b. ***Special courts-martial.***—The commanding officer of a command of the Army designated in Article 9 may appoint special courts-martial.

The principles of the last four subparagraphs of 5*a* apply to special courts-martial. See Article 9 as to accusers or prosecutors.

A battalion or other unit is "detached" when isolated or removed from the immediate disciplinary control of a superior in such a manner as to make its commander primarily the one to be looked to by superior authority as the officer responsible for the administration of the discipline of the soldiers composing the unit. Whenever there is doubt whether a unit is detached in the sense of Article 9, the matter will be referred to the officer exercising general court-martial jurisdiction over the command, and his determination shall be final. The term "detached" is used in a disciplinary sense and is not necessarily limited to what constitutes detachment in a physical or tactical sense. For instance, the commanding officer of a field artillery battalion which is part of a division, if responsible directly to the division commander for the discipline of the battalion, may appoint special courts-martial even though there is a division artillery commander who controls the battalion in other matters. The power of the battalion commander to appoint such courts is subject to the power of the division commander to reserve to himself the right to appoint special courts-martial for any or all subordinate units and detachments in his command. However, a subordinate commander may exercise his power to appoint special courts-martial unless a competent superior commander reserves that power to himself and so notifies the subordinate.

c. ***Summary courts-martial.***—The commanding officers of commands of the Army designated in Article 10 may appoint summary courts-martial, but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable.

When but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him (A. W. 10), and no order appointing the court need be issued. When more than one officer is present, a subordinate officer will be appointed summary court-martial.

If the appointing authority of a summary court or the summary court officer is the accuser or the prosecutor of the person or persons to be tried, it is discretionary with the appointing authority whether he will forward the charges to superior authority with a recommendation that the summary court be appointed by the latter; but the fact that the appointing authority or the summary court officer is the accuser or prosecutor in a particular case does not invalidate the trial.

The principles of the fourth and fifth subparagraphs of 5*a* and the third subparagraph of 5*b* apply to summary courts-martial.

6. **APPOINTMENT OF TRIAL JUDGE ADVOCATE, DEFENSE COUNSEL, ASSISTANTS.**—For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and one or more assistant trial judge advocates and one or more assistant defense counsel when necessary. The trial judge advocate and defense counsel of each general court-martial shall, if available, be members of the Judge Advocate General's Corps or officers who are members of the bar of a Federal court or of the highest court of a State of the United States. In all cases in which the officer appointed as trial judge advocate shall be a member of the Judge Advocate General's Corps or an officer who is a member of the bar of a Federal court or of the highest court of a State, the officer appointed as defense counsel shall be either a member of the Judge Advocate General's Corps or 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 (43; A. W. 11).

The term "member of the Judge Advocate General's Corps" as used in the foregoing subparagraph includes all Regular Army officers appointed in the Judge Advocate General's Corps, and all non-regular officers of any component of the Army of the United States on active Federal duty assigned to the Judge Advocate General's Corps by competent orders.

In any case in which a trial judge advocate of a court-martial is a member of the Judge Advocate General's Corps or a member of the bar of a Federal court or of the highest court of a State, the order appointing the court will expressly state the qualifications of both the trial judge advocate and the defense counsel as prescribed by Article 11. See Appendix 2 for the form of statements of qualification.

No person who has acted as a member, trial judge advocate, assistant trial judge advocate, or investigating officer in any case shall subse-

quently act in the same case as defense counsel or assistant defense counsel unless expressly requested by the accused (56; App. 5 and 6; A. W. 11). No person who has acted as a member, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act in the same case as a member of the prosecution (A. W. 11).

In general, it is desirable that as many assistant defense counsel as assistant trial judge advocates be appointed, and that officers be appointed as assistant defense counsel and assistant trial judge advocates who have comparable military experience and legal qualifications. When the conduct of the prosecution in any case before a court-martial devolves upon an assistant trial judge advocate who is a member of the Judge Advocate General's Corps or is a member of the bar of a Federal court or the highest court of a State, and neither the defense counsel nor any of his assistants or individual counsel present is a member of the Judge Advocate General's Corps or a member of the bar of a Federal court or the highest court of a State, the proceedings will be adjourned pending procurement for the conduct of the defense of a defense counsel who is a member of the Judge Advocate General's Corps or a member of the bar of a Federal court or of the highest court of a State, unless the accused expressly consents to proceeding with the trial in the absence of such legally qualified defense counsel. In this connection, see 43.

The power of appointment under Article 11 cannot be delegated.

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Chapter IV

COURTS-MARTIAL

JURISDICTION IN GENERAL—JURISDICTION OF GENERAL, SPECIAL, AND SUMMARY COURTS-MARTIAL

7. **JURISDICTION IN GENERAL—Source, Nature, and Requisites.**—While courts-martial have no part of the jurisdiction set apart under the article of the Constitution which relates to the judicial power of the United States, they have an equally certain constitutional source. They are established under the constitutional power of Congress to make rules for the government and regulation of the land forces of the United States, and they are recognized in the provisions of the fifth amendment expressly exempting "cases arising in the land and naval forces" from the requirement as to presentment and indictment by grand jury.

The jurisdiction of courts-martial is entirely penal or disciplinary. They have no power to adjudge the payment of damages or to collect private debts (116*g*).

"Courts-martial are lawful tribunals, with authority to determine finally any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced." (Grafton *v.* U. S., 206 U. S. 333, 347–348)

The proceedings, findings, and sentences of courts-martial as approved, reviewed or confirmed pursuant to the Articles of War are final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings are binding upon all departments, courts, and agencies and officers of the United States, subject only to action upon application for a new trial as provided in Article 53 (A. W. 50*h*). Only a Federal court has jurisdiction on writ of habeas corpus to inquire whether a court-martial has jurisdiction of the person and the subject matter or whether it exceeded its powers. See chapter XXX.

The jurisdiction of courts-martial does not, in general, depend on where the offense was committed. See, however, Article 92 as to murder and rape and 183*c* (A. W. 96) as to crimes not capital.

The jurisdiction of a court-martial—its power to try and determine a case—and hence the validity of each of its judgments, is conditioned upon these indispensable requisites: That the court was appointed by an official empowered to appoint it; that the membership of the court was in accordance with law with respect to number and competency to sit on the court; and that the court thus constituted was invested by act of Congress with power to try the person and the offense charged.

8. **JURISDICTION IN GENERAL—Persons.**—As to persons subject to military law, see Article 2 and the notes thereunder (App. 1). In addition to the persons described in Article 2 the following persons are subject to military law:

While so serving, officers and enlisted men of the Medical Department of the Navy serving with a body of marines detached for service with the Army in accordance with the provisions of section 1621 of the Revised Statutes (act 29 Aug. 1916, 39 Stat. 573; 34 U. S. C. 716).

Various other classes of persons described in particular statutes which, being of infrequent application, are merely cited in the notes under Article 2, Appendix 1.

For the jurisdiction of general courts-martial to try persons who by the law of war are triable by military tribunals, see 12.

9. **JURISDICTION IN GENERAL—Contempts.**—A military tribunal may punish as 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 (A. W. 32). See 109 (Contempts).

10. **JURISDICTION IN GENERAL—Termination.**—***General Rule.***—The general rule to be followed in the Army is that court-martial jurisdiction over officers, cadets, soldiers, and others in the military service of the United States ceases on discharge or other separation from such service and that jurisdiction as to an offense committed during a period of service thus terminated is not revived by reentry into the military service.

Exceptions.—To this general rule there are, however, some exceptions which include the following:

Jurisdiction as to certain cases of conspiracy, fraud and stealing is not terminated by discharge or dismissal (A. W. 94).

All persons under sentence adjudged by court-martial remain subject to military law while under sentence (A. W. 2).

If a soldier obtains his discharge by fraud, the discharge may be canceled and the soldier arrested and returned to military control. He may also be required to serve out his enlistment and may be tried for his fraud.

A discharge, other than dishonorable or bad conduct, releases only from the particular contract and term of enlistment to which it relates and therefore does not terminate other subsisting enlistments or relieve the soldier from liability to trial by court-martial for an offense committed during any of such enlistments. On the other hand, a dishonorable or bad conduct discharge terminates all subsisting enlistments, and a soldier so discharged can not be tried by court-martial for an offense committed during any enlistment, except as provided in Article 94 and as stated in the next subparagraph.

In certain cases, if the person's discharge or other separation does not interrupt his status as a person belonging to the general category of persons subject to military law, court-martial jurisdiction does not terminate. Thus, when an officer holding an emergency commission was discharged from that commission by reason of his acceptance of a commission in the Regular Army, there being no interval between services under the respective commissions, it was held that there was no termination of the officer's military status—merely the accomplishment of a change in his status from that of a temporary to that of a permanent officer—and that court-martial jurisdiction to try him for an offense (striking enlisted men) committed prior to the discharge was not terminated by the discharge. So also a dishonorably discharged general prisoner was tried for an offense committed while a soldier and prior to his dishonorable discharge, and it was held that the discharge did not terminate his amenability to trial for the offense.

Effect of Escape.—The escape of the accused after arraignment and during trial does not terminate the jurisdiction of the court, which may proceed with the trial notwithstanding his absence.

Effect of Termination of Term of Service.—Jurisdiction, having attached by commencement of action with a view to trial—as by arrest, confinement, or filing of charges—continues for all purposes of trial, sentence and punishment. If action is initiated with a view to trial because of an offense committed by an individual prior to the normal date of expiration of his period of service, he may be retained in the service for trial to be held after his period of service would otherwise have expired.

11. **JURISDICTION IN GENERAL—Exclusive and Nonexclusive.**—Courts-martial have exclusive jurisdiction of purely military offenses. But a person subject to military law is, as a rule, subject to the law applicable to persons generally, and if by an act or omission he violates an Article of War and the local criminal law, the act or omission may be made the basis of a prosecution before a court-martial or before a proper civil tribunal, and in some cases before both. See 68. The jurisdiction which first attaches in any case is, generally,

entitled to proceed. For limitation as to the crimes of murder and rape, see Article 92.

When any person subject to military law, except one who is held by the military authorities to answer for a crime or offense punishable under the Articles of War, or who is awaiting trial, or result of trial, or who is undergoing sentence for a crime or offense punishable by the Articles of War, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia and punishable by the laws of the land, the commanding officer is required, *except in time of war*, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial (A. W. 74). See AR 600–355 for policy with respect to Article 74.

Under international law, jurisdiction over persons in the military service of the United States or other sovereign who commit offenses in the territory of a friendly foreign state in which the visiting army is by consent quartered or in passage, remains in the visiting sovereign. This is an incident of sovereignty which may be waived by the visiting sovereign and is not a right of the individual concerned.

The provisions of the Articles of War conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction over offenders or offenses that by statute or by the law of war are triable by such military commissions, provost courts or other military tribunals (A. W. 15). See Articles 80 to 82, inclusive, for some of the instances of concurrent jurisdiction.

12. **JURISDICTION OF GENERAL COURTS-MARTIAL—Persons and Offenses.**—General courts-martial have power to try any person subject to military law for any crime or offense made punishable by the Articles of War. In addition they have power to try any other person who by the law of war is subject to trial by military tribunals for any crime or offense against the law of war and for any crime or offense against the law of occupied enemy territory whenever the local civil authority is superseded in whole or in part by the military authority of the occupying power. The law of occupied enemy territory includes the local criminal law as adopted or modified by competent authority, and the proclamations, ordinances, regulations or orders promulgated by competent authority of the occupying power.

13. **JURISDICTION OF GENERAL COURTS-MARTIAL—Punishments.**—General courts-martial have the power to adjudge any punishment authorized by law or the custom of the service (A. W. 12) within certain limitations. The more important limitations are: certain punishments are mandatory under the law, for example, that prescribed by Article 95; the discretion of courts-martial to adjudge

punishments may be limited under Article 45; the death penalty can be imposed only when specifically authorized (A. W. 43); and certain kinds of punishments are prohibited (A. W. 41).

The statutory limitations just mentioned and other limitations are considered in connection with other topics. See in particular 115–117 (Punishments).

14. **JURISDICTION OF SPECIAL COURTS-MARTIAL—Persons and Offenses.**—Special courts-martial shall have power to try any person subject to military law for any crime or offense not capital made punishable by the Articles of War, but the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interests of the service so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon jurisdiction of special courts-martial as to capital offenses (A. W. 13).

The crimes and offenses denounced in Articles 64, 66, 67, and 92 (except murder not premeditated) are capital at all times; those denounced by Articles 58, 59, 75 to 78, inclusive, 81, 82, and 86 are capital if committed in time of war.

Although capital under one of the articles cited, a crime or offense is not capital within the meaning of Article 13 if the applicable maximum limit of punishment prescribed by the President under Article 45 is less than death; or whenever, in any case in which the death penalty is authorized by law but is not mandatory, the authority competent to appoint a general court-martial shall have directed that the case be treated as not capital (A. W. 25). However, no crime or offense, capital or otherwise, for which a mandatory punishment is prescribed can be tried by a special court-martial if such punishment is beyond the power of a special court-martial to adjudge. Thus a case of premeditated murder can not properly be referred to a special court-martial for trial because the penalty in the event of conviction must either be death or imprisonment for life.

15. **JURISDICTION OF SPECIAL COURTS-MARTIAL—Punishments.**—Special courts-martial can not adjudge death, dishonorable discharge or dismissal, confinement in excess of 6 months, or forfeiture of more than two-thirds pay per month for a period of not exceeding 6 months (A. W. 13). Subject to approval of the sentence by an officer exercising general court-martial jurisdiction (A. W. 47*d*), and subject to appellate review by The Judge Advocate General and appellate agencies in his office (A. W. 50*e*), a special court-martial may adjudge a bad conduct discharge in the case of an enlisted person, but a bad conduct discharge shall not be adjudged by a special court-martial unless a complete record of the proceedings of, and testimony taken by, the court is prepared in the case (A. W. 13). Even when a

bad conduct discharge is adjudged, a special court-martial is limited by Article 13 to the adjudgment of a forfeiture of two-thirds pay per month for 6 months. As to other limitations see 115–117 (Punishments).

16. **JURISDICTION OF SUMMARY COURTS-MARTIAL—Persons and Offenses.**—Summary courts-martial have power to try any person subject to military law, except an officer, a warrant officer, or a cadet, for any crime or offense not capital made punishable by the Articles of War; but noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a special court-martial; and the President may, by regulations, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law (A. W. 14).

Under the authority of Article 14, persons of actual, relative or assimilated rank above that of the third enlisted grade are hereby excepted from the jurisdiction of summary courts-martial, but noncommissioned officers of the first two grades may be tried by summary courts-martial if they specifically consent thereto in writing. See Appendix 8 for the form of consent.

Other noncommissioned officers may be tried by summary courts-martial, either if they do not object, or if they have objected, when such trial is thereafter directed by the officer competent to bring them to trial before a special court-martial.

17. **JURISDICTION OF SUMMARY COURTS-MARTIAL—Punishments.**—A summary court-martial can not adjudge dishonorable discharge or bad conduct discharge of a soldier (A. W. 108), confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of pay for one month (A. W. 14). See also 115–117 (Punishments).

The maximum amounts of confinement and forfeiture (or of confinement and detention) may be imposed together in one sentence. Since confinement and restriction to limits are both forms of deprivation of liberty, only one of those punishments may be imposed in maximum amount in any one sentence. An apportionment must be made if it is desired to adjudge both forms of punishment, confinement and restriction to limits, in one and the same sentence. For example, assuming the punishment to be in conformity with other limitations, a summary court might impose confinement at hard labor for 15 days; restriction to limits for 45 days; and forfeiture of two-thirds of one month's pay.

A summary court-martial has the power to adjudge, in addition to or in lieu of other punishments, reprimand or admonition and to adjudge the reduction of soldiers to the lowest enlisted grade.

Chapter V

ARREST AND CONFINEMENT

SCOPE—GENERAL AND MISCELLANEOUS—WHO MAY ARREST OR CONFINE—DURATION AND TERMINATION—ARREST OF DESERTERS BY CIVIL OFFICERS—ARREST OF DESERTERS BY CIVILIANS GENERALLY

18. **SCOPE.**—The paragraphs on this subject deal primarily with the arrest or confinement of persons subject to military law in connection with trial by court-martial, and deal only incidentally or not at all with the arrest and confinement of such persons for other purposes, with the arrest and confinement of persons not subject to military law, and with various other matters touching arrest and confinement such as those discussed in 156, 157, and 161. See in this connection AR 600–355 and 600–375.

19. **GENERAL AND MISCELLANEOUS.**—*a. Basic considerations.*—Any person subject to military law charged with crime or with a serious offense under the Articles of War shall be placed in confinement or in arrest as circumstances may require, but when charged with a minor offense only, he shall not ordinarily be placed in confinement (A. W. 69). The foregoing provision is not mandatory and its exercise rests within the discretion of the person vested with power to arrest or confine. The character and duration of the restraint imposed before and during trial, and pending final action upon a case, will be the minimum necessary under the circumstances. No restraint need be imposed in cases involving minor offenses. A failure to arrest or confine does not affect the jurisdiction of the court.

No person subject to military law shall be confined with enemy prisoners or any foreign nationals outside the continental limits of the United States, nor shall any accused who is confined while awaiting trial be made subject to punishments or penalties other than confinement for any offense with which he stands charged prior to execution of an approved sentence on charges against him (A. W. 16). Prisoners whose sentences have not been approved and ordered executed will be distinguished from prisoners who are serving sentences. They will be accorded the facilities, accommodations, treatment, and training prescribed for unsentenced prisoners in accordance with Army Regulations, and they will not forfeit pay or allowances during the period of confinement except pursuant to sentences ordered executed. See AR 600–375.

*b. **Arrest defined—status of persons in arrest.***—Arrest, as used in this chapter, is moral restraint imposed upon a person by oral or written orders of competent authority limiting his personal liberty pending disposition of charges. The restraint imposed is binding upon the person arrested, not by physical force, but by virtue of his moral and legal obligation to obey the order of arrest. A person placed in arrest shall be restricted to his barracks, quarters or tent, unless such limits shall be enlarged by proper authority (A. W. 69). He is subject to the restrictions incident to arrest prescribed in AR 600–355. A person in the status of arrest cannot be required to perform his full military duty, since placing him on duty inconsistent with such status terminates his arrest. This, however, does not prevent his being required to do ordinary cleaning or policing about his quarters, or to take part in routine training not involving the exercise of command or the bearing of arms. If he breaks his arrest by going beyond the limits specified in the order of arrest, he is subject to trial (A. W. 69).

A commanding officer may, within his discretion and without imposing arrest, restrict an accused person administratively to specified areas of a military command with the further provision that he will participate in all military duties and activities of his organization while under such restraint. Thus an accused person may be required to remain within a specified area at specified times either because his continued presence pending investigation may be necessary or because it may be considered a wise precaution adminstratively to restrict him to such an area in order that he may not again be exposed to the temptation of misconduct similar to that for which he is already under charges. Violations of such administrative restrictions are punishable as are breaches of punitive restriction.

*c. **Confinement defined—status of confinement prior to trial.***—Confinement is physical restraint imposed by order of competent authority, either oral or written, depriving a person of liberty pending the disposition of charges. Confinement will not be imposed pending trial unless deemed necessary to assure the accused's presence at trial, or because of the seriousness of the offense charged, as for an offense involving moral turpitude.

*d. **Procedure for arresting or confining.***—(1) *Preliminary inquiry into offense.*—No authority shall order a person into arrest or confinement unless he has personal knowledge of the offense or has made inquiry into it. Full inquiry is not required, but the known facts should be sufficient to furnish reasonable grounds for believing that the offense has been committed by the person to be restrained.

(2) *Procedural steps to arrest.*—An arrest is imposed by notifying the person to be arrested that he is under arrest and informing him of the limits of his arrest.

(3) *Procedural steps to confine.*—A person to be confined is placed under guard and taken to the guardhouse or other place of confinement. The authority ordering confinement will deliver to the commander of the guard or to the prison officer a written statement of the name, grade, and organization of the prisoner and of the Articles of War which he has allegedly violated. See AR 600–355. Unless such a written statement is delivered with the prisoner, the commander of the guard may refuse to receive the prisoner (A. W. 71).

For reports and other action required in case of confinement or arrest and for action required when a commanding officer places an officer in arrest or confinement without preferring charges, see AR 600–355.

20. **WHO MAY ARREST OR CONFINE.**—*a. General.*—Except as prescribed in *c* below, persons subject to military law may be placed in arrest or confinement as follows:

(1) *Officers and warrant officers.*—By commanding officers only, in person or through other officers, or by oral or written orders or communications. The authority to place officers and warrant officers in arrest or confinement will not be delegated. The term "commanding officer" shall be construed to refer to an officer commanding a post, camp, or station or other place where troops are on duty, and the officer commanding a body of troops who, under Article 10, has power to appoint a summary court-martial.

(2) *Enlisted persons.*—By officers only, in person or through other persons subject to military law, or by oral or written orders or communications. The officer in command of any company or detachment may delegate to the noncommissioned officers thereof authority to place enlisted persons who are assigned or attached to his company or detachment, or are temporarily within its jurisdiction, e. g., in quarters or camp, in arrest or confinement as a means of restraint at the instant when restraint is necessary.

b. ***Authority of military police.***—(1) In the execution of their police duties, military police, and such persons as are designated pursuant to orders of an appropriate commanding officer to perform military police duties, are vested with such powers of arrest or confinement over persons subject to military law as are provided by Army Regulations. See AR 600–355.

(2) The authority to arrest or confine persons not specifically mentioned herein is set forth in AR 600–355.

c. ***In quarrels, frays or disorders.***—All officers, warrant officers and noncommissioned officers have power to part and quell all quarrels, frays and disorders among persons subject to military law and to order officers who take part in the same into arrest and other persons subject to military law into arrest or confinement, as circum-

stances may require, until their proper superior officer is acquainted therewith (A. W. 68).

*d. **Authority of trial judge advocate to restrain.***—A trial judge advocate of a court-martial, as such, has no authority to place in arrest an officer or soldier about to be tried by the court. These are duties which devolve upon the convening authority or upon the post commander or other proper officer in whose custody or command the accused is at the time.

*e. **Authority of courts-martial to restrain.***—A court-martial has no control over the nature of the arrest or other status of restraint of a prisoner except as regards his custody in its presence.

*f. **Responsibility for restraint after trial.***—Upon notification from a trial judge advocate of the result of trial (see 41*b*) a commanding officer will take prompt and appropriate action with respect to the restraint of the person tried. Such action, depending on the circumstances, may involve the immediate release of the person from any restraint, or the imposition of any necessary restraint pending final action on the case.

21. **DURATION AND TERMINATION.**—Although charges should be preferred promptly (26; A. W. 70) the accused is not automatically released from restraint because of any delay in preferring the charges. He must remain in arrest or confinement until released by proper authority. The proper authority to release the accused from arrest is normally the officer who imposed the arrest. The proper authority to order release from confinement is the commanding officer to whose command the guardhouse or prison is subject. Once the prisoner is turned over to the guard, he passes beyond the control and power to release of the officer who initially ordered him confined, unless such officer is the commanding officer described above. The release of a prisoner without proper authority is a punishable offense (A. W. 73). Undue delay in preferring or prosecuting charges should be investigated with a view to prompt disposition of the case or the release of the accused from arrest or confinement by competent authority when appropriate. In this connection see 26 and Article 70.

22. **ARREST OF DESERTERS BY CIVILIANS—Civil Officers.**—Any civil officer having authority to arrest offenders under the laws of the United States, or of a State, Territory, District or possession of the United States may arrest summarily a deserter from the military service of the United States and deliver him to the military authorities of the United States (A. W. 106).

The right of the United States to arrest and bring to trial a deserter is paramount to any right of control over him by a parent on the ground of his minority. See 189.

23. **ARREST OF DESERTERS BY CIVILIANS—Civilians Generally.**—A private citizen has no authority as such, without the order or direction of a military officer, to arrest or detain a deserter from the Army of the United States (Kurtz *v.* Moffit, 115 U.S. 487); but sending out a description of a deserter with a request for his arrest and the offer of a reward for his apprehension and delivery, coupled with the provisions of law and regulations authorizing the payment of such reward, is sufficient authority for the arrest of a deserter by a private citizen.

The fact that the person who arrested and delivered a deserter was not authorized to do so is not a legal ground for the discharge of the deserter from military custody.

Chapter VI

PREPARATION OF CHARGES

DEFINITIONS—WHO MAY INITIATE; WHO MAY PREFER; ORDERING PREFERMENT—WHEN PREFERRED—GENERAL RULES AND SUGGESTIONS—DRAFTING OF CHARGES—DRAFTING OF SPECIFICATIONS

24. **DEFINITIONS.**—The formal written accusation in court-martial practice consists of two parts, the technical charge and the specification. For offenses in violation of the Articles of War, the charge merely indicates the article the accused is alleged to have violated, while the specification sets forth the specific facts and circumstances relied upon as constituting the violation. Each specification, together with the charge under which it is placed, constitutes a separate accusation. The term "charges" or "charges and specifications" is applied to the formal written accusation or accusations against the accused.

New and separate charges preferred after others have been preferred are known in military law as "additional charges". They may relate to transactions not known at the time or to offenses committed after the original charges were preferred. Charges of this character do not require a separate trial, and, subject to the completion of the preliminary procedure necessary for all charges, may be tried with the original ones.

25. **WHO MAY INITIATE; WHO MAY PREFER; ORDERING PREFERMENT.**—Charges are frequently initiated by someone bringing to the attention of the military authorities information concerning a supposed offense committed by a person subject to military law. Such information may, of course, be received from anyone, whether subject to military law or not.

Any person subject to military law may prefer charges, even though he be under charges, in arrest or in confinement. In the absence of personal knowledge, the accuser must make inquiry into the alleged offenses to avoid preferring charges which are either groundless or inappropriate to the offenses committed. Instead of preferring charges it is ordinarily preferable, especially in a minor case, to inform the accused's immediate commanding officer of the matter.

A person subject to military law can not legally be ordered to prefer charges to which he is unable truthfully to make the required oath on his own responsibility, but he may legally be ordered by a proper

superior to prefer such charges as in the subordinate's opinion he may properly substantiate by the required oath. See 5*a*.

26. **WHEN PREFERRED.**—When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct (A. W. 70). When it is intended to prefer charges, they should be preferred without unnecessary delay. An accumulation or saving up of charges through improper motives is prohibited; but when a good reason exists (as when in the interest of discipline it is advisable to exhibit a continued course of conduct) a reasonable delay is permissible if the person concerned is not in arrest or confinement. See 21.

Ordinarily charges for an offense should not be preferred against an individual if, after exhaustive investigation, the only available evidence that the offense was committeed is his statement that he committed it.

27. **GENERAL RULES AND SUGGESTIONS.**—Before drafting charges and specifications the accuser should make an analysis of the facts and a study of the pertinent paragraphs of chapter XXIX, in which appear the elements of proof of various offenses, and of Appendix 4, in which the forms of specifications are set forth.

One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person. A soldier should not be charged with both disorderly conduct and assault if the disorderly conduct consisted in making the assault, or with both a failure to report for a routine scheduled duty, such as reveille, and with absence without leave if the failure to report occurred during the period for which he is charged with absence without leave. The larceny of several articles should not be alleged in several specifications, one for each article, when the larceny of all of them can properly be alleged in one specification (180*a*). If a soldier willfully disobeys an order to do a certain thing, and persists in his disobedience when the same order is given by the same or other superior, a multiplication of charges of disobedience should be avoided (152*b*). There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses.

Ordinarily charges for minor derelictions should not be joined with charges for serious offenses. For example, a charge of failure to repair for reveille should not be joined with a charge of burglary. If, however, the minor offense serves to explain the circumstances of the greater offense, it is permissible to charge both.

A joint offense is one committed by two or more persons acting together in pursuance of a common intent. Anyone who commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal; and anyone who causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such. But an accessory after the fact cannot be charged as a principal. A person whose only connection with a larceny was that he received the stolen goods, knowing them to be stolen, cannot be charged with the larceny, although he may be charged with wrongfully receiving stolen property. Offenders are properly joined only if there is a common unlawful design or purpose; the mere fact that several persons happen to have committed the same types of offenses at the same time, although material as tending to show concert, does not necessarily establish it. The fact that several soldiers happen to have absented themselves without leave at about the same time will not, in the absence of evidence indicating a conspiracy, justify joining them in one specification, for they may merely have been availing themselves of the same opportunity of leaving.

In joint offenses the participants may be separately or jointly charged. The preparation of joint charges is discussed in detail in Appendix 4, Instructions *f*. The advantage of a joint charge is that all the accused will be tried at one trial, thereby saving time, labor and expense. This must be weighed against the possible unfairness to the accused which may result if their defenses are inconsistent or antagonistic. See 70*d* (Motion to Sever). In drafting charges in such cases it must also be remembered that an accused cannot be called as a witness for the prosecution without his consent (134*d*). If, therefore, the testimony of an accomplice is necessary, such accomplice should not be tried jointly with those against whom he is expected to testify.

28. **DRAFTING OF CHARGES.**—The technical charge should be appropriate to all specifications under it, and ordinarily will be written: "Violation of the _____ Article of War," giving the number of the article. Neither the designation of a wrong article nor the failure to designate any article is ordinarily material, provided the specification alleges an offense of which courts-martial have jurisdicition. However, if an offense is alleged for which a mandatory punishment is prescribed by a particular Article of War, such as premeditated murder (A. W. 92), a violation of that particular article must be alleged. See also 78*b*. For other instructions see Appendix 4.

29. **DRAFTING OF SPECIFICATIONS.**—*a.* The specification should include the following:

The name of the accused person and a showing, either by a description of such person by rank and organization or otherwise, that the accused is within court-martial jurisdiction as to persons. For rules as to the use of the christian name, use of an alias, change in rank, general prisoner, and similar matters see the instructions in Appendix 4. The serial number of the accused should not appear in the specification.

A statement in simple and concise language of the facts constituting the offense. The facts so stated will include all the elements of the offense sought to be charged. In this connection, see the fourth subparagraph of 87*b*. Any intent, or state of mind such as guilty knowledge, expressly made an essential element of an offense should be alleged; thus a misappropriation in violation of Article 94 should be alleged as "knowingly and willfully" done. If the alleged acts of the accused are not in themselves criminal or contrary to the custom of the service but are made an offense by statute (including Articles 95 and 96) or regulations, words importing criminality such as "wrongfully", "unlawfully", "without authority", "dishonorably" or "feloniously", depending upon the nature of the particular offense involved, should be used to describe the accused's acts. To a reasonable extent matters of aggravation may be recited. If applicable, the wording of the appropriate Article of War or other statute should be used in preference to a supposedly equivalent expression. In charging a person with being found drunk on duty, the specification should not allege that he was found intoxicated on duty.

A statement of when and where the offense was committed. Examples of the correct form for alleging time and place appear in Appendix 4, Instructions *g*.

b. One specification should not allege more than one offense either conjunctively or in the alternative. Thus a specification should not allege that the accused "lost and destroyed" or that he "lost or destroyed" certain property.

c. A specification alleging the violation of a written order, or of any written obligation—as an oath of allegiance or a parole—should set forth the writing, preferably verbatim, and the act or acts which constitute the alleged violation. Oral statements should be set out as nearly as possible in exact words, but should always be qualified by the words "or words to that effect," or some similar expression.

d. Some specimen charges and forms for specifications covering the more usual offenses are given in Appendix 4.

Chapter VII

SUBMISSION OF AND ACTION UPON CHARGES

GENERAL—SIGNING AND SWEARING TO CHARGES—FORWARDING CHARGES—ACTION BY COMMANDER EXERCISING IMMEDIATE JURISDICTION UNDER ARTICLE 104—ACTION BY OFFICER EXERCISING COURT-MARTIAL JURISDICTION—INVESTIGATION OF CHARGES—REFERENCE TO STAFF JUDGE ADVOCATE

30. **GENERAL.**—For the prescribed form and instructions in the preparation of the charge sheet see Appendix 3.

In the ordinary case charges will be submitted and acted upon as follows:

a. When any person has knowledge of an offense committed by a person subject to military law it is the custom of the service to report the facts to the immediate commanding officer of the offender. In the great majority of cases charges are actually preferred by the company, battery, or troop commander, who ordinarily exercises jurisdiction over the accused under Article 104. He does not prefer charges for offenses which he may properly dispose under Article 104; instead he imposes company punishment for such offenses and prefers charges only as to offenses which he believes will require trial by court-martial.

b. If someone other than the immediate commanding officer of the accused prefers charges he will forward them to the immediate commanding officer of the accused, so that any charges of which disposal can be made under Article 104 will be eliminated from the charges and to permit the immediate commanding officer to enter on the charge sheet the data which are available in the records of the organization.

c. After the immediate commanding officer has preferred charges or has received charges preferred by someone else and has, as to offenses for which such action is proper, acted under Article 104, and has entered on the charge sheet all data which he can supply, he then forwards the remaining charges to the officer exercising summary court-martial jurisdiction.

d. The officer exercising summary court-martial jurisdiction may also dispose of offenses under Article 104 for which he deems such action proper. He then either disposes of the remainder of the charges by referring them to a summary court, or, if he exercises special or general court-martial jurisdiction, he may refer the charges to such courts subject to the limitations stated below under *Basic Considera-*

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tions. If he does not have special or general court-martial jurisdiction and desires to recommend trial by a court of one of these classes he forwards the charges with his recommendation to the commander authorized to appoint the particular kind of court which he believes should dispose of the case.

e. Any commander superior to the officer exercising summary court-martial jurisdiction to whom the charges may be forwarded will take the action described in *d* subject to the same limitations.

Detailed Procedure.—The matters discussed in the preceding part of this paragraph are treated in detail in the following paragraphs: 31, signing and swearing to charges; 32, the manner in which charges are forwarded; 33, the steps to be taken by the officer having jurisdiction under Article 104; 34, the steps to be taken by the officers exercising court-martial jurisdiction (including action with a view to common trial); 35, the investigation of charges, the reference of charges to the staff judge advocate, and action to be taken in case of suspected insanity.

Basic Considerations.—Before taking action on charges certain basic considerations are always to be borne in mind:

First. No person subject to military law should ever be interrogated relative to an offense of which he is suspected or accused without first making certain that he understands his rights under Article 24.

Second. No charge shall be recommended for trial by general court-martial unless prior to such action the investigation required by Article 46*b* shall have been made (35*a*).

Third. No case shall be referred for trial by general court-martial unless it has been referred for consideration and advice to the staff judge advocate of the appointing authority (35*b*; A. W. 47*b*).

Fourth. No charge shall be referred for trial if the appointing authority is satisfied that the accused is insane or was insane at the time of the offense charged. See 110.

Fifth. When it appears to any accuser, or investigating officer, or commander to whom charges are forwarded in a particular case that a witness then available may not be so available at a subsequent stage of the proceedings or that because of distance or other reasons the disposition of the case may be delayed pending the taking of depositions, he will promptly make the matter known to the officer competent to appoint a court-martial appropriate for the trial of the offense charged so that depositions may be taken in accordance with the third proviso of Article 25. See 106.

Exceptional Cases.—In exceptional cases in which the accused is not, strictly speaking, under the command of any military authority

inferior to the Department of the Army, for example, military attachés or retired personnel not on active duty, the general principles of this paragraph are applicable; but the charges may, according to the particular circumstances, be forwarded either to the Department of the Army or to the commanding officer of the territorial command in which the accused may be.

31. **SIGNING AND SWEARING TO CHARGES.**—See Article 46*a*. Charges and specifications will be signed and sworn to substantially as indicated on the form (App. 3). Available data as to service, witnesses, and similar items required to complete the form will be included. Ordinarily the charge sheet will be forwarded in triplicate, but only the original need be signed.

Charges need not be sworn to if the person signing them believes the accused to be innocent but deems trial advisable in the interest of the service or for the protection of the accused (e. g., in a case of homicide of an escaping prisoner which was apparently justified). In no case, however, should an accused be tried on unsworn charges over his objection.

32. **FORWARDING CHARGES.**—Whenever the accuser is a person other than the commander exercising immediate jurisdiction over the accused under Article 104 and it appears to the accuser that the case will be disposed of either under Article 104 or by reference to a summary court-martial, he need not forward the charges by letter of transmittal. The forwarding of a charge by the officer exercising immediate jurisdiction under Article 104, unaccompanied by a letter of transmittal, will be considered a recommendation for trial by a summary court-martial.

When charges are submitted with a view to trial by special or general court-martial they will be forwarded by a letter of transmittal which should contain a specific recommendation as to the disposition of the charges, an explanation of any unusual features of the case, and a statement as to the character of the service of the accused. The letter of transmittal will also include or carry as an inclosure a summary of the evidence expected from each witness or other source. The signature of each witness to the summary of his testimony will be obtained unless the procurement of the signature will unduly delay the forwarding of the charges. All reasonably available documentary evidence (originals or admissible copies) will be forwarded with the charges unless, on account of the bulk of such evidence or for other good reason, it is inadvisable to do so. Any articles, weapons or bulky items which may be useful as exhibits should be properly marked, preserved and referred to in the letter of transmittal with a statement as to where they may be found.

33. **ACTION BY COMMANDER EXERCISING IMMEDIATE JURISDICTION UNDER ARTICLE 104.**—If punishment under Article 104 is appropriate for any offense alleged, he will so dispose of it. Specifications and charges thus disposed of will be lined out and initialed. Charges not so disposed of should be carefully examined to insure that they are complete and correct in form and properly signed and sworn to by a person subject to military law, and to insure that they are supported by the summary of evidence supplied by the accuser. If charges or specifications have been disposed of under Article 104, the remaining charges and specifications will be renumbered, if appropriate.

As to offenses for which punishment was not imposed under Article 104, he will proceed as follows: He will attach to the charges any available admissible evidence of previous convictions (79*c*) which in the case of soldiers is usually in the form of an extract copy of the pertinent entries in the service record; enter on the form any required data that are missing (App. 3); correct any errors in such data, initialing the corrections; and take appropriate action with respect to the restraint of the accused. See 19. He will make no corrections or changes on the charges themselves. He will make or cause to be made an investigation of the charges sufficient to enable him to take appropriate action. The report of such investigation will be informal or formal, depending on whether the case will probably be disposed of by the officer exercising summary court-martial jurisdiction. The report will accompany the charges. He may act under Article 104 after the investigation.

34. **ACTION BY OFFICER EXERCISING COURT-MARTIAL JURISDICTION.**—*a.* ***General.***—He will act under Article 104 with reference to offenses for which such disposition is proper. Specifications and charges thus disposed of and specifications and charges which are dismissed as trivial or for other reasons (see next subparagraph) will be lined out and initialed. The remaining charges and specifications will be renumbered, if appropriate.

b. ***Dismissal of charges.***—He may decide that all or some of the charges do not warrant further action because they are trivial, do not state offenses, are unsupported by available evidence, or because there are other sound reasons for not punishing the accused with respect to the acts alleged. If so, he may dismiss all or part of the charges. Dismissal of charges may be accomplished by return to the accuser of the charge sheet with appropriate notation, or by similar informal action.

c. ***Alterations.***—Charges forwarded or referred for trial and the accompanying papers should be free from defect of form or substance, but delays incident to the return of papers for correction of

defects which are not substantial will be avoided. Obvious errors may be corrected and the charges may be redrafted over the signature of the accuser, provided the redraft does not involve any substantial change or include any person, offense, or matter not fairly included in the charges as preferred. Corrections and redrafts should be initialed by the officer making them. If a substantial change is made new charges should be signed and sworn to by an accuser.

d. ***Investigations.***—He will make or cause to be made any necessary investigation but will not investigate charges signed by himself if another officer is available. If the charges were investigated pursuant to 35 and Article 46*b* before reaching him, another investigation need not be made unless there is reason to believe that further investigation would aid in the administration of justice. If as a result of an investigation a more serious or essentially different offense is charged, he should direct a new investigation to afford the accused an opportunity to exercise the privileges afforded him by 35*a* and Article 46*b* with respect to the new or different matters alleged. For example, if charges of absence without leave are changed to desertion, or charges of larceny to robbery, the amended charges will be investigated anew.

e. ***Policies generally applicable.***—With due regard to the policies of the Department of the Army and other superiors and subject to jurisdictional limitations, charges, if tried at all, should be tried by the lowest court that has power to adjudge an appropriate and adequate punishment. In this connection see 14 as to the authority to cause a capital case to be tried by special court-martial. The objections to referring charges for a serious military offense, such as desertion, to an inferior court should be considered. Further, it should be observed that the retention in the Army of thieves and persons guilty of other offenses involving moral turpitude injuriously reflects upon the good name of the service and its self-respecting personnel. Ordinarily a specification as to which the statute of limitations apparently may be successfully pleaded should not be referred for trial.

f. ***Delays.***—Action will be taken promptly in every case. For the penalties for delay, see 26 and Article 70. When a person is held for trial by general court-martial the commanding officer will within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same is not practicable, he will report to superior authority the reasons for delay (A. W. 46*c*).

g. ***Forwarding; reference for trial.***—Charges referred for investigation or trial or forwarded should be accompanied by the related papers and any available evidence of previous convictions. When charges are forwarded a recommendation as to disposition of the case, signed by the forwarding officer, will be included. A commanding officer should take into consideration the character and prior service of the accused in deciding upon his action or recommendation in desertion cases and in other cases involving offenses of a purely military nature. He should not hesitate in a proper case to recommend restoration to duty. The usual form of indorsement referring charges for trial is shown on the form of the charge sheet (App. 3). The signed indorsement referring charges will be on the original sheet and may include any proper instructions; for instance, a direction that the charges be tried with certain other charges against the accused, or in a common trial with other persons, or that a capital case for which the death penalty is not mandatory be treated as not capital (14 and A. W. 25).

h. ***Special and summary courts-martial.***—If a case involving an offense punishable by bad conduct discharge (117*c*) is referred for trial to a special court-martial, the appointing authority may direct by his signed indorsement that it be tried without a reporter (46) if the interest of the service does not appear to require that a bad conduct discharge be adjudged. If the only officer present with a command decides to try the charges as a summary court-martial no indorsement is required.

i. ***Common trial.***—If two or more persons commit an offense or offenses which, although not jointly committed (27), are committed at the same time and place and are provable by the same evidence, the appointing authority may in his discretion direct a common trial for such offenses only. Offenses which are not closely related should not be tried in a common trial, notwithstanding the fact that some other offenses with which each accused is charged may be closely related. Thus where A and B are each charged with larcenies which were committed at the same time and place, and B is also charged with an assault with intent to rob alleged to have been committed several days later, the assault specification against B should not be tried in a common trial, although the charges of larceny may properly be tried at such a trial.

35. **INVESTIGATION OF CHARGES; REFERENCE TO STAFF JUDGE ADVOCATE; SUSPECTED INSANITY.**—*a.* ***Investigation of charges—introductory statement.***—No charge will be referred to a general court-martial for trial until a thorough and impartial investigation thereof has been made in compliance with Article 46*b*. The officer appointed to make an investigation should be a mature officer, preferably a field officer or one with legal training

and experience. Neither the accuser nor any officer who is expected to become a member of the prosecution or defense upon possible trial of the case will be designated as investigating officer.

In conducting the investigation, the investigating officer will comply with Articles 46*b* and 24.

The purpose of the investigation required by Article 46*b* is to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information upon which to determine what disposition should be made of the case. It is not the function of the investigating officer to perfect a case against the accused, but to ascertain and impartially weigh *all* available facts in arriving at his conclusions. He is required to conduct *a thorough and impartial investigation*, and is not limited to the examination of witnesses and documentary evidence listed on the charge sheet. He should extend his investigation as far as may be necessary to make it thorough. The investigation should be dignified and military, as brief as is consistent with thoroughness and fairness, and limited to the issues raised by the charges and to the proper disposition of the case. Any failure to comply substantially with the requirements of Article 46*b* which results in prejudice to the accused's substantial rights at the trial—such as a denial of a reasonable opportunity to secure material witnesses for use at the trial or of an opportunity to prepare his defense—may require a delay in disposition of the case or disapproval of the proceedings. See 70*c*. Similarly a failure to comply with the provisions of Article 24 may result in a miscarriage of justice.

The remainder of this paragraph (35*a*) is intended primarily to indicate a proper procedure in the usual cases. Variations to meet the circumstances of other cases or exceptional or local conditions, or for any other good reasons, are not only permissible but should be adopted, provided the spirit and purpose of the statutory requirements referred to above are observed and carried out.

Instructions.—At the outset of the investigation the accused will be informed of the following: The offense charged against him; the name of the accuser and of the witnesses against him as far as then known by the investigating officer; the fact that charges are about to be investigated; his right to have counsel represent him at the investigation if he so desires, as provided in Article 46*b*; his right to cross-examine witnesses if they are available and to present anything he may desire in his own behalf, either in defense or mitigation; his right to have the investigating officer examine available witnesses requested by him; his right to make a statement in any form, but that he is not required to make any statement regarding the offense of which he is accused or being investigated, and that any statement he may make may be used as evidence against him in a trial by court-martial.

If the accused requests to be represented by counsel, the investigating officer will promptly report the accused's request to the officer who referred the charges for investigation. The latter will take the following action:

(1) If the accused requests civilian counsel of his own selection, he will give the accused a reasonable opportunity to obtain such civilian counsel without unduly delaying the investigation, but such counsel will not be provided at Government expense.

(2) If the accused desires military counsel of his own selection, and if such military counsel is reasonably available within the command, he will provide such military counsel. If such counsel is not under the command of the officer who referred the charges for investigation that officer will take prompt action to ascertain the availability of the requested counsel and, if available, to obtain his services without unduly delaying the investigation. See second subparagraph of 45*a*.

(3) If counsel is not provided as indicated in (1) or (2) above, and if the officer who ordered the investigation is the officer exercising general court-martial jurisdiction over the command, he will detail a qualified officer to represent the accused as counsel at the investigation; otherwise he will forward the accused's request directly and expeditiously to the officer exercising general court-martial jurisdiction over the command, who will promptly designate and provide such counsel.

If practicable, charges must be forwarded to the officer exercising general court-martial jurisdiction within eight days after an accused is arrested or confined (A. W. 46*c*). The investigation should be conducted promptly, while the events are fresh in the minds of witnesses. An investigation will not be delayed if the accused is unable to provide civilian counsel of his own selection within a reasonable time after having been given an opportunity to obtain such counsel.

The principles stated in the first, fourth, fifth, ninth, and tenth subparagraphs of 45*b* apply equally to the counsel at the investigation. Whenever counsel is requested by accused the investigation will be conducted in the presence of such counsel unless the accused expressly excuses his counsel.

All available witnesses, including those requested by the accused, who appear to be reasonably necessary for a thorough and impartial investigation will be called and examined in the presence of the accused, and if counsel has been requested, in the presence of the accused and his counsel. Ordinarily application for the attendance of any witness subject to military law will be made to the immediate commanding officer of the witness. The decision of the officer exercising summary court-martial jurisdiction over the command to which the witness

belongs is final as to availability. There is no provision for compelling the attendance of witnesses not subject to military law or the law of war, or for paying any witness. Although exceptions may be made by the investigating officer, he will ordinarily require witnesses who are examined during the investigation to sign and swear to the truth of the substance of their statements after they have been reduced to writing. If material witnesses on behalf of the accused or the prosecution are not reasonably available, and if it appears that they may not be available at the time of trial, the investigating officer should initiate action with a view toward obtaining necessary depositions. See 30, 106, and Article 25.

When the investigating officer makes known to the accused the substance of the testimony expected from a witness as ascertained from a written statement of the witness, interview with the witness, or other similar means, and the accused states that he does not desire to cross-examine such witness, the witness need not be called even if available. When a witness requested by the accused is available, such witness need not be called if the accused withdraws his request upon being informed that the testimony expected by the accused from such witness will be regarded as having been actually taken.

To the extent required by fairness to the Government and the accused, documentary evidence and statements of witnesses who are not available will be shown, or the substance thereof will be made known, to the accused and to his counsel if counsel has been requested.

Whenever it appears that the case may be disposed of by reference to a general court-martial for trial, a formal report of investigation will be made. For a form of report see Appendix 12. Although previously prepared forms may be used, special care should be exercised to insure that the use of forms of report of investigation does not result in perfunctory or inaccurate certifications of compliance with the requirements of this paragraph (35*a*). Unless otherwise indicated by him, the submission of his report by an investigating officer will be regarded as a statement that to the best of his knowledge and belief the investigation of the matters set forth in the charges was made in substantial conformance with all requirements, the matters set forth in the charges as to which he recommends trial are true, and such charges are in proper form.

A formal report by indorsement or letter will include, or carry as inclosures or by reference to other papers returned or submitted by him with the report:

First. A statement of the name, organization, or address of counsel and information as to the presence or absence of counsel throughout the proceedings in all cases in which counsel has been requested by the accused.

Second. A statement of the substance of the testimony taken on both sides, including any stipulated testimony, e. g., where accused withdraws a request for a witness upon being told that the testimony expected would be regarded as taken.

Third. Any other statements, documents, or matters considered by him in reaching his conclusions or making his recommendations, or recitals of the substance or nature of such items.

Fourth. A statement of any reasonable ground for the belief that the accused is or was at the time of an offense mentally defective, deranged, or abnormal. The recommendation of the investigating officer as to what disposition should be made of the case.

An informal report according to circumstances or instructions of superior authority made in cases in which it does not appear that the case will be disposed of by reference for trial by general court-martial, may be made orally or by a brief memorandum indorsement, notations on the charge sheet, or other suitable means, and, however made, need include in abbreviated form only the first, second and fourth items of the formal report, but the sources of any material evidence for either side which were not shown in the papers received by the investigating officer should be reported.

b. ***Reference to staff judge advocate.***—Before directing the trial of any charge by general court-martial the convening authority will refer it to his staff judge advocate for consideration and advice; and no charge will be referred to a general court-martial for trial unless it has been found that a thorough and impartial investigation thereof has been made as prescribed in Article 46*b*, that such charge is legally sufficient to allege an offense under the Articles of War, and is sustained by evidence indicated in the report of investigation (A. W. 47*b*).

Subject to the provisions of this paragraph (35*b*), reference to a staff judge advocate will be made and his advice submitted in such manner and form as the appointing authority may direct; but the appointing authority will at all times communicate directly with the staff judge advocate in matters relating to the administration of military justice (A. W. 47*a*).

The advice of the staff judge advocate shall include a written and signed statement as to his findings with respect to substantial compliance with the provisions of Article 46*b*, the legal sufficiency of the charge under the Articles of War, whether the charge is sustained by evidence indicated in the report of investigation, and shall include a signed recommendation of the action to be taken by the appointing authority. Such recommendation will accompany the charges if referred for trial. See 41*d*.

c. ***Suspected insanity.***—For action to be taken when it is suspected that accused lacks mental capacity or that he was not mentally responsible at the time of the offense charged see 111.

Chapter VIII

MEMBERS OF COURTS-MARTIAL

APPOINTMENT—CHANGES IN PERSONNEL—MEMBERS—PRESIDENT—LAW MEMBER

36. **APPOINTMENT.**—See 4–6, inclusive, for various matters relating to the appointment of courts-martial, including the detail of a law member, and the appointment of a trial judge advocate, defense counsel, and assistants.

For forms of appointing orders see Appendix 2.

37. **CHANGES IN PERSONNEL.**—It is within the discretion of the appointing authority to make changes in the personnel appointed or detailed by him; for instance, he may detail new members or a new trial judge advocate. These changes are usually accomplished by promulgation of formal written amending orders. If the need arises for a change by oral order, the oral order should be confirmed by written orders. For forms of amending orders see Appendix 2. Amending orders should be kept to a minimum.

In appointing a new court, the old court should not be dissolved nor the order appointing the old court rescinded or revoked for the reason that it may be necessary that the old court be reconvened.

When a general court-martial is appointed to sit at a post, camp, station or subordinate command at a distance from the officer exercising general court-martial jurisdiction, and the personnel of the court are selected from such post, camp, station or subordinate command, the commanding officer of the installation or subordinate command should transmit timely recommendations to the appointing authority as to the availability of members of his command (as affected by leave, reassignment, relief from active duty, or other matters) to act as personnel of any court to which they have been or may be detailed.

38. **MEMBERS.**—*a.* ***Duties in general, oath.***—Members of courts-martial hear the evidence, determine the guilt or innocence of the accused and, if the accused is found guilty, adjudge a proper sentence. See in this connection 78, 80, 81. Each member of the court is sworn to determine the case "according to the evidence" and "without partiality, favor or affection" (A. W. 19). See 103 and Article 19 as to oath of members.

If before trial it appears to a member that he should not sit on the court, either at all or in a particular case, for reasons enumerated in 58*e* or for other reasons that might not otherwise come to the timely attention of the appointing authority, he will take appropriate steps to bring the matter to the attention of the appointing authority.

Each member has an equal voice and vote with other members in deliberating upon and deciding all questions submitted to a vote or ballot, neither the president nor the law member having any greater rights in such matters than any other member.

Members will be dignified and attentive. Although a court has no power to punish its members, improper conduct by a member, such as a refusal or failure to vote or properly to discharge any other duty under his oath or otherwise, is a military offense.

b. ***New member.***—If, in the course of a trial, a new member is detailed to the court pursuant to 37 and is sworn (opportunity to challenge him having been given), the substance of all proceedings had and evidence taken in the case prior to his introduction will be made known to him in open court before the trial proceeds.

c. ***Absence of members—in general.***—A member of a general or special court-martial who has reason to believe that he will be absent from a session of the court will so inform the trial judge advocate, stating the reason.

When less than a quorum is present the court cannot be organized as such or proceed with a trial. Less than five members (three in a special court-martial) may adjourn from day to day, and when five (three) are present and one is challenged, the remaining four (two) may pass on the challenge.

When, pursuant to Article 4, an enlisted person requests participation of enlisted members in his trial by general or special court-martial the court shall not, without his consent, proceed with his trial unless one-third of the members actually sitting on the court throughout his trial are enlisted persons.

If the membership of a court-martial is reduced below the minimum required by law or if the trial judge advocate has good reason to anticipate a reduction he will report the facts to the appointing authority. A report relating to personnel requirements will usually be made by the trial judge advocate through the commanding officer of the post, command or station where the court is sitting, who will promptly forward it or the substance thereof to the appointing authority, together with the names of an appropriate number of officers or enlisted persons available and suitable for detail as members of the court-martial.

The principles of 38*b* apply when a member misses part of the proceedings because of absence during a trial.

Absence of Law Member.—A general court-martial shall not receive evidence upon any matter nor shall it vote upon its findings or sentence in the absence of the law member (A. W. 8). When the law member is absent at any time during the trial of a case by general court-martial the court will adjourn until either the law member is present or a new law member is regularly detailed and is present, and will, if the circumstances so require, cause a report of the facts to be made to the appointing authority.

39. **PRESIDENT—Duties.**—The senior in rank among the members present is the president and presiding officer of the court. If the law member of a general court-martial is or becomes the senior member present, he exercises the functions of both president and law member.

As president he maintains order and, subject to the direction of the court, gives the directions necessary for the regular and proper conduct of the proceedings, and takes proper steps to expedite the trial of all charges referred to the court. Unless otherwise provided, he speaks and acts for the court in every instance for which a rule of procedure has been prescribed by law, regulation, or its own resolution, and authenticates by his signature all acts, orders, and proceedings of the court. With reference to the duty of the president of a special court-martial to rule on interlocutory questions, see 51*c*.

As a member he has the duties, powers, and privileges of members in general.

In special court-martial cases the president will instruct the court in accordance with Article 31. See in this connection 78*a*, 78*d*, and 125*a*.

40. **LAW MEMBER.**—As law member, his principal duty is to rule upon interlocutory questions (51*d*) and to advise the court on questions of law and procedure which may arise in discussions in closed session. Such advice may include an explanation as to the elements necessary to establish the offense charged, what lesser offenses, if any, are included in the offense charged, the possible findings the court may make by way of exceptions and substitutions, the maximum punishment for each offense with which accused is charged, and if requested, the proper form in which to state the findings and sentence reached by the court. As a member he has the duties, powers, and privileges of members in general. In accordance with Article 31, it is the duty of the law member before a vote is taken to advise the members in open court concerning the presumption of innocence and the nature and quantum of evidence required to sustain findings of guilty. See 78*a*, 78*d* and 125*a*.

Chapter IX

COUNSEL AND OTHER PERSONNEL

TRIAL JUDGE ADVOCATE—ASSISTANT TRIAL JUDGE ADVOCATE—DEFENSE COUNSEL—ASSISTANT DEFENSE COUNSEL—INDIVIDUAL COUNSEL—REPORTER—INTERPRETER—CLERKS AND ORDERLIES

41. **TRIAL JUDGE ADVOCATE.**—*a.* ***Selection; relief; absence.***—He will be carefully selected.

The trial judge advocate of a general court-martial shall, if available, be a member of the Judge Advocate General's Corps or 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 (6; A. W. 11). Within the meaning of Article 11, determination of the availability of members of the Judge Advocate General's Corps or of members of Federal or State bars rests exclusively within the discretion of the appointing authority and his determination shall be final.

The trial judge advocate must be fair and free from bias, prejudice, or hostility. If he has acted as a member of the court, defense counsel, assistant defense counsel, or investigating officer in any case he shall not subsequently act in the same case as trial judge advocate or assistant trial judge advocate (A. W. 11). A report of facts will be made at once to the appointing authority through appropriate channels whenever it appears to the president of the court, or to the trial judge advocate himself, that the latter is for any reason, including bias, prejudice, hostility, or previous connection with a particular case, disqualified or unable properly and promptly to perform his duties. See 58*b*.

For a proper reason (e. g., preparation of another case) the president may excuse from attendance during a trial or trials such of the personnel of the prosecution as will not be required.

b. ***Duties in general; weekly report; report to commanding officer of result of trial; freedom in conducting cases.***—The trial judge advocate 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 its proceedings (A. W. 17). When charges are referred to him for trial, it is his duty promptly to bring them to trial before the court indicated in the reference for trial. See 103 and Article 19 as to oath.

Unless otherwise directed by the appointing authority, he will submit a weekly report to the latter through the president of the court, in which, in addition to such matter as may be required by the appointing authority, will be included a statement of the reasons for delay in disposing finally of cases that have been on hand for over two weeks.

Immediately upon final adjournment of the court in a case, and irrespective of whether any announcement in open court was made concerning the result, the trial judge advocate will notify the commanding officer of the accused in writing of the result, including any findings reached and any sentence imposed by the court.

Subject to the provisions of the manual, he should be left free by the court to introduce his evidence in such order as he sees fit. In general, he may bring cases to trial in such order as he deems expedient. He will be given ample opportunity to prepare properly the prosecution of each case. With a view to saving time, labor, and expense, he should join in appropriate stipulations as to unimportant or uncontested matters. See 140*b* (Stipulations).

c. ***Duties prior to trial.***—He will report to the appointing authority any substantial irregularity in the order appointing the court or in the charges or accompanying papers. Ordinarily he will correct and initial slight errors or obvious mistakes in the charges, but will not without authority make any substantial change therein. See 34. He will take proper action to assure that the data on the charge sheet and any evidence of previous convictions are complete and free from errors of substance or form.

Unless otherwise directed by the president or unless obviously unnecessary, he will send a timely notice to the members of the court and to all others concerned, including the officer, if any, whose duty it is to see that the accused attends, of the date, hour and exact place of any meeting of the court. He may include in this notice such other matter as the president may direct, such as a statement of the uniform to be worn. Prior to trial he will notify and arrange to have present at the trial witnesses who are to testify in person (including witnesses desired by the defense) and the reporter and interpreter if required. See 105. Before deciding that the presence of any particular witness is necessary he should first consider whether the evidence which the witness is expected to give can as well be covered by a stipulation or deposition. See 105*a* and Article 25. If in disagreement with the defense counsel as to whether the attendance of a witness required by the defense is necessary, he will report the matter to the appointing authority.

Before the court assembles he will obtain a suitable room for the court, see that it is in order, procure the requisite stationery, and take such action as will enable him to make a prompt, full, and system-

atic presentation of the case at the trial. As to each offense charged, the burden is on the prosecution to prove beyond a reasonable doubt by relevant evidence that the offense was committed, that the accused committed it, that he had the requisite criminal intent at the time, and that the accused is within the jurisdiction of the court, except to the extent that such burden is relieved by a plea of guilty. Whatever the defense may be, this burden never changes. Proper preparation to meet this burden includes a consideration of the essential elements of the offense and of the pertinent rules of evidence, to the end that only relevant evidence will be introduced at the trial, and requires a determination of the order in which the evidence will be introduced. In general, evidence should be presented in sequence of events as nearly as practicable, and, when several offenses are charged, especially if unrelated, the evidence should be directed to the development of their proof in the order charged so that neither the court nor the accused may be in doubt at any time as to the offense to which the evidence being introduced refers.

If he finds that the provisions of this manual do not clearly settle a question likely to arise at the trial, he should endeavor to secure for use at the trial, authorities to sustain his contentions, such as pertinent decisions of the courts or authoritative military precedents. To secure these authorities he may communicate with the appointing authority.

If, while preparing a case, he discovers a matter which in his opinion makes it inadvisable to bring the case to trial he will inform the appointing authority at once, provided it is reasonably apparent that the matter was not known to the appointing authority when the charges were referred for trial. For example, such action would be appropriate when the trial judge advocate discovers that there has not been a substantial compliance with Article 46*b* (35*a*), and it appears that the accused may be prejudiced thereby, or that the accused was or is insane, or that the only witness to an essential fact has disappeared or repudiates the substance of the testimony expected from him.

d. ***Duties during trial.***—He executes all orders of the court. Under the direction of the court he keeps or superintends the keeping of the required record of proceedings. He signs the record of each day's proceedings.

Although his primary duty is to prosecute, any act (such as the conscious suppression of evidence favorable to the defense) inconsistent with a genuine desire to have the whole truth revealed is prohibited.

While the court is in open session, he should respectfully call its attention to any apparent illegalities or irregularities in its action or in the proceedings.

He will take care that any papers in his possession which relate to a case referred to him for trial and which are not in evidence are not exposed to any risk of inadvertent examination by members of the court; nor will he bring to the attention of the court any intimation of the views of the appointing authority, or those of the staff judge advocate, with respect to the guilt or innocence of the accused, appropriate sentence, or concerning any other matter exclusively within the discretion of the court. See Article 88.

Aside from opinions expressed in the proper discharge of his duty to prosecute (e. g., in an argument on the admissibility of evidence), he should not give the court his opinion upon any point of law arising during the trial except when it is requested by the court in open court. When he addresses the court he will rise. The court may require him to reduce his arguments to writing.

e. ***Relations to the accused and his counsel.***—Except to the extent that this manual may otherwise require, it is not his duty to assist or advise the defense.

Immediately upon receipt of charges referred to him for trial he will serve a copy of the charge sheet as received and corrected by him on the accused and will inform the defense counsel of the court that such copy has been so served. Except as otherwise directed by the appointing authority, he will permit the defense to examine from time to time any paper accompanying the charges, including the report of investigation and papers sent with charges on a rehearing. He will also permit the defense to examine from time to time the orders appointing the court and all modifying orders.

Ordinarily his dealings with the defense will be through any counsel the accused may have. Thus if he desires to know how the accused intends to plead he will ask the regularly appointed defense counsel or other counsel, if any, of the accused. He will not attempt to induce a plea of guilty.

Except for unannounced findings and sentence the defense will be allowed to read the record of trial as it is written, and the trial judge advocate of a general court-martial, or of a special court-martial in which a verbatim record is made, will furnish every person tried by the court who desires it a copy of the record of trial, including, when requested, a copy of all documentary exhibits, less unannounced findings and sentence. See in this connection 46*b* (Preparation of carbon copies); 48 (Clerks and Orderlies); and 85*b* (Receipt or certificate of delivery).

42. **ASSISTANT TRIAL JUDGE ADVOCATE.**—*a.* ***Duties in general.***—An assistant trial judge advocate of a general or special court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the trial judge ad-

vocate of the court (A. W. 116). If the trial judge advocate is unable to authenticate the record of trial because of death, disability, or absence, it will be authenticated by the assistant trial judge advocate in lieu of the trial judge advocate if the former was actually present during the trial. See Article 33 and Appendix 6. If the trial judge advocate was absent during the trial and the assistant trial judge advocate conducted the trial, he is, for purposes of authentication, the trial judge advocate. He will perform those duties in connection with trials which the trial judge advocate may designate. See 103 and Article 19 as to oath.

b. Term "trial judge advocate" includes assistant.—Wherever in this manual the trial judge advocate of a general court-martial is mentioned the term will be understood to include assistant trial judge advocates, if any, unless the context shows clearly that a different sense is intended.

43. **DEFENSE COUNSEL.**—*a. Selection; relief; absence.*—He will be carefully selected.

In any case in which the appointed trial judge advocate is a member of the Judge Advocate General's Corps or of the bar of a Federal court or the highest court of a State of the United States, the appointed defense counsel must be an officer who is similarly qualified. Although the trial judge advocate may be an officer of the Judge Advocate General's Corps, the defense counsel need not be an officer of such Corps, provided he is a member of the bar of a Federal court or the highest court of a State of the United States. See 6 and Article 11. No person who has acted as member, trial judge advocate, assistant trial judge advocate, or investigating officer in any case shall subsequently act as defense counsel or assistant defense counsel in the same case unless he is expressly requested by the accused (A. W. 11).

It is a purpose of Article 11 to insure that an accused person shall have the right, subject to express waiver, to be represented at his trial by general or special court-martial by a legally qualified lawyer in every case in which the prosecution is conducted by an officer so qualified. Necessary action will be taken at all stages of the proceedings to provide such representation. See 6.

A report of facts will be made at once to the appointing authority for his appropriate action, whenever it appears to the president of the court or to the defense counsel himself that the latter is for any reason, including bias, prejudice, hostility toward the accused, disqualification as above noted or otherwise, unable promptly and impartially to perform his duties in any case. For a proper reason (e. g., preparation of another case) the court, if in session, otherwise the president, may with the express consent of the accused excuse from attendance during a trial such of the personnel of the defense as will not be required.

b. ***Duties.***—When the defense is not in charge of individual counsel the duties of defense counsel are those outlined in 45*b*. When the defense is in charge of individual counsel, civil or military, the duties of defense counsel as associate counsel are those which the individual counsel may designate.

When charges are referred to a court for trial the defense counsel will inform the accused immediately that he has been detailed to defend him at the trial, explain his general duties and advise him of his right to select individual counsel, civil or military, of his own choice pursuant to Article 17. If the accused expresses a desire to be represented by individual counsel, the defense counsel will immediately report the fact to the appointing authority through proper channels and take appropriate steps to secure and consult the requested counsel and render any other desired assistance in behalf of the accused. Unless the accused otherwise desires, the defense counsel will undertake the immediate preparation of the defense without waiting for the appointment or the retaining of any individual counsel.

c. ***Terms "counsel", "counsel for the accused", "defense counsel".***—The term "counsel" as used in this manual will be interpreted to include, unless otherwise indicated by the context, defense counsel (civil or military) and trial judge advocate. Whenever the phrase "counsel for the accused" or any similar phrase is used it is to be understood, unless otherwise indicated, to include appointed defense counsel and any individual counsel. The term "defense counsel" will be understood to include an assistant defense counsel, if any, unless the context shows that a different sense is intended.

44. **ASSISTANT DEFENSE COUNSEL.**—An assistant defense counsel shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon counsel for the accused (A. W. 116). But see 6, 43*a*. Unless in charge of the defense, he will perform those duties in connection with the trial that the counsel in charge of the defense may designate.

45. **INDIVIDUAL COUNSEL FOR THE ACCUSED.**—*a.* ***Statutory rights of accused; detail of individual counsel.***—The accused shall have the right to be represented in his defense (general or special court-martial) by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article 11. Should the accused have counsel of his own selection, the defense counsel and, if any, the assistant defense counsel, of the court shall, if the accused so desires, act as his associate counsel (A. W. 17). Civilian counsel will not be provided at the expense of the Government.

Application through the usual channels for the detail of a person requested by the accused as military counsel may be made by the accused or by anyone on his behalf. When the application reaches an

officer who is authorized to make the detail and to order any necessary travel, he will act thereon without delay and transmit through channels to the appointing authority his reply as to the availability of the requested counsel. His decision as to the availability of the requested counsel is subject to revision by his immediate superior on appeal by or on behalf of the accused.

*b. **Duties in general; freedom in conducting defense.***—An officer or other military person acting as individual counsel for the accused before a general or special court-martial will perform such duties as usually devolve upon the counsel for a defendant before civil courts in a criminal case. He will guard the interests of the accused by all honorable and legitimate means known to the law. It is his duty to undertake the defense regardless of his personal opinion as to the guilt of the accused; to disclose to the accused any interest he may have in connection with the case, any ground of possible disqualification, and any other matter which might influence the accused in the selection of counsel; to represent the accused with undivided fidelity, and not to divulge his secrets or confidence. It is improper for him to assert in argument his personal belief in the accused's innocence or to tolerate any manner of fraud or chicane.

He should make timely request to the trial judge advocate to secure the attendance of defense witnesses, and with a view to saving time, labor and expense, he should cooperate with the trial judge advocate in the preparation of depositions and in appropriate stipulations as to unimportant or uncontested matters. See 140*b* (Stipulations).

Before the trial he will advise an accused soldier of his right to have soldiers as members of the court. See Article 4. If the accused elects to exercise this right, the defense counsel will prepare the written request required by Article 4 and forward it without delay to the appointing authority or to the court if trial is imminent.

He will explain to the accused the meaning and effect of a plea of guilty and his right to introduce evidence after such plea (71); his right to testify or to remain silent (134*d* and 135*a*); his right to make a statement (76); his right to introduce evidence in extenuation (124, 132*b*); and, in an appropriate case, his right to interpose the statute of limitations (67 and 78). These explanations will be made regardless of the intentions of the accused as to testifying, making a statement, or as to how he will plead.

His preparation for trial should include a consideration of the essential elements of each offense charged and of the pertinent rules of evidence, to the end that the evidence he proposes to introduce in defense may be confined to relevant evidence, and that he may be ready to make appropriate objection to any irrelevant evidence that might be offered by the prosecution. In determining the order in

which he proposes to introduce evidence for the defense, he should observe the general principle stated in the third subparagraph of 41*c*.

The fourth subparagraph of 41*c* applies equally to him.

He will examine the record of the proceedings of the court before it is authenticated.

The court will avoid any unwarranted interference with his conduct of the defense, but may require him to reduce his arguments to writing. When he addresses the court he will rise.

Ample opportunity will be given the accused and his counsel to prepare the defense, including opportunities to interview each other and any other person.

When the trial proceeds after the accused has escaped, the counsel for the accused continues to represent him.

46. **REPORTER.**—*a.* ***Authority for appointment or detail.***—Under such regulations as the Secretary of the Army may from time to time prescribe, the president of a court-martial or military commission or a court of inquiry shall have power to appoint a reporter (A. W. 115).

Enlisted men may be detailed to serve as stenographic reporters for general or special courts-martial, courts of inquiry, and military commissions.

Subject to such exceptions as may be made by appointing authorities, and within the limitations prescribed by statute, the appointment of either civilian or military court reporters is hereby authorized, except for summary courts-martial and for special courts-martial in cases in which a bad conduct discharge is not authorized or in which the appointing authority directs that a reporter will not be used. See 34*h*, 117.

In the appointment of civilian reporters, among applicants equally qualified, preference will be given to former members of the armed forces of the United States who have been honorably discharged therefrom, and to their widows, and also to the wives of any such honorably discharged former members of the armed forces of the United States who have been injured and are not themselves qualified but whose wives are qualified to hold such positions.

b. ***Duties; oath; compensation.***—He shall record the proceedings of and testimony taken before such court or commission and may set down the same in the first instance in shorthand or by mechanical recording device (A. W. 115). If a question is raised as to whether any particular matter is included in the term, "proceedings of and testimony taken," the court will determine the question in accordance with applicable law and regulations. There will be no "off the record" discussions in open court. The reporter will follow the forms pre-

scribed for the preparation of records contained in Appendix 6 and will be familiar with the provisions of 85*b*.

He will discharge his duties as promptly as practicable under the circumstances. In general court-martial cases and in special court-martial cases (other than those in which a reporter is not authorized) he will prepare an original of each record and of all documentary exhibits received in evidence and carbon copies of each record and of all documentary exhibits equal to the number of accused tried, whether or not the accused request copies. Additional carbon copies will be made as may be required by the trial judge advocate, not exceeding the number authorized by the appointing authority.

See 103 as to oath.

Civilian or enlisted stenographic reporters appointed or detailed to serve at general or special courts-martial shall be compensated at the rates prescribed in AR 35–4120. Authorization need not be shown in the appointing order.

47. **INTERPRETER.**—*a.* ***Authority for appointment.***—Under such regulations as the Secretary of the Army may from time to time prescribe, the president of a court-martial or military commission, or court of inquiry, or a summary court, may appoint an interpreter (A. W. 115). One or more interpreters, as may be required, may be employed for courts-martial whenever necessary without application to the appointing authority.

b. ***Duties; oath; compensation.***—He shall interpret for the court (A. W. 115).

In questioning a witness through an interpreter the question should be put in the same interrogatory form as when questioning a witness not through an interpreter. The interrogator, for example, will ask, "What is your name?" rather than state to the interpreter, "Ask the witness what his name is."

The interpreter should translate questions and answers as given to him. Thus, if the question is "What is your name?" that question should be asked in the language of the witness, and the interpreter should not use such a form as, "They want to know what your name is".

See 103 and Article 19 as to oath, and AR 35–4120 as to compensation.

48. **CLERKS AND ORDERLIES.**—When necessary the commanding officer will detail suitable soldiers as clerks and as orderlies to assist the trial judge advocate and counsel for the accused.

Chapter X

PROCEDURE

CERTAIN GENERAL MATTERS—CLOSED SESSIONS—INTERLOCUTORY QUESTIONS OTHER THAN CHALLENGES—CONTINUANCES

49. **CERTAIN GENERAL MATTERS.**—*a.* ***Order of proceedings.***—The chronological order of the usual proceedings in trial by general and special courts-martial is indicated in the guide to procedure in Appendix 5 and in the forms of records in Appendices 6 and 7. As far as practicable the discussion in the chapters on procedure herein follows the same order.

b. ***Proceedings in each case to be complete.***—In each case the proceedings must be completed without reference to any other case. For example, in each case tried opportunity to challenge must be given and the required oaths administered.

c. ***Joint trials; common trials.***—In joint trials (27) and in common trials (34) each of the accused must in general be accorded every right and privilege which he would have if tried separately. Each accused may, if he desires, be defended by individual counsel, make individual challenges for cause (58*e*), make individual preemptory challenges in a common trial but not in a joint trial (58*d*), cross-examine witnesses, testify in his own behalf, and introduce evidence in his own behalf. Both court and counsel must be careful to notice evidence which is admissible against only one or some of the joint or several accused and consider it only against such accused. See 127*b* (Confessions). Where the evidence is equally applicable to several or all accused, however, needless repetition may be avoided by the use of appropriate general language and consolidation of evidence pertinent to all accused.

d. ***Reference to appointing authority.***—Whenever a matter as to future proceedings in a case is referred to the appointing authority by or on behalf of a general court-martial he will refer the matter to his staff judge advocate for consideration and advice.

e. ***Spectators.***—Except for security or other good reasons, as when testimony as to obscene matters is expected, the sessions of courts-martial will be open to the public. When practicable, notices of the time and place of sessions of courts-martial will be published in such a manner that persons subject to military law may be afforded oppor-

tunity to attend as spectators provided attendance does not interfere with the performance of their duties. Witnesses other than the accused properly may be excluded.

*f. **Opportunity to present and support contentions.***—Both sides are entitled to an opportunity properly to present and support their respective contentions upon any question or matter presented to the court for decision. Improperly restricting argument, particularly in long and complicated cases, or an arbitrary refusal to entertain argument on an interlocutory question may constitute error. But the right should not be abused, and the court may in its discretion limit or refuse to hear argument when it is manifest that such argument is trivial, mere repetition, or made solely for the purpose of delay. As to oral and written argument, see 77.

*g. **Explanation of rights of accused.***—Whenever deemed necessary the court will cause to be explained to the accused any right which he appears not fully to understand. The right of the accused with respect to Article 39 (Statute of Limitations), the meaning and effect of a plea of guilty (71), the right to remain silent or to testify (134*d*; 135*b*; A. W. 24) or to make an unsworn statement (76) will be explained in open court when applicable unless it otherwise affirmatively appears that the accused is aware of his rights in the premises. See Appendix 5 for instructions.

50. **CLOSED SESSIONS.**—A general or special court-martial will sit in closed session (A. W. 19, A. W. 31) during the deliberation and voting upon the findings and sentence and upon interlocutory questions, including challenges. See, however, 58*f* (Procedure on challenge).

Whenever the closing or opening of the court is required, the president will announce such closing or opening.

When the court is closed, all persons except the members who are to vote on the matter will withdraw, unless such members withdraw to another room for the closed session. See Article 30 in this connection.

51. **INTERLOCUTORY QUESTIONS OTHER THAN CHALLENGES.**—*a. **Statutory provisions.***—The law member of a general court-martial shall rule in open court on all interlocutory questions other than challenges arising during the proceedings. Any ruling made by the law member upon an interlocutory question, other than a motion for a finding of not guilty (71*d*), or the question of accused's sanity, including whether the same has become an issue in the trial (112), shall be final and shall constitute the ruling of the court; but the law member may in any case consult with the court in closed session before making a ruling and may change a ruling made at any time during the trial (A. W. 31). See 51*d*.

b. ***Applicability of this paragraph.***—This paragraph (51) applies to all interlocutory questions arising during the proceedings (i. e., all questions other than the findings and sentence) except the question whether a challenge shall be sustained. Any statement or indication in this manual to the effect that a certain question is to be decided by the court is not to be understood as making an exception to the foregoing rule. See, for example, 46*b*.

c. ***Rulings by the president of a special court-martial.***—The president of a special court-martial will rule in open court upon all interlocutory questions other than challenges arising during the trial, such as questions as to the admissibility of evidence offered during the trial, incompetency of witnesses, continuances, adjournments, recesses, motions, order of the introduction of witnesses, and the propriety of any argument or statement of counsel or the trial judge advocate. If a member objects to a ruling of the president upon a question, the court shall be closed and the question voted on as stated in 51*f*.

d. ***Rulings by the law member.***—A ruling by the law member on an interlocutory question other than on a motion for a finding of not guilty or the question of the accused's sanity, being final so far as concerns the court, no repetition of the ruling or announcement of its finality is necessary. Rulings by the law member on a motion for a finding of not guilty and on the question of the sanity of an accused are final unless objected to by a member of the court. Upon such objection the court will be closed and the question decided by vote of the court. See 51*f*.

e. ***Form of rulings.***—Each ruling by the president of a special court-martial, and each ruling by the law member which is subject to objection, should be prefaced by a statement such as "subject to objection by any member."

f. ***Voting on interlocutory questions.***—When voting on any interlocutory question other than a challenge the members of the court shall vote orally, beginning with the junior in rank, and the question shall be decided by a majority vote (A. W. 31). If there be a tie vote on any objection, motion, request, or similar matter, the objection, motion, request, or other matter, is overruled or denied. The voting is in closed session, but the president announces the decision in open court.

g. ***Necessary inquiry to be made—preponderance of evidence controls.***—The ruling or decision should be preceded by any necessary inquiry into the pertinent facts and law. Upon such inquiry questions of fact are determined by a preponderance of the evidence. While the responsibility for a ruling devolves upon the law member or president, as the case may be, he may properly ask that the court close to permit

him to consult with the other members of the court before making his ruling.

52. **CONTINUANCES.**—*a.* ***Statutory provisions; number of; postponement in lieu of continuance.***—For reasonable cause a court-martial may grant a continuance to either party for such time and as often as may appear to be just (A. W. 20).

There is no limit to the number of continuances which may be granted. Any necessity for formal continuance may often be obviated by requesting the president to postpone the assembling of the court or by requesting the court to adjourn or to take a recess.

b. ***Grounds for; effect of denying.***—Among the grounds that may be considered as reasonable are the absence of a material witness; sickness of the trial judge advocate, accused, counsel, or a witness; insufficient time to prepare for trial; and a pending prosecution in a civil court based on the same act or omission.

A failure by the trial judge advocate to cause a copy of the charges to be served as required may be a ground for a continuance; and in time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him (A. W. 46*c*).

The refusal by a court to grant a continuance when reasonable cause is shown will not ordinarily nullify the proceedings, but may be a good ground for directing a rehearing. The right to prepare for trial and to secure necessary witnesses is fundamental and must be extended to accused persons. Although the question of a continuance is one for the sound discretion of the court, whenever it appears that the court has abused its discretion and denied the accused a reasonable opportunity to prepare for trial or otherwise perfect his defense, the proceedings should be disapproved. A rehearing should be ordered only if the prejudice to the rights of the accused can be cured thereby.

c. ***Application and action thereon.***—Application should be made to the court if in session, otherwise to the appointing authority, but an application to the court for an extended delay, if based on reasonable cause, may be referred by the court to the appointing authority.

The proper time for making an application to the court is after the accused is arraigned and before he pleads. The court may defer until after arraignment action on an application made before arraignment, and should so defer action whenever it appears that the granting of a continuance before arraignment may involve a risk of the trial of an offense being barred by the statute of limitations. See 67.

Reasonable cause for the application must be alleged. For instance, when a continuance is desired because of the absence of a witness, the application should show that the witness is material, that due diligence

has been used to procure his testimony or attendance, that the party applying for the continuance has reasonable ground to believe that he will be able to procure such testimony or attendance within the period stated in the application, the facts which he expects to be able to prove by such witness, and that he can not safely proceed with the trial without such witness.

In general the facts as set forth in the application may be accepted as substantially true; but if long or repeated delay is involved, or the facts are disputed or improbable, or if any other good reason therefor exists, the applicant may be required to furnish further proof. On any issue of law or fact arising in the proceedings on an application for a continuance, both parties will be given an opportunity to present evidence and to make an argument.

An application based on the absence of a witness may be denied when the opposite party is willing to stipulate that the absent witness would testify as stated in the application unless it clearly appears that such denial would be prejudicial.

Chapter XI

PROCEDURE

ASSEMBLING—SEATING OF PERSONNEL AND ACCUSED—ATTENDANCE AND SECURITY OF ACCUSED—INTRODUCTION OF THE ACCUSED AND COUNSEL—SWEARING REPORTER—ASKING ACCUSED AS TO COPY OF GENERAL COURT-MARTIAL RECORD—ANNOUNCEMENT OF MEMBERS PRESENT

53. **ASSEMBLING.**—A general or special court-martial assembles at its first session in accordance with the order convening it, thereafter according to adjournment. When, as is usually the case, the appointing order, after stating the hour and date of the first meeting, adds the words "or as soon thereafter as practicable"; or when, as is often the case, the court adjourns to meet at the call of the president, or whenever advisable or necessary for any reason, the president of the court will fix the hour and date for the first or subsequent meeting, as the case may be, and notify the trial judge advocate in order that proper notice of the meeting may be given to all concerned. See 41*c*.

54. **SEATING OF PERSONNEL AND ACCUSED.**—When the court is ready to proceed, it is called to order by the president. The members will be seated with the president in the center, the law member on his immediate left, and other members alternately to the right and left according to rank. If the rank of a member is changed, he will sit according to his new rank. Subject to change by the court, other personnel and the accused will be seated as the president directs, except that the accused will be permitted to sit with his counsel. It is customary to seat the personnel of the prosecution on the right side of the courtroom (facing the court) and the defense on the left. The witness chair faces the president, and the reporter's table is placed near the witness chair. A diagram of a suggested arrangement of the court is contained in Appendix 5.

55. **ATTENDANCE AND SECURITY OF ACCUSED.**—The appointing authority or the post commander or other proper officer in whose custody or command the accused is at the time of trial is responsible for the attendance of the accused before the court. The accused will be properly attired in the class of dress or uniform prescribed by the president for the court. An accused officer, warrant officer, or soldier will wear the insignia of his rank or grade and may wear any decorations, emblems, or ribbons to which he is entitled.

The presence of the accused throughout the proceedings in open court is, unless otherwise stated, essential. See 10 (Effect of Escape), and 83 (Revision).

Neither the court nor the trial judge advocate as such is responsible for or has any authority in connection with the security of a prisoner being tried, and neither the court nor the trial judge advocate as such has any control over the imposition or nature of the arrest or other status of restraint of an accused, except that the court does have control over the accused insofar as his personal freedom in its presence is concerned. However, the court or the trial judge advocate may make recommendations to the proper authority as to these matters.

56. **INTRODUCTION OF THE ACCUSED AND COUNSEL; SWEARING REPORTER; ASKING ACCUSED AS TO COPY OF GENERAL COURT-MARTIAL RECORD; ANNOUNCEMENT OF MEMBERS PRESENT.**—Whenever a quorum and the accused are present for the trial of a new case, and before the court convenes, each member of the prosecution who is not by the order appointing the court shown to be a member of the Judge Advocate General's Corps or a member of the bar of a Federal court or of the highest court of a State of the United States (6) will prepare and submit to the law member of a general court-martial or the president of a special court-martial a certificate stating whether he is or is not so qualified. If any member of the prosecution certifies that he is a legally qualified lawyer in the sense of Article 11, each regularly appointed member of the defense whose qualifications are not shown by the appointing order and any individual defense counsel will also prepare and submit a similar certificate. For forms see Appendix 6. In this connection, if the appointed trial judge advocate is a lawyer qualified in the sense of Article 11, the regularly appointed defense counsel must be so qualified, and this particular requirement cannot be waived by the accused, although the regularly appointed defense counsel may be excused with the consent of the accused (A. W. 11).

After the pretrial requirements of the preceding subparagraph have been satisfied the president will convene the court. The trial judge advocate will announce the name of the accused, and, at the first session of the trial, ask the accused whom he desires to introduce as counsel. If the certificates submitted in accordance with the preceding subparagraph show that any member of the prosecution is a qualified lawyer as provided in Article 11 and that no member of the counsel for the defense present at the trial (including individual counsel) is similarly qualified, the officer to whom the certificates have been submitted will announce the fact, and will explain to the accused his right to such counsel. The accused will be asked whether he is willing to proceed to trial without counsel so qualified as a lawyer. If the ac-

cused states that he is willing to proceed to trial the proceedings will continue. If not, the court will adjourn pending procurement of defense counsel who is legally qualified as stated in 6. Any change in defense counsel during the trial and the qualifications of any new counsel should be brought to the attention of the court and the accused in a similar manner. The court should, whenever the occasion requires, take appropriate action to the end that the accused, if he so desires, will be represented before the court by counsel of his own selection, civil counsel if he so provides or military if such counsel be reasonably available (45*a*), otherwise by the defense counsel duly appointed for the court pursuant to Article 11 (A. W. 17). See 6 and 43.

If at any trial by general or special court-martial it appears that the regularly appointed defense counsel, individual counsel, or any assistant defense counsel has previously acted in the same case as a member, trial judge advocate, or investigating officer, the fact will be announced in open court by the trial judge advocate, who will also explain that under Article 11 such officer is disqualified to act as a member of the defense unless expressly requested by the accused. The accused will be asked in open court whether he desires to introduce such counsel notwithstanding his previous participation in the case. See Appendix 5 and Article 11.

After the introduction of the accused and his counsel the reporter will be sworn (see 103, Oath), and the accused, in the case of trial by general court-martial, or by special court-martial whenever a verbatim report is made, will be asked whether he desires a copy of the record of trial.

At the first session in a trial, the trial judge advocate will announce the names of the members present. Similar announcement will be made whenever there is a change in the membership present, either through the appearance of a new member or a member previously absent, or through the absence of a member previously present.

During the introduction of the accused and his counsel and the naming of the members present, the accused and the personnel of the prosecution and defense will stand.

Chapter XII

PROCEDURE

EXCUSING MEMBERS—CHALLENGES—WITNESS FOR THE PROSECUTION—ACCUSER—OATHS—ARRAIGNMENT

57. **EXCUSING MEMBERS.**—*a.* ***Disclosing grounds for challenge.***—After announcing the members present, the trial judge advocate will disclose in open court every ground for challenge believed by him to exist in the case and will request that each member do likewise with respect to grounds of challenge, whether against the member himself or any other member. The fact that a member has participated in the investigation of the case or that he has forwarded charges with a recommendation concerning trial by court-martial is among the grounds for challenge which should be so disclosed. The trial judge advocate will announce to the court the general nature of the charges, the name of the accuser, the investigating officer, the officers forwarding the charges, and of court members who participated in any proceedings already had.

Similar disclosure and request will be made by the trial judge advocate with respect to a new member before he is sworn; and the trial judge advocate or any member will disclose any such ground at any time during the proceedings that he becomes aware of it.

b. ***Action upon disclosure.***—If it appears from any disclosure that a member is subject to challenge on any ground stated in clauses first to sixth of 58*e* and the fact is not disputed, such member will be excused forthwith. Except as just stated, no action is required under this paragraph (57*b*) with respect to any disclosure that may be made; but proceedings under this paragraph are without prejudice to any rights of challenge of either side.

