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MANUAL
FOR
COURTS-MARTIAL
UNITED STATES
1969 (Revised edition)

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Executive Order 11476

PRESCRIBING THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION)

By virtue of the authority vested in me by the Uniform Code of Military Justice (Title 10, United States Code, Ch. 47), and as President of the United States, I hereby prescribe the following Manual for Courts-Martial, to be designated as "Manual for Courts-Martial, United States, 1969 (Revised edition)."

This Manual shall be in force and effect in the armed forces of the United States on and after August 1, 1969, with respect to all court-martial processes taken on and after that date: *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 August 1, 1969; and any such investigation, trial, or other action begun prior to that date, may be completed in accordance with the applicable laws, Executive orders, and regulations pertaining to the various armed forces in the same manner and with the same effect as if this Manual had not been prescribed: *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: *Provided further*, That the maximum punishment for an offense committed prior to August 1, 1969, shall not exceed the applicable limit in effect at the time of the commission of such offense: *And provided further*, That for cases arising under section 12 of the Act of May 5, 1950, 64 Stat. 147 (50 U.S.C. 740), the provisions of paragraph 110, Manual for Courts-Martial, United States, 1951, shall remain in effect.

Richard Nixon

THE WHITE HOUSE,
June 19, 1969.

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Chapter I

MILITARY JURISDICTION

SOURCES—EXERCISE

1. SOURCES. The sources of military jurisdiction include the Constitution and international law. International law includes the law of war. 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 enemy territory (military government); by a government temporarily governing the civil population within its territory or a portion thereof 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 gencies through which military jurisdiction is exercised include:

Military Commissions and Provost Courts for the trial of offenses within their respective jurisdictions. Subject to any applicable rule of international law or to any regulations prescribed by the President or by any other competent authority, these tribunals will be guided by the applicable principles of law and rules of procedure and 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 and Officers in Charge exercising nonjudicial powers under Article 15.

Courts of Inquiry for the investigation of any matter referred to such court by competent authority. See Article 135. Under the provisions of Article 140, the authority to promulgate regulations governing courts of inquiry is hereby delegated to the Secretaries concerned.

Chapter II

CLASSIFICATION—COMPOSITION OF COURTS-MARTIAL

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3. CLASSIFICATION. Courts-martial are classified as general, special, and summary courts-martial (Art. 16).

4. COMPOSITION. ***a. General.*** General courts-martial shall consist of a military judge and any number of members not less than five or of a military judge alone. Special courts-martial shall consist of any number of members not less than three, and, if so detailed, a military judge, or of a military judge alone. The military judge is not a member of the court. In any case to which a military judge has been detailed, the accused, knowing the identity of the military judge and after consulting with counsel, may request, in writing, trial by the military judge alone. If the military judge approves the request, he alone constitutes the general or special court-martial without participation by the members. Summary courts-martial shall consist of one commissioned officer (Art. 16).

b. Who may serve as members. Any commissioned officer on active duty with the armed forces is eligible to serve on courts-martial (Art. 25(a)). Any warrant officer on active duty with the armed forces is eligible to serve on general and special courts-martial for the trial of any person other than a commissioned officer (Art. 25(b)). Any enlisted member on active duty with the armed forces who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted accused who has personally requested in writing prior to assembly (61*h*) that enlisted members serve on the court (Art. 25(c)).

No distinction exists among the various classes of commissioned officers, warrant officers, or enlisted members on active duty with the armed forces. The term "active duty" as used herein refers to the status of being in the active Federal service of any of the armed forces under a competent appointment or enlistment or pursuant to a competent muster, order, call, or induction. Retired members of any Regular component and members of any Reserve component of the armed forces are eligible to serve on courts-martial only when they are in an active duty status. Members of the Environmental Science Services Administration and the Public Health Service are eligible to serve on courts-martial when they are assigned to and serving with an armed force.

No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case (62*f*; Arts. 1(9), 25(d)(2)) or, in the case of a rehearing or a new or other trial, if he was a member of the court which first heard the case (62*f*; Art. 63(b)). No enlisted member of an armed force may serve as a member of a court-martial for the

trial of another enlisted member who is a member of the same unit (Art. 25(c)(1)). The word "unit" as used herein means any regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company of the Army, a squadron of the Air Force, or a ship's crew, or a body corresponding to one of them (Art. 25(c)(2)).

Definitions made pursuant to Article 25(c)(2) are as follows:

Army. A "unit" of the Army in the sense of Article 25(c) is a company, battery, troop, detachment, or other organization of the Army for which a separate morning report is prepared.

Navy and Coast Guard. A "unit" of the Navy or the Coast Guard in the sense of Article 25(c) is a ship, company, detached command, or other organization for which a separate unit personnel diary is prepared.

Air Force. A "unit" of the Air Force in the sense of Article 25(c) is a squadron or other organization of the Air Force for which a separate unit military strength balance report is prepared.

Marine Corps. A "unit" in the Marine Corps in the sense of Article 25(c) is a company, battery, squadron, detachment, or other organization for which a separate unit personnel diary is prepared.

Arrest or confinement renders a person ineligible to serve as a member of a court-martial. For other cases in which a person should not serve as a member of a general or special court-martial and for grounds for challenge, see 62*f*.

The availability of certain persons for detail may be restricted by regulations of the Secretary of a Department.

c. Rank of members. A commissioned officer may be tried only by a court-martial composed of commissioned officers. A warrant officer may be tried only by a court-martial composed of commissioned officers or of commissioned and warrant officers (Art. 25(a), (b)). When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in grade or relative rank (Art. 25(d)(1)), nor, in the case of a commissioned officer, by those below him on the same promotion list.

Whenever practicable, the senior member of a general or special court-martial should be an officer whose grade is not below that of lieutenant of the Navy or Coast Guard or captain of the Army, Air Force, or Marine Corps. Whenever practicable, a summary court-martial should be an officer whose grade is not below that of lieutenant of the Navy or Coast Guard or captain of the Army, Air Force, or Marine Corps.

An enlisted member who has requested in writing that enlisted members serve on the general or special court-martial which will try his case may not be tried by a court the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court unless eligible enlisted members cannot be obtained because of physical conditions or military exigencies. If these members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained (Art. 25(c)(1)). For example, when the only enlisted members on duty at an isolated station or on board a ship at sea are members of the same unit (Art. 25(c)(2)) as the accused and no other enlisted members can be obtained without manifest injury to the service, the convening authority may, in his sound discretion, direct that the trial be held without

enlisted members. Mere inconvenience is not a ground for proceeding with a trial without enlisted members. The detailed written statement appended to the record stating that enlisted members could not be obtained as members is subject to review when the record of trial is examined under Articles 65, 66, and 69.

d. Qualification of members. When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament (Art. 25(d)(2)).

e. Military judge of a court-martial. The authority convening a general court-martial shall, and, subject to regulations of the Secretary concerned, the authority convening a special court-martial may, detail a military judge thereto (Art. 26(a)).

A military judge shall be a commissioned officer of the armed forces on active duty who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member (Art. 26(b)).

The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail by the convening authority. Unless the general court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge (38). A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member. He may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee (Art. 26(a)).

The order convening a court-martial to which a military judge is detailed will expressly state that the military judge is certified as qualified for such duty by the Judge Advocate General of the armed force of which he is a member (Art. 26(b)). The order convening a general court-martial will further state that the military judge has been designated and assigned in accordance with Article 26(c). See appendix 4 for the form of these statements.

Proceedings of a court-martial are void unless the military judge of a general court-martial, or when detailed, of a special court-martial, is qualified as prescribed by Article 26.

No person is eligible to act as military judge in a case if he is the accuser (Art. 1(9)), or a witness for the prosecution (63), or has acted as an investigating officer or counsel in the same case (Art. 26(d)). An officer who has served as a member should not be detailed as military judge for a rehearing (92*a*), or a new (110*a*(2)) or other (92*b*) trial of the same case. Prior participation in the same case as military judge, staff judge advocate, or legal officer to the convening authority may be a ground for challenge for cause. (See 62*f*.)

f. Detail of members and military judge from other commands of the same armed force. The convening authority may, with the concurrence of their proper commander, detail as members of a court-martial or as military judge of a court-martial eligible members of the same armed force who are not otherwise under his command. Concurrence of the proper commander may be oral and need not be evidenced by the record of trial.

g. Detail of military judge and members from other armed forces. (1) *General policy.* A convening authority may detail a military judge from among qualified officers under his command or made available to him regardless of the armed force of which the military judge is a member. Members of courts-martial ordinarily are members of the same armed force as the accused. When a court composed of members of more than one armed force is convened, at least a majority of the membership of a general or special court-martial should be members of the same armed force as the accused unless exigent circumstances render it impracticable to obtain such a majority without manifest injury to the service.

(2) *Joint command or joint task force.* Subject to the provisions of 4*g*(1) above, the commanding officer of a joint command or joint task force who has been specifically empowered by the President or the Secretary of Defense to exercise jurisdiction over personnel of another armed force (13) may detail as members of courts-martial any eligible persons under his command or made available to him. The commanding officer of a subordinate joint command or joint task force who has been authorized by the superior commander to exercise reciprocal special and summary court-martial jurisdiction (13) may, subject to similar restrictions, detail as members of special courts-martial any eligible persons under his command or made available to him. However, a summary court-martial will be a member of the same armed force as the accused.

(3) *All other convening authorities.* All other convening authorities may, under exceptional circumstances, request from the Judge Advocate General concerned the authority to detail members of other armed forces to courts-martial. With the concurrence of the other Judge Advocates General concerned, authority may be granted to detail members of other armed forces, subject to the provisions of 4*g*(1) above, for a particular case or, when appropriate, generally.

Chapter III

COURTS-MARTIAL

CONVENING AUTHORITIES—DETAIL OF TRIAL COUNSEL, DEFENSE COUNSEL, ASSISTANTS—DETAIL OR EMPLOYMENT OF REPORTERS AND INTERPRETERS

5. CONVENING AUTHORITIES. ***a. General courts-martial.*** (1) General courts-martial may be convened by the President of the United States, the Secretary concerned, the commanding officers of commands designated in Article 22(a), and any other commanding officer designated by the Secretary concerned or empowered by the President. The term "Secretary concerned" refers to the Secretary of the Army, with respect to matters concerning the Army; the Secretary of the Navy, with respect to matters concerning the Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Navy; the Secretary of the Air Force, with respect to matters concerning the Air Force; and the Secretary of Transportation, with respect to matters concerning the Coast Guard when it is not operating as a service in the Navy. (See app. 3, 10 U.S.C. § 101(8).)

(2) When a commanding officer is designated by the Secretary concerned pursuant to Article 22(a)(6) or empowered by the President pursuant to Article 22(a)(7) to convene general courts-martial, the convening order will cite the authorization. See appendix 4 for form.

(3) It is unlawful for a commanding officer who is an accuser to convene a general court-martial for the trial of the person so accused. When any commanding officer who would normally convene the general court-martial is the accuser in the case, he shall refer the charges to a superior competent authority who will either convene the court or designate another competent convening authority who is superior in rank to that accuser or, if in the same chain of command, who is superior in command to that accuser to exercise jurisdiction. A superior competent authority may convene the court to try any other case in a subordinate command if he so desires (Art. 22(b)). Thus, if the exigencies of the service interfere with the prompt disposition of cases, a superior competent to convene general courts-martial properly may convene courts for the trial of cases arising in a subordinate command.

(4) An accuser is a person who signs and swears to charges, a person who directs that charges nominally be signed and sworn to by another, or any other person who has an interest other than an official interest in the prosecution of the accused (Art. 1(9)). No person will be ordered to sign and swear to charges if he does not believe the allegations therein to be true in fact to the best of his knowledge and belief. The person who signs and swears to charges is always an accuser. Whether a commanding officer who convened the court is the accuser in other cases is a question of fact. Action by a commanding officer which is merely official and in the strict line of duty cannot be regarded as suf-

ficient to disqualify him. For example, a commanding officer may, without becoming the accuser in the case, direct a subordinate to investigate an alleged offense with a view to formulating and preferring appropriate charges if the facts disclosed by the investigation should warrant preferring charges. The commanding officer may thereafter refer the charges for trial as in other cases.

(5) Except as provided in Article 140, no one other than those expressly designated in Article 22 as having the authority to convene general courts-martial has this authority and anyone having this authority cannot delegate or transfer it to another. The authority of a commanding officer to convene 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 commanding officer are stated in regulations of the Secretary of a Department.

(6) An officer who has power to convene 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 37. He may withdraw any specification or charge at any time unless the court has finally terminated the proceedings thereon by a finding or by a ruling which amounts to a finding of not guilty. See, however, Article 44(c).

b. Special courts-martial. (1) Special courts-martial may be convened by any person who may convene a general court-martial, the commanding officers of the commands designated in Article 23(a), and any other commanding officer empowered by the Secretary concerned. See 5*a*(1) for definition of "Secretary concerned." When empowered by the Secretary, an officer in charge of a command of the Navy may also convene special courts-martial (Art. 23(a)(7)).

(2) The principles stated in 5*a*(2) to 5*a*(6), inclusive, apply to special courts-martial. See Article 23(b) as to accusers.

(3) A squadron, battalion, or corresponding unit or command is "separate" or "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 discipline of the command. Whenever there is doubt whether a command is detached in the sense of Article 23 the matter, if arising in the Army or the Air Force, will be referred to the officer exercising general court-martial jurisdiction over the command, and if arising in the Navy or Coast Guard, to the flag or general officer in command or the senior officer present who designated the detachment, for his determination. This determination shall be final. The terms "separate" or "detached" are used in a disciplinary sense and are not necessarily limited to what constitutes separation or detachment in a physical or tactical sense. For instance, the commanding officer of a field artillery battalion which is part of an army division, if responsible directly to the division commander for the discipline of the battalion, may convene special courts-martial even though there is a division artillery commander who controls the battalion in other matters. Also, an air force squadron might be responsible directly to an air force for disciplinary matters although responsible to a group for its operations. In such a case, the squadron would be separate in the sense of Article 23(a)(4). The power of the squadron or battalion com-

mander to convene special courts-martial is subject to the power of superior competent authority to reserve to himself the right to convene these courts for any or all subordinate units and detachments in his command.

(4) A subordinate commander may exercise his power to convene special courts-martial unless a competent superior reserves that power to himself and so notifies the subordinate.

c. Summary courts-martial. Summary courts-martial may be convened by any person who may convene a general or special court-martial, the commanding officers of the commands designated in Article 24(a), and any other commanding officer empowered by the Secretary concerned. See 5*a*(1) for definition of "Secretary concerned." When empowered by the Secretary, an officer in charge of a command of the Navy may also convene summary courts-martial (Art. 24(a)(4)). Summary courts-martial may, however, be convened in any case by superior competent authority when deemed desirable by him. When but one commissioned officer is present with a command or detachment he shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases brought before him (Art. 24(b)), and no order convening the court need be issued. When more than one commissioned officer is present, a subordinate commissioned officer will be detailed as summary court-martial.

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

The principles stated in 5*a*(2), (5) and (6), and 5*b*(3) and (4) apply to summary courts-martial.

6. DETAIL OF TRIAL COUNSEL, DEFENSE COUNSEL, ASSISTANTS. ***a. General.*** For each general and special court-martial the authority convening the court shall detail a trial counsel and a defense counsel, together with such assistants as he deems necessary or appropriate. Detailed counsel shall be commissioned officers. An accused may, however, be represented by individual counsel (48*a*, *b*). No person who has acted as investigating officer, military judge, or court member in a case may act later as trial counsel, assistant trial counsel, or, unless expressly requested by the accused (61*f*(4); app. 8*a*), as defense counsel or assistant defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense, nor may any person who has acted for the defense act later for the prosecution (Art. 27(a)). In the absence of evidence to the contrary, a person who, between the time the case has been referred for trial and the trial, has been a detailed counsel or assistant counsel of the court to which the case has been referred, shall be deemed to have acted as a member of the prosecution or the defense, as the case may be. A person who has acted for the accused at a pretrial investigation or other proceedings involving the same general matter is ineligible to act thereafter for the prosecution. An accuser, unless expressly requested by the accused (61*f*(4); app. 8*a*), may not act as defense counsel or assistant defense counsel in the same case.

The power to detail under Article 27 cannot be delegated.

mander to convene special courts-martial is subject to the power of superior competent authority to reserve to himself the right to convene these courts for any or all subordinate units and detachments in his command.

(4) A subordinate commander may exercise his power to convene special courts-martial unless a competent superior reserves that power to himself and so notifies the subordinate.

c. Summary courts-martial. Summary courts-martial may be convened by any person who may convene a general or special court-martial, the commanding officers of the commands designated in Article 24(a), and any other commanding officer empowered by the Secretary concerned. See 5*a*(1) for definition of "Secretary concerned." When empowered by the Secretary, an officer in charge of a command of the Navy may also convene summary courts-martial (Art. 24(a)(4)). Summary courts-martial may, however, be convened in any case by superior competent authority when deemed desirable by him. When but one commissioned officer is present with a command or detachment he shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases brought before him (Art. 24(b)), and no order convening the court need be issued. When more than one commissioned officer is present, a subordinate commissioned officer will be detailed as summary court-martial.

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

The principles stated in 5*a*(2), (5) and (6), and 5*b*(3) and (4) apply to summary courts-martial.

6. DETAIL OF TRIAL COUNSEL, DEFENSE COUNSEL, ASSISTANTS. ***a. General.*** For each general and special court-martial the authority convening the court shall detail a trial counsel and a defense counsel, together with such assistants as he deems necessary or appropriate. Detailed counsel shall be commissioned officers. An accused may, however, be represented by individual counsel (48*a*, *b*). No person who has acted as investigating officer, military judge, or court member in a case may act later as trial counsel, assistant trial counsel, or, unless expressly requested by the accused (61*f*(4); app. 8*a*), as defense counsel or assistant defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense, nor may any person who has acted for the defense act later for the prosecution (Art. 27(a)). In the absence of evidence to the contrary, a person who, between the time the case has been referred for trial and the trial, has been a detailed counsel or assistant counsel of the court to which the case has been referred, shall be deemed to have acted as a member of the prosecution or the defense, as the case may be. A person who has acted for the accused at a pretrial investigation or other proceedings involving the same general matter is ineligible to act thereafter for the prosecution. An accuser, unless expressly requested by the accused (61*f*(4); app. 8*a*), may not act as defense counsel or assistant defense counsel in the same case.

The power to detail under Article 27 cannot be delegated.

The convening authority may, with the concurrence of the appropriate commanding officer, detail as counsel or as assistant counsel of general and special courts-martial any qualified officer regardless of the armed force of which that officer is a member.

b. Qualification of counsel of general courts-martial. An officer who is detailed as trial counsel or defense counsel of a general court-martial must be a judge advocate of the Army, Navy, Air Force, or Marine Corps, or a law specialist of the Coast Guard, who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a commissioned officer of the Army, Navy, Air Force, Marine Corps, or Coast Guard who is a member of the bar of a Federal court or of the highest court of a State (Art. 27(b) (1)); and, in addition to the foregoing qualification, must be an officer who is certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member (Art. 27(b) (2)).

A "judge advocate of the Army" is any commissioned officer of the Regular Army appointed in the Judge Advocate General's Corps, any other member of the Army assigned thereto by the Secretary of the Army, or any of the other persons mentioned in Section 3072, title 10, United States Code. A "judge advocate of the Navy" is a commissioned officer of the Judge Advocate General's Corps of the Navy. A "judge advocate of the Air Force" is a commissioned officer of the Air Force designated as a judge advocate by the Secretary of the Air Force (10 U.S.C. § 8067(*g*)). *A* "judge advocate of the Marine Corps" is a commissioned officer on the active list of the Marine Corps who is designated as a judge advocate with the approval of the Secretary of the Navy. A "law specialist" is a commissioned officer of the Coast Guard designated for special duty (law) (Art. 1(11)).

The order convening a general court-martial will expressly state the qualification of the trial counsel and the defense counsel as prescribed by Article 27(b). See appendix 4 for the form of statement of qualification. A statement that counsel is certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member is sufficient to show that the person so certified is fully qualified by reason of legal training or bar membership as prescribed by Article 27(b) (1).

c. Qualification of counsel of special courts-martial. In all special courts-martial the accused must, prior to an Article 39(a) session or assembly of the court, be afforded the opportunity to be represented by counsel qualified under Article 27(b) unless such counsel cannot be obtained because of physical conditions or military exigencies (Art. 27(c)). The accused may, however, decline to be represented by qualified counsel, in which event such counsel need not be provided (61*f*(3)). The case may initially be referred to a court with counsel who is not qualified under Article 27(b), provided prior to trial the requirements of Article 27(c) are met. If the accused chooses not to exercise his right to be represented by qualified counsel, trial may proceed with counsel initially detailed. There is no requirement, as there is in the case of general courts-martial, that trial counsel be qualified under Article 27(b). Any commissioned officer not disqualified by reason of prior participation in the same case (6*a*) may be detailed as trial counsel in a special court-martial. Physical conditions or military exigencies, as the terms are here used, may exist under

rare circumstances, such as on an isolated ship on the high seas or in a unit in an inaccessible area, provided compelling reasons exist why trial must be held at that time and at that place. Mere inconvenience does not constitute a physical condition or military exigency and does not excuse a failure to extend to an accused the right to qualified counsel.

If qualified defense counsel cannot be obtained because of physical conditions or military exigencies, trial may proceed. In that event, however, the convening authority must, prior to assembly of the court, make a written statement explaining why counsel with such qualifications could not be obtained. This statement, which shall be submitted at trial as an appellate exhibit, must set forth in detail not only the reasons why qualified defense counsel could not be obtained, but also why the trial had to be held at that time and at that place, notwithstanding the fact that qualified counsel could not be obtained. This written statement is subject to review when the record of trial is examined under Article 65. If trial proceeds without qualified defense counsel, a bad-conduct discharge may not be adjudged at that trial. (For this and other reasons precluding the adjudging of a bad-conduct discharge, see 15*b*.)

When counsel qualified under Article 27(b) need not be detailed, any commissioned officer not disqualified by reason of prior participation in the same case (6*a*) may be detailed as defense counsel of a special court-martial. But if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel must be similarly qualified (Art. 27(c)(1)); and if the trial counsel is a judge advocate, or a law specialist, or a member of the bar of a Federal court or of the highest court of a State, the defense counsel detailed by the convening authority must be one of the foregoing (Art. 27(c)(2)). Likewise, if any assistant trial counsel is qualified to act as counsel before a general court-martial, the detailed defense counsel must be similarly qualified; and if any assistant trial counsel is a judge advocate, or a law specialist, or a member of the bar of a Federal court or the highest court of a State, the detailed defense counsel must be one of the foregoing.

The convening order will expressly state whether trial counsel and defense counsel are or are not legally qualified lawyers in the sense of Article 27(c). See appendix 4 for forms. Proof of the qualification of judge advocates, law specialists (see 6*b*), and officers certified as qualified by an appropriate Judge Advocate General pursuant to Article 27(b)(2) is on file in the office of the Judge Advocate General of the armed force of which the officer concerned is a member. The qualifications of other officers as members of the bar of a Federal court or of the highest court of a State (Art. 27(c)(2)) will be determined by the convening authority before detail on the basis of the officer's personnel records or by interrogation of the officer, or both. After such a determination the officer concerned will report any change in his qualifications to the convening authority. The record of trial will show verification of the qualifications recited on the orders. See 61 *e* and *f* and appendices 8*a* and 8*b*.

d. Qualifications of assistant trial counsel and assistant defense counsel. In general, it is desirable that as many assistant defense counsel as assistant trial counsel be detailed, and that officers be detailed as assistant defense counsel and assistant trial counsel who have comparable military experience and legal qualifications. In special courts-martial when the conduct of the defense devolves upon the assistant defense counsel because of the absence of defense counsel, the assistant defense counsel must have the same

qualifications (Art. 27(c)) as are required for defense counsel (6*c*; Art. 38(e)). See 45 and 47 as to duties of assistant trial counsel and assistant defense counsel.

The convening order for every general or special court-martial will expressly state whether assistant counsel are or are not legally qualified as lawyers in the sense of Article 27 (6*c*). Whenever appropriate, the qualifications of assistant counsel detailed for special courts-martial shall be determined and shown as prescribed in 6*c*. See appendix 4 for form and 61*f*(2) for procedure as to inquiry into the qualifications of individual counsel for the defense.

7. DETAIL OR EMPLOYMENT OF REPORTERS AND INTERPRETERS. Under such regulations as the Secretary concerned may prescribe, the convening authority of a court-martial or military commission or a court of inquiry shall detail or employ qualified court reporters, who shall record the proceedings of and testimony taken before that court or commission. Under like regulations the convening authority of a court-martial, military commission, or court of inquiry may detail or employ interpreters who shall interpret for the court or commission (Art. 28). No person may act as reporter or interpreter in any case in which he is an accuser.

The detail or employment of reporters and interpreters may be effected by the convening authority personally or through a staff officer, including the trial counsel. The detail or employment of reporters and interpreters may be oral and need not be shown in the record of trial or allied papers.

Unless otherwise directed by the convening authority, a reporter will not be detailed or employed for summary courts-martial. The convening authority, when he deems it appropriate, may direct that a reporter not be used in special courts-martial. By regulations, the Secretary concerned may require or restrict the detail or employment of reporters for summary and special courts-martial. See Article 19.

See chapter XXII as to oaths generally, and 49 and 50 for duties. See appropriate regulations of the Secretary concerned for compensation and other matters pertinent to the employment of reporters and interpreters.

Chapter IV

JURISDICTION OF COURTS-MARTIAL

SOURCES, NATURE, AND REQUISITES—JURISDICTION AS TO PERSONS—JURISDICTION AS TO CONTEMPTS—TERMINATION OF JURISDICTION—EXCLUSIVE AND NONEXCLUSIVE JURISDICTION—RECIPROCAL JURISDICTION—JURISDICTION OF GENERAL COURTS-MARTIAL—JURISDICTION OF SPECIAL COURTS-MARTIAL—JURISDICTION OF SUMMARY COURTS-MARTIAL

8. SOURCES, 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 armed 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 (126*h*).

The jurisdiction of courts-martial does not, in general, depend on where the offense was committed (Art. 5). See, however, 213*e* as to crimes and offenses not capital punishable under Article 134. Similarly, the jurisdiction of a court-martial with respect to offenses against military law is not affected by the place where the court sits.

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 the following requisites: That the court was convened by an official empowered to convene it; that the membership of the court was in accordance with the law with respect to number and competency to sit on the court; and that the court was invested by act of Congress with power to try the person and the offense charged.

9. JURISDICTION AS TO PERSONS. Article 2 describes certain persons who are subject to the code. In addition to the persons described in Article 2, certain persons whose status as members of the armed forces or as persons otherwise subject to the code apparently has been terminated may, nevertheless, be amenable to trial by court-martial. See Articles 3, 4, and 73, appendix 2. Notwithstanding the provisions of Article 2(11), persons serving with, employed by, or accompanying the armed forces cannot be tried by courts-martial under that article in peacetime.

It is not necessary that an accused be a person subject to the code under Article 2 in order to be amenable to trial by court-martial for a violation of

Article 83, 104, or 106. For the jurisdiction of general courts-martial to try persons who by the law of war are triable by military tribunals, see 14.

10. JURISDICTION AS TO CONTEMPTS. A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder (Art. 48). See 118 (Contempts).

11. TERMINATION OF JURISDICTION. ***a. General rule.*** The general rule is that court-martial jurisdiction over commissioned officers, cadets, midshipmen, warrant officers, enlisted members and other persons subject to the code ceases on discharge from the service or other termination of that status and that jurisdiction as to an offense committed during a period of service or status thus terminated is not revived by re-entry into the military service or return into such a status.

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

Jurisdiction as to an offense against the code for which a court-martial may adjudge confinement for five years or more committed by a person while in a status in which he was subject to the code and for which he cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia is not terminated by discharge or other termination of that status (Art. 3(a)). Courts-martial may not try such offenses if, at the time of trial, the accused has severed all connection with the military and is in civilian status, but may do so if he has subsequently become subject to the code by re-entry into the armed forces or otherwise.

All persons in the custody of the armed forces serving a sentence imposed by a court-martial remain subject to military jurisdiction (Art. 2(7)).

Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is, subject to the statute of limitations, subject to trial by court-martial on that charge (Art. 83(2)) and is after apprehension subject to the code while in the custody of the armed forces for that trial. See 162. Upon conviction of that charge he is subject to trial by court-martial for all offenses under the code committed before the fraudulent discharge (Art. 3(b)).

No person who has deserted from the armed forces may be relieved from amenability to the jurisdiction of the code by virtue of a separation from any later period of service regardless of the type of discharge under which the separation was accomplished (Art. 3(c)).

When the person's discharge or other separation does not interrupt his status as a person belonging to the general category of persons subject to the code, court-martial jurisdiction over him does not terminate. Thus, when an officer holding a commission in a Reserve component of an armed force is discharged from that commission, while on active duty, by reason of his acceptance of a commission in a Regular component of that armed force, there being no interval between the periods of service under the respective commissions, there is 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 court-martial juris-

diction to try him for an offense committed before the discharge is not terminated by the discharge. Also, a discharged prisoner in the custody of an armed force may be tried for an offense committed while a member of the armed forces and before the execution of his discharge.

c. Effect of voluntary absence from trial. The accused's voluntary and unauthorized absence after the trial has commenced in his presence and he has been arraigned does not terminate the jurisdiction of the court, which may proceed with the trial to findings and sentence notwithstanding his absence. In such a case the accused, by his wrongful act, forfeits his right of confrontation.

d. Effect of termination of term of service. Jurisdiction having attached by commencement of action with a view to trial—as by apprehension, 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 before his official discharge—even though the term of enlistment may have expired—he may be retained in the service for trial to be held after his period of service would otherwise have expired. Similarly, if jurisdiction has attached by the commencement of action before the effective terminal date of self-executing orders, a person may be held for trial by court-martial beyond that terminal date. See also Article 2(1).

12. EXCLUSIVE AND NONEXCLUSIVE JURISDICTION. Courts-martial have exclusive jurisdiction of purely military offenses. But a person subject to the code is, as a rule, subject to the law applicable to persons generally, and if by an act or omission he violates the code 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*d* (Former jeopardy).

Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial (Art. 14(a)). See 97*c* and Article 14(b) as to the effect of such delivery to the civil authorities upon the execution of a sentence of a court-martial. See also pertinent departmental regulations made pursuant to Article 14.

Under international law, a friendly foreign nation has jurisdiction to punish offenses committed within its borders by members of a visiting force, unless it expressly or impliedly consents to surrender its jurisdiction to the visiting sovereign. Which nation shall exercise jurisdiction is a matter for determination by the nations involved and is not a right of the individual concerned.

The provisions of the code conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals (Art. 21). See Articles 104 and 106 for some instances of concurrent jurisdiction.

13. RECIPROCAL JURISDICTION. Each armed force has court-martial jurisdiction over all persons subject to the code. The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President (Art. 17(a)). So much

of the authority vested in the President by Article 22(a)(7) as enables him to empower any officer of the armed forces who is the commander of a joint command or joint task force to convene a general court-martial for the trial of members of any of the armed forces in accordance with Article 17(a) and this paragraph is delegated to the Secretary of Defense.

Jurisdiction by one armed force over personnel of another should be exercised only when the accused cannot be delivered to the armed force of which he is a member without manifest injury to the service. However, the commander of a joint command or joint task force who has authority to convene general courts-martial may convene courts-martial for the trial of members of another armed force when specifically empowered by the President or the Secretary of Defense to refer such cases for trial by courts-martial. Such a commander may, in his discretion, specifically authorize commanding officers of subordinate joint commands or joint task forces who are authorized to convene special and summary courts-martial to convene such courts for the trial of members of other armed forces under regulations which the superior commander may prescribe.

Cases involving two or more accused who are members of different armed forces should not be referred to a court-martial for a joint or a common trial.

As to the composition of a general or special court-martial for the trial of an accused who is a member of another armed force, see 4*g*.

In all cases, departmental review after that by the officer with authority to convene a general court-martial for the command which held the trial, where that review is required by the code, shall be carried out by the department that includes the armed force of which the accused is a member (Art. 17(b)).

14. JURISDICTION OF GENERAL COURTS-MARTIAL. ***a. Persons and offenses.*** Subject to the regulations prescribed in 13, general courts-martial have power to try any person subject to the code for any offense made punishable by the code. In addition they have power to try any person who by the law of war is subject to trial by military tribunal for any crime or offense against the law of war and for any crime or offense against the law of the territory occupied as an incident of war or belligerency whenever the local civil authority is superseded in whole or in part by the military authority of the occupying power. The law of occupied 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 (Art. 18).

A general court-martial composed only of a military judge does not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case (Art. 18).

b. Punishments. Upon a finding of guilty of an offense made punishable by the code, general courts-martial have the power, within certain limitations, to adjudge any punishment not forbidden by the code (Art. 18).

Certain punishments are mandatory under the law, for example, those prescribed by Articles 106 and 118 (1) and (4); the discretion of courts-martial to adjudge punishments may be limited by the President under Article 56 (125–127); the death penalty can be adjudged only when specifically authorized

(Arts. 18, 52(b)(1)); and certain kinds of punishment are prohibited (Art. 55). When a general court-martial exercises jurisdiction under the law of war, it may adjudge any punishment permitted by the law of war (Art. 18). Certain limitations on the discretion of military tribunals to adjudge punishments under the law of war are prescribed in international conventions.

15. JURISDICTION OF SPECIAL COURTS-MARTIAL. ***a. Persons and offenses.*** (1) Subject to the regulations prescribed in 13, special courts-martial have power to try any person subject to the code for any noncapital offense made punishable by the code and, under regulations as provided in this paragraph, for capital offenses (Art. 19). Although a capital offense for which there is prescribed a mandatory punishment beyond the punitive power of a special court-martial may never be referred to such a court, an officer exercising general court-martial jurisdiction over the command which includes the accused may cause any other capital offense to be referred to a special court-martial for trial. The Secretary of a Department may, by regulations, authorize officers exercising special court-martial jurisdiction to cause capital offenses, except those in violation of Articles 106 and 118 (1) and (4), to be tried by special court-martial without first obtaining the consent of the officer exercising general court-martial jurisdiction over the command.

(2) An offense is capital within the meaning of Article 19 when the maximum punishment which a general court-martial may adjudge therefor includes the death penalty. Subject to the exceptions noted in the following subparagraph, the offenses denounced in Articles 94, 99, 100, 102, 104, 110(a), 118(1) and (4), and 120(a) are capital at all times; those denounced by Articles 85, 90, 101, 106, and 113 are capital if committed in time of war.

(3) Although capital under one of the articles cited, an offense is not capital if the applicable maximum limit of punishment prescribed by the President under Article 56 is less than death (127*c*); nor is a case in which the death penalty is not mandatory but is authorized by law capital if the authority competent to convene a court-martial for a capital case has directed that the case be treated as not capital (126*a*). Upon a rehearing or new or other trial, a case is not capital if the legal sentence adjudged at a prior hearing or trial or as ultimately reduced by the convening or other proper authority was other than death (Art. 63). However, no offense for which a mandatory punishment is prescribed can be tried by a special court-martial if that punishment is beyond the power of a special court-martial to adjudge. Thus, a case of premeditated murder cannot be referred to a special court-martial for trial because the penalty in the event of conviction must be either death or imprisonment for life (Art. 118(1)).

See 92*a* regarding limitations on rehearings on sentence only before special courts-martial.

b. Punishments. Special courts-martial may, under such limitations as the President may prescribe (125–127; Art. 56) adjudge any punishment not forbidden by the code except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months. A bad-conduct discharge may not be adjudged by a special court-martial unless (1) a military judge was detailed to the trial, except in any case in which a military judge could not be detailed

because of physical conditions or military exigencies, (2) counsel qualified under Article 27(b) was detailed to represent the accused, and (3) a complete and verbatim record of the proceedings and testimony was made.

Physical conditions or military exigencies, as the terms are here used, may exist under rare circumstances, such as on an isolated ship on the high seas or in a unit in an inaccessible area, provided compelling reasons exist why trial must be held at that time and at that place. Mere inconvenience does not constitute a physical condition or military exigency and does not excuse a failure to detail a military judge.

If a military judge cannot be detailed because of physical conditions or military exigencies, a bad-conduct discharge may be adjudged provided the other conditions have been met. In that event, however, the convening authority must, prior to trial, make a written statement explaining why a military judge could not be obtained. This statement, which shall be submitted at trial as an appellate exhibit, must set forth in detail not only the reasons why a military judge could not be detailed, but also why the trial had to be held at that time and at that place, notwithstanding the absence of a military judge. This written statement is subject to review when the record of trial is examined under Articles 65, 66, and 67. Under no circumstances, however, may an accused be sentenced to a bad-conduct discharge by a special court-martial without counsel qualified under Article 27(b) having been detailed to represent the accused (6*c*). The requirement for counsel will be satisfied when counsel qualified under Article 27(b), and not otherwise disqualified, has been detailed and made available, even though the accused may choose not to cooperate with, or utilize the service of, such detailed counsel. See 48*a*.

When a bad-conduct discharge is adjudged and it appears:

(1) that counsel qualified under Article 27(b) was not detailed to represent the accused, or

(2) that a military judge was not present at trial and either no explanatory statement by the convening authority was attached to the record of trial, or the attached statement fails to establish the requisite physical conditions or military exigencies, the portion of the sentence providing for a bad-conduct discharge may not be approved. See 81*d*. As to forfeiture of pay, even when a bad-conduct discharge is adjudged, a special court-martial may not adjudge forfeitures in excess of two-thirds pay per month for six months. As to other limitations, see 125 to 127 (Punishments).

16. JURISDICTION OF SUMMARY COURTS-MARTIAL. ***a. Persons and offenses.*** Subject to the regulations prescribed in 13, summary courts-martial have the power to try persons subject to the code except commissioned officers, warrant officers, cadets, aviation cadets, and midshipmen for any non-capital offense made punishable by the code. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. This is true even though the person may also have refused punishment under Article 15 and demanded trial by court-martial. See 132. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial, as may be appropriate (Art. 20).

The principles stated in 15*a*(2) and (3) apply to summary courts-martial,

b. Punishments. Summary courts-martial may, under such limitations as the President may prescribe (125–127; Art. 56), adjudge any punishment not forbidden by the code except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to certain specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay (Art. 20); but in the case of enlisted members above the fourth enlisted pay grade, summary courts-martial may not adjudge confinement, hard labor without confinement, or reduction except to the next inferior grade.

The maximum amount of confinement and forfeiture of pay or of confinement and detention of pay, may be adjudged together in one sentence. Since confinement and restriction to limits are both forms of deprivation of liberty, only one of those punishments may be adjudged in a 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-martial might adjudge confinement at hard labor for 15 days (one-half of the authorized confinement), restriction to limits for 30 days (one-half of the authorized restriction), and forfeiture of two-thirds pay for one month. In such a case, the more severe form of deprivation of liberty is served first, the less severe thereafter.

Chapter V

APPREHENSION AND RESTRAINT

SCOPE—GENERAL—APPREHENSION—RESTRAINT—ARREST AND CONFINEMENT—DURATION AND TERMINATION—APPREHENSION OF DESERTERS BY CIVILIANS

17. SCOPE. The paragraphs on this subject deal primarily with the apprehension and restraint of persons subject to the code in connection with trial by court-martial, and deal only incidentally or not at all with the apprehension and restraint of these persons for other purposes, with the apprehension and restraint of persons not subject to the code, and with various other matters touching apprehension and restraint such as those concerning confinement on bread and water or diminished rations (125), the effective date of certain sentences (126*h*(5)), execution of a sentence of confinement (93), resisting apprehension (174*a*), breaking arrest or escaping from custody or confinement (174*b*, *c*, *d*), breaching or escaping from correctional custody imposed pursuant to Article 15 (213*f*(13)), releasing a prisoner without authority (175*a*), unlawful detention of another (176), and confinement as punishment for contempt (118).

18. GENERAL. ***a. Definitions.*** *Apprehension* is the taking of a person into custody (Art. 7(a); see 174*d*).

Arrest is the restraint of a person by an order, not imposed as punishment for an offense, directing him to remain within certain specified limits (Art. 9(a)).

Confinement is the physical restraint of a person (Art. 9(a)).

b. Basic considerations. (1) Any person subject to the code accused of an offense under the code shall be ordered into arrest or confinement, as circumstances may require; but when accused only of an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement (Art. 10). The foregoing provision is not mandatory and its exercise rests within the discretion of the person vested with the power to arrest or confine. No restraint need be imposed in cases involving minor offenses. A failure to restrain does not affect the jurisdiction of the court.

(2) No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces (Art. 12). If members of the armed forces are separated from the other categories mentioned, however, they may be confined in the same jails, prisons, or other confinement facilities.

(3) Other than restraint administered as prescribed in this subparagraph (18*b*(3)), forfeiture of pay or allowances due on and after the date of approval of certain sentences, and minor punishments for infractions of discipline while confined, no punishment may be imposed upon an accused as a

result of trial by court-martial until the sentence has been approved and ordered executed. No person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest, restriction, or confinement upon the charges pending against him, nor shall the arrest, restriction, or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline (Art. 13). Minor punishment shall include all punishment authorized by regulations of the Secretary of a Department for violation of the discipline prescribed for the place in which an accused is confined. See 68*g* regarding the effect of punishments for minor offenses upon subsequent court-martial proceedings. Prisoners being held for trial or whose sentences have not been approved and ordered executed will be accorded the facilities, accommodations, treatment, and training prescribed in pertinent regulations.

19. APPREHENSION. ***a. Who may apprehend.*** All commissioned officers, warrant officers, petty officers, noncommissioned officers, and, when in the execution of their guard or police duties, Air Force security police, military police, members of the shore patrol, and such persons as are designated by proper authority to perform guard or police duties, including duties as criminal investigators, are authorized to apprehend, if necessary, persons subject to the code or subject to trial thereunder upon reasonable belief that an offense has been committed and that the person apprehended committed it. See Article 7(b).

Petty officers, noncommissioned officers, and enlisted members performing guard or police duties should apprehend a commissioned or a warrant officer offender only pursuant to specific orders of a commissioned officer, except when this action is necessary to prevent disgrace to the service, the commission of a serious offense, or the escape of one who has committed a serious offense. In all cases involving the apprehension of commissioned officers and warrant officers by petty officers, noncommissioned officers, and enlisted members performing guard or police duties, the individual effecting the apprehension will, immediately thereafter, notify the officer to whom he is responsible or an officer of the Air Force security police, military police, or shore patrol.

b. In quarrels, frays or disorders. Commissioned officers, warrant officers, petty officers, and noncommissioned officers have authority to quell quarrels, frays, and disorders among persons subject to the code and to apprehend persons subject to the code who take part therein (Art. 7(c)).

c. Procedural steps to apprehend. An apprehension is effected by clearly notifying the person to be apprehended that he is thereby taken into custody. The order of apprehension may be either oral or written.

d. Securing custody of alleged offender. There is a clear distinction between the authority to apprehend and the authority to arrest or confine. Any person empowered to apprehend an offender is authorized to secure the custody of an alleged offender until proper authority may be notified, the limitations (21*a*; Art. 9) on the power to arrest or confine notwithstanding.

20. RESTRAINT. ***a. Status of a person in arrest.*** As used in this chapter, arrest is moral restraint imposed upon a person by oral or written orders of

competent authority limiting the person's 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. He is subject to the restrictions incident to arrest prescribed in regulations of the Secretary concerned. A person in the status of arrest cannot be required to perform his full military duty, and if he is placed—by the authority who placed him in arrest or by superior authority—on duty inconsistent with this status his arrest is thereby terminated. This, however, does not prevent his being required to do ordinary cleaning or policing, or to take part in routine training and duties not involving the exercise of command or the bearing of arms. But see 131*c*(3) with respect to arrest in quarters imposed as a punishment under Article 15.

b. Restriction in lieu of arrest. An officer authorized to arrest (21*a*) may, within his discretion and without imposing arrest, restrict an accused person of his command, or subject to his authority, 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 the restriction. 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 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 these restrictions are punishable as violations of Article 134, as are breaches of punitive restrictions.

c. Confinement before trial. As used in this chapter, confinement is physical restraint, imposed by either oral or written orders of competent authority, depriving a person of freedom pending the disposition of charges. Confinement will not be imposed pending trial unless deemed necessary to insure the presence of the accused at the trial or because of the seriousness of the offense charged.

d. Procedure for arresting or confining. (1) *General.* No person may be ordered into arrest or confinement except for probable cause (Art. 9(d)). No authority may 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 or reported facts should be sufficient to furnish reasonable grounds for believing that the offense has been committed by the person to be restrained.

The foregoing does not preclude imposition of restraint necessary for the administration of military justice, such as arrest, restriction, or confinement to insure the presence of an accused for impending execution of a punitive discharge. See also 21*d*. A person subject to punitive restraint as a result of the sentence of a court-martial or punishment under Article 15 is not chargeable with conformance to this restraint until notified of the action which places it in effect. See 131*e* and Article 57(b) and (c). Reasonable restraint may, however, be imposed pending receipt of notice that the sentence has been ordered into execution.

(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. The order of arrest may be either oral or written.

(3) *Procedural steps to confine.* A person to be confined is placed under guard and taken to the place of confinement. The authority ordering the confinement will cause to be delivered to the provost marshal, commander of the guard, correction officer, or master at arms, a written statement of the name, grade, and organization of the prisoner and of the offense of which he is accused. No provost marshal, commander of the guard, correction officer, or master at arms may refuse to receive or keep any prisoner committed to his charge by a commissioned officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner (Art. 11(a)).

(4) *Notification to accused.* When any person subject to the code is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him (Art. 10). Concerning the time element between service of charges and trial, see Article 35. See Article 98 concerning unnecessary delay in the disposition of any case.

(5) *Report required.* Every provost marshal, commander of a guard, correction officer, or master at arms to whose charge a prisoner is committed shall, within 24 hours after that commitment, or, in the case of a commander of the guard or master at arms, as soon as he is relieved from guard, report in writing to the commanding officer the name of the prisoner, the offense charged against him, and the name of the person who ordered or authorized the commitment (Art. 11(b)).

e. Unlawful detention. Any person subject to the code who, except as provided by law, apprehends, arrests, or confines any person is subject to trial by court-martial (Art. 97).

21. ARREST AND CONFINEMENT. ***a. Who may arrest or confine.*** Persons subject to the provisions of the code or to trial thereunder may be ordered into arrest or confinement as follows:

(1) *Commissioned officer, warrant officer, or civilian.* Only a commanding officer to whose authority the individual is subject may order a commissioned officer, warrant officer, or civilian into arrest or confinement. The arrest or confinement must be effected by an order, oral or written, delivered in person or by another commissioned officer (Art. 9(c)). The authority to order such persons into arrest or confinement may not be delegated (Art. 9(c)). For this particular purpose, the term "commanding officer" refers to an officer commanding a post, camp, station, base, auxiliary airfield, Marine barracks, naval or Coast Guard vessel, shipyard, or other place where members of the armed forces are on duty, and the officer commanding or in charge of any other command who, under Article 24, has power to convene a summary court-martial.

(2) *Enlisted member.* Any commissioned officer may order an enlisted member into arrest or confinement. The arrest or confinement must be effected by an order, oral or written, delivered in person or through other persons subject to the code (Art. 9(b)). A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of his command or subject to his authority into arrest or confinement (Art. 9(b)). Thus, the commanding officer of any command or detachment may delegate to the warrant officers, petty officers, or noncommissioned officers thereof authority to place enlisted members who are assigned or attached to his command

or detachment, or who are temporarily within its jurisdiction, for example, in quarters, camp, base, station, or ship, in arrest or confinement as a means of restraint at the instant when restraint is necessary.

b. Authority of trial counsel to restrain. A trial counsel of a court-martial, as such, has no authority to place in arrest or confinement a person about to be tried by the court. These are duties which devolve upon the convening authority or upon the post, station, or base commander or other proper officer in whose custody or command the accused is at the time.

c. 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.

d. Responsibility for restraint after trial. Upon notification from a trial counsel of the result of a trial (44*e*), a commanding officer will take prompt and appropriate action with respect to the restraint of the person tried. This 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. See 20*d*(1) and 88*f*.

22. DURATION AND TERMINATION. Although charges should be preferred promptly (25; Arts. 10, 30(b), 33), the accused is not automatically released from restraint because of any delay in preferring the charges. He must remain in arrest, restriction, 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 release from confinement in a military confinement facility is the commanding officer to whose command that facility is subject. Once a prisoner is placed in confinement, he passes beyond the control and power of release of the officer who initially ordered him confined, unless that officer is the commanding officer described above. The release of a prisoner without proper authority is a punishable offense (Art. 96). Undue delay in preferring or prosecuting charges should be investigated with a view to prompt disposition of the case or, when appropriate, the release of the accused from arrest, restriction, or confinement by competent authority. Any person subject to the code who is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under the code is subject to trial by court-martial (Art. 98).

23. APPREHENSION OF DESERTERS BY CIVIL AUTHORITIES. Any civil officer having authority to apprehend offenders under the laws of the United States or of a State, Territory, Commonwealth, or possession, or the District of Columbia may summarily apprehend a deserter from the armed forces and deliver him into the custody of those forces (Art. 8).

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

See Article 14 and appropriate regulations of the Secretary concerned as to delivery of offenders to and return from civil authorities.

Chapter VI

PREPARATION OF CHARGES

DEFINITIONS—WHEN PREFERRED—GENERAL RULES AND SUGGESTIONS—DRAFTING OF CHARGES—DRAFTING OF SPECIFICATIONS

24. DEFINITIONS. ***a. Charges and specifications.*** The formal written accusation in court-martial practice consists of two parts, the technical charge and the specification. For offenses in violation of the code, 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. See Article 30.

b. Additional charges. New and separate charges preferred after others have been preferred are known in military law as "additional charges." These ordinarily 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 if incorporated in the trial of the original ones before arraignment, but necessary preliminary procedures for all charges must be completed. See 65*b*. Additional charges may not be incorporated in the trial after arraignment.

25. WHEN PREFERRED. When any person subject to the code is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused (32*f*(1)) and to try him or to dismiss the charges and release him (Art. 10). Any person subject to the code who is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under the code shall be punished as a court-martial may direct (Art. 98). 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 a person is permitted to continue a course of conduct so that a ringleader or other conspirators may also be discovered or when a suspected counterfeiter goes uncharged until his guilty knowledge becomes apparent—a reasonable delay is permissible if the person concerned is not in arrest or confinement.

Ordinarily, charges for an offense should not be preferred against an individual if, after investigation, the only available evidence that the offense was committed is his statement that he committed it. In rare cases, however, it may be advisable to prefer charges before the completion of an investigation made pursuant to such a statement, as, for example, when the statute of limitations may run before all contemplated witnesses can be interrogated.

26. GENERAL RULES AND SUGGESTIONS. ***a. Elements of the offense.*** Before drafting charges and specifications, the accuser should analyze the facts and study the pertinent paragraphs of chapter XXVIII, in which appear the elements of proof of various offenses, and appendix 6, in which the forms of specifications are set forth.

b. Offenses arising out of one transaction. One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person. A person 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 (200*a*(8)). If a person 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 (169*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. See 74*b*(4) and 76*a*(5).

c. Joining minor and serious offenses. Ordinarily, charges for minor derelictions should not be joined with charges for serious offenses. For example, a charge of failure to report for a routine roll call 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. But see 30*g* and 33*h* regarding joinder of charges at a single trial.

d. Joint offenses. A joint offense is one committed by two or more persons acting together in pursuance of a common intent. See 156 for a discussion of principals and 157 for a discussion of accessories after the fact. Principals may be charged jointly with the commission of the same offense, but an accessory after the fact cannot be charged jointly with the principal he is alleged to have received, comforted, or assisted. 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 of purpose, does not necessarily establish it. The fact that several persons 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. However, if the participants are members of different armed forces, they should be charged separately. See 13. The preparation of joint charges is discussed in detail in appendix 6(*a*)(8). 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 69*d* (Motion to sever). In drafting charges, it must also be remembered that an accused cannot be called as a witness except upon his own request (148*e*). If, therefore, the testi-

mony of an accomplice is necessary, he should not be tried jointly with those against whom he is expected to testify.

27. DRAFTING OF CHARGES. The technical charge should be appropriate to all specifications under it and ordinarily will be written: "Violation of the Uniform Code of Military Justice, Article ____," giving the number of the article. Subparagraphs of the article under which the specification is laid need not be stated. Thus, in alleging murder while engaged in the perpetration of a robbery, "Article 118" is alleged in the charge, not "Article 118(4)." When an offense is specifically defined in a particular punitive article, it ordinarily should be charged under that article rather than under Article 134, the general 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 jurisdiction. For example, if an offense is alleged for which a mandatory punishment is prescribed by a particular article, such as premeditated murder (Art. 118), the mandatory punishment prescribed by the correct article must be adjudged, even if the offense has been laid under another article. See 74*c*. For other instructions, see appendix 6*a*.

28. DRAFTING OF SPECIFICATIONS. ***a. Contents of specification.*** The specification should include the following:

(1) The name of the accused and a showing, either by a description by rank and organization or otherwise, that he is within court-martial jurisdiction as to persons. For rules as to the manner of describing the accused, see the instructions in appendix 6*a*. The service number of the accused should not appear in the specification.

(2) A statement of where and when the offense was committed. Examples of the correct form for alleging place and time appear in appendix 6*a*.

(3) A statement in simple and concise language of the facts constituting the offense. As a general rule, the facts so stated will include all the elements of the offense sought to be charged. However, see appendix 6*c* for examples of permissible abbreviated pleadings. See 87*a*(2) as to the legal sufficiency of specifications. Any intent or state of mind, such as guilty knowledge, expressly made an essential element of an offense should be alleged; thus, the offense of delivering less than is called for by receipt in violation of Article 132 should be alleged as "knowingly" done. If the alleged act of the accused is not specifically proscribed by one of the punitive articles of the code, but is made an offense under the code by applicable statute (including Arts. 133 and 134), regulations, or custom having the effect of law (213*b*), words importing criminality such as "wrongfully," "unlawfully," "without authority," or "dishonorably," depending upon the nature of the particular offense involved, should be used to describe the accused's acts. In this connection, see 28*c*. However, if the alleged act of the accused would not under any circumstances be an offense, the mere addition to the specification of words importing criminality will not in itself convert the act into an offense. To a reasonable extent, matters of aggravation may be recited. If applicable, the wording of the appropriate punitive article or other statute should be used in preference to a supposedly equivalent expression. For example, in charging a person with being found drunk on duty, the specification should not allege that he was found intoxicated on duty.

b. Each specification to allege but one offense. 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. However, if two acts or a series of acts constitute one offense or if an offense is committed by more than one means, they may be alleged conjunctively.

c. Alleging written instruments; orders; directives. When a written instrument, for example, a false pass, a forged document, or a threatening letter, or a part thereof, forms the gist of an offense, the specification should set forth the writing, preferably verbatim, and the act or acts which constitute the offense. When the offense alleged constitutes a violation of an official directive, the specification should contain sufficient information to indicate what specific directive, or part thereof, the accused is alleged to have violated, and the act or acts which constitute the alleged violation. In this connection, see 147*a* and 171. However, omission, or an error in the citation, of the directive does not constitute fatal error if the omission or error does not mislead the accused to his prejudice. 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. Specimen forms. Specimen charges and forms for specifications covering the more usual offenses are in appendix 6. These prescribed forms should always be used when they are applicable or when they can be adapted to the offense which is to be alleged.

Chapter VII

SUBMISSION OF AND ACTION UPON CHARGES

INITIATING AND PREFERRING CHARGES—BASIC CONSIDERATIONS—ACTION BY PERSON HAVING KNOWLEDGE OF A SUSPECTED OFFENSE—ACTION BY COMMANDER EXERCISING IMMEDIATE JURISDICTION UNDER ARTICLE 15—ACTION BY OFFICER EXERCISING SUMMARY COURT-MARTIAL JURISDICTION—INVESTIGATION OF CHARGES—ACTION BY OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION

29. INITIATING AND PREFERRING CHARGES. ***a. Who may initiate.*** Charges are initiated by someone bringing to the attention of the military authorities information concerning an offense suspected to have been commited by a person subject to the code. This information may, of course, be received from anyone, whether subject to the code or not.

b. Who may prefer. Any person subject to the code may prefer charges, even if he is under charges, in arrest, or in confinement. In many cases, if the commander who exercises immediate jurisdiction over the accused under Article 15 is not empowered to convene courts-martial, he actually prefers the charges. However, when such a commander is also empowered to convene courts-martial and has only an official interest in the disposition of the case, it is customary for him to direct a commissioned officer of his command to make a preliminary inquiry into the suspected offense and to prefer appropriate charges if the facts shown by the inquiry warrant the preferring of charges. See 5*a*(3) and (4), 33*a*, and Article 1(9).

c. Ordering preferment. A person subject to the code cannot be ordered to prefer charges to which he is unable truthfully to make the required oath on his own responsibility.

d. Preparation of charge sheet. Charges will be prepared as prescribed by regulations of the Secretary of a Department.

e. Signing and swearing to charges. Charges and specifications shall be signed under oath before a commissioned officer of the armed forces authorized to administer oaths. For example, they may not be sworn to before a warrant officer who is not commissioned, even if such a warrant officer is an adjutant and therefore would have general authority to administer oaths for other purposes. See 113 and Articles 30 and 136. The form of oath is prescribed in 114*i* and is set forth on the charge sheet. In no case may an accused be tried on unsworn charges over his objection.

30. BASIC CONSIDERATIONS. The following basic considerations apply to any action upon a charge or with respect to a suspected offense:

a. No person subject to the code may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing

him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial. See Article 31(b).

b. In an interrogation at which an accused or suspect is in custody, he will also be advised that he has a right to consult with counsel, provided as indicated in 34*c*, and to have counsel present at the interrogation. After having been advised of these rights, the accused or suspect ordinarily should not be interrogated in the absence of counsel unless he expressly and voluntarily states (1) that he does not desire counsel and (2) that he is willing to make a statement. See 140*a*(2).

c. No charge may be referred to a general court-martial for trial until the formal investigation required by Article 32 has been made (34).

d. No charge may be referred to a general court-martial for trial until it has been referred for consideration and advice to the staff judge advocate or legal officer of the convening authority (35*b*; Art. 34(a)).

e. No charge may be referred for trial if the convening authority is satisfied that the accused is insane or was insane at the time of the offense charged (121).

f. When it appears to any accuser, or to any investigating officer or commander to whom sworn 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 convene a court-martial for the trial of the offense charged so that depositions may be taken in accordance with the provisions of Article 49. See 5 and 117.

g. Subject to jurisdictional limitations and at the discretion of the convening authority, charges against an accused, if tried at all, ordinarily should be tried at a single trial by the lowest court that has power to adjudge an appropriate and adequate punishment. See 26*c* and 33*h*.

h. Immediately upon receipt of charges or of information as to a suspected offense, the proper authority shall determine the type of restraint, if any, that is to be imposed on the accused pending trial or other disposition of the case. See 18*b*, 20, 22, and Article 10.

i. Upon receipt of charges or of information as to a suspected offense, the proper authority—ordinarily the immediate commanding officer of the accused—shall take prompt action to determine what disposition should be made thereof in the interests of justice and discipline. See Articles 30 and 98. When a person is held for trial by a general court-martial, the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction; otherwise he shall report in writing to that officer the reasons for delay (Art. 33).

31. ACTION BY PERSON HAVING KNOWLEDGE OF A SUSPECTED OFFENSE. When any person has knowledge of an offense committed by a person subject to the code, it is customary to report the facts to the commander exercising immediate jurisdiction over the accused under Article

15 to permit that commander to take the action outlined in 32. If charges are preferred by someone other than the commander who exercises immediate jurisdiction under Article 15, they should be forwarded to that commander to permit him to take the action outlined in 32.

32. ACTION BY COMMANDER EXERCISING IMMEDIATE JURISDICTION UNDER ARTICLE 15. The provisions of this paragraph (32) apply only when the commander exercising immediate jurisdiction is not also empowered to convene courts-martial. If this commander is so empowered, see 33. Upon receipt of charges or information indicating that a member of his command has committed an offense punishable by the code, action will be taken by the commissioned officer or warrant officer immediately authorized to exercise powers over the accused under Article 15, who is referred to hereafter in this chapter as the "immediate commander." Ordinarily he will dispose of the case in the following manner:

a. General. All actions taken under this paragraph are subject to the basic considerations stated in 30.

b. Preliminary inquiry. He will make, or cause to be made, a preliminary inquiry into the charges or the suspected offenses sufficient to enable him to make an intelligent disposition of them. This inquiry is usually informal. It may be conducted by the commander or by a member of his command. It may consist only of an examination of the charges and the summary of expected evidence which accompanies them. In other cases it may involve a more extensive investigation and the collection of evidence. With respect to searches, see 152. See 32*f* for the information which must accompany charges if they are forwarded with a recommendation for trial. It is not the function of the person making the inquiry merely to prepare a case against the accused. He should collect and examine all evidence that is essential to a determination of the guilt or innocence of the accused, as well as evidence in mitigation or extenuation.

c. Preferring charges. When charges have not already been preferred and the preliminary inquiry shows that offenses punishable by the code have been committed by a member of his command, he may prefer appropriate charges for those offenses which he believes cannot properly be disposed of under Article 15. Charges may be preferred against an accused who is absent without authority, to stop the running of the statute of limitations. If charges have already been preferred but they are not formally correct or do not conform to the expected evidence, formal corrections, and those changes in the charges and specifications which are needed to make them conform to the evidence, may be made (33*d*; Art. 34(b)). When the preliminary inquiry shows that additional or different offenses have been committed (24*b*), the immediate commander may prefer appropriate new charges for those offenses which he believes cannot properly be disposed of under Article 15. In such a case, he should consolidate all charges against the accused into one set of charges.

d. Dismissal of charges. He may decide, as a result of the preliminary inquiry, that all or some of the charges do not warrant further action because they are trivial, do not state offenses, or are unsupported by available evidence, or because there are other sound reasons for not punishing the accused with respect to the acts alleged. Likewise, as to suspected offenses for which charges have not been preferred, he may determine that charges should not be preferred.

If so, he need not prefer charges. Unless competent superior authority has directed otherwise, he may dismiss all or part of any charges that have been preferred. With respect to offenses for which charges have been preferred, specifications and charges thus disposed of will be lined out and initialed. If all offenses charged are dismissed, he may notify the accuser of the action taken and the reasons therefor.

e. Nonjudicial punishment. Unless competent superior authority has directed otherwise, he may impose punishment under Article 15 for any minor offense, whether or not it is charged. See 128 and 131. With respect to offenses for which charges have been preferred, specifications and charges disposed of under Article 15 will be lined out and initialed and any remaining charges and specifications renumbered. If he believes punishment under Article 15 is proper in the case of a commissioned officer or warrant officer, he ordinarily should forward the charges and allied papers or the report of preliminary inquiry to the officer exercising immediate summary court-martial jurisdiction with an appropriate recommendation. When reduction in pay grade is considered a proper punishment and he is not authorized to impose that punishment, he should forward the charges or report to a commander who has that authority under Article 15. In this connection, see 129 and 131*b*(2).

f. Forwarding charges. If trial by court-martial is believed to be appropriate for any remaining offenses, the charges will be forwarded, ordinarily through the chain of command, to the officer exercising summary court-martial jurisdiction over the command of which the accused is a member. In forwarding the charges, the following rules will be observed:

(1) *Informing accused of charges.* Before forwarding the charges, the immediate commander will inform the accused of the charges against him (Arts. 10, 30(b)) and complete and sign the certificate to that effect on the charge sheet. When, because of the unavailability of the accused, it is impracticable to comply with this requirement, a report of the circumstances will be included in the letter forwarding the charges.

(2) *Notice of refusal to accept punishment under Article 15.* The immediate commander will note in the space provided on page 4 of the charge sheet whether the accused has been permitted and has elected to refuse punishment under Article 15 as to any offense charged. See 16*a*, 132, and Article 20.

(3) *Minor offenses.* When charges are submitted with a view to trial by summary court-martial or action under Article 15, they need not be forwarded by a formal letter of transmittal, but should be accompanied by evidence of admissible previous convictions and sufficient information about the circumstances, including an informal summary of the expected evidence, to enable the commander receiving them to make an intelligent disposition of the case without an additional investigation.

(4) *Serious offenses.* When charges are submitted with a view to trial by special or general court-martial, they will be forwarded by a letter of transmittal signed personally by the forwarding officer. The letter will include, or carry as inclosures, the following:

(*a*) 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.

(*b*) All reasonably available documentary evidence and exhibits. If, because of the bulk of this evidence or for other good reason, it is inadvisable to forward it with the letter of transmittal, it should be properly marked, preserved, and referred to in the charges or the letter of transmittal, with a statement as to where it may be found.

(*c*) Evidence of admissible previous convictions by courts-martial (75*b*(2)) which, in the case of enlisted persons, is usually in the form of an attested copy of the pertinent entries in the accused's personnel records. See 143*b*(2) and 144*b* (Official records).

(*d*) Explanation of any unusual features of the case, including such matters as the character of the accused's military service before the offense charged and his record before entry into the military service, if known.

(*e*) Specific recommendation as to the disposition of the charges.

33. ACTION BY OFFICER EXERCISING SUMMARY COURT-MARTIAL JURISDICTION. Upon the receipt of charges or information indicating that a member of his command has committed an offense punishable by the code, the officer exercising summary court-martial jurisdiction over the accused will—subject to the *basic considerations* stated in 30—ordinarily dispose of the case in the following manner:

a. Preliminary inquiry. When charges have not already been preferred, and the officer exercising summary court-martial jurisdiction is also the commander exercising immediate jurisdiction over the accused under Article 15, he may take the action outlined in 32*b* and *c*. However, if the officer exercising summary court-martial jurisdiction becomes an accuser in fact, he renders himself ineligible to exercise whatever powers he may have had to convene a special or general court-martial for the trial of the case. See Articles 22(*b*) and 23(*b*). Accordingly, when he has only an official interest in the case (5*a*(4)), he ordinarily will transmit the available information about the case to an officer of his command "for preliminary inquiry and report, including, if appropriate in the interest of justice and discipline, the preferring of any charges which appear to you to be sustained by the expected evidence."

Unless otherwise directed, the officer to whom such a case is transmitted will make a preliminary inquiry similar to that described in 32*b*. If the officer making the inquiry forwards his report without preferring charges, the officer exercising summary court-martial jurisdiction will take the action outlined in 32, as appropriate. If the officer making the inquiry prefers charges, the officer exercising summary court-martial jurisdiction will dispose of them in accordance with the rules prescribed in the remaining subparagraphs of this paragraph (33).

b. Date of receipt. Immediately upon the receipt of sworn charges, the officer exercising summary court-martial jurisdiction over the command will cause the hour and date of receipt to be entered in the space provided on page 3 of the charge sheet. This date is important as it fixes the end of the period of time which is to be considered in determining whether the prosecution of the accused is barred by the statute of limitations. See Article 43(b) and (c).

c. Informing accused of charges. If, when charges are received by the officer exercising summary court-martial jurisdiction, it appears that the accused has not been advised of the charges against him, the action prescribed in 32*f*(1) will be taken promptly.

d. Alterations. The officer exercising summary court-martial jurisdiction will make a preliminary examination of the charges and the allied papers to determine whether the specifications are laid under the proper punitive articles, are formally correct, and are supported by the expected evidence. Charges forwarded or referred for trial and the accompanying papers should be free from defect of form and substance, but delays incident to the return of papers to the accuser for correction of defects which are not substantial will be avoided. Obvious errors may be corrected and the charges may be redrafted over the accuser's signature, provided the redraft does not 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 change involves the inclusion of any person, offense, or matter not fairly included in the charges as preferred, new charges, consolidating all offenses which are to be charged, should be signed and sworn to by an accuser. See Article 34(b).

e. Investigations. When the offenses are so serious that it may be appropriate to forward them with a recommendation for trial by general court-martial, he will appoint a commissioned officer to investigate the charges in accordance with 34 and Article 32, subject to the following exceptions:

(1) *Effect of investigation of subject matter before charges preferred.* If an investigation of the subject matter of an offense was conducted before the accused was charged with the offense, for example, by a court of inquiry, and if the accused was present at the investigation and was afforded the rights set forth in Article 32(b), no further investigation of that charge is necessary unless it is demanded by the accused after he is informed of the charge. A demand for further investigation in such a case entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf. See Article 32(c).

(2) *Effect of changing charges after investigation is made.* If the charges were investigated pursuant to 34 and Article 32(b) before reaching the officer exercising summary court-martial jurisdiction, he need not direct another investigation unless there is reason to believe that a further investigation would aid in the administration of military justice. In any event, supplementary investigations by the same or a different investigating officer may be directed. If, at any time after an investigation under Article 32(b) has been conducted, the charges are changed to allege a more serious or essentially different offense, a new investigation should be directed to give the accused an opportunity to exercise the privileges afforded him by 34 and Article 32(b) with respect to the new or different matters alleged. In this connection, see 33*d*.

f. Dismissal of charges. He has the same authority as the commander exercising immediate jurisdiction over the accused under Article 15 with respect to dismissal of all or part of the charges. In this connection, see 32*d*.