58. **CHALLENGES.**—*a.* ***Statutory provisions.***—Members of a general or special court-martial may be challenged by the accused or the trial judge advocate for cause stated to the court. The court shall determine the relevancy and validity thereof and shall not receive a challenge to more than one member at a time. Challenges by the trial judge advocate shall ordinarily be presented and decided before those by the accused are offered. Each side shall be entitled to one peremptory challenge, but the law member of the court shall not be challenged except for cause (A. W. 18).

*b. **Who subject to; who may challenge; relief of member of prosecution for cause.***—Only the members of a general or special court-martial are subject to challenge, and they may be challenged only by the trial judge advocate and the accused. When it appears, however, that a member of the prosecution is disqualified because of previous participation in the same case as a member, defense counsel, assistant defense counsel or investigating officer (A. W. 11), that member of the prosecution will be excused by the president forthwith. If the trial cannot continue because a particular member of the prosecution is excused, the court will adjourn and report the fact to the appointing authority.

*c. **When made; reconsideration; opportunity to challenge new member.***—Challenges should be made before arraignment, but the court may permit a challenge for cause to be presented at any stage of the proceedings. A challenge will be so permitted if the challenger has exercised due diligence or if the challenge is based on any of the grounds stated in clauses first to sixth of 58*e*.

The fact that a particular challenge for cause has been adversely determined does not preclude the court from again entertaining it if good cause, such as newly discovered evidence, is shown. Full and timely opportunity will be given to challenge every new member.

*d. **Peremptory challenges.***—A peremptory challenge does not require any reason or ground therefor to exist or to be stated and may be used before, after, or during the challenges for cause, or against a member unsuccessfully challenged for cause, or against a new member if not previously utilized in the trial, but can not be used against the law member.

In a joint trial all accused constitute the "side" (A. W. 18) of the defense and are entitled to but one peremptory challenge, but in a common trial each accused is entitled to one peremptory challenge.

*e. **Challenges for cause—grounds for.***—Among the grounds of challenges for cause are:

First: That he (the challenged member) is not competent or is not eligible to serve on courts-martial.

Second: That he is not a member of the court.

Third: That he is the accuser as to any offense charged.

Fourth: That he will be a witness for the prosecution.

Fifth: That (upon a rehearing or a new trial) he was a member of the court which first heard the case.

Sixth: That he is an enlisted person who is assigned to the same company or corresponding military unit as the accused.

Seventh: That he personally investigated an offense charged as a member of a court of inquiry, as investigating officer, or otherwise.

Eighth: That he has forwarded the charges in the case with his personal recommendation concerning trial by court-martial.

Ninth: That he has formed or expressed a positive and definite opinion as to the guilt or innocence of the accused as to any offense charged.

Tenth: That he will act as reviewing authority or staff judge advocate on the case.

Eleventh: Any other facts indicating that he should not sit as a member in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality. Examples of other facts constituting grounds for challenge are: that he will be a witness for the defense; that he testified or submitted a written statement in connection with the investigation of the charges (unless at the request of the accused); that he has officially expressed an opinion as to the mental condition of the accused; that he is a prosecutor as to any offense charged; that he has a direct personal interest in the result of the trial; that he is in any way closely related to the accused; that he participated in the trial of a closely related case; that he is decidedly hostile or friendly to the accused; that not having been present as a member when testimony on the merits was heard, or other important proceedings were had in the case, his sitting as a member will involve an appreciable risk of injury to the substantial rights of an accused, which risk will not be avoided by a reading of the record. See in connection with this last example 38*b* and the fourth subparagraph of 38*c*.

f. ***Procedure.***—After any challenges made by the trial judge advocate have been decided, he will, after complying with any request made by the accused to be permitted to examine the papers and orders referred to in 41*e*, give the accused an opportunity to exercise his rights as to challenge. The accused thereupon challenges in turn each member to whom he objects. As to peremptory challenges, see 58*d*. Full and timely opportunity will be given to the accused, including each accused in a joint or common trial, to exercise his right of challenge. A challenge may be withdrawn by the challenger for any reason, as when the challenged member makes a statement or reply which is satisfactory to the challenger. A challenge on the ground stated in the last example in the eleventh clause of 58*e* will often be withdrawn by the challenger upon his being informed that certain witnesses will be recalled and reexamined.

If a member is challenged for any of the first six grounds enumerated in 58*e*, and he admits the fact upon which the challenge is based, or if a member is peremptorily challenged, or if in any case, it is manifest that a challenge will be unanimously sustained, the member will be excused forthwith unless objection or question is made or raised;

otherwise the challenge, if not withdrawn, must be passed on by the court after both sides have been given an opportunity to introduce evidence and to make an argument. The challenger may subject the challenged member to an examination under oath as to his competency as a member. For form of the oath, see 103. During deliberation and voting on a challenge the court will be closed.

Courts should be liberal in passing upon challenges, but need not sustain a challenge upon the mere assertion of the challenger. The burden of maintaining a challenge rests on the challenging party. A failure to sustain a challenge when good ground is shown may require a disapproval on jurisdictional grounds or cause a rehearing because of error injuriously affecting the substantial rights of an accused.

Vote upon the challenge is by secret written ballot, which ballot may be in the form "sustained" or "not sustained." See Article 31 as to counting and checking the vote and announcing the result of the ballot and Article 19 as to disclosing or discovering the vote or opinion of any particular member upon a challenge. Deliberation on the challenge may properly include full and free discussion. The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of members in the exercise of their judgment. A majority of the ballots cast by the members present at the time the vote is taken shall decide the question of sustaining or not sustaining the challenge. A tie vote on a challenge is a vote in the negative, and the challenge is not sustained. Upon the court being opened the president shall state in open court that the challenge has been sustained or not sustained.

The challenged member will take no part in the hearings, deliberations, and voting upon a challenge against him. If the challenge is sustained, the challenged member will withdraw, otherwise he will resume his seat. With reference to action by a court when it has been reduced below a quorum, or when the number of soldiers on a court is reduced below one third in a case in which the accused has requested enlisted members or when a challenge of the law member for cause is sustained, see 38*c*.

59. **WITNESS FOR THE PROSECUTION.**—If at any stage of the proceedings any member of the court is called as a witness by the prosecution, he shall, before qualifying as a witness, be excused from further duty as a member in the case. Whether a member called as a witness for the court is to be considered as a witness for the prosecution depends on the character of his testimony. In case of doubt he will be excused as a member. If a witness called by the defense testifies adversely to the defense, he does not thereby become a "witness for the prosecution."

60. **ACCUSER.**—An officer who has signed and sworn to the charges in a particular case is necessarily an accuser in the case. Although the person who signs and swears to charges is ordinarily the only accuser in the case, that is not always true. There may be another or others who are the real accusers. See 5*a* and the notes in Appendix 2 under Article 4.

61. **OATHS.**—After the proceedings as to challenges are concluded the members of the court, the trial judge advocate, and each assistant trial judge advocate are sworn. See 103 and Article 19 as to oaths. The organization of the court is then complete and it may proceed with the trial of the charges in the case then before the court.

62. **ARRAIGNMENT.**—The court being organized and both parties ready to proceed, the trial judge advocate will read to the accused the charges and specifications, including the signature of the accuser, and will then ask the accused how he pleads to each charge and specification. This proceeding constitutes the arraignment. The pleas are not part of the arraignment. The fact that the service of the charges was within five days of the arraignment does not prevent the arraignment even though the accused objects on that ground to the proceeding, but such fact is available, in time of peace, as a ground of valid objection to any further proceedings in the case at that time (A. W. 46*c*). As to deferring action on an application for a continuance until after arraignment, see 52*c*.

During the arraignment, the accused and the personnel of the prosecution and defense will stand. With the consent of the court the accused may waive the reading of the charges and specifications.

As a rule, the procedure to be followed in an arraignment involving several charges and specifications will be to arraign according to numerical order on the specifications of the first charge, then on the first charge, and so on with the rest.

After the members have been sworn to try and determine "the matter now before" them, additional charges, which the accused has had no notice to defend and regarding which the right to challenge has not been accorded him, can not be introduced, nor may the accused be required to plead thereto. But if all the usual proceedings prior to arraignment are first had with respect to such additional charges, including proceedings as to excusing and challenging members and administering oaths, such charges may be introduced, the accused may be arraigned on them, and the trial may proceed on both sets of charges as the trial of one case. In such a case an application for a reasonable continuance should be granted.

Chapter XIII

PROCEDURE—PLEAS AND MOTIONS

PLEAS AND MOTIONS—MOTIONS RAISING DEFENSES AND OBJECTIONS—MOTIONS TO DISMISS—MOTIONS FOR APPROPRIATE RELIEF—PLEAS—MOTIONS PREDICATED UPON THE EVIDENCE

63. **PLEAS AND MOTIONS.**—For matters dealing with the arraignment see 62. Pleas in court-martial procedure are pleas of guilty, not guilty, and pleas corresponding to permissible findings (71, 78). Defenses and objections raised before trial of the issue raised by a plea of not guilty shall be raised only by motion to dismiss or to grant appropriate relief as provided in this chapter.

Except as otherwise stated, pleas are entered, and motions raising defenses or objections are made, after arraignment.

64. **MOTIONS RAISING DEFENSES AND OBJECTIONS.**—*a.* ***Defenses and objections which may be raised.***—Any defense or objection which is capable of determination without trial of the issue raised by a plea of not guilty may be raised before trial by reference to the appointing authority, or by motion to the court before a plea is entered.

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

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

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

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

d. ***Time of making motions.***—The motion discussed in *a* and *b* above should be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

Certain other motions predicated upon issues raised by the evidence in the case, such as motions for a finding of not guilty and motions to dismiss the proceedings on the grounds of *res judicata*, should generally be made after the prosecution has rested its case or at the conclusion of all the evidence. A motion to inquire into the mental condition of the accused (112) or to dismiss the proceedings on the ground that the accused lacks the requisite mental capacity (110*c*) may be raised at any time during the trial.

e. ***Hearing on the motion.***—A motion raising a defense or objection will be determined at the time it is made unless the court defers action on the motion until a later time.

Before passing on a contested motion the court will give each side an opportunity to introduce pertinent evidence and to make an argument. Except as otherwise indicated in the discussion of motions (67, Statute of Limitations) and elsewhere (112*a*, Insanity) the burden rests on the accused to support by a preponderance of evidence a motion raising a defense or objection. A decision on such a motion is an interlocutory matter.

f. ***Effect of rulings on motion.***—The denial of a motion raising a defense or objection does not prevent the entering of another to the same specification or charge. The court may reconsider its action in denying or sustaining a motion as long as the case is before the court.

Except as otherwise indicated in the discussion on motions an accused will not be required to plead to a specification or charge so long as the action of the court in sustaining a motion to dismiss or for appropriate relief relating to the specification or charge stands; but when all such motions as to a given charge or specification are denied, the accused should enter a plea or, if he stands mute, a plea of not guilty should be entered for him by the court.

Notwithstanding the action of the court on a motion raising a defense or objection, the trial may proceed in the usual course as long as one or more specifications and charges remain as to which a plea stands. For example, when a motion to dismiss is sustained as to all but one specification and charge to which the plea is not guilty, the trial on that specification and charge may continue. But when the trial cannot proceed further as the result of the action of the court on a motion raising a defense or objection, the court will adjourn and submit the record of its proceedings so far as had to the appointing authority.

The appointing authority may not return to the court for reconsideration a ruling of the court which amounts to a finding of not guilty, such as the granting of a motion to dismiss because of lack of mental responsibility at the time of the offense (112*a*), or the granting of a motion for a finding of not guilty (72*a*). As to motions granted by the court which do not amount to a finding of not guilty, the appointing authority may, if he disagrees, return the record to the court with a statement of his reasons for disagreeing and with instructions to reconvene and reconsider its action with respect to the matters as to which he is not in accord with the court. To the extent that the court and the appointing authority differ as to a question which is solely one of law, such as a question as to the jurisdiction of the court, the court will accede to the views of the appointing authority; but if the matters as to which the appointing authority disagrees are issues of fact, such as whether there was a manifest impediment with respect to the statute of limitations, the court will exercise its sound discretion in reconsidering the motion. The order returning the record should include an appropriate direction with respect to proceeding with the trial. If the appointing authority finds that the action of the court was proper but that the defect raised by the motion can be cured, he will take appropriate steps to remedy the defect and return the record to the court for trial as above indicated. If he does not wish to return the record for trial, he will take appropriate action to conclude the case by the publication of appropriate orders in cases wherein the action of the court operates as a bar to further prosecution. Generally such action should be taken if the proceedings are terminated by sustaining a motion to dismiss because of former trial, pardon, constructive condonation of desertion, promised immunity, or when findings of not guilty are entered on motion. In other cases, he will take action appropriate under the circumstances.

g. ***Inadmissible defenses and objections.***—Such objections as that the accused at the time of the arraignment is undergoing a sentence of a general court-martial, or that owing to the long delay in bringing him to trial he is unable to disprove the charge or to defend himself,

or that his accuser was actuated by malice or is a person of bad character, or that he was released from arrest upon the charges, are not proper subjects for motion prior to plea, however much they may constitute ground for a continuance, or affect the questions of the truth or falsity of the charge, or of the measure of punishment. The same is true in general as to objections that are solely matters of defense under a plea of not guilty and, in effect, merely contest the truth of the allegations of a charge.

65. **MOTIONS TO DISMISS—General.**—A motion to dismiss properly relates to any defense raised in bar of trial. Among the defenses which may be raised by such motion prior to entering a plea are lack of jurisdiction, failure of the charges to allege an offense (66), running the statute of limitations (67), former trial (68), pardon, constructive condonation of desertion, former punishment, and promised immunity (69).

66. **MOTIONS TO DISMISS—Lack of Jurisdiction; Failure to Allege an Offense.**—*a. General.*—If the court lacks jurisdiction or if the charges fail to allege any offense under the Articles of War the proceedings are a nullity. These defenses and objections cannot be waived and may be asserted at any time.

b. Jurisdiction of the court over the person.—A motion to dismiss on the ground of lack of jurisdiction may be based on the absence of any of the conditions stated in 7.

c. Failure to allege an offense.—By a motion to dismiss the accused may object to the sufficiency of a specification to allege any crime or offense. With the exceptions stated in 12, courts-martial do not have jurisdiction to try any offenses not cognizable under the Articles of War. Unless the specification of a charge alleges an offense of which a court-martial may take cognizance, a motion to dismiss should be granted as to the specification. If the motion is sustained the court will direct that the specification be stricken and disregarded.

67. **MOTIONS TO DISMISS—Statute of Limitations.**—Exemption from liability to be tried or punished by a court-martial for all but a few crimes or offenses may be claimed after two (or three) years with certain limitations. See Article 39 in Appendix 1 and the notes thereunder. In the case of any offense the trial of which in time of war shall be certified by the Secretary of the Army to be detrimental to the prosecution of the war or inimical to the Nation's security, the period of limitation for the trial of the offense shall be extended to the duration of the war and six months thereafter. See Article 39.

The period of limitations begins to run on the date of the commission of the offense. Certain offenses, as, for example, wrongful cohabitation, are continuing offenses, and the accused cannot avail himself of the statute of limitations for any part of continuing offenses not

within the bar of the statute of limitations. Fraudulent enlistment (A. W. 54) is not a continuing offense. Absence without leave (A. W. 61) and desertion (A. W. 58) are not continuing offenses for the purpose of computing the time under the statute of limitations or for the purpose of determining whether the offenses were committed in time of war. For these purposes the offenses are committed, respectively, on the date the person first receives pay and allowances under the enlistment, or so absents himself or deserts.

In applying this statute the court will be guided by the crime or offense as described in the specification, and not by the Article of War stated in the charge. Thus, if an offense properly chargeable under Article 93 is erroneously charged under Article 96, the limitation is nevertheless three years rather than two years.

If it appears from the charges that the statute has run against an offense or (in the case of a continuing offense) a part of the offense charged, the court will bring the matter to the attention of the accused and advise him of his right to assert the statute. This action should, as a rule, be taken at the time of the arraignment. If the accused pleads guilty to a lesser included offense against which the statute of limitations has apparently run, the court will advise the accused of his right to interpose the statute in bar of trial and punishment as to that offense.

The burden is not on the defense to show that neither absence from the jurisdiction of the United States nor other impediment prevents the accused from claiming exemption under Article 39. For example, if it appears from the charges in a peacetime desertion case that more than three years have elapsed between the date of the commission of the offense and the date of the arraignment, the motion should be sustained unless the prosecution shows by a preponderance of evidence that the statute does not apply because of periods which, under the second proviso of Article 39, are to be excluded in computing the three years.

68. **MOTIONS TO DISMISS—Former Trial.**—No person shall be tried a second time for the same offense without his consent; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of Article 40 until the reviewing and, if there be one, the confirming authority, shall have taken final action upon the case (A. W. 40).

A person has not been "tried" in the sense of Article 40 if the proceedings were void for any reason, such as a lack of jurisdiction to try the person or the offense.

The same acts constituting a crime against the United States cannot, after acquittal or conviction of the accused in a civil or military court

deriving its authority from the United States, be made the basis of a second trial of the accused for that crime in the same or in another such court without his consent. The civil courts in the Territories, in Puerto Rico and the Canal Zone, as well as the district and other courts of the United States, derive their authority from the United States. The same acts when committed in a State may constitute two distinct offenses, one against the United States and the other against the State. In such a case trial by a State court does not bar trial by court-martial.

In general, once a person is tried in the sense of Article 40, he cannot without his consent be tried for another offense if either offense is necessarily included in the other and if the two offenses differ from each other in degree only. Thus a trial for manslaughter may be interposed in bar of trial for the same homicide subsequently charged as murder because both offenses involve the same unlawful killing and are distinguished from each other only by the state of mind of the accused. On the other hand, a trial for a homicide is not barred by a former trial for an assault and battery. See however, 72*b*, for an example of a case when the defense of *res judicata* may be asserted. A trial for absence without leave (A. W. 61) bars trial for the same absence charged as desertion and vice versa if the same enlistment is involved in both cases, since both offenses involve the same unauthorized absence. But when a soldier deserts and reenlists, trial for absence without leave from the second enlistment does not bar trial for desertion from the first enlistment although the same period of time may in part be involved in both cases.

Subject to the rules as to documentary evidence, including the rules as to the use of copies, proof of former trial by court-martial or civil court may be, respectively, by the order publishing the case (or by the record of trial if no order was published or the order is not sufficiently explicit), and by the indictment and record of conviction or acquittal.

69. **MOTIONS TO DISMISS—Miscellaneous Defenses and Objections.**—*a.* ***Pardon.***—A pardon is an act of the President which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. A pardon may be interposed in bar of trial by a motion to dismiss. The usual rules as to documentary evidence apply to a written pardon, whether in the nature of an individual pardon, or of a general amnesty. If the document is not sufficiently explicit to determine whether the motion should be sustained, the defense may introduce other evidence tending to establish the pardon. In the case of a constructive pardon, facts and circumstances constituting the pardon must be proved.

*b. **Constructive condonation of desertion.***—If a deserter has been unconditionally restored to duty without trial by an officer exercising general court-martial jurisdiction, this action amounts to a constructive condonation of the desertion and may be interposed in bar of trial subsequently ordered. If an officer exercising general court-martial jurisdiction shall have directed that a deserter be restored to duty but that he remain subject to trial for the offense, such a restoration is not a constructive condonation of the desertion and the individual so restored remains subject to trial.

*c. **Former punishment.***—Punishment previously imposed under Article 104 for a minor offense may be interposed in bar of trial for the same offense. For a definition of "minor" offense, see 118. Such punishment, however, does not bar trial for another crime or offense growing out of the same act or omission. For instance, punishment under Article 104 for reckless driving would not bar trial for manslaughter if the reckless driving caused a death.

Administrative reduction pursuant to Army Regulations is not a bar to trial.

*d. **Promised immunity.***—See 134*d* (Testimony of Accomplices).

70. **MOTIONS TO GRANT APPROPRIATE RELIEF.**—*a. **General.***—A motion to grant appropriate relief is one made to cure a defect of form or substance which impedes the accused in properly preparing for trial or conducting his defense. Among the objections which may properly be raised by such a motion are objection to a charge or specification in matters of form only; a substantial defect in the conduct of the pretrial investigation (see 35*a*; 70*c*; A. W. 46); prejudicial joinder in a joint trial (70*d*); and misjoinder in common trial (34). In general these objections are waived if not asserted prior to the entry of a plea, but the court may grant relief from the waiver for good cause (64). The motion should briefly and clearly set forth the nature of and the grounds for the request, objection or question it is intended to make or raise. The motion admits nothing either as to the jurisdiction of the court or the merits of the case.

*b. **Defect in charges and specifications.***—If a specification, although alleging an offense cognizable by court-martial, is defective in some matter of form as, for example, that it is inartfully drawn, indefinite, or redundant or that it misnames the accused, or does not contain sufficient allegations as to time and place, the objection should be raised by a motion for appropriate relief. If the specification is defective to the extent that it does not fairly apprise the accused of the particular offense charged, the court upon the defect being brought to its attention will, according to the circumstances, direct the specification to be stricken and disregarded or continue the case to allow the trial judge advocate to apply to the convening authority for directions

as to further proceedings, or permit the specification to be amended so as to cure such defect, and continue the case for such time as in the opinion of the court may suffice to enable the accused properly to prepare his defense in view of the amendment. If it clearly appears that the accused has not in fact been misled in the preparation of his defense by a defect in the form of the charge and specifications, and that a continuance is not necessary for the protection of his substantial rights, the court may proceed immediately with the trial upon directing an appropriate amendment of the defective charge or specification.

*c. **Defects arising out of the pretrial investigation.***—A substantial failure to comply with the requirements of 35*a* and Article 46*b* may be brought to the attention of the court by a motion for appropriate relief. Such a motion should be sustained only if the accused shows that the defect in the conduct of the investigation has in fact prevented him from properly preparing for trial or has otherwise injuriously affected his substantial rights. If the motion is sustained the court may grant a continuance to enable the accused to prepare his defense properly, or may adjourn the proceedings to permit compliance with 35*a* and Article 46*b* and report the basis of its action to the appointing authority. The latter may, after taking necessary action to cure the defect, return the record to the court with instructions to proceed with the trial.

*d. **Motion to sever.***—A motion to sever is a motion by one of two or more coaccused to be tried separately from the other or others. Occasion for the motion may arise in either a joint or a common trial.

In a common trial a motion to sever will be liberally considered. It should be granted on the motion of an accused arraigned in a common trial with other accused against whom offenses are charged which are unrelated to those charged against the mover (34).

The motion should be granted in any case if good cause is shown; but when the essence of the offense is a combination between the parties—conspiracy, for instance—the court may properly be more exacting than in other cases as to whether the facts established in support of the motion constitute good cause. The more common grounds for this motion are that the mover desires to avail himself on his trial of the testimony of one or more of his coaccused, or of the testimony of the wife of one, or that a defense of the other accused is antagonistic to his own or that evidence as to them will in some manner prejudice his defense.

If the motion is granted, the court will first decide which accused it will proceed to try and, in the case of joint charges, direct an appropriate amendment of the charges and specifications. For instance, if after severance the trial of B is directed in a case in which A and B are jointly charged with an offense, the specification should be

amended to allege in effect either that B committed the offense or that B committed the offense in conjunction with A. The amendment should be formally made as a part of the proceedings, no actual alteration being made in the charge sheet itself. For an example see the form of record, Appendix 6. When, as a result of action on a motion to sever, trial of one or more accused is deferred, the trial judge advocate will report the facts at once to the appointing authority so that he may take appropriate action to try the deferred accused or to make other disposition of the charges as to such accused.

*e. **Miscellaneous motions for relief.***—In addition to grounds for motions discussed above in this paragraph (70) there are others which may be made for the purpose of raising a specific objection on the merits prior to trial. For examples, see 111 and 112 (Insanity). If a motion amounts in substance to an application for a continuance, or to a challenge, motion to dismiss, or other matter for which a procedure is provided, the motion will be regarded as such application, challenge, motion to dismiss, or other matter. A motion to elect—that is, a motion that the prosecution be required to elect upon which of two or more charges or specifications it will proceed—will not be granted.

71. **PLEAS.**—Pleas in court-martial procedure include guilty, not guilty, and pleas corresponding to permissible findings of lesser included offenses. See 78 (Findings). The court may refuse to accept a plea of guilty and should not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. Should an accused enter a contradictory plea such as guilty without criminality or guilty to a charge after pleading not guilty to all specifications thereunder, such contradictory plea will be regarded as a plea of not guilty. The court should ordinarily grant an application not manifestly made in bad faith to change or modify a plea.

The court will proceed to trial and judgment as if he pleaded not guilty when an accused fails or refuses to plead or answers foreign to the purpose. See Article 21. By standing mute an accused does not waive any objections otherwise waived by a plea.

Except as to matters covered by a plea of guilty, a plea admits nothing as to the jurisdiction of the court and nothing as to the merits of the case. Any admission involved in a plea of guilty to any offense has effective existence as such only as long as that plea stands. A plea of not guilty or guilty will, in the absence of a motion to grant appropriate relief because of a defect in misnaming accused, be regarded as a waiver of any objection based on a misnomer of accused, whether under an alias or otherwise.

The accused has a legal and moral right to enter a plea of not guilty even if he knows he is guilty. This is so because his plea of not guilty amounts to nothing more than a statement that he stands upon his right to cast upon the prosecution the burden of proving his alleged guilt.

A plea of guilty does not exclude the taking of evidence, and in the event that there be aggravating or extenuating circumstances not clearly shown by the specification and plea, any available and admissible evidence as to such circumstances should be introduced.

In all cases in which a plea of guilty is entered and also whenever an accused, in the course of the trial following a plea of guilty, makes a statement to the court, in his testimony or otherwise, inconsistent with the plea, the summary court, the president of a special court-martial, and the law member of a general court-martial will make such explanation and statement to the accused as the occasion requires. See in this connection Appendix 5. If, after such explanation and statement, it appears to the court that the accused in fact entered the plea improvidently or through lack of understanding of its meaning and effect, or if after such explanation and statement the accused does not voluntarily withdraw his inconsistent statement, the court will proceed to trial and judgment as if he had pleaded not guilty. See Article 21. Occasion for making this explanation and statement frequently arises in desertion cases when the accused, after pleading guilty, testifies or states in effect that throughout his unauthorized absence he had the intention of returning. When, after a plea of guilty has been received, the accused asks to be allowed to withdraw it and substitute a plea of not guilty or any other corresponding plea he should be permitted to do so.

One plea may be entered as applicable to all or to certain specified charges and specifications, such as "Not guilty to all charges and specifications."

72. **MOTIONS PREDICATED UPON THE EVIDENCE.**—*a.* ***Motion for a finding of not guilty.***—At the close of the case for the prosecution and before the opening of the case for the defense the court may, on motion of the defense for findings of not guilty, consider whether the evidence before the court is legally sufficient to support a finding of guilty as to each specification designated in the motion. The court in its discretion may require that the motion specifically indicate wherein the evidence is legally insufficient. The court will determine the matter as an interlocutory question. See 51 and Article 31. If there is any substantial evidence which, together with all reasonable inferences therefrom and all applicable presumptions, fairly tends to establish every essential element of an offense

charged or included in any specification to which the motion is directed, the motion as to such specification will not be granted. The court in its discretion may defer action on any such motion as to any specification and permit or require the trial judge advocate to reopen the case for the prosecution and produce any available evidence. If the motion is sustained as to any specification the court will forthwith enter a finding of not guilty of such specification and, when appropriate, of the proper charge.

b. ***Res judicata.***—*Res judicata* is the rule that an issue of fact or law put in issue and finally determined by a court of competent jurisdiction cannot be disputed between the same parties in a subsequent trial even if the second trial is for another offense. Thus if B has been acquitted by court-martial of having committed an assault with a knife upon A, B can assert the acquittal as a defense if, upon the subsequent death of A as a result of the wound inflicted by the assault, B is later tried for murder, although the defense of former trial might not be available to him (68). A motion raising the defense of *res judicata* should ordinarily be made after the prosecution has rested its case or later unless it can be shown at an earlier stage of the trial that the issues of fact or law in the case on trial and in the case relied upon to sustain the motion are the same. Proof of the former adjudication may be made by the record of the trial relied on to sustain the motion.

Chapter XIV

PROCEDURE

NOLLE PROSEQUI—ACTION WHEN EVIDENCE INDICATES AN OFFENSE NOT CHARGED—INTRODUCTION OF EVIDENCE

73. **NOLLE PROSEQUI.**—A nolle prosequi is a declaration of record by the prosecution that by direction of the appointing authority the prosecution withdraws a certain specification, or a certain specification and charge, and will not pursue the same further at the present trial. A nolle prosequi will be entered only when directed by the appointing authority, who may give such direction either on his own initiative or on application duly made to him. In a joint case or in a case referred for a common trial he may limit the direction to one or more of the accused.

Proper grounds for such direction include substantial defect in the specification, insufficiency of available evidence to prove the specification, and the fact that it is proposed to use one of the accused as a witness.

Entry of a nolle prosequi will not be exercised arbitrarily or unfairly to the accused. For instance, when evidence has been received in support of a specification and it appears that, through lack of diligence in the preparation, the evidence may be insufficient to sustain a finding of guilty and that a finding of not guilty is imminent, a nolle prosequi will not be employed to circumvent such a finding with a view toward a subsequent trial for the same offense.

A nolle prosequi is not in itself equivalent to an acquittal or to a grant of pardon and is not as such a ground of objection or of defense in a subsequent trial, but if entered pursuant to a grant of immunity (134*d*) such grant of immunity may be asserted as a defense.

As to withdrawal of charges, see 5 (Appointing Authorities).

74. **ACTION WHERE EVIDENCE INDICATES AN OFFENSE NOT CHARGED.**—If at any time during the trial it becomes manifest to the court that the available evidence as to any specification is not legally sufficient to sustain a finding of guilty thereof or of any lesser included offense thereunder, but that there is substantial evidence, either before the court or offered, tending to prove that the accused is guilty of some other offense not alleged in any specification before the court, the court may, in its discretion, either suspend trial

pending action on an application by the trial judge advocate to the appointing authority for directions in the matter or proceed with the trial. In the latter event a report of the matter may properly be made to the appointing authority after the conclusion of the trial.

Application of this rule would be appropriate when in a trial for the larceny of a watch the proof shows that the article taken was a compass, and when in a trial for the wrongful sale of property (A. W. 84) the proof shows that the accused negligently lost the property.

In any such case, if charges for the offense indicated by the evidence are preferred and are referred for trial, they should be referred to a court none of whose members has participated in the former trial.

75. **INTRODUCTION OF EVIDENCE.**—*a.* ***General duties of court.***—When proffered evidence would be excluded on objection the court should bring the matter to the attention of any party entitled, but failing, to object, except where such failure amounts to a waiver. Such action is particularly important when improper questions are asked by a member of the court, or when improper testimony is elicited by questions of a member of the court, the reasons for this being the natural hesitancy of the parties to object to a question asked by a member of the court and the weight likely to be given to testimony elicited through questions by the court or by a member. In the interest of justice a court may always of its own motion exclude inadmissible evidence.

Rules of evidence are stated in 123–140 and in various connections throughout the manual; for example, in 112*c* (Insanity) and in 146 (Desertion).

The court is not obliged to content itself with the evidence adduced by the parties. When such evidence appears to be insufficient for a proper determination of any issue or matter before it, the court may and ordinarily should take appropriate action with a view to obtaining such available additional evidence as is necessary or advisable for such determination. The court may, for instance, require the trial judge advocate to recall a witness, to summon new witnesses, or to make investigation or inquiry along certain lines with a view to discovering and producing additional evidence.

See 112 for action by the court when it appears that further inquiry into the mental responsibility of the accused is warranted in the interest of justice.

In its discretion the court may direct that a document, although excluded as not admissible in evidence, be marked for identification and appended to the record for the consideration of the reviewing authority, and the court will so direct on request of the party offering the document. See 140*c* (Offer of Proof).

When a document, which must or should be returned to the source from which it was obtained, such as an original record, is received in evidence or marked for identification, a suitable copy or extract copy thereof, certified as such by the trial judge advocate, will be substituted for such document and it will then be returned.

The court will explain to the accused his right to remain silent, or to testify as a witness (134*d*, 135*b*; A. W. 24), or to make an unsworn statement (76), unless it clearly appears that the accused fully understands his rights in the premises. The explanation is usually made after the prosecution has rested. See Appendix 5 for an example. Whenever it appears warranted, the court should advise the accused of his right to testify for a limited purpose. For example, if it appears that the accused does not understand his right to testify for the limited purpose of showing the circumstances under which a confession was obtained without subjecting himself to cross-examination on the issue of guilt or innocence, an explanation should be made by the court. See 127, 135*b*.

The court should protect every witness from improper questions, harsh or insulting treatment, and unnecessary inquiry into his private affairs. The court should also forbid any question which appears to be intended merely to annoy a witness or which, though otherwise proper, is needlessly offensive in form. See 136 and Article 24 for questions which a witness can not be required to answer over his objection.

*b. **General duties of trial judge advocate.***—As to preparation for trial, attendance of witnesses, sending out interrogatories for depositions, and swearing of witnesses, see 41, 105, 106, and 103, respectively.

After the pleas the trial judge advocate will, to the extent required by the court, read the parts of the Manual for Courts-Martial or of authoritative precedents that are pertinent to the definition, proof and defense of the offenses charged.

He may make an opening statement—that is, a brief statement of the issues to be tried and what he expects to prove—but will avoid including or suggesting matters as to which no admissible evidence is available or intended to be offered. Ordinarily such a statement is made only immediately before the introduction of evidence for the prosecution, but in exceptional cases the court may, in its discretion, permit like statements to be made at later stages of the proceedings.

On behalf of the prosecution he conducts the direct and redirect examination of the witnesses for the prosecution and the cross and recross examination of the witnesses for the defense. He will, unless the court otherwise directs, conduct the direct and redirect examination of witnesses for the court, and if such witnesses are adverse to

the prosecution, may conduct the cross-examination on behalf of the prosecution.

c. General duties of defense counsel.—He may make an opening statement for the defense similar to that indicated in 75*b*. This statement is ordinarily made just after the prosecution has rested or immediately following the opening statement of the trial judge advocate; but in exceptional cases the court may in its discretion permit it or other like statements to be made at other stages of the proceedings.

On behalf of the defense he conducts the direct and redirect examination of the witnesses for the defense and the cross and recross-examination of the witnesses for the prosecution and of the witnesses for the court if they are adverse to the defense.

As to preparation for trial, attendance of witnesses, and submission of interrogatories for depositions, see 45, 105, and 106, respectively.

d. Views and inspections.—In exceptional circumstances the court, in the exercise of its sound discretion, may proceed to view or inspect the premises or place or an article or object if such view or inspection is necessary to enable the members better to understand and apply the evidence in the case. The proceeding is authorized only if conducted in the presence of the accused and his counsel and should not be undertaken if the court is already familiar with the premises involved, or if photographs, diagrams or maps adequately present the situation. The court may be escorted to the view by any person familiar with the premises and objects. The escort may point out particular features to be noted by the court without making any statement in the nature of evidence or argument. Unless he is already sworn as a member of the prosecution, the escort will take the following oath or affirmation:

> "You swear (or affirm) that you will conduct the court and will well and truly point out to them the place in which the offense charged in this case is alleged to have been committed; and that you shall not speak to the court concerning the alleged offense, except to describe the place aforesaid. So help you God."

The things seen by the court during the view or inspection are not evidence, but the members may consider and apply the evidence in the light of the knowledge obtained by their inspection. The court should not hear witnesses or take evidence at the view, but anything said thereat by the prosecution, by counsel, the authorized escort, or by the court, will be recorded verbatim and constitute a part of the record of trial in any general court-martial case or in any special court-martial case in which a verbatim record is taken. Reenactments of the events involved or acts alleged to have been committed are not authorized upon a view.

Chapter XV

PROCEDURE

STATEMENTS — ARGUMENTS — FINDINGS—DATA AS TO SERVICE — EVIDENCE OF PREVIOUS CONVICTIONS—SENTENCE—ANNOUNCING SENTENCE—MATTERS OF CLEMENCY—ADJOURNMENT

76. **STATEMENTS.**—The accused, whether he has testified or not, may make an unsworn statement to the court in denial, explanation, or extenuation of the offenses charged, but this right does not permit the filing of the affidavit of the accused. This unsworn statement is not evidence, and the accused can not be cross-examined upon it, but the prosecution may rebut statements of fact therein by evidence. Such consideration will be given the statement as the court deems warranted.

The statement may be oral or in writing, or both, and may be made by the accused, by counsel, or by both. A written statement should be signed, and is ordinarily read to the court by the accused or by counsel.

The statement should not include what is properly argument, but ordinarily the court will not check a statement on that ground if it is being made orally and personally by an accused.

If the statement made by an accused includes admissions or confessions, they may be considered as evidence in the case, but in a joint or common trial the statement by one accused is not evidence against his coaccused. If a statement made by either accused or counsel is inconsistent with a plea of guilty or indicates that such plea may have been entered improvidently or through lack of understanding of its meaning and effect, the court will take appropriate action as set forth in 71 (Pleas).

77. **ARGUMENTS.**—After both sides have rested, arguments may be made to the court by the trial judge advocate, the accused, and his counsel. The trial judge advocate has the right to make the opening argument, and if any argument is made on behalf of the defense, the closing argument. Arguments throughout the trial may be oral, in writing, or both, unless the court requires an argument to be reduced to writing. See 41*d* and 45*b*. Arguments in writing will ordinarily be read to the court by the party who submits them. The last subparagraph of 76 applies equally to arguments.

The failure of an accused to take the stand must not be commented upon; but if he testifies on the merits with respect to an offense charged,

and if he fails in such testimony to deny or explain specific facts of an incriminating nature that the evidence of the prosecution tends to establish with respect to that offense, such failure may be commented upon. When, however, an accused is on trial for a number of offenses and, taking the stand in his own defense, testifies to one or more of them only, no comment can be made on his failure to testify as to the others.

Refusal of a witness to answer a proper question may be commented upon.

As to permissible comments on the fact that one witness testified after hearing another, see 135 (Examination of Witness).

After the arguments and before the court closes for the findings, both sides should be asked whether they have anything further to offer.

78. **FINDINGS.**—*a.* ***General.***—*Basis of findings.*—Only matters properly before the court as a whole may be considered. A member should not, for instance, be influenced by any knowledge of the acts, character, or service of the accused not based on the evidence or other proper matter before the court; or by any opinions not properly in evidence; or by motives of "partiality, favor, or affection." See in this connection 76 (Statements) and 77 (Arguments). Matters as to which comment in argument is prohibited can not be considered.

In weighing the evidence a member is, however, expected to utilize his common sense and his knowledge of human nature and of the ways of the world. In the light of all the circumstances of the case he should consider the inherent probability or improbability of the evidence, and with this in mind he may properly believe one witness and disbelieve several witnesses whose testimony is in conflict with that of the one. See in this connection 139 (Credibility of witnesses) and 127 (Confessions).

Reasonable doubt.—In order to convict of an offense the court must be satisfied beyond a reasonable doubt that the accused is guilty thereof. See Article 31. By "reasonable doubt" is intended not fanciful or ingenious doubt or conjecture but substantial, honest, conscientious doubt suggested by the material evidence, or lack of it, in the case. It is an honest, substantial misgiving, generated by insufficiency of proof. It is not a captious doubt, nor a doubt suggested by the ingenuity of counsel or court and unwarranted by the testimony; nor a doubt born of a merciful inclination to permit the defendant to escape conviction; nor a doubt prompted by sympathy for him or those connected with him. The meaning of the rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt; what is required being not an absolute or mathematical certainty but a moral

certainty. A court-martial which acquits because, upon the evidence, the accused may possibly be innocent falls as far short of appreciating the proper amount of proof required in a criminal trial as does a court which convicts on a mere possibility that the accused is guilty.

The rule as to reasonable doubt extends to every element of the offense. If, in a trial for assault with intent to kill, a reasonable doubt exists as to such intent, the accused can not properly be convicted as charged, although he might be convicted of the lesser included offense of assault. Prima facie proof of an element of an offense does not preclude the existence of a reasonable doubt with respect to that element. The court may decide, for instance, that the prima facie evidence presented does not outweigh the presumption of innocence.

If a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused can not legally be convicted of that offense. See 110*b* as to the standard of mental responsibility and 112*a* as to the burden of proof and presumption of sanity.

A reasonable doubt may arise from the insufficiency of circumstantial evidence, and such insufficiency may be with respect either to the evidence of the circumstances themselves or to the strength of the inferences drawn from them.

Reasons for Findings; Divulging or Disclosing Findings.—No finding should include any indication of the reasons for making it. For the information of the reviewing authority but not as part of a finding, the court may formulate for inclusion in the record a statement of the reasons which led to a finding and a statement of the weight given to certain evidence. A proper occasion for such action arises when the court finds an accused not guilty because of a reasonable doubt as to his sanity.

See Article 19 as to divulging findings and as to disclosing or discovering the vote or opinion of a member upon the findings.

Acquittal; Statute of Limitations.—Whenever the court has acquitted an accused upon all specifications and charges, the court shall at once announce such result in open court. An acquittal automatically results from findings of not guilty of all charges and specifications.

If by exceptions and substitutions an accused is found guilty of a lesser included offense against which it appears that the statute of limitations (A. W. 39) has run, the court will advise him in open court of his right to avail himself of the statute in bar of punishment if he so desires. However, if an accused pleads guilty upon arraignment to such lesser included offense and persists in his plea after the meaning and effect thereof have been explained to him, including his right to interpose the statute of limitations in bar of punishment if he is found guilty of the lesser included offense, he is deemed to have waived the statute of limitations unless he expressly asserts it in bar

of punishment. If an accused asserts the statute in bar of punishment, the issue will be determined in substantially the same manner as the corresponding issue upon a motion to dismiss on the grounds of the statute of limitations (67).

b. ***Findings as to the charges.***—Permissible findings include guilty; not guilty; not guilty, but guilty of a violation of the ——— Article of War.

An attempt should be found as a violation of Article 96 unless the attempt is included in the express terms of some other article.

The finding of the charge as to any specification should be supported by, and not be inconsistent with, the finding as to that specification. Thus, if two specifications of desertion are under one charge and the accused is found guilty of the first specification, but guilty of absence without leave only as to the second specification, the finding should be: Of the Charge: As to Specification 1: Guilty. As to Specification 2: Not guilty, but guilty of a violation of the 61st Article of War. A finding of guilty of one specification appropriate to its charge requires a finding of guilty of the charge, but a finding of not guilty of another such specification under that charge does not require any finding of the charge as to it. Thus, upon finding an accused guilty of one of the two specifications under a proper charge, and not guilty of the other, the finding of the charge should be simply guilty.

A court may not find an offense as a violation of an Article of War under which it was not charged solely for the purpose of increasing the authorized punishment or for the purpose of saving the jurisdiction of the court. For example, in the case of an officer charged with a violation of Article 95 the court may not find him guilty of a violation of Article 96 in order to adjudge confinement, although, if the circumstances warrant, the court may properly find the accused guilty of a violation of Article 96 in such a case and adjudge dismissal or a lesser sentence. Similarly, if an accused is charged with a violation of Article 93 for an offense committed during a previous enlistment, the offense can not be considered as a violation of Article 94 for the purpose of saving the jurisdiction of the court even though the offense alleged in the specification might in the beginning properly have been laid under Article 94. See 87*b*.

c. ***Findings as to the specification.***—*General.*—Permissible findings include guilty, not guilty, guilty with exceptions, with or without substitutions, and not guilty of the exceptions and guilty of any substitutions, as stated below.

The finding should be consistent with itself. A finding of guilty without criminality should not be made.

Any different findings as to two or more joint accused should be consistent with one another. When one of two joint accused is found

not guilty and the other is found guilty, the name of the former as well as the words indicating a joint offense should be eliminated from the specification by the finding as to the latter. When, however, three or more accused are involved, it is sufficient if the finding as to each accused clearly appears from reading of all the findings together.

Exceptions and Substitutions.—One or more words or figures may be excepted and, where necessary, others substituted, provided the facts as so found constitute an offense by an accused which is punishable by the court, and provided that such action does not change the nature or identity of any offense charged in the specification or increase the amount of punishment that might be imposed for any such offense. The substitution of a new date or place may, but does not necessarily, change the nature or identity of an offense.

Lesser Included Offenses.—If the evidence fails to prove the offense charged but does prove the commission of a lesser offense necessarily included in that charged, the court may by its findings except appropriate words and figures of the specification, and, if necessary, substitute others, finding the accused not guilty of the excepted matter but guilty of the substituted matter. The test as to whether an offense found is necessarily included in that charged is that it is included only if it was necessary in proving the offense charged to prove all elements of the offense found. A familiar instance is a finding of guilty of absence without leave under a charge of desertion. Such a finding may be worded when the specification is in the usual form: Of the specification: Guilty, except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent without leave from" and "without leave", of the excepted words, not guilty, of the substituted words, guilty.

In the discussion of certain offenses in 141–183 (Punitive Articles) some of the included offenses are stated.

d. ***Procedure.***—After both sides have rested and before the court retires into closed session for the purpose of arriving at its findings the law member of a general court-martial or the president of a special court-martial will, in open court, advise the court that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt, and 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; and that if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no such doubt; and that the burden of proof to establish the guilt of the accused is upon the Government (A. W. 31). The advice may be in the language of this paragraph; explanatory matter may, but need not, be added.

The court sits in closed session during deliberation on the findings. Deliberation may properly include full and free discussion as to the merits of the case. The influence of superiority in rank should not be employed in any manner in an attempt to control the independence of members in the exercise of their judgment.

Voting is by secret ballot (A. W. 31) and is obligatory. A finding of not guilty results as to any specification or charge if no other valid finding is reached thereon; but a court may reconsider any finding before the same is announced or the court has opened to receive evidence of previous convictions; and the court may reconsider any finding of guilty on its own motion at any time before the record of trial has been authenticated and transmitted to the reviewing authority. The order in which the several charges and specifications are to be voted upon will be determined by the president, subject to the control of the court, except that all the specifications under a charge shall precede that charge. The concurrence of all members present at the time the vote is taken is necessary to convict of an offense for which the death penalty is mandatory (e. g., A. W. 82); in all other cases the concurrence of two-thirds of the members present at the time a vote is taken is necessary for a finding (A. W. 43). See Article 31 as to counting and checking votes and announcing the result of the ballot. If in computing the number of votes required a fraction results such fraction will be counted as one; thus if five members are to vote, a requirement that two-thirds concur is not met if less than four concur.

79. **DATA AS TO SERVICE—EVIDENCE OF PREVIOUS CONVICTIONS—EVIDENCE OF FORMER DISCHARGES—EVIDENCE OF FORMER PUNISHMENT.**—*a.* ***General.***—In the event of conviction of an accused the court will open for the purpose of receiving as evidence such data as to his age, pay, and service as may be shown on the first page of the charge sheet, and of giving the trial judge advocate an opportunity to introduce evidence of the prior convictions of the accused by court-martial.

This evidence, and any evidence introduced by the accused in extenuation (79 *d* and *e*) is for the consideration of the court in fixing the kind and amount of punishment. See in this connection 115–117 (Punishments).

A written stipulation containing the pertinent data as to service and previous convictions may be accepted by the court.

b. ***Data as to service.***—If the defense objects to such data as being inaccurate or incomplete in a specified material particular, or as containing certain specified objectionable matter, the court may either sustain the objection without further inquiry or proceed to determine the issue. Objections not asserted may be regarded as waived.

*c. **Evidence of previous convictions.***—Such evidence is not limited to evidence relating to offenses similar to the one of which the accused stands convicted or to the evidence referred with the charges. Such evidence must, however, relate to offenses committed during a current enlistment, appointment, or other engagement or obligation for service of the accused, and in the case of a soldier during the one year, and in the case of others during the three years next preceding the commission of any offense charged. In computing the one or three years, as the case may be, periods of unauthorized absences as shown by the finding in the case or by the evidence of previous convictions should be excluded.

In the case of a general prisoner, whether the sentence of dishonorable or bad conduct discharge was suspended or not, the rules as to an enlisted person apply, except that the evidence of previous convictions should be limited to evidence of offenses committed during his status as a general prisoner.

Unless the accused has been tried for an offense in the sense of Article 40, evidence as to the offense is not admissible as evidence of a previous conviction. See 68 (Former Trial).

As to documentary evidence of previous convictions, see the last subparagraph of 68 (Former Trial). The service record of the accused or an admissible copy or extract copy thereof may also be used. The accused may, of course, object on proper grounds to the introduction of any offered evidence of previous convictions. If he does, action as indicated in 79*b* will be taken. Any objection not asserted may be regarded as waived. In the absence of objection an offense may be regarded as having been committed during the required periods unless the contrary appears.

*d. **Evidence of former discharges.***—The accused may introduce evidence of the character given him on any former discharges from the military service, subject to the right of the prosecution to introduce in rebuttal evidence of the character given the accused on other discharges from the service.

*e. **Evidence of former punishment.***—The fact that disciplinary punishment under Article 104 has been enforced against the accused may be shown by the accused as a factor in extenuation upon trial for an offense growing out of the same act or omission for which such punishment was imposed and enforced (A. W. 104).

80. **SENTENCE.**—*a. General.—Basis for Determining.*—Except for an offense for which a mandatory punishment is prescribed, the determination of a proper punishment for an offense rests within the discretion of the court subject to such limitations as may be prescribed in 115–117 and by the Article of War violated. See in particular the Table of Maximum Punishments (117*c*). To the extent that punish-

ment is discretionary the sentence should provide a legal, appropriate, and adequate punishment. See 115–117 (Punishments).

When applicable, the Table of Maximum Punishments prescribes the maximum limits authorized for each offense therein listed. Normally, the maximum punishment will be reserved for an offense which is aggravated by the circumstances, or after conviction of which there is received by the court evidence of previous convictions of similar or greater gravity. In the exercise of its discretion in adjudging a sentence the court should consider among other factors the character of the accused as given in former discharges if introduced into evidence, the number and character of previous convictions, the circumstances extenuating or aggravating the offense or any collateral feature thereof made material by the limitation on punishment—such as value in larceny or length of absence in absence without leave. The members should bear in mind that the punishment adjudged must be justified by the necessities of justice and discipline. See in this connection 78*a* (Basis of Findings), 79*a* (Evidence of Former Punishments), 79*c* (Evidence of Previous Convictions), and 124, 132*b* (Evidence in Extenuation).

Among other factors which may properly be considered are the penalties adjudged in other cases for similar offenses so as to render sentences relatively uniform throughout the Army with due regard to the nature and seriousness of the circumstances attending each particular case. In special circumstances, to meet the needs of local conditions, sentences more severe than those normally adjudged for similar offenses may be necessary. Courts will be instructed, however, to exercise their own discretion and will not adjudge sentences known to be excessive in reliance upon the mitigating action of the reviewing or higher authority. Comments with respect to matters proper for consideration in fixing the punishment are made in other connections. For example, see 113 (Mental Deficiency of Accused), 140*a*, and 157*a*.

As to dishonorable and bad conduct discharges, see 87*b* (Advisory Instructions); 116 *b* and *d;* and 117*c* (Permissible Additional Punishments).

The imposition by courts-martial of inadequate sentences upon officers and others convicted of crimes which are punishable by the civil courts would tend to bring the Army, as to its respect for the criminal laws of the land, into disrepute.

If an accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court will impose punishment only with reference to the act or omission in its most important aspect.

Miscellaneous.—Forms of sentences are given in Appendix 9. See Article 19 as to divulging the sentence and as to disclosing or discovering the vote or opinion of a member upon the sentence.

For the information of the reviewing authority, a court-martial may formulate for inclusion in the record a brief statement of the reasons for the sentence.

*b. **Procedure.***—The court sits in closed session during deliberation on the sentence. Deliberation may properly include full and free discussion. The influence of superiority in rank should not be employed in any manner in an attempt to control the independence of members in the exercise of their judgment.

When the discussion is completed, any member who desires to propose a sentence writes his proposal on a slip of paper. The junior member collects these proposed sentences and submits them to the president. The court then votes on the proposed sentences, beginning with the lightest, until a sentence is adopted by a two-thirds vote. Voting is by secret written ballot (A. W. 31) and is obligatory on each member regardless of his vote as to the findings. It is the duty of each member to vote for a proper sentence for the offense or offenses of which the accused has been found guilty, without regard to his opinion or vote as to the guilt or innocence of the accused. The concurrence of all members present at the time a vote is taken is required to adjudge the death penalty; three-fourths of the members present at the time the vote is taken must concur to adjudge a sentence to life imprisonment and to confinement for more than 10 years, and the concurrence of two-thirds of the members present at the time the vote is taken is required to adjudge any other sentence (A. W. 43). See Article 31 as to counting and checking votes and announcing the result of the ballot. If in computing the number of votes required a fraction results, such fraction will be counted as one; thus if six members are to vote, a requirement that three-fourths concur is not met unless five concur. Any sentence, even in a case where the punishment is mandatory, must have the concurrence of the required number of members. If a general court-martial, after finding an accused guilty of an offense for which a mandatory punishment is prescribed by the Articles of War, shall find upon a ballot being taken upon the question of imposition of such mandatory sentence that the number of votes required by Article 43 for the imposition of such sentence have not been cast in its favor, then a second ballot shall be taken upon the same question. If upon such second ballot the requisite number of votes for the imposition of such sentence is still lacking, the court will reconsider its findings in the case and may revoke its former findings and find the accused not guilty, or guilty of a lesser included offense.

81. **ANNOUNCING SENTENCE; MATTERS OF CLEMENCY; ADJOURNMENT.**—When a court-martial has sentenced an accused, the court will at once announce the findings and sentence in open court, unless good reasons exist for not making the findings and sentence public at that time. In this latter event the president may state in open court that the findings and sentence are not to be announced.

After such announcement or statement the defense may submit in writing for attachment to the record any matters as to clemency which it desires to have considered by the members of the court or the reviewing authority. The rules of evidence are not applicable to such matters.

One or more recommendations for clemency, each signed by the members joining therein, may be submitted to the trial judge advocate for forwarding with the record. The recommendation may include a proposal that all or part of the sentence be suspended, including a sentence to bad conduct or dishonorable discharge. It should be specific as to amount and character of clemency recommended and as to the reasons for the recommendation.

At the conclusion of the case, the court may proceed to other business or adjourn until a definite time or adjourn to meet at the call of the president.

As to the duty of trial judge advocate to notify the commanding officer of the accused of the result of trial, see 41*b*.

Chapter XVI

PROCEDURE

SPECIAL AND SUMMARY COURTS—REVISION—REHEARING AND NEW TRIALS

82. **SPECIAL AND SUMMARY COURTS.**—*a.* ***Special courts.***—The procedure of special courts-martial will, so far as practicable, be that prescribed for general courts-martial. The principal distinction in procedure between special and general courts is that in the former all rulings on interlocutory questions other than challenges are made by the president (and not by a law member), subject to objection by other members (51*c*). See also 39. With respect to the preparation of records of trial by special court-martial see 56, 86, and Appendix 7; as to the disposition of such records by the reviewing authority, see 87*c*.

b. ***Summary courts.***—(1) *Function.*—The function of a summary court-martial is to exercise justice promptly for relatively minor offenses under a simple form of procedure. In the trial of the case the summary court represents both the Government and the accused. In the absence of a plea of guilty he will thoroughly and impartially investigate both sides of the matter and will assure that the interests of both the Government and the accused are safeguarded. For the jurisdiction of summary courts-martial, see 16, 17, and Article 14.

(2) *Procedure before trial.*—When charges are referred to a summary court-martial, the court will carefully examine the charges and the other data contained in the form to determine the offense or offenses to be tried and the evidence that may be adduced to prove them. Although he should correct and initial slight errors or obvious mistakes in the charges, he has no authority to make any substantial changes therein. As soon as the charges and any accompanying papers have been examined and a determination has been made as to the proof necessary to sustain the charges, arrangements should be made for trial. He should promptly notify all witnesses and the accused of the time and place set for the trial. The commanders of all military witnesses and of the accused should be requested to have them present. Civilian witnesses may be notified in any convenient manner. A summary court-martial has the same power as the trial judge advocate of a general or special court-martial to compel the attendance of civilian

witnesses by subpoena (105; A. W. 22) and to take depositions in proper cases (106; A. W. 25).

(3) *Procedure at trial—Preliminary matters.*—The summary court will number cases serially in the order in which they are tried. Unless otherwise stated, the procedure of summary courts-martial will as far as practicable be that prescribed for general courts-martial.

When the witnesses and the accused have arrived, the court will proceed to the trial. Witnesses (other than the accused) should ordinarily be excluded from the court until called to testify. The accused may be advised of the following matters: the nature of the proceedings; the general nature of the charges; who appointed the court; the name of the accuser; the names of the witnesses to be called so far as is known; the right of the accused to cross-examine them or have the court ask any questions which the accused desires answered; the right of the accused to call any witnesses or produce any evidence in his own behalf with the assurance that the court will assist him in every possible way to do so; and his right to testify or to remain silent (134*d*; 135*b*; A. W. 24), or to make an unsworn statement (76). For forms of such explanations see Appendix 5.

If the accused is a noncommissioned officer he will be asked to indicate in writing on the charge sheet whether he consents to trial by summary court-martial. See Appendix 8. If such accused is a noncommissioned officer of the first two grades, and objects, the summary court-martial will adjourn the proceedings and forward the charge sheet and a statement of the accused's objection to the appointing authority. If a noncommissioned officer of a lower grade, after explanation of his right so to do, objects to trial by summary court-martial the matter will be submitted to the officer exercising special court-martial jurisdiction over the command (through the appointing authority if the latter does not also exercise special court-martial jurisdiction) for his determination as to whether the trial should continue. See 16, Article 14, and Appendix 8.

Arraignment and pleas.—After the rights of the accused have been explained to him, the charges should be read or shown to him. Any necessary explanation of the charges may be made. The accused should then be asked how he pleads to each specification and charge. If he pleads guilty to any specification or charge, the summary court will explain the elements of the offense to which he has pleaded guilty and the maximum sentence which the court could impose. If the accused desires he may change his plea.

If the accused desires to change his plea or if the summary court is in doubt as to his understanding and desire to plead guilty, or if at any time during the trial the accused makes a statement, sworn or unsworn, inconsistent with his plea of guilty, a plea of not guilty will be entered.

If a plea of guilty to all specifications and charges is allowed to stand, the court may proceed at once to find the accused guilty and to adjudge an appropriate sentence; but the court may, in the interest of justice, proceed with trial and consider evidence on the merits or in mitigation or extenuation. If after hearing such evidence the court should believe the plea of guilty to have been improvidently entered it may permit a withdrawal of the plea.

Conduct of trial proper.—Witnesses for the prosecution will be called first and examined under oath as to all matters relevant to the offense charged, and the accused will be extended the right to cross-examine them. The summary court will aid the accused in the cross-examination, and if the accused desires, the court will ask questions suggested by the accused. On behalf of the accused, the court will obtain the attendance of witnesses, swear and examine them, and will obtain such other evidence as may tend to disprove or negative guilt of the charges, explain the acts or omissions charged, show extenuating circumstances, or establish good character. He will explain to the accused his right to testify, remain silent, or make an unsworn statement, and will give the accused full opportunity to exercise his election. If the accused elects to make an unsworn statement the court may not cross-examine him thereon (76).

The principles stated in 78*a* to *c* inclusive, 80*a*, and 81 as to findings and sentence apply equally to summary courts-martial. Before determining an appropriate sentence the summary court will show or read to the accused any admissible evidence of previous convictions (79*c*) and the personal data appearing on the first page of the charge sheet and will ask whether it is correct. If the accused claims it is not the court will take the action indicated in 79*b*.

(4) *Record.*—See Appendix 8 for form of record of trial by summary court-martial. So much of the proceedings as relate to pleas, findings and sentence must be recorded in the appropriate place on page 4 of all three copies of the charge sheet. The number of previous convictions considered will be entered in the space provided for the entry on the record. If none were considered, an entry will be made to that effect. For other entries to be made when appropriate, see Appendix 8. The summary court will sign the record in triplicate and will forward all three copies and the accompanying papers without letter of transmittal to the appointing authority. If the summary court is the only officer present with the command, the record will so state, and that officer thereafter holds the record as reviewing authority. For disposition of records by the reviewing authority, see 87*c*.

83. **REVISION.**—The procedure of a general or a special court-martial when reconvened for the purpose of revising its action or

correcting its record will in general be as indicated by the form of record of proceedings on revision (App. 6). See Article 40 as to matters that can not be reconsidered. Only the members of the court who participated in the findings and sentence, and the trial judge advocate and assistant trial judge advocate, if any, will assemble and the court will convene. The defense counsel, the accused and his individual counsel, if any, may also be present if required by the court, but their presence is otherwise not necessary. The trial judge advocate will read to the court the indorsement of the reviewing authority returning the record and directing the reconvening, or, if the record of trial by a special court-martial has been returned to him orally, he may state briefly to the court the views of the reviewing authority as communicated to him. The court will then close, consider and take action upon the matter before it, open, and adjourn. As the action so taken is entirely corrective, a case will not be reopened by the calling or recalling of witnesses or otherwise. Any modification of the record to make it conform to that which took place at the trial is made formally, no actual physical change being made in the original record. See 85*b* (Contents of record) and Appendix 6*a* (Form of Record of Proceedings on Revision).

For procedure in reconsideration of action on motions and similar matters see 64*f*.

What has been said in respect to the procedure on revision by general or special courts-martial will as far as applicable govern such procedure by summary courts-martial.

84. **REHEARING AND NEW TRIALS.**—See 89 (Ordering Rehearings), 101 and 102 (New Trial), 131*b* (Former Testimony), Article 52 and Article 53. The procedure in general is the same as in other trials.

No member of the general or special court-martial upon a rehearing or upon a new trial should be permitted to examine the record of the former proceedings or any document (other than the charges) referred with the charges to the trial judge advocate, except when received in evidence at the rehearing or new trial; but that part of the record which relates to errors committed at the former proceedings may be examined by the law member of a general court-martial or the president of a special court-martial when necessary to enable him to decide upon the admissibility of offered evidence or other questions of law involved, and may be read to the court when necessary for it to pass upon a ruling on any question of law made subject to objection by a member. See Article 31.

Chapter XVII

RECORDS OF TRIAL

GENERAL, SPECIAL, AND SUMMARY COURTS-MARTIAL

85. **GENERAL COURTS-MARTIAL.**—*a.* ***General and miscellaneous.***—Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it (A. W. 33).

The record is prepared by the trial judge advocate under the direction of the court, but the court as a whole is responsible for it. It is immaterial to the sufficiency of a record whether it was kept or written by the trial judge advocate or by a clerk or reporter acting under his direction. The trial judge advocate will preserve or cause to be preserved any notes, stenographic or other, from which the record of trial is prepared. These notes may be destroyed after final disposition of the case under Article 48 or Article 50.

The record of the proceedings in each case will be separate and complete in itself and independent of any other document, both in form and in substance.

b. ***Contents, appendages, authentication.***—The record must show all the essential jurisdictional facts. It will set forth a complete history of the proceedings had in open court and material conclusions arrived at in both open and closed sessions. For details of contents and certain exceptions to the foregoing general rule, see Appendix 6. When a record is amended in revision proceedings the record of proceedings in revision will show specifically, ordinarily by page and line, the part of the original record that is changed and the change made. When a motion to dismiss is sustained as to all charges and specifications, or when the trial does not terminate in the usual way for other reasons, the record will show the proceedings as far as they went.

Accompanying the record and securely bound together will be the original charge sheet and, if not used as exhibits or properly disposed of otherwise, the other papers which accompanied the charges when referred for trial, including, if the trial was a rehearing of the case or a new trial, the record of the prior hearing or hearings. For detailed instructions as to the arrangement of the record of trial and the accompanying papers see Appendix 6.

Recommendations and other papers relative to clemency will be bound into the record immediately after the exhibits. Similar action will be taken with respect to documents marked for identification and not admitted in evidence. If the findings and sentence were not announced, the trial judge advocate or assistant trial judge advocate, or member, as the case may be, will certify after the signatures on the record that he personally recorded such findings and sentence. A copy of the reporter's voucher will be attached to the record, also any copy of the record not otherwise utilized. The receipt or receipts of the accused for copies of the record furnished pursuant to 41*e* will also be attached. In cases in which it is impractical to secure a receipt from the accused, a certificate of delivery will be attached.

The defense counsel should examine the record of trial before it is authenticated. A suitable notation that this duty has been accomplished should be included, preferably on the page bearing the authentication. See Appendix 6 for the form of notation.

The record will be authenticated by the president and the trial judge advocate (A. W. 33). Such authentication can be made only by the president and trial judge advocate who were actually present at the trial; that is, the senior member of the court present at the trial will authenticate as president and the trial judge advocate or, if the trial judge advocate was absent from the trial, the senior assistant trial judge advocate who was actually present will authenticate as trial judge advocate. If, *after* trial, the persons who served in those capacities become unable to authenticate because of death, disability, or absence, the record will be signed by another member who was present at the trial in lieu of the president and by an assistant trial judge advocate who was present at the trial in lieu of the trial judge advocate; otherwise by another member of the court who was present (A. W. 33). If some one other than the president or trial judge advocate authenticates, the reason must be stated. See Appendix 6 for forms of authentication.

Certificates of qualification (56) submitted by the officers conducting the prosecution and defense will be attached to the record immediately after the authentication.

When prior to action by the reviewing authority a record of trial is lost or destroyed, a new record will, if practicable, be prepared and will become the record of trial in the case. The new record will, however, be prepared only when the extant original notes or other sources are such as to enable the preparation of a complete and substantially accurate record of the case. In any case of loss of a record the trial judge advocate or other proper person will fully inform the appointing authority as to the facts and as to the action, if any, taken.

c. ***Disposition.***—The original record and accompanying papers with a proper letter of transmittal and General Court-Martial Data Sheet properly filled out will be sent by the trial judge advocate to the appointing authority or to his successor in command, or in the case of a court appointed by the President, to The Judge Advocate General (A. W. 35).

86. **SPECIAL AND SUMMARY COURTS-MARTIAL.**—The foregoing paragraph (85) applies equally to records of trial by special court-martial in which bad conduct discharges are adjudged. In other cases the requirements of 85 are in general applicable to records of trial by special court-martial except as otherwise indicated in the form for records of trial by special courts-martial (App. 7) or elsewhere.

As to records of trial by summary court-martial see the last subparagraph of 82*b* and Appendix 8.

Chapter XVIII

ACTION

REVIEWING AUTHORITY—CONFIRMING AUTHORITY

87. **REVIEWING AUTHORITY.**—*a. Who is the reviewing authority.*—The reviewing authority is normally the officer who appointed (convened) the court-martial which adjudged the sentence. After a change in command or in the status or identity of the command, the reviewing authority may be the officer commanding for the time being, a successor in comand, or any officer exercising general court-martial jurisdiction (A. W. 47*e*).

Ordinarily action is taken by only one reviewing authority; when, however, the reviewing authority who has approved the sentence of a special court-martial involving a bad conduct discharge does not exercise general court-martial jurisdiction, an officer authorized to appoint a general court-martial, normally the officer exercising general court-martial jurisdiction over the command within which the accused was tried by special court-martial, also takes action upon the record of trial as reviewing authority (A. W. 47*d*).

An officer commanding for the time being is the officer who has temporarily taken the place of the officer who appointed the court. For example, when an assigned commander is not present for duty with his command because of illness, absence on leave, or for any other cause, the officer exercising the command functions of the assigned commander during such absence is the officer commanding for the time being. A successor in command is the officer who has succeeded to a command, that is, has assumed permanently the command function of a predecessor by reason of assignment, absorption of one command by another, or otherwise. Thus, when a separate brigade is merged into a division, the commander of the division becomes the successor in command for the purpose of acting as reviewing authority upon a record of trial by a general court-martial appointed by the brigade commander. Under unusual circumstances, as, in a case in which a command has been inactivated, action upon a sentence adjudged by a court-martial appointed by the commanding officer prior to inactivation may be taken by any officer exercising general court-martial jurisdiction.

The fact that, pending action on the proceedings, the accused leaves the command of the reviewing authority does not divest the latter of his status as reviewing authority with respect to the proceedings.

A reviewing authority cannot delegate his functions as such to anyone.

b. ***Powers and duties.***—Express approval of a sentence by a reviewing authority is an action which must precede the execution of the sentence. See Article 47. Approval of the findings or proceedings is unnecessary and, in the absence of express approval of the sentence, is not sufficient. For powers incident to the power to approve see Article 47*f*. For powers incident to the power to order the execution of a sentence see Article 51.

When a sentence in excess of the legal limit is divisible, such part as is legal may be approved. If the court lacked jurisdiction as to some of the offenses for which accused was tried, the proceedings as to the other offenses tried are not invalid for that reason.

Neither the reviewing authority nor any other officer is authorized to add to the punishment imposed by a court-martial. No reviewing authority other than the President is authorized to commute a sentence. As to reduction of enlisted persons as a consequence of action on certain sentences, see 116*d*. Upon a rehearing no sentence in excess of or more severe than the original sentence shall be enforced, unless the sentence be based upon a finding of guilty of an offense not considered upon the merits of the original proceedings (A. W. 52). When only so much of a finding of guilty of an offense charged as involves a finding of a lesser included offense would otherwise be approved and it appears from the record that punishment for such lesser included offense is barred by Article 39, the reviewing authority will disapprove that finding, and he may order a rehearing if he also disapproves the entire sentence. When upon a charge to which the accused has pleaded not guilty a court-martial finds him guilty of a lesser included offense and does not advise him of his right with respect to the statute of limitations, and it appears from the record that punishment for such lesser included offense is barred by Article 39, the reviewing authority will disapprove so much of the findings and sentence as pertains to the offense found. In this connection it should be remembered that absence without leave is not a continuing offense for the purpose of the statute of limitations.

Article 37 vests a sound legal discretion in the reviewing authority to the end that substantial justice may be done. The effect of a particular error within the purview of Article 37 should be weighed by him in the light of the facts as shown by the record and, unless it appears to him that the substantial rights of the accused were injuriously affected, he should disregard the error as a basis for concluding that

the proceedings are invalid or for disapproving a finding or the sentence. No finding or sentence should be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect or that his substantial rights were in fact otherwise injuriously affected thereby. If through mistake or inadvertence the trial judge advocate should be present during all or part of a closed session of the court, such irregularity is not a ground for disapproval unless it appears that his presence injuriously affected the substantial rights of the accused.

For action to be taken by the reviewing authority when it appears from the record or from any other source that the accused may have been insane at the time of the commission of the offense or at the time of trial, regardless of whether such question was raised at the trial or how it was determined if raised, see 114.

For action when the reviewing authority differs with the court with respect to its rulings on motions and similar objections, see 64*f*.

The disapproval of a sentence nullifies it as a basis of punishment, and confirmation of a disapproval is not required. A disapproval should be express and explicit. Approval or disapproval of findings or a sentence or any part of the findings or sentence should not be left to implication. For example, in approving "only so much" of a finding of guilty as involves a lesser included offense, all elements of the offense intended to be approved should be clearly included in the statement of approval. Neither an acquittal nor a finding of not guilty requires approval or confirmation, and neither should be disapproved. Disapproval cannot in any event affect the finality of a legal acquittal or of a legal finding of not guilty.

A commanding officer may, through his staff judge advocate or otherwise, give general instruction to a court-martial which he has appointed, preferably before any cases have been referred to it for trial. Such instruction may relate to the rules of evidence, burden of proof, and presumption of innocence, and may include information as to the state of discipline in the command, as to the prevalence of offenses which have impaired efficiency and discipline, and of command measures which have been taken to prevent offenses. Such instruction may also present the views of the Department of the Army as to what are regarded as appropriate sentences for designated classes of offenses. The commander may not, however, directly or indirectly give instruction to or otherwise unlawfully influence a court as to its future action in a particular case.

Commanding officers are expressly forbidden to censure, reprimand, or admonish a court-martial or any member thereof with respect to its findings, a sentence adjudged by it, or the exercise of any judicial

responsibility. Likewise, all persons subject to military law are forbidden to attempt to coerce or unlawfully influence the action of a court-martial or military commission or any member thereof in reaching the findings or sentence in any case, or the action of an appointing, reviewing or confirming authority with respect to his judicial acts. See Article 88.

Reference of General and Special Court-Martial Records to Staff Judge Advocate or to The Judge Advocate General.—See Articles 11 and 47 for statutory requirements.

The staff judge advocate will submit a written review of the record of trial when required under the provisions of Article 47. The review will include his opinion as to the adequacy and weight of evidence and the effect of any error or irregularity respecting the proceedings, and a specific recommendation as to the action to be taken. Reasons for both the opinion and the recommendation will be stated. The reviewing authority may direct his staff judge advocate to make a more comprehensive written review or supplementary oral or written reviews or reports. The reviewing authority may, before acting on the case, transmit the record to The Judge Advocate General with a request for advice either as to the whole case or as to any particular matter involved; and, if he has no staff judge advocate or officer acting as such, he will so transmit it for the advice of The Judge Advocate General on the whole case before acting thereon. No sentence shall be approved by the reviewing authority unless upon conviction established beyond reasonable doubt of an offense made punishable by the Articles of War and unless the record of trial has been found legally sufficient to support the sentence. See Article 47*c*. When a reviewing authority is in disagreement with his staff judge advocate as to whether a conviction of an offense is established beyond reasonable doubt, the reviewing authority should transmit the record of trial, with an expression of his own views and the opinion of the staff judge advocate, to The Judge Advocate General for advice.

Correction of Record.—A record of trial may upon review be found incomplete or defective in some material respect, as, for example, a failure to show that the members of the court were sworn, or that the required number of members concurred in the vote on the findings and sentence. The court may have performed its duty properly but through clerical error or inadvertence the events may have been improperly recorded. In such a case the record must be corrected to speak the truth. It may be returned to the president of the court, or to the summary court officer in the case of trial by a summary court, for a certificate of correction to relate the true facts, which certificate will be authenticated in the same manner as the record of trial. See 85*b*. In general and special courts-martial cases the authenticated

certificate will be attached to the record of trial after the original signatures authenticating the record. If the accused has been furnished a copy of the record, he will be furnished a copy of the certificate of correction for which he must give a receipt for inclusion in the original record. (See App. 6.) A copy of the certificate will be attached to and forwarded with each unclaimed copy of the record. A certificate of correction may be used only to make the record correspond to that which actually occurred at the trial. If the court was not sworn, for example, a certificate of correction can not properly state the contrary.

Revision Proceedings.—For procedure in revision see 83. If it appears that there was an error in the action of the court which might be corrected if the court were reconvened, the reviewing authority may return the record of trial to the court for reconsideration and revision of its proceedings. For example, if a previous conviction was erroneously considered by the court, and it is believed that the consideration of such conviction influenced the court in rendering the sentence adjudged, or if the sentence adjudged is less than the mandatory sentence for the offense, the reviewing authority may return the record to the court to reconsider the matter and revise its proceedings accordingly. See 83 and Article 40 as to matters that can not be reconsidered. Except for the purpose of making the record of trial speak the truth and the exceptions stated in Article 40*c* and *d* proceedings in revision may not be had in any case in which any part of the sentence has been ordered executed.

Advisory Instructions.—In the course of taking action upon a record of trial a reviewing authority is empowered to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact. Such questions not only affect a sentence because of their bearing on the issue of guilt or innocence, but they often reveal mitigating or other circumstances indicating the nature and extent of punishment justified in the particular case. The punishment approved should be that which is warranted by the circumstances of the offense and the previous record of the accused. Appropriate action to reduce the sentence should be taken when the sentence, though legal, appears unnecessarily severe. Although evidence of previous convictions may always be considered in determining the proper measure of punishment, evidence of previous convictions of offenses materially less grave than the offense or offenses for which the sentence was adjudged is not to be regarded as in itself justifying a sentence of maximum severity. In approving severe sentences consideration should be given to all factors, including the possibility of rehabilitation as well as possible deterrent effect.

Dishonorable discharge should be reserved for those who should be separated from the service under conditions of dishonor, after having

been convicted of offenses usually recognized by the civil law as felonies, or of offenses of a military nature requiring severe punishment.

A bad conduct discharge may be imposed in any case in which a dishonorable discharge may be imposed as well as in certain other cases. It is deemed to be a less severe punishment than dishonorable discharge, and is primarily designed as a punishment for bad conduct, as distinguished from serious offenses of a civil nature and serious military offenses. It is appropriate as punishment for an accused who has been convicted repeatedly of minor offenses and whose punitive separation from the service appears to be necessary.

The reviewing authority may, in the exercise of his sound discretion, suspend the execution of a dishonorable discharge or bad conduct discharge to the end that the accused may have the opportunity to redeem himself in the military service, but the reviewing authority should not suspend the execution of either type of discharge in a case involving conviction of an offense which reveals that degree of moral turpitude which obviously disqualifies the accused for further military service.

The reviewing authority may properly consider as a basis for mitigation or remission not only matters relating solely to clemency, such as long confinement pending trial or the fact that as an accomplice the accused testified for the prosecution, but any other factors which may properly be considered in fixing the punishment. See 80*a* (Basis for Determining Sentence).

Ordering Execution of Sentence; Mitigation; Remission; Suspension.—Execution of a sentence to death, a sentence involving a general officer or a sentence involving dismissal or reduction of an officer, imprisonment for life, or dismissal or suspension of a cadet is ordered by the appropriate confirming authority. Other sentences are ordered into execution by the reviewing authority—the officer authorized to appoint a general court-martial in the case of a bad conduct discharge adjudged by a special court-martial—but no authority shall order the execution of any sentence involving dishonorable discharge not suspended, bad conduct discharge not suspended, or confinement in a penitentiary until the appellate review required by Article 50 shall have been completed.

The authority ordering the execution of a sentence of death issues instructions concerning the time and place of execution, any designations or instructions in this particular matter by the court or the reviewing authority being disregarded.

The power of the reviewing authority to order the execution of a sentence includes the power to mitigate or remit the whole or any part of the sentence (A. W. 51); but in any case the punishment imposed

by the sentence as mitigated or remitted must be included in the sentence adjudged by the court and must be one that the court might have imposed in the case. For example, a sentence as mitigated may not provide for confinement in excess of one year without dishonorable or bad conduct discharge.

To mitigate a punishment is to reduce it in quantity or quality, the general nature of the punishment remaining the same. A sentence can not be commuted (changed to punishment of a different nature) except by a confirming authority.

A sentence adjudging dishonorable discharge may be mitigated to a bad conduct discharge, but a bad conduct discharge can not be mitigated. Forfeiture of pay may be mitigated to detention of pay for a like period or less. However, a fine may not be mitigated to a forfeiture, nor a forfeiture to a fine, as this would constitute commutation. Confinement at hard labor may be mitigated to hard labor without confinement for a like period or less. A sentence of dishonorable or bad conduct discharge, forfeiture of all pay and allowances to become due, and confinement at hard labor for a definite period may be mitigated to a lesser punishment; for example, to confinement at hard labor for a period, within applicable limits, not exceeding that adjudged and forfeiture of not more than two-thirds of the soldier's pay per month for a period not exceeding the period of confinement adjudged.

The action of a reviewing authority in approving a sentence and simultaneously remitting a part thereof is legally equivalent to approving only the sentence as reduced.

The authority competent to order the execution of a sentence of a court-martial may, at the time of approval or confirmation of the sentence, suspend the execution in whole or in part of any such sentence as does not extend to death and may restore the person under sentence to duty during the suspension. See Article 51. The authority competent to order the execution of a sentence should suspend the whole of the sentence when it appears to him that such action will promote discipline. No order suspending execution of a dishonorable or bad conduct discharge shall be vacated unless and until any confirming action required by Article 48 and the appellate review of the sentence required by Article 50 have been completed (A. W. 51).

As to penitentiary confinement see 90*a*.

Forms of Action and Related Matters.—The reviewing authority will state at the end of the record of trial in each case his decisions and orders. This equally applies in summary court cases, including when the reviewing authority is the officer that tried the case as summary court. Forms of action are in Appendix 10. See, also, 82*b*. Any reprimand or admonition provided for by the sentence of a general or special court-martial as ordered executed will be included in the action.

Confirming action does not normally set forth a reprimand or admonition adjudged, but it is included in the promulgating order. The action will be signed by the reviewing authority in his own hand. Below his signature will appear his rank and the fact that he is the commanding officer or other fact authorizing him to take the action. Any supplementary or corrective action taken by the reviewing authority pursuant to a holding on appellate review under Article 50 must also be signed by the reviewing authority in his own hand.

Any action taken may be recalled and modified before it has been published or the party to be affected has been officially notified thereof.

In a proper case the action may include an order directing the release of an accused from arrest or confinement.

When in his final action on a case the reviewing authority disapproves a finding of desertion or a sentence based wholly or in part on such a finding, he should indicate in his action the reasons therefor. Such reasons assist the disbursing officer in making certain decisions relative to forfeitures and stoppages. In any case the reasons for a disapproval may be stated.

If the sentence of a general court-martial as ordered executed provides for confinement, the place of confinement will be designated. In cases involving imprisonment for life, dismissal and confinement of officers, and the dismissal and confinement of cadets, the confirming authority will designate the place of confinement.

c. ***Disposition of record and related matters.***—*General Court-Martial.*—The record of trial, with the decisions and orders of the reviewing authority thereon, ordinarily will be transmitted without letter of transmittal direct to The Judge Advocate General of the Army. With the record will be forwarded the accompanying papers (see 85), six authenticated copies of the order, if any, promulgating the result of the trial, and two signed copies of the review of the staff judge advocate. In cases involving more than one accused an additional copy of the order of promulgation will be forwarded for each additional accused. If the order of execution is withheld under Article 50*e*, the reviewing authority will, before forwarding the record, take therefrom the data necessary for drafting a general court-martial order, and when such order is issued the same number of copies thereof will be forwarded as in the case of an order not so withheld. See Appendix 6*c* for the arrangement of the record and allied papers for forwarding.

Special Court-Martial.—Ordinarily special court-martial orders will be issued by the convening authority except in cases in which the convening authority approves a sentence to bad conduct discharge. In such cases, after approving the bad conduct discharge the convening authority will forward the record to the officer authorized to appoint a

general court-martial for the command, who will thereafter process the case in accordance with the provisions of Articles 47 and 50*e*. Orders promulgating sentences to bad conduct discharge will be issued by the officer exercising general court-martial jurisdiction. Subject to the foregoing exception, the record and accompanying papers, together with a copy of the order publishing the result of the trial, will be forwarded by indorsement to the officer exercising immediate general court-material jurisdiction over the command. The record will be examined by the staff judge advocate for errors, defects, and omissions. See 91. If any are discovered, corrective or modifying action may be taken by the officer exercising general court-martial jurisdiction or he may return the record with directions that proper action be taken by the reviewing authority. After necessary corrective action has been taken, the record is filed in the office of the staff judge advocate. If, however, the record involves an approved sentence to bad conduct discharge it will be forwarded, as in the case of a general court-martial record, to The Judge Advocate General of the Army. See Article 50*e*.

Summary Court-Martial.—The original and two copies thereof will, after action by the reviewing authority, be delivered to the regimental, separate battalion, or other unit personnel officer, who will in the case of an approved sentence, enter the essential data on the service record of the accused. See AR 345–125, Service Record; AR 345–5, Report of Changes; and AR 345–400, Morning Reports. One of the copies will be forwarded to The Adjutant General, Washington, D. C.; the other copy will be forwarded to the officer exercising general court-martial jurisdiction over the command, where the staff judge advocate will examine it for errors, defects or omissions and action will be taken as provided for records of special courts-martial.

d. ***Orders and related matters.***—An order promulgating the result of a trial by general or special court-martial, while not necessary to the validity of the trial, will be issued whether such result was an acquittal or otherwise. For forms of orders and data to be shown therein see Appendix 11 and AR 310–50. Matter unfit for publication will be set forth only in the original order, in such copies as may be furnished The Adjutant General, the authorities of the post or other place where the accused is, and to the commanding officer of the place where the accused is to be confined, if confinement is involved.

The order will be of the date that the reviewing or confirming authority takes final action on the case. The order will state the date upon which the sentence was adjudged by the court.

When a rehearing is directed, neither the action of the court at the former proceeding nor the action of the reviewing or confirming authority thereon will be published in orders, but the court-martial order promulgating the final action in the case will in a separate

paragraph publish such charges and specifications at the former hearing as may not have been referred for rehearing, together with the action of the court and reviewing authority thereon.

88. **CONFIRMING AUTHORITY.**—For cases in which confirmation is required and for the powers of the confirming authority see Articles 48, 49, and 50. Confirming power is vested in the President, the Secretary of the Army, a Judicial Council with the concurrence of The Judge Advocate General or Assistant Judge Advocate General in charge of a branch office, a Judicial Council, and in no other officer or officers. See 96 and Articles 48 and 49 for confirming powers.

Chapter XIX

ACTION

ORDERING REHEARINGS—PLACE OF CONFINEMENT

89. **ORDERING REHEARING.**—The procedure to be followed at the rehearing of a case is in general the same as in other trials. See 84.

For conditions under which the reviewing or confirming authority or The Judge Advocate General may authorize or direct a rehearing, see Article 52.

A rehearing may not be ordered by an authority empowered to take that action if, upon taking his final action, he approves a part of the sentence.

For limitations as to membership of courts and as to offenses triable upon rehearing, see Article 52. If the accused is convicted at the first trial of a lesser included offense only, a rehearing on the offense originally charged can not properly be ordered. If, however, a rehearing should improperly be ordered on the original offense charged and the accused should be found guilty thereof, such finding may be valid as to the lesser offense of which he was found guilty in the first trial.

The order directing a rehearing should be made at the time of disapproving or vacating the sentence and will ordinarily be included in the action on such sentence.

When a rehearing is directed there will be referred to the trial judge advocate not only the charges but also the record of the former proceeding and all pertinent accompanying papers, together with a copy of any opinion or holding of agencies of the office of The Judge Advocate General or the review of the staff judge advocate, to inform the trial judge advocate of the errors made at the former hearing which have necessitated the rehearing.

For related provisions as to a new trial after final disposition of the case on appellate review, see 101–102.

90. **PLACE OF CONFINEMENT.**—*a.* **Penitentiary.**—A penitentiary may be designated as the place of confinement for the whole period of confinement imposed by the sentence as ordered executed, provided the period exceeds one year, and provided also that the sentence is wholly or partly based on one or more of the offenses listed below or was imposed in commutation of a death sentence:

Desertion in time of war.
Repeated desertion in time of peace.
Mutiny.
An offense involving an act or omission recognized as an offense of a civil nature and made punishable by penitentiary confinement for more than one year by some statute of the United States of general application within the continental United States, excepting Title 18, U. S. C., §13, or by the law of the District of Columbia whether statutory or common.

A penitentiary will not be designated as the place of confinement except as authorized above. For the limitation on the length of penitentiary confinement, see the proviso of Article 45. Instructions as to the particular penitentiary to be designated will be issued from time to time by the Department of the Army. See AR 600–375. Federal reformatories and correctional institutions are penitentiaries within the meaning of this paragraph and will not be designated as the place of confinement unless penitentiary confinement is authorized under the provisions of Article 42.

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

*b. **Disciplinary barracks; military post, etc.***—Subject to such instructions as may be issued from time to time by the Department of the Army, the United States Disciplinary Barracks at Fort Leavenworth, Kansas, or one of its branches, or the guardhouse of a military post, station, or camp will be designated as the place of confinement in cases in which a penitentiary is not designated.

Chapter XX

ACTION AFTER PROMULGATION

REVIEW OF SENTENCE AND FILING OF RECORDS, SPECIAL AND SUMMARY COURTS-MARTIAL—CORRECTION OF GENERAL COURT-MARTIAL RECORDS—REPORT IN OFFICER CASES—MISCELLANEOUS MATTERS

91. **REVIEW OF SENTENCES OF SPECIAL AND SUMMARY COURTS; FILING OF RECORDS.**—The officer immediately exercising general court-martial jurisdiction over a command has supervisory powers over special and summary courts-martial therein. He will cause the records of trial of such courts when forwarded to him as required by 87*c* to be examined for errors, defects, or omissions. He will direct the reviewing authority to take such corrective or modifying action as he deems necessary or desirable with respect to the sentence; or he may, as circumstances require in the interest of justice, vacate the findings of guilty or the sentence or take other necessary corrective action. If the sentence of a special court-martial includes a bad conduct discharge, action thereon by the officer exercising general court-martial jurisdiction is required as in a general court-martial case. See Articles 13, 47*d*, and 50*e*.

The office of the staff judge advocate is designated as the place for filing all records of trial by special courts-martial which do not involve sentences adjudging bad conduct discharge and records of trials by summary courts-martial forwarded as required by 87*c*. Special courts-martial records involving bad conduct discharges shall be filed in the office of The Judge Advocate General. Special and summary courts-martial records filed in the office of the staff judge advocate shall be retained until directions are received for their disposal under the provisions of the act of 7 July 1943 (57 Stat. 380), as amended by the act of 6 July 1945 (59 Stat. 434; 44 U. S. C. 366–371), or until storage elsewhere is authorized by appropriate regulations. See AR 15–15 and Technical Manual 12–259.

92. **CORRECTION OF GENERAL AND CERTAIN SPECIAL COURT-MARTIAL RECORDS.**—When a record of trial by general court-martial, or a record of trial by special court-martial in which a bad conduct discharge has been approved, has been forwarded by the reviewing authority to higher authority and an error of the kind mentioned in 87*b* (Correction of Clerical Errors and Revision Proceedings) is noted by the higher authority, the record ordinarily will be returned to the reviewing authority with directions for the

correction of the record or revision of the proceedings. However, if circumstances warrant, the higher authority may take the necessary action without reference to the reviewing authority.

93. **REPORT OF OFFICER CASES.**—Immediately upon the promulgation of any sentence of a court-martial in the case of an officer which does not require confirmation but involves suspension from rank and command, restriction, or any other material change in the status of the officer, the commander issuing the order will advise The Adjutant General, by prompt means, of the sentence imposed as approved or mitigated and the date of promulgation thereof.

94. **MISCELLANEOUS MATTERS.**—As to mitigation, remission, suspension, and vacating suspension, see 87 and Article 51. Orders remitting the whole or any part of a sentence issued subsequent to the order promulgating the result of the trial will be published in appropriate general or special court-martial orders. Subsequent action affecting a previously approved summary court-martial sentence is published in special orders.

Any sentence (except a sentence to death) or any part thereof may be suspended under Article 51 for a period beyond any term of confinement but within the current enlistment or period of service. If the order of suspension is not vacated prior to the actual discharge of a military person not in confinement under the sentence, the confinement and other unexecuted portions of the sentence are remitted by execution of the discharge. Although suspension of a sentence may generally be vacated at any time during a soldier's term of service, no order suspending the execution of a dishonorable or bad conduct discharge shall be vacated until confirming or appellate action thereon shall have been completed as required by Articles 48 and 50. See Article 51*b*(1).

Any action taken toward the suspension of the sentence of a general or special court-martial while the sentence is being served and any action taken toward vacating such a suspension will be promulgated in a general or special court-martial order.

Regulations relating to the details of execution and remission of sentences of forfeiture and confinement are contained in AR 35–2460 (Court-martial forfeitures—enlisted men) and AR 600–375 (Prisoners—general provisions).

The authority who designated the place of confinement, or higher authority, may change the place of confinement of any prisoner under his jurisdiction; but when the Disciplinary Barracks or other military prison or post has been designated as the place of confinement of a prisoner, the place of confinement can not thereafter be changed to a penitentiary under the same sentence.

The distribution to be made of general and special court-martial orders is announced from time to time in Army Regulations.

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Chapter XXI

APPELLATE REVIEW—CONFIRMATION

PRELIMINARY ACTION—APPELLATE REVIEW, BOARD OF REVIEW, JUDICIAL COUNCIL—LEGAL INSUFFICIENCY—WEIGHING EVIDENCE—BRIEFS, ARGUMENTS AND RECOMMENDATIONS—MISCELLANEOUS—FINALITY OF ACTION

95. **PRELIMINARY ACTION.**—A sentence of a court-martial may not be executed until approved by the reviewing authority (A. W. 47*d*). A sentence of death, a sentence involving a general officer, dismissal of an officer, reduction of an officer (A. W. 44), suspension or dismissal of a cadet, or imprisonment for life may not be executed until also confirmed. Sentences of the first two descriptions are confirmed by the President, and the others in the Office of The Judge Advocate General or by the Secretary of the Army. See Article 48. That portion of a sentence to dishonorable or bad conduct discharge or confinement in a penitentiary may not be executed until after appellate review in the Office of The Judge Advocate General. See Article 50*e*. All records of trial by general courts-martial and records of trial by special courts-martial involving bad conduct discharge are forwarded, after approval by the reviewing authorities to The Judge Advocate General. In cases to be forwarded to The Judge Advocate General not requiring confirmation or appellate review prior to execution, the general court-martial order is promulgated prior to forwarding.

96. **APPELLATE REVIEW—BOARD OF REVIEW—JUDICIAL COUNCIL.**—*a.* ***Confirmation by the President.***—A record of trial involving a sentence of death or of a general officer is examined by a Board of Review in the Office of The Judge Advocate General. The record and opinion of the Board is then forwarded to the Judicial Council in the Office of The Judge Advocate General for further examination and thence to The Judge Advocate General and the Secretary of the Army, in turn, whose recommendations are submitted to the President for his confirming action.

b. ***Confirmation by Judicial Council.***—A record of trial involving dismissal or reduction of an officer, suspension or dismissal of a cadet or imprisonment for life, is examined by a Board of Review. The record and opinion of the Board is then forwarded to the Judicial Council for confirming action in conjunction with The Judge Advo-

cate General. See Article 50*d* (2), (3) and (4). See Article 48*b* as to confirmation by the Secretary of the Army in cases of disagreement between The Judge Advocate General and Judicial Council.

c. ***Holding by Board of Review.***—A record of trial involving dishonorable or bad conduct discharge, whether or not suspended, or involving confinement in a penitentiary is examined by a Board of Review and may, if so directed by The Judge Advocate General or requested by the Board of Review, be forwarded to the Judicial Council for confirming action as indicated in 96*b*. A holding of legal sufficiency by the Board of Review is final and conclusive unless The Judge Advocate General directs or the Board of Review requests action by the Judicial Council. The final holding is transmitted to the reviewing authority, who takes action with respect to execution of the sentence and promulgates the general court-martial order in any case in which such action has not previously been taken.

d. ***Examination in Office of the Judge Advocate General.***—A record of trial not disposed of under 96*a*, *b*, or *c* is examined in the Office of The Judge Advocate General and in certain cases may be forwarded to a Board of Review for action set forth in *c*. See Article 50*f*.

97. **LEGAL INSUFFICIENCY.**—A holding of legal insufficiency by a Board of Review becomes legally effective upon concurrence in the holding by The Judge Advocate General. A determination of legal insufficiency by the Judicial Council becomes legally effective upon the concurrence of The Judge Advocate General [A. W. 50*d* (1)] or the completion of confirming action as prescribed in Article 48.

98. **WEIGHING EVIDENCE.**—In the appellate review of records of trial The Judge Advocate General and all appellate agencies in his office have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact. See Article 50*g*.

99. **BRIEFS, ARGUMENTS, AND RECOMMENDATIONS.**—Under rules prescribed by The Judge Advocate General briefs, including points and authorities with respect to the legality of the proceedings and matters in mitigation and other pertinent matter, may be presented to the Office of The Judge Advocate General by or in behalf of accused persons. The accused will not be permitted to present oral arguments in person. In forwarding records of trial reviewing authorities may present to The Judge Advocate General any matter not included in the record of trial pertinent to disposition of the case and may submit recommendations. The Judge Advocate General may request additional information or recommendations from reviewing authorities or from other sources within the Army bearing upon the propriety of action to be taken on confirmation, appellate review, execution, or mitigation of a sentence. See Article 88, which forbids the

exertion of improper influence on confirming authorities with respect to ~~these~~ judicial actions.

100. **MISCELLANEOUS.**—*a.* ***Branch offices.***—Boards of Review and Judicial Councils established in branch offices of The Judge Advocate General with distant commands and the Assistant Judge Advocates General in charge of such branch offices perform their duties in the manner prescribed for The Judge Advocate General and appellate agencies in his office. They operate under the general supervision of The Judge Advocate General. Records of trial involving sentences requiring approval or confirmation by the President are forwarded directly to The Judge Advocate General without action in the branch offices. Powers of mitigation and remission are not exercised by the Assistant Judge Advocate General in charge or by other agencies of a branch office, but appropriate recommendations may be submitted to The Judge Advocate General. See Article 50*c*.

b. ***Effect of error.***—The proceedings of a court-martial will not be held invalid nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless, after an examination of the entire proceedings, it shall affirmatively appear that the error has injuriously affected the substantial rights of the accused (A. W. 37). Error is not presumed to affect injuriously the substantial rights of an accused.

c. ***Mitigation, remission, and suspension by The Judge Advocate General.***—For powers incident to the power to confirm see Article 49. The Judge Advocate General has the power to mitigate, remit, or suspend the whole or any part of a sentence in any case requiring appellate review under Article 50 and not requiring approval or confirmation by the President, but the power to mitigate, remit, or suspend is exercised by The Judge Advocate General under the direction of the Secretary of the Army. In the exercise of his powers to mitigate, remit, or suspend sentences The Judge Advocate General acts under such general policies and regulations or under such general or specific directives as may be prescribed by the Secretary of the Army.

d. ***Court-martial orders.***—General court-martial orders publishing the result of proceedings upon confirmation of sentences under Article 48 are promulgated by the Department of the Army, but The Judge Advocate General may transmit any record of trial in which confirming action has been taken to the reviewing authority for the publication of necessary general or special court-martial orders or direction of a rehearing.

e. ***Finality of court-martial judgments.***—The appellate review of records of trial provided by Article 50, the confirming action taken pursuant to Articles 48 or 49, the proceedings, findings, and sentences

of courts-martial as approved, reviewed, or confirmed as required by the Articles of War, and all dismissals and discharges carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War are 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 application for a new trial as provided in Article 53 and Chapter XXII of this manual.

Chapter XXII

PETITION FOR NEW TRIAL

BASIS FOR REMEDY—FORM OF PETITION

101. **PETITION; BASIS FOR REMEDY.**—Within one year after the final disposition of a case upon initial appellate review of a record of trial by general court-martial or a record of trial by special court-martial which resulted in an approved sentence including a bad conduct discharge, an accused may petition The Judge Advocate General for a new trial, or for vacation of any sentence adjudged and for restoration of rights, privileges, or property affected by the sentence, and in a proper case for substitution for a dismissal, dishonorable discharge, or bad conduct discharge previously executed, a form of discharge authorized for administrative issuance: provided, however, that as to cases involving offenses committed during World War II, the application for a new trial may be made within one year after the termination of that war, or within one year after final disposition of the case upon initial appellate review, whichever is later. Completion of review and action required by Article 50 and of any confirming action required by Article 48 constitutes final disposition of a case upon initial appellate review. Only one such petition may be entertained with regard to any one case. See Article 53. The petition should show good cause for the remedy requested. The petition may be submitted either by the accused or by his counsel or representative, regardless of whether he is in the service or has been separated therefrom. A petition may not be submitted after the death of an accused.

Good cause for granting a new trial, for vacation of a sentence, or for other remedy shall be deemed to exist only if within the discretion of The Judge Advocate General all the facts and information before him, including the record of trial, the petition and other matter presented by the accused, affirmatively establish that an injustice has resulted from the findings or sentence. In cases in which sentences have been confirmed by the President pursuant to Article 48, matters relating to issues of alleged error or injustice which were before the President at the time of confirmation will not, in the absence of newly discovered evidence bearing upon such issues, establish sufficient cause for relief under Article 53.

102. **FORM OF PETITION; PROCEDURE.**—The petition will be in writing and signed under oath or affirmation by the accused, or by a person possessing the power of attorney of the accused for the purpose or the authorization of a court of law to sign the petition as the representative of the accused, and will be forwarded in triplicate directly to The Judge Advocate General, Department of the Army, Washington 25, D. C. Insofar as practicable the petition will be typewritten with lines double-spaced, and will contain the following:

(1) The name and serial number of the accused and the date of trial.

(2) The remedy sought.

(3) The sentence or a description thereof as finally approved or confirmed, together with a statement of any subsequent reduction thereof by clemency or otherwise.

(4) A brief description of any findings or sentence believed unjust.

(5) A full statement of the fact, ruling, or error which is relied upon as good cause for the remedy sought. No fact, ruling, or error other than matters relating to jurisdiction will be deemed to constitute good cause unless it had a substantial contributing effect upon the findings of guilty or upon the sentence imposed. For example, if perjury in the testimony of a witness is relied upon as a basis for a new trial, the petition should show that the particular testimony had a substantial contributing effect upon the findings of guilty or upon the sentence adjudged and that without the perjured testimony there would have been findings of not guilty or the sentence would have been substantially less severe. If newly discovered evidence is relied upon as a basis for a remedy, the petition should similarly show that such evidence, if considered by a court-martial in light of all the other evidence in the record, would result in findings or a sentence substantially different from those as to which complaint is made.

(6) The affidavit of each person whom the accused expects to present as a witness in the event of a new trial. Each such affidavit should set forth briefly the relevant facts within the personal knowledge of the affiant.

Upon written request and within his discretion The Judge Advocate General may allow oral argument upon a petition. Any hearing granted will be conducted under rules prescribed by The Judge Advocate General, and the hearing may be before The Judge Advocate General or before an officer or officers designated by him. The Judge Advocate General may cause such additional investigation to be made and such additional evidence to be secured as he may deem appropriate.

Action in granting or denying a remedy under Article 53 shall be taken by The Judge Advocate General in writing signed in his own hand or by his direction. When appropriate the action granting a remedy will be published in Department of the Army orders.

Any new trial granted pursuant to Article 53 shall be conducted under rules prescribed in 84, before a court-martial appointed by an officer possessing authority to appoint an appropriate court-martial and designated for the purpose by The Judge Advocate General. The new trial shall be held at such time and place as the appointing authority directs.

Article 53 does not require that the execution of a sentence be delayed to permit a petition for a new trial or related remedy. The presentation of a petition will not operate to stay execution of a sentence.

Chapter XXIII

OATHS

OATHS IN TRIAL BY COURTS-MARTIAL—AUTHORITY TO ADMINISTER OATHS

103. **OATHS IN TRIALS BY COURTS-MARTIAL.**—In this paragraph the word "oath" includes affirmation. Excepting the oath to test competency, the oath of the escort on inspections by the court, and the oath to charges, forms of oaths and other matters relating to oaths in trials by courts-martial are found in Articles 19 and 114. The form of oath to test competency and the form of oath to charges are shown in the second subparagraph of this paragraph (103) and Appendix 3, respectively. The oath of the escort is set forth in 75*d*. In case of affirmation the phase "So help you God" will be omitted.

The prescribed oaths must be administered in and for each case and to each member, trial judge advocate, assistant trial judge advocate, reporter, and interpreter before he functions in the case as such. The point in the proceedings at which each of the various oaths is usually administered is shown in Appendix 6. In addition to the prescribed oath there may be such additional ceremony or acts as will make the oath binding on the conscience of the person taking it. While the members and the trial judge advocate and his assistants are being sworn, all persons concerned with the trial and any spectators present will stand. When the reporter, interpreter, or a witness is being sworn, he and the trial judge advocate or assistant trial judge advocate administering the oath will stand. If either the trial judge advocate or an assistant trial judge advocate is to testify, the oath will be administered by the other or by the president. The trial judge advocate will administer to a challenged member who is to be examined under oath as to his competency the following oath:

You swear (or affirm) that you will answer truthfully to questions touching your competency as a member of the court in this case. So help you God.

104. **AUTHORITY TO ADMINISTER OATHS.**—Any officer or clerk of any of the departments lawfully detailed to investigate frauds on or attempts to defraud the Government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army, Navy, Marine Corps, or Coast Guard detailed to conduct

an investigation, and the recorder, and if there be none the presiding officer, of any military, naval, or Coast Guard board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation (R. S. 183, as amended by act 13 Feb 1911, 36 Stat. 898; act of 28 Jan 1915, 38 Stat. 800; 5 U. S. C. 93).

Any officer of any component of the Army of the United States on active duty in Federal service commissioned in or assigned or detailed to duty with the Judge Advocate General's Corps, any staff judge advocate or acting staff judge advocate, the president of a general or special court-martial, any summary court-martial, the trial judge advocate or any assistant trial judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant, assistant adjutant, or personnel adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and shall also have the general powers of a notary public in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents and all other forms of notarial acts to be executed by persons subject to military law (A. W. 114).

A warrant officer serving as assistant adjutant of any command has power to administer oaths for all purposes of military administration (sec. 4, act 21 Aug 1941, 55 Stat. 653; 10 U. S. C. 593).

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

In all cases in which oaths are authorized or required to be administered under the laws of the United States, they may be administered by notaries public duly appointed in any State, district, or Territory of the United States, by clerks and prothonotaries of courts of record of any such State, district, or Territory, by the deputies of such clerks and prothonotaries and by all magistrates authorized by the laws of or pertaining to any such State, district, or Territory to administer oaths (act 3 Jul 1926, 44 Stat. 830; 5 U. S. C. 92*a*).

Chapter XXIV

INCIDENTAL MATTERS

ATTENDANCE OF WITNESSES—PREPARATION OF INTERROGATORIES AND TAKING OF DEPOSITIONS—EMPLOYMENT OF EXPERTS—EXPENSES OF COURTS-MARTIAL—CONTEMPTS

105. **ATTENDANCE OF WITNESSES.**—*a.* ***Preliminary, general, and miscellaneous.***—Every trial judge advocate of a general or special court-martial and every summary court-martial shall have the power to issue the like process to compel witnesses to appear and testify which courts of the United States having criminal jurisdiction may lawfully issue, but such process shall run to any part of the United States, its Territories and possessions. Upon request by the defense counsel, witnesses for the defense shall be subpoenaed through process issued by the trial judge advocate in the same manner as for witnesses for the prosecution (A. W. 22). The process to compel witnesses to appear and testify cannot be issued for the purpose of compelling a witness to appear for preliminary examination. See 82*b* (2) concerning the authority of summary courts-martial to compel the attendance of witnesses.

In this paragraph (105) the term "trial judge advocate" includes a summary court-martial unless the context otherwise indicates.

The trial judge advocate will take timely and appropriate action with a view to the attendance at the trial of the witnesses who are to testify in person. He will not of his own motion take such action with respect to a witness for the prosecution unless satisfied that his testimony is material and necessary and that a deposition will, for any reason, not properly answer the purpose, or will involve equal or greater inconvenience or expense. The trial judge advocate will take similar action with respect to all witnesses requested by the defense, except that where there is reason to believe that the testimony of a witness so requested would be immaterial or unnecessary, or that a deposition would fully answer the purpose and protect the rights of the parties, the matter will be referred for decision to the appointing authority or to the court, according to whether the question arises before or after the trial commences. The trial judge advocate may consent to admit the facts expected from the testimony of a witness requested by the defense if the prosecution does not contest such facts

or they are unimportant. An application for the attendance of a witness may sometimes be withdrawn if the trial judge advocate offers to enter into a stipulation as to the testimony of such witness. In connection with the subject of this paragraph, see 105*b* (Warrant of Attachment).

b. ***Civilian witnesses.***—*Issue, Service, and Return of Subpoena.*—A subpoena is prepared, signed, and issued in duplicate, on the forms provided by the Department of the Army. See Appendix 13 for the form of a completed subpoena with certificate of service.

If practicable, a subpoena will be issued at such time as will permit service to be made or accepted at least twenty-four hours before the time the witness will have to start from home in order to comply with the subpoena. If a subpoena requires the witness to bring with him a document or documents to be used in evidence, each document will be described in sufficient detail to enable the witness to identify it readily.

Unless he believes that formal service is advisable, the trial judge advocate will mail the subpoena in duplicate, together with a penalty envelope bearing a return address, to the witness with a request that he sign the acceptance of service on the copy and return it in the penalty envelope. The return envelope should be addressed to the trial judge advocate of the court and not to the officer by name. The trial judge advocate may, and ordinarily should, include with the request a statement to the effect that the rights of the witness to fees and mileage will not be prejudiced by a compliance with the request.

If formal service is believed to be necessary, the trial judge advocate will take appropriate action with a view to timely and economical service. For example, if the witness is near the station of the trial judge advocate, he or someone detailed or designated by the commanding officer of the station may serve the subpoena; if the witness is near some other military station the duplicate subpoenas may be inclosed in a suitable letter to the commanding officer of that station; or the duplicate subpoenas may be inclosed in a suitable letter to the commander of an army or similar command within which the witness resides or may be found. Any such commander will take appropriate action with a view to the prompt service of the subpoena by the most economical available means. Travel orders for the purpose will be issued when necessary. Service will ordinarily be made by a person subject to military law, but may legally be made by others. Service is made by personal delivery of one of the copies to the witness. The other copy, with proof of service made as indicated on the form, will be promptly returned to the trial judge advocate. If service can not be made, the trial judge advocate will be promptly so informed. When use for it is probable, a return penalty envelope, addressed to the trial

judge advocate and not to the officer by name, may be sent to the person who is to serve the subpoena.

In occupied enemy territory the appropriate commander is empowered to compel the attendance of a civilian witness in response to a subpoena issued by the trial judge advocate.

Neglect or Refusal to Appear.—See that part of Article 23 preceding the second proviso, and the second subparagraph below (Warrant of Attachment).

In order to maintain a prosecution under the part of Article 23 referred to, a person must not only be duly subpoenaed but be paid or tendered fees, including fee for one day of actual attendance, and mileage both ways, "at the rates allowed to witnesses attending the courts of the United States" (A. W. 23). Whenever such action appears to be advisable, a finance officer under the command of the appointing authority, or the finance officer nearest to the place where the witness is found, will, upon request by the trial judge advocate, at once provide the trial judge advocate, or other officer or person designated for the purpose, the required amount of money to be tendered or paid to the witness for one day of attendance and mileage for the journeys to and from the court. See AR 35–4120. If an officer charged with serving a subpoena pays the necessary fees and mileage to a witness, taking a receipt therefor, he is entitled to reimbursement.

Warrant of Attachment.—In any case the trial judge advocate may properly consult the court as to the desirability of issuing a warrant of attachment under Article 22. He should consult the court before issuing a warrant of attachment for a witness desired by the defense, if, in his opinion, the evidence desired can be obtained in another manner, or if he is willing to admit that the witness would testify as stated by the defense.

Whenever it becomes necessary to issue a warrant of attachment (D. A., A. G. O. Form No. 119), the trial judge advocate will issue and deliver or send it for execution to an officer designated for the purpose by the commander of the proper army or other command.

As the arrest of a person under a warrant of attachment involves depriving him of his liberty, the authority for such action may be inquired into by a writ of habeas corpus. To enable the officer to make a full return in case a writ of habeas corpus is served upon him the warrant of attachment will be accompanied by a copy of the charges in the case, including the order referring the charges for trial and copies of the orders appointing the court-martial, each sworn by the trial judge advocate to be a full and true copy of the original; the original subpoena, showing proof of service of a copy of same; and an affidavit of the trial judge advocate that the person being attached is a material witness in the case, that such person has failed and neglected to appear

although sufficient time has elapsed for that purpose, and that no valid excuse has been offered for such failure to appear.

In executing such process it is lawful to use only such force as may be necessary to bring the witness before the court. Whenever the use of force is likely to be required or whenever travel or other orders are necessary, appropriate application to the proper commander for assistance or for orders will be made by the officer who is to execute the process.

For matters relating to habeas corpus proceedings in connection with attachments, see 184–189.

c. ***Military witnesses.***—The attendance of persons in the military service stationed at the place of meeting of the court, or so near that no expense of transportation will be involved, will ordinarily be obtained by informal notice served by the trial judge advocate on the person concerned that his attendance as a witness is desired. In order to assure the attendance of such person the proper commanding officer should be informally advised so that he can arrange for the timely presence of the witness. If for any reason formal notice is required, the trial judge advocate will request the proper commanding officer to order the witness to attend; but if expense of transportation is involved, the proper superior will be requested to issue the necessary order. The attendance of persons on the retired list, not assigned to active duty, should be obtained in the same manner as in cases of civilian witnesses not in Government employ. No travel order will be issued in such cases. If practicable, request for the attendance of military witnesses will be so made that the witness will have notice at least twenty-four hours before starting to attend the meeting of the court.

When documents which are to be introduced in evidence are in the custody and control of military authorities, the trial judge advocate, the court, or the appointing authority will, upon proper request, take necessary action to effect the production of such documents without the necessity of further legal process.

106. **PREPARATION OF INTERROGATORIES AND TAKING OF DEPOSITIONS.**—*a.* ***Preliminary, general, and miscellaneous.***—For statutory provisions, see Articles 25 and 26. For the use of a deposition in evidence, see 131*a*. Concerning the use of depositions in summary courts-martial, see 82*b*(2). With reference to the taking of pretrial depositions, see 30*e*, 35*a*, and the third proviso of Article 25. For the form of a deposition, see Appendix 14.

At any time after charges have been signed as provided in Article 46 and before the charges have been referred for trial, any authority competent to appoint a court-martial for the trial of such charges may designate officers to represent the prosecution and the defense and authorize such officers, upon due notice, to take the deposition of any

witness. The deposition may subsequently be received in evidence as in other cases. See Article 25. Ordinarily, the authority competent to appoint a general court-martial will designate the officers, preferably the trial judge advocate and defense counsel of an existing court or their assistants, to take the depositions.

A deposition may be taken in a foreign country by any officer, civil or military, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths. See 133*a* as to judicial notice of the seals of foreign notaries public with respect to the authentication of depositions taken before foreign notaries.

If the name of the person whose deposition is desired is unknown, he may be identified in the interrogatories and any accompanying papers by his office or position, for example, "Comanding Officer, Company C, 27th Infantry"; "Cashier, Commercial National Bank, Fort Leavenworth, Kansas."

In this paragraph (106), unless the context otherwise indicates, the term "trial judge advocate" includes a summary court-martial.

b. ***Preparation of interrogatories.***—The party desiring a deposition ordinarily submits to the opposite party the interrogatories he wishes the witness to answer; but he may submit them to the court, and the court, when it desires the deposition of a witness, may direct the trial judge advocate to submit appropriate interrogatories to the court. In any case all parties in interest will be given full opportunity to submit cross-interrogatories and additional interrogatories, direct and cross, as desired. When the defense in a capital case submits interrogatories, cross-interrogatories may be submitted to the same extent as in a case not capital.

If the interrogatories and cross-interrogatories are submitted to the court, objections on any ground known at the time may be made and passed upon at that time. But see 131*a* as to objections at the trial. A wider latitude than usual should be allowed as to leading questions.

c. ***Sending out interrogatories.***—All interrogatories are entered upon the prescribed form as indicated by the notes and instructions thereon. According to circumstances, and having regard to economy, promptness, and the proper taking of the deposition, the trial judge advocate may send the interrogatories to the commanding officer of the military station nearest the witness; to a responsible person, preferably one competent to administer oaths; to the commander of an army, department, or other comparable command; to the witness himself; or to The Adjutant General. According to circumstances the interrogatories will be accompanied by such of the following as are advisable or necessary: a proper explanatory letter, an addressed

return penalty envelope, subpoenas in duplicate, voucher for fees and mileage.

The return penalty envelope should be addressed to the trial judge advocate of the court and not to the officer by name. The subpoenas will, and the voucher will not, be signed; but both subpoenas and voucher will be completed to the extent permitted by the known facts, and the latter will be accompanied by the required number of copies of the orders appointing the court.

d. ***Action by officer receiving interrogatories.***—When interrogatories are received by a military officer, he will take appropriate action with a view to the prompt and economical taking of the deposition by a competent person, the sending of the deposition to the trial judge advocate (addressed by office, not by name), and the payment of the necessary fees. Subject to limitations on his authority, he may, for example, send a suitable person to the residence of the witness; or arrange by mail or otherwise for the taking of the deposition; or, in the case of a civilian witness, subpoena him or arrange for his attendance without subpoena.

In the event that the deposition can not be taken promptly upon receipt of the interrogatories, the officer receiving the interrogatories will take immediate steps to advise the officer who requested the deposition of the delay and of the approximate date that the deposition will be taken. In all cases the taking of the deposition will be expedited.

e. ***Suggestions for person taking deposition.***—Before a witness gives his answers to the interrogatories they should be read and, if necessary, explained to him, or he should be permitted to read them over in order that his answers may be clear, full, and to the point. The person taking the deposition should not advise the witness how he should answer, but he should endeavor to see that the witness understands the questions and what is desired to be brought out by them and that his answers are clear, full, and to the point.

The person taking the deposition shall administer the oath to the witness, and interpreter, if any (see 47 and A. W. 19), and in the presence of the witness shall record or cause to be recorded the testimony of the witness. Objections made at the time of the examination shall be noted upon the deposition. Evidence objected to shall be taken and recorded subject to the objections.

When the testimony is fully transcribed the deposition will ordinarily be submitted to the witness for examination or read to him. Any changes in form or substance which the witness desires to make shall be entered by the person taking the deposition. The deposition will then be signed by the witness, unless the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the person taking the deposition will state the reason for

the omission of the signature over his own signature. The certificate of the person taking the deposition will then be executed. See Appendix 14.

If a military officer takes a deposition, he will ordinarily complete and certify the voucher. When a deposition is taken by a civil officer, he should, if so requested, obtain and furnish with the return of the deposition the data necessary for the completion of the witness voucher.

*f. **Action on receipt of deposition.***—Upon receipt of the deposition the trial judge advocate will advise the accused or his counsel of that fact and will give them an opportunity to examine the deposition before the trial.

*g. **Depositions on oral interrogatories.***—Depositions may be taken on oral interrogatories by consent of the parties or by direction of the court or the appointing authority. After reasonable notice to the parties that a deposition is desired the court or appointing authority may direct the trial judge advocate and defense counsel, or an assistant trial judge advocate and assistant defense counsel, if any, to proceed to the residence of the witness, or other designated place, for the purpose of taking the deposition of the witness upon oral examination. In the event the above procedure is not followed, each party, instead of writing out the questions to be asked the witness, as contemplated in *b* above, will indicate in a separate letter or memorandum the nature of the charges and the points desired to be covered in the oral examination of the witness. Whenever practicable the commanding officer to whom the papers are sent, as contemplated in *c* above, will, in addition to designating the person authorized by law to administer oaths to take the deposition, detail officers, preferably officers experienced in the duties of trial judge advocate and defense counsel, respectively, to represent both sides in propounding the questions. The rules as to representation by legally qualified counsel (45) are applicable. See 131*a* as to objections.

107. **EMPLOYMENT OF EXPERTS.**—When the employment of an expert is necessary during a trial by court-martial, the trial judge advocate, in advance of the employment, will, on the order or permission of the court, request the appointing authority to authorize such employment and to fix the limit of compensation to be paid the expert. The request should, if practicable, state the compensation that is recommended by the prosecution and the defense. Where in advance of trial the prosecution or the defense knows that the employment of an expert will be necessary, application should be made to the appointing authority for authority to employ the expert, stating the necessity therefor and the probable cost. In the absence of previous authorization as stated no fees, other than ordinary witness fees, may be paid for the employment of an individual as an expert witness.

108. **EXPENSES OF COURTS-MARTIAL.**—See AR 35-4120.

109. **CONTEMPTS.**—See Article 32.

The power to punish for contempt is vested in general, special, and summary courts-martial.

The conduct described in Article 32 constitutes a direct contempt. Indirect or constructive contempts—those not committed in the presence or immediate proximity of the court while it is in session—and the conduct and acts described or referred to in Article 23 (refusal to appear, or to qualify or testify as a witness, having been duly subpoenaed) are not punishable under Article 32, but may be punished under other provisions of law, such as Article 23, in the case of persons not subject to military law, and Article 96, in the case of persons subject to military law.

The words "any person", as used in Article 32, include all persons, whether or not otherwise subject to military law. They do not include members of the court itself, although such members may be punishable as indicated in 38*a*.

When a contempt punishable under Article 32 has been committed, the court may, after giving the party an opportunity to be heard, impose a punishment within the limits prescribed by Article 32. A record is made in and as a part of the regular record of the case before the court showing the facts as to the contempt and the proceedings with reference to it. Sentences adjudged for contempt require the approval of the reviewing authority in order to be effective.

The court, instead of proceeding as stated above, may cause the removal of the offender and in a proper case initiate his prosecution before a civil or military court.

Chapter XXV

INSANITY

GENERAL CONSIDERATION—INQUIRY BEFORE TRIAL—INQUIRY BY COURT—SENTENCE—ACTION BY REVIEWING AUTHORITY

110. **GENERAL CONSIDERATION.**—*a.* ***Insanity.***—A person is insane within the meaning of this chapter either if he lacked mental responsibility at the time of the offense as defined in 110*b*, or if he lacks the requisite mental capacity at the time of trial as stated in 110*c*.

b. ***Lack of mental responsibility.***—If a reasonable doubt exists as to the mental responsibility of the accused for an offense charged, the accused can not legally be convicted of that offense. A person is not mentally responsible in a criminal sense for an offense unless he was, at the time, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right. The phrase "mental defect, disease, or derangement" comprehends those irrational states of mind which are the result of deterioration, destruction, or malfunction of the mental, as distinguished from moral, faculties. Thus a mere defect of character, will power, or behavior, as manifested by one or more offenses or otherwise does not necessarily indicate insanity, even though it may demonstrate a diminution or impairment in ability to adhere to the right in respect to the act charged. See 78*a*, 112.

c. ***Mental capacity at time of trial.***—No person should be brought to trial unless he possesses sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense.

111. **INQUIRY BEFORE TRIAL.**—If it appears to any commanding officer who considers the disposition of charges as indicated in 30, or to any investigating officer (35*a*), trial judge advocate or defense counsel, that there is reason to believe that the accused is insane (110*c*) or was insane at the time of the alleged offense (110*b*), that fact and the basis of the observation should be reported through appropriate channels in order that an inquiry into the mental condition of the accused may be conducted before charges are referred for trial. When the report indicates substantial basis for the belief, the

matter will be referred to a board of one or more medical officers for their observation and report with respect to the sanity of the accused. At least one member of the board should be a psychiatrist. The board should be fully informed of the reasons for doubting the sanity of the accused, and in addition to other requirements, should be required to make separate and distinct findings as to each of the three following questions:

a. Was the accused at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to distinguish right from wrong? (110*b*).

b. Was the accused at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to adhere to the right? (110*b*).

c. Does the accused possess sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense? (110*c*).

To determine these questions the board should place the accused under observation, examine him and conduct such further investigation as it deems necessary. On the basis of this report, further action in the case may be suspended or the charges may be dismissed by an officer competent to appoint a court-martial appropriate to try the offense charged, proceedings may be taken to discharge the accused from the service on the grounds of his mental disability, or the charges may be referred for trial. Such additional mental examination may be directed as circumstances may require. The officer directing or requesting the mental examination of the accused will attach the report of examination to the charges if referred for trial or forwarded.

112. **INQUIRY BY COURT.**—*a.* ***Presumption of sanity; reasonable doubt; burden of proof.***—The accused is presumed initially to be sane and to have been sane at the time of the alleged offense. This presumption merely supplies the required proof of mental capacity and responsibility and authorizes the court to assume that accused is sane until evidence is presented to the contrary. When, however, evidence tending to prove that the accused is insane (110*c*) or was insane at the time of his alleged offense (110*b*) is introduced either by the prosecution or by the defense or on behalf of the court, then the sanity of the accused is an essential issue. If, in the light of all evidence, including that supplied by the presumption of sanity, a reasonable doubt as to the mental responsibility of the accused at the time of the offense (110*b*) remains, the court must find the accused not guilty of that offense. If a reasonable doubt as to the mental capacity of the accused at time of trial (110*c*) remains, the court will adjourn and

transmit to the appointing authority the record of its proceedings as far as had with a statement of its determination of the issue of mental capacity. Although the issue of insanity is usually raised by the defense by producing evidence of mental irresponsibility or lack of capacity, it is the duty of the court to call for evidence on this matter whenever there is reasonable indication that such inquiry is warranted in the interest of justice. The burden of proving the sanity of the accused, like every other fact necessary to establish the offense alleged, is always on the prosecution, but it is not incumbent upon the prosecution to introduce any evidence tending to prove the sanity of the accused until the question of sanity becomes an issue in the case.

b. ***Procedure.***—The issue of insanity may be raised at any time while a case is before the court. The actions and demeanor of the accused as observed by the court or the bare assertion from a reliable source that the accused is believed to lack mental capacity or is mentally irresponsible may be sufficient to warrant inquiry. It should be remembered, however, that although a person who lacks mental capacity or responsibility to the extent indicated in 110 should not be tried, sanity is presumed (112*a*) and a mere assertion that a person is insane is not necessarily sufficient to impose any burden of inquiry on the court, or to raise the issue of insanity.

A request, suggestion, or motion that inquiry be had may be made by any member of the court, prosecution, or defense. The law member may rule, subject to objection by any member of the court and final determination by the court, as to whether an inquiry should be made (A. W. 31). If it is determined to make such an inquiry, priority will be given to it, and the inquiry should exhaust all reasonably available sources of information with respect to the mental condition of the accused. If it appears that the inquiry will be protracted, or if the court desires to hear expert testimony, the court may adjourn and report the matter to the appointing authority with its recommendation in the premises. Such recommendation may include in a proper case a recommendation that the accused be examined as provided in 111, and that the officer or officers conducting the examination be made available as witnesses. In his discretion the appointing authority may withdraw the charges from the court as a result of a report of examination conducted under 111; or he may transmit the report to the court for its consideration subject to the provisions of 112*c*.

If the court finds the accused not mentally responsible for his acts (110*b*) it will forthwith enter findings of not guilty as to the proper charges and specifications. If it finds the accused mentally responsible for his acts, but at the time of trial lacking requisite mental capacity (110), it will record such findings. In either case the proceedings

so far as had will be forwarded to the appointing authority. If the accused is found to be sane the trial proceeds.

If the issue of insanity is raised as an interlocutory question and the court finds the accused sane the defense is not precluded by this finding from offering further evidence on the issue of insanity and, when all the evidence in the case has been received, the court may proceed to its findings on the guilt or innocence of the accused. If in consideration of its findings upon the general issue the court entertains a reasonable doubt that the accused was mentally responsible for his acts it will enter findings of not guilty as to the proper charges and specifications (110*b*).

If the appointing authority disagrees with the court in its finding that the accused lacks requisite mental capacity at the time of trial (110*c*), or where the reviewing authority determines that the disability was temporary and that the accused has recovered his mental capacity, he may return the case to the court with instructions to reconsider its findings and, if appropriate, to proceed with the trial.

*c. **Evidence.***—The issue of the sanity of the accused is one of fact, and the modes of proof and rules of evidence with respect to this issue are, generally, those prescribed in Chapter XXVIII. Although the testimony of an expert on mental disorders as to his observations and opinion with respect to the mental condition of the accused may be given greater weight than that of a lay witness, in a proper case a lay witness who is acquainted with the accused and who has observed his behavior may testify as to his observations and may also give such opinion as to the accused's general mental condition as may be within the bounds of the common experience and means of observation of men.

As in the proof of other matters, evidence should be presented by the testimony of witnesses in open court, depositions (131), stipulated testimony, or documentary evidence.

So much of the original signed report of a board of medical officers, or any other medical record as pertains to entries of facts which are properly admissible under the official record or business entry exceptions to the hearsay rule (130) may be received in evidence. The opinions as to the mental conditions of the accused contained in the report of a board of medical officers (111) may be received in evidence, provided the officers making such report are made available for call as witnesses by the prosecution, defense, or the court for examination. The documentary supporting data not otherwise admissible under 130 (for example, statements as to the history of the accused) are not made admissible by reason of their inclusion in the report. The entire report may, however, be received by stipulation.

For rules of evidence as to expert witnesses, hypothetical questions, and similar matters, see 125*b*.

113. **SENTENCE—As Affected by Mental Impairment or Deficiency.**—In an appropriate case in which the issue of insanity is resolved against the accused, the court may, in arriving at its sentence, consider any evidence with respect to the mental condition of the accused which falls short of creating a reasonable doubt as to his sanity. The fact that the accused is a person of low intelligence, or that by virtue of a curable mental or neurological condition his ability to adhere to the right is diminished, may be a mitigating factor. On the other hand, in determining the severity of a sentence, the court may consider evidence, properly introduced, tending to show that an accused has little regard for the rights of others, such as evidence showing that he possesses homicidal tendencies.

114. **ACTION BY REVIEWING AUTHORITY.**—Whenever it appears to the reviewing authority, after consideration of the record as a whole, that a reasonable doubt exists as to the sanity of the accused, he should disapprove any findings of guilty of the charges and specifications affected by such doubt and take appropriate action with respect to the sentence. The reviewing authority will take the action prescribed in 111 before taking action on the record whenever it appears from the record of trial or otherwise that further inquiry as to the mental condition of the accused is warranted in the interest of justice regardless of whether any such question was raised at the trial or how it was determined if raised.

Chapter XXVI

PUNISHMENTS

GENERAL LIMITATIONS—MISCELLANEOUS LIMITATIONS AND COMMENTS—MAXIMUM LIMITS OF PUNISHMENTS

115. **GENERAL LIMITATIONS.**—No person subject to military law shall be confined with enemy prisoners or any other foreign nationals outside the continental limits of the United States, nor shall any accused, prior to the order directing execution of the approved sentence, be made subject to any punishment or penalties other than confinement. See Article 16. See 19*a* concerning the facilities, accommodations, treatment, and training to be afforded to prisoners awaiting trial or in confinement pending action by the officer authorized to order execution of the sentence adjudged by the court. An accused of these classes will not be required to observe duty hours and training schedules devised as punitive measures, or required to perform punitive labor, or to wear other than the prescribed uniform during such period of confinement, prior to the order directing execution of the sentence.

Cruel and unusual punishments of every kind, including flogging, branding, marking, or tattooing on the body are prohibited (A. W. 41).

Courts-martial will not impose any punishment not sanctioned by the custom of the service such as carrying a loaded knapsack, wearing irons, shaving the head, placarding, pillory, stocks, and tying up by the thumbs. Military duties such as guard duty, drills, and the sounding of calls will not be degraded by imposing them as punishments. Solitary confinement, a bread-and-water diet, loss of good conduct time, and the placing of a prisoner in irons will not be adjudged as punishments by a court-martial.

For other limitations, see 109 (Contempts), 116 (Miscellaneous limitations), and 117 (Maximum limits).

116. **MISCELLANEOUS LIMITATIONS AND COMMENTS.**—*a.* ***General courts-martial.***—The death penalty is mandatory in the case of spies (A. W. 82); except as noted below, dismissal is mandatory for conduct unbecoming an officer and a gentleman (A. W. 95); it is mandatory that either death or life imprisonment be adjudged for premeditated murder (179*a* and A. W. 92); except in time

of war (A. W. 44) dismissal is the mandatory minimum sentence for false muster (A. W. 56), false returns (A. W. 57), and personal interest in the sale of provisions (A. W. 87). Punishment as adjudged by the court for any such offense must be in conformity with the pertinent article. For instance, except in time of war when reduction to the ranks is authorized (A. W. 44), the sentence of a court upon conviction of a violation of Article 95 must be dismissal, nothing less, and, if convicted of that offense alone, nothing more. Upon conviction of premeditated murder in violation of Article 92, dishonorable discharge and forfeitures may be adjudged with life imprisonment.

The death penalty can not be adjudged except for an offense expressly made so punishable in the Articles of War (A. W. 43); see 14 for a statement of the particular articles. Although an offense may expressly be made punishable by death, the death penalty can not be adjudged for that offense if the applicable limit of punishment prescribed by the President under Article 45 (117) is less than death. Nor can the death penalty be adjudged if the appointing authority has directed that a case be treated as not capital (A. W. 13, A. W. 25).

In adjudging the sentence of death a court-martial will not prescribe the method of execution, which will be prescribed by the confirming authority. Usage of the service contemplates execution of the death sentence by hanging or shooting. Hanging is considered more ignominious than shooting and is the usual method, for example, in the case of a person sentenced to death for spying, for murder in connection with mutiny, or for premeditated murder or rape. Shooting is the usual method in the case of a person sentenced to death for a purely military offense, as desertion in time of war.

A general court-martial possesses the authority to adjudge any punishment authorized by law or the custom of the service, including a bad conduct discharge (A. W. 12).

b. ***Special and summary courts-martial.***—Special courts-martial shall not have power to adjudge confinement in excess of six months, nor to adjudge forfeiture of more than two-thirds pay per month for a period not exceeding six months (A. W. 13). Summary courts-martial shall not have power to adjudge confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of one month's pay (A. W. 14). Although a special court-martial may adjudge bad conduct discharge (A. W. 13), neither a special nor summary court-martial can impose dismissal or dishonorable discharge (A. W. 13, A. W. 14, A. W. 108, A. W. 118). However, these courts are not limited to the kinds of punishment stated in Articles 13 and 14. See 17 as to the apportionment that may be required if a summary court-martial wishes to adjudge both confinement and restriction. The table of relative values of punishments for purposes of substitution (117*c*) will also guide apportionment. Al-

though a special court-martial can not, in adjudging a bad conduct discharge, also adjudge forfeiture of all pay and allowances, it may in such a case properly adjudge a forfeiture of two-thirds pay per month for a period not exceeding six months.

*c. **Officers and warrant officers.***—In general, any limitation as to the punishment that may be imposed on an officer by a court-martial is applicable to the case of a warrant officer. Except as noted hereafter, an officer can not be reduced in grade, such as from captain to first lieutenant, or to the grade or status of a warrant or noncommissioned officer, or sentenced to bad conduct discharge, or sentenced to confinement at hard labor unless the sentence includes dismissal, or sentenced to hard labor without confinement in any case. Similar limitations apply in the case of a warrant officer. The separation from the service of a warrant officer by sentence of court-martial is effected by dishonorable discharge.

An officer may be punished by dismissal and a warrant officer may be punished by dishonorable discharge for any offense in violation of an article of war, but no officer or warrant officer shall be sentenced to confinement or forfeiture of all pay and allowances unless the sentence also includes dismissal or dishonorable discharge. In no case shall a sentence to confinement in the case of an officer or warrant officer exceed the maximum prescribed for soldiers by the Table of Maximum Punishments.

In time of war when compulsory induction laws are in effect an accused officer, if within the age limits for induction and otherwise qualified to serve as a soldier, may be sentenced to be reduced to the lowest enlisted grade in lieu of dismissal. Such reduction should be adjudged only when dismissal, without other punishment, would otherwise be adjudged by the court.

*d. **Enlisted persons; general prisoners.***—For the maximum limits of punishment for certain offenses committed by enlisted personnel, see 117. In the case of an enlisted person of other than the lowest grade a sentence which as ordered executed or as suspended includes either dishonorable or bad conduct discharge, whether suspended until release from confinement or not, or hard labor, whether with or without confinement, immediately reduces such enlisted person to the lowest grade. Authorized punishments for enlisted personnel include reduction to the lowest enlisted grade from any higher grade. Reduction to an intermediate grade by sentence of court-martial is not authorized.

If a general prisoner, already under a suspended sentence to dishonorable or bad conduct discharge, is tried by court-martial, dishonorable or bad conduct discharge and other penalties appropriate in the case of a soldier may be adjudged. However, if a general prisoner has been separated from the service by dishonorable or bad conduct

discharge the imposition of any form of punishment other than confinement at hard labor would in general be futile.

*e. **Reprimand; admonition.***—There is no restriction either as to the court which may adjudge these punishments or as to the persons subject to military law on whom they may be imposed, but the court will not fix the terms or wording of a reprimand or admonition.

*f. **Restriction to limits.***—This form of punishment is a deprivation of privileges. There is no restriction either as to the court which may adjudge this punishment or as to the persons subject to military law on whom it may be imposed, but it will not be adjudged in excess of three months and will not in any event operate to exempt the person on whom it is imposed from any military duty.

*g. **Forfeiture; fines; detention of pay.***—To be effective any forfeiture, fine, or detention must be adjudged in express terms. In determining the amount of a forfeiture or fine, particularly a large fine, the court should consider the ability of the accused to pay.

Fines and forfeitures accrue to the United States and can not be adjudged by a court-martial for the benefit of any individual. A court-martial has no authority to provide by stoppage, assignment, or otherwise, for the settlement of any pecuniary liability whatever, including any liability to a Government agency, such as a company fund. A sentence directing an accused to make a deposit or a contribution of pay or of other funds is illegal.

A forfeiture is an appropriate punishment for all military personnel whatever their rank or status. Unless a total forfeiture is adjudged, a sentence to forfeiture deprives the accused of the amount expressly stated in the sentence and applies for the number of months or days expressly stated. Allowances are forfeited only when the sentence includes the forfeiture of all pay and allowances. Such a penalty will be adjudged only when the accused is also sentenced to dishonorable or bad conduct discharge, or to dismissal. Forfeiture of a soldier's deposits or of the interest thereon can not be adjudged by sentence of court-martial. A general court-martial is not limited as to the amount of forfeiture it may adjudge, but in the case of an enlisted person it may not adjudge a forfeiture of more than two-thirds pay per month for twelve months unless it also sentences the accused to dishonorable or bad conduct discharge. For the limit of jurisdiction of a special or a summary court-martial to adjudge forfeitures, see 116*b*. See, generally, as to forfeitures, Army Regulations relating to the Finance Department, particularly AR 35–2460 (Court-martial forfeitures—enlisted men). As to pay subject to forfeiture, see 117*c*.

Ordinarily a fine, rather than a forfeiture, is the proper monetary penalty to be adjudged against a civilian subject to military law. A forfeiture may not be applied to money to be paid by an employer other than the Government.

Whereas a forfeiture deprives the accused of all or part of his pay, a fine, which is in the nature of a judgment, makes him pecuniarily liable in general to the United States for the amount of money specified in the sentence. All courts-martial have the power to adjudge fines instead of forfeitures, not only in those instances wherein fines are expressly authorized (A. W. 80 and A. W. 94), but, subject to the limitations prescribed in the Table of Maximum Punishments, in all cases in which the applicable article of war authorizes punishment as a court-martial may direct. If a punishment is prescribed for an offense in the Table of Maximum Punishments, there is no authority for the imposition of a fine, either in addition to, or in lieu of, the prescribed punishment unless the case falls within the provisions of "Permissible additional punishments." In general, a court-martial has the same power to fine a prisoner of war that it has to fine a member of the Army. In order to enforce collection, a fine is usually accompanied in the sentence by a provision that the person fined shall be imprisoned until the fine is paid or until a fixed portion of time considered as an equivalent punishment has expired. See Appendix 9, examples 18 and 19.

Detention of pay is a less severe form of punishment than a forfeiture in that the amount detained is ultimately returned to the accused when he is separated from the service. Detention of pay will not be adjudged by a court-martial except against an enlisted person of the Army.

A forfeiture, fine, or detention becomes legally effective on the date the sentence adjudging it is promulgated.

h. ***Suspension from rank, command, or duty.***—Suspension from rank includes suspension from command. It does not affect the right of an officer to promotion nor his right to rise in files, but renders him ineligible to sit as a member of a court-martial, court of inquiry, or military board, and deprives him of privileges depending on rank, such as any priority dependent on rank in the selection of quarters.

Suspension from command merely deprives the officer of authority to exercise military command and, consequently, his authority to give orders to his juniors and to perform any duty involving the exercise of command. It does not affect his right to promotion. Suspension from duty is analogous to suspension from command and is particularly appropriate in the case of an officer assigned to a purely administrative duty not involving the exercise of military command.

Sentences to loss of rank or promotion are not authorized.

i. ***Confinement at hard labor; hard labor.***—Any person subject to trial by court-martial may be sentenced to confinement at hard labor. Such a sentence can not be adjudged in the case of a commissioned officer unless the officer is also sentenced to dismissal, nor in the case of a warrant officer unless the warrant officer is also sentenced to dishonorable discharge. Only under unusual circumstances

should confinement at hard labor be adjudged against a soldier without a sentence to forfeiture or fine. A sentence to confinement does not of itself automatically result in any fine or forfeiture of pay and allowances.

Confinement "without hard labor" will not be adjudged. See Article 37 as to the effect of a failure to couple hard labor with confinement. The place of confinement will not be designated by the court.

Hard labor without confinement will not be adjudged in excess of three months. It may be adjudged only in the cases of soldiers.

Hard labor without confinement, adjudged as a punishment by courts-martial, shall be performed in addition to other duties which fall to the soldier; and no soldier shall be excused or relieved from any military duty for the purpose of performing such hard labor. A sentence imposing hard labor shall be considered satisfied when the soldier shall have performed hard labor during available time in addition to performing his military duties. Normally, the immediate commanding officer of the accused will designate the amount and character of the labor to be performed.

117. **MAXIMUM LIMITS OF PUNISHMENTS.**—*a.* ***Persons and offenses.***—The limits prescribed herein (117) will be applied by courts-martial in cases of soldiers and general prisoners. The mentioned limitations, though not binding upon courts sentencing officers, warrant officers, and civilians subject to military law, except as stated in 116*c* and in section B, 117*c*, may be used as a guide subject to such exceptions as may be deemed warranted for determining the appropriate punishment for such persons. The maximum authorized penalties will also be applied insofar as applicable in the cases of enlisted prisoners of war.

b. ***General limitations.***—The limitations herein (117) do not exclude any other applicable limitations; for example, those set forth in 115 and 116—in particular, it should be remembered that special courts-martial can not adjudge confinement in excess of six months nor forfeiture of pay in excess of two-thirds pay per month for six months (116*b*).

A court shall not, by a single sentence which does not include dishonorable or bad conduct discharge, adjudge against the accused:

Forfeiture of pay at a rate greater than two-thirds of his pay per month.

Forfeiture of pay in an amount greater than two-thirds of his pay for twelve months.

Confinement at hard labor for a period greater than twelve months.

A court shall not, by a single sentence, adjudge against an accused:

Detention of pay at a rate greater than two-thirds of his pay per month.

Detention of pay in an amount greater than two-thirds of his pay for three months.

In the execution of a single sentence not including dishonorable or bad conduct discharge, and in the execution of two or more sentences against the same accused, none of which includes dishonorable or bad conduct discharge, any forfeiture or forfeitures of pay included in the sentence or sentences shall be applied, together with other authorized stoppages or deductions, if any, excepting such as are made at the request of the accused, so as not to deprive the accused of more than two-thirds of his pay for any month. As to pay which is subject to forfeiture, see 117*c*.

c. ***Maximum punishments.***—The punishment stated opposite each offense listed in the table below is hereby prescribed as the maximum punishment for that offense, and for any lesser included offense if the latter is not listed, and for any offense closely related to either if not listed. The maximum punishment so prescribed for the offense should be restricted to those cases in which, due to aggravating circumstances, the greatest permissible punishment should in the discretion of the court be imposed. If an offense not listed in the table is included in an offense which is listed and is also closely related to some other listed offense, the lesser punishment prescribed for either the included or closely related offense will prevail as the maximum limit of punishment.

Offenses not listed in the table, and not included within an offense listed or not closely related to either, remain punishable as authorized by Title 18, United States Code, or by the Code of the District of Columbia, whichever prescribed punishment is the lesser, or as authorized by the custom of the service. With respect to other matters proper for consideration in fixing punishment, see 80*a*, 113, 140*a*, and 157*a*.

The description of each offense listed in the table must be construed in connection with the article of war under which such offense is listed.

The table, which lists the maximum punishment in terms of confinement or forfeiture, or both, contains no reference to lesser forms of punishment, such as hard labor without confinement, restriction to limits, or detention of pay, which are appropriate for many minor offenses. Unless dishonorable or bad conduct discharge is adjudged, the court in its discretion may substitute at the following rates other punishments for those listed in the table:

Forfeiture	Confinement at hard labor	Detention	Hard labor without confinement	Restriction to limits
1 day's pay	1 day	1½ day's pay	1½ days	3 days

In computing the maximum amount of forfeiture in dollars and cents (see forms of sentences, App. 9) the base pay of the soldier (of the reduced grade if the sentence carries a reduction) plus pay for length of service (and overseas pay if no confinement is adjudged) will be taken as the basis. The term "base pay" comprehends no element of pay other than the minimum base pay of the grade or class within grade as fixed by statute and does not include extra pay for any special qualifications or for special duties performed, such as flying pay or pay incident to qualification as a combat infantryman. Unless dishonorable or bad conduct discharge is adjudged the monthly contribution of a soldier to family allowance will be excluded in computing the amount of pay subject to forfeiture. In computing time of absence without leave any one continuous period of absence found that totals not more than twenty-four hours is counted as a day; any such period found that totals more than twenty-four hours and not more than forty-eight hours is counted as two days, and so on. The hours of departure and return on different dates are assumed to be the same if both are not found.

In determining the maximum punishment for two or more separate and distinct, but like, offenses against property, values as found in different specifications can not be aggregated.

Bad conduct discharge may be adjudged upon conviction of any offense for which dishonorable discharge is authorized in the table.

Immediately upon a declaration of war subsequent to the effective date of this manual the prescribed limitations on punishment for violations of Articles of War 58, 59, 61, 64, and 86 will be automatically suspended and will not apply until the formal termination of such war or until restored by Executive order prior to such formal termination.[1]

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[1] NOTE.—The limitations upon punishments for violations of Articles of War 58, 59, and 86 were suspended until further orders, as to offenses committed after February 3, 1942, by Executive Order No. 9048, February 3, 1942. The limitations upon punishments for absence without leave from command, guard, quarters, station, or camp in violation of Article of War 61 were suspended until further order, as to offenses committed after December 1, 1942, by Executive Order No. 9267, November 9, 1942. Executive Order No. 9683, January 19, 1946, terminated the suspensions of limitations upon punishments for violations of Articles of War 58, 59, 61, and 86 as to offenses committed after January 19, 1946, except offenses committed in occupied enemy territory. Executive Order No. 9772, August 24, 1946, terminated the suspensions of limitations upon punishments for offenses committed after August 24, 1946, in occupied enemy territory. Nothing contained in this manual or the order of its promulgation is to be construed as altering the effect of the foregoing Executive orders.

TABLE OF MAXIMUM PUNISHMENTS

SECTION A

Article of War	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence	Bad conduct discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Month	Day
54	Enlistment, fraudulent:							
	Procured by means of willful misrepresentation or concealment of a fact in regard to a prior enlistment or discharge, or in regard to a conviction of a civil or military offense, or in regard to imprisonment under sentence of a court.	Yes		1				
	Other cases of	Yes			6			
58	Attempting to desert:							
	After not more than 6 months in service	Yes			6			
	After more than 6 months in service	Yes			9			
	In execution of a conspiracy or in the presence of an unlawful assemblage which the troops may be opposing.	Yes		3				
	Desertion:							
	Terminated by apprehension—							
	Not more than 6 months in service at time of desertion.	Yes		1½				
	More than 6 months in service at time of desertion.	Yes		2½				
	Terminated by surrender—							
	After absence of not more than 60 days.	Yes		1				
	After absence of more than 60 days	Yes		1½				
	In the execution of a conspiracy or in the presence of an unlawful assemblage which the troops may be opposing.	Yes		5				
59	Advising another to desert				6		6	
	Assisting knowingly or persuading another to desert.	Yes		1				
61	Absence without leave:							
	From command, quarters, station or camp—							
	For not more than 60 days, for each day or fraction of a day of absence.					3		2
	For more than 60 days	Yes			6			
	With intent to avoid maneuvers or field exercises.				6		6	
	From guard—							
	For not more than 1 hour							15
	For more than 1 hour				3		3	
	With intent to abandon		Yes		6			

Table of Maximum Punishments—Continued

SECTION A—Continued

Article of War	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence	Bad conduct discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Month	Day
61	Failing to repair at the fixed time to the properly appointed place of—							
	A routine scheduled duty other than those specified below.	----	----	----	----	----	----	3
	March	----	----	----	2	----	2	----
	Reveille or retreat roll call	----	----	----	----	----	----	1
	Leaving without permission the properly appointed place of assembly for, or place for, a routine duty.	----	----	----	1	----	1	----
62	Using contemptuous or disrespectful words against the President, Vice President, etc.	Yes	----	1	----	----	----	----
63	Behaving with disrespect toward his superior officer.	----	----	----	6	----	6	----
64	Willful disobedience of the lawful order of a commissioned officer in the execution of his office.	Yes	----	5	----	----	----	----
	Striking, drawing, or lifting up any weapon or offering any violence to a superior officer in the execution of his office.	Yes	----	10	----	----	----	----
65	Attempting to strike or attempting otherwise to assault a warrant officer or a noncommissioned officer in the execution of his office.	----	----	----	6	----	6	----
	Behaving in an insubordinate or disrespecful manner toward a warrant officer or a noncommissioned officer in the execution of his office.	----	----	----	2	----	2	----
	Willful disobedience of the lawful order of a warrant officer or a noncommissioned officer in the execution of his office.	----	Yes	----	6	----	----	----
	Striking or otherwise assaulting a warrant officer or a noncommissioned officer in the execution of his office.	Yes	----	1	----	----	----	----
	Threatening to strike or otherwise assault, or using other threatening language toward a warrant officer or a noncommissioned officer in the execution of his office.	----	----	----	4	----	4	----
	Using insulting language toward a warrant officer or a noncommissioned officer in the execution of his office.	----	----	----	2	----	2	----
68	Drawing a weapon upon a warrant officer or noncommissioned officer quelling a quarrel, fray, or disorder.	Yes	----	3	----	----	----	----
	Refusing to obey a warrant officer or noncommissioned officer quelling a quarrel, fray, or disorder.	----	Yes	1	----	----	----	----

Table of Maximum Punishments—Continued

SECTION A—Continued

Article of War	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence	Bad conduct discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
68	Threatening a warrant officer or noncommissioned officer quelling a quarrel, fray, or disorder.				6		6	
69	Breach of arrest				3		3	
	Escaping from confinement	Yes		1				
73	Releasing, without proper authority, a prisoner committed to his charge.	Yes		1				
	Suffering a prisoner committed to his charge to escape—							
	Through design	Yes		1				
	Through neglect				6		6	
83	Suffering, through neglect, military property to be damaged, lost, spoiled, or wrongfully disposed of:							
	Of a value of $20 or less				3		3	
	Of a value of $50 or less and more than $20.				6		6	
	Of a value of more than $50		Yes	1				
	Suffering, willfully, military property to be damaged, lost, spoiled, or wrongfully disposed of:							
	Of a value of $20 or less				6		6	
	Of a value of $50 or less and more than $20.	Yes			6			
	Of a value of more than $50	Yes		2				
84	Injuring or losing, through neglect, horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, or items belonging to two or more of said classes:							
	Of a value of $20 or less				3		3	
	Of a value of $50 or less and more than $20.				6		6	
	Of a value of more than $50		Yes	1				
	Injuring or losing, willfully, horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, or items belonging to two or more of said classes:							
	Of a value of $20 or less				6		6	
	Of a value of $50 or less and more than $20.	Yes			6			
	Of a value of more than $50	Yes		2				

Table of Maximum Punishments—Continued

SECTION A—Continued

Article of War	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence	Bad conduct discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
84	Selling or otherwise wrongfully disposing of horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, or items belonging to two or more of said classes:							
	Of a value of $20 or less	Yes			6			
	Of a value of $50 or less and more than $20.	Yes		1				
	Of a value of more than $50	Yes		5				
85	Found drunk:							
	At formation for, or on a duty other than those specified below.				3		3	
	Reveille or retreat roll call							20
	On guard		Yes		6			
86	Found sleeping or drunk on post, sentinel	Yes			6			
	Leaving post before regularly relieved from, sentinel.	Yes		1				
90	Using a provoking or reproachful speech or gesture to another.				3		3	
93	Arson	Yes		20				
	Assault:							
	With intent to do bodily harm	Yes		1				
	With intent to do bodily harm with a dangerous weapon, instrument, or other thing.	Yes		5				
	With intent to commit any felony except murder or rape.	Yes		10				
	With intent to commit murder or rape	Yes		20				
	Burglary	Yes		10				
	Larceny:							
	Of property of a value of $20 or less	Yes			6			
	Of property of a value of $50 or less and more than $20.	Yes		1				
	Of property of a value of more than $50	Yes		5				
	Forgery	Yes		5				
	Housebreaking	Yes		10				
	Manslaughter:							
	Involuntary	Yes		3				
	Voluntary	Yes		10				
	Mayhem	Yes		7				
	Perjury	Yes		5				
	Robbery	Yes		10				
	Sodomy	Yes		5				

Table of Maximum Punishments—Continued

SECTION A—Continued

Article of War	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence	Bad conduct discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
94	Conspiracy to defraud the United States	Yes		5				
	Forging or counterfeiting a signature, making a false oath, and offenses related to either of these.	Yes		5				
	Other cases:							
	When the amount involved is $20 or less	Yes			6			
	When the amount involved is $50 or less and more than $20.	Yes		1				
	When the amount involved is more than $50.	Yes		5				
96	Abusing a public animal				3		3	
	Adultery	Yes		1				
	Aiding a prisoner to escape	Yes		1				
	Allowing a prisoner to receive or obtain intoxicating liquor.				3		3	
	Appearing in civilian clothing without authority.							10
	Appearing in unclean uniform, or not in prescribed uniform, or in uniform worn otherwise than in manner prescribed.				1		1	
	Assault				3		3	
	Assault, aggravated:							
	Indecent	Yes		5				
	With a dangerous weapon	Yes		3				
	Upon a commissioned officer, knowing him to be such, not in the execution of his office; a commissioned officer of a friendly foreign power, knowing him to be such; a commissioned officer of the Air Force, Coast Guard, or Navy, knowing him to be such.	Yes		3				
	Assault and battery				6		6	
	Upon a female under the age of 16 years	Yes		2				
	Attempting to escape from confinement	Yes			6			
	Bigamy	Yes		2				
	Breach of restriction, punitive or administrative.				1		1	
	Breach of quarantine				6		6	
	Carrying a concealed weapon				3		3	
	Committing a nuisance				3		3	

Table of Maximum Punishments—Continued

SECTION A—Continued

Article of War	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence	Bad conduct discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
96	Concealing, destroying, mutilating, obliterating, or removing willfully and unlawfully a public record, or taking and carrying away a public record with intent to conceal, destroy, mutilate, obliterate, remove, or steal the same.	Yes		3				
	Conspiracy to commit an offense:							
	For which confinement in excess of one year is authorized.	Yes		5				
	For which confinement for less than one year is authorized.	Yes		1½				
	Conspiring to escape from confinement	Yes			6			
	Destroying, willfully, private property:							
	Of a value of $20 or less		Yes		6			
	Of a value of $50 or less and more than $20.	Yes		1				
	Of a value of more than $50	Yes		5				
	Discharging a firearm, wrongfully and willfully, under such circumstances as to endanger life.	Yes		1				
	Discharging, through carelessness, a firearm				3		3	
	Disorderly in command, quarters, station, or camp.				1		1	
	Disorderly under such circumstances as to bring discredit upon the military service.				4		4	
	Drinking liquor with prisoner				2		2	
	Drunk and disorderly in command, quarters, station, or camp.				3		3	
	Drunk and disorderly under such circumstances as to bring discredit upon the military service.				6		6	
	Drunk in command, quarters, station, or camp.							15
	Drunk under such circumstances as to bring discredit upon the military service.				3		3	
	Drunk, prisoner found				3		3	
	Failing to obey a lawful order:							
	Of a superior officer				6		6	
	Of a noncommissioned officer				3		3	
	Failing to pay a just debt under such circumstances as to bring discredit upon the military service.	Yes			6			
	False imprisonment	Yes		5				

Table of Maximum Punishments—Continued

SECTION A—Continued

Article of War	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence	Bad conduct discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
96	False official report or statement knowingly made:							
	By a noncommissioned officer		Yes		6			
	By any other soldier				3		3	
	False or unauthorized naval, military, or official pass, furlough, or discharge certificate, making, altering, possessing, selling, or otherwise disposing of.	Yes		3				
	False swearing	Yes		3				
	Fleeing from the scene of an accident				6		6	
	Gambling:							
	By a noncommissioned officer with a person of lower military rank or grade.						3	
	In command, quarters, station, or camp in violation of orders.				2		2	
	Impersonating an officer, noncommissioned officer, or agent of superior authority:							
	With intent to defraud	Yes		3				
	All other cases				6		6	
	Indecent acts or liberties with a child under the age of sixteen years.	Yes		7				
	Indecent exposure of person				6		6	
	Introducing marihuana or a habit forming drug into command, quarters, station, or camp:							
	For sale	Yes		2				
	All other cases	Yes		1				
	Wrongful possession of marihuana or such drug.	Yes		1				
	Introducing intoxicating liquor into command, quarters, station, or camp for sale in violation of orders.				6		6	
	Loaning money, either as principal or agent, at a usurious rate of interest to another in the military service.						3	
	Negligent homicide		Yes	1				
	Obtaining money or other property by check without sufficient funds in bank:							
	With intent to defraud—							
	Of a value of $20 or less	Yes			6			
	Of a value of $50 or less and more than $20.	Yes		1				
	Of a value of more than $50	Yes		3				
	Without intent to defraud				4		4	

Table of Maximum Punishments—Continued

SECTION A—Continued

Article of War	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence	Bad conduct discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
96	Obtaining money or other property under false pretenses:							
	When the amount obtained is $20 or less.	Yes			6			
	When the amount obtained is $50 or less and more than $20.	Yes		1				
	When the amount obtained is more than $50.	Yes		3				
	Operating a vehicle while under the influence of intoxicating liquor or drugs.		Yes		6			
	Operating a vehicle in a reckless manner:							
	Resulting in personal injury				6		6	
	Otherwise				3		3	
	Pandering	Yes		5				
	Receiving, knowingly, stolen goods:							
	Of a value of $20 or less	Yes			6			
	Of a value of $50 or less and more than $20.	Yes		1				
	Of a value of more than $50	Yes		3				
	*Self-maiming	Yes		7				
	Sentinel:							
	Offenses against—							
	Attempting to strike, or attempting otherwise to assault, in the execution of his duty.				6		6	
	Behaving in an insubordinate or disrespectful manner toward, in the execution of his duty.				1		1	
	Disobedience, willful, of the lawful order of, in the execution of his duty.	Yes		1				
	Failing to obey a lawful order of				3		3	
	Striking or otherwise assaulting, in the execution of his duty.	Yes		1				
	Threatening to strike, or otherwise assault, or using other threatening language toward, in the execution of his duty.				4		4	
	Using insulting language toward, in the execution of his duty.				3		3	
	Offenses by—							
	Loitering or sitting down on duty				1		1	
	Straggling				3		3	
	Subornation of perjury	Yes		5				

*The offense of self-maiming with the intent to avoid hazardous duty or to shirk important service is not included in this listed offense, and the limit of punishment herein prescribed does not apply thereto.

Table of Maximum Punishments—Continued

SECTION A—Continued

Article of War	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence	Bad conduct discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
96	Taking, opening, abstracting, secreting, destroying, or obstructing mail matter in the custody of the Post Office Department or in the custody of any other agency.	Yes		5				
	Unclean accouterment, arms, clothing, equipment, or other military property, found with.				1		1	
	Unlawful entry		Yes		6			
	Uttering, willfully, a forged instrument	Yes		5				
	Violating standing orders				6		6	
	Violation of condition of parole by general prisoner.				3			
	Wearing unauthorized insignia, medal, decoration, or badge.				6		6	
	Wrongful carnal knowledge of a female below the age of sixteen years.	Yes		15				
	Wrongfully refusing to testify before a court-martial, military commission, court of inquiry, or board of officers.	Yes		5				
	Wrongfully taking or wrongfully taking and using the property of another, willfully [redacted] with the intent to deprive the owner temporarily of his property:							
	Of a value of $20 or less				3		3	
	Of a value of $50 or less and more than $20.				6		6	
	Of a value of more than $50		Yes		6			
	Any motor vehicle	Yes		2				

SECTION B

Permissible additional punishments.—If an accused be found guilty by the court of an offense or offenses for none of which dishonorable or bad conduct discharge is authorized, proof of five or more previous convictions will authorize bad conduct discharge and forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence and, if the confinement otherwise authorized is less than three months, confinement at hard labor for three months. See 79*c* as to limitations concerning evidence of previous convictions which may be considered.

If an accused be found guilty by a court of two or more offenses for none of which dishonorable or bad conduct discharge is authorized, the fact that the authorized confinement without substitution for such offenses is six months or more will authorize bad conduct discharge and forfeiture of all pay and allowances due after the order directing execution of the approved sentence. But see 116*b*.

A fine may be adjudged against any enlisted person, in lieu of forfeitures, for any offense listed in the Table of Maximum Punishments for which dishonorable discharge is authorized, provided a dishonorable discharge is also adjudged in the case. A fine should not ordinarily be adjudged against an officer, warrant officer, or enlisted person unless the accused was unjustly enriched by means of an offense of which he is convicted involving loss to the United States or violative of military directives.

If a soldier of other than the lowest enlisted grade is convicted by a court-martial the court may, in its discretion, adjudge reduction to the lowest grade in addition to the punishments otherwise authorized. Reprimand or admonition may be adjudged in any case.

Chapter XXVII

DISCIPLINARY POWER OF COMMANDING OFFICER

AUTHORITY; POLICY; EFFECT OF ERRORS—PUNISHMENTS—PROCEDURE—APPEALS—MISCELLANEOUS

118. **AUTHORITY; POLICY; EFFECT OF ERRORS.**—Under the provisions of Article 104 and of this chapter, the commanding officer of any detachment, company, or higher command may, for minor offenses, without the intervention of a court-martial, impose disciplinary punishments upon persons of his command who are subject to military law, including officers. This authority of a commanding officer can not be delegated, but communications with respect thereto may be signed or transmitted by him personally or as provided for official communications in general.

Whether an offense may be considered "minor" depends upon its nature, the time and place of its commission and the person committing it. Generally speaking, the term includes misconduct not involving moral turpitude or any greater degree of criminality than is involved in the average offense tried by summary court-martial. An offense for which the Articles of War prescribe a mandatory punishment or authorize the death penalty or penitentiary confinement is not a minor offense. Offenses such as larceny, fraudulently making and uttering bad checks, and the like, involve moral turpitude and are not to be treated as minor. Escape from confinement, willful disobedience of noncommissioned officers, and threatening or assaulting sentinels are offenses which are more serious than the average offense tried by summary courts-martial and should not ordinarily be treated as minor.

Article 104 and the provisions of this chapter do not apply to, include, or limit the use of those nonpunitive measures that a commanding officer is authorized and expected to use to further the efficiency of his command, such as administrative admonitions, reprimands, exhortations, disapprovals, criticisms, censures, reproofs and rebukes, written or oral, not intended or imposed as a punishment for a military offense. The fact that admonition and reprimand are termed disciplinary punishments by Article 104 does not deprive a commanding officer of the power he had prior to the enactment of that article to make use of admonition and reprimand, not as a penalty but as a purely corrective measure, more analogous to instruction than to

punishment, in the strict line of his duty to create and maintain efficiency.

A commanding officer should resort to his power under Article 104 in every case in which punishment is deemed necessary and that article applies unless it is clear that punishment under that article would not meet the ends of justice and discipline. Superior commanders should restrain any tendency of subordinate commanders to resort unnecessarily to court-martial jurisdiction for the punishment of offenders.

Any failure to comply with the regulations in this chapter will not invalidate a punishment imposed under Article 104, except to the extent that may be required by a clear and affirmative showing of injury to a substantial right of the person on whom the punishment was imposed, which right was neither expressly nor impliedly waived.

119. **PUNISHMENTS.**—*a.* ***Enlisted persons other than noncommissioned officers.***—Authorized punishments include admonition or reprimand, withholding of privileges, extra fatigue, restriction to certain specified limits, hard labor without confinement, or any combination of these punishments for not exceeding seven consecutive calendar days from the date imposed, but shall not include forfeiture or detention of pay or confinement under guard (A. W. 104).

b. ***Noncommissioned officers.***—Persons of actual, relative, or assimilated rank of noncommissioned officers may be punished under Article 104 to the same extent and subject to the same limitations as other enlisted persons except that hard labor or extra fatigue will not be imposed upon such persons. No punishment is permitted which tends to degrade the rank of the person on whom the punishment is imposed.

c. ***Officers and warrant officers.***—The types of punishment authorized in the cases of noncommissioned officers may be imposed upon officers and warrant officers by the commanding officer of any detachment, company, or higher command which includes the accused, but it is customary to refer the matter to the officer exercising special court-martial jurisdiction over the accused officer or warrant officer for his determination. In addition, any officer exercising general court-martial jurisdiction may, under the provisions of Article 104, impose upon a warrant officer or officer of his command below the rank of brigadier general a forfeiture of not more than one-half of his pay (as distinguished from pay and allowances) per month for three months.

d. ***Execution of punishment.***—Except as otherwise prescribed, the immediate commanding officer of the accused is charged with the execution of punishment imposed pursuant to Article 104. Punishments will be strictly enforced.

120. **PROCEDURE.**—The commanding officer, after ascertaining to his satisfaction by such investigation as he deems necessary that an

offense cognizable by him under Article 104 has been committed by a member of his command, will notify such member of the nature of the offense as clearly and concisely as may be possible, and will inform him that he proposes to impose punishment under Article 104 as to the offense unless trial by court-martial is demanded. He will also inform the accused that he may submit such matters as he desires in mitigation, extenuation or defense. In appropriate cases he will inform the accused that he is not required to make any statement, and that any statement he may make may be used against him. The notification and information will be by written communication through proper channels in the case of an officer or warrant officer and may be by written communication in any case. If the notification is in writing, the accused will be directed to acknowledge receipt of the communication by indorsement through the proper channels and to include in the indorsement any demand for trial he wishes to make and any matter in mitigation, extenuation or defense. See Appendix 15 for the suggested form of such correspondence. If the notification is not in writing the accused will be given a reasonable time to make up his mind.

With reference to each offense as to which no demand for trial is made, the commanding officer may proceed to impose punishment. The accused will be notified of the punishment imposed as soon as practicable and at the same time will be informed of his right to appeal. See 121. If the original communication was in writing, the notification of the punishment imposed and any reprimand or admonition that may be included in such punishment will be by indorsement on the communication carrying the original notification, and the accused will be directed to acknowledge receipt by similar indorsement and to include in his indorsement the date of such receipt and any appeal he may desire to make. If the notification of the punishment is not in writing, the immediate commanding officer of the accused will be informed of the matter and given the necessary data for the record of punishment. See 122.

121. **APPEALS.**—A person punished under the provisions of Article 104 who deems his punishment unjust or disproportionate to the offense may, through proper channels, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. An appeal not made within a reasonable time may be rejected by the next superior authority. An appeal will be in writing through proper channels (see 120 as to appeal by indorsement) and will include a brief signed statement of the reasons for regarding the punishment as unjust or disproportionate. The immediate commanding officer of the accused will when necessary include with the appeal a copy of the record (see 122) in the case. In passing upon

the appeal the superior will ordinarily hear no witnesses. When justice requires such action, he will modify the punishment or set it aside, but will not increase it, and will in no case award a different kind of punishment. After having considered the appeal, he will return the papers through channels to the appellant, with a statement of the disposition of the case and with a direction to return the papers to the immediate commanding officer of the appellant for file with the record of the case.

122. **MISCELLANEOUS.**—The officer who imposed the punishment, his successor in command, any higher authority, and any officer exercising general court-martial jurisdiction over a command which includes the accused, shall have power to suspend, mitigate, or remit any unexecuted portion of the punishment. Application for suspension, mitigation, or remission and any action taken under this authority will be in writing and subject to the regulations as to appeals as far as applicable.

As to each offense for which punishment is imposed under Article 104, the immediate commanding officer of the person on whom such punishment was imposed will cause a record to be made and filed in his office or other proper place, showing the offense, with date and place of commission; the punishment, with the authority that imposed it and the date the accused received the notice of the imposition of the punishment; the decision of higher authority on any appeal; any mitigation or remission of the punishment; and any remarks or additional data desired. See Appendix 15*b* for the form of record. Where punishment is accomplished by written communication and indorsements, the written correspondence will constitute the record.

With reference to interposing punishment imposed under Article 104 in bar of trial, see 69*c*. With reference to showing punishment under Article 104 in extenuation, see 79*e*.

A demand for trial does not require preferring, transmitting, or forwarding of charges, but punishment may not be imposed under Article 104 while the demand is in effect.

Chapter XXVIII

RULES OF EVIDENCE

123. **SYNOPSIS OF CHAPTER.**—In this synopsis the references on the left are to paragraphs; those on the right are to pages.

124. **GENERAL RULES.**—The rules stated in this chapter are applicable in cases before courts-martial, including summary courts-martial. So far as not otherwise prescribed in this manual, the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States and, when not inconsistent with such rules, at common law will be applied by courts-martial.

On interlocutory matters relating to the propriety of proceeding with the trial, as when a continuance is requested, the court may in its discretion relax the rules of evidence to the extent of receiving affidavits, certificates of military and civil officers, and other writings of similar apparent authenticity and reliability, such as the certificate of a physician as to the illness of a witness, unless on objection to a particular writing it is made to appear that the relaxation might injuriously affect the substantial rights of an accused or the interests of the Government.

Evidence to be admissible must be material and relevant. Evidence is not material when the fact which it tends to prove is not part of the issues in the case. Evidence is not relevant when, though the fact which it is intended to prove thereby is material to the issue of guilt or innocence or to some collateral issue, such as the credibility of a witness, yet the evidence itself is too remote or far-fetched to have any probative value for that purpose. If evidence is held immaterial or irrelevant to the issue of guilt or innocence, but is received in extenuation, it must be considered solely in connection with the measure of punishment in the event of conviction.

Evidence, apparently irrelevant, may be admitted provisionally upon a statement of the party offering it that other facts later to be proved will show its relevancy, but such evidence should afterward be excluded if its relevancy is not ultimately shown. However, it is generally more desirable to require the party offering the evidence first to prove the facts showing its relevancy. For that purpose he may be permitted temporarily to withdraw a witness or witnesses and to recall one or more witnesses who have been examined.

In the exercise of a sound discretion the court may limit the number of witnesses called by either side to testify to the same matter if, upon an offer of proof (140*c*) or otherwise, it appears that the testimony of any excluded witness would be merely cumulative. This rule applies in particular to character witnesses.

125. **PRESUMPTIONS; DIRECT AND CIRCUMSTANTIAL EVIDENCE.**—*a.* ***Presumptions.***—Presumptions or inferences may be considered as falling into two classes: First, those which arise without the introduction of any evidence; and second, those which can not arise until after some evidence has been introduced.

In the first class are those presumptions which relate to facts the existence of which courts are bound to presume in the absence of proof to the contrary. An accused person is presumed to be innocent until his guilt is proved beyond a reasonable doubt; an accused is presumed to have been sane at the time of the offense charged until a reasonable doubt of his sanity at the time appears from the evidence; and, in the absence of proof to the contrary, a woman's chastity is presumed.

In the second class are those presumptions which relate to facts that a court may infer, if it deems the inference warranted by all the circumstances, from the existence of other facts which must be first established. In this connection see 125*b* (Circumstantial evidence). Examples of this second class of presumptions are:

A sane person is presumed to have intended the natural and probable consequences of acts which he is shown to have committed.

Persons shown to be acting as public officers are presumed to be legally in office and to perform their duties properly.

Malice may be presumed when a homicide is caused by the use of a deadly weapon in a manner likely to result in death.

A condition shown to have existed at one time is presumed, in the absence of any indication to the contrary, to have continued. In the absence of a showing to the contrary, it is presumed that the residence of a person remains unchanged, and that an office holder continues in office until the end of the term for which appointed or elected. Also, the circumstances of a particular case may give rise to a permissible inference that a condition shown to have existed at one time existed for some prior period of time. For example, proof that shortly after a collision the lights on a vehicle were not burning, although in working order at the time, would support an inference that the lights had not been turned on at the time of the collision.

Proof that a letter correctly addressed and properly stamped or franked was deposited in the mail raises a presumption of delivery to the addressee, and a similar presumption arises with regard to telegrams regularly filed with a telegraph company for transmission.

Identity of name raises a presumption of identity of person. The strength of this presumption will depend upon how common the name is and upon other circumstances.

Proof that a person was in possession of recently stolen property may raise a presumption that the person stole it, and, if it is shown that the property was stolen from a certain place, at a certain time and under certain circumstances, that the person stole it at the particular place and time and under the circumstances shown.

It may be presumed that one who has assumed the custodianship of the property of another has stolen such property if he does not

or can not account for or deliver it at the time an accounting or delivery is required of him.

The weight to be given presumptions of the second class necessarily depends upon all the circumstances attending the proved facts which give rise to the presumptions. For this reason the making and weighing of such presumptions and the consideration of evidence tending to overcome them call for the application by members of courts of their common sense and general knowledge of human nature and the ordinary affairs of life.

The force of any inference of fact which may have been raised by the evidence is not necessarily overcome by the introduction of rebutting evidence. The proof as a whole, including any such inference and the presumption of innocence, is to be considered by the court in arriving at its conclusions.

b. ***Direct and circumstantial evidence.***—*General.*—If a statement made by a witness or contained in a document is such that if true it would directly prove or disprove a fact in issue, the statement is called direct evidence. If the statement would, if true, directly prove or disprove not a fact in issue but a fact or circumstance from which, either alone or in connection with other facts, a court may, according to the common experience of mankind, reasonably infer the existence or nonexistence of another fact which is in issue, then such a statement is called indirect or circumstantial evidence. For example, on a charge of larceny of a purse, testimony of a witness that he saw the accused take the purse from the overcoat of the owner is direct evidence, and testimony of a witness that he found the purse hidden in the locker of the accused is circumstantial evidence of the taking.

Circumstantial evidence is not resorted to because of the absence of direct evidence. It is admissible even when there is direct evidence. There is no general rule for contrasting the weight of circumstantial and direct evidence. The assertion of an eyewitness who is absolutely trustworthy in every respect may be more convincing than the contrary inferences that appear probable from circumstances. Conversely, one or more circumstances may be more convincing than a plausible witness.

Testimonial Knowledge.—That he should speak only of what he has learned through his senses is a primary qualification of a witness. For instance, a witness might testify that while on sentry post at night he heard three shots and saw two persons running in the distance; but he should not proceed further and state that the shots killed a mule and that the accused was one of the persons running if his knowledge as to the effect of the shots and the identity of the persons running away is based on rumors and gossip heard the following day.

Opinion Evidence.—It is a general rule that a witness must state facts and not his opinions or conclusions. However, a witness may express an opinion on matters within the common observation and experience of men, such as to the speed of an automobile or as to whether a certain person was drunk at a certain time, or as to whether a voice heard was that of a man, woman, or child. As to the expression of opinion with respect to general mental condition, see 112*c*.

An expert witness—that is, one who is skilled in some art, trade, profession or science or who has knowledge and experience in relation to matters which are not generally within the knowledge of men of common education and experience—may express an opinion on a state of facts which is within his specialty and which is involved in the inquiry. Prior to being permitted to express his opinion, it should be shown that he is an expert in the specialty. Proof of such qualification may be waived expressly or by failure to object to the reception in evidence of testimony of an expert nature.

Expert testimony may be adduced in several ways. An expert witness may be asked to state his relevant opinion, when based on his personal observation or on an examination or study conducted by him, without first specifying hypothetically in the question the data on which the opinion is to be based. He may be required on direct or cross-examination to specify the data upon which his opinion is based, but if in the course of relating the data he gives testimony which would be inadmissible on the issue of guilt or innocence, such testimony is not to be considered upon that issue. An expert witness may also be asked to express his opinion upon a hypothetical question (a question supposing a certain state of facts to exist) if the question is based on facts in evidence at the time the question is asked, or, if the court so permits in the exercise of a sound discretion, on facts which are later to be received in evidence. If evidence of such facts is not later introduced, the opinion based on those facts should be excluded.

Bad Character of the Accused.—The general and fundamental rule is that the doing of an act may not be evidenced by showing the bad moral character of the accused or his former misdeeds as a basis for an inference of guilt. This forbids any reference to his bad character in any form, either by general repute or by personal opinions of individuals who know him. It also forbids any reference in the evidence to former specific offenses or other acts of misconduct, whether he has or has not been tried and convicted of their commission.

There are certain exceptions to this rule, among them the following:

In order to show the probability of his innocence, the accused may introduce evidence of his own good character, including evidence of his military record and standing and evidence of his general reputation as a moral well-conducted person and law-abiding citizen. However,

if the accused desires to introduce evidence as to some specific trait of character, such evidence must have a reasonable tendency to show that it was unlikely that he committed the particular offense charged. For example, evidence of reputation for peacefulness would be admissible in a prosecution for any offense involving violence, but it would be inadmissible in a prosecution for a non-violent theft. If the accused introduces evidence of his own good character, the prosecution may introduce evidence in rebuttal. The rebutting evidence will be limited by the extent of the character evidence introduced by the accused. Thus, when in a prosecution for theft the accused has limited his proof of good character to evidence of his good reputation for honesty, the prosecution may not introduce evidence of the bad reputation of the accused as to general morality and conduct but will be limited to proof of his bad reputation for honesty. As to means of proving character, see 139*b*.

If the accused takes the stand as a witness, his credibility may be attacked as in the case of other witnesses. For this purpose it may be shown that his reputation for truth and veracity is bad or that he has been convicted of a crime involving moral turpitude or affecting his credibility. See 139*b*.