If the officer exercising summary court-martial jurisdiction finds that trial of a particular case would be warranted except for the fact that it would probably be detrimental to the prosecution of a war or inimical to the national security, he will, without dismissing any charges that may have been preferred, forward the case to the officer exercising general court-martial jurisdiction over the command. Any officer exercising general court-martial jurisdiction who receives the charges in such a case is authorized to determine whether trial

of the accused is warranted under the circumstances and, if so, whether the security considerations involved are paramount to trial. As appropriate under the circumstances, such a commander may dismiss the charges, authorize their trial, or forward them to the Secretary concerned. In this connection, see Article 43(e).

g. Nonjudicial punishment. He has the same authority as the commander exercising immediate jurisdiction over the accused under Article 15 with respect to the imposition of nonjudicial punishment. See 32*e*, 129, and 131. He may impose this punishment himself or he may return the case to the immediate commander of the accused for appropriate action. In the case of warrant officers and commissioned officers, he may, unless his disciplinary authority has been limited or withheld (128), impose nonjudicial punishment. If his authority has been limited or withheld, or if he believes a greater punishment is appropriate in the interest of justice and discipline, he should forward the charges and allied papers or, if charges have not been preferred, the report of preliminary inquiry to the officer exercising general court-martial jurisdiction or the general or flag officer in command. See 131*b*(1)(*b*) and Article 15(b)(1)(B).

h. Disposition of the charges by trial. If he determines that some punishment should be adjudged against the accused but that punishment under Article 15 is not appropriate or has in a proper case been refused by the accused, he must decide to which kind of court-martial the case should be referred. Subject to jurisdictional limitations and at the discretion of the convening authority, charges against an accused, if tried at all, ordinarily should be tried at a single trial by the lowest court that has the power to adjudge an appropriate and adequate punishment. See 26*c*, if both major and minor offenses are involved. The fact that, upon conviction of a particular offense, the Table of Maximum Punishments (127*c*) may authorize a punishment in excess of that which can be adjudged by a summary or special court-martial does not in itself preclude reference of such an offense to a summary or special court-martial for trial. In this connection, see 15*a* and 16*a* as to the authority to cause a capital case to be tried by an inferior court-martial. He should take into consideration the character and prior service of the accused in deciding upon his action or recommendation. If he determines that the offense is so serious that the accused, if convicted, should be separated from the service by a punitive discharge, he must decide to which court the case should be referred in order that the appropriate kind of discharge—dishonorable or bad-conduct—may be adjudged. In this connection, see 76*a* (3) and (4). Ordinarily, a specification as to which the statute of limitations (Art. 43) apparently may be successfully pleaded should not be referred for trial. See 68*c*.

i. Forwarding charges. When trial by a special or general court-martial is deemed appropriate and he is not empowered to convene such a court for the trial of the case (5*a*, *b*), he will forward the charges and necessary allied papers, in accordance with regulations of the Secretary concerned, to an officer exercising the appropriate kind of court-martial jurisdiction. If, however, the forwarding officer is an accuser (5*a*(4)), the court must be convened by a competent authority superior in rank or command. The charges will be forwarded by indorsement or letter of transmittal, signed by the forwarding officer, and will contain his recommendation as to their disposition. If the charges are forwarded

with a recommendation for trial by general court-martial, the forwarding officer should observe the following rules:

(1) He will inclose a copy of the report of investigation made under 34 and Article 32 or will explain why such an investigation was not made before forwarding the charges.

(2) If an investigation under 34 and Article 32 was made, he will cause a copy of the substance of the testimony taken on both sides during the investigation to be furnished to the accused and will report that fact in his indorsement or letter of transmittal.

(3) He will note in the indorsement or letter of transmittal whether any material witnesses may not be available at the time of the trial and the action that has been initiated to have these witnesses or their depositions available at the trial. See chapter XXIII and Article 49.

j. Reference for trial. (1) *Manner of reference.* Charges are ordinarily referred to a court-martial for trial by means of the indorsement on the charge sheet. Although the indorsement is usually completed on all copies of the charge sheet, only the original need be signed. The indorsement may include any proper instructions; for instance, a direction that the charges be tried with certain other charges against the accused (24*b*), or in a common trial with other persons (33*l*), or that a capital case be treated as not capital (15*a*(3)); or, in a special court-martial, that the authorized maximum punishment does not include a bad-conduct discharge (15*b*). If, for any proper reason, it is desired to refer charges to a court different than that to which they were originally referred, the new reference is customarily accomplished by means of a new indorsement affixed to the charge sheet. In such a case the original indorsement is lined out and initialed.

(2) *Special court-martial.* The officer exercising summary court-martial jurisdiction (5*c*; Art. 24) is *often also empowered to convene special courts martial* (5*b*; Art. 23). If he is so empowered and determines that trial by special court-martial is appropriate, he should complete the indorsement in the prescribed manner and transmit the charges and allied papers to the trial counsel of the court.

(3) *Summary court-martial.* If he determines that trial by summary court-martial is appropriate, he should complete the indorsement in the prescribed manner and transmit the charges to the summary court-martial. If the only officer present with a command decides to try the charges as summary court-martial, no indorsement is required.

k. Reporters in trials by special courts-martial. When the convening authority is authorized to direct that a reporter not be detailed or employed for trials by special courts-martial, he may, in an appropriate case, include in the indorsement referring the charges for trial the direction, "Reporter not authorized." In this connection, see 7.

l. Common trial. If two or more persons are charged with the commission of an offense or offenses which, although not jointly committed (26*d*), were committed at the same time and place and are provable by the same evidence, the convening authority may in his discretion direct a common trial for these offenses only. Offenses charged against different accused 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. See 69*d* (Motion to sever).

m. Suspected insanity. If he suspects that an accused lacks mental capacity or that he was not mentally responsible at the time of the offense charged, he should initiate an inquiry into the mental condition of the accused as provided in 121.

34. INVESTIGATION OF CHARGES. ***a. Introductory statement.*** No charge may be referred to a general court-martial for trial until a thorough and impartial investigation thereof has been made (Art. 32).

The officer appointed to make such an investigation should be a mature officer, preferably an officer of the grade of major or lieutenant commander or higher, or one with legal training and experience. Neither the accuser nor any officer who is expected to become the military judge or 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 31 and 32. The purpose of the investigation required by Article 32 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 or mentioned in the papers accompanying the charges. 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 32 which results in prejudice to the substantial rights of the accused 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 69*c* and 87*c*. Similarly, a failure to comply with the provisions of Article 31 may result in a miscarriage of justice. Recommendations of an investigating officer are advisory only.

The remainder of this paragraph (34) 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 reason, 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.

b. Advising the accused. 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 certified under Article 27(b) represent him at the investigation if he so desires, including the several alternatives available to him as set forth in 34*c*; his right to cross-examine witnesses against him if they are available

and to present anything he may desire in own behalf, either in defense, extenuation, or mitigation; his right to have the investigating officer examine available witnesses requested by him; his right to make a statement in any form; and his rights under Article 31 (b).

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

(1) If the accused desires civilian counsel provided by him, he will give the accused a reasonable opportunity to obtain the civilian counsel without unduly delaying the investigation, but that counsel will not be provided at government expense; or

(2) If the accused desires military counsel of his own selection and that counsel is reasonably available within the command, he will provide that military counsel. If the 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; or

(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 counsel certified under Article 27 (b) to represent the accused as counsel at the investigation; otherwise he will forward the request of the accused directly and expeditiously to the officer exercising general court-martial jurisdiction over the command, who will promptly designate and provide certified counsel.

The principles stated in 42*b* and, except as indicated above, in 48 apply equally to the counsel at the investigation. Whenever counsel is requested by the accused, the investigation will be conducted in the presence of the counsel unless the accused expressly excuses him.

If practicable, charges must be forwarded to the officer exercising general court-martial jurisdiction within eight days after an accused is ordered into arrest or confinement (Art. 33). 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 obtain civilian counsel provided by him within a reasonable time after having been given an opportunity to obtain that counsel.

If the accused is represented by counsel, the government may be represented at the investigation by counsel with equivalent qualifications designated by the officer who directed the investigation, at the discretion of the latter.

d. Witnesses. 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, who will determine the availability of the witness. There is no provision for paying compensation to any witness who gives evidence at the pretrial investigation. There is no provision for compelling the attendance of witnesses not subject to military jurisdiction.

Witnesses who give evidence during the investigation must be examined

on oath or affirmation and, unless procurement of their signatures will cause undue delay in the completion of the investigation, they should sign and swear to the truth of the substance of their statements after they have been reduced to writing. If the accused elects to make a statement, he shall have the option of making it under oath or affirmation or of making an unsworn statement and he should be afforded the opportunity of signing and swearing to the truth of the substance of his statement after it has been reduced to writing. See 114*j* for forms of oaths. If it appears that material witnesses on behalf of the accused or the prosecution may not be available at the time of trial, the investigating officer should initiate action with a view toward obtaining necessary depositions. See 30*f*, 117, and Article 49.

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 the witness, the witness need not be called even if available. When a witness requested by the accused is available, the witness need not be called if the accused withdraws his request upon being informed that the testimony expected by the accused from the 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, if counsel has been requested, to his counsel. Upon objection by the accused or his counsel, statements of unavailable witnesses which are not under oath or affirmation will not be considered by the investigating officer.

e. Formal report. 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 to the officer who directed it. In this connection, see 34*f*. Such a report ordinarily will be made in triplicate, but one additional copy will be made for each accused in excess of one. Although previously prepared forms may be used, special care should be exercised to insure that the use of these forms does not result in perfunctory or inaccurate certifications of compliance with the requirements of this paragraph (34). 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 the 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:

(1) 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.

(2) A statement of the substance of the testimony taken on both sides, including any stipulated testimony, for example, when an accused withdraws a request for a witness upon being told that the testimony expected would be regarded as taken. One additional copy of the statement of the substance of the testimony taken will be prepared for each accused to enable the officer exercising summary court-martial jurisdiction to furnish each

accused with a copy if the charges are forwarded to the officer exercising general court-martial jurisdiction. See 33*i*(2) and Article 32(b).

(3) 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 these items.

(4) 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.

(5) A statement as to whether essential witnesses will be available in the event of trial. If essential witnesses will not be available, the reasons for nonavailability will be stated.

(6) The recommendation of the investigating officer as to what disposition should be made of the case.

f. Informal report. Unless competent superior authority has directed otherwise, if it does not appear that the case will be disposed of by reference for trial by general court-martial, an informal report to the officer who directed the investigation will be made orally or by a brief memorandum, indorsement, notations on the charge sheet, or other suitable means. However made, the report need include in abbreviated form only the items required in 34*e*(1), (2), (4), and (6) above, 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.

35. ACTION BY OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION. ***a. General.*** The charges received by the officer exercising general court-martial jurisdiction ordinarily will have been investigated under the provisions of 34 and Article 32, and will have been examined and forwarded with an appropriate recommendation by an officer exercising summary court-martial jurisdiction. The charges and allied papers usually will be in triplicate, with one additional copy for each accused in excess of one. With respect to the disposition of charges received by him, he is empowered, as the officer exercising general court-martial jurisdiction, to refer them for trial to a general court-martial convened by him, to authorize the trial of certain capital offenses by inferior courts-martial, or, in lieu of trial, to impose any of the punishments authorized in Article 15(b)(1)(B) upon commissioned officers and warrant officers of his command (See 131*b*(1)). In addition to these powers—of which only the power under Article 15 may be delegated (128*a*)—he may take any action on the charges which the immediate commander (32) or the officer exercising summary court-martial jurisdiction (33) is authorized to take. He may take this latter action himself or he may return the charges and allied papers to a proper subordinate commander for appropriate disposition.

b. Reference to staff judge advocate or legal officer. Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate or legal officer for consideration and advice. The convening authority may not refer a charge to a general court-martial for trial unless he has found that the charge alleges an offense under the code and is warranted by evidence indicated in the report of investigation (Art. 34(a)). In those cases in which the Secretary concerned is the convening authority, the

appropriate Judge Advocate General shall act as the staff judge advocate or legal officer. In any case in which the proceedings have been terminated by declaration of a mistrial, the convening authority, before directing further trial by general court-martial, will again refer the charges to his staff judge advocate or legal officer for consideration and advice. See 56*e*(3).

Subject to the provisions of this paragraph (35), reference to a staff judge advocate or legal officer will be made and his advice submitted as provided in 35*c*. The convening authority shall at all times communicate directly and personally with his staff judge advocate or legal officer in matters relating to the administration of military justice. See Article 6(b). No person who has acted as investigating officer, military judge, or member of the court, prosecution, or defense in any case may later act as staff judge advocate or legal officer in the same case. See Article 6(c).

c. Action of the staff judge advocate or legal officer. The advice of the staff judge advocate or legal officer shall include a written and signed statement as to his findings with respect to whether there has been substantial compliance with the provisions of Article 32, whether each specification alleges an offense under the code, and whether the allegation of each offense is warranted by evidence indicated in the report of investigation. The advice should include, as appropriate, a discussion of the circumstances and available evidence, significant mitigating and extenuating factors, and any prior recommendations for disposition of the case. It shall also include a signed recommendation of the action to be taken by the convening authority. The recommendation will accompany the charges if they are referred for trial.

Chapter VIII

CONVENING OF COURTS-MARTIAL

CONVENING ORDERS—CHANGES IN PERSONNEL—COMMAND RELATIONSHIP WITH COURT

36. CONVENING ORDERS. ***a. General.*** See 4 to 6, inclusive, for various matters relating to the convening of courts-martial including the detail of a military judge, and the detail of trial counsel, defense counsel, and their assistants. It may be inferred that personnel detailed to court-martial duty are on active duty with an armed force. See Article 25.

b. Form and content. A court-martial is created by a convening order issued by the convening authority. The convening order designates the kind of court, the place and time it is to meet, lists the members of the court, and, when appropriate, the military judge and the members of the prosecution and defense. It should designate no more members than those who are expected to be present for the trial of cases referred to the court which it convenes. The qualifications of the military judge under Article 26 and of the members of the prosecution and defense under Article 27 are shown in the convening order. Unless otherwise provided by regulations of the Secretary concerned, the convening order shall also show that the certified legal personnel (Art. 26(b) and Art. 27(b)) have previously taken a prescribed oath to perform their duties faithfully (Art. 42(a)). See chapter XXII as to oaths generally. If enlisted persons are detailed as members of the court, the unit—company, squadron, ship's crew, or corresponding body—of which each is a member is shown (4*b;* Art. 25(c)). The convening order may contain a provision for the withdrawal of cases from other courts-martial and referral of those cases to the new court (56); it should contain no reference as to whether a reporter or interpreter is authorized. See appendix 4 for forms of convening orders.

c. Selection of personnel. (1) *General.* Courts-martial are ordinarily composed of personnel of the convening authority's command. With respect to utilizing personnel of other commands or other armed forces, see 4*f* and *g*. If his subordinate commands are separated geographically, the convening authority may convene a court for each locality, using personnel from the area where the court is to sit. When a general court-martial is to be, or has been, convened to sit at a post, camp, station, or subordinate command located at a distance from the officer exercising general court-martial jurisdiction, and the personnel of the court are selected from that post, camp, station, or subordinate command, the commander of the installation or subordinate command should transmit timely recommendations to the convening 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.

(2) *Enlisted members.* When charges against an enlisted person have been referred to a general or special court-martial to which enlisted members have not been detailed, the accused may request that enlisted persons serve on the court (61*h*, *j*; Art. 25(c)). Such a request should be made in writing before the conclusion of any Article 39(a) session called by the military judge prior to assembly, and must be made before the court is assembled for the trial of the accused. When a request is made, the convening authority shall:

(*a*) Detail a sufficient number of eligible enlisted persons to the court and, if appropriate, relieve a sufficient number of officers or warrant officers from the court to the end that at least one-third of the members who will actually participate in the trial of the case will be enlisted persons; or

(*b*) Withdraw the charges from the court to which they were originally referred and refer them to a court which includes the required percentage of eligible enlisted persons; or

(*c*) Advise the court before which the charges are pending to proceed with the trial in the absence of enlisted members if eligible enlisted persons cannot be obtained because of physical conditions or military exigencies. When this action is taken, the convening authority should transmit to the trial counsel, for inclusion in the record of trial, a detailed written statement of the reasons why enlisted persons could not be obtained for the trial of the case. This statement may be transmitted to the trial counsel when the charges are referred to trial if the facts are known at that time.

37. CHANGES IN PERSONNEL. ***a. General.*** Subject to the exceptions stated below (37*b*), it is within the discretion of the convening authority to make changes in the composition of courts-martial convened by him. For instance, he may detail new members to a court in lieu of, or in addition to, the members of the original court; or he may detail a new military judge, trial counsel, or defense counsel in lieu of the personnel designated to perform those respective duties by the original convening order. When practicable, the convening authority should change the composition of courts-martial from time to time to provide the maximum opportunity for eligible personnel to gain experience in the administration of military justice.

b. Exceptions. No member of a general or special court-martial may be absent or excused after the court has been assembled for the trial of the accused except for physical disability or as a result of a challenge or by order of the convening authority for good cause (Art. 29(a)). Good cause contemplates a critical situation such as emergency leave or military exigencies, as distinguished from the normal conditions of military life. The determination of facts which constitute good cause for the excuse from attendance or the relief of a member rests within the discretion of the convening authority. The record of trial should detail the basis for absence or relief of any member after assembly and affirmatively establish that the absence or relief falls within the provisions of Article 29(a). The convening authority may not detail additional members to a general or special court-martial after the court has been assembled unless the court is reduced below a quorum or for other good cause. If practicable, he should excuse from future sessions of the court in a particular case any member who was absent when testimony on the merits was heard or other important proceedings were held.

See 41*c* for procedure when a member is absent.

c. Manner in which effected. (1) *Changes in composition.* Changes in the composition of a court-martial, such as changes which involve the detail of new personnel to a court or the relief of a member, are usually accomplished by the promulgation of formal written orders amending the original convening order. If it is necessary to make a change by oral order, message, or signal, the oral order, message, or signal should be confirmed by written orders. For forms of amending orders, see appendix 4. Amendments of the original convening order should be kept to a minimum. To avoid making a number of separate changes by way of amendment, it is better practice to convene a new court. If trial proceedings have not begun, any case pending before the old court may be withdrawn from it and referred to the new court subject to the limitations in 56. In convening a new court, the old court should not be dissolved, nor the order convening the old court rescinded or revoked, as it may be necessary to reassemble the old court for revision proceedings.

(2) *Excusing personnel.* If the convening authority excuses a member or counsel from attendance at future sessions of a general or special court-martial in a particular case or series of cases, but does not desire to relieve him permanently as a member or counsel, he may do this by oral order, message, or signal and need not confirm the action by a written order. See 41*c*, 44*b* and *c*, and 46*b* and *c*.

38. COMMAND RELATIONSHIP WITH COURT. ***a. General.*** Convening authorities and other commanding officers are expressly forbidden to censure, reprimand, or admonish a court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings. No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any other convening, approving or reviewing authority with respect to their judicial acts (Art. 37). See also Article 98.

b. Exceptions. (1) *Instructions.* The provisions of 38*a* do not prohibit general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial.

(2) *Court statements.* The provisions of 38*a* do not prohibit statements and instructions given in open court by the military judge, president of a special court-martial without a military judge, or counsel.

c. Evaluation of member. In the preparation of an effectiveness, fitness or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty, no person subject to the code may consider or evaluate the performance of duty of any such member as a member of a court-martial.

d. Evaluation of counsel. In the preparation of an effectiveness, fitness or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified

to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty, no person subject to the code may give a less favorable rating or evalaution of any defense counsel because of the zeal with which such counsel represented any accused before a court-martial. See 43.

e. Evaluation of military judge. (1) *General courts-martial.* Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge detailed to a general court-martial, which relates to his performance of duty as a military judge.

(2) *Special courts-martial.* The convening authority shall not prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to a special court-martial which relates to his performance of duty as a military judge. When the military judge is normally rated or his report is reviewed by the convening authority, the manner in which such military judge will be rated or evalauted upon his performance of duty as a military judge may be as prescribed in regulations of the Secretary concerned. These secretarial regulations will insure the absence of any command influence in the rating or evaluation of the military judge's judicial performance. See 38*a* and Article 37.

Chapter IX

PERSONNEL OF COURTS-MARTIAL

MILITARY JUDGE—PRESIDENT—MEMBERS—COUNSEL; GENERAL PROVISIONS—SUSPENSION OF COUNSEL—TRIAL COUNSEL—ASSISTANT TRIAL COUNSEL—DEFENSE COUNSEL—ASSISTANT DEFENSE COUNSEL—COUNSEL FOR THE ACCUSED—REPORTER—INTERPRETER—GUARDS, CLERKS, AND ORDERLIES

39. MILITARY JUDGE. ***a. Selection.*** See 4*e* for qualifications and assignment of the military judge.

b. Duties. (1) *General.* The military judge shall preside over each open session of the court-martial to which he has been detailed. He takes appropriate action in the open sessions of the court in order that the proceedings may be conducted in a dignified, military manner. He is responsible for the fair and orderly conduct of the proceedings in accordance with law. During the trial, he rules on all interlocutory questions including challenges (57), determines if a deposition may be taken while the case is being heard (117*b*), recesses or adjourns the court as appropriate, and instructs the court on questions of law and procedure which may arise. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused is final and constitutes the ruling of the court. He may, however, change his ruling at any time during the trial.

(2) *Article 39(a) sessions.* The military judge may call the court into session without the presence of the members of the court pursuant to Article 39(a) for the purpose of hearing and determining interlocutory motions raising defenses and objections, ruling on other matters that may legally be ruled on by the military judge, and performing other procedural functions which do not require the presence of court members. He may also, if permitted by regulations of the Secretary concerned, hold the arraignment, receive pleas, and enter findings of guilty upon an accepted plea of guilty. See 53*d*, 70*b* and appendix 8*a*. The military judge prescribes the uniform to be worn at Article 39(a) sessions.

(3) *Assembling with members.* The military judge should set the time for assembly of the court after consultation with the senior member. The military judge is not a member of the court and does not vote with the members of the court on matters properly referred to the court for decision. Before the court closes to vote on the findings, he instructs it as provided in 73. After the court has finally voted on the findings, he may, at the request of the court, assist it in open court so that it may put the findings in proper form (74*b*; Art. 39). Before the court closes to vote on the sentence, he must give appropriate instructions including the maximum authorized punishment which it may impose (76*b* and 81*d*).

(4) *Interference in conduct of trial.* The military judge may properly intervene in a trial of a case to prevent unnecessary waste of time or to clear up

some obscurity. He should bear in mind, however, that his undue interference or participation in the examination of witnesses, or a severe attitude on his part toward witnesses, may tend to prevent the proper presentation of the case or hinder the ascertainment of the truth.

Consultation between the military judge and counsel in court is often necessary, but the military judge should avoid controversies which are apt to obscure the issues before the court. In addressing counsel, the accused, witnesses, or the court members, he should avoid a controversial manner or tone. He should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or a premature judgment.

(5) *Court-martial composed of military judge alone* (*Art. 16*). The military judge alone may assemble as a court in the presence of the accused, the defense counsel, and the trial counsel as indicated in 53*d*. The military judge of such a court-martial shall determine all questions of law and fact arising during the proceedings, make findings of guilt or innocence, and, if the accused is convicted, adjudge an appropriate sentence. He shall make a general finding and shall in addition find the facts specially when requested. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein (74*i*).

c. Record. All proceedings involving rulings or instructions made or given by the military judge during the course of a trial shall be made a part of the record. All rulings and instructions shall be made or given in open session in the presence of the accused and the counsel for the prosecution and defense, but the rulings which, in the discretion of the military judge, should not be brought to the attention of the members (57*g*(2)), if any, need not be made in their presence. See Article 39. A conference between the military judge and counsel for either side, or the senior member of the court, held outside of court for the purpose of discussing the time of the commencement or continuation of the trial, need not be made a part of the record. See 58*a* as to postponement of meeting of the court for a trial. See also 57*g*(2) for rules governing proceedings held outside the presence of members of a court-martial with respect to preliminary evidence, offers of proof, and arguments as to the admissibility of offered evidence, and 73*d* for rules governing the preparation of instructions by the military judge.

d. Absence of military judge. In any case in which a military judge has been detailed to the court, no proceedings may be held in his absence. When the military judge is presiding at a trial with members, he must be present at all times during the trial of the case except when the court is closed to deliberate or vote (Art. 39). When the military judge is absent from any open session of the court during the trial of a case, the court will adjourn until either the military judge is present or a new military judge is regularly detailed and is present. In appropriate cases, the court will report the absence of the military judge to the convening authority. If, before trial, it appears to a military judge that he should not sit on the court, either at all or in a particular case, for reasons enumerated in 62*f* or for other reasons, he will bring the matter to the attention of the convening authority.

e. New military judge. The military judge may not be replaced during the progress of a trial except for physical disability, as a result of challenge, or

for other good cause. As in 37*b*, good cause contemplates a critical situation such as emergency leave or military exigencies, as distinguished from the normal conditions of military life. The record of trial should show the facts which constitute good cause. If a new military judge is detailed to the court in the course of a trial, an opportunity to challenge him for cause having been given, the trial may proceed as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced or a stipulation thereof has been read and shown to him in the presence of the accused and counsel for both sides. An accused who was being tried by the military judge alone, must once again be given the opportunity to request trial by the new military judge alone. If the accused does not so request or if the new military judge does not approve the request, the accused should be tried by a court composed of a military judge and members. See 80*b* for the procedure to be followed when a new military judge is present at revision proceedings.

f. Authentication of record. The military judge who was present at the conclusion of the proceedings in a case will authenticate the record of trial. See 82*f*.

40. PRESIDENT. ***a. General.*** The senior in rank among the members detailed to a general or special court-martial is the president; however, the senior member present at a trial, whether or not he is the senior member detailed to the court, is president of the court for the trial of that case.

b. Duties. (1) *Court-martial with a military judge.* The president of a court-martial with a military judge detailed has the duties, powers, and privileges of members in general. He has the following additional powers and duties:

(*a*) He consults with the military judge as to the time of assembly and prescribes the uniform to be worn at sessions attended by the members.

(*b*) If authorized by regulations of the Secretary concerned, he shall administer oaths to such personnel not previously sworn as those regulations may prescribe. See chapter XXII as to oaths generally.

(*c*) He presides over closed sessions of the court and speaks for the court in announcing the findings and sentence and the results of any vote upon a matter properly presented to the court members for decision.

(*d*) He speaks for the members of the court in conferring with, or in requesting instructions from, the military judge upon any question of law or procedure; but, except for his right as a member to object to certain rulings of the military judge (57*d*, 118), he shall not interfere with those rulings of the military judge which affect the legality of the proceedings.

(2) *Special court-martial without a military judge.* The president of a special court-martial without a military judge is responsible for the fair and orderly conduct of the proceedings in accordance with law in all cases referred to the court. After consultation with trial counsel, he sets the time of trial. As the presiding officer of the court, he takes appropriate action to preserve order in the open sessions of the court in order that the proceedings may be conducted in a dignified, military manner. He also performs, as applicable, the duties prescribed for the president of a court-martial with a military judge (40*b*(1)). In addition, he rules upon all questions of law and all interlocutory questions except challenges (57). He recesses or adjourns the court as appropriate. His

ruling upon any question of law other than a motion for a finding of not guilty is final and constitutes the ruling of the court. On a motion for a finding of not guilty and any interlocutory question of fact, he rules subject to the objection of any member (57*c*). He may, however, change his ruling at any time during the trial. Before the court closes to vote on the findings, he gives the court those instructions which are required by the law in the light of the circumstances of the case. See 73*a*, *b*. Before the court closes to vote upon the sentence, he must give appropriate instructions, including the maximum authorized punishment which may be imposed (76*b* and 81*d*). He will not inform the court of any punishment in excess thereof which could be imposed by a different court or, in case of a rehearing or a new other trial, which could have been imposed had the prior proceedings not taken place. See Article 63(b). With respect to the conduct of trials, he will be guided by the principles outlined in 39*b*(4).

c. Authentication of record. At a special court-martial without a military judge the senior member of the court who was present at the conclusion of the proceedings will authenticate the record of trial as president. See 83 and appendix 9*b*(3).

41. MEMBERS. ***a. General.*** This paragraph is inapplicable to trials by the military judge alone and to Article 39(a) sessions which are conducted without the presence of the members.

The qualifications of members of courts-martial are discussed in 4*a* to *d* inclusive.

b. Duties. 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. Each member has an equal voice and vote with other members in deliberating upon and deciding all questions submitted to a vote or ballot, the senior member having no greater rights in these matters than any other member. In this connection, see 57*f*, 62*h*(3), 74*d*, and 76*b*(2). Members will be dignified and attentive. Members should not fraternize with the military judge, witnesses, or trial personnel during the course of the trial and should avoid any conduct which may create any appearance of prejudice to the accused. Members should not discuss the case with nonmembers or with other members, until it is submitted to them for final decision. 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, may be a military offense.

c. Absence of members. No member of a general or special court-martial may be absent from the court during the trial of a case except for physical disability, as a result of a challenge, or by order of the convening authority. If, before the meeting of the court for the trial of a case, it appears to a member that he should not sit on the court for reasons enumerated in 62*f* or for any other reason except physical disability, he will take appropriate steps to bring the matter to the attention of the convening authority.

If he is able to do so, a member of a general or special court-martial who is, or has reason to believe that he will be, absent from a session of the court because of physical disability will so inform the trial counsel. The latter will make an informal inquiry to verify the cause of the absence and, if it occurs after the

assembly of the court for the trial of the accused, will report his findings to the court (41*d*(4)).

d. Effect of absence. (1) *General.* When less than a quorum, that is, the minimum number of members required by Article 16, is present, the court may not proceed with a trial. Less than a quorum may adjourn until a prescribed time. When a quorum is present at a special court-martial without a military judge and one member is challenged, the remaining members may pass on the challenge.

(2) *Enlisted members.* When, pursuant to Article 25(c), an enlisted person requests participation of enlisted members in his trial by general or special court-martial, the court may not proceed with his trial unless at least one-third of the members actually sitting on the court at all sessions at which the members are present after assembly are enlisted members, or the convening authority has directed that the court assemble without enlisted members. See 4*c* and 36*c*(2).

(3) *Before assembly.* The unauthorized absence of a member of a general or special court-martial from a session of the court may be a military offense, but his absence before the assembly of the court for the trial of the accused will not prevent the court from proceeding with the trial if a quorum is present. The trial counsel will report any unauthorized absence of a member to the convening authority.

(4) *After assembly.* If a member who was present at the assembly of the court for the trial of the accused is absent from a future session of the court in the same case, the court may proceed only if a quorum remains and the absence is the result of a challenge, physical disability, or the order of the convening authority for good cause. As to the latter, see 37*b*. In determining whether a member is absent because of physical disability the military judge or president of a special court-martial without a military judge may accept the statement of the trial counsel as to the results of his informal inquiry into the cause of absence (41*c*) or may require the trial counsel to procure and present other evidence, such as a certificate from a physician or a proper official as to the illness of the absent member. To determine whether a member is absent by order of the convening authority, the military judge or the president of a special court-martial without a military judge may accept the statement of the trial counsel that he has been advised by oral order, message, or signal that the member has been excused by the convening authority from further attendance in the case. The trial counsel shall include in his statement the reason for the excusal (37*c*).

e. New member of general court-martial. When a member who was previously absent from, or who has been newly detailed to, a general court-martial has been sworn (or it has been ascertained as a matter of record that he has been previously sworn in accordance with regulations of the Secretary concerned), an opportunity to challenge him having been given, the trial may proceed after the recorded evidence previously introduced in open session has been read to him in the presence of the military judge, the accused, counsel, and the other members of the court. See Article 29(b).

f. New member of special court-martial. When a member who was previously absent from, or who has been newly detailed to, a special court-martial has been sworn (or it has been ascertained as a matter of record that

he has been previously sworn in accordance with regulations of the Secretary concerned), an opportunity to challenge him having been given, the trial shall proceed as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced is read, or a stipulation thereof is read to him, in the presence of the military judge, if any, the accused, counsel, and the other members of the court. See Article 29(c).

42. COUNSEL; GENERAL PROVISIONS. ***a. Definition of terms.*** The term "counsel" as used in this manual includes, unless otherwise indicated by the context, the detailed trial counsel and defense counsel of a general or special court-martial and their assistants, if any, and any individual counsel, civilian or military. Whenever the term "trial counsel" is mentioned, it refers to the detailed trial counsel of a general or special court-martial, including, unless otherwise indicated by the context, any assistant trial counsel. Whenever the terms "defense counsel" or "counsel for the accused" are used, they include, unless otherwise indicated by the context, the detailed defense counsel, any detailed assistant defense counsel, and any individual counsel. The term "individual counsel" refers to military counsel selected by the accused and to civilian counsel provided by him.

b. General rules of conduct. In performing their duties before courts-martial, counsel should maintain a courteous and respectful attitude toward the military judge, the members of the court, and opposing counsel, and should treat adverse witnesses and the accused with fairness and due consideration. Personal colloquies between counsel which cause delay or promote unseemly wrangling should be carefully avoided. The conduct of counsel before the court and with each other should be characterized by candor and fairness. Counsel should not knowingly misquote the contents of a paper, the testimony of a witness, the language or argument of opposing counsel, or the language of a decision or a textbook; nor, with knowledge of its invalidity, should counsel cite as authority a decision that has been reversed or an official directive that has been changed or rescinded. As publication in the public press, or on the radio or television, of the circumstances of a pending case may interfere with a fair trial and otherwise prejudice the due administration of justice, counsel should refrain from discussing any such circumstances with representatives of the press, radio, or television unless authorized by the convening authority or other competent superior authority.

c. Interviewing witnesses. Counsel may properly interview any witness or prospective witness for the opposing side in any case without the consent of opposing counsel or the accused. See 44*h* as to relations between the prosecution and the accused. In interviewing a witness, counsel should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth when appearing as a witness at the trial. See Article 31.

43. SUSPENSION OF COUNSEL. Rules defining professional or personal misconduct, or other reasonable grounds, which disqualify a person, either temporarily or indefinitely, from acting as counsel before courts-martial may be announced by the Judge Advocates General of the armed forces in appropriate regulations. These regulations shall provide for notice and opportunity to be heard and will also establish procedures to provide for the suspension of persons from acting as counsel before courts-martial. Appropriate action may be taken

by a convening authority, in accordance with the regulations, to recommend suspension of the person affected from practice as counsel before courts-martial of the armed force concerned. Suspension will not be effected except by the Judge Advocate General of the armed force concerned. The Judge Advocate General concerned may, upon good cause shown, modify or revoke a prior order of suspension.

When any person is suspended as counsel before courts-martial by the Judge Advocate General of any armed force, the Judge Advocate General taking that action will notify the Judge Advocates General of the other armed forces and this suspension will be good cause for suspension of the person from acting as counsel before courts-martial of the other armed forces, without further hearing. Also, disbarment by the Court of Military Appeals will be good cause for suspension from acting as counsel before courts-martial without further hearing.

44. TRIAL COUNSEL. ***a. Selection.*** See 6 for qualifications of trial counsel.

b. Disqualification. When it appears to the court or to the trial counsel that any member of the prosecution named in the convening order is for any reason, including misconduct, bias, prejudice, hostility, previous connection with a particular case, or lack of legal qualifications, if required, disqualified or unable properly and promptly to perform his duties, a report of the facts will be made at once to the convening authority and appropriate action taken to insure that the disqualified member shall not act for the prosecution.

c. Absence. For a proper reason, for example, preparation of another case, the convening authority, the military judge, or the president of a special court-martial without a military judge may excuse from attendance during a trial or trials those personnel of the prosecution whose attendance will not be required.

d. General duties. The trial counsel shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of the proceedings (Art. 38(a)). When charges are referred to him for trial, it is his duty to bring them promptly to trial before the court indicated in the reference for trial. In general, he may bring cases to trial in the order he deems expedient. He will be given ample opportunity to prepare properly the prosecution of each case.

e. Reports of result of trial. Upon final adjournment of the court in a case, the trial counsel will, in writing, notify the immediate commanding officer of the accused of the result, including any findings reached and any sentence imposed by the court. Unless otherwise directed by the convening authority, the trial counsel will furnish a copy of this report to the convening authority and, if the accused is in confinement, to the commanding officer to whose command the place of confinement is subject. Immediate action will be taken to release the accused if the trial results in an acquittal or in a sentence not involving confinement. See 21*d* and 22 in this respect.

f. Duties before trial. (1) *Examination of file.* He will report to the convening authority any substantial irregularity in the order convening the court or in the charges or accompanying papers. If the membership of the court to which the case is referred is reduced below a quorum for any reason or if the

trial counsel has good reason to anticipate such a reduction, he will report the facts through appropriate channels to the convening authority. See 36*c*(1). 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 33*d* and *e*(2). 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.

(2) *Notification of personnel; witnesses.* He will give timely oral or written notice to the members of the court and to all others concerned, including any officer whose duty it is to see that the accused attends the court, of the date, hour, and exact place of any meeting of the court. He may include in this notice such other matter as the military judge or president may direct, such as a statement of the uniform to be worn. Before 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. 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 is material and necessary and whether a deposition will properly answer the purpose and is practicable. See 117 and Article 49. The trial counsel does not, however, have authority to determine whether witnesses requested by the defense will be required to attend. If he disagrees with the defense counsel as to whether the attendance of a witness is necessary, he will report the matter to the convening authority in the matter prescribed in 115*a*.

(3) *Preparing for trial.* Before the court assembles, he will obtain a suitable room for the court, see that it is in order, procure requisite stationery, prepare a copy of the charges and specifications for each member of the court and the military judge, and take such other action as will enable him to make a prompt, full, and systematic 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 competent evidence that the offense was committed, that the accused committed it, and that he had the requisite criminal intent at the time, except to the extent that such a burden is relieved by a plea of guilty. When the question of jurisdiction of the court over the accused is placed in issue, the prosecution also has the burden of proving that jurisdiction exists, without regard to the accused's pleas. Whatever the defense may be, the burden of proof in each of these instances 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 competent 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 the 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. If evidence is to be presented out of proper sequence to suit the convenience of witnesses or for other reasons, the trial counsel may invite the attention of the court to the anticipated deviation.

(4) *Legal research.* 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 de-

cisions of the courts or authoritative military precedents. To secure these authorities, he may communicate with the convening authority.

(5) *Reporting inadvisability of trial.* 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 convening authority at once, provided it is reasonably apparent that the matter was not known to the convening authority when the charges were referred for trial. For example, this action would be appropriate when the trial counsel discovers that there has not been a substantial compliance with Article 32, 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.

g. Duties during trial. (1) *General.* 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.

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. With a view to saving time and expense, he should join in appropriate stipulations as to unimportant or uncontested matters. See 154*b* (Stipulations).

He should respectfully call the attention of the court 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. He will not bring to the attention of the court any intimation of the views of the convening authority, or those of the staff judge advocate or legal officer, with respect to the guilt or innocence of the accused, an appropriate sentence, or concerning any other matter exclusively within the discretion of the court. See Article 37.

Aside from opinions expressed in the proper discharge of his duty to prosecute, for example, in his closing argument or in an argument on a motion or on the admissibility of evidence, he should not give the court his opinion upon any point of law arising during the trial except in court when it is requested by the military judge or the president of a special court-martial without a military judge. It is improper for him to assert before the court his personal belief as to the guilt or innocence of the accused. When he addresses the court, he will rise.

(2) *Presentation of the case.* The trial counsel may make an opening statement—that is, a brief statement of the issues to be tried and what he expects to prove—but he 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 immediately before the introduction of evidence for the prosecution, but in exceptional cases the military judge, or the president of a special court-martial without a military judge, in his discretion may 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 military judge, or the president of a special court-martial without a military judge, otherwise directs, conduct the examination for the court of any witnesses called by the court.

On behalf of the prosecution, he may cross-examine a witness called by the court if the witness has not previously testified for the prosecution or defense (see 153*b*(1)), or if the witness has so testified, as to any new matter elicited upon recall by the court (see 149*b*(3)).

See 72 as to closing arguments.

h. Relations with 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 that the copy has been so served. Except as otherwise directed by the convening authority (see, for example, 151*b*(1) and (3)), 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 the charges on a rehearing. He will also permit the defense to examine from time to time the order convening the court and all amending orders. Before trial, he should advise the defense of the probable witnesses to be called by the prosecution, and the fact that the defense has not been so advised with respect to a witness who appears at the trial may be a ground for a continuance.

His dealings with the defense should be through any counsel the accused may have. Thus, if he desires to know how the accused intends to plead or whether an enlisted accused desires enlisted members on the court, he will ask the regularly detailed defense counsel or other counsel, if any, of the accused. He will not attempt to induce a plea of guilty.

The trial counsel will furnish every person tried by the court a copy of the record of the proceedings as soon as it is authenticated. In this connection, see 82*g*(1) (Disposition—Delivery to accused).

i. Duties after trial. See 82, 83, and appendix 9*b* for rules and procedures governing the preparation, authentication, and disposition of the record of trial.

45. ASSISTANT TRIAL COUNSEL. ***a. General court-martial.*** Unless he is disqualified by reason of prior participation in the case (6*a*), any person named in the convening order as an assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when he is qualified to be a trial counsel as required by Article 27(b), perform any duty imposed by law, regulation, or the custom of the service upon the trial counsel of the court. See Article 38(d). He will perform those duties in connection with trials which the trial counsel may designate. However, an assistant trial counsel who is not qualified to be a trial counsel as required by Article 27(b) may not perform any of the duties of the trial counsel before the court in a general court-martial case. Except when the contrary affirmatively appears, all duties performed outside of court by the assistant trial counsel of a general court-martial shall be deemed to have been performed under the direction of the trial counsel.

b. Special court-martial. Unless he is disqualified by reason of prior participation in the case, any person named in the order as an assistant trial counsel of a special court-martial may perform any duty of the trial counsel. See Article 38(d). He will perform those duties in connection with trials which the trial counsel may designate.

46. DEFENSE COUNSEL. ***a. Selection.*** See 6 for qualifications of defense counsel.

b. Disqualification. A report of facts will be made at once to the convening authority for his appropriate action when it appears to the court or to the defense counsel that any member of the defense named in the convening order is for any reason, including unfitness, bias, prejudice, hostility toward the accused, lack of legal qualifications if required, or previous connection with the same case, unable properly and promptly to perform his duties in any case.

c. Absence. For a proper reason, for example, preparation of another case, the military judge, or the president of a special court-martial without a military judge, shall, with the express consent of the accused, excuse from attendance during a trial those personnel of the defense whose attendance will not be required. See Article 38(b).

d. General duties. When the defense is not in charge of individual counsel (42*a*), the duties of defense counsel are those outlined in 48. When the defense is in charge of individual counsel, civilian 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, civilian or military, of his own choice pursuant to Article 38(b). If the accused expresses a desire to be represented by individual counsel, the defense counsel will immediately report the fact to the convening authority, through the trial counsel, and take appropriate steps to secure and consult the requested counsel and, if the accused desires, act as associate counsel. Unless the accused otherwise desires, the defense counsel will undertake the immediate preparation of the defense without waiting for the detail or retention of any individual counsel.

47. ASSISTANT DEFENSE COUNSEL. Unless he is disqualified by reason of prior participation in the case (6*a*; Art. 27(a)), any person named in the order as an assistant defense counsel of a general or special court-martial may, when he is qualified to be the defense counsel as required by Article 27, perform any duty imposed by law, regulations, or custom of the service upon counsel for the accused. See Article 38(e). 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. However, an assistant defense counsel who is not qualified to be defense counsel as required by Article 27 may not perform any of the duties of the defense counsel before the court in a general or special court-martial case. Except when the contrary affirmatively appears, all duties performed outside of court by the assistant defense counsel shall be deemed to have been performed under the direction of the counsel in charge of the defense.

48. COUNSEL FOR THE ACCUSED. ***a. Statutory right to counsel of his own choice.*** The accused has the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him,

or by the military counsel of his own selection if reasonably available, or by the defense counsel detailed under Article 27. Should the accused have counsel of his own selection, the defense counsel and any assistant defense counsel who were detailed, shall, if the accused so desires, act as his associate counsel; otherwise they shall be excused by the military judge or by the president of a special court-martial without a military judge (Art. 38(b)). Civilian counsel will not be provided at the expense of the United States.

Only a person qualified under Article 27(b) or otherwise qualified as a lawyer may act as individual counsel or represent an accused before a general court-martial or a special court-martial at which a bad-conduct discharge may be adjudged. Even at his own insistence after full advice an accused may not be represented by a person who does not fall within one of these categories. An accused may, if he desires, conduct his own defense without assistance of counsel. In such a case, the military judge or the president of a special court-martial without a military judge (15*b*), shall advise him of his right to be represented by qualified counsel. In any case, whether represented by counsel or by himself, an accused may have a nonlawyer present and seated at the counsel table and may consult with him, subject to the discretion of the military judge or the president of a special court-martial without a military judge.

Military personnel on active duty or persons employed by the armed forces shall not solicit or accept fees of any kind from an accused as reimbursement for acting as his counsel before a court-martial or before any of the appellate agencies concerned with the administration of justice under the code.

b. Detail of individual military counsel. The application 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, but it is usually forwarded by the defense counsel to the convening authority. The convening authority will take the following action:

(1) If the requested counsel is within his immediate command and is reasonably available, he will make the detail and order any necessary travel. If he determines that the requested counsel is not reasonably available, he will so advise the accused.

(2) If the requested counsel is not a member of the command of the convening authority, the convening authority will forward the request for a determination of availability to the commanding officer or head of the organization, activity, or agency with which the requested counsel is on duty.

When a determination is made within a military department that requested counsel is not available, unless made at departmental level or by a commanding officer or supervisor immediately subordinate to the departmental level, that determination is subject to appeal to the requested counsel's next higher commanding officer or level of supervision. Appeals may not be made which require action at departmental or higher level. The accused will be promptly notified of any decision on a request or an appeal. A pending appeal is ordinarily a proper ground for postponement or continuance of the trial. When a determination has been made that requested military counsel is not reasonably available and the case is subsequently tried by a special or general court-martial, the application of the accused for that counsel and the actions of the convening authority and, if applicable, of other authorities, together with the reasons for

the determination, shall be made a matter of record and be included with the record of trial.

A person who has acted as a member of the prosecution in the same case is not available for detail as individual counsel. See 6*a* and Article 27. A military person who has been made available to act as individual counsel will, so far as is practicable, be relieved of all other duties which may interfere with the proper preparation and presentation of the accused's case.

c. Duties in general. An officer or other military person acting as 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 a civilian court 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 innocence of the accused or to tolerate any manner of fraud or chicane.

When a defense counsel is designated to defend two or more coaccused in a joint or common trial, he should advise them of any conflicting interests in the conduct of their defense which would, in his opinion, warrant a request on the part of any of the accused for other counsel.

d. Securing witnesses. He should make timely request to the trial counsel to secure the attendance of defense witnesses, and with a view to saving time, labor, and expense, he should cooperate with the trial counsel in the preparation of depositions and in appropriate stipulations as to unimportant or uncontested matters. See 154*b* (Stipulations).

e. Request for trial by the military judge alone. If the case has been referred to a court to which a military judge has been detailed, he will advise the accused that, prior to assembly, the accused may request that he be tried by the military judge alone. See Articles 16 and 18. If the accused desires to request trial by the military judge alone, the defense counsel will prepare a written request to be signed by the accused and himself and forward it through the trial counsel to the military judge for decision. See appendix 8*e*.

f. Request for enlisted members for the court. Before the trial, he will also advise an accused enlisted person of his right to have enlisted persons as members of the court. See Article 25(c). If the accused elects to exercise this right, the defense counsel will prepare the written request required by Article 25(c), have it signed by the accused, and forward it without delay, through the trial counsel, to the convening authority or to the court if trial is imminent.

g. Consultation with the accused. He will explain to the accused the meaning and effect of a plea of guilty and his right to introduce evidence after such a plea (70; app. 8*a*); his right to testify or to remain silent (148*e*, 149*b*; app. 8*a*); his right, after findings are announced, to make an unsworn statement and to introduce evidence as to matters in extenuation and mitigation (75*c*; app. 8*a*); and his right to assert any proper defense or objection, such as the statute of limitations in an appropriate case (68*c*, 74*h*). These explanations

will be made regardless of the intentions of the accused as to testifying or as to how he will plead. Counsel should endeavor to obtain full knowledge of all the facts of the case before advising the accused, and he is bound to give the accused his candid opinion of the merits of the case.

h. Preparation for trial. Ample opportunity will be given the accused and his counsel to prepare the defense, including opportunities to interview each other and any other person. See 42*c* and 44*h*. Counsel's 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 competent evidence, and that he may be ready to make appropriate objection to any incompetent evidence that might be offered by the prosecution. If practicable, he should plan to introduce the defense evidence in the sequence of events and to defend against the alleged offenses in the order charged. When he addresses the court, he will rise.

The provisions of 44*f*(4) apply equally to counsel for the defense.

i. Presentation of the defense. Counsel may make an opening statement for the defense similar to that indicated in 44*g*(2). This statement is ordinarily made just after the prosecution has rested or immediately following the opening statement of the trial counsel, but in exceptional cases the military judge, or the president of a special court-martial without a military judge, as a matter of discretion may 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 witnesses for the defense. He conducts cross and recross-examination of prosecution witnesses and of witnesses called by the court.

See 72 as to closing arguments.

j. Absence of accused. When the trial proceeds after the accused has voluntarily absented himself without authority (11), the counsel should continue to represent the accused.

k. Duties after trial. (1) *Clemency petition.* At the close of the trial or as soon thereafter as practicable, if the accused is found guilty, the defense counsel may prepare a recommendation for clemency setting forth any matters as to clemency which he desires to have considered by the members of the court or the reviewing authority. He will secure the signatures of those members of the court who have indicated their willingness to sign the recommendation, and will submit it to the trial counsel for attachment to the record of trial. See 77*a*.

(2) *Appellate brief.* In every court-martial proceeding, the defense counsel may, in the event of conviction, forward for attachment to the record of proceedings a brief of such matters as he feels should be considered in behalf of the accused on review, including any objection to the contents of the record which he considers appropriate (82*e*; Art. 38(c)).

(3) *Advising accused of appellate rights.* If the accused is convicted, the defense counsel will advise him in detail of his appellate rights. For example, in an appropriate case, he shall advise him of his right to be represented before the Court of Military Review and, when appropriate, he will assist the accused in requesting appellate representation by preparing a letter for the signature of the accused, addressed to the appropriate authority, or by other means. Although

direct communication with the appellate defense counsel is authorized, a request for appellate representation ordinarily will be forwarded to the convening authority in order that it may be attached to the record of trial. The accused shall have 10 days from notice of the action of the convening authority (84), or in special court-martial cases in which action is taken by a separate officer exercising general court-martial authority (94*a*(3)), from notice of the action of the latter, in which to forward a request that he be represented by appellate counsel before a Court of Military Review. Such a request should be made conditional upon the record being referred to a Court of Military Review under Article 66 or Article 69. The accused should be advised that his failure to forward within 10 days a request for appellate representation may be regarded as a waiver of his right to appellate counsel before the Court of Military Review, if that court has taken its final action in the case before receipt of such a request. The defense counsel should also advise the accused of any right he may have to appeal to the Court of Military Appeals and to be represented before that court by appellate defense counsel. See 102 in this connection.

(4) *Deferment of confinement.* If the accused is convicted and his sentence includes confinement at hard labor, the defense counsel will advise him of his right to make application for deferment of service of the confinement in accordance with Article 57(d). See 88*f*.

(5) *Examination of record.* See 82*e* for duties in connection with examination of the record of trial.

49. REPORTER. ***a. Authority to detail or employ.*** See 7 and Article 28 for the authority for, and the manner of detailing or employing, reporters and 33*k* as to the manner of directing that a reporter not be used in a special court-martial.

b. Duties. (1) *General.* See Article 39. He shall record the proceedings of and testimony taken before courts-martial, courts of inquiry, or military commissions for which he is detailed or employed (Art. 28) and may do this in the first instance in longhand, shorthand, or by mechanical or electronic means. If a question is raised at the trial as to whether any particular matter is included in the term, "proceedings of and testimony taken," the military judge, or the president of a special court-martial without a military judge, will determine the question in accordance with applicable law and regulation. It is the duty of the reporter to include in the record everything which is said or takes place in open sessions, hearings out of the presence of the court members, and the reporter will omit no portion of these proceedings from the record. The reporter will follow the forms prescribed for the preparation of records contained in appendix 9 and will be familiar with the provisions of 82. He will discharge his duties as promptly as practicable under the circumstances.

(2) *Copies of record.* In general and special court-martial cases in which the sentence adjudged affects a general or flag officer, or includes death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more, the reporter will prepare an original and two copies of each record and of all documentary exhibits and additional copies of each record and of all documentary exhibits received in evidence equal to the number of accused tried. In all other general and special court-martial cases, the reporter will prepare an original of each record and of all documentary exhibits and copies

of each record and of all documentary exhibits received in evidence equal to the number of accused tried.

In any general or special court-martial case, the convening authority may direct that additional copies of the record and of documentary exhibits be prepared.

(3) *Oath; compensation.* See chapter XXII as to oaths generally. The Secretary concerned will provide regulations concerning the form of the oath for the reporter, the time and place of the taking thereof, the manner of recording same, and whether the reporter shall take one oath for all cases in which he performs these duties, or whether he shall take an oath for each particular case. The Secretary concerned may prescribe regulations for the payment of allowances, expenses, per diem, and compensation of reporters.

50. INTERPRETER. ***a. Authority to detail or employ.*** See Article 28. See 7 for the authority for, and manner of detailing or employing, interpreters and 53*i* for the rule as to the detail or employment of an interpreter for an accused who does not understand the English language.

b. Duties; oath; compensation. He shall interpret for the court, commission, or the accused. 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?" the 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."

The Secretary concerned will provide regulations concerning the form of the oath for the interpreter, the time and place of the taking thereof, the manner of recording same, and whether the interpreter shall take one oath for all cases in which he performs these duties, or whether he shall take an oath for each particular case. The Secretary concerned may prescribe regulations for the payment of allowances, expenses, per diem, and compensation of interpreters.

c. Counter-interpreters. The accused may, at his own expense, provide a counter-interpreter to test the translation of the detailed or employed interpreter. See 141.

51. GUARDS, CLERKS, AND ORDERLIES. When appropriate, the convening authority or, if the trial is to be held at a distance, the commanding officer of the post, camp, or station where the trial is to be held will provide guards and detail suitable enlisted persons as clerks and orderlies to assist the members and officers of the court.

Chapter X

GENERAL PROCEDURAL RULES

REFERENCE TO CONVENING AUTHORITY—MISCELLANEOUS MATTERS—INTRODUCTION OF EVIDENCE—ACTION WHEN EVIDENCE INDICATES AN OFFENSE NOT CHARGED—WITHDRAWAL OF SPECIFICATIONS; MISTRIALS—INTERLOCUTORY QUESTIONS OTHER THAN CHALLENGES—POSTPONEMENTS AND CONTINUANCES

52. REFERENCE TO CONVENING AUTHORITY. When a matter as to future proceedings in a trial by court-martial is referred to a convening authority exercising general court-martial jurisdiction, he will refer the matter to his staff judge advocate or legal officer for consideration and advice.

53. MISCELLANEOUS MATTERS. ***a. Order of proceedings.*** The chronological order of the usual proceedings in trials by general and special courts-martial is indicated in the guide to procedure in appendix 8 and in the forms of records in appendices 9 and 10.

b. Proceedings in each case to be complete. In each case, the proceedings and the record thereof must be completed without reference to any other case. For example, the requirement for appropriate instructions in each case cannot be met if the military judge, or president of a special court-martial without a military judge, simply refers to instructions given to those same court members in another or related case.

c. Joint and common trials. In joint trials (26*d*) and in common trials (33*l*) each of the accused must in general be accorded every right and privilege which he would have if tried separately. For example, each accused may, if he desires, be defended by individual counsel, make individual challenges for cause (62*h*), make individual peremptory challenges (62*e*), cross-examine witnesses, testify in his own behalf, introduce evidence in his own behalf, make an individual request that the membership of the court include enlisted persons, if an enlisted accused (4*b*, 61*h*), and, if a military judge has been detailed, make an individual request for trial by the military judge alone. In a joint or common trial, evidence which is admissible against only one or some of the joint or several accused may be considered only against the accused concerned. For example, see 140*b*. When the evidence is equally applicable to several or all accused, however, needless repetition may be avoided by the use of appropriate language and consolidation of evidence pertinent to all accused.

d. Sessions. (1) *Article 39*(*a*) *session.* At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to Article 35, call the court into session without the presence of the members for the purpose of:

(*a*) hearing and determining motions raising defenses or objections

which are capable of determination without trial of the issues raised by a plea of not guilty;

(*b*) hearing and ruling upon any matter which may be ruled upon by the military judge, whether or not the matter is appropriate for later consideration or decision by the members of the court;

(*c*) holding the arraignment and receiving the pleas of the accused, if permitted by the regulations of the Secretary concerned; and

(*d*) performing any other procedural function which may be performed by the military judge which does not require the presence of the members of the court.

These proceedings are a part of the trial and shall be conducted in the presence of the accused, the defense counsel, and the trial counsel. See 57*g*(2) and 73*d*. Process, including a subpoena, may be issued to compel the attendance of witnesses and the production of evidence. See 115.

The military judge of a court-martial composed of a military judge and members should, ordinarily, call the court into session without the attendance of members for the purpose of ascertaining, when applicable, the existence of a request for trial by military judge alone or a request for enlisted members; disposing of interlocutory matters; hearing defenses and objections; ruling upon other matters that may legally be ruled upon by the military judge such as admitting evidence; and performing other procedural functions which do not require the presence of court members. He may also, if permitted by regulations of the Secretary concerned, hold the arraignment, receive pleas, and enter findings of guilty upon an accepted plea of guilty. The military judge may call the court into one or more Article 39(a) sessions prior to assembly, after assembly, and when directed by the appropriate reviewing authority, subsequent to announcement of sentence.

A typical matter which may be disposed of at an Article 39(a) session prior to assembly is the decision on the admissibility of a contested statement of the accused. An objection by the defense to the admissibility of a statement on the ground that it was not voluntary may involve a lengthy hearing before the military judge from which the members of the court are excluded. By ruling on this question at such a session before the members of the court have assembled, the members are not required to spend considerable time waiting for a decision of the military judge. If the military judge sustains the objection, the issue is resolved, and the facts and innuendoes surrounding the making of the statement will not reach the members by inference or otherwise. If the military judge determines to admit the statement, the issue of voluntariness may be presented to the full court.

An Article 39(a) session may be held after announcement of sentence in order to dispose of matters raised by appellate authorities such as questions of jurisdiction or speedy trial. For example, if a Court of Military Review remands a case for consideration of a speedy trial issue, the military judge may call the court into session without members to dispose of the question.

(2) *Military judge alone.* (*a*) *General.* A general or special court-martial to which a military judge has been detailed shall consist of the military judge alone if the accused, before the court is assembled, so requests in writing and the military judge approves. Before deciding whether to make such a request, the accused is entitled to know the identity of the military judge and to consult

with his defense counsel (Article 16). The military judge may hear arguments from both trial and defense counsel prior to acting on a request for trial before him alone. See appendix 8*e* for form of request.

Since a general court-martial composed of a military judge alone does not have jurisdiction to try any case which has been referred for trial as capital (14*a*), the accused in such a case has no right to request trial before the military judge alone.

(*b*) *Request prior to trial.* If the accused has requested trial by the military judge alone and the military judge has approved the request prior to the start of trial, he should assure himself at the trial, before announcing that the court has assembled, that the request was understandingly made by the accused. After a request has been approved, it may be withdrawn by the accused at any time before assembly of the court in the discretion of the military judge. If the military judge finds that the approved request is defective or allows the accused to withdraw it, he may either adjourn the session or call the court into Article 39(a) session preparatory to assembly of the court with members. If the request was understandingly made and has not been withdrawn, the military judge should immediately announce that the court has assembled. See 61*g* and appendix 8*b* for procedure.

(*c*) *Request made at Article 39(a) session.* A request for trial by the military judge alone, if not made earlier, should be made at any Article 39(a) session held prior to assembly. If the military judge has a pending request at an Article 39(a) session, he will assure himself at the session that the request was understandingly made. If the military judge approves the request, he should announce that the court is assembled and proceed with the trial of the case. If the military judge disapproves the request, he should continue with the Article 39(a) proceedings. See appendix 8*a* for procedure.

(*d*) *Inquiry prior to assembly with members.* If a request for trial by the military judge alone has not been made prior to trial or at an Article 39(a) session, if any, the military judge, after calling the court to order, should give the accused an opportunity to make such a request. If the accused submits a request and the military judge approves, the military judge should excuse the members from further participation in the case and announce that the court is assembled for the trial of the case. If the accused expressly declines to submit a request or if the military judge disapproves the request, the trial will proceed. See 61*g* and appendix 8*b* for procedure.

(*e*) *Procedure.* The same general procedure shall be used in a trial before the military judge alone as is used in a trial before a military judge and members. The military judge rules finally on all questions of law and fact in the case including the admissibility of evidence and the factual issue of the mental responsibility of the accused. The military judge shall also determine the guilt or innocence of the accused and, when appropriate, adjudge a sentence. The military judge shall make a general finding and shall in addition find the facts specially when requested. See 39*b*(5), 74*i*, and appendix 8*b*.

(3) *Miscellaneous Provisions.* The Article 39(a) session and the proceedings before the court composed of the military judge alone, as well as the proceedings before the court with members, are all open sessions. Consultation of the court members with counsel or the military judge, shall also take place in open session, shall be made a part of the record, and shall be in the presence

of the accused, the defense counsel, the trial counsel, and, when a military judge is detailed, in the presence of the military judge. See 57*g*(2) and 73*d*.

A court-martial with members will sit in closed sessions during the deliberation and voting upon the findings and sentence, and upon other matters properly referred to it for decision. Only the members of the court who are to vote shall be present at these closed sessions. The military judge may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may the military judge vote with the members of the court.

No member of a general or special court-martial shall have access to or use in any open or closed session the Manual for Courts-Martial, reports of decided cases, or any other reference material, except that the president of a special court-martial without a military judge may use these publications or materials in open session.

e. Spectators; publicity. As a general rule, the public shall be permitted to attend open sessions of courts-martial. Unless otherwise limited by directives of the Secretary of a Department, the convening authority, the military judge, or the president of a special court-martial without a military judge may, for security or other good reasons, direct that the public or certain portions thereof be excluded from a trial. However, all spectators may be excluded from an entire trial, over the accused's objection, only to prevent the disclosure of classified information. The authority to exclude should be cautiously exercised, and the right of the accused to a trial completely open to the public must be weighed against the public policy considerations justifying exclusion. In most instances, it is proper to exclude only those persons falling within a limited category for which good reasons exist for exclusion. For example, it would be proper to exclude minors when the evidence is likely to involve scandalous or indecent matter which would have an adverse effect on immature minds, to exclude those persons that would cause an overcrowded courtroom or displace those with a special concern in the trial, and to exclude any person who interferes with the administration of justice. Further, it would be proper to exclude all spectators temporarily when a child witness cannot coherently testify before an audience.

Persons other than the accused have no standing to object to the exclusion of spectators. When practicable, notices of the time and place of sessions of courts-martial will be published so that persons subject to the code may be afforded opportunity to attend as spectators provided attendance does not interfere with the performance of their duties. See also 118 (Contempts).

The taking of photographs in the courtroom during an open or closed session of the court, broadcasting of the proceedings from the courtroom by radio or television, or the recording of the proceedings by recording or similar devices for public release or broadcast will not be permitted.

The release of information with respect to suspected offenses and trials by courts-martial will be in accordance with regulations of the Secretary of a Department.

f. Witnesses. Ordinarily, witnesses other than the accused should be excluded from the courtroom except when they are testifying. To prevent the false shaping of testimony through collusion, coercion, or other means, the military judge, or the president of a special court-martial without a military judge,

upon his own motion or upon motion of counsel may instruct a witness to refrain from discussing his testimony or prospective testimony with anyone except counsel or the accused in the case. See appendix 8 for form of instruction.

g. 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. Restricting argument, particularly in long and complicated cases, or an arbitrary refusal to entertain argument on an interlocutory question, may constitute error; however, the right to present argument should not be abused, and the military judge or president of a special court-martial without a military judge may as a matter of discretion limit or refuse to hear argument when it is trivial, mere repetition, or made for the purpose of delay. Arguments throughout the trial may be oral, in writing, or both. See 82*b*(4) in this connection.

h. Explanation of rights of accused. Ordinarily, the military judge, or the president of a special court-martial without a military judge, need not volunteer advice to the accused during the course of the trial as it may be assumed that his counsel has performed his duties properly, has advised the accused of his rights and the law affecting the case, and that, for reasons best known to them, they desire to pursue a certain course. When deemed necessary, the military judge, or the president of a special court-martial without a military judge, will satisfy himself that the accused is aware of any right to which he is entitled by inquiry of counsel or by explaining that right. The rights of the accused with respect to the statute of limitations (68*c*; Art. 43) will, when applicable, be explained to the accused unless it otherwise affirmatively appears that the accused is aware of these rights. See 70*b* for the procedure to be followed as to guilty pleas. An accused who is not represented by legally qualified counsel should be advised of his rights to remain silent, testify as a witness, or make an unsworn statement as appropriate at the proper stages of a trial (75*c*(2), 140*a*, 148*e*, and 149*b*). When an accused is represented by legally qualified counsel, it may be assumed that he has been correctly advised of these rights, and it is unnecessary to inquire if the accused has been so advised or to explain the right to the accused. Any inquiry or explanation as to the rights of the accused to testify in a court-martial with a military judge shall be made out of the hearing of the court members. See appendix 8 for forms of instructions.

i. Right of accused to interpreter. Upon a showing by the defense that the accused does not understand the English language and desires the services of an interpreter, the military judge, or the president of a special court-martial without a military judge, will direct the trial counsel to take appropriate action to provide the accused with a competent interpreter. The latter will interpret for the accused all proceedings had in open session and all testimony given in any language other than that understood by the accused. The interpreter will be sworn before entering upon his duties. See chapter XXII as to oaths generally.

54. INTRODUCTION OF EVIDENCE. ***a. Presentation of the case.*** 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. In a court-martial with a military judge, the examination by the court is ordinarily conducted by the military judge; thereafter, if necessary, members of the court may ask questions of the witness. The court should protect every witness from improper questions, insulting treatment, and unnecessary inquiry into his private affairs. See 149*b* in this regard. Also see 150 and Article 31(a) and (c) for questions which a witness cannot be required to answer over his objection and 148, 149, 151, and 153 for other rules respecting the examination of witnesses.

b. Responsibility of the court. The court is not obliged to content itself with the evidence adduced by the parties. When that evidence appears to be insufficient for a proper determination of the matter before it or when not satisfied that it has received all available admissible evidence on an issue before it, the court may take appropriate action with a view to obtaining available additional evidence. The court may, for instance, require the trial counsel to recall a witness, to summon new witnesses, or to make an investigation or inquiry along certain lines with a view to discovering and producing additional evidence. In doing so, however, the court must be careful not to depart from an impartial role. The right of the members to cause the recall of a witness or to call for additional evidence is subject to an interlocutory ruling by the military judge or the president of a special court-martial without a military judge as to the propriety therefor.

c. Exclusion of improper evidence. When offered evidence would be excluded on objection, the military judge, or the president of a special court-martial without a military judge, may as a matter of discretion bring the matter to the attention of any party entitled, but failing, to object to its admission. This action is particularly important when improper testimony is elicited by questions asked by a member of the court—the reason 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. In the interest of justice, the military judge or the president of a special court-martial without a military judge may on his or its own motion exclude inadmissible evidence.

Rules of evidence are stated in chapter XXVII and in various connections throughout this manual; for example, in 122*c* (Insanity), and 164 (Desertion).

d. Documentary evidence. If a document is marked for identification but not admitted in evidence, it should be appended to the record for the information of the convening authority and appellate agencies. See 154*c* (Offer of proof).

When a document, such as an original record, which must or should be returned to the source from which it was obtained, is received in evidence or marked for identification, a suitable copy or extract copy thereof will be substituted for the document and it will then be returned. Similar action may be taken to substitute an accurate description or photograph for an item of real evidence which must be returned to its source or is too bulky for inclusion in the record of trial. In this connection, see 138*c* (Real evidence).

e. Views and inspections. In exceptional circumstances, the military judge or the president of a special court-martial without a military judge may as a matter of sound discretion authorize the court to view or inspect the prem-

ises or place or an article or object if the 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 counsel, the accused, and, in a court-martial with a military judge, the military judge. The view should not be undertaken if the members of the court are 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, without making any statement in the nature of evidence or argument, may point out particular features to be noted by the court. Before entering on his duties as escort, he will take the oath or affirmation prescribed in 114*h*.

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 counsel, the authorized escort, members of the court, or the military judge 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.

The fact that a view or inspection has been made does not preclude the introduction in evidence of photographs or diagrams of articles or objects viewed, nor of maps or sketches of the premises or place viewed, if that evidence is otherwise admissible.

f. Inquiry into mental status. See 122 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.

55. ACTION WHEN EVIDENCE INDICATES AN OFFENSE NOT CHARGED. ***a. General.*** If during the trial it becomes manifest to the court that there is substantial evidence, either before the court or offered, tending to prove that the accused is guilty of some other untried offense not alleged in any specification before the court, the court must proceed with the trial of the offenses charged. A report of the matter may properly be made to the convening authority after the conclusion of the trial.

b. Trial of new charges. When charges are preferred for an offense indicated by the evidence referred to in 55*a*, they may be referred to trial only to a court none of whose members participated in the previous trial.