Evidence of other acts of the accused, closely connected in point of time and circumstances of commission to the offense for which he is on trial, is admissible if it tends to establish the identity of the accused as the perpetrator of the offense in question, to show the motive or plan of action of the accused, to show his intent or guilty knowledge if intent or guilty knowledge is an element of the offense charged, or to refute his claim that his participation in the offense charged was the result of accident or mistake. Such evidence is admissible even though it tends to establish the commission of an offense not charged. The court should not consider evidence so offered as bearing in any way upon the question of the general moral character of the accused.

The following are illustrations of the rule and the exceptions:

If two adjoining buildings are burglarized on the same night and under similar circumstances, it is permissible to show upon trial of an accused for burglarizing one of the buildings that the accused was involved in the burglary of the other building. Such evidence has a reasonable tendency to establish that he was the person involved in the burglary charged.

On a charge of knowingly passing a counterfeit coin, evidence that the accused had on another recent occasion passed a counterfeit coin is admissible as tending to establish that on the instant occasion he knew the coin to be counterfeit.

On a charge of assaulting a fellow soldier with intent to wound, an assault on another soldier six months earlier and under entirely different circumstances would not be admissible, having no bearing on the intent in the case charged.

On a charge of attempting to desert, the fact that the accused had recently assaulted and beaten another soldier and was under arrest awaiting trial for the offense would be admissible as evidence of a probable motive to attempt to desert.

On a charge of falsification of accounts of stores, evidence that the accused had stolen some of the same stores would be admissible if offered as proof of a motive for concealing the theft by falsifying accounts; but evidence of a conviction of falsification in a totally distinct transaction would be inadmissible, because that evidence does not bear upon his present intent or motive but bears solely upon his general moral character.

126. **HEARSAY RULE.**—*a. General rule.*—Hearsay is not evidence. This means simply that a fact can not be proved by showing that somebody stated it was a fact. Thus, either an oral or a written statement not made by a witness in court in the trial of a particular case but later offered in court as evidence of the truth of the matter stated is hearsay and not evidence. Such a statement does not become evidence because received by the court without objection. Underlying the hearsay rule is the principle that the testimony of witnesses, to be of value, must be taken in court so that the witnesses may be sworn, cross-examined, confronted by the accused, and observed by the court.

The fact that a given statement was or was not made may itself be relevant. In such a case a witness may testify that the statement was made—not for the purpose of proving the truth of what was stated but for the purpose of proving the fact that it was stated.

b. Illustrations.—Captain A conducted the investigation of charges against the accused. The testimony of Captain A at the trial that the witnesses other than the accused testified to certain facts at the investigation is inadmissible to prove such facts because the testimony of Captain A is hearsay. However, the testimony of any person present at the investigation that he heard the investigating officer warn the accused that he was not required to make any statement and that any statement he might make might be used against him is admissible for the purpose of showing that the warning was in fact given. This is true because in the latter case the testimony is offered, not for the purpose of proving the truth of the statements made by the investigator, but merely to prove the fact that such statements were made to the accused.

A soldier is being tried for larceny of clothes from a locker. Private A is able to testify that Private B told Private A that he, Private

B, saw the accused leave the quarters with a bundle resembling clothes about the time the clothes were stolen. Such testimony from Private A would be hearsay and inadmissible. Private B himself should be called as a witness.

The fact that the statement was made to an officer in the course of an official investigation does not make hearsay admissible. For instance, if Private B had made his statement to Captain C in the course of an official investigation by Captain C, the testimony of Captain C as to what Private B told him officially is nevertheless hearsay and inadmissible.

X is unable to identify A as her assailant at the trial of A for the rape of X, but M is able to testify that on the date following the rape X declared at a line up that A was her assailant and pointed at him. The testimony of M is hearsay and inadmissible.

A soldier, B, is being tried for selling clothing. Policeman A is able to testify that while on duty as a policeman he saw the accused go into a shop with a bundle under his arm, that A entered the shop and the accused ran away and A was unable to catch him, and that the next day A asked the proprietor of the shop what the accused was doing there, and the proprietor replied that the accused sold him some clothes issued by the Government, and that he paid the accused $2.50 for them. The testimony of the policeman as to the reply of the proprietor is hearsay and inadmissible. The fact that the policeman was acting in the line of his duty at the time the proprietor made the statement would not render the evidence admissible.

A soldier is being tried for disobedience of a certain order given him orally by Captain C. A witness is able to testify that he heard Captain C give the order to the accused. Such testimony, including the terms of the order, is not hearsay.

Unless covered by an exception, official statements made by an officer—as, for instance, by a company, regimental, or department commander, or by a staff officer, in an indorsement or other communication—are not excepted from the general rule of exclusion by reason of the official character of the communication or the rank or position of the officer making it. Nor is such a statement so excepted from the hearsay rule because it is among papers referred to the trial judge advocate with the charges.

c. ***Exceptions.***—Some of the exceptions to the hearsay rule presented for application in court-martial trials are stated in 127 to 132.

127. **CONFESSIONS; ADMISSIONS BY ACCUSED; ACTS AND STATEMENTS OF CONSPIRATORS AND ACCOMPLICES; STATEMENTS THROUGH INTERPRETERS.**—*a.* ***Confessions and admissions.***—A confession is an acknowledgment of guilt. An admission is an incriminatory statement falling short

of an acknowledgment of guilt. A confession or admission may not be received in evidence if it was not voluntarily made. In view of the unusual circumstances in which accused persons are sometimes placed when making confessions, evidence of confessions is in general to be received with caution. When, however, a confession is explicit and deliberate as well as voluntary, and if oral, is proved by a witness or witnesses by whom it has not been misunderstood and is not misrepresented, it is indeed one of the strongest forms of proof known to the law.

Courts should bear in mind that mere silence on the part of an accused when questioned as to his supposed offense is not to be treated as a confession or admission.

Although a confession may be inadmissible as a whole because it was not voluntarily made, nevertheless the fact that it furnished information which led to the discovery of other evidence of pertinent facts will not be a reason for excluding such other evidence. For example, if an accused charged with larceny said that he had stolen certain articles and had secreted them in a certain place, the fact that the confession was improperly induced by promises or threats would not exclude evidence that the articles were discovered in that place.

No statement, admission, or confession of an accused person obtained by the use of coercion or unlawful influence shall be received in evidence by any court-martial. It is the duty of any person in obtaining a statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, and that any statement by the accused may be used as evidence against him in a trial by court-martial (A. W. 24).

A confession or admission may not be received in evidence if it was not voluntarily made. If the confession or admission was obtained from the accused in the course of an investigation, by informal interrogation or by any similar means, it may not be received in evidence unless it appears that the accused, through preliminary warning or otherwise, was aware of his right not to make any statement regarding an offense of which he was accused or concerning which he was being interrogated and understood that any statement made by him might be used as evidence against him in a trial by court-martial. The fact that a confession or admission otherwise admissible was made to an investigator during an investigation of a charge does not make the confession or admission inadmissible. If it appears that the accused made a confession or admission spontaneously and without urging or request, as when the accused, a private, makes an incriminating statement to a friend, another private, the statement may be regarded as voluntary.

A confession is not admissible in evidence unless it is affirmatively shown that it was voluntary. An admission of the accused, however,

may be introduced without such preliminary proof except when it is indicated that the admission was involuntary. No hard and fast rules for determining whether a confession or admission was voluntary are here prescribed. Some instances of coercion or unlawful influence in obtaining a confession or admission are:

(1) Infliction of bodily harm, including prolonged questioning accompanied by deprivation of the necessities of life (food, sleep, adequate clothing, etc.).

(2) Threats of bodily harm.

(3) Imposition of confinement or deprivation of privileges or necessities because a statement is not made by the accused, or threats of the same if a statement is not made.

(4) Promises of immunity or clemency with respect to an offense allegedly committed by the accused.

(5) Promises of reward or benefit, of a substantial nature, likely to induce a confession or admission from the particular accused.

Evidence that the accused stated, orally or in writing, that he made the confession or admission freely without hope of reward or fear of punishment, or evidence that the accused was warned just before he made the confession or admission that he need not make any statement at all regarding the offense in question and that any statement made by him might be used as evidence against him, is evidence, but not conclusive evidence, that the confession or admission was voluntary.

An accused has the right to testify concerning the involuntary nature of his confession or admission without subjecting himself to cross-examination upon other issues in the case or upon the truth or falsity of the confession or admission. See 135*b* (Cross-examination). If he desires to exercise it, he should be accorded this right before the incriminating statement is received in evidence. If he so requests, he should also be given the opportunity before the statement is admitted in evidence to present other evidence tending to show that his pre-trial statement was involuntarily made or to cross-examine any witness who has testified as to its voluntary nature.

The ruling of the law member (or of the special court-martial) that a particular confession or admission may be received in evidence is not conclusive of the voluntary nature of the confession or admission. Such a ruling merely places the confession or admission before the court. The ruling is final only on the question of admissibility. Each member of the court, in his deliberation upon the findings of guilt or innocence, may come to his own conclusion as to the voluntary nature of the confession or admission and accept or reject it accordingly. He may also consider any evidence adduced as to the voluntary or involuntary nature of the confession or admission as affecting the weight to be given thereto.

An accused cannot be legally convicted upon his uncorroborated confession. A court may not consider the confession of an accused as evidence against him unless there is in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be substantial evidence of the corpus delicti other than the confession. Other confessions or admissions of the accused are not such corroborative evidence. Usually the corroborative evidence is introduced before evidence of the confession; but a court may in its discretion admit the confession in evidence upon the condition that it will be stricken and disregarded in the event that the above requirement as to evidence of the corpus delicti is not eventually met. This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense. If unlawful homicide is charged, evidence of the death of the person alleged to have been killed, coupled with evidence of circumstances indicating the probability that he was unlawfully killed, will satisfy the rule and authorize consideration of the confession if otherwise admissible. In a case of alleged larceny or in a case of alleged unlawful sale, evidence that the property in question was missing under circumstances indicating in the first case that it was probably stolen, and in the second case that it was probably unlawfully sold, would be a compliance with the rule.

If an oral confession or admission of an accused has been reduced promptly to a writing signed by him, the writing is the best evidence of the confession or admission. See 129*a*.

Evidence of a confession or admission or supposed confession or admission cannot be restricted to evidence of only a part. If a part only is shown, the defense by cross-examination or otherwise may show the remainder of the statement.

b. ***Acts and statements of conspirators and accomplices.***—When several persons have combined for some unlawful purpose or have acted in concert in the commission of an offense, the acts and statements of one conspirator or co-actor done or made in pursuance of the common design or act are admissible in evidence against the others or any of them in a prosecution for the unlawful combination or for the offense. In this respect, proof of a formal agreement to accomplish the unlawful purpose is unnecessary if a tacit understanding is shown to have existed, and it is immaterial, upon a trial of an accused for an offense committed pursuant to a conspiracy or jointly with other persons, that a conspiracy or joint act is not charged or that no conspirator or co-actor is named in the specification. It is likewise immaterial whether such acts or statements were done or made in the

presence or hearing of the other parties. Except acts and statements in furtherance of an escape, the acts and statements of a conspirator or co-actor done or made after the common design is accomplished or abandoned are not admissible against the others. Thus in a trial of one conspirator or co-actor the acts or statements of his accomplices not done or made in pursuance of the common design or act, including such statements embodied in pre-trial confessions or admissions, may not be received in evidence against him, even as evidence corroborative of the confession or admission of the accused himself. This is so whether or not the other conspirators or co-actors are brought to trial with him. When conspirators or accomplices are tried in a joint or common trial and a pre-trial confession or admission of one of them, not made in pursuance of the common design or act, is received in evidence, the court will consider it as evidence only against the particular accused who made it. The effect of an unsworn statement made by one of several joint offenders at the trial is likewise to be confined to the one who made it.

When it is desired to introduce evidence of the acts or statements of accomplices done or made in pursuance of the common design or act, foundation should first be laid by either direct or circumstantial evidence sufficient to establish prima facie the fact of conspiracy or joint action between the parties. But as it sometimes may interfere with the proper development of the case to require the trial to begin with proof of conspiracy or joint action, the prosecution may, at the trial, prove such declarations or acts of one made or done in the absence of others before laying the required foundation, though such proof will be treated as of no effect unless the conspiracy or joint action be afterwards independently established.

One accomplice is, of course, competent to testify against the others. But see 134*d* as to the competency of an accused as a witness.

The conviction of one accomplice may not be received in evidence in a trial of the others as proof that the accused were participants in the offense charged or as proof that such offense had probably been committed.

*c. **Statements made through interpreters.***—The statement of an accused made through an interpreter to a person who did not understand the language spoken by the accused may be related in evidence by such person only when the interpreter was acting as the agent of the accused or when it is shown that the accused was present and understood the language into which his statement was interpreted. Otherwise a statement made through an interpreter by the accused to another should be proved by the testimony of the interpreter himself.

128. **DYING DECLARATIONS; RES GESTAE; FRESH COMPLAINT.**—*a.* ***Dying declarations.***—See 179*a* (Murder) and 180*a* (Manslaughter).

b. ***Res gestae.***—Circumstances, including exclamations, declarations, and statements of participants and bystanders, substantially contemporaneous with the main fact under consideration and so closely connected with the main fact as to throw light upon its character, are termed res gestae. Evidence of anything constituting a part of the res gestae is always admissible.

Thus, when an accused, A, is charged with the murder of B, evidence given by any person who was present is admissible to show that immediately before the killing the wife of the accused exclaimed to him, "B has just assaulted me." This evidence is admissible because the making of the remark was substantially contemporaneous with the main fact under consideration—the alleged killing—and so closely connected therewith as to throw light upon its character in that the remark tends to indicate the motive in the mind of the accused, regardless of whether his wife had in fact been assaulted. The admissibility of such evidence does not constitute an exception to the hearsay rule because it is introduced, not for the purpose of proving the truth of the remark, but merely to show that the remark was made.

It sometimes happens, however, that an utterance constituting a part of the res gestae was made under such circumstances of shock or surprise as to show that it was not the result of reflection or design but made spontaneously. Evidence of an utterance shown to have been made under those circumstances may be introduced for the purpose of proving the truth of the utterance itself. This does constitute an exception to the hearsay rule. For example, an accused, A, is charged with having shot B. A witness testifies that he, as well as A, B, and a fourth man, C, were present at the time of the shooting; that A and C had pistols; that he did not actually see the shot fired; that he was looking at B and not at A and C when he heard a shot, and saw B, who was looking toward A and C, fall; and that as B fell B exclaimed "A has shot me!" The testimony as to B's exclamation is admissible as part of the res gestae; but, because of the circumstances under which the exclamation was made, the evidence may also be considered as tending to prove that it was A who shot B.

c. ***Fresh complaint.***—In cases involving sexual offenses, such as rape, statutory rape, sodomy, attempts to commit such offenses, assault with intent to commit rape or sodomy, and indecent assaults, evidence that the alleged victim of such an attack made complaint within a short time is admissible. This evidence is to be restricted to proof that a complaint against the accused was made, the details of the

offense related during the course of making the complaint being inadmissible under this rule. Evidence of fresh complaint is received solely for the purpose of corroborating the testimony of the victim and not for the purpose of showing the truth of the matter stated in the complaint. However, when it is shown that the complaint was made while the victim was in such a state of shock occasioned by the attack as to give warrant to a reasonable conclusion that the complaint was not the result of reflection or design but was made spontaneously, the complaint, as well as the details of the attack related during the course of making it, may be received in evidence as tending to prove the truth of the matters stated.

129. **DOCUMENTARY EVIDENCE; PROVING CONTENTS OF WRITING; AUTHENTICATION OF WRITINGS.**—*a.* ***Proving contents of writing.***—*General Rule.*—A writing is the best evidence of its own contents and must be introduced to prove its contents. Under this rule, known as the best evidence rule, if it is desired to prove the contents of a private letter or other unofficial paper or of an official paper such as a pay voucher, a written claim against the Government, a pay roll, a company morning report, an enlistment paper, etc., or of a written confession or admission of an accused, the strict and formal method of doing so is to call a witness who can authenticate (identify as genuine) the document, and then to introduce the original in evidence. However, a carbon copy of a document, as complete as the original in all essential respects, including relevant signatures, if any, or an identical copy made by photographic or other duplicating process (see 130*e*), is considered to be a duplicate original and, as such, is equally admissible as an original. An objection to the introduction of secondary evidence, that is, testimony or a copy not considered a duplicate original, as proof of the contents of a writing is waived by failure to object to the reception of the secondary evidence. Such a waiver, however, adds nothing to the weight to be given to, or the evidentiary nature of, the secondary evidence thus received.

Exceptions.—If a writing has been lost or destroyed or if it is otherwise satisfactorily shown that the writing can not be produced, the contents may be proved by a copy or by oral testimony of witnesses who have seen the writing.

When the original consists of numerous writings which can not conveniently be examined by the court, and the fact to be proved is the general result of the whole collection, and that result is capable of being ascertained by calculation, as for instance, if the fact to be proved is the balance shown by account books, the calculation may be made by some competent person and the result of the calculation testified to by him. In such cases it must be shown to the court that the writings are

so numerous or bulky that they can not conveniently be examined by the court; that the fact to be proved is the general result of the whole collection; that the result is capable of being ascertained by calculation; that the witness is a person skilled in such matters and capable of making the calculation; that he has examined the whole collection and has made such a calculation; and that the opposite party has had access to the books and papers from which the calculation is made. Opportunity will be afforded the opposite party to cross-examine the witness upon the books and papers in question and to have them or such of them as the cross-examiner may desire and the court may permit on proper showing (or properly authenticated or proved copies), produced in court for the purposes of the cross-examination.

In the case of an official record required by law, regulation, or custom to be preserved on file in a public office, a duly authenticated copy is admissible to the extent that the original would be, without first proving that the original has been lost or destroyed, and without otherwise accounting for the original. Only an exact copy of the official record is admissible under this rule, although it may consist merely of an extract of those portions material to the case. The copy may be made by photographic process. A certified résumé of the matters set forth in an official record is generally inadmissible. However, when the head of an executive establishment, department or independent agency, or a person designated by him for the purpose, shall certify that it is contrary to public policy to divulge the source of official knowledge of a certain fact or event or to divulge the text of a particular record, a certificate by that person of such fact or event as officially recorded in any book, record, paper or document on file in the establishment, department or agency, or in any bureau, branch, force, command or unit thereunder, is prima facie evidence of such fact or event.

In any case in which the identity of the accused as a member of the military service is in issue, his identity may be established, prima facie, by the certificate of The Adjutant General or one of his assistants that a duly qualified fingerprint expert on duty as such in his office has compared the fingerprints submitted as those of the accused with the fingerprints of a person in the military service, described by name, organization and serial number, and that such fingerprints have been found to be those of one and the same person. The fingerprints forwarded to The Adjutant General may be identified as those of the accused by the testimony of the person who took them or by someone who was present at the time they were taken. See also 142 and 183*a*.

A duly authenticated certificate or statement signed by an officer having the custody of an official record, or by his deputy, that after diligent search no record or entry of a specified tenor is found to

exist in the records of his office is admissible as evidence that the records of his office contain no such record or entry. It is also proper to prove that an official record contains no entry as to a particular fact in issue or that there is no official record as to such fact by the testimony of the custodian of the official record in question, or his deputy.

*b. **Authentication of writings.**—General.*—In order to prove that a writing is what it purports to be, in the case of a private letter, the person who received the letter should testify that he received it, and he should identify it. Then it should be proved that the signature is in the handwriting of the purported writer of the letter. But in proving the genuineness of letters the rule is that the arrival by mail of a reply purporting to be from the addressee of a prior letter duly addressed and mailed is sufficient evidence of the genuineness of the reply to justify its introduction in evidence. A similar rule prevails as to telegrams purporting to be from the addressee of a prior telegram or telephone message. A reply, however, is not to be considered as evidence of the genuineness of the message to which the reply was purportedly made.

Whenever the genuineness of the handwriting of any person may be involved, as when it is desired to introduce in evidence against an accused a pay voucher (or admissible photostatic copy thereof) purportedly signed by him, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses or by the court to prove or disprove genuineness; but before admitting such specimens of handwriting, evidence should be offered raising a reasonable inference as to the genuineness of the specimens.

A failure to object to a proffered document on the ground that the genuineness of any signature appearing thereon has not been shown, or on the ground that the genuineness of the document in general has not been shown, may be regarded as a waiver of such objections.

Official Records.—An official record, or copy thereof, must be properly authenticated unless authentication is waived by a failure to object to its reception in evidence on that ground. Official records are generally proved by authenticated copies thereof. Originals are authenticated in the same manner as copies except that the attesting certificate states that the document is an original. In the case of a copy of an official record, an "attesting certificate" is a signed certificate or statement indicating that the paper in question is a true copy of the original and that the signer is the custodian of the original, or his deputy. An "authenticating certificate" is a signed certificate or statement indicating that the signer of the attesting certificate is who he purports to be or that the attesting certificate is in proper form, or containing words of like import.

A copy of an official record of the National Military Establishment, and of any executive department, or independent agency, and any

bureau, branch, force, command, or unit thereunder may be duly authenticated by the seal, inked stamp, or other identification mark of the establishment, department, agency, bureau, force, command or unit, or by an attesting certificate. Thus "A true (extract) copy: (Sgd) John Smith, Maj., Ass't Adjutant General, 1st Infantry Division.," would be sufficient, prima facie, to authenticate a document as a copy of an original record in the custody of the Adjutant General of the 1st Infantry Division.

A copy of an official record of the United States, of its Territories and possessions and their political subdivisions, and of the District of Columbia, may be duly authenticated by:

(1) Any indication under the great seal of the United States, or the seal of the Territory or possession in which the record is kept, or the seal of the District of Columbia in the case of records kept under its authority, that the document is a true copy (or the original).

(2) Any authentication provided for by any law of the United States, including rules of criminal procedure for the district courts of the United States made pursuant thereto, or by any law of the Territory or possession or political subdivision thereof in which the record is kept, or of the District of Columbia in the case of records kept under its authority.

A copy of an official record of any State of the United States, including its political subdivisions, may be duly authenticated by:

(1) Any indication, under the state seal of the State, that the document is a true copy (or the original).

(2) Any authentication provided for by the law of the State or of the political subdivision thereof in which the record is kept, or by any law of the United States, including rules of criminal procedure for the district courts of the United States made pursuant thereto.

A copy of an official record of any foreign country or political subdivision thereof may be duly authenticated by:

(1) Any indication, under the great seal of the foreign country, that the document is a true copy (or the original).

(2) Any authentication provided for by the law of the foreign country or of the political subdivision thereof in which the record is kept, or by any law of the United States, including rules of criminal procedure for the district courts of the United States made pursuant thereto.

(3) An authenticating certificate signed by a secretary of embassy or legation, consul general, consul, vice consul, or by any officer in the foreign service of the United States stationed in the foreign country in which the record is kept, under the seal of his office.

A copy of an official record of any foreign country or political subdivision thereof in which armed forces of the United States are stationed or through which they are passing or which is occupied by armed forces of the United States or any ally thereof may be authenticated by a certificate signed by the commander of the armed forces concerned, or his deputy for the purpose. If such authenticating commander, or his deputy, is not an officer of the armed forces of the United States, his authenticating certificate shall be accompanied by a certificate or statement signed by a commissioned officer of the armed forces of the United States indicating that the signer of the authenticating certificate is who he purports to be.

Copies of foreign official records and their authenticating certificates or statements, if written in a language other than English, should be translated through the testimony of one having knowledge of the language concerned. However, any translation accompanying and made a part of any certificate or statement may be received in evidence subject to objection by counsel or by any member of the court.

A certificate or statement signed by a custodian of an official record, or his deputy, that after diligent search no record or entry of a specified tenor is found to exist in the records of his office may be authenticated as above provided.

In addition to the methods of authentication above provided, an official record or a copy thereof may be authenticated by the testimony of any person, based on his personal knowledge, to the effect that the proffered document is a particular official record or that such document is a true and exact copy of the official record, as the case may be.

130. **DOCUMENTARY EVIDENCE; OFFICIAL WRITINGS; OFFICIAL RECORDS; BUSINESS ENTRIES; LIMITATIONS AS TO ADMISSIBILITY OF OFFICIAL RECORDS AND BUSINESS ENTRIES; MAPS AND PHOTOGRAPHS.**—*a.* ***Official writings.***—It is to be borne in mind that the mere fact that a document is an official writing or report does not in itself make it admissible in evidence for the purpose of proving the truth of the matters therein stated. An official writing may be admitted in evidence for this purpose only when it comes within one of the recognized exceptions to the hearsay rule.

b. ***Official records.***—An official statement in writing (whether in a regular series of records or a report) concerning a certain fact or event is admissible in evidence when the officer or other person making the writing had an official duty, imposed upon him by law, regulation or custom to record the fact or event or to know, or to ascertain through customary and trustworthy channels of information, the truth of the matters recorded. Any such record, including an official record compiled from mere notes or memoranda or from other official records, is

competent prima facie evidence of the fact or event, without calling to the stand the officer or other person who made it. For instance, the original of an enlistment paper, physical examination paper, outline-figure and fingerprint card, guard report, individual equipment record, service record, and morning report are competent evidence of the facts recited in them, except as to entries therein which the recording official obviously had no duty to record or concerning which he obviously had no duty to know or ascertain the truth. As to copies see 129*a* (Exceptions). However, as in the case of certain entries in a service record, an official record compiled from other official records is subject to objection on the ground that it is not the original record. See, however, in this connection 79*c* (Previous convictions) and 142 (Final indorsement on service record). A failure to object to an official record on the ground that the information therein contained is compiled from other official records may be regarded as a waiver of the objection.

It may be presumed, prima facie, that records emanating from official sources, foreign and domestic, concerning facts and events generally recorded by public officials of civilized states and nations, such as records of births, deaths and marriages, are records required by law, regulation or custom to be kept and that the person recording any such fact or event had the official duty to know or ascertain the truth therof.

c. ***Business entries.***—Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event if made in regular course of any business and if it was the regular course of such business to make such memorandum or record at the time of the act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility. The term "business," as used in this paragraph, includes business, profession, occupation and calling of every kind.

A business entry is properly authenticated by proof that it came from the cutody of and was made by or deposited in an office whose business it was to record the act, transaction, occurrence, or event set forth in the entry. It is not necessary that a business entry be authenticated (identified) by the person who made it or that the authenticating witness have personal knowledge that the entry was correct.

An entry made in the usual course of business is admissible even though it was not made or kept pursuant to any law or regulation.

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Tally sheets used by a post warehouse as a convenient business method of keeping account of military stores passing through it have been held admissible although no regulation, directive or order required that the tally sheets be made or kept.

*d. **Limitations as to admissibility of official records and business entries.***—Official records are admissible in evidence only insofar as they relate to a "fact or event" and the admissibility of business entries is limited to a memorandum or record of "any act, transaction, occurrence, or event" appearing therein. Records or entries of opinion are not admissible under either exception to the hearsay rule. Nevertheless, it is often difficult as a practical matter to draw the line between opinion and fact and some assertions based on trained observation which, strictly speaking, might be considered statements of opinion, so closely approximate statements of fact as to permit the law to place them in the latter category rather than the former. Thus an autopsy report containing the opinion of a pathologist as to the *physical* cause of death (as when he concludes that death was caused by a gunshot wound) is generally admissible in evidence. On the other hand, even though law or regulation may require a pathologist making an autopsy report to state whether the death was caused by homicide, accident or suicide, his entry in the autopsy report to the effect that death was caused by homicide is pure opinion and is not admissible as an official record.

Neither the official record nor the business entry exception to the hearsay rule renders admissible in evidence writings or records made principally with a view to prosecution or other legal action during the course of an investigation into alleged unlawful or improper conduct. Thus, neither the report of an investigating officer nor the accompanying summary of the testimony of a witness on a preliminary investigation of a charge is competent evidence of the truth of the facts therein stated. See, however, 127*a* (Confessions and admissions) and 139*b* (Impeachment). On the other hand, since it is not the function of a pathologist performing an autopsy to determine that the death was caused by any particular person or even that the death was the result of unlawful conduct, his entries in the autopsy report as to the identification of the individual upon whose body the autopsy was performed, as to the physical facts found to exist with respect to the corpse and as to the physical cause of death do not come within this limitation and such entries may be admissible under either the official record or business entry exception to the hearsay rule. Entries in morning reports as to absence without leave, desertion and the like, and entries in guard reports as to escape from confinement are not made primarily with a view to prosecution and are therefore not inadmissible because of this limitation.

*e. **Maps and photographs.***—Maps, photographs, sketches, and similar items relating to localities, wounds, persons, and like matters are admissible when properly verified by the person who took or made them, or by anyone personally acquainted with the locality, object, or person thereby represented or pictured, and able to state from his own personal knowledge or observation that they are correct, or that they represent the actual appearance of the subject matter in question. Such documents are also admissible when they come within either the official record or business entry exception to the hearsay rule. Fingerprints, upon proper verification, are admissible, but caution should be taken to use only witnesses skilled in interpreting fingerprints.

131. **DOCUMENTARY EVIDENCE; DEPOSITIONS; FORMER TESTIMONY.**—*a. **Depositions.**—General.*—See Articles 25 and 26. For procedure in taking depositions see 106. Any case referred to a special court-martial for trial under the first proviso of Article 13 is a case "not capital" within the meaning of Article 25. Under the second proviso of Article 25, a case is not capital, although the death penalty is authorized by law but is not mandatory for the particular offense, whenever the appointing authority shall have directed that the case be treated as not capital. Upon a rehearing or new trial a case is not capital within the meaning of Article 25, even though the death penalty is authorized by law but is not mandatory for the particular offense, if the authorized sentence adjudged upon the original hearing or trial was other than death and if no new capital offense is included in the charges and specifications alleged at the rehearing or new trial. See Article 52 (Rehearings). Although a particular offense charged in the case is punishable by death under the article of war denouncing it, the offense is not legally so punishable if the applicable limit of punishment prescribed by the President under Article 45 is less than death. See 117*c*.

Testimony taken by deposition may be introduced for the defense in capital cases if otherwise admissible. If the defense calls for such testimony in a capital case, the deponent may be cross-examined by written interrogatories or otherwise as fully as a witness in a case not capital. With the express consent of the defense made or presented in open court, but not otherwise, a court may admit deposition testimony not for the defense in a capital case.

Offering and Reading of Depositions.—If only a part of a deposition is offered in evidence by a party, the other party (including the prosecution in a capital case) may require him to offer all of it which is relevant to the part offered. If the party at whose instance a deposition has been taken decides not to offer it or offers only a part of it, the other party may offer the deposition or the parts not theretofore offered, except that, in a capital case, the prosecution may not

thus offer a deposition or parts thereof without the express consent of the defense made or presented in open court.

A deposition will ordinarily be read to the court by the side on whose behalf it is offered. At the reading objections may be made to the introduction of the evidence which it contains in the same way that they are made when evidence is offered in the usual manner. A failure to object, at the time interrogatories were submitted for acceptance to the court or at the time the deposition was taken, to the competency of the deponent, or to questions contained in written interrogatories or otherwise propounded, or to the admissibility of evidence contained in the deposition, shall not be considered a waiver of such objection nor shall a failure to note any such objection in the body of the deposition be considered a waiver thereof. If the court shall have ruled previously on such an objection at the time interrogatories were submitted to it for acceptance, it shall again pass upon the objection at the time the deposition is read, if requested to do so, without regard to its previous ruling.

The same rules as to the competency of witnesses and the admissibility of evidence apply to the introduction of evidence taken by deposition that apply to the introduction of other evidence before the court, except that a wider latitude than usual should be allowed as to leading questions upon written interrogatories. Also, whenever a business entry is properly authenticated by the testimony of a witness taken on deposition, a copy of the business entry, identified as such by the witness, may be substituted for the original. The copy will accompany and be part of the deposition and may be received in evidence equally with the original.

Except when express consent is required, failure to object to the introduction of a deposition on the ground that it was not authorized by Article 25 or was not taken before a proper officer or on reasonable notice may be regarded as a waiver of that objection. After being read to the court, a deposition will be properly marked as an exhibit with a view to incorporation in the record.

b. **Former testimony.**—As to use of the record of the proceedings of a court of inquiry, see Article 27.

When, at any trial by a court-martial, including a rehearing or new trial, it appears to the satisfaction of the court that a witness who has testified in either a civil or military court at a former trial of the same person in which the issues were the same as in the case on trial and the accused was confronted with the witness and afforded the right of cross-examination, is dead, insane, or too old or infirm to attend the trial, or is beyond the reach of process, or more than one hundred miles from the place where the trial is had, or can not be found, his testimony at the former trial, if properly proved, may be received by the court if otherwise admissible, except that such testimony of an absent witness

may not be introduced in evidence in a capital case without the consent of the accused unless the witness is dead, insane or beyond the reach of process. As to cases to be considered "not capital" see 131*a*.

The testimony of a witness who has testified at a former trial by court-martial may be proved by the record of the former trial or by a duly certified copy of so much of that record as contains the desired testimony, and, in any case, the testimony may be proved by the stenographic report of the testimony verified by the person by whom it was reported. If in any case other competent proof is not available, the former testimony of such a witness may be proved by any person who heard the same being given and who remembers all or substantially all of it.

If otherwise admissible, a deposition taken for use or used at a former trial by a court-martial is admissible in a subsequent trial of the same person on the same issues.

132. **DOCUMENTARY EVIDENCE; MEMORANDA; AFFIDAVITS.**—*a.* ***Memoranda.***—Memoranda may be used to supply facts once known but now forgotten or to refresh the memory. Memoranda are therefore of two classes: First, if the witness does not actually remember the facts or events but relies on the memorandum exclusively, as in the case of a witness using an old diary, then the witness must be able to state that the memorandum accurately represented his knowledge at the time of its making. It is not necessary that he should himself have made the memorandum if he can state from his present recollection that when the memorandum was made or made known to him at some time in the past his recollection was fresh as to the facts or events recorded, that the memorandum was made at or near the time of his observance of such facts or the occurrence of such events and that the memorandum was correct when made. If the certainty of the witness rests on his normal habit or course of business in making or perusing memoranda similar to the memorandum in question, this may be considered a sufficient foundation for the use of the memorandum. Second, if the witness can actually remember the facts or events and merely needs the memorandum to refresh his memory or a part of it, then the above limitations do not apply. Thus a witness may have his memory refreshed by showing to him while he is on the stand a newspaper account of an incident in which he was involved. However, the court should see to it that no attempt is made to use such a memorandum to give a false memory to a witness under the guise of refreshing it.

A memorandum of the first class is admissible. If the memorandum is of the second class, the witness will testify without the memorandum itself being admitted in evidence.

The memorandum to be used must always, on demand, be shown to the opponent for purposes of inspection and cross-examination.

b. Affidavits.—The general rule is that affidavits are not admissible as evidence of the truth of the matter therein stated, for they are hearsay assertions. However, the defense, if it so desires, may introduce affidavits or other written statements as to the character of the accused and as to matters in extenuation of a possible sentence. See also the exception in the second subparagraph of 124 (Interlocutory questions).

133. **JUDICIAL NOTICE; FOREIGN LAW.**—*a. Judicial notice.*—Certain kinds of facts need not be proved because the court is authorized to recognize their existence without proof. This recognition is termed judicial notice.

The principal matters of which a court-martial may take judicial notice are as follows:

The ordinary divisions of time, as years, months, weeks, and like periods; general facts and laws of nature, including their ordinary operations and effects; and general facts of history.

The political organization of the Government of the United States, of its Territories and possessions, of the District of Columbia, and of the several States of the United States, and their chief officials; the signatures and duties of persons attesting official documents, or copies thereof, made or kept under the authority of an executive department or independent bureau, agency or office of the United States.

The treaties of the United States and executive agreements between the United States and any State of the United States or between the United States and any foreign country; and current political conditions of war and peace.

The organic and public laws, including regulations having the force of law, the seals of courts of record, and the seals of public officers or offices of the United States, of its Territories and possessions and their political subdivisions, of the District of Columbia and of all States of the United States and their political subdivisions.

The public laws, or regulations having the force of law, in effect in any country or territory or political subdivision thereof occupied by the armed forces of the United States; the law of nations, including the law of war; the common law.

The great seals or seals of state of the United States, its Territories and possessions, the District of Columbia, the several States of the United States and foreign countries; the seals of notaries public, foreign and domestic.

The organization of the National Military Establishment and the departments, agencies, bureaus, branches, forces, commands and units thereunder, their locations, their seals, inked stamps or other identification marks and the regulations and official publications

pertaining thereto or issued thereby, including general orders, bulletins, circulars, price lists, and court-martial orders; the signatures and duties of persons attesting official documents, or copies thereof, of the National Military Establishment or of any department, agency, bureau, branch, force, command, or unit thereunder. If the court takes judicial notice of an official publication of a department, agency, bureau, branch, force, command, or unit of the National Military Establishment inferior to the Department of the Army, Navy, or Air Force, the record of trial must accurately reflect the content of the official publication, or portions thereof, so judicially noticed.

The principle of judicial notice does not prohibit the court from receiving evidence of a fact of which it is authorized to take judicial notice, and, if not satisfied of the fact of which it is asked to take judicial notice, it may resort to any authentic source of information. For example, if the terms of a circular of the Department of the Army are material, the court may send for a copy of the circular.

It is customary for the side desiring the court to take judicial notice of a fact to ask the court to do so, at the same time presenting any available authentic source of information on the subject. For example, when counsel asks the court to take judicial notice of the law of a State of the United States pertaining to a certain matter, he should furnish the court with an official publication of that State in the form of a statute book or book of reports or, if an official publication is not available, with a reliable textbook setting forth the particular law. If the court, in taking judicial notice, makes use of a document, the document, or pertinent extracts therefrom, should be included in the record of trial as an exhibit and the record should show affirmatively the matter of which judicial notice is taken.

*b. **Foreign law.***—With the exception of the law in effect in a country or territory occupied by the armed forces of the United States, a court-martial cannot take judicial notice of foreign law or foreign regulations having the force of law. Such law must be proved like any other fact. There are several ways of proving foreign laws and regulations. First, the laws of a foreign country or political subdivision thereof may be proved by the testimony of a person who is familiar with them through education or experience. Such a person may testify as to the content and interpretation of the foreign law in question or as to the correctness or genuineness of a text or official publication setting forth such law. Insofar as his testimony may relate merely to the content of a foreign law as set forth in the published statutes or regulations of the foreign country concerned (as distinguished from his testimony concerning an interpretation of any such law already properly in evidence or concerning customary law), it is subject to objection based on the best evidence rule. If such

an objection is made, an official publication of the statute or regulation in question should be produced. Second, foreign laws may be proved by official publications in which they are set forth, such as statute books, books of reports, journals or gazettes published by the foreign country concerned, or pamphlets, circulars, and similar publications of the Department of the Army or of any department or agency of the United States. Pamphlets, circulars, and similar publications of the Department of the Army, or of any department or agency of the United States, setting forth foreign law are not subject to objection on the ground of the best evidence rule. Third, textbooks or commentaries written by professionally qualified persons may be received as evidence of foreign law to the same extent as parole testimony.

Official legal publications are to be treated as official records and may be authenticated as are other official records. See 129*b*. However, it may be presumed, prima facie, that publications containing evidence of foreign law, obtained from a public office, are what they purport to be, that is, that they are official publications, or texts written by professionally qualified persons, as the case may be. This presumption applies whether or not the public office from which such a publication is obtained is located in the country the law of which is sought to be proved. A signed certificate or statement by the public officer having custody of the publication that it was in his custody and obtained from his office will sufficiently establish those facts. When necessary, the certificate or statement can be authenticated as though the publication of foreign law was an official record kept in the public office from which it was obtained. See 129*b*. If a publication containing evidence of foreign law is proffered, a failure to object to it on the ground that it is improperly authenticated may be considered a waiver of the objection.

When a document containing evidence of foreign law is in a language other than English, it should be translated as in the case of foreign official records. See 129*b*. In any case in which a foreign law is proved by a document which is to be returned to the custodian thereof at the conclusion of the trial, pertinent extracts therefrom, or a proved or admitted translation of the document or extracts, may be included in the record of trial as an exhibit in lieu of the original.

134. **COMPETENCY OF WITNESSES.**—*a.* ***General.***—The general capacity, mental and moral, of an adult witness is always presumed. The party alleging the contrary must always prove to the court a specific ground of incapacity or else the witness should be allowed to testify. The burden of proof rests upon the party who alleges incompetency.

Any known objection to the competency of a witness should be made before he is sworn. If his incompetency should later appear,

however, a valid objection should be sustained or the court of its own motion should refuse to hear him further and order that any testimony he may have given be disregarded.

b. Children.—The competency of children as witnesses is not dependent upon their age, but upon their apparent sense and their understanding of the moral importance of telling the truth. Such sense and understanding may appear upon such preliminary questioning of the child as the court deems necessary or from the appearance of the child and testimony that he gives in the case. The court should make sure that any child witness under the age of 14 years understands the difference between truth and falsehood and is aware of his obligation to tell the truth.

c. Conviction of crime.—Conviction of an offense does not disqualify a witness but may be shown to diminish his credibility. See 139*b* (Impeachment).

d. Interest or bias.—Interest or bias does not disqualify. For instance, the fact that a person owes a party money or has a property interest with or against a party does not disqualify him from testifying for or against that party. A person who is an avowed friend or enemy of the accused, or who is an enemy national, is not thereby disqualified from testifying for or against the accused.

Husband and wife are competent witnesses in favor of each other. Although husband and wife are competent witnesses against each other, the general rule is that either spouse may assert a claim of privilege against the use of one of them as a witness against the other. This privilege does not exist, however, when the husband or wife is the individual or one of the individuals injured by an offense charged against the other, as in a prosecution for bodily injuries inflicted by one upon the other, for bigamy, polygamy, unlawful cohabitation, abandonment of wife or children or failure to support them, or for using or transporting the wife for "white slave" or other immoral purposes. When the privilege does exist, it may be waived with the consent of both spouses to the use of one of them as a witness against the other. See 137*b* as to the privilege relating to communications between husband and wife.

The accused is at his own request, but not otherwise, a competent witness. His failure to make such a request shall not create any presumption against him. Upon taking the stand as a witness he occupies no exceptional status. The same rules as to the admissibility of evidence, privilege of the witness, impeachment of his credibility, and similar matters will apply to him as to any other witness. As to cross-examination of the accused, see 135*b*.

One of two or more accomplices or conspirators is competent to testify, whether he be charged jointly or separately or not at all and

whether he be tried jointly, in common, or separately, and whether he be called for the prosecution or for the defense; except that he can not, if he is an accused in the same trial, be called except upon his own request, and if not himself an accused in the trial he may assert his privilege not to incriminate himself. See in this connection, 127*b* (Acts of conspirators) and 136*b* (Compulsory self-incrimination).

The fact that an accomplice testifies for the prosecution does not make him afterwards immune from trial except to the extent that immunity may have been promised him by an authority competent to order his trial by general court-martial. The fact that a witness has obtained a promise of immunity without which he may not have been willing to testify does not disqualify him as a witness.

135. **EXAMINATION OF WITNESSES.**—*a.* ***General.***—As to oaths of witnesses, see 103 and Article 19. When a witness is recalled to the witness stand, he will not be sworn again, but should be reminded that he has been sworn in the case and is still under oath. A failure so to remind him, however, does not affect the validity of the trial and will not be ground for rejecting the testimony.

Subject to the discretion of the court, a witness before completing his testimony is not ordinarily permitted to be present in court during the introduction of other evidence or during the opening statements. The fact that a witness was so present may be commented upon in argument by either party, in relation to the weight to be given the evidence of the witness.

Witnesses are usually examined in the following order: Witnesses for the prosecution, witnesses for the defense, witnesses for the prosecution in rebuttal, witnesses for the defense in rebuttal, witnesses for the court. The order of examining each witness is usually direct examination, cross-examination, redirect examination, recross-examination and examination by the court However, the court may permit the recall of witnesses, including an accused, at any stage of the proceedings; it may permit material testimony to be introduced by either party out of its regular order and place, and may permit a case once closed by either or both sides to be reopened for the introduction of testimony previously omitted.

The court should not excuse a witness until satisfied that neither party has any further questions to ask him.

Refusal by a witness to answer a proper question is a military offense or an offense under Article 23, according to whether the witness is subject to military law.

It is never necessary for a party to ask questions through the court or ask that the court adopt a question.

A witness should be required to limit his answer to the question asked. He can not, however, he required to answer categorically by

a simple "yes" or "no" unless it is clear that such an answer will be a complete response to the question. A witness may always be permitted at some time before completing his testimony to explain any of his testimony.

The reason for any objection will ordinarily be stated.

With reference to questioning witnesses through an interpreter, see 47 (Duties of interpreter).

*b. **Cross; redirect and recross-examination; examination by the court or a member.**—Cross-examination.*—Cross-examination of a witness is a matter of right. It should, in general, be limited to the issue concerning which the witness has testified on direct examination and to the question of his credibility. Cross-examination is necessarily exploratory and full latitude should be allowed the cross-examiner. The extent of cross-examination with respect to a legitimate subject of inquiry is, however, within the sound discretion of the court. Leading questions may be used freely on cross-examination.

No obligation is imposed upon the court to protect a witness, whatever his office, rank, grade, or station in life, from being discredited upon cross-examination, short of military disrespect or an attempted invasion of his right not to incriminate himself or an attempt to degrade him in connection with immaterial matters. On the question of his credibility, the witnesss may be cross-examined as to his relationship to the parties and to the subject matter of the case, his interest, motives, inclinations, and prejudices, his means of obtaining a correct and certain knowledge of the facts about which he testifies and the manner in which he has used those means, his powers of discernment, memory, and description and other matters which affect his credibility. He may be asked in a proper case whether he has expressed animosity toward the accused, or whether on a previous occasion he made a statement materially different from that embraced in his testimony. See generally, 139*b* (Impeachment of witnesses).

An accused person taking the stand as a witness becomes subject to cross-examination. So far as the latitude of the cross-examination is discretionary with the court, a greater latitude may properly be allowed in his cross-examination than in that of other witnesses. When the accused testifies in denial or explanation of any offense, the cross-examination may cover the whole subject of his guilt or innocence of that offense. Any fact relevant to the issue of his guilt of such offense or relevant to his credibility as a witness is properly the subject of cross-examination. The accused can not avail himself of the privilege against self-incrimination to escape proper cross-examination concerning an offense about which he has testified.

When an accused is on trial for a number of offenses and on direct examination has testified about only one or some of them, his cross-examination must be confined to matters having a bearing upon the offense or offenses about which he has testified and upon his credibility. If an accused testifies on direct examination only as to matters in extenuation and having no bearing on the issue of his guilt or innocense of any offense for which he is being tried, as when he testifies as to the incidents and duration of his military service or as to his family responsibilities and difficulties, he may not be cross-examined on the issue of his guilt or innocence and his cross-examination must be so limited. If an accused testifies on direct examination only as to the involuntary nature of his confession or admission, the cross-examination must be limited to that issue and his credibility. On cross-examination on this issue he may not be required to state whether his confession or admission was true or false.

Redirect and Recross-Examination.—Ordinarily the redirect examination will be confined to matters brought out on the cross-examination, and the recross-examination will be confined to matters brought out on the redirect examination. But in these matters the court, in the interest of truth and justice, should be liberal in relaxing the rule.

Examination by the Court or a Member.—The court and its members may ask a witness any questions that either side might properly ask the witness. If new matter, not properly the subject of cross-examination of the witness on his previous testimony, be elicited by questions of the court or its members, both parties will be permitted to cross-examine the witness upon the new matter.

In questioning an accused the court and its members must confine themselves to questions which would have been admissible on cross-examination of the accused by the prosecution.

Questions by the court or its members and evidence elicited thereby are subject to objection on proper grounds by either side and by members of the court.

c. ***Leading questions; ambiguous and misleading questions; other objectionable questions.***—*Leading Questions—General Rule.*—Leading questions are questions which either suggest the answer it is desired the witness shall make, or which, embodying a material fact, are susceptible of being answered by a simple yes or no. A leading question except on cross-examination should be excluded upon proper objection. For example, if a knife is introduced in evidence a witness should not be asked on direct examination whether it is the knife with which he saw the accused stab Private A. He should be asked first whether he recognizes the knife, and if he answers that he does, then he may be asked where he saw it, and what was done with

it. A question may be none the less leading, even though it includes the prefatory phrase "Did you or did you not?"

Exceptions.—To abridge the proceedings, the witness may be led at once to points on which he is to testify. The rule is therefore not applicable to that part of the examination of a witness which is purely introductory. For example, in a desertion case the policeman who supposedly apprehended the accused may be asked whether at a certain time and place he saw the accused.

When a witness appears to be hostile to the party calling him or is manifestly unwilling to give evidence, the court may, in its discretion, permit the party calling him to use leading questions. In this connection, see 139*b* (Impeachment).

When it appears that a witness has made an erroneous statement through a mere slip of the tongue, his attention may be directed to the matter by a leading question in order to afford him an opportunity to correct the statement if he so desires.

When, from the nature of the case, the mind of the witness can not be directed to the subject of the inquiry without a particular specification of it, a leading question may be asked for that purpose. Thus, if a witness testified that he heard the accused make a certain statement on a certain occasion in the hearing of certain other persons, and such persons are called to contradict the witness, each of them may be asked whether he heard the accused make the statement.

In other cases the court, in its discretion, may allow liberal departures from the rule, as when a witness is obviously embarrassed and is timid through fear of strange surroundings or when the witness, because of his age or mental infirmity, is laboring under obvious difficulties in directing his mind toward the subject matter of inquiry. However, the court must always be careful, in departing from the rule, not to allow an untruthful witness an opportunity to shape his testimony as he thinks the questioner desires, or the reverse, or to conform to the testimony of other witnesses from suggestions he may gather during his examination, and not to allow either the trial judge advocate or counsel for the accused on direct examination to intimate to a witness that his testimony on a material point is wrong, or ought to be changed, except within the limits indicated above.

As to the use of memoranda to refresh recollection, see 132*a* (Memoranda).

Ambiguous and Misleading Questions.—A question which is ambiguous or misleading should never be permitted either on direct or cross-examination. Such a question is unfair to a witness, who may thereby be led into making an unintentional mistatement. Moreover his answer may give a wrong impression to the court. Included in

ambiguous or misleading questions are those embodying two or more separate elements or questions. Thus the question "Did you see the accused leave the quarters with a bundle under his arm?" really contains four questions. Under certain circumstances the affirmative or negative answer of the witness might be intended to apply to only one of the four questions involved and might be understood by the court to apply to all of them. Also included are questions which assume a fact to which the witness has not previously testified. Thus the question "When you saw the accused was anyone with him?" would be improper unless the witness has previously testified that he had seen the accused.

Other Objectionable Questions.—Questions should not be asked for the purpose of suggesting matters known not to exist or that the rules of evidence clearly make inadmissible. See also 75*a* (Duties of court) and 136 (Immaterial, Degrading, and Incriminating Questions).

136. **IMMATERIAL, DEGRADING, AND INCRIMINATING QUESTIONS.**—*a.* ***Immaterial questions and compulsory self-degradation.***—Under Article 24 no witness or deponent need answer any question not material to the issue or when such answer (to a question not material to the issue) might tend to degrade him. The privilege against compulsory self-degradation applies only to matters not material to the issue, whereas the privilege against compulsory self-incrimination covers all matters whatsoever. A question is material to the issue when the answer thereto might be expected to have some bearing upon any subject of inquiry legitimately before the court, including the credibility of witnesses. Whenever a witness refuses to answer a question on the ground that it is immaterial (or on the ground that it is immaterial and the answer thereto might tend to degrade him), the court shall determine whether the question is or is not material and, if the court rules that the question is material, the witness may be required to answer it.

b. ***Compulsory self-incrimination.***—The fifth amendment to the Constitution of the United States provides that in a criminal case no person shall be compelled "to be a witness against himself." The principle embodied in this provision applies to trials by courts-martial and is not limited to the person on trial, but extends to any person who may be called as a witness. See Article 24 as to the prohibition against compelling a witness to incriminate himself or to answer any question the answer to which may tend to incriminate him.

If a witness states that the answer to a question might tend to incriminate him, he will not be required to answer the question unless it clearly appears to the court that no answer to the question could have that effect.

Although an answer to a question apparently would incriminate or tend to incriminate a witness, he cannot refuse to answer if, for instance, with respect to the offense as to which the privilege is asserted, he might successfully plead the statute of limitations, former trial, or similar defenses (67, 68, and 69). As to waiver of the privilege by an accused testifying in his own behalf, see 135*b* (Cross-examination).

The privilege of a witness to refuse to respond to a question the answer to which may incriminate him is a personal one, which the witness may exercise or waive as he may see fit. It is not for the trial judge advocate or accused to object to the question or to check the witness, or for the court to exclude the question or direct the witness not to answer, although the court should advise an apparently uninformed witness of his right to decline to make any answer which might tend to incriminate him.

The prohibition against compelling one to give evidence against himself is a prohibition of the use of physical or moral compulsion to extort communications from him and not an exclusion of his body as evidence when it is material. It follows that it would be appropriate for the court to order the accused to expose his body for examination by the court or by a surgeon who would later testify as to the results of his examination. Upon refusal to obey the order, the clothing of the accused may be removed by force. The accused may likewise be compelled to try on clothing or shoes, or to place his bare foot in tracks, or to submit to having his fingerprints made.

137. **PRIVILEGED AND NONPRIVILEGED COMMUNICATIONS.**—*a.* ***General.***—A privileged communication is one that relates to matters occurring during a confidential relation which it is the public policy to protect. A witness can decline to answer a question touching such a communication, and if the privilege is that of the accused, or of the Government, or of any person other than the witness, the court will not permit the witness to answer the question, except with the consent of the person entitled to the benefit of the privilege or of the proper governmental authorities, as the case may be.

b. ***Certain privileged communications.***—*State Secrets and Police Secrets.*—Communications made by informants to public officers engaged in the discovery of crime are privileged. The deliberations of courts and of grand and petit juries are privileged, but the results of their deliberations are not privileged. Diplomatic correspondence, and, in general, all oral or written official communications, the disclosure of which would, in the opinion of the head of the executive department or independent agency concerned, be detrimental to the public interest, are privileged.

The privilege that extends to communications made by informants to public officers engaged in the discovery of crime should be given a

common-sense interpretation, keeping in mind both the public interest and the interest of the accused.

Communications between Husband and Wife, Attorney and Client, and Chaplain and Communicant.—Confidential communications between husband and wife are privileged. This privilege may be claimed, or waived, only by the communicating spouse and not by the spouse to whom the communication was made. Consequently, the spouse to whom the communication was made may not testify concerning it unless the other consents. See also 134*d* (Interest or Bias).

The testimony of an attorney or his interpreter, clerk, stenographer, or other associate as to communications between the client and the attorney, made while the relation of attorney and client existed and in connection with the matter for which the attorney was engaged, will not be received by a court, unless such communications clearly contemplate the commission of a crime; for example, perjury or subornation of perjury. Of course, communications prior or subsequent to the relation are not privileged. The client, but not the attorney, may waive this privilege. Communications between an accused and military or civilian counsel detailed, assigned, or otherwise engaged to represent an accused before a court-martial or during the course of an investigation of charges are privileged.

A communication from a person subject to military law to an Army chaplain of any denomination made in the relationship of priest or clergyman and penitent, either as a formal act of religion or as a matter of conscience to a chaplain in his capacity as a priest or clergyman, is privileged against disclosure by the chaplain, or by his interpreter or any of his assistants, unless the privilege is expressly waived by the person making the communication.

The purpose of the privilege extended to communications between husband and wife, attorney and client, and chaplain and communicant, which grows out of a recognition of the public advantage that accrues from encouraging free communication in such circumstances, is not disregarded by allowing outside parties (not an interpreter, clerk, or other associate of an attorney or an assistant or interpreter to a chaplain who overhear or see such privileged communications, either by accident or design, but without the connivance of the person to whom the communication was addressed, to testify to what they have overheard or seen.

Confidential and Secret Evidence.—The officers of the Inspector General's Department are confidential agents of the Secretary of the Army or of the commander on whose staff they are serving. Their investigations are confidential unless a different procedure is prescribed by the authority ordering the investigation. Reports of such investigations and their accompanying testimony and exhibits are

likewise confidential and there is no authority of law or practice requiring that any persons be furnished with copies thereof. However, when application is made to the authority ordering the investigation for permission to use in a trial by court-martial testimony or exhibits accompanying a report of investigation, which testimony or exhibits have become material in the trial, he should ordinarily approve such application unless the testimony or exhibits requested contain state secrets or unless, in the exercise of a sound discretion, he is of the opinion that it would be contrary to public policy to divulge some or all of the information desired.

*c. **Certain nonprivileged communications.**—Communications by Wire or Radio.*—Private communications are not privileged because transmitted by wire or radio and the information concerning them that comes to the knowledge of operators, either military or civil, of any such means of transmission is likewise not privileged. Wire or radio operators, military and civil, may be ordered or subpoenaed to testify before a court-martial as to private wire or radio communications, and private telegrams and radiograms may be brought before a court-martial by the usual process. But see 138.

Communications to Medical Officers and Civilian Physicians.—It is the duty of medical officers of the Army to attend officers and soldiers when sick, to make the annual physical examination of officers, and to examine recruits for enlistment, and they may be specially directed to observe an officer or soldier or specially to examine or attend him. Such observations, examination, or attendance would be official and the information acquired would be official. While the ethics of the medical profession forbid them to divulge to unauthorized persons the information thus obtained and the statements thus made to them, such information and statements do not possess the character of privileged communications.

Communications between civilian physician and patient are not privileged.

138. **CERTAIN ILLEGALLY OBTAINED EVIDENCE.**—Evidence obtained as a result of an unlawful search (see 18 USC 2236) of the property of an accused conducted or instigated by persons acting under authority of the United States, and evidence obtained as a result of interception by any person, not being authorized by the sender, of a communication by wire or radio, unless such means of transmission is part of or is being used by a military communication system, is inadmissible in a trial by court-martial. All evidence obtained through information supplied by such illegally obtained evidence is likewise inadmissible.

A search of property owned or controlled by the United States, or located in a foreign country or in occupied territory and occupied or

used by persons subject to military law or to the law of war, which search has been authorized by the commanding officer having jurisdiction over the locality where the property is situated or, if the property is situated in a foreign country or in occupied territory, over personnel subject to military law or to the law of war in such locality, is lawful.

139. **CREDIBILITY OF WITNESSES; IMPEACHMENT OF WITNESSES.**—*a. Credibility of witnesses.*—The credibility of a witness is his worthiness of belief, and is determined by his character, by the acuteness of his powers of observation, the accuracy and retentiveness of his memory, his general manner in giving evidence, relation to the matter in issue, appearance and deportment, friendships and prejudices, general reputation for truth and veracity in the community in which he lives, and by comparison of his testimony with other statements made by him out of court or testimony of others, and by evidence of a similar nature. See in this connection, 135*b* (Cross-examination). The court may draw its own conclusions as to the credibility of a witness and attach such weight to his evidence as his credibility may warrant.

There may be cases in which the court would be justified in attaching no weight at all to the testimony of a witness or in which the court would not be warranted in accepting certain testimony as sufficient to establish the guilt of an accused. For example, a conviction should not be based on the contradictory, uncertain, or improbable testimony of but one witness if the contradiction or other fault is not explained. A conviction may be based upon the uncorroborated testimony of an accomplice, but such testimony, even though apparently credible, is of doubtful integrity and is to be considered with great caution.

In general, a witness gains no corroboration merely by repeating his statements a number of times to the same effect. Hence, similar statements made by a witness prior to the trial consistent with his present testimony are in general not admissible to corroborate him. But this is only a general rule, and there are some situations in which such statements, having a real evidential value, are admissible. If the testimony of a witness has been attacked on the ground that it was due to an influence created by a matter which came into existence after the happening of the event to which such testimony relates, evidence of his statements or conduct, consistent with his testimony, made or occurring before the creation of that influence should ordinarily be received. For example, if a witness is impeached on the ground of bias due to a quarrel with the accused, the fact that before the date of the quarrel he made an assertion similar to his present testimony tends to show that his present testimony is not due to bias. If his impeachment is sought on the ground of collusion or corruption consistent statements

made prior to the imputed or admitted collusion or corruption may have such evidential value as to make them admissible, and if his testimony is attacked on the ground that he made a prior inconsistent statement or on the ground that such testimony was a fabrication of recent date, evidence that he made a consistent statement before there was a motive to misrepresent, and before any imputed or admitted inconsistent statement, may be received.

If a witness testifies as to the identity of the accused as the person who committed, or did not commit, the offense in question, such testimony may be corroborated, even though the credibility of the witness has not been directly attacked, by proof that the witness made a similar identification with respect to the accused on a previous occasion. See as to corroboration of victim in sex offenses, 128*c* (Fresh Complaint). See also 126*a* (Hearsay Rule).

b. ***Impeachment of witnesses.***—*General.*—Impeachment signifies the process of attempting to diminish credibility. The credibility of any witness, including an accused, may be attacked.

The general rule is that a party is not permitted to impeach his own witness; that is, deliberately to attempt to discredit him. Such inconsistencies, however, as incidentally develop between witnesses for the same side are not impeachments. The general rule is subject to a few exceptions. If a party is compelled to call a witness whom the law or circumstances of the case make indispensable, or if a witness proves unexpectedly hostile to the party calling him, the party is permitted to impeach the witness. In the latter case it must first appear that the witness is hostile and that the party calling him has been surprised by the evidence given by the witness. The witness may then be asked if he has previously made statements inconsistent with his testimony, the time, place and circumstances of the making of such statements being described to him in detail, and upon his denial, or if he testifies that he does not remember whether he made them or not, witnesses may be called to prove that he did make them.

If surprise is the only reason for permitting a party to impeach his own witness, the party may attack the credibility of the witness only by proof of prior inconsistent statements and may not show that the witness has a poor reputation for truth and veracity, that the witness has been convicted of crime or similar facts. The surprise which will allow a party to impeach his own witness must be actual, not feigned, surprise.

Witnesses for the court are not witnesses for the prosecution or defense and may be impeached by either side.

Various Grounds—General lack of veracity.—When impeachment of a witness on this ground is undertaken, the impeaching evidence must be limited to evidence of his general reputation for truth and veracity

in the community in which he lives or pursues his ordinary profession or business. In the military service "community" may include the organization, post, or station of the witness. Personal opinion as to character is not admissible, except that a witness may, after testifying that he knows the reputation of the person in question as to truth and veracity in the community in which he resides or pursues his ordinary profession or business, and that such reputation is bad, be further asked whether or not from his knowledge of such reputation he would believe the person in question on oath. After such impeaching evidence, evidence that the general reputation of the witness for truth and veracity in such community is good may be used in rebuttal. Testimony concerning the general reputation of a witness as to truth and veracity in the community in which he lives or pursues his ordinary business or profession must come from a person having personal knowledge of such reputation by reason of having himself lived or pursued his ordinary business or profession, or having served, in the community in question.

Conviction of Crime.—Evidence of conviction of any crime, whether by a civil or military court, is admissible for the purpose of impeachment if the crime involves moral turpitude or is such as to affect the credibility of the witness. Proof of such conviction may be made by the original or an admissible copy of the record thereof, or by an admissible copy of the order promulgating the sentence. Before introducing such proof, the witness must first be questioned with reference to the conviction sought to be shown, in order that he may have an opportunity of denying or of admitting and explaining it. If the witness admits the conviction, other proof is unnecessary. Evidence relating to an offense not involving moral turpitude or affecting the credibility of the witness should be excluded.

It is not permissible to show commission of a crime for purposes of impeachment other than by proof of conviction of the crime. In a prosecution for rape, or assault with intent to commit rape, any evidence, otherwise competent, tending to show the unchaste character of the alleged victim is admissible on the issue of the probability of her having consented to the act charged and on the question of her credibility, and for this purpose evidence of her lewd habits, ways of life or associations, and of her specific acts of illicit sexual intercourse or other lascivious acts with the accused or with others, is admissible without proof of conviction of any crime involved. The court, in the exercise of a sound discretion, may reject such evidence if it is so remote in point of time as to be clearly and logically irrelevant. Thus, upon cross-examination of the victim in a rape case, it would be proper for the court to exclude a question as to whether she had ever participated in sexual intercourse before the alleged rape. On the

other hand it would be improper to prohibit an attempt, upon her cross-examination or otherwise, to show that she was engaged in the business of prostitution at or about the time of the alleged rape.

For the purpose of impeachment it may be shown by cross-examination or otherwise that the witness is in custody and that his testimony was affected by fear or favor growing out of his detention.

Inconsistent Statements.—A witness may be impeached by showing by any competent evidence that he has previously made a statement inconsistent with his testimony on the stand. The foundation for the introduction of evidence of the making of an inconsistent statement must first be laid by asking the witness on cross-examination if he did not make the inconsistent statement, at the same time directing his attention to the time and place of the statement and the person to whom it was made. If the witness admits making the statement, no other proof that he made it is admissible. If he denies making the statement or testifies that he does not remember whether he made it or not, evidence that he made it may be introduced.

If the inconsistent statement is contained in a writing signed by the witness, the writing may be shown to the witness, and he may be asked to identify his signature thereon. If he admits his signature, the writing then becomes admissible in evidence. If he does not admit his signature, it may be otherwise proved, and the writing will then become admissible in evidence. An oral statement of a witness which has been reduced to writing may be related in evidence, without accounting for the writing, by anyone who heard him make it. As to a statement through an interpreter, see 127*c*.

It is to be borne in mind that proof that a witness not the accused made an inconsistent statement is admissible only for the purpose of impeaching him. Such proof is not to be received as tending to establish the truth of the matters contained in the statement, unless, of course, the witness testifies that his inconsistent statement is true (not merely that he made it) and thus adopts such statement as part of his testimony.

The fact that the inconsistent statement was made in the course of an investigation or at another trial does not cause proof of the making of the statement to be inadmissible for purposes of impeachment. However, neither an accused who has testified in his own behalf nor any witness may be cross-examined upon, or impeached by proof of, any statement which was obtained from him by the use of coercion or unlawful influence (A. W. 24).

Proof of the making of an inconsistent statement relating only to a collateral fact not in issue in the case is inadmissible.

A witness has a right to explain any apparently inconsistent statement previously made by him and may, if excused from the stand, be recalled for that purpose.

A witness who refuses to testify as to a certain fact (as when he relies on his right not to incriminate himself) or who testifies that he has no recollection as to such fact, cannot be impeached by proof that at some other time he made a statement as to the fact in question. The reason for this rule is that proof of his former statement would not serve to contradict his testimony or lack thereof. See 132*a* as to the use of a memorandum when a witness claims a failure of memory.

Prejudice and Bias.—Prejudice, bias, friendship, former quarrels, relationship, and similar facts may be shown to diminish the credibility of the witness, either by the testimony of other witnesses or by cross-examination of the wintess himself.

Effect of Impeaching Evidence.—Whether the credibility of a witness has been successfully impeached is ordinarily a question to be determined by each member of the court. Consequently, the law member of a general court-martial, or the president of a special court-martial (or the majority of the members thereof) should not sustain a motion to strike from the record or to disregard otherwise the testimony of a particular witness simply because impeaching evidence with respect to the witness or his testimony has been introduced.

140. **MISCELLANEOUS MATTERS; INTENT; STIPULATIONS; OFFER OF PROOF; WAIVER OF OBJECTIONS.**—*a.* ***Intent.***—In certain offenses, such as larceny, burglary and desertion, a specific intent is necessary. In others, such as murder, a particular frame of mind must be proved—premeditation in the case of murder punishable by death—malice aforethought in all cases of murder. In those cases the specific intent or frame of mind may be established either by independent evidence, as, for example, words proved to have been used by the offender, or by circumstantial evidence, as by inference from the act itself.

In still other offenses, as sleeping on post, drunkenness on duty, neglect of duty, and absence without leave, specific intent is not an element, and proof of the act alone is sufficient to establish guilt. Other illustrations and details as to evidence of intent in the more usual cases are included in Chapter XXIX (Punitive Articles).

Drunkenness.—It is a general rule of law that voluntary drunkenness, whether caused by liquor or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent or state of mind, when a particular intent or state of mind is a necessary element of the offense.

Evidence of drunkenness should be carefully scrutinized, as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act.

In courts-martial, evidence of drunkenness of the accused may be admitted on the question of the measure of punishment to be awarded in the event of conviction even though in the particular case the intent or state of mind of the accused is not in issue.

As to proof of drunkenness, see 125*b* (Opinion Evidence) and 173 (Drunkenness on duty).

Ignorance of Fact.—Ignorance or mistake of fact will exempt a person from criminal responsibility, provided always it is an honest ignorance or mistake and not the result of carelessness or fault on his part. Examples appear in Chapter XXIX (Punitive Articles).

Ignorance of Law.—Ignorance of the law, or of regulations or directives of a general nature having the force of law, is not an excuse for a criminal act. However, before a person can properly be held responsible for a violation of any such order or directive of any command inferior to the Department of the Army or the headquarters of an overseas theater or overseas or Territorial department (with respect to personnel stationed or having duties within such theater or department), it must appear that he knew of the order or directive, either actually or constructively. Constructive knowledge may be found to have existed when the order or directive was of so notorious a nature, or was so conspicuously posted or distributed, that the particular accused ought to have known of its existence.

The rule that ignorance of the law is not an excuse may be partially relaxed by courts-martial in a trial for purely military offenses of soldiers recently enlisted. For example, a recruit might be permitted to show that certain articles of war had never been read to him as required by Article 110. Although such evidence would not amount to a defense, it could be regarded by the court as an extenuating circumstance.

b. ***Stipulations.***—*As to Facts.*—The parties may make a written or oral stipulation of the existence or nonexistence of any fact. A stipulation need not be accepted by the court and should not be accepted if any doubt exists as to the understanding of the accused as to what is involved. If an accused has pleaded not guilty and the plea still stands the court should not accept a stipulation which practically amounts to a confession. A stipulation of a fact which if true would operate as a complete defense to an offense charged should not ordinarily be accepted by the court. In a capital case and other important cases a stipulation should be closely scrutinized before acceptance. The court is not bound by a stipulation even if received. For instance its own inquiry may convince the court that the stipulated fact is not true. The court may permit a stipulation to be withdrawn. If so withdrawn, it is not effective for any purpose.

As to Testimony and Documentary Evidence.—The parties may stipulate that if a certain person were present in court as a witness, he would give certain testimony under oath. See 52*c* in this connection (stipulation which warrants denial of continuance). Such a stipulation does not admit the truth of the indicated testimony, nor does it add anything to the weight of the testimony. Stipulated testimony may be attacked or contradicted or explained in the same way as though the witness had actually so testified in person. The principles as to acceptance and withdrawal of stipulations as to facts apply here; but the court may be more liberal in accepting stipulations as to testimony.

Subject to the same observations as to stipulations of testimony, stipulations may be made as to the contents of a document.

c. ***Offer of proof.***—Whenever the court refuses to hear certain testimony or refuses to receive certain evidence of any kind, the counsel offering the testimony or other evidence may make a concise statement of the substance of the expected testimony or other excluded evidence. The statement and any documentary evidence referred to therein will be included in the record of trial.

d. ***Waiver of objections.***—The prosecution or the defense may in open court either orally or in writing waive an objection to the admissibility of offered evidence. Such a waiver adds nothing to the weight of the evidence nor to the credibility of its source. The court in its discretion may refuse to accept, and may permit the withdrawal of, any such waiver. There is no prescribed form for making a waiver. Thus, if it clearly appears that the defense or prosecution understood its right to object, any clear indication on its part that it did not desire to assert that right may be regarded as a waiver of the objection. However, a waiver of an objection does not operate as a consent if consent is required, and a mere failure to object does not amount to a waiver except as otherwise stated or indicated in this manual.

Chapter XXIX

PUNITIVE ARTICLES

141. **SYNOPSIS OF CHAPTER.**—In this synopsis the references on the left are to paragraphs; the references on the right are to pages.

142. FIFTY-FOURTH ARTICLE OF WAR

FRAUDULENT ENLISTMENT

Discussion.—A fraudulent enlistment is an enlistment procured by means of either a willful—that is, intentional—misrepresentation in regard to any of the qualifications or disqualifications prescribed by law, regulation, or orders for enlistment, or a willful concealment in regard to any such disqualification.

Misrepresentation and concealment include any act, statement, or omission which has the effect of conveying what is known by the applicant to be an untruth or of concealing what he knows to be the truth concerning his qualifications or disqualifications for enlistment.

Misrepresentation or concealment may be with respect to matters which, if truthfully stated or revealed, would induce an inquiry by the recruiting officer concerning the qualifications or disqualifications for enlistment, such as answers to questions as to previous service and previous applications for enlistment. A soldier who enlists without a discharge from a prior enlistment should be charged under Article 54 if he has received pay or allowances, otherwise he should be charged under Article 96. See 183*a*.

A person who procures himself to be enlisted by means of several willful misrepresentations and concealments as to his qualifications for the one enlistment so procured and receives pay and allowances under that enlistment commits but one offense under Article 54.

Receipt of pay or allowances is an essential element of the offense. Acceptance of food, clothing, shelter, or transportation from the Gov-

ernment, unaccompanied by any restraint of the accused, constitutes receipt of allowances. However, whatever is furnished the accused while in confinement pending trial for fraudulent enlistment, or transportation furnished the accused for the convenience of the Government, is not considered an allowance.

Proof.—(*a*) The enlistment of the accused in the military service as alleged; (*b*) that the accused willfully—that is, intentionally—misrepresented or concealed a certain material fact or facts regarding his quaifications for enlistment as alleged; (*c*) that his enlistment was procured by such intentional misrepresentations or concealment; and (*d*) that under the enlistment the accused received either pay or allowances, or both, as alleged.

The receipt of pay or allowances should be proved by direct evidence if such evidence is reasonably available, but may be proved by circumstantial evidence, such as by merely showing that the accused was on duty under the enlistment a sufficient time to warrant the inference that he had been fed or sheltered or both.

If concealment of a dishonorable discharge is alleged, the final indorsement on the service record is competent evidence of the dishonorable discharge.

To prove that the accused enlisted at various times under different names, his identity as the person so enlisting may be proved, prima facie, by photostatic copies of the various enlistment and identification records with the certificate of The Adjutant General, or one of his assistants, as official custodian of those records, that the fingerprint records accompanying the various enlistment records have been compared by a duly qualified fingerprint expert on duty as such in his office and that the fingerprints are those of one and the same person. See 129*a* (Proving contents of writing—exceptions).

If an accused is being held under suspected fraudulent enlistment at a post where he is unknown, his fingerprints should be taken and forwarded to The Adjutant General for identification and comparison. If it appears from Army records that the individual had previously been enlisted and was not regularly discharged, The Adjutant General or one of his assistants will so certify, and the certificate, together with the testimony of the person who took the fingerprints (or of someone present when they were taken), may be used to establish a prima facie case of fraudulent enlistment. Of course, fingerprints are not the only method of identification. A witness may be available who has known the accused in his several enlistments and can identify him. So also signatures on the enlistment records, tattoo marks and scars on the body, peculiarities and deformities may be used to establish identity.

143. FIFTY-FIFTH ARTICLE OF WAR

OFFICER MAKING UNLAWFUL ENLISTMENT

Discussion.—This article applies only to officers. Similar offenses committed by others subject to military law should be charged under Article 96.

The prohibited enlistment must be knowingly made—it must be proved that the accused knew, or had reasonable cause to believe, that the person enlisted by him was within the prohibited class.

It must be proved that the enlistment or muster when made was prohibited by law, regulations, or orders which were binding on the accused and that he knew or was chargeable with knowledge of the law, regulation, or order.

The procedure of "mustering in" is not now used by the Army, and this article should therefore be used only when an officer effects an unlawful enlistment. See 144 (False Muster).

Proof.—(*a*) The enlistment by the officer of the person named, as alleged; (*b*) that the person was within a class whose enlistment was prohibited at the time of the enlistment; and (*c*) that the accused knew or was chargeable with knowledge of such facts at the time of the enlistment.

144. FIFTY-SIXTH ARTICLE OF WAR

FALSE MUSTER

Discussion.—Muster is the assembling, inspecting, entering upon the formal rolls, and officially reporting as a component part of the command, of persons and animals. Although the morning report has some of the attributes of the muster roll, it lacks several elements included therein and is therefore not the equivalent within the meaning of this Article.

Since neither the muster roll nor any substantial equivalent is used at present in the Army, offenses should not now be charged under this article. The willful making of a false official report covering composition of his command by an officer may be charged under either Article 95 or Article 96. See 182 and 183. Frauds of the type covered by the article may be charged under Article 95 or Article 96, and, in appropriate cases, under Article 94. See 181*a*.

145. FIFTY-SEVENTH ARTICLE OF WAR

a. FALSE RETURNS

Discussion.—This article applies to commanding officers only. It is applicable whenever a return or report is required by law or regulations and the return made is known by the officer to be false. A false

entry in the books of a unit fund which under regulations is subject to the inspection of higher authority is within the scope of this article.

Proof.—(*a*) That the accused officer was a commanding officer, as alleged; (*b*) that it was his duty as such to render to a certain superior authority a certain return as specified; (*c*) that he rendered the return, which was false in certain particulars as alleged; and (*d*) that the accused officer knew that the return was false at the time of making it.

b. OMISSION TO RENDER RETURNS

Discussion.—This offense consists in the omission to make a required return, either deliberately or through neglect. The term "neglect" involves an element of culpability and includes the case of an officer who, knowing the return to be due, fails to render it through remissness or procrastination.

A failure to make a return caused by the exigencies of war or other cause beyond the control of the officer is not properly chargeable. However, failure to render a return when due creates a presumption of neglect.

Proof.—(*a*) That the accused officer was a commanding officer as alleged; (*b*) that it was his duty as such to render to a certain superior authority a certain return as specified; and (*c*) that he omitted through neglect or design to render the return.

146. FIFTY-EIGHTH ARTICLE OF WAR

a. DESERTION

Discussion.—Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service.

A general prisoner whose dishonorable discharge has been executed, although subject to military law [A. W. 2 (e)], is not considered to be "in the service of the United States" and accordingly cannot be charged with desertion under the article.

Absence without leave with intent not to return.—Both elements are essential to the offense, which is complete when the person absents himself without authority from his place of service, which is for him "the service of the United States", with intent not to return thereto. A prompt repentance and return, while material in extenuation, is no defense. The fact that such intent is coupled with a purpose to return provided a particular but uncertain event happens in the future, or to report for duty elsewhere, or again to enlist, does not constitute a defense. Unless, however, an intent not to return to his place of duty exists at the inception of, or at some time during, the absence the soldier cannot be a deserter, whether his purpose is to stay away a

definite or an indefinite length of time. If a soldier while in desertion again enlists and deserts while serving under the second enlistment, he is amenable to trial for both desertions.

Under Article 28 any soldier who, without having first received a regular discharge, again enlists in the Army, or in the Air Force, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army shall be deemed to have deserted the service of the United States. Such enlistment is not only no defense to a charge of desertion but is prima facie proof of it. His presence in the military service under such enlistment is not in itself a return to military control with respect to his former enlistment, although a return may be effected through his voluntary disclosure of the facts or through the discovery of the facts without his aid. For example, when such a deserter is confined by his commanding officer as a result of information received from the Department of the Army, his desertion should be regarded as terminated by apprehension. If a soldier enlists without a discharge, the specification charging desertion should follow the usual form, the desertion being alleged as having occurred on the date the accused absented himself without leave. If not absent without leave before he again enlisted, he becomes so absent at that time.

Absence without leave with intent to avoid hazardous duty or with intent to shirk important service.—Under Article 28 any person subject to military law who "quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter." The "hazardous duty" or "important service" may include such service as duty in a combat or other dangerous area; embarkation for foreign duty or duty beyond the continental limits of the United States; movement to a port of embarkation for that purpose; entrainment for duty on the border in time of war or threatened invasion or other disturbances; strike or riot duty; or employment in aid of the civil power in, for example, protecting property, or quelling or preventing disorder in times of great public disaster. Such services as drill, target practice, maneuvers, and practice marches will not ordinarily be regarded as included.

Proof.—(*a*) That the accused absented himself without leave, or remained absent without leave from his place of service, organization, or place of duty, as alleged; (*b*) that he intended, at the time of absenting himself or at some time during his absence, to remain away permanently from such place, or to avoid hazardous duty, or to shirk important service as alleged; (*c*) that his absence was of a duration and was terminated as alleged; and (*d*) that the desertion was committed under the circumstances alleged, such as in the execution of a certain conspiracy or in time of war. As to time of war, see 133 (Judicial Notice).

Absence without leave.—Absence without leave is usually proved, prima facie, by entries on the morning report. But the morning report, even though it refers to the accused as a "deserter", is not complete evidence of desertion; it is evidence only of absence without leave, and it is still necessary to prove an intent to remain permanently absent or to avoid hazardous duty or to shirk important service. Having once been shown to exist, the condition of absence without leave with respect to an enlistment may be presumed to have continued, in the absence of evidence to the contrary, until the return of the accused to military control under that enlistment. When a soldier during one enlistment again enlists or attempts to enlist while on a duty status or while on pass or furlough, he by that act abandons his status of duty, pass, or furlough, and from that moment becomes absent without leave with respect to the former enlistment, as well as becoming a deserter under the provisions of Article 28 if he enlisted in another unit. Similarly a soldier absent on a short pass from his station who is found on board a ship bound for China may be regarded as having abandoned any authority he might have for his absence and to be absent without leave, although he may not have gone beyond the area fixed in the pass and the pass may not have expired.

Intent.—If the condition of absence without leave is much prolonged and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain absent permanently. However, a plea of guilty of absence without leave to a charge of desertion is not in itself a sufficient basis for a conviction of desertion. In such a case no inference of the intent not to return arises from any admission involved in the plea, and to warrant conviction of desertion evidence of a prolonged absence or of other circumstances must be introduced from which the intent to desert can be inferred. The inference may be drawn from evidence proving that the accused attempted to dispose of his uniform or other military property; his civilian clothes were missing; he purchased a ticket for a distant point or was arrested or surrendered at a considerable distance from his station; while absent he was in the neighborhood of military posts and did not surrender to the military authorities; he was dissatisfied in his company or with the military service; he had made remarks indicating an intention to desert the service; he was under charges or had escaped from confinement at the time he absented himself; or that just previous to absenting himself he stole or took without authority money, civilian clothes, or other property that would assist him in getting away. On the other hand, evidence of previous excellent and long service, that none of the property of the accused was missing from his locker, that he was under the influence of intoxicating liquor or drugs when he absented himself and that he continued for some time under their influence, and similar evidence may be

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regarded as a basis for a contrary inference. Although the accused may testify that he intended to return, such testimony is not compelling, as the court may believe or reject the testimony of any witness in whole or in part. The fact that a soldier intends to report or actually reports at another station does not prevent a conviction for desertion, as that fact in connection with other circumstances may tend to establish his intention not to return to his proper place of duty. However, a soldier absent without leave from his place of service and without funds may report to another station for transportation back to his original place of duty, which would tend to negative the existence of an intent to desert. No general rule can be laid down as to the effect to be given to an intention to report or an actual reporting at another station.

In proving a specification alleging that the accused quit his organization or place of duty with the intent to avoid hazardous duty or with the intent to shirk important service, there should be evidence of facts raising a reasonable inference that the accused knew with reasonable certainty that he would be required for such hazardous duty or important service. For example, it might be shown: (*a*) that the accused was personally warned of the imminence of the duty or service; or (*b*) that his organization, as a whole, was so warned at a formation at which the roll was called and the accused was present; or (*c*) that the period of his absence was of such duration and under such circumstances that the accused must have had reasonable cause to know that he would miss a certain hazardous duty or important service.

If the accused soldier enlisted without a discharge (A. W. 28), it should be proved that he was a soldier in a certain organization of the Army and that, without being discharged from that organization, he again enlisted in the Army, or in the Air Force, or in the militia when in the service of the United States, or in the Navy, or in the Marine Corps of the United States or in a foreign army. For the method of proving the fact that the accused was not discharged from his prior enlistment, see 183*a* (Disorders and neglects, etc.).

b. ATTEMPTING TO DESERT

Discussion.—An attempt to desert is an overt act beyond mere preparation toward accomplishing a purpose to desert. The attempt to desert may be with the intent not to return, to avoid hazardous duty, or to shirk important service. Once the attempt is made, the fact that the soldier desists, either of his own accord or otherwise, does not cancel the offense. The offense of attempting to desert is complete if a soldier, intending to desert, hides himself in an empty freight car on the post, intending to effect his escape from the post by being taken

out in the car. Entering the car with the intent to desert is the overt act. See the discussion of desertion.

Proof.—(*a*) That the accused made the attempt by doing the overt act or acts alleged; (*b*) that he intended to desert at the time of doing such act or acts; that is, he then entertained the intent not to return, or the intent to avoid hazardous duty or to shirk important service as alleged; (*c*) that the attempt was made under the circumstances alleged. See the comments under proof of desertion.

147. FIFTY-NINTH ARTICLE OF WAR

ADVISING, PERSUADING, OR ASSISTING DESERTION

Discussion.—See 146*a*. The offenses of persuading and assisting desertion are not complete unless the desertion occurs; but the offense of advising is complete when the advice is given, whether the person advised deserts or not.

It is not necessary that the accused act alone in giving the advice or assistance or in the persuasion; and he may act through other persons in committing the offenses.

Proof.—(*a*) That the accused in the manner and form alleged, advised, used persuasion to induce, or knowingly assisted a certain person subject to military law to desert as alleged; (*b*) if charged with persuading or assisting desertion, that the certain person deserted as alleged (see 146*a*, Proof of desertion), and, if persuasion is alleged, that he was induced to desert by such persuasion; and, if so alleged, (*c*) that the act of advising, persuading, or assisting was done in time of war. As to time of war, see 133 (Judicial Notice).

148. SIXTIETH ARTICLE OF WAR

ENTERTAINING A DESERTER

Discussion.—For desertion see 146*a*. This article applies only to commanding officers. It is not requisite that the officer be absolutely certain that the soldier is a deserter; reasonable cause for the belief of such fact is sufficient. However a mere suspicion by the accused officer of a possible desertion by one of his soldiers, without more evidence, would not warrant charging under this article.

Proof.—(*a*) That the accused was a commanding officer as alleged; (*b*) that while so in command he discovered that a certain soldier in his command was a deserter from the Army, Air Force, Navy, or Marine Corps, as alleged; (*c*) that the soldier was in fact a deserter (see 146*a*, Proof); and (*d*) that he retained the soldier in his command without informing superior authority or the commanding officer of the organization to which the deserter belonged.

149. SIXTY-FIRST ARTICLE OF WAR

ABSENCE WITHOUT LEAVE

Discussion.—See 146*a*. The article is designed to cover every case not elsewhere provided for in which any person subject to military law is through his own fault not at the place where he is required to be at a time when he should be there. The first part of this article—that relating to the properly appointed place of duty—applies whether the place is appointed as a rendezvous for several or for one only. Thus it applies in the case of a soldier failing to report for kitchen police or leaving such duty after reporting.

A soldier turned over to the civil authorities upon application under Article 74 is not absent without leave while held by them under such delivery. So, also, when a soldier, being absent with leave, or absent without leave, is held, tried, and acquitted by the civil authorities, his status as absent with leave, or absent without leave, is not thereby changed, however long he may be held. If a soldier is convicted by the civil authorities, the fact that he was arrested, held, and tried does not excuse any unauthorized absence. The status of absence without leave is not changed by an inability to return through sickness, lack of transportation facilities, or other disabilities. But the fact that all or part of a period of unauthorized absence was in a sense enforced or involuntary should be given due weight when considering the punishment to be imposed.

A general prisoner whose dishonorable discharge has been executed has no "command, guard, quarters, station or camp" within the meaning of Article 61, since he is in confinement not because of military duty but only because of compulsion. Accordingly, such a prisoner may not be charged with absence without leave under Article 61 but should, if the facts warrant, be charged with escape from confinement under Article 69, or otherwise by an appropriate specification under Article 96. Until actual execution of the dishonorable discharge the prisoner is subject to Article 61, even though the dishonorable discharge may have been ordered executed.

Proof.—If the accused fails to appear at or goes from a place of duty—

(*a*) That a certain authority appointed a certain time and place for a certain duty by the accused as alleged; and (*b*) that the accused failed to report to the place at the proper time, or, having so reported, went from the same without authority from anyone competent to give him leave to do so.

If the accused is charged with absenting himself without proper leave—

(*a*) That the accused absented himself from his command, guard, quarters, station, or camp for a certain period, as alleged; and (*b*) that such absence was without authority from anyone competent to give him leave.

If the accused is charged with absenting himself without proper leave from his guard with intent to abandon the same—

(*a*) That the accused absented himself from his guard as alleged; (*b*) that the absence was without authority from anyone competent to give him leave; and (*c*) facts and circumstances indicating that the accused intended to abandon his guard.

If the accused is charged with absenting himself with the intent to avoid maneuvers—

(*a*) That the accused absented himself from his guard, quarters, or camp for a certain period, as alleged; (*b*) that the accused knew or had good cause to know that such absence would occur during a part of a period of maneuvers or field exercises; (*c*) facts and circumstances indicating that the accused intended to avoid service during all or part of a period of maneuvers or field exercises.

In connection with proof of absence without leave, see 130 (Documentary Evidence), and 146*a* (Discussion of absence without leave as element of desertion).

150. SIXTY-SECOND ARTICLE OF WAR

DISRESPECT TOWARD THE PRESIDENT, VICE PRESIDENT AND CERTAIN OTHER OFFICIALS

Discussion.—This article covers both (1) words which are disrespectful or contemptuous in themselves, such as abusive epithets, denunciatory or contemptuous expressions, or intemperate or malevolent comments upon official or personal acts; and (2) words which are disrespectful or contemptuous because of the connection in which used and the surrounding circumstances.

The person against whom the words are used must be occupying one of the offices named at the time of the offense. However, it is immaterial whether the words are spoken against him in his official or private capacity.

The language must be disrespectful or contemptuous. Adverse criticism of the Government, or of the President or Congress, in the course of a political discussion, even though emphatically expressed, if not intended to be personally disrespectful, should not be charged as a violation of the article. Similarly expressions of opinion made in a purely private conversation should not ordinarily be made the basis for a court-martial charge. However, any written publications given broad circulation, or the utterance of disrespectful or contemptuous

words in the presence of military inferiors, would constitute an aggravation of the offense.

Truth or falsity of the statements made is generally immaterial, since the gist of the offense is the contemptuous or disrespectful character of the language used.

Proof.—(*a*) That the accused used certain contemptuous or disrespectful words against the President, or other of the authorities mentioned in the article, as alleged; and (*b*) if the words are not in themselves contemptuous or disrespectful, that they were used under certain circumstances or in a certain connection giving them the character of contemptuous or disrespectful words, as alleged.

151. SIXTY-THIRD ARTICLE OF WAR

DISRESPECT TOWARD A SUPERIOR OFFICER

Discussion.—The disrespectful behavior contemplated by this article is such as detracts from the respect due to the authority and person of a superior officer. It may consist of acts or language, however expressed.

It is not essential that the disrespectful behavior be in the presence of the superior, but in general it is considered objectionable to hold one accountable under this article for what was said or done by him in a purely private conversation.

The "superior officer" toward whom the disrespectful behavior is directed need not be in the chain of command over the accused, nor need he be in the execution of his office. It is ordinarily sufficient that he be any officer senior in rank to the accused. However, under certain circumstances a superior officer may not be senior in rank; a line officer, though inferior in rank, may be the commanding officer, and thus the superior of a staff officer in the organization such as a medical officer.

Disrespect by words may be conveyed by opprobrious epithets or other contemptuous or denunciatory language. Disrespect by acts may be exhibited in a variety of modes—as neglecting the customary salute, by a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer.

Where the accused did not know the person against whom the acts or words were directed was his superior officer, such lack of knowledge is a defense.

Proof.—(*a*) That the accused did or omitted to do certain acts or used certain language to or concerning a certain officer, as alleged; (*b*) that the behavior involved in such acts, omissions or words was, under certain circumstances, or in a certain connection, or with a certain meaning, as alleged; and (*c*) that the officer toward whom the

acts, omissions, or words were directed was the superior officer of the accused.

152. SIXTY-FOURTH ARTICLE OF WAR

a. ASSAULTING SUPERIOR OFFICER

Discussion.—The phrase "on any pretense whatsoever" is not to be understood as excluding as a defense the fact that the striking was done in legitimate self-defense or in the discharge of some duty, such as is enjoined by Article 67.

By "superior officer" is meant not only the commanding officer of the accused, whatever may be the relative rank of the two, but any other commissioned officer of rank superior to that of the accused. That the accused did not know the officer to be his superior is available as a defense.

The word "strikes" means an intentional blow with anything by which a blow can be given.

The phrase "draws or lifts up any weapon against" covers any simple assault committed in the manner stated. The weapon chiefly had in view by the word "draw" is no doubt the sword; the term does, however, apply to a bayonet in a sheath, or to a pistol, and the drawing of either in an aggressive manner or the raising or brandishing of the same in a threatening manner in the presence of the superior and at him is the sort of act contemplated. The raising in a threatening manner of a firearm, whether or not loaded, or of a club, or of any implement or thing by which a serious blow could be given, is within the description "lifts up".

The phrase "offers any violence against him" comprises any form of battery or of mere assault not embraced in the preceding more specific terms "strikes" and "draws or lifts up". But if not executed the violence must be physically attempted or menaced. A mere threatening in words is not an offering of violence in the sense of this article.

An officer is in the execution of his office when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or military usage. In general, any striking or use of violence against any superior officer by a person subject to military law, over whom it is the duty of that superior officer to maintain discipline at the time, would be striking or using violence against him in the execution of his office. A commanding officer of a unit in the field in the actual exercise of command is generally considered to be on duty at all times. See 173.

A discharged general prisoner or other civilian subject to military law [A. W. 2 (*d*)] and under the command of an officer is subject to the provisions of this article.

Proof.—(*a*) That the accused struck a certain officer, or drew or lifted up a weapon against him, or offered violence against him, as alleged; (*b*) that the officer was the superior officer of the accused at the time; and (*c*) that the superior officer was in the execution of his office at the time.

b. DISOBEYING SUPERIOR OFFICER

Discussion.—The willful disobedience contemplated is such as shows an intentional defiance of authority, as when a soldier is given an order by an officer to do or cease doing a particular thing at once and refuses or deliberately omits to do what is ordered. A neglect to comply with an order through heedlessness, remissness, or forgetfulness is an offense chargeable under Article 96. If the order to a person is to be executed in the future, a statement by him to the effect that he intends to disobey it is not an offense under Article 64, although carrying out that intention may be.

The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.

A person cannot be convicted under this article if the order was illegal; but an order requiring the performance of a military duty or act is presumed to be lawful and is disobeyed at the peril of the subordinate. Acts involved in the disobedience of an illegal order might under some circumstances be charged as insubordination under Article 96.

That obedience to a command involved a violation of the religious scruples of the accused is not a defense.

The order must be directed to the subordinate personally. Failure to comply with the general or standing orders of a command, or with the Army Regulations, is not an offense under this article, but under Article 96; a nonperformance by a subordinate of any mere routine duty is likewise a violation of Article 96, and not of this article.

The form of an order is immaterial, as is the method by which it is transmitted to the accused, but the communication must amount to an order, and the accused must know that it is from his superior officer; that is, a commissioned officer who is authorized to give the order whether he is superior in rank to the accused or not.

Proof.—(*a*) That the accused received a certain command from a certain officer as alleged; (*b*) that such officer was the superior officer of the accused; and (*c*) that the accused willfully disobeyed the command. A command of a superior officer is presumed to be a lawful command.

153. SIXTY-FIFTH ARTICLE OF WAR

a. ASSAULTING A WARRANT OFFICER OR A NONCOMMISSIONED OFFICER

Discussion.—This article has the same general objects with respect to warrant officers and noncommissioned officers as Articles 63 and 64 have with respect to commissioned officers, namely, to insure obedience to their lawful orders, and to protect them from violence, insult, or disrespect. An assault by a general prisoner whose dishonorable or bad conduct discharge has been executed, or by any other civilian subject to military law, upon a warrant officer or noncommissioned officer should be charged under Article 96.

The terms "willfully disobeys", "lawful", and "in the execution of his office" are used in the same sense as in Article 64; and the term "order" is used in the same sense as "command" in Article 64.

For the definition of assault, see 180*k*. The part of this article relating to assaults covers any unlawful violence against a warrant officer or a noncommissioned officer in the execution of his office, whether such violence is merely threatened or is advanced in any degree toward application.

Proof.—(*a*) That the accused soldier struck a certain warrant officer or noncommissioned officer as alleged, or assaulted or attempted or threatened to strike or assault him in a certain manner, as alleged; and (*b*) that such violence was done, attempted, or threatened while the warrant officer or noncommissioned officer was in the execution of his office.

b. DISOBEYING A WARRANT OFFICER OR A NONCOMMISSIONED OFFICER

Discussion.—See discussion under 153*a*. The article does not include an acting noncommissioned officer nor a military policeman who is not in fact a warrant officer or a noncommissioned officer.

Proof.—(*a*) That the accused soldier received a certain order from a certain warrant officer or noncommissioned officer, as alleged; and (*b*) that the order was given while the warrant officer or noncommissioned officer was in the execution of his office; and (*c*) that the accused soldier willfully disobeyed the order. An order from a warrant officer or a noncommissioned officer in the execution of his office is presumed to be a lawful order.

c. USING THREATENING OR INSULTING LANGUAGE OR BEHAVING IN AN INSUBORDINATE OR DISRESPECTFUL MANNER TOWARD A WARRANT OFFICER OR A NONCOMMISSIONED OFFICER

Discussion.—The word "toward" limits the application of this part of the article to language and behavior within sight or hearing of the

warrant officer or noncommissioned officer concerned, the word not being used in the same sense as in Article 63.

Proof.—(*a*) That the accused used language or did or omitted to do acts under certain circumstances, or in a manner, or with an intended meaning, as alleged; (*b*) that such language or behavior was used toward and within the sight or hearing of a certain warrant officer or noncommissioned officer; and (*c*) that the warrant officer or noncommissioned officer was in the execution of his office at the time.

154. SIXTY-SIXTH ARTICLE OF WAR

a. GENERAL

Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority. Sedition implies the raising of a commotion or disturbance against the State; it is a revolt against legitimate authority and differs from mutiny in that it implies a resistance to lawful civil power.

The concert of insubordination contemplated in mutiny or sedition need not be preconceived nor is it necessary that the act of insubordination be active or violent. It may consist simply in a persistant and concerted refusal or omission to obey orders, or to do duty, with an insubordinate intent.

The intent which distinguishes mutiny or sedition is the intent to resist lawful authority in combination with others. The intent to create a mutiny or sedition may be declared in words or, as in all other cases, it may be inferred from acts done or from the surrounding circumstances.

b. ATTEMPTING TO CREATE A MUTINY

Discussion.—An attempt to commit a crime is an act done with specific intent to commit the particular crime and proximately tending to, but falling short of, its consummation. There must be an apparent possibility to commit the crime in the manner specified. Although material in extenuation, voluntary abandonment of purpose after an act constituting an attempt is not a defense.

A single individual may harbor an intent to create a mutiny and may commit some overt act tending to create a mutiny and so be guilty of an attempt to create a mutiny, whether he was joined by others, and whether or not a mutiny actually followed.

Proof.—(*a*) An act or acts of accused which proximately tended to create a certain intended or actual collective insubordination; (*b*) a specific intent to create a certain intended or actual collective insubordination; and (*c*) that the insubordination occurred or was intended to occur in a company, party, post, camp, detachment, guard, or other command in the Army of the United States.

c. BEGINNING OR JOINING IN A MUTINY

Discussion.—See 154*a*. There can be no actual mutiny until there has been an overt act of insubordination joined in by two or more persons. Therefore no person can be found guilty of beginning or joining in a mutiny unless an overt act of mutiny is proved. A person is not guilty of beginning a mutiny unless he is the first, or among the first, to commit an overt act of mutiny; and a person cannot join in a mutiny without joining in some overt act. Hence presence of the accused at the scene of mutiny is necessary in these two cases.

Proof.—(*a*) The occurrence of certain collective insubordination in a company, party, post, camp, detachment, or other command in the Army of the United States; and (*b*) that the accused began or joined in that collective insubordination.

d. CAUSING OR EXCITING A MUTINY

Discussion.—See 154*a*. As in 154*c*, no person can be guilty of causing or exciting a mutiny unless an overt act of mutiny follows his efforts. But a person may excite or cause a mutiny without taking personal part in, or being present at, the demonstrations of mutiny which result from his activities.

Proof.—(*a*) The occurrence of certain collective insubordination in a certain company, party, post, camp, detachment, or guard, or other command in the Army of the United States; and (*b*) acts of the accused tending to cause or excite the certain collective insubordination.

155. SIXTY-SEVENTH ARTICLE OF WAR

a. FAILURE TO SUPPRESS MUTINY OR SEDITION

Discussion.—See 154. The article applies only to officers and soldiers. Similar acts or omissions by other persons subject to military law are chargeable under Article 96.

One is not present at a mutiny unless an act or acts of collective insubordination occur in his presence.

The article requires of an officer or solder "his utmost endeavor" to suppress a mutiny or sedition at which he is present. When such extreme measures are reasonably necessary under the circumstances, the use of a dangerous weapon and the taking of life are required; but the use of more force than is reasonably necessary under the circumstances is an offense. See 180*a* (Manslaughter).

Proof.—(*a*) The occurrence of an act or acts of collective insubordination in the presence of the accused; and (*b*) acts or omissions of the accused which constitute a failure to use his utmost endeavor to suppress such acts.

b. FAILURE TO GIVE INFORMATION OF MUTINY OR SEDITION

Discussion.—See 155*a*. When circumstances known to the accused are such as would have caused a reasonable man in the same or similar circumstances to believe that a mutiny or sedition was impending, these circumstances will be sufficient to charge the accused with such "reason to believe" as will render him culpable under the article.

It is not a necessary element of the crime that the impending mutiny or sedition materialize.

"Delay" imports the lapse of an unreasonable time without action.

Proof.—(*a*) That the accused knew that a mutiny or sedition was impending or that he knew of circumstances that would have induced in a reasonable man a belief that a mutiny or sedition was impending; and (*b*) acts or omissions of the accused which constitute a failure or unreasonable delay in informing his commanding officer of his knowledge or belief.

156. SIXTY-EIGHTH ARTICLE OF WAR

a. DISOBEDIENCE OF ORDERS INTO ARREST OR CONFINEMENT

Discussion.—A fray is a fight in a public place to the terror of the people, in which acts of violence occur or dangerous weapons are exhibited or threatened to be used. All persons aiding or abetting a fray are principals. The word "fray" is thus seen to be somewhat restrictive, but the words "quarrels" and "disorders" include any disturbance of a contentious character from a mere war of words to a rout or riot.

It is immaterial under the article whether the officer or other person who tries to part or quell a quarrel, fray, or disorder is on a duty status or not, as it is immaterial whether the persons engaged in the quarrel, fray, or disorder are superior to him in rank or not.

It should appear that the power conferred by the article was being exercised for the purpose stated, and therefore the charges and proof should refer to the order given during the disorder. It should be made to appear that the accused heard or understood the order and knew that the person giving it was an officer or noncommissioned officer, or other person authorized by the article to give the order.

Proof.—(*a*) That the accused was a participant in a certain quarrel, fray, or disorder occurring among persons subject to military law; (*b*) that during the disorder a certain officer, or other authorized person, ordered the accused into arrest or confinement as alleged, with a view to quell or part the disorder; and (*c*) that the accused refused to obey.

b. THREATENING, DRAWING A WEAPON UPON, OR OFFERING VIOLENCE TO, AN OFFICER, WARRANT OFFICER, BAND LEADER OR NONCOMMISSIONED OFFICER

Discussion.—See discussion in 153, 154, and 156*a*. The word "threat" as here used includes any menacing action, either by gesture or by words.

Proof.—The proof of the second, third, and fourth offenses defined by the article should follow in form and essentials the proof in 156*a*, except that, instead of proving a refusal to obey, drawing a weapon, making a threat, or doing violence must be proved as the consummation of the particular offense.

157. SIXTY-NINTH ARTICLE OF WAR

a. BREACH OF ARREST

Discussion.—The distinction between arrest and confinement lies in the difference between the kinds of restraint imposed. In arrest the restraint is moral restraint imposed by orders fixing the limits of arrest or by the terms of this article (19*b*). Confinement imports some physical restraint (19*c*).

The offense of breach of arrest is committed when the person in arrest infringes the limits set by orders or by Article 69, and the intention or motive that actuated him is immaterial to the issue of guilt, though, of course, proof of inadvertence or bona fide mistake is admissible in extenuation. Innocence of the offense with respect to which an arrest or confinement may have been imposed is not a defense. A person cannot be convicted of a violation of this article if the arrest or confinement was in fact illegal. However, the circumstances of a breach of an illegal restraint may subject the person breaking such restraint to a prosecution under some other article. For example, if a prisoner in making an escape assaults a sentinel, the fact that the confinement was illegal would not be a defense to a prosecution for the assault. It is immaterial whether the breach of arrest or escape from confinement took place before or after trial, acquittal, or sentence. A violation of a restraint on liberty other than arrest or confinement, as an administrative restriction imposed in the interests of training, discipline, or medical quarantine, or the restraint imposed on a prisoner paroled to work within certain limits, should be charged under Article 96. For authority to release from arrest, see 21.

Proof.—(*a*) That the accused was duly placed in arrest; and (*b*) that before he was set at liberty by proper authority he transgressed the limits fixed by Article 69 or by the orders of proper authority. An arrest is presumed to be legal.

b. ESCAPE FROM CONFINEMENT

Discussion.—See 157*a*. An escape may be either with or without force or artifice, and either with or without the consent of the custodian. Any completed casting off of the restraint of confinement, before being set at liberty by proper authority, is an escape from confinement, and lack of effectiveness of the physical restraint imposed is immaterial to the issue of guilt. An escape is not complete until the prisoner has, momentarily, at least, freed himself from the restraint of his confinement; so, if the movement toward escape is opposed, or before it is completed an immediate pursuit follows, there will be no escape until opposition is overcome or pursuit is shaken off. In cases in which the escape is not completed the offense should be charged as an attempt under Article 96.

Proof.—(*a*) That the accused was duly placed in confinement; and (*b*) that he freed himself from the restraint of his confinement before he had been set at liberty by proper authority. A confinement is presumed to be legal.

158. SEVENTIETH ARTICLE OF WAR

UNNECESSARY DELAYS IN INVESTIGATING OR DISPOSING OF CHARGES

Discussion.—The purpose of this article is to insure expedition in the disposition of court-martial charges and punishment of an officer responsible for unnecessary delay. See 26, 34, and 35.

By its terms, Article 70 applies only to officers and is applicable only when the accused has been placed in arrest or confinement. Unnecessary delays in disposing of charges concerning which there has been no arrest or confinement, while less serious than those denounced by this article, are nevertheless violative of good order and military discipline, and may properly be chargeable under Article 96.

The article applies to an investigating officer and to any other officer whose duties require him to act with reference to court-martial charges or the disposition thereof.

Proof.—(*a*) That the accused was the investigating officer directed to investigate certain charges, or that he was an officer charged with certain duties in connection with certain charges, as alleged, such charges being against an accused person who was then in arrest or confinement, as specified; (*b*) that unnecessary delay occurred in the making of the investigation, or in the disposition of the charges prior to the final conclusion thereof, as alleged; and (*c*) facts and circumstances indicating that the accused was responsible for the unnecessary delay.

159. SEVENTY-FIRST ARTICLE OF WAR

REFUSING TO RECEIVE OR KEEP PRISONER DULY COMMITTED

Discussion.—The words "commander of a guard" include a commander of any rank or grade, and may include a noncommissioned officer or other soldier. The term "any prisoner" includes civil as well as military prisoners who are committed according to the terms of the article. A provost marshal or commander of a guard may in his discretion, but upon his own responsibility, receive a prisoner without an account of the charge against him or other due formality of commitment; he must receive the prisoner when accompanied by the required account in writing signed by the committing officer.

A mere name or description of the offense charged in common parlance, when written and signed by the committing officer, is a sufficient "account in writing".

Proof.—(*a*) That the accused was a provost marshal or commander of a guard in the military forces of the United States; (*b*) that a certain prisoner was committed to his charge by a certain officer belonging to the forces of the United States; (*c*) that at the time of commitment the committing officer delivered to the accused a written account of the crime or offense charged against the prisoner, which account was signed by the committing officer; and (*d*) that the accused refused to receive or keep the prisoner.

160. SEVENTY-SECOND ARTICLE OF WAR

FAILING TO RENDER REPORT OF PRISONERS

Discussion.—See 159. The term "commanding officer" refers to the commander to whom the guard report is properly made.

Proof.—(*a*) That the accused was the commander of a certain guard in the military forces of the United States; (*b*) that a prisoner was committed to his charge; and (*c*) that the accused failed to make a report in writing within 24 hours after the confinement, or as soon as the accused was relieved from his guard, or failed to set forth in his report in writing one or more of the particulars prescribed in the article, as alleged.

161. SEVENTY-THIRD ARTICLE OF WAR

a. RELEASING A PRISONER WITHOUT PROPER AUTHORITY

Discussion.—The words "any prisoner" include a civilian or military prisoner.

While a commander of the guard must receive a prisoner properly committed by any officer, the power of the committing officer ceases

as soon as he has committed the prisoner, and he is not, as such committing officer, a "proper authority" to order a release. Normally, the lowest authority competent to order release is the commanding officer of the command of which the prison, stockade, or guard holding the prisoner, is a part. See 21.

An officer may receive in his charge a prisoner not committed in strict compliance with the terms of Article 71 or other law (see 159), and a prisoner having been so received has been "duly committed".

The release of a prisoner is a removal of restraint by the custodian rather than by the prisoner. Circumstances which justify charges against the custodian for release of a prisoner without proper authority will not justify charges against the prisoner for escape from confinement. However, the offense of escape from confinement and that of suffering a prisoner to escape through neglect, or through design, may arise out of the same occurrence.

Proof.—(*a*) That a certain prisoner was duly committed to the charge of the accused; and (*b*) that the accused released him without proper authority.

b. SUFFERING A PRISONER TO ESCAPE THROUGH NEGLECT

Discussion.—See 161*a*. The word "neglect" is here used in the same sense as the word "negligence".

Negligence is a relative term. It is defined in law as the absence of due care. The legal standard of care is that which would have been taken by a reasonably prudent man in the same or similar circumstances. This test applies the standard required of persons acting in the capacity in which the accused was acting. Thus, if the accused is an officer, the test will be, "How would a reasonably prudent officer have acted?" If the circumstances would have indicated to a reasonably prudent officer that a very high order of care was required to prevent escape, then the accused must be held to a very high order of care. The test is thus elastic, logical, and just.

A prisoner cannot be said to have escaped until he has overcome the opposition that restrained him and shaken off immediate pursuit. If he escapes, the fact that he returns, is taken in a fresh pursuit, is killed, or dies is not a defense to a charge of having suffered him to escape through neglect.

Proof.—(*a*) That a certain prisoner was duly committed to the charge of the accused; (*b*) that the prisoner escaped; (*c*) that the accused did not take such care to prevent escape as a reasonably prudent person, acting in the capacity in which the accused was acting, would have taken in the same or similar circumstances; and (*d*) that the escape was the proximate result of the neglect of the accused.

c. SUFFERING A PRISONER TO ESCAPE THROUGH DESIGN

Discussion.—See 161*a* and *b*. In law a wrongful act is designed when it is intended or when it results from conduct so shockingly and grossly devoid of care as to leave room for no reasonable inference but that the act was contemplated as an extremely probable result of the course of conduct followed. Thus, on a charge of suffering a prisoner to escape through design, evidence of gross negligence may be received as probative of design.

It sometimes happens that a prisoner has been permitted larger limits than should have been allowed, and an escape is consummated without hindrance. It does not follow that such an escape is necessarily to be considered as designed. The conduct of the responsible custodian is to be examined in the light of all the circumstances of the case, the gravity of the crime with which the prisoner is charged, the probability of his return, and the intention and motives of the custodian.

Proof.—(*a*) That a certain prisoner was duly committed to the charge of the accused; (*b*) a design of the accused to suffer the escape of that prisoner; and (*c*) that the prisoner escaped as a result of the carrying out of the design of the accused.

162. SEVENTY-FOURTH ARTICLE OF WAR

DELIVERY OF ACCUSED MILITARY PERSONNEL TO CIVIL AUTHORITIES

Discussion.—For discussions of concurrent jurisdiction see 11 and 68. Department of the Army policy in regard to the delivery of military personnel to the civil authorities, subject to the requirements of this article, is announced from time to time in AR 600–355.

The punitive provisions of Article 74 apply only to commanding officers and only in time of peace. The provision requiring "utmost endeavor" by a commanding officer in delivering or assisting in the apprehension of an accused person is to be construed in a reasonable sense with reference to the circumstances of the particular case. Mere inadvertent omission is not an offense under this article; the offense contemplates only refusals and willful neglects to act.

Proof.—(*a*) That the accused was the commanding officer of a certain post or command; (*b*) that a person subject to military law was accused of a certain crime or offense, committed within the geographical limits of the United States and the District of Columbia; (*c*) that application was duly made to the accused officer, by a proper civil authority, to deliver such accused person to civil authorities, or to assist the civil officers of justice in apprehending and securing him; (*d*) that the application established the duty of the accused

to deliver the offender; and (*e*) acts or omissions of the accused officer which constitute a refusal or willful neglect to deliver such accused person or to aid in apprehending or securing him.

163. SEVENTY-FIFTH ARTICLE OF WAR

a. MISBEHAVIOR BEFORE THE ENEMY

Discussion.—Misbehavior is not confined to acts of cowardice. It is a general term, and as here used it renders culpable under the article any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the custom of our arms. Running away is but a particular form of misbehavior specifically made punishable by this article.

"The enemy" includes not merely the organized forces of the enemy in time of war, but also imports any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades. Whether a person is "before the enemy" is not a question of definite distance, but is one of tactical relation. For example, a member of an antiaircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to move into combat may be before the enemy although miles from the enemy lines. On the other hand, an organization some distance from the front which is not a part of a tactical operation then going on or in immediate prospect is not "before the enemy" within the meaning of this article.

Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy. Self-maiming may be within this clause.

Proof.—(*a*) That the accused was serving in the presence of an enemy; and (*b*) acts or omissions constituting misbehavior of the accused as alleged.

b. RUNNING AWAY BEFORE THE ENEMY

Discussion.—See 163*a*.

Proof.—(*a*) That the accused was serving in the presence of an enemy; and (*b*) that he misbehaved himself by running away.

c. SHAMEFULLY ABANDONING OR DELIVERING UP ANY COMMAND

Discussion.—This provision concerns primarily commanding officers chargeable with responsibility for defending a particular fort, post, guard, or command. Abandonment by a subordinate would ordinarily be charged as misbehavior or running away.

The words "deliver up" are synonymous with "surrender."

Surrender or abandonment of a command by an officer charged with its defense can be justified only by the utmost necessity or extremity.

Surrender or abandonment without such absolute necessity is shameful within the meaning of this article.

Proof.—(*a*) That the accused was charged by orders or by circumstances with the duty to defend a certain fort, post, camp, guard or other command; and (*b*) that without justification he abandoned it or surrendered it.

d. ENDANGERING THE SAFETY OF A COMMAND BY MISCONDUCT, DISOBEDIENCE OR NEGLECT

Discussion.—Misconduct implies a wrongful intention and not a mere error of judgment. Carelessness or negligence, or other conduct below the standard reasonably expected of the individual under the circumstances, constitutes "neglect" as used in the article.

Proof.—(*a*) That it was the duty of the accused to defend a certain fort, post, camp, guard, or other command; (*b*) that he committed certain misconduct, disobedience, or neglect as alleged; and (*c*) that thereby he endangered the safety of the command.

e. SPEAKING WORDS INDUCING OTHERS TO MISBEHAVE, RUN AWAY OR ABANDON, DELIVER UP OR ENDANGER THE SAFETY OF ANY COMMAND

Discussion.—This provision covers the speaking of words which induce others to commit any of the offenses previously referred to in the article. Unless the words induce others to such misconduct there is no offense under this provision. However, the uttering of words having a natural tendency to cause such action by others, even though they do not in fact do so, may constitute misbehavior of the speaker under the first clause of the article.

Proof.—(*a*) That some person other than the accused misbehaved in the presence of the enemy, or ran away, or abandoned or delivered up, or by some misconduct, disobedience, or neglect endangered the safety of a command which it was his duty to defend; and (*b*) that such action was induced by words spoken by the accused as alleged.

f. CASTING AWAY ARMS OR AMMUNITION

Proof.—(*a*) That the accused was serving in the presence of the enemy; and (*b*) that he cast away certain arms or ammunition, as specified.

g. QUITTING POST OR COLORS TO PLUNDER OR PILLAGE

Discussion.—The essence of this offense is leaving the place of duty with intent to pillage or plunder. The mere leaving with that purpose is sufficient even though the plunder or pillage may not be consummated.

"Post" includes any place of duty, whether permanent or temporary, fixed or mobile. The words "plunder or pillage" are construed as meaning to seize or appropriate public or private property.

Proof.—(*a*) That the accused while before the enemy left his post or other place of duty; and (*b*) that his intention in so leaving was to seize or appropriate, by force or violence, public or private property.

h. OCCASIONING FALSE ALARMS

Discussion.—This clause covers any spreading of false or disturbing rumors or reports, as well as the false giving of established alarm signals. The offense is committed if an alarm is given without any reasonable cause, even though there may have been no willful intent.

Proof.—(*a*) That an alarm was occasioned in a certain camp, garrison or quarters; (*b*) conduct of the accused which occasioned the alarm; and (*c*) that the alarm was false, or without any reasonable or sufficient justification.

164. SEVENTY-SIXTH ARTICLE OF WAR

SUBORDINATES COMPELLING COMMANDER TO SURRENDER

Discussion.—When the surrender or abandonment of a command is induced or attempted to be brought about by words spoken, the offense should be charged under Article 75. If the surrender or abandonment is compelled or attempted to be compelled by acts rather than words, the charge may be laid under the present article.

The offenses here contemplated are similar to a mutiny or attempted mutiny designed to bring about the surrender or abandonment of a command. Unlike mutiny, however, concert of action is not an essential element of the offenses under this article. The offense of compelling the giving up or abandonment of any command is not complete until the command is abandoned or given up to the enemy. The offense of attempting to compel any commander of any command to give it up to the enemy does not require actual abandonment or surrender, but there must be some act done with this purpose in view, even though it may fall short of an actual accomplishment of the purpose. See paragraph 163*c* for the meaning of "abandon"; to "give up" is to be interpreted as meaning the same as "delivers up" in paragraph 163*c*.

Proof.—(*a*) That a certain commander was in command of a garrison, fort, post, camp, guard, or other command; and (*b*) acts or omissions of the accused resulting in the abandonment or giving up of the command, or done with the intent or purpose of compelling such commander to abandon it or give it up to the enemy.

165. SEVENTY-SEVENTH ARTICLE OF WAR

a. MAKING KNOWN THE PAROLE OR COUNTERSIGN TO ONE NOT ENTITLED TO RECEIVE IT

Discussion.—A countersign is a word given from the principal headquarters of a command to aid guards and sentinels in their scrutiny of persons who apply to pass the lines. It consists of a secret challenge and a password. A parole is a word used as a check on the countersign; it is imparted only to those who are entitled to inspect guards and to commanders of guards. See FM 26–5.

The class of persons entitled to receive the countersign will expand and contract under the varying circumstances of war. Who these persons are will be determined largely, in any particular case, by the general or special orders under which the accused was acting. It is no defense under the terms of this article that the accused did not know that the person to whom he communicated the countersign or parole was not entitled to receive it. Before imparting such a word a person subject to military law must determine at his peril that the person to whom he presumes to make known the word is a person authorized to receive it.

The intent or motive that actuated the accused is immaterial to the issue of guilt, as would also be the circumstance that the imparting was negligent or inadvertent. It is likewise immaterial whether the accused had himself received the password in the regular course of duty or whether he obtained it in some other way.

Proof.—(*a*) That the accussed made known the countersign or parole to a certain person, known or unknown, and (*b*) that such person was not entitled to receive it.

b. GIVING A PAROLE OR COUNTERSIGN DIFFERENT FROM THAT RECEIVED

Proof.—(*a*) That the accused received a certain countersign or parole; and (*b*) that he gave a parole or countersign different from that which he received to a person to whom he had a duty to give the correct countersign or parole.

166. SEVENTY-EIGHTH ARTICLE OF WAR

FORCING A SAFEGUARD

Discussion.—A safeguard is a detachment, guard, or detail posted by a commander for the purpose of protecting some person or persons, place, or property. The term also includes a written order left by a commander with an enemy subject or posted upon enemy property for the protection of the individual or property concerned.

Any trespass on the protection of the safeguard will constitute an offense under the article, provided that the accused was aware of the existence of the safeguard.

Proof.—(*a*) That a safeguard had been issued or posted for the protection of a certain person or persons, place or property, as alleged; and (*b*) that, with knowledge of the safeguard, or under circumstances that charged him with notice thereof, the accused performed acts in violation of its protection, as alleged.

167. SEVENTY-NINTH ARTICLE OF WAR

NEGLECTING TO SECURE OR MISAPPROPRIATING CAPTURED ENEMY PROPERTY

Discussion.—Immediately upon its capture from the enemy public property becomes the property of the United States. Neither the individual who takes it nor any other person has any private right in such property. On the contrary, every person subject to military law has an immediate duty to take such steps as are within his powers and functions to secure such property to the service of the United States and to protect it from destruction or loss.

Neglect to secure captured public property consists of a failure to take the steps a reasonably prudent man, acting in the capacity in which the accused was acting, would have taken in the same or similar circumstances to secure the property in question to the service of the United States. Wrongful appropriation of captured public property includes any unauthorized or unjustified act of appropriating or disposing of the property which is inconsistent with the rights of the United States.

Proof.—(*a*) That certain public property was captured from the enemy; and (*b*) acts or omissions of the accused evidencing either (1) failure to perform the responsibilities of a reasonably prudent man acting in his capacity to secure such property for the service of the United States, or (2) disposition or other appropriation of the captured public property inconsistent with the right of the United States to complete ownership thereof.

168. EIGHTIETH ARTICLE OF WAR

a. DEALING IN CAPTURED OR ABANDONED PROPERTY

Discussion.—This article is somewhat broader than Article 79 in that it protects private, public, abandoned, and captured property. It covers any dealing in or disposition of abandoned or captured property whereby the accused receives or expects to receive some profit or other advantage to himself or anyone connected with him. It prohibits receipt as well as disposition by barter, gift, pledge, lease, or loan. It forbids the destruction or abandonment of the property.

The expectation of profit need not be founded on any specific understanding; it is enough if the prohibited act be done for the purpose or in the hope of benefit or advantage, pecuniary or otherwise.

Proof.—(*a*) That the accused has disposed of, dealt in, received, or otherwise handled certain public or private captured or abandoned property; and (*b*) that by so doing the accused received or expected some profit or advantage to himself or to a certain person connected in a certain manner with himself, as alleged.

b. FAILING TO REPORT AND TURN OVER CAPTURED OR ABANDONED PROPERTY

Discussion.—See 168*a*. Reports of receipt of captured or abandoned property are to be made direct or through such channels as are required by current regulations or orders or the customs of the service. "Proper authority" is any authority competent to order disposition of the property in question.

Proof.—(*a*) That certain captured or abandoned public or private property came into the possession, custody, or control of the accused; and (*b*) acts or omissions of the accused evidencing his failure to report to proper authority the receipt thereof, and his failure to turn it over as required.

169. EIGHTY-FIRST ARTICLE OF WAR

This article denounces offenses by all persons whether or not otherwise subject to military law. Trial of offenders may be by court-martial or by military commission.

a. RELIEVING OR ATTEMPTING TO RELIEVE THE ENEMY

Discussion.—"Enemy" imports citizens as well as soldiers and does not restrict itself to the enemy government or its army. All the citizens of one belligerent are enemies of the government and of all the citizens of the other.

To relieve the enemy as used in this article is equivalent to furnishing it with the arms, ammunition, supplies, money, or other things as denounced in the article. It is immaterial whether the articles furnished are needed by the enemy or whether the transaction is a donation or sale. Knowledge or intent is not an essential in proof of this offense.

Proof.—That the accused either directly or indirectly furnished or attempted to furnish the enemy with certain arms, ammunition, supplies, money, or other thing, as alleged.

b. HARBORING OR PROTECTING THE ENEMY

Discussion.—See 169*a*. An enemy is harbored or protected when he is shielded, either physically or by use of any artifice, aid or repre-

sentation, from any injury or misfortune which in the chance of war may befall him. It must appear that the offense is knowingly committed, but circumstances sufficient to put a reasonable man on notice will be sufficient to charge the accused with notice.

Proof.—(*a*) That the accused harbored or protected a certain person; and (*b*) that the person so protected was an enemy, and that the accused had notice or was chargeable with notice of that fact.

c. HOLDING CORRESPONDENCE WITH THE ENEMY

Discussion.—Correspondence does not necessarily import a mutual exchange of communication. The law requires absolute nonintercourse, and any unauthorized communication, no matter what may be its tenor or intent, is here denounced. The prohibition lies against any method of communication whatsoever, and the offense is complete the moment the communication issues from the accused, whether it reaches its destination or not. The words "directly or indirectly" apply to this offense. It is essential to prove that the offense was knowingly committed.

Citizens of neutral powers resident in or visiting invaded or occupied territory can claim no immunity from the customary laws of war relating to communication with the enemy.

Proof.—(*a*) That the accused uttered a certain communication, as alleged; (*b*) that the communication was intended for a certain person; and (*c*) that the accused had notice or was chargeable with notice that such person was an enemy.

d. GIVING INTELLIGENCE TO THE ENEMY

Discussion.—See 169*c*. This is a particular case of corresponding with the enemy, rendered more heinous by the fact that the communication contains intelligence that may be useful to the enemy for any of the many reasons that make information valuable to belligerents. As in the preceding case, knowledge must be proved, and it is immaterial to the issue of guilt whether the intelligence was conveyed by direct or indirect means. The word "intelligence" imports that the information conveyed is true or implies the truth, at least in part.

Proof.—(*a*) That the accused knowingly conveyed to the enemy certain information, as alleged; and (*b*) that the information was true, at least in part.

170. EIGHTY-SECOND ARTICLE OF WAR

BEING A SPY

Discussion.—The words "any person" bring within the jurisdiction of courts-martial and military commissions all persons of whatever

nationality or status who may be accused of the offense denounced by the article.

The principal characteristic of this offense is a clandestine dissimulation of the true object sought, which object is an endeavor to obtain information with the intention of communicating it to the hostile party. Thus, soldiers not wearing disguise, dispatch drivers, whether soldiers or civilians, and persons in aircraft who carry out their missions openly and who have penetrated hostile lines are not to be considered spies, for the reason that, while they may have resorted to concealment, they have practiced no dissimulation.

It is necessary to prove an intent to communicate information to the hostile party. This intent will very readily be inferred on proof of a deceptive insinuation of the accused among our forces, but this inference may be overcome by very clear evidence that the person had come within the lines for a comparatively innocent purpose, as to visit his family or to reach his own lines by assuming a disguise.

It is not essential that the accused obtain the information sought or that he communicate it. The offense is complete with the lurking or dissimulation with intent to accomplish these objects.

A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy incurs no responsibility for his previous acts of espionage.

A person living in occupied territory who, without dissimulation, merely reports what he sees or what he hears through agents to the enemy may be charged under Article 81 with communicating with or giving intelligence to the enemy, but he may not be charged under this article with being a spy.

Proof.—(*a*) That the accused was found at a certain place within our zone of operations, acting clandestinely, or under false pretenses; and (*b*) that he was obtaining, or endeavoring to obtain, information with intent to communicate it to the enemy.

171. EIGHTY-THIRD ARTICLE OF WAR

SUFFERING THE LOSS, DAMAGE OR WRONGFUL DISPOSITION OF MILITARY PROPERTY

Discussion.—This article concerns only military property belonging to the United States. The loss, damage, or disposition may be said to be willfully suffered by one who, knowing the act to be imminent or actually going on, takes no steps to prevent it, as by a sentinel who, seeing a small and readily extinguishable fire in a stack of hay on his post, allows the hay to burn. A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a probable loss, damage, or wrongful disposition.

The willful or neglectful sufferance specified by the article may consist in a deliberate violation or positive disregard of some specific injunction of law, regulations, or orders; or it may be evidenced by such circumstances as a reckless or unwarranted personal use of the property, causing or allowing it to remain exposed to the weather, insecurely housed, or not guarded; permitting it to be consumed, wasted, or injured by other persons; loaning it to an irresponsible person by whom it is damaged.

Proof.—(*a*) That certain military property belonging to the United States was lost, spoiled, damaged, or wrongfully disposed of in the manner alleged; (*b*) that such loss, damage, or disposition was suffered by the accused through a certain omission of duty on his part; (*c*) that such omission was willful or negligent as alleged; and (*d*) the value of the property, as alleged.

Although there may be no direct evidence that the property was military property belonging to the United States, still circumstantial evidence such as evidence that the property shown to have been lost, spoiled, damaged, or wrongfully disposed of by the accused was of a type and kind issued for use in, or furnished and intended for the military service, might together with other proved circumstances warrant the court in inferring that it was such military property.

172. EIGHTY-FOURTH ARTICLE OF WAR

a. SELLING OR WRONGFULLY DISPOSING OF MILITARY PROPERTY

Discussion.—The article applies to any property issued for use in the military service, and the fact that the property sold, disposed of, lost, or injured was issued to someone other than the accused is immaterial. "Clothing" includes all articles of clothing whether issued under a clothing allowance or otherwise. The article applies only to soldiers. Officers or others guilty of similar offenses should be charged under Article 83, 94, or 96, depending on the circumstances.

Proof.—(*a*) That the accused soldier sold or otherwise disposed of certain property in the manner alleged; (*b*) that the disposition was wrongful; (*c*) that the property was issued for use in the military service; and (*d*) the value of the property as alleged.

b. WILLFULLY OR THROUGH NEGLECT INJURING OR LOSING MILITARY PROPERTY

Discussion.—See 172. A willful injury or loss is one that is intentionally occasioned. A loss or injury is occasioned through neglect when it is the result of a want of such attention to the nature or probable consequences of an act or omission as was appropriate under the circumstances.

If it is shown by either direct or circumstantial evidence that the property was issued to the accused, it may be presumed that the injury or loss shown, unless satisfactorily explained, was due to the neglect of the accused. The rule of this subparagraph applies only to items of individual issue.

Proof.—(*a*) That certain property was injured in a certain way or lost, as alleged; (*b*) that the property was issued for use in the military service; (*c*) that the injury or loss was willfully caused by the accused in a certain manner, as alleged; or that the injury or loss was the result of neglect on the part of the accused; and (*d*) the value of the property as alleged.

173. EIGHTY-FIFTH ARTICLE OF WAR

BEING FOUND DRUNK ON DUTY

Discussion.—Under this article it is necessary that accused be found to be drunk while actually on duty, but the fact that he became drunk before going on duty, although material in extenuation, is immaterial on the question of guilt. A person is not found drunk on duty in the sense of this article if he is simply discovered to be drunk when ordered, or otherwise required to perform the duty, upon which, because of his condition, he does not enter at all. But the article does apply although the duty may be of merely preliminary or anticipatory nature, such as attending an inspection by a soldier designated for guard, or an awaiting by a medical officer of a possible call for his services.

The term "duty" as used in this article means military duty. But it is important to note that every duty which an officer or soldier is legally required by superior military authority to execute, and for the proper execution of which he is answerable to such authority, is necessarily a military duty.

The commanding officer of a post, or of a command, or detachment in the field in the actual exercise of command, is constantly on duty. In the case of other officers or soldiers the term "on duty" relates to duties of routine or detail, in garrison or in the field, and does not relate to those periods when, no duty being required of them by orders or regulations, officers and men occupy the status of leisure known to the service as "off duty".

In time of war and in a region of active hostilities the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this article.

So also, an officer of the day and members of the guard are on duty during their entire tour within the meaning of this article, but a sentinel found drunk on post should ordinarily be charged under Article 86.

The offense of a person who absents himself from his duty and is found drunk while so absent, or who is relieved from duty at a post and ordered to remain there to await orders, and is found drunk during such status, is not chargeable under this article.

Whether the drunkenness was caused by liquor or drugs is immaterial; and any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article.

Proof.—(*a*) That the accused was on a certain duty as alleged; and (*b*) that he was found drunk while on that duty.

On an issue of drunkenness, admissible testimony is not confined to a description of the conduct and demeanor of the accused, and the testimony of a witness that the accused was drunk or was sober is not inadmissible on the ground that it is an expression of opinion.

174. EIGHTY-SIXTH ARTICLE OF WAR

a. BEING FOUND DRUNK ON POST

Discussion.—See 173. A sentinel is on post within the meaning of this article not only when he is walking a post duly designated for a sentinel, as is ordinarily the case in garrison, but also, for example, when he may be stationed in observation against the approach of an enemy, or on post to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work.

The post of a sentinel is not limited to an imaginary line, but includes, according to orders or circumstances, such contiguous area within which he may walk as may be necessary for the protection of property committed to his charge or for the discharge of such other duties as may be required by general or special orders. The sentinel who goes anywhere within that area for the discharge of his duties does not leave his post, but if found drunk or sleeping within the area he may be convicted of a violation of this article.

The fact that the sentinel is not posted in the regular way is not a defense. It is sufficient, for example, if the sentinel has taken his post in accordance with proper instruction, whether or not formally given. The term sentinel may include an observer detailed to watch such special equipment as that designed to show the approach of enemy aircraft or to locate enemy artillery. It does not, however, include, an officer or noncommissioned officer of a guard not posted or performing the duties of a sentinel; neither does it include an ordinary military or civilian watchman.

Proof.—(*a*) That the accused was posted or on post as a sentinel, as alleged; and (*b*) that he was found drunk while on his post.

b. BEING FOUND SLEEPING ON POST

Discussion.—See 174*a*. The fact that the accused had been previously overtaxed by excessive guard or other duty is not a defense, although evidence to that effect may be received in extenuation of the offense.

Proof.—(*a*) That the accused was posted or on post as a sentinel, as alleged; and (*b*) that he was found sleeping while on his post.

c. LEAVING POST BEFORE BEING RELIEVED

Discussion.—See 174*a*. The offense of leaving post is not committed when a sentinel goes an immaterial distance from the point, path, area, or object which was prescribed as his post. If, however, he goes such a distance that his ability fully to perform his duty as a sentinel is impaired, he is guilty of leaving his post.

Proof.—(*a*) That the accused was posted or on post as a sentinel, as alleged; and (*b*) that he left his post without being regularly relieved.

175. EIGHTY-SEVENTH ARTICLE OF WAR

PERSONAL INTEREST IN SALE OF PROVISIONS

Discussion.—The offense is committed as well when a commanding officer profits personally from the sale of necessaries, or the granting of the privilege of their sale, through a commission, present, or otherwise, however small, secured through agreement with the vendor, as when the officer is himself the owner of a direct interest in the articles introduced for sale. The introduction for trade in the post exchange or similar agency of victuals or other articles appropriate for use by military personnel in which the commanding officer has an interest is an offense within the meaning of this article.

Circumstances of the acceptance by an officer of "gifts" from a vendor selling or seeking to sell at a station of which the officer is commander may justify an inference that such so called gifts were in fact consideration for privileges granted the vendor by the officer.

Proof.—(*a*) That the accused was an officer commanding in a certain garrison, fort, barracks, camp, or other place where troops of the United States were serving; and (*b*) that, for his private advantage, he was interested in or laid an imposition upon the sale of any victuals or other necessaries of life brought into that place for the use of troops.

176. EIGHTY-NINTH ARTICLE OF WAR

a. COMMITTING WASTE OR SPOIL

Discussion.—The terms "waste" or "spoil" as used in this article refer to such acts of voluntary destruction of or permanent damage

to real property as burning down buildings, tearing down fences, or cutting down trees.

Proof.—That the accused committed waste or spoil on certain property in the manner alleged.

b. WRONGFULLY DESTROYING PROPERTY

Discussion.—To be destroyed the property need not be completely demolished or annihilated, but need be only sufficiently injured to be useless for the purpose for which it was intended. The article includes destruction of property through willful misconduct or such reckless disregard of property rights as to carry an implication of willfulness.

Proof.—(*a*) That the accused destroyed certain property, as alleged; and (*b*) that such destruction was willful and wrongful.

c. COMMITTING DEPREDATION

Discussion.—"Any kind of depredation" includes plundering, pillaging, robbing, and any damage to property through willful misconduct or reckless disregard of property rights not included in the preceding specific terms of the article if accompanied by force, violence, or disorderly conduct. Taking of property through trick, device, or deceit, unaccompanied by an element of force, is not a depredation.

Proof.—That the accused committed certain acts of depredation on certain property, as alleged.

d. COMMITTING RIOT

Discussion.—A riot is a tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and who afterwards actually execute the same in a violent or turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful.

Proof.—(*a*) That the accused was a member of a violent and tumultuous assembly of three or more persons of their own authority; (*b*) that accused and at least two other members of the assembly possessed an intent mutually to assist one another against anyone in the execution of an enterprise of a private nature; (*c*) that the assembly or some of its members committed acts of violence or a tumultuous disturbance of the peace as alleged; and (*d*) circumstances from which terror and disturbance resulting from such acts of violence may be inferred.

e. REFUSING OR FAILING TO SEE REPARATION MADE

Discussion.—Refusing to entertain a proper complaint, refusing or failing to convene a board for the assessment of damage (see A. W.

105), or to act on such proceedings, or to direct proper stoppages, are instances of this offense.

Proof.—(*a*) That the accused was the commanding officer of a certain command, as alleged; (*b*) that complaint was duly made to him by a certain person of damage to or loss of certain property occasioned through waste, spoil, wrongful destruction, or depredation by troops of the command of the accused, as alleged; and (*c*) that the accused either refused or failed in the manner alleged to see reparation made to the injured party, insofar as the pay of the offender or offenders would go toward such reparation.

177. NINETIETH ARTICLE OF WAR

PROVOKING SPEECHES OR GESTURES

Discussion.—Reproachful, provoking, or threatening words or gestures of a nature to induce breaches of the peace directed toward another person subject to military law are denounced by this article.

Proof.—(*a*) That the accused wrongfully directed reproachful or provoking speeches or gestures toward another person; and (*b*) that the person toward whom the speeches or gestures were addressed was at that time a person subject to military law.

178. NINETY-FIRST ARTICLE OF WAR

a. FIGHTING A DUEL

Discussion.—A duel is a combat between two persons fought with deadly weapons by agreement.

Proof.—(*a*) That the accused fought another person in private combat with deadly weapons; and (*b*) that the combat was by prior agreement.

b. PROMOTING, BEING CONCERNED IN, OR CONNIVING AT FIGHTING A DUEL OR FAILING TO REPORT KNOWLEDGE OF A CHALLENGE

Discussion.—Prodding or taunting another to challenge or to accept a challenge to duel, acting as a second or as carrier of a challenge or acceptance, or otherwise furthering or contributing toward the fighting of a duel are examples of promoting a duel. Anyone who has reason to believe steps are being or have been taken toward arranging or fighting a duel and who fails to notify appropriate authorities and to take other reasonable preventive action thereby connives at the fighting of a duel. Knowledge creates an obligation to act; the failure so to do constitutes a crime.

Proof.—That the accused promoted, was concerned in, or connived at the fighting of a duel by taunting another to challenge, acting as a

second, failing to bring knowledge possessed by him of an intended duel to the attention of the authorities, or otherwise, as alleged.

179. NINETY-SECOND ARTICLE OF WAR

a. MURDER

Discussion.—"In time of peace" contemplates a complete peace, officially proclaimed.

Murder is the unlawful killing of a human being with malice aforethought. "Unlawful" means without legal justification or excuse. The death must result within a year and a day of the act or omission that caused it. The offense is committed at the place of the act or omission although the victim may have died elsewhere.

Among the lesser offenses which may be included in a charge of murder are voluntary and involuntary manslaughter, attempt to commit murder, and certain forms of assault.

Without legal justification.—A homicide done in the proper performance of a legal duty is justifiable. Thus, executing a person pursuant to a legal sentence of death, killing in suppressing a mutiny or riot or in preventing the escape of a prisoner if no other possible means are adequate, killing an enemy in battle, and killing to prevent the commission of a felony attempted by force or surprise, such as murder, burglary, robbery, or arson, are cases of justifiable homicide.

The general rule is that the acts of a subordinate officer or soldier, done in good faith and without malice in compliance with his supposed duty or superior orders, are justifiable, unless those acts are manifestly beyond the scope of his authority, and such that a man of ordinary sense and understanding would know to be illegal.

The foregoing principles should not be construed as conferring immunity upon an officer or soldier who willfully or through culpable negligence does acts endangering the lives of innocent third parties in the discharge of his duty to prevent escape or effect an arrest.

Without legal excuse.—A homicide which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense, is excusable. Thus, if a lawful operation, performed with due care and skill, causes the death of the patient, the homicide is excusable. To excuse a killing on the ground of self-defense upon a sudden affray, the killing must have been believed on reasonable grounds to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To avail himself of the right of self-defense, the person doing the killing must

not have been the aggressor or intentionally provoked the altercation; but if after provoking a fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor.

Malice aforethought.—The presence of malice aforethought distinguishes the offense of murder.

Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take the life of anyone. The use of the word "aforethought" does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed.

Malice aforehought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except if death be inflicted in the heat of a sudden passion, caused by adequate provocation—see 180*a*); knowledge that the act which causes death will probably cause the death of, or grievious bodily harm to, any person, whether such person is the person actually killed or not, even though such knowledge be accompanied by indifference whether death or great bodily harm is caused, or by a wish that it may not be caused; intent to commit any felony (see 180*d*); intent to oppose force to an officer or other person lawfully engaged in arresting, keeping in custody, or imprisoning any person, dispersing an unlawful assembly, suppressing a riot or affray, or otherwise keeping the peace, provided the offender has notice that the person killed is such officer or other person so employed.

Premeditation.—Murder does not require premeditation, but if premeditated it is a more serious offense and may be punished by death. A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intention to kill someone and consideration of the act intended. Premeditation imports substantial, although brief, deliberation or design. For example, if in the course of an attempt to rape, the assailant deliberately chokes his victim until she suffocates, the deliberate nature of his act reveals premeditation, even though he may have entered upon the attempt intending no other harm. But if, in attempting to run from her assailant, the victim falls from a cliff and is killed, premeditation is lacking. A murder is without premeditation if a fire is started by arson, and a person is burned to death whose presence in the building was unknown to the arsonist.

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Proof.—(*a*) That the accused unlawfully killed a certain person named or described by certain means, as alleged (requiring proof that the alleged victim is dead, that his death resulted from an injury received by him, that such injury resulted from an act of the accused, and that the death occurred within a year and a day of such act); (*b*) that such killing was with malice aforethought; and if alleged, (*c*) that the killing was premeditated.

In trials for murder and manslaughter.—The law recognizes an exception to the rule rejecting hearsay by allowing the dying declaration of the victim of the crime concerning the circumstances which have induced his present condition, and especially concerning the person by whom the violence was committed, to be detailed in evidence by one who has heard them. For testimony of this character to be competent, it is necessary—and must be proved preliminary to proof of the declaration—that the person whose words are repeated by the witness should have been *in extremis* and under a sense of impending death, that is, in the belief that he was to die soon; but the victim need not himself state that he is under this impression, provided the fact is otherwise shown. If this belief of the victim is established, it is not essential for admissibility of his words that death should have followed them immediately. But if, when uttering the words, he was under the impression that he would recover, they would be inadmissible even if he presently died. It is no objection to their admissibility that the words were in answer to leading questions, or upon urgent solicitations of other persons. If instead of speaking he expressed himself, or answered questions by intelligible signs, descriptions of these signs through testimony are equally admissible. But only those declarations are admissible that would be admitted if the party were himself a witness; thus, irrelevant and immaterial remarks and statements of opinion as distinguished from facts cannot be received. If the declaration was put in writing at the time made, the writing should be produced. Dying declarations are admissible both in favor of and against the accused.

Evidence of dying declarations should be received with great caution, for they are usually made under circumstances of mental and physical debility, and without being subjected to the test of cross-examination or the other ordinary legal safeguards.

b. RAPE

Discussion.—Rape is the unlawful carnal knowledge of a woman by force and without her consent.

Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

The offense may be committed on a female of any age.

Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient if there is no consent.

Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and if a woman fails to take such measures to frustrate the execution of a man's design as she is able to take and are called for by the circumstances, the inference may be drawn that she did in fact consent.

It has been said of this offense, "It is true that rape is a most detestable crime . . .; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent."

Carnal knowledge with her consent of a female under the age of consent, commonly called statutory rape, is not an offense under this article, but may be an offense under Article 96. See 183*c*.

Among the lesser offenses which may be included in that of rape are assault with intent to commit rape, assault and battery, assault, and attempt to commit rape.

Proof.—(*a*) That the accused had carnal knowledge of a certain female, as alleged, and (*b*) that the act was done by force and without her consent.

180. NINETY-THIRD ARTICLE OF WAR

a. MANSLAUGHTER

Discussion.—See 179*a*. Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary.

Voluntary manslaughter is homicide caused by an act likely to result in death, intentionally committed in the heat of sudden passion brought about by provocation. The law recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by provocation, and not by malice, he may strike a fatal blow before he has had time to control himself, and therefore does not in such a case punish him as severely as if the killing were done with malice aforethought. The provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man, and the act of killing must be committed under and because of the passion. The provocation must not be sought or induced as an excuse for killing or doing harm. If sufficient cooling time elapses between the provocation and the blow, the killing is murder, even if the passion persists.

Instances of adequate provocation are: assault and battery inflicting serious bodily harm, an unlawful imprisonment, and the sight by a husband or wife of an act of adultery committed by his or her spouse. If the person so assaulted or imprisoned, or the husband or wife so

situated, at once kills the offender or offenders in the heat of sudden passion caused by their acts, voluntary manslaughter only has been committed. Instances of inadequate provocation are: insulting or abusive words or gestures, a slight blow with the hand or fist, trespass or other injuries to property, and breaches of contract. See also 140*a* (Drunkenness).

Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not inherently dangerous to human life, or by culpable negligence in performing a lawful act or an act required by law. In involuntary manslaughter in the commission of an unlawful act, the unlawful act must be evil in itself by reason of its inherent nature and not an act which is wrong only because it is forbidden by a statute or order. Thus, the driving of an automobile in slight excess of a speed limit duly fixed, but not recklessly or in a culpably negligent manner, is not the kind of unlawful act contemplated. On the other hand, voluntary engagement in an affray is such an unlawful act. To use an immoderate amount of force in suppressing a mutiny, riot, or affray is an unlawful act, and if death is caused thereby the one using such force is guilty of manslaughter at least.

Culpable negligence is a degree of carelessness greater than simple negligence and may be described as a negligent act or omission accompanied by a disregard for the foreseeable consequences to others of such act or omission. Thus, a negligent act or omission which, when viewed in the light of human experience, might foreseeably result in the death of another, even though the act or omission would not, necessarily, be likely to have fatal consequences, may be the basis for a charge of involuntary manslaughter. Instances of culpable negligence in performing a lawful act are: negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in fun at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous; carelessly leaving poisons or dangerous drugs where they may endanger life.

When there is no legal duty to act there can, of course, be no neglect. Thus when a stranger makes no effort to save a drowning man, or a person allows a mendicant to freeze or starve to death, no crime is committed.

Among the lesser offenses which may be included in a particular charge of voluntary manslaughter are an attempt to commit voluntary manslaughter, involuntary manslaughter, negligent homicide in violation of Article 96, assault with intent to commit voluntary manslaughter, assault with intent to do bodily harm, assault and battery, and assault. Among the lesser included offenses which may be included within a charge of involuntary manslaughter are negligent

homicide in violation of Article 96, assault and battery, and assault.

Proof.—(*a*) Item (*a*) under 179*a*; and (*b*) facts and circumstances, as alleged, indicating that the homicide amounted in law to the degree of manslaughter alleged.

b. MAYHEM

Discussion.—Mayhem is an injury of any part of the body of a person whereby he is rendered less able in fighting either to defend himself or to annoy his adversary. The hurt must result in a loss or permanent disability of the part of the body injured.

It is mayhem to put out a man's eye, to cut off his hand, foot, or finger, or even to knock out a front tooth, as these injuries render the individual less able to fight; but it is otherwise if an ear lobe is cut off or a back tooth is knocked out, as these injuries merely disfigure him.

To constitute mayhem the injury must be willfully and maliciously done, but need not be premeditated. If the injury is done under circumstances which would excuse or justify homicide, no offense is committed. A person inflicting such an injury upon himself is guilty of this offense; and if another does it at his request, both are so guilty.

Among the lesser offenses included in a particular charge of mayhem are an attempt to commit mayhem, assault with intent to commit mayhem, assault with intent to commit bodily harm, assault and battery, and assault.

Proof.—(*a*) That the accused inflicted on a certain person a certain injury in the manner alleged; and (*b*) facts and circumstances showing the injury to have been inflicted intentionally and maliciously.

c. ARSON

Discussion.—Arson is the willful and malicious burning of the dwelling house or outhouse of another. The offense is against the habitation of another rather than against his property. The term "dwelling house" includes outbuildings that form part of the cluster of buildings used as a residence. A shop or store is not the subject of arson unless occupied as a dwelling. It is not arson to burn a house that has never been occupied or which has been temporarily abandoned; but it is arson if the occupant is merely temporarily absent. It is not arson for a tenant to burn the dwelling in which he lives even though it is the property of another, but the legal owner of a house which is in the rightful occupancy of another may be guilty of arson in burning it. It is not arson to burn the dwelling of another at his request.

To constitute a burning some part, however small, of the house must be actually consumed or disintegrated by the heat, but a mere scorching is not a burning.

Proof.—(*a*) That the accused burned a certain dwelling house of another; and (*b*) facts and circumstances indicating that the act was willful and malicious.

d. BURGLARY

Discussion.—Burglary is the breaking and entering, in the night, of the dwelling house of another, with intent to commit a felony therein.

In addition to those offenses designated as felonies at common law, such as murder, manslaughter, arson, robbery, rape, sodomy, mayhem, and larceny (irrespective of value), any offense of a civil nature punishable by death or imprisonment for a term exceeding one year is a felony (18 USC 1). It is immaterial whether the felony be committed or even attempted, and if a felony is actually intended it is no defense that its commission was impossible.

To constitute burglary the house must be the dwelling house of another—the term "dwelling house" including outhouses within the common inclosure, farmyard, or cluster of buildings used as a residence.

A store is not a subject of burglary unless part of, or used also as a dwelling house, as when the occupant uses another part of the same building as his dwelling, or when the store is habitually slept in by his servants or members of his family.

The house must be in the status of being occupied at the time of, the breaking and entering. It is not necessary to this status that anyone actually be in it; but if the house has never been occupied at all or has been left without any intention of returning to it this status does not exist. Separate dwellings within the same building, as a flat in an apartment house or a room in a hotel, are subjects of burglary by other tenants or guests, and in general by the owner of the building himself. A tent is not a subject of burglary.

There must be a breaking, actual or constructive. Merely to enter through a hole left in the wall or roof or through an open window or door, even if left only slightly open and pushed farther open by the person entering, will not constitute a breaking; but if there is any removal of any part of the house designed to prevent entry, other than the moving of a partly open door or window, it is sufficient. Opening a closed door or window or other similar fixture, or cutting out the glass of a window or the netting of a screen is a sufficient breaking. The breaking of an inner door by one who has entered the house without breaking, or by a servant lawfully within the

house, but who has no authority to enter the particular room, is a sufficient breaking, but unless such a breaking is followed by an entry into the particular room with intent to commit a felony therein burglary is not committed.

There is a constructive breaking when the entry is gained by a trick, such as concealing oneself in a box; or under false pretense, such as impersonating a gas or telephone inspector; or by intimidating the inmates through violence or threats into opening the door; or through collusion with a confederate, an inmate of the house; or by descending a chimney, even if only a partial descent is made and no room is entered.

An entry must be effected before the offense is complete, but the entry of any part of the body, even a finger, is sufficient; and an insertion into the house of an instrument, except merely to facilitate further entrance, is a sufficient entry.

Both the breaking and entry must be in the nighttime, which is the period between sunset and sunrise, when there is not sufficient daylight to discern a man's face, and both must be done with the intent to commit a felony in the house. If the available evidence appears to warrant such action, the actual commission of the felony alleged in the burglary specification to have been intended should be charged in a separate specification.

Proof.—(*a*) That the accused broke and entered a certain dwelling house of a certain other person, as specified; (*b*) that such breaking and entering were done in the nighttime; and (*c*) facts and circumstances (for instance, the actual commission of the felony) which indicate that such breaking and entering were done with the intent to commit the alleged felony therein.

e. HOUSEBREAKING

Discussion.—Housebreaking is unlawfully entering the building of another with intent to commit a criminal offense therein.

The offense is broader than burglary in that the place entered is not required to be a dwelling house; it is not necessary that the place be occupied; it is not essential that there be a breaking; the entry may be either in the night or in the daytime; and the intent need not be to commit a felony. The intent to commit some criminal offense is an essential element of the offense, and must therefore be alleged and proved in order to support a conviction of this offense.

The term "criminal offense" includes any act or omission violative of the Articles of War which is cognizable by courts-martial except acts or omissions constituting purely military offenses.

The principles of the last sentence of the discussion in 180*d* (Burglary) should be observed when charging housebreaking.

Proof.—(*a*) That the accused entered the place alleged and (*b*) facts and circumstances indicating an intent to commit a criminal offense therein, as alleged.

f. ROBBERY

Discussion.—Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation.

It is not robbery to take one's own property, unless the person from whom it is taken has a special property interest in the goods and the right to possession; nor is it robbery to take property under the honest belief that it is one's own. It is not necessary that the person from whom the property is taken be the actual owner—it is enough if he has a possession or a custody that is good against the taker.

The property must be taken from the person or in his presence; but to be in the presence it is not necessary that the owner be within any certain distance of his property. If persons enter a house and force the owner by threats to disclose the hiding place of valuables in an adjoining room, and leaving the owner tied, go into such room and steal the valuables, they have committed robbery.

The taking must be against the will of the owner by means of violence or intimidation. The violence or intimidation must precede or accompany the taking.

The violence must be actual violence to the person, but the amount used is immaterial. It is enough if it overcomes the actual resistance of the person robbed, or puts him in such a position that he makes no resistance, or suffices to overcome the resistance offered by a chain or other fastening by which the article is attached to the person. If an article is merely snatched from the hand of another or a pocket is picked by stealth and no other force is used, and the owner is not put in fear, the offense is not robbery. But if resistance is overcome in snatching the article, there is sufficient violence, as when the earring of a woman is torn from her ear or a hair ornament entangled in her hair is snatched away. There is sufficient violence when a person's attention is diverted by his being jostled by a confederate of a pickpocket, who is thus enabled to steal the person's watch; or when a man is knocked insensible and his pockets rifled; or when an officer steals property from the person of a prisoner in his charge after handcuffing him on the pretext of preventing his escape.

It is equally robbery when the robber by threats or menaces puts his victim in such fear that he is warranted in making no resistance. The fear must be a reasonably well-founded apprehension of present or future danger, and the goods must be taken while the apprehension exists. The danger apprehended may be his own death or some bod-

ily injury to him, or the destruction of his habitation, or a prosecution for an unnatural crime, where a mere accusation, though false, would so injure a person that fear of it would naturally cause him to give up his property. Extortion by means of threats of prosecution for other types of purported offenses, however, should be charged under Article 96.

Robbery includes larceny, and the elements of that offense must always be present and should be alleged in the specification and proved at the trial. When the evidence falls short of proving the force or fear or other facts necessary to robbery but does prove larceny, the accused, by proper exceptions, may be found guilty of larceny.

Among the lesser offenses that may be included in a particular charge of robbery are also assault with intent to rob, larceny from the person, assault and battery, and assault.

Proof.—(*a*) The larceny of the property (see proof under 180*g*—Larceny—but omitting proof of specific value); (*b*) that such larceny was from the person or in the presence of the person alleged to have been robbed; and (*c*) that the taking was by force and violence or by putting in fear, as alleged.

g. LARCENY

Discussion.—Larceny, or stealing, is the unlawful appropriation of personal property which the thief knows to belong either generally or specially to another, with intent to deprive the owner permanently of his property therein. Unlawful appropriation may be by trespass or by conversion through breach of trust or bailment. In military law former distinctions between larceny and embezzlement do not exist.

Once a larceny is committed, a return of the property or payment for it is no defense. An intent to buy the property stolen or otherwise to replace it with an equivalent is not a defense even though such an intention existed at the time the larceny was committed. Personal property only is the subject of larceny. Property includes not only things possessing intrinsic value, but also bank notes and other forms of paper money and commercial paper and other writings which represent value.

The appropriation by the thief must be without the consent of the owner and must be complete. It is not complete, for example, if the property is secured by a chain and the chain has not been severed. As a general rule, however, any movement of the property or any exercise of dominion over it with the requisite intent is sufficient. The appropriation need not be by the thief with his own hand. If a person, having the intent to steal, entices the horse of another into his own stable without touching the animal, or procures an insane person to

take certain articles, or procures a railroad company to deliver to him the trunk of another by changing the check on it, or has the funds of another transferred to his own bank account, he is guilty of larceny.

If general ownership is in one person and special ownership in another, such as a borrower or hirer, it is optional to charge the ownership as in the general owner or in the special owner. The general owner is the person who has title to the property, whereas the special owner—for example, a borrower or hirer—does not have the title but has possession, custody or control over the property.

When a larceny of several articles is committed at substantially the same time and place it is a single larceny even though the articles belong to different persons. Thus, if a thief steals a suitcase containing the property of several individuals, or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification.

In cases of larceny of property other than property described in Article 94, if the accused has sold the stolen property, the charges should not include specifications alleging the sale unless the sale has been made to an innocent party and constitutes such a fraud upon the purchaser as to warrant the preferment of a specification based upon the fraud.

There must be an intent to deprive the owner permanently of his property. It may exist at or after the time of the appropriation. For example, the act of driving off in the automobile of another without permission, with the intent to ride a short distance and then to return it, is not larceny, but if at the time of the taking or if at some time during the ride an intent to keep the automobile permanently is formed, then larceny has been committed. The existence of the intent must in most cases be inferred from the circumstances. If a person secretly takes property, hides it, and denies that he knows anything about it, the intent to steal may well be inferred; but if he takes it openly, and returns it, this would tend to negative an intent to steal. Proof of a subsequent sale of property is strong evidence of an intent to steal, and, therefore, evidence of the sale may be introduced to support a charge of larceny. A person may be guilty of larceny even though he intends to return the property ultimately, if that intent depends on a future condition or contingency which may never happen. One who pawns the property of another without authority, intending to redeem it at a future date and return it to the owner, may be guilty of larceny.

As to the form of a larceny specification see Appendix 4.

Proof.—(*a*) The appropriation by the accused of the property as alleged; (*b*) that such property belonged to a certain other person named or described; (*c*) that such property was of the value alleged,

or of some value; and (*d*) the facts and circumstances of the case indicating that the appropriation was with the intent to deprive the owner permanently of his interest in the property or of its value or a part of its value.

As a general rule value in larceny is the local legitimate market value on the date of the theft. Serviceable items of Government issue, the property of the Government, are deemed to have values equivalent to the prices listed in official publications of the Departments of the Army, Navy, and Air Force. Value of other personal property which, because of its character or because of the place where the theft was committed, does not have a readily ascertainable legitimate market value, may be determined by the market value in the United States or by the replacement cost, whichever is the lesser. Value may be established by proof of very recent purchase price paid for the article upon the market; by the testimony of an expert qualified as to the market value of similar articles; or by the testimony of a person who has ascertained the price of similar articles by adequate inquiry in the market involved. The owner of property may not testify as to his opinion of its value unless he is qualified as an expert or has made inquiries as stated above. If the character of the property clearly appears in evidence, or if the property is exhibited to the court, the court, from its own experience, may in a proper case infer that the property has some value; or if as a matter of common knowledge property of the type in question has value substantially in excess of $50, as, for example, in the case of an automobile of recent manufacture and in good condition or a large collection of precious stones, the court may find a value of more than $50.

If it appears upon trial for larceny that the accused intended to deprive the owner only temporarily of his property without his consent, the court may find the lesser included offense of wrongful appropriation of the property in violation of Article 96.

h. PERJURY

Discussion.—Perjury is the willful and corrupt giving, upon a lawful oath, or in any form allowed by law to be substituted for an oath, in a judicial proceeding or course of justice, of false testimony material to the issue or matter of inquiry. "Judicial proceeding or course of justice" includes trials by courts-martial.

The false testimony must be willfully and corruptly given; that is, with a deliberate intent to testify falsely.

A witness may commit perjury by testifying that he knows a thing to be true when in fact he either knows nothing about it at all or is not sure about it, and this is so whether the thing be true or false in fact. A witness may also commit perjury in testifying falsely as

to his belief, remembrance, or impression, or as to his judgment or opinion on matters of fact. If a witness swears that he does not remember certain facts when in fact he does, he commits perjury, if the other elements of the offense are present. So, also, if a witness testifies that in his opinion a certain person was drunk when in fact he entertains the contrary opinion, he commits perjury.

The oath must be one required or authorized by law and must be duly administered by one authorized to administer it. Where a form of oath has been prescribed a literal following of the statute is not essential. It is sufficient if the oath administered conforms in substance to the statutory form. An oath includes an affirmation if the latter is authorized in lieu of an oath.

It is no defense that the witness voluntarily appeared, or that he was incompetent as a witness, or that his testimony was given in response to questions that he could have declined to answer, even if he was forced to answer over his claim of privilege.

The false testimony must be material to the issue or matter of inquiry, but the issue or matter of inquiry may be a collateral one. Thus perjury may be committed by giving material false testimony with respect to the credibility of a material witness, or in an affidavit in support of a request for a continuance, as well as by giving testimony with respect to a fact from which a legitimate inference may be drawn as to the existence or nonexistence of a fact in issue.

Proof.—(*a*) That a certain judicial proceeding or course of justice was pending; (*b*) that the accused took an oath or its equivalent in that proceeding, or course of justice, as alleged; (*c*) that the oath was administered to the accused in a matter in which an oath was required or authorized by law, as alleged; (*d*) that the oath was administered by a person having authority to do so; (*e*) that upon such oath he gave the testimony alleged; (*f*) that the testimony was false, and material to the issue or matter of inquiry; and (*g*) facts and circumstances indicating that such false testimony was willfully and corruptly given.

The testimony of a single witness is insufficient to convict for perjury without corroboration by other testimony or by circumstances which may be shown in evidence tending to prove the falsity. Documentary evidence is especially valuable in this connection; for example, when a person is charged with perjury as to facts directly disproved by documentary or written testimony springing from himself with circumstances showing the corrupt intent; or when the testimony with respect to which perjury is charged is contradicted by a public record proved to have been well known to the accused when he took the oath.

i. FORGERY

Discussion.—Forgery is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice.

Some of the instruments that are subjects of forgery are checks, indorsements, orders for delivery of money or goods, railroad tickets, military orders directing travel, and receipts. A writing falsely made includes a false instrument that may be in part or entirely printed, engraved, written with a pencil, or made by photography or other device. A false writing may be made by materially altering an existing writing, by filling in a paper signed in blank, or by signing an instrument already written.

The instrument must be false—must purport to be what it is not. Signing the name of another to a check with intent to defraud is forgery as the instrument purports on its face to be what it is not. But if, after the false signature of such person is added the word "by" with the signature of the person making the check, thus indicating the authority to sign, the offense is not forgery, even if no such authority exists, as the check on its face is what it purports to be. Forgery may be committed by signing one's own name to an instrument; for example, where a check payable to the order of a certain person comes into the hands of another of the same name, he commits forgery when knowing the check to be another's, he indorses it with his own name intending to defraud. Forgery may also be committed by signing a fictitious name, as when a person makes a check payable to himself as drawee and signs it with a fictitious name as drawer.

To constitute a forgery the instrument must on its face appear to be enforceable at law, for example, a check or note; or one which might operate to the prejudice of another, for example, a receipt. The fraudulent making of an instrument affirmatively invalid on its face is not a forgery. However, the fraudulent making of a signature on a check is forgery even if there be no resemblance to the genuine signature, and the name is misspelled.

Alterations in writings must be material. Examples of alterations are erasures of material matters, changing the date, amount, or place of payment of a note.

The false instrument must be made or altered with intent to defraud or injure another. It is immaterial, however, whether anyone be actually defrauded or injured, or that no further step be made toward carrying out the intent to defraud than the making of the false writing.

Passing or uttering as true and genuine a forged instrument, knowing it to be false, or attempting so to do, is not chargeable under this article. For discussions of these offenses see 181*c* and 183*c*.

Proof.—(*a*) That a certain writing was falsely made or altered as alleged; (*b*) that the writing was of a nature which would, if genuine, apparently impose a legal liability on another, or change his legal liability to his prejudice; (*c*) that it was the accused who so falsely made or altered such paper; and (*d*) facts and circumstances indicating the intent of the accused thereby to defraud or prejudice a right of another person.

The instrument itself should be produced, if available. The falsity of a written instrument may be proved by the testimony of the person whose signature was forged, showing that he had not signed the document himself, and that he had not authorized the accused to do so for him. If the name of a fictitious person is used, as, for example, the purported signature of a fictitious person as drawer of a check, evidence of falsity may include evidence from the bank upon which the check is drawn that the drawer of the check has no account in that bank.

j. SODOMY

Discussion.—Sodomy consists of a person taking into his or her mouth or anus the sexual organ of any other person or animal or placing his or her sexual organ in the mouth or anus of any other person or animal. Any penetration, however slight, is sufficient to complete the crime of sodomy. Both parties may be principals.

Proof.—That the accused had sexual connection by mouth or anus with a certain other person or with an animal, as alleged.

k. ASSAULT WITH INTENT TO COMMIT ANY FELONY

Discussion.—An assault with intent to commit any felony is an assault made with a specific intent to murder, rape, rob, or to commit voluntary manslaughter, sodomy, or other felony.

Assault, and assault and battery.—An assault is an attempt or offer with unlawful force or violence to do a corporal hurt to another. It may be either an actual attempt to commit a battery upon the person of another or a putting of the other in reasonable fear of immediate bodily harm. Pointing an unloaded pistol which the assailant knows to be unloaded at another may constitute an assault if the victim is aware of the attack, and is reasonably put in fear. Pointing a loaded pistol with intent to shoot it at one whose back is turned and who is unaware of the impending application of violence to his person, although not a putting in fear, is an attempted battery and, therefore, an assault. Some other examples of assault are raising a stick over the head of another as if to strike him, striking at another with a cane or fist, assuming a threatening attitude and hurrying toward another, and drawing a pistol from a holster or pocket with an actual or apparent intent to use it.

There must be an intent, actual or apparent, to inflict corporal hurt on another. If the circumstances known to the person menaced clearly negative such intent, there is no assault. Thus, if a person accompanies an apparent attempt to strike another by an unequivocal announcement in some form of his intention not to strike, there is no assault. This principle was applied in a case in which the accused raised his whip and shook it at the complainant within striking distance saying, "If you weren't an old man, I would knock you down." However, there is an assault when an assailant makes an offer to inflict immediate bodily injury upon another if the other does not comply with a demand which the assailant has no lawful right to make. Thus, if A points a pistol at B and says to B, "If you don't hand over your watch, I will shoot you," A has committed an assault upon B. The intent to inflict bodily harm may consist of culpable negligence in doing an act which causes personal injury to another or which puts another in reasonable fear of bodily injury. See 180*a* (Manslaughter) for a discussion of culpable negligence.

It is not a defense to a charge of assault that for some reason unknown to the assailant his attempt was bound to fail. If a soldier loads his rifle with what he believes to be a good cartridge and, pointing it at a person, pulls the trigger, he is guilty of assault although the cartridge was in fact so defective that it did not explode. The same principle was applied to a case in which a person in a house shot through the roof at a place where he supposed a policeman was concealed, although the policeman was at another place on the roof.

If there be a demonstration of violence, coupled with an apparent ability to inflict the injury, so as to cause the person at whom it is directed reasonably to fear the injury unless he retreats to safety, and under the circumstances he is compelled to retreat to avoid any impending danger, the assault is complete, even though the assailant may never have been within actual striking distance of the person assailed. There must, however, be an apparent present ability to inflict injury. To aim a pistol at a man at such a distance that it clearly could not injure would not be an assault.

A battery is an unlawful application of force by material agencies, either intentionally or through culpable negligence, to the person of another. It is a battery to spit on another; to push a third person against him; to set a dog at him which bites him; to cut his clothes while he is wearing them (though without touching or intending to touch his person); to shoot him; to cause him to take poison; or to run an automobile against him. It is a battery for a man to fondle against her will a woman not his wife. The force may be applied through conductors reasonably close to the person assaulted. To strike the dress of the person assailed, or the horse on which he is riding, or the

house in which he resides, may be as much a battery as to strike his face. It is not, however, a battery to lay hands on another to attract his attention, or to seize another to prevent a fall. Sending a missile into a crowd also is battery on anyone whom the missile hits; and so is the use, on the part of one who is excused in using force, of more force than is required. If the injury is inflicted unintentionally and without culpable negligence, the offense is not committed.

Proof of a battery is not essential to a conviction of assault, but proof of battery will support a conviction of assault, for an assault is necessarily included in a battery.

Assault with intent to murder.—This is an assault aggravated by the concurrence of a specific intent to murder; in other words, it is an attempt to murder. As in other attempts there must be an overt act, beyond mere preparation or threats, or an attempt to make an attempt. To constitute an assault with intent to murder by firearms it is not necessary that the weapon be discharged; and in no case is the actual infliction of injury necessary. If a man with intent to murder another deliberately assaults him by shooting at him, the fact that he misses does not alter the character of the offense. When the intent to murder exists, the fact that for some reason unknown the actual consummation of the murder is impossible because of the means employed does not prevent the person using them from being guilty of an assault with intent to commit murder if the means are apparently adapted to the end in view. Thus, if a soldier intending to murder another loads his rifle with what he believes to be a ball cartridge and aims and discharges his rifle at the other, it is no defense that he, by accident, used a blank cartridge.

A general felonious intent or specific design to commit another felony is not sufficient, and if a person is too drunk to entertain the specific intent the offense is not committed. But if the accused, intending to murder A, shoots at and wounds B, mistaking him for A, he is guilty of assaulting B with the intent to murder him; so also if a man fires into a group with intent to murder some one, he is guilty of an assault with intent to murder each member of the group.

Assault with intent to commit manslaughter.—This offense differs from assault with intent to murder in the lack of the element of malice necessary to constitute the latter crime. It is an assault in an attempt to take human life in a sudden heat of passion caused by provocation. The specific intent to kill is necessary, and the act must be done under such circumstances that, had death ensued, the offense would have been voluntary manslaughter. There can be no assault with intent to commit involuntary manslaughter.

Assault with intent to commit rape.—This is an attempt to commit rape in which the overt act amounts to an assault upon the woman in-

tended to be ravished. Indecent advances, solicitations however earnest, mere threats; and actual attempts to rape wherein the overt act is not an assault do not amount to this offense. Thus, where a man, intending to rape a woman, stealthily concealed himself in her room to await a favorable opportunity to execute his design but was discovered and fled, he was not guilty of an assault with intent to commit rape.

No actual touching is necessary. When a man entered a woman's room and got in the bed where she was and within reach of her person for the purpose of raping her he committed the offense under discussion, although he did not touch the woman.

The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the person of the woman. Any less intent will not suffice.

Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted.

Assault with intent to rob.—This is an attempt to commit robbery wherein the overt act is an assault which is made with an intent forcibly to take, steal, and carry away property of the person assaulted from his person or in his presence by violence or putting him in fear.

The fact that the accused intended to take only money and that the person he attempted to rob had none is not a defense.

Assault with intent to commit sodomy.—The assault must be against a human being, and must be with the specific intent to commit sodomy. Any less intent, or different intent, will not suffice.

Proof.—(*a*) That the accused assaulted a certain person, as alleged; and (*b*) facts and circumstances indicating the existence at the time of the assault of the specific intent of the accused to murder, or to commit manslaughter, rape, robbery, sodomy, or another felony as alleged.

l. ASSAULT WITH INTENT TO DO BODILY HARM WITH A DANGEROUS WEAPON, INSTRUMENT, OR OTHER THING

Discussion.—Weapons and other objects are dangerous when they are used in such a manner that they are likely to produce death or great bodily harm. The mere fact that a weapon is susceptible of being so used is not enough. Boiling water may be so used as to be a dangerous thing, and a pistol may be so used as not to be a dangerous weapon.

Proof.—(*a*) That the accused assaulted a certain person with a certain weapon, instrument, or thing; and (*b*) facts and circumstances indicating that the weapon, instrument, or thing was used in a manner likely to produce death or great bodily harm.

m. ASSAULT WITH INTENT TO DO BODILY HARM

Discussion.—This is an assault aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed. It is not necessary that any battery actually follow, or if bodily harm is actually inflicted, that it be of the kind intended. With respect to this form of aggravated assault, "bodily harm" means great bodily harm and not those minor injuries, such as a black eye or a bloody nose, which might result from a simple assault and battery with the fists. It is possible, however, to commit an assault with intent to do bodily harm with the fist, as when a strong man strikes a feeble man and breaks his jaw, or a victim is held by one of several assailants for the purpose of allowing the others to beat him into insensibility with their fists, or is knocked by a blow with a fist from a height (such as a grandstand) so that the resulting fall might cause serious physical injury. Intent to do great bodily harm may be inferred when serious bodily injury is in fact inflicted by means of the force employed. If the accused acts in reckless disregard of the safety of others it is not a defense that he did not have in mind the particular person injured.

Proof.—(*a*) That the accused assaulted a certain person, as alleged; and (*b*) facts and circumstances indicating the concurrent intent to do bodily harm to such person.

181. NINETY-FOURTH ARTICLE OF WAR

a. MAKING OR CAUSING TO BE MADE A FALSE OR FRAUDULENT CLAIM

Discussion.—Making a claim is a distinct act from presenting it. A claim may be made in one place and presented in another. The article does not relate to claims against an officer of the United States in his private capacity, but to claims against the United States or any officer thereof as such. It is not necessary that the claim be allowed or paid or that it be made by the person to be benefited by the allowance or payment. The claim must be made or caused to be made with knowledge of its fictitious or dishonest character. This does not include claims, however groundless they may be, that are honestly believed by the maker to be valid, nor claims that are merely made negligently or without ordinary prudence, but it does include claims made by a person who has the belief of the false character of the claim that the ordinarily prudent man would have entertained under the circumstances. See also the discussion in 181*b*.

As an example, a false claim is made when an officer having a claim respecting property lost in the military service knowingly includes articles that were not in fact lost and submits that claim to his commanding officer for the action of the board.

Proof.—(*a*) That the accused made or caused to be made a certain claim against the United States, as alleged; (*b*) that the claim was false or fraudulent in the particulars specified; (*c*) that when the accused made the claim or caused it to be made he knew that it was false or fraudulent in such particulars; and (*d*) the amount involved, as alleged.

b. PRESENTING OR CAUSING TO BE PRESENTED FOR APPROVAL OR PAYMENT A FALSE OR FRAUDULENT CLAIM

Discussion.—See discussion in 181*a*.

The claim must be presented, directly or indirectly, to some person having authority to approve or pay it. False and fraudulent claims include not only those containing some material false statement, but also claims which the person presenting knows to have been paid or for some other reason knows he is not authorized to present or upon which he knows he has no right to collect.

When an officer knows that a certain duly assigned pay account of his is outstanding and that the assignee can collect on it if he chooses to do so, it is no defense to a charge against the officer of presenting for payment a second account covering the same period as the assigned account that the second account was presented relying on the assignee's statement that he would not present the first. But if the accused has good grounds to believe and actually does believe when he presents the second account that the assigned account had been canceled or surrendered by the assignee, his presentation of the second claim does not constitute this offense. A cancellation or surrender of the first account after the presentation of the second account is no defense to the charge.

Presenting to a paymaster a false final statement, knowing it to be false, is an example of the offense under discussion.

Proof.—(*a*) That the accused presented or caused to be presented for approval or payment to a certain person in the civil or military service of the United States having authority to approve or pay it a certain claim against the United States as alleged; (*b*) that such claim was false or fraudulent in the particulars alleged; (*c*) that when the accused presented the claim or caused it to be presented he knew it was false or fraudulent in such particulars; and (*d*) the amount involved, as alleged.

c. MAKING, USING, PROCURING, OR ADVISING THE MAKING OR USE OF A FALSE WRITING OR OTHER PAPER IN CONNECTION WTH CLAIMS

Discussion.—See 181*a* and *b*. The false or fraudulent statement must be material. The offense of making or advising the making or use of a writing or paper known to contain a false material statement

for the purpose of gaining approval or payment of a claim is complete without any use of such paper having been attempted, or the claim presented. But the paper must be made or used to complete the offense of procuring its making or use.

Proof.—(*a*) That the accused made or used or procured or advised the making or use of a certain writing or other paper, as alleged; (*b*) that certain material statements in such writing or other papers were false or fraudulent, as alleged; (*c*) that the accused knew the statements were false or fraudulent; (*d*) facts and circumstances indicating that the act of the accused was for the purpose of obtaining or aiding certain others to obtain the approval, allowance, or payment of a certain claim or claims against the United States, as specified; and (*e*) the amount involved, as alleged.

d. FALSE OATH IN CONNECTION WITH CLAIMS

Discussion.—See 181*a* and *b*.