56. WITHDRAWAL OF SPECIFICATIONS; MISTRIALS. ***a. General.*** Although the convening authority may withdraw, or cause to be withdrawn, any specification or an entire case from the consideration of any court for any reason, both the grounds upon which the specification or case is withdrawn and the time at which the withdrawal is directed will have an effect upon the action that may subsequently be taken. Withdrawal is accomplished by the convening authority directing the prosecution to take the necessary action to remove from the consideration of a particular court a specification and, when appropriate, the charge under which it is laid or the entire case. This action may be taken only when directed by the convening authority, who may give such a direction either on his own initiative or on application made to him. In the case of a joint or common trial, the withdrawal may be limited to one or more of the

accused. In no event will a specification or case be withdrawn arbitrarily or unfairly to the accused.

b. Grounds for withdrawal. Normally, less than all of the specifications may not be withdrawn after the trial proceedings have begun except upon a determination of the convening authority that the specifications so withdrawn should be dismissed or for other good cause determined by the convening authority and made a matter of record. Among the proper grounds upon which a particular specification may be withdrawn are that the specification contains a fatal defect, that the evidence in support thereof is insufficient, or that one of the accused is to be used as a witness.

Further, a convening authority normally should not withdraw an entire case after commencement of the trial with a view to further prosecution unless he determines that urgent and unforeseen military necessity requires that the trial be postponed or terminated, and it does not appear that the military situation will permit the rescheduling or resumption of the trial within a reasonable time. However, this action may sometimes be appropriate for other good cause in the interest of justice. See, for example, 122*b*(2). When a case is withdrawn with a view to future prosecution, a detailed statement of the reasons therefor must be included in the record.

If, prior to trial, the accused has requested trial before a military judge alone (53*d*(2)), the case may not be withdrawn with a view to further prosecution except for good cause shown in the record of trial.

c. Effect of withdrawal. The withdrawal of a specification on proper grounds before the commencement of the trial in a case is not in itself a ground of objection or a defense in a subsequent trial for the same offense. However, a future trial may be precluded for other reasons, such as a grant of immunity (68*h* and 148*e*). Although a specification should not be withdrawn after commencement of the trial without a showing of good cause in the record unless it is to be dismissed, a showing of good cause is especially important after the introduction of evidence bearing on the guilt or innocence of the accused as to the alleged offense, as withdrawal at this stage may bar future prosecution for that offense. See Article 44. Accordingly, if further prosecution is intended, the power to withdraw a specification or a case after commencement of the trial should be exercised only because of urgent and unforeseen military necessity or for other good cause in the interest of justice.

d. Action of trial counsel upon a withdrawal. A withdrawal of a specification before trial is accomplished by the trial counsel lining out and initialing the withdrawn specification on the charge sheet and renumbering the remaining specifications or charges when appropriate.

If less than all of the specifications are withdrawn after the members of the court are aware that those withdrawn had been referred to trial, the trial counsel should announce the withdrawal in open session and the military judge, or the president of a special court-martial without a military judge, should instruct the court not to consider those specifications for any reason. When a specification is withdrawn after the trial of a case commences, but before the members of the court are aware that it had been referred to trial, the trial counsel should line out and initial the withdrawn specification on the charge sheet, renumber the remaining specifications and charges when appropriate, and insure

that the withdrawn specification is not brought to the attention of the court members.

e. Mistrials. (1) *General.* Aside from the withdrawal of charges as provided for in 56*a* through *d*, the declaration of a mistrial acts to withdraw the charges from the court-martial. The military judge or the president of a special court-martial without a military judge may as a matter of discretion declare a mistrial when, after considering all the circumstances, that action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the trial. A mistrial may be declared respecting the entire proceedings or respecting only the proceedings after findings. Examples of circumstances warranting this action are prejudicial misconduct by a court member and the improper disclosure to the court of inadmissible evidence, opinions, or information which is so highly prejudicial to either side that its effects cannot be removed by an instruction to the court to disregard the disclosure (57*d*(2)).

(2) *Procedure.* When it appears to the military judge, or the president of a special court-martial without a military judge, that a mistrial may be in order or when either party moves for a mistrial, the military judge, or the president of a special court-martial without a military judge, shall immediately determine the position of both parties on the subject. In a court-martial with a military judge this should be done in a hearing conducted out of the presence of the members of the court. Counsel for each side should be given an opportunity to state whether he objects to the declaration of a mistrial and to argue upon the question if he desires. Thereupon, the matter will be ruled upon as an interlocutory question (57).

(3) *Effect upon further proceedings.* The declaration of a mistrial is within the sound discretion of the military judge or the president of a special court-martial without a military judge; and unless there has been an abuse of discretion, it does not preclude further prosecution for the same offense before another court-martial. Further, in no case does a mistrial granted with the consent of the defense preclude such a further prosecution. In any case in which a mistrial has been declared, a record of trial will be prepared showing the proceedings up to the time of the declaration of the mistrial. See generally 82 and 83. If a mistrial has been declared in a general court-martial and further prosecution is not contemplated, the review of the staff judge advocate or legal officer should be limited to questions of jurisdiction. See 85*b*. If further prosecution is contemplated, a review will not be prepared, but the convening authority, before directing trial by general court-martial, will again refer the charges to his staff judge advocate or legal officer for consideration and advice. See 35*b* and *c* and Article 34(a).

57. INTERLOCUTORY QUESTIONS OTHER THAN CHALLENGES. ***a. General provisions.*** The military judge shall rule on all interlocutory questions arising during the proceedings. Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty (71*a*), or upon any interlocutory question other than the factual issue of mental responsibility of the accused is final and constitutes the ruling of the court. He also rules finally as to challenges. See 62. The president of a special court-martial without a military judge shall rule on all interlocutory questions other than challenges. See 62*h*(3) as to procedure for determining challenges. Any ruling made by the president of a special court-martial without a military judge

on any question of law other than a motion for a finding of not guilty is final and constitutes the ruling of the court.

The military judge or the president of a special court-martial without a military judge may change his ruling at any time during the trial. (Art. 51(b)).

The following rules and procedures apply to both the military judge and the president of a special court-martial without a military judge:

(1) *Mental responsibility.* When the factual issue of mental responsibility of the accused is raised as an interlocutory question (122*b*), the ruling of the military judge or the president of a special court-martial without a military judge is final unless objected to by a member of the court. Before asking whether any member of the court objects to his ruling, he should give the court members such instructions as will enable them to understand the issue that is before them and the legal standards and procedure by which they will determine it if objection is made. If objection is then made, the court will be closed and the issue decided by a vote of the members (57*f*). In a court-martial with a military judge, he shall not be present while the court is closed to deliberate or vote.

(2) *Treatment of offered evidence.* The military judge or the president of a special court-martial without a military judge may examine an offered item of real or documentary evidence before ruling on its admissibility. He will take care that an offered document or, when practicable, an item of real evidence is not exposed to risk of inadvertent examination by members of the court until he has ruled that the document or item of real evidence is admissible. In this connection, see 57*g*(2) for rules governing certain proceedings held by the military judge outside the presence of the members of a court-martial. The military judge or the president of a special court-martial without a military judge should give the court members appropriate instructions to disregard evidence which, once having been admitted, is excluded by a subsequent ruling. He should also advise the court members of any limitations applicable to evidence which has been admitted for a limited purpose; for examples, see 138*g*, 140*b*, and 153*b*(2)(c).

b. Applicability of this paragraph. This paragraph (57) applies to the disposition of questions of law and interlocutory questions, that is, to all questions other than the findings, sentence, and administrative matters such as declaring recesses and adjournments, arising during trial, except the question of whether a challenge should be sustained. It should be kept in mind, however, that these two categories may be overlapping in that a question may be both interlocutory and a question of law.

All questions of law are ruled upon finally by the military judge. Except for a motion for a finding of not guilty, all questions of law are ruled upon finally by the president of a special court-martial without a military judge. Questions of the applicability of a rule of law to an undisputed set of facts are normally questions of law. Similarly, the legality of an act is normally a question of law. For example, the legality of an order when disobedience of the order is charged, the legality of restraint when there is a prosecution for breach of arrest, or the sufficiency of a pre-interrogation warning are customarily all questions of law. It is possible, however, for such questions to be decided solely upon some factual issue, in which case they would be questions of fact. An example is a question of whether the person who issued an order in fact occupied a position which would authorize him to issue it.

A question is interlocutory unless the ruling on it would finally decide the case on its merits. Questions that go to the ultimate issue of guilt or innocence are not interlocutory. Whether a question is interlocutory may vary with the context in which it arises. An issue is not purely interlocutory if an accused raises a defense or objection and the disputed facts involved go to the ultimate question of guilt or innocence. For example, if during a trial for desertion the accused makes a motion to dismiss for lack of jurisdiction and presents evidence tending to show that he is not a member of an armed force, his status as a military person reaches the ultimate question of guilt or innocence, and, if the motion is denied, the disputed facts must be resolved by each member of the court in connection with his deliberation upon the findings. If, on the other hand, the accused was charged with larceny and presented the same evidence as to his military status, the evidence would bear only upon his amenability to trial and the issue would be disposed of solely as an interlocutory question.

Interlocutory questions may be questions of fact or questions of law. This distinction is important because generally the president of a special court-martial without a military judge rules finally on interlocutory questions of law, but not on interlocutory questions of fact. On interlocutory questions of fact he rules subject to the objection of any other member. On mixed questions of fact and law, rulings should be made subject to objection by any other member to the extent that the issue of fact can be isolated and considered separately. For example, a mixed question of fact and law could arise in connection with the admissibility of an out-of-court statement by the accused. If a conflict were to exist in the testimony, with a law enforcement agent testifying that he gave a certain preliminary warning and the accused testifying that no such statement was made at all, that would be a question of fact. A question could also exist as to whether the agent's statement would, if in fact made, constitute a legally sufficient warning. This would be a question of law. In such a case, the admissibility of the accused's out-of-court statement would be a mixed question of law and fact.

c. Rulings by the president of a special court-martial without a military judge. The president of a special court-martial without a military judge shall rule in open session upon all interlocutory questions (57*b*), other than challenges, arising during the trial, such as questions as to the admissibility of evidence offered during the trial, competency of witnesses, continuances, adjournments, recesses, motions, order of the introduction of witnesses, and the propriety of any argument or statement of the trial or defense counsel. His ruling upon any question of law other than a motion for a finding of not guilty is final. For example, the ruling of the president upon instructions is final and is not subject to objection by a member. Any question as to whether the ruling of the president is conclusive shall be determined by him. Although he rules finally on all questions of law, his rulings on interlocutory questions of fact, including a factual issue of mental responsibility or mental capacity of the accused (122*b*(2)), are subject to objection by any member of the court. As to mixed questions of law and fact see 56*b*.

The ruling of the president on a motion for a finding of not guilty is final unless objected to by a member of the court. Before asking whether any member of the court objects to his ruling on a motion for a finding of not guilty, the president should give the court such instructions as will enable them to under-

stand the issue that is before them and the legal standards by which they will determine it if objection is made. See 71*a*. If, thereafter, a member objects to the president's ruling on a motion for a finding of not guilty, the court will be closed and the question voted on as stated in 57*f*.

d. Rulings by the military judge. A ruling by the military judge on a question of law, including a motion for a finding of not guilty, or on an interlocutory question other than the factual issue of mental responsibility of the accused, is final so far as concerns the court and no repetition of the ruling is necessary (57*a*). The military judge shall determine whether a ruling made by him is final.

e. Form of ruling. Each ruling by the military judge and the president of a special court-martial without a military judge 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 tie vote on a motion for a finding of not guilty or on a question relating to the sanity of the accused is a determination against the accused. A tie vote on any other question is a determination in favor of the accused. See Articles 51(b) and 52(c). The voting is in closed session, but the president announces the decision in open session. See 62*h*(3) for the manner of voting on challenges by a special court-martial without a military judge.

g. Necessary inquiry to be made; preponderance of evidence controls.

(1) *General.* The ruling or decision on an interlocutory question should be preceded by any necessary inquiry into the pertinent facts and law. For example, the party making the objection, motion, or request may be required to furnish evidence or legal authority in support of his contention. Upon such an inquiry, questions of fact are determined by a preponderance of the evidence.

(2) *Military judge.* The military judge is responsible for rulings made by him, but he may consult with the members of the court in open session upon appropriate matters such as a continuance, adjournment, or recess before making his ruling. When necessary, he may recess the court for a time sufficient to enable him to consult pertinent legal authorities before making his ruling.

When sitting with members, the military judge should hear arguments of counsel on proposed instructions (73*d*), and, at the request of the defense, on matters concerning the admissibility of a pretrial statement of the accused, out of the hearing of the members of the court. Also, if it appears to the military judge that an offer of proof (154*c*), preliminary evidence or argument with respect to the admissibility of offered evidence, or any other proceeding not requiring the presence of the members may contain matters prejudicial to the rights of the accused or the Government, he should, upon his own motion or upon motion of counsel, direct that the members of the court be excluded during these proceedings. Counsel for both sides, the accused, and the reporter will be present during these proceedings, which will be fully recorded, transcribed, and incorporated in the record of trial. But see 82*b*(1) and 83*b*.

When, as a result of a hearing held out of the presence of the members of the court, the military judge rules that offered evidence is admissible, the

evidence will be offered in open session; in addition, if preliminary evidence adduced at such a hearing goes to the weight of the evidence admitted by the ruling of the military judge, both sides will be given an opportunity to present for the consideration of the members of the court any competent evidence affecting the weight to be given to the evidence so admitted. In this connection, see 140*a*(2) and (3).

In lieu of, or in addition to, any oral arguments of counsel with respect to the admissibility of evidence, the military judge may also direct counsel to submit written arguments or briefs on questions of law. These written arguments should not be brought to the attention of the members of the court but should be made part of the record of trial.

(3) *President of a special court-martial without a military judge.* While the responsibility for a ruling rests with the president of a special court-martial without a military judge, he may properly close the court and consult with the other members of the court before making his ruling, when such ruling is subject to the objection of any member of the court.

58. POSTPONEMENTS AND CONTINUANCES. ***a. Postponement of trial.*** The necessity for a formal continuance may often be avoided by requesting the convening authority, the military judge or the president of a special court-martial without a military judge, whoever is appropriate, to postpone the initial session of the trial or by requesting an adjournment or recess.

b. Continuances, general. The military judge or the president of a special court-martial without a military judge should, upon a showing of reasonable cause, grant a continuance to any party and for such time, and as often as, may appear to be just (Art. 40). Whether a request for continuance should be granted is a matter of sound discretion and is an interlocutory question (57). There is no limit to the number of continuances which may be granted.

c. Grounds for continuance. Among the grounds that may be considered as reasonable are the absence of a material witness; sickness of the trial counsel, accused, defense 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 counsel to cause a copy of the charges to be served as required by Article 35 may be a ground for a continuance. In time of peace, no person may, against his objection, be brought to trial before a general court-martial within a period of five days after the service of the charges upon him, or before a special court-martial within a period of three days after the service of charges upon him (Art. 35). In computing these time periods, the date of service of the charges on the accused and the date of trial are excluded. Holidays and Sundays are not excluded.

d. Effect of denying application for continuance. The refusal to grant a continuance when reasonable cause is shown 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 all accused persons. Although the question of a continuance is one within the sound discretion of the military judge or president of a special court-martial without a military judge, whenever it appears that there has been an abuse of discretion and the accused has been denied 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.

e. Application for a continuance. The military judge or the president of a special court-martial without a military judge acts upon the application for continuance as an interlocutory question (57). Both parties may present matters for and against the granting of the continuance, and the trial counsel may be directed, on behalf of the court, to obtain and present information which will permit an informed decision. This may include information obtained from the convening authority or other military sources. The determination of whether a continuance should be granted, however, rests with the military judge or the president of a special court-martial without a military judge independently of the convening authority's preference.

Although the proper time for making an application for a continuance is at an Article 39(a) session held prior to assembly or, if no such session is held, immediately after arraignment, an application made at any other time should be considered on its merits.

f. Matters in support of application. Reasonable cause for the application must be shown. 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 the testimony or attendance, that the party applying for the continuance has reasonable ground to believe that he will be able to procure the testimony or attendance within the period stated in the application, the facts which he expects to be able to prove by the witness, and that he cannot safely proceed with the trial without the witness.

In general, the matters 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 information. 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 pertinent matters and to make an argument.

Chapter XI

ORGANIZATION OF THE COURT AND ARRAIGNMENT OF THE ACCUSED

ATTENDANCE OF THE COURT—ATTENDANCE AND SECURITY OF ACCUSED—PRELIMINARY ORGANIZATION OF THE COURT—CHALLENGES—WITNESS FOR THE PROSECUTION—INVESTIGATING OFFICER—ARRAIGNMENT

59. ATTENDANCE OF THE COURT. A general or special court-martial reports in accordance with the order convening it—thereafter according to adjournment. When this order, after stating the hour and date of the first meeting, adds the words "or as soon thereafter as practicable"; or when the court adjourns to meet at the call of the military judge or the president of a special court-martial without a military judge, the military judge or the president will fix the hour and date for the first or subsequent meeting, as the case may be. He will advise the trial counsel in order that proper notice of the meeting may be given to all concerned. See 58*b* (Postponement of trial).

A court-martial may hold sessions at any hour of the day, but it should not meet at unusual hours nor should the duration of the sittings be unusually protracted, unless the case is one of extraordinary urgency and such a measure is therefore warranted.

60. ATTENDANCE AND SECURITY OF ACCUSED. The convening authority, the ship or station 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 and will determine the nature and degree of any restraint to be imposed on the accused. However, physical restraint will not be imposed upon the accused during open sessions of the court unless prescribed by the military judge or the president of a special court-martial without a military judge. The accused will be properly attired in the class of dress or uniform prescribed by the military judge or president for the court. An accused officer, warrant officer, or enlisted person 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 11*c* (Effect of voluntary absence from trial).

61. PRELIMINARY ORGANIZATION OF THE COURT. ***a. Informal inquiry.*** A court-martial should not be called to order for any session of the trial of a new case until the military judge, or the president of a special court-martial without a military judge, after examining the order convening the court and making an informal inquiry of the personnel present has determined that the accused and, if the presence of the members is required at such ses-

sion, a quorum of the court are present for the trial of the case, and that the detailed members of the prosecution and defense are apparently qualified, as prescribed by Article 27(b) or (c), to conduct the prosecution and defense of the case. In determining the presence of a quorum of the court, the military judge or president should consider whether an enlisted accused has made a proper request for enlisted members; if so, at least one-third of the members present must be enlisted members unless the convening authority has determined that eligible enlisted persons are not available. In this connection, see 36*c*(2) and 41*d*(2).

The military judge should also inquire into the existence of a request by the accused for trial by the military judge alone in appropriate cases. See 53*d*(2).

b. Seating of personnel and the accused. When the court is ready to proceed, it is called to order by the military judge or the president of a special court-martial without a military judge. The members will be seated with the president in the center 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. The military judge will sit apart from the court. Depending upon the size and arrangement of the courtroom, other personnel and the accused will be seated as the military judge or the president of a special court-martial without a military judge may direct, except that the accused will be permitted to sit with his counsel. See appendix 8*b* for suggested seating arrangements for general courts-martial.

c. Announcing personnel of the court and the accused. After the court is called to order for the trial of a new case, the trial counsel will announce the name of the accused and will state by what order, including any amendment thereof, the court is convened. He will then announce the names of the military judge if one has been detailed; the members, if any are present; and counsel who are present. The trial counsel will also announce the names of members absent, when the presence of members is required, and of counsel who are absent. Similar announcement will be made whenever there is a replacement of the military judge, the members or counsel present, either through the appearance of new personnel or personnel previously absent or through the absence of personnel previously present. When the court meets after an adjournment or recess or after it has been closed for any reason, the trial counsel will state for the record whether all parties to the trial who were present at the time of the adjournment or recess, or at the time the court closed, are present.

d. Swearing reporter and interpreter. After accounting for the above personnel, the trial counsel will ascertain as a matter of record whether or not the reporter and interpreter, if any, have previously been sworn in accordance with regulations of the Secretary concerned (Art. 42(a)). If not previously sworn, the reporter and interpreter, if any, will be sworn pursuant to regulations of the Secretary concerned. See chapter XXII as to oaths generally. A similar procedure will be followed in the case of any new reporter or interpreter who may be detailed or employed during the course of a trial.

e. Introduction of prosecution counsel. A general court-martial is not legally constituted unless the detailed trial counsel has been certified as competent to perform such duties by the Judge Advocate General of the armed

force of which he is a member (Art. 27(b)). The trial counsel will next announce whether the legal qualifications of the members of the prosecution are other than as stated in the order convening the court and whether any member of the prosecution has acted as investigating officer (64), military judge, court member, or member of the defense in the same case, or has acted as counsel for the accused at a pretrial investigation or other proceedings involving the same general matter (6*a*; Art. 27). If it appears that the trial counsel or any of his assistants may be disqualified by reason of prior participation in the case, the military judge, or the president of a special court-martial without a military judge, will initiate an inquiry to determine whether the individual concerned is, in fact, disqualified and, if so, whether he has acted for the prosecution (6*a*). When it appears that a member of the prosecution is disqualified by reason of prior participation and that he has acted as a member of the prosecution in the case before the court, the court should be adjourned and the facts reported to the convening authority. If the disqualified member has not acted for the prosecution, the proceedings may continue, but the disqualified member will not be permitted to act for the prosecution during any future stage of the proceedings and he will be excused forthwith. When, as a result of excusing a disqualified member of the prosecution, no qualified trial counsel or assistant trial counsel remains, the court should be adjourned and the facts reported to the convening authority.

Any change in prosecution counsel during the trial and the qualifications of any new counsel should be brought to the attention of the court in the manner prescribed in the preceding subparagraph.

f. Introduction of defense counsel. (1) *General rules as to legal qualifications.* A general court-martial is not legally constituted unless the detailed defense counsel has been certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member (Art. 27(b)). Similarly, a special court-martial is not legally constituted if the accused has not been afforded the opportunity to be represented by counsel qualified under Article 27(b) unless such counsel cannot be obtained because of physical conditions or military exigencies (6*c*). If qualified defense counsel cannot be obtained because of physical conditions or military exigencies or if the accused has declined qualified counsel, a special court-martial is not legally constituted unless the following jurisdictional requirements are also satisfied:

(*a*) If the detailed trial counsel or any assistant trial counsel is qualified to act as counsel before a general court-martial, the detailed defense counsel shall be a person similarly qualified (6*c*; Art. 27(c)(2)); or

(*b*) If the detailed trial counsel or any assistant trial counsel is a judge advocate, or a law specialist, or a member of the bar of a Federal court or the highest court of a State, the detailed defense counsel shall be one of the foregoing (6*c*;Art. 27(c)(3)).

(2) *Ascertaining legal qualifications of counsel for the defense.* After the court has ascertained the qualifications of the members of the prosecution, the military judge will ask the accused whom he desires to introduce as counsel. Counsel representing the accused will then be asked to state whether the legal qualifications of the detailed members of the defense are other than as stated in the order convening the court.

If the accused introduces counsel of his own selection and the qualifications of that counsel are not shown in the order convening the court, his selected counsel will be asked to state whether he has been certified by an appropriate Judge Advocate General as competent to act as counsel before a general court-martial and, if not, whether he has any of the legal qualifications enumerated in Article 27(b)(1). See 48*a* regarding qualifications of counsel before general and special courts-martial.

(3) *Action when defense counsel is not legally qualified.* If the detailed defense counsel of a general court-martial has not been certified as competent to perform these duties by the Judge Advocate General of the armed force of which he is a member (Article 27(b)), the military judge will adjourn the court and report the matter to the convening authority. If the accused in a trial by general court-martial has selected as individual counsel a person who is neither qualified under Article 27(b) nor otherwise qualified as a lawyer, the military judge will advise the accused that he may not be represented by a person who does not have the requisite qualifications and will not permit the unqualified counsel to represent the accused at the trial. See 48*a*.

At a special court-martial, the military judge or the president of a special court-martial without a military judge will adjourn the court and report the matter to the convening authority when it appears:

(*a*) That the accused has not been afforded the opportunity to be represented by counsel qualified under Article 27(b) unless such counsel cannot be obtained because of physical conditions or military exigencies (6*c*; Art. 27(c)(1)); or

(*b*) That the detailed trial counsel or any assistant trial counsel is qualified to act as counsel before a general court-martial, but the detailed defense counsel is not so qualified (6*c*; Art. 27(c)(2)); or

(*c*) That the detailed trial counsel or any assistant trial counsel is a a judge advocate, or a law specialist, or a member of the bar of a Federal court or the highest court of a State, but the detailed defense counsel is not one of the foregoing (6*c*; Art. 27(c)(3)).

When the equivalency requirements of (*b*) and (*c*) have been satisfied by the detailed counsel, the trial may not proceed without the presence of such counsel unless the accused expressly states at the trial that he does not desire his presence. If the accused does not so state, the court will adjourn pending procurement of a detailed defense counsel who has the requisite qualifications. The accused may also defend himself or be represented by individual counsel. If the special court-martial may legally adjudge a bad-conduct discharge (15*b*), the accused may not be represented by an individual counsel who is not qualified as a lawyer (48*a*). Regardless of the legal qualifications of individual counsel, the detailed defense counsel and assistant defense counsel shall, if the accused so desires, act as his associate counsel; otherwise, they shall be excused by the military judge or the president of a special court-martial without a military judge (Art. 38(b)).

(4) *Prior participation of defense counsel in same case.* After the court has determined that the defense counsel has the requisite legal qualifications, the trial counsel will ask the counsel representing the accused to state whether any member of the defense present, including individual counsel, is the

accuser or has acted in the same case as a member of the prosecution (6*a*, *d*), or as investigating officer (64), military judge, or court member. If it appears that any member of the defense has previously acted in the same case for the prosecution, he will be excused forthwith. If a member of the defense is the accuser or has participated in the same case as an investigating officer, military judge, or court member, he will be excused unless the accused expressly requests his services. If, as a result of excusing a member of the defense, the accused is left without counsel having the requisite legal qualifications, the court will be adjourned and the matter reported to the convening authority.

g. Announcement of request for trial by the military judge alone. When it has been ascertained that counsel representing the prosecution and defense are qualified to perform their respective duties, the military judge or the president of a special court-martial without a military judge will so state. In every case in which a military judge has been detailed and in which the death penalty may not be adjudged (14*a*), the military judge should ascertain whether the accused has been advised of his right to request trial by the military judge alone. If the accused has not been so advised, the military judge should insure that the accused is properly advised and, after consultation with counsel, given an opportunity to submit a request at that time. See appendix 8*e* for form of request.

h. Announcement of request for enlisted members. After the announcement of the qualifications of counsel and if the accused is not to be tried by a military judge alone, the trial counsel will, in the case of an enlisted accused, announce whether the accused has made a request in writing that the membership of the court include enlisted persons. See appendix 8. If a written request, signed by an enlisted accused, is not made before or at this time, the accused may not thereafter assert his right to have enlisted members on the court. If a proper request for enlisted members is made before or at this time, the court may not be assembled unless at least one-third of the members actually sitting on the court are enlisted persons or unless the convening authority has directed that the trial proceed in the absence of enlisted members. See 4*b* and *c*. When one or more, but not all, of the accused being tried at a joint or common trial make a proper request for enlisted members, the military judge or the president of a special court-martial without a military judge will take action similar to that prescribed when a motion to sever has been granted. In this connection, see 69*d*.

i. Oaths. The oaths for military judges, court members, counsel, reporters and interpreters shall be prescribed in regulations of the Secretary concerned (Art. 42(a)). See chapter XXII as to oaths generally.

It must be established in open session whether the members of the court if any, or properly qualified counsel, or the military judge if any, have previously been sworn pursuant to regulations of the Secretary concerned. Any such personnel, including individual defense counsel, not previously sworn should now be sworn in accordance with regulations of the Secretary concerned. When an oath is being administered to any of the above personnel, all persons in the courtroom will stand.

j. Assembly of the court. Following the procedure outlined by this paragraph (61), the military judge or the president of a special court-martial

without a military judge may announce that the court is assembled. The court is assembled when, after the members have gathered in the courtroom to start the trial, the military judge or the president of a special court-martial without a military judge has announced that the court is assembled. In a court-martial consisting of a military judge alone, the court is assembled at the time announced by the military judge. See appendix 8*b*.

k. Applicability to Article 39(a) sessions. Immediately after commencing an Article 39(a) session (53*d*), the military judge should insure that the court is properly constituted by following the procedure in *b*, *c*, *d*, *e*, *f*, and *i* above. After insuring that the court is properly constituted, the military judge may proceed to take up the matters in *g* and *h* above. See appendix 8*a*.

62. CHALLENGES. ***a. Statutory provisions.*** The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The military judge, or if none has been detailed, the court members shall determine the relevancy and validity of challenges for cause, but a challenge may not be received to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered. Each accused and the trial counsel is entitled to one peremptory challenge, but the military judge may not be challenged except for cause (Art. 41).

b. Disclosing grounds for challenges. After the members of the court, the military judge, and counsel have been sworn, the trial counsel will announce to the court the general nature of the charges, the name of the accuser, the investigating officer, the officer or officers forwarding the charges to the convening authority, and the name of any court member or military judge who participated in any proceedings already had. He will then disclose in open session every ground for challenge believed by him to exist in the case and will request that the military judge and each member do likewise with respect to grounds of challenge, whether against the military judge or member himself or against any others who are subject to challenge for cause. In disclosing grounds for challenge, personnel should state only the ultimate nature of the circumstances which in their opinion makes them subject to challenge, and not details such as derogatory information regarding the accused. Among the grounds for challenge which a member or military judge should disclose are these: That he has participated in the investigation of the case, has acted as counsel for the accused, will be a witness for the prosecution, or has forwarded the charges to the convening authority with a recommendation concerning trial by court-martial.

Similar disclosures and requests will be made by the trial counsel with respect to a new member or military judge; and the trial counsel, any member, or the military judge will disclose any such ground at any time during the proceedings that he becomes aware of it.

Without challenging for cause, the trial or defense counsel may question the court, or individual members thereof, and the military judge concerning the existence or nonexistence of facts which may disclose a proper ground of challenge for cause. Thus, the defense counsel may question the court, or individual members thereof, with respect to whether they know the accused and, if so, whether they are hostile or friendly toward him. It is optional with the

questioning party whether the member being questioned shall be sworn to testify as to his competency as a member before answering these preliminary questions.

In any case referred to a court-martial composed of a military judge and members, the military judge may direct that the examination of a member be conducted out of the presence of the remaining members of the court, and he should do so in any case in which the information elicited may be derogatory to the accused and may disqualify the other members. In a special court-martial without a military judge, the questioning of a member should be free enough to provide the court members with sufficient information to pass upon the impartiality of the member concerned, but disclosure of information derogatory to the accused may disqualify the other members who hear it. If the members are disqualified by a disclosure, the president should adjourn the court and report the matter to the convening authority.

c. Action upon disclosure. If it appears from any disclosure that the military judge or a member is subject to challenge on any ground stated in clauses (1) through (8) of 62*f*, and the fact is not disputed, the military judge or member will be excused forthwith. If the military judge is excused or the court is reduced below a quorum, the court will adjourn pending detail of a new military judge or additional members. Except as just stated, no action is required under this subparagraph (62*c*) with respect to any disclosure that may be made; but proceedings under this paragraph are without prejudice to any rights of challenge on either side.

d. When made; reconsideration; opportunity to challenge new member. In any case in which an Article 39(a) session is held prior to assembly, challenge of the military judge should be made during the Article 39(a) session. Whenever counsel is aware of any possible grounds for challenge for cause of a member, he should raise the matter at the earliest practicable session of the court. In all other cases, challenges should be made immediately following assembly of the court. The military judge or the president of a special court-martial without a military judge should, however, permit a challenge for cause to be presented at any stage of the proceedings. 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 or military judge.

e. Peremptory challenges. A peremptory challenge does not require any reason or ground therefor to exist or to be stated. It may be used before, during, or after challenges for cause, or against a member unsuccessfully challenged for cause, or against a new member if not previously utilized in the trial. It cannot be used against the military judge. A member challenged peremptorily will be excused forthwith.

In a joint or common trial each accused is entitled to one peremptory challenge.

f. Challenges for cause—grounds for. Among the grounds of challenges for cause against members of special and general courts-martial and, unless otherwise indicated by the context, the military judge are the following:

(1) That the challenged military judge or member is not eligible to serve as military judge or member, respectively, on courts-martial.

(2) That he is not a member or military judge of the court.

(3) That he is the accuser as to any offense charged. See Article 1(9) for definition of accuser.

(4) That he will be a witness for the prosecution. See 63 for definition of witness for the prosecution.

(5) That he was the investigating officer as to any offense charged. See 64 for definition of investigating officer.

(6) That he has acted as counsel for the prosecution or the accused as to any offense charged.

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

(8) That he is an enlisted member who is a member of the same unit as the accused. See 4*b* and Article 25(c)(2) for definitions of the word "unit."

(9) That he has forwarded the charges in the case with his personal recommendation concerning trial by court-martial.

(10) 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, except that this shall not necessarily apply to a military judge who has formed or expressed such an opinion solely in his role as military judge sitting alone in a previous trial of the same or a closely related case.

(11) That he has acted in the same case as the convening authority or as the legal officer or staff judge advocate to the convening authority.

(12) That he will act in the same case as the reviewing authority (84) or as the legal officer or staff judge advocate to the reviewing authority (85*a*).

(13) Any other facts indicating that he should not sit as a member or military judge in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality. Examples of the facts which may constitute 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, when it can be avoided, a member is junior in rank or grade to the accused; 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 as a member or as counsel 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 held 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. In connection with this last example, see 41*e* and *f*, and 62*h*(1).

g. Limitations on inquiry as to eligibility of military judge. A challenge against a military judge based on the ground that he is not eligible to act as military judge (62*f*(1)) will not be sustained unless it is shown: (1) That he is not a commissioned officer; or (2) that he is not on active duty with an armed force; or (3) that he is not a member of the bar of a Federal court or of the highest court of a State of the United States; or (4) that he has not been certified to be qualified for duty as a military judge (Art. 26(b)); or (5) that

in a general court-martial he is not designated and assigned in accordance with Article 26(c). The hearing on such a challenge will be limited to the issue of determining whether any one of the reasons enumerated above exists. In this connection, it may be inferred that a person detailed as the military judge of a court-martial is a commissioned officer on active duty with an armed force, and the recital of his qualifications in the convening order is evidence of the facts recited therein. An inquiry into the general educational, legal, or judicial experience of the military judge is improper.

h. Procedure. (1) *Manner of making challenges.* After any challenges made by the trial counsel have been decided, he will, after complying with any request made by the accused to be permitted to examine the papers referred to in 44*h*, give the accused an opportunity to exercise his rights as to challenge. The accused thereupon may challenge, in turn, the military judge and each member to whom he objects. As to peremptory challenges, see 62*e*. 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 that a member was absent when testimony on the merits or other important proceedings was had will often be withdrawn by the challenger upon his being informed that certain witnesses will be recalled and re-examined.

(2) *Inquiry.* If a member or the military judge is challenged for cause, the challenge, if not withdrawn, must be passed on by the military judge, or if none has been detailed, by the members of the court less the member challenged, after both sides have been given an opportunity to question the person challenged, to introduce evidence and to argue. The challenger may subject a challenged member to an examination which may be under oath as to the subject matter of the challenge. For form of the oath, see 114*g*. This examination may properly extend to any of the matters enumerated in 62*f* as constituting or possibly constituting a ground for challenge and any other matters which have a substantial or direct bearing on the rights of the accused or the Government to a fair and impartial court. The military judge will rule upon challenges as to his own participation in a case, and all interlocutory matters arising during the hearing on challenge. Any member, against whom a challenge for cause has been directed, will take no part in the hearings upon the challenge except when called to testify or to make a statement as to his competency. If the challenged member is president of a special court-martial without a military judge, he shall, subject to 57*a* and *c*, continue to rule upon interlocutory questions arising during the hearing although he may, at the time such a question arises, be testifying under oath as to his competency. In any case in which the military judge while making a statement or the president of a special court-martial without a military judge while testifying as to his competency, is required to rule upon an interlocutory question, he should preface any ruling by a statement such as, "As military judge (president) I rule that . . ."

The military judge, or if none has been detailed, the court should be liberal in passing on 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.

(3) *Deliberation and voting by a special court-martial without a military judge.* In a special court-martial without a military judge, deliberation and voting upon a challenge will be in closed session, and the challenged member will be excluded. Before closing the court, the president should instruct the court on the applicable law and procedure to be followed in deciding the challenge. The vote upon the challenge is by secret written ballot, which ballot may be in the form "Sustained" or "Not Sustained." See Article 51(a) as to counting and checking the vote and announcing the result of the ballot. 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 disqualifies the member challenged (Art. 52(c)). Upon the court being opened, the president shall state that the challenge has been sustained or not sustained. When three members of a special court-martial without a military judge are present and one is challenged, the remaining two may vote on the challenge.

(4) *Action.* If the challenge is sustained, the challenged member or military judge will withdraw from the court; otherwise he will resume his seat. The court will then proceed to consider the next challenge, if one is presented. When a court has been reduced below a quorum, or when the number of enlisted persons 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 military judge for cause is sustained, the court will adjourn and report the matter to the convening authority.

63. WITNESS FOR THE PROSECUTION. If at any stage of the proceedings the military judge or any member of the court is called as a witness for the prosecution, he shall, before qualifying as a witness, be excused from further duty as military judge or member, respectively, in the case. Whether the military judge or 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 military judge or member, respectively. If a witness called by the defense testifies adversely to the defense, he does not thereby become a "witness for the prosecution."

For the purpose of this paragraph, a witness includes not only one who testifies in court but anyone whose declaration is received as evidence for any purpose, including written declarations made by affidavit or otherwise. For example, a person who by his certificate has attested or otherwise authenticated an official record introduced in evidence by the prosecution, or who has authenticated any writing so introduced, is a witness for the prosecution even if he does not testify in person.

64. INVESTIGATING OFFICER. Within the meaning of the fifth clause of 62*f* and Articles 25(d)(2), 26(a), and 27(a), the term "investigating officer," as applied to a particular offense, shall be understood to include a person who, under the provisions of 34 and Article 32, has investigated that offense or a

closely related offense alleged to have been committed by the accused. The term also includes any other person who, as counsel for, or a member of, a court of inquiry, or as an investigating officer or otherwise, has conducted a personal investigation of a general matter involving the particular offense. However, it does not include a person who, in the performance of his duties as counsel, has conducted an investigation of a particular offense or a closely related offense with a view to prosecuting or defending it before a court-martial. But see 6*a* and 62*f*(6).

65. ARRAIGNMENT. ***a. General.*** When a general or special court-martial has been organized and both parties are ready to proceed, the trial counsel will present the court with copies of the charges and specifications upon which the accused is about to be tried. See 56*d* in this connection and 79*d* for procedure of a summary court-martial. The trial counsel will then read to the accused the charges and specifications. Thereafter, each accused will be called upon to plead. This proceeding constitutes the arraignment. The pleas are not part of the arraignment. The accused may waive the reading of the charges and specifications.

As a rule, after arraignment in a case involving several charges and specifications, the procedure to be followed will be to receive pleas according to numerical order on the specifications of the first charge, then on the first charge, and so on with the rest. When appropriate, a single plea may be entered as to all charges and specifications without enumerating them.

If an Article 39(a) session is conducted by the military judge prior to assembly, the arraignment may be held and the pleas of the accused accepted at that time if permitted by the regulations of the Secretary concerned. If the arraignment is held at such a session, the trial counsel may present the court members with copies of the charges and specifications immediately after assembly. See 39*b*, 53*d*(1) and 70*b* for entering findings on a plea of guilty.

b. Additional charges. After the arraignment of the accused upon certain charges, additional charges cannot be introduced at the same trial. However, additional charges can be introduced at any stage of the proceedings before the arraignment if all the usual pre-arraignment proceedings concerning those additional charges have been completed, including proceedings as to qualifying counsel and challenging and excusing the military judge and members of the court. In such a case, the accused may be arraigned on the additional charges as well as on the original charges, and the trial may proceed on both sets of charges. It is not necessary that any personnel of the court be resworn when additional charges are introduced. An application for a reasonable continuance should be granted.

Chapter XII

PLEAS AND MOTIONS

GENERAL—MOTIONS RAISING DEFENSES AND OBJECTIONS—MOTIONS TO DISMISS—MOTIONS TO GRANT APPROPRIATE RELIEF—PLEAS—MOTION FOR FINDING OF NOT GUILTY; RES JUDICATA

66. GENERAL. ***a. Pleas.*** Pleas in court-martial procedure are pleas of guilty, not guilty, and pleas corresponding to permissible findings (70, 74*b*). Pleas are entered after arraignment.

b. Motions. A motion is an application to the military judge or to the president of a special court-martial without a military judge for particular relief. Defenses and objections raised before a plea is entered shall be raised only by a motion to dismiss or to grant appropriate relief as provided in this chapter. Motions to dismiss (67*a*) normally are made before a plea is entered and motions for appropriate relief normally are made prior to plea or prior to the conclusion of any Article 39(a) session held prior to assembly, whichever occurs earlier (67*b*). Any defense or objection, however, 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 convening authority as well as by motion made at the appropriate time at trial. Reference of these matters to the convening authority before trial is without prejudice to the renewal of the assertion by motion at the trial.

67. MOTIONS RAISING DEFENSES AND OBJECTIONS. ***a. Defenses and objections which may be raised.*** Defenses and objections such as that trial is barred by the statute of limitations, former jeopardy, 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 constitutes a waiver.

b. Defenses and objections which must be raised. Defenses and objections based on defects in the preferring 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. Failure to raise any such objection prior to plea or prior to the conclusion of any Article 39(a) session held prior to assembly, whichever occurs earlier, constitutes a waiver thereof, but the military judge or the president of a special

court-martial without a military judge may grant relief from the waiver for good cause shown.

c. Form and content of motion. 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 or 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. Defenses and objections which may appear to be available to the accused shall, if not asserted, be brought to the attention of the accused in any case in which he is not represented by counsel and may be brought to his attention in any case.

d. Time of making motions. A motion raising any of the defenses and objections discussed in *a* and *b* above normally is made before the plea is entered or prior to the conclusion of any Article 39(a) session held prior to assembly, whichever occurs earlier. See 53*d*.

Motions for a finding of not guilty are made after the prosecution has rested its case or at the conclusion of all of the evidence. A motion to inquire into the mental condition of the accused (122) or to delay the proceedings on the ground that the accused lacks the requisite mental capacity (120*d*) 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 military judge or the president of a special court-martial without a military judge defers action on the motion until a later time. If action is deferred, however, the military judge or the president of a special court-martial without a military judge should rule on the motion before the court closes to deliberate on the accused's guilt or innocence. Before action is taken on a contested motion, each side will be given an opportunity to introduce pertinent evidence and to make an argument. When trying a case with members, the military judge may conduct the hearing out of their presence; but, a hearing on a motion in which the mental responsibility of the accused is in issue should be conducted in the presence of the members. Although counsel may refer to the facts of other pertinent cases when arguing out of the hearing of the members of the court, he may do so before the members only when the motion is one in which the ruling is made subject to the objection of any member of the court. Except as otherwise indicated in the discussion of motions (68*c*, Statute of limitations) and elsewhere (122*a*, Insanity), the burden generally rests on the accused to support by a preponderance of the evidence a motion raising a defense or objection. A decision on such a motion is always an interlocutory matter, but matters presented on such a motion may also raise a contested issue of fact of a kind which should properly be considered by the court in connection with its determination of the accused's guilt or innocence. See 57*b*. For example, if a specification alleges that an offense was committed at a time which is within the statute of limitations and the accused makes a motion to dismiss on the ground that trial is barred by Article 43, asserting that the offense was committed at an earlier time than that alleged, the time of the commission of the offense must, if the motion is denied, be specifically considered by each member of the court in connection with his deliberation on

the findings of guilt or innocence. If by exceptions or substitutions the court finds that the offense was committed at an earlier time, the ruling denying the motion to dismiss must be changed to one granting the motion, provided the statute of limitations has run against the offense in view of the earlier time of commission found. See also 122 for a discussion of the question of the mental responsibility of the accused in connection with the findings on the general issue.

f. Effect of rulings on motion. The denial of a motion raising a defense or objection does not prevent the entering of another motion to the same specification or charge. The military judge or the president of a special court-martial without a military judge may reconsider any action in denying or sustaining a motion as long as the specification affected thereby 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 granting 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 military judge or by the president of a special court-martial without a military judge.

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 granted 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 to the convening authority.

If a specification before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action (Art. 62(a)). This action should be taken only on application by the prosecution, with notice to the defense, after affording both sides an opportunity to be heard. The convening authority may not return the record to the court for reconsideration of a ruling which amounts to a finding of not guilty, as, for example, the granting of a motion to dismiss because of lack of mental responsibility at the time of the offense (120*b*) or the granting of a motion for a finding of not guilty (71*a*; Art. 62(b)). Likewise, the convening authority may not direct the military judge or the president of a special court-martial without a military judge to reconsider a ruling on a motion to grant appropriate relief or a ruling granting a request for a continuance. In returning the record of proceedings to the court, the convening authority will include a statement of his reasons for disagreeing, together with instructions to reconvene and reconsider the ruling with respect to the matter in disagreement. Except as provided in 122*b*(3) he will not refer to or include in his communication any factual information relative to the ruling in question which is not already a part of the record nor will he direct the court to consider any evidence or information other than that which is already in the record. To the extent that the matter in disagreement relates solely to a question of law, as, for example, whether the charges allege an offense

cognizable by a court-martial, the military judge or the president of a special court-martial without a military judge will accede to the view of the convening authority. If the matter in disagreement relates to issues of fact, as, for example, whether an officer exercising general court-martial jurisdiction has unconditionally restored a suspected deserter to duty without trial with knowledge of the alleged desertion (68*f*), the military judge or special court-martial without a military judge will exercise his or its discretion in reconsidering the motion.

If the convening authority does not return the record for reconsideration, he will take the necessary action to conclude the case by publishing appropriate orders. See generally 82, 83, and 85*b*.

When a motion to grant appropriate relief has been granted by the military judge or the president of a special court-martial without a military judge, the convening authority may cause appropriate action to be taken to remedy the defect and, if appropriate, may return the record to the court or another court for appropriate further action. If he does not return the record to the court or arrange for trial by another court, as when a motion for change of venue has been granted (69*e*), he will dismiss the charges to which the motion relates.

68. MOTIONS TO DISMISS. ***a. General.*** A motion to dismiss properly relates to any defense or objection raised in bar of trial. Among the defenses and objections which may be raised by this motion before entering a plea are lack of jurisdiction (68*b*), failure of the charges to allege an offense (68*b*), running of the statute of limitations (68*c*), former jeopardy (68*d*), pardon (68*e*), constructive condonation of desertion (68*f*), former punishment (68*g*), immunity (68*h*), and unreasonable denial of speedy trial (68*i*). See 57 for finality of rulings.

b. Lack of jurisdiction; failure to allege an offense. (1) *General.* If the court lacks jurisdiction or if the charges fail to allege any offense under the code, the proceedings are a nullity. These objections cannot be waived and may be asserted at any time.

(2) *Lack of jurisdiction.* A motion to dismiss on the ground of lack of jurisdiction is ordinarily based on an assertion that the court is not properly constituted because it was not convened by an official empowered to convene it or on an assertion that the accused is not a person who properly may be tried by court-martial. See 8 as to requisites for court-martial jurisdiction and 9 as to jurisdiction of courts-martial as to persons. With respect to jurisdiction of an offense committed before a fraudulent discharge, a final conviction of having fraudulently obtained the discharge in violation of Article 83(2) may be shown by the prosecution as a final adjudication of the fraudulent discharge, and the accused may not dispute the jurisdiction of the court as to the earlier offense on the ground that his separation from the service was not fraudulent. See Article 3(b).

(3) *Failure to allege an offense.* By a motion to dismiss, the accused may object to the failure of a specification to allege any offense triable by court-martial. With the exceptions stated in 14*a*, courts-martial do not have jurisdiction to try any offenses not cognizable under the code. 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

granted, the military judge, or the president of a special court-martial without a military judge, will direct that the specification be striken and disregarded.

c. Statute of limitations (Art. 43). Except for certain offenses for which there is no limitation as to time (Art. 43(a)), a person charged with an offense under the code is not liable to be tried by court-martial, unless the statute of limitations has been tolled (Art. 43(d)), extended (Art. 43(e)), or suspended (Art. 43(f)), if sworn charges have not been received by the officer exercising summary court-martial jurisdiction over the command within the period of time—either two or three years after the commission of the offense—specified in Article 43. See 215*d* for a discussion of the substantive rules with respect to the statute of limitations.

When it appears from the charges or from the evidence introduced at the trial that the statute has run against an offense charged or, in the case of a continuing offense, a part of the offense charged, the military judge, or the president of a special court-martial without a military judge, will bring the matter to the attention of the accused and advise him of his right to assert the statute unless it otherwise affirmatively appears that the accused is aware of his rights in this regard. See 53*h*. If the accused pleads guilty to a lesser included offense against which the statute of limitations has apparently run, the military judge, or the president of a special court-martial without a military judge, will advise the accused of his right to interpose the statute in bar of trial as to that offense. See also 74*h*.

The burden is not on the defense to show that neither absence from the territory in which the United States has authority to apprehend him nor other impediment prevents the accused from claiming exemption under Article 43. 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 when sworn charges and specifications were received by an officer exercising summary court-martial jurisdiction over the command, the motion should be granted unless the prosecution shows by a preponderance of evidence that the statute does not apply because of periods which, under the provisions of Article 43(d), are to be excluded in computing the three years.

Since the statute of limitations is a matter of defense, it may be waived by the accused provided he is aware of his right to assert it. A plea of guilty, after explanation of its effect with respect to the statute of limitations, operates as such a waiver. If an accused pleads guilty to an included offense against which the statute of limitations has run and persists in the plea after the meaning and effect thereof have been explained to him including his right to interpose the statute of limitations as to the included offense, the plea of guilty, as long as it stands, is a waiver of his right to interpose the statute of limitations. Under these circumstances he may not, after a finding of guilty of the included offense, assert the statute of limitations.

The defense of the statute of limitations generally is raised by a motion to dismiss. However, the defense also may be raised under a plea of not guilty by introducing evidence during the trial in those cases involving contested issues of fact which must be considered by the members of the court in connection with the issue of guilt or innocence. See 67*e* for an example of a case in which it is appropriate to raise the defense under a plea of not guilty. In such a case, however, the accused should advise the military judge or the president of a special

court-martial without a military judge that he is insisting upon the defense of the statute of limitations under his plea of not guilty, as failure to assert the defense during the hearing may constitute a waiver.

See 74*h* for the procedure to be followed when the accused is found guilty of a lesser included offense to which he has not entered a plea of guilty and against which the statute of limitations has run.

d. Former jeopardy. No person may, without his consent, be tried a second time for the same offense (Art. 44(a)). See 215*b* for a discussion of the substantive rules with respect to the defense of former jeopardy. Former jeopardy by court-martial, in support of a motion to dismiss, may be established in appropriate cases by the order publishing the results of the trial. Former jeopardy before a civilian court may be established by the indictment and record of conviction or acquittal.

e. 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.

f. Constructive condonation of desertion. If an officer exercising general court-martial jurisdiction unconditionally restores a deserter to duty without trial with knowledge of the alleged desertion, 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 has 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.

g. Former punishment. Nonjudicial punishment previously imposed under Article 15 for a minor offense and punishment imposed under Article 13 for a minor disciplinary infraction may be interposed in bar of trial for the same offense or infraction. For a definition of "minor offenses," see 128*b*. See 215*c* for a discussion of the substantive rules with respect to the defense of former punishment.

h. Grant or promise of immunity. An authority competent to order a person's trial by general court-martial may grant or promise him immunity from trial. A grant of immunity may be interposed as a bar to trial if the trial in question is contrary to the grant. A promise of immunity may also be interposed as a bar to trial if the trial is contrary to the terms of the promise.

i. Speedy trial. An accused has the right to a speedy trial, the denial of which may be asserted by a motion to dismiss. See 215*e* for a discussion of the substantive rules with respect to the right to a speedy trial. When the accused moves for a dismissal of certain charges on the ground that there has been an unreasonable delay as to those charges, the prosecution has the burden of establishing that the delay was not unreasonable. Objections based on the lack of a speedy trial may be waived by a failure to make a timely motion to dismiss the affected charges.

69. 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 be raised by such a motion are defects in charges and specifications which do not amount to a failure of the charge to allege an offense (69*b*), a substantial defect in the conduct of the pretrial investigation (see 34, 69*c*, Art. 32), prejudicial joinder in a joint trial (69*d*), misjoinder in a common trial (33l, 69*d*), and a general atmosphere of prejudice at the place of trial (69*e*). In general these objections are waived if not asserted before the entry of a plea or the conclusion of an Article 39(a) session held prior to assembly, whichever occurs earlier, but relief from the waiver may be granted for good cause (67*b*). The motion should briefly and clearly set forth the nature of and grounds for the request, objection, or questions it is intended to make or raise. The motion admits nothing as to either the jurisdiction of the court or the merits of the case. For examples of other motions to grant appropriate relief which may be made during the trial, see 69*f*. See 57 for finality of rulings.

b. Defects in charges and specifications. (1) *General.* If a specification, although alleging an offense cognizable by courts-martial, is defective in matters of form, as when it is inartfully drawn, indefinite, or redundant or when it misnames the accused, is laid under the wrong article, or does not contain sufficient allegations as to time and place, the objection should be raised by a motion for appropriate relief.

(2) *When accused is not misled.* If it clearly appears that the accused has not in fact been misled by the form of the charges 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.

(3) *When accused may be misled.* If the specification is defective to the extent that it does not fairly apprise the accused of the particular offense charged, the military judge or the president of a special court-martial without a military judge, when the defect is raised, will according to the circumstances direct the specification to be stricken and disregarded, or continue the case to allow the trial counsel to apply to the convening authority for directions as to further proceedings, or permit the specification to be amended so as to cure the defect and continue the case for such time as in the opinion of the military judge or the president of a special court-martial without a military judge will enable the accused properly to prepare his defense in view of the amendment.

In determining which of the courses mentioned in the preceding subparagraph is to be followed, the military judge or the president of a special court-martial without a military judge will exercise discretion in the light of the circumstances of each case. The following discussion is intended to provide guidance only and is not to be considered as providing a solution for every case.

When a defective specification alleges a relatively minor offense and one or more specifications remain before the court alleging serious offenses as to which a delay of the trial might prejudice the interests of the accused or the Government, the military judge or the president of a special court-martial

without a military judge may strike the defective specification and proceed with the trial of the remaining offenses.

Proper occasions for amending a defective specification and continuing the case may arise when the prosecution is prepared to propose an appropriate amendment which, without changing the nature of the offense charged, supplies sufficient particulars to enable the accused properly to prepare his defense.

When the trial counsel is not prepared to propose an appropriate amendment to a defective specification, or when a proposed amendment to such a specification would change the nature of the offense intended to be alleged and when the interests of justice do not require that the defective specification be stricken in order that the trial may proceed with respect to other specifications, the military judge or the president of a special court-martial without a military judge may continue the case in order to permit the trial counsel to refer the matter to the convening authority. This procedure is also appropriate in any case when there is doubt as to the proper relief which should be granted with respect to a defective specification.

c. Defects arising out of the pretrial investigation. A substantial failure to comply with the requirements of 34 and Article 32 may be brought to the attention of the court by a motion for appropriate relief. Such a motion should be granted 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 granted, the military judge may direct a continuance to enable the accused to prepare his defense properly, or may adjourn the proceedings to permit compliance with 34 and Article 32 and report the basis of his action to the convening 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 co-accused 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 (33*l*).

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 military judge or the president of a special court-martial without a military judge 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 use at his trial the testimony of one or more of his co-accused or the testimony of the wife of one, that a defense of the other accused is antagonistic to his own, or that evidence as to the other accused will in some manner prejudice his defense.

If the motion is granted, the military judge or the president of a special court-martial without a military judge will decide which accused will be tried first and, in the case of joint charges, direct an appropriate amendment of the charges and specifications. For instance, if after severance the court proceeds with the trial of B in a case in which A and B have been 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 procedural guide, appendix 8*b*. When, as a result of action on a motion to sever, trial of one or more accused is deferred, the trial counsel will report the facts at once to the convening authority so that he may take appropriate action to try the deferred accused or to make other disposition of the charges as to that accused.

e. Change of venue. If the accused demonstrates that there exists at the place of trial where the prosecution is pending so great a general atmosphere of prejudice against him that he cannot obtain a fair and impartial trial in that place, he is entitled, upon a motion for a change of venue, to be tried at some other place. When such a motion is granted, the charges shall be returned to the convening authority for arrangements for trial elsewhere.

f. Miscellaneous motions for relief. In addition to the grounds for motions discussed above in this paragraph (69), there are others which may be made for the purpose of raising a specific objection on the merits before trial of the general issue. For examples, see 121 and 122 (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 ordinarily not be granted. But see 26*b*.

70. PLEAS. ***a. General.*** In court-martial procedure, pleas include guilty, not guilty, and pleas corresponding to permissible findings of included offenses. See 74*b*(3). The military judge, the president of a special court-martial without a military judge, or summary court-martial may refuse to accept a plea of guilty and should not accept the plea without first determining that it is made voluntarily with understanding of the nature of the charge. If an accused arraigned before a court-martial makes any irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record and the court shall proceed as though he had pleaded not guilty (Art. 45(a)). The term "irregular pleading" includes such contradictory pleas as guilty without criminality or guilty to a charge after pleading not guilty to all specifications thereunder.

A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged (Art. 45(b); see 15*a*(3)), but a plea of guilty may be received as to a noncapital offense which is necessarily included in a capital offense alleged.

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 or waiver involved in a plea of guilty to any offense has effective existence only as long as the plea stands. A plea of not guilty or guilty will, in the absence of a motion to grant appropriate relief, be regarded as a waiver of

any objection which must be raised by such a motion before plea, including any objection based on a misnomer of the accused whether under an alias or otherwise. See 67*b*. By standing mute, an accused does not waive any objections otherwise waived by a plea.

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 if there are aggravating or extenuating circumstances not clearly shown by the specification and plea, any available and admissible evidence as to those circumstances may be introduced. If a plea of guilty to an included offense is entered, the trial counsel shall proceed with the prosecution of the offense charged.

b. Procedure if plea of guilty is entered. The following procedure is prescribed for all cases in which a plea of guilty is entered:

(1) In general and special court-martial cases, the plea of guilty will be received only after the accused has had an opportunity to consult with the counsel detailed for or selected by him. If the accused has refused counsel, the plea should not be received.

(2) The military judge, the president of a special court-martial without a military judge, or summary court-martial should explain to the accused the meaning and effect of any plea of guilty made by him. This explanation should include the following:

The elements of the offense to which the plea of guilty relates;

That, as to the offense to which the plea of guilty relates, the plea admits every element charged and every act or omission alleged and authorizes conviction of the offense without further proof;

The maximum authorized punishment, including permissible additional punishment (127*c*, Section B), as appropriate, which may be adjudged upon conviction of the offense; and

That the maximum authorized punishment may be adjudged upon conviction of the offense.

(3) A plea of guilty will not be accepted unless the military judge, the president of a special court-martial without a military judge, or summary court-martial, after the accused has been questioned, is satisfied not only that the accused understands the meaning and effect of his plea and admits the allegations to which he has pleaded guilty but also that he is voluntarily pleading guilty because he is convinced that he is in fact guilty. See appendix 8*b* for an example of the procedure which may be followed.

(4) The explanation made and the replies of the accused thereto will be set forth verbatim in the record of trial when a verbatim record is kept. In other records of trial, the substance of the explanation and replies will be set forth in the record of trial. In records of trial by summary court-martial, the fact that a plea of guilty was explained will be recorded in the space provided.

(5) The question whether the plea will be received is an interlocutory one.

In a trial by court-martial with members to which a military judge has been detailed, the explanation of the meaning and effect of a guilty plea and

any inquiry into the providence of a guilty plea should be accomplished by the military judge out of the presence of the members of the court-martial.

When an accused in the course of a trial following a plea of guilty makes a statement to the court, in his testimony or otherwise, inconsistent with the plea, the military judge, the president of a special court-martial without a military judge, or the summary court-martial will inquire into the providence of the plea. If as a result of this inquiry it appears that the accused in fact entered the plea improvidently or through lack of understanding of its meaning and effect, or if the accused does not voluntarily withdraw his inconsistent statement, a plea of not guilty shall be entered and the trial will proceed as though he had pleaded not guilty. See Article 45(a). If before the sentence is announced in a trial by general or special court-martial the accused asks permission to withdraw a plea of guilty and substitute a plea of not guilty or a plea to a lesser included offense, the military judge or the president of a special court-martial without a military judge may, as a matter of discretion, permit him to do so. As to the procedure at a trial by summary court-martial, see 79*d*(2). If a plea of guilty previously entered is set aside, the prosecution will be given an opportunity to reopen its case and produce any available evidence which it did not introduce because of the plea of guilty. See 81b(2) as to the procedure when an accused asks permission to withdraw a plea of guilty during a rehearing on the sentence only.

If the accused is being tried by a military judge alone or by a summary court-martial, a finding of guilty may be entered immediately following the acceptance of the plea. In a trial by a court-martial with members, a finding of guilty of the charge and specifications may, if permitted by regulations of the Secretary concerned, be entered immediately without vote after a plea of guilty has been accepted by the military judge or the president of a special court-martial without a military judge. The findings will be entered by the announcement that the accused has been found guilty in accordance with his pleas. See Appendix 8*b*.

71. MOTION FOR FINDING OF NOT GUILTY; RES JUDICATA. ***a. Motion for finding of not guilty.*** On motion of the defense, a finding of not guilty may be entered as to any offense charged after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of that offense. If a motion for a finding of not guilty at the close of the evidence offered by the prosecution is not granted, the defense may offer evidence without having reserved the right to do so. But if all the evidence in the record, whether adduced by the defense or the prosecution, or both, is sufficient to sustain a conviction, the conviction need not be set aside upon review merely because the court erred in denying the motion for a finding of not guilty at the time it was made.

The military judge, or the president of a special court-martial without a military judge, in his discretion may require that the motion specifically indicate wherein the evidence is legally insufficient. The matter will be determined as an interlocutory question. See 57 and Article 51(b). If there is any evidence which, together with all inferences which can properly be drawn therefrom and all applicable presumptions, could reasonably tend to establish every essential element of an offense charged or included in any specification to which the motion is directed, the motion will not be granted. The military judge, or the

president of a special court-martial without a military judge, in his discretion may defer action on any such motion as to any specification and permit the trial counsel to reopen the case for the prosecution and to produce any available evidence. If the motion is granted as to any specification, the ruling amounts to a finding of not guilty of that specification and, when appropriate, of the proper charge.

The ruling of the military judge upon a motion for a finding of not guilty is final and constitutes the ruling of the court, but the president of a special court-martial without a military judge rules subject to objection by any member of the court (Art. 51(b)). After ruling initially and before asking whether any member objects to the ruling, the president shall instruct the court as to the elements of the offense and any lesser included offenses, the test to be applied in determining whether the motion should be granted, and any other matters which properly warrant instruction at that time (57*c*).

b. Res judicata. The doctrine of res judicata provides that a matter put in issue and finally determined by a court of competent jurisdiction cannot be disputed between the same parties in a subsequent trial, even though the determination was based upon an erroneous view or application of the law. Res judicata applies only to the matter determined and not to any principle of law announced by the court which may have led to the determination of the matter. In criminal trials, the doctrine of res judicata precludes the prosecution from relitigating a matter determined in the accused's favor by a previous final judgment or ruling, whether the present trial is for the same or a different offense and whether the previous proceeding culminated in an acquittal, a conviction, or otherwise. The accused may invoke the doctrine by asserting a motion to dismiss on the basis of a matter finally determined in his favor at a previous trial or by objecting to evidence which is offered to prove a matter which was finally determined in his favor at a previous trial. The former adjudication may be proved by the record of trial in which it appears. Whether res judicata applies to a certain matter is an interlocutory question. See 57. The accused may invoke the doctrine of res judicata as to matters finally determined in a previous trial by court-martial or in any previous trial in which the United States or any governmental unit deriving its authority therefrom was a party. The doctrine may not be asserted by the prosecution. See, however, 68*b*(2).

As an example of the operation of the doctrine of res judicata, if the accused is being tried by court-martial for the murder of A, he may successfully object to the introduction of evidence that he shot A if he had been acquitted at a previous trial by court-martial of a charge of having assaulted A by shooting him on the same occasion, and this is so even though the defense of former jeopardy (68*d*) might not be available to the accused. As another example, the accused may successfully object to the introduction of a confession against him if that confession was excluded as being inadmissible against him at a previous trial by court-martial, even if the confession was excluded under an erroneous concept of the law.

Chapter XIII

MATTERS RELATED TO FINDINGS AND SENTENCE

ARGUMENTS—INSTRUCTIONS TO A COURT-MARTIAL WITH MEMBERS—FINDINGS—PRESENTENCING PROCEDURE—SENTENCE—CONCLUSION OF THE TRIAL

72. ARGUMENTS. ***a. General.*** After both sides have rested, arguments may be made to the court by the trial counsel, the accused, and his counsel. The trial counsel has the right to make the opening argument and, if any argument is made on behalf of the defense, the closing argument. The closing argument of the trial counsel is generally limited to the discussion of propositions or matters argued by the defense. If the trial counsel is permitted by the court to introduce new matter in his closing argument, the defense should be afforded an opportunity to reply thereto, but this will not preclude the trial counsel from presenting a final argument. See 75*e* as to argument on the sentence.

If the arguments indicate that a plea of guilty was entered improvidently, the military judge or the president of a special court-martial without a military judge will take appropriate action as indicated in 70.

Arguments of counsel may be oral, in writing, or both. See 82*b*(4) in this connection.

b. Content. A reasonable latitude should be allowed counsel in presenting their arguments. Restricting argument, particularly in long and complicated cases, may constitute error; however, the military judge, or the president of a special court-martial without a military judge may as a matter of discretion limit argument when it is trivial or mere repetition. In arguments on findings and sentence, as discussed in this paragraph and 75*e*, and as distinguished from arguments on other matters (53*g* and 57*g*(2)), neither counsel may cite legal authorities or the facts of other cases, except when arguing before the military judge sitting alone.

Counsel may make a reasonable comment on the evidence and may draw such inferences from the testimony as will support his theory of the case. The testimony, conduct, motives, and evidence of malice on the part of witnesses may, so far as disclosed by the evidence, be commented upon. It is improper to state in an argument any matter of fact as to which there has been no evidence. A party may, however, argue as though the testimony of his own witnesses conclusively established facts related by them.

The prosecution may not comment upon the failure of the accused to take the witness stand; however, if the accused has testified on the merits with respect to an offense charged and if he fails in that 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 a failure may be commented upon. When an accused is on trial for a number of offenses and has testified

to one or more of them only, no comment can be made on his failure to testify as to the others. Trial counsel may not comment on the exercise by the accused of his rights under Article 31(b), the conduct of the defense at the Article 32 investigation, nor upon the probable effect of the court's findings on relations between the military and civilian communities.

Refusal of a witness to answer a proper question may be commented upon. But see 148*e* and 150*b*. As to permissible comments on the fact that one witness testified after hearing another, see 149*a* (Examination of witnesses).

c. Improper argument. Argument should not be interrupted by the other side or by the court unless it becomes improper, in which case it may be appropriate for the military judge or the president of a special court-martial without a military judge to order that the argument be confined to proper matters, and that any improper part already made be disregarded.

73. INSTRUCTIONS TO A COURT-MARTIAL WITH MEMBERS. ***a. General.*** After closing arguments have been concluded, the military judge, or the president of a special court-martial without a military judge, will give the court those instructions which are required by the law in the light of the circumstances of the case. He will instruct the court as to the elements of the offense charged in each specification and the elements of each included offense in issue. The elements of the offense, for instructional purposes, are those issues of fact related to the offense which must be determined by the members of the court on the question of the guilt or innocence of the accused. When the question of insanity is reasonably raised by the evidence, he must instruct the court as to this issue. He should give instructions on the law governing each affirmative defense reasonably in issue under the evidence and on the meaning of each term having a special legal connotation employed in the instructions. For example, in offenses of murder or manslaughter, instructions on self-defense (216*c*) must be given if that defense is reasonably raised by the evidence; and in the case of offenses requiring proof of specific intent or actual knowledge, instructions on the possible effect of intoxication (154*a*(3)) must be given when this is an issue reasonably raised by the evidence. If any evidence, including evidence of other acts of misconduct of the accused, has been admitted for a limited purpose, he should instruct the court concerning the limited purpose for which it was received. See chapter XXVII as to instructions concerning other evidentiary matters.

Information as to the elements of certain offenses and included offenses may be obtained from the subparagraphs entitled "Discussions" and "Proof" which appear in the discussion of the punitive article relating to each. See chapter XXVIII. A mere reading of the elements of proof from applicable subparagraphs will not, however, in most cases be sufficient to apprise the court of what must be proved to warrant a conviction, nor will it provide other necessary instructions, such as those on affirmative defenses in issue. Instructions should be tailored to fit the circumstances of the individual case. If the military judge, or the president of a special court-martial without a military judge, entertains any doubt as to the elements of a particular offense, the law governing an affirmative defense, what matter should be included in any instruction, or any other question relating to instructions, he may call upon trial and defense counsel to produce any law available on these matters, including citations and authorities.