Proof.—(*a*) That the accused made or procured or advised the making of an oath to a certain writing or other paper, as alleged; (*b*) that the oath was false, as alleged; (*c*) that the accused knew it was false; (*d*) facts and circumstances indicating that the act was for the purpose of obtaining or aiding certain others to obtain the approval, allowance, or payment of a certain claim or claims against the United States, as alleged.

e. FORGERY OF SIGNATURE IN CONNECTION WITH CLAIMS

Discussion.—See 181*a* and *b*. Any fraudulent making of the signature of another, whether or not an attempt is made to imitate the handwriting, is forging or counterfeiting.

Proof.—(*a*) That the accused forged or counterfeited the signature of a certain person on a certain writing or other paper or that he procured or advised such act, as specified; or that he used the forged or counterfeited signature of a certain person or procured or advised its use, knowing such signature to be forged or counterfeited, as alleged; and (*b*) facts and circumstances indicating that his act was for the purpose of obtaining or aiding others to obtain the approval, allowance or payment of a certain claim against the United States, as alleged.

f. DELIVERING LESS THAN AMOUNT CALLED FOR BY RECEIPT

Discussion.—It is immaterial for this offense by what means, whether deceit, collusion or otherwise, the accused effected the transaction, or what his purpose was in so doing.

The giving by a disbursing officer of the full amount called for by a receipt but in excess of the amount properly due, then receiving back

the excess over the amount due; and the insertion by a disbursing officer upon a receipt signed in blank of the amount properly due, after paying to the creditor a less amount, are examples of this offense.

Proof.—(*a*) That the accused had charge, possession, custody, or control of certain money or property of the United States furnished or intended for the military service thereof, as alleged; (*b*) that he obtained a receipt for a certain amount or quantity of that money or property, as alleged; (*c*) that for the receipt he knowingly delivered, or caused to be delivered, to a certain person having authority to receive it an amount or quantity of the money or property less than the amount or quantity thereof specified in the receipt; and (*d*) the value of the undelivered money or property, as alleged.

g. MAKING OR DELIVERING RECEIPT WITHOUT HAVING FULL KNOWLEDGE THAT IT IS TRUE

Discussion.—When, for instance, an officer, or other person subject to military law, is authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service thereof, and a receipt or other paper is presented to him for signature, stating that a certain amount of supplies has been furnished by a certain contractor, it is his duty before signing the paper to know that the full amount of supplies therein stated to have been furnished has in fact been furnished, and that the statements contained in the paper are true. If, with intent to defraud the United States, he signs the paper without that knowledge, he is guilty of a violation of this clause of the article; and signing the paper without such knowledge is prima facie evidence of the intent to defraud.

Proof.—(*a*) That the accused was authorized to make or deliver a certificate of the receipt from a certain person of certain property of the United States furnished or intended for the military service thereof, as alleged; (*b*) that he made or delivered to that person a certificate of receipt, as alleged; (*c*) that the certificate was made or delivered without the accused having full knowledge of the truth of a certain material statement or statements therein; (*d*) facts and circumstances indicating that his act was done with intent to defraud the United States; and (*e*) the amount involved, as alleged.

h. STEALING, LARCENY, EMBEZZLEMENT, MISAPPROPRIATION, MISAPPLICATION SALE AND WRONGFUL DISPOSITION OF MILITARY PROPERTY

Discussion.—The offenses of larceny and embezzlement have been incorporated under the provisions of this article into the offense of stealing. See 180*g*. Stealing and sale of the same property are separate offenses and should be charged in separate specifications.

Misappropriating means devoting to an unauthorized purpose, whether or not it be for the use or benefit of the accused. Misapplication occurs when that purpose is for the use or benefit of the offender. The misappropriation of the property or money need not be for the benefit of the accused; the words "to his own use or benefit" qualify the word "applies" only.

To be the subject of an offense within this article, the property must be that "of the United States furnished or intended for the military service thereof." This does not include post exchange, company, or officers' club funds or property or money appropriated for other than the military service.

That the property belonged to the United States and was furnished or intended for the military service may be proved by direct evidence; or it may be proved by circumstantial evidence that it was property of a type and kind furnished or intended for or issued for use in the military service, together with proof of other circumstances warranting an inference that it was property of the United States so furnished and intended.

Proof.—*Stealing (larceny and embezzlement).*—(*a*) (See 180*g*—Proof); and (*b*) that the property belonged to the United States and was furnished or intended for the military service thereof, as alleged.

Misappropriation and misapplication.—(*a*) That the accused misappropriated or applied to his own use certain property in the manner alleged; (*b*) that the property belonged to the United States and was furnished or intended for the military service thereof, as alleged; (*c*) facts and circumstances indicating that the act of the accused was willfully and knowingly done; and (*d*) the value of the property, as alleged.

Sale or wrongful disposition.—(*a*) That the accused sold or disposed of certain property in the manner alleged; (*b*) that the property belonged to the United States and was furnished or intended for the military service thereof; (*c*) facts and circumstances indicating that the act of the accused was wrongfully or knowingly done; and (*d*) the value of the property, as alleged.

i. PURCHASING OR RECEIVING IN PLEDGE PROPERTY OF THE UNITED STATES

Discussion.—To commit this offense the accused must know not only that the person selling or pledging the property was within the specified classes and that the property belonged to the United States, but also that the person selling or pledging it had no lawful right so to do.

Proof.—(*a*) That the accused purchased or received in pledge for a certain obligation or indebtedness certain military property of the United States, as alleged, knowing it to be property of that character; (*b*) that the property was so purchased or received in pledge from a certain soldier, officer, or other person who was a part of or employed in the military service of the United States, as alleged; (*c*) that the accused knew the person selling or pledging the property to be a soldier, officer, or other person of the described class; (*d*) that the soldier, officer, or other person had no lawful right to sell or pledge the property; (*e*) that at the time of the act the accused knew of such lack of lawful right in the soldier, officer, or other person so to sell or pledge the property; and (*f*) the value of the property, as alleged.

j. ENTERING INTO AN AGREEMENT OR CONSPIRING TO DEFRAUD THE UNITED STATES THROUGH FALSE CLAIMS OR TO COMMIT OTHER OFFENSES UNDER THIS ARTICLE

Discussion.—A conspiracy is the corrupt agreeing together of two or more persons to do by concerted action something unlawful either as a means or an end. The mere entry into an agreement for the purpose of defrauding the United States through any of the means specified, or an agreement to commit any offense denounced by this article, constitutes the offense. Formal agreement is unnecessary if concert of action or other circumstances raise an inference of an agreement.

Agreement between a contractor and an officer to defraud the United States by means of a padded voucher to be certified as correct by the officer is an example of this offense.

Proof.—(*a*) That the accused and one or more persons named or described entered into an agreement; (*b*) that the object of the agreement was to defraud the United States by obtaining or assisting certain other persons to obtain the allowance or payment of a certain false or fraudulent claim, or to commit any offense denounced by this article, as alleged; and (*c*) the amount involved, as alleged.

k. ARREST, TRIAL AND SENTENCE AFTER SEPARATION FROM THE SERVICE OF PERSONS GUILTY OF ANY OFFENSE UNDER THIS ARTICLE OR OF CERTAIN OTHER OFFENSES

Discussion.—The continuing jurisdiction of courts-martial under the concluding sentence of this paragraph applies only to a person who was formerly in the military service of the United States and who has been separated from the service, and for an offense denounced by Article 94 or for stealing or failing properly to account for any

money or other property held in trust by him for enlisted persons or as its official custodian while in the military service.

182. NINETY-FIFTH ARTICLE OF WAR

CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN

Discussion.—The conduct contemplated may be that of an officer of either sex or of a cadet. When applied to a female officer the term "gentleman" is the equivalent of "gentlewoman".

Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character and his standing as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally, seriously compromises his position as an officer and exhibits him as morally unworthy to remain an officer of the honorable profession of arms.

There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing, or indecency or indecorum, or of lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet ideal standards or to possess the attributes in the exact degree demanded by the standards of his own time; but there is a limit of tolerance below which the individual standards in these respects of an officer or cadet can not fall without his being morally unfit to be an officer or cadet or to be considered a gentleman. This article contemplates such conduct by an officer or cadet which, taking all the circumstances into consideration, satisfactorily shows such moral unfitness.

This article includes acts made punishable by any other article, provided such acts amount to conduct unbecoming an officer and a gentleman; thus an officer who steals military property violates both this and Article 94.

Instances of violation of this article are: knowingly making a false official statement; dishonorable neglect to pay debts; opening and reading the letters of another without authority; giving a check on a bank when he knows or reasonably should know there are no funds to meet it, and without intending that there should be; using insulting or defamatory language to another officer in his presence or about him to other military persons; being grossly drunk and conspicuously disorderly in a public place; public association with notorious prostitutes; cruel treatment of soldiers; committing or attempting to commit a crime involving moral turpitude; failing without a good cause to support his family.

Proof.—(*a*) That the accused did or omitted to do the acts, as alleged; and (*b*) the circumstances, intent, and motive, as specified.

183. NINETY-SIXTH ARTICLE OF WAR

a. DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND MILITARY DISCIPLINE

Discussion.—The disorders and neglects punishable under Article 96 include those acts or omissions to the prejudice of good order and military discipline not made punishable by any of the preceding articles.

"To the prejudice of good order and military discipline" refers only to acts directly prejudicial to good order and military discipline and not to acts which are prejudicial only in a remote or indirect sense. An irregular or improper act on the part of an officer or soldier can scarcely be conceived which may not be regarded as in some indirect or remote sense prejudicing military discipline, but the article does not contemplate such distant effects and is confined to cases in which the prejudice is reasonably direct and palpable.

Instances of such disorders and neglects in the case of officers are: disobedience of standing orders or of the orders of an officer when the offense is not chargeable under a specific article, allowing a soldier to go on duty knowing him to be drunk, rendering himself unfit for duty by excessive use of intoxicants or drugs, and drunkenness.

Instances of such disorders and neglects in the case of enlisted persons are: failing to appear on duty in proper uniform, appearing with dirty clothing, malingering, abusive use of military vehicles, careless discharge of firearms, impersonating an officer, and making false statements to an officer in regard to matters of duty.

Among the disorders herein made punishable is the use of coercion or unlawful influence to obtain any statement, admission, or confession from any accused person (A. W. 24); and the fraudulent enlistment contemplated by Article 28, which differs from fraudulent enlistment under Article 54 in that the element of the receipt of pay or allowances is not present. The fact that at the time of the alleged fraudulent enlistment the accused was serving in a prior enlistment from which he had not been discharged may be proved, prima facie, by introducing authenticated records of a former unexpired enlistment. If the period of the prior enlistment has elapsed, the fact that there was no discharge from his former enlistment may be proved, prima facie, by the certificate of The Adjutant General or one of his assistants that the files and records of the office of The Adjutant General contain no record of the discharge of the accused from that enlistment.

For proof of fraudulent enlistment under Article 54, see 142 (Proof).

For a discussion of willful self-inflicted injury which results in a permanent impairment of the ability of a person to fight, see 180*b*.

(Mayhem). Any willfully and wrongfully self-inflicted injury which results in temporary or permanent impairment of the ability of a person to perform military duty may be punishable under Article 96 as a disorder to the prejudice of good order and military discipline.

Proof.—(*a*) That the accused did or failed to do the acts specified; and (*b*) the circumstances as specified.

b. CONDUCT OF A NATURE TO BRING DISCREDIT UPON THE MILITARY SERVICE

Discussion.—"Discredit" as here used means "to injure the reputation of." Examples of this conduct on the part of persons subject to military law may include acts of violation of local law committed under such circumstances as to bring discredit upon the military service. So also any discreditable conduct not elsewhere made punishable by any specific article or by one of the other clauses of Article 96 is punishable under this clause.

If an officer or soldier by his conduct in incurring private indebtedness or by his attitude toward it or his creditor thereafter reflects discredit upon the service to which he belongs, he should be brought to trial for his misconduct. He should not be brought to trial unless in the opinion of the military authorities the facts and law are undisputed and there appears to be no legal or equitable counterclaim or set-off that may be urged by the officer or soldier. The military authorities will not attempt to discipline officers and soldiers for failure to pay disputed private indebtedness or claims, that is, when there appears to be a genuine dispute as to the facts or the law. An officer may be tried for this offense under either Article 95 or Article 96, as the circumstances may warrant.

Proof.—(*a*) That the accused did or failed to do the acts alleged; and (*b*) the circumstances as specified.

c. CRIMES OR OFFENSES NOT CAPITAL

Crimes or offenses, not capital, which are referred to and made punishable by Article 96 include those acts or omissions not made punishable by another article which are denounced as crimes or offenses by enactments of Congress or under authority of Congress and made enforceable in the Federal civil courts.

State and foreign laws are not included within the crimes or offenses not capital referred to in Article 96 and violation thereof may not be prosecuted as such except insofar as state law becomes Federal law of local application under Title 18, U. S. C., § 13. On the other hand, an act which is a violation of a state law or a foreign law may constitute a disorder or neglect to the prejudice of good order and military discipline or conduct of a nature to bring discredit upon the military service and so be punishable under the first or second clause of Article 96.

For the purpose of court-martial jurisdiction the Federal laws which may be applied under the clause, "crimes or offenses not capital," are divided into two groups:

Crimes or offenses of unlimited application.—Certain noncapital crimes and offenses denounced by Title 18, U. S. C., such as counterfeiting (18 U. S. C. 471), various frauds against the Government not denounced by Article 94, and other offenses which are directly injurious to the Government and are made punishable wherever committed are made applicable under the third clause of Article 96 to all persons subject to military law regardless of where the wrongful act or omission occurred.

Crimes or offenses of local application.—Crimes or offenses not capital which are listed in Title 18, U. S. C., but which are limited in their applicability to the special maritime and territorial jurisdiction of the United States as defined in Title 18, U. S. C., § 7, those applicable within the continental United States, and those included in the law of the District of Columbia, in the laws of the territories or possessions of the United States, and in the laws applicable in reservations or places over which the United States has exclusive jurisdiction or concurrent jurisdiction with a State, which are not specifically included in some article, are made applicable under Article 96 to all persons subject to military law who commit such crimes or offenses within the geographical boundaries of the areas in which they are applicable. For the law of a reservation or place over which the United States has exclusive or concurrent jurisdiction with a state, see Title 18, U. S. C., § 13. For example, a person subject to military law cannot be prosecuted under the third clause of Article 96 for having committed a crime or offense, not capital, such as statutory rape, when the act occurred in occupied foreign territory merely because that act would have been an offense against the law of the District of Columbia if it had been committed there. Such an act might, however, in a proper case be prosecuted under the first or second clause of Article 96 as a disorder or neglect to the prejudice of good order and military discipline or as an offense of a nature to bring discredit upon the military service.

VARIOUS TYPES OF OFFENSES UNDER THE NINETY-SIXTH ARTICLE OF WAR

ASSAULT

See 180*k* (Assault).

ASSAULT AND BATTERY

See 180*k* (Assault).

INDECENT ASSAULT

Discussion.—See 180*k* (Assault). An indecent assault is the taking by a man of indecent, lewd, or lascivious liberties with the person of a female, without her consent and against her will with intent to gratify his lust or sexual desires. In a proper case indecent assault may be a lesser included offense of assault with intent to commit rape.

Proof.—(*a*) That the accused assaulted a certain female by taking indecent liberties with her person; (*b*) facts and circumstances indicating that the acts were done with intent to gratify the lust or sexual desires of the accused.

INDECENT ACTS WITH A CHILD UNDER THE AGE OF 16 YEARS

Discussion.—This offense consists of taking any immoral, improper, or indecent liberties with, or the commission of any lewd or lascivious act upon or with the body of, any child of either sex under the age of 16 years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of the person committing the act, or of the child, or of both. Consent by a child to any such act or conduct is not a defense.

Proof.—(*a*) That the accused took certain immoral, improper, or indecent liberties with a certain child as alleged; or that he performed certain lewd or lascivious acts upon or with the body of a certain child as alleged; (*b*) that the child was under the age of 16 years as alleged; and (*c*) facts and circumstances indicating that the intent of the accused was to arouse or gratify the lust or passion or sexual desires of the accused or the child or both, as alleged.

ATTEMPTS

Discussion.—An attempt to commit a crime is an act done with intent to commit that particular crime, and forming part of a series of acts which will apparently, if not interrupted by circumstances independent of the will of the actor, result in its actual commission.

An intent to commit a crime not accompanied by an overt act to carry out the intent does not constitute an attempt. For example, a purchase of matches with intent to burn a haystack is not an attempt. But it is an attempt when the haystack is actually set on fire, even though it may be immediately put out by rain, blown out by the wind, or otherwise extinguished, with only immaterial damage to the hay. It is not an attempt when every act intended by the accused could be completed without committing a crime, even though the accused may at the time believe he is committing a crime. Thus, to shoot at a log believing it to be a man would not be an attempt to murder.

Soliciting another to commit a crime is not an attempt, nor is mere preparation to do a criminal act.

If an attempt is included in the offense charged it may be found as a lesser included offense in violation of Article 96. However, if such attempt is denounced by some specific article it should be found under that article.

See in connection with attempts 78*b* (Finding as to the charges).

Proof.—(*a*) That the accused committed an overt act which if not interrupted by circumstances independent of the will of the accused would have resulted in the commission of the offense, as alleged; (*b*) that the accused intended to commit that particular offense (this may usually be shown by the facts and circumstances surrounding the act); and (*c*) the apparent possibility of committing the offense in the manner indicated.

UTTERING A FORGED INSTRUMENT

Discussion.—See 180*i* (Forgery). To constitute this offense there must be a knowledge that the instrument is a forgery, and there must be an intent to defraud. The intent to defraud may be implied if knowledge of the falsity of the document is shown. It is not necessary that the instrument actually be passed. A mere offer coupled with a representation that it is good is a sufficient uttering.

Proof.—(*a*) That as alleged in the specification, a certain paper was falsely made or falsely altered; (*b*) that such writing was of a nature which would, if genuine, apparently impose a legal liability on another, or change his legal liability to his prejudice; (*c*) that the accused, as alleged in the specification, uttered the paper as true and genuine; (*d*) that the accused, when so doing, knew said paper to have been falsely made or falsely altered, as alleged in the specification; and (*e*) facts and circumstances indicating the intent of the accused to defraud or prejudice the right of another.

The instrument itself should be produced if available.

BURNING BUILDINGS, VESSELS, LUMBER, STORES, ARMS, AND AMMUNITION

Discussion.—Title 18, U. S. C., § 81 provides as follows:

> Whoever, within the special maritime and territorial jurisdiction of the United States, willfully and maliciously sets fire to or burns, or attempts to set fire to or burn any building, structure or vessel, and machinery or buiding materials or supplies, military or naval stores, munitions of war, or any structural aids or appliances for navigation or shipping, shall be fined not more than $1,000 or imprisoned not more than five years, or both.
>
> If the building shall be a dwelling or if the life of any person be placed in jeopardy, he shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

This section includes arson, which is denounced by Article 93 and is discussed in 180*c*, and other types of offenses involved in a wrongful

burning of property. If the particular offense committed does not come within the definition of arson in Article 93, it should be alleged as an offense under Article 96.

Proof.—(*a*) That the accused committed the act as alleged, and (*b*) facts and circumstances indicating that the act was willful and malicious.

CONSPIRACY

Discussion.—See 181*j* as to a definition of conspiracy generally. Title 18, U. S. C., § 371 makes punishable any conspiracy to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, if one or more of the conspirators do any act to effect the object of the conspiracy. The offense denounced by the section differs from the conspiracies denounced by Article 94 in that under article 94 it is not necessary to allege and prove the doing of an overt act to effect the object of the conspiracy, whereas such overt act is an essential element of the offense under this section.

Proof.—(*a*) That the accused and one or more persons named or described entered into an agreement; (*b*) that the object of the agreement was to commit an offense against the United States as alleged or to defraud the United States or any agency thereof in the manner or for the purpose alleged; and (*c*) that one or more of the persons named or described performed an act to effect the object of the conspiracy as alleged.

FALSE SWEARING

Discussion.—Depending on the circumstances and place of commission, false swearing may be punishable as a crime under the third clause of Article 96, or as conduct to the prejudice of good order and military discipline under the first clause, or as conduct of a discreditable nature under the second clause. It may consist, for example, in giving false testimony in a judicial proceeding or course of justice on other than material matters or in making a false oath to an affidavit. It is not necessary that the proceeding in which the oath is taken should be a judicial proceeding. The oath may be taken before any person authorized by law to administer oaths; and a court-martial will take judicial notice of the qualifications of such persons to administer oaths.

Proof.—(*a*) That the accused was sworn in a proceeding or made an oath to an affidavit; (*b*) that the oath was administered by a person having authority to do so; (*c*) that the testimony given or the matter in the affidavit was false, as alleged; and (*d*) facts and circumstances indicating that the false testimony or affidavit was willfully and corruptly given or made.

DISLOYAL STATEMENTS UNDERMINING DISCIPLINE AND LOYALTY

Discussion.—Certain disloyal statements by military personnel may lack the necessary elements to constitute an offense under Title 18, U. S. C., §§ 2385, 2387 and 2388, but nevertheless, under the circumstances be punishable as conduct to the prejudice of good order and military discipline or conduct reflecting discredit on the military service. Examples are public utterances designed to promote disloyalty or disaffection among troops, as praising the enemy, attacking the war aims of the United States, or denouncing our form of Government.

Proof.—(*a*) That the accused made the disloyal statement as alleged; (*b*) facts and circumstances indicating the design as alleged.

Chapter XXX

HABEAS CORPUS

GENERAL—RETURN TO WRIT OR ORDER ISSUED BY A STATE COURT OR JUDGE—WRIT OR ORDER ISSUED BY A FOREIGN COURT—RETURN TO WRIT OR ORDER ISSUED BY A FEDERAL COURT OR JUDGE—FORMS—BRIEF

184. **GENERAL.**—A writ of habeas corpus is a form of process issued by a civil court to inquire into the legality of any restraint upon the liberty of a person. It is a summary remedy for unlawful restraint of liberty and cannot be used to perform the functions of a writ of error or an appeal. A writ of habeas corpus directs the custodian to produce the body of the person restrained before the issuing authority on the date named and to state the reason for his restraint. Some courts first issue an order to show cause why a writ of habeas corpus should not issue. See Dorsey *v.* Gill, 148 F 2d 857. Such an order does not direct the production of the body of the person restrained but calls upon the custodian to explain or show cause why a writ of habeas corpus should not issue. If such an order to show cause is issued and the petitioner establishes a prima facie case of illegality of restraint, a writ of habeas corpus is issued and a hearing is had. When a writ of habeas corpus has been issued and there is a hearing on the writ at which the court or judge determines that it or he has jurisdiction to proceed and that the restraint is unlawful, the person is ordered released from such restraint. If the court or judge determines either that it or he lacks jurisdiction to proceed or that the restraint is lawful the writ is dismissed.

185. **RETURN TO WRIT OR ORDER ISSUED BY A STATE COURT OR JUDGE.**—A State court is without authority to inquire into the legality of the restraint if it appears that the custody is by virtue "of the authority of the United States," the principle being that no State can authorize one of its judges or courts to exercise judicial power by habeas corpus within the jurisdiction of another and independent government. No State judge or court, after he or it is judicially informed that the person is held under the authority of the United States, has any right to interfere with the restraint or to require the petitioner to be brought before the State judge or court. If a person thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone,

to grant him release. A deserter apprehended by a civil officer authorized by a statute of the United States to apprehend deserters is in the custody of the United States. See 189 (Brief in habeas corpus case).

If a State court or judge issues a writ, order or other process to inquire into the legality of restraint imposed upon a person held by military authority, the officer to whom the process is directed will report that fact by telegraph, telephone, or other expeditious means direct to The Judge Advocate General of the Army (AR 410–5) and by similar means to the commanding general of the territorial command in which the person held by the military authorities is located. He will also report the facts to the United States Attorney for the district and request the latter to represent him.

In the case of a person who has been apprehended under a warrant of attachment (105*b*, Warrant of Attachment), if not inconsistent with instructions received from the authorities specified in the preceding subparagraph, the officer on whom the writ is served will not produce the body but will make return as indicated in 188 (Form B). In other cases, such as the case of an enlisted person or general prisoner, the officer on whom the writ is served will not produce the body, but will make a return as indicated in 188 (Form D). A brief of authorities (189) is not intended to be attached to such a return.

186. **WRIT OR ORDER ISSUED BY A FOREIGN COURT OR JUDGE.**—A court or judge of a foreign country has no authority to inquire into the legality of restraint upon any person held by United States military authority. Any process in the nature of a writ of habeas corpus issued by any foreign court or judge to any officer acting in his official capacity as an officer of the United States will not be obeyed, but its issuance will be reported to the commander of the United States force within whose command the person restrained is located and to The Judge Advocate General of the Army. Except as authorized by Headquarters, Department of the Army, no officer of the Army of the United States will subject himself, in his command capacity, to the jurisdiction of any foreign court for such purpose.

187. **RETURN TO WRIT OR ORDER ISSUED BY A FEDERAL COURT OR JUDGE.**—Subject to certain exceptions, United States courts and judges of such courts have the power to issue writs of habeas corpus to inquire into the legality of restraint upon liberty imposed by authority of the United States (28 U. S. C. 2241). Upon the issuance of such a writ or related process the officer to whom it is directed will report that fact by telegraph, telephone or other expeditious means of communication direct to The Judge Advocate General of the Army (AR 410–5) and to the commanding general of the territorial command, stating briefly the grounds on which the release

of the person is sought. He will also report the facts to the United States Attorney for the district and request the latter to represent him.

If consistent with instructions received from the authorities specified in the preceding subparagraph, the officer on whom the writ was served will obey the writ or order and make a return setting forth the reasons for the restraint. See 188 (Forms A and C) and 189 (Brief).

With reference to the papers to accompany the return in a case to which Form A applies, see 105*b* (Warrant of Attachment). In a case to which Form C applies, the copies of the charges and of the order under which the accused is held in arrest or confinement will be certified by the adjutant and sworn to before an officer authorized to administer oaths for military administration, in the following form:

I hereby certify that the foregoing is a full and true copy of the original charges preferred against ——— ———, and of the original order for his arrest (or confinement, as the case may be), and that the same are in the usual form of military charges, and that such charges and order conform to the rules regulating military procedure.

———————, Adjutant.

Sworn to and subscribed before me this ——— day of ———, 19—.

———————,
Captain, Inf.,
Asst. Adj., 29th Inf.

The copy of the order convening the court or publishing the sentence will be certified and verified in a similar manner.

Should the court order the discharge of the person, the officer making the return, through counsel or otherwise, should note an appeal pending instructions from Headquarters, Department of the Army, report to The Judge Advocate General of the Army the action taken by the court or judge, and forward a copy of the order and opinion of the court or judge as soon as it can be obtained.

188. **FORMS.**—The return in a particular case should, of course, vary from the form according to the facts. Thus, if the person whose release is sought (Form C) is an officer or a warrant officer, proper changes should be made.

FORM A

(Return to writ)

In re ——— ——— (name of party held)

(*Writ of habeas corpus—Return of respondent*)

To the Honorable ——— ——— (court or judge):

The respondent, Major ——— ———, United States Army, upon whom has been served a writ of habeas corpus for the production of ——— ———, respectfully makes return and states that he holds the said ——— ——— by authority of the United States pursuant to a warrant of attachment issued under Section 213 of Title II, Selective Service Act of 1948, Article of War 22, by a trial judge advocate of a lawfully convened general [or special] court-martial

(*or* "by a summary court-martial") and duly directed to him, the said respondent, for execution, that he is diligently and in good faith engaged in executing said warrant of attachment, and that he respectfully submits the same for the inspection of the court, together with the original subpoena and proof of service of the same, a copy of the order appointing the court-martial sworn to as such, before which the said ——— ——— has been subpoenaed to testify, a copy of the charges and specifications in the case, sworn to as such, in which said ——— ——— is a witness, a copy of the order referring the case to the court for trial, sworn to as such, and an affidavit of ——— ——— showing that said ——— ——— is a material witness in the case, that he has failed to appear and has offered no valid excuse for such failure.

In obedience, however, to the said writ of habeas corpus the respondent herewith produces before the court the body of the said ——— ———, and for the reasons set forth in this return prays this honorable court to dismiss the said writ.

———————————,
Major, United States Army.

Dated ———, 19—.

FORM B

(Return to writ)

(Make return as in Form A, except substitute for last paragraph the following:)

And said respondent further makes return that he has not produced the body of the said ————, because he holds him by authority of the United States as above set forth, and that this court [or "your honor," as the case may be] is without jurisdiction in the premises, and he respectfully refers to the decisions of the Supreme Court of the United States in Ableman *v.* Booth (21 How. 506) and Tarble's case (13 Wall. 397) as authority for the action, and prays this court [or "your honor"] to dismiss the writ.

———————————,
Major, United States Army.

Dated ———, 19—.

FORM C

(Return to writ)

In re ——— ——— (name of party held)

(*Writ of habeas corpus—Return of respondent*)

To the Honorable ——— ——— (court or judge):

The respondent, Major ——— ———, United States Army, upon whom has been served a writ of habeas corpus for the production of ————, respectfully makes return and states that he holds the said ———— by authority of the United States as a soldier in the United States Army [or "as a general prisoner under sentence of general court-martial"] under the following circumstances:

That the said ———— was duly enlisted as a soldier in the service of the United States at ———, ———, on ———, 19—, for a term of ——— years. (If the offense is fraudulent enlistment, this recital should be omitted.)

(*Here state the offense. If it is fraudulent enlistment by representing himself to be of the required age, it may be stated as follows:*)

That on the ——— day of ———, 19—, at ——— ———, the said ———, being under 18 years of age, did fraudulently enlist in the military service of the United States for the term of ——— years, by falsely representing himself to be over 18

years of age, to wit: ——— years and —— months; and has, since the said enlistment, received pay and allowances (or either) thereunder.

(*If the offense be desertion, it may be stated substantially as follows:*)

That the said ——— ——— deserted said service at ———, ———, on ——— ———, 19—, and remained absent in desertion until he was apprehended at ———, ———, on ——— ———, 19—, by ——— ———, and was thereupon committed to the custody of the respondent as commanding officer of the post of ———.

The said ——— ——— has been placed in confinement [or "arrest" as the case be], and formal charges have been preferred against him for the said offense, a copy of which charges, and of the order under which said ——— ——— is held in confinement [or "arrest"] duly certified and verified, are hereto annexed, and that he will be brought to trial thereon as soon as practicable before a court-martial, to be convened by the commanding general of the ——— Army [or "convened by Special Orders No. ———, Headquarters ———, dated ——— 19—, a copy of which, duly certified and verified, is hereto annexed"].

(*If the party held is a general prisoner, the following paragraph should be substituted for the preceding paragraph:*)

That the said ——— ——— was duly arraigned for the said offense before a general court-martial, convened by Special Orders No. ———, Headquarters ———, dated ——— 19—, was convicted thereof by said court, and was sentenced to be ———, which sentence was duly approved on the ——— day of ———, 19—, by the convening authority [or "by the officer commanding the ——— for the time being," or "by ———, successor in command to the convening authority" *or* "by ———, an officer authorized to appoint a general court-martial as required by Article of War 47"]. Upon appellate review as provided by Title II, Selective Service Act of 1948, Article of War 50, the record of trial in the case of the said ——— was held to be legally sufficient to support the findings of guilty and the sentence (and the sentence was duly confirmed by ——— as required by Article of War 48). A copy of the order promulgating said sentence, duly certified and verified, is attached hereto.

In obedience, however, to the said writ of habeas corpus the respondent herewith produces before the court the body of the said ———, respectfully refers to the decisions cited in the annexed brief [if the case does not involve a minor under the required age the words "respectfully refers to the decisions cited in the annexed brief" will be omitted], and for the reasons set forth in this return prays this honorable court to dismiss the said writ.

———,
Major, United States Army.

Dated ———, 19—.

FORM D

(Return to writ)

(*Make return as in Form C, except as to the last paragraph, for which substitute the paragraph set out in Form B.*)

189. BRIEF.—The following brief may be filed with the return to a writ of habeas corpus issued by a United States court in the case of a soldier whose discharge is sought on the ground of minority. In accordance with the circumstances in the case this brief may be modified in consultation with the appropriate United States Attorney or other legal officer.

BRIEF

The right to avoid the contract of enlistment of a soldier on the ground of minority will be considered under the following heads: I. Under the common law; II. Under the statutes; III. When the minor is held for punishment.

I. Under the Common Law

The enlistment of a minor is not avoidable by the minor nor by his parent or guardian at common law, but is only avoidable if the right to avoid it is conferred by statute.

This proposition is clearly established by a decision of the Supreme Court (*In re Morrissey*, 137 U. S. 157, 159), in which the court said:

> An enlistment is not a contract only, but effects a change of status. (*Grimley's case*, 137 U. S. 147.) It is not, therefore, like an ordinary contract, voidable by the infant. At common law an enlistment was not voidable either by the infant or by his parents or guardians.

The court cites, in support of these statements, *Rex* v. *Rotherfield Greys* (1 B. & C., 345, 349, 350; 107 Eng. Rep. R. 128, 130); *Rex* v. *Lytchet Matraverse* (7 B. & C., 226, 231; 108 Eng. Rep. R. 707); *Commonwealth* v. *Gamble* (11 S. & R. 93 (Pa. R.)); *U. S.* v. *Blakeney* (3 Gratt. 387, 405, 411 (Va.)).

In *Rex* v. *Rotherfield Greys*, *supra*, it was said by Best, J.:

> By the general policy of the law of England, the parental authority continues until the child attains the age of twenty-one years; but the same policy also requires that a minor shall be at liberty to contract an engagement to serve the State. When such an engagement is contracted, it becomes inconsistent with the duty which he owes to the public, that the parental authority should continue. The parental authority, however, is suspended but not destroyed. When the reason for its suspension ceases, the parental authority returns.

In *Rex* v. *Lytchet Matraverse*, *supra*, Bayley, J., after quoting these views of Best, J., says:

> Lawrence, J., in *Rex* v. *Roach* (6 T. R. 254), seems to take the same view of the subject, and to consider the authority of the State paramount to that of the parent so long as the minor continues in the public service, but as soon as he leaves it then the parental authority is restored.

It is clear from these authorities and others which could be cited that at common law the enlistment of a minor of *sufficient capacity* to bear arms was valid regardless of age. The right of the State to the services of such minors is forcefully laid down in *Lanahan* v. *Birge* (30 Conn. 438, 444). See also *Cooley's Principles of Constitutional Law*, *1898 Edition*, page 99, where on the authority of *Ex parte Brown* (4 Fed. Cas. 325, No. 1972), and *United States* v. *Bainbridge* (24 Fed. Cas. 947, No. 14497), it is said:

Minors may be enlisted without the consent of their parents or guardians when the law fails to require such consent.

II. Under the Statutes

The pertinent statutes construed in the cited cases and those now in effect are the following:

Sec. 1116, R. S. Recruits enlisting in the Army must be effective and able-bodied men, and between the ages of sixteen and thirty-five years, at the time of their enlistment. This limitation as to age shall not apply to soldiers re-enlisting.

This section was modified by the act of March 2, 1899 (30 Stat. 978), which provides:

That the limits of age for original enlistments in the Army shall be eighteen and thirty-five years. (10 U. S. C. 621.)

Sec. 1117, R. S. No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians; *Provided*, That such minor has such parents or guardians entitled to his custody and control.

This section is identical to the fifth proviso of Section 27, National Defense Act of June 3, 1916, as amended (39 Stat. 186; 10 U. S. C. 627), which reenacted it in the same words, substituting the age of 18 years for the age of 21.

Sec. 1118, R. S. No minor under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of a felony shall be enlisted or mustered into the military service.

This proviso was not changed by Section 27 of the Army Reorganization Act of June 4, 1920, which struck from Section 27 of the National Defense Act (41 Stat. 775) only the first part of the section, up to and including the third proviso, but did not affect the proviso (fifth proviso) here in question. A further proviso, not pertinent to the consideration of the issue in this case, was added by the act of July 22, 1941, chapter 325 (55 Stat. 606).

Public Law 128, 80th Congress, provides in part:

* * * effective July 1, 1947 the Secretary of the Army is authorized, notwithstanding the provisions of Section 127d of this Act (National Defense Act of 1916 as amended), to accept original enlistments in the Regular Army from among qualified male persons not less than seventeen years of age for periods of two, three, four, five, or six years * * * *Provided further*, That no person under the age of eighteen years shall be enlisted without the written consent of his parents or guardian, and the Secretary of the Army shall, upon the application of the parents or guardian of any such person enlisted without their written consent, discharge such person from the military service with pay and with the form of discharge certificate to which the service of such person, after enlistment, shall entitle him. (Act of June 28, 1947, c. 162, sec. 1, 61 Stat. 191; as amended by act of July 26, 1947, c. 343, Title II, sec. 205 (a), 61 Stat. 501; 10 U. S. C. 625.)

Title I, Public Law 759, 80th Congress, provides in part:

Notwithstanding any other provisions of law, no person between the ages of eighteen and twenty-one shall be discharged from service in the armed forces of the United States while this title is in effect because such person entered such service without the consent of his parent or guardian. (Act of June 24, 1948, Title I, sec. 6 (*l*), Selective Service Act of 1948.)

1. The statutes confer no right upon the minor to avoid his enlistment, certainly not if he be 16 years of age or over.

Section 1116, R. S., as amended, and Public Law 128, 80th Congress, prescribing the age limits of original enlistment, were made for the benefit of the Government, and not the minor. (*In re Morrissey*, 137 U. S. 157; *In re Grimley*, 137 U. S. 147; *In re Wall*, 8 Fed. 85; *In re Davison*, 21 Fed. 618; *In re Zimmerman*, 30 Fed. 176; *In re Spencer*, 40 Fed. 149; *In re Lawler*, 40 Fed. 233; *Solomon* v. *Davenport*, 87 Fed. 318; *Wagner* v. *Gibbon*, 24 Fed. 135.)

Section 1117, R. S., as amended, and the cited proviso of Public Law 128, 80th Congress, while recognizing the right of the parent to the services of the minor confer no right on the minor to avoid his enlistment. See the cases cited above and *Ex parte Rush*, 246 Fed. 172; *In re Riley*, 20 Fed. Cas. 797, No. 11834; *In re Perrone*, 89 Fed. 150; *In re Miller*, 114 Fed. 838, Cert. den. 186 U. S. 486; *In re* Scott, 144 Fed. 79; *Doane* v. *Burkman*, 190 Fed. 541.

In the Morrissey case the Supreme Court of the United States said that the provision of Section 1116, R. S. "* * * is for the benefit of the parent or guardian * * * but it gives no privilege to the minor. * * * An enlistment is not a contract only, but effects a change of status. Grimley's case, ante, 147. It is not, therefore, like an ordinary contract, voidable by the infant * * *. The contract of enlistment was good, so far as the petitioner is concerned. He was not only *de facto*, but *de jure*, a soldier—amenable to military jurisdiction."

Whether the designation of the age limit of 16 years in section 1118, R. S., is such as to make the enlistment of the minor under 16 years of age void or voidable by the minor has not been decided by the Supreme Court. In *Hoskins* v. *Pell* (239 Fed. 279) the court held that such an enlistment was void, but that decision is believed not to be sustained by the weight of authority. On principle, the minor, if of sufficient capacity to render military service, should not be permitted to avoid his enlistment obtained through his fraudulent statements as to his age. However this may be, if the minor continued to serve and receive pay after passing that age, he acquired the status of a soldier like one who was enlisted when over 16 years without the consent of his parents, and a court-martial has jurisdiction to try and sentence him to punishment for desertion, from which sentence

he can not be discharged on habeas corpus on petition of himself or his parents (*Ex parte Hubbard*, 182 Fed. 76).

2. The statutes requiring the consent of the parent or guardian of a minor to his enlistment (sec. 1117, R. S., as amended by sec. 27, act of June 3, 1916 and Public Law 128, 80th Congress) impliedly confer upon the parent or guardian the right to void an enlistment entered into by a minor under the prescribed age without the required consent, if the minor is not held for trial or punishment for a military offense.

In support of this proposition see the cases cited under II, proposition 1.

3. A parent or guardian with knowledge of the enlistment of a minor under the prescribed age, and acquiescing therein for a considerable period, may be held to be estopped from asserting the right to avoid the enlistment.

In support of this proposition see *Ex parte Dunakin* (202 Fed. 290), where it was held, quoting from the syllabi:

> Where a minor enlisted without the consent of his parent or guardian, and his mother, who was his surviving parent, on learning of his enlistment shortly thereafter, did nothing to repudiate the same or to secure his release, and testified that she would have been reconciled to it, had he remained in the Army and not deserted, but after his desertion she wanted to keep him out of the Army, her acts constituted an implied consent to his enlistment.

See also *Ex parte Dostal*, 243 Fed. 664.

4. A minor fraudulently enlisting and remaining in the service after attaining the legal age of enlistment, or the age beyond which parental consent is not required, thereby validates his enlistment.

In support of this proposition see the case of *Ex parte Hubbard* (182 Fed. 76), in which the court held, quoting the syllabus:

> A minor enlisted in the Army when under the age of 16, who has continued to serve and receive pay after passing that age, acquires the status of a soldier like one who was enlisted when over 16 without the consent of his parents, and a court-martial has jurisdiction to try and sentence him to punishment for desertion, from which sentence he can not be discharged on habeas corpus on petition of himself or his parents.

III. WHERE MINOR IS HELD FOR PUNISHMENT

Neither the minor nor his parent nor guardian may avoid the enlistment if the soldier is held for trial or under sentence for a military offense.

In support of this proposition see the cases cited above under II, proposition 1, and also the following: *In re Kaufman* (41 Fed. 876); *In re Dohrendorf* (40 Fed. 148); *In re Cosenow* (37 Fed. 668); *In re*

Dowd (90 Fed. 718); *In re Miller* (114 Fed. 838); *United States* v. *Reaves* (126 Fed. 127); *In re Lessard* (134 Fed. 305); *Ex parte Anderson* (16 Iowa 595); *McConologue's Case* (107 Mass. 154, 170); *In re Carver* (142 Fed. 623); *In re Scott* (144 Fed. 79); *Dillingham* v. *Booker* (163 Fed. 696); *Ex parte Rock* (171 Fed. 240); *Ex parte Hubbard* (182 Fed. 76); *Ex parte Lewkowitz* (163 Fed. 646); *United States* v. *Williford* (220 Fed. 291); *Hoskins* v. *Dickerson* (239 Fed. 295); *Lazarus* v. *Brown* (242 Fed. 983); *Ex parte Foley* (243 Fed. 470); *Ex parte Rush* (246 Fed. 172); *Ex parte Beaver* (271 Fed. 493).

The reasons given for these decisions are that the enlistment of a minor in the Army without the consent of his parent or guardian required by section 1117, R. S., "is not void, but voidable only"; that the soldier being not only *de facto* but *de jure* a soldier, he is subject to the Articles of War and may commit a military offense; and that if held for trial or punishment for a military offense, the interests of the public in the administration of justice are paramount to the right of the parent or guardian, and require that the soldier abide the consequences of his offense before the question of his discharge will be considered by the court. In the Miller case (114 Fed. 842) the court supported its holding by the analogy of a minor held for punishment for a civil offense, saying:

> The common law, unaided by statute, fully recognizes the parents' right to the custody and services of their minor child; but it has never been held that they could, by the writ of habeas corpus or otherwise, obtain his custody and his immunity when he was held by an officer of a civil court of competent jurisdiction to answer a charge of crime. His enlistment having made the prisoner a soldier notwithstanding his minority, he is amenable to the military law just as the citizen who is a minor is amenable to the civil law. The parents can not prevent the law's enforcement in either case * * *.

The views here cited were approved in the Reaves case (126 Fed. 127) where, upon full consideration of the authorities, the Circuit Court of Appeals remanded Reaves, a minor, who had deserted from the Navy, to the custody of the naval authorities as represented by the chief of police who had apprehended him. In the Carver case (142 Fed. 623) the syllabus reads:

> A minor under the age of 18 years, who unlawfully enlisted in the Army without the consent of his father, can not be discharged from the service on a writ of habeas corpus sued out by his father so long as he is under arrest for desertion, nor until he has been discharged from such custody or has served the sentence imposed on him by the military tribunal.

In the Lewkowitz case (163 Fed. 646) the syllabus reads:

> A minor, who by misrepresenting his age has fraudulently enlisted in the Army without the consent of his parents, and thereby subjected himself to punishment under military law, will not be relieved from such punishment by the civil courts by discharging him on a writ of habeas corpus on the application of

his parents, even though the military prosecution is not instituted until after the writ was issued.

This was followed by the unanimous opinion in the Circuit Court of Appeals in the Love case (*Laikuna* v. *Williford*, 220 Fed. 291) in which the court expressly approved the view stated in the Lewkowitz case, quoting section 761, R. S., relating to the procedure under writs of habeas corpus, which reads as follows:

> The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.

The court added:

> Law and justice do not, in our opinion, require Love to be withdrawn from the military authorities and relieved of liability for his offense in favor of his mother's right to his custody.

In the Beaver case (271 Fed. 493) the syllabus reads:

> If a minor, enlisting without the required consent of his parent or guardian, has committed an offense triable by court-martial and punishable by military law, the right of his parents or guardian to his custody and services is subordinate to the right of the military officers to hold him to answer for such offense.

By act of July 27, 1892 (27 Stat. 278), "fraudulent enlistment, and the receipt of any pay or allowance thereunder," was made a military offense, punishable under the 62d Article of War. The offense is now defined in Article 54 (41 Stat. 800), which provides that the offense "shall be punished as a court-martial may direct." A minor who procures his enlistment by willful misrepresentation or concealment as to his qualifications for enlistment, and receives pay or allowances under his enlistment, commits this offense, and the statute authorizes his punishment therefor. In general, it may be stated that if a minor has committed a military offense the interests of the public in the administration of justice are paramount to the right of the parent and require that the soldier shall abide the consequences of his offense before the right of his discharge be passed upon. The soldier shall not be allowed to escape punishment for his offense, even though his parents assert their right to his services. A minor in civil life is liable to punishment for a crime or misdemeanor, even though his confinement may interfere with the rights of his parents; and the above authorities clearly apply the same rule to a minor held for trial or punishment for a military offense.

Appendix 1

THE ARTICLES OF WAR*

The articles included in this section* shall be known as the Articles of War and shall at all times and in all places govern the Armies of the United States.

I. PRELIMINARY PROVISIONS

ART. 1. Definitions.

(*a*) The word "officer" shall be construed to refer to a commissioned officer.

(*b*) The word "soldier" shall be construed as including a noncommissioned officer, a private, or any other enlisted man or woman.

(*c*) The word "company" shall be construed as including a troop, battery, or corresponding unit of the ground or air forces.

(*d*) The word "battalion" shall be construed as including a squadron or corresponding unit of the ground or air forces.

(*e*) The word "cadet" shall be construed to refer to a cadet of the United States Military Academy.

ART. 2. Persons Subject to Military Law.—The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law," or "persons subject to military law," whenever used in these articles: *Provided*, That nothing contained in this Act, except as specifically provided in Article 2, subparagraph (*c*), shall be construed to apply to any person under the United States Naval jurisdiction unless otherwise specifically provided by law.

(*a*) All officers, warrant officers, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same;

(*b*) Cadets;

(*c*) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: *Provided*, That an

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* Section 1, Chapter II, act of 4 June 1920 (41 Stat. 787), as amended by acts of 20 August 1937 (50 Stat. 724, amending Arts. 50½ and 70), 1 August 1942 (56 Stat. 732, amending Art. 50½), 14 December 1942 (56 Stat. 1050, amending Art. 114) and 15 December 1942 (56 Stat. 1051, amending Art. 52), as amended by the act of 24 June 1948 (Public Law 759, 80th Cong.).

The words "Secretary of the Army" have been used in the reproduction of these articles in all places where the words "Secretary of War" or "Secretary of the Department of the Army" appeared in the original statute. Similarly the words "Department of the Army" have been substituted for the words "War Department" wherever they appear in the statute (National Security Act of 1947; sec. 205 act 26 Jul 1947; Public Law 253, 80th Cong.).

The words "Judge Advocate General's Corps" have been used in the reproduction of these articles in all places where the words "Judge Advocate General's Department" appeared in the original statute.

officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;

(*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;

(*e*) All persons under sentence adjudged by courts-martial;

(*f*) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia.

Notes, A. W. 2 (a): Retired personnel of the Regular Army are among those "belonging to the Regular Army of the United States" (sec. 2, act 3 June 1916, 39 Stat. 166; as amended by sec. 2, act 4 June 1920; 41 Stat. 759; 10 U. S. C. 4).

Personnel of the Air Force are not subject to the jurisdiction of Army courts-martial under A. W. 2 (*a*) except as to offenses committed prior to 25 June 1948 (Public Law 775, 80th Cong.).

National Guard, reserve, and retired personnel are subject to courts-martial jurisdiction from the dates on which they are required by orders to report for duty in the active military service (50 U. S. C. App. 402; ML 1939, Sup. III, sec. 2220–2222; Dig. Op. JAG, 1912–40, sec. 359 (4)).

As to jurisdiction over National Guard officers attending service schools under authority of Section 99, National Defense Act, see Dig. Op. JAG, 1912–40, sec. 359 (5).

Notes, A. W. 2 (d): The phrase "though not otherwise subject to these articles" is construed to mean those who are not members of the armies of the United States. In re Berue, 54 F. Supp. 252.

The phrase "in the field" is construed to refer to any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted. In re Berue, *supra.*

The phrase "persons accompanying or serving with the armies of the United States in the field," includes those who, under the facts and circumstances surrounding the movement, maintenance, supply or operation of the Army are accompanying or serving it in any such capacity. In re Berue, *supra;* Perlstein *v.* U. S., 151 F. 2d 167.

For a distinction between persons "serving with" and those "accompanying" the armies, see CM 329933, 7 Bull. JAG. 125–127.

Termination of employment of a person engaged in a military operation prior to trial by a military court for an offense alleged to have been committed while in such employment does not establish that such person was not subject to military law as a person accompanying the Army of the United States in the field in time of war. It is not the person's employment status but whether he was still "accompanying" the Army at the time the offense was committed that furnished the test of the court-martial's jurisdiction over him. Perlstein *v.* U. S., *supra.*

For examples of civilians subject to military law under this article, see Dig. Op. JAG, 1912, p. 151; Dig. Op. JAG, 1912–40, sec. 359 (9) et seq; 4 Bull. JAG 223 et seq.

Notes, A. W. 2 (e): A soldier awaiting final approval of his sentence to life imprisonment and dishonorable discharge escaped and committed robbery during his escape. The date of the finality of his dishonorable discharge under the sentence is immaterial in determining whether he was amenable to trial by court-martial for the robbery committed during the period of escape because he was a person "under sentence adjudged by court-martial" (Mosher *v.* Hunter, 143 F. 2d 745; certiorari denied 323 U. S. 800; rehearing denied 326 U. S. 806).

Notes, Miscellaneous:

Other persons subject to military law:

Patients in the Army and Navy General Hospital, Hot Springs, Ark. (act 3 Mar. 1909, 35 Stat. 748; 24 U. S. C. 20).

Personnel of the Coast and Geodetic Survey transferred to the service of the Department of the Army (sec. 16, act 22 May 1917, 40 Stat. 88; 33 U. S. C. 855).

Personnel of the Light House service transferred to the service of the Department of the Army (act 29 Aug. 1916, 39 Stat. 602; 33 U. S. C. 758).

Personnel of the Public Health Service detailed in time of war for duty with the Army (JR No. 9, 9 Jul 1917, 40 Stat. 242; 42 U. S. C. 20).

Prisoners of war. (Articles 45, 46, Geneva Convention on Prisoners of War of 27 Jul 1929.)

Surrendered enemy personnel (CM 302791, 5 Bull. JAG 262; CM 324937, 6 Bull. JAG 277).

For discussion of the amenability of interned enemy aliens (2 Bull. JAG 51).

II. COURTS-MARTIAL

ART. 3. Courts-Martial Classified.—Courts-martial shall be of three kinds, namely:

First, general courts-martial;

Second, special courts-martial; and

Third, summary courts-martial.

A. COMPOSITION

ART. 4. Who May Serve on Courts-Martial.—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial.

All warrant officers in the active military service of the United States and warrant officers in the active military service of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on general and special courts-martial for the trial of warrant officers and enlisted persons, and persons in this category, shall be detailed for such service when deemed proper by the appointing authority.

Enlisted persons in the active military service of the United States or in the active military service of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on general and special courts-martial for the trial of enlisted persons when requested in writing by the accused at any time prior to the convening of the court. When so requested, no enlisted person shall, without his consent, be tried by a court the membership of which does not include enlisted persons to the number of at least one third of the total membership of the court.

When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command and when eligible those enlisted persons of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers and enlisted persons having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of minority membership thereof. No person shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution.

Notes, A. W. 4: Competency of retired officers (Dig. Op. JAG, 1912–40, sec. 211; act 23 Apr 1904, 33 Stat. 264; 10 U. S. C. 991).

Competency of reserve officers on active duty (Dig. Op. JAG, 1912–40, sec. 361 [2]).

Temporary officers of the Army of the United States are competent to sit from the date of their acceptance into the active military service of the United States; and all officers lawfully called, drafted, or ordered into, or to duty for training in, the active military service of the United States, from the dates they are required by the terms of the call, draft, or order to obey the same.

Eligibility of members: As to enlisted persons, see A. W. 16, and A. W. 1 (*c*).

If a commander or an officer personally originates or drafts charges or causes them to be preferred nominally by another for him with the purpose of having them brought to trial, he is properly the accuser even though he may occupy no hostile or adverse position toward the accused (CM 328331, 1948).

ART. 5. General Courts-Martial.—General courts-martial may consist of any number of members not less than five.

ART. 6. Special Courts-Martial.—Special courts-martial may consist of any number of members not less than three.

ART. 7. Summary Courts-Martial.—A summary court-martial shall consist of one officer.

B. BY WHOM APPOINTED

ART. 8. General Courts-Martial.—The President of the United States, the commanding officer of a Territorial department, the Superintendent of the Military Academy, the commanding officer of an Army group, an Army, an Army corps, a division, a separate brigade, or corresponding unit of the Ground or Air Forces, or any command to which a member of the Judge Advocate General's Corps is assigned as staff judge advocate, as prescribed in article 47, and, when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and may in any case be appointed by superior authority when by the latter deemed desirable.

The authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Corps or 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 certified by the Judge Advocate General to be qualified for such detail: *Provided*, That no general court-martial shall receive evidence or vote upon its findings or sentence in the absence of the law member regularly detailed. The law member, in addition to his duties as a member, shall perform the duties prescribed in article 31 hereof and such other duties as the President may by regulations prescribe.

Note, A. W. 8: A commander specially empowered by the President to appoint general courts-martial need not cite the order of the President in the orders appointing a court (Givens *v.* Zerbst, 255 U. S. 11).

ART. 9. Special Courts-Martial.—The commanding officer of a district, garrison, fort, camp, station, or other place where troops are on duty, and the commanding officer of an Army group, an Army, an Army corps, a division, brigade, regiment, detached battalion, or corresponding unit of Ground or Air Forces, and the commanding officer of any other detached command or group of detached units placed under a single commander for this purpose may appoint special courts-martial; but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed desirable.

ART. 10. Summary Courts-Martial.—The commanding officer of a garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a regiment, detached battalion, detached company, or other detachment may appoint summary courts-martial; but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable: *Provided*, That when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him.

ART. 11. Appointment of Trial Judge Advocates and Counsel.—For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and one or more assistant trial judge advocates and one or more assistant defense counsel when necessary: *Provided*, That the trial judge advocate and defense counsel of each general court-martial shall, if available, be members of the Judge Advocate General's Corps or officers who are members of the bar of a Federal court or of the highest court of a State of the United States: *Provided further*, That in all cases in which the officer appointed as trial judge advocate shall be a member of the Judge Advocate General's Corps, or an officer who is a member of the bar of a Federal court or of the highest court of a State, the officer appointed as defense counsel shall likewise be a member of the Judge Advocate General's Corps or 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: *Provided further*, That when the accused is represented by counsel of his own selection and does not desire the presence of the regularly appointed defense counsel or assistant defense counsel, the latter may be excused by the president of the court: *Provided further*, That no person who has acted as member, trial judge advocate, assistant trial judge advocate or investigating officer in any case shall subsequently act in the same case as defense counsel or assistant defense counsel unless expressly requested by the accused: *Provided further*, That no person who has acted as member, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act in the same case as a member of the prosecution: *Provided further*, That no person who has acted as member, trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act as a staff judge advocate to the reviewing or confirming authority upon the same case.

C. JURISDICTION

ART. 12. General Courts-Martial.—General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: *Provided*, That general courts-martial shall have power to adjudge any punishment authorized by law or the custom of the service including a bad-conduct discharge.

Notes, A. W. 12: Concerning the jurisdiction of a military commission, see Ex parte Quirin, 317 U. S. 1.

As to the jurisdiction of a general court-martial under the law of war, see CM 302791 (5 Bull. JAG 262) and CM 318380 (6 Bull. JAG 117).

ART. 13. Special Courts-Martial.—Special courts-martial shall have power to try any person subject to military law for any crime or offense not capital made punishable by these articles: *Provided*, That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interests of the service so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses herein prescribed.

Special courts-martial shall not have power to adjudge dishonorable discharge or dismissal, or confinement in excess of six months, nor to adjudge forfeiture of more than two-thirds pay per month for a period of not exceeding six months: *Provided*, That subject to approval of the sentence by an officer exercising general court-martial jurisdiction and subject to appellate review by The Judge Advocate General and appellate agencies in his office, a special court-martial may adjudge a bad-conduct discharge in addition to other authorized punishment: *Provided further*, That a bad-conduct discharge shall not be adjudged by a special court-

martial unless a complete record of the proceedings of and testimony taken by the court is taken in the case.

ART. 14. Summary Courts-Martial.—Summary courts-martial shall have power to try any person subject to military law, except an officer, a warrant officer, or a cadet, for any crime or offense not capital made punishable by these articles: *Provided*, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a special court-martial: *Provided further*, That the President may, by regulations, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law.

Summary courts-martial shall not have power to adjudge confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of one month's pay.

ART. 15. Jurisdiction not Exclusive.—The provisions of these articles 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 be triable by such military commissions, provost courts, or other military tribunals.

Notes, A. W. 15: A military commission to try offenses against the law of war may be appointed by any field commander or by any commander competent to appoint a general court-martial (Application of Yamashita, 327 U. S. 1).

Congress has incorporated by reference as within the jurisdiction of military commissions all offenses which are defined as such by the law of war and which may constitutionally be included within that jurisdiction (Ex parte Quirin, 317 U. S. 1).

Congress, by the adoption of this article, adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts and as further defined and supplemented by the Hague Convention (Application of Yamashita, *supra*).

An enemy combatant is not a "person subject to the Articles of War", and a military commission before which he is tried for violation of the law of war, convened pursuant to the common law of war, is not subject to the Articles of War except insofar as those articles save jurisdiction of and sanction military commissions (Application of Yamashita, *supra*).

ART. 16. Persons in the Military Service—How Triable.—Officers shall be triable only by general and special courts-martial and in no case shall a person in the military service, when it can be avoided, be tried by persons inferior to him in rank. No enlisted person may sit as a member of a court-martial for the trial of another enlisted person who is assigned to the same company or corresponding military unit.

No person subject to military law shall be confined with enemy prisoners or any other foreign nationals outside of the continental limits of the United States, nor shall any defendant awaiting trial be made subject to punishment or penalties other than confinement prior to sentence on charges against him.

D. PROCEDURE

ART. 17. Trial Judge Advocate to Prosecute; Counsel to Defend.—The trial judge advocate 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 its proceedings. The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel, duly appointed for the court pursuant to Article 11. Should the

accused have counsel of his own selection, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel.

ART. 18. Challenges.—Members of a general or special court-martial may be challenged by the accused or the trial judge advocate for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time. Challenges by the trial judge advocate shall ordinarily be presented and decided before those by the accused are offered. Each side shall be entitled to one peremptory challenge; but the law member of the court shall not be challenged except for cause.

ART. 19. Oaths.—The trial judge advocate of a general or special court-martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation: "You, A. B., do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority or duly announced by the court, except to the trial judge advocate and assistant trial judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial upon a challenge or upon the findings or sentence, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God."

When the oath or affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the trial judge advocate and to each assistant trial judge advocate, if any, an oath or affirmation in the following form: "You, A. B., do swear (or affirm) that you will faithfully and impartially perform the duties of a trial judge advocate, and will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed. So help you God."

All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: "You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God."

Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: "You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God."

Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: "You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God."

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

ART. 20. Continuances.—A court-martial may, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just.

ART. 21. Refusal or Failure to Plead.—When an accused arraigned before a court-martial fails or refuses to plead, or answers foreign to the purpose, or after a plea of guilty makes a statement inconsistent with the plea, or when it appears to the court that he entered a plea of guilty improvidently or through lack of

understanding of its meaning and effect, the court shall proceed to trial and judgment as if he had pleaded not guilty.

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

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

Note, A. W. 23: By Chapter 645, Public Law 772, 80th Congress, "chapter 6 of the act of March 4, 1909" (35 Stat. 1088) was revised, recodified and amended. The provisions of Chapter 6, act of 4 March 1909, *supra* (offenses against public justice), are now set forth in Title 18, U. S. C., §§ 1621–1622, 1506, 2071 (a), 2071 (b), 505, 206, 207, 208, 210, 1503, 1505, 371, 1504, 755, 1501, 752 and 1071, 752–753, 754, 873, and 4, respectively.

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

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

ART. 25. Depositions—When Admissible.—A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to, or, in foreign places, because of nonamenability to process, refuses to, appear and testify in person at the place of trial or hearing: *Provided,* That testimony by deposition may be adduced for the defense in capital cases: *Provided further,* That a deposition may be read in evidence in any case in which the death penalty is authorized by law but is not mandatory, whenever the appointing authority shall have directed that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial: *And provided further,* That at any time after charges have been signed as provided in article 46, and before the charges have been referred for trial, any authority competent to appoint a court-martial for the trial of such charges may designate officers to represent the prosecution and the defense and may authorize such officers, upon due notice, to take the deposition of any witness, and such deposition may subsequently be received in evidence as in other cases.

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

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

ART. 28. Certain Acts to Constitute Desertion.—Any officer 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 absent himself permanently therefrom shall be deemed a deserter.

Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and where

the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein.

Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter.

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

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

ART. 31. Method of Voting.—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. The law member of a general court-martial or the president of a special court-martial, shall rule in open court upon interlocutory questions, other than challenge, arising during the proceedings: *Provided*, That unless such ruling be made by the law member of a general court-martial, if any member object thereto, the court shall be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank: *And provided further*, That any such ruling made by the law member 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 member may in any case consult with the court, in closed session, before making a ruling, and may change any ruling made at any time during the trial. It shall be the duty of the law member of a general or the president of a special court-martial before a vote is taken to advise the court that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt, and 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 the accused's favor and he shall be acquitted; if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no such doubt; that the burden of proof to establish the guilt of the accused is upon the Government.

ART. 32. Contempts.—A military tribunal may punish as 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: *Provided*, That such punishment shall in no case exceed one month's confinement, or a fine of $100, or both.

ART. 33. Records—General Courts-Martial.—Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the trial judge advocate; but in case the record can not be authenticated by the president and trial judge advocate, by reason of the death, disability, or absence of either or both of them, it shall be signed by a member in lieu of the president and by an assistant trial judge advocate, if there be one, in lieu of the trial judge advocate; otherwise by another member of the court.

ART. 34. Records—Special and Summary Courts-Martial.—Each special court-martial and each summary court-martial shall keep a record of its proceedings, separate for each case, which record shall contain such matter and be authen-

ticated in such manner as may be required by regulations which the President may from time to time prescribe.

ART. 35. Disposition of Records—General Courts-Martial.—The trial judge advocate of each general court-martial shall, with such expedition as circumstances may permit, forward to the appointing authority or to his successor in command the original record of the proceedings of such court in the trial of each case. All records of such proceedings shall, after having been acted upon, be transmitted to the Judge Advocate General of the Army.

ART. 36. Disposition of Records—Special and Summary Courts-Martial.—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by special court-martial and a report of each trial by summary court-martial shall be transmitted to the headquarters of the officer exercising general court-martial jurisdiction over the command, there to be filed in the office of the staff judge advocate: *Provided, however*, That each record of trial by special court-martial in which the sentence, as approved by the appointing authority, includes a bad-conduct discharge, shall, if approved by the officer exercising general court-martial jurisdiction under the provisions of article 47, be forwarded by him to The Judge Advocate General for review as hereinafter in these articles provided. When no longer of use, records of summary courts-martial may be destroyed as provided by law governing destruction of Government records.

ART. 37. Irregularities—Effect of.—The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused: *Provided*, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles: *Provided further*, That the omission of the words "hard labor" in any sentence of a court-martial adjudging imprisonment or confinement shall not be construed as depriving the authorities executing such sentence of imprisonment or confinement of the power to require hard labor as a part of the punishment in any case where it is authorized by the Executive order prescribing maximum punishments.

ART. 38. President May Prescribe Rules.—The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, insofar as he shall deem practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules and regulations made in pursuance of this Article shall be laid before the Congress.

E. LIMITATIONS UPON PROSECUTIONS

ART. 39. As to Time.—Except for desertion or absence without leave committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before arraignment of such person: *Provided*, That for desertion in time of peace, rape or for any crime or offense punishable under articles 93 and 94 of this code the period of limitations upon trial and punishment by court-martial shall be three years: *Provided further*, That the

period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: *Provided further*, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law: *And provided further*, That in the case of any offense the trial of which in time of war shall be certified by the Secretary of the Army to be detrimental to the prosecution of the war or inimical to the Nation's security, the period of limitations herein provided for the trial of the said offense shall be extended to the duration of the war and six months thereafter.

Notes, A. W. 39: "Manifest impediment" does not mean merely want of evidence or ignorance as to the offender or offense by the military authorities, but it means something akin to absence, want of power, or a physical inability to bring the party charged to trial. A "manifest impediment" does not exist where the military authorities, by reasonable diligence, could make such party amenable to justice; and any concealment of the evidence of his guilt, or other like fraud on his part by which the prosecution is delayed until the time of the bar has run, does not in and of itself deprive him of the benefit of the statute (14 Op. Atty. Gen. 265).

Where an escaped prisoner was within the United States, without the knowledge of the military authorities as to his whereabouts, there was not a manifest impediment to his trial (CM 212634, 10 BR 249).

ART. 40. As to Number.—No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.

No authority shall return a record of trial to any court-martial for reconsideration of—

(*a*) An acquittal; or

(*b*) A finding of not guilty of any specification; or

(*c*) 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 War; or

(*d*) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

And no court-martial in any proceedings on revision shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited.

Notes, A. W. 40: The findings of an Army administrative board, or a proceeding before an investigating board, can not preclude trial by court-martial (Dig. Op. JAG, 1912–40, sec. 397 (2)).

The provision that "no person shall, without his consent, be tried a second time for the same offense" means a first complete trial and not a justly or unavoidably interrupted one (Sanford, Warden *v.* Robbins, 115 F. 2d 435; certiorari denied (1941), 312 U. S. 697).

If a new trial before another court is ordered, although not requested by the accused, by reason of jurisdictional and fundamental errors committed during the first trial, the accused can not plead former conviction in bar of further prosecution for the same offense before a second court-martial as "jeopardy" or as a violation of his constitutional rights (Sanford, Warden *v.* Robbins, *supra*).

F. PUNISHMENTS

ART. 41. Cruel and Unusual Punishments Prohibited.—Cruel and unusual punishments of every kind, including flogging, branding, marking, or tattooing on the body are phohibited.

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

Note, A. W. 42: By Chapter 645, Public Law 772, 80th Congress, "section 289, Penal Code of the United States, 1910," as revised and recodified, is set forth in Title 18, U. S. C., § 13.

ART. 43. Death Sentence—When Lawful; Vote on Findings and Sentence.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all the members present at the time the vote is taken. Conviction of any offense for which the death sentence is not mandatory and any sentence to confinement not in excess of ten years, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote.

ART. 44. Officers—Reduction to Ranks.—When a sentence to dismissal may lawfully be adjudged in the case of an officer the sentence may in time of war, under such regulations as the President may prescribe, adjudge in lieu thereof reduction to the grade of private.

ART. 45. Maximum Limits.—Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not exceed such limit or limits as the President may from time to time prescribe: *Provided,* That in time of peace the period of confinement in a penitentiary shall in no case exceed the maximum period prescribed by the law which, under article 42 of these articles, permits confinement in a penitentiary, unless in addition to the offense so punishable under such law the accused shall have been convicted at the same time of one or more other offenses.

G. ACTION BY APPOINTING OR SUPERIOR AUTHORITY

ART. 46. Charges; Action Upon.

(*a*) *Signature; oath.*—Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein and that the same are true in fact, to the best of his knowledge and belief.

(*b*) *Investigation.*—No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. The accused shall be permitted, upon his request, to be represented at such investigation by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general courts-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.

(*c*) *Forwarding charges; delays; service of charges.*—When a person is held for trial by general court-martial, the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

ART. 47. Action by Convening Authority.

(*a*) *Assignment of judge advocates; channels of communication.*—All members of the Judge Advocate General's Corps will be assigned as prescribed by The Judge Advocate General after appropriate consultations with commanders on whose staffs they may serve; and The Judge Advocate General or senior members of his staff will make frequent inspections in the field in supervision of the administration of military justice. Convening authorities will at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice; and the staff judge advocate of any command is authorized to communicate directly with the staff judge advocate of a superior or subordinate command, or with The Judge Advocate General.

(*b*) *Reference for trial.*—Before directing the trial of any charge by general court-martial the convening authority will refer it to his staff judge advocate for consideration and advice; and no charge will be referred to a general court-martial for trial unless it has been found that a thorough and impartial investigation thereof has been made as prescribed in the preceding article, that such charge is legally sufficient to allege an offense under these articles, and is sustained by evidence indicated in the report of investigation.

(*c*) *Action on record of trial.*—Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge advocate or The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.

(*d*) *Approval.*—No sentence of a court-martial shall be carried into execution until the same shall have been approved by the convening authority: *Provided*, That no sentence of a special court-martial including a bad-conduct discharge shall be carried into execution until in addition to the approval of the convening authority the same shall have been approved by an officer authorized to appoint a general court-martial.

(*e*) *Who may exercise.*—Action by the convening authority may be taken by an officer commanding for the time being, by a successor in command, or by any officer exercising general court-martial jurisdiction.

(*f*) *Powers incident to power to approve.*—The power to approve the sentence of a court-martial shall include—

(1) the power to approve or disapprove a finding of guilty and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

(2) the power to approve or disapprove the whole or any part of the sentence; and

(3) the power to remand a case for rehearing under the provisions of article 52.

ART. 48. Confirmation.—In addition to the approval required by article 47, confirmation is required as follows before the sentence of a court-martial may be carried into execution, namely:

(*a*) By the President with respect to any sentence—

(1) of death, or

(2) involving a general officer: *Provided*, That when the President has already acted as approving authority, no additional confirmation by him is necessary;

(*b*) By the Secretary of the Army with respect to any sentence not requiring approval or confirmation by the President, when The Judge Advocate General does not concur in the action of the Judicial Council;

(*c*) By the Judicial Council, with the concurrence of The Judge Advocate General, with respect to any sentence—

(1) when the confirming action of the Judicial Council is not unanimous, or when by direction of The Judge Advocate General his participation in the confirming action is required, or

(2) involving imprisonment for life, or

(3) involving the dismissal of an officer other than a general officer, or

(4) involving the dismissal or suspension of a cadet;

(*d*) By the Judicial Council with respect to any sentence in a case transmitted to the Judicial Council under the provisions of article 50 for confirming action.

ART. 49. Powers Incident to Power to Confirm.—The power to confirm the sentence of a court-martial shall be held to include—

(*a*) The power to approve, confirm, or disapprove a finding of guilty, and to approve or confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

(*b*) The power to confirm, disapprove, vacate, commute, or reduce to legal limits the whole or any part of the sentence;

(*c*) The power to restore all rights, privileges, and property affected by any finding or sentence disapproved or vacated;

(*d*) The power to order the sentence to be carried into execution;

(*e*) The power to remand the case for a rehearing under the provisions of article 52.

ART. 50. Appellate Review.

(*a*) *Board of review; judicial council.*—The Judge Advocate General shall constitute, in his office, a Board of Review composed of not less than three officers of the Judge Advocate General's Corps. He shall also constitute, in his office, a Judicial Council composed of three general officers of the Judge Advocate General's Corps: *Provided*, That The Judge Advocate General may, under exigent circumstances, detail as members of the Judicial Council, for periods not in excess of sixty days, officers of the Judge Advocate General's Corps of grades below that of general officer.

(*b*) *Additional boards of review and judicial councils.*—Whenever necessary, The Judge Advocate General may constitute two or more Boards of Review and Judicial Councils in his office, with equal powers and duties, composed as provided in the first paragraph of this article.

(*c*) *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 who shall be a general officer of The Judge Advocate General's Corps, with any distant command, and to establish in such branch office one or more Boards of Review and Judicial Councils composed as provided in the first paragraph of this article. Such Assistant Judge Advocate General and such Board of Review and Judicial Council 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 the Board of Review and Judicial Council in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President: *Provided*, That the power of mitigation and remission shall not be exercised by such Assistant Judge Advocate General or by agencies in his office, but any case in which such action is deemed desirable shall be forwarded to The Judge Advocate General with appropriate recommendations.

(*d*) *Action by board of review when approval by President or confirming action is required.*—Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted to the President or such other confirming authority, as the case may be, it shall be examined by the Board of Review which shall take action as follows:

(1) In any case requiring action by the President, the Board of Review shall submit its opinion in writing, through the Judicial Council which shall also submit its opinion in writing, to The Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the Board's and Council's opinions, with his recommendations, directly to the Secretary of the Army for the action of the President: *Provided*, That the Judicial Council, with the concurrence of the Judge Advocate General shall have powers in respect to holdings of legal insufficiency equal to the powers vested in the Board of Review by subparagraph (3) of this paragraph.

(2) In any case requiring confirming action by the Judicial Council with or without the concurrence of The Judge Advocate General, when the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence it shall submit its opinion in writing to the Judicial Council for appropriate action.

(3) When the Board of Review is of the opinion that the record of trial in any case requiring confirming action by the President or confirming action by the Judicial Council is legally insufficient to

support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall submit its holding to the Judge Advocate General and when the Judge Advocate General concurs in such holding, such findings and sentence shall thereby be vacated in accord with such holding and the record shall be transmitted by the Judge Advocate General to the appropriate convening authority for a rehearing or such other action as may be proper.

(4) In any case requiring confirming action by the President or confirming action by the Judicial Council in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, or the sentence, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action or for other appropriate action in a case in which confirmation of the sentence by the President is required under article 48 (*a*).

(*e*) *Action by board of review in cases involving dishonorable or bad conduct discharges or confinement in penitentiary.*—No authority shall order the execution of any sentence of a court-martial involving dishonorable discharge not suspended, bad conduct discharge not suspended, or confinement in a penitentiary unless and until the appellate review required by this article shall have been completed and unless and until any confirming action required shall have been completed. Every record of trial by general or special court-martial involving a sentence to dishonorable discharge or bad conduct discharge, whether such discharges be suspended or not suspended, and every record of trial by general court-martial involving a sentence to confinement in a penitentiary, other than records of trial examination of which is required by paragraph (*d*) of this article, shall be examined by the Board of Review which shall take action as follows:

(1) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, and confirming action is not by the Judge Advocate General or the Board of Review deemed necessary, the Judge Advocate General shall transmit the holding to the convening authority, and such holding shall be deemed final and conclusive.

(2) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, but modification of the findings of guilty or the sentence is by the Judge Advocate General or the Board of Review deemed necessary to the ends of justice, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

(3) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General concurs in such holding, the findings and sentence shall thereby be vacated in whole or in part in accord with such holding, and the record shall be transmitted by the Judge Advocate General to the convening authority for rehearing or such other action as may be appropriate.

(4) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General shall not

concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

(*f*) *Appellate action in other cases.*—Every record of trial by general court-martial the appellate review of which is not otherwise provided for by this article shall be examined in the Office of the Judge Advocate General and if found legally insufficient to support the findings of guilty and sentence, in whole or in part, shall be transmitted to the Board of Review for appropriate action in accord with paragraph (*e*) of this article.

(*g*) *Weighing evidence.*—In the appellate review of records of trials by courts-martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact.

(*h*) *Finality of court-martial judgments.*—The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War, 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 application for a new trial as provided in article 53.

ART. 51. Mitigation, Remission, and Suspension of Sentences.

(*a*) *At the time ordered executed.*—The power of the President, the Secretary of the Army, and any reviewing authority to order the execution of a sentence of a court-martial shall include the power to mitigate, remit, or suspend the whole or any part thereof, except that a death sentence may not be suspended. The Judge Advocate General shall have the power to mitigate, remit, or suspend the whole or any part of a sentence in any case requiring appellate review under article 50 and not requiring approval or confirmation by the President, but the power to mitigate or remit shall be exercised by the Judge Advocate General under the direction of the Secretary of the Army. The authority which suspends the execution of a sentence may restore the person under sentence to duty during such suspension; and the death or honorable discharge of a person under suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence.

(*b*) *Subsequent to the time ordered executed.*

(1) Any unexecuted portion of a sentence other than a sentence of death, including all uncollected forfeitures, adjudged by court-martial may be mitigated, remitted or suspended and any order of suspension may be vacated, in whole or in part, by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States disciplinary barracks, in which the person under sentence may be, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority or by the Judge Advocate General under the direction of the Secretary of the Army; *Provided*, That no sentence approved or confirmed by the President shall be mitigated, remitted, or suspended by any authority inferior to the President: *And provided further*, That no order of suspension of a sentence to dishonorable discharge or bad conduct discharge shall be vacated unless and until confirming or

appellate action on the sentence has been completed as required by articles 48 and 50.

(2) The power to suspend a sentence shall include the power to restore the person affected to duty during such suspension.

(3) The power to mitigate, remit or suspend the sentence or any part thereof in the case of a person confined in the United States disciplinary barracks or in a penitentiary shall be exercised by the Secretary of the Army or by the Judge Advocate General under the direction of the Secretary of the Army.

ART. 52. Rehearings.—When any reviewing or confirming authority disapproves a sentence or when any sentence is vacated by action of the Board of Review or Judicial Council and the Judge Advocate General, the reviewing or confirming authority or the Judge Advocate General may authorize or direct a rehearing. Such rehearing shall take place before a court-martial composed of membes not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding.

ART. 53. Petition for New Trial.—Under such regulations as the President may prescribe, the Judge Advocate General 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 dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided*, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, 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*, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States.

III. PUNITIVE ARTICLES

A. ENLISTMENTS; MUSTER; RETURNS

ART. 54. Fraudulent Enlistment.—Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct.

ART. 55. Officer Making Unlawful Enlistment.—Any officer who knowingly enlists or musters into the military service any person whose enlistment or

muster in is prohibited by law, regulations, or orders shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

ART. 56. False Muster.—Any officer who knowingly makes a false muster of man or animal, or who signs or directs or allows the signing of any muster roll knowing the same to contain a false muster or false statement as to the absence or pay of an officer or soldier, or who wrongfully takes money or other consideration on mustering in a regiment, company, or other organization, or on signing muster rolls, or who knowingly musters as an officer or soldier a person who is not such officer or soldier, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

ART. 57. False Returns—Omission to Render Returns.—Every officer whose duty it is to render to the Department of the Army or other superior authority a return of the state of the troops under his command, or of the arms, ammunition, clothing, funds, or other property thereunto belonging, who knowingly makes a false return thereof shall be dismissed from the service and suffer such other punishment as a court-martial may direct. And any officer who, through neglect or design, omits to render such return shall be punished as a court-martial may direct.

B. DESERTION; ABSENCE WITHOUT LEAVE

ART. 58. Desertion.—Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

ART. 59. Advising or Aiding Another to Desert.—Any person subject to military law who advises or persuades or knowingly assists another to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

ART. 60. Entertaining a Deserter.—Any officer who, after having discovered that a soldier in his command is a deserter from the military or naval service or from the Marine Corps, retains such deserter in his command without informing superior authority or the commander of the organization to which the deserter belongs, shall be punished as a court-martial may direct.

ART. 61. Absence Without Leave.—Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct.

C. DISRESPECT; INSUBORDINATION; MUTINY

ART. 62. Disrespect Toward the President, Vice President, Congress, Secretary of the Army, Governors, Legislatures.—Any officer who uses contemptuous or disrespectful words against the President, Vice President, the Congress of the United States, the Secretary of the Army, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct.

ART. 63. Disrespect Toward Superior Officer.—Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished as a court-martial may direct.

ART. 64. Assaulting or Willfully Disobeying Superior Officer.—Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct.

ART. 65. Insubordinate Conduct Toward Noncommissioned Officer.—Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a warrant officer or a noncommissioned officer while in the execution of his office, or uses threatening or insulting language or behaves in an insubordinate or disrespectful manner toward a warrant officer or a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct.

ART. 66. Mutiny or Sedition.—Any person subject to military law who attempts to create or who begins, excites, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court-martial may direct.

ART. 67. Failure to Suppress Mutiny or Sedition.—Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or, knowing or having reason to believe that a mutiny or sedition is to take place, does not without delay give information thereof to his commanding officer shall suffer death or such other punishment as a court-martial may direct.

ART. 68. Quarrels; Frays; Disorders.—All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and noncommissioned officers have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order officers who take part in the same into arrest, and other persons subject to military law who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer, nurse, band leader, warrant officer, field clerk, or noncommissioned officer, or draws a weapon upon or otherwise threatens or does violence to him, shall be punished as a court-martial may direct.

D. ARREST; CONFINEMENT

ART. 69. Arrest or Confinement.—Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; but when charged with a minor offense only, such person shall not ordinarily be placed in confinement. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer or cadet who breaks his arrest or who escapes from confinement, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court-martial may direct.

Notes, A. W. 69: For arrest and custody of members of friendly foreign forces, see Title 22. U. S. C., 702 and 706 (sec. 2, act 30 June 1944, 58 Stat. 643).

For arrest of civilians on military reservations, see AR 490–5.

ART. 70. Charges; Action Upon, Unnecessary Delay.—When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct.

ART. 71. Refusal to Receive and Keep Prisoners.—No provost marshal or commander of a guard shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States, provided the officer committing shall, at the time, deliver an account in writing, signed by himself, of the crime or offense charged against the prisoner. Any officer or soldier so refusing shall be punished as a court-martial may direct.

ART. 72. Report of Prisoners Received.—Every commander of a guard to whose charge a prisoner is committed shall, within twenty-four hours after such confinement, or as soon as he is relieved from his guard, report in writing to the commanding officer the name of such prisoner, the offense charged against him, and the name of the officer committing him; and if he fails to make such report, he shall be punished as a court-martial may direct.

ART. 73. Releasing Prisoner Without Proper Authority.—Any person subject to military law who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any prisoner so committed to escape, shall be punished as a court-martial may direct.

ART. 74. Delivery of Offenders to Civil Authorities.—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence.

Notes, A. W. 74: See Dig. Op. JAG, 1912, pp. 134–136; Dig. Op. JAG, 1912–40, sec. 432; and AR 600–355.

"When any civil official of the State of * * * attempts to arrest any person subject to military law upon the military reservation at Fort * * * the person whose arrest is sought must inform the civil official that he is required to make the arrest through the post commander and that the person whose arrest is sought can not otherwise submit. If, after this, the civil official persists, the arrest will be prevented unless the procedure under the 74th Article of War is followed." The foregoing instruction by a corps area commander was held subject to no objection. (See Op. J. A. G. 014.13, April 8, 1925; Dig. Op. JAG, 1925, p. 1).

E. WAR OFFENSES

ART. 75. Misbehavior Before the Enemy.—Any officer or soldier who, before the enemy, misbehaves himself, runs away, or shamefully abandons or delivers up

or by any misconduct, disobedience, or neglect endangers the safety of any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camp, garrison, or quarters, shall suffer death or such other punishment as a court-martial may direct.

ART. 76. Subordinates Compelling Commander to Surrender.—Any person subject to military law who compels or attempts to compel any commander of any garrison, fort, post, camp, guard, or other command, to give it up to the enemy or to abandon it shall be punishable with death or such other punishment as a court-martial may direct.

ART. 77. Improper Use of Countersign.—Any person subject to military law who makes known the parole or countersign to any person not entitled to receive it according to the rules and discipline of war, or gives a parole or countersign different from that which he received, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct.

ART. 78. Forcing a Safeguard.—Any person subject to military law who, in time of war, forces a safeguard shall suffer death or such other punishment as a court-martial may direct.

ART. 79. Captured Property to be Secured for Public Service.—All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct.

ART. 80. Dealing in Captured or Abandoned Property.—Any person subject to military law who 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 to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties.

ART. 81. Relieving, Corresponding With, or Aiding the Enemy.—Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct.

ART. 82. Spies.—Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.

F. MISCELLANEOUS CRIMES AND OFFENSES

ART. 83. Military Property—Willful or Negligent Loss, Damage or Wrongful Disposition.—Any person subject to military law who willfully, or through neglect, suffers to be lost, spoiled, damaged, or wrongfully disposed of, any military property belonging to the United States shall make good the loss or damage and suffer such punishment as a court-martial may direct.

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ART. 84. Waste or Unlawful Disposition of Military Property Issued to Soldiers.—Any soldier who sells or wrongfully disposes of or willfully or through neglect injures or loses any horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, shall be punished as a court-martial may direct.

ART. 85. Drunk on Duty.—Any person subject to military law, who is found drunk on duty, shall be punished as a court-martial may direct.

ART. 86. Misbehavior of Sentinel.—Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall suffer any punishment, except death, that a court-martial may direct.

ART. 87. Personal Interest in Sale of Provisions.—Any officer commanding in any garrison, fort, barracks, camp, or other place where troops of the United States may be serving who, for his private advantage, lays any duty or imposition upon or is interested in the sale of any victuals or other necessaries of life brought into such garrison, fort, barracks, camp, or other place for the use of troops, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

ART. 88. Unlawfully Influencing Action of Court.—No authority appointing a general, special, or summary court-martial nor any other commanding officer, shall censure, reprimand, or admonish such court, or any member thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise, by such court or any member thereof, of its or his judicial responsibility. No person subject to military law shall attempt to coerce or unlawfully influence the action of a court-martial or any military court or commission, or any member thereof, in reaching the findings or sentence in any case, or the action of an appointing or reviewing or confirming authority with respect to his judicial acts.

ART. 89. Good Order to be Maintained and Wrongs Redressed.—All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or wrongfully destroys any property whatsoever or commits any kind of depredation or riot, shall be punished as a court-martial may direct. Any commanding officer, who, upon complaint made to him refuses or omits to see reparation made to the party injured, insofar as the offender's pay shall go toward such reparation, as provided for in article 105, shall be dismissed from the service, or otherwise punished, as a court-martial may direct.

ART. 90. Provoking Speeches or Gestures.—No person subject to military law shall use any reproachful or provoking speeches or gestures to another; and any person subject to military law who offends against the provisions of this article shall be punished as a court-martial may direct.

ART. 91. Dueling.—Any person subject to military law 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, if an officer, be dismissed from the service or suffer such other punishment as a court-martial may direct; and if any other person subject to military law, shall suffer such punishment as a court-martial may direct.

ART. 92. Murder—Rape.—Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct:

Provided, That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

ART. 93. Various Crimes.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct: *Provided*, That any person subject to military law who commits larceny or embezzlement shall be guilty of larceny within the meaning of this article.

ART. 94. Frauds Against the Government.—Any person subject to military law who makes or causes to be made any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures, or advises the making or use of, any writing or other paper knowing the same to contain any false or fraudulent statements; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes or procures, or advises the making of, any oath to any fact or to any writing or other paper knowing such oath to be false; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures, or advises the forging or counterfeiting of any signature upon any writing or other paper, or uses, or procures, or advises the use of any such signature, knowing the same to be forged or counterfeited; or

Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service 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; or

Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipment, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof: *Provided*, That any person, subject to military law, who commits larceny or embezzlement with respect to property of the United States, furnished or intended for the military service thereof, or with respect to other property within the purview of this article, steals said property within the meaning of this article; or

Who knowingly purchases or receives in pledge of any obligation or indebtedness from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipment, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same; or

Who enters into any agreement or conspires to commit any of the offenses aforesaid;

Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties. If any person, being guilty of any of the offenses aforesaid or who steals or fails properly to account for any money or other property held in trust by him for enlisted persons or as its official custodian while in the military service of the United States, receives his discharge or is dismissed or otherwise separated from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not been so separated therefrom.

Notes, A. W. 94: The provision of this article that any person guilty of an offense thereunder while in the military service is subject to arrest and trial by court-martial therefor after his discharge will not be held unconstitutional by a court of the first instance, in view of the fact that it has been in effect and enforced for sixty years (Ex parte Joly, 290 Fed. 858).

The phrase in the last sentence of this article, "being guilty of any of the offenses aforesaid," does not require the military authorities to demonstrate the guilt of such a person in any proceeding before they have a right to hold him; the word "guilty" being used in the sense of "justly chargeable with" or "responsible for" a crime (U. S. ex rel. Marino *v.* Hildreth, 61 F. Supp. 667).

ART. 95. Conduct Unbecoming an Officer and Gentleman.—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

Note, A. W. 95: Offenses under A. W. 95 and A. W. 96 are not the same, nor established by the same evidence, the former being applicable to officers and cadets; and the conviction of an officer under both articles on the same facts held not illegal as placing him twice in jeopardy for the same offense (McRae *v.* Henkes, 273 Fed. 108).

ART. 96. General Article.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law 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.

IV. COURTS OF INQUIRY

ART. 97. When and by Whom Ordered.—A court of inquiry to examine into the nature of any transaction of or accusation or imputation against any officer or soldier may be ordered by the President or by any commanding officer; but a court of inquiry shall not be ordered by any commanding officer except upon the request of the officer or soldier whose conduct is to be inquired into.

ART. 98. Composition.—A court of inquiry shall consist of three or more officers. For each court of inquiry the authority appointing the court shall appoint a recorder.

ART. 99. Challenges.—Members of a court of inquiry may be challenged by the party whose conduct is to be inquired into, but only for cause stated to the court. The court shall determine the relevancy and validity of any challenge, and shall not receive a challenge to more than one member at a time.

The party whose conduct is being inquired into shall have the right to be represented before the court by counsel of his own selection, if such counsel be reasonably available.

ART. 100. Oath of Members and Recorders.—The recorder of a court of inquiry shall administer to the members the following oath: "You, A. B., do swear (or affirm) that you will well and truly examine and inquire, according to the evidence, into the matter now before you without partiality, favor, affection, prejudice, or hope of reward. So help you God." After which the president of the court shall administer to the recorder the following oath: "You, A. B., do swear (or affirm) that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God."

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

ART. 101. Powers; Procedure.—A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to courts-martial and the trial judge advocate thereof. Such witnesses shall take the same oath or affirmation that is taken by witnesses before courts-martial. A reporter or an interpreter for a court of inquiry shall, before entering upon his duties, take the oath or affirmation required of a reporter or an interpreter for a court-martial. The party whose conduct is being inquired into or his counsel, if any, shall be permitted to examine and cross-examine witnesses so as fully to investigate the circumstances in question.

ART. 102. Opinion on Merits of Case.—A court of inquiry shall not give an opinion on the merits of the case inquired into unless specially ordered to do so.

ART. 103. Record of Proceedings—How Authenticated.—Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signature of the president and the recorder thereof, and be forwarded to the convening authority. In case the record can not be authenticated by the recorder, by reason of his death, disability, or absence, it shall be signed by the president and by one other member of the court.

V. MISCELLANEOUS PROVISIONS

ART. 104. Disciplinary Powers of Commanding Officers.—Under such regulations as the President may prescribe, the commanding officer of any detachment, company, or higher command, may, for minor offenses, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

The disciplinary punishments authorized by this article may include admonition or reprimand, or the withholding of privileges, or extra fatigue, or restriction to certain specified limits, or hard labor without confinement or any combination of such punishments for not exceeding one week from the date imposed; but shall not include forfeiture of pay or confinement under guard; except that any officer exercising general court-martial jurisdiction may, under the provisions of this article, also impose upon a warrant officer or officer of his command below the rank of brigadier general a forfeiture of not more than one-half of his pay per month for three months.

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, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. 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.

ART. 105. Injuries to Property—Redress of.—Whenever complaint is made to any commanding officer that damage has been done to the property of any person or that his property has been wrongfully taken by persons subject to military law, such complaint shall be investigated by a board consisting of any number of officers from one to three, which board shall be convened by the commanding officer and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be stopped against the pay of the offenders. And the order of such commanding officer directing stoppages herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the stoppages so ordered.

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

Notes, A. W. 105: Civilian employees of the Army within the territorial jurisdiction of the United States in time of peace are not "persons subject to military control" within the meaning of A. W. 2 and A. W. 105, and the stoppage of their pay to reimburse owners of private property for damages due to the fault or negligence of such civilian employee is not authorized (3 Comp. Gen. 999).

A municipal corporation is, for civil purposes, deemed a "person" (United States *v.* Amedy, 11 Wheat. 392, 412) and is so considered within the meaning of A. W. 105.

An insurance company has no right of subrogation (Op. J. A. G. 153, November 23, 1922; Dig. Op. JAG, 1922, p. 11).

This article provides the administrative remedy for damage to or loss of property resulting from offenses denounced in Article 89.

ART. 106. Arrest of Deserters by Civil Officials.—It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District, or possession of the United States, to arrest offenders, summarily to arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the United States.

ART. 107. Soldiers to Make Good Time Lost.—Every soldier who in an existing or subsequent enlistment deserts the service of the United States, or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve.

ART. 108. Soldiers—Separation From the Service.—No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Army, or by sentence of a general or special court-martial.

ART. 109. Oath of Enlistment.—At the time of his enlistment every soldier shall take the following oath or affirmation: "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 the rules and Articles of War." This oath or affirmation may be taken before any officer.

ART. 110. Certain Articles of War To Be Read or Explained.—Articles 1, 2, 24, 28, 29, 54 to 97, inclusive, 104 to 109, inclusive, and 121 shall be read or carefully explained to every soldier at the time of his enlistment or muster in, or within six days thereafter, and shall be read or explained once every six months to the soldiers of every garrison, regiment, or company in the service of the United States. And a complete text of the Articles of War and the Manual for Courts-Martial shall be made available to any soldier, upon his request, for his personal examination.

ART. 111. Copy of Record of Trial.—Every person tried by a general court-martial shall, on demand therefor, made by himself or by any person in his behalf, be entitled to a copy of the record of the trial.

ART. 112. Effects of Deceased Persons—Disposition of.—In case of the death of any person subject to military law the commanding officer of the place of command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters; and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all such effects, and said summary court shall have authority to collect and receive any debts due decedent's estate by local debtors and to pay the undisputed local creditors of decedent in so far as any money belonging to the deceased which may come into said summary court's possession under this article will permit, taking receipts therefor for file with said court's final report upon its transactions to the Department of the Army; and as soon as practicable after the collection of such effects said summary court shall transmit such effects and any money collected, through the Quartermaster Department, at Government expense, to the widow or legal representative of the deceased, if such be found by said court, or to the son, daughter, father, provided the father has not abandoned the support of his family, mother, brother, sister, or the next of kin in the order named, if such be found by said court, or the beneficiary named in the will of the deceased, if such be found by said court, and said court shall thereupon make to the Department of the Army a full report of its transactions; but if there be none of the persons hereinabove named, or such persons or their addresses are not known to or readily ascertainable by said court, and the said court shall so find, said summary court shall have authority to convert into cash, by public or private sale, not earlier than thirty days after the death of the deceased, all effects of deceased except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposits, any will or other papers of value belonging to the deceased, any sabers, insignia,

decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, together with an inventory of the effects secured by said summary court, and a full account of its transactions, to the Department of the Army for transmission to the Auditor for the Department of the Army for action as authorized by law in the settlement of accounts of deceased officers and enlisted men of the Army.

The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment.

Notes, A. W. 112: The Quartermaster Department was consolidated into the Quartermaster Corps by section 3 of the act of 24 August 1912 (37 Stat. 591; M. L. 1939, sec. 65).

The powers and duties of the Auditor for the Department of the Army were vested in the General Accounting Office by section 304 of the act of 10 June 1921 (42 Stat. 24; 31 U. S. C. 44).

ART. 113. Inquests.—When at any post, fort, camp, or other place garrisoned by the military forces of the United States and under the exclusive jurisdiction of the United States, any person shall have been found dead under circumstances which appear to require investigation, the commanding officer will designate and direct a summary court-martial to investigate the circumstances attending the death; and, for this purpose, such summary court-martial shall have power to summon witnesses and examine them upon oath or affirmation. He shall promptly transmit to the post or other commander a report of his investigation and of his findings as to the cause of the death.

ART. 114. Authority to Administer Oaths.—Any officer of any component of the Army of the United States on active duty in Federal service commissioned in or assigned or detailed to duty with the Judge Advocate General's Corps, any staff judge advocate or acting staff judge advocate, the President of a general or special court-martial, any summary court-martial, the trial judge advocate or any assistant trial judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant, assistant adjutant or personnel adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and shall also have the general powers of a notary public in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents and all other forms of notarial acts to be executed by persons subject to military law: *Provided*, That no fee of any character shall be paid to any officer mentioned in this Act for the performance of any notarial act herein authorized.

Notes, A. W. 114: A warrant officer serving as assistant adjutant of any command has power to administer oaths for all purposes of military administration. See section 4, act of 21 August 1941 (55 Stat. 653).

Many States have enacted statutes providing that certain officers of the Army may administer to military personnel oaths in connection with the execution of legal instruments required under the laws of the State concerned. The statute of the particular State should be consulted in each case to ascertain what officers may administer such oaths.

ART. 115. Appointment of Reporters and Interpreters.—Under such regulations as the Secretary of the Army may from time to time prescribe, the president of a court-martial or military commission or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission and may set down the same, in the first instance, in shorthand. Under like regulations the president of a court-martial or military

commission, or court of inquiry, or a summary court, may appoint an interpreter, who shall interpret for the court or commission.

ART. 116. Powers of Assistant Trial Judge Advocate and of Assistant Defense Counsel.—An assistant trial judge advocate of a general or special court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the trial judge advocate of the court. An assistant defense counsel shall be competent likewise to perform any duty devolved by law, regulation, or the custom of the service upon counsel for the accused.

ART. 117. Removal of Civil Suits.—When any civil or criminal prosecution is commenced in any court of a State of the United States against any officer, soldier, or other person in the military service 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 military 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.

ART. 118. Officers, Separation from Service.—No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction.

Notes, A. W. 118: This article does not apply to warrant officers.

For the right of an officer to apply for trial when dismissed by order of the President without trial, see section 227, Military Laws of the United States, 1939 (R. S. 1230; 10 U. S. C. 573).

ART. 119. Rank and Precedence among Regulars, Militia, and Volunteers.—That when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade.

Note, A. W. 119: Prior to 7 August 1947 this article provided that the President could make such assignments only "in time of war or public danger." The article was amended by the deletion of the quoted words by section 522, Officers' Personnel Act of 1947 (Public Law 381, 80th Cong.).

ART. 120. Command When Different Corps or Commands Happen to Join.—When different corps or commands of the military forces of the United States happen to join or do duty together, the officer highest in rank of the line of the Regular Army, Marine Corps, forces drafted or called into the service of the United States or Volunteers, there on duty, shall, subject to the provisions of the last preceding article, command the whole and give orders for what is needful in the service, unless otherwise directed by the President.

ART. 121. Complaints of Wrongs.—Any officer or soldier who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to the officer exercising general court-martial jurisdiction over the officer against whom the complaint is made. That officer shall examine into said complaint and take proper measures for redressing

the wrong complained of; and he shall, as soon as possible, transmit to the Department of the Army a true statement of such complaint, with the proceedings had thereon.

Section 244, Public Law 759, 80th Congress. This title shall become effective on the first day of the eighth calendar month after approval of this title.

Section 245, Public Law 759, 80th Congress. All offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the effective date of this title, under any law embraced in or modified, changed or repealed by this title, may be prosecuted, punished, and enforced in the same manner and with the same effect as if this title had not been passed.

Appendix 2

FORMS FOR ORDERS APPOINTING COURTS-MARTIAL

a(1) FORM OF ORDER APPOINTING A GENERAL COURT-MARTIAL

Headquarters ———— (Army) (Division) ( ).
(Place) ——— (Date) ——— 19 ———.

SPECIAL ORDERS
No. ————

A general court-martial is appointed to meet at ———, ———, on ———— 19——, or as soon thereafter as practicable, for the trial of such persons as may be properly brought before it.

DETAIL FOR THE COURT

Col. ————————, (Arm or Br. of Sv.), 5th Cavalry.
Lt. Col. ————————, ( ), 1st Infantry.
Lt. Col. ————————, ( ), 3d Field Artillery Group.
Maj. ————————, ( ), (JAGC), or (Certified by TJAG, as qualified), Hq. 29th Inf. Div., LAW MEMBER.
Maj. ————————, ( ), 3d Field Artillery Group.
Capt. ————————, ( ), 4th Infantry.
Capt. ————————, ( ), 5th Cavalry.
Capt. ————————, ( ), 1st Infantry.
Capt. ————————, ( ), 3d Field Artillery Group.
Capt. ————————, ( ), (JAGC) or (Member of the bar of the Supreme Court of Illinois) (Member of the bar of the U. S. District Court, E. Dist., Illinois) (Certified by TJAG as qualified), 5th Cavalry, trial judge advocate.
1st Lt. ————————, ( ), 3d Field Artillery Group, assistant trial judge advocate.

Capt. ————————, ( ), (JAGC) or (Member of the Bar of the District of Columbia) (Certified by TJAG as qualified), 128th Infantry, defense counsel.
1st Lt. ————————, ( ), 4th Infantry, assistant defense counsel.

NOTES.—The order will be authenticated as may be prescribed in Army Regulations.

A succession of orders modifying an order appointing a court-martial may result in serious errors. When practicable it should be avoided by appointing a new court. It is not deemed advisable to issue orders dissolving a court-martial.

The order should name the members in order of rank and grade.

The following paragraphs of the manual are referred to in connection with the appointment of courts-martial: 4 (Composition of courts-martial); 5 (Appointing authorities); 6 (Appointment of trial judge advocate, defense counsel, assistants); 36 (Appointment of courts-martial); 41 and 43 (Selection of trial judge advocate and defense counsel).

If travel is necessary, a paragraph directing such travel may be included in the appointing order, or a separate order or orders may be issued according to circumstances.

The order will specifically designate the law member of such and show his qualification. See 4*c*. It will also show the qualification of the trial judge advocate and defense counsel if they are qualified under A. W. 11. See 6.

The order appointing a general court-martial, when issued by a commander specially empowered thereto by the President, may, but need not, cite the order of the President.

(2) FORM OF ORDER AMENDING ORDER APPOINTING A GENERAL COURT-MARTIAL

SPECIAL ORDERS } Headquarters ———— (Army) (Division) ( ).
No. ————— } (Place) ——— (Date) ——— 19 —.

Capt. ———, (Arm or Br. of Sv.), (Org.), is detailed as a member of the general court-martial appointed by paragraph ———, Special Orders ———, this Headquarters, dated ———, vice Capt. ———, (Arm or Br. of Sv.), (Org.), relieved.

NOTE.—The order will be authenticated as may be prescribed in Army Regulations.

b. FORM OF ORDER APPOINTING A SPECIAL COURT-MARTIAL

Headquarters ————, ———,
(Place ———), (Date) ——— 19—.

SPECIAL ORDERS }
No. ————— }

A special court-martial is appointed to meet at ———, ———, on ——— 19—, or as soon thereafter as practicable, for the trial of such persons as may be properly brought before it.

DETAIL FOR THE COURT

Maj. ————————, (Arm or Br. of Sv.), 1st Cavalry.
Capt. ————————, ( ), 3d Cavalry.
Capt. ————————, ( ), 4th Coast Artillery Battalion.
1st Lt. ————————, ( ), 3d Cavalry.
1st Lt. ————————, ( ), 1st Infantry.
Capt. ————————, ( ), 4th Coast Artillery Battalion, trial judge advocate.
Capt. ————————, ( ), 3d Cavalry, defense counsel.

NOTES.—See the first five notes to form 2a(1).

When a superior appoints a court because a subordinate commanding officer is the accuser or prosecutor, he may specify in the order the names of the person or persons to be tried.

If the trial judge advocate of a special court-martial is a member of the Judge Advocate General's Corps or a member of the bar of the highest court of a State, or of a Federal court, the order will expressly state the qualifications of both the trial judge advocate and the defense counsel in the same manner as they are stated in the form of order appointing a general court-martial. See App. 2*a*.

c. FORM OF ORDER APPOINTING SUMMARY COURT-MARTIAL

This form is similar to the form for special court-martial except that only one officer is detailed. As to appointment of summary courts-martial, see 5*c*.

Appendix 3

CHARGE SHEET

CHARGE SHEET

Location	Date

Accused (Last name—First name—Middle name) (List aliases when material)	Army serial No.	Grade

Organization. (If the accused is not a member of the Army, state other appropriate description showing that he is subject to military law.)

Present age	Pay per month (Base pay plus longevity)	Allotments to dependents per month		Government insurance deductions per month
		Class F	Class E	
	$	$	$	$

Record of Service

Initial date and term of current service

Prior service. (As to each terminated enlistment, give inclusive dates of service and organization in which serving at termination. Give similar data as to service not under an enlistment.)

Data As To Witnesses

Name of witness	Address of witness	Witness for	
		Prosecution	Accused

Documentary Evidence

List and note where each item may be found.

Data As To Restraint

Nature of any restraint of accused	Date	Location

(End of Page 1 of Charge Sheet)

Charge: Violation of the _____ Article of War.

Specification:

(End of Page 2 of Charge Sheet)

Charges (Continued)

Additional Sheets, if Necessary, for Charges and Specifications Will Be Attached Here.

Signature of Accuser	Grade and Organization

Affidavit

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this _____ day of _____, 19 ___, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he either had personal knowledge of or has investigated the matters set forth in the specifications and that the same are true in fact, to the best of his knowledge and belief.

(Signature) _____

_____
(Grade and organization)

_____
(Official character, as adjutant, summary court, notary public, etc.)*

* If the oath is administered by a civil officer having a seal, his official seal should be affixed.

1st Indorsement**

Headquarters _____, _____ (Place), _____ (Date) 19___.

Referred for trial to _____ (Grade, name, and organization of summary court, or trial judge advocate),

_____ (Summary) court-martial appointed by paragraph ___, (Trial judge advocate of special or general)

Special Orders No. _____, Headquarters _____, _____ 19___.

By _____ (Command or order) of _____ (Grade and name of commanding officer)

_____, Adjutant

I have served a copy hereof on each of the above named accused, this_____ day of _____, 19___.

Signature (Trial Judge Advocate)	Grade and organization

** Relative to proper instructions which may be included in the indorsement of reference for trial, see 34 *g*, *h*.

(End of Page 3 of Charge Sheet)

RECORD OF TRIAL BY SUMMARY COURT-MARTIAL			CASE NUMBER
SPECIFICATIONS AND CHARGES	PLEAS	FINDINGS	SENTENCE OR ACQUITTAL AND REMARKS

TO BE FILLED IN BY THE ACCUSED IF HE IS A NONCOMMISSIONED OFFICER:

I consent object to trial by summary court-martial.
(Strike out word not applicable)

_____
(Signature of accused)

TO BE FILLED IN BY SUMMARY COURT IF APPLICABLE:

1. The accused, a noncommissioned officer of the first two grades, refused to consent in writing to trial by summary court-martial. The charges are hereby returned to the appointing authority.

_____, Summary Court.
(Signature, rank, and organization)

2. If the accused, a noncommissioned officer of the third or a lower grade, objected to trial by summary court-martial, was such trial thereafter directed by the officer exercising special court-martial jurisdiction over the command?

Yes No
(Strike out word not applicable)

3. Was the meaning and effect of a plea of guilty explained to the accused?

Yes No
(Strike out word not applicable)

TO BE FILLED IN BY SUMMARY COURT:

Number of prior convictions considered _____.

Place_____, Date_____ 19____.

*_____, Summary Court.
(Signature, rank, and organization)

*(Enter after signature, "Only officer present with command," if such is the case.)

Headquarters_____ 19____.
(Organization, place, and date)

_____
(Action of reviewing authority)

_____, Commanding
(Signature, rank, and organization)

Entered on service record in case of conviction.

_____
(Initials of personnel adjutant)

(End of Page 4 of Charge Sheet)

Appendix 4

FORMS FOR CHARGES AND SPECIFICATIONS

INSTRUCTIONS

a. **General.**—These forms are intended as a general guide for use in the drafting of charges and specifications, not only for the offenses specifically provided for, but for like offenses. The forms are not mandatory, and the drafter may add to or deviate from them when necessary. Abbreviations should not be used in specifications. Grades, organizations, and months should be written out in full; but dates of the month and times should be written in Arabic numerals. The designation of the organization should include a numerical prefix and only the official designation of the unit should be alleged. See AR 220–5. The serial number of the accused should not be alleged in the specification. See 24–29 (Preparation of charges).

b. ***Numbering of charges and specifications.***—When there is more than one charge the charges shoud be numbered, using the Roman numerals I, II, etc. When there is more than one specification under a charge the specifications under that charge should be numbered, using the Arabic numerals 1, 2, etc. Additional charges (24) are numbered in the same manner as the original charge: a single added charge is designated simply "Additional Charge", but if more than one, they are numbered Additional Charge I, Additional Charge II, etc. Specifications under additional charges are designated as prescribed above. The term "Additional" is not used in connection with the specifications.

c. **Name and description of accused.**—The name of the accused as stated in the specification should include his Christian name, middle name or initial, and except in a case in which the jurisdiction of the court over the person is not dependent upon his being a person subject to military law (e. g., see A. W. 81 and 82) should be accompanied by such descriptive language of rank, grade, organization, or position as will show that he is a person subject to military law and therefore subject to the jurisdiction of the court as to persons. Thus, in the ordinary case of a soldier, the specification should read, "In that Private John Smith, Company A, 7th Infantry did," etc.

These forms apply whether the accused is a member of the Regular Army, or of volunteer forces accepted or mustered into the military service of the United States, or of the National Guard, or of other forces which may have been drafted, called, or ordered into, or to duty or for training in, the military service of the United States. If, however, the accused has not obeyed a call, draft, or order, his name should be followed by the words "lawfully called (drafted) (ordered) into the military service of the United States."

If the accused has not been assigned to an organization, the word "unassigned" may be employed.

In the case of a cadet, the specification should read "In that Cadet John Smith, United States Military Academy, did," etc.

In the case of a member of the Marine Corps detached for service with the armies of the United States by order of the President, the words "detached for service with the armies of the United States by order of the President" should

follow the other words of identification and description. When the accused is an officer or enlisted man of the Medical Department of the Navy, serving with a body of Marines detached for service with the armies of the United States by order of the President, this fact should be alleged as follows: "In that ———, Medical Department of the Navy, serving with a body of Marines detached for service with the armies of the United States by order of the President, did," etc.

As to the persons made subject to military law by A. W. 2(*d*), the words "a retainer to the camp of United States troops without the territorial jurisdiction of the United States," or "a person accompanying the armies of the United States without the territorial jurisdiction of the United States," or "a person serving with the armies of the United States without the territorial jurisdiction of the United States," should be employed, or if it be in time of war, the words "a retainer to the camp of United States troops in the field" or "a person accompanying the armies of the United States in the field," or "a person serving with the armies of the United States in the field," may be used, according to the circumstances of each case. Where jurisdiction is asserted under A. W. 2(*e*), the name of the accused should be followed by the words "a person under sentence adjudged by court-martial," or if he is a general prisoner, he may be described as "General Prisoner John Smith."

d. **Use of aliases.**—If without discharge a soldier enlists two or more times, each time under a different name, he should be charged under the name, etc., pertaining to his first unterminated enlistment with the other names, etc., under aliases; thus, "Private John Smith, Company B, 7th Infantry, alias Private John Brown, Company A, 10th Infantry."

e. **In case of change of grade.**—Where the grade of the accused has changed since the date of an alleged offense, the accused should be designated by his present grade followed by a statement of his grade at the date of the alleged offense; thus, "In that Private A B, Company ———, ——— Infantry, then Sergeant, Company ———, ——— Infantry, did," etc.

f. **Form of specification in joint offense.**—In the case of a joint offense (27) each accused may be charged separately as if he alone was concerned or all may be charged jointly—that is, in a single specification, in accordance with the principles of the following examples, depending on the decision of the person preferring the charges as to how the persons concerned should be tried. If Privates A, B, and C are joint perpetrators of an offense and it is intended to charge and try all three at the same trial they should be charged in a single specification as follows:

"In that Private A, Company ———, ——— Infantry, Private B, Company ———, ——— Infantry, and Private C, Company ———, ——— Infantry, acting jointly, and in pursuance of a common intent, did (here allege place, time, and offense as when charging one accused)."

If it is intended that only A and B shall be charged and tried jointly but that C, although a joint actor, is not to be tried at the same trial, such action may be accomplished as follows:

"In that Private A, Company ———, ——— Infantry, and Private B, Company ———, ——— Infantry, acting jointly and in pursuance of a common intent, did, in conjunction with Private C, Company ———, ——— Infantry (here allege place, time, and offense)."

If it is intended that C shall be tried alone, he may be charged in the same manner as if he had committed the offense by himself. However, if it is desired to show in the specification that A and B were joint actors with C, even though they are not to be tried with him, C may be charged as follows:

"In that Private C, Company ———, ——— Infantry, did, in conjunction with Private A, Company ———, ——— Infantry, and Private B, Company ———, ——— Infantry (here allege place, time, and offense)."

g. **Place and date of offense.**—The place and date of the commission of the alleged offense will, as a rule, be stated in the body of each specification and not in a separate line at the end thereof. The allegations of the time and place of the commission of an offense should be stated as accurately as possible, but if the act or acts charged extend over a considerable period of time it may be necessary to cover the period in the allegation. Allegations of "from March to September, 1887," and "from May to October, 1888," have been countenanced in a case in which the accused was charged with the neglect of a duty that required continuous performance. Also it is proper to allege that an offense was committed while "en route" between certain points. If the exact time or place of the commission of the offense is not known it is frequently preferable to allege it as having occurred "on or about" a certain date or time, or "at or near" a certain locality, rather than to aver it as committed on a particular day or between two specified days or at a particular place. There is no defined construction to be placed upon the words "on or about" as used in the allegation of time in a specification. The phrase can not be said to cover any precise number of days or latitude in time. It is ordinarily used in military pleading for the purpose of indicating some period, as nearly as can be ascertained and set forth, at or during which the offenses charged are believed to have been committed in cases in which the exact day can not well be named. And the same is to be said as to the use of the words "at or near" in connection with the averment of place.

h. **Value.**—Whenever the value of property is an essential element of proof of an offense, it must be stated; and, if several articles of different kinds are alleged, the value of each article, and not the aggregate value of all the articles, should be stated. For example, an allegation that the accused stole "clothing and equipment of a total value of $———" is improper; it should be stated as "one shirt, value $———, one pair of shoes, value $———, and one blanket, value $———, of a total value of $———." Value of articles should be stated as "value $2.08" if known exactly, e. g., per Government price list if they are articles of Government property, or "value about $5.00" if they are used articles of civilian property appraised, ordinarily, at the actual open market value at the time and place of the offense. If money itself is involved, e. g., when money is alleged to have been stolen, it should be described as "about $3.50, lawful money of the United States."

SPECIMEN CHARGES

Charge I: Violation of the 54th Article of War.

Specification: In that Private Richard Roe, Company A, 2d Infantry, alias Private John Doe, Company F, 29th Infantry, did, under the name of John Doe, at Fort Jay, New York, on 24 July 1947, by willfully concealing the fact that he was then a private in said Company A, 2d Infantry, procure himself to be enlisted in the military service of the United States by Captain William White, Medical Corps, and did thereafter at Fort Jay, New York, receive allowances under the enlistment so procured.

Charge II: Violation of the 58th Article of War.

Specification: In that Private Richard Roe, Company A, 2d Infantry, alias Private John Doe, Company F, 29th Infantry, did, at Fort Sheridan, Illinois, on

or about 6 March 1947, desert the service of the United States and did remain absent in desertion until he was apprehended at Fort Jay, New York, on or about 5 August 1947.

Charge III: Violation of the 96th Article of War.

Specification 1: In that Private Richard Roe, Company A, 2d Infantry, alias Private John Doe, Company F, 29th Infantry, did, at Fort Sheridan, Illinois, on or about 6 March 1947, wrongfully strike Private John Brown, Company A, 2d Infantry, a sentinel in the execution of his duty, in the face with his fist.

Specification 2: In that Private Richard Roe, Company A, 2d Infantry, alias Private John Doe, Company F, 29th Infantry, having received a lawful order from Private John Brown, Company A, 2d Infantry, a sentinel in the execution of his duty, to halt, did, at Fort Sheridan, Illinois, on or about 6 March 1947, willfully disobey the same.

FORMS FOR SPECIFICATIONS

A.W. 54

Fraudulent enlistment.

1. See specification under Charge I of specimen charges above, and *d* (Use of aliases) in instructions above.

2. In that ——— did, at ———, on or about ——— 19—, by willfully [misrepresenting that he was then (a citizen of the United States) (single) (21 years of age) (———) when in fact he was then (not a citizen of the United States) (married) (17 years of age) (———)] [concealing the fact (that on or about ——— 19—, he had been convicted of a felony, to wit: ———, by the ——— court in and for ———) (that from about ——— 19—, to about ——— 19—, he had been imprisoned in a (reformatory) (jail) (penitentiary) under sentence of a court) (that on or about ——— 19—, he was discharged from the (Army) (Navy) (———) (on account of disability) (through sentence of a (civil) (military) (naval) court) (with character less than good) (that ———)] procure himself to be enlisted in the military service of the United States by ———; and did thereafter at ———, receive (pay) (allowances) (pay and allowances) under the enlistment so procured.

A.W. 55

Making prohibited enlistment.

3. In that ——— did, at ———, on or about ——— 19—, knowingly enlist into the military service of the United States one ———, who, as he, the said ———, then well knew, was (an) (insane) (intoxicated) (———) (a) person (who had been convicted of a felony) (under the age of 16 years) (———), whose enlistment was prohibited by (law) (regulations) (orders).

A.W. 57

False returns; omission to render returns.

4. In that ———, being in command of———, and it being his duty to render to ——— a return of the state of (the troops under his command) (the ——— thereunto belonging) for the period ——— to ——— 19—, did, at ———, on or about ——— 19—, knowingly make a false return for said period, which return was false in that it showed (one ——— as absent with leave) (———), when as he, the said ———, then well knew (the said ——— was absent without leave) (———).

5. In that ———, being in command of ———, and it being his duty to render to the ——— a return of the state of (the troops under his command) (the ——— thereto belonging) for the period ——— to ———, did, (on and after ——— 19—) (from ——— until ———), through (neglect) (design), omit to render such return.

A.W. 58

Desertion.

6. In that ——— did, at ———, on or about ——— 19—, desert the service of the United States, and did remain absent in desertion until he (was apprehended) (surrendered himself) at ———, on or about ——— 19—.

Desertion by absenting to avoid hazardous duty, etc.

7. In that ——— did, at ———, on or about ——— 19—, desert the service of the United States by (quitting) (absenting himself without proper leave from) his (organization) (place of duty), with intent (to avoid hazardous duty, to wit: ———) (to shirk important service, to wit: ———), and did remain absent in desertion until he (was apprehended) (surrendered himself) at ——— on or about ——— 19—.

Desertion in execution of conspiracy.

8. In that ——— did, at ———, on or about ——— 19—, (in the execution of a conspiracy to desert the service of the United States, previously entered into with ——— and ———) desert the service of the United States and did remain absent in desertion until he (was apprehended) (surrendered himself) at ———, on or about ——— 19—.

Attempt to desert.

9. In that ——— did, at ———, on or about ——— 19—, (in the execution of a conspiracy to desert the service of the United States previously entered into with ——— and ———) attempt to desert the service of the United States by (here insert the overt act done toward accomplishing the purpose to desert) with intent [permanently to absent himself without proper leave from his post and proper duties] [to (quit) (absent himself without proper leave from) his (organization) (place of duty) in order to (avoid hazardous duty, to wit: ———) (shirk important service, to wit: ———)].

A.W. 59

Advising desertion.

10. In that ——— did, at ———, on or about ——— 19—, by (saying to him "———" or words to that effect) (———) advise Private ———, Company ———, ——— Infantry, to desert the service of the United States.

Assisting desertion.

11. In that ——— did, at ———, on or about ——— 19—, by (here insert manner and form of persuasion or assistance) (persuade) (knowingly assist) Private ——— ———, Company ———, ——— Infantry, to desert the service of the United States at ———, on or about ——— 19—.

A.W. 60

Entertaining a deserter.

12. In that ———, having discovered that ———, a soldier in his command, was a deserter from the (military service) (naval service) (Marine Corps) did, at ———, from about ——— to about ——— 19—, retain said deserter in his command without informing superior authority or the commander of the organization to which the deserter belonged of the presence of said deserter in his command.

A.W. 61

13. In that ——— did, at ———, on or about ——— 19—, fail to repair at the fixed time to the properly appointed place (of assembly) for ———. **Failing to repair.**

14. In that ——— did, at ———, on or about ——— 19—, without proper leave, go from the properly appointed place (of assembly) for ———, after having repaired thereto for the performance of said duty. **Quitting duty.**

15. In that ——— did, without proper leave, absent himself from his ——— at ——— from about ——— 19—, to about ——— 19—. **A. W. O. L.**

16. In that ——— did, without proper leave, with intent to avoid service during maneuvers with his (company), (———), absent himself from his (guard) (quarters) (camp) (station) at ———, on or about ——— 19—, and did remain absent without leave until ——— 19—. **A. W. O. L. to avoid maneuvers.**

17. In that ———, being on guard as a ———, did, at ———, on or about ——— 19—, absent himself without proper leave from his guard with intent to abandon the same. **Abandoning guard.**

A.W. 62

18. In that ——— did, at ———, on or about ——— 19—, use (orally and publicly) (———) the following (contemptuous) (disrespectful) (contemptuous and disrespectful) words against the (President) (Vice President) (Congress of the United States) (Secretary of the Army) [(Governor) (Legislature) of the (State of ———) (Territory of ———) (———, a possession of the United States, in which he, the said ——— was then quartered)] to wit: "——— ——— ———," or words to that effect. **Disrespect to President, etc.**

A.W. 63

19. In that ——— did, at ———, on or about ——— 19—, behave himself with disrespect toward ———, his superior officer, by (saying to him ———, or words to that effect) (contemptuously turning from and leaving him while he was talking to him the said ———) (———). **Disrespect to superior officer**

A.W. 64

20. In that ——— did, at ———, on or about ——— 19—, strike ———, his superior officer, who was then in the execution of his office (in) (on) the ——— with (a) (his) ———. **Striking superior officer.**

21. In that ——— did, at ———, on or about ——— 19—, (draw) (lift up) a weapon, to wit: a ———, against ———, his superior officer, who was then in the execution of his office. **Drawing, etc., weapon against superior officer.**

22. In that ——— did, at ———, on or about ——— 19—, offer violence against ———, his superior officer, who was then in the execution of his office, in that he, the said ———, did ———. **Offering violence to superior officer.**

23. In that ———, having received a lawful command from ———, his superior officer, to ———, did, at ———, on or about ——— 19—, willfully disobey the same. **Willful disobedience of superior officer.**

5. In that ———, being in command of ———, and it being his duty to render to the ——— a return of the state of (the troops under his command) (the ——— thereto belonging) for the period ——— to ———, did, (on and after ——— 19—) (from ——— until ———), through (neglect) (design), omit to render such return.

A.W. 58

Desertion.

6. In that ——— did, at ———, on or about ——— 19—, desert the service of the United States, and did remain absent in desertion until he (was apprehended) (surrendered himself) at ———, on or about ——— 19—.

Desertion by absenting to avoid hazardous duty, etc.

7. In that ——— did, at ———, on or about ——— 19—, desert the service of the United States by (quitting) (absenting himself without proper leave from) his (organization) (place of duty), with intent (to avoid hazardous duty, to wit: ———) (to shirk important service, to wit: ———), and did remain absent in desertion until he (was apprehended) (surrendered himself) at ——— on or about ——— 19—.

Desertion in execution of conspiracy.

8. In that ——— did, at ———, on or about ——— 19—, (in the execution of a conspiracy to desert the service of the United States, previously entered into with ——— and ———) desert the service of the United States and did remain absent in desertion until he (was apprehended) (surrendered himself) at ———, on or about ——— 19—.

Attempt to desert.

9. In that ——— did, at ———, on or about ——— 19—, (in the execution of a conspiracy to desert the service of the United States previously entered into with ——— and ———) attempt to desert the service of the United States by (here insert the overt act done toward accomplishing the purpose to desert) with intent [permanently to absent himself without proper leave from his post and proper duties] [to (quit) (absent himself without proper leave from) his (organization) (place of duty) in order to (avoid hazardous duty, to wit: ———) (shirk important service, to wit: ———)].

A.W. 59

Advising desertion.

10. In that ——— did, at ———, on or about ——— 19—, by (saying to him "———" or words to that effect) (———) advise Private ———, Company ———, ——— Infantry, to desert the service of the United States.

Assisting desertion.

11. In that ——— did, at ———, on or about ——— 19—, by (here insert manner and form of persuasion or assistance) (persuade) (knowingly assist) Private ——— ———, Company ———, ——— Infantry, to desert the service of the United States at ———, on or about ——— 19—.

A.W. 60

Entertaining a deserter.

12. In that ———, having discovered that ———, a soldier in his command, was a deserter from the (military service) (naval service) (Marine Corps) did, at ———, from about ——— to about ——— 19—, retain said deserter in his command without informing superior authority or the commander of the organization to which the deserter belonged of the presence of said deserter in his command.

A.W. 61

13. In that ——— did, at ———, on or about ——— 19—, fail to repair at the fixed time to the properly appointed place (of assembly) for ———. **Failing to repair.**

14. In that ——— did, at ———, on or about ——— 19—, without proper leave, go from the properly appointed place (of assembly) for ———, after having repaired thereto for the performance of said duty. **Quitting duty.**

15. In that ——— did, without proper leave, absent himself from his ——— at ——— from about ——— 19—, to about ——— 19—. **A. W. O. L.**

16. In that ——— did, without proper leave, with intent to avoid service during maneuvers with his (company), (———), absent himself from his (guard) (quarters) (camp) (station) at ———, on or about ——— 19—, and did remain absent without leave until ——— 19—. **A. W. O. L. to avoid maneuvers.**

17. In that ———, being on guard as a ———, did, at ———, on or about ——— 19—, absent himself without proper leave from his guard with intent to abandon the same. **Abandoning guard.**

A.W. 62

18. In that ——— did, at ———, on or about ——— 19—, use (orally and publicly) (———) the following (contemptuous) (disrespectful) (contemptuous and disrespectful) words against the (President) (Vice President) (Congress of the United States) (Secretary of the Army) [(Governor) (Legislature) of the (State of ———) (Territory of ———) (———, a possession of the United States, in which he, the said ——— was then quartered)] to wit: "——— ——— ———," or words to that effect. **Disrespect to President, etc.**

A.W. 63

19. In that ——— did, at ———, on or about ——— 19—, behave himself with disrespect toward ———, his superior officer, by (saying to him ———, or words to that effect) (contemptuously turning from and leaving him while he was talking to him the said ———) (———). **Disrespect to superior officer**

A.W. 64

20. In that ——— did, at ———, on or about ——— 19—, strike ———, his superior officer, who was then in the execution of his office (in) (on) the ——— with (a) (his) ———. **Striking superior officer.**

21. In that ——— did, at ———, on or about ——— 19—, (draw) (lift up) a weapon, to wit: a ———, against ———, his superior officer, who was then in the execution of his office. **Drawing, etc., weapon against superior officer.**

22. In that ——— did, at ———, on or about ——— 19—, offer violence against ———, his superior officer, who was then in the execution of his office, in that he, the said ———, did ———. **Offering violence to superior officer.**

23. In that ———, having received a lawful command from ———, his superior officer, to ———, did, at ———, on or about ——— 19—, willfully disobey the same. **Willful disobedience of superior officer.**

A.W. 65

Assault on warrant officer or noncommissioned officer.

24. In that ——— did, at ———, on or about ——— 19—, (strike) (assault) ———, a (warrant officer) (noncommissioned officer) who was then in the execution of his office, by ——— him (in) (on) the ——— with (a) (his) ———.

Attempt or threat to strike, etc., a warrant officer or noncommissioned officer.

25. In that ——— did, at ———, on or about ——— 19—, (attempt) (threaten) to (strike) (assault) ———, a (warrant officer) (noncommissioned officer) [(in) (on) the ———] with (a) (his) ———, while said ——— was in the execution of his office.

Willful disobedience of warrant officer or noncommissioned officer.

26. In that ———, having received a lawful order from ———, a (warrant officer) (noncommissioned officer) who was then in the execution of his office, to ———, did, at ———, on or about ——— 19—, willfully disobey the same.

Threats, insults, insubordination, and disrespect toward warrant officer or noncommissioned officer.

27. In that ——— did, at ———, on or about ——— 19—, [use the following (threatening) (insulting) (threatening and insulting) language], [behave in an (insubordinate) (disrespectful) (insubordinate and disrespectful) manner] toward ———, a (warrant officer) (noncommissioned officer) who was then in the execution of his office ["——— ———," or words to that effect] [by ———].

A.W. 66

Mutiny, sedition.

28. In that ——— did, at ———, on or about ——— 19—, (attempt to create) (begin) (excite) (cause) a mutiny in ——— by [urging the members of said ——— concertedly to refuse to obey the lawful orders of ———, their (commanding) (superior) officer, to ———] [unlawfully assuming control over about ——— soldiers of said (command) (———), and in the execution of such control causing said soldiers concertedly to disregard and defy the lawful orders of ———, their (commanding) (superior) officer to (assemble for drill) (———),] [———], with the intent to (usurp) (subvert) (override) (usurp, subvert, and override), for the time being, lawful military authority.

29. In that ——— did, at ———, on or about ——— 19—, voluntarily join in a mutiny which had been begun in ——— against the lawful military authority of ———, the commanding officer thereof, and did, with intent to (usurp) (subvert) (override) (usurp, subvert, and override) for the time being, in concert with sundry other members of said ——— assembled on the (parade ground) (———), refuse to (disperse) (do any further duty) (assemble for drill) (———).

A.W. 67

Failure to suppress mutiny or sedition.

30. In that ———, being present at a (mutiny) (sedition) among the soldiers of ———, did, at ———, on or about ——— 19—, fail to use his utmost endeavor to suppress the same, in that (having commanded the men of his own company to return to their quarters, he took no means to compel their obedience or reduce them to discipline upon their refusal to obey said command) (———).

Failing to give information of mutiny, etc.

31. In that ———, being at ——— and (knowing) (having reason to believe) on ——— 19—, that a (mutiny) (sedition) was

to take place in ———, on or about ——— 19—, did fail to give without delay information of said intended (mutiny) (sedition) to his commanding officer.

A.W. 68

Offenses against persons suppressing quarrel, etc.

32. In that ———, being engaged in a (quarrel) (fray) (disorder) among persons subject to military law, and having been ordered into (arrest) (confinement) by ———, did, at ———, on or about ——— 19—, [(refuse to obey) (draw a weapon, to wit: a ———, upon) the said ———] [threaten the said ——— by (saying to him (her) ———, or words to that effect) (———)] [do violence to the said ———, by ———].

A.W. 69

Breaking arrest; escape from confinement.

33. In that ———, having been duly placed in (arrest at ———) (confinement in ———), on or about ——— 19—, did, at ———, on or about ——— 19—, (break his said arrest) (escape from said confinement) before he was set at liberty by proper authority.

A.W. 70

Delay in investigating or disposing of a case.

34. In that ———, an officer being charged with the duty of investigating (carrying to a final conclusion the case) against ———, a person subject to military law who had been placed in (arrest) (confinement), was, at ———, on or about ——— 19—, responsible for unnecessary delay in (investigating said charges) (carrying the case to a final conclusion) in that he (did ———) (failed to ———).

A.W. 71

Refusal to receive or keep prisoner.

35. In that ———, being on duty as (provost marshal) (commander of the guard) at ———, on or about ——— 19—, did refuse to (receive) (keep) one ———, a prisoner duly committed to his charge by ———, an officer belonging to the forces of the United States who, at the time of committing said prisoner, delivered to the said ——— an account in writing, signed by himself, of the (crime) (offense) charged against said prisoner.

A.W. 72

Failure to report commitment of prisoner.

36. In that ———, (having been) (being) on duty as commander of the guard at ———, did, on or about ——— 19—, fail to report in writing to the commanding officer of that (post) (———) (as soon as relieved from his guard) (within 24 hours after the confinement of said prisoner) the name of ———, a prisoner committed to his charge, the offense charged against him and the name of the officer committing him.

A.W. 73

Releasing prisoner without authority; suffering prisoner to escape.

37. In that ——— did, at ———, on or about ——— 19—, [without proper authority release] [through (neglect) (design) suffer] ———, a prisoner duly committed to his charge (to escape).

A.W. 74

Refusal to deliver offenders to civil authorities.

38. In that ———, being at the time the commanding officer at ———, and an application having been duly made to him by the ——— of ——— for the (delivery) (apprehension and securing) of ———, a (soldier) (officer) under his command, who was accused of a (crime) (offense) committed against the laws of ———, in order that the said ——— might be brought to trial, did, at ———, on or about ——— 19—, (refuse) (willfully neglect) to (deliver said ——— to said ——— or ———) (aid the said ——— of ——— in apprehending and securing the said ———).

A.W. 75

Misbehavior before the enemy.

39. In that ——— did, at ———, on or about ——— 19—, misbehave himself before the enemy, by (refusing) (failing) to advance with his command, which had then been ordered forward by ——— to engage with ———, which forces the said command was then opposing (———).

40. In that ——— did, at ———, on or about ——— 19—, misbehave himself before the enemy, (by insubordinate conduct directed to ———, his superior officer) (by cowardly failing to assist in preparing fortifications) (by ———), while his command was (engaged with the enemy) (had been ordered forward to attack the enemy) (———).

41. In that ——— did, at ———, on or about ——— 19—, run away from his (company) (———), which was then engaged with the enemy, and did not return thereto until (after the engagement had been concluded) (———).

42. In that ———, being present with his ——— while it was engaged with the enemy, did, at ———, on or about ——— 19—, shamefully abandon the said ——— and (seek safety in the rear) (———), and did fail to rejoin it until (the engagement was concluded) (———).

43. In that ——— did, at ———, on or about ——— 19—, while before the enemy, shamefully (deliver up) (abandon) to the enemy ———, which it was his duty to defend.

44. In that ——— did, at ———, on or about ——— 19—, while before the enemy, by his (misconduct) (disobedience) (neglect) endanger the safety of ———, which it was his duty to defend, in that he (———) (failed and neglected to post a sufficient number of sentinels).

45. In that ——— did, at ———, on or about ——— 19—, while before the enemy, speak words inducing [(the officers) (the soldiers) (the officers and soldiers) of ———] [———] (to misbehave themselves before the enemy) (to run away from ———, which was then before the enemy) (shamefully to abandon their command, which was then engaged with the enemy) (shamefully to deliver up to the enemy, ———, which it was their duty to defend), to wit: ———, or words to that effect.

46. In that ——— did, at ———, on or about ——— 19—, while before the enemy speak words inducing ———, who was then on outpost duty, (shamefully to abandon his post) (———), to wit: ———, or words to that effect.

47. In that ———, while before the enemy, did, at ———, on or about ——— 19—, unlawfully cast away his (rifle) (ammunition) (———).

48. In that ——— did, while before the enemy, quit his (post) (colors) at ———, on or about ——— 19—, for the purpose of (plundering) (pillaging) (plundering and pillaging) (———).

49. In that ——— did, while on duty before the enemy, occasion a false alarm in the (camp) (garrison) (quarters) (———) at ———, on or about ——— 19—, by (needlessly and without authority causing the call to arms to be sounded) (———).

A.W. 76

50. In that ——— did, at ———, on or about ——— 19—, (compel) (attempt to compel) ———, the commanding officer of ———, (to give it up to the enemy) (to abandon said ———), by ———. **Compelling surrender, etc.**

A.W. 77

51. In that ——— did, at ———, on or about ——— 19—, make known the (parole) (countersign) to wit: ———, to ———, a person who, according to the rules and discipline of war, was not entitled to receive it. **Making known, etc., parole or countersign.**

52. In that ———, having received as the proper (parole) (countersign) the word ———, did, at ———, on or about ——— 19—, give to ———, a person to whom he knew it was his duty to give the proper (parole) (countersign), a (parole) (countersign) different from that which he had received, to wit: ———.

A.W. 78

53. In that ——— did, at ———, on or about ——— 19—, force a safeguard, known by him to have been placed over the premises occupied by ———, at ———, by (overwhelming the guard posted for the protection of the same) (———). **Forcing safeguard.**

A.W. 79

54. In that ——— did, at ———, on or about ——— 19—, neglect to secure the following public property of the United States, which had been taken from the enemy, viz, ——— of the value of about $——— and ——— of the value of about $———. **Neglect to secure captured property.**

55. In that ——— did, at ———, on or about ——— 19—, wrongfully appropriate to (his own use) (———) the following public property of the United States, taken from the enemy, viz.: ——— of the value of about $——— and ——— of the value of about $———.

A.W. 80

56. In that ——— did, at ———, on or about ——— 19—, unlawfully (buy) (sell) (trade in) (deal in) (dispose of) the following (captured) (abandoned) property of the United States, namely: ——— of the value of about $——— and ——— of the value of about $———, thereby (receiving) (expecting) as (profit) **Dealing, etc., in captured or abandoned property.**

(benefit) (advantage) (profit, benefit and advantage) to (himself) (—, his brother) (———), (the sum of ———) (——— of the value ———).

Failing to give notice, etc., of captured or abandoned property.

57. In that ——— did, at ———, on or about ——— 19—, fail to give notice of and to turn over without delay to proper authority the following (captured) (abandoned) property of the United States, which had come into his (possession) (custody) (control), namely: ——— of the value of about $——— and ——— of the value of about $———.

A.W. 81

Aiding the enemy, etc.

58. In that ——— did, at ———, on or about ——— 19—, (relieve) (attempt to relieve) the enemy with (arms) (ammunition) (supplies) (money) (———), by furnishing and delivering to certain members of the enemy's army ——— of the value of about $——— and ——— of the value of about $———.

59. In that ——— did, at ———, on or about ——— 19—, knowingly (harbor) (protect) (harbor and protect) ———, a person whom he, the said ———, then knew to be a member of the enemy's forces (and who was then being sought by a patrol of the United States forces), by (concealing the said member of the enemy's forces in his house) (———).

60. In that ——— did, at ———, on or about ——— 19—, knowingly give intelligence to the enemy, (by informing a patrol of the enemy's forces of the whereabouts of a military patrol of the United States forces) by (———).

61. In that ——— did, at ———, on or about ——— 19—, knowingly (hold correspondence with) (give intelligence to) (hold correspondence with and give intelligence to) the enemy [(directly by writing and transmitting secretly through the lines to one ———, whom he, the said ———, then knew to be an (officer) (———) of the enemy's army, a communication (in words and figures as follows) (substantially as follows)] [(indirectly by publishing in ———, a newspaper published at ———, a communication in words and figures as follows) (substantially as follows)], to wit: ———, and which communication was intended to reach the enemy.

A.W. 82

Spying.

62. In that ——— was, at ———, on or about ——— 19—, found (lurking) (acting) (lurking and acting) as a spy in and about ———, a (fortification) (post) (quarters) (encampment) of the armies of the United States there situated, (———) for the purpose of (collecting) (attempting to collect) material information in regard to the (numbers) (resources) (operations) (———) of the military forces of the United States, with intent to impart the same to the enemy.

A.W. 83

Suffering military property to be lost, etc.

63. In that ——— did, at ———, on or about ——— 19—, (willfully) (through neglect) suffer ——— of the value of $——— military property belonging to the United States, to be (lost) (spoiled by ———) (damaged by ———) [wrongfully disposed of by (sale to ———) (———)].

A.W. 84

64. In that ——— did, at ———, on or about ——— 19—, (unlawfully sell to ———) (wrongfully dispose of by ———) ——— of the value of $——— issued for use in the military service of the United States. **Disposing of military property.**

65. In that ——— did, at ———, on or about ——— 19—, (willfully) (through neglect) (injure by ———) (lose) ———, of the value of $———, issued for use in the military service of the United States. **Injuring or losing military property.**

A.W. 85

66. In that ——— was, at ———, on or about ——— 19—, found drunk while on duty as ———. **Drunk on duty.**

A.W. 86

67. In that ———, being on guard and posted as a sentinel, at ———, on or about ——— 19—, was found (drunk) (sleeping) upon his post. **Sentinel drunk or asleep.**

68. In that ———, being on guard and posted as a sentinel at ———, on or about ——— 19—, did leave his post before he was regularly relieved. **Sentinel leaving post.**

A.W. 87

69. In that ———, who was then commanding in ———, where troops of the United States were serving, did, on or about ——— 19—, for his private advantage, lay a (duty) (imposition) (duty and imposition) of (——— percent) (———) upon the sales of (victuals) (certain necessaries of life, to wit: ———) brought into said ———, for the use of the troops thereat. **Taxing, etc., provisions.**

70. In that ———, who was then commanding in ———, where troops of the United States were serving, did, on or about ——— 19—, for his private advantage, become interested in the sale of (victuals) (certain necessaries of life, to wit: ———) (———), brought into said ——— for the use of the troops thereat by ———, by (receiving) (entering into an agreement to receive) (the sum of $———) (——) as a consideration for the privilege (of ———) extended by him to said ———. **Interest in sale of provisions.**

A.W. 89

71. In that ——— did, at ———, on or about ——— 19—, wrongfully commit (waste) (spoil) upon ———, the property of ———, of the value of $———, by ———. **Waste, spoil, damage, etc.**

72. In that ——— did, at ———, on or about ——— 19—, wrongfully destroy ———, the property of ———, of the value of $———.

73. In that ——— did, at ———, on or about ——— 19—, commit a depredation upon (an) (a) (orchard) (———) of the value of $———, the property of ———, by unlawfully (entering same and removing growing fruit from the trees of said orchard) (———).

Riot.

74. In that ———, ——— and ——— did, at ———, on or about ——— 19—, commit a riot, in that they, together with certain other (soldiers) (persons) to the number of ———, whose names are unknown, did, (with force and arms) unlawfully and riotously, and in a violent and tumultuous manner, assemble to disturb the peace of ———, and having so assembled, did (unlawfully, riotously, and in a violent and tumultuous manner disturb, enter, and break up ———) (unlawfully and riotously assault ——— by ———), to the terror and disturbance of ———.

Refusing reparation.

75. In that ———, who was then the commanding officer of ———, did, at ———, on or about ——— 19—, complaint having been made to him that (damage had been done to ———, the property of ———) (———, the property of ———, had been taken) by (———, a ———) (——— ——— soldiers) of his command, (a) person(s) subject to military law, (refuse) (fail) to see reparation made to the said ——— so far as said ———'s pay would go toward such reparation and as provided for in the 105th Article of War, by ———.

A.W. 90

Provoking speeches, etc.

76. In that ——— did, at ———, on or about ——— 19—, wrongfully use a (reproachful) (provoking) (reproachful and provoking) (speech, to wit: ———, or words to that effect) (against) (gesture to) ———, a person subject to military law, (by shaking his fist in the face of the said ———) (———).

A.W. 91

Dueling, etc.

77. In that ——— (and ———) did, at ———, on or about ——— 19—, fight a duel (with ———), using as weapons therefor (pistols) (swords) (———).

78. In that ——— did, at ———, on or about ——— 19—, promote a duel between ——— and ——— by (telling said ——— he would be a coward if he failed to challenge said ——— to a duel) (knowingly carrying from said ——— to said ——— a challenge to fight a duel).

79. In that ———, being officer of the day at ——— and having knowledge that ——— and ——— intended and were about to engage in a duel near that ———, did, at ———, on or about ——— 19—, connive at the fighting of said duel by knowingly permitting ———, one of the parties to said proposed duel, to leave the post and go toward the place appointed for said duel at the time which he, ———, then knew had been appointed therefor.

80. In that ———, having knowledge that a challenge to fight a duel (had been sent) (was about to be sent) by ——— to ———, did, at ———, on or about ——— 19—, fail to report that fact promptly to the proper authority.

A.W. 92

Murder (Premeditated).

81. In that ——— did, at ———, on or about ——— 19—, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill ———, a human being, by (shooting him with a rifle) (———).

82. In that ——— did, at ———, on or about ——— 19—, with malice aforethought, willfully, feloniously, and unlawfully kill ———, a human being, by (shooting him with a rifle) (———). **Murder. (Not premeditated).**

83. In that ——— did, at ———, on or about ——— 19—, forcibly and feloniously, against her will, have carnal knowledge of ———. **Rape.**

A.W. 93

84. In that ——— did, at ———, on or about ——— 19—, feloniously, willfully, and unlawfully kill ———, by ——— him (in) (on) the ——— with a ———. **Voluntary manslaughter.**

85. In that ——— did, at ———, on or about ——— 19—, feloniously and unlawfully kill ———, by ——— him (in) (on) the ——— with a ———. **Involuntary manslaughter.**

86. In that ——— did, at ———, on or about ——— 19—, feloniously, willfully, maliciously, and unlawfully cut off the (hand) (arm) (———) of ———. **Mayhem.**

87. In that ——— did, at ———, on or about ——— 19—, feloniously, willfully, maliciously and unlawfully maim ———, by ——— him (in) (on) the ——— with a ———.

88. In that ——— did, at ———, on or about ——— 19—, willfully, maliciously, unlawfully, and feloniously burn the (dwelling house) (a building, to wit: a ———, parcel of the dwelling house) of ———. **Arson.**

89. In that ——— did, at ———, on or about ——— 19—, in the nighttime, feloniously and burglariously break and enter the (dwelling house) (——— within the curtilage) of ———, with intent to commit a felony, viz: (larceny) (rape) (murder) (———), therein. **Burglary.**

90. In that ——— did, at ———, on or about ——— 19—, unlawfully enter the (dwelling) (bank) (store) (warehouse) (shop) (stable) (———) of ———, with intent to commit a criminal offense, to wit: ———, therein. **Housebreaking.**

91. In that ——— did, at ———, on or about ——— 19—, by force and violence and by putting him in fear, feloniously steal from the (person) (presence) of ———, ———, the property of ———, value about $———. **Robbery.**

92. In that ——— did, at ———, on or about ——— 19—, feloniously steal ———, value about $———, the property of ———. **Larceny and Embezzlement.**

93. In that ———, having taken a lawful oath (affirmation) in a (trial by ——— court-martial of ———) (trial by a court of competent jurisdiction, to wit: ———, of ———) (deposition for use in a trial by ——— of), that he would testify (depose) truly, did, at ———, on or about ——— 19—, willfully, corruptly and contrary to such oath, testify (depose) in substance that ———, which testimony (deposition) was upon a material matter and which he did not then believe to be true. **Perjury.**

94. In that ——— did, at ———, on or about ——— 19—, with intent to defraud [falsely make in its entirety a certain (check) (———) in the following words and figures, to wit: ———] [falsely alter a certain (check) (———), in the following words and figures, to wit: ———, by ———] which said (check) (———) was a writing of a (public) (private) nature, which might operate to the prejudice of another. **Forgery.**

Sodomy.

95. In that ——— did, at ———, on or about ——— 19—, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os (per anum) with (———) (a mare, the same being a beast) (———).

Assault with intent to commit a felony or do bodily harm.

96. In that ——— did, at ———, on or about ——— 19—, with intent to (commit a felony, viz: ———) (do him bodily harm), commit an assault upon ———, by feloniously and willfully (striking) (———) the said ——— (in) (on) the ——— with a ———.

Assault with intent to do bodily harm with a dangerous weapon.

97. In that ——— did, at ———, on or about ——— 19—, with intent to do him bodily harm, commit an assault upon ———, by (shooting) (striking) (cutting) (———) him (in) (on) the ———, with a dangerous (weapon) (instrument) (thing) to wit: a (pistol) (pickax) (bayonet) (———).

A.W. 94

Making, etc., false claim.

98. In that ——— did, at ———, on or about ——— 19—, (make) (cause to be made by ———) a claim against the (United States) (finance officer at ———) by presenting (a voucher) (———) to ———, an officer of the United States authorized to (approve) (allow) (pay) (approve, allow and pay) such claim, in the amount of $——— for [private property alleged to have been (lost) (destroyed) in the military service] [———] which claim was (false) (fraudulent) (false and fraudulent) in that ———, and was then known by the said ——— to be (false) (fraudulent) (false and fraudulent).

Presenting, etc., false claim.

99. In that ——— did, at ———, on or about ——— 19—, (present) (cause to be presented by ———) for (approval) (payment) (approval and payment) a claim against the (United States) (finance officer at ———) (———) by (presenting) (causing to be presented) (a voucher) (———) to ———, an officer of the United States, duly authorized to (approve) (pay) (approve and pay) such claims, in the amount of $———, for (services alleged to have been rendered to the United States by ——— during ———,) (———) which claim was (false) (fraudulent) (false and fraudulent) in that ———, and was then known by the said ——— to be (false) (fraudulent) (false and fraudulent).

Making, etc., false writing.

100. In that ———, for the purpose of (obtaining) (aiding others, viz., ———, to obtain) the (approval) (allowance) (payment) (approval, allowance and payment) of a claim against the United States by presenting to (———, finance officer at ———) (———), an officer of the United States duly authorized to (approve) (pay) (allow) (approve, pay, and allow) such claim, did, at ———, on or about ——— 19—, (make) (use) (make and use) (procure) (advise) the (making) (using) (making and using) of a certain (writing) (paper), to wit: ———, which said (writing) (paper), as he, the said ———, then knew, contained a statement that ———, which statement was (false) (fraudulent) (false and fraudulent) in that ———, and was then known by the said ——— to be (false) (fraudulent) (false and fraudulent).

Making, etc., false oath.

101. In that ———, for the purpose of (obtaining) (aiding others, viz: ———, to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United

States, by presenting to (———, finance officer at ———) (———), an officer of the United States duly authorized to (approve) (pay) (allow) (approve, pay, and allow) such claims, did, at ———, on or about ——— 19—, (make) [(procure) (advise) (advise and procure) the making of], an oath (by ———) (to the fact that ———) [to a certain (writing) (paper), to wit: ———, to the effect that ———], which said oath was false in that ———, and was then known by the said ——— to be false.

Forging, etc., signature.

102. In that ———, for the purpose of (obtaining) (aiding others, viz: ———, to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the [United States, by presenting to (———, finance officer at ———) (———), an officer of the United States duly authorized to (approve) (pay) (allow) (approve, pay, and allow) such claims], did, at ———, on or about ——— 19—, (forge) (counterfeit) (forge and counterfeit) [(procure) (advise) (procure and advise) the (forging) (counterfeiting) (forging and counterfeiting) of] the signature of ———, upon a ———, (by ———), in words and figures as follows: ———.

Using, etc., forged signature.

103. In that ———, for the purpose of (obtaining) (aiding others, viz: ———, to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States by presenting to (———, finance officer at ———) (———), an officer of the United States duly authorized to (approve) (pay) (allow) (approve, pay, and allow) such claims, did, at ———, on or about ——— 19—, (use) (advise the use of) (procure the use of) the signature of ——— on a certain (writing) (paper), to wit: ———, such signature being (forged) (counterfeited) (forged and counterfeited), and then known by the said ——— to be (forged) (counterfeited) (forged and counterfeited).

Paying amount less than called for by receipt.

104. In that ———, having (charge) (possession) (custody) (control) of (money) (———) of the United States, (furnished) (intended) (furnished and intended) for the military service thereof, did, at ———, on or about ——— 19—, knowingly (deliver) (cause to be delivered) to ———, the said ——— having authority to receive the same, (an amount) (———), which, as he, ———, then knew, was (——— dollars, ——— cents) (———) less than the (amount) (———) for which he received a (certificate) (receipt) from the said ———.

Making receipt without knowledge of the facts.

105. In that ———, being authorized to (make) (deliver) (make and deliver) a paper certifying the receipt of property of the United States (furnished) (intended) (furnished and intended) for the military service thereof, did, at ———, on or about ——— 19—, (make) (deliver) (make and deliver) to ——— a writing in words and figures as follows: ———, without having full knowledge of the truth of the statements therein contained and with the intent to defraud the United States.

Stealing, embezzlement of military property.

106. In that ——— did, at ———, on or about ——— 19—, feloniously steal ———, of the value of about $———, property of the United States (furnished) (intended) (furnished and intended) for the military service thereof.

Misappropriation, etc., of military property.

107. In that ——— did, at ———, on or about ——— 19—, [(knowingly and willfully misappropriate) (knowingly and willfully apply to his own use) (knowingly and willfully apply to his own benefit) (knowingly and willfully apply to his own use and benefit) by ———] [(wrongfully) (knowingly and without proper authority) (wrongfully and knowingly) (sell) (dispose of by ———)], ——— of the value of about $———, property of the United States (furnished) (intended) (furnished and intended) for the military service thereof.

Purchasing, etc., United States property.

108. In that ——— did, at ———, on or about ——— 19—, knowingly (purchase) [receive in pledge for an (obligation) (indebtedness)] from ———, (a soldier) (———) (in) (employed in) the military (service) (forces) of the United States, ———, of the value of about $———, property of the United States, the said ——— not having the lawful right to (sell) (pledge) the same.

Conspiracy, etc., to defraud United States.

109. In that ——— did, at ———, on or about ——— 19—, (conspire) (agree) (agree and conspire) with ———, to ——— (described under A. W. 94).

A.W. 95

Making check with insufficient funds.

110. In that ——— did, at ———, on or about ——— 19—, [with intent to defraud] [with intent to (deceive) (injure) (deceive and injure)] wrongfully and unlawfully make and utter to ———, a certain check, in words and figures as follows, to wit: ———, [and by means thereof did fraudulently obtain from ——— ($———) (———, of the value of about $———)] [in payment of ———], he, the said ———, then well knowing that he did not have and not intending that he should have (any account with) (sufficient funds in) the ——— bank for payment of said check.

Drunk, etc.

111. In that ——— was, at ———, on or about ——— 19—, in a public place, to wit: ———, (drunk) (disorderly) (drunk and disorderly) while in uniform, to the disgrace of the military service.

Failure, etc., to pay debt.

112. In that ———, being indebted to ——— in the sum of $——— for ———, which amount became due and payable (on) (about) (on or about) ———, did, at ———, from ——— 19—, to ——— 19—, dishonorably fail and neglect to pay said debt.

Failure to keep promise to pay debt.

113. In that ———, having on or about ——— 19—, become indebted to ——— in the sum of ——— for ———, and having failed without due cause to liquidate said indebtedness, and having on or about ——— 19—, promised said ——— (in writing) that on or about ——— 19—, he would (settle such indebtedness in full) (pay on such indebtedness the sum of $———), did, without due cause, at ———, on or about ——— 19—, dishonorably fail to keep said promise.

Making false official statement.

114. In that ——— did, at ———, on or about ——— 19—, with intent to deceive ———, officially (report) (state) (certify) to the said ——— that ———, which (report) (statement) (certificate) was (known by the said ——— to be untrue) (believed by the said ——— to be untrue) (made by the said ——— with disregard of a knowledge of the facts) (made by the said ——— as true when he did not know it to be true) in that ———.

115. In that ———, *with intent to defraud* ———, did, at ———, on or about ——— 19—, by ———, unlawfully pretend to ——— that ———, well knowing that said pretenses were false, and by means thereof did fraudulently [obtain from the said ——— (the sum of $———) (merchandise of the value of $———)]. **False pretenses.**

A.W. 96

116. In that ——— did, at ———, on or about ——— 19—, wrongfully (kick a public horse in the belly) (———). **Abusing animals.**

117. In that ——— (a married man) did, at ———, on or about ——— 19—, wrongfully have sexual intercourse with ———, (a married woman) (a woman) not his wife. **Adultery.**

118. In that ——— did, at ———, on or about ——— 19—, (assist) (aid) ———, a (general) (———) prisoner in confinement at ———, to escape from said confinement before he was set at liberty by proper authority by [furnishing to the said ——— (the necessary tools and instruments) (———) by means of which the said ——— was enabled to effect his said escape from confinement] [———]. **Aiding prisoner to escape.**

119. In that ———, a (sentinel) (overseer) (———), being in charge of prisoners, did at ———, on or about ——— 19—, wrongfully allow ———, a prisoner under his charge [to (go to) (enter) (go to and enter) an unauthorized place, to wit: ———] [to (hold unauthorized conversation with ———) (loiter) (neglect his task by ———) (obtain) (receive) intoxicating liquor (———)]. **Allowing prisoner to do unauthorized act.**

120. In that ——— did, at ———, on or about ——— 19—, without authority, appear in civilian clothing. **Appearing in civilian clothing without authority.**

121. In that ——— did, at ———, on or about ——— 19—, wrongfully appear (at) (on) ——— (without his ———) (with his ——— not buttoned) (in an unclean ———) (with an unclean ———) (———). **Improper or unclean uniform, etc.**

122. In that ——— did, at ———, on or about ——— 19—, wrongfully attempt to (strike) (———) ——— (in) (on) the ——— ——— with ———. **Assault.**

123. In that ——— did, at ———, on or about ——— 19—, wrongfully and indecently commit an assault upon ——— by ———, with intent to gratify his (lust) (sexual desires). **Assault, aggravated: Indecent.**

124. In that ——— did, at ———, on or about ——— 19—, commit an assault upon ——— by (shooting) (striking) (cutting) (———) (at him) (him) (in) (on) (the ———) with a dangerous (weapon) (instrument) (thing), to wit: a (pistol) (pickax) (bayonet) (———). **With a dangerous weapon.**

125. In that ——— did, at ———, on or about ——— 19—, (strike) (———) ———, a commissioned officer of (the Army of the United States) (———, a friendly foreign power) [the United States (Navy) (Coast Guard) (Air Force)], who was then in uniform. **Upon a commissioned officer, etc.**

126. In that ——— did, at ———, on or about ——— 19—, wrongfully (strike) (———) ———, (a female under the age of 16 years,) (a child) (in) (on) the ——— with (a) his ———. **Assault and battery.**

127. In that ———, a prisoner lawfully in confinement in (the post guardhouse) (———), did, at ———, on or about ——— 19—, attempt to escape from such confinement. **Attempting to escape.**

Bigamy. 128. In that ——— did, at ———, on or about ——— 19—, wrongfully, unlawfully, and bigamously marry ———, having at the time of his said marriage to ———, a lawful wife then living, to wit: ———.

Breach of restriction. 129. In that ———, having been restricted to the limits of ———, did, at ———, on or about ——— 19—, break said restriction by going to ———.

Breach of quarantine. 130. In that ———, having been (placed in medical quarantine) (restricted for medical purposes) to the ———, did, at———, on or about ——— 19—, break said (medical quarantine) (medical restriction) by going beyond the limits thereof.

Breaking parole. 131. In that ———, a prisoner on parole, did, at ———, on or about ——— 19—, break his parole by ———.

Burning, etc., of building. 132. In that ——— did, at ———, on or about ——— 19—, maliciously (set fire to) (burn) (attempt to burn) [(destroy) (injure) by ———] [attempt to (destroy) (injure)] (a) (an) ——— (arsenal, armory, etc., as the case may be).

Carrying concealed weapon. 133. In that ——— did, at ———, on or about ——— 19—, unlawfully carry a concealed weapon, viz.: a ———.

Committing nuisance. 134. In that ——— did, at ———, on or about ——— 19—, wrongfully (urinate) (defecate) (———) (on the floor of the squad room) (———).

Concealing, mutilating, etc., public record. 135. In that ——— did, at ———, on or about ——— 19—, willfully and unlawfully [(conceal) (remove) (mutilate) (obliterate) (destroy)] [attempt to (conceal) (remove) (mutilate) (obliterate) (destroy)] [take and carry away with intent to (conceal) (remove) (mutilate) (obliterate) (destroy) (steal)] a public record, to wit: (the descriptive list of ———) (———).

Conspiracy to commit offense against U. S. 136. In that ——— did, at ———, on or about ——— 19—, conspire with ———, to (commit an offense against the United States, to wit: ———, by ———) (defraud the United States by ———) (defraud the ———, an agency of the United States, by ———), and that ———, (——— and ———), did, for the purpose of effecting the object of said conspiracy, ———.

Conspiracy to escape. 137. In that ———, a prisoner lawfully in confinement in (the post guardhouse) (———), did, at ———, on or about ——— 19—, conspire with ——— (and ———) to escape from such confinement.

Careless discharge of firearm. 138. In that ——— did, at ———, on or about ——— 19—, through carelessness, discharge a (service rifle) (———) in his (squad room) (tent) (———).

Destruction of Government property. 139. In that ——— did, at ———, on or about ——— 19—, willfully, wrongfully, and unlawfully destroy ———, value about $———, property of the United States.

Disfiguring, etc., with vitriol, etc. 140. In that ——— did, at ———, on or about ——— 19—, with intent to (maim) (disfigure) (maim and disfigure), willfully, unlawfully, and feloniously, (throw) (pour) upon ———, (scalding hot water) (vitriol) (———, a corrosive acid) (———, a caustic substance).

Drinking liquor with prisoner. 141. In that ———, a sentinel (———) in charge of prisoners, did, at ———, on or about ——— 19—, drink intoxicating liquor with ———, a prisoner under his charge.

142. In that ——— did, at ———, on or about ——— 19—, wrongfully and unlawfully operate a motor vehicle upon a (public street) (highway) while [under the influence of (liquor) (drugs)] [drunk]. **Driving while drunk.**

143. In that ———, a prisoner, was, at ———, on or about ——— 19——, found drunk. **Drunk, prisoner found.**

144. In that ——— was, at ———, on or about ——— 19—, (drunk) (disorderly) (drunk and disorderly) [in (command) (quarters) (station) (camp) (———)] [(in uniform in a public place, to wit: ———) (———)]. **Drunkenness, etc.**

145. In that ———, having received a lawful order from ——— to ———, the said ——— being in the execution of his office, did, at ———, on or about ——— 19—, fail to obey the same. **Failing to obey order.**

146. In that ———, being indebted to ——— in the sum of $——— for ———, which amount became due and payable (on) (about) (on or about) ———, did, at ———, from ——— 19—, to ——— 19——, dishonorably fail and neglect to pay said debt. **Failure to pay debts, etc.**

147. In that ——— did, at ———, on or about ——— 19—, with intent to deceive ———, officially (report) (state) to the said ———, that ———, which (report) (statement) was (known by the said ——— to be untrue) (believed by the said ——— to be untrue) (made by the said ——— with disregard of knowledge of the facts) (made by the said ——— as true when he did not know it to be true), in that ———. **False official report.**

148. In that ———, with intent to defraud ———, did, at ———, on or about ——— 19—, unlawfully pretend to ——— that ———, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said ——— (the sum of $———) (merchandise of the value of $———) (———). **False pretenses.**

149. In that ——— did, at ———, on or about ———19—, (in an affidavit) (in his testimony before a ——— court-martial at the trial of ———) (in ———) make under oath a statement in substance as follows: ———, which statement he did not then believe to be true. **False swearing.**

150. In that ———, being (the driver of) (a passenger in) (the senior officer in) a vehicle at the time of a(n) (accident) (collision), did, at ———, on or about ——— 19—, wrongfully and unlawfully leave the scene of the accident without [rendering assistance to ——— who had been struck (and injured) by the said vehicle] [making his identity known after colliding with another vehicle]. **Fleeing scene of accident.**

151. In that ——— did, at ———, on or about ——— 19—, by willfully concealing the fact that he was then a private in ———, procure himself to be enlisted in the military service of the United States, by ———. **Fraudulent enlistment.**

152. In that ——— did, at ———, on or about ——— 19—, gamble in quarters, in violation of (here insert description of order). **Gambling in quarters in violation of orders.**

153. In that (Sergeant) (Corporal) ——— did, at ———, on or about ——— 19—, gamble with Private(s) ——— (and ———). **Gambling with subordinate.**

154. In that ——— did, at ———, on or about ——— 19—, wrongfully and unlawfully [(take indecent liberties) (commit indecent acts) with] [commit a (lewd) (lascivious) act (upon) **Indecent acts with a child.**

(with) the body of] ———, a (female) (male) under sixteen years of age, by [fondling (her) (him) and placing his hands upon (her) (his) leg and private parts] [———], with intent to (arouse) (gratify) the sexual desires of the said ——— (and ———).

Indecent exposure. 155. In that ——— did, at ———, on or about ——— 19—, while (at a barracks window) (———) willfully and wrongfully expose in an indecent manner to public view his ———.

Introduction of marihuana, drugs, into command. 156. In that ——— did, at ———, on or about ——— 19—, wrongfully introduce (for sale) into (quarters) (station) (camp) (———) (one ounce of heroin) (———).

Introduction of intoxicating liquor into command. 157. In that ——— did, at ———, on or about ——— 19—, wrongfully introduce (two quarts of whiskey) (———) into (command) (quarters) (station) (camp) in violation of (here insert description of order).

Impersonating an officer, etc. 158. In that ——— did, at ———, on or about ——— 19—, wrongfully and unlawfully impersonate an (officer) (noncommissioned officer) (agent of a superior authority) of the Army of the United States by publicly wearing the uniform and insignia of the rank of (captain) (first sergeant) (———) [(with the intent to defraud ——— by ———)].

Joyriding. 159. In that ——— did, at ———, on or about ——— 19—, wrongfully and unlawfully take and use for his own use and benefit and without the (consent) (authority) of the owner, a certain motor vehicle, to wit: a ———, the property of ———, with the intent to deprive said owner temporarily of his property.

Making false pass, etc. 160. In that ——— did, at ———, on or about ——— 19—, wrongfully, unlawfully, and falsely (make) (alter) (counterfeit) (sell) (tamper with) (give to ———) (have in his possession with the intent to defraud ———) a certain instrument purporting to be (a) (an) (naval) (military) (official) (pass) (furlough) (discharge certificate) (———), knowing the same to be (false) (unauthorized) (———).

Maiming, etc. 161. In that ——— did, at ———, on or about ——— 19—, with intent to (maim) (disfigure) (maim and disfigure), willfully, unlawfully and feloniously [(cut) (bite) (slit) the (nose) (ear) (lips)] [injure the tongue] [injure the (limb) (———)] of ———, by ———.

Malingering. 162. In that ——— did, at ———, (on or about ——— 19—) (between ——— and ———), with the intention of evading his (duty) (———) as a (soldier) (———), a feign (illness) (disability) (insanity) (———).

Negligent homicide. 163. In that ——— did, at ———, on or about ——— 19—, unlawfully kill ———, [by negligently ——— him (in) (on) the ——— with a dangerous instrumentality, to wit: a ———] [by driving a (motor vehicle) (———) against the said ——— in a negligent manner].

Obstructing, taking, etc., of correspondence. 164. In that ——— did, at ———, on or about ——— 19—, unlawfully take (a) certain [letter(s)] [postal card(s)] [package(s)] addressed to ———, [out of the (Army Post Office ———) (orderly room of ———) (unit mail box of ———) (———)] [from ———], before it was delivered to the person to whom it was directed, with design to [obstruct the correspondence] [pry into the (business) (secrets)] of ———.

165. In that ——— did, at ———, on or about ——— 19—, [wrongfully and unlawfully (open) (secrete) (destroy)] [feloniously steal] (a) certain [letter(s)] [postal card(s)] [package(s)], addressed to ———, which said letter(s) (———) [(was) (were) then in the (Army Post Office ———) (orderly room of ———) (unit mail box ———) (custody of ———) (———)] [had previously been committed to ——— (a representative of ———) an official agency for the transmission of communications] before said letter(s) (was) (were) delivered to the person(s) to whom it (they) (was) (were) directed.

Offenses against and by sentinel.

166. In that ——— did, at ———, on or about ——— 19—, (attempt) (threaten) to (strike) (assault) ———, a sentinel in the execution of his duty [(in) (on) the ———] with (a) (his) ———.

167. In that ———, (a prisoner,) did, at ———, on or about ——— 19—, [use the following (threatening) (insulting) (threatening and insulting) language] [behave in an (insubordinate) (disrespectful) (insubordinate and disrespectful) manner] toward ———, a sentinel in the execution of his duty, ["———," or words to that effect] [by ———].

168. In that ———, having received a lawful order from a sentinel in the execution of his duty, to ———, did, at ———, on or about ——— 19—, (fail to obey) (willfully disobey) the same.

169. In that ——— did, at ———, on or about ——— 19—, (strike) (assault) ———, a sentinel in the execution of his duty, (in) (on) the ——— ——— with (a) (his) ———.

170. In that ———, while posted as a sentinel, did, at ———, on or about ——— 19—, (loiter) (wrongfully sit down) on his post.

Pandering.

171. In that ——— did, at ———, on or about ——— 19—, wrongfully and unlawfully (compel) (induce) (entice) (procure) [attempt to (compel) (induce) (entice) (procure)] ——— to engage in (acts of prostitution) (sexual intercourse for hire and reward) with persons to be directed to her by the said ———.

172. In that ——— did, at ———, on or about ——— 19—, wrongfully and unlawfully [receive valuable consideration, to wit: ———, on account of arranging for] [arrange for] (———) (unnamed persons) to engage in sexual intercourse (sodomy) with ———, a prostitute.

Possession of drug or marihuana.

173. In that ——— did, at ———, on or about ——— 19—, have in his possession ——— ounces, more or less, of a habit forming drug, to wit: ———, said drug not having been ordered by a medical officer of the Army.

Receiving stolen goods.

174. In that ——— did, at ———, on or about ——— 19—, feloniously receive, have, and conceal (describe property as in larceny), the goods and chattels of (name owner), then lately before feloniously stolen, taken, and carried away; he, the said (accused), then well knowing the said goods and chattels to have been so feloniously stolen, taken, and carried away.

Reckless driving.

175. In that ——— did, at ———, on or about ——— 19—, wrongfully and unlawfully operate a motor vehicle in a reckless manner [and thereby cause the said motor vehicle to (collide with another vehicle) (overturn) (strike a tree) and strike and injure ——— by (breaking his shoulder) (———)].

Refusing to testify.

176. In that ———, being in the presence of a [(general) (special) court martial] [duly appointed board of officers] of the United States of which ——— was president (and having qualified as a witness) (and having been directed by said ——— to qualify as a witness) (and having been directed by said ——— to answer the following questions put to him as a witness, "———"), did, at ———, on or about ——— 19—, wrongfully refuse (to qualify as a witness) (to answer said questions).

Self inflicted injury.

177. In that ——— did, at ———, on or about ——— 19—, willfully injure himself in the ——— by (shooting himself with ———) (———), thereby unfitting himself for the full performance of military service.

Statutory perjury.

178. In that ——— did, at ———, on or about ——— 19—, in a claim for (family allowance) (compensation) (insurance) [in ———, a document required by (regulations made under) (the War Risk Insurance Act) (———) for the making of a claim for (family allowance) (compensation) (insurance), to wit: ———], willfully and unlawfully make a statement that ———, which statement was a material fact, and known by the said ——— to be false, in that ———.

Straggling.

179. In that ——— did, at ———, on or about ——— 19—, while accompanying his organization on (a practice march) (maneuvers), without just cause straggle.

Subornation of perjury.

180. In that ——— did, at ———, on or about ——— 19—, procure ——— to commit perjury, by inducing him, the said ———, to take an oath before a competent (tribunal) (officer) (person) in a (trial by court-martial of ———) (———) that he, the said ———, would (testify) (depose) truly, and willfully, corruptly, and contrary to such oath to (testify) (depose) in substance that ——— which, (testimony) (deposition) was false, was (material) (a material matter), and was known by the said ——— and the said ——— to be false.

Unlawful entry.

181. In that ——— did, at ———, on or about ——— 19—, wrongfully and (unlawfully) (without authority) enter the (dwelling house) (garage) (warehouse) (tent) (vegetable garden) (orchard) (———) of ———.

Using a drug, marihuana.

182. In that ——— did, at ———, on or about ——— 19—, wrongfully use ———, a narcotic drug.

Usury.

183. In that ——— (, for and in behalf of one ———,) did, at ———, on or about ——— 19—, loan to ——— $———, under an agreement whereby he, the said ———, was to receive for the use of said money for ——— (months) (days) interest at the rate of ——— per cent per (annum) (month) (the sum of $ ———), thereby (demanding) (receiving) (demanding and receiving) an usurious rate of interest for said loan.

Uttering forged instrument.

184. In that ——— did, at ———, on or about ——— 19—, with intent to defraud, willfully, unlawfully, and feloniously (pass) (utter) (publish) [attempt to (pass) (utter) (publish)] as true and genuine a certain ———, in words and figures as follows: ———, a writing of a (public) (private) nature, which might operate to the prejudice of another, which said ——— was, as he, the said ———, then well knew, falsely (made) (altered) and forged.

185. In that ——— did, at ———, on or about ——— 19—, wrongfully violate (paragraph ———, Army Regulations ———, ——— 19—) (paragraph ———, General Orders No. ———, Headquarters ———, ——— 19—) (section ———, Post Traffic Regulations, Fort ———) (———), by (operating an automobile at a speed in excess of fifty miles per hour) (introducing intoxicating liquor into the officers' club) (flying a military airplane at an altitude of less than ——— feet above the ground) (———). **Violating standing orders.**

186. In that ——— did, at ———, on or about ——— 19—, wrongfully and without authority wear upon his (uniform) (civilian clothing) (the insignia of grade of a master sergeant) (the combat infantryman badge) (the Distinguished Service Cross) (the ribbon representing the Silver Star) (the lapel button representing the Legion of Merit) (———). **Wearing unauthorized medal, etc.**

187. In that ———, did, at ———, on or about ——— 19—, willfully and wrongfully discharge a firearm, to wit: ———, (in a mess hall) (———), under circumstances such as to endanger human life. **Willful discharge of firearm.**

188. In that ——— did, at ———, on or about ——— 19—, wrongfully and unlawfully have carnal knowledge of ———, a female child under the age of sixteen years. **Wrongful carnal knowledge.**

189. In that ——— did, at ———, on or about ——— 19—, wrongfully (and without the consent of the owner) (and without authority), (take) (take and use) (use) (appropriate) a certain (motor vehicle) (motion picture camera) (hunting rifle) (evening gown) (———), value about $ ———, property of ———. **Wrongful taking and using.**

* WITH INTENT TO DEPRIV
THE OWNER TEMPORARILY
OF HIS PROPERTY

Appendix 5

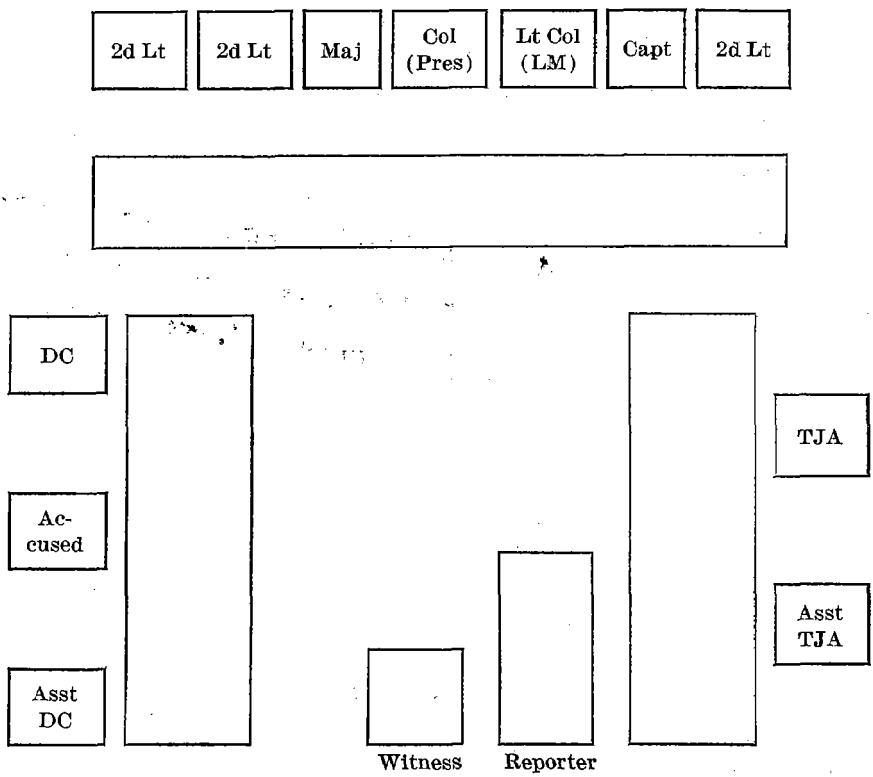
PROCEDURE FOR TRIALS BEFORE GENERAL AND SPECIAL COURTS-MARTIAL

Certificates concerning counsels' qualifications.

NOTE.—Any members of the prosecution not shown by the order appointing the court to be members of the Judge Advocate General's Corps, or of the bar of a Federal court or of the highest court of a State of the United States, will, after the accused and a quorum of the court are present and before the court convenes, present to the law member (or president of a special court-martial) a certificate stating whether he is a member of such Corps or bar. If the appointing orders or such certificate reveals that any member of the prosecution is so qualified, each member of the defense (both appointed and individual counsel) whose qualifications are not shown by the appointing order will submit a similar certificate. See 56; for form of certificate, see App. 6*b*.