If there is an accepted plea of guilty to an offense and a finding of guilty has not been entered without vote, the military judge, or the president of a special court-martial without a military judge, may invite the attention of the court to the fact that no further proof of the offense to which the plea relates need be introduced by the prosecution to warrant a finding of guilty of that offense. See 70*b*.

All instructions given by the military judge, or the president of a special court-martial without a military judge, will be given in open session in the presence of the accused and counsel for both sides.

b. Charging the court. After instructing the court as set forth in 73*a*, the military judge, or the president of a special court-martial without a military judge, shall, in all cases in which a not guilty plea has been entered and, when appropriate, in cases in which a plea of guilty to all charges and specifications has been entered, charge the court:

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

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

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

(4) That the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States.

c. Military judge's summarizing and commenting upon the evidence. When the military judge deems it necessary or desirable, he may give the court such additional instructions as will assist it in making its findings. For example, he may, in an appropriate case, make an orderly statement of the issues of fact, summarize and comment upon the evidence on each side of those issues, and discuss the law applicable thereto at greater length than required by 73*a*.

In summarizing or commenting upon the evidence, the military judge should use the greatest caution to insure that his remarks do not extend beyond an accurate, fair, and dispassionate statement of what the evidence shows, both in behalf of the prosecution and the defense. He should not depart from the role of an impartial judge, or assume the role of a partisan advocate. He should not assume as true the existence or nonexistence of a material fact in issue as to which the evidence is conflicting, as to which there is dispute, or which is not supported by the evidence, and he should make it clear that the members of the court are left free to exercise their independent judgment as to the facts.

d. Preparing instructions. If the military judge, or the president of a special court-martial without a military judge, deems it necessary or desirable, he may recess the court so that he may have time to prepare his instructions, and he may request counsel for both sides to furnish him with proposed instructions as to a particular issue in the case or as to any or all of the offenses charged. Counsel may submit proposed instructions without such a request, however, and need not submit them even when requested to do so. If either counsel submits proposed instructions or requests instructions on any matter, the military judge, or the president of a special court-martial without a military judge, should

provide instructions on the matter if it is in issue and has not been adequately covered elsewhere in his instructions. Any proposed instructions submitted by counsel will be presented in writing and copies will be furnished to the opposing counsel. The military judge, or the president of a special court-martial without a military judge, may accept, reject, or modify any proposed instruction that is submitted, and may substitute instructions of his own or refuse to give any instructions on a matter included in a proposed instruction submitted by counsel, subject to the limitations above. In giving an instruction proposed by counsel, he should not identify its source. He will cause all proposed instructions to be marked for identification and appended to the record of trial for consideration on review. Counsel may be permitted to present argument upon proposed instructions. The military judge will exclude the members during the presentation of any argument upon a proposed instruction. The argument should be recorded and incorporated in the record.

Normally, written instructions are not taken into closed session by the court, but any copy which is taken into closed session must be appended to the record of trial as an appellate exhibit.

74. FINDINGS. ***a. General.*** The following principles apply to findings whether made by the military judge alone or by the members:

(1) *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; by any opinions not properly in evidence; or by motives of partiality, favor, or affection. Matters as to which comment in argument is prohibited cannot be considered.

(2) *Weighing evidence.* In weighing the evidence, a member is 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. In this connection, see 153*a* (Credibility of witnesses) and 153*b* (Impeachment of witnesses).

(3) *Reasonable doubt.* In order to convict of an offense, the court must be satisfied beyond a reasonable doubt that the accused is guilty thereof. By "reasonable doubt" is intended not a 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 of guilt. 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 accused 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 is not an absolute or mathematical certainty but a moral certainty.

The rule as to reasonable doubt extends to every element of the offense. If, in a trial for desertion with intent to remain away permanently, a reasonable doubt exists as to that intent, the accused cannot properly be convicted as charged, although he might be convicted of the lesser included offense of

absence without proper authority (app. 12). It is not necessary that each particular fact advanced by the prosecution be proved beyond a reasonable doubt; it is sufficient to warrant conviction if, on the whole evidence, the court is satisfied beyond a reasonable doubt that the accused is guilty.

If a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused cannot legally be convicted of that offense. See 120*b* as to the standard of mental responsibility and 122 as to the burden of proof and presumption of sanity. See the fourth paragraph of 214 as to the burden of proof when a special (affirmative) defense is in issue.

A reasonable doubt may arise from the insufficiency of direct as well as circumstantial evidence. There is no general rule for contrasting the weight of direct and circumstantial evidence. See 138*b*. The rule as to reasonable doubt applies equally to cases supported by direct evidence and those in which the only competent evidence is circumstantial.

b. Findings as to the specifications. (1) *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 as to a specification should be consistent throughout. A finding of guilty without criminality should not be made.

When two or more accused are tried jointly, the findings as to each accused should be stated separately. Any different findings as to two or more joint accused should be consistent with one another. Thus, if A and B are joint accused and the court finds B guilty of the offense charged and finds A not guilty, B should be found guilty by excepting from the specification the name of A and the words in the specification which indicate that the offense was a joint one.

(2) *Exceptions and substitutions.* One or more words or figures may be excepted and, when necessary, others substituted, provided the facts as so found constitute an offense by the accused which is punishable by the court and provided such an 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. For action to be taken when the evidence indicates an offense not charged, see 55.

(3) *Included offenses.* If the evidence fails to prove the offense charged but does prove the commission of an offense necessarily included in that charged or of an attempt to commit the offense charged or of an offense necessarily included therein, 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. For a discussion of included offense, see 158; for a discussion of attempts, see 159.

A table listing some commonly included offenses appears in appendix 12.

(4) *Offenses arising out of the same act or transaction.* The accused may be found guilty of two or more offenses arising out of the same act or transaction, without regard to whether the offenses are separate. In this connection, however, see 76*a*(5).

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

An attempt should be found as a violation of Article 80 unless the attempt is included in the express terms of some other article. For examples, see Articles 85, 94, 100, 104, and 128.

The finding as to a charge should not be inconsistent with, but should support, the findings as to the specifications thereunder. Thus, if two specifications of desertion are under one charge and the accused is found guilty of the first specification, but guilty of only absence without leave as to the second specification, the finding as to the charge should be: Of the Charge: As to Specification 1: Guilty. As to Specification 2: Not guilty, but guilty of a violation of Article 86. 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 as to the charge should be simply guilty.

A court may not find an offense as a violation of an article under which it was not charged solely for the purpose of increasing the authorized punishment or for the purpose of adjudging less than the prescribed mandatory punishment.

d. Procedure for courts-martial with members. (1) *General.* In every case tried by a court-martial with members in which findings of guilt or innocence are to be made, the members must vote on the findings unless regulations of the Secretary concerned permit a finding of guilty to be entered without vote upon the acceptance of a plea of guilty. After the military judge, or the president of a special court-martial without a military judge, has instructed the court as prescribed in 73, the court will close to deliberate and vote on the findings. Only the members of the court will be present. Deliberation may properly include full and free discussion as to the merits of the case. The influence of superiority in rank shall not be employed in any manner in an attempt to control the independence of members in the exercise of their judgment.

(2) *Voting.* Voting shall be by secret written ballot (Art. 51(a)) and is obligatory for all charges and specifications for which findings have not been entered without a vote (Art. 45(b)). The order in which the several charges and specifications are to be voted upon will ordinarily be determined by the president, subject to the objection of a majority of the court, except that all the specifications under a charge shall precede that charge. The members normally vote upon a specification or charge by marking on their ballots: "Guilty;" "Not guilty;" or "Not guilty, but guilty of _____." The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court (Art. 51(a)).

(3) *Numbers of votes required.* No person may be convicted of an offense for which the death penalty is made mandatory by law (see, for example, Art. 106), except by the concurrence of all the members of the court-martial present at the time the vote is taken. No person may be convicted of any other offense, when voting is required (74*d*(1)), except by the concurrence of two-thirds of the members present at the time the vote is taken (Art. 52). If, in computing

the number of votes required, a fraction results, the fraction will be counted as one; thus, if five members are to vote, a requirement that two-thirds concur is not met unless four concur. A finding of not guilty results as to any specification or charge if no other valid finding is reached thereon; however, a court may reconsider any finding before the same is formally announced in open session. The court may also reconsider any finding of guilty on its own motion at any time before it has first announced the sentence in the case. Any member of a court may propose that a finding be reconsidered. If a reballot is proposed by any member as to a finding of guilty of an offense for which the death penalty is mandatory by law, an additional ballot shall be taken immediately. Otherwise, the question shall be determined on secret written ballot, and a reballot shall be taken on a prior not guilty finding when a majority of the members vote in favor thereof or on a prior guilty finding if more than one-third of the members favor reballoting.

e. Requesting additional instructions. If during their deliberation on the findings, the members of a court-martial with a military judge are in doubt as to the applicability of the law or the effect of certain evidence in a case, such as whether they may make a finding of guilty of a specification by substitutions and exceptions, or whether there is any lesser included offense of which they may find the accused guilty, the court may be opened and additional instructions requested from the military judge. These instructions will be given in open session in the presence of the accused and counsel for both sides and will be made a part of the record.

If a special court-martial without a military judge desires additional information on the subjects mentioned above, it may open and request counsel for both sides to present legal authorities on the question or direct the trial counsel to obtain the information. The proceedings, including any information that is given the court by the trial counsel pursuant to such direction, will be in open session in the presence of the accused and his counsel and will be made a part of the record.

f. Form of Findings. (1) *Court-martial with a military judge and members.* After a court-martial with a military judge detailed has finally voted on the findings in closed session, the court may open and ask the military judge for assistance so that it may put the findings in proper form. The military judge should first require the president to state whether the court has reached its findings and, if so, what those findings are. This statement of the president does not constitute the announcement of the findings. The military judge may require the president to submit the findings to him in writing in lieu of an oral statement. The president shall speak for the court members in discussing the findings with the military judge, and he shall be careful not to disclose the vote of any particular member of the court; he may, however, indicate whether a finding was concurred in by two-thirds or all of the members, as the case may be. If the court has not reached its findings, the military judge may give such additional instructions as the court members may require to assist them in arriving at findings.

(2) *Special court-martial without a military judge.* A special court-martial without a military judge shall put its findings in proper form in closed session, following the forms indicated in appendix 8*b* and the instructions contained in 74 *b* and *c*.

(3) *Court-martial composed of a military judge alone.* The military judge sitting alone shall put his findings in proper form following the forms indicated in appendices 8*b* and 8*f* and the instructions contained in 74 *b* and *c*.

(4) *Reason for findings.* No finding by a court-martial with members should include any indication of the reasons for making it. For memorandum of decision and special findings by the military judge sitting alone, see 74*i* and appendix 8*f*.

g. Announcing the findings. As soon as a court-martial with members has determined the findings in a case, it will announce them in open session in the presence of the military judge, if any, counsel, and the accused. Only the required percentage of members who concurred in findings of guilty should be announced. If it is discovered before the conclusion of a trial that there was an error made in announcing the actual findings of the court, the error may be remedied by the announcement of the correct findings. This does not amount to a reconsideration by the court. See 74*d*(3) as to when reconsideration is proper. In any case tried by a military judge with members, the military judge may require the president to submit the findings to him in open session in writing prior to their announcement.

When the military judge who is trying the case alone has determined the general findings, he will announce them in open session in the presence of counsel and the accused (74*i*).

h. Statute of limitations. If by exceptions and substitutions an accused is found guilty of an included offense to which he has not entered a plea of guilty, and against which it appears that the statute of limitations (Art. 43) has run, the military judge, or the president of a special court-martial without a military judge will, as soon as such a finding is announced, advise him in open session of his right to avail himself of the statute. If an accused interposes the statute, the issue will be determined in substantially the same manner as a motion to dismiss on the grounds of the statute of limitation (68*c*), and if it is determined that the statute has run against the offense, the military judge, or the president of a special court-martial without a military judge, will set aside the findings and dismiss the specification.

However, if an accused has pleaded guilty to an included offense and has persisted in his plea after the meaning and effect thereof have been explained to him, including his right to interpose the statute of limitations as to that offense, he has thereby waived the right to interpose the statute of limitations for the offense as long as his plea of guilty stands. Under these circumstances an accused may not, after a finding of guilty of such an included offense, assert the statute.

i. Court-martial composed of a military judge alone. The military judge sitting alone decides the guilt or innocence of the accused. He shall make general findings as indicated in 74*b* and *c* and may make such special finding as he deems appropriate. Upon request, however, special findings shall be made of factual matters reasonably in issue. The special findings will usually include findings as to the elements of the offenses of which accused may be found guilty, findings on the question of mental responsibility if raised by the evidence, and findings on special defenses reasonably in issue. A request for special findings must be made prior to the announcement of general findings by the military

judge and must specify the matter to be determined. Only one set of special findings may be requested by a party in any case. The military judge may require that a request for special findings be submitted in writing. The general findings, when determined, must be announced in open court with all parties present and special findings may be announced at that time. If the military judge files an opinion or memorandum of decision, however, it is sufficient if the special findings appear therein.

Requested special findings need not be made in the event of an acquittal of an offense, or relating to the principal offense, if conviction is of an included offense.

If the accused so requests, the military judge may announce his special findings prior to the presentencing procedure; otherwise the special findings may be attached to the record within a reasonable time after sentencing and before authentication of the record. The military judge may file an opinion or memorandum of decision at any time prior to authentication although the general and special findings were previously announced.

75. PRESENTENCING PROCEDURE. ***a. General.*** After the findings of guilty have been announced, the prosecution and defense may present appropriate matter to aid the court in determining the kind and amount of punishment to be imposed. If the accused was tried by a military judge sitting alone, the presentencing procedure may begin after the military judge announces the findings of guilty. See 74*i*.

Matter which is presented to the court after findings of guilty have been announced may not be considered as evidence against the accused in determining the legal sufficiency of the findings of guilty upon review. If any matter inconsistent with a plea of guilty is received or if it appears from any matter received that a plea of guilty was entered improvidently, action should be taken as outlined in 70.

b. Matter presented by the prosecution. (1) *Data as to service.* The trial counsel will read to the court from the charge sheet the data as to the age, pay, and service of the accused and the duration and nature of any restraint imposed before trial. If the defense objects to the data as being inaccurate or incomplete in a specified material particular, or as containing certain specified objectionable matter, the military judge or the president of a special court-martial without a military judge shall determine the issue. Objections not asserted may be regarded as waived.

(2) *Evidence of previous convictions.* The trial counsel will next introduce evidence of any previous convictions of the accused by courts-martial. This evidence is not limited to offenses similar to the one of which the accused stands convicted. The evidence must, however, relate to offenses committed during the six years next preceding the commission of any offense of which the accused stands convicted. In computing the six-year period, periods of unauthorized absence as shown by the findings in the case or by the evidence of previous convictions should be excluded.

Unless the accused has been tried for an offense within the meaning of Article 44(b), evidence as to the offense is not admissible as evidence of a previous conviction. See 68*d* (Former jeopardy). Therefore, no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall, as to that charge or specification, be admissible as a

previous conviction until the finding of guilty has become final after review of the case has been fully completed. A pending request to the Judge Advocate General to vacate or modify the findings and sentence of a court-martial on grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused (Art. 69) is not a part of the review within the meaning of Article 76 (108), and does not affect the admissibility of that court-martial as a previous conviction.

Ordinarily, previous convictions are proved by the record of previous convictions or the personnel records of the accused or an admissible copy or extract copy thereof. They may also be proved by the order promulgating the result of trial. The rules as to documentary evidence (143) apply to the proof of previous convictions as discussed in this subparagraph. A vacation of a suspended sentence does not itself qualify as a previous conviction and is not admissible as such.

(3) *Matter showing aggravation of an offense to which a plea of guilty has been entered.* If a finding of guilty of an offense is based upon a plea of guilty and available and admissible evidence as to any aggravating circumstances was not introduced before the findings, the prosecution may introduce that evidence after the findings are announced. See 70 in this connection.

c. Matter presented by the defense. (1) *General.* Whether or not it introduced evidence on the issue of guilt or innocence, the defense may, after findings of guilty are announced and before the court closes to vote on the sentence, introduce matter in extenuation or mitigation. With respect to matter in extenuation and mitigation offered by the defense, the military judge or the president of a special court-martial without a military judge may 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.

(2) *Statement of accused.* Whether or not he testified on the issue of guilt or innocence or as to matters in extenuation or mitigation, the accused may make an unsworn statement to the court in mitigation or extenuation of the offenses of which he stands convicted, but the right to make such an unsworn statement does not permit the filing of the affidavit of the accused. This unsworn statement is not evidence, and the accused cannot be cross-examined upon it, but the prosecution may rebut statements of fact therein by evidence. The statement may be oral or in writing, or both. It may be made by the accused, by counsel, or by both. The statement should not include what is properly argument, but ordinarily the military judge or the president of a special court-martial without a military judge will not stop a statement on that ground if it is being made orally and personally by the accused.

(3) *Matter in extenuation.* Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of the offense, including the reasons that actuated the accused but not extending to a legal justification or excuse.

(4) *Matter in mitigation.* Matter in mitigation has for its purpose the lessening of the punishment to be assigned by the court or the furnishing of grounds for a recommendation for clemency. The fact that nonjudicial punishment under Article 15 has been imposed and enforced against the accused may

be shown by the accused as a factor in mitigation upon trial for an offense growing out of the same act or omission for which the punishment was imposed and enforced. See 68*g*. Matter in mitigation may include particular acts of good conduct or bravery. It may exhibit the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other traits that go to make a good officer or enlisted person. For example, the accused may introduce evidence of the character given him on any former discharge 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.

d. Optional matter presented when court-martial constituted with military judge. Under regulations of the Secretary concerned the trial counsel may, prior to sentencing, obtain and present to the military judge any personnel records of the accused or copies or summaries thereof. Summaries of such records will be prepared and authenticated by the custodian thereof as provided in appendix 8*g*. Personnel records of the accused include all those records made or maintained in accordance with departmental regulations which reflect the past conduct and performance of the accused. If the accused objects to the data as being inaccurate or incomplete in a specified material particular, or as containing certain specified objectionable matter, the military judge shall determine the matter. Objections not asserted will be regarded as waived. The accused may submit in rebuttal any matter which reflects on his past conduct and performance. In cases where members determine sentence, the military judge may admit for their consideration any information from these records which reflects the past conduct and performance of the accused.

e. Rebuttal evidence. After matter in aggravation, extenuation, or mitigation has been introduced, the prosecution or defense has the right to cross-examine any witnesses and to offer evidence in rebuttal.

f. Argument. After introduction of matters relating to the sentence, counsel for each side may make argument for an appropriate sentence. Trial counsel may not, in this argument, purport to speak for the convening authority or any higher authority, refer to the views of these authorities, refer to any policy directive relative to punishment, or refer to any punishment or quantum of punishment in excess of that which can lawfully be imposed in the particular case by the particular court.

76. SENTENCE. ***a. Basis for determining.*** In determining the kind and amount of punishment to be imposed, the following matters are applicable:

(1) 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 the limitations prescribed in chapter XXV and by the article violated. See particularly the Table of Maximum Punishments (127*c*). To the extent that punishment is discretionary, the sentence should provide a legal, appropriate, and adequate punishment.

(2) When applicable, the Table of Maximum Punishments prescribes the maximum limits authorized for each offense listed therein, and it should not be interpreted as indicating what is an appropriate sentence in an individual case. Whether the maximum or a lesser sentence will be imposed should be determined after a consideration of all the facts and circumstances involved in the case, regardless of the stage of the trial at which they were established.

Accordingly, the court may consider evidence of other offenses or acts of misconduct which were properly introduced in the case, even if that evidence does not meet the requirements of admissibility in 75*b*(2) and even if it was introduced for a limited purpose before the findings. See 138*g* and 153*b*(2)(*b*). In the exercise of its discretion in adjudging a sentence, the court may consider evidence when properly introduced respecting the character of the accused as given in former discharges, the number and character of previous convictions, that a guilty plea is a mitigating factor, the nature and duration of any pretrial restraint, any evidence of mental impairment or deficiency (123), and the circumstances extenuating, mitigating, or aggravating the offense. It must also consider collateral features which limit the punishment—such as value in larceny, the length of absence in absence without leave, or the fact that the convening authority has directed that a capital case be treated as not capital (Art. 49). For matters to be considered upon a rehearing, see 81*d*. See 145*c* and Article 50 for limitations resulting from the use by the prosecution of testimony contained in a record of a court of inquiry.

(3) Dishonorable discharge should be reserved for those who should be separated 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. See 127*c*, Section B, as to when a dishonorable discharge is authorized as an additional punishment.

(4) 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 a less severe punishment than dishonorable discharge and is designed as a punishment for bad-conduct rather than as a punishment for serious offenses of either a civil or military nature. 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. See 127*c*, Section B, as to when a bad-conduct discharge is authorized as an additional punishment.

(5) The maximum authorized punishment may be imposed for each of two or more separate offenses arising out of the same act or transaction. If one offense is included in the other, the offenses are not separate. Also, the general rule is that offenses are not separate unless each requires proof of an element not required to prove the other. For example, if an accused is convicted of escape from confinement (Art. 95) and desertion (Art. 85) which both arose out of the same act or transaction, the court may legally adjudge the maximum punishment authorized for each offense because an intent to remain permanently absent is not a necessary element of the offense of escape, and a freeing from restraint is not a necessary element of the offense of desertion; but if, in this example, the accused had been convicted of absence without leave instead of desertion, he could not be separately punished for the two offenses because absence without leave does not require proof of any element not also required to prove the escape.

Care must be exercised in applying the general rule stated in the above paragraph as there are other rules which may be applicable, with the result that in some instances a final determination of whether two offenses are separate can be made only after a study of the circumstances involved in the individual case. The following are examples of rules under which offenses may not be

separate although each offense requires proof of an element not required to prove the other:

(*a*) *When the intent for each of several offenses is to be inferred from the same fact.*

Example: An accused is convicted of desertion by an absence with an intent to remain away permanently (Art. 85(a)(1)) and also of desertion by quitting his organization with intent to shirk important service (Art. 85(a)(2)), as the result of one absence. If the intent for each offense is to be inferred from the fact that the accused failed to comply with orders for overseas shipment, the offenses are not separate.

(*b*) *When two offenses are committed as the result of a single impulse or intent.*

Example: An accused is convicted of unlawfully opening mail matter (Art. 134) and larceny (Art. 121) therefrom. If he opened the mail bag for the purpose of stealing money contained in a letter in the bag, the offenses would not be separate.

The following are examples of rules which establish that offenses are separate whether or not each offense requires proof of an element not required to prove the other:

(*a*) *When the offenses involve violations of different social standards.*

Example: An accused is convicted of robbery (Art. 122) and conspiracy (Art. 81) to commit the same robbery. Even if the overt act set forth in the conspiracy is the consummated robbery, the offenses are separate. See 160.

(*b*) *When the offenses involve the breach of separate duties.*

Example: An accused is convicted of misbehavior before the enemy through cowardly conduct in wrongfully failing to join his unit in the front lines (Art. 99(5)) and the willful disobedience of the lawful order of a superior officer to join his unit in the front lines (Art. 90(2)). The offenses are separate because in the first instance the accused had a duty to be with his unit and in the second he had a duty to obey the order to join it.

When an accused is convicted of two or more offenses which are not separate, the maximum punishment for all of those offenses which merge is the maximum prescribed in the Table of Maximum Punishments for the one carrying the most severe punishment.

b. Procedure for courts-martial with members. (1) *Instructions on punishment.* Before a court-martial closes to deliberate and vote on the sentence, the military judge, or the president of a special court-martial without a military judge, must give appropriate instructions on the punishment, to include a statement of the maximum authorized punishment which may be imposed. The instructions should be tailored to fit the facts and circumstance of the individual case and should fully inform the members of the court-martial on their sole responsibility for selecting an appropriate sentence and that the court-martial may consider all matters in extenuation and mitigation as well as those in aggravation, whether introduced before or after the findings; evidence admitted as to the background and character of the accused; and the reputation or record

of the accused in the service for good conduct, efficiency, fidelity, courage, bravery, or other traits of good character. The maximum punishment will be the lowest of the following: the total permitted by 127*c* for the offenses of which the accused stands convicted, or the jurisdictional limit of the court-martial (see Art. 19), or, in a rehearing or new or other trial of the case, the maximum authorized pursuant to 81*d* or 110*a*(2). A court-martial must not be advised of the basis for the sentence limitation or of any sentence which might be imposed for the offense if not limited as set forth above. If an additional punishment is authorized because of the provisions of 127*c*, Section B, however, the military judge or the president of a special court-martial without a military judge, should advise the court of the basis for the increased permissible punishment. If the president of a special court-martial without a military judge has any question as to the maximum punishment that may be adjudged in a case, he may request counsel for either or both sides to procure and present pertinent information concerning the matter for his consideration. This information will be given in open session in the presence of the accused and his counsel and should be made a matter of record.

(2) *Deliberation and voting.* The court sits in closed session during deliberation and voting upon the sentence. Only the members of the court will be present. Deliberation may properly include full and free discussion. The influence of superiority in rank shall 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 the concurrence of the required number of members. Voting is by secret written ballot. The junior member shall in each case collect and count the votes. The count shall be checked by the president who shall forthwith announce the result of the ballot to the members of the court.

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. Any sentence, even in a case where the punishment is mandatory, must have the concurrence of the required number of members. If the required proportion of the court members are conscientiously unable to reach agreement on a sentence, this fact shall be announced in open session and a mistrial declared. The convening authority may thereafter direct a rehearing on the sentence before a different court.

(3) *Number of votes required.* No person may be sentenced to suffer death, except by the concurrence of all the members of the court-martial present at the time the vote is taken. No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken. All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken. See Article 52(b). If, in computing the number of votes required, a fraction results, the 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.

(4) *Form of sentence.* Forms of sentences appear in appendix 13. The sentence adjudged should follow one of those forms or a combination or modification of those forms. The court may be given additional instructions in open session concerning the sentence when it so requests or when otherwise appropriate to assist in a proper sentence determination. See 74*e* for the correct procedure on additional instructions.

c. Announcing of sentence by court-martial with members. As soon as the court has determined the sentence, the president will announce it in open session in the presence of the military judge, if any, the accused, and counsel for both sides. Only the required percentage of members who concurred in the sentence should be announced. If the military judge notes any ambiguity or apparent illegality in the sentence as announced by the court, he should bring the irregularity to the attention of the court so that it may close to reconsider and correct the sentence. The court may not, however, reconsider the sentence with a view to increasing its severity after the sentence has been announced unless the sentence prescribed for the offense of which the accused has been convicted is mandatory (Art. 62(b)). If it is discovered before the dispersal of a court, however, that there was an error made in announcing the sentence as actually determined by the court, the error may be remedied by announcing the correct sentence in open session. In appropriate cases, such an error may also be corrected in a similar manner by reconvening the court if the error is not discovered until after dispersal. In these situations it is unnecessary to have a reconsideration. These procedures may not be used when the sentence announced is the one actually determined but it is later discovered that it does not express the actual intent of the court members. In a trial by special court-martial without a military judge, an ambiguous or apparently illegal sentence may be called to the attention of the court by the trial counsel.

Within the limitations prescribed in this paragraph, the court may reconsider a sentence on its own motion at any time before the record of trial has been authenticated and transmitted to the convening authority. In such a case, however, all personnel of the court, the accused, counsel for both sides, and the military judge, if any, must be present.

d. Procedure for reconsideration by a court-martial with members. Subject to the rules provided in *c* above, any member of the court may propose that a sentence be reconsidered. The question shall be determined by secret written ballot, and a reballot on the sentence with a view to increasing it will be taken only if a majority of the members present vote in favor thereof; but a reballot on the sentence with a view to decreasing it will be taken if the vote therefor indicates that reconsideration *is not opposed* by the number of votes required for the sentence that was previously agreed upon.

e. Court-martial composed of military judge alone. Following the presentencing procedure (75), the military judge sitting alone will, after deliberation, announce the sentence in open session in the presence of the accused and counsel for both sides.

77. CONCLUSION OF THE TRIAL. ***a. Recommendation for clemency.*** After the sentence has been announced, the defense may submit in writing for attachment to the record any matters as to clemency which it desires to have considered by the military judge, the members of the court or the convening

authority. The rules of evidence are not applicable to these matters, but they should not be cumulative of matters presented to the court before the sentence was announced.

Mitigating circumstances which could not be taken into consideration in determining the sentence may be the basis of a recommendation for clemency by the military judge who adjudged the sentence or by individual members of the court. The recommendation should represent the free and voluntary expression of the individuals who join therein. It should be specific as to the amount and character of the clemency recommended and as to the reasons for the recommendation.

A recommendation for clemency will never be based upon a doubt as to the guilt of the accused. If, contrary to law, such a recommendation is made, it will not impeach the finding of the court on the matter of guilt. The guilt or innocence of the accused is determined by the findings of the court, and, if the necessary number of members do not concur in a finding of guilt, the accused must be acquitted. A recommendation for clemency which clearly expresses a doubt as to guilt divulges the vote or opinion of any member making such a recommendation and thereby violates his oath.

b. Adjournment. At the conclusion of the case, the court may proceed to other business, adjourn until a definite time, or adjourn to meet at the call of the military judge or the president of a special court-martial without a military judge.

c. Post trial matters. See 48*j*(2) as to the right of the defense to submit a brief of the matters which it desires to have considered in behalf of the accused on review.

In those cases in which confinement at hard labor is included in the sentence adjudged, the accused may submit to the convening authority an application for the deferment of the service of the confinement. See 88*f*.

As to the duty of trial counsel to notify the accused's commanding officer of the result of trial, see 44*e*. For preparation and authentication of the record, see chapter XVI.

Chapter XIV

PROCEDURE OF INFERIOR COURTS-MARTIAL

SPECIAL COURTS-MARTIAL—SUMMARY COURTS-MARTIAL

78. SPECIAL COURTS-MARTIAL. The principal distinction in procedure between general and special courts-martial is that a military judge and a verbatim recording of the trial are required in every general court-martial, whereas they are not mandatory in all special courts-martial. The same procedure should be followed at a special court-martial with a military judge as at a general court-martial, including any Article 39(a) session that may be held (app. 8*a* and *b*). The procedure for a special court-martial without a military judge may be provided for in regulations of the Secretary of a Department and will, so far as practicable, conform to that provided for general courts-martial. With respect to the preparation of records of trial by special courts-martial, see 83 and appendices 9 and 10; as to the disposition of such records by the convening authority, see 91*b*.

79. SUMMARY COURTS-MARTIAL. ***a. Function.*** The function of a summary court-martial is to exercise justice promptly for relatively minor offenses under a simple form of procedure. The summary court will thoroughly and impartially inquire into both sides of the matter and will assure that the interests of both the Government and the accused are safeguarded. Unless otherwise stated herein or in regulations of the Secretary of a Department, the procedure prescribed for a general court-martial will, when applicable, serve as a guide for a summary court-martial. See appendix 8*b* in this connection. See also 137.

b. Power to obtain evidence. A summary court has the same power as the trial counsel of a general or special court-martial to compel the attendance of civilian witnesses by subpoena (115; Art. 46) and to take depositions in proper cases (117; Art. 49). To obtain the attendance of witnesses, the summary court will take action similar to that taken by the trial counsel of a general or special court-martial. In this connection, see 44*f*(2).

c. Examination of file. When charges are referred to a summary court-martial, the court will carefully examine the charges and allied papers to see that the charges are in proper form and that the data on the charge sheet and any evidence of previous convictions are complete and free from error of substance or form. The summary court will report to the convening authority any substantial irregularity in the charges or accompanying papers. Ordinarily, the court will correct and initial slight errors or obvious mistakes in the charges, but if substantial changes are required, the court will refer the matter to the convening authority. See 33*d*.

d. Trial procedure. (1) *Determining jurisdiction.* After determining that the charges and other data are in proper form, the summary court should arrange for the presence of the accused. When the accused appears, the court should advise him of the following matters: the general nature of the charges; the fact that they have been referred to a summary court-martial for trial; who convened the court; the name of the accuser; the names of the witnesses who will probably be called; 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; his right to testify on the merits or to remain silent (148*e*; app. 8*a*; Art. 31) and, after any findings of guilty are announced, to make an unsworn statement in mitigation or extenuation of any offense of which he may be convicted (75*c*; app. 8*a*); the maximum sentence which the court can adjudge if the accused is found guilty of the offense or offenses charged.

The summary court will also advise him of his right to object to trial by summary court-martial (Art. 20) and will ask him whether he consents or objects to trial. After giving the accused a reasonable time to consider the question, the summary court will record his response in the space provided on the charge sheet. If the accused objects to trial, the summary court will note those facts on the charge sheet and will return the charges and allied papers to the convening authority. If the accused consents to trial, the summary court will proceed with the trial.

(2) *Arraignment and pleas.* After complying with the provisions of the preceding paragraph (79*d*(1)) and determining that it has jurisdiction over the accused, the summary court will read or show the charges and specifications to the accused. Any necessary explanation of the charges may be made. The accused should then be asked how he pleads to each specification and charge.

If the accused pleads guilty to any specification or charge, the summary court should explain to him the meaning and effect of the plea. This explanation should include the following:

The elements of the offense to which the plea of guilty relates;

That, as to the offense to which the plea of guilty relates, the plea admits every element charged and every act or omission alleged and authorizes conviction of the offense without further proof;

The maximum authorized punishment which may be adjudged upon conviction; and

That the maximum authorized punishment may be adjudged upon conviction of the offense. See 70*b*(2).

A plea of guilty will not be accepted unless the summary court-martial after questioning the accused is satisfied not only that the accused understands the meaning and effect of his plea and admits the allegations to which he has pleaded guilty but also that he is voluntarily pleading guilty because he is convinced that he is in fact guilty. See 70*b*(3).

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. However, the court may, in the interest of justice, proceed with the trial and consider evidence on the merits. If, after hearing evidence on the merits, the court believes the plea of guilty to have been improvidently entered, it shall enter a plea of not guilty and proceed as though the accused had pleaded not guilty. See 70 and Article 45.

(3) *Presentation of evidence.* If the accused has pleaded not guilty or if following a plea of guilty evidence on the merits or in extenuation or mitigation is to be received, arrangements will be made for the attendance of necessary witnesses. Witnesses should be excluded from the courtroom until called to testify. Witnesses for the prosecution will be called first and examined under oath as to all matters relevant to the offense charged. The accused will be extended the right to cross-examine these witnesses. The summary court will aid the accused in the cross-examination, and, if the accused desires, will ask questions suggested by the accused. On behalf of the accused, the court will obtain the attendance of witnesses, administer the oath and examine them, and 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 grounds for mitigation. Before determining the findings, he will explain to the accused his right to testify on the merits or to remain silent and will give the accussed full opportunity to exercise his election. See appendix 8*b* for form of explanation.

(4) *Findings and sentence.* The applicable principles stated in 74 and 76 should be considered by a summary court-martial in determining the findings and sentence, respectively. The court will announce the findings to the accused as soon as they are determined. If the accused has been found guilty of any offense, the summary court will advise him of his right to submit matter in extenuation or mitigation, including the making of an unsworn statement (75*c;* app. 8). Before determining the sentence, the summary court will show or read to the accused any admissible evidence of previous convictions (75*b*(2)) and the personal data appearing on the charge sheet and will ask him whether they are correct. If the accused claims they are not correct in any particular, the court will determine the issue (75*b*(1), (2)). The court will advise the accused of the sentence as soon as it is determined. If the sentence includes confinement, the summary court will take such action as may be prescribed by the convening authority to have the accused delivered to an appropriate place of confinement. The court will also advise the accused of his right to apply to the convening authority for deferment of service of the confinement. See 88*f*.

e. Record. Unless otherwise prescribed by regulations of the Secretary of a Department, the procedures provided herein are applicable to summary court-martial records. So much of the proceedings as relate to pleas, findings, and sentence must be recorded in the appropriate place on all copies of the charge sheet. The number of previous convictions considered and the fact that the accused was advised of the matters outlined in 79*d* will also be noted in the spaces provided on all copies of the charge sheet. Unless otherwise prescribed by the convening or higher authority, the evidence considered by the summary court-martial need not be summarized or attached to the record of trial. The summary court should, however, line out and initial the name or names of any witnesses who are listed on the charge sheet but who were not called to testify. If the testimony of witnesses other than those listed was considered, the

court should insert their names and addresses on all copies of the charge sheet and note whether they testified for or against the accused. The summary court will authenticate the record by signing each copy. He will forward all copies and the accompanying papers without formal letter of transmittal to the convening 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 convening authority for purposes of review. For disposition of summary court-martial records, see 91*c*.

Chapter XV

PROCEDURAL ASPECTS OF REVISION PROCEEDINGS, REHEARINGS, AND NEW OR OTHER TRIALS

REVISION—REHEARINGS AND NEW OR OTHER TRIALS

80. REVISION. ***a. General.*** The procedure of a general or 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 in revision (app. 8*c*). See Article 62 for matters that cannot be reconsidered and 67*f* as to procedure in reconsideration of action on motions and similar matters. A certificate of correction is the proper action for correcting an erroneous record to show the true proceedings. In this connection, see 86*c* (Correction of record).

b. Personnel. Proceedings in revision may be taken only by the members of the court, or, if trial was by a military judge alone, the military judge who adjudged the findings and sentence. These proceedings may not be taken if the court has been dissolved. In this connection see 37*c*(1). The military judge, the accused, and counsel for both sides must be present during the open sessions of the court in revision. In those cases which were tried by a court with members, the absence of a member of the court who participated in the findings and sentence does not invalidate the proceedings if a quorum is present (five for a general court-martial—three for a special court-martial). In such cases, the same military judge should be present, but, unlike a case tried by the military judge alone, the legality of the proceedings will not be affected if a new military judge is properly detailed to the court, sworn (or it has been ascertained as a matter of record that he has previously been sworn in accordance with regulations of the Secretary concerned) and, opportunity to challenge him for cause having been afforded counsel, he has familiarized himself with those portions of the record which are to be considered by the court in taking its action in revision. Similarly, the legality of the proceedings is not affected if a member of the prosecution or defense is present who was previously absent from, or who has been newly detailed to, the court, provided he has the requisite legal qualifications and has been sworn (or it has been ascertained as a matter of record that he has previously been sworn in accordance with regulations of the Secretary concerned).

c. Procedure. In cases in which the court has not reconvened on its own motion, the trial counsel will read in open session the communication from the convening authority returning the record and directing the reconvening. The military judge, or the president of a special court-martial without a military judge should give the court any instructions necessary for the proper accomplishment of the revision action. If the members of a court-martial to

which a military judge has been detailed have any doubt as to the action which they may take, the military judge should be requested to give them additional instructions. If the president of a special court-martial without a military judge has any doubt as to the court's action in such a case, he may direct the trial counsel to produce in open session such legal authority and other information as may be necessary. The instructions will be given in open session and will be made a matter of record. If necessary, the court will then close to consider and determine the appropriate action to be taken on the matter before it. As soon as it has determined its action, the court will announce that action in the presence of the military judge, if any, the accused, and counsel for both sides. In this connection, see 74*f* (Form of findings) and 76*b*(4) (Form of sentence). The court will then adjourn.

As the action which may be taken is entirely corrective, a case will not be reopened by the calling or recalling of witnesses or otherwise. The military judge, or the trial counsel of a special court-martial without a military judge, may invite the attention of the court to any ambiguous or apparently illegal action taken by it.

d. Record. All proceedings in open session will be in the presence of the military judge, if any, the accused, and counsel for both sides, and will be made a matter of record which will be authenticated in the manner prescribed for the original record. No physical change will be made in the original record. Amendments to the original convening order detailing a new military judge to a court with members or counsel will be incorporated in the record of revision. See 82*b* (Contents of record) and appendices 8*d* (Revision procedure) and 9*b* (Authentication of record).

e. Revision action by summary court-martial. What has been said with respect to the procedure in revision by general or special courts-martial will, so far as applicable, govern procedure in revision by summary courts-martial.

81. REHEARINGS AND NEW OR OTHER TRIALS. ***a. Related provisions.*** See 92 (Ordering rehearing or other trial), 94*a*(2) (Review of records of trial pursuant to Article 65(c)), 109 and 110 (New trial), and 145*b* (Former testimony); Articles 63, 66(d), and 67(e) (Rehearings), and 73 (New trial).

b. Procedure. (1) *New or other trials and rehearings in full.* In new or other trials and in rehearings which require findings on all charges and specifications referred to a court-martial, the procedure in general is the same as in an original trial.

(2) *Rehearings on sentence only.* In a rehearing on the sentence only (92), the procedure in general is the same as in any trial, but the portion of the procedure usually occurring after challenges, through and including the findings, is omitted. The court is advised of the offenses of which the accused stands convicted and for which they shall impose sentence. No new evidence of guilt or innocence not presented at the original trial shall be presented, but the matters covered in 75 are proper. The prosecution and defense may establish the content of the record of the original trial, relative to the evidence on the merits relating to the offenses of which the accused stands convicted but not sentenced. This may be done by stipulation (154*b*), or it may be done by reading from the record of the original hearing, whether or not testimony so read would be admissible as former testimony under the former testimony

exception to the hearsay rule (145*b*) and whether or not the testimony was given through an interpreter. Matters excluded from the record or improperly admitted at the previous hearing will not be brought to the attention of the court. The accused at such a rehearing may not withdraw any plea of guilty upon which the findings of guilty now before the court were based. However, if he establishes that such a plea was improvident (70*b*), the hearing will be suspended and the matter referred to the authority directing the rehearing on the sentence, for appropriate action.

(3) *Combined rehearings.* When a rehearing on sentence is combined with a trial on the merits of some of the specifications referred to the court, whether or not those specifications are being reheard, the trial will first proceed on the merits without reference to the rehearing on sentence. After the court has announced its findings, it will then be advised of the offenses on which the rehearing on sentence is being held, additional challenges for cause will be permitted if appropriate, and the principles set forth in 81*b*(2) will apply as to those offenses. The court will then continue with its sentencing procedure and will adjudge a single sentence as to all offenses under consideration. See 81*d*(1).

c. Examination of record of former proceedings. No member of a general or special court-martial upon a rehearing or upon a new or other 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 counsel, except when received in evidence at the rehearing or new trial. But see 81*b*(2) as to the procedure for reading from the record on rehearings on sentence. The president of a special court-martial without a military judge, however, may examine that part of the record of any prior proceedings which relates to errors committed at the former proceedings when necessary to enable him to decide upon the admissibility of offered evidence or other questions of law involved. In this connection, see the ninth paragraph of 92*a*. Such a part of the record may be read to the court when necessary for it to pass upon a ruling made subject to objection by any member under Article 51(b). See 57 and 67*f*.

The military judge may examine the record of the former proceedings and may read to the court such parts as may be necessary for the court to pass upon a ruling made subject to objection by any member.

d. Rules relating to sentence. (1) *Rehearings and new trials.* Before a court-martial retires to determine a sentence upon a rehearing or new trial, it will be advised of the maximum sentence it may impose (76*b*(1)). See Article 63(b) as to limitations on sentence with respect to rehearings and 110*a*(2) with respect to new trials.

Offenses on which a rehearing or new trial is held shall not be the basis for punishment in excess of or more severe than the legal sentence upon a previous hearing or trial, as ultimately reduced by the convening or other proper authority when any such action has been taken. Thus, if the sentence in the previous proceeding to dishonorable discharge, confinement at hard labor for three years, and total forfeitures was modified by a convening or other proper authority to bad-conduct discharge, confinement at hard labor for two years, and total forfeitures, based upon considerations of appropriateness or clemency, the sentence as modified is the most severe which can be predicated on findings of guilty of the reheard offenses. In adjudging a sentence

not in excess of or more severe than the one imposed at a previous hearing or trial, a court-martial is not limited to adjudging the same or a lesser form or amount of the same type of punishment formerly adjudged. When a rehearing is combined with a trial on additional charges (92), the maximum sentence is computed by combining the maximum punishments, as determined above, for the reheard offenses with the maximum for the additional offenses of which the accused is found guilty, subject to the applicable provisions of 126 and 127.

The court shall not be advised of the basis for the sentence limitation.

If the accused is found guilty upon any charge and specification upon a new trial under Article 73 or a rehearing the court will, subject to the pertinent limitations above, adjudge an appropriate sentence (76*a*) without regard to any credit to which the accused may be entitled by virtue of the prior execution of any part of the sentence. See 89*c*(7)(*a*) (Action on rehearing) for the action of the convening authority with respect to the sentence adjudged on a rehearing. See 89*c*(7)(*b*) and 110*b* for such action on the sentence adjudged upon a new trial.

(2) *Other trials.* The term "other trial" refers to another trial of a case in which the original proceedings were declared invalid because of lack of jurisdiction (8) or failure of the charges to allege any offense under the code (68*b*). The other trial of a case is subject to the sentence rules provided for rehearings in (1) above, except that no sentence limitations apply if the original trial was invalid because a summary or special court-martial improperly tried an offense involving a mandatory punishment or one otherwise considered capital. See 15*a* and 16*a*.

Chapter XVI

RECORDS OF TRIAL

GENERAL COURTS-MARTIAL—INFERIOR COURTS-MARTIAL

82. GENERAL COURTS-MARTIAL. ***a. Responsibility for preparation.*** Each general court-martial shall keep a separate record of the proceedings of the trial of each case brought before it. The record is prepared by the trial counsel under the direction of the court, but the persons authenticating the record are responsible for its accuracy. See Articles 38(a) and 54(a). It is immaterial to the sufficiency of a record whether it was kept or written by the trial counsel or by a reporter acting under his direction.

If practicable, the trial counsel will retain or cause to be retained any stenographic or other notes or any mechanical or electronic recordings from which the record of trial was prepared for such a period as may be prescribed in appropriate regulations.

b. Contents. (1) *General.* The record of the proceedings in each case will be separate and complete in itself and independent of any other document. The record will show all the essential jurisdictional facts. It will set forth a verbatim transcript, except as provided below, of all proceedings had in open sessions of the court, all sessions held by the military judge, and hearings held out of the presence of the members. See 74*f*(1) and Article 39. Unless otherwise prescribed by regulations of the Secretary concerned, transcripts need not be verbatim in the following cases: if the proceedings have resulted in an acquittal of all charges and specifications or if terminated prior to findings with prejudice to the government, the record need only contain sufficient information to establish lawful jurisdiction over the accused and the offenses; if the court has adjudged a sentence not including discharge, and not in excess of that which can otherwise be adjudged by a special court-martial, and if not affecting a general or flag officer, the record shall contain the same matter as prescribed by 83*b* in special court-martial cases. If testimony is given through an interpreter, the record will so state. When a trial is terminated before findings or sentence, the record of trial will show the proceedings up to the time of the termination. For details of contents and certain exceptions to the foregoing rules, see appendices 9 and 10.

(2) *Matter stricken from the record.* Although not considered by the court as evidence, any remarks or testimony ordered to be stricken or disregarded will nevertheless be fully recorded.

(3) *Record of revision proceedings.* When a record is amended in revision proceedings, the record of the proceedings in revision will show specifically, ordinarily by page and line, the part of the original record that is changed and the changes made. In such a case, no physical change will be made in the original record. See 80*d* and appendix 8*d*.

(4) *Arguments and briefs.* All oral arguments and statements of counsel made during the trial shall be set forth verbatim in the record. If the speed of an oral argument is such that the reporter is unable to record it verbatim, the military judge should direct counsel either to reduce the speed of his argument or to submit the argument in writing. A written brief or statement of counsel may be read to the court if appropriate and thereafter attached to the record as an exhibit.

(5) *Appendages.* Accompanying the original record—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 the report of investigation under Article 32 and, if the trial was a rehearing or new or other trial of the case, the record of the former hearing or hearings.

The following matters will, in an appropriate case, be bound into the record immediately following the exhibits: Recommendations and other papers relative to clemency (77*a*); offered exhibits which were excluded as not admissible in evidence (54*d*); proposed instructions and any arguments made thereon (73*d*); the certificate of a medical officer as to the physical condition of an accused who has been sentenced to confinement on diminished rations or on bread and water (125).

Copies of vouchers for the payment of reporters or witnesses need not be attached to the record.

c. Copies. For instructions as to the preparation of copies of the record, see 49*b*(2) and appendix 9*f*. All copies of the record except those delivered to the accused will be attached to the original record of trial when it is forwarded to the convening authority.

d. Security classification. When the record contains information which is required to be classified by the security regulations of the armed force concerned, the trial counsel will take appropriate action in accordance with pertinent regulations to assign a proper security classification to the record. However, convening authorities, staff judge advocates, and legal officers will be on the alert to downgrade or declassify a record of trial which does not contain data requiring *security* protection. If the papers accompanying the record of trial include classified matter which is not material to the inquiry, this matter should be withdrawn from the papers to be bound with the record if the withdrawal will permit downgrading or declassification of the record. If the accompanying papers include classified matter which is material to the inquiry, action should be taken to have this matter declassified or downgraded when that action is possible and will permit downgrading or declassification of the record.

e. Correction of record. After the record has been transcribed and before it is authenticated, the trial counsel should examine it carefully for errors or omissions. If any are discovered, he should make and initial those changes which are necessary to make the record show the true proceedings. If major corrections are necessary, he should direct the reporter to rewrite the record or the part of it that is defective. Changes may not be made by the trial counsel after the record is authenticated.

When undue delay will not result, the trial counsel should permit the defense counsel to examine the record before it is forwarded to the convening authority. A suitable notation that this examination has been accomplished by the defense counsel should be included in the record, preferably on the page bearing the authentication. See appendix 9*c* for form. If the defense counsel discovers errors or omissions in the record, he should suggest to the trial counsel appropriate changes to make the record show the true proceedings. If the trial counsel does not concur with the defense counsel as to a suggested change, or if the record has already been authenticated, the trial counsel should bring the suggestions to the attention of those who authenticated the record.

At any time before the record is forwarded to the convening authority, the persons who authenticate the record may change it to make it show the true proceedings. Those changes, as well as any changes made by the trial counsel, should be initialed by the persons who authenticate the record.

f. Authentication. The record in each case shall be authenticated by the signature of the military judge who was actually present at the conclusion of the proceedings. If the record cannot be authenticated by the military judge by reason of his death, disability or absence, it shall be authenticated by the signature of the trial counsel who was actually present at the conclusion of the proceedings or by that of a member if the trial counsel is unable to authenticate it by reason of his death, disability or absence. In a court-martial consisting of only a military judge the record shall be authenticated by the court reporter under the same conditions which impose such a duty on a member under this paragraph. See appendix 9*b* for forms of authentication.

g. Disposition. (1) *Delivery to accused.* Subject to the exceptions noted below with respect to security matters, the trial counsel will arrange for the accused to be furnished with a copy of the record of trial and all documentary exhibits received in evidence as soon as the record is authenticated. See 54*d* 143*a*(2), appendix 9*f*, and Article 54(c). The receipt of the accused for the copy of the record furnished him will be attached to the original record of trial. If it is impracticable to secure a receipt from the accused before the original record is forwarded to the convening authority, the trial counsel will attach to the original record a certificate to the effect that a copy of the record has been transmitted to the accused—giving the means of transmission and the addressee. In this case, the receipt of the accused will be forwarded to the convening authority as soon as it is obtained.

The accused is also entitled to an authenticated copy of a record in revision to the same extent that he is to a copy of the original proceedings.

If the copy of the record prepared for the accused contains matter requiring security protection, the trial counsel, unless otherwise directed by the convening authority, will forward the accused's copy to the convening authority. The latter will excise or withdraw from the accused's copy any matter requiring security protection (82*d*) and will, thereafter, cause the expurgated copy to be delivered to the accused together with a certificate to the effect that certain matter has been deleted or withdrawn from the accused's copy of the record for reasons of national security, and that the original record of trial may be inspected in the files of the Judge Advocate General of the appropriate Depart-

ment under such regulations as may be prescribed by the Secretary concerned. The certificate will list:

(*a*) The pages from which matter has been deleted;

(*b*) The pages which have been removed in their entirety; and

(*c*) The exhibits which have been withdrawn.

A copy of this certificate, together with a statement signed by the accused acknowledging receipt of an expurgated copy of the record of trial, or a certificate of delivery of the expurgated copy, shall be attached to the original record of trial.

(2) *Forwarding to convening authority.* The original record and accompanying papers and the necessary copies of the record will be forwarded to the convening authority or to his successor in command or, if the court was convened by the President of the United States or the Secretary of a Department, to the Judge Advocate General of the Department concerned. See Articles 17(b) and 60.

h. Loss of record. When a record of trial is lost or destroyed, a new record will be prepared if practicable and will become the record of trial in the case. The new record will, however, be prepared only when the available original notes or other sources enable the preparation of a complete and substantially accurate record of the case. In any case of loss of a record before action by the convening authority, the trial counsel or other proper person will fully inform the convening authority as to the facts and as to the action, if any, taken.

i. Loss of notes or recordings of the proceedings. If the notes or recordings of the proceedings in court are lost before the record of trial has been prepared, the convening authority will be fully informed of the facts. Thereafter, unless the convening authority directs otherwise, a record of trial will be prepared following, as nearly as practicable, the form of record prescribed in appendices 8 and 9. The record will be authenticated and disposed of as provided in 82*f* and *g*. The fact that such a record does not contain a verbatim transcript of all the proceedings may deprive the accused of his right under the code to a full appellate review of his case and, thus, be a proper reason for disapproving any sentence adjudged, but it shall not preclude the convening authority from ordering a rehearing as to any offense of which the accused was found guilty if the finding is supported by the summary of the evidence contained in the record. In this connection, see 92.

83. INFERIOR COURTS-MARTIAL. ***a. Special court-martial records involving bad-conduct discharge.*** Subject to the exceptions set forth in appendices 8 and 9, a record of trial by special court-martial in which a bad-conduct discharge is adjudged will contain a verbatim transcript of all proceedings held in open session and, if a military judge is detailed, all sessions and hearings held by him out of the presence of the members. It will follow the form in appendix 9 and will be prepared and disposed of in accordance with the rules prescribed in 82 for a record of trial by general court-martial. As to authentication, see appendix 9*b*.

b. Special court-martial records not involving bad-conduct discharge. When a bad-conduct discharge is not adjudged, and the proceedings have not resulted in an acquittal of all charges and specifications, and have not been terminated prior to findings with prejudice to the Government, a record of trial

by special court-martial need contain only a summarized report of the testimony, objections and other proceedings (app. 10). In such a case, however, if a reporter was detailed and actually served in that capacity throughout the trial, the convening or higher authority may direct that the proceedings be reported verbatim as prescribed by 83*a* and appendices 8 and 9. Unless otherwise provided by regulations of the Secretary concerned, if the trial has resulted in an acquittal of all charges and specifications or if terminated prior to findings with prejudice to the Government, the record of trial need contain only sufficient information to establish lawful jurisdiction over the accused and the offenses. The notes or recordings of the original proceedings need not be retained after the record of trial has been authenticated, unless otherwise provided by regulations of the Secretary concerned. The form of the summarized record of trial and instructions as to its preparation, authentication, and disposition will be as prescribed by the Secretary of a Department.

c. Summary courts-martial. For the preparation, authentication, and disposition of records of trial by summary courts-martial, see 79*e*.

Chapter XVII

INITIAL REVIEW OF AND ACTION ON RECORDS OF TRIAL

WHO MAY TAKE INITIAL ACTION—REFERENCE TO STAFF JUDGE ADVOCATE OR LEGAL OFFICER—ADDITIONAL POWERS AND DUTIES OF THE CONVENING AUTHORITY—EXAMINATION OF FINDINGS OF GUILTY—POWERS OF THE CONVENING AUTHORITY WITH RESPECT TO THE SENTENCE—FORMS OF ACTION AND RELATED MATTERS—ORDERS AND RELATED MATTERS—DISPOSITION OF THE RECORD AND RELATED MATTERS

84. WHO MAY TAKE INITIAL ACTION. ***a. General.*** After every trial by court-martial, including rehearings and new and other trials, the record shall be forwarded to the convening authority for initial review and action. As used in this chapter, the term "convening authority" includes the person who convened the court, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction. See Article 60. The convening authority cannot delegate his functions as such to anyone. The fact that the accused is not a member of, or is not present in, the command of the convening authority does not divest the latter of his right to take initial action on the record of trial.

b. Normal convening authority. The person who convened the court-martial which adjudged the sentence in a particular case normally is the convening authority who takes initial action on the record of trial of that case. The power of a convening authority to take initial action on a record of trial vests in the office, not in the person, of the authority so acting. Thus, when an assigned commander is not present for duty with his command because of illness, leave, or for any other cause, the commissioned officer temporarily succeeding to command during that absence is, within the meaning of Article 60, the officer commanding for the time being and, as such, is authorized to take initial action as convening authority on a record of trial of a court convened by the assigned commander. Similarly, if an officer has assumed permanently the command functions of a predecessor by reason of assignment, absorption of one command by another, or otherwise, he is, within the meaning of Article 60, a successor in command and, as such, is authorized to take initial action as convening authority on a record of trial of a court convened by his predecessor.

c. Officer exercising general court-martial jurisdiction. When it is impracticable for the person who convened the court, the commissioned officer commanding for the time being, or a successor in command to take initial action upon a record of trial, this action may be taken by any officer exercising general court-martial jurisdiction. For example, in a case in which a command has

been inactivated or has been alerted for immediate overseas movement action upon a sentence adjudged by a court-martial convened by the commander prior to the inactivation or movement may be taken by any officer exercising general court-martial jurisdiction. Similar action would be appropriate if the person who normally would take action as convening authority is disqualified, as when he has granted immunity to a witness for the prosecution or when a member of the court-martial which tried the accused subsequently became the officer commanding for the time being or the successor in command. In these cases, the normal convening authority will forward the record of trial—ordinarily through the chain of command—to an officer authorized to exercise general court-martial jurisdiction. For purposes of regularity, the record should be forwarded by a letter of transmittal containing a statement of the reasons for the failure of the normal convening authority to act on the record.

d. Action when a bad-conduct discharge is adjudged by a special court-martial. Ordinarily, action upon a record of trial is taken by only one convening authority. When, however, the convening authority who has approved a sentence of bad-conduct discharge adjudged by a special court-martial does not exercise general court-martial jurisdiction, the officer exercising general court-martial jurisdiction over the command within which the accused was tried by special court-martial ordinarily also reviews and takes action upon the record in the same manner as on a record of trial by general court-martial. See 94*a*(3) and Article 65(b). In such a case, the officer exercising general court-martial jurisdiction shall act only with respect to the findings and sentence as approved by the convening authority. As to the vacation of a suspended sentence, see 97*b*. As to the deferment of service of a sentence to confinement, see 88*f*.

85. REFERENCE TO STAFF JUDGE ADVOCATE OR LEGAL OFFICER. ***a. General.*** Before acting upon a record of trial by general court-martial, or a record of trial by special court-martial which involves a sentence of bad-conduct discharge, a convening authority who exercises general court-martial jurisdiction will refer it to his staff judge advocate or legal officer for review and advice. See Articles 61 and 65(b).

No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing (convening) authority upon the same case (Art. 6(c)).

If a convening authority has no staff judge advocate or legal officer, or if the person serving in that capacity is ineligible to act as staff judge advocate or legal officer for any reason (*e.g.*, Art. 6(c)), he may request the assignment of a staff judge advocate or legal officer to review the record, he may forward the record for action to an officer exercising general court-martial jurisdiction as provided in 84*c*, or, if permitted by appropriate regulations, he may forward the record to the Judge Advocate General concerned for review and advice before acting thereon.

b. Form and content of review. The staff judge advocate or legal officer to whom a record of trial is referred for review and advice will submit a written review thereof to the convening authority. The review will include a summary of the evidence in the case, his opinion as to the adequacy and weight of the 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 review may include matters outside the record of trial which, in the opinion of the reviewer, may have a legitimate bearing on the action of the convening authority in the exercise of his discretion to disapprove all or a part of the findings, but resort may not be had to these matters to support a finding of guilty. Matters outside the record may be included in the review to assist the convening authority in determining his action on the sentence. However, if an adverse matter from outside the record is included, the accused must be afforded an opportunity to rebut or explain the matter, unless he supplied the information himself or may be charged with knowledge that the information might be used against him, as when it appears in a record of nonjudicial punishment.

If the final action of the court has resulted in an acquittal of all charges and specifications, the review shall be limited to questions of jurisdiction (Art. 61). The review should also be limited to questions of jurisdiction when, after trial has begun, the proceedings were terminated without findings, and no further action is contemplated. See 35*b*, 56*e*(3), and 82*b*(1).

c. Disagreement between convening authority and staff judge advocate or legal officer. Ordinarily, the convening authority should accept the opinion of his staff judge advocate or legal officer as to the effect of any error or irregularity respecting the proceedings, as to the adequacy of the evidence, and as to what sentence can legally be approved. However, it is within the particular province of the convening authority to weigh evidence, judge the credibility of witnesses, determine controverted questions of fact that may have been raised in the record, and determine what legal sentence should be approved. In those unusual cases in which a convening authority is in disagreement with his staff judge advocate or legal officer as to the effect of any error or irregularity respecting the proceedings, as to the adequacy of the evidence, or as to what sentence can legally be approved, the convening authority may transmit the record of trial, with an expression of his own views and the opinion of his staff judge advocate or legal officer, to the Judge Advocate General of the armed force concerned for advice. In any case which is forwarded to the Judge Advocate General, if the convening authority takes an action different from that recommended by his staff judge advocate or legal officer, he should state the reasons for his action in a letter transmitting the record to the Judge Advocate General (91*a*).

d. Disposition of review. The original of the review of the staff judge advocate or legal officer will be attached to the original record of trial, and other copies of such review will be prepared in such number and distributed as prescribed in regulations of the Secretary of a Department.

86. ADDITIONAL POWERS AND DUTIES OF THE CONVENING AUTHORITY. ***a. General.*** Express approval of a sentence by a convening authority is an action which must precede the execution of the sentence (Arts. 60, 61, 64, 65, 71(d)). Express approval of the findings is unnecessary and, in the absence of express approval of the sentence, is not sufficient to give the sentence legal effect. In acting on the findings and sentence of a court-martial, the convening authority may approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and as he in his discretion determines should be approved. Unless he indi-

cates otherwise, approval of any part of the sentence shall constitute approval of the findings of guilty. See Article 64.

Unless the convening authority indicates otherwise, disapproval of the entire sentence constitutes disapproval of all findings of guilty. If he disapproves the findings and sentence of a court-martial, he may, except when there is lack of sufficient evidence in the record to support the findings, order a rehearing. In this connection, see 92 and Article 63.

b. Matters to be considered on review. (1) *When proceedings resulted in findings of guilty.* Before he may approve a finding of an offense or the sentence adjudged therefor, the convening authority must determine:

(*a*) That the court was legally constituted throughout the trial (chs. II, III) and had jurisdiction over the offense 87*a*(2) and the person tried (ch. IV);

(*b*) That the accused had the requisite mental capacity at the time of trial and the requisite mental responsibility at the time of the commission of the offense (ch. XXIV, especially 124);

(*c*) That the competent evidence of record (87*a*(3); ch. XXVII) established beyond a reasonable doubt each element of the offense of which the accused was found guilty (ch. XXVIII);

(*d*) That the sentence was within the power of the court to adjudge (ch. IV) and within the prescribed limitations on punishments (110*a*(2): Art. 63(b); ch. XXV);

(*e*) That there were no errors which materially prejudiced the substantial rights of the accused (87*c*).

(2) *Finding of not guilty or ruling amounting to finding of not guilty.* Neither a finding of not guilty nor a ruling of the court which amounts to a finding of not guilty requires any action by the convening authority thereon. He should neither approve nor disapprove the action of the court in such a case. Disapproval cannot in any event affect the finality of a legal acquittal or a ruling of the court that amounts to a legal acquittal. The record of trial in a case involving an acquittal of all charges and specifications should be examined, however, to determine whether the court was properly constituted and had jurisdiction over the accused and the offense tried. A similar examination should be made with respect to findings of not guilty of some, but not all, of the specifications upon which the accused was tried. In this connection, see 87*a*(2), 89*c*(1), and 92.

No action may be taken by the convening authority that would amount to censure of the court or member, military judge, or counsel thereof. See Article 37.

For action when the convening authority differs with the court with respect to a ruling which does not amount to an acquittal, see 67*f*.

c. Correction of record. A record of trial may upon review be found to be incomplete or defective in some material respect, as when it fails to show that the members of the court were sworn or that the required number of members concurred in the vote on the finding or 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 make it show the true proceedings. It may be returned to the military judge, or to the president of a special court-martial without a military judge, or to

the summary court-martial for a certificate of correction to relate the true facts. The certificate will be authenticated in the same manner as the record of trial. See 82*f*, 83*c*, and 79*e*. In general and special court-martial cases, the authenticated certificate will be attached to the record of trial after the original signatures authenticating the record, the accused will be furnished a copy of the certificate of correction, and his receipt will be obtained and attached to the record of trial. See 82*g*(1) and appendix 9. If, in accordance with regulations of the Secretary of a Department, the accused is furnished a copy of the summary court-martial record of trial, he will also be furnished a copy of the certificate of correction. The certificate will be attached to the record of trial together with the accused's receipt. A copy of the certificate will be attached to all other copies of the record which were prepared. See 79*e* and appendices 9*f* and 10*d*. 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, the error cannot be cured by a certificate of correction.

d. Revision proceedings. For procedure in revision, see 80. When there is an apparent error or omission in the record, or when the record shows improper or inconsistent action by a court-martial with respect to a finding or sentence which can be rectified without material prejudice to the substantial rights of the accused, the convening authority may return the record to the court for appropriate action (Art. 62(b)). For example, if the sentence adjudged is less than the mandatory sentence for the offense, the convening authority may return the record to the court to reconsider the matter and revise its proceedings accordingly. In such a case, the record is ordinarily transmitted to the trial counsel of a general or special court-martial or to the summary court-martial by a written communication pointing out the apparent defect in the record and directing the reconvening of the court for the purpose of reconsideration and revision of its proceedings. See Article 62(b) as to matters that cannot be reconsidered. Except for the purpose of making the record show the true proceedings and the exceptions stated in Article 62(b) (2) and (3), proceedings in revision may not be had in any case in which any part of the sentence has been ordered executed.

e. Action when insanity indicated. For action to be taken by the convening 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 124.

87. EXAMINATION OF FINDINGS OF GUILTY. ***a. Findings as to a specification.*** (1) *General.* The convening authority must make a specific and independent determination with respect to each finding of guilty. In considering the legality of a finding of guilty of a specification, the convening authority will be guided by the principles stated in 74*a* and *b*.

(2) *Legal sufficiency of the specification.* If a specification of which the accused has been found guilty fails to allege any offense under the code, the proceedings as to that specification are a nullity and will be declared invalid (86*b*(2), 89*c*(1), 92; app. 14, form 27). If a specification alleges an offense under the code, the proceedings as to that specification should not be held invalid solely because the specification is defective; however, if it appears

from the record that the accused was in fact misled by the defect or that his substantial rights were in fact otherwise materially prejudiced thereby, appropriate corrective action will be taken. See 87*c*. The test of the sufficiency of a specification is not whether it could have been made more definite and certain, but whether the facts alleged therein and reasonably implied therefrom set forth the offense sought to be charged with sufficient particularity to apprise the accused of what he must defend against, and whether the record is sufficient to enable him to avoid a second prosecution for the same offense. In this connection, see 28, 69*b*, and appendix 6.

(3) *Sufficiency of the evidence.* In the course of taking action upon a record of trial, the convening authority is empowered to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact. In considering the evidence he should recognize that the trial court saw and heard the witnesses, and he will be guided by the principles stated in 74*a* and chapter XXVII. Unless he determines that a finding of guilty was established beyond a reasonable doubt by the competent evidence of record, he must disapprove the finding.

(4) *Lesser included offense.* When the evidence, although insufficient to establish the guilt of the accused of the offense of which he was found guilty, is sufficient to support a finding of guilty of an included offense, the convening authority may approve so much of the finding of guilty as involves a finding of guilty of the included offense. In this connection, see 158, appendices 12 and 14*b* (forms 15–18), and Article 59(b). 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 indicated in the statement of approval.

b. Consideration of the findings as to the charge. Although the guilt of the accused is, in general, determined by the findings as to the specification, there should be a consistent finding as to the charge under which the specification is laid. If the finding as to a specification is not consistent with the finding as to the charge, and the inconsistency raises a reasonable doubt as to the intent of the court (as when the court finds the accused guilty of a proper specification, but finds him not guilty of, or makes no findings as to, the charge under which it is laid), the convening authority should return the record to the court for reconsideration and revision. However, if the inconsistency leaves no doubt as to the intent of the court, it may be corrected by the convening authority in his action. For example, when, in a trial for desertion in violation of Article 85, the court finds the accused guilty only of absence without leave, but finds such offense to be a violation of Article 85 instead of Article 86, the convening authority may correct the inconsistency by approving only so much of the finding of guilty of the specification and charge as involves a finding of guilty of the specification in violation of Article 86.

c. Effect of errors on the findings. The convening authority may not approve a finding of guilty if, as a result of an error affecting that finding, the substantial rights of the accused were materially prejudiced. See Article 59. In determining whether the substantial rights of the accused have been materially prejudiced, the convening authority must determine what effect the error had or reasonably may have had on the court's decision. The test is not merely whether there was sufficient competent evidence to support the result. Rather, the test is whether the competent evidence of record is of such quantity and quality that

a court of reasonable and conscientious men would have reached the same result had the error not been committed. Regardless of the compelling nature of the competent evidence of record, however, if the error amounts to so flagrant a violation of a fundamental right of the accused that he has not had a fair trial, the finding must be disapproved.

If the court lacked jurisdiction as to some of the offenses for which the accused was tried, the proceedings as to the other offenses tried are not invalid for that reason.

88. POWERS OF THE CONVENING AUTHORITY WITH RESPECT TO THE SENTENCE. ***a. General.*** The convening authority has the power to disapprove a legal sentence in whole or in part, as well as the power to reduce the sentence in quality and quantity and to change a punishment to one of a different nature, so long as its severity is not increased. However, neither the convening authority nor any other authority is authorized to increase the punishment imposed by a court-martial. A sentence adjudged by the court may be approved if it was within the jurisdiction of the court to adjudge and it does not exceed the maximum limits prescribed by the President under Article 56 (ch. XXV) for the offenses of which the accused legally has been found guilty. When a sentence is in excess of the legal limits, that part included in the adjudged sentence which is legal may be approved. See chapter XXV for limitations on sentence. See 81*d* regarding sentence limitations upon a rehearing or new or other trial. With respect to action on a rehearing or new or other trial, see also 89*c*(7).

The disapproval of a sentence nullifies it as a basis for punishment; affirmation of a disapproval is not required. For limitations upon ordering a rehearing after disapproval of a sentence, see 92. An approval or disapproval of a sentence should be express and explicit and should not be left to implication. For example, in approving "only so much" of a sentence as involves a reduced sentence, the entire sentence intended to be approved should be set forth clearly in the statement of approval.

b. Determining what sentence should be approved. In determining what sentence, or part thereof, should be approved, the convening authority will be guided by the principles stated in 76. The sentence approved should be that which is warranted by the circumstances of the offense and the previous record of the accused. Appropriate action should be taken to approve a less severe sentence when the sentence, though legal, appears unnecessarily severe. In approving sentences, consideration should be given to all factors, including the possibility of rehabilitation as well as the possible deterrent effect. In considering matters outside the record, the provisions of 85*b* will apply.

The convening authority should consider as a basis for approving only a part of a legal sentence all matters relating to clemency, such as long confinement pending trial.

The convening authority will consider in taking his action that an accused who is not serving confinement should not be deprived of more than two-thirds of his pay for any month as a result of one or more sentences by court-martial or other stoppages or deductions, unless requested by the accused. See 88*d*(3) and 126*h*(5) concerning deferral of forfeitures.

c. Approval of a part of a sentence. The convening authority may, subject to the limitations in 88*a* or elsewhere below, approve any sentence which

is no more severe than that adjudged by the court-martial. He may change the nature of the punishment adjudged by the court-martial but may not approve any sentence which the court-martial might not itself legally have adjudged in the case. However, when a court has adjudged a mandatory sentence, such as imprisonment for life (Art. 118(1) and (4)), the convening authority may approve a lesser sentence.

In determining whether the part of a sentence to be approved is one that legally could have been adjudged by the court, the convening authority will be guided by the applicable rules in chapter XXV, and, if a rehearing or new or other trial is involved, by 81*d*. For example, a sentence as approved may not provide for restriction in excess of two months or hard labor without confinement for more than three months.

d. Execution of sentence. (1) *Authority to order.* Except in the case of a new trial (110*b*), the convening authority may, at the time of approval of any sentence, order its execution if, as approved by him, it does not involve a general or flag officer, a sentence of death or dismissal, or an unsuspended sentence of dishonorable discharge, bad-conduct discharge, or confinement for one year or more. See Article 71. Except in the case of a new trial, if the convening authority in his action approves but suspends the execution of that part of a sentence providing for dishonorable or bad-conduct discharge, or confinement for one year or more, he may order all other parts of the sentence into execution unless any part thereof requires the approval of the President under Article 71(a) or the Secretary concerned under Article 71(b).

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 convening authority will be disregarded.

(2) *To confinement.* See 126*j* concerning the effective date of the running of a sentence to confinement and 97*c* and 88*f* as to the interruption thereof in certain instances.

(3) *To forfeitures of pay or allowances.* If a sentence as approved by the convening authority does not include confinement or if the sentence to confinement is to be suspended, any approved forfeitures may not be *applied* until the sentence is ordered into execution. See 126*h*(5) and Article 57. In those cases where a sentence which includes forfeitures may not be ordered into execution by the convening authority in his initial action because of Article 71, the forfeitures will nevertheless apply to pay or allowances becoming due on or after the date the sentence is approved by the convening authority when the approved sentence also includes confinement not suspended, unless the convening authority specifically defers the application of the forfeitures. See Article 57(a).

Approved forfeitures may not be applied during any period in which the service of a sentence to confinement is deferred. In the action or order deferring the service of confinement, the officer directing such action should, when forfeitures have also been adjudged, include a statement to the effect that the application of the remaining forfeitures is deferred until the sentence is ordered into execution, unless such deferment is sooner rescinded. When deferment of confinement is rescinded, or the sentence to confinement is ordered into execution, the order promulgating such action should state whether the for-

feitures are to apply effective the date of the rescission or at a subsequent date. See appropriate forms in appendices 14 and 15.

If the convening authority is authorized to order forfeitures applied or executed at the time he takes his initial action, his action should state, as appropriate, whether the forfeitures are to be executed, suspended, applied as of the date of his action, or deferred until some future date.

e. Suspension of execution of sentence. (1) *General.* See 97*b* for the procedure involved in the vacation of a suspension, and 97*a* for the general rules affecting suspensions.

At the time he approves a sentence, the convening authority may suspend for a stated period of time the execution of all or any part of it except a sentence of death. The purpose of suspending the execution of a sentence is to grant the accused a probationary period within which he may by refraining from further misconduct earn the remission of his sentence. However, the period of suspension should not be unreasonably long and no suspension may extend beyond the current enlistment or period of service. The period for which the execution of a sentence may be suspended may be further limited by regulations of the Secretary of a Department. The convening authority should suspend the whole of a sentence, except death, when it appears to him that this action will promote discipline and aid in the rehabilitation of the accused.

A part of a sentence should not be suspended if it would be contrary to the customs of the service to execute the portion of the sentence that remains unsuspended. For example, with respect to a sentence of dishonorable or bad-conduct discharge, forfeiture of all pay and allowances, and confinement at hard labor, it would be contrary to the customs of the service to suspend the execution of the punitive discharge and the confinement and order the total forfeitures into execution. See the last paragraph of 88*b* in this regard.

(2) *Types of suspensions.* (*a*) *General.* Except as otherwise provided in this paragraph (88*e*) or as may be provided by regulations of the Secretary of a Department, the convening authority may, at the time he approves a sentence, suspend its execution for a specific term, for example, for a number of months or until a certain date, or he may suspend it until the occurrence of an anticipated future event. In either case, he should provide in his action that unless the suspension is sooner vacated the expiration of the period of suspension shall operate as a remission of the suspended portion of the sentence. An appropriate authority may, before the expiration of the period of suspension, remit any part of the sentence, including a suspended part; reduce the period of suspension; or, for a proper reason, vacate the suspension. In this connection, see 97*a*, 105*b*, and Article 74.

(*b*) *Suspending dishonorable or bad-conduct discharge when sentence also includes confinement.* If the approved sentence involves a dishonorable or bad-conduct discharge and confinement, the convening authority may determine that the execution of the punitive discharge should be suspended to the end that the accused may have the opportunity of redeeming himself in the military service, but that the execution of the confinement should not be suspended. In such a case, he may suspend the execution of the punitive discharge until the release of the accused from confinement, or for a definite pe-

riod thereafter, and provide in his action for the remission of the suspended portion of the sentence as indicated in the preceding subparagraph.

(*c*) *Suspending the execution of forfeiture.* See 88*d*(3).

(3) *Termination of suspension by remission.* The expiration of the period specifically provided in the action suspending a sentence or part thereof remits the suspended portion unless the suspension is sooner vacated. However, the unauthorized absence of an accused interrupts the running of the period of suspension of a sentence. The death, a discharge which terminates status as a person subject to the code, or the release from active duty of a person under a suspended sentence shall operate as a remission of the suspended portion of the sentence.

f. Deferment of service of sentence to confinement. Deferment of service of a sentence to confinement is a postponement of the running of the sentence. It is to be distinguished from suspension of the execution of a sentence to confinement. Deferment is not a form of clemency, nor does it have any such connotation. Under the provisions of Article 57(d), the officer who convened the court or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned, may, in his sole discretion and upon application by the accused, defer an accused's service of a sentence to confinement, which has not been ordered executed. A court-martial is not empowered to defer the service of a sentence to confinement. The deferment is terminated and the sentence to confinement begins to run or resumes running when the sentence is approved and ordered executed. The officers so empowered to defer the service of sentences to confinement should take into consideration all relevant factors in each case and grant or deny deferment based upon the best interests of the accused and the service. Deferment should not be granted, for example, when the accused may be a danger to the community or when the likelihood exists that he may repeat the offense or flee to avoid service of his sentence. The discretion to defer confinement is sole and plenary. The power to take such action vests in the office, not in the person, of the authority so acting. Application may be made to the officer exercising general court-martial jurisdiction only when the accused is no longer under the jurisdiction of the officer who convened the court. In this event, application is made to the officer exercising general court-martial jurisdiction over the command to which the accused is then assigned, whether or not this officer exercises supervisory authority over the case within the meaning of 94.

Application for deferment of the service of confinement may be made by an accused or through his counsel, at any time after the adjournment of the court which imposed the sentence.

The application for deferment and the granting or denying of such application must be in writing. This correspondence will be included, or forwarded for inclusion, in the record of the trial.

The granting of an application for deferment, together with the date upon which it was granted, will be set forth in the convening authority's action in those cases in which the granting of the application takes place prior to or concurrently with the action being signed. See appendix 14 for appropriate forms of action. In all other cases the granting of an application for deferment will be promulgated in supplementary orders and such orders will be included, or forwarded for inclusion, in the record of trial. See appendix 15.

When deferment is granted, no form of restriction to specified limits or any other limitation on the accused's liberty shall be ordered as a substitute for the confinement so deferred. The deferring of a sentence will not in and of itself give rise to any other form of limitation on an accused's liberty. An accused may, however, be restricted to certain specified limits or have his liberty curtailed during the period of a deferred sentence to confinement for any independent reason which would warrant this action being taken. See 20*a* and *b*.

The deferment is terminated when the sentence is ordered into execution. The confinement may at this time be suspended but it may not be further deferred.

Deferment of the service of confinement and suspension of confinement cannot exist concurrently. When the service of a sentence to confinement at hard labor has been deferred and the confinement is thereafter suspended, the deferment is thereby terminated and only the suspension of the sentence to confinement is operative.

g. Rescission of deferment of sentence to confinement. The officer granting the deferment or, if the individual is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned, has sole and plenary discretionary authority to rescind it at any time. This power likewise vests in the office, not in the person of the authority so acting. Rescission of a deferment occurring prior to or concurrently with the taking of the initial action in the case, will be set forth in the action, together with the dates of the granting of deferment and the rescission thereof. See appendix 14 for appropriate forms. Rescission of a deferment taking place after the convening authority's action will be promulgated in supplementary orders and such orders will be included, or forwarded for inclusion, in the record of trial. See appendix 15.

89. FORMS OF ACTION AND RELATED MATTERS. ***a. General.*** The convening authority will state at the end of the record of trial in each case his decisions and orders. This requirement equally applies in summary court-martial cases, including those in which the convening authority is the officer that tried the case as summary court. See 5*c* and 79*e*. The action will be signed personally by the convening authority. 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. Appendix 14 contains forms of action of the convening authority. These forms, or a combination or modification of them, should be used whenever they are appropriate.

b. Modification of initial action. The convening authority may recall and modify any action taken by him at any time before it has been published or the accused has been officially notified thereof. When, as an incident of the review of a record of trial pursuant to Articles 65(b), 66, or 67, or examination of a record of trial pursuant to Article 69, any incomplete, ambiguous, void, or inaccurate action of the convening authority is noted, this action will be modified by him in accordance with the advice or instructions of a higher reviewing authority or the Judge Advocate General. See 95. Any supplementary or corrective action taken by the convening authority shall be signed personally by the convening authority.

c. Action on findings and sentence. (1) *General.* If the court acquitted the accused of all charges and specifications, no action is required unless the proceedings are declared invalid because of a lack of jurisdiction or failure of the specifications, or any of them, to allege any offense cognizable by courts-martial. In this connection, see 86*b*(2), 87*a*(2), and 92*b*.

(2) *Disapproval of sentence.* As disapproval of the entire sentence, without mention of the findings, constitutes disapproval of all findings of guilty, the action in a case in which all the findings of guilty are to be disapproved ordinarily will not mention the findings. If the convening authority disapproves the sentence and does not order a rehearing, he will dismiss the charges. If a rehearing is ordered or if any finding is declared invalid because of the failure of a specification to allege any offense, the disapproval or the declaration of invalidity, together with the reasons therefor, will be set forth in the action. See 92. Similarly, if the reasons for the disapproval of a particular finding of guilty might aid in determining the effect of the proceedings upon future administrative disposition of the accused, the reasons for the disapproval should be set forth in the action. This action would be appropriate, for example, when a finding of guilty is disapproved because of the insanity of the accused (124), or because trial of the offense was barred by the statute of limitations (68*c*; Art. 43), or if a finding of guilty of desertion is disapproved. The reasons for the disapproval of a finding of guilty may be set forth in any case.

(3) *Approval of sentence.* When any part of the sentence is to be approved, mention will be made in the action only of those findings or parts of findings which are to be disapproved. See 89*c*(2) for the rule as to stating reasons for disapproving a finding of guilty. Approval of the sentence, standing alone, constitutes approval of all findings of guilty.

(4) *Execution; suspension.* A statement of the approval of all or a part of the sentence should be followed in the action by a statement, when appropriate, of whether, as approved, the sentence is to be executed or whether the execution of all or any part thereof is to be suspended. See, however, 88*d*(3) as to deferral of forfeitures. Also, see appendix 14 for forms. The reasons for the approval, execution, or suspension of all or any part of a sentence need not be stated in the action.

(5) *Place of confinement.* If the convening authority orders a sentence of confinement at hard labor into execution, the place of confinement, as prescribed in pertinent regulations of the Secretary of a Department will be designated in his action. When a sentence of confinement is ordered into execution subsequent to the initial action of the convening authority, the authority ordering the execution will designate the place of confinement. In this connection, see 93.

(6) *Custody or confinement while awaiting result of appellate review.* When a record of trial involving an approved sentence is required to be forwarded to the appropriate Judge Advocate General (Art. 65(a), (b)), the convening authority will, unless he orders any approved sentence of confinement into execution and designates a place of confinement, provide in his action for the temporary custody or confinement of the accused pending final disposition of the case upon appellate review. See appendix 14 (form 41) for form of action and 96 for action to be taken in event the place of temporary custody or confinement is changed prior to final disposition of the case upon appellate review.

(7) *Deferment of service of sentence to confinement.* Whenever the service of the sentence to confinement is deferred by the convening authority prior to or concurrently with his initial action in the case, the action will include the date on which the deferment became effective. The reason for the deferment need not be stated in the action. Deferment of the service of confinement subsequent to initial action is accomplished by supplementary orders. See 88*f* generally and appendices 14 and 15 for appropriate forms.

(8) *Action on rehearing or new or other trial.* (*a*) *Rehearing or other trial.* In acting on a rehearing or other trial, the convening authority is subject to the sentence limitations prescribed for the court in adjudging a sentence. See 81*d*. Additionally, except when a rehearing or other trial is combined with a trial on additional offenses, if any portion of the original sentence was suspended and the suspension was not properly vacated (97*b*) before the order directing the rehearing, the convening authority shall take the necessary suspension action to prevent an increase in the same type of punishment as was previously suspended.

The convening authority may approve a sentence adjudged upon a rehearing or other trial without regard to whether any portion or amount of the punishment adjudged at the former trial has been served or executed. However, in computing the term or amount of punishment actually to be served or executed under the new sentence, the accused will be credited with any portion or amount of the former sentence included within the new sentence that was served or executed prior to the time it was disapproved or set aside. For example, if the original sentence consisted of confinement at hard labor for six months and forfeiture of $50 per month for six months, of which one month's confinement has been served (Art. 57(b)) but no pay has been forfeited, and the sentence adjudged upon the rehearing is identical to the original sentence, the person charged with administrative execution of the new sentence would credit the accused with one month's confinement; the accused would have a balance of confinement for five months and forfeitures for six months yet to be executed. To insure that credit shall be given in proper cases, the convening authority shall, if he approves any part of a sentence adjudged upon a rehearing or other trial, direct in his action that any portion or amount of the former sentence served or executed between the date it was adjudged and the date it was disapproved or set aside shall be credited to the accused. See appendix 14 (forms 19 and 45).

If, in his action on the record of a rehearing, the convening authority disapproves the findings of guilty of all charges and specifications which were tried at the former hearing and that part of the sentence which was based on these findings, he will, unless a further rehearing is ordered, provide in his action that all rights, privileges, and property affected by any executed portion of the sentence adjudged at the former hearing shall be restored. The same restorative action will be taken if the court, at a rehearing, acquits the accused of all charges and specifications which were tried at the former hearing. See Article 75 and appendix 14 (forms 10 and 24).

(*b*) *New trial.* Insofar as authorized and practicable, the action of the convening authority, on a new trial, will conform to the rules prescribed in (*a*) above. See 110*a*(2), *b*, *d*, and *f* for rules regarding action on a new trial.

(9) *Reprimand; admonition.* Any reprimand or admonition provided for by the sentence of a general or special court-martial as ordered executed by the convening authority will be included in his action. In those cases in which the execution of the sentence, including the reprimand or admonition, requires the approval of the President under Article 71(a) or the Secretary concerned under Article 71(b), a reprimand or admonition will not be set forth in the action of the convening authority and need not be set forth in the action of the President or Secretary, but it is included in the promulgating order directing the execution of the sentence.

90. ORDERS AND RELATED MATTERS. ***a. General.*** Unless otherwise prescribed by regulations of the Secretary of a Department, orders promulgating the result of trial and action by the convening or higher authorities on the record will be prepared, issued, and distributed as indicated herein (90).

An order promulgating the result of a trial by general or special court, and any action by the convening or higher authorities on the record of trial, although not necessary to the validity of the trial, will be issued whether the result was an acquittal or otherwise, and regardless of the action of the convening or higher authorities thereon. For forms of orders and data to be shown therein, see appendix 15 and pertinent regulations.

An order promulgating the proceedings and the initial action of the convening authority will bear the date of the action of the convening authority on the record of trial except when the order promulgating the result of a trial by special court-martial involving a bad-conduct discharge is issued by the officer exercising general court-martial jurisdiction over the command (90*b*(1)). In the latter case, the order will bear the date this officer took action on the record of trial, but will recite in the body of the order the action of the convening authority and the date thereof.

An order promulgating an acquittal or action on the findings or sentence taken subsequent to the initial action of the convening authority will bear the date of its publication.

The promulgating order will state the date upon which the sentence was adjudged by the court or the date upon which the acquittal was announced.

b. By whom issued. (1) *Initial orders.* The order promulgating the result of trial and the initial action of the convening authority will be issued by the convening authority in all cases except those in which a record of trial by special court-martial involving an approved bad-conduct discharge is forwarded to the officer exercising general court-martial jurisdiction over the command under the provisions of Article 65(b). In the latter case, the promulgating order will be issued by the officer exercising general court-martial jurisdiction who takes action on the record.

(2) *Orders issued subsequent to initial action of the convening authority.* Action taken on the findings or sentence subsequent to the initial action thereon by the convening authority shall be promulgated by appropriate orders. The officer or official empowered to take subsequent actions will vary according to the nature of the action taken. According to the circumstances, the officer or official having authority to act may include one or more of the following: the convening authority who took the initial action, the officer exercising general court-martial jurisdiction over the accused, the Secretary concerned, and an Under Secretary, Assistant Secretary, Judge Advocate General, or commanding

officer designated under Article 74. As to authority to modify the initial action and to publish promulgating orders required thereby, see 89*b* (Modification of initial action) and 95 (Correction of records of trial subject to appellate review); as to the authority to take other actions and to publish promulgating orders required thereby, see 94 (Review of sentences of special and summary courts-martial), 97*a* (Remission and suspension), 97*b* (Vacation of suspension), 88*f* (Deferment of execution of sentence to confinement), 88*g* (Rescission of deferment of confinement), 100*b* (Action when sentence is set aside), 100*c* (Action when sentence is affirmed in whole or in part), 107 (Court-martial orders), and 110 *b*, *d*, and *e* (New trial); as to authority of the Judge Advocate General to vacate or modify findings or sentence in cases finally reviewed, see 110A (Powers of the Judge Advocate General after final review).

c. Orders containing classified information or matter unfit for publication. When an order contains information which must be classified, only the order retained in the unit files and those copies which accompany the record of trial are to be complete. When the order contains obscene matter that is unfit for open publication, only the order retained in the unit files, those copies which accompany the record of trial, those which are furnished the chief custodian of the personnel records of the armed force concerned, the authorities of the command where the accused is held in custody or to which he is to be transferred, and the commander of the place where the accused is to be confined, if confinement is involved, are to be complete.

All other copies are prepared to eliminate, by use of asterisks, sufficient data to avoid the necessity of classification and such obscene matter as may be unfit for open publication.

d. Distribution. Distribution of promulgating orders will be in accordance with pertinent regulations of the Secretary of a Department. In this connection, however, see 91*a*, 91*b*, and appendices 9*e* and 10*b*.

e. Summary court-martial. An order promulgating the result of a trial by summary court-martial need not be issued. However, the action of the convening authority will be shown on all copies of the record of trial. See 79*e* and appendix 11. The action on the original copy will bear the signature of the convening authority; if a promulgating order is not used, action on the other copies either will bear the signature of the convening authority or will be prepared and certified as true copies of the original.

Any action taken on a summary court-martial case subsequent to the initial action of the convening authority will be promulgated in appropriate orders.

91. DISPOSITION OF THE RECORD AND RELATED MATTERS.

a. General court-martial. A record of trial by general court-martial, with the action of the convening authority thereon, ordinarily will be transmitted without letter of transmittal directly to the Judge Advocate General of the armed force concerned. However, if the convening authority has taken an action contrary to that recommended by his staff judge advocate or legal officer, he should forward the record by a letter of transmittal containing an explanation of his action. See 85*c*.

With the original record of trial will be forwarded the accompanying papers (82*b*) and, unless otherwise prescribed by regulations of the Secretary of a Department, 10 authenticated copies of the order promulgating the result

of trial as to each accused and the review of the staff judge advocate or legal officer. If the approved sentence in the case affects a general or flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more, two additional copies of the record of trial will be attached to the original record. If a copy of the record cannot be delivered to the accused for any reason, the copy prepared for him will also be attached to the record with an explanation of the reason for nondelivery.

See appendix 9*e* as to the arrangement of the record and accompanying papers for forwarding.

b. Special court-martial. (1) *Cases including an approved bad-conduct discharge.* After taking action thereon, a special court-martial convening authority who does not also exercise general court-martial jurisdiction will forward the original and two copies of a special court-martial case that includes an approved bad-conduct discharge directly to the officer who exercises general court-martial jurisdiction over the command. No orders promulgating this initial action need be published (90*b*(1)). If a copy of the record cannot be delivered to the accused for any reason, the copy prepared for him will also be attached with a statement of the reasons for nondelivery. See appendix 9*e* as to the arrangement of a verbatim record.

The officer exercising general court-martial jurisdiction receiving such a record, or who has himself convened a special court-martial which has adjudged a bad-conduct discharge, will, after receiving the advice of his staff judge advocate or legal officer (85), take appropriate action upon the findings and sentence. If the sentence as approved includes a bad-conduct discharge, the record will be disposed of in the manner prescribed in 91*a* for records of trial by general courts-martial.

(2) *Other cases.* A convening authority who does not exercise general court-martial jurisdiction will forward all records of trial by special court-martial in which the sentence as approved by him does not include a bad-conduct discharge directly to the officer exercising general court-martial jurisdiction over the command for review (94). With the record will be forwarded the accompanying papers and, unless otherwise prescribed by regulations of the Secretary of a Department, four authenticated copies of the order promulgating the result of trial (90*b*). See appendix 10*b* as to the arrangement of these records.

c. Summary court-martial. Unless otherwise prescribed by regulations of the Secretary of a Department, a record of trial by summary court-martial will be disposed of as indicated herein (91*c*).

The original and two copies thereof will, after action by the convening authority, be delivered to the custodian of the personnel records of the unit, who will, in the case of an approved sentence, enter the essential data on the service record of the accused and on any other records as required by regulations. A notation that the entry has been made will be recorded on all copies of the record of trial.

The original and one copy will be forwarded, ordinarily without letter of transmittal, to the officer exercising general court-martial jurisdiction over the command. The remaining copy will be retained in the unit files until disposed of in accordance with pertinent regulations.

If the sentence, as ordered executed, involves confinement on bread and water or diminished rations, the medical certificate required by 125 will be attached to the original record of trial and a copy of this certificate will be attached to each copy of the record.

Chapter XVIII

ACTION

ORDERING REHEARING OR OTHER TRIAL—PLACE OF CONFINEMENT

92. ORDERING REHEARING OR OTHER TRIAL. ***a. Rehearing.*** If the convening authority disapproves the findings of guilty and the sentence of a court-martial he may, except when there is lack of sufficient evidence in the record to support the findings, order a rehearing, in which case he shall state the reasons for disapproval (Art. 63(a)). A rehearing may not be ordered in a case in which there is a lack of evidence in the record to support a finding of guilty of the offense charged or of an offense necessarily included in that charged; but if proof of guilt consisted of inadmissible evidence, for which there is available an admissible substitute, a rehearing may properly be ordered. For example, if proof of guilt of absence without leave was made on the basis of improperly authenticated documentary evidence, over the objection of the defense, the convening authority may disapprove the findings of guilty and the sentence and order a rehearing if he has reason to believe that properly authenticated documentary evidence will be available for use at the rehearing. On the other hand, if no proof of unauthorized absence was introduced at the trial, a rehearing may not be ordered. If a sentence is disapproved because of any procedural error prejudicial to the substantial rights of the accused, a rehearing may properly be ordered, subject to the foregoing restrictions. A rehearing may be ordered as to any offense if the conviction thereof is based on a plea of guilty.

Under like limitations a rehearing may be ordered by an officer having supervisory authority (94*a*(2)), an officer authorized to convene general courts-martial (94*a*(3)), a Court of Military Review (Art. 66(d)), or the Court of Military Appeals (Art. 67(e)). If a rehearing has been ordered, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

A rehearing may not be ordered by an authority competent to take that action if, upon taking his action, he approves a part of the sentence. The order directing a rehearing will be made at the time of disapproving or setting aside the sentence and, when appropriate, will be included in the action on the sentence. If, as a result of review by higher authority, a rehearing is ordered in a case in which the sentence or any part thereof has already been ordered into execution, the order of execution shall be vacated at the time the rehearing is ordered.

In addition to having the power, as indicated above, to order a rehearing in full which requires findings on all charges and specifications referred to the court-martial (81*b*(1)), the convening authority or a reviewing authority may order a rehearing on the sentence only based on the sustained findings (81*b*(2)) or a combined rehearing which requires findings by the court-martial on only some specifications and sentencing based on those of which the accused is con-

victed at the rehearing combined with those which have been sustained on review (81*b*(3)). When such a combined rehearing is ordered by an authority superior to the convening authority and the latter finds a rehearing impracticable on any specification, he may reassess and approve a sentence on the basis of the findings which were approved or affirmed, if not otherwise precluded from so doing, for example, when the reviewing authority in ordering a rehearing on certain specifications also sets aside the sentence. In the latter event, or in any case in which he finds it to be more appropriate, he may order a rehearing on the sentence based on the findings which have been approved or affirmed.

As to procedure and rules relating to the sentence imposable in each of the three types of rehearings, see 81.

Additional charges (24*b*) may be referred for trial together with charges as to which a rehearing has been directed.

Every rehearing, including a rehearing on the sentence only, shall take place before a court-martial composed of members who were not members of the court-martial which previously heard the case. The military judge at a rehearing may be the same military judge who presided over a previous trial of the same case. See 62*f*(10). The existence or absence of a request for trial by the military judge alone at the previous hearing has no effect on the composition of the court at the rehearing. In any rehearing which is referred to a court with a military judge and members, the accused may request that the case be heard by the military judge alone. Upon a rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial and the sentence shall be limited as provided in 81*d*(1).

If at a previous trial the accused was guilty of an included offense, a rehearing may properly be ordered only as to that included offense or as to an offense necessarily included in that found. If, however, a rehearing is ordered improperly on the original offense charged and the accused is found guilty thereof, that finding may be valid as to the lesser offense of which he was found guilty at the first trial. If the accused was found guilty of the offense charged on a previous trial, a rehearing may be ordered as to any offense necessarily included therein, provided there is evidence in the record which tends to prove that included offense.

When a rehearing is ordered by the convening authority, there will be referred to the trial counsel, in order to inform him of the errors made at the former hearing which have necessitated the rehearing, not only the charges but also the record of the former proceedings and all pertinent accompanying papers, together with a copy of any decision of the Court of Military Review or the Court of Military Appeals, the review of the staff judge advocate or legal officer, and the statement by the convening authority of his reasons for disapproving the original sentence.

A rehearing on the sentence only may not be referred to a court-martial of a different kind from that which made the original findings. The three kinds of courts-martial are summary, special, and general courts-martial. See Article 16.

See 81 for the procedure to be followed at a rehearing, 89*c*(7) for the action by the convening authority upon the record of a rehearing, and 94*a*(2) for rehearings directed as a result of the action of the officer having supervisory authority with respect to summary court-martial cases and special court-martial

cases in which a bad-conduct discharge is not adjudged. For related provisions as to a new trial upon the application of the accused see 109 and 110.

b. Other trial. If the convening or higher authority finds the original proceedings to be invalid because of lack of jurisdiction (8) or failure of the charges to allege any offense cognizable by courts-martial (68*b*), that authority will, in his action, state the basis for declaring the proceedings invalid. For form, see appendix 14. This type of case will be referred to a court none of whose members has participated in the former trial. If the case is referred to a court with a military judge and members, the accused may request that the case be heard by the military judge alone. The military judge at the other trial may be the same military judge who presided over a previous trial of the case. See 62 *f*(10). See 81*b*(1) and *d* as to the procedure and sentence limitations applicable to other trials.

93. PLACE OF CONFINEMENT. For action of the convening authority in providing for the temporary custody or confinement of the accused pending final disposition of the case upon appellate review, see 89*c*(6) and appendix 14. When the service of a sentence to confinement at hard labor has been deferred and the deferrment is subsequently rescinded, the place of confinement will be designated in the convening authority's initial action on the sentence or the order which rescinds the deferment.

The authority who orders a sentence to confinement into execution shall designate the place of confinement in accordance with pertinent departmental regulations. Under such instructions as the Secretary concerned may prescribe, a sentence of confinement adjudged by a court-martial or other military tribunal, whether or not the sentence includes discharge or dismissal, and whether or not the discharge or dismissal has been executed, may be carried into execution by confinement in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use. Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated (Art. 58(a)).

Chapter XIX

ACTION AFTER PROMULGATION

REVIEW OF SENTENCES AND FILING OF RECORDS OF SPECIAL AND SUMMARY COURTS-MARTIAL—CORRECTION OF RECORDS OF TRIAL SUBJECT TO APPELLATE REVIEW—REPORTS IN CERTAIN CASES—MISCELLANEOUS MATTERS

94. REVIEW OF SENTENCES AND FILING OF RECORDS OF SPECIAL AND SUMMARY COURTS-MARTIAL. ***a. Review.*** (1) *General.* The officer immediately exercising general court-martial jurisdiction over a command and such other authority as may be designated by the Secretary concerned have supervisory powers over special and summary courts-martial in that command. Except as specifically provided in this paragraph (94), the manner of exercising these supervisory powers shall be as prescribed in regulations of the Secretary concerned.

(2) *Review of records of trial pursuant to Article 65(c).* When forwarded to him for review (91), the officer having supervisory authority will cause a judge advocate, or a law specialist or lawyer of the Coast Guard to review records of trial by summary court-martial and records of trial by special court-martial which do not include approved sentences to bad-conduct discharge (Art. 65(c)). If the action of the court has resulted in an acquittal of all charges and specifications, or if the convening authority has disapproved the findings of guilty and the sentence and has dismissed the charges, the review shall be limited to the question of jurisdiction. The officer having supervisory authority shall act only with respect to the findings of guilty and the sentence as approved or approved and suspended, in whole or in part, by the convening authority and as found correct in law and fact pursuant to Art. 65(c) and may, in the interest of justice, take any action with respect to such findings and sentence as may be taken by a convening authority in the latter's initial action on the record, including suspending the sentence in whole or in part or ordering a rehearing. See chapters XVII and XVIII. When, however, a review made pursuant to this subparagraph indicates that proceedings in revision (Art. 62(b)) are necessary, the record normally will be returned to the convening authority with advice concerning the necessary action. An officer having supervisory authority may order the restoration of any rights, privileges, and property affected by such part of the sentence as he may set aside. See 106.

The officer having supervisory authority may bring any fatal error to the attention of the convening authority or his successor. If warranted by the circumstances, he may advise the convening authority that he has the power to withdraw his previous action, disapprove the findings of guilty and the sentence, and either direct a rehearing or dismiss the charges pursuant to Article 63. See 92. After a finding of guilty upon a rehearing, the court will adjudge an

appropriate sentence without regard to any credit to which the accused may be entitled by virtue of the prior execution of any part of the original sentence. See 81. Persons charged with the administrative duty of executing a sentence adjudged upon a rehearing after the sentence has been ordered into execution shall credit the accused with any executed portion or amount of the original sentence in computing the term or amount of punishment actually to be executed pursuant to the sentence adjudged upon the rehearing. See Article 75(a).

When, upon review pursuant to this paragraph and any further review and procedures which may be provided in regulations of the Secretary concerned, the proceedings, findings, and sentence as approved by the convening authority have been found correct in law and fact, the proceedings shall be final in the sense of Articles 44 and 76.

(3) *Review of special court-martial records pursuant to article 65*(b). If the sentence of a special court-martial as approved by a convening authority who does not exercise general court-martial jurisdiction includes a bad-conduct discharge, whether or not suspended, the record shall, ordinarily, be forwarded to the officer exercising general court-martial jurisdiction over the command to be reviewed and acted upon in the same manner as a record of trial by a general court-martial (Art. 65(b)). The Secretary concerned may, however, provide by regulation for forwarding of the record in appropriate cases to any officer exercising general court-martial jurisdiction, who shall be considered "the officer exercising general court-martial jurisdiction over the command" within the meaning of Article 65(b). The reviewing authority shall act only with respect to the findings of guilty and the sentence as approved, suspended, or deferred by the convening authority. If the sentence as approved by an officer exercising general court-martial jurisdiction, either as the convening authority (Art. 60) or as prescribed in this subparagraph, includes a bad-conduct discharge, whether or not suspended, the record shall be forwarded to the appropriate Judge Advocate General to be reviewed by a Court of Military Review (Art. 65(b)). If the sentence as approved by the officer exercising general court-martial jurisdiction does not include a bad-conduct discharge, the record of trial shall thereafter be treated as a special court-martial record not involving a bad-conduct discharge.

b. Filing of records. After review as prescribed by 94*a*(2), records of trial by summary court-martial and records of trial by special court-martial which do not involve approved sentences to bad-conduct discharge shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation. Special court-martial records which involve approved sentences to bad-conduct discharge shall be filed in the office of the appropriate Judge Advocate General.

95. CORRECTION OF RECORDS OF TRIAL SUBJECT TO APPELLATE REVIEW. When a record of trial by general court-martial, or a record of trial by special court-martial in which a sentence to bad-conduct discharge has been approved, has been forwarded by a convening authority to higher authority and error of the kind mentioned in 86*c* and *d* is noted by the higher authority, the record will be returned to the convening authority (Art. 60) with directions for the correction of the record or revision of the proceedings.

When, as an incident of the review of a record of trial pursuant to Articles 65(b), 66, 67, or 69, it is noted that the action of the convening authority or of a higher authority is incomplete, ambiguous, or contains clerical errors, the

authority who took the incomplete, ambiguous, or erroneous action may be instructed to withdraw the original action and to substitute a corrected action therefor. See appendix 14 for a form of corrected action by the convening authority.

96. REPORTS IN CERTAIN CASES. In the case of an officer, immediately upon promulgation of any sentence of a court-martial which does not require appellate review under Article 66 but which involves any material change in the status of the officer, the commander issuing the order will, by prompt means, advise the appropriate officer of the Department concerned of the sentence imposed as approved, reduced, or deferred and the date of promulgation thereof.

Whenever an accused person under a court-martial sentence subject to review under Article 66 is transferred from the general court-martial jurisdiction which has been designated as the command having temporary custody of the accused (89*c*(6)) before the accused has been notified of the decision of the Court of Military Review, the officer ordering the transfer will, by prompt means, notify the appropriate Judge Advocate General.

97. MISCELLANEOUS MATTERS. ***a. Remission and suspension.*** As to the power of the convening authority to reduce, change the nature of, or suspend a sentence at the time he takes his action or orders the sentence into execution, see 88 and Articles 64 and 71(d). As to the powers of the supervisory authority, and the powers of the reviewing authority of a special court-martial the sentence of which includes a bad-conduct discharge, to reduce, change the nature of, or suspend a sentence at the time he takes his action, see 94*a*(2) and 94*a*(3).

Under Article 74(a) the Secretary concerned and, when designated by him, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures, other than a sentence approved by the President, except as provided in 105*b*. The officials authorized by the Secretary concerned to exercise these powers after the sentence has been ordered into execution shall be designated in departmental regulations. The officer having supervisory authority (94*a*(1)) and the commanding officer of the accused who has immediate authority to convene a court of the kind that adjudged the sentence are empowered to remit or suspend any part or amount of the unexecuted part of any sentence by summary court-martial or of a sentence by special court-martial which does not include a bad-conduct discharge. Such action may be taken without regard to whether the person acting has previously approved the sentence. Suspension actions taken under the authority of this paragraph (97) and Article 74(a) are subject to the rules set forth in 88*e*.

The Secretary concerned may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial (Art. 74(b)).

b. Vacation of suspension. Before the vacation of the suspension of a special court-martial sentence which as approved includes a bad-conduct discharge, or of any general court-martial sentence, the officer having special court-martial jurisdiction over the probationer shall hold a hearing on the alleged

violation of probation. The probationer shall be represented at the hearing by counsel if he so desires (Art. 72(a)). Insofar as applicable the procedure at the hearing shall be similar to that prescribed for investigations conducted under the provisions of 34. See appendix 16 for a form of record of this proceeding and a procedural guide.

The record of the hearing and the recommendations of the officer having special court-martial jurisdiction shall be sent for action to the officer exercising general court-martial jurisdiction over the probationer. If this officer vacates the suspension, any unexecuted part of the sentence affected by the vacation shall be executed, unless the sentence then extends to dismissal, or includes, unsuspended, dishonorable discharge, bad-conduct discharge, or confinement for one year or more, and has not been affirmed by a Court of Military Review and, in cases reviewed by it, the Court of Military Appeals. See Articles 71(b) and (c). Also, if the sentence extends to dismissal, no part of the sentence may be ordered into execution until approved by the Secretary concerned (Art. 71(b)) and a vacation of a suspension of a dismissal is not effective until approved by the Secretary concerned (Art. 72(b)).

The suspension of any sentence by summary court-martial, or of a sentence by special court-martial which does not include a bad-conduct discharge, may be vacated (without a hearing) by any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence. See Article 72(c).

An act of misconduct, in order to serve as a basis for vacation of suspension of a sentence, must occur within the period of suspension. Similarly, the order of vacation of the suspension must be issued prior to the end of the period of suspension even though, in certain cases, it may not be effective as an order of execution of the suspended sentence until the completion of appelate review or action by the Secretary concerned. See the second paragraph of 97*b*. The running of the period of suspension of a sentence is, however, interrupted by the unauthorized absence of the accused.

For forms of orders vacating suspension, see appendix 15.

c. Interruptions of execution of a sentence. A sentence to confinement, hard labor without confinement, restriction to limits, or deprivation of privileges is continuous until the term expires, with certain exceptions. These exceptions include the following:

> When delivery under Article 14 is made to any civil authority of a person undergoing sentence of a court-martial, the delivery, if followed by conviction in a civil tribunal, interrupts the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for his offense shall, upon the request of competent military authority, be returned to military custody for the completion of his sentence (Art. 14(b)).
>
> When a prisoner serving a court-martial sentence to confinement is later convicted by a court-martial of another offense for which he is sentenced to confinement, the subsequent sentence interrupts the running of the prior sentence to confinement. Any unremitted remaining portion of the prior sentence will be served after the subsequent sentence has been fully executed.

Periods during which the person undergoing such a sentence is absent without authority, or is absent under a parole which proper authority has later revoked, or is erroneously released from confinement through misrepresentation or fraud on the part of the prisoner, or is erroneously released from confinement upon his petition for a writ of habeas corpus under a court order which is later reversed by a competent tribunal shall be excluded in computing the service of the term of the punishment.

Periods during which a sentence to confinement is suspended or deferred shall be excluded in computing the service of the term of confinement (Art. 57(b)).

d. Changes in place of confinement. Subject to pertinent regulations, the authority who designated the place of confinement, higher authority, or any other authority authorized by pertinent regulations may change the place of confinement of any prisoner under his jurisdiction.

e. Distribution of court-martial orders. The distribution of orders promulgating the results of courts-martial and any action after promulgation of the sentence will be as prescribed in regulations of the Secretary of a Department.

f. Powers of the Judge Advocate General after final review. See 110A and Article 69.

Chapter XX

APPELLATE REVIEW—EXECUTION OF SENTENCES

GENERAL—PRELIMINARY ACTION—REVIEW BY THE COURT OF MILITARY REVIEW—REVIEW BY THE COURT OF MILITARY APPEALS—APPELLATE COUNSEL—REVIEW IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL—BRANCH OFFICES—COMMUTATION, REMISSION, AND SUSPENSION—RESTORATION—COURT-MARTIAL ORDERS—FINALITY OF COURT-MARTIAL JUDGMENTS

98. GENERAL. A sentence of a court-martial may not be executed until approved by the convening authority (Arts. 60, 61, 64, 65, 71(d)). A special court-martial sentence which, as approved by the convening authority, includes a bad-conduct discharge must, generally, also be approved by an officer exercising general court-martial jurisdiction (94*a*(3); Art. 65(b)). In addition to this approval, certain sentences may not be executed until approved or affirmed by higher authority.

No court-martial sentence extending to death or involving a general or flag officer may be executed until affirmed by a Court of Military Review and the Court of Military Appeals and approved by the President (Arts. 66(b), 67(b)(1) and 71(a)). No sentence extending to the dismissal of a commissioned officer (other than a general or flag officer), cadet, or midshipman may be executed until affirmed by a Court of Military Review and, in cases reviewed by it, the Court of Military Appeals, and approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by him (Arts. 66(b), 71(b)). No sentence to dishonorable or bad-conduct discharge, whether or not suspended, may be executed until affirmed by a Court of Military Review and, in cases reviewed by it, the Court of Military Appeals. No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more may be ordered executed until affirmed by a Court of Military Review and, in cases reviewed by it, the Court of Military Appeals (Arts. 67(b), 71(c), 72(b)). All other court-martial sentences, unless suspended, may be ordered executed by the convening authority when approved by him (Art. 71(d))). See 88*d* as to the effect of a suspension on the execution of some sentences.

99. PRELIMINARY ACTION. All records of trial by general courts-martial and records of trial by special courts-martial which, as approved by the convening authority and by an officer exercising general court-martial jurisdiction, include a bad-conduct discharge shall be sent after approval by the proper authority to the Judge Advocate General of the armed force of which the accused is a member (Arts. 17(b), 65(a) and (b)). In these cases, a general or special court-martial order announcing the result of the trial and the action of the convening or higher authority will be promulgated before forwarding.

100. REVIEW BY THE COURT OF MILITARY REVIEW. ***a. General.*** Each Judge Advocate General shall establish a Court of Military Review composed of appellate military judges. For the composition of these courts, the qualifications of the appellate military judges, the grounds for their ineligibility and the restrictions upon the official relationship of a member of the court to other members, see Article 66.

The Judge Advocate General shall refer to a Court of Military Review the record in every case of trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more (Art. 66(b)). In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by proper authority. It may affirm only such findings of guilty or such part of a finding of guilty as includes an included offense, and the sentence or such part of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. It has generally the same powers with respect to modification of a sentence as does the convening authority (88*c*), but it does not have authority to suspend a sentence or any part thereof. However, it may reduce the period of a suspension prescribed by a convening authority. It does not have the authority to defer the service of a sentence to confinement. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses (Art. 66(c)).

A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused (Art. 59(a)).

b. Action when sentence is set aside. (1) If the Court of Military Review sets aside any findings of guilty or the sentence, it may, except as to findings set aside for a lack of sufficient evidence in the record to support the findings, order the applicable type of rehearing (81*b*) or reassess the sentence as appropriate under the circumstances of the case. If it sets aside all the findings and the sentence and does not order a rehearing, it shall order that the charges be dismissed. See Articles 59(a) and 66(d).

(2) In his discretion, the Judge Advocate General may forward the decision of the Court of Military Review and the record of trial to the Court of Military Appeals for review with respect to any matter of law (Art. 67(b)(2), 67(d)). In these cases, he will cause a copy of the decision of the Court of Military Review and his order of reference to be served upon the accused and upon the appellate defense counsel.

(3) If the Judge Advocate General does not order the case forwarded to the Court of Military Appeals, he shall advise an appropriate convening authority (see 84 and Article 60) to take action in accordance with the decision of the Court of Military Review. If the Court of Military Review has ordered a rehearing the record shall be sent to an appropriate convening authority. If he finds a rehearing impracticable, he may dismiss the charges (Art. 66(e)). Ordinarily, the final action will be promulgated by an appropriate convening authority. If the charges are dismissed, all rights, privileges, and property affected by an executed portion of the sentence which has been set aside, except an executed dismissal or discharge, shall be restored. (Art. 75(a)). See 110*d*

as to the action which may be taken if an executed dismissal or dishonorable or bad-conduct discharge is not sustained on a new trial.

c. Action when sentence is affirmed in whole or in part. (1) *Sentences which do not require the approval of the President.* (*a*) If the sentence, as affirmed by the Court of Military Review extends to dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more, the Judge Advocate General, in his discretion, may take the action prescribed in 100*b*(2) above. Otherwise he will transmit a copy of the preliminary court-martial order (90*b*(1)) and two copies of the decision of the Court of Military Review, with such instructions as to future action as may be appropriate (Art. 66(e)) and with instructions to cause a copy of the decision to be served upon the accused, to the officer immediately exercising general court-martial jurisdiction over the accused. This copy will bear an indorsement notifying the accused of his right to petition the Court of Military Appeals for review with respect to any matter of law within 30 days from the time he is notified of the decision of the Court of Military Review, and that any petition for review will be forwarded through the officer immediately exercising general court-martial jurisdiction over the accused and through the appropriate Judge Advocate General. Either the receipt of the accused for the copy of the decision of the Court of Military Review or a certificate of service upon him, showing the date of service will be transmitted in duplicate by expeditious means to the appropriate Judge Advocate General. The latter will forward one copy of the receipt or certificate of service to the Clerk of the Court of Military Appeals when required by the court. If the officer who exercises immediate general court-martial jurisdiction over the accused is not the officer who convened the court, or his successor in command, the Judge Advocate General shall also transmit a copy of the decision of the Court of Military Review to the convening authority who convened the court for his information.

The accused has 30 days from the time when he is notified of the decision of a Court of Military Review to petition the Court of Military Appeals for review. The placing of a petition for review in proper military channels divests the Court of Military Review of jurisdiction over the case, and jurisdiction is thereby conferred on the Court of Military Appeals. If the accused does not so petition, the convening authority, or the officer immediately exercising general court-martial jurisdiction over the accused, or the Secretary concerned (Art. 60) may order any sentence which, as affirmed by the Court of Military Review, extends to dishonorable or bad-conduct discharge or confinement for one year or more into execution or take other authorized appropriate action (Art. 74(a)) as the circumstances may warrant.

(*b*) If an accused, whose sentence as affirmed by the Court of Military Review extends to dismissal, does not forward a timely petition for review, the Judge Advocate General will transmit the record, the decision of the Court of Military Review, and his recommendations to the Secretary concerned or to the appropriate Under Secretary or Assistant Secretary for action under Article 71(b). He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of any part of the sentence as approved by him. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person so

reduced may be required to serve for the duration of the war or emergency and six months thereafter (Art. 71(b)). The action of the Secretary concerned will be promulgated by departmental court-martial orders.

(*c*) If the accused forwards a timely petition for review no supplemental order of execution will be promulgated until final action by the Court of Military Appeals is taken.

(2) *Sentences which require the approval of the President.* If the Court of Military Review affirms any sentence which affects a general or flag officer or which, as affirmed by it, extends to death, the Judge Adovcate General shall transmit the record of trial and the decision of the Court of Military Review directly to the Court of Military Appeals. He shall cause a copy of the decision of the Court of Military Review to be served upon the accused and upon the appellate defense counsel.

d. Rules of procedure. Uniform rules of procedure for proceedings in and before Courts of Military Review shall be prescribed by the Judge Adovcates General of the armed forces (Art. 66(f)).

101. REVIEW BY THE COURT OF MILITARY APPEALS. Under such rules as it may prescribe, the Court of Military Appeals shall review the record in the following cases (Art. 67(b)):

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

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

(3) All cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review. But see 103 and Art. 69.

In any case reviewed by it, the Court of Military Appeals may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Military Review. In a case which the Judge Advocate General orders sent to the Court of Military Appeals, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Military Appeals shall take action only with respect to matters of law (Art. 67(d)).

If the Court of Military Appeals sets aside any findings of guilty or the sentence, it may, except as to findings set aside for a lack of sufficient evidence in the record to support the findings, order the applicable type of rehearing (81*b*) or reassessment of the sentence as appropriate under the circumstances of the case. If it sets aside all the findings and the sentence and does not order a rehearing, it shall order that the charges be dismissed. See Articles 59(a) and 67(e).

After it has acted on a case, the Court of Military Appeals may direct the Judge Advocate General to return the record to the Court of Military Review for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct an appropriate convening

authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority to whom the record is transmitted finds a rehearing impracticable, he may discuss the charges. (Art. 67 (f)).

If the sentence, as affirmed by the Court of Military Appeals, requires the action of the Secretary concerned, action thereon will be taken in accordance with the procedures prescribed in 100*c*(1)(*b*). If the sentence as affirmed by the Court of Military Appeals extends to death or affects a general or flag officer, the record of trial, the decision of the Court of Military Review, the recommendations of the Judge Advocate General, and the decision of the Court of Military Appeals shall be transmitted to the Secretary concerned for the action of the President pursuant to Article 71(a).

102. APPELLATE COUNSEL. ***a. Detail.*** The Judge Advocate General shall detail in his office one or more commissioned officers as appellate Government counsel, and one or more commissioned officers as appellate defense counsel, who are qualified under Article 27(b)(1) (Art. 70(a)).

b. Duties. The appellate Government counsel shall represent the United States before the Court of Military Review or the Court of Military Appeals when directed to do so by the Judge Advocate General (Art. 70(b)).

The appellate defense counsel shall represent the accused before the Court of Military Review or the Court of Military Appeals (Art. 70(c))—

(1) when he is requested to do so by the accused;

(2) when the United States is represented by counsel; or

(3) when the Judge Advocate General has sent a case to the Court of Military Appeals.

For duties of the defense counsel who conducted the defense at the trial with respect to advising the accused of his right to be represented by the appellate defense counsel in connection with the appellate review of his case, see 48*j*(3).

If his opinion is requested, the appellate defense counsel will, to the best of his professional knowledge, advise the accused as to whether there are meritorious grounds for petitioning the Court of Military Appeals for review. If the appellate defense counsel is convinced that there are no substantial questions of law presented by the record of trial with respect to the findings of guilty and the sentence as affirmed by the Court of Military Review, he should so advise the accused. Regardless of his personal opinion as to the merit of the issues which can be raised, the appellate defense counsel will, if requested, assist the accused in the preparation of his petition and render such other assistance as may be proper if the accused decides to petition for review. He is authorized to communicate directly with the accused and with his counsel in the field. These communications are privileged.

In any case in which the sentence as affirmed by the Court of Military Review is subject to review by the Court of Military Appeals, the officer exercising general court-martial jurisdiction over the accused shall, if requested by the accused, detail a qualified counsel to advise and assist the accused in connection with any proper matter concerning further appellate review. If he is reasonably available, the defense counsel who conducted the defense during the trial may perform these duties.

c. Civilian counsel. The accused has the right to be represented before the Court of Military Appeals or the Court of Military Review by civilian counsel if provided by him (Art. 70(d)).

103. REVIEW IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL. Every record of trial by general court-martial, in which there has been a finding of guilty and a sentence, the appellate review of which is not otherwise provided for by Article 66, shall be examined in the office of the Judge Advocate General. If any part of the findings or sentence is found unsupported in law, or if the Judge Advocate General so directs, the record shall be reviewed by a Court of Military Review in accordance with Article 66, but in that event there may be no further review by the Court of Military Appeals unless the Judge Advocate General orders the record sent to the Court of Military Appeals under Article 67(b)(2) (Art. 69).

When a record by trial by general court-martial is referred to a Court of Military Review under Article 69, the Judge Advocate General shall advise the appellate defense counsel of the reference if such a counsel must be detailed under Article 70(c)(1) or (2). See 48*j*(3). Additionally, if an accused has not been advised of his right to representation before the Court of Military Review and made a request in this regard, he shall be advised of the reference and of his right to representation before the Court of Military Review under Article 70, provided he forwards a prompt request therefor.

If the Judge Advocate General forwards a case to the Court of Military Appeals for review, he will take the action prescribed in 100*b*(2).

104. BRANCH OFFICES. Courts of Military Review established in branch offices of the Judge Advocate General and the Assistant Judge Advocate General in charge of these offices may perform their duties in the manner prescribed for the Judge Advocate General and the Court of Military Review in his office. They operate under the general supervision of the Judge Advocate General. Records of trial involving sentences requiring action by the President shall be sent directly to the Judge Advocate General without action in the branch office. See Article 68.

105. COMMUTATION, REMISSION, AND SUSPENSION. ***a. Commutation.*** The power to commute, that is to change a punishment to one of a different nature, may be exercised by the President and by the Secretary concerned or such an Under Secretary or Assistant Secretary as may be designated by him. See Article 71(a) and (b). See also 88*c* for the powers of convening and reviewing authorities to change the nature of a punishment.

b. Remission and suspension. If the Judge Advocate General is of the opinion that a sentence as affirmed by the Court of Military Review which does not require the approval of the President should be remitted or suspended in whole or in part, he may, before taking the action prescribed in 100*c*(1), transmit the record of trial and the decision of the Court of Military Review with his recommendations to the Secretary concerned for action pursuant to Article 74, or take such action as may be authorized by the Secretary concerned under Article 74(a). See also 97*a*.

After the President has commuted a death sentence to a lesser punishment, the Secretary concerned may remit or suspend any remaining part or amount

of the unexecuted portion of the sentence of a person convicted by a military tribunal under his jurisdiction.

106. RESTORATION. See 110*d* as to action which may be taken when the sentence adjudged upon a new trial is set aside or disapproved.

In other cases all rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disapproved by any competent authority shall be restored unless a new trial or rehearing is ordered and such executed part is included in a sentence imposed upon the new trial or rehearing (Art. 75(a)). Ordinarily, any restoration should be announced in the court-martial order promulgating the final results of the proceedings (90*b*(2), 107; app. 15*b*).

107. COURT-MARTIAL ORDERS. General court-martial orders publishing the final results of proceedings in cases in which the President or the Secretary concerned has taken final action are promulgated by departmental orders. In other cases, the final action may be promulgated by an appropriate convening authority or the Secretary concerned.

108. FINALITY OF COURT-MARTIAL JUDGMENTS. The appellate review of records of trial provided by the code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by the code, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by the code, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in Article 73, to action by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused as provided in Article 69, and to action by the Secretary concerned as provided in Article 74, and the authority of the President (Art. 76). See 75*b*(2).

Chapter XXI

NEW TRIAL, RELATED AND OTHER MATTERS

THE PETITION FOR NEW TRIAL—CONDUCT OF NEW TRIAL AND SUBSEQUENT ACTION—POWERS OF THE JUDGE ADVOCATE GENERAL AFTER FINAL REVIEW—RIGHT OF DISMISSED OFFICER TO TRIAL BY COURT-MARTIAL

109. THE PETITION FOR NEW TRIAL. ***a. General.*** At any time within two years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court (Art. 73).

A petition may not be submitted after the death of an accused.

The execution of a sentence need not be delayed to permit a petition for a new trial. Presentation of a petition does not, of itself, operate to stay the execution of a sentence.

b. Who may petition. A petition for a new trial may be submitted either by the accused or by his counsel or representative regardless of whether the accused is in the service or has been separated therefrom. See 109*e*.

c. Who may act on petition. If the accused's case is pending before a Court of Military Review or the Court of Military Appeals, the Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise, the Judge Advocate General of the armed force which reviewed the previous trial shall act upon the petition except that petitions submitted by persons who, at the time of trial and sentence from which the petitioner seeks relief, were members of the Coast Guard, and who are members of the Coast Guard at the time the petition is submitted, will be acted upon in the Department in which the Coast Guard is serving at the time the petition is so submitted, that is, either by the Judge Advocate General of the Navy or the General Counsel of the Department of Transportation, as the case may be. See Article 73.

d. Grounds for new trial. (1) *General.* A new trial under Article 73 will be granted only upon the grounds of newly discovered evidence or fraud on the court. Sufficient grounds for granting a new trial will be deemed to exist only if within the discretion of the authority considering the petition all the facts and information before that authority, including, but not limited to, the record of trial, the petition, and other matters presented by the accused affirmatively establish that an injustice has resulted from the findings or the sentence and that a new trial would probably produce a substantially more favorable result for the accused.

(2) *Newly discovered evidence.* A new trial will not be granted on the grounds of newly discovered evidence unless the petition shows:

(*a*) That the evidence is in fact newly discovered, that is, discovered since the trial;

(*b*) That the evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence;

(*c*) That the newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

(3) *Fraud on the court.* No alleged fraud on the court will be deemed to constitute good cause unless it had a substantial contributing effect upon the findings of guilty or upon the sentence adjudged.

Examples of fraud on the court which may warrant the granting of a new trial are:

(*a*) Confessed or proved perjury in testimony or forgery of documentary evidence which clearly had a substantial contributing effect upon a finding of guilty and without which there probably would have been a finding of not guilty or a failure of proof of the offense alleged.

(*b*) Willful concealment by the prosecution from the defense of evidence favorable to the defense which, if produced and considered by the court in the light of all the other evidence, would probably have resulted in a finding of not guilty.

(*c*) Willful concealment of a material ground for challenge of the military judge or any member of the court or of the disqualification of any official of the court or the convening authority, when that ground or disqualification was not known to the defense at the time of trial.

e. Form of petition. The petition will be in writing. It will be signed under oath or affirmation by the accused, by a person possessing the power of attorney of the accused for that purpose, or by a person with the authorization of an appropriate court of law to sign the petition as the representative of the accused. It will be forwarded in triplicate directly to the Judge Advocate General of the armed force concerned. When practicable, the petition will be typewritten with lines double spaced and will contain the following:

(1) The name and service number of the accused, the date of the trial, and the present address of the accused.

(2) The request for a new trial.

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

(4) A brief description of any finding or sentence believed to be unjust.

(5) A full statement of the newly discovered evidence or fraud on the court relied upon for the remedy sought.

(6) Affidavits pertinent to the facts asserted in (5)above.

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

f. Action upon petition. In cases referred to a Court of Military Review, it shall take action in accordance with the rules of procedure prescribed under Article 66(f). In cases referred to it, the Court of Military Appeals shall take action in accordance with its rules. The authority considering the petition may cause such additional investigation to be made and such additional information to be secured as he may deem appropriate.

Upon written request and within his discretion, the authority considering the petition may allow oral argument upon a petition. If the petition is con-

sidered by the Judge Advocate General, the hearing may be before him or before an officer or officers designated by him.

If the Judge Advocate General is of the opinion that meritorious grounds for relief under Article 74 have been established but that a new trial is not indicated, he may take action under that article when authorized or transmit the petition and related papers to the Secretary concerned with his recommendations. The Judge Advocate General may also, in those cases which have been finally reviewed but have not been reviewed by a Court of Military Review, take action under Article 69. See 110A.

A new trial should not be granted by a Court of Military Review or the Court of Military Appeals if a consideration of the record of trial indicates that appropriate action should be taken under Articles 66(d) or 67(e).

110. CONDUCT OF NEW TRIAL AND SUBSEQUENT ACTION. ***a. Conduct of new trial.*** (1) If a new trial is granted, the Judge Advocate General shall designate a convening authority who has power to convene a court-martial appropriate for the trial of the case. The new trial shall be held at such time and place as the convening authority directs.

(2) Every new trial shall take place before a court-martial composed of members who were not members of the court-martial which first heard the case. The military judge at a new trial may be the same military judge who presided over a previous trial of the same case. See 62*f*(10). The existence or absence of a request for trial by the military judge alone at the previous trial has no effect on the composition of the court at the new trial. In any new trial which is referred to a court with a military judge and members, the accused may request that the case be heard by the military judge alone. Upon a new trial, the accused shall not be tried for any offense of which he was found not guilty, or upon which he was not tried by the first court-martial, and no sentence shall be adjudged in excess of or more severe than the legal sentence upon the previous trial, as ultimately reduced by the convening or other proper authority when any such action has been taken.

(3) If the accused is found guilty upon any charge or specification on a new trial, the court will, subject to the foregoing limitations, adjudge an appropriate sentence without regard to any credit to which the accused may be entitled by virtue of the prior execution of any part of the sentence. See 81*d*(1).

b. Action by the convening authority upon the record. The convening authority's action is the same as in other cases except that he may not order any part of the sentence executed. See 88*d*(1), 89, and appendix 14.

c. Disposition of record of new trial. Irrespective of the result of the new trial, the record thereof shall be forwarded to the appropriate Judge Advocate General after action by the convening authority and, in special court-martial cases reviewed by him, by the officer exercising general court-martial jurisdiction over the command, or by another officer having supervisory authority (94*a*).

d. Restoration; disposition of original sentence. Except as hereafter provided, the Secretary concerned will order the restoration of rights, privileges, and property affected by an executed portion of a court-martial sentence which has not again been adjudged upon a new trial or which, after the new trial, has not been sustained upon the action of any reviewing authority (Arts. 60, 65, 66, 67). The Secretary shall set aside so much of the findings and so much of the sentence adjudged upon the original trial as may be appropriate.

If a previously executed sentence of dishonorable or bad-conduct discharge is not imposed on a new trial, the Secretary concerned shall substitute therefor a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of his enlistment (Art. 75(b)).

If a previously executed sentence of dismissal is not imposed on a new trial, the Secretary concerned shall substitute therefor a form of discharge authorized for administrative issue, and the commissioned officer dismissed by that sentence may be reappointed by the President alone to such commissioned grade and with such rank as in the opinion of the President that former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to the existence of a vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and the reappointment shall be considered as actual service for all purposes, including the right to pay and allowances (Art. 75(c)).

e. Court-martial orders. Court-martial orders promulgating the final action taken as a result of a new trial including any restoration of rights, privileges, and property, shall be promulgated by departmental orders. See appendix 15*b*.

f. Action by persons charged with the execution of the sentence. Persons charged with the administrative duty of executing a sentence adjudged upon a new trial after it has been ordered into execution shall credit the accused with any executed portion or amount of the original sentence included within the new sentence in computing the term or amount of punishment actually to be executed pursuant to the new sentence. For example, if one year of an original sentence to confinement for five years has been executed, and a sentence to confinement for three years is adjudged and approved upon a new trial, the accused will be credited with the confinement for one year already served, leaving only confinement for two years of the new three-year sentence yet to be executed.

110A. POWERS OF THE JUDGE ADVOCATE GENERAL AFTER FINAL REVIEW. The findings or sentence, or both, in a court-martial case which has been finally reviewed, but has not been reviewed by a Court of Military Review, may be vacated or modified, in whole or part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused (Art. 69). Each Judge Advocate General shall provide appropriate procedures for considering all cases properly submitted under this paragraph. An accused need not make a request in order for the Judge Advocate General to exercise these powers, but each Judge Advocate General may prescribe the manner and form by which application for this relief may be made and, if requested by a person other than the accused, may require that the applicant establish his authority to act on behalf of the accused.

The procedure by which a case may be considered by the Judge Advocate General under this paragraph is not part of the appellate review within the meaning of Article 76 (see 75*b*(2)). Court-martial orders promulgating action taken under this authority will be as designated by the Secretary concerned. See 90*b*(2).

The authority granted to the Judge Advocate General under this provision of Article 69 does not limit the powers of the Judge Advocate General to grant a new trial under Article 73 nor of the Secretary concerned acting through boards established under 10 U.S.C. 1552 to correct an error or remove an injustice.

111. RIGHT OF DISMISSED OFFICER TO TRIAL BY COURT-MARTIAL. The President may dismiss a commissioned officer of any armed force in time of war under 70A Stat. 89, 10 U.S.C. § 1161. See Article 4 for the details regarding the right of a commissioned officer so dismissed to trial by court-martial.

Chapter XXII

OATHS

OATHS IN TRIALS BY COURTS-MARTIAL—AUTHORITY TO ADMINISTER OATHS—FORMS OF OATHS

112. OATHS IN TRIALS BY COURTS-MARTIAL. ***a. General.*** The word "oath" includes the word "affirmation." In the administration of an affirmation, the words "So help you God" are omitted. Matters concerning oaths in proceedings of courts of inquiry are found in Article 135.

b. Persons required to be sworn. All court-martial personnel, which includes the military judge, members of general and special courts-martial, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, reporters, and interpreters, shall take an oath to perform their duties faithfully (Art. 42(a)). Additionally, an individual defense counsel, military or civilian, shall take a similar oath. Each witness before a court-martial shall be examined on oath (Art. 42(b)). All persons whose testimony is taken by deposition, oral or written, shall be examined on oath (117*a*; Art. 49(c)). See 114 for forms of other specialized oaths.

c. Secretarial regulations. As to all court-martial personnel required to be sworn, Article 42(a) specifically provides that regulations of the Secretary concerned shall prescribe the following: the form of the oath; the time and place of the taking thereof; the manner of recording same; and whether the oath shall be taken for all cases in which these duties are to be performed, or for a particular case. Such secretarial regulations may also prescribe similar provisions as to the oath to be taken by individual counsel, military or civilian. In the case of certified legal personnel (Art. 26(b); Art. 27(b)), these secretarial regulations may provide for the administration of an oath on a one-time basis (Art. 42(a)). Unless provided otherwise by regulations of the Secretary concerned, it is not required that the oaths to court-martial personnel be administered in the presence of the accused.

See also 61*i* concerning that point in the proceedings at which it is usually ascertained that the required oaths have previously been taken, or are then administered.

d. Procedure for administering oaths. There is no particular procedure which must be used in administering an oath. Any procedure which appeals to the conscience of the person to whom the oath is administered and which binds him to speak the truth, or, in the case of one other than a witness, properly to perform his duties, is sufficient. The customary procedure in administering the prescribed oath consists (1) of requiring the person taking it to place a hand upon a Bible while the oath is administered or (2) of the raising of the right hand by both the individual administering the oath and the individual taking

the oath at the time of the reading thereof and the response thereto. Persons who recognize special forms or rites as obligatory may be sworn in their own manner or according to the ceremonies of the religion they profess and declare to be binding.

In those instances when the prescribed oath is administered in open court to the military judge, or the court members, or the trial and defense counsel or their assistants, or the individual counsel (military or civilian), all persons present in the courtroom will stand. While any other person is being sworn, such as a reporter, interpreter, or witness, he and the person administering the oath will stand. In those rare instances when the trial counsel testifies as a witness, the prescribed oath will be administered by the military judge, or, by the president of a special court-martial without a military judge, or as prescribed in regulations of the Secretary concerned. If the assistant trial counsel testifies as a witness, the trial counsel will administer the oath.

113. AUTHORITY TO ADMINISTER OATHS. The following persons on active duty may administer oaths necessary in the performance of their duties: The president, military judge, trial counsel, and assistant trial counsel for all general and special courts-martial; the president and the counsel for the court of any court of inquiry; all officers designated to take a deposition; all persons detailed to conduct an investigation; all recruiting officers; and all other persons designated by regulations of the armed forces or by statute (Art. 136(b)).

For other persons who are authorized to administer oaths, see Articles 49(c) and 136(a).

114. FORMS OF OATHS. Unless otherwise prescribed by regulations of the Secretary concerned, the forms of oaths set forth in *a* through *e* below may be used for those instances in which the personnel concerned have not previously been sworn, and may be administered by the individual indicated. The remaining forms of oaths set forth herein (*f–k* below) are to be used in other specialized situations.

a. Oath for military judge. The trial counsel shall administer the following oath to the military judge:

> "You (name of military judge) do swear (or affirm) that you will faithfully and impartially perform, according to your conscience and the laws applicable to trials by courts-martial, all the duties incumbent upon you as military judge of this court. So help you God."

b. Oath for court-members. The following oath, as appropriate, will be administered to court-martial members by the trial counsel:

> "You (name(s) of member(s)) do swear (or affirm) that you will faithfully perform all the duties incumbent upon you as a member of this court; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by courts-martial, the case of (the accused now before this court) (any accused brought before you); and that you will not disclose or discover the vote or opinion of any particular member of the court (upon a challenge or) upon the findings or sentence unless required to do so in due course of law. So help you God."

c. Oaths for counsel. The following oath, as appropriate, will be administered to trial counsel and to each assistant trial counsel, if any; and to defense counsel and to each assistant defense counsel, if any:

"You (name(s) of counsel) do swear (or affirm) that you will faithfully perform the duties of (trial counsel) (defense counsel) (in the case now in hearing) (in any case referred to this court). So help you God."

The following oath will be administered to individual counsel (military or civilian), if any:

"You (name of counsel) do swear (or affirm) that you will faithfully perform the duties of individual counsel in the case now in hearing. So help you God."

In the case of any counsel not previously sworn, the oath will be administered by the military judge if one is detailed to the court; otherwise, by the president.

d. Oath for reporter. The trial counsel shall administer the following oath to every reporter of the proceedings of a court-martial:

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

e. Oath for interpreter. The trial counsel or the summary court shall administer the following oath to every interpreter in the trial of any case before a court-martial before he enters upon his duties:

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

f. Oath for witnesses. The trial counsel or the summary court shall administer the following oath to each witness before he first testifies in a case:

"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."

g. Oath for questioned member. When a member is challenged or is questioned concerning his competency to serve, the trial counsel shall administer, when appropriate (62*b*), the following oath to the member who is to be examined under oath as to his competency.

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

h. Oath for escort. The escort on views or inspections by the court shall, before entering upon his duties as escort, take the following oath, which shall be administered by the trial counsel:

"You swear (or affirm) that you will escort 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 will not speak to the court concerning (the alleged offense) ( ), except to describe (the place aforesaid) ( ). So help you God."

i. Oath to charges. The form of oath to charges, which shall be administered by a commissioned officer of the armed forces authorized to administer oaths, is as follows:

"You swear (or affirm) that you are a person subject to the Uniform Code of Military Justice; that you have personal knowledge of or have

investigated the matters set forth in the foregoing charge(s) and specification(s); and that the same are true in fact to the best of your knowledge and belief. So help you God."

j. Oath to witnesses at Article 32 investigation. The oath administered by the investigating officer to witnesses in an investigation under Article 32 is as follows:

"You swear (or affirm) that the (statement given by you is) (evidence you are about to give shall be) the truth, the whole truth, and nothing but the truth. So help you God."

k. Oath to person giving a deposition. Any person whose testimony is taken by deposition, whether on oral examination or by written interrogatories, shall, before he testifies, be examined on oath, administered by the officer, civil or military, taking the deposition, in the following form:

"You swear (or affirm) that the evidence you are about to give shall be the truth, the whole truth, and nothing but the truth. So help you God."

Chapter XXIII

INCIDENTAL MATTERS

ATTENDANCE OF WITNESSES—EMPLOYMENT OF EXPERTS—DEPOSITIONS—CONTEMPTS—EXPENSES OF COURTS-MARTIAL

115. ATTENDANCE OF WITNESSES. ***a. General.*** The trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions (Art. 46).

The formal written instrument or process that serves to summon a witness to appear and testify is a *subpoena.* A subpoena cannot be used for the purpose of compelling a witness to appear at an examination before trial, except for the taking of a deposition. See, however, Article 135 as to courts of inquiry.

In this paragraph (115) the term "trial counsel" includes a summary court-martial unless the context indicates otherwise. See 79*b* concerning the authority of summary courts-martial to compel the attendance of witnesses.

The trial counsel will take timely and appropriate action to provide for the attendance of those witnesses who have personal knowledge of the facts at issue in the case for both the prosecution and the defense. He will not of his own motion take that action with respect to a witness for the prosecution unless satisfied that the testimony of the witness is material and necessary. The trial counsel will take similar action with respect to all witnesses requested by the defense, except that when there is disagreement between the trial counsel and the defense counsel as to whether the testimony of a witness so requested would be necessary, the matter will be referred for decision to the convening authority or to the military judge or the president of a special court-martial without a military judge according to whether the question arises before or after the trial begins. A request for the personal appearance of a witness will be submitted in writing, together with a statement, signed by the counsel requesting the witness, containing (1) a synopsis of the testimony that it is expected the witness will give, (2) full reasons which necessitate the personal appearance of the witness, and (3) any other matter showing that the expected testimony is necessary to the ends of justice. The decision on the request must be made on an individual basis in each case by weighing the materiality of the testimony and its relevance to the guilt or innocence of the accused, together with the relative responsibilities of the parties concerned, against the equities of the situation. If the convening authority determines that the witness will not be required to attend the trial, the request may be renewed at the trial for determination by the military judge or the president of a special court-martial without a military judge, as if the question arose for the first time during the trial.

The trial counsel may consent to admit the facts expected from the testimony of a witness requested by the defense if the prosecution does not contest these facts or if they are unimportant. An application for the attendance of any witness may be withdrawn if the trial counsel and defense counsel enter into a stipulation as to the testimony of that witness. See 48*d* and 154*b* (Stipulations).

b. Military witnesses. The attendance of a person in the military service stationed at the place of the meeting of the court, or so near that travel at government expense will not be involved, will ordinarily be obtained by notification, oral or otherwise, by the trial counsel, to the person concerned of the time and place he is to appear as a witness. In order to assure the attendance of the 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 counsel will, through regular channels, request the proper commanding officer to order the witness to attend.

If a military person, desired as a witness, is not present at the place where the court-martial is convened and his attendance would involve travel at government expense, the appropriate superior will be requested to issue the necessary order.

The attendance of military persons not assigned to active duty should be obtained in the same manner as the attendance of civilian witnesses not in government employ.

If practicable, a request for the attendance of a military witness will be made so that the witness will have notice at least 24 hours before starting to attend the meeting of the court.

c. Use and examination of documentary and other evidence in control of military authorities. If documents or other evidentiary materials are in the custody and control of military authorities, the trial counsel, the convening authority, the military judge, or the president of a special court-martial without a military judge will, upon reasonable request and without the necessity of further process, take necessary action to effect their production for use in evidence and, within any applicable limitations (see 151*b*(1) and (3)), to make them available to the defense to examine or to use, as appropriate under the circumstances. See also 44*h*.

d. Civilian witnesses. (1) *Issue, service, and return of subpoena.* The trial counsel is authorized to subpoena as a witness, at government expense, any civilian who is to be a material witness and who is within any part of the United States, or the Territories, Commonwealths, and possessions, and can compel the attendance of such a civilian (Art. 46). As to employment of expert witnesses, see 116.

A subpoena normally is prepared, signed, and issued in duplicate on the official forms provided. See appendix 17 for the form of a completed subpoena with certificate of service. If a subpoena requires the witness to bring with him a document or an exhibit to be used in evidence, each document or exhibit will be described in sufficient detail to enable the witness to identify it readily.

If practicable, a subpoena will be issued in time to permit service to be made or accepted at least 24 hours before the time the witness will have to start from home in order to comply with the subpoena.

Unless he believes that formal service is advisable, the trial counsel will mail the subpoena to the witness in duplicate, inclosing a postage paid envelope

bearing a return address, with the request that the witness sign the acceptance of service on the copy and return it in the postage paid envelope. The return envelope should be addressed to the trial counsel of the court and not to that officer by name. The trial counsel 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 voluntary compliance with the request and that a voucher for fees and for mileage going to and returning from the place of the sitting of the court will be delivered to him promptly on being discharged from attendance on the court.

If formal service is believed to be necessary, the trial counsel will take appropriate action with a view to timely and economical service. For example, if the witness is near the place where the court is convened, the trial counsel, or someone detailed or designated by the commanding officer of the installation, may serve the subpoena; if the witness is near some other military installation, the duplicate subpoenas may be inclosed with a suitable letter to the commanding officer of that installation; or the duplicate subpoenas may be inclosed with a suitable letter to the commander of an army area, naval district, air command, or other comparable command within which the witness resides or may be found. These commanders will take appropriate action to complete prompt service of the subpoena by the most economical available means. Travel orders for the purpose will be issued when necessary. Service ordinarily will be made by persons 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 counsel. If service cannot be made, the trial counsel will be promptly so informed. When use for it is probable, a return postage paid envelope, addressed to the trial counsel of the court and not to that officer by name, may be sent to the person who is to serve the subpoena.

In foreign territory, the attendance of civilian witnesses may be obtained in accordance with existing agreements or, in the absence thereof, within the principles of international law. However, 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 counsel.

(2) *Neglect or refusal to appear.* See Article 47 and *Warrant of attachment below.* In order to maintain a prosecution under Article 47, a person must not only be duly subpoenaed but must be paid or tendered fees, including the fee for one day of actual attendance and mileage both ways, "at the rates allowed to witnesses attending the courts of the United States" (Art. 47).

When it appears advisable, the trial counsel may address a written request or the senior officer present may address a written order, for the provision of fees, to a finance or disbursing officer under the command of the convening authority, or to a finance or disbursing officer of the same armed force as the convening authority and convenient to the place where the witness is found. On receipt of the request or order, the finance or disbursing officer will immediately provide the trial counsel, or any other 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 journey to and from the court. In this respect, see appropriate regulations of the Secretary of a Department. If an officer charged with serving a subpoena pays from his

personal funds the necessary fees and mileage to a witness, taking a receipt therefor, he is entitled to reimbursement.

(3) *Warrant of attachment.* In order to compel the appearance of a civilian witness in an appropriate case, the trial counsel will consult the convening authority, the military judge, or the president of a special court-martial without a military judge, according to whether the question arises before or after the court has convened for trial of the case, as to the desirability of issuing a warrant of attachment under Article 46.

When it becomes necessary to issue a warrant of attachment, the trial counsel will prepare it and, when practicable, effect execution through a civil officer of the United States. Otherwise, the trial counsel will deliver or send it for execution to an officer designated for the purpose by the commander of the proper army area, naval district, air command, or other appropriate command.

As the arrest of a person under a warrant of attachment involves depriving him of his liberty, the authority for this 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 the orders convening the court-martial, or copies thereof; a copy of the charges in the case, including the order referring the charges for trial, each copy certified by the trial counsel to be a full and true copy of the original; the original subpoena, showing proof of service of a copy thereof; a certificate stating that the necessary witness fees and mileage have been duly tendered; and an affidavit of the trial counsel that the person being attached is a material witness in the case, that the person has willfully neglected or refused to appear although sufficient time has elapsed for that purpose, and that no valid excuse has been offered for the failure to appear.

In executing this process, it is lawful to use only such force as may be necessary to bring the witness before the court. When it appears that the use of force may be required or when 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.

116. EMPLOYMENT OF EXPERTS. The provisions of this paragraph are applicable unless otherwise prescribed by regulations of the Secretary of a Department. When the employment of an expert is necessary during a trial by court-martial, the trial counsel, in advance of the employment, will, on the order or permission of the military judge or the president of a special court-martial without a military judge, request the convening authority to authorize the 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. When, 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 convening authority for permission to employ the expert, stating the necessity therefor and the probable cost. In the absence of a previous authorization, only ordinary witness fees may be paid for the employment of a person as an expert witness.

117. DEPOSITIONS. ***a. Definitions.*** A *deposition* is the testimony of a witness in response to questions submitted by the party desiring the deposition and by the opposite party, which is reduced to writing and taken under oath

before a person empowered to administer oaths. Depositions normally are taken to preserve the testimony of witnesses whose availability at the time of the trial appears uncertain. See 30*f* and 34*d*. *Written interrogatories* are questions, prepared by the prosecution or defense or both, which are reduced to writing before submission to a witness whose testimony is to be taken by deposition. The answers, reduced to writing and properly sworn to, constitute the deposition testimony of the witness. Under Article 49(a), a deposition taken on oral examination constitutes an *oral deposition*, and a deposition taken on written interrogatories constitutes a *written deposition*.

b. Rules and procedures generally applicable. In addition to the requirements under Article 49 and those contained elsewhere herein (117), the following rules apply to depositions, written or oral, to be used in trials by courts-martial:

(1) *Submission of request.* At any time after charges have been signed as provided in Article 30, any party may request permission to take oral depositions or, with the approval of the other party, written depositions. Normally, before the taking of any deposition, a request for permission to do so will be submitted to the convening authority or, if impracticable, to another authority competent to convene a court-martial for the trial of the pending charges. If a request to take a deposition originates after the commencement of a trial, it will be submitted to the military judge or the president of a special court-martial without a military judge. Opposing counsel will be permitted to inspect the request and any accompanying papers before submission to such an authority. All requests will include the reasons for taking the deposition and the points desired to be covered therein. If the name of the person whose deposition is desired is unknown, he may be identified by his office or position, for example, "Commanding Officer, Company C, 1st Battalion, 27th Infantry, Fort Adams, Vermont;" "Commander, 3101st Maintenance Squadron, Reese Air Force Base, Lubbock, Texas;" "Cashier, Commercial National Bank, Fort Leavenworth, Kansas."

(2) *Rights of the accused.* The qualifications of counsel and the rights of the accused to counsel for the taking of a deposition are the same as those prescribed for trial by the type of court-martial before which the deposition is to be used (6*a*, *b*, and *c*, 48*a* and *b*). The accused and his counsel with whom he has established an attorney and client relationship shall be present at the taking of any deposition unless the accused consents to the taking of the deposition in the absence of himself, his counsel, or both. If a deposition is to be taken before counsel have been otherwise detailed to a case, the authority who approved the taking of the deposition will designate counsel, preferably the trial counsel and defense counsel of an existing court or their assistants, to represent the prosecution and the defense in taking the deposition of any witness.

(3) *Action on the request.* A pretrial request for the taking of a deposition may be denied for good cause only by an authority competent to convene a court-martial for the trial of the pending charges. See Article 49(a). When the request for the taking of a deposition is submitted after the commencement of a trial, the military judge or the president of a special court-martial without a military judge shall rule as to whether it shall be taken (57).

(4) *Notice.* The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition (Art. 49(b)). Notice of the taking of a deposition for the prosecution may be given to the accused or his civilian or military counsel. Notice of the taking of a deposition for the defense may be given to the trial counsel, an assistant trial counsel, or the convening authority.

(5) *Obtaining witnesses.* If it is necessary to subpoena a civilian witness, the person designated to take the deposition will cause the duplicate subpoena to be served personally upon the witness and will return the original to the trial counsel by an indorsement stating that the duplicate has been delivered.

If the deposition of a person in the military service is required, the person designated to take the deposition or appropriate military authority shall direct the witness to appear at the proper time and place.

(6) *Examination of witnesses in capital cases.* When the defense calls for testimony to be taken by deposition in a capital case, the deponent may be cross-examined by written interrogatories, or otherwise, in the same manner as a deponent in a case not capital. See 145*a*.

(7) *Taking the deposition.* The person taking a deposition shall administer the appropriate oath to the witnesses and to the reporter and interpreter, if any (see 114; Art. 42), and in the presence of the witness shall record or cause to be recorded the testimony of the witness. Objections and motions made during the taking of a deposition shall not be ruled on by the officer taking the deposition, but they shall be recorded in the deposition, and the evidence objected to shall be taken and recorded. The person taking the deposition is responsible for maintaining order during the taking of the deposition and for protecting counsel and the deponent from annoyance, embarrassment, or oppression. When improper conduct of counsel or the deponent prevents the conducting of orderly and fair proceedings, the person taking the deposition should adjourn the proceedings and make a report of the circumstances to the court or the convening authority, as appropriate.

(8) *Authentication.* Depositions may be taken before and authenticated by any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths (Art. 49(c)). See 147*a* as to taking judicial notice of the seals of foreign notaries public with respect to the authentication of depositions taken before them, and of the signatures of persons authorized to administer oaths under Article 136 and chapter XXII.

(9) *Fees and expenses.* A civilian who performs travel to give his deposition is entitled to the same fees and expenses as if he had personally testified before the court sitting at the place the deposition is taken.

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.

(10) *Action on receipt of completed deposition.* Upon receipt of the completed deposition the trial counsel will notify the accused or his counsel and will give the defense an opportunity to examine it. The trial counsel, as the legal custodian of the deposition, is responsible that no alteration whatever is made therein.

(11) *Use at trial.* See 79*b* concerning the use of depositions in trials by summary courts-martial. See 145*a* for the rules of evidence applicable to depositions.

c. Written depositions. (1) *Submission of interrogatories to opposition.* The side desiring a deposition on written interrogatories will submit to opposing counsel a list of written interrogatories to be propounded to the absent witness. Opposing counsel may examine the interrogatories and will be allowed a reasonable time for the preparation of cross-interrogatories and objections, if any.

(2) *Sending out interrogatories.* All interrogatories are entered upon any prescribed form as indicated by any notes and instructions thereon. The trial counsel normally should send the interrogatories to the commanding officer of the military station nearest the witness. 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 envelope, a subpoena in duplicate, and a voucher for fees and mileage.

The return envelope should be addressed to the trial counsel of the court and not to that officer by name. The subpoena will, but the voucher will not, be signed; but both subpoena 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 convening the court.

(3) *Action by person 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. It may be left to the person designated to take the deposition to indicate the time and place of the taking.

In the event that the deposition cannot be taken promptly upon receipt of the interrogatories, the person 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.

(4) *Procedures.* 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, what is desired to be brought out by them, and that the answers are clear, full, and to the point.

When the testimony is fully transcribed the deposition will ordinarily be submitted to the witness for examination or read to him. Appropriate changes in form or substance which the witness desires to make may 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, over his own signature, state the reason for the omission of the signature of the witness. The certificate of the person taking the deposition will then be executed on the forms.

d. Oral depositions. An oral deposition is taken by propounding oral questions which along with the answers thereto are reduced to writing or other verbatim record. The entire proceeding is recorded verbatim, and the record need not be signed by the witness but will normally be certified by the officer taking the deposition. See 117*b* as to rules and procedures generally applicable.

118. CONTEMPTS. ***a. General.*** The power to punish for contempt is vested in general, special, and summary courts-martial.

A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both (Art. 48).

The words "any person," as used in Article 48, include all persons, whether or not subject to military law, except the military judge and the members of the court. These excepted persons may be punishable as indicated in 41*b*.

The conduct described in Article 48 constitutes a direct contempt. Neither indirect or constructive contempt, that is, that which is not committed in the presence or immediate proximity of the court while it is in session, nor the conduct and the action described or referred to in Article 47(a) is punishable under Article 48. Having been duly subpoenaed, persons not subject to military law may be prosecuted and punished under Article 47 for neglect or refusal to appear or refusal to qualify as a witness or to testify or to produce evidence. Persons subject to military law may be punished under Article 134 for the offenses discussed in this subparagraph.

When requested by a member of the court or any party to the trial and when the court deems it advisable, the military judge, the president of a special court-martial without a military judge, or a summary court-martial may warn a person that his conduct is improper and that his persistence therein may cause the court to hold him in contempt.

b. Procedure when a person is charged with contempt. When the conduct of a person before a court-martial warrants action under Article 48, the regular proceedings of the court should be suspended and the person directed to show cause why he should not be held in contempt. He will be given an opportunity to explain his conduct. The mere insistence by the person that his language or behavior was proper does not necessarily purge him of contempt.

When the military judge is trying the case alone, he will determine whether a person shall be held in contempt, and if he so determines, he will proceed to determine an appropriate punishment within the limits authorized by Article 48 and chapter XXV.

When the court includes members, the preliminary question as to whether a person should be held in contempt will be disposed of by a ruling of the military judge, or the president of a special court-martial without a military judge, both of which will be made subject to the objection of any member of the court.

Before asking whether any member of the court objects to his ruling, the military judge, or the president of a special court-martial without a military judge, should give the court members such instruction as will enable them to understand the issue that is before them and the legal standards and procedure by which they will determine it if objection is made. If there is no objection to a preliminary ruling that the person not be held in contempt, no further action thereon is required, and the court will resume its regular proceedings.

If any member objects to the ruling, the court will close and vote orally, beginning with the junior in rank, and the question shall be decided by a majority vote. A tie vote shall be a determination in favor of the person who is being proceeded against.

If, as a result of the vote of the court, or a ruling of the military judge or the president of a special court-martial without a military judge that is not objected to, there has been a preliminary determination that the person be held in contempt, the court will close to determine, by secret written ballot, whether he shall be held in contempt. Before closing for a final determination, the court should be given any instructions considered appropriate by the military judge or the president of a special court-martial without a military judge. In the event of conviction, the court will also determine by secret written ballot an appropriate punishment within the limits authorized by Article 48 and chapter XXV. Concurrence of two-thirds of the members present at the time the vote is taken is required both to convict and to punish a person for contempt.

Thereupon the court will open and the president will announce the holding and the punishment, if any, adjudged.

The action thus taken is properly summary, a formal trial not being required and no appeal or review being authorized except for the automatic review by the convening authority.

Before resuming the original proceedings, a record will be made in and as a part of the regular record of the case before the court, showing the facts concerning the contempt and the proceedings with reference to it; or the court may, upon the accomplishment of the record of the contempt proceedings, forthwith transmit the record to the convening authority, appropriate entries concerning this action being entered in and as a part of the regular record. For an example of proceedings in contempt, see appendix 8*c*.

In order to be effective, a punishment for contempt requires approval of the convening authority. Upon notification of the action of the court and pending formal review of the record of the contempt proceedings, the convening authority may require the person to undergo any confinement adjudged (21*d*; Art. 57(b)). The person held in contempt shall be advised, in writing, of the holding and punishment of the court and also of the action of the convening authority upon the proceedings for contempt. Copies of this communication shall be furnished to such other persons as may be concerned with the execution of the punishment, and a copy shall also be included with the record of trial proper.

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.

A person held in contempt may be allowed to continue to testify or to perform his functions before the court.

c. Place of confinement of person held in contempt. The place of confinement for a civilian or military person who is held in contempt and is to be punished by confinement shall, upon approval of the punishment by the convening authority, be designated by that officer.

119. EXPENSES OF COURTS-MARTIAL. See appropriate regulations of the Secretary of a Department.

Chapter XXIV

INSANITY

GENERAL CONSIDERATION—INQUIRY BEFORE TRIAL—INQUIRY AND DETERMINATION BY COURT—EFFECT OF MENTAL IMPAIRMENT OR DEFICIENCY UPON SENTENCE—ACTION BY CONVENING OR HIGHER AUTHORITY

120. GENERAL CONSIDERATION. ***a. Insanity.*** A person is insane within the meaning of this chapter either if he lacked mental repsonibility at the time of the offense as defined in 120*b*, or if he lacks the requisite mental capacity at the time of trial as stated in 120*d*.

b. General lack of mental responsibility. If a reasonable doubt exists as to the mental responsibility of the accused for an offense charged, the accused cannot be legally convicted of that offense (74*a*(3)). 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 the moral, faculties. To constitute lack of mental responsibility, the impairment must not only be the result of mental defect, disease, or derangement but must also deprive the accused of his ability to distinguish right from wrong or to adhere to the right as to the act charged. Thus, mere defect of character, will power, or behavior, as manifested by one or more offenses, ungovernable passion, or otherwise, does not necessarily indicate insanity, even though it may demonstrate a diminution or impairment in ability to adhere to the right with respect to the act charged. Similarly, mental disease, in itself, does not always amount to mental irresponsibility. For example, if a person commits an assault under psychotic delusion with a view to redressing or revenging some supposed injury to his reputation, he is nevertheless mentally responsible if he knew at the time that the act was contrary to law, and if he was not acting under an irresistible impulse. On the other hand, an accused is not responsible for a homicide, if, as a result of mental disease, he had an insane delusion that another person was in the act of attempting to kill him and he thereupon killed the supposed attacker under the delusion that it was necessary to kill the deceased to preserve his own life.

c. Partial mental responsibility. A mental condition, not amounting to a general lack of mental responsibility (120*b*), which produces a lack of mental ability, at the time of the offense, to possess actual knowledge or to entertain a specific intent or a premeditated design to kill, is a defense to an offense having one of these states of mind as an element. For example, if premeditated murder is charged and the court finds that, as a result of mental impairment, not

amounting to a general lack of mental responsibility, the accused at the time of the offense lacked the mental ability to entertain a premeditated design to kill, the court must find the accused not guilty of premeditated murder, but it may find him guilty of the included offense of unpremeditated murder as a premeditated design to kill is not an element of the latter.

d. 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 to conduct or cooperate intelligently in his defense.

121. INQUIRY BEFORE TRIAL. If it appears to any commanding officer who considers the disposition of charges as indicated in 32, 33, and 35 or to any investigating officer (34), trial counsel, or defense counsel that there is reason to believe that the accused is insane (120*d*) or was insane at the time of the alleged offense (120*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 trial. When the report indicates a reasonable basis for the belief, the matter will be referred to a board of one or more medical officers for their observation and report as 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 (120*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 (120*b*)?

c. Does the accused possess sufficient mental capacity to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his defense (120*d*)?

To determine these questions the board should place the accused under observation, examine him, and conduct any further investigation that it deems necessary. On the basis of this report, further action in the case may be suspended, the charges may be dismissed by an officer competent to convene a court-martial appropriate to try the offense charged, administrative action 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 examinations may be directed at any stage of the proceedings 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.

122. INQUIRY AND DETERMINATION BY THE 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 authorizes the court to assume that the accused was and is sane until evidence is presented to the contrary. When, however, some evidence which could reasonably tend to show that the accused is insane (120*d*)

or was insane at the time of his alleged offense (120*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. Although the defense usually raises the issue of insanity 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 an 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, and when the sanity of the accused becomes an issue, the prosecution should introduce any available evidence tending to prove his sanity. If, in the light of all the evidence, including that supplied by the inference of sanity (138*a*(2)), a reasonable doubt as to the mental responsibility of the accused at the time of the offense (120*b*) remains, the court must find the accused not guilty of that offense. If a reasonable doubt extends only to the accused's ability, at the time of the offense, to possess the actual knowledge, specific intent, or premeditated design to kill which is an element of the offense, the court must find the accused not guilty of that offense, but it may convict him of any included offense which does not require proof of one of these states of mind and as to which there is not otherwise a reasonable doubt. If a reasonable doubt as to the mental capacity of the accused at the time of trial (120*d*) remains, the court will adjourn and transmit to the convening authority the record of its proceedings with a statement of its determination of the issue of mental capacity.

b. Procedure. (1) *General.* Different issues relating to the sanity of an accused may be raised in a variety of ways at any time during the course of a trial. The method of disposing of an issue depends upon the kind of issue and manner in which it is raised.

(2) *Inquiry.* 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 by the court. It should be remembered, however, that although a person who lacks mental capacity or responsibility to the extent indicated in 120 should not be tried, sanity is presumed (122*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 or other action to cause the court to make inquiry concerning the accused's sanity may be initiated by the military judge or any member of the court, prosecution, or defense. The military judge rules finally as to whether an inquiry should be made into the mental capacity of the accused at the time of trial or into the mental responsibility of the accused at the time of the offense (Art. 51(b); see 122*b*(3) and (4)). The president of a special court-martial without a military judge rules finally on all questions of law but rules subject to objection by any member on all factual issues. Thus, if the issue of whether an inquiry should be made into the mental capacity of the accused at the time of trial or into the mental responsibility of the accused at the time of the offense involves only a legal determination, the president of a special court-martial without a military judge rules finally. When such an issue is solely one of fact, the president of a special court-martial without a military judge rules subject to objection by any member (Art. 51(b); see 122*b*(3) and (4)). As to mixed questions of law and fact, see 57*b*. Before asking whether any

member objects to a ruling which is subject to objection, the members should be given such instructions as will enable them to understand the question that is before them and the legal standards and procedure by which they will determine it if objection is made. If thereafter, a member objects to the ruling, the court will close and vote on whether an inquiry should be made (57*f*). A tie vote of the members upon a motion relating to the sanity of the accused is a determination against the accused (Art. 52(c)). If it is determined to make 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 convening authority with its recommendations. These recommendations may include a recommendation that the accused be examined as provided in 121 and that the officer or officers conducting the examination be made available as witnesses. As a result of a subsequent report of mental examination conducted under 121, the convening authority may withdraw the charges from the court, hold the proceedings in abeyance, refer the matter to the court for its consideration subject to the provisions of 122*c*, or take other appropriate action.

(3) *Issue of mental capacity at time of trial.* Regardless of the manner in which it is raised, the issue of mental capacity at the time of trial is always an interlocutory question, since a determination in favor of the accused has no effect on his guilt or innocence of an offense but only interrupts the trial until the incapacity no longer exists. An issue of mental capacity should be resolved as early in the trial as possible in order to prevent confusion if an issue of mental responsibility is also raised. The military judge rules finally on the issue of mental capacity at the time of trial (57*d*). In a special court-martial without a military judge, the president rules subject to objection by any member of the court on the issue of mental capacity (57*c*). See 122*b*(2) for instructions to be given and methods of ruling and voting. If it is determined that a reasonable doubt exists as to the requisite mental capacity of the accused (120*d*), this fact shall be recorded and the record of all proceedings held in the case forwarded to the convening authority. Otherwise, the trial shall continue. If the convening authority disagrees with the determination of the court or if he 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 the question and, if appropriate, to proceed with the trial.

(4) *Issue of mental responsibility at time of offense.* Regardless of whether the issue of mental responsibility is raised as an interlocutory matter by a motion to dismiss or by the introduction of evidence on the question of guilt or innocence, the court must always determine the issue in arriving at its findings on guilt or innocence. When the issue is raised by motion, however, it may be considered as an interlocutory question at the discretion of the military judge or the president of a special court-martial without a military judge. The usual procedure is to submit the issue to the court for determination during its deliberations on the findings. See 122*b*(2) for the instructions to be given and the methods of ruling and voting when the issue is treated as an interlocutory question. When the issue is so treated, both the military judge and the president

of a special court-martial without a military judge rule subject to objection by any member.

If the court finds the accused not mentally responsible for his acts (120*b*) upon an interlocutory determination, it will forthwith enter findings of not guilty as to the proper charges and specifications, and forward the record of all proceedings held to the convening 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. In considering its findings upon the issue of guilt or innocence, if 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 (120*b*).

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 XXVII. 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, 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 an opinion as to the general mental condition of the accused as may be within the bounds of the common experience and means of observation of men.

As in the proof of other matters, evidence may be presented by the testimony of witnesses in open session, depositions (145*a*,) stipulated testimony, or documentary evidence.

So much of the report of a board of medical officers or any other medical record as pertains to entries of facts or events which are properly admissible under the official records or business entry exceptions to the hearsay rule (144*b*, *c*, and *d*) may be received in evidence. The opinions as to the mental condition of the accused contained in such a report are not within these exceptions to the hearsay rule. They may be received in evidence by stipulation or, in a proper case, as memoranda of past recollections recorded (146*a*). The report or any other pertinent matter, although not necessarily admissible in evidence, may nevertheless be examined by the military judge, or the president of a special court-martial without a military judge, for the limited purpose of determining whether further inquiry into the mental condition of the accused should be made. Before ruling, the military judge, or the president of a special court-martial without a military judge, should make available to the members of the court any portions of the document which are necessary for them to intelligently consider the ruling. The court should be instructed that this information is made available only for the limited purpose of determining if further inquiry into the mental condition should be made.

For the rules of evidence as to expert witnesses, hypothetical questions, and similar matters, see 138*e*.

123. EFFECT OF MENTAL IMPAIRMENT OR DEFICIENCY UPON SENTENCE. In arriving at its sentence, the court may 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 mental or neurological condi-

tion 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.

124. ACTION BY CONVENING OR HIGHER AUTHORITY. After consideration of the record as a whole, if it appears to the convening or appropriate higher authority that a reasonable doubt exists as to the sanity of the accused, the findings of guilty affected by that doubt should be disapproved and appropriate action taken with respect to the sentence. If the doubt relates to mental capacity at the time of trial, a rehearing may be directed when the incapacity no longer exists.

Convening or higher authorities will take the action prescribed in 121 before taking action on the record of trial when it appears from the record or otherwise that further inquiry as to the mental condition of the accused is warranted in the interest of justice, regardless of whether the question was raised at the trial or how it was determined if raised. When further inquiry results in a determination that the accused lacks the mental capacity to understand the review proceedings, a conviction may not be approved or affirmed under Articles 64, 65, or 66 until the accused regains the requisite mental capacity. However, this should not cause a delay in making a determination in favor of an accused which will result in the setting aside of a conviction. When further inquiry after trial produces new information which raises an issue concerning mental responsibility at the time of the offense, the affected charges and specifications may be dismissed and appropriate action taken on the sentence or a new trial or rehearing may be directed, as may be appropriate under the circumstances of the case.

Chapter XXV

PUNISHMENTS

GENERAL LIMITATIONS—MISCELLANEOUS LIMITATIONS—MAXIMUM LIMITS OF PUNISHMENTS

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125. GENERAL LIMITATIONS. In all cases of conviction, a court-martial should adjudge a legal, appropriate, and adequate punishment, with due regard for the requirements of the code. See 76*a* and 127 for the basis of determining adequate punishment. The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe

for that offense (Art. 56). See also 118 (Contempts), 126 (Miscellaneous limitations), and 127 (Maximum limits of punishments).

No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces (Art. 12), nor, subject to the provisions as to the effective date of forfeitures set forth in 126*h*(5), may any person while being held for trial or the results of trial be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him (see Art. 13). Prisoners being held for trial or whose sentences have not yet been approved and ordered executed will be accorded the facilities, accommodations, treatment, and training prescribed in pertinent regulations. During the period that he is held for trial or awaiting action on his sentence, an accused will not be required to observe either duty hours or training schedules devised as punitive measures, required to perform punitive labor, nor required to wear other than the uniform prescribed for unsentenced prisoners, except that during those periods he may be subjected to minor punishment for infractions of discipline (see Art. 13).

Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to the code. The use of irons, single or double, except for the purpose of safe custody, is prohibited (Art. 55).

Courts-martial shall not impose any punishment not sanctioned by the custom of the service, such as carrying a loaded knapsack, shaving the head, placarding, pillorying, placing in stocks, or tying up by the thumbs. Loss of good conduct time will not be adjudged as punishment by a court-martial.

Confinement on bread and water or diminished rations may be adjudged only against enlisted members attached to or embarked in a vessel and shall not be adjudged in excess of three days. However, the categories of enlisted personnel upon whom this type of punishment may be imposed may be limited by regulations of the Secretary concerned. A court-martial may not adjudge a sentence to solitary confinement, but a sentence to confinement on bread and water or diminished rations may be carried into execution by confining the prisoner in a place where he can communicate only with authorized personnel. The ration to be furnished an enlisted member undergoing a punishment of confinement on diminished rations is that specified by the authority charged with the administration of the punishment, but the ration may not consist solely of bread and water unless this punishment has been specifically adjudged. When any person is sentenced to be confined on bread and water or diminished rations, the signed certificate of a medical officer, containing his opinion as to whether serving the sentence would produce serious injury to the health of the accused, must be obtained before the sentence is ordered into execution. The certificate, which shall be attached to the record of proceedings, shall be in the following form:

> "I certify that from an examination of _____, and of the place where he is to be confined, I am of the opinion that the execution of the foregoing sentence to confinement on (bread and water) (diminished rations) will (not) produce serious injury to his health."

126. MISCELLANEOUS LIMITATIONS. ***a. General comments.*** The death penalty is mandatory in the case of spies (Art. 106); it is mandatory that either death or life imprisonment be adjudged for murder upon a finding of

guilty under subsections (1) or (4) of Article 118. Punishment as adjudged by the court must be in conformity with the article prescribing the offense, and may not exceed the maximum authorized for the offense in the Table of Maximum Punishments, unless the limitations in the table have been suspended. For example, Article 85 (Desertion) authorizes such punishment other than death as a court-martial may direct, except in time of war when either death or such other punishment as a court-martial may direct is authorized. However, the maximum penalty that may be adjudged for desertion is also limited by the Table of Maximum Punishments unless the limitations in the table have been suspended by the President under the authority of Article 56, in which event only the limits prescribed in Article 85 would govern. See 127*c*(5) for offenses as to which the Table of Maximum Punishments is automatically suspended upon declaration of war.

A court-martial may not adjudge the death penalty except for an offense made expressly so punishable by an article of the code (Art. 52(b)(1)). See 15*a* (2) for an enumeration of the particular articles. Although an offense may be made expressly punishable by death, the death penalty cannot be adjudged for that offense if the applicable limit of punishment prescribed by the President under Article 56 (127) is less than death, nor can the death penalty be adjudged if the convening authority has directed that a case be treated as not capital (see Arts. 19, 49(f)). With reference to the limitation on the imposition of the death penalty in the case of a rehearing or new or other trial, see 81*d* and 110*a*(2). See 145 for limitations on the use of depositions, former testimony, and records of courts of inquiry in cases involving the death sentence and on the use of records of courts of inquiry in cases involving the dismissal of a commissioned officer.

In adjudging a sentence of death, a court-martial will not prescribe the method of execution. A dishonorable discharge is by implication included in a death sentence. A sentence to death which has been finally ordered executed will be carried into effect in the manner authorized or prescribed by regulations of the Secretary concerned.

A court-martial may not adjudge an administrative separation from the service, and dishonorable or bad-conduct discharge or dismissal, as appropriate according to the status of the accused (see 126 *d* and *e*), are the only forms of punitive separations that may be adjudged. Concerning the appropriateness of a sentence to dishonorable or bad-conduct discharge, see 76*a* (3) and (4).

b. General courts-martial. Subject to the provisions of this chapter (XXV), general courts-martial may adjudge any punishment not forbidden by the code, including the penalty of death when specifically authorized by the code, and, in appropriate cases, any punishment permitted by the law of war (Art. 18). See 14*a* for jurisdiction of a general court-martial composed of a military judge alone.

c. Special and summary courts-martial. (1) *Special courts-martial.* See 15*b* and Article 19 for the limitations on the jurisdiction of a special court-martial in adjudging punishments.

(2) *Summary courts-martial.* See 16*b* and Article 20 for the limitations on the jurisdiction of a summary court-martial in adjudging punishments.

(3) *General comments.* Special and summary courts-martial are not limited to the kinds of punishments set forth in Articles 19 and 20. See 16*b* as

to the apportionment that may be required if a summary court-martial wishes to adjudge both confinement and restriction. The Table of Equivalent Punishments (127*c*) will be used to make an apportionment.

d. Commissioned officers and warrant officers. In general, any limitation as to the punishment that may be imposed on a commissioned officer by a court-martial is applicable in the case of a warrant officer. A commissioned or warrant officer may not be reduced in grade by any court-martial. However, in time of war or national emergency the Secretary concerned, or such Under Secretary or Assistant Secretary as may be designated by him, may commute a sentence of dismissal to reduction to any enlisted grade (Art. 71(b)).

A commissioned officer or warrant officer may be punished by a punitive separation from the service when convicted by general court-martial of any offense in violation of the code. The separation from the service of commissioned officers, including commissioned warrant officers, when adjudged by the sentence of a general court-martial, shall be by dismissal. The separation from the service of all other warrant officers by sentence of a general court-martial shall be by dishonorable discharge.

Only a general court-martial may sentence a commissioned or warrant officer to confinement, and in no case shall the confinement exceed the maximum prescribed for enlisted members by the Table of Maximum Punishments. A commissioned or warrant officer may not be sentenced to hard labor without confinement in any case.

e. Enlisted members; prisoners sentenced to punitive discharge. For the maximum limits of punishment for certain offenses committed by enlisted members, see 127. Under Article 58a, unless otherwise provided in regulations prescribed by the Secretary concerned, a court-martial sentence of an enlisted member in a pay grade above E–1, as approved by the convening authority, that includes (1) a dishonorable or bad-conduct discharge, (2) confinement, or (3) hard labor without confinement reduces that member to pay grade E–1, effective on the date of that approval. If the sentence of a member who is thus reduced in pay grade is set aside or disapproved, or, as finally approved, does not include any of these punishments, the rights and privileges of which he was deprived because of that reduction shall be restored to him and he is entitled to the pay and allowances to which he would have been entitled, for the period the reduction was in effect, had he not been so reduced. Reduction effected under Article 58a is not a part of the sentence, but is an administrative result thereof.

A court-martial is authorized to sentence an enlisted member to be reduced to the lowest or any intermediate grade. But see 16*b* concerning the limitations on the power of summary courts-martial to sentence enlisted members above the fourth enlisted pay grade to a reduction.

If a prisoner already under a suspended sentence to dishonorable or bad-conduct discharge is tried by a court-martial, dishonorable or bad-conduct discharge may be adjudged as well as other appropriate penalties. However, if a prisoner has been separated from the service by dishonorable or bad-conduct discharge, the adjudging of another punitive discharge would, in general, be futile.

f. Reprimand; admonition. There is no restriction either as to the court which may adjudge a reprimand or admonition as punishment or as to the

persons subject to the code upon whom this punishment may be imposed, but the court will not specify the terms or wording of a reprimand or admonition.

g. Restriction to limits. There is no limitation either as to the court which may adjudge the punishment of restriction to limits or as to the persons subject to the code upon whom it may be imposed. It will not be adjudged in excess of two months and will not in any event operate to exempt the person on whom it is imposed from any military duty.

h. Forfeiture; fine; detention of pay. (1) *General.* Any partial forfeiture, fine, or detention of pay should be adjudged in express terms and stated in dollars only rather than in dollars and cents, or in days' pay (see app. 13). 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 cannot 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 unit fund. A sentence directing an accused to make a deposit or a contribution of pay or of other funds is illegal.

(2) *Forfeiture.* A forfeiture is an appropriate form of 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 period of time expressly stated. Allowances are forfeited only when the sentence includes the forfeiture of all pay and allowances. Subject to the provisions of Article 57(a), a forfeiture applies to pay and allowances which accrue during the enlistment, extension of enlistment, or other engagement or obligation of service in which the accused is serving at the time the sentence is adjudged. Forfeiture of a member's deposits or of the interest thereon cannot be adjudged by sentence of a court-martial. A forfeiture may not be applied to money to be paid by an employer other than the United States. A general court-martial is not limited as to the amount of forfeiture it may adjudge. For the limit of jurisdiction of a special or a summary court-martial to adjudge a forfeiture, see 15*b* and 16*b*.

The maximum amount of a partial forfeiture (app. 13) is computed by using the basic pay authorized for the cumulative years of service of the accused and, if no confinement is adjudged, any sea or foreign duty pay. When a sentence includes a reduction of an enlisted member, expressly or by operation of law (see Art. 58a) and whether or not suspended, the forfeiture must be based on the pay for the reduced grade. Additionally, any monthy contribution which an enlisted member is required to make, or will be required to make as the result of a sentence including a reduction, in order to entitle him to a basic allowance for quarters must be deducted before the amount of pay subject to forfeiture is computed. However, other allotments need not be deducted. The term "basic pay" includes no element of pay other than the basic pay of the grade or class within grade as fixed by statute and does not include special pay for a special qualification such as diving pay, or incentive pay for the performance of hazardous duties such as flying, parachute jumping, or duty on board a submarine. See appropriate regulations of the Secretary of a Department as to periods which may not be counted in computing increase of pay for length of service.

The terms "forfeiture of all pay and allowances" and "to forfeit all pay and allowances," as used in 88, this chapter (XXV), and appendix 13 mean the forfeiture of all pay and allowances becoming due on and after the date a lawfully adjudged sentence is approved by the convening authority. But see 88*d*(3) with respect to the suspension or deferral of forfeitures in certain cases. See, generally, as to forfeitures, applicable regulations of the Secretary of a Department.

(3) *Fine.* Whereas a forfeiture deprives the accused of all or part of his pay only as it accrues, a fine, when ordered executed, is in the nature of a judgment and makes him immediately liable to the United States for the entire amount of money specified in the sentence. All courts-martial have the power to adjudge fines instead of forfeitures in cases involving members of the armed forces. General courts-martial have the further power to adjudge fines in addition to forfeitures in appropriate cases. See Section B, 127*c*. Special and summary courts-martial may not adjudge any fine in excess of the total amount of forfeitures which may be adjudged in a case. A fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as the result of the offense of which he is convicted. However, a fine may always be imposed as a punishment for contempt (Art. 48).

In general, a court-martial has the same power to fine a prisoner of war that it has to fine a member of the armed forces. Ordinarily, a fine, rather than a forfeiture, is the proper monetary penalty to be adjudged against a civilian subject to military law. In order to enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired (see app. 13, form 11). The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court (15*b*, 16*b*, 126*b*).

(4) *Detention of pay.* Detention of pay is a less severe form of punishment than a forfeiture in that the amount detained is ultimately returned to the accused. The period for which the pay is to be detained may not exceed one year from the date the sentence is ordered executed. Summary courts-martial may not adjudge detention of pay of more than two-thirds of one month's pay. All other courts-martial may not adjudge detention of pay of more than two-thirds pay per month for three months. The rules prescribed in 126*h*(2) for determining maximum allowable partial forfeitures also apply in determining the maximum detention that may be adjudged in a case. The amount of pay detained is returned to the accused at the expiration of the specified period of detention or the offender's term of service, whichever is earlier.

(5) *Effective date of certain sentences.* See Article 57. Whenever a sentence of a court-martial as approved includes a forfeiture of pay or allowances in addition to confinement not suspended or deferred, the forfeiture will apply to pay or allowances becoming due on and after the date the sentence is approved by the convening authority. However, a convening authority may defer the effective date of forfeitures by providing specifically therefor in his action. See 88*d*(3). No forfeiture shall extend to any pay or allowances accrued before the date a sentence is approved by the convening authority. Except as provided above, all other sentences to forfeiture and sentences to fine or detention of pay become effective on the date the sentence is ordered executed.

i. Suspension from rank, command, or duty; loss of rank, promotion, numbers, or seniority. Sentences to suspension from rank, command, or duty are not authorized.

Sentences to loss of rank or promotion are not authorized except as provided below.

Sentences to loss of numbers, lineal position, or seniority are authorized only in cases of Navy, Marine Corps, and Coast Guard officers. All losses of numbers will be numbers in the appropriate lineal list. For line officers, it will be numbers of officers not restricted in the performance of duty. For officers of staff corps, it will be numbers corresponding to line officers not restricted in the performance of duty.

j. Confinement at hard labor. Any person subject to trial by court-martial may be sentenced to confinement at hard labor. A sentence to confinement does not of itself automatically result in any fine or forfeiture of pay or allowances. The place of confinement will not be designated by the court. See, in this respect, 93.

Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended or the service thereof is deferred shall be excluded in computing the service of the term of confinement (Art. 57(b)). See also 97*c*, 88*f* and Article 14 concerning the interruption of the execution or the running of a sentence to confinement.

Confinement without hard labor should not be adjudged. The omission of the words "hard labor" from any sentence of a court-martial adjudging confinement does not deprive the authority executing that sentence of the power to require hard labor as a part of the punishment (Art. 58(b)).

k. Hard labor without confinement. Hard labor without confinement will not be adjudged in excess of three months. A summary court-martial will not adjudge hard labor without confinement in excess of 45 days. It may be adjudged only in the cases of enlisted members. Hard labor without confinement, adjudged as punishment by courts-martial, shall be performed in addition to other regular duties which fall to enlisted members; and no enlisted member shall be excused or relieved from any military duty for the purpose of performing it. A sentence imposing hard labor without confinement shall be considered satisfied when the enlisted member 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. The daily performance of the designated hard labor before or after routine duties are completed satisfies the sentence whether the particular daily assignment requires one, two, or more hours. Upon completion of the daily assignment, the accused should be permitted to take leave or liberty to which he properly is entitled.

127. MAXIMUM LIMITS OF PUNISHMENTS. ***a. Persons and offenses.*** The limits prescribed herein (127) will be applied by courts-martial in cases of enlisted members and prisoners sentenced to punitive discharge. These limitations, though not binding upon courts sentencing commissioned officers, warrant officers, aviation cadets, cadets, midshipmen, and civilians subject to military law, except as stated in 126*d*, may be used as a guide, subject to

any exceptions deemed warranted for determining the appropriate punishment for those persons. These limitations will also be applied insofar as applicable in the cases of enlisted prisoners of war.

b. General limitations. The limitations herein (127) do not exclude any other applicable limitations (81*d*, 125, 126). In using the Table of Maximum Punishments to determine the maximum allowable sentence in a case, it must be remembered that summary and special courts-martial may not adjudge punishments in excess of those prescribed in 15*b* and 16*b* even when the table prescribes a maximum in excess thereof. See 76*b* and 81*d* for rules concerning sentence instructions when sentence limitations apply.

c. Maximum punishments. (1) *Applicability and use of Table of Maximum Punishments.* The punishment stated opposite each offense listed in the Table of Maximum Punishments 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. 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. However, if the offense is closely related to more than one listed offense, the maximum punishment for the most closely related offense shall be used in making this determination.

Offenses not listed in the table and not included within an offense listed, or not closely related to either, are punishable as authorized by the United States Code (see, generally, Title 18) or the Code of the District of Columbia, whichever prescribed punishment is the lesser, or as authorized by the custom of the service. When the maximum punishment is thus determined by reference to the United States Code or the Code of the District of Columbia and the respective Code provides for confinement or imprisonment for a specified period or not more than a specified period, the maximum punishment by court-martial includes confinement at hard labor for that period. If the period is one year or more, the maximum punishment by court-martial also includes a dishonorable discharge and total forfeitures; if six months or more, a bad-conduct discharge and total forfeitures. With respect to other matters which properly may be considered in fixing punishment, see 76*a*, 123, and 154*a*.

The maximum punishment 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. In this connection, see 76*a* (Sentence—Basis for determining) and 88*b* (Determining what sentence should be approved).

The limitations are for each separate offense, not for each separate charge. In this connection, see 76*a*(5). For several separate and distinct offenses, even though they are alleged under the same charge, the court may, in its discretion, where the circumstances warrant severity, adjudge in its sentence the aggregate of the limit of punishment for each separate and distinct offense. In determining the maximum punishment for two or more separate and distinct, but like, offenses against property, the values as found in different specifications cannot be aggregated, as if alleged in a single specification, for the purpose of increasing the maximum punishment.

(2) *Applicability and use of Table of Equivalent Punishments.* The Table of Maximum Punishments, 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. In the case of enlisted members, the court in its discretion may substitute at the following rates other punishments for those listed in the table:

Table of Equivalent Punishments

Confinement on bread and water or diminished rations*	Confinement at hard labor	Hard labor without confinement	Restriction to limits	Forfeiture	Detention
½ day	1 day	1½ days	2 days	1 day's pay	1½ day's pay

*Maximum authorized is 3 days (125).

The foregoing table may be used in a variety of ways to determine substitute punishments. Thus, if an enlisted member is convicted of an offense for which the maximum forfeiture is two-thirds of one month's pay, the court may substitute other punishments, at the above indicated rates, for all or part of the 20 days' forfeiture. For example, it may impose forfeiture of 10 days' pay and for the remaining 10 days' forfeiture it may substitute 10 days' confinement, or 15 days' hard labor without confinement, or 20 days' restriction. Similarly, if the authorized punishment for an offense is confinement at hard labor for one month and forfeiture of two-thirds of one month's pay, the court may, for example, by substitution adjudge hard labor without confinement for 15 days (1½ for 1), restriction to limits for 40 days (2 for 1), and forfeiture of two-thirds pay for one month. However, in making substitutions the court must observe the limitations on its jurisdiction and on particular types of punishment. For instance, the two examples given above would not be applicable in a trial by summary court-martial of an enlisted member above the fourth enlisted pay grade, as confinement or hard labor without confinement cannot be adjudged (16*b*). Also, if the authorized punishment for an offense is confinement at hard labor for one month and forfeiture of two-thirds pay for one month, a summary court-martial could not adjudge additional forfeitures in lieu of any part of the confinement, since it has no jurisdiction to adjudge a forfeiture of more than two-thirds of one month's pay. Similarly, if the authorized punishment for an offense is confinement at hard labor for two months and forfeiture of two-thirds pay per month for two months, no court can substitute restriction to the limits for all of the confinement (that is, 2 x 60, or 120 days) since in no event may restriction be imposed in excess of two months (60 days). Since confinement and restriction are both forms of deprivation of liberty, only one of these two punishments may be imposed in the maximum amount in any one sentence—an apportionment must be made if it is desired to adjudge both forms of punishment in one and the same sentence (16*b*). Substituted punishments are of importance chiefly in cases of minor offenses. By

substituting additional forfeitures, or hard labor without confinement, the accused will be adequately punished but will not be prevented from performing his regular duties.

(3) *Computation of period of unauthorized absence.* In computing time of absence without leave, any one continuous period of absence found that totals not more than 24 hours is counted as a day; any such period found that totals more than 24 hours and not more than 48 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. For example, if an accused is convicted of an absence without leave from 0600 hours, 4 April, to 1000 hours, 7 April, of the same year (76 hours), the maximum punishment would be based on an absence of four days. However, if the accused is convicted simply of an absence from 4 to 7 April, the maximum punishment would be based on an absence of three days (72 hours).

(4) *Punitive discharges.* A bad-conduct discharge may be adjudged upon conviction of any offense for which a dishonorable discharge is authorized in the table. In determining whether a bad-conduct discharge is more appropriate than a dishonorable discharge, see 76*a*(3) and (4).

(5) *Automatic suspension of limitations.* Immediately upon a declaration of war subsequent to the effective date of this manual, the prescribed limitations on punishment for violations of Articles 82, 85, 86(3), 87, 90, 91(1) and (2), 113, and 115 automatically will be suspended and will not apply until the formal termination of the war or until restored by Executive Order before formal termination.

(6) *Arrangement of Table of Maximum Punishments.* The headings of the table and the descriptions of offenses therein are condensed for convenience of arrangement, are intended solely to identify the portions of this manual and the offenses to which they pertain, and do not define any offense. In the case of a discrepancy between a heading or description of an offense in the table and any other part of this manual, the other part shall be controlling. The descriptions of offenses do not purport to define either the elements of proof of (ch. XXVIII) or the form of pleading for (app. 6) the various offenses.

TABLE OF MAXIMUM PUNISHMENTS

SECTION A

Article	Offenses	Punishments				
		Dishonorable discharge, forfeiture of all pay and allowances	Bad-conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—		Forfeiture of two thirds pay per month not to exceed—
				Years	Months	Months
77	Principals.[1]					
78	Accessory after the fact.[2]					
79	Conviction of lesser included offense. (See 158 and Art. 79.)					

[1] Any person punishable under the code who aids, abets, counsels, commands, procures, or causes the commission of an offense punishable by the code shall, unless otherwise specifically prescribed, be subject to the maximum punishment authorized for the commission of the offense.

[2] Any person subject to the code who is found guilty as an accessory after the fact to an offense punishable by the code shall be subject to the maximum punishment authorized for the offense to which he is an accessory, except that in no case shall the death penalty be imposed nor the confinement authorized exceed more than one-half of the maximum confinement authorized for that offense, nor shall the period of confinement in any case, including offenses for which life imprisonment may be adjudged, exceed 10 years.

TABLE OF MAXIMUM PUNISHMENTS—Continued

Article	Offenses	Punishments				
		Dishonorable discharge, forfeiture of all pay and allowances	Bad-conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—		Forfeiture of two-thirds pay per month not to exceed—
				Years	Months	Months
80	Attempts.[3]					
81	Conspiracy.[4]					
82	Soliciting or advising another:					
	If the offense is not committed or attempted—					
	To desert	Yes		3		
	To mutiny	Yes		10		
	If the offense is not committed—					
	To commit an act of misbehavior before the enemy.	Yes		10		
	To commit an act of sedition	Yes		10		
83	Fraudulent enlistment:					
	Procured by means of false representation concerning, or failure fully to disclose, any detail of membership in, association with, or activities in connection with, any of the organizations, associations, movements, groups, or combinations listed in the enlistment documents processed and noted at the time of enlistment.	Yes		5		
	Other cases of	Yes		1		
	Fraudulent separation	Yes		5		
84	Effecting an unlawful enlistment or appointment:					
	Of a person having membership in, association with, or activities in connection with, any prohibited organization, association, movement, group, or combination listed in enlistment or appointment documents.	Yes		5		
	Other cases of	Yes		1		
	Effecting an unlawful separation	Yes		5		
85	Desertion:					
	With intent to avoid hazardous duty or to shirk important service.	Yes		5		
	Other cases of—					
	Terminated by apprehension	Yes		3		
	Terminated otherwise	Yes		2		
	Attempted desertion:					
	With intent to avoid hazardous duty or to shirk important service.	Yes		5		
	Other cases of	Yes		1		
86	Absence without leave:					
	Failing to go to, or going from, the appointed place of duty.				1	1
	From unit, organization, or other place of duty—					
	For not more than 3 days				1	1
	For more than 3 days but not more than 30 days				6	6
	For more than 30 days	Yes		1		
	From guard or watch				3	3
	With intent to abandon		Yes		6	
	With intent to avoid maneuvers or field exercises				6	6
87	Missing movement of ship, aircraft, or unit:					
	Through design	Yes		1		
	Through neglect		Yes		6	
89	Behaving with disrespect toward his superior commissioned officer.		Yes		6	

[3] Unless otherwise provided in this table, any person subject to the code who is found guilty of an attempt to commit any offense punishable by the code shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall the death penalty be imposed nor the authorized period of confinement exceed 20 years.

[4] Any person subject to the code who is found guilty of conspiracy shall be subject to the maximum punishment authorized for the offense which is the object of the conspiracy, except that in no case shall the death penalty be imposed.

TABLE OF MAXIMUM PUNISHMENTS—Continued

Article	Offenses	Punishments				
		Dishonorable discharge, forfeiture of all pay and allowances	Bad-conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—		Forfeiture of two-thirds pay per month not to exceed—
				Years	Months	Months
90	Striking, drawing, or lifting up any weapon or offering any violence to his superior commissioned officer in the execution of his office.	Yes		10		
	Willfully disobeying a lawful order of his superior commissioned officer.	Yes		5		
91	Striking or otherwise assaulting, while in the execution of his office, a:					
	Warrant officer	Yes		5		
	Noncommissioned or petty officer	Yes		1		
	Willfully disobeying the lawful order of a:					
	Warrant officer	Yes		2		
	Noncommissioned or petty officer		Yes		6	
	Treating with contempt or being disrespectful in language or deportment, while in the execution of his office, a:					
	Warrant officer		Yes		6	
	Noncommissioned or petty officer				3	3
92	Violating or failing to obey any lawful general order or regulation.[5]	Yes		2		
	Knowingly failing to obey any other lawful order [5]		Yes		6	
	Being derelict in the performance of duties				3	3
93	Cruelty toward or oppression or maltreatment of any person subject to his orders.	Yes		1		
94	Mutiny, sedition, failing to report, etc. (See Art. 94.)					
95	Resisting apprehension		Yes	1		
	Breaking arrest		Yes		6	
	Escaping from custody or confinement	Yes		1		
96	Releasing, without proper authority, a prisoner duly committed to his charge.	Yes		2		
	Suffering a prisoner duly committed to his charge to escape:					
	Through design	Yes		2		
	Through neglect		Yes	1		
97	Unlawful detention of another	Yes		3		
98	Unnecessary delay in disposing of a case, or failing to enforce or comply with procedural rules.		Yes		6	
99	Misbehavior before the enemy. (See Art. 99.)					
100	Subordinate compelling surrender. (See Art. 100.)					
101	Improper use of countersign. (See Art. 101.)					
102	Knowingly forcing a safeguard. (See Art. 102.)					
103	Captured or abandoned property, failing to secure, give notice and turn over, selling, or otherwise wrongfully dealing in or disposing of:					
	Of a value of $50 or less		Yes		6	
	Of a value of $100 or less and more than $50		Yes	1		
	Of a value of more than $100	Yes		5		
	Looting or pillaging. (Any punishment other than death.)					
104	Aiding the enemy. (See Art. 104.)					
105	Misconduct as a prisoner. (Any punishment other than death.)					

[5] This punishment does not apply in the following cases:

(1) If in the absence of the order or regulation which was violated or not obeyed the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed in this table.

(2) If the violation or failure to obey is a breach of restraint imposed as a result of an order.

In these instances, the maximum punishment is that specifically prescribed elsewhere in this table for the offense.

TABLE OF MAXIMUM PUNISHMENTS—Continued

Article	Offenses	Punishments				
		Dishonorable discharge, forfeiture of all pay and allowances	Bad-conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—		Forfeiture of two-thirds pay per month not to exceed—
				Years	Months	Months
106	Spies. (See Art. 106.)					
107	Signing any false record, return, regulation, order, or other official document.	Yes		1		
	Making any other false official statement:					
	By a noncommissioned or petty officer	Yes		1		
	By any other enlisted member				3	3
108	Selling or otherwise disposing of military property of the United States:					
	Of a value of $50 or less		Yes		6	
	Of a value of $100 or less and more than $50		Yes	1		
	Of a value of more than $100	Yes		5		
	Through neglect damaging, destroying, or losing, or through neglect suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, military property of the United States of a value or damage:					
	Of $50 or less				3	3
	Of $100 or less and more than $50				6	6
	Of more than $100		Yes	1		
	Willfully damaging, destroying, or losing, or willfully suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, military property of the United States of a value or damage:					
	Of $50 or less		Yes		6	
	Of $100 or less and more than $50		Yes	1		
	Of more than $100	Yes		5		
109	Wasting, spoiling, destroying, or damaging any property other than military property of the United States of a value or damage:					
	Of $50 or less		Yes		6	
	Of $100 or less and more than $50		Yes	1		
	Of more than $100	Yes		5		
110	Hazarding or suffering to be hazarded any vessel of the armed forces:					
	Willfully and wrongfully (See Art. 110(a)).					
	Negligently	Yes		2		
111	Operating any vehicle while drunk or in a reckless or wanton manner:					
	Resulting in personal injury	Yes		1		
	Otherwise		Yes		6	
112	Found drunk on duty		Yes		9	
113	Misbehavior of sentinel or lookout:					
	In areas designated as authorizing entitlement to special pay for duty subject to hostile fire.	Yes		10		
	In all other places	Yes		1		
114	Dueling	Yes		1		
115	Feigning illness, physical disablement, mental lapse, or derangement.	Yes		1		
	Intentional self-inflicted injury	Yes		7		
116	Riot	Yes		10		
	Breach of the peace				6	6
117	Provoking or reproachful words or gestures				3	3
118	Murder. (See Art. 118.)					
119	Manslaughter:					
	Voluntary	Yes		10		
	Involuntary	Yes		3		
120	Rape. (See Art. 120.)					
	Wrongful carnal knowledge of a female under the age of 16 years.	Yes		15		

TABLE OF MAXIMUM PUNISHMENTS—Continued

Article	Offenses	Punishments				
		Dishonorable discharge, forfeiture of all pay and allowances	Bad-conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—		Forfeiture of two-thirds pay per month not to exceed—
				Years	Months	Months
121	Larceny of property:					
	Of a value of $50 or less		Yes		6	
	Of a value of $100 or less and more than $50		Yes	1		
	Of a value of more than $100 or any motor vehicle, aircraft, or vessel	Yes		5		
	Wrongful appropriation of property:					
	Of a value of $50 or less				3	3
	Of a value of $100 or less and more than $50				6	6
	Of a value of more than $100		Yes		6	
	Of any motor vehicle, aircraft, or vessel	Yes		2		
122	Robbery	Yes		10		
123	Forgery	Yes		5		
123a	Check, worthless, making, drawing, uttering, delivering, with intent to defraud (for procurement of an article or thing of value), in the face amount of:					
	$50 or less		Yes		6	
	$100 or less and more than $50		Yes	1		
	More than $100	Yes		5		
	Check, worthless, making, drawing, uttering, delivering, with intent to deceive (for payment of past due obligation or any other purpose).		Yes		6	
124	Maiming	Yes		7		
125	Sodomy:					
	By force and without consent	Yes		10		
	With a child under the age of 16 years	Yes		20		
	Other cases of	Yes		5		
126	Arson:					
	Aggravated	Yes		20		
	Simple, where the property is—					
	Of a value of $100 or less	Yes		1		
	Of a value of more than $100	Yes		10		
127	Extortion	Yes		3		
128	Assault				3	3
	Upon a commissioned officer of the Air Force, Army, Coast Guard, Navy, or a friendly foreign power, not in the execution of his office.	Yes		3		
	Upon a warrant officer, not in the execution of his office.	Yes		1½		
	Upon a noncommissioned or petty officer, not in the execution of his office.		Yes		6	
	Upon any person who, in the execution of his office, is performing Air Force security police, military police, shore patrol, or civil law enforcement duties.	Yes		1		
	Upon a sentinel or lookout while in execution of his duty.	Yes		1		
	Assault (consummated by a battery):					
	On a child under the age of 16 years	Yes		2		
	Other cases of				6	6
	Assault, aggravated:					
	With a dangerous weapon or other means or force likely to produce death or grievous bodily harm.	Yes		3		
	Intentionally inflicting grievous bodily harm, with or without a weapon.	Yes		5		
129	Burglary	Yes		10		
130	Housebreaking	Yes		5		
131	Perjury	Yes		5		

TABLE OF MAXIMUM PUNISHMENTS—Continued

Article	Offenses	Punishments				
		Dishonorable discharge, forfeiture of all pay and allowances	Bad-conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—		Forfeiture of two-thirds pay per month not to exceed—
				Years	Months	Months
132	Frauds against the United States:					
	In connection with making or presenting a claim or obtaining the approval, allowance, or payment of a claim (Art. 132(1) and (2)).	Yes		5		
	By delivering an amount less than called for by a receipt or by making or delivering a receipt without knowledge of the facts (Art. 132(3) and (4))—					
	When the amount involved is $50 or less		Yes		6	
	When the amount involved is $100 or less and more than $50.		Yes	1		
	When the amount involved is more than $100.	Yes		5		
134	Abusing a public animal				3	3
	Adultery	Yes		1		
	Assault:					
	Indecent	Yes		5		
	With intent to commit voluntary manslaughter, robbery, sodomy, arson or burglary.	Yes		10		
	With intent to commit housebreaking	Yes		5		
	With intent to commit murder or rape	Yes		20		
	Bigamy	Yes		2		
	Bribe or graft, accepting, asking, receiving, offering, or promising.	Yes		3		
	Burning with intent to defraud	Yes		10		
	Check, worthless, making and uttering (by dishonorably failing to maintain sufficient funds).		Yes		6	
	Correctional custody:					
	Escape from	Yes		1		
	Breach of restraint during		Yes		6	
	Criminal libel	Yes		5		
134	Debt, dishonorably failing to pay		Yes		6	
	Disloyal statements undermining discipline and loyalty, uttering.	Yes		3		
	Disorderly:					
	In command, quarters, station, camp, or on board ship.				1	1
	Under such circumstances as to bring discredit upon the military service.				4	4
	Drinking liquor with a prisoner				3	3
	Drugs, habit forming, wrongful possession, sale, transfer, use or introduction into a military unit, base, station, post, ship or aircraft.	Yes		10		
	Drugs, marihuana, wrongful possession, sale, transfer, use or introduction into a military unit, base, station, post, ship or aircraft.	Yes		5		
	Drunk:					
	Aboard ship				3	3
	In command, quarters, station, or camp				1	1
	Prisoner found				3	3
	Under such circumstances as to bring discredit upon the military service.				3	3
	Incapacitating self to perform duties through prior indulgence in intoxicating liquor.				3	3
	Drunk and disorderly:					
	Aboard ship		Yes		6	
	In command, quarters, station, or camp				3	3
	Under such circumstances as to bring discredit upon the military service.				6	6

TABLE OF MAXIMUM PUNISHMENTS—Continued

Article	Offenses	Punishments				
		Dishonorable discharge, forfeiture of all pay and allowances	Bad-conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—		Forfeiture of two-thirds pay per month not to exceed—
				Years	Months	Months
134	False or unauthorized military pass, permit, discharge certificate, or identification card:					
	Making, altering, selling	Yes		3		
	Possessing or using with intent to defraud or deceive.	Yes		3		
	Other cases		Yes		6	
	False pretenses, obtaining services under:					
	Of a value of $50 or less		Yes		6	
	Of a value of $100 or less and more than $50		Yes	1		
	Of a value of more than $100	Yes		5		
	False swearing	Yes		3		
	Firearm, discharging:					
	Through carelessness				3	3
	Wrongfully and willfully, under circumstances as to endanger life.	Yes		1		
	Fleeing from the scene of an accident		Yes		6	
	Gambling by a noncommissioned or petty officer, with a person of lower military grade.					3
	Homicide, negligent		Yes	1		
	Impersonating an officer, warrant officer, noncommissioned or petty officer, or agent of superior authority:					
	With intent to defraud	Yes		3		
	All other cases		Yes		6	
	Indecent acts or liberties with a child under the age of 16 years.	Yes		7		
	Indecent exposure of person				6	6
	Indecent, insulting, or obscene language:					
	Communicated to a female of the age of 16 years or over.	Yes		1		
	Communicated to any child under the age of 16 years.[6]	Yes		2		
134	Indecent or lewd acts with another	Yes		5		
	Mail matter in the custody of the Post Office Department or in the custody of any other agency, or not yet delivered or received; taking, opening, abstracting, secreting, destroying, stealing, or obstructing.	Yes		5		
	Mails, depositing or causing to be deposited obscene or indecent matter in.	Yes		5		
	Misprision of a felony	Yes		3		
	Nuisance, committing				3	3
	Obstructing justice	Yes		5		
	Pandering	Yes		5		
	Parole, violation of		Yes		6	
	Perjury, statutory	Yes		5		
	Perjury, subornation of	Yes		5		
	Prisoner, allowing to do an unauthorized act				3	3
	Public record, willfully and unlawfully altering, concealing, destroying, mutilating, obliterating, removing, or taking and carrying away with intent to alter, conceal, destroy, mutilate, obliterate, remove, or steal.	Yes		3		
	Quarantine, medical, breaking				6	6
	Refusing, wrongfully, to testify before a court martial, military commission, court of inquiry, board of officers, investigation under Article 32, or officer taking deposition.	Yes		5		

[6] See indecent acts or liberties with a child when the offense is so charged as a result of an indecent, insulting, or obscene communication in the physical presence of a child.

TABLE OF MAXIMUM PUNISHMENTS—Continued

Article	Offenses	Punishments				
		Dishonorable discharge, forfeiture of all pay and allowances	Bad-conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—		Forfeiture of two-thirds pay per month not to exceed—
				Years	Months	Months
134	Restriction, administrative or punitive, breaking				1	1
	Sentinel or lookout:					
	Behaving in an insubordinate or disrespectful manner toward, while in the execution of his duty.				3	3
	Loitering or sitting down by, while on duty				3	3
	Soliciting another to commit an offense.[7]					
	Stolen property knowingly receiving, buying, concealing:					
	Of a value of $50 or less		Yes		6	
	Of a value of $100 or less and more than $50		Yes	1		
	Of a value of more than $100	Yes		3		
	Straggling				3	3
	Threat, communicating	Yes		3		
	Transporting, unlawfully, a vehicle or aircraft in interstate or foreign commerce.	Yes		5		
	Unclean accouterment, arms, clothing, equipment, or other military property, found with.				1	1
	Uniform, unclean, appearing in, or not in prescribed uniform, or in uniform worn otherwise than in manner prescribed.				1	1
	Unlawful entry		Yes		6	
	Weapon, concealed, carrying		Yes	1		
	Wearing unauthorized insignia, medal, decoration, or badge.				6	6
	Wrongful cohabitation				4	4

[7] Unless otherwise provided in the Table, any person subject to the Code who is found guilty of soliciting or inducing another person to commit an offense which, if committed by one subject to the Code, would be punishable under this Table, shall be subject to the maximum punishment authorized for the offense solicited or induced, except that in no ase shall the death penalty be imposed nor shall the period of confinement in any case, including offenses for which life mprisonment may be adjudged, exceed 5 years.

SECTION B

Permissible additional punishments. If an accused is found guilty of an offense or offenses for none of which dishonorable discharge is authorized, proof of three or more previous convictions adjudged by a court during the year next preceding the commission of any offense of which the accused stands convicted will authorize dishonorable discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than one year, confinement at hard labor for one year. In computing the one-year period preceding the commission of any offense, periods of unauthorized absence as shown by the findings in the case or by the evidence of previous convictions should be excluded. See 75*b*(2) as to further limitations on consideration of previous convictions.

If an accused is found guilty of an offense or offenses for none of which dishonorable or bad-conduct discharge is authorized, proof of two or more previous convictions adjudged by a court during the three years next preceding the commission of any offense of which the accused stands convicted will authorize bad-conduct discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than three months, confinement at hard labor for three months. See 15*b* concerning the limitations on the power of special courts-martial to adjudge a bad-conduct discharge and forfeitures and 75*b*(2) for limitations on consideration of previous convictions.

If an accused is found guilty 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 these offenses is six months or more will, in addition, authorize bad-conduct discharge and forfeiture of all pay and allowances. But see 15*b*.

A general court-martial may adjudge a fine as an additional punishment in an appropriate case. See 126*h*(3).

If an enlisted member of other than the lowest enlisted grade is convicted by a court-martial the court may, in its discretion, adjudge reduction to any inferior grade in addition to the punishments otherwise authorized. But see 16*b* concerning the limitations on summary courts-martial. See also 126*e*. Reprimand or admonition may be adjudged in any case.

Chapter XXVI

NONJUDICIAL PUNISHMENT

AUTHORITY—POLICIES APPLICABLE—EFFECT OF ERRORS—PUNISHMENTS—RIGHT TO DEMAND TRIAL—PROCEDURE; RECORDS OF PUNISHMENT—SUSPENSION, MITIGATION, REMISSION, AND SETTING ASIDE—APPEALS

128. AUTHORITY. ***a. Who may impose nonjudicial punishment.*** Unless otherwise provided by this chapter or regulations of the Secretary concerned, a commanding officer may, under Article 15, impose disciplinary punishments for minor offenses, without the intervention of a court-martial, upon commissioned officers, warrant officers, and other military personnel of his command. As used in this chapter, the term "commanding officer" or "commander" includes a warrant officer exercising command.

Under regulations prescribed by the Secretary concerned, a commanding officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his powers under Article 15 to an officer who is one of his principal assistants. Those regulations shall define what officers may be considered as principal assistants for these purposes. Unless otherwise prescribed by those regulations or the terms of the delegation, the officer to whom those powers are delegated has the same authority under Article 15 as the officer who delegated the powers. Subject to regulations of the Secretary concerned, a commanding officer having disciplinary authority under Article 15 may limit or withhold the exercise by a subordinate commander of any disciplinary authority that subordinate commander would otherwise have under that article.

In the Army and Air Force, authority under Article 15 may be exercised only by commanding officers and officers to whom this authority has been delegated. In the Navy, Marine Corps, and Coast Guard, that authority may be exercised by commanding officers and officers to whom this authority has been delegated. In addition, an officer in charge of any unit of the Navy, Marine Corps, or Coast Guard may impose upon enlisted members assigned to the unit of which he is in charge, and take action under 134 concerning, those punishments authorized to be imposed by a commanding officer who is below the grade of lieutenant commander or major which the Secretary concerned may specifically prescribe by regulation. For the purposes of Article 15, the term "assigned," as used in the preceding sentence, has the same meaning as the term "of his command." In matters within the authority of an officer in charge, the term "commanding officer" or "commander," as used in this chapter, includes an officer in charge. The Army and Air Force have no "officer in charge" as that term is used in Article 15(c).

b. Minor offenses. The term "offenses," as used in connection with the authority to impose disciplinary punishment under Article 15 for minor offenses,

includes only those acts or omissions constituting offenses under the punitive articles of the Uniform Code of Military Justice. The nature of an offense, and the circumstances surrounding its commission, are among the factors which must be considered in determining whether or not it is minor in nature. Generally, the term "minor" includes misconduct not involving any greater degree of criminality than is involved in the average offense tried by summary court-martial. This term ordinarily does not include misconduct of a kind which, if tried by general court-martial, could be punished by dishonorable discharge or confinement for more than one year. The imposition and enforcement of disciplinary punishment under this article for an act or omission is not a bar to trial by court-martial for a serious crime or offense which grew out of the same act or omission and which is not properly punishable under this article. See 68*g* and Article 15(f). However, the accused may show at the trial that he has been punished under Article 15 and, if he does, this fact must be considered in determining the measure of punishment to be adjudged if a finding of guilty results.

c. Nonpunitive measures. Article 15 and this chapter do not apply to, include, or limit the use of those nonpunitive measures that a commanding officer or an officer in charge is authorized and expected to use to further the efficiency of his command or unit, such as administrative admonitions, reprimands, exhortations, disapprovals, criticisms, censures, reproofs, and rebukes, written or oral, not imposed as punishment for a military offense. These nonpunitive measures may also include, subject to any applicable regulations, administrative withholding of privileges.

d. Double punishment and increase in punishment prohibited. When punishment has been imposed upon a person under Article 15 for an offense, punishment may not again be imposed upon him for the same offense under Article 15 either by the commanding officer who imposed the punishment or by any other commanding officer. But see 128*b*.

Once punishment has been imposed it may not be increased, upon appeal or otherwise.

129. POLICIES APPLICABLE. ***a. General.*** Commanders are responsible for the maintenance of discipline within their commands. In the great majority of instances, discipline can be maintained through effective leadership including, when required, the use of those nonpunitive measures which a commander is expected to use to further the efficiency of his command or unit and which are not imposed under Article 15. See 128*c*. When a minor offense has been committed and nonpunitive measures are considered insufficient, authority under Article 15 should ordinarily be used unless it is clear that only trial by court-martial will meet the needs of justice and discipline.

If a commanding officer determines that his authority under Article 15 is insufficient to make a proper disposition of the case, or if his authority to impose punishment under that article has been withheld (see 128*a*), he may refer the case to a superior commander for appropriate disposition.

Before exercising authority under Article 15, the officer who is to exercise it must thoroughly evaluate each case on an individual basis. No policy may be established whereby certain categories of offenses must be disposed of under Article 15 regardless of the circumstances, or predetermined kinds or amounts

of punishments must be imposed for certain classifications of offenses that are proper for disposition under Article 15.

b. Purpose and nature of action under Article 15. Punishments under Article 15 are primarily corrective in nature. In determining the appropriate kind and amount of punishment to be administered, commanding officers should consider the age, experience, intelligence, and prior disciplinary and military record of the offender, as well as all the other facts and circumstances of the case. When selecting the appropriate kind or combination of punishments to be imposed, commanders should consider the nature and characteristics of the various forms of authorized punishment discussed in 131*c*. This information should also be used by superior authority to whom appeals from punishments imposed under this article are directed when he takes action on those appeals.

In determining an appropriate punishment, commanders should consider the desirability of suspending probationally all or a portion of the punishment selected. Probational suspension of punishment normally is warranted in the case of first offenders or when persuasive extenuating or mitigating matters are present. Suspension not only provides a behavioral incentive to the offender but also affords the commander an excellent opportunity to evaluate the offender during the period of suspension.

130. EFFECT OF ERRORS. A failure to comply with any of the procedural provisions of this chapter will not invalidate a punishment imposed under Article 15, 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 or impliedly waived.

131. PUNISHMENTS. ***a. General limitations.*** The Secretary concerned may, by regulations, place limitations on the powers granted by Article 15 with respect to the kind and amount of the punishment authorized (Art. 15(a)). Subject to 128*a*, and any limitations contained in regulations of the Secretary concerned, the kinds and amounts of punishment authorized by Article 15(b) may be imposed upon military personnel of any armed force as provided in this paragraph (131).

b. Authorized maximum punishments. In addition to or in lieu of admonition or reprimand, one or more of the following disciplinary punishments may, subject to the limitations of 131*d*, be imposed upon military personnel of their commands by the categories of commanding officers designated herein:

(1) *Upon commissioned officers and warrant officers of his command.* (*a*) by any commanding officer, restriction to certain specified limits, with or without suspension from duty, for not more than 30 consecutive days;

(*b*) if imposed by an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command—

1. arrest in quarters for not more than 30 consecutive days;

2. forfeiture of not more than one-half of one month's pay per month for two months;

3. restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

4. detention of not more than one-half of one month's pay per month for three months.

(2) *Upon other military personnel of his command* (*a*) by any commanding officer—

1. if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than three consecutive days;

2. correctional custody for not more than seven consecutive days;

3. forfeiture of not more than seven days' pay;

4. reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;

5. extra duties, including fatigue or other duties, for not more than 14 consecutive days;

6. restriction to certain specified limits, with or without suspension from duty, for not more than 14 consecutive days;

7. detention of not more than 14 days' pay;

(*b*) if imposed by a commanding officer of the grade of major or lieutenant commander or above—

1. if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than three consecutive days;

2. correctional custody for not more than 30 consecutive days;

3. forfeiture of not more than one-half of one month's pay per month for two months;

4. reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but enlisted members in pay grades above E–4 may not be reduced more than one pay grade, except that during time of war or national emergency declared by the Congress, this category of persons may be reduced two grades if the Secretary concerned determines that circumstances require the removal of this limitation;

5. extra duties, including fatigue or other duties, for not more than 45 consecutive days;

6. restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

7. detention of not more than one-half of one month's pay per month for three months.

c. Nature of punishments. (1) *Admonition and reprimand.* When admonition or reprimand is imposed as punishment under Article 15, it should be clearly indicated that it is imposed as a punishment under that article. See 128*c* as to admonitions and reprimands imposed as purely administrative measures.

In the case of commissioned officers and warrant officers, admonitions and reprimands given as punishment under Article 15 must be administered in writing. In other cases, unless otherwise prescribed by regulations of the Secretary concerned, they may be administered either orally or in writing.

An admonition or reprimand may be imposed in lieu of or combined with other Article 15 punishments.

(2) *Restriction.* This form of punishment is the least severe form of deprivation of liberty. Restriction involves moral rather than physical re-

straint. The severity of this type of restraint is dependent not only upon its duration but also upon the geographical limits specified when the punishment is imposed. A person undergoing restriction may be required to report to a designated place at specified times if it is considered reasonably necessary to insure that the punishment is being properly executed. Unless otherwise specified by the commanding officer imposing this form of punishment, a person in restriction may be required to perform any military duty.

(3) *Arrest in quarters.* The authority to impose arrest in quarters as punishment under Article 15 may be exercised only by an officer exercising general court-martial jurisdiction or by a general or flag officer in command. Arrest in quarters as a punishment under Article 15 may be imposed only upon commissioned officers and warrant officers.

As in the case of restriction, the restraint involved in this punishment is enforced by a moral obligation rather than by physical means. An officer undergoing this punishment may be required to perform those duties prescribed by regulations of the Secretary concerned. However, an officer so punished is required to remain within his quarters during the period of punishment unless the limits of his arrest are otherwise extended by appropriate authority. The quarters of an officer may consist of his military residence, whether a tent, stateroom, or other quarters assigned to him, or a private residence occupied by him when he has not been furnished Government quarters.

(4) *Correctional custody.* Correctional custody is the physical restraint of a person during duty or nonduty hours, or both, imposed as a punishment under Article 15, and may include extra duties, fatigue duties, or hard labor. If practicable, this form of restraint will not be served in immediate association with persons awaiting trial or held in confinement pursuant to trial by court-martial. A person undergoing correctional custody may be required to perform those regular military duties, extra duties, fatigue duties, and hard labor which may be assigned by the authority charged with the administration of the punishment. The conditions under which correctional custody is served shall be prescribed by regulations of the Secretary concerned. In addition, the Secretary concerned may, by regulations, limit the categories of enlisted members upon whom this kind of punishment may be imposed. The authority competent to order the release of a person from correctional custody shall be as designated by regulations of the Secretary concerned.

(5) *Confinement on bread and water or diminished rations.* This punishment may be imposed only upon an enlisted person attached to or embarked in a vessel. See 132. Confinement on bread and water or diminished rations involves confinement in a place where the person so confined may communicate only with authorized personnel. The ration to be furnished a person undergoing a punishment of confinement on diminished rations is that specified by the authority charged with the administration of the punishment, but the ration may not consist solely of bread and water unless this punishment has been specifically imposed. When punishment on bread and water or diminished rations is imposed, a signed certificate of a medical officer (see 125), containing his opinion that no serious injury to the health of the person to be confined will be caused by that punishment, must be obtained before the punishment is executed. The categories of enlisted personnel upon whom this type of punishment may be imposed may be limited by regulations of the Secretary concerned.

(6) *Extra duties.* This punishment involves the performance of duties in addition to those normally assigned to the person undergoing the punishment. Extra duties may include fatigue duties. Military duties of any kind may be assigned as extra duty (but see 125). Extra duties assigned as punishment of noncommissioned officers, petty officers, or any other enlisted persons of assimilative positions designated by regulations of the Secretary concerned, may not be of a kind which demeans their grades or positions.

(7) *Reduction in grade.* Reduction in grade is one of the most severe forms of nonjudicial punishment which may be imposed as a penalty for misconduct. Accordingly, a commander's authority to effect a reduction should be utilized with discretion.

As used in Article 15, the phrase "if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction" does not refer to the authority to promote the individual concerned but to the general authority to promote to the grade held by the individual to be punished.

(8) *Forfeiture of pay.* Forfeiture involves a permanent loss of entitlement to the pay forfeited. The word "pay," as used with respect to forfeiture of pay under Article 15, refers only to the basic pay of the individual plus any sea or foreign duty pay. "Basic pay" includes no element of pay other than the basic pay fixed by statute for the grade and length of service of the individual concerned and does not include special pay for a special qualification, incentive pay for the performance of hazardous duties, proficiency pay, subsistence and quarters allowances, and similar types of compensation. If the punishment includes both reduction, whether or not suspended, and forfeiture of pay, the forfeiture must be based on the grade to which reduced. Also, any monthly contribution from his pay that an enlisted person with dependents is required by law to make to entitle him to a basic allowance for quarters must be deducted before the net amount of pay subject to forfeiture is computed. The amount to be forfeited will be expressed in dollar amounts only (not in dollars and cents) and not in a number of days' pay or fractions of monthly pay. If the forfeiture is to be applied for more than one month, the amount to be forfeited per month and the number of months should be stated. Forfeiture of pay may not extend to any pay accrued before the date of its imposition.

(9) *Detention of pay.* Unlike a forfeiture of pay, a detention of pay involves only a temporary withholding of pay. The period for which the pay is to be detained, which may not be for more than one year from the date punishment is imposed, must be specified at the time the punishment of detention is imposed. As in the case of a forfeiture of pay, only basic pay plus sea or foreign duty pay may be detained. The amount to be detained will be expressed in dollar amounts only (not in dollars and cents) and not in a number of days' pay or fractions of monthly pay. If the detention is to be applied for more than one month, the amount to be detained per month and the number of months should be stated. If the punishment includes both reduction, whether or not suspended, and detention of pay, the detention must be based on the grade to which reduced. Any monthly contribution that an enlisted person with dependents is required by law to make to entitle him to a basic allowance for quarters must be deducted before the net amount of pay subject to detention is computed. The amount of pay detained is returned to the offender at the expiration of the

specified period of detention or the offender's term of service, whichever is earlier. Detention of pay may not extend to any pay accrued before the date of its imposition.

d. Combination and apportionment. The punishments of restriction and extra duties may be combined to run *concurrently*, but the combination may not exceed the maximum duration imposable for extra duties. Neither restriction nor extra duties may be combined to run concurrently with correctional custody beyond the maximum duration imposable for correctional custody. The punishment of restriction in the case of an officer may not be combined to run concurrently with arrest in quarters beyond the maximum duration imposable for arrest in quarters. The punishment of correctional custody inherently includes a form of restriction and may include extra duties.

As provided by Article 15(b), neither the punishments of arrest in quarters and restriction in the case of an officer, nor two or more of the punishments of correctional custody, extra duties, and restriction in the case of an enlisted person, may be combined to run *consecutively* in the maximum amount imposable for each. All of these punishments are in the nature of deprivation of liberty, and when they are combined to run consecutively there must be an apportionment in accordance with the provisions of this subparagraph (131*d*). Forfeiture of pay and detention of pay may not be combined to run either consecutively or concurrently without an apportionment. Both punishments amount to a deprivation of entitlement to pay, either permanently or temporarily. See example (2), below, for an illustration of a properly apportioned combination

Confinement on bread and water or diminished rations may not be imposed in combination with correctional custody, extra duties, or restriction.

In those instances in which an apportionment is required when combining certain punishments, the following Table of Equivalent Nonjudicial Punishments, derived from the statutory maximum authorized punishments, will be used in substituting one form of punishment for another:

Table of Equivalent Nonjudicial Punishments

Kind of punishment	Upon commissioned and warrant officers (To be used only by an officer with GCM jurisdiction, or by a flag officer in command or his delegate)	Upon other personnel
Arrest in quarters	1 day	
Restriction	2 days	2 days
Extra duties		1½ days*
Correctional custody		1 day
Forfeiture of pay	1 day's pay	1 day's pay
Detention of pay	1½ days' pay	1½ days' pay*

*The factors designated by asterisks in the table above are 2 instead of 1½ when the punishment is imposed by a commanding officer below the grade of major or lieutenant commander. The punishment of forfeiture and detention of pay may not be substituted for the other punishments listed in the table, nor may those other punishments be substituted for forfeiture or detention of pay.

The use of the foregoing table is illustrated by the following examples:

(1) A commanding officer in the grade of major or lieutenant commander, or above, may impose punishment consisting of correctional custody for 10 days, extra duties for 15 days, and restriction to limits for 20 days to run consecutively, using the following calculation: the authorized maximum

correctional custody imposable is 30 days, of which only 10 days have been imposed; 15 days of extra duties can be substituted for 10 of the unused days of correctional custody (1½ for 1); and 20 days of restriction to limits can be substituted for the remaining 10 days of unused correctional custody (2 for 1). Additionally, the commanding officer may impose a forfeiture or detention of pay, or a properly apportioned combination of those punishments, a reduction, and an admonition or reprimand.

(2) A commanding officer in the grade of major or lieutenant commander, or above, may impose upon an enlisted person a forfeiture of 5 days' pay and a detention of 10 days' pay for the first month, the same forfeiture and detention for the next month, and a detention of 10 days' pay for the third month. This is calculated as follows: the total amount that may be forfeited is one-half of one month's pay per month for two months, or 30 days' pay. However, a total of only 10 days' pay has been forfeited, leaving a total permissible detention of 30 days' pay (20 x 1½). The monthly allocation of forfeitures and detentions, shown in the example, has been made because (A) the combination of punishments may not operate so as to deprive the offender of more than one-half of his monthly pay in any one month, and (B) the forfeitures may not be imposed beyond the second month. Other allocations, equally within the above principles, could be made.

The Table of Equivalent Nonjudicial Punishments may be used only when punishment is initially imposed. It may not be used in mitigating punishment or at the time of vacation of suspension of punishments. For example, a punishment of 20 days' correctional custody may not, at the end of ten days, be mitigated to restriction for more than 10 days as only 10 days of the original punishment remains unserved. Also, a punishment of 20 days' correctional custody which has been suspended may not at the time of the vacation of the suspension be mitigated to restriction for more than 20 days.

e. Effective date and execution of punishments. The punishments of reduction, forfeiture of pay, and detention of pay, if unsuspended, take effect on the date the commanding officer imposes the punishments. Other punishments, if unsuspended, will take effect and be carried into execution as prescribed by regulations of the Secretary concerned.

132. RIGHT TO DEMAND TRIAL. Except in the case of a person attached to or embarked in a vessel, punishment may not be imposed under Article 15 upon any member of the armed forces who has, before the imposition of the punishment under that article, demanded trial by court-martial in lieu of the punishment thereunder. He also has the right, in all cases, to refuse trial by summary court-martial (Art. 20; 16*a*; 79*d*(1)). Thus, if a serviceman refuses both punishment under Article 15 and trial by summary court-martial, he may then be tried, if at all, only by a special or general court-martial. A person is attached to or embarked in a vessel if, at the time the nonjudicial punishment is imposed, he is assigned or attached to the vessel, is on board for passage, or is assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regularly organized body. If the member is attached to or embarked in a vessel, he does not have the right to demand trial by court-martial in lieu of punishment under this article unless this right shall have been specifically granted by regulations of the Secretary concerned.

133. PROCEDURE; RECORDS OF PUNISHMENT. ***a. Procedure for Army and Air Force.*** The commanding officer, upon ascertaining to his satisfaction after any inquiry he considers necessary that an offense punishable under Article 15 has been committed by a member of his command, will, if he determines to exercise his Article 15 authority, so notify the member of the nature of the alleged misconduct by a concise statement of the offense in such terms that a specific violation of the code is clearly stated and inform him that he intends to impose punishment under Article 15 for the misconduct unless, if such a right exists (132), trial by court-martial is demanded. Also, unless prohibited by regulations of the Secretary concerned, the commander may notify the member concerned of his intention to recommend to a superior commander that the member be punished under Article 15 for his alleged misconduct unless, if such a right exists (132), trial by court-martial is demanded. The notification will also inform the member that he may submit any matter desired in mitigation, extenuation, or defense. In every case, the member will be notified that he is not required to make any statement regarding the offense or offenses of which he is accused or suspected and that any statement made by him may be used against him in a trial by court-martial. An election to accept nonjudicial punishment constitutes a waiver of the right to demand trial. A demand for trial does not require that charges be preferred, transmitted, or forwarded, but punishment may not be imposed under Article 15 while the demand is in effect.

The member will be given a reasonable time to reply to the notification of intent to impose or recommend the imposition of Article 15 punishment, state whether he demands trial by court-martial, if that right exists (132), and submit any matter in extenuation, mitigation, or defense he desires to be considered. With respect to an offense or offenses as to which a right to trial by court-martial exists but has not expressly been demanded, punishment may be imposed immediately by the commander indicated in the notice as the commander who is to impose the punishment. Punishment may be imposed only by the personal action of the commander or officer delegated that authority in accordance with 128*a*. The member will be notified of the punishment imposed, informed of his right to appeal to the next superior authority, and directed to acknowledge receipt of the notification of punishment and to state his election regarding an appeal.

The proceedings will be conducted in writing in all cases involving commissioned officers and warrant officers and in all cases in which the punishment includes reduction in grade, confinement on bread and water or diminished rations, correctional custody, restriction or extra duties for more than 14 days, or forfeiture or detention of pay. In other cases the proceedings may be in writing or may be conducted orally, following the same sequence. However, in any case the member may be permitted to appear in person before the officer authorized to impose the punishment, and that officer may personally interview witnesses. Any written statements or other documentary evidence pertaining to the case which have been considered by the officer authorized to impose the punishment shall be attached to the file in the manner prescribed by pertinent regulations. When oral proceedings are conducted, the commander will cause a summarized record to be made and filed.

b. Procedure for Navy, Marine Corps, and Coast Guard. Unless in appropriate cases (132), the accused has demanded trial by court-martial in lieu of nonjudicial punishment, the commanding officer will ordinarily inquire at the mast, or office hours, into the facts as to any minor offenses allegedly committed by a member of his command. If, where permitted under 132, the accused has demanded trial by court-martial, the commanding officer may proceed in accordance with 33 without a mast or office hours hearing, except that he may not impose nonjudicial punishment while the demand is in effect. An accused who does not demand trial by court-martial in lieu of nonjudicial punishment may nevertheless be tried by court-martial if the circumstances of the case so warrant.

Subject to the foregoing, when the mast or office hours procedure is followed, the accused will be accorded a hearing which shall include the following elemental requirements:

(1) Presence of the accused before the officer conducting the mast.

(2) Advice to the accused of the offenses of which he is suspected.

(3) Explanation to the accused of his rights under Article 31(b) of the Uniform Code of Military Justice.

(4) Presentation of the information against the accused, either by the testimony of witnesses in person or by the receipt of their written statements, copies of the latter being furnished to the accused.

(5) Availability to the accused for his inspection of all items of information in the nature of physical or documentary evidence which will be considered.

(6) Full opportunity to the accused to present any matters in mitigation, extenuation, or defense of the suspected offenses. At the completion of the hearing, the commanding officer may impose punishment under Article 15.

Under extraordinary circumstances, the commanding officer may designate an officer to conduct the hearing, described above, and that officer shall thereafter promptly provide him with a summary transcript of all information presented at the hearing and having any bearing on the guilt or innocence of the accused and the quantum of punishment to be imposed. Upon the receipt of that transcript, punishment under Article 15 may be imposed without further hearing.

The record of a court of inquiry or other fact-finding body, in which proceeding the accused was accorded the rights of a party with respect to an act or omission for which nonjudicial punishment is contemplated, may be substituted for the impartial hearing required above.

A summary transcript of all information presented at a hearing and having any bearing on the guilt or innocence of the accused and the quantum of punishment to be imposed, or a copy of the report of a court of inquiry or other fact-finding body, together with any additional information presented by the accused, shall be forwarded with any reference of a breach of discipline to a superior competent authority when that reference is made under the policy set forth in 129. If the superior competent authority imposes punishment under Article 15, the accused shall be notified personally or in writing as soon as practicable of the punishment imposed.

The officer imposing punishment shall cause the accused to be promptly and fully informed of his right to appeal from the punishment so imposed. Receipt of all written communications by an accused must be by written indorsement through proper channels.

Admonitions and reprimands imposed as punishments under Article 15 shall be by written communication through proper channels in the case of a commissioned officer or warrant officer, and may, in any case, be by written communication.

*c. **Records of punishment.*** Consistent with the requirements of this chapter, records of nonjudicial punishment shall be in that form and contain that matter prescribed by regulations of the Secretary concerned. These regulations will also provide for the disposition of records of nonjudicial punishment.

134. SUSPENSION, MITIGATION, REMISSION, AND SETTING ASIDE. Under Article 15(d), the officer who imposes the punishment or his successor in command may, at any time, remit or mitigate any part or amount of the unexecuted portion of the punishment imposed and may set aside in whole or in part the punishment, whether executed or unexecuted, and restore all rights, privileges, and property affected. He may also mitigate reduction in grade, whether executed or unexecuted, to forfeiture or detention of pay. In addition, he may, at any time, suspend probationally any part or amount of the unexecuted portion of the punishment imposed and may suspend probationally a reduction in grade or a forfeiture, whether or not executed. An uncollected forfeiture of pay shall be considered as unexecuted. A "successor in command," within the meaning of Article 15, shall be as prescribed by regulations of the Secretary concerned.

Pursuant to Article 15(a), relating to the promulgation of rules concerning the suspension of punishments, the following rules are prescribed:

(1) An executed punishment of reduction or forfeiture may be suspended only within a period of four months after the date of its imposition.

(2) Suspension of a punishment may not be for a period longer than six months from the date of the suspension, and the expiration of the current enlistment or term of service of the person involved automatically terminates the period of suspension.

(3) Unless the suspension is sooner vacated, suspended portions of the punishment are remitted, without further action, upon the termination of the period of suspension.

(4) Vacation of suspension may be effected by any commanding officer or officer in charge competent to impose upon the offender concerned punishment of the kind and amount involved in the vacation of suspension.

Although a formal hearing is not necessary to vacate a suspension, if the punishment suspended is of the kind set forth in Article 15(e)(1)-(7), the probationer should, unless impracticable, be given an opportunity to appear before the officer authorized to vacate suspension of the punishment to rebut any derogatory or adverse information upon which the proposed vacation is based, and may be given the opportunity so to appear in any case.

When mitigating—

(1) arrest in quarters to restriction;

(2) confinement on bread and water or diminished rations to correctional custody;

(3) correctional custody or confinement on bread and water or diminished rations to extra duties or restriction, or both; or

(4) extra duties to restriction;

the mitigated punishment may not be for a greater period than the punishment

mitigated. For example, if a punishment of arrest in quarters for 15 days is to be mitigated to restriction to specified limits, the duration of the restriction may not exceed 15 days. Similarly, when mitigating forfeiture of pay to detention of pay, the amount of the detention may not be greater than the amount of the forfeiture. When mitigating reduction in grade to forfeiture or detention of pay, the amount of the forfeiture or detention may not be greater than the amount that could have been imposed initially under Article 15 by the officer who imposed the punishment mitigated. Thus, if a commander in a grade below major or lieutenant commander imposes a reduction and it is later mitigated by him or superior authority, the maximum mitigated punishment would be 7 days' forfeiture of pay or 14 days' detention of pay (131). Restriction may not be mitigated to a lesser period of other punishments in the nature of deprivation of liberty, such as correctional custody or extra duties, for restriction is the least severe form of deprivation of liberty.

The power to set aside punishments and restore rights, privileges, and property affected by the executed portion of a punishment should ordinarily be exercised only when the authority considering the case believes that, under all the circumstances of the case, the punishment has resulted in a clear injustice. Also, the power to set aside an executed punishment and mitigate a reduction in grade to a forfeiture or detention of pay should ordinarily be exercised only within a reasonable time after the punishment has become executed. In this connection, four months is a reasonable time in the absence of unusual circumstances.

An application for suspension, mitigation, remission, or setting aside of the punishment in whole or in part not made within a reasonable time may be rejected by the authority to whom the application is made. In the absence of unusual or special circumstances, such an application made more than 15 days after the punishment was imposed may be considered as not having been made within a reasonable time.

135. APPEALS. A person punished under the authority of Article 15 who considers his punishment unjust or disproportionate to the offense may, through the proper channels, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may, in the meantime, be required to undergo the punishment adjudged (Art. 15(e)). An appeal not made within a reasonable time may be rejected by the superior authority. In the absence of unusual circumstances, an appeal made more than 15 days after the punishment was imposed may be considered as not having been made within a reasonable time. Authority "superior" to a particular commanding officer is the authority normally superior in the chain of command or any other authority who may be designated as a superior for the purposes of Article 15, under regulations which the Secretary concerned may prescribe. However, when the punishment has been imposed under a delegation of a commander's power to impose nonjudicial punishment (see 128), the appeal will not be directed to that commander.

Appeals will be made in writing and may include the appellant's reasons for regarding the punishment as unjust or disproportionate. Before acting on an appeal from any punishment of the kind set forth in Article 15(e)(1)–(7), the authority who is to act on the appeal shall refer the case to a judge advocate of the Army, Navy, Air Force or Marine Corps, or a law specialist or lawyer of

the Marine Corps, Coast Guard, or Transportation Department for consideration and advice, and may so refer the case upon appeal from any punishment imposed under Article 15. When a case is referred to a judge advocate, law specialist, or lawyer for consideration, he is not limited to an examination of any written matter comprising the record of proceedings and may make any inquiries he determines to be desirable. If the authority to whom an appeal is made has no legal personnel of the categories mentioned above serving on his staff or otherwise available to him, he may either—

(1) refer the case for consideration and advice by appropriate legal personnel of one of those categories serving on the staff of another commander or

(2) refer the case for action to a superior authority who has appropriate legal personnel available to him for this purpose.

In acting upon an appeal, the superior authority may exercise the same powers with respect to the punishment imposed as may be exercised under Article 15(d) by the officer who imposed the punishment or his successor in command. Thus, under the conditions set forth in 134, he may suspend, remit, mitigate, or set aside in whole or in part the punishment imposed. After having considered an appeal, the superior authority will transmit to the appellant, through channels, a written statement of his disposition of the case. Under Article 15(e), any superior authority may exercise the same powers as may be exercised by the officer who imposed the punishment or his successor in command under 134 and Article 15(d), whether or not an appeal has been made from the punishment. If authorized by regulations of the Secretary concerned, a superior authority who is a commanding officer exercising general court-martial jurisdiction, or is an officer of general or flag rank in command, may, under Article 15(a), delegate those powers he has as a superior authority under Article 15(e) and this chapter to a principal assistant.

Chapter XXVII

RULES OF EVIDENCE

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137. GENERAL. The rules stated in this chapter are applicable in cases before courts-martial, including summary courts-martial, and a summary court-martial has the same discretionary power as a military judge concerning the reception of evidence. So far as not otherwise prescribed in this manual, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts or, when not inconsistent with those rules, at common law will be applied by courts-martial. See 57 as to who shall make the rulings and decisions of the court with respect to the admissibility of evidence and other interlocutory matters in general and special court-martial cases.

Unless it is shown that the relaxation of the rules of evidence might injuriously affect the substantial rights of the accused or the interests of the United States, the military judge or the president of a special court-martial without a military judge may as a matter of discretion relax them as to interlocutory matters relating to an application for a continuance (see 58) or to the availability of witnesses (see 145*b*, *c;* Art. 49(d)). For example, with respect to these matters it is permissible to receive in evidence affidavits, certificates of military and civilian officials, and other writings of similar apparent authenticity and reliability, such as a certificate of a physician as to the illness of a witness. See 75*c* as to matters in extenuation or mitigation, 122*c* as to matters concerning the question as to whether further inquiry into the mental condition of the accused should be made, and 146*b* as to the use of affidavits or other written statements to prove the character of the accused.

In court-martial trials conducted in foreign countries, certain categories of witnesses may, by virtue of treaty or executive agreement, have privileges in addition to those mentioned in this chapter.

Evidence to be admissible (competent) must primarily be relevant. Evidence is not relevant, as that term is used in this manual, when the fact which it tends to prove is not part of any issue in the case. Also, evidence is not relevant when, though the fact intended to be proved thereby is part of an issue in the case, the evidence itself is too remote to have any appreciable probative value for that purpose. As used in this manual with reference to the pertinency of evidence, "material evidence" has the same meaning as "relevant evidence."

Evidence which is apparently irrelevant may be admitted provisionally at the discretion of the military judge or the president of a special court-martial without a military judge upon a statement of the party offering it that other facts later to be proved will show its relevancy, but the evidence should afterward be excluded, and the members of the court instructed to disregard it, if its relevancy is not ultimately shown. It is generally more desirable, however, to require the party offering the evidence first to prove the facts showing its relevancy.

The military judge or the president of a special court-martial without a military judge may as a matter of discretion limit the number of witnesses called by either side to testify to the same matter if it appears that the testimony of the excluded witnesses would be merely cumulative.

138. PRESUMPTIONS AND PERMISSIBLE INFERENCES; DIRECT AND CIRCUMSTANTIAL EVIDENCE; REAL EVIDENCE; TESTIMONIAL KNOWLEDGE; OPINION EVIDENCE; CHARACTER EVIDENCE; EVIDENCE OF OTHER OFFENSES OR ACTS OF MISCONDUCT OF THE ACCUSED; EVIDENCE OF HABIT OR USAGE.

a. Presumptions and permissible inferences. (1) *Presumptions.* The term "presumption" is applied to facts which courts are bound to assume in the absence of adequate evidence to the contrary. Examples of presumptions are—An accused person is presumed to be innocent until his guilt is proved beyond a reasonable doubt; and an accused is presumed to have been sane at the time of the offense charged, and to be sane at the time of trial, until a reasonable doubt of his sanity at the time in question is raised by the evidence. See also 148 as to the presumption of competency of witnesses.

These presumptions are procedural rules governing the production of evidence and do not themselves supply evidence.

(2) *Permissible inferences.* There are a number of permissible inferences encountered in the trial of criminal cases which are sometimes loosely referred to as "presumptions" but which actually are not presumptions at all but are merely well-recognized examples of the use of circumstantial evidence. The drawing of these inferences is not mandatory, and their weight or effect is to be measured only in terms of their logical value. The weight which should be given to any inference will depend upon all the circumstances attending the proved facts which give rise to the inference. The fact that evidence is introduced to show the nonexistence of a fact which might be inferred from proof of other facts does not, if the evidence can reasonably be disbelieved, necessarily destroy the logical value of the inference, but the rebutting evidence must be weighed against the inference. The same is true if the evidence is introduced to show the nonexistence of the facts upon which the inference is based. In drawing and weighing inferences, and in considering evidence introduced in rebuttal thereof, common sense and a general knowledge of human nature and the ordinary affairs of life should be applied.

Some examples of common inferences, only the first example having a presumption also present, are—

> Since most persons are sane, it may be inferred that a certain person is sane and that he was sane at any given time. Thus, it may be inferred that an accused was sane at the time of the offense and is sane at the time of trial. The inference of sanity permits consideration of all the evidence in the light of the general human experience that most persons are sane.
>
> It may be inferred that a sane person intended the natural and probable consequences of acts shown to have been intentionally committed by him.
>
> When it is shown that a person was acting as a public officer, it may be inferred that he was legally in office and that he performed his duties properly.
>
> It may be inferred that a condition shown to have existed at one time continues to exist. Thus, it may be inferred that a person's residence remains unchanged; for instance, it may be inferred that at the time of trial a deponent continues to reside where he resided at the time his deposition was taken. Also, proof that a certain condition existed at one time will support an inference of its earlier existence if the subsequent condition is one which ordinarily would not exist unless it had also existed at the earlier time. For example, proof that immediately after a collision the lights on a vehicle were not burning, although in working order at that 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 will support an inference that it was delivered to the addressee, and a similar inference is permissible in regard to telegrams regularly filed with a telegraph company for transmission.

Identity of name ordinarily will support an inference of identity of person. Whether or not this inference may be drawn in a particular case, and the weight to be given to it if it is drawn, will depend upon how common the name is and upon other circumstances.

When it is shown that a person was in possession of recently stolen property or a part thereof, it may be inferred that the person stole the property and, if it is shown that the property was stolen from a certain place at a certain time and under certain circumstances, that he stole it from that place at that time and under those circumstances.

It may be inferred that one who has assumed the custody of another's property has stolen the property if he refuses or fails to account for or deliver it when an accounting or delivery is due.

The fact that one or more inferences contradict or are inconsistent with one or more other inferences does not necessarily neutralize or destroy the inferences on either side of the question. The relative weights of conflicting inferences should be assessed in accordance with the logical value of each in the light of all attendant circumstances.

b. Direct and circumstantial evidence. Evidence which tends directly to prove or disprove a fact in issue is called direct evidence. Evidence which tends directly to prove or disprove not a fact in issue but a fact or circumstance from which, either alone or in connection with other facts or circumstances, one may, according to the common experience of mankind, reasonably infer the existence or nonexistence of another fact which is in issue is called indirect or circumstantial evidence. For example, on a charge of larceny of a wallet, testimony of a witness that he saw the accused take the wallet from the coat of the owner is direct evidence that the accused took the wallet, and testimony of a witness that he found the wallet hidden in the locker of the accused is circumstantial evidence that the accused took it.

Circumstantial evidence is not resorted to as a secondary or inferior kind of evidence or only when there is an 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 may be more convincing than contrary inferences that may be drawn from certain circumstances. Conversely, an inference drawn from one or more circumstances may be more convincing than a contrary assertion of an eyewitness.

c. Real evidence. Physical objects, such as clothing, jewelry, weapons, and marks or wounds on a person's body, may be received or exhibited in evidence if they are relevant to an issue in the case. Evidence of this kind is called real evidence. If an item of real evidence which has been introduced in the case is not to be attached to the record of trial because of the impossibility or impracticability of doing so or for some other reason, the item should be clearly and accurately described for the record by testimony, photographs, or other means so that it may be considered properly upon review of the case. See also 54*d*.

d. Testimonial knowledge. Ordinarily, a witness is qualified to speak only of what he has learned through his senses. For instance, a sentry might testify

that while on a sentry post at night he heard two shots and saw two persons running in the distance, but he may not proceed further and state that the shots killed a man and that one of the persons running was the accused if his information as to the effect of the shots and the identity of the persons running away is based on rumor and gossip heard the following day.

That a witness is not able to testify with positive or absolute certainty about a fact which he has personally observed, or concerning which he is otherwise qualified to testify (see, for example, 138*e*), goes only to the weight and not to the admissibility of whatever testimony he may be able to give with respect to that fact.

A witness may testify as to his own age, including the date of his birth. Similarly, a witness who is a near relation or an adoptive parent of a person may testify as to the person's age, including the person's date of birth.

e. Opinion evidence. It is a general rule that a witness must state facts and not his opinions or conclusions. However, if an inference drawn by a witness from certain facts personally observed by him is of a kind which is commonly drawn and which cannot, or ordinarily cannot, adequately be conveyed to the court by a mere recitation of the observed facts, the witness may state the inference, when the matter inferred is relevant, even though the inference amounts to an opinion or conclusion. Examples of admissible inferences of this kind are the speed of an automobile, whether a voice heard was that of a man, woman, or child, and whether or not a person was drunk. As to the expression of opinion with respect to general mental condition, see 122*c*. See also 138*f*(1) as to opinion evidence concerning character, 138*h* concerning habit or usage, and 143*b*(1) as to opinion evidence concerning handwriting. That a witness is not able to testify with positive or absolute certainty about a fact which he has personally observed, or concerning which he is otherwise qualified to testify, goes only to the weight and not to the admissibility of whatever testimony he may be able to give with respect to that fact.

An expert witness—that is, one who is skilled in some art, trade, profession, or science or who has had specialized training or 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 matter which is within his specialty and which is involved in the inquiry. Before being permitted to express his opinion, it should be shown that he is an expert in the specialty. A showing of expert qualifications may be waived, however, either expressly or by a failure to object on the ground of a lack of such a showing 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 shown to have been based on his personal observation or on an examination or study conducted by him, including an examination or study by him of reports of others of a kind customarily considered in the practice of the expert's specialty, without introducing in evidence or specifying hypothetically or otherwise in the question the particular data upon which the opinion was based and without showing the details of the expert's observation, examination, or study. The expert may be required, on direct or cross-examination, to specify the data upon which his opinion was based and to relate the details of his observation, examination, or study. If in the course of doing so he refers to matters which, if themselves regarded as evidence in the

case would be inadmissible and might improperly influence the members of the court, as when a psychiatrist testifies that his opinion as to the accused's mental responsibility was based in part on the accused's past criminal record, the military judge, or the president of a special court-martial without a military judge, should instruct the members of the court in open session that these matters are to be considered only with respect to the weight to be given to the expert opinion.

An expert witness may also be asked to express an opinion upon a hypothetical question—a question assuming 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 military judge or the president of a special court-martial without a military judge as a matter of discretion so permits, on facts which are later to be received in evidence. If evidence of these facts is not later introduced, the hypothetical opinion based on them should be excluded and the members of the court instructed to disregard it. The requirement that hypothetical questions, and the answers thereto, shall be based upon facts in evidence does not apply, however, to questions asked upon cross-examination for the purpose of testing the credibility of the expert witness. See 149*b*(1).

An expert witness who to some extent has based an opinion upon his study of books or papers dealing with his specialty may be cross-examined as to that opinion by reference to any reputable works in his field, including works not relied upon by the expert witness in his testimony.

An admissible opinion or conclusion may be regarded as evidence of the matter to which the opinion or conclusion relates.

f. Character evidence—Proof of character; character of the accused; of others. (1) *Proof of character.* When proof of the character of a person is admissible, the opinion of a witness as to that person's character may be received in evidence if it is shown that the witness has such an acquaintance or relationship with the person as to qualify him to form a reliable opinion in this respect. Another method of proving character is by introducing evidence of reputation for the kind of character involved. By "reputation" is meant the repute in which a person generally is held in the community in which he lives or pursues his business or profession. Testimony concerning the reputation of a person in the community in which he lives or pursues his business or profession must come from someone whose knowledge of that reputation was gained from having himself been a member of the community in question. Thus, testimony of this kind by one who has merely visited the community of a person for the purpose of investigating his character is inadmissible. In the military service, "community" includes an organization, post, camp, ship, or station.

See 146*b* as to the use of affidavits or other written statements to prove the character of the accused.

(2) *Character of the accused.* Evidence that the accused has a bad moral character may not be introduced for the purpose of raising an inference of guilt, although this evidence may be introduced for the purpose of rebutting evidence of good moral character introduced by the defense.

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 as shown by authenticated copies of efficiency or fitness reports or otherwise and evidence of his general character as a moral, well-conducted per-

son and law-abiding citizen. However, he may not, for this purpose, introduce evidence as to some specific trait of character unless evidence of that trait would have a reasonable tendency to show that it was unlikely that he committed the offense charged. For example, evidence of good character as to peaceableness would be admissible to show the probability of innocence in a prosecution for any offense involving violence, but it would not be admissible for such a purpose in a prosecution for a non-violent theft. After the accused introduces evidence as to his good character, the prosecution may, in rebuttal, introduce evidence as to his bad character. However, the character evidence in rebuttal which may properly be received will be limited by the scope of the character evidence introduced by the accused. Thus, when in a prosecution for larceny the accused has confined his proof of good character to evidence of his good character as to honesty, the prosecution may not show in rebuttal that the accused has a bad character as to general morality and conduct but will be limited, with respect to the introduction of character evidence in rebuttal, to proof of his bad character as to honesty; but if the accused has introduced evidence of his general good character as a moral and law-abiding person the prosecution may show not only that the accused has a bad moral character generally but also that he has a bad character as to honesty.

The prosecution is not limited in its rebuttal of evidence of the accused's good character to the method of proving character used by the defense. Consequently, the prosecution may use opinion evidence of bad character in rebuttal of reputation evidence of good character presented by the defense and may use reputation evidence of bad character in rebuttal of opinion evidence of good character presented by the defense. Additionally, if a defense witness testifies as to the good reputation of the accused, the prosecution may cross-examine the witness as to his personal opinion of the character of the accused, provided the witness is qualified to express such an opinion. Also, if a defense witness testifies that in his opinion the accused has a good character, the prosecution may cross-examine the witness concerning the reputation of the accused, provided the witness is qualified to testify concerning the accused's reputation. In all these situations, however, the prosecution will be bound by the general limitations upon the introduction of evidence of bad character in rebuttal previously mentioned.

The prosecution may not, for the purpose of rebutting evidence of the accused's good character, introduce evidence of other specific offenses or acts of misconduct of the accused unless that evidence is in rebuttal of evidence introduced by the defense that other offenses or acts of misconduct were not committed (see the seventh paragraph of 153*b*(2)(*b*)) or is admissible under 138*g*. See also 75*d*.

If the accused testifies as a witness, the prosecution may, for the purpose of impeaching his credibility, show that the accused has a bad character as to truth and veracity. If the credibility of the accused is attacked on this or any other ground, the defense may show that the accused's character as to truth and veracity is good. See 153*b*(2)(*a*).

(3) *Character of persons other than the accused.* Evidence as to the character of persons other than the accused is admissible when it is relevant to an issue in the case. Thus, for example, when there is a question as to whether the accused was acting in the heat of sudden passion caused by adequate provocation in taking the life of a person who purportedly attacked him (see 198*a*,

Voluntary manslaughter) or as to whether the accused was acting in self-defense or in defense of another (see 216*c*), it may be shown that the alleged victim of the homicide or assault had a violent character or that he had a peaceable character. This evidence is admissible because of its relevancy to the inquiry as to whether the alleged victim had provoked the accused or as to whether the alleged victim had been the aggressor. It may also be shown in such a case that the accused, at the time of his act, was aware of the violent or peaceable character of the alleged victim or entertained a belief with respect to that character, for this evidence would have some bearing upon the question as to the reasonableness and extent of the passion or apprehension of danger on the part of the accused. When it may be shown, for example, that the alleged victim had a violent character, evidence of specific acts of violence of the alleged victim is admissible to show his violent character as well as opinion or reputation evidence of his violent character (see (1) above). Likewise, when the accused's knowledge or belief, possessed at the time of his act, that the alleged victim had a violent character has been shown, evidence that the accused at that time knew of specific acts of violence of the alleged victim or entertained a belief with respect to those acts is admissible.

Proof of bad moral character of persons other than the accused, including his associates and confederates, is not admissible to raise an inference of the accused's guilt by an implication that he also must have been a person of bad moral character.

See 153*b*(2) (*a*) and the fifth paragraph of 153*b*(2) (*b*) as to the admissibility of evidence of the character of witnesses and of alleged victims of sexual offenses.

g. Evidence of other offenses or acts of misconduct of the accused. The general rule is that evidence of other offenses or acts of misconduct of the accused is not admissible as tending to prove his guilt, for ordinarily this evidence would be useful only for the purpose of raising an inference that the accused has a disposition to do acts of the kind charged or criminal acts in general and, if the disposition thus inferred was to be made the basis for an inference that he did the act charged, the rule forbidding the drawing of an inference of guilt from evidence of the bad moral character of the accused would apply. However, if evidence of other offenses or acts of misconduct of the accused has substantial value as tending to prove something other than a fact to be inferred from the disposition of the accused or is offered in proper rebuttal of matters raised by the defense, the reason for excluding the evidence is not applicable. For instance, evidence of other offenses or acts of misconduct of the accused is admissible in the following circumstances:

(1) When it tends to identify the accused as the perpetrator of the offense charged.

Example: Two adjoining buildings are burglarized on the same night and in a similar manner. It is permissible to show upon the trial of an accused for burglarizing one of the buildings that he participated in the burglary of the other, for this evidence has a reasonable tendency to establish that he participated in the burglary charged.

Example: The accused is charged with burglary. Evidence is admissible that the burglar left a pistol at the scene of the burglary and that the pistol had recently been stolen from X by the accused.

Example: The accused is being tried for inducing X to turn over a large sum of money by a peculiarly ingenious fraudulent scheme. Evidence that the accused obtained money from Y by the same scheme is admissible.

(2) When it tends to prove a plan or design of the accused.

Example: The accused is being tried for having obtained money from Z by going through a marriage ceremony with her, securing the funds on a false representation that he would invest them for her, and then absconding. Evidence that he pursued the same course with W, X, and Y is admissible.

(3) When it tends to prove knowledge or guilty intent in a case in which these matters are in issue.

Example: The accused is charged with receiving stolen goods knowing them to have been stolen. Evidence that before the occasion charged he had received stolen goods under similar circumstances is admissible as tending to prove that on the occasion charged he knew that the goods which were then received by him had been stolen.

Example: The accused is charged with larceny of property belonging to X. Evidence that the accused sold the property is admissible—even if the sale is itself an offense—since this evidence would tend to prove that he intended to deprive X of the property permanently.

But: On a charge of assaulting a person and intentionally inflicting grievous bodily harm, a former assault on a third person under entirely different circumstances would not be admissible, for it would have no bearing on the intent in the case charged.

(4) When it tends to show the accused's consciousness of guilt of the offense charged.

Example: The accused is charged with homicide. Evidence that the accused had absented himself without proper authority shortly after the homicide is admissible as tending to show the accused's consciousness of guilt of the homicide.

(5) When it tends to prove motive.

Example: The accused is charged with desertion with intent to remain away permanently. The fact that at the time of the alleged desertion the accused had allegedly committed larceny and knew that he was under investigation or awaiting trial for that offense would be admissible as evidence of a motive to desert.

Example: The accused is charged with falsification of his accounts. Evidence that he had stolen some of the goods to be accounted for is admissible as tending to show that he had a motive to falsify the accounts for the purpose of concealing the theft.

But: On a charge of falsification of accounts, evidence of falsification in a totally distinct transaction would be inadmissible, for that evidence does not bear upon the involvement of the accused in the offense charged but bears solely upon his moral character.

(6) When it tends to rebut a contention, express or implicit, made by the accused that his participation in the offense charged was the result of accident or mistake or was the result of entrapment.

Example: The accused is charged with an offense involving an accusation that he administered poison to X. The accused, expressly or by implication, defends on the ground that he administered the poison to X as a result of accident or mistake. Evidence that the accused had poisoned other persons is admissible if the circumstances of the other acts are so similar to the circumstances of the act charged that the other acts tend to show that the act charged was not the result of accident or mistake.

Example: The accused is charged with selling military property without proper authority. He defends on the ground of entrapment, claiming that the sale was solicited by a government agent. Evidence that on previous relatively recent occasions the accused had sold military property without proper authority is admissible to show that on the occasion charged the accused was not an otherwise unwilling participant.

(7) When it tends to rebut any issue raised by the defense, unless its sole purpose (see the fourth paragraph of 138*f*(2)) is to rebut evidence of the accused's good character.

Example: The accused is charged with murder committed by stabbing the alleged victim with a knife, and he defends on the ground that he took the life of the victim in self-defense. Evidence that shortly before the homicide the accused had threatened another person with a knife in the absence of any apprehension of harm is admissible as tending to show that the accused was the aggressor with respect to the homicide charged.

If evidence of other offenses or acts of misconduct of the accused is admitted under the above provisions, the military judge, or the president of a special court-martial without a military judge, should instruct the members of the court in open session concerning any limitations upon the purpose for which the evidence may be considered. See 73*a*.

Evidence that the accused *has committed* other offenses or acts of misconduct not amounting to proof of conviction thereof is not admissible, on cross-examination of the accused or otherwise, merely to impeach his credibility as a witness; but if that evidence is in rebuttal of evidence introduced by the defense that other offenses or acts of misconduct were not committed or is for some other reason admissible independently of impeachment it will also be admissible to impeach the accused's credibility as a witness, provided it has a tendency to do so. Evidence that the accused was *convicted* of a crime involving moral turpitude or otherwise affecting his credibility is admissible to impeach his credibility if he testifies. See 153*b*(2)(*b*). When evidence that the accused was convicted

of crime is introduced before the findings and is of a kind which is then admissible only for the purpose of impeaching his credibility as a witness, the military judge, or the president of a special court-martial without a military judge, should instruct the members of the court in open session that in arriving at the findings they may consider the evidence only for the purpose of determining the credibility of the accused.

h. Evidence of habit or usage. Evidence that a person was in the habit of doing a certain thing in a certain way, or that he had been doing a certain thing in a certain way as a matter of usage, is admissible as tending to prove that he acted according to his habit or usage on a specified occasion. Evidence of specific instances of behavior is admissible to prove habit or usage if the evidence is of a sufficient number of instances to warrant a finding of the habit or usage. The most common instance of admissible evidence of habit or usage is evidence of the regular course of action in a business or calling.

See, however, 138*f*(2) and *g* as to the rule forbidding the drawing of an inference of guilt from evidence of the bad moral character of the accused.

139. HEARSAY RULE. ***a. General rule.*** A statement which is offered in evidence to prove the truth of the matters stated therein, but which was not made by the author when a witness before the court at the hearing in which it is so offered, is hearsay. The word "statement" means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated. Hearsay may not be recited or otherwise introduced in evidence, and it does not become competent evidence by reason of a mere failure to object to its reception in evidence. This rule simply means that a fact cannot be proved by showing that someone stated it was a fact. The basis of the rule is the fundamental principle, which is subject to certain well-established exceptions, that in a criminal prosecution the testimony of the witnesses shall be taken before the court, so that at the time they give the testimony offered in evidence they will be sworn and will be subject to cross-examination, the scrutiny of the court, and confrontation by the accused. Hearsay as defined above includes the testimony of a witness given at the hearing that on another occasion he made a certain statement, if that statement is offered to prove the truth of the matters stated and has not been adopted by the witness as a part of his testimony at the hearing.

The fact that a given statement was made may itself be relevant. If this is so, the making of the statement may be shown by any competent evidence, 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. Lieutenant A had conducted a preliminary inquiry (32*b*) into the alleged offense. Testimony by Lieutenant A at the trial that persons other than the accused stated certain facts at the inquiry would be inadmissible to prove those facts since the testimony of Lieutenant A would be hearsay if it was offered for this purpose. However, the testimony of any person who was present at the inquiry that he heard Lieutenant A warn the accused that he did not have to make any statement regarding the offense and that any statement made by him could be used as evidence against him in a trial by court-martial would be admissible for the purpose of showing that the warning was in fact given.

A is being tried for assaulting B. The defense presents the testimony of C that just before the assault C heard B say to A that he was about to kill him with his knife. The testimony of C is not hearsay, for it is offered to show that A acted in self-defense because B made the statement and not to prove the truth of B's statement.

A is being tried for the rape of B. C is able to testify that at an identification lineup B indicated—verbally or otherwise—that A was her attacker. The testimony of C would not be admissible to prove that it was A who raped B, for if it was admitted for that purpose it would be hearsay. See, however, the fourth paragraph of 153*a*.

Private A is being tried for disobedience of a certain order given him orally by Lieutenant B. C is able to testify that he heard Lieutenant B give the order to A. This testimony, including testimony of C as to the terms of the order, would not be hearsay.

The accused is being tried for the larceny of clothes from a locker. A is able to testify that B told A that he, B, saw the accused leave the quarters in which the locker was located with a bundle resembling clothes about the same time the clothes were stolen. This testimony from A would not be admissible to prove the facts stated by B.

B is being tried for wrongfully selling government 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 thereafter A asked the proprietor of the shop what the accused was doing there and the proprietor replied that the accused sold him some uniforms for which he paid the accused $30. Testimony by the policeman as to the reply of the proprietor would be hearsay if it was offered to prove the facts stated by the proprietor. 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 to prove the truth of the statement.

A defense witness in an assault case testifies on direct examination that the accused did not strike the alleged victim, B. On cross-examination by the prosecution, the witness admits that at a preliminary investigation he stated that the accused had struck B. The testimony of the witness as to this statement, unless he further testifies that the statement is true and thus adopts it as part of his testimony at the trial, is inadmissible to prove that the accused in fact struck B, for if it was received for this purpose it would be hearsay. See 153*b* (2) (*c*) with respect to the use of such an inconsistent statement for impeachment purposes.

Official statements made by an officer—as by the commanding officer of a battalion, squadron, or ship, or by a staff officer, in an indorsement or other communication—are not excepted from the operation of the hearsay rule merely by reason of the official character of the communication or the rank or position of the officer making it. Nor is such a statement excepted from the hearsay rule merely because it is among papers referred to the trial counsel with the charges. See 144.

*c. **Exceptions.*** The principal exceptions to the hearsay rule applicable in court-martial trials are stated in 140 through 146.

140. CONFESSIONS AND ADMISSIONS; ACTS AND STATEMENTS OF CONSPIRATORS AND ACCOMPLICES. ***a. Confessions and admissions.*** (1) *Definitions.* A confession is an acknowledgment of guilt. An admission is a self-incriminatory statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory.

(2) *Voluntariness.* To be admissible against him, a confession or admission of the accused must be voluntary. A confession or admission which was obtained through the use of coercion, unlawful influence, or unlawful inducement is not voluntary. See Article 31.

Some instances of coercion, unlawful influence, and unlawful inducement in obtaining a confession or admission are:

Infliction of bodily harm, including questioning accompanied by deprivation of the necessities of life, such as food, sleep, or adequate clothing.

Threats of bodily harm.

Imposition of confinement, or deprivation of privileges or necessities, because a statement was not made by the accused, or threats thereof if a statement is not made by him.

Promises of immunity or clemency as to any offense allegedly committed by the accused.

Promises of reward or benefit, or threats of disadvantage, likely to induce the accused to make the confession or admission.

Obtaining the statement in violation of Article 31(b) or other warning requirements in this subparagraph (140*a*(2)) as to the right to remain silent.

Obtaining the statement in violation of the warning requirements in this subparagraph (140*a*(2)) as to the right to counsel.

A statement is obtained in violation of Article 31(b) if, without an adequate warning under that article, a person subject to the code or acting as an instrument of such a person or a unit of an armed force obtained it by official interrogation or request, formal or informal, from one who in connection with the interrogation or request was accused or suspected of the offense to which the statement relates. A statement is obtained in violation of other warning requirements as to the right to remain silent if any other official or agent of the United States or of any State thereof or political subdivision of either, or someone acting as an instrument of such an official or agent, obtained it by custodial interrogation from an accused or suspect without having, before any questioning, warned him of his right to remain silent and that anything said by him could be used against him in court. If before or during the questioning the accused or suspect indicates in any manner that he desires to exercise his right to remain silent and that desire remains in effect, any statement thereafter obtained from him by continued interrogation is considered to be the product of unlawful influence and to be involuntary.

A statement is obtained in violation of the warning requirements as to the right to counsel if a person of the types described in the above paragraph obtained it by official interrogation from an accused or suspect when he was in custody without having, before any questioning, warned him of his right to consult, and to have with him at the interrogation, civilian counsel provided by him (or, when entitled thereto, civilian counsel provided for him) or, if the interrogation is a United States military interrogation, military counsel assigned to his case for the purpose. Even if such a warning and the warning

of the right to remain silent were given, a statement obtained at the interrogation from the accused or suspect without the presence of counsel may be regarded as not being the product of unlawful influence, and as being voluntary, only if it is affirmatively shown that with respect to the statement the accused or suspect freely, knowingly, and intelligently waived his right to the assistance of counsel and to remain silent.

A statement of an accused or suspect obtained from him in violation of any of the above warning requirements as to the right to remain silent or the right to counsel is considered to be involuntary, and therefore inadmissable against him, because of the violation alone, even if the accused or suspect knew that he had these rights despite the lack of warning. These warning requirements do not apply to the questioning of witnesses at a trial.

A statement obtained from an accused or suspect in an interrogation conducted in accordance with all applicable rules is not involuntary because that interrogation was preceded by one which was not so conducted, if it clearly appears that all improper influences of the preceding interrogation had ceased to operate on the mind of the accused or suspect at the time he made the statement. See the last paragraph of 150*b* as to the inadmissibility of evidence obtained as a result of information supplied by a statement obtained from the accused by compelling him to incriminate himself, when the compulsion was applied by certain persons acting in a governmental capacity.

The admissibility of a confession or admission of the accused must be established by an affirmative showing that it was voluntary, unless the defense expressly consents to the omission of such a showing. If the statement of the accused was not *obtained* from him, but was made by him spontaneously, for example, without urging, interrogation, or request, it may be regarded as voluntary. However, when the statement was *obtained* from the accused, it may affirmatively be shown that it was voluntary by proof that its making was not induced by a threat, promise, or use of duress amounting to coercion, unlawful influence, or unlawful inducement and that any warnings required above as to the right to remain silent or to counsel were given. See the fourth paragraph of this subparagraph (140*a*(2)) as to the additional proof that is necessary in certain cases.

The accused has the right to testify concerning the involuntary nature of his confession or admission without thereby subjecting himself to cross-examination upon other issues in the case or upon the truth or falsity of the statement, but he will be subject to proper cross-examination as to the voluntariness of the statement and as to his credibility. If he desires to exercise it, he should be accorded this right to testify before a ruling is made as to the admissibility of the statement. If he so requests, he should also be allowed, before such a ruling is made, to present other evidence for the purpose of showing that the statement was involuntary and to cross-examine any witness who has testified as to its voluntary nature. See 57*g*(2) as to hearings upon these matters conducted by the military judge out of the presence of the members of the court.

A ruling of the military judge or the president of a special court-martial without a military judge that a confession or admission of the accused is admissible does not establish for the members of the court that the statement was voluntary. Such a ruling, although it must be based on an interlocutory finding that the statement was voluntary, merely places the confession or admission before the members of the court, that is, the ruling is

final only on the question of admissibility. If a ruling has been made that a confession or admission of the accused is admissible and evidence raising an issue as to the voluntariness of the statement has been introduced in open session, the military judge, or the president of a special court-martial without a military judge, should instruct the court in open session that each member of the court, in connection with his deliberation upon the findings of guilt or innocence, should consider the evidence regarding the circumstances under which the statement was obtained with a view to determining whether the statement was voluntary and must disregard the statement entirely as evidence against the accused if he is not convinced beyond a reasonable doubt that it was voluntary; that each member who so concludes that the statement was voluntary should further consider the evidence regarding the circumstances under which the statement was obtained in determining the weight to be given to the statement and should give weight to the statement only to the extent that he believes it to be truthful; and that with respect to these matters each member should in no way be influenced by the ruling admitting the statement in evidence. So that the members of the court may properly apply the above instruction, the court should also be instructed concerning the legal aspects of voluntariness, including any requirement of a warning or understanding of a warning, pertinent to the case.

(3) *Purported confession or admission of the accused claimed not to have been made by him.* The accused has the right to testify that he did not in fact make a confession or admission asserted to have been made by him without thereby subjecting himself to cross-examination upon other issues in the case or upon the truth or falsity of the disputed statement, but he will be subject to proper cross-examination as to whether the statement was made by him and as to his credibility. If he so requests, the accused should be accorded this right to testify and an opportunity to show otherwise that the statement was not made by him before a ruling is made as to the admissiblity of the statement. See 57*g*(2) as to hearings upon these matters conducted by the military judge out of the presence of the members of the court. If a confession or admission has been received in evidence as having been made by the accused and evidence has been introduced in open session raising an issue as to whether the statement was in fact made by the accused, the military judge, or the president of a special court-martial without a military judge, should instruct the court in open session that each member of the court, in connection with his deliberation upon the findings of guilt or innocence, should consider the evidence as to whether the accused made the statement with a view to determining whether the statement was in fact made by the accused and, if he concludes that it was so made, with a view to determining the weight to be given to the statement; that he must disregard the statement entirely as evidence against the accused if he is not convinced beyond a reasonable doubt that it was in fact made by the accused; and that with respect to these matters he should in no way be influenced by the ruling admitting the statement in evidence.

(4) *Admission by silence.* If an imputation against a person comes to his attention under circumstances that would reasonably call for a denial by him of the accuracy of the imputation if the imputation was not true, a failure on his part to utter such a denial will support an inference that he thereby admitted the truth of the imputation. Thus, if a friend of A, in discussing the theft of a watch, says to A, "I saw you steal that watch last night," and A remains silent, competent evidence of these facts may, in a trial of A for

larceny of the watch, be introduced against A for the purpose of raising an inference that by his silence A admitted the truth of the imputation, for in such a case it could reasonably be concluded that A, if he was innocent, would have exclaimed to his friend that he had not stolen the watch. A person's failure to utter a denial of the correctness of an imputation concerning an offense for which, at the time of the failure, he was in confinement, arrest, or custody or for which, at that time, he was under official investigation cannot be made the basis for an inference of an admission of the truth of the imputation. The fact that on official questioning the accused, in the exercise of his rights under Article 31(b) or its civilian counterpart (see the third paragraph of (2) above), remained silent or refused to answer a certain question is inadmissible against him.

(5) *Corroboration of confessions and admissions.* It is a general rule that a confession or admission of the accused cannot be considered as evidence against him on the question of guilt or innocence unless independent evidence, either direct or circumstantial, has been introduced which corroborates the essential facts admitted sufficiently to justify an inference of their truth. Other confessions or admissions of the accused, if they are themselves of a kind subject to this general rule, may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some, but not all, of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission which are so corroborated by the independent evidence. Although the independent evidence is usually introduced before introducing evidence of the confession or admission, the military judge or the president of a special court-martial without a military judge may as a matter of discretion admit the confession or admission in evidence prior to the introduction of the independent evidence upon the condition that the statement must be excluded and disregarded if the above requirement as to the introduction of independent evidence is not eventually met. The independent evidence need not of itself be sufficient to establish beyond a reasonable doubt the truth of facts stated in the confession or admission. For example, if an accused charged with premeditated murder has voluntarily confessed that, intending to kill the alleged victim, he concealed himself so that he might surprise the victim at a certain place and, when the victim passed by, plunged a knife in his back, independent evidence that the victim was found dead as a result of a knife wound in his back at the place where, according to the confession, the incident occurred would support an inference of the truth of the essential facts admitted in the confession and would authorize consideration of the confession in determining whether the accused was guilty of premeditated murder. Although, to satisfy the requirement of corroboration of a confession or admission of an accused, the independent evidence need only raise an inference of the truth of the essential facts admitted, the accused cannot be convicted unless the confession or admission, together with the corroborating and any other evidence, is sufficent to convince the court of the guilt of the accused beyond a reasonable doubt. The rule requiring independent corroborating evidence does not apply to a confession or admission made by the accused before the court by which he is being tried. The rule requiring independent corroborating evidence also does not apply to statements made prior to or contemporaneously

with the act, nor does it apply to statements which are admissible to prove the truth of the matters stated under some rule of evidence other than that pertaining to the admissibility of confessions and admissions.

(6) *Miscellaneous.* A confession or admission not made as testimony in the trial is admissible for the purpose of proving the truth of the matters stated in the confession or admission only when the person who made it is an accused in the case, and it is then admissible for that purpose only with respect to, and against, the accused who made it. These limitations do not apply, however, if the statement is admissible to prove the truth of the matters stated therein without regard to the fact that it is a confession or admission, as when in his testimony at a former trial of the accused an accomplice has made a confession damaging to the accused which is admissible as former testimony under 145*b*.

If only part of a confession or admission or supposed confession or admission of the accused is shown, the defense by cross-examination or otherwise may introduce all other parts of the statement—which may consist of a connected series of statements—that are explanatory of, or in any way relevant to, that part.

A voluntary oral confession or admission of the accused may be proved by the testimony of anyone who heard him make it, even if it was reduced to writing and the writing is not accounted for.

A statement of the accused obtained from him in violation of Article 31 or any of the warning requirements in (2) above, or through the use of coercion, unlawful influence, or unlawful inducement is not admissible in evidence even if it is offered against him for some purpose other than to establish a confession or admission. See Article 31(d). For example, in a case in which a statement of the accused so obtained is charged as being false, it cannot be received in evidence to show that he made it.

See 142*e* (Polygraph tests and drug-induced or hypnosis-induced interviews).

b. Acts and statements of conspirators and accomplices. A statement, including non-verbal conduct amounting to a statement, made by one conspirator during the conspiracy and in pursuance of it is admissible in evidence for the purpose of proving the truth of the matters stated against those of his coconspirators who were parties to the conspiracy at the time the statement was made or who became parties to the conspiracy thereafter. The statement is not admissible merely because it was made while the conspiracy was existing; it must, to be admissible under this rule, have been made in pursuance of the conspiracy. When evidence of such a statement is offered, the question as to whether the conspiracy existed and whether the statement was made in pursuance of it is, for the purpose of determining the admissibility of the statement, decided by the military judge or the president of a special court-martial without a military judge. However, at the discretion of the military judge or the president of a special court-martial without a military judge, the statement may be admitted in evidence without preliminary proof of these matters upon the condition that the statement must ultimately be excluded and disregarded if it is not afterwards shown to be admissible as coming within the rule under discussion or to be otherwise admissible. When the existence of a conspiracy is in issue, either on the merits or as a foundation for the admissibility of evidence, evidence of any act or other conduct of each of the alleged conspirators tending

to prove the conspiracy, including evidence of statements offered for a purpose other than as tending to prove the truth of the matters stated, is admissible for the purpose of showing the existence of the conspiracy, and this is so even if the act or other conduct occurred after the conspiracy had ended.

It is immaterial that the offense charged is the doing of an act rather than a conspiracy to do the act. For example, if X is charged with having murdered A, evidence that X, Y, and Z conspired to murder A and that Z did the killing is admissible. If the conspiracy is shown to have existed, any statement of Y or of Z made during the conspiracy and in pursuance of the purpose to kill A is admissible in evidence against X.

The agreement constituting the conspiracy may be, and usually is, proved by circumstantial evidence. It is seldom possible to prove a formal or express agreement. The agreement constituting the conspiracy may be a tacit one. Evidence of the conduct, including the statements, of an accomplice of the accused or of any person acting in concert with him is, for the purpose of determining its admissibility, treated as if it was evidence of the conduct of a coconspirator.

A statement made by one conspirator after the main objectives of the conspiracy have been achieved or abandoned does not become admissible against his coconspirators, for the purpose of proving the truth of the matters stated, merely because the statement was made in pursuance of a then existing common intent to conceal the conspiracy or otherwise avoid apprehension or punishment therefor. However, if it is shown that as part of the agreement constituting the conspiracy there existed an express agreement among the conspirators to continue, after the achievement or abandonment of the main objectives of the conspiracy, to act in concert with a view to concealing the conspiracy or otherwise avoiding its penal consequences, a statement made in pursuance of that express agreement by one conspirator after the achievement or abandonment of the main objectives of the conspiracy may be received in evidence against his coconspirators for the purpose of proving the truth of the matters stated if the statement is in other respects admissible for that purpose under the general rules set forth above.

When two or more accused are tried at the same trial, evidence of a statement made by one of them which is admissible against him only or against him and some, but not all, of his co-accused may not be received in evidence unless all references inculpating an accused against whom it is inadmissible are effectively deleted or the maker of the statement becomes subject to relevant cross-examination. See also 153*b*(2)(c) as to the instruction which should be given in the case of inconsistent statements of a coconspirator or accomplice.

Evidence that an accomplice of the accused was convicted of or pleaded guilty to the offense charged against the accused or an offense arising out of the same circumstances cannot be received against the accused as tending to prove that the offense charged was committed or that the accused participated in it.

141. STATEMENTS MADE THROUGH INTERPRETERS. As a general rule, a statement made through an interpreter outside of a judicial proceeding may be proved only by the testimony of the interpreter or by other evidence of the statement itself and may not be proved by evidence of the interpreter's translation. However, as an exception to this general rule, if other-

wise admissible, evidence of any of the following translations is admissible to prove the statement translated:

A translation made by an agent of the accused, provided proof of the statement translated is to be used against the accused;

A translation made during and in pursuance of the common venture, but not necessarily with knowledge of the venture, by an agent of a coconspirator or accomplice of the accused, provided proof of the statement translated is to be used against the accused;

A translation made by an agent of a witness, provided proof of the statement translated would tend to impeach the credibility of the witness.

When admissible, evidence of a translation of a statement may be furnished by the testimony of any person who heard the translation being made, or by a writing which contains the translation and which is admissible because acknowledged by the person who made the statement or for some other reason. When a party introduces evidence of only part of a translation of a statement, an adverse party may introduce evidence of all other parts of the translation that are relevant to that part. If a person who has carried on a conversation through an interpreter could have rejected the services of that interpreter or in any manner had agreed to his employment or to the accuracy of the translation, it may be considered that the interpreter was the agent of that person. The foregoing provisions as to statements made through interpreters relate only to permissible methods of proving the statements. Other rules should be consulted with respect to determining the admissibility of the statements themselves. See, for example, 140*a* (Confessions and admissions), 140*b* (Acts and statements of conspirators and accomplices), and 153*b*(2)(c) (Inconsistent statements).

When otherwise admissible, testimony given through a sworn interpreter at the trial in which it is offered may properly be received in evidence. Testimony of a *witness* given through an interpreter at another trial or hearing may be proved by the testimony of the interpreter. It may be also proved by the record of trial or hearing or by other evidence of the interpretation when the testimony of the witness is competent as former testimony under 145*b*, or otherwise, without a showing that the interpreter is unavailable. An interpretation may not be used to prove the truth of the testimony interpreted unless that testimony is itself competent as former testimony or is otherwise competent in the case being tried for the purpose of proving the truth of the matters stated. Subject to Article 49, a deposition taken through a sworn interpreter may be read in evidence to the same effect that it could be had the deponent testified in the English language at the taking of the deposition (see 145*a*). Also, subject to Article 50, testimony through a sworn interpreter contained in a record of the proceedings of a court of inquiry may be read in evidence in a trial by court-martial to the same effect that it could be had the testimony been given in the English language (see 145*c*). An interpreter who has made an affirmation to interpret truly is considered to be a sworn interpreter.

Evidence of an interpreter's translation of a statement may be used, in a proper case, to enable the interpreter, or some other person who heard the statement being made and who understood it, to refresh his present recollection or show his past recollection concerning the statement, and this is so even if the evidence of the translation thus used would not itself be admissible to prove the statement. See 146*a* and the last paragraph of 149*c*(1)(b).

A person who interprets at a trial is a witness with respect to the interpretation given by him. Consequently, under such limitations as the military judge or the president of a special court-martial without a military judge may proprly impose to prevent undue delay in the trial or to maintain an appropriate trial procedure in general, such a person is subject to the usual tests of credibility, including, in a proper case, cross-examination, impeachment, and contradiction by the testimony of other interpreters. See also 50.

142. DYING DECLARATIONS; SPONTANEOUS EXCLAMATIONS; FRESH COMPLAINT AND LACK OF FRESH COMPLAINT; STATEMENTS OF MOTIVE, INTENT, OR STATE OF MIND OR BODY; POLYGRAPH TESTS AND DRUG-INDUCED OR HYPNOSIS-INDUCED INTERVIEWS. ***a. Dying declarations.*** In trials for homicide or for any offense resulting in the death of the alleged victim, whether or not homicide is charged, the dying declaration of the alleged victim concerning the circumstances of the act which induced his dying condition, including the identity of the person or persons who caused the injury, is admissible in evidence to prove those circumstances. To be admissible as a dying declaration, the declaration must have been made while the victim was in extremity and while he was under a sense of impending death and without hope of recovery. There is no requirement that death immediately follow the declaration, but if it was made while the victim had a hope of recovery it is not admissible under this exception to the hearsay rule even though he died shortly thereafter. It may be shown that the victim was under a sense of impending death and was without hope of recovery by evidence that he made an assertion to this effect or by other competent evidence, including inferences from the nature and extent of the wound or illness. If not obtained by duress or under circumstances indicating that the declarant may have been misled, a dying declaration may be received in evidence even if it was made in answer to leading questions or upon urgent solicitation. The declaration may be by spoken words or intelligible signs or it may be in writing.

A dying declaration is not admissible unless there is evidence that the declarant had an opportunity to observe the matters he purports to describe. Evidence that the declarant had such an opportunity may be supplied by assertions to that effect in the declaration itself or by direct or circumstantial evidence independent of the declaration. The fact that the declaration in question is in the form of a conclusion will not prevent it from being properly receivable in evidence as a dying declaration, unless it appears that the declarant was giving expression to suspicion or conjecture rather than to known facts.

Except as otherwise indicated in the above second paragraph of this subparagraph, a dying declaration is not admissible in evidence as such if it would have been inadmissible as testimony given on the witness stand by the declarant. For example, a dying declaration which was made by a person who would not have been competent as a witness is not admissible under this exception to the hearsay rule.

Dying declarations are admissible both in favor of and against the accused. The utmost care should be exercised in weighing these declarations since they are often made under circumstances of mental and physical debility and are not subject to the usual tests of veracity. A dying declaration and its maker may be contradicted and impeached in the same manner as other testimony and wit-

nesses (see 153*b*), and to discredit the declaration it may be shown that the declarant had a bad character either generally or as to specific traits or that he did not believe in future rewards and punishments.

b. Spontaneous exclamations. An utterance concerning the circumstances of a startling event made by a person while he was in such a condition of excitement, shock, or surprise, caused by his participation in or observation of the event, as to warrant a reasonable inference that he made the utterance as an impulsive and instinctive outcome of the event, and not as a result of deliberation or design, is admissible as an exception to the hearsay rule to prove the truth of the matters stated. Such a spontaneous exclamation may be proved by any competent evidence, and the testimony of a person who heard the utterance being made, but who was not present at the occurrence which gave rise to it, is competent for this purpose. For example, in a prosecution for assault by stabbing, the testimony of a person who did not see the attack, but who came upon the alleged victim thereafter, that the victim, while visibly in agony as a result of the wounds received, cried out, "John Drew stabbed me!", is admissible to prove the exclamation of the victim, and the exclamation, thus shown to be a spontaneous exclamation, is admissible as tending to prove that the stabbing was done by a man named John Drew.

An exclamation is not admissible as a spontaneous exclamation unless independent evidence of the startling event which gave rise to it and of an opportunity on the part of its maker to observe the event is introduced. The example given above of an admissible spontaneous exclamation made by the victim of a stabbing meets this requirement, for the testimony of the witness concerning the victim's wounds would supply independent evidence of both the startling event—the stabbing—and the opportunity for observation on the part of the vicitim. The fact that the exclamation is in the form of a conclusion will not prevent it from being properly receivable in evidence as a spontaneous exclamation, unless it appears that the person who made it was giving expression to suspicion or conjecture rather than to known facts. A spontaneous exclamation is not inadmissible because it was made by a person who is or would have been—by reason of infancy or mental infirmity, for example—incompetent as a witness.

Except as otherwise indicated in the above second paragraph of this subparagraph, a spontaneous exclamation is not admissible in evidence as such if it would have been inadmissible as testimony given on the witness stand by the person who made it. For example, a spontaneous exclamation is not admissible as such if the person who made it is the spouse of the person against whom it is to be used and the privilege prohibiting the use of one spouse as a witness against the other is applicable and has not been waived (see 148*e*).

A spontaneous exclamation is admissible even though it was made by a person who is alive and whether or not he is available as a witness. It is not essential to the admissibility of a spontaneous exclamation that the event which called it forth be the act charged.

The fact that the utterance was made in response to questioning does not necessarily indicate that it is not admissible as a spontaneous exclamation, but this fact should be considered in determining whether the utterance was impulsive and instinctive rather than the result of deliberation or design. Similarly, a lapse of time between the startling event and the utterance will not render the

utterance inadmissible as a spontaneous exclamation if the person who made it was, at the time of making it, still in a condition of excitement, shock, or surprise caused by his observation of the event.

Spontaneous exclamations are sometimes called res gestae, but that term is often used with respect to other kinds of admissible utterances whether or not their admissibility depends upon an exception to the hearsay rule. For instance, the term has been applied to statements which are received in evidence merely to prove the fact that they were made (see examples in 139*b*). The term res gestae cannot properly be used to describe any particular rule of evidence.

c. Fresh complaint and lack of fresh complaint. In a prosecution for a sexual offense in which an alleged victim of either sex has testified that consent was lacking, evidence that the alleged victim made a complaint of the offense within a reasonable time after its commission is admissible for the purpose of corroborating the testimony of the victim, and this is so whether or not lack of consent is an element of the offense and even if the credibility of the victim has not been directly attacked. This evidence is to be restricted to proof that the complaint, including the identification of the offender, was made. A description of the details of the offense given during the course of making the complaint is not admissible under this rule. However, a description of the details of the offense related during the course of making the complaint may be received in evidence if admissible as evidence of a consistent statement for the purpose of corroboration under 153*a* or if admissible under the spontaneous exclamation (142*b*), or any other, exception to the hearsay rule.

In a prosecution for a sexual offense in which lack of consent is an element or in which the alleged victim has testified that consent was lacking, evidence that the alleged victim failed to make a complaint of the offense within a reasonable time after its commission is admissible. If evidence of such a failure to make a complaint has been received, the military judge, or the president of a special court-martial without a military judge, should, upon request by the defense, instruct the members of the court in open session that this evidence may be considered only on the question of the credibility of the testimony of the alleged victim generally and, if lack of consent is an element of an offense in issue, also on the question as to whether or not there was consent.

Sexual offenses include all offenses of a sexual nature, such as rape, carnal knowledge, sodomy, attempts to commit these offenses, assault with intent to commit rape or sodomy, and indecent assaults or acts.

d. Statements of motive, intent, or state of mind or body. If a statement made under circumstances not indicative of insincerity discloses a relevant and then existing motive, intent, or state of mind or body of the person who made the statement, evidence of the statement is admissible for the purpose of proving the motive, intent, or state of mind or body so disclosed. However, evidence of a statement of a person other than the accused may not be adduced by the prosecution or the court under this rule when the statement would amount to an accusation that the accused committed the act charged or that the act charged had been committed, even though the statement would incidentally disclose a relevant motive, intent, or state of mind or body of the person who made the statement. For example, in a case in which A is charged with having murdered B by poisoning him, and A maintains that the poison was intentionally administered by B himself, the prosecution may not show an absence of a

suicidal frame of mind on the part of B by introducing evidence that shortly before his illness B stated, "I'm afraid A is putting poison in my food," or, "I'm afraid someone is putting poison in my food." On the other hand, had B's statement been, "I intend to buy a farm when I retire next year," evidence of that statement could be introduced by the prosecution to show that B had not intended to take his own life.

The admissibility of evidence of a statement disclosing motive, intent or state of mind or body constitutes an exception to the hearsay rule only when the disclosure depends upon the statement being accepted as true. If the disclosure results from the mere fact that the statement was made, as when the mental condition of a person is indicated by his statement that he is the Emperor Napoleon, the admissibility of evidence of the statement does not constitute an exception to the hearsay rule. Whatever the theory of admissibility, a statement of motive, intent, or state of mind or body may be proved by the testimony of anyone who heard it being made or by other competent evidence.

The rule relating to the admissibility of evidence of statements of motive, intent, or state of mind or body does not authorize proof of a person's motive, intent, or state of mind or body by evidence of a disclosure thereof made in another person's statement, unless the person whose motive, intent, or state of mind or body is so disclosed has in some manner approved of the statement. Thus, in a homicide case, evidence of a statement of the victim, not shown to have had the approval of the accused, to the effect that the victim was going to remain at home on the night of the homicide because the accused intended to visit him is not admissible to show an intention of the accused to visit the victim and thus raise an inference that the accused kept the appointment. However, if a statement made by one person would tend to supply or produce, rather than disclose, a relevant motive, intent, or state of mind or body on the part of another, evidence that the statement was made may be received to show its probable effect on the other. See the illustration in the second paragraph of 139*b*.

Evidence of a person's statement as to his memory or belief of a fact, offered as tending to prove the fact remembered or believed, is not admissible under the rule pertaining to evidence of statements of motive, intent, or state of mind or body.

Subject to the limitations pertaining to the admissibility of confessions or admissions (see 140*a*), evidence of statements of the accused tending to show a consciousness of guilt is admissible. Evidence of statements of the accused, not made under circumstances indicative of insincerity, tending to show a consciousness of innocence is also admissible, and this is so whether the statement was made before, during, or after the alleged offense.

e. Polygraph tests and drug-induced or hypnosis-induced interviews. The conclusions based upon or graphically represented by a polygraph test and the conclusions based upon, and the statements of the person interviewed made during, a drug-induced or hypnosis-induced interview are inadmissible in evidence in a trial by court-martial.

143. DOCUMENTARY EVIDENCE—PROVING CONTENTS OF A WRITING; AUTHENTICATION OF WRITINGS; CERTAIN PROCEDURAL MATTERS RELATING TO DOCUMENTARY EVIDENCE; DEFINITION OF "WRITING". ***a. Proving contents of a writing.*** (1) *Gen-*

eral rule, *best evidence rule*. A writing, to be admissible, must meet the requirements of one or more of the exceptions to the hearsay rule (see, for example, 144*b* as to official records and 144*c* as to business entries) or be otherwise admissible, must be properly authenticated (143*b*), and must, when applicable, meet the requirements of or fall within an exception to the best evidence rule. The *best evidence rule* provides that, in proving the contents of a writing, the "original" of the writing is the best evidence of its own contents and must, therefore, be introduced except in certain situations described in 143*a*(2). The term "original" in this rule, in addition to its ordinary meaning, includes a carbon copy of a writing, as complete as the ribbon copy in all respects, including relevant signatures, if any, and includes an identical copy made by photographic or other duplicating process for use as an original or as one of a number of originals. These copies are known as duplicate originals. Any other evidence of the contents of a writing, including testimony, is known as secondary evidence.

In some cases, the terms of a copy or purported copy of a writing may themselves be relevant, without regard to the terms of the original writing. In these cases, with respect to the operation of the best evidence rule, the copy in question is considered to be the "original."

The best evidence rule applies only to methods of proving the contents of a writing, not to methods of proving matters which exist independently of a writing. Consequently, relevant matters existing independently of a writing in which they are recited may be proved by any competent evidence without regard to, or accounting for, the writing. Also, even if a writing satisfies the requirements of the best evidence rule or an exception thereto, it may not be received in evidence to prove matters recited therein unless it is admissible for this purpose under some other rule of evidence. See, for example, 144*b* (Official records) and 144*c* (Business entries).

When evidence is offered to show the contents of a writing, any objection to the admission of the evidence on the ground that the document offered is not the original or a duplicate original and that the evidence offered is secondary is waived by a failure to object on that ground. Such a failure to object does not, however, necessarily constitute a waiver of other possible objections to the admissibility of the evidence. For example, it does not waive authentication of the writing (see 143*b*(1) as to waiver of authentication), nor will it render a writing competent if it would not otherwise be admissible for the purpose of proving the truth of the matters stated therein, such as a writing which is hearsay and not within any of the exceptions to the hearsay rule. See 139*a*.

(2) *Exceptions to the best evidence rule.* (*a*) *Exceptions pertaining to writings lost, destroyed, infeasible to produce, or in the accused's possession and to machine, electronic, or coded writings.* If it is shown that an admissible writing has been lost or destroyed or for any reason cannot feasibly be produced or, if a party other than the accused desires to introduce its contents, that it is in the possession of the accused, the contents may be proved by an authenticated copy or by the testimony of a witness who has seen and can remember the substance of the writing. When the prosecution desires to introduce the contents of a writing the original of which has been shown to be in the possession of the accused, there is no requirement that a demand be made upon the accused for the production of the original before secondary evidence is admissible. Also, if an admissible machine, electronic, or coded writing (see 143*d*) is of a kind

which, without skilled interpretation, may be unintelligible or subject to misunderstanding, its contents may be proved and its meaning explained by the testimony of a witness sufficiently familiar with the system used in producing the writing to be able to interpret the writing accurately, or the contents of the writing may be proved by a machine "translation" authenticated by the testimony of a witness familiar with the system used in producing the "translation." See also 143*a*(2) (*c*) and (*e*) and 144*b* and *c* as to machine, electronic, or coded official records and business entries.

(*b*) *Summarization of numerous or bulky writings.* When admissible writings are so numerous or bulky that they cannot conveniently be examined by the court and the fact to be proved is the result of a summarization of the whole collection, as when the fact to be proved is the balance shown by account books, the collection may be summarized by a qualified person or group of qualified persons and he or a member of the group may testify as to the result of the summarization. In these cases, it must first be shown that the writings would be admissible but are so numerous or bulky that they cannot conveniently be examined by the court; that the fact to be proved is the result of a summarization of the whole collection; that the witness is qualified by training or experience to summarize the writings; that he or a group of which he was a member composed of persons qualified by training or experience for their respective tasks examined and summarized the whole collection; and that the opposite party had access to the writings on which the summarization was based. The writings may be examined and summarized by mechanical or electronic means. The opposite party may question the witness and his associates concerning the writings and may have as many of the writings, or authenticated copies thereof, as are necessary for this purpose produced in court. A showing of the qualifications of the witness, or of any person associated with him in the examination and summarization of the writings, can be waived by a failure to object on the ground of a lack of such a showing to the testimony of the witness.

(*c*) *Copies and official publications of official records.* An official record (144*b*) kept in official custody, if admissible for any purpose, may be evidenced by a properly authenticated (143*b*(2)) copy, without first proving that the original has been lost or destroyed and without otherwise accounting for the original. If the record is written in a spoken language or is pictorial (see 144*e*), only an exact (true) copy is admissible under this exception to the best evidence rule, although it may consist merely of an extract of those portions relevant to the case and handwritten portions may be copied in type when the handwriting is not to be evidenced by the copy. The copy may be made by photographic or other duplicating process. If the record is a machine, electronic, or coded record, the copy or extract copy may consist of an accurate written "translation" of the record, whether made by machine or by a person. See also the second paragraph of 144*c* as to government records photographically or otherwise reproduced in the regular course of business. An official record, if admissible for any purpose, may also be evidenced by an official publication thereof, without accounting for any other form of the record.

(*d*) *Summaries of official records.* If the head of an executive or military department or independent governmental agency determines that it would be detrimental to the public interest to disclose the text or informational source of a certain official record kept under the authority of the department or agency, a properly authenticated (143*b*(2) (*f*)) certificate or statement signed by him, or

by his deputy or assistant, setting forth a summary of the record is as admissible in evidence as the record itself, provided that the certificate or statement contains a statement to the effect that the above-mentioned determination was made. Also, any admissible foreign official record may be evidenced by a properly authenticated (143*b*(2)(*f*)) written summary if the foreign jurisdiction will not furnish an exact copy or extract of the record. Unless otherwise indicated by a provision of this manual or by a rule of law generally applicable in criminal cases in the United States district courts, however, other summaries of official records are not admissible.

(*e*) *Copies of banking entries.* A business entry (144*c*) of a business regularly but not necessarily exclusively engaged in public banking activities may, if the entry relates to these activities and is admissible for any purpose, be evidenced by a properly authenticated (143*b*(3)) copy, without first proving that the original has been lost or destroyed and without otherwise accounting for the original. If the entry is written in a spoken language, only an exact (true) copy is admissible under this exception to the best evidence rule, although it may consist merely of an extract of those portions relevant to the case and handwritten portions may be copied in type when the handwriting is not to be evidenced by the copy. The copy may be made by photographic or other duplicating process. If the entry is a machine, electronic, or coded entry, the copy or extract copy may consist of an accurate written "translation" of the entry, whether made by machine or by a person. See also the second paragraph of 144*c* as to business entries photographically or otherwise reproduced in the regular course of business.

(*f*) *Certificates of fingerprint comparison and identity.* A certificate or statement signed by a custodian of personnel or fingerprint records of an armed force of the United States, or by his deputy or assistant, that a qualified fingerprint expert on duty with the custodian has compared certain attached fingerprints—those which had been forwarded for the purpose of comparison—with fingerprints in the custodian's custody of a person described in the certificate by name, military status, and service number, and that the attached fingerprints and the fingerprints with which they were compared have been found by the expert to be those of one and the same person, is admissible as evidence that the identity and military status of the person whose fingerprints are attached are as described in the certificate. A similar certificate or statement signed by a custodian, or by his deputy or assistant, of fingerprint records of any department, bureau, or agency of the Federal government of the United States is equally admissible. The attached fingerprints may be identified as those of a certain person by the testimony of the person who took them, by the testimony of anyone who observed the taking of the fingerprints, or by other competent evidence.

(*g*) *Evidence of absence of official record.* A properly authenticated (143*b*(2)(*f*)) certificate or statement to the effect that after diligent search no record or entry of a specified tenor was found to exist in certain official records designated by the certificate or statement, signed by the custodian of the records, by his deputy or assistant, or, as to foreign official records, by any person authorized in the place where the records are kept to make the certificate or statement, is admissible as evidence that the designated official records contain no record or entry of the specified tenor; and a properly authenticated certificate or written statement which is otherwise acceptable as proof of the

nonexistence of a record or entry under the law of the place where the official records are kept or under any law of the United States is likewise admissible. It may also be shown that certain official records contain no record or entry of a specified tenor by the testimony of the custodian of the records, by the testimony of his deputy or assistant, or by the testimony of any person who searched the records or was a member of a group which searched them and who is familiar with the product of the group and qualified to testify thereto. Official records may be searched by physical, mechanical, or electronic means. If a disputed fact or event is of a kind which within the scope of an official duty would have been made the subject of a record or entry in certain official records, proof that these records contain no record or entry of the fact or event may be received as evidence that the fact does not exist or that the event did not occur.

(*h*) *Evidence of absence of business entry.* It may be shown that certain business entries contain no record or entry of a specified tenor by the testimony of the person in charge of the entries, by the testimony of his assistant, or by the testimony of any person who searched the entries or was a member of a group which searched them and who is familiar with the product of the group and qualified to testify thereto. Also, as to those business entries of a business regularly but not necessarily exclusively engaged in public banking activities which relate to these activities, a properly authenticated (143*b*(3)) certificate or statement to the effect that after diligent search no record or entry of a specified tenor was found to exist in certain of these entries designated by the certificate or statement, signed by the person in charge of the entries in question or his assistant, is admissible as evidence that the designated business entries contain no record or entry of the specified tenor. The entries searched may be indicated in the certificate or statement as being in fact business entries relating to public banking activities in a manner similar to that described in 143*b*(3) with respect to a certificate or statement authenticating a banking entry or copy thereof. Business entries may be searched by physical, mechanical, or electronic means. If a disputed act, transaction, occurrence, or event is of a kind which in the regular course of business would have been made the subject of a record or entry in certain business entries, proof that these business entries contain no record or entry of that act, transaction, occurrence, or event may be received as evidence that the act, transaction, occurrence, or event did not take place.

(*i*) *Copies of telegrams and radiograms.* See the second paragraph of 143*b*(1) as to copies of telegrams and radiograms.

b. Authentication of writings. (1) *General.* A writing that is not authenticated may not be introduced in evidence as being genuine, but authentication can be waived by a failure to object on the ground of lack of proof of authenticity to the reception in evidence of the writing. A mere failure to object on this ground to the reception in evidence of a writing, however, will add nothing to the evidentiary nature of the writing. For example, it will not render a writing competent if it would not otherwise be admissible for the purpose of proving the truth of the matters stated therein, such as a writing which is hearsay and not within any of the exceptions to the hearsay rule. See 139*a*. A writing may be authenticated by any competent proof that it is genuine—is in fact what it purports or is claimed to be. It may be authenti-

cated by a certificate or other written statement only when the certificate or statement is admissible for this purpose as an exception to the hearsay rule. See 143*b*(2). (Authentication of official records) and 143*b*(3) (Authentication of banking entries). When so admissible and itself properly authenticated (see, for example, the second paragraph of 143*b*(2)(*a*)), the certificate or other written statement may be introduced in evidence to prove the truth of all authenticating facts stated or indicated therein, including the stated or indicated identity, position, and duties of the signer thereof.

A letter or similar written communication, or a telegram or radiogram, purporting to be a reply from the addressee of a written or other type of message shown to have been communicated to that addressee or to have been placed in a reliable channel of communication may be inferred to be genuine. A purported reply, however, is not to be considered as evidence of the genuineness of the letter or other type of communication to which the reply was purportedly made. The contents of a telegram or radiogram in the terms in which it was filed for transmission may, if admissible, be evidenced by the original filed for transmission or, without accounting for that original, by any copy of the message, whether or not made as a memorandum or record, which was made in the regular course of business of a military or civilian transmitting or receiving agency, including such a copy delivered to the addressee of the telegram or radiogram. Any copy so made may be inferred to be an accurate copy of the original message. Likewise, the contents of a telegram or radiogram in the terms in which it was received by the addressee may, if admissible, be evidenced by the copy received by the addressee or, without accounting for that copy, by the original filed for transmission or by any copy of the kind referred to above. See the third paragraph of 144*c* for an application of the principle of inferred genuineness of replies in relation to checks returned with payment refused.

When there is a question as to whether certain handwriting is that of a certain person, as when the question is whether a signature appearing on a check or on an admissible photographic copy thereof is in fact the signature of the person who purportedly signed the check, any proved—by evidence raising an inference of genuineness—or admitted specimen of the person's handwriting is admissible in evidence for the purpose of comparison by witnesses or the court to prove that the handwriting in question is or is not the person's handwriting. Also, when there is a question as to whether certain handwriting is that of a certain person, the opinion of a handwriting expert (see 138*e*), or of anyone acquainted with the person's handwriting, to the effect that the handwriting is or is not that of the person is admissible in evidence. Anyone who, under circumstances which enable him to form a belief as to the character of a person's handwriting, has seen another write by hand or has seen handwriting which can reasonably be believed to be that of a person may be considered to be acquainted with the handwriting of that person. Examples of handwriting which can reasonably be believed to be that of a certain person are handwriting purporting to be his apparently written in the ordinary course of business and handwriting purporting to be his in a letter apparently written by him in reply to a letter shown to have been mailed to him. A failure by a party to object to the reception in evidence of a writing on the ground that the genuineness of a certain signature or certain other handwriting appearing thereon has not been shown

may be regarded as a waiver by him of that objection if he does not contest the general authenticity of the writing.

If a part of a writing appears to have been altered after the execution of the writing, neither that part nor any part dependent for its authenticity upon the altered part may be received in evidence as being genuine unless the alteration is satisfactorily explained or authentication has been waived.

Upon cross-examination of a witness who has testified concerning his opinion as to whether certain handwriting was that of a certain person, unidentified specimens of the handwriting or purported handwriting of that person or of others may be used for the purpose of testing the credibility of the opinion of the witness, whether or not the unidentified specimens had previously been authenticated in the case or would otherwise be admissible if authenticated. After the specimens have been so used, they may be authenticated and introduced by either party if this has not already been done in some other connection. In the interest of fairness and orderly procedure, the military judge or the president of a special court-martial without a military judge may impose reasonable conditions upon the use of this method of testing the credibility of the opinion of the handwriting witness, as by requiring that the witness be given adequate time and opportunity to study the unidentified handwriting specimens.

(2) *Authentication of official records.* (*a*) *General provisions and definitions.* Like any other writing, an official record (144*b*) or copy thereof must be properly authenticated if it is to be introduced in evidence as being genuine, although authentication can be waived by a failure to object on the ground of lack of proof of authenticity to the reception in evidence of the writing. Official records kept in official custody are ordinarily evidenced by properly authenticated copies. Original official records may be authenticated in the same manner as copies, except that if an attesting certificate is used for this purpose it will indicate that the attested writing is an original. See also the fourth paragraph of 143*b*(2)(*f*). When used in connection with a copy of an official record, an "attesting certificate" is a certificate or statement, signed by the custodian of the record or his deputy or assistant, which in any form indicates that the writing to which the certificate or statement refers is a true copy of the record (or an accurate "translation" of a machine, electronic, or coded record) and that the signer of the certificate or statement is acting in an official capacity as the person having custody of the record or as his deputy or assistant. See, however, the last paragraph of 143*b*(2)(*e*) as to the signer and form of a certificate or statement attesting a copy of a foreign official record. An "authenticating certificate" is a certificate or written statement which in any manner indicates that the signature on the attesting certificate is genuine. When an authenticating certificate or any certificate or written statement in the chain of authentication of an official record or copy thereof indicates the genuineness of the *official position* of the purported signer of another certificate or statement in the chain, such an indication may be inferred to be also an indication that the *signature* on that other certificate or statement is genuine.

A custodian of an official record is a person who has official custody thereof, that is, a person who is the official keeper of the record, as distinguished from a person who has mere manual possession of the record for official or other purposes. If a certificate or statement in the previously described form of an attesting certificate is itself properly authenticated, this official custody in the person indicated in the attestation as having custody of the record, and

the status as his deputy or assistant of one who has signed the attestation in that capacity, may be inferred. Some attesting certificates may be authenticated by taking judicial notice of the signature thereto. Others require authentication by a proper and judicially noticeable seal, by an accompanying certificate or statement in the chain of authentication having a proper and judicially noticeable signature or seal, or by other proof of genuineness, according to whatever procedure is adequate to authenticate the official record or copy thereof attested and, consequently, the attestation. See the following provisions of 143*b*(2) and see 147*a* (Judicial notice). An authenticating certificate, or any certificate or written statement in the chain of authentication, may be similarly authenticated.

(*b*) *Military records.* A copy of an official record of the Department of Defense or any department, agency, bureau, branch, force, command, or unit thereunder, of the Coast Guard or National Guard or any of their subordinate commands or units, or of a military agency or unit of an ally of the United States may be authenticated by the seal, inked stamp, or other identification mark of that department, agency, bureau, branch, force, command, or unit or by an attesting certificate. Thus, an attesting certificate reading, "A true (extract) copy of the original in the custody of the [Adjutant General, First Infantry Division] [Director of Administrative Services, First Air Division] [Commanding Officer (USS) (USCG_____) _____]: /s/ John Smith, [Major (Asst Adjutant General, First Infantry Division) (Director of Administrative Services, First Air Division)] [LCDR, (U.S. Navy) (U.S. Coast Guard), Personnel Officer, (USS) (USCG_____) _____]," may be considered to be an authentication of a copy of an official record in the custody of the custodian mentioned in the attesting certificate.

(*c*) *United States records.* A copy of an official record of the United States, of a Commonwealth or possession thereof or any political subdivision of that Commonwealth or possession, or of the District of Columbia may be authenticated by:

Any indication under the seal of the United States, the seal of the Commonwealth or possession or political subdivision thereof in which the record is kept, or the seal of the District of Columbia as to records kept therein that the writing is a true copy (or an accurate "translation" of a machine, electronic, or coded record);

Any authentication provided for by any law of the United States, including rules of criminal procedure for the United States district courts made pursuant thereto, or by any law of the Commonwealth or possession or political subdivision thereof in which the record is kept or of the District of Columbia as to records kept under its authority;

An attesting certificate, without further authentication, as to records kept under the authority of any department, bureau, agency, office, or court of the Federal government of the United States;

An attesting certificate, under the seal of the department, bureau, agency, office, or court in which the record is kept or under the seal of office of an official or office having a seal of office and having supervision over the department, bureau, agency, or office in which the record is kept, or an attesting certificate, accompanied by an authenticating certificate under the seal of office of an official having a seal of office and having supervision

over the department, bureau, agency, or office in which the record is kept, and signed by such an official or his deputy or assistant;

An attesting certificate, under the seal of a court, or the seal of a judge or clerk of a court, existing by authority of a law of the United States and located in the district, Commonwealth, or possession in which the record is kept or existing by authority of the Commonwealth or possession or political subdivision thereof in which the record is kept or of the District of Columbia as to records kept therein, or an attesting certificate, accompanied by an authenticating certificate signed by a judge or clerk, including a deputy or assistant clerk, of such a court under the seal of the court or the seal of a judge or clerk thereof; or

An attesting certificate, accompanied by an authenticating certificate under the seal of office of an official having a seal of office and having duties by authority of the United States in the district, Commonwealth, or possession in which the record is kept, or having duties in, and by authority of, the Commonwealth or possession or political subdivision thereof in which the record is kept, or having duties in, and by authority of, the District of Columbia as to records kept therein, and signed by such an official or his deputy or assistant.

The uncapitalized word "district" as used above means a judicial district of the United States. As used with reference to possessions of the United States in this subparagraph (143*b*(2)(*c*)) and in 147*a* (Judicial notice), the word "possession" includes, in addition to those possessions of the United States designated as such by law, any trust territory administered by the United States and any territory or area administered by the United States by treaty, executive agreement, or act of Congress, whether or not sovereignty thereover exists in the United States.

A copy of an official record of a former Territory or possession of the United States or a political subdivision of such a former Territory or possession may be authenticated as though the record was originally an official record of the governmental unit having custody thereof at the time of authentication.

(*d*) *State records.* A copy of an official record of a State of the United States or of a political subdivision of a State may be authenticated by:

Any indication under the seal of the State or political subdivision thereof in which the record is kept that the writing is a true copy (or an accurate "translation" of a machine, electronic, or coded record);

Any authentication provided for by the law of the State or political subdivision thereof in which the record is kept, or by any law of the United States, including rules of criminal procedure for the United States district courts made pursuant thereto;

An attesting certificate, under the seal of a court, or the seal of a judge or clerk of a court, existing by authority of the State or political subdivision thereof in which the record is kept, or an attesting certificate, accompanied by an authenticating certificate signed by a judge or clerk, including a deputy or assistant clerk, of such a court under the seal of the court or the seal of a judge or clerk thereof; or

An attesting certificate, accompanied by an authenticating certificate under the seal of office of an official having a seal of office and having duties in, and by authority of, the State or political subdivision thereof in which the record is kept, and signed by such an official or his deputy or assistant.

(*e*) *Foreign records.* A copy of an official record of a foreign country or political subdivision thereof may be authenticated by:

Any indication under the great seal (seal of state) of the foreign country in which the record is kept that the writing is a true copy (or an accurate "translation" of a machine, electronic, or coded record);

Any authentication provided for by the law of the foreign country or political subdivision thereof in which the record is kept, or by any law of the United States, including rules of criminal procedure for the United States district courts made pursuant thereto and treaties to which the United States is a party;

An attesting certificate, accompanied by an authenticating certificate signed by a United States secretary of embassy or legation, consul general, consul, vice consul, consular agent, or foreign service officer or by a diplomatic or consular official of the foreign country assigned or accredited to or recognized by the United States; or

An attesting certificate, accompanied by a certificate or statement signed by a United States secretary of embassy or legation, consul general, consul, vice consul, consular agent, or foreign service officer, or by a diplomatic or consular official of the foreign country assigned or accredited to or recognized by the United States, which indicates the genuineness of the signature of any foreign official whose certificate or written statement indicating genuineness of signature relates to the attestation or is in a chain of certificates or written statements indicating genuineness of signature relating to the attestation.

As to the last two methods of authenticating a copy of a foreign official record set forth above, if armed forces of the United States or an ally thereof are stationed in, passing through, or occupying the foreign country or place in which the record is kept, the certificate or statement furnishing the authentication of a copy of the record may be signed by an officer commanding or administering any unit or agency of those armed forces or by his deputy or assistant or any judge advocate, law specialist, or legal officer or advisor serving under him, instead of by a diplomatic or consular official. Such an authentication is final if made by a commissioned officer of the United States. If the person providing the authentication is not a commissioned officer of the armed forces of the United States, final authentication shall be furnished by a certificate or statement signed by a commissioned officer of the United States indicating that the signature on the authenticating certificate is genuine.

If a foreign certificate or statement in the chain of authentication of a copy of a foreign official record is under the seal of a foreign official or agency, the seal, instead of the signature on the certificate or statement, may be indicated as being genuine by the next certificate or statement in the chain.

A certificate or statement attesting a copy of a foreign official record may be signed by the custodian of the record or his deputy or assistant or by any person authorized in the place where the record is kept to attest a copy of the record, and the attestation may be in any form authorized in that place. If a certificate or statement attesting a copy of a foreign official record is itself properly authenticated, it may be inferred that the attestation and the form thereof are authorized in the place where the record is kept.

(*f*) *Miscellaneous.* Copies of foreign, or other, official records and their attesting, authenticating, and other accompanying certificates or state-

ments, when written in a language other than English, may be translated through the testimony of one having knowledge of the language concerned. Also, a written translation accompanying an attesting, authenticating, or other certificate or written statement in the chain of authentication is as admissible as the writing translated and may in the absence of an objection to its accuracy be inferred to be an accurate translation.

In addition to the methods of authentication set forth in the foregoing provisions of 143*b*(2), 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 writing in question is an official record or was obtained by him, as a record, from the proper official custody or that the writing is a correct copy of such a record or of a record thus shown to be an official record by the testimony of another, as the case may be. Also, if an attesting certificate, or any certificate or written statement in the chain of authentication, is directly authenticated by admissible testimony or in any other manner, it need not be accompanied by whatever additional certificates or statements might otherwise be required by the foregoing provisions of 143*b*(2). Thus, if an attesting certificate, or any certificate or statement in the chain of authentication, is apparently signed by a proper person or is apparently under a proper seal and that signature or seal is shown to be genuine by admissible testimony, the certificate or statement may be considered to be an authentication of the official record, or copy thereof, to which it pertains, provided that when the certificate or statement is not an attesting certificate the intervening written authentication meets applicable requirements.

If an original official record is subscribed by a judicially noticeable signature or is under a judicially noticeable seal or symbol (see 147*a*), that original (or an admissible photographic or other facsimile thereof, for example, a facsimile itself admissible as an official record) may be authenticated by taking judicial notice of the signature, seal, or symbol.

A certificate or statement that no record or entry of a specified tenor was found to exist in certain official records (143*a*(2)(*g*)) may be authenticated in the same manner as a certificate or statement attesting a copy of a record taken from those official records. The inferences applicable to a properly authenticated attesting certificate (see the last paragraphs of 143*b*(2)(*a*) and (*e*)) are similarly applicable to a properly authenticated certificate or statement of the nonexistence of an official record or entry. A certificate or statement of the head of an executive or military department or independent governmental agency, or his deputy or assistant, setting forth a summary of an official record the text or informational source of which should not be disclosed (143*a*(2)(*d*)) may be authenticated in the same manner as a certificate or statement attesting a copy of that record. A written summary of a foreign official record (143*a*(2)(*d*)) may be authenticated in the same manner as a copy of the record, although an attesting certificate or other identification in this case will refer to a summary instead of a copy. A document that, on its face, appears to be an official publication of an official record is admissible as being in fact an official publication of the record unless it is shown to lack that character.

(3) *Authentication of banking entries.* A business entry, or copy thereof, of a business regularly but not necessarily exclusively engaged in public banking activities may, if the entry relates to these activities, be authenticated by a certificate or statement, signed under oath before a notary public by the person

in charge of the business entry or his assistant, which in any form indicates that the writing to which the certificate or statement refers is the entry itself or a true copy thereof (or an accurate "translation" of a machine, electronic, or coded entry), as the case may be, that the entry was made as a memorandum or record in the regular course of the business and relates to its public banking activities, and that the signer is the person in charge of the entry or his assistant, accompanied by a statement signed by the notary, under the seal of his office, which indicates that the certificate or statement was signed under oath before him. A certificate or statement that after diligent search no record or entry of a specified tenor was found to exist in certain entries of this kind (see 143*a*(2)(*h*)) also may be authenticated by an accompanying statement signed by a notary public, under the seal of his office, which indicates that the certificate or statement was signed under oath before him. When a certificate or statement of either of these two types is notarized as provided above, it may be inferred that a person who has signed it as the person in charge of the business entry or entries referred to therein, or as his assistant, in fact occupies that status.

A business entry, or copy thereof, of the kind mentioned above may also be authenticated in the same manner as any business entry. See 144*c*.

c. Certain procedural matters relating to documentary evidence. See 53*g*, 54*d*, and 57*g*. Before a ruling is made upon an objection to the reception in evidence of a writing, the objecting party, on request, will be allowed to support the objection by argument, the presentation of evidence, and proper cross-examination of witnesses who have testified concerning the writing.

A writing does not become admissible against a party merely because he requested its production or inspected it.

d. Definition of "writing." The word "writing" as used in this chapter (XXVII), means every method of recording data upon any medium. For example, it includes handwriting, typewriting or other machine writing, printing, and all documentary, pictorial, photographic, chemical, mechanical, or electronic recordings or representations of facts, events, acts, transactions, communications, places, ideas, or other occurrences or things, whether expressed by words, letters, numbers, pictures, signs, symbols, marks, or chemical, mechanical, or electronic media, including all types of machine, electronic, or coded records, memoranda, or entries.

144. OFFICIAL WRITINGS; OFFICIAL RECORDS; BUSINESS ENTRIES; LIMITATIONS AS TO THE ADMISSIBILITY OF OFFICIAL RECORDS AND BUSINESS ENTRIES; MAPS, PHOTOGRAPHS, SKETCHES, CHARTS, AND FINGERPRINTS; BUSINESS, PROFESSIONAL, OR PUBLIC LISTS AND DIRECTORIES. ***a. Official writings.*** The fact that a writing is an official writing does not in itself make the writing admissible in evidence for the purpose of proving the truth of the matters stated therein. An official writing may be admitted in evidence for this purpose only when it comes within an exception to the hearsay rule.

b. Official records. A writing made as a record of a fact or event, whether the writing is in a regular series of records or consists of a report, finding, or certificate, is admissible as evidence of the fact or event if it was made by any person within the scope of his official duties and those duties included a duty to

know, or to ascertain through appropriate and trustworthy channels of information, the truth of the fact or event, and to record such fact or event. It may be inferred that:

A person who had these duties performed them properly; and

A foreign or domestic record of a fact or event purporting or indicated to have been officially made or kept meets all the above requirements for admissibility, if the record is properly authenticated or authentication is waived, in accordance with 143*b*(2). An official duty is any duty included in a military or civilian governmental function.

Examples of military records containing entries which may be admissible under this exception to the hearsay rule are enlistment papers, physical examination papers, outline-figure and fingerprint cards, morning reports, service records, officer and enlisted qualification records, records of court-martial convictions, logs, unit personnel diaries, individual equipment records, guard reports, daily strength records of prisoners, and rosters of prisoners.

If admissible under this exception, an official record is not subject to objection on the ground that it was copied or compiled from notes, memoranda, or other writings or from other official records, nor is it otherwise subject to objection on the ground that it is secondary evidence. See 143*a*(2) as to those copies and summaries of official records which are not themselves admissible as official records but are admissible under an exception to the best evidence rule.

If a machine, electronic, or coded official record is of a kind which, without skilled interpretation, may be unintelligible or subject to misunderstanding, its contents may be proved and its meaning explained by the testimony of a witness sufficiently familiar with the system used in producing the record to be able to interpret the record accurately, or the contents of the record may be proved by a machine "translation" authenticated by the testimony of a witness familiar with the system used in producing the "translation." Also, written "translations" of machine, electronic, or coded official records, whether made by machine or by a person and however properly authenticated, are admissible if they are otherwise within an exception to the best evidence rule (see 143*a*(2)(*c*)) or if they were themselves made as official records.

c. Business entries. Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event is admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business and if it was the regular course of that business to make the 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 these circumstances will not affect its admissibility. The term "business," as used with respect to business entries, includes a business, profession, occupation, or calling of any kind.

If in the regular course of business or activity any business, institution, department or agency of government, or member of a profession or calling has kept or recorded any memorandum, writing, entry, print, representation, or combination thereof of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, microcard, minia-

ture photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law or regulation. Such a reproduction, when satisfactorily identified, is as admissible in evidence as the original itself whether the original is in existence or not and an enlargement or facsimile of the reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under the direction of the court. Also, whether or not the reproduction is available, a properly authenticated copy of the reproduction is admissible in evidence subject to the same conditions of admissibility that would apply to a properly authenticated copy of the original itself. See 143*a*(2) (*c*) and (*e*). These rules relating to the destruction of originals and to the admissibility of reproductions and facsimiles, enlargements, and authenticated copies of reproductions, will not preclude admission of the originals or exclude from evidence any writing or copy thereof which is otherwise admissible under the rules of evidence.

A writing purporting to be a memorandum or record of an act, transaction, occurrence, or event may be authenticated as a business entry by proof that it came through a reliable source from a business whose regular course it was to make a memorandum or record of the act, transaction, occurrence, or event, for it may be inferred from this proof that the writing was in fact made as a memorandum or record in the regular course of that business. Also, it is not necessary that a business entry be authenticated by the person who made it or that an authenticating witness have personal knowledge that the entry was correct. Thus, if the holder of a check, draft, or other order for the payment of money upon a bank or other depository, or a person or organization acting on behalf of the holder, presents the instrument through regular banking channels for payment, collection, or deposit and the instrument is returned to the holder or his agent purportedly through regular banking channels with a notation in the form of a stamp, ticket, or other writing either on the instrument itself or accompanying it, purportedly made by the drawee or presenting bank or other depository or clearinghouse, indicating that payment of the instrument has been refused by the drawee because of insufficient funds of the maker or drawer in the drawee's possession or control or for other reasons, proof of the above facts will support an inference of the authenticity of the notation as having been made as a memorandum or record in the regular course of a banking business. The notation if thus authenticated, is admissible under the business entry exception to the hearsay rule as evidence that payment of the instrument was refused by the drawee for the reasons indicated in the notation, and this is so whether or not a similar notation also made as a memorandum or record was kept in the drawee or presenting bank or other depository or clearinghouse. See also 143*b*(3) regarding the authentication of banking entries.

If admissible under the business entry exception to the hearsay rule, a business entry is not subject to objection on the ground that it was copied or compiled from notes, memoranda, or other writings or from other business entries, nor is it otherwise subject to objection on the ground that it is secondary evidence. However, unless they are themselves writings made as business entries or are admissible under an exception to the best evidence rule, copies and written compilations of business entries are subject to objection on the ground that they are secondary evidence. The reproductions of business entries

mentioned as being admissible in the second paragraph of this subparagraph (144*c*) are examples of copies which themselves are made as business entries. On the other hand, the admissibility of enlargements, facsimilies, or authenticated copies of reproductions provided for in that paragraph constitutes an exception to the best evidence rule. See 143*a* as to the best evidence rule and its exceptions in general, and see 145*a* as to the use of copies of business entries in depositions.

If a machine, electronic, or coded business entry is of a kind which, without skilled interpretation, may be unintelligible or subject to misunderstanding, its contents may be proved and its meaning explained by the testimony of a witness sufficiently familiar with the system used in producing the entry to be able to interpret the entry accurately, or the contents of the entry may be proved by a machine "translation" authenticated by the testimony of a witness familiar with the system used in producing the "translation." Also, written "translations" of machine, electronic, or coded business entries, whether made by machine or by a person and however properly authenticated, are admissible if they are otherwise within an exception to the best evidence rule (see 143*a*(2)(*e*)) or if they were themselves made as business entries.

A memorandum or record which satisfies the requirements of the business entry exception to the hearsay rule is admissible under that exception regardless of whether it was made in a private or governmental capacity.

d. Limitations as to the 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." The word "event" may be considered to include the words "act," "transaction," and "occurrence," and to be included within the meaning of the word "fact." Records or entries of "opinion" are not admissible under either the official record or the business entry exception to the hearsay rule. However, it is often difficult as a practical matter to draw the line between what is opinion and what is 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 in the former, at least to the extent of allowing a record of them to be admitted in evidence without incurring an appreciable risk of doing an injustice because of lack of opportunity to cross-examine. For example, if otherwise admissible as official records or business entries, entries in a physician's report setting forth his diagnosis of an illness of a kind which can readily be diagnosed by the medical profession, and in an autopsy report setting forth the opinion of the pathologist as to the physical cause of death, as when he concludes that death was caused by a certain disease, by a certain poison, or by a gunshot wound, are admissible in evidence to prove the illness and the physical cause of death, respectively. On the other hand, entries in a report of a board of medical officers (psychiatrists) as to the mental condition of a certain person are not admissible to prove that mental condition, for a diagnosis of a person's mental condition involves opinion to such a degree as to require that those making the diagnosis be subject to cross-examination. See 122*c*.

Under the official record exception to the hearsay rule, the maker of the record must not only have acted within the scope of his official duties in recording the fact or event but must, in addition, have had an official duty to know or ascertain the truth of that fact or event. A somewhat correlative principle applies under the business entry exception to the hearsay rule. It is not sufficient that an entry was made in a regular course of conduct which had some relationship to business if it was not made in the regular course of a business. "Regular course" of business must find meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business. Because of these limitations and the opinion limitation, a pathologist's entry in an autopsy report as to whether the death was caused by homicide, accident, or suicide, as distinguished from his entry as to the physical cause of death, is not admissible under either the official record or the business entry exception to the hearsay rule. The above-mentioned limitations apply in such a case because any official duty the pathologist might have to make an entry as to his finding in this respect would not fix upon him the additional official duty of ascertaining the truth of circumstances surrounding the occurrence of death reported to him by others but not observed by him during the course of his examination, and it is obvious that it is not the regular course of the business of a pathologist to make such an entry based on that kind of data; and if the entry was based not on reported matters but on an examination of the body by the pathologist, the opinion thus expressed by him would be of a kind which should be open to the test of cross-examination.

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 disciplinary or legal action, as a record of, or during the course of an investigation into, alleged unlawful or improper conduct. Thus, a report of a military policeman concerning his investigation of an offense and the statements of witnesses accompanying the report are not admissible under either of these exceptions as evidence of the truth of the facts stated therein, although an accompanying statement of the accused may be admissible if it constitutes a voluntary confession or admission of the accused contained in that statement (see 140*a*) and an accompanying statement of a person who later testifies may be used to show any inconsistent statement appearing therein (see 153*b*(2)(*c*)). With the exceptions indicated below concerning the use of records and reports of preliminary judicial hearings, the same considerations apply to a record or report of an investigation conducted under Article 32. 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 any unlawful conduct, his entries in the autopsy report as to the identification of the person 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 these entries may be admissible under either the official record or the business entry exception to the hearsay rule. Official record entries in morning reports, unit military strength balance reports, logs, unit personnel diaries, and service records as to absence without leave or the circumstances of return to military control, and in the above records and in guard reports, daily strength records of prisoners, and rosters of prisoners as to escape from confinement, are not inadmissible because of this limitation, for these entries are

made principally for the purpose of reflecting day to day events as they affect strength in personnel and other administrative matters not within the limitation. The limitation does not prohibit the use of depositions to prove the deposition testimony of the deponent under Article 49, the use of records and reports of trials or preliminary judicial hearings, such as an investigation conducted under Article 32, to prove former testimony under the former testimony exception to the hearsay rule, or the use of records of courts of inquiry as contemplated by Article 50. See 145. Also, the limitation does not prohibit the use of depositions, records and reports of trials or preliminary judicial hearings, and records and reports of courts of inquiry to prove statements recorded or reported therein which, if proved by testimony given at the trial, would be admissible under the rules of evidence in general (see the last paragraphs of 145 *a*, *b*, and *c*), nor does the limitation prohibit the use of records of conviction or imposition of nonjudicial punishment as proof of the conviction or imposition of nonjudicial punishment when this proof is otherwise admissible.

e. Maps, photographs, sketches, charts, and fingerprints. Maps, photographs, x-rays, sketches, and similar projections of localities, objects, persons, and other matters are admissible when verified by any person, whether or not he made or took them, who is sufficiently familiar with the locality, object, person, or other thing thereby represented or pictured to be able from his own personal knowledge or observation to state that they faithfully represent the actual appearance of the subject matter in question. Such writings are also admissible when they come within either the official record or business entry exception to the hearsay rule. See 144*b* and 144*c*. See 143*a*, however, as to the admissibility of a photograph or other projection of a writing for the purpose of proving the contents of the writing.

In cases involving complicated mathematical computations or compilations, charts showing these computations or compilations and the mathematical results thereof, authenticated by a witness qualified to understand and interpret the computations or compilations and prepared from data contained in writings and testimony properly received in evidence, are admissible at the discretion of the military judge or president of a special court-martial without a military judge. The charts should not contain conclusionary captions or statements other than those indicating the mathematical results of the computations or compilations, nor should the charts be in the possession of, or observable by, the members of the court during their deliberations in closed session. Charts may also be used in connection with the summarizations of numerous or bulky writings mentioned in 143*a*(2)(*b*).

When a witness points or otherwise refers to certain parts of a map, photograph, sketch, or chart, the military judge, or the president of a special court-martial without a military judge, should require counsel examining the witness to have the witness mark the exhibit in some fashion and identify the mark in his testimony so that reviewing authorities may obtain a clear comprehension of the testimony of the witness. If a large map, photograph, sketch, or chart is being used so that it can be observed by all parties to the trial, the military judge, or the president of a special court-martial without a military judge, should require that it, or a copy complete with all marks placed upon the original, be attached to the record of trial as an exhibit. A blackboard should not be used unless it can be photographed or reproduced in some manner.

Fingerprints are admissible when they come within either the official record or the business entry exception to the hearsay rule or are in any manner properly verified, but evidence concerning the comparison of fingerprints must come from persons skilled in comparing fingerprints.

f. Business, professional, or public lists and directories. A list, register, directory, catalogue, or other published compilation intended for use in a line of business or a profession is admissible as an exception to the hearsay rule to prove the truth of any matter appearing therein, or the nonexistence of any matter not appearing therein but which could reasonably be expected to have been included had it existed, if it appears that the compilation is generally used and relied upon in the line of business or profession as being accurate. Also, a list, register, or directory intended for use by the public at large, such as a telephone directory, is likewise admissible if it is common knowledge that the compilation is generally regarded by the public as being accurate. If, however, it is shown that a compilation intended for business, professional, or public use is not in fact generally accurate, it is not admissible under these rules.

145. DEPOSITIONS; FORMER TESTIMONY; RECORDS OF COURTS OF INQUIRY. ***a. Depositions.*** See Article 49. For procedure in taking depositions, see 117. To satisfy the conditions of admissibility set forth in Article 49(d)(2), it must appear that the witness, for one of the specific causes enumerated or for other reasonable cause, in fact is unable or refuses to appear and testify in person. For example, if nonamenability to process is the only ground advanced for the admissibility of a deposition, it must appear, either through a refusal of the witness to comply with a request for his attendance or otherwise, that the witness is in fact unavailable. The condition set forth in Article 49(d)(3) cannot be considered as satisfied unless it appears that there has been an exercise of due diligence in attempting to locate the witness. Although not specifically so indicated in Article 49, a deposition is inadmissible against an accused if he was not afforded an opportunity to be present with his counsel at the taking thereof (see 117*b*(2)), but such a defect may be waived.

A case referred to a special court-martial for trial under 15*a*(1) is a case "not capital" within the meaning of Article 49. Under Article 49(f), a case in which the death penalty is authorized by the code but is not mandatory for an offense of the kind charged is not capital when the convening authority has directed that the case be treated as not capital. Upon a rehearing or new or other trial thereof, a case in which the death penalty is imposable under the code for an offense of the kind charged is not capital within the meaning of Article 49 if the legal sentence upon a previous hearing or trial of the case, as ultimately reduced by the convening or other proper authority when any such action has been taken, was other than death. Although an offense is punishable by death under the article denouncing it, the offense is not legally so punishable, and therefore is not capital, if the applicable limit of punishment prescribed by the President under Article 56 is less than death. In a trial upon two or more specifications, the proceedings as to each constitute a separate "case."

Testimony taken by deposition may be introduced by the defense in capital cases if otherwise admissible. If the defense calls for testimony to be taken by deposition in a capital case, the deponent may be cross-examined by written interrogatories, or otherwise, in the same manner as a deponent in a case not

capital. With the express consent of the defense made or presented in court, but not otherwise, competent deposition testimony not for the defense may be introduced in a capital case. When otherwise admissible, deposition testimony not for the defense may be admitted without the consent of the defense in a case not capital tried with a capital case if the testimony is not relevant to the capital case or, when it is relevant to the capital case, if the cases do not involve the same criminal transaction and the military judge instructs the court in open session that the testimony is not to be considered as to the capital case.

If only part of a deposition is offered in evidence by a party, he should, at the request of the opposite party, be required to offer all of it that is relevant to the part offered. This should be done even though the prosecution may seek to use it to compel presentation of a deposition relevant to a capital case. If the party at whose instance a deposition has been taken does not offer it or offers only a part of it, any other party may offer the deposition or the parts not offered, except that (1) the prosecution may not thus offer, in a capital case, a deposition or part thereof without the express consent of the defense made or presented in court, and (2) in no case may a deposition or part thereof be used against a party, whether or not he initiated the taking of the deposition, who raises a valid objection to its use against him. For example, when the objecting party has introduced no part of the document as a deposition, no part may then be admitted over objection if it fails to meet any of the requirements of Article 49(d)(1), (2), or (3) or if that party did not have notice of its taking.

A deposition will ordinarily be read to the court by the side on whose behalf it is being offered. At the reading, objections may be made to the introduction of the evidence which it contains in the same way that they would be made if the evidence was offered in the usual manner. If the ground of an objection to the use of a deposition or a part thereof is one which might have been obviated or removed, either in connection with the deposition itself or by retaking the deposition, if presented at the time interrogatories were submitted to the objecting party or to the military judge or the president of a special court-martial without a military judge or at the time the deposition was taken, a failure to have made the objection at that time is a waiver of the objection. It may be shown that an objection actually was made even if the objection is not noted in the body of the deposition, but in the absence of such a showing it may be assumed that no objections were made other than those noted. If the military judge or the president of a special court-martial without a military judge has ruled on an objection at the time interrogatories were submitted for acceptance, the objection shall again be considered at the time the deposition is read, if a request to do so is then made, without regard to the 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 put to a deponent upon written interrogatories. Also, when 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, marked by the person taking the deposition in such a manner as to indicate that it is the copy identified by the witness, will accompany and be part of the deposition and shall be admissible in evidence equally with the original.

A failure to object to the introduction of a deposition on the ground that it was not taken on reasonable notice or before a proper officer, on the ground that it does not appear that the deponent is unavailable as a witness, or on the ground that the accused was not afforded in connection with the taking of the deposition an opportunity to be adequately represented by counsel and to confront and cross-examine the deponent may be regarded as a waiver of that objection.

When it is stated that a deposition or a part thereof is "admissible" or may be "introduced" in evidence, this means merely that, in the terms of Article 49 (d), the document or an appropriate part thereof "may be read in evidence." Except for inspection of the document by the president of a special court-martial without a military judge for the purpose of determining the admissibility of its contents, the document itself is not shown to the members of the court. However, after having been read to the court, the document will be marked as an appellate exhibit and included in the record.

The limitations upon the use of deposition testimony mentioned above and in Article 49 do not apply with respect to statements of deponents which are admissible under some rule of evidence other than that authorizing the introduction of depositions. Any such statement, for example, a voluntary confession or admission of the accused made while a deponent or an inconsistent statement of a witness similarly made, may be proved by the deposition in which it appears, if that document is properly receivable as an official record of the statement or otherwise as a writing, or by other competent evidence. See, however, 141 for rules applying to proof of statements made through an interpreter.

b. Former testimony. In any trial by court-martial, including a rehearing or new trial, the testimony of a witness given in a civil or military court at a former trial of the accused in which the issues were substantially the same, except a former trial shown by the objecting party to be void because of lack of jurisdiction as to the proceedings, may when properly proved and otherwise admissible, be received in evidence to the same effect that it could be received if the witness were given again to give the testimony in person at the present trial, provided that the witness refuses at the trial to testify concerning the matter in question or it appears:

That the witness is dead, insane, or too ill or infirm to attend the trial;

That the witness is nonamenable to process and not otherwise available to testify at the trial;

That despite the exercise of due diligence in trying to locate him the witness cannot be found; or

That due to military necessity or other reasonable cause the witness is unable to attend the trial.

The prosecution, however, may not introduce the former testimony of a witness unless, in addition to the above requirements having been met, the accused was afforded at the former trial an opportunity to be adequately represented by counsel and to confront and cross-examine the witness and unless, in a capital case, it appears that the witness is dead or insane or is nonamenable to process and not otherwise available to testify at the trial. Cases considered "not capital" in 145*a* are also considered "not capital" with respect to the admissibility of former testimony. If refusal of a witness to testify is the ground upon which

his former testimony is to be introduced, his former testimony will be admissible only insofar as it relates to the matters concerning which he has refused to testify. Former testimony given at a preliminary judicial hearing, such as an investigation conducted under Article 32, of an allegation against the accused is admissible under the same conditions as testimony given at a former trial of the accused.

A failure to object to the introduction of testimony given at a former trial or preliminary judicial hearing of the accused on the ground that the issues in the former trial or hearing were not substantially the same, on the ground that the accused was not afforded at the former trial or hearing an opportunity to be adequately represented by counsel and to confront and cross-examine the witness or on the ground that it does not appear that the witness is now unavailable may be regarded as a waiver of that objection.

When former testimony of an accused is sought to be admitted or used to cure the error arising from the erroneous use of an inadmissible pretrial statement the Government must affirmatively show that the prosecution's use of the inadmissible statement did not induce the accused's in court testimony. The Government must affirmatively demonstrate the lack of causal relationship between the in court testimony and the inadmissible pretrial statement, and must affirmatively dispel the inference that no testimonial utterance would have been made had not the prosecution introduced the illegally obtained statement.

The testimony of a witness who has testified at a former trial or preliminary judicial hearing may be proved by a record of the testimony in an official or other admissible record of the former trial or hearing, by an admissible copy of such a record of the testimony, by an official or other admissible stenographic, mechanical, or electronic report of the testimony, or—whether or not any record or report of the testimony is available—by a person who heard the witness give the testimony and who remembers all of it, or the substance of all of it, that is relevant to the topic in question. Although a record or report of former testimony is not inadmissible to prove that testimony merely because of being nonverbatim, a record or report of former testimony of a witness which is not complete as to that testimony or its substance, whether or not an otherwise verbatim record or report, is, because of its incompleteness, inadmissible to prove the testimony unless the omissions are shown to be inconsequential or irrelevant to the purposes for which the testimony is offered. See 141 as to proving former testimony given through an interpreter. If only part of the former testimony of a witness is offered in evidence by a party, he should, at the request of the opposite party, be required to offer all of the former testimony of the witness that is relevant to the part offered.

If the former testimony of a witness is to be proved by the record of the former trial or hearing or other writing in which it appears, the testimony should merely be read in evidence from the writing. Except for inspection of the writing by the president of a special court-martial without a military judge for the purpose of determining the admissibility of its contents, the writing itself is not shown to the members of the court. See also 81*c*. However, the writing or the pertinent parts thereof will be properly included in the record as an appellate exhibit.

If otherwise admissible under 145*a* and Article 49, a deposition taken for use or used at a former trial by court-martial is admissible in a subsequent trial of the same person on the same issues.

The limitations upon the use of former testimony mentioned above do not apply with respect to statements made at a former trial or preliminary judicial hearing, or at any trial or hearing, which are admissible under some rule of evidence other than that authorizing the introduction of former testimony. Any such statement, for example, a voluntary confession or admission of the accused or an inconsistent statement of a witness, may be proved by any competent evidence, for instance, by the testimony of a person who heard the statement being made or by a record or report of the statement in an official or other admissible record or report of a trial or preliminary judicial hearing at which it was made. However, a statement made by an accused at a trial in connection with an inquiry into the providence of his plea