Seating of court.

NOTE.—The president is seated with the law member on his immediate left. Remaining members are seated alternately to the right and left of the president in order of seniority, thus:



The trial proceeds substantially as follows:

PRES: The court will come to order. **Court called to order.**

TJA: The prosecution is ready to proceed with the trial in the case of the United States against **Prosecution ready.**

(Name, rank, and organization of accused as read from charge sheet.)

NOTE.—The accused and all members of the prosecution and defense here rise and remain standing until the choice of counsel has been announced.

TJA: The accused is present together with the regularly appointed defense counsel (and assistant defense counsel). **Introduction of accused and counsel.**

TJA: By whom does the accused desire to be defended?

DC: The accused [desires to be defended by the regularly appointed defense counsel (and assistant defense counsel)] [introduces as individual counsel ———, and desires the regularly appointed defense counsel (and assistant defense counsel) to act as associate counsel]. **Individual counsel.**

NOTE.—Appointed counsel not desired by the accused will be excused.

NOTE.—If the above described certificates show that any member of the prosecution is a legally qualified lawyer in the sense of Article 11, and that no counsel for the defense present at the trial (including individual counsel) is similarly qualified, the law member (or president of a special court-martial) will announce that fact and will inform the accused:

LM (PRES): (Private) ———, one of the officers of the prosecution is a qualified lawyer in the sense of Article of War 11. No member of counsel for the defense present is similarly qualified under Article of War 11. **Explanation of counsels' qualifications.**

You have the right to be represented by a duly qualified lawyer, if you want one. If you object to proceeding to trial without being represented by defense counsel so qualified, the court will be adjourned pending procurement of defense counsel who is so qualified. (Private) ———, do you object to proceeding to trial without being represented by a duly qualified lawyer?

Acc: I do. (I do not.)

NOTE.—If accused does not object, the proceedings will continue:

TJA: No member of the prosecution has acted as member, defense counsel, assistant defense counsel or investigating officer in this case. **Prior participation by a member of prosecution.**

TJA: Has the defense counsel (individual counsel) or assistant defense counsel acted as investigating officer, member or trial judge advocate in this case? **Prior participation by defense counsel.**

DC: The (defense counsel) (———) has acted as (———). (No counsel for the defense has so acted.)

NOTE.—In appropriate cases the TJA will advise accused:

TJA: (Private) ———, the (regularly appointed defense counsel) (———) previously has acted as (———) in this case. Under Article of War 11 he may not now act as defense counsel (———) unless expressly requested by you. (Private) ———, do you expressly request that (———) act in this case as defense counsel (———) notwithstanding his previous participation in this case?

Acc: I do. (I do not.)

NOTE.—If accused requests to be so represented the proceedings will continue, and all except the TJA resume their seats. Otherwise, the court will adjourn pending procurement of legally qualified counsel.

*Reporter sworn.

TJA: The reporter will be sworn.

NOTE.—The reporter stands with right hand raised; the TJA, right hand raised, faces the reporter and administers the oath.

*Oath of reporter.

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

Reporter: I do.

*Copy of record.

TJA: Does the accused desire a copy of the record of trial?

DC: He does. (He does not.)

NOTE.—Any interpreter used may be sworn now or just before he acts. See Article 19 for form of oath.

Order appointing the court.

TJA: The court is appointed by paragraph ———, Special Orders No. ———, Headquarters ———, dated ——— 19—, (and as amended by paragraph ——, Special Orders No. ——, Headquarters ——, dated —— 19—). [With permission of the court, I shall omit the reading of the order(s).]

NOTE.—At the first meeting of the court the TJA should read the order appointing the court. If there is an amending order he should announce it and read it at the first meeting of the court after such amendment is published.

Enlisted members.

If the accused is an enlisted person, the following should be included:

TJA: The accused has (not) made a request in writing that the membership of this court include enlisted persons.

NOTE.—If a request for enlisted members is not made prior to or at this time, the trial proceeds. If a request is made, and requirements for enlisted membership do not appear to have been met (4*a* and *c*), the court should adjourn and report the matter to the appointing authority.

The accused and all members of the prosecution rise and remain standing while the names of the members present and absent are announced.

Members present and absent.

TJA: The following members of the court are present:

Absent:

Reasons for absence.

NOTE.—Reasons or authority for absences should be stated if known to the TJA. All the personnel of the court, including the TJA and defense counsel and their assistants, should be accounted for as present or absent. After those present and absent are announced, all except the TJA resume their seats.

Nature of charges.

TJA: The general nature of the charges in this case is ———; the charges were preferred by ———; forwarded by ———; and investigated by ———. No member of the court will be a witness for the prosecution. The records of this case disclose [no grounds for challenge] [grounds for the challenge of ———, for the following reason: he (is the accuser) (was the investigating officer) (forwarded the charges as commanding officer) (will be a witness for the prosecution) (———).]

Challenges:

—grounds disclosed by records.

NOTE.—If disclosed grounds of challenge are undisputed and are within the first six grounds enumerated in 58*e*, the president will excuse the

*Not applicable to special courts-martial trials if reporter is not used.

member forthwith. The sixth of these grounds provides that an enlisted member of the court may not belong to the same company or corresponding military unit as the accused. If the excusing of an enlisted court member results in an enlisted membership of less than one-third of the total membership of the court, the court will adjourn and report the matter to the appointing authority. The procedure outlined in 58*f* will be followed for challenge on other grounds.

The court will rearrange itself after all challenges have been acted upon.

TJA: If any member of the court is aware of any facts which he believes to be a ground for challenge by either side against any member, it is requested that he state such facts. —members volunteer.

TJA: The prosecution (has no) challenges (——— for cause on the ground ———). —by prosecution. (for cause)

NOTE.—A challenged member will be given the right to make a statement with respect to the challenge; if it appears that the member should be excused, the president may excuse him subject to the objection of any member. In case of an objection by any member or the defense, evidence may be presented to the court upon the issue. In the event of a contested challenge, the challenged member will withdraw, the court will close, and a vote will be taken by secret written ballot; a majority is necessary to sustain the challenge. (Procedure on challenge.)

Challenges for cause ordinarily should be made before arraignment but may be presented at any stage of the proceedings if the challenger has exercised due diligence or the challenge is based upon grounds enumerated in 58*e*, clauses 1–6. Challenges for cause may again be presented, even though once overruled, if for good cause, such as newly discovered evidence.

The TJA will administer the following oath to a challenged member who is to be examined as to his competency:

"You swear (or affirm) that you will answer truthfully questions touching your competency as a member of the court in this case. So help you God."

TJA: The prosecution has no peremptory challenge (desires to challenge peremptorily ———). (peremptory)

NOTE.—For nature of peremptory challenge, see 58*d*.

TJA: Does the accused desire to challenge any member of the court for cause? —by defense.

DC: No. (The defense challenges ——— for cause on the ground ———.) (for cause)

TJA: Does the accused wish to exercise his right to one peremptory challenge against any member except the law member? (peremptory)

DC: The defense (has no peremptory) challenges (——— peremptorily).

NOTE.—For joint and common trials, see 58*d*.

TJA: Does the accused object to being tried by any member of the court now present? Court accepted by accused.

DC: No. (The defense challenges, etc.)

NOTE.—The question by the TJA is repeated until the accused answers in the negative.

TJA: The court will be sworn. Court sworn.

NOTE.—All persons in the courtroom stand while the oath is administered to the court and to the personnel of the prosecution. Each member raises his right hand as his name is called by the TJA in administering the following oath:

TJA: You, Colonel ———, Lieutenant Colonel ———, etc.,

NOTE.—When the TJA has called all the members by name, he continues:

Oath of court.

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

Each Member of the Court: I do.

NOTE.—The members lower their hands but remain standing while the oath is administered by the president to the TJA (and the assistant TJA). These immediately raise their right hands and the president, without words of introduction, pronounces the oath in the manner indicated above for the oath administered to the members of the court:

TJA and Ass't sworn (Oath).

PRES: You, (Captain ——— and Lieutenant ———), do swear that you will faithfully and impartially perform the duties of a trial judge advocate (and assistant trial judge advocate), and will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed. So help you God.

TJA (and Assistant TJA): I do.

NOTE.—All now resume their seats except the TJA, the accused and his counsel.

Nolle prosequi.

TJA: (By direction of the appointing authority, the prosecution withdraws the following charges and specifications, and will not pursue the same further at this trial: ———.)

NOTE.—Subject to the provisions of 73, a nolle prosequi may be entered at this time or at any time before the court has reached a finding thereon (5*a*).

Arraignment:

TJA: (Private) ———, I will now read the charges and specifications under which you are about to be tried. The affidavit and the 1st indorsement referring the case to me for trial are apparently in proper form; you may examine them if you wish.

NOTE.—The TJA now reads the charges and specifications together with the name of the accuser. With the consent of the court the accused may waive the reading of the charges and specifications.

TJA: (With the permission of the court and the consent of the accused I shall omit the reading of the charges, a copy of which is before each member of the court and the accused.) —waiver of reading charges.

DC: (The accused consents.)

PRES: (The reading of the charges may be omitted.)

NOTE.—Amendments should ordinarily be made at this point and should be orally announced. (For form see "Amendment after severence," App. 6*a*.) —amendment of charges.

If consent to omit the reading is granted, a summary is given, thus:

TJA: (The charges are laid under the ——— Article(s) of War, and allege the offense(s) of ———. They are signed by ———, a person subject to military law, as accuser, are properly sworn to before an officer authorized to administer oaths, and are referred by 1st Indorsement to (me) (Captain ———) as trial judge advocate of this court for trial.) —summary statement.

The charges were served upon the accused by (me) (1st Lieutenant ———) (assistant) (trial judge advocate) on ——— 19—. —notice of service.

NOTE.—Unless the date of service is at least five days prior to the date of trial, except in time of war, the TJA should ask the accused whether he will waive this defect in service. If the accused declines to do so, the court must grant a continuance at the conclusion of the arraignment (52). —waiver of 5-day delay after service.

TJA: (Private) ———, I advise you that any motions to dismiss any charge or to grant other relief should be made at this time. —motions.

NOTE.—See 52*c*, 64. If it appears from the charges that the statute of limitations (A. W. 39) has run against an offense charged, the law member (or president of a special court-martial) will advise the accused of his right to move dismissal of that charge (65, 67). (statute of limitations)

DC: The defense [has no motions to be made] [moves that Specification ———, Charge ———, be dismissed because of former acquittals on, ———, by a court-martial convened pursuant to paragraph ———, Special Orders ———, Headquarters ———, dated ———, of the charge of ——— (reciting charge and specifications in full)] [moves that ———].

TJA: (Private) ———, I ask you how you plead to each charge and specification. —request for pleas.

NOTE.—This concludes the arraignment.

DC: The accused pleads (not guilty) (guilty) (to all specifications and charges) (to Specification ———, Charge ———: ———) (to Specification ———, Charge ———: Guilty, except the words ——— and ———, substituting therefor, respectively, the words ——— and ———, to the excepted words not guilty, to the substituted words guilty). (To Charge ———: Not guilty, but guilty of a violation of the ——— Article of War.) Pleas. —with exceptions and substitutions.

NOTE.—If the accused pleads guilty to any specification or charge, the defense counsel continues:

—explanation of plea of guilty.

DC: (The meaning and effect of the plea of guilty to Specification ———, Charge ———, and to Charge ——— have been explained to the accused.)

NOTE.—The court should satisfy itself by questions addressed directly to the accused, and by additional explanation, that he understands the effect of his plea of guilty and wishes it to stand. The following explanation may be used:

(form of explanation)

LM (PRES): (Private) ———, you have pleaded guilty to Specification ———, Charge ———. By so doing you have admitted guilt of the offense(s) of ———, and you have admitted each of the following elements which constitute the offense(s): ———. Your plea subjects you to a finding of guilty, without proof, of such specification(s) and charge(s) by the court, in which event you may be sentenced by the court to the following maximum punishment: ———. Before accepting your plea of guilty the court wishes to advise you that you are legally entitled to plead not guilty and place the burden upon the prosecution of proving your guilt. With this in mind do you still wish to plead guilty?

Acc: Yes, sir. [I desire to change my plea(s) to not guilty.]

NOTE.—Upon completion of pleas the accused, assistant TJA, and counsel for the defense are seated.

—statute of limitations—plea of guilty to lesser included offense.

NOTE.—If the accused pleads guilty to a lesser included offense against which the statute of limitations has apparently run, the law member (or president of a special court-martial) will advise the accused of his right to interpose the statute in bar of trial and punishment as to that offense (67).

Legal authorities.

TJA: (The prosecution has no legal authorities to present to the court.) (With the permission of the court, I wish to read the following extracts from legal authorities: ———.)

TJA: Does the defense or the court desire to present legal authorities?

DC: The defense does (not) ———.

Opening statement by prosecution.

TJA: (The prosecution has no opening statement.)

NOTE.—No opening statement is required, and none should be made unless it will clarify the procedure to be followed by the TJA. When, for example, the prosecution relies principally upon a confession, and before the confession is introduced a witness is called to prove the corpus delicti, the TJA may indicate in an opening statement what he intends to do, in order that the evidence may be properly appraised as it is presented. See 75*b*.

Prosecution presents its case.

TJA: (The prosecution and defense have agreed to stipulate ———.)

NOTE.—Prior to acceptance of the stipulation the law member, by questions, should determine that the accused joins in the stipulation.

LM (PRES): The stipulation is (not) accepted.

Introduction of witness.

TJA: The prosecution calls as its (first) (next) witness ———.

NOTE.—The witness, if in the military service, salutes the president of the court when he enters the courtroom. If under arms, the witness remains covered until he is about to take the oath. He then removes his headgear, raises his right hand, and the TJA administers the oath. A civilian witness enters the courtroom uncovered, raises his right hand, and the TJA administers the oath.

TJA: You swear that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God. **Oath of witness.**

Witness: I do.

NOTE.—The witness now takes his seat in the witness chair. Usually the first two questions asked every witness are formal, and are asked by th TJA, whether the witness be called by him, by the defense, or by the court.

TJA: State your full name, (rank, organization, and station) (occupation and residence). **Formal questions.**

TJA: Do you know the accused? If so, what is his name?

NOTE.—If the witness states that he knows the accused, he will normally be asked to point to the accused if he sees him in the courtroom.

NOTE.—At the conclusion of the direct examination the TJA announces: **Direct examination.**

TJA: The prosecution has no further questions.

NOTE.—For use of documentary evidence, see 129–132. Exhibits offered in evidence should be marked "(Prosecution) (Defense) Exhibit ———." Prosecution exhibits should be numbered consecutively; defense exhibits should be lettered consecutively. An authenticating witness must be identified as official custodian or otherwise qualified to verify the document. The procedure in introducing such evidence may be: **Exhibits: —documentary evidence.**

TJA (DC): I hand you this document. What is it?

NOTE.—If document is not the original:

TJA (DC): (Is the original available? Explain.)
Witness: ———.

TJA (DC): I offer in evidence (the original) (a copy of) (extracts from) ——— to be attached to the record and marked exhibit ——— (to be withdrawn at the conclusion of the trial and an authenticated copy substituted).

NOTE.—In the case of authenticated copies of morning reports or other public records, the procedure may be as follows:

TJA (DC): I offer in evidence a duly authenticated extract copy of the morning report of ———, to be attached to the record and marked exhibit ———. **(morning report)**

DC: The defense (does not object) (objects because ———).

NOTE.—Documents offered will be shown to the other side and an opportunity afforded to examine them. If there is objection to the introduction, arguments may be made by both sides.

LM (PRES): The (extract copy of the morning report) (———) will be received in evidence and marked as requested. (Defense objection is sustained.)

NOTE.—The president of a special court-martial makes the ruling, "Subject to objection by any member ———."

When received in evidence the document may be read to the court.

NOTE.—Material things such as watches, coats, etc., when properly identified and relevant, may be offered as exhibits in the same manner as documentary evidence. If the material object has not been connected with the accused by competent evidence, the law member may rule either that: **—real evidence.**

"The ——— offered in evidence by the prosecution will not be admitted at the present time."

or

"The ——— offered in evidence by the prosecution will be received subject to its being later connected with the accused."

If due to the nature of real or physical evidence it is impracticable to attach it to the record, the side offering it should request authority to withdraw it at the end of the trial. In such case the party offering it should develop by testimony a description of the article sufficient to enable the reviewing authority to visualize it.

Confessions, admissions.

NOTE.—Before a confession may be received in evidence the prosecution must show affirmatively that it was voluntary. See 127. If upon objection by the defense to the admission in evidence of a confession or admission on the ground that it was not voluntarily obtained, it appears to the court that the accused does not understand his right to testify for the limited purpose of showing the circumstances under which the confession or admission was obtained without subjecting himself to cross-examination upon other issues, the law member (president of a special court-martial) should explain to the accused his rights in accordance with 75, 127, 135*b* as follows:

—explanation of accused's right to limit testimony to circumstances of confession.

LM (PRES): (Private) ———, the prosecution has offered in evidence a confession (admission) allegedly made by you and has introduced evidence tending to show that it was voluntarily made. Your counsel has objected to its admission in evidence on the grounds that the confession (admission) was not voluntarily made by you. As the accused in the case you have a right at this time to introduce any evidence you may desire relevant to the circumstances under which the confession (admission) was obtained. You also have the right to take the stand at this time as a witness for the limited purpose of showing the circumstances under which the confession (admission) was obtained. If you do that, whatever you say will be considered and weighed as evidence by the court just like the testimony of other witnesses. You may be cross-examined upon your testimony, but if you limit your testimony to the circumstances surrounding the taking of the confession (admission) you cannot be cross-examined on the question of your guilt or innocence of the offense itself, nor can you be asked on cross-examination whether the confession (admission) is true or false. In other words, you can only be cross-examined upon the issues concerning which you testify and upon your credibility, but not upon anything else.

On the other hand you need not take the stand at all. You have a perfect right to remain silent, and the fact that you do not take the stand yourself will not be considered as an admission that your confession (admission) was voluntary, nor can it be commented on in any way by the trial judge advocate in addressing the court. Do you understand your rights?

Acc: Yes, sir.

LM (PRES): Take time to consult with your counsel and state to the court what you intend to do.

Cross-examination.

NOTE.—After the prosecution has concluded the direct examination of a witness, the defense counsel cross-examines or declines to cross-examine the witness.

DC: The defense has no (further) questions.

Redirect and recross-examination.

NOTE.—If the defense cross-examines the witness the TJA may now conduct a redirect examination; after he has concluded the defense counsel may similarly conduct a recross-examination. When both the TJA and defense counsel have concluded their questions the TJA asks the court:

TJA: Are there any questions by the court?

Examination by court.

NOTE.—Any member wishing to question the witness first secures the permission of the president.

If either the TJA or defense counsel wishes to ask further questions of the witness after his examination has been turned over to the court, permission of the court should be secured. Such requests should, in general, be granted, subject to the court's discretionary power to limit or reject superfluous interrogation.

When questions by the court are concluded, the president announces:

PRES: The witness is excused.

Excused.

NOTE.—Unless expressly excused from further attendance during the trial, all witnesses will remain subject to call or recall until the trial has been concluded. When a witness is recalled the TJA reminds such witness, after he has appeared before the court:

TJA: You are reminded that you are still under oath.

Recalled.

Witness called by court.

NOTE.—The procedure in the case of a witness called by the court is the same as outlined above; the court may, if it wishes, take over the questioning of the witness at any time after the two formal questions. In the absence of directions from the court to the contrary, however, the TJA conducts the examination of a witness called by the court in the same manner as if the witness had been called by the prosecution.

TJA: The prosecution rests.

Prosecution rests.

DC: (The defense has no opening statement.)

Opening statement by defense.

Defense presents its case.

NOTE.—The defense introduces its stipulations, witnesses and documentary evidence, following the procedure indicated above for the TJA; the TJA administers the oath to all witnesses and asks the first two formal questions.

DC: The rights of the accused as a witness have been explained to him and he (elects to remain silent) (wishes to make an unsworn statement) (wishes to take the stand as a witness).

Accused as witness.

—explanation of his rights.

NOTE.—If the accused takes the stand as a witness it must be only at his own request; no comment can be made upon his silence if he elects to remain silent. If he wishes to testify concerning certain specifications only, the defense counsel should so announce; the direct and cross-examination and examination by the court must be limited accordingly.

Unless it affirmatively appears to the court that the accused understands his rights as a witness it will, through the law member (or president of a special court-martial), assure itself by questions addressed directly to the accused, and additional explanation, that he understands his rights, and have him, after consultation with his counsel, state again what he elects to do. The following additional explanation may be used:

LM (PRES): (Private) ———, as the accused in this case you have these rights:

First, you may be sworn and take the stand as a witness. If you do that, whatever you say will be considered and weighed as evidence by the court just like the testimony of other witnesses, and you can be cross-examined on your testimony by the trial judge advocate and the court. (The following may be used if there is more than one specifica-

tion: If your testimony should concern less than all of the offenses charged against you and you should not say anything about the others, then you may be questioned about the whole subject of those offenses concerning which you testify, but you will not be questioned about any offenses concerning which you do not testify.)

Second, if you do not want to testify under oath you may, without being sworn, say anything you desire to the court as an unsworn statement, denying, explaining, or excusing any of the acts charged against you here. This statement can be oral or written, and can be made either by yourself, by your counsel, or by both of you. Since such a statement is not given under oath and since you cannot be cross-examined upon it, it cannot be given the same weight by the court as sworn testimony, but it will be considered by the court and given such weight as it may seem to deserve. However, any admission or confession which you may make in your unsworn statement can be considered by the court as evidence against you. Furthermore, even though you may be sworn as a witness, you may afterwards, if you wish, also make a statement of this kind, not under oath.

Third, you may remain silent, that is, say nothing at all. You have a right to do this if you wish, and if you do so the fact that you do not take the witness stand yourself, or make any statement, will not count against you in any way with the court. It will not be considered as an admission that you are guilty, nor can it be commented on in any way by the trial judge advocate in addressing the court.

Knowing these various rights, take time to consult with your counsel and then state to the court which you will do.

Acc: I desire to (be sworn as a witness) (make an unsworn statement) (remain silent).

NOTE.—Should the accused elect to take the stand as a witness, the TJA will administer the oath and ask the following preliminary questions, after which the procedure follows that of other defense witnesses:

TJA: State your name, grade, organization and station.

Acc: ———.

TJA: Are you the accused in this case?

Acc: ———.

NOTE.—When the defense has concluded its case the DC announces:

Defense rests.

DC: The defense rests.

Rebuttal by prosecution.

NOTE.—The TJA may now call or recall witnesses in rebuttal. Upon completion he should announce:

Witnesses called by court.

TJA: The prosecution has no further evidence to offer. Does the court wish to have any witnesses called or recalled?

PRES: It does (not).

NOTE.—If any member desires that any witness be called or recalled the president of a special court-martial may direct such witness to be called, subject to objection by any other member, or close the court and determine its wishes by majority vote. In a trial by general court-martial the law member will rule finally as to whether the witness will be called,

except that as to a witness expected to testify in relation to the sanity of the accused the law member will rule subject to objection by any other member.

TJA: The prosecution waives opening argument. (———)

Arguments by counsel.

NOTE.—The TJA has the right to make the opening argument, and if any argument is made on behalf of the defense, the closing argument. Arguments are not required. Either the TJA or defense counsel may call to the attention of the court any matters likely to be overlooked by it, and make any reasonably pertinent argument on the law or the facts of the case, subject to limitations which may be imposed by the court, in its discretion, under 77.

If no oral arguments are made, defense counsel and TJA continue:

DC: The defense submits the case without comment.

TJA: The prosecution submits the case without comment.

Final questions by president.

PRES: Has the prosecution anything further to offer?

TJA: It has (not).

PRES: Has the defense anything further to offer?

DC: It has (not).

NOTE.—The question is repeated by the president until both the prosecution and the defense answer in the negative. See 77, 135*a*.

NOTE.—After both sides have rested and before the court retires into closed session the law member (or president of a special court-martial) will, in open court, instruct the court (78*d*) thus:

Instructions concerning presumption of innocence, degree of guilt, and burden of proof.

LM (PRES): The court is advised that the accused is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt; if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in the accused's favor and he shall be acquitted. If there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no such doubt. The burden of proof to establish the guilt of the accused is upon the Government.

PRES: The court will be closed.

Court closed for findings.

NOTE.—All persons now leave the room except the court. The TJA should not consult with the court in closed session. If his assistance in referring to the evidence is required, it should be obtained in open court and in the presence of the accused and his counsel (A. W. 30).

NOTE.—When the court has been closed the members vote on the findings. For the method of voting see Article 31. A ⅔ majority is essential to a finding of guilty of any offense except that for which the death penalty is mandatory (spying, A. W. 82) in which case the vote must be unanimous. Normally specifications are voted on first, and then the charges under which they are laid. See 78*b* and *c* for forms for findings with exceptions and substitutions. Any finding may be reconsidered at any time before it is announced or the court has been opened to receive evidence of previous convictions. See 78*d* as to further reconsideration of findings of guilty. Members of the court may discuss the case freely in closed session, before and after voting. The vote itself must be kept secret.

Procedure in closed session.

NOTE.—When the finding has been reached the court is opened. When the accused and counsel and the personnel of the prosecution have resumed their places (standing) the president announces, either

Court opened.

PRES: (Private) ———, the court, in closed session and upon secret written ballot, has found you not guilty of all specifications and charges.

The court stands adjourned unless there is other business.

Announcement of acquittal.

NOTE.—or, if the accused has been found guilty of any specification.

If found guilty.

Evidence of previous convictions received:

PRES: The court is open to receive evidence of previous convictions, if any, and to hear the personal data concerning the accused shown on the charge sheet.

—read to court.

TJA: I have evidence of (no) (3) (—) previous convictions (during the current enlistment and within one year preceding the commission of the alleged offense for which the accused is now on trial) to submit (as follows: ———). See 79*c*.

—verified by accused.

TJA: Has the accused any objection to the evidence of previous convictions read?

DC: (No objection.) (The accused objects ———.)

NOTE.—The accused may object, on proper grounds, and require the production of proper evidence of such convictions, or the rejection of improper evidence offered. When such evidence has been accepted the TJA continues:

—marked and attached to record.

TJA: The evidence of previous convictions, as read, will be marked Exhibit ——— and attached to the record.

Personal data from charge sheet:

TJA: I now read the personal data concerning the accused, as shown on the first page of the charge sheet: ——.

—verified by accused.

TJA: Are these data correct?

DC: (They are correct.) (The accused objects to ———.)

NOTE.—If in error, corrections should be made. Errors claimed by the accused which the TJA is not able readily to verify will, if of minor importance, be noted in the record and no further action taken upon them by the court; if of material importance the court may direct verification of the error claimed before proceeding to vote upon the sentence.

Court closed for sentence:

PRES: The court will be closed.

Procedure in closed session.

NOTE.—Voting follows as indicated above for findings (A. W. 31). For the majority essential to impose sentence, see 80*b* and Article 43. Customarily, members will propose sentences, after which votes will be taken on each sentence, beginning with the lightest, until one receives the required majority. When all the proposed sentences have been voted upon, and none adopted, either new proposals may be sought, or the sentences already proposed, plus any new ones submitted, may be again put to vote. The sentence must be determined by secret written ballot, and ⅔ (or in a proper case ¾, or all) of the members present must concur in it.

The sentence must be within the maximum limits prescribed by 117. The court should adjudge a single sentence for all the offenses of which the accused was found guilty. A separate sentence must be adjudged for each accused.

For approved forms for findings see App. 6*a* and 78*b* and *c*; for approved forms for sentence see App. 9.

Court opened.

When a sentence has been adopted by the court, the court is opened. Personnel of the prosecution and defense resume their places (standing), except that the accused stands immediately before the president. If the court so determines, the findings and sentence need not be announced (81).

Announcement of conviction and sentence.

PRES: (Private) ———, it is my duty as president of this court to inform you that the court, in closed session and upon secret written ballot, (⅔)* (all)* of the members present at the time the vote was taken concurring in each finding of guilty, finds you: [Of (all) the specification(s) and charge(s): Guilty]. [Of Specification ———, Charge ———: ———. Of Specification ———, Charge ———: Guilty, except the words ——— and ———, substituting therefor, respectively, the words ——— and ———, of the excepted words, Not guilty, of the substituted words,

Findings: —itemized. —with exceptions and substitutions.

Guilty. Of Charge ———: Not guilty, but guilty of a violation of the ——— Article of War]; and again in closed session and upon secret written ballot, (⅔)* (¾)* (all)* of the members present at the time the vote was taken concurring, sentences you: ——. **Sentence.**

NOTE.—See Appendix 9 for forms of sentences.

NOTE.—*Announce only the required fraction, not the actual number who concurred.

Concerning recommendations for clemency, see 81.

PRES: Has the prosecution any other cases to try at this time? **Conclusion of trial.**

TJA: I have nothing further. (———)

(PRES: The court adjourns to meet at my call.) **Adjournment.**

Appendix 6

FORM FOR RECORD OF TRIAL BY GENERAL COURTS-MARTIAL; ARRANGEMENT OF RECORD WITH ALLIED PAPERS

a. RECORD OF TRIAL BY GENERAL COURT-MARTIAL

Record of Trial by General Court-Martial of Private ————, ————, (ASN)

Company ————, ———— Infantry, ————.

Erasures.

Margins.

[NOTE.—Erasures or interlineations will be initialed by those who authenticated the record. Pages will be numbered at the bottom; margins of 2½ inches will be left at the top, and 1 inch at the bottom and left side of each page.

Marginal notes.

Words on the left margin of this appendix are not part of the form of record.

Record of arguments.

Written arguments will be attached as exhibits, appropriate references being made to each at the proper place in the record. Oral arguments concerning any question, interlocutory or other, need not be recorded except to the extent required by the court and necessary for a proper understanding of any objection made or question raised with respect to an argument. The proceedings and action on any such objection or question will be recorded. The fact that a party made or declined to make an argument will be recorded.

Use of form.

This form is to be used as a general guide; the actual record may depart from the form in numerous particulars.]

Index.

INDEX

Witnesses.

TESTIMONY

Name of witness	Direct	Cross	Redirect	Recross	Court	Recalled

EXHIBITS, ETC., APPENDED

Exhibits.

Description	Number	Page where introduced

——— copies of record furnished as per attached certificates or receipts.

Copies of record.

——— copies of record forwarded herewith. See 85*b*.

Proceedings of a general court-martial which convened at ———, pursuant to the following order(s):

[NOTE.—Insert a literal copy of the order appointing the court, and following it, copies of any orders modifying the detail.]

Orders.

———, ———, ——— 19—.

Place, date, and hour.

The court met pursuant to the foregoing order(s) at ——— o'clock ———.

PRESENT

Personnel present.

[NOTE.—List personnel of the court who are present, including any individual defense counsel.]

Col. ———, 5th Cavalry.
Lt. Col. ———, 1st Infantry.
Lt. Col. ———, 3d Field Artillery Group.
Maj. ———, J. A. G. C., LAW MEMBER.
Maj. ———, 3d Field Artillery Group.
Capt. ———, 4th Infantry.
Capt. ———, J. A. G. C., trial judge advocate.
1st Lt. ———, 3d Field Artillery Group, assistant trial judge advocate.
Capt. ———, 4th Infantry, member of the bar of the Supreme Court of Illinois, defense counsel.
Capt. ———, 4th Infantry, assistant defense counsel.

ABSENT

Absentees and reason for absence.

[NOTE.—The fact of, and any known reason for, the absence of any of the personnel of the court will be stated. If no reason is known, state "reason unknown." See 38*c*.]

Capt. ———, 1st Infantry, (detached service).
Capt. ———, 3d Field Artillery Group, (reason unknown).

Appearance of accused and introduction of counsel.

The court preceeded to the trial of Private ———, ——— (ASN) Company ———, ——— Infantry, ———, who, on appearing before the court, was asked by the trial judge advocate by whom he desired to be defended. The accused [stated that he desired to be defended by the regularly appointed defense counsel (and assistant defense counsel)] [introduced Capt. ———, ——— (ASN), 10th

Infantry, as individual counsel and stated that he also desired the regularly appointed defense counsel and assistant defense counsel as associate counsel] [———].

Explanation of counsel's qualifications.

[NOTE.—If the order appointing the court or certificates submitted by counsel showed that any member of the prosecution was a qualified lawyer in the sense of A. W. 11, and that no counsel for the defense present at the trial was so qualified, the record will show that the law member explained to the accused his right to be represented by such qualified counsel and that either the accused did not object to proceeding without being represented by such qualified counsel, or that the court adjourned pending the procurement of such counsel.]

Prior participation by a member of prosecution.

Prosecution: No member of the prosecution has acted as member, defense counsel, assistant defense counsel or investigating officer in this case.

Prior participation in case by defense counsel.

Prosecution: Has the defense counsel (individual counsel) or assistant defense counsel acted as investigating officer, member, or trial judge advocate in this case?

[NOTE.—Here the record will show the verbatim response of the defense counsel, and, if his answer is in the affirmative, the record will show verbatim the explanation made by the trial judge advocate as to the requirement under A. W. 11 that such a counsel may represent the accused only upon expressed request of the accused. The question put by the trial judge advocate to the accused as to whether he expressly requests the defense counsel will be recorded, as will the response of the accused.]

Reporter sworn.

——— was sworn as reporter.

Copy of record.

Prosecution to accused: Do you want a copy of the record?

Accused: ———.

Interpreter sworn.

——— was sworn as interpreter.

[NOTE.—The interpreter may be sworn just before he functions as such.]

Names of members announced.

The trial judge advocate then announced the names of the members of the court present (and absent).

Officers officially interested in case.

The trial judge advocate announced that the charges were preferred by ———, investigated by ———, and forwarded by ———.

Request for enlisted membership.

Prosecution: The accused has (not) made a request in writing that the membership of this court include enlisted persons.

[NOTE.—This announcement is made only if the accused is an enlisted person. See 4*a* and *c*.]

Excusing members.

Prosecution: If any member of the court is aware of any facts which he believes to be a ground of challenge by either side against any member, it is requested that he state such facts.

Capt. ———, 4th Infantry, announced that he signed the charges in the case. He was excused and withdrew.

Challenges by trial judge advocate.

Prosecution: The prosecution has no challenges.

[NOTE.—Insert here any challenges made by the trial judge advocate and action thereon.]

Opportunity to challenge given accused.

Prosecution to accused: You now have an opportunity to exercise your rights of challenge.

Defense: ———.

Challenge by accused.

[NOTE.—If defense does not desire to challenge, the record will so state. Record any challenge and any statement made by the challenged member. See 58. If the defense withdraws the challenge, or if the challenged member is excused without closing, the record will so state. Should challenged member testify concerning his competency, the record should continue:]

Challenged member sworn.

The challenged member was sworn to testify concerning his competency to act as a member of the court, and testified as follows:

[NOTE.—See 103. If the challenge is contested the proceedings thereon are recorded and, after showing both sides as resting on such issue, the record continues:]

Court votes on challenge; decision announced.

The challenged member withdrew, the court was closed and voted upon the challenge by secret written ballot, and, upon being opened, the president announced that the challenge was (sustained, and the challenged member thereupon withdrew) (not sustained, and the challenged member thereupon resumed his seat).

Further challenges by accused.

The accused was asked whether he objected to any other member present, to which he replied (in the negative.)

(Defense: ———.)

[NOTE.—Show each successive challenge as above. After accused finally replies in the negative, if a quorum is present the record continues:]

Court, etc., sworn.

The members of the court and the personnel of the prosecution were then sworn.

Nolle prosequi.

[NOTE.—A nolle prosequi may be entered at any time; see 73. The following form may be used:]

Prosecution: By direction of ———, the prosecution withdraws the following charges and specifications and will not pursue the same further at the present trial: ———.

Arraignment.

The accused was then arraigned upon the following charges and specifications:

[NOTE.—Do not copy material that precedes the charges proper on charge sheet.]

Charges.

Charge I: Violation of the ——— Article of War.

Specification: In that, etc.

Charge II: Violation of the ——— Article of War.

Specification 1: In that, etc.

Specification 2: In that, etc.

Signature, affidavit, indorsement.

[NOTE.—Copy name, etc., of accuser; the affidavit with name, official position, etc., of person who administered oath; and the indorsement referring case for trial, with name, official position, etc., of person signing such indorsement.]

Motions to dismiss, etc.

[NOTE.—Motions to dismiss and for other relief, such as motions to sever, for continuance, or for examination of the accused because of suspected insanity, are properly presented at this point; all proceedings and action thereon will be recorded. See 64–67. Any explanation of the accused's right to move that a charge be dismissed because barred by the statute of limitations, and the accused's response thereto, will be recorded. If a motion to dismiss is granted, the ruling may be thus: The motion is sustained. The accused will not be required to plead to Specification ———, Charge ———.

Amendment of charges.

If charges are amended on motion or otherwise, or after a motion to sever is granted in the case of accused jointly charged, the amendment will be formally stated for the record. See 70*b* and *d*. After a motion to sever is granted, the formal amendment may be in the following form:]

-after severance.

President: Each specification is formally amended by striking out the words "and Private ———, Company ———, ——— Infantry", the accused who is not now to be tried, and the words "acting jointly and in pursuance of a common intent", and by inserting after the word "did" the words "acting in conjunction with Private ———, Company ———, ——— Infantry", the accused who is not now to be tried. Trial will proceed on the charges as amended.

Pleas to general issue.

The accused then pleaded as follows:

To the Specification, Charge I: Guilty (or not guilty).

To Charge I: Guilty (or not guilty).

To Specification 1, Charge II: Guilty (or not guilty).

To Specification 2, Charge II: Guilty (or not guilty).

To Charge II: Guilty (or not guilty).

(*or*) [*or* (*example of substitution:*)]

To all charges and specifications, Guilty (or not guilty).

To the Specification, Charge I: Guilty, except the (words) (words and figures) (———), substituting therefore the (words) (words and figures) (———), of the excepted words, Not guilty, of the substituted words, Guilty.

To Charge I: Not guilty, but guilty of a violation of the ——— Article of War.

Explanation of plea of guilty.

[NOTE.—If an explanation of a plea of guilty is made (71), the terms of the explanation and any response by the accused will be fully recorded.]

Record of matters read to court by trial judge advocate.

By direction of the court the following matters were read to the court by the trial judge advocate, to wit:

[NOTE.—Any extracts from the manual that are read will be identified by paragraph, page, etc., but need not be copied into the record. See 75*b*.]

Opening statement.

[NOTE.—Any opening statement of the trial judge advocate (75*b*) need not be recorded except to the extent required by the court or necessary for a proper understanding of any objection. The objection and any proceedings and action thereon will be recorded.]

Witness sworn.

Sgt. John Jones, Company ———, ——— Infantry, a witness for the prosecution, was sworn and testified as follows:

Caution if recalled.

[NOTE.—Each witness will be sworn. When a witness is recalled, the reminder that he is still under oath will be recorded (135*a*).]

Direct examination.

DIRECT EXAMINATION

Questions by prosecution:

Q. Do you know the accused? If so, state his name.

A. I do; ——— ———.

Q. Is he in the military service of the United States?

A. ———.

Show accused subject to military law.

[NOTE.—If accused is not in the military service of the United States, show by interrogation how he is otherwise subject to court-martial jurisdiction.]

Q. What is his grade and organization?
A. ———.

[NOTE.—Succeeding questions and answers will be recorded in order exactly as spoken. Events which transpire and illustrations given by physical motions of witnesses will be described as accurately as possible. Any remarks or testimony ordered stricken will nevertheless be fully recorded, although not considered by the court as evidence. If testimony is given through an interpreter, the record will so state.]

Questions and answers fully recorded.

Testimony through interpreter.

CROSS-EXAMINATION

Cross-examination.

Questions by defense:
Q. ———?
A. ———.

[NOTE.—If the defense declines to cross-examine witness, the record should so state.]

REDIRECT EXAMINATION

Redirect examination.

Questions by prosecution:
Q. ———?
A. ———.

RECROSS-EXAMINATION

Recross-examination.

Questions by defense:
Q. ———?
A. ———.
Prosecution: (Record objection.)
Defense: (Record reply.)

[NOTE.—Concerning arguments, see note at beginning of this appendix.]

The law member: The objection is (sustained) (not sustained).

Ruling.

EXAMINATION BY THE COURT

Examination by the court.

Questions by ———:
Q. ———?
A. ———.

CROSS-EXAMINATION

Cross-examination by defense.

Questions by defense:
Q. ———?
A. ———.

REDIRECT EXAMINATION

Questions by prosecution:

Redirect examination by prosecution.

Q. ———?
A. ———.

[NOTE.—Exhibits offered in evidence should be marked "(Prosecution) (Defense) Exhibit ———." Prosecution exhibits should be numbered consecutively; defense exhibits should be lettered consecutively.]

Introduction of exhibits.

Prosecution: I hand you this document. What is it?
Witness: ———.

[NOTE.—If the document is not the original:]

Prosecution: Is the original available? Explain.

Witness: ———.

Prosecution: I offer in evidence (the original) (copy of) (extracts from) ———, to be attached to the record and marked Prosecution Exhibit ———, (to be withdrawn at the conclusion of the trial and an authenticated copy substituted).

Defense: The defense (does not object) (objects because ———).

Law Member: The (extract copy of the morning report) (———) will be received in evidence and marked as requested. (Defense objection is sustained.)

[NOTE.—See App. 5 for procedure for introduction of exhibits.]

Appending rejected document.

[NOTE.—See 75*a* and 140*c* concerning marking and appending rejected documentary evidence.]

Prosecution rests.

Prosecution: The prosecution rests.

Action on motion for finding of not guilty.

[NOTE.—Proceedings and action on any motion for a finding of not guilty will be recorded. Action may be described thus: The court was closed, and upon being opened the president announced that the motion is (denied) (granted as to Specification ———, Charge ———).]

[NOTE.—If the court adjourns to meet another day, the record should continue:]

Adjournment.

The court then, at ——— o'clock —. m., on ——— 19—, adjourned to meet at ——— o'clock —. m., on ——— 19—.

———,
Captain, 5th Cavalry,
Trial Judge Advocate.

———, ——— 19—.
(Place)

Accounting for personnel.

The court met, pursuant to adjournment, at ——— o'clock —. m., all the personnel of the court, prosecution, and defense who were present at the close of the previous session in this case being present (except).

[NOTE.—Account for absentees as before, except that no mention need be made of personnel not present at the close of the previous session.]

The accused and the reporter were also present.

New member.

Capt. ——— ———, 4th Infantry, appeared and was announced by the trial judge advocate as a member of the court pursuant to the following order: (Insert a literal copy of such order).

[NOTE.—Proceedings concerning the excusing, challenging, and swearing of the new member are substantially as for original members. If the new member is sworn the record continues:]

The record of the proceedings of ——— 19—, in this case was then read to (or by) the new member.

Opening statement by defense.

The defense counsel made an opening statement to the court.

[NOTE.—See note above relating to opening statement by trial judge advocate.]

Witness sworn.

Cpl. John Smith, Company ———, ——— Infantry, a witness for the defense, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by the defense:
Q. ———?
A. ———.

[NOTE.—Record any subsequent examinations of the witness.]

[NOTE.—Any inquiry or explanation of the accused's rights as a witness (75*a*) and the accused's response thereto will be recorded.] **Accused's rights as a witness.**

The accused, at his own request, was sworn and testified as follows: **Accused sworn.**

DIRECT EXAMINATION

(*or*)

The accused made an unsworn statement. **Unsworn statement.**

[NOTE.—Any such statement will be recorded in full if oral or attached as an exhibit if written.]

Defense: The defense rests. **Defense rests.**

The prosecution recalled Sgt. John Jones, Company ———, ——— Infantry, who, after being reminded that he was still under oath, testified as follows: **Rebuttal.**

(*or*)

The prosecution announced that it had no further testimony to offer.

[NOTE.—The defense will be asked whether it has any further testimony to offer and, if not, the record will continue:]

The defense (had no further testimony to offer) (having no further testimony to offer requested until ——— o'clock —. m., to prepare its defense (or argument).

[NOTE.—If the court takes a recess, the record will continue:]

The court then took a recess until ——— o'clock —. m., at which hour the personnel of the court, prosecution and defense, and the accused and the reporter resumed their seats. **Recess.**

Arguments were then made (submitted) as follows: **Closing arguments.**

[NOTE.—See note at beginning of this form, and 77. The court should require oral argument to be recorded when good reason exists, e. g., when accused makes an admission in his argument.]

[NOTE.—The law member's advice to the court concerning the presumption of the accused's innocence (78*d*, A. W. 31) will be recorded verbatim.] **Advice to court.**

Neither the prosecution nor the defense having anything further to offer, the court was closed, and upon secret written ballot, (two-thirds) (all) of the members present at the time the vote was taken concurring in each finding of guilty, finds the accused: **Findings.**

[NOTE.—The finding on each specification and charge not previously disposed of on motions will be shown. For a finding of guilty of a specification charging an offense for which the death penalty is by law mandatory (A. W. 82) and the charge under which that specification stands, the record must show that all members of the court present at the time the vote was taken concurred therein (A. W. 43).] **Death penalty.**

Of the specification, Charge I: (Guilty) (Not guilty).
Of Charge I: (Guilty) (Not guilty).

Of Specification 1, Charge II: (Guilty, except the words "——," substituting therefor the words "———," of the excepted words, Not guilty, and of the substituted words, Guilty.) (Not guilty.)

Of Specification 2, Charge II: (Guilty) (Not guilty).

Of Charge II: As to Specification 1: (Not guilty, but guilty of a violation of the ——— Article of War.) As to Specification 2: (Guilty) (Not guilty).

(*or*)

Of all specifications and charges: (Guilty) (Not guilty).

[NOTE.—If the accused is found not guilty upon all specifications and charges, the record will continue:]

Acquittal. The court was opened; the president announced that the accused was acquitted upon all specifications and charges.

[NOTE.—If the accused is found guilty of any offense, the record will continue:]

Previous convictions. The court was opened and the trial judge advocate, in the presence of the accused and his counsel, stated that he had no evidence of previous convictions to submit [read the attached evidence of previous convictions (Exhibits ——— to ———)].

Data as to service, etc. The trial judge advocate read the data as to age, pay, and service shown on the charge sheet as follows: (insert matter read).

[NOTE.—If objection is made to evidence of previous convictions or to data as to service, proceedings had thereon will be recorded. See 79.]

Sentence. The court was closed, and upon secret written ballot, (two-thirds) (three-fourths) (all) of the members present at the time the vote was taken concurring, sentences the accused to ———.

Reasons. [NOTE.—For majority necessary to support sentence, see 80*b* and A. W. 43. As to including reasons for findings and a statement of the weight given to evidence, see 78*a*. As to including reasons for sentence, see 80*a*.]

Announcement of sentence. The court was opened and the president announced the findings and sentence.

(*or*)

The court was opened and the president announced the findings and sentence.

Matters as to clemency. Documents submitted by the defense for consideration in connection with clemency are attached hereto marked ———.

Adjournment. The court then, at ——— —. m., on ——— 19—, (proceeded to other business) (adjourned until ——— —. m., ——— 19—) (adjourned to meet at the call of the president).

Authentication.

———————————,
Colonel, 5th Cavalry, President.
[or Lieutenant Colonel, 1st Infantry, a member in lieu of the president because of his (death) (disability) (absence).]

_____,

Captain, J. A. G. C., Trial Judge Advocate.

[or First Lieutenant, 3d Field Artillery, assistant trial judge advocate, because of (death) (disability) (absence) of the trial judge advocate.] [or Major, 3d Field Artillery Group, a member in lieu of the trial judge advocate and the assistant trial judge advocate because of (death) (disability) (absence) of the trial judge advocate, and of (death) (disability) (absence) of the assistant trial judge advocate.]

I examined the record before it was authenticated. **Examination by defense counsel.**

_____,

Captain, 4th Infantry, Defense Counsel.

[NOTE.—If the findings and sentence were not announced, the trial judge advocate or assistant trial judge advocate, or member, as the case may be, will certify immediately after the authentication of the record as follows:] **Certificate.**

I certify that I personally recorded the findings and sentence of the court.

_____ _____.

[NOTE.—Certificates of qualification of members of the prosecution and defense submitted in accordance with 56 follow immediately after authentication. See App. 6*b* for form.] **Certificates of members of prosecution and defense.**

[NOTE.—Exhibits follow in numerical order, then any rejected documents ordered appended, and then any recommendations and other papers relating to clemency. **Exhibits.**

The papers forming the complete record will be securely bound together at the top. **Binding.**

Bulky exhibits, such as a pistol, will not ordinarily be attached to the record. When advisable or necessary, a description or photograph of such an exhibit may be attached as an exhibit, statement of the substitution being made in the record.] **Bulky exhibits.** **Revision of record.**

_____,
(Place)
_____ 19—.

The court reconvened at _____ o'clock —. m., pursuant to the following indorsement:

[NOTE.—Insert copy of indorsement.] **Indorsement convening court.**

All the members of the court, and the personnel of the prosecution who were present at the close of the previous session in this case were present (except _____). **Accounting for personnel.**

[NOTE.—Account for personnel as before, no mention being made of those not present at the close of the previous session in the case. No member will sit in revision proceedings who was not present at the previous session in the case.]

[NOTE.—If the accused and the personnel of the defense are present, that fact will be stated. See 83.]

The trial judge advocate read to the court the foregoing indorsement. **Indorsement read.**

The court was closed and revoked its former findings and sentence, and upon secret written ballot _____. **When court revokes findings and sentence.**

[NOTE.—Continue as before indicated with reference to the findings. If the new findings include a finding of guilty the record continues:]

The court upon secret written ballot ———.

[NOTE.—Continue as before indicated with reference to the sentence, announcement of findings and sentence, and adjournment or proceeding to other business. If new findings do not include a finding of guilty, the record continues as before indicated for opening the court, announcing an acquittal, adjournment, etc.]

When court revokes sentence.

The court was closed and revoked its former sentence and upon secret written ballot ———.

[NOTE.—Continue as before indicated with reference to the sentence, announcement of sentence, adjournment, etc.]

When court amends record.

The court was closed and amended the record by (inserting between lines ——— and ———, page ———, the words "The members of the court and the personnel of the prosecution were then sworn"). The court was opened and ———.

(*or*)

When court adheres to decision.

The court was closed and respectfully adheres to its former (findings) (sentence) (findings and sentence).

[NOTE.—Continue as before indicated with reference to adjournment or proceeding to other business.]

Authentication.

[NOTE.—The record of revision proceedings is authenticated as indicated above for the record of principal trial.]

Certificate of Correction.

——————— 19—.

United States

v.

———————

———————

The record of trial in the above case, which was tried by the general court-martial appointed per par. ———, S. O. ———, Hq. ———, dated ——— 19—, at ———, on ——— 19—, is corrected by the insertion on page ——— immediately following line ———, of the following:

Correction.

"——— was sworn as reporter."

This correction is made because the reporter was sworn at the time of trial but a statement to that effect was omitted, by error, from the record.

Authentication.

[NOTE.—The record of revision proceedings is authenticated as indicated above for the record of principal trial.]

Accused's receipt for certificate.

Copy of the certificate received by me this ——— day of ———, 19—.

———————

(Name) (ASN)

Binding record.

[NOTE.—The record of revision will be bound with the original record, before the exhibits.]

b. CERTIFICATE OF MEMBERS OF PROSECUTION AND DEFENSE

_____,
(Place)

_____ 19—
(Date)

I certify that I am not a member of the bar of a Federal court or of the highest court of a State of the United States.

(*or*)

I certify that I am a member of the bar of (the United States District Court for the ——— District of ———) (the Supreme Court of the State of ———, which is the highest court of that State).

_____

_____
(Rank) (ASN) (Arm or Sv)

_____
(Organization)

[NOTE.—See 56.]

c. ARRANGEMENT OF RECORD WITH ALLIED PAPERS

When forwarded by the reviewing authority, records of trial by general court-martial should be arranged and bound with allied papers as follows:

1. Chronology Sheet.
2. General Court-Martial Data Sheet.
3. General Court-Martial Order, 6 copies, plus one copy for each accused in excess of one.
4. Review of Staff Judge Advocate, in duplicate.
5. Charge Sheet.
6. Report of investigating officer, required by 35*a* and Article 46 (b), followed by any other papers which accompanied the charges when referred for trial, unless included in the record proper.
7. Advice of Staff Judge Advocate, required by 35*b* and Article 47 (b).
8. Copy of reporter's voucher.
9. Any copies of the record not otherwise utilized.
10. Records of former hearings.
11. Record of trial proper in the following order: index sheet; receipt of accused, or certificate of trial judge advocate covering delivery of copy of record; special order appointing the court and amending orders, if any; record of proceedings in court; any certificates of qualification of counsel (56, 85); action of reviewing authority; exhibits; clemency papers; offered exhibits not received in evidence.

Appendix 7

FORM FOR RECORD OF TRIAL BY SPECIAL COURT-MARTIAL

[NOTE.—See note at head of App. 6. If offenses of which the accused is charged would, upon conviction, support a sentence including a bad conduct discharge, unless the appointing authority directs otherwise all testimony should be reported verbatim and a complete record of trial prepared substantially in the form set forth in App. 6 for trials by general court-martial. See 34*h* and A. W. 13. For other cases, summarized report of testimony, objections and other proceedings is permitted, index is not required, and an original record only is essential. For use of reporter see 46*a*.]

Proceedings in the trial of Private ———, ———, Company ———, ——— (ASN) Infantry, by the special court-martial appointed by the orders of which copies are appended marked Prosecution Exhibit ———.

———, (Place)
——— 19—.

The court met pursuant to the orders appointing it at ———o'clock, —. m., all the personnel of the court being present (except as follows:)

[NOTE.—List absentees.]

The accused and the regularly appointed defense counsel, (or counsel introduced by him,) viz,——— and ——— were present. (———was sworn as reporter and ——— as interpreter.)

The trial judge advocate stated that no member of the prosecution had acted as member, defense counsel, assistant defense counsel, or investigating officer in the case.

The defense counsel was then asked whether any member of the defense had acted as investigating officer, member, or trial judge advocate in the case.

[NOTE.—If no defense counsel had so participated, it will be so stated.

If a member of the defense had acted as investigating officer, etc., the record will show that the trial judge advocate explained to the accused that such counsel could represent him only at his express request and that the accused so requested or that suitable action was taken, either by excusing the particular counsel, or by adjournment pending the procurement of a counsel satisfactory to the accused.]

The trial judge advocate announced that the accused had (not) made a request in writing that the membership of the court include enlisted persons.

[NOTE.—This announcement will not be made if the accused is not an enlisted person.]

The following members of the court were excused and withdrew for the reasons stated opposite their respective names.

Capt. ——— ——— (excused without challenge as being the accuser).

Lt. ——— ——— (excused upon challenge for cause).

Lt. ——— ——— (excused upon peremptory challenge).

There was no contest with respect to the excusing of any of the officers named (except as follows:)

[NOTE.—Insert a summary of the entire proceedings had with respect to each contest.]

The accused having been given full opportunity to exercise his rights as to challenge, the members of the court and the personnel of the prosecution were sworn.

[NOTE.—Record continues as provided for a general court-martial up to arraignment.]

The accused was then arraigned upon the charges and specifications appended and marked Prosecution Exhibit ——— (charge sheet).

[NOTE.—The record continues as provided in App. 6 for a general court-martial, subject to limitations noted above. Data as to service, etc., need not be recorded. For form of certificate of qualifications of counsel, see App. 6*b*.]

Appendix 8

FORM FOR RECORD OF TRIAL BY SUMMARY COURT-MARTIAL

RECORD OF TRIAL BY SUMMARY COURT-MARTIAL — Case Number 100

Specifications and charges	Pleas	Findings	Sentence or acquittal and remarks
Sp. 1: Ch. I	G	G	To forfeit twenty-five dollars of his pay.
Sp. 2: Ch. I	NG	G	
Ch. I	G	G	
Sp. : Ch. II	NG	NG	
Ch. II	NG	NG	

TO BE FILLED IN BY THE ACCUSED IF HE IS A NONCOMMISSIONED OFFICER:

I consent ~~object~~ to trial by summary court-martial.
(Strike out word not applicable)

/s/ Jack J. Johnson, Sergeant, first class
(Signature of accused)

TO BE FILLED IN BY SUMMARY COURT IF APPLICABLE:

1. The accused, a noncommissioned officer of the first two grades, refused to consent in writing to trial by summary court-martial. The charges are hereby returned to the appointing authority.

_____, Summary Court.
(Signature, rank and organization)

2. If the accused, a noncommissioned officer of the third or a lower grade, objected to trial by summary court-martial, was such trial thereafter directed by the officer exercising special court-martial jurisdiction over the command?

Yes No
(Strike out word not applicable)

3. Was the meaning and effect of a plea of guilty explained to the accused?

Yes ~~No~~
(Strike out word not applicable)

TO BE FILLED IN BY SUMMARY COURT:

Number of prior convictions considered 1.

Place Fort Dix, N. J., Date 9 September 19 49.

*/s/ Charles B. Foster, Major, 181st Inf, Summary Court.
(Signature, grade, and organization)

CHARLES B. FOSTER

*(Enter after signature, "Only officer present with command", if such is the case.)

(Form continued on next page.)

Headquarters 181st Inf, Fort Dix, N. J., 11 September 19 49 .
(Organization, place and date)

Approved and ordered executed.
(Action of reviewing authority)

/s/ William H. Richardson , Commanding
(Signature, grade and organization)
WILLIAM H. RICHARDSON
Col., 181st Inf

Entered on service record in case of conviction.

/s/ C. F. S.
(Initials of personnel adjutant)

Appendix 9

FORMS OF SENTENCES

A sentence adjudged by a court-martial should follow substantially one of the following forms or any necessary modification or combination of such forms. Forfeitures, fines, and detentions will be expressed in dollars or dollars and cents.

1. To have ——— dollars of his pay detained.[1]
2. To have ——— dollars per month for ——— months detained.[1]
3. To forfeit ——— dollars of his pay.[2]
4. To forfeit ——— dollars per month for ——— months (*or* one year).[2]
5. To perform hard labor for ——— days (*or* months).[3]
6. To be confined at hard labor, at such place as proper authority may direct, for ——— days (*or* months *or* years).[4]
7. To be confined at hard labor, at such place as proper authority may direct for ——— months [4] and to forfeit ——— dollars [2] per month for a like period.
8. To be dishonorably discharged the service (and) to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence,[5] and to be confined at hard labor, at such place as proper authority may direct for ——— (months) (years).
9. *a.* To be discharged from the service with a bad conduct discharge (to forfeit ——— dollars pay per month for ——— months [6] and to be confined at hard labor at such place as proper authority may direct for ——— months).

b. To be discharged from the service with a bad conduct discharge, [(and) to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence] [and to be confined at hard labor at such place as proper authority may direct for ——— (months) (years)].[7]

10. To be reduced to the lowest enlisted grade.
11. To be admonished.
12. To be reprimanded.
13. To be restricted to the limits of his post (*or* other place) for ——— months.[8]
14. To be suspended from duty for ——— months.[9]
15. To be suspended from command for ——— months.[9]
16. To be suspended from rank for ——— months.[9]
17. To be dismissed the service,[10] [to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence] [and to be

[1] Appropriate in the case of enlisted persons only (116*g*). For other limitations see 117*b*.

[2] For limitations in cases of enlisted persons see 117*b*.

[3] Not to exceed three months (116*i* and A. W. 14).

[4] In the case of soldiers, a single sentence which does not include dishonorable discharge or bad conduct discharge may not include confinement at hard labor for a period greater than one year (117*b*).

[5] See 116*g*.

[6] A special court-martial may not adjudge forfeiture of more than two-thirds pay per month for six months even though a bad conduct discharge is adjudged (A. W. 13).

[7] See 117*c*; A. W. 12; A. W. 13.

[8] Not to exceed three months (116*f*, A. W. 14).

[9] See 116*h*.

[10] Applicable in the case of commissioned officers only (116*e*).

confined at hard labor at such place as proper authority may direct for ——— (months) (years)].

18. To pay to the United States a fine of ——— dollars, [and to be confined at hard labor at such place as proper authority may direct, until said fine is so paid, but for not more than ——— months (*or* years)].[11]

19. To pay to the United States a fine of ——— dollars, [to be confined at hard labor, at such place as proper authority may direct, for ——— months (*or* years)], [and to be further confined at hard labor until said fine is so paid, but for not more than ——— months (*or* years), in addition to ——— months (*or* years) hereinbefore adjudged].[11]

20. To be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for the term of his natural life.

21. To be put to death in such manner as proper authority may direct.

---

[11] See 116*g*; 117*c*, Section B.

Appendix 10

FORMS FOR ACTION BY REVIEWING AUTHORITY

(NOTE.—Show headquarters, place, and date of action. Signature is followed by rank organization, and the word "Commanding". The forms are not mandatory and are not intended to provide for every case.)

GENERAL COURT-MARTIAL

a. Forms of action cases not requiring confirmation under A. W. 48*a*, *c*(2), *c*(3), and c(4), and cases not involving dishonorable or bad conduct discharge not suspended, or confinement in a penitentiary (A. W. 50*e*):

1. In the foregoing case of ——— the sentence is approved and will be duly executed (*or* is disapproved).

2. In the foregoing case of ——— the sentence is approved, but owing to the length of time the accused has been in confinement, ——— days (*or* months) of the confinement adjudged are remitted. As thus modified the sentence will be duly executed. ——— is designated as the place of confinement.

3. In the foregoing case of ——— the findings of guilty of Specifications 1 and 2, Charge II, are disapproved. (The sentence is approved and will be duly executed). (Only so much of the sentence as provides for ——— is approved and will be duly executed). (——— is designated as the place of confinement).

4. In the foregoing case of ——— only so much of the findings of guilty of Charge I and its specification as involves findings that the accused absented himself without leave at the place and time alleged and remained so absent until ———, in violation of Article of War 61, is approved. Only so much of the sentence as provides for ——— is approved and will be duly executed. ——— is designated as the place of confinement.

5. In the foregoing case of ——— only so much of the finding of guilty of Specification 1 with respect to value as finds some value not in excess of ——— is approved. Only so much of the sentence as provides for ——— is approved and will be duly executed. ——— is designated as the place of confinement.

6. In the foregoing case of ——— the sentence is approved, but the execution thereof is suspended.

7. In the foregoing case of ——— the sentence is approved and will be duly executed, but the execution thereof, insofar as it relates to forfeiture of pay (*or* to confinement), is suspended.

8. In the foregoing case of ——— the sentence is disapproved and a rehearing is ordered before another court to be hereafter designated.

9. In the foregoing case of ——— the sentence is approved and will be duly executed. ——— is designated as the place of confinement.

10. In the foregoing case of ——— the sentence is approved and will be duly executed, but the execution of that portion thereof adjudging dishonorable (*or* bad conduct) discharge is (suspended) (suspended until the soldier's release from confinement. ——— is designated as the place of confinement.)

b. Forms of action in cases wherein the order of execution is withheld pending appellate review under A. W. 50*e*:

1. In the foregoing case of ——— the sentence is approved (but the period of confinement is reduced to ———). ——— is designated as the place of confinement. Pursuant to A. W. 50*e* the order directing the execution of the sentence is withheld.

2. In the foregoing case of ——— the sentence is approved but the dishonorable discharge is mitigated to a bad conduct discharge. Pursuant to A. W. 50*e* the order directing the execution of the sentence is withheld.

3. In the foregoing case of ——— so much of the sentence to confinement as is in excess of ——— years is disapproved. ——— is designated as the place of confinement. Pursuant to A. W. 50*e* the order directing the execution of the sentence is withheld. (NOTE.—This form is appropriate in cases in which the court has adjudged a sentence to life imprisonment, but which the reviewing authority disapproves in part under the provisions of A. W. 47*f*(2). It is to be noted however, that the reviewing authority under A. W. 47*f*(2) may exercise only his power to disapprove and that he does not have the power under A. W. 51*a* to mitigate, remit, or suspend a sentence to life imprisonment, that power being reserved to the confirming authority as the authority competent to order the execution of the sentence.)

4. In the foregoing case of ———, pursuant to A. W. 50, the finding of guilty of Specification ——— is disapproved. Only so much of the sentence as provides for ——— is approved and will be duly executed. ——— is designated as the place of confinement. (NOTE.—Form for supplementary action pursuant to holding of legal insufficiency in the office of The Judge Advocate General.)

c. Forms of action in cases requiring confirmation under A. W. 48*a*, *c*(2), *c*(3), and *c*(4):

1. In the foregoing case of ——— the sentence is approved (but the period of confinement is reduced to ———). The record of trial is forwarded for action under Article of War 48.

2. In the foregoing case of ——— only so much of the findings of guilty of Charge I and its specification is approved as finds the accused guilty of the specification in violation of Article of War 96. The sentence is approved but it is recommended that the sentence to dismissal be commuted to ———. The record of trial is forwarded for action under Article of War 48.

SPECIAL COURTS-MARTIAL

(NOTE.—Forms 1–9 under *a* above are applicable.)

1. In the foregoing case of ——— the sentence is approved. The record of trial is forwarded for action under Article of War 47*d*. (NOTE.—Form of action for convening authority in cases where a bad conduct discharge is adjudged. The officer exercising general court-martial jurisdiction to whom the record of trial is forwarded under A. W. 47*d* may use the forms of actions indicated in *a* 10, and *b* 1, and 4 above.)

SUMMARY COURTS-MARTIAL

1. Approved and ordered executed (*or* disapproved). ——— is designated as the place of confinement.

2. Approved and suspended.

3. Approved and ordered executed, but the forfeiture (*or* confinement) is suspended.

Appendix 11

FORMS FOR ORDERS OF PROMULGATION—FORMS FOR ORDER REMITTING UNEXECUTED PORTIONS OF SENTENCE—FORMS FOR ORDERS VACATING ILLEGAL SENTENCES—FORMS FOR ORDERS VACATING SUSPENSIONS

a. **FORMS FOR ORDERS OF PROMULGATION.**—(1) The following form may be used in general court-martial cases involving dishonorable discharge, bad conduct discharge, and (with exception noted) penitentiary confinement. Orders in cases requiring confirmation by the President, or those involving life imprisonment, dismissal of an officer or the dismissal or suspension of a cadet will be promulgated by Headquarters, Department of the Army.

General Court-Martial Orders No. 7 } Headquarters, 97th Infantry Division, ———, ——— 19 —.

Before a general court-martial which convened at ————, pursuant to paragraph ——, Special Orders No. ——, Headquarters, 97th Infantry Division, ——— 19 —, as amended by paragraph ——, Special Orders No. ——, Headquarters, 97th Infantry Division, ——— 19—, was arraigned and tried:

Private John Doe, 37024891, Company F, 303d Infantry.

Charge I: Violation of the 58th Article of War.

Specification: In that Private John Doe, Company F, 303d Infantry, did, at Fort Jackson, S. C., on or about 27 March 1949, desert the service of the United States and did remain absent in desertion until he was apprehended at Chicago, Ill., on or about 30 August 1949.

Charge II: Violation of the 93d Article of War.

Specification: In that Private John Doe, Company F, 303d Infantry, did at Fort Jackson, S. C., on or about 27 March 1949, feloniously steal about $27.00 lawful money of the United States, the property of Private Charles Block.

PLEAS

To the *specification*, Charge I: "Not guilty."
To Charge I: "Not guilty."
To the *specification*, Charge II: "Not guilty."
To Charge II: "Not guilty."
or
To all the *specifications* and charges: "Not guilty."

(NOTE.—If a plea of guilty or not guilty is not entered to a specification or charge owing, for example, to the fact that the court sustained a motion to dismiss, the facts will be briefly stated under "Pleas." In such a case the specification or charge need not be listed under "Findings.")

FINDINGS

Of the *specification*, Charge I: "Guilty."
Of Charge I: "Guilty."
Of the *specification*, Charge II: "Guilty."

Of Charge II: "Guilty."

or

Of all the *specifications* and charges: "Guilty."

(*or* in the event of findings of not guilty of all charges and *specifications:*

Of all the *specifications* and charges: "Not guilty."

The court thereupon acquitted the accused on ——— 1949).

SENTENCE

To be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at hard labor at such place as proper authority may direct for three years. (Two previous convictions considered.)

The sentence was adjudged on ——— 19—.

(The sentence is approved and will be duly executed, but the execution of that portion thereof adjudging dishonorable discharge is suspended until the soldier's release from confinement. The Branch United States Disciplinary Barracks, ———, is designated as the place of confinement.)

(NOTE.—The above form is not appropriate in cases involving confinement in a penitentiary.)

or

(The sentence is approved and, Article of War 50 having been complied with, will be duly executed. The Branch United States Disciplinary Barracks, ———, is designated as the place of confinement.)

or

(Pursuant to Article of War 50 the findings of guilty and the sentence are disapproved.)

or

(Pursuant to Article of War 50 the findings of guilty of Charge II and its specification are disapproved, and only so much of the sentence as provides for ——— is approved. As thus modified the sentence will be duly executed. The Branch United States Disciplinary Barracks, ————, is designated as the place of confinement.)

(NOTE.—The order will be authenticated as may be prescribed by Army Regulations.)

(2) The following form may be used in special court-martial cases other than those in which a bad conduct discharge is adjudged:

Special Court-Martial
Orders No. 43

Headquarters, 303d Infantry,
———, ——— 19—.

Before a special court-martial which convened at ————, pursuant to paragraph ——, Special Orders No. ——, this headquartres, ——— 19—, as amended by paragraph ——, Special Orders No. ——, this headquarters, ——— 19—, was arraigned and tried:

Private John Doe, 37024891, Company F, 303d Infantry.

Charge: Violation of the 84th Article of War.

Specification: In that Private John Doe, Company F, 303d Infantry, did at Fort Jackson, South Carolina, on or about 27 March 1949, through neglect, lose one jacket, field, wool, olive drab, value $14.00, and one blanket, wool, olive drab, value $7.29, issued for use in the military service.

PLEAS

To the *specification:* "Not guilty."

To the charge: "Not guilty."

FINDINGS

Of the *specification:* "Guilty."
Of the charge: "Guilty."

SENTENCE

To be confined at hard labor at such place as proper authority may direct for three months and to forfeit $——— of his pay per month for a like period.
The sentence was adjudged on ——— 19—.
The sentence is approved and will be duly executed.

(NOTE.—The order will be authenticated as may be prescribed in Army Regulations.)

(3) Orders promulgating the proceedings in special court-martial cases wherein bad conduct discharges are adjudged will be published by the officer exercising general court-martial jurisdiction to whom the record is forwarded for approval pursuant to A. W. 47*d*. The form is generally that shown in (1) above except that the action of the convening authority will be shown immediately after the entry as to the date upon which the sentence was adjudged, as follows:
The sentence was approved by the convening authority on ——— 19—.

b. **FORM FOR ORDERS REMITTING UNEXECUTED PORTIONS OF SENTENCE.**

Special Court-Martial Orders No. 51 } Headquarters, 303d Infantry, ———, ——— 19—.

The unexecuted portion of the sentence to confinement in the case of Recruit (then Private) John Doe, 37024891, Company F, 303d Infantry, promulgated in Special Court-Martial Orders No. 43, this headquarters, ——— 19—, is remitted.

(NOTE.—The order will be authenticated as may be prescribed by Army Regulations.)

c. **FORM FOR ORDERS VACATING ILLEGAL SENTENCES.**

Special Court-Martial Orders No. 15 } Headquarters, 97th Infantry Division, ———, ——— 19—.

Proceedings of the special court-martial in the case of Private John Doe, 37024891, Company F, 303d Infantry, including the findings of guilty of absence without leave in violation of the 61st Article of War and the sentence, having been published in Special Courts-Martial Orders No. 12, Headquarters, 303d Infantry, ——— 19—, and the record of trial having been examined in accordance with paragraph 91, Manual for Courts-Martial, 1949, by the officer exercising immediate general court-martial jurisdiction over the command and by him found to be legally insufficient to sustain the findings and the sentence, the findings of guilty and the sentence are vacated. Private Doe will be released from the confinement adjudged by the sentence in this case and all rights, privileges and property of which he has been deprived by virtue of the findings and sentence so vacated will be restored.

(NOTE.—The order will be authenticated as prescribed in Army Regulations.)

Special Court-Martial Orders No. 16 } Headquarters, 303d Infantry, Fort Jackson, S. C., ——— 19—.

The findings of guilty and the sentence in the case of Private John Doe, 37024891, Company F, 303d Infantry, as promulgated in Special Court-Martial Orders No. 12, this headquarters, ——— 19—, having been determined to be illegal and void, pursuant to paragraph 91, Manual for Courts-Martial, 1949, are hereby vacated. Private Doe will be released from the confiement imposed by the sentence in this

case, and all rights, privileges, and property of which he has been deprived by virtue of the findings of guilty and the sentence in this case will be restored.

(NOTE.—The order will be authenticated as may be prescribed in Army Regulations.)

d. Supplementary action on a sentence adjudged by a summary court-martial will follow the above text, but will be published in the form of special orders.

e. FORMS FOR ORDERS VACATING SUSPENSIONS.

General Court-Martial Orders No. ——

Headquarters, ————, ———, ——— 19—.

So much of the order published in General Court-Martial Orders No. ——, this headquarters, ——— 19—, as suspends execution of the sentence in the case of ——— is vacated. The sentence will be carried into execution.

or

So much of the order published in General Court-Martial Orders No. ——, this headquarters ——, 19—, as suspends execution of the sentence to dishonorable discharge in the case of ——— is vacated, and Article of War 50*e* having been complied with, the sentence to ——— will be carried into execution.

(NOTE.—The order will be authenticated as may be prescribed in Army Regulations.)

Special Court-Martial Orders No. ——

Headquarters, ————, ———, ——— 19—.

So much of the order published in Special Court-Martial Orders No. ——, this headquarters, ——— 19—, as suspends execution of the sentence to confinement (*or* forfeiture of pay) in the case of ——— is vacated. The sentence to ——— will be carried into execution.

(NOTE.—The order will be authenticated as may be prescribed in Army Regulations.)

Appendix 12

INVESTIGATING OFFICER'S REPORT

_____ Ind.

Major John Jones, 303d Inf., INVESTIGATING OFFICER, 1 March 1949
TO: The Commanding General, 97th Inf. Div., Cp. Swift, Texas.

1. I have investigated the inclosed charges dated 27 February 1949 against Corporal John J. Jernigan (37,000,000), Company F, 303d Inf., in accordance with the provisions of Article of War 46*b* and paragraph 35*a*, Manual for Courts-Martial. At the outset of the investigation I informed the accused of the nature of the charges alleged against him; of the name of the accuser and of the witnesses so far as known to me; of the fact that the charges were about to be investigated by me; of his right upon his request to have counsel represent him at the investigation, either civil counsel provided by him or military counsel of his choice if such counsel should be reasonably available, or counsel appointed by the officer exercising general court-martial jurisdiction over the command; of his right to cross-examine all available witnesses against him and to present anything he might desire in his own behalf, either in defense or mitigation; of his right to have the investigating officer examine available witnesses requested by him; and of his right to make a statement in any form, but that he was not required to make any statement regarding the offense~~(s)~~ of which he was accused or being investigated, and that any statement he might make might be used as evidence against him.

2. ~~The accused did not request counsel.~~ (The accused requested 1st Lt. John Doe Hq. 97th Inf. Div., as counsel, and that officer was present as counsel for the accused throughout the investigation.[1])
(Grade) (Name) (Organization)

3. In the presence of the accused I have examined all available witnesses and documentary evidence on both sides and have reduced the material testimony given by each witness under direct and cross-examination to a statement embodying the substance of the testimony taken, which statements are attached hereto as indicated:

Capt. Richard Smith, Hq. Co., 97th Inf. Div.—Exhibit 2
1st Sgt. William Jones, Hq. Co., 97th Inf. Div.—Exhibit 3

4. In the written form attached the substance of the expected testimony of the following named witnesses was made known to the accused. The accused stated

[1] If the accused waives the right to have counsel present throughout all or a part of the investigation after having requested such counsel, state the circumstances and the particular proceedings conducted in the absence of such counsel.

that he did not desire to cross-examine such witnesses and they were not examined in the presence of the accused:

Mr. William Sibley, 10 Main Street, Albemarle, Texas— Exhibit 4

5. Depositions of the following witnesses were taken in compliance with the provisions of Articles 25 and 26 and are appended:

Private Joseph White, Co. A, 1st Inf.—Exhibit 5

6. The following documents have been examined, shown to the accused, and are appended:

Extract Copy of Morning Report, Hq. Co., 97th Inf.Div., for 9 Jan 49—Exhibit 6

Extract Copy of Morning Report, Hq. Co., 97th Inf. Div., for 26 Feb 49—Exhibit 7

7. The following real evidence was examined, shown to the accused

(If certain real evidence which was examined was not shown to the accused and is now preserved for safekeeping as here state the reasons.)

indicated:

None

8. The accused, after having been warned of his rights to make a statement or remain silent, as indicated above, said that he did not desire to make a statement ~~(made a statement appended hereto as Exhibit 8).~~

9. Explanatory or extenuating circumstances:

Possible stress of bad home conditions may have influenced his acts. The accused, during four years of military service, has never before committed an offense warranting even company punishment. Both the company commander and the first sergeant state that he has been an excellent soldier.

10. There was (no) reasonable ground for inquiring into the mental capacity of the accused at the time of the investigation. There was (no) reasonable ground for inquiring into his mental responsibility at the time of the alleged offense.

(If grounds for inquiry as to accused's mental condition exist state reasons therefor and action taken.)

~~(A report of a board of medical officers (psychiatrist) is attached as Exhibit 9.)~~

11. I have made inquiry and find no prior convictions committed during the current enlistment and within one year preceding the commission of the offense with which the accused is now charged (par. 79c, MCM).

~~(A copy of the record of prior convictions is attached as Exhibit 10).~~

12. In arriving at my conclusions I have considered not only the nature of the offenses and the evidence in the case, but I have likewise considered the age of

the accused, his military service, and the established policy of the Department of the Army that trial by general court-martial will be resorted to only when the charges can be disposed of in no other manner consistent with military discipline.

13. Trial by special court-martial is recommended.

/s/ John Jones
Signature

JOHN JONES
Name typed

Maj., Inf., Hq. 97th Inf. Div.
Organization

Appendix 13

SUBPOENA FOR CIVILIAN WITNESS

SUBPOENA FOR CIVILIAN WITNESS

The President of the United States to Claude M. Rickaby

Greeting:

You are hereby summoned and required to be and appear in person on the 15th day of December, 1948, at 1:30 o'clock p.m.,[1] ~~(before _____[2], a _____[3], designated to take your deposition to be read in evidence)~~ before a[4] general court-martial of the United States, at Fort Wilson, Columbus, Ohio, appointed to meet by paragraph 17, Special Orders No. 282, Headquarters 50th Infantry Division, dated 9 October 1948, then and there to testify and give evidence as a witness for the defense in the case of[5] Private John T. Derrick, 35406324, Company A, 113th Infantry Fort Wilson, Ohio.[6] ~~(and you are hereby required to bring with you, to be used in evidence in said case, the following described documents, to wit: _____).~~

And have you then and there this precept.

Dated at Fort Wilson, Ohio, this 11th day of December, 1948.

/s/ Daniel C. O'Brien
Daniel C. O'Brien, Capt., FA
(To be subscribed by trial judge advocate, recorder, etc.)
Trial Judge Advocate

[1] Line out when inappropriate "before _____, a _____, designated to take your deposition to be read in evidence."

[2] When used, enter name, grade, and organization, if any.

[3] When used, enter official character, if any, such as trial judge advocate, summary court, notary public, etc.

[4] General (or special or summary) court-martial, etc.

[5] Enter name, etc., of accused or other subject of investigation.

[6] Line out when inappropriate "and you are hereby required to bring with you, to be used in evidence in said case, the following described documents, to wit."

808220°—48——25

The witness is requested to subscribe on one copy of the subpoena the following and to return to the person serving the subpoena the copy thereof so subscribed.

[7] When service is *by mail* the witness will be requested to subscribe this acknowledgment of acceptance on one copy and to return same to the officer who issued the subpoena.

_____
(Place)

_____, 19____

[7] I hereby accept service of the above subpoena.

_____
(Signature of witness)

[8] This proof of service will be filled out when service is personal, and the copy thus completed be returned to the officer issuing the subpoena.

[8] Personally appeared before me the undersigned authority, 2d Lt. Osmer P. Fox, who, being first duly sworn according to law, deposes and says that at Marysville, Ohio, on 13 December 1948, he personally delivered to Claude M. Rickaby in person a duplicate of the within subpoena.

/s/ Osmer P. Fox
(Signature)

SUBSCRIBED AND SWORN to before me at Fort Wilson, Ohio, this 13th day of December, 1948.

/s/ Valentine Quade
(Signature)

VALENTINE QUADE
Lt. Col., JAGC
(Grade, organization and official character)

Appendix 14

DEPOSITION OF CIVILIAN WITNESS

[1] This form to be used when deposition is taken on written interrogatories. It should be modified in case it is to be used for oral depositions so as to conform to the provisions of the Manual for 'Courts-Martial,' 1949 (par. 106 for such cases).

[2] Strike out words not used.

[3] Strike out word not used.

[4] General (or special or summary) court-martial, or military commission, or court of inquiry, or military board.

[5] Insert name or title of person who is requested to cause the deposition to be taken.

[6] To be subscribed by the trial judge advocate or other proper person with his name, grade, organization, and official title as "trial judge advocate", "summary court", "recorder", etc. Request by the defense for a deposition is transmitted to the trial judge advocate (or to the court) who executes the written request.

[7] If it is desired to give special instructions, there should be added "special instructions attached."

UNITED STATES

vs [2]

~~In the matter of~~ [2]

Pvt. John T. Derrick, 35406324, Company A, 113th Infantry

INTERROGATORIES AND DEPOSITION [1]

Deposition of Lucy Jones Derrick [3] (~~stationed~~) (residing) at 280 East Third St., Newark, N. J., to be read in evidence before a [4] general court-martial, United States Army, appointed to meet at Fort Wilson, Columbus, Ohio, by paragraph 17, Special Orders No. 282, Headquarters 50th Infantry Division, 9 October 1948.

Fort Wilson, Ohio, 10 Dec 1948. To:[5] Commanding General, First Army, Governors Island, N. Y.

It is requested that you cause to be taken on the following interrogatories the deposition of the above named witness.

/s/Daniel C. O'Brien [6]
DANIEL C. O'BRIEN
Capt., 103 FA Bn
Trial Judge Advocate

HEADQUARTERS, First Army, 12 Dec 1948

To: Major Peter M. Milweed, Hqs First Army, who will take or cause to be taken the deposition above requested.[7]

By command of Major General GLASS:

/s/ Milton E. Weiss Adjutant

Milton E. Weiss, Col., AGD General

First interrogatory: Are you in the military service of the United States? If so, what is your full name, grade, organization, and station? If not, what is your full name, occupation, and residence?

Answer:[8] My name is Lucy Jones Derrick. I live at 280 East Third Street, Newark, N. J. I work as a waitress at the Bluebird Restaurant on Clendenny Avenue in Newark.

Second interrogatory: Do you know the accused? If so, how long have you known him?

Answer: I have known the accused for three years.

Third interrogatory: What is your relationship to the accused?

Answer:

Fourth interrogatory:

Answer:

First cross-interrogatory:[9]

Answer:

First interrogatory by the [10]_____

Answer:

(Witness sign here) /s/ Lucy Jones Derrick
Lucy Jones Derrick

I certify that the above deposition was duly taken by me, and that the above named witness, having been first duly sworn by me, gave the foregoing deposition in my presence at Newark, N. J., this 13th day of December, 1948.

(Name) /s/ Peter M. Milweed

PETER M. MILWEED
Maj., Hqs First Army
(Grade and organization)

Summary Court
(Official character, as summary court, notary public, etc.)

[8] If the spaces for answers are not sufficient, extra sheets may be inserted by the officer taking the deposition. In such case, he will rewrite the interrogatories, writing the answers immediately below the respective interrogatories.

[9] In case no cross-interrogatories are propounded, this fact will be recorded and authenticated by the signature of defense counsel when the deposition is taken by the prosecution, and by the trial judge advocate when the deposition is taken by the defense, in court-martial cases.

[10] Insert "court", "commission", or "board" as the case may be.

Appendix 15

PUNISHMENT UNDER ARTICLE 104

a. IMPOSITION OF PUNISHMENT UNDER ARTICLE 104 UPON OFFICERS

HEADQUARTERS XL CORPS

APO 200

Nashville, Tennessee

15 February 1949

201. Doe, J. (Off)
SUBJECT: Disciplinary Action
THRU: Commanding General
XL Corps Artillery
APO 200, Nashville, Tennessee
TO: Lieutenant Colonel John E. Doe, FA
800th Field Artillery Battalion
APO 201, Nashville, Tennessee

1. Preliminary investigation indicates that on 14 February 1949 you failed through neglect to provide the prescribed inspection of the convoy of your battalion at the intersection of Maneuver Routes 27 and 29 in the vicinity of Wartrace, Tennessee, as directed by Brigadier General Smith at a conference of battalion commanders of the corps artillery on 13 February 1949. Your dereliction was to the prejudice of good order and military discipline.

2. It is my intention to impose punishment for this offense under Article of War 104 unless you demand trial by court-martial. In accordance with paragraph 120, MCM 1949, you are notified of this intended action. You will acknowledge receipt of this communication by indorsement through proper channels, and you will state therein whether you demand trial in lieu of action under Article of War 104. You may submit in the indorsement any matter in mitigation, extenuation, or defense.

/s/ Richard Roe
RICHARD ROE
Major General, United States Army
Commanding

(NOTE.—Under the provisions of 120, the letter notifying the accused of the intention to impose punishment and all subsequent indorsements will be through proper military channels. Indorsements by intermediate commanders through whom the communication may pass are not shown on this form. Accordingly, the indorsements are not numbered.)

201. Doe, J. (Off) —— Ind.
800th FA Bn., APO 201, Nashville, Tennessee, 17 February 1949
TO: CG, XL Corps, APO 200, Nashville, Tennessee
(THRU: CO, 50th FA Group, APO 201, Nashville, Tennessee)

Receipt is acknowledged. Trial by court-martial is not demanded. No matters in mitigation, extenuation or defense are submitted.

/s/ John E. Doe
JOHN E. DOE
Lt. Col., 800th FA

201. Doe, J. (Off) —— Ind.
Hq. XL Corps, APO 200, Nashville, Tennessee, 19 February 1949
TO: Lt. Col. John E. Doe, 800th FA Bn., APO 201, Nashville, Tennessee
(THRU: CG, XL Corps Artillery, APO 200, Nashville, Tennessee)

1. A forfeiture of $100.00 pay per month for two months is hereby imposed.

2. In addition to the forfeiture imposed, you are reprimanded. Your neglect to provide the prescribed inspection of the convoy of your battalion resulted in the failure of your convoy to take the prescribed route for the corps artillery and created confusion in the movement of the corps. Had such neglect occurred in combat the effect upon the operations of the corps might have been serious. I trust that my action in this case will cause you to pursue your duties in an exemplary manner, thereby demonstrating the propriety of your retention in rank and command.

3. You are advised of your right to appeal in accordance with paragraph 121, MCM 1949. You are directed to reply further by indorsement and to state therein the date of receipt of this indorsement and any appeal you may desire to make.

/s/ Richard Roe
RICHARD ROE
Major General, United States Army
Commanding

201. Doe, J. (Off) —— Ind.
800th FA Bn., APO 201, Nashville, Tennessee, 21 February 1949
TO: CG, XL Corps, APO 200, Nashville, Tennessee
(THRU: CO 50th FA Group, APO 200, Nashville, Tennessee)

1. Received 21 February 1949. Contents noted.

2. I do not appeal from this punishment.

/s/ John E. Doe
JOHN E. DOE
Lt. Col., 800th FA

b. RECORD OF PUNISHMENT UNDER ARTICLE 104

COMPANY PUNISHMENT BOOK

Glassborn, Peter E. — Pvt. — Co. A, 109th Infantry

Name, Last name first — Grade — Organization

Offense	Date and place of commission	Punishment	By whom imposed	Date of notice to accused	Decision on appeal if any	Mitigation or remission	Remarks	Initials of immediate CO
Failure to repair for KP.	4 July 1944, Ft. Wilson, Ohio.	6 days restr.	CO Co. A.	5 July 1944..	No App.	None..	None..	J. B. S.
Disorderly in barracks.	17 Nov. 1944, Ft. Wilson, Ohio.	7 days HL.	CO Co. A.	18 Nov. 1944.	No App.	None..	None..	J. B. S.

(NOTE.—One page is given to each person and an alphabetical index will be found of assistance in consulting the record.)

INDEX

[References are to paragraphs and pages; "A. W." indicates Articles of War, and "App." indicates Appendix.]

Consult specific, rather than general, headings. For example, for "trial judge advocate," look under "trial judge advocate" and not under "judge advocate."

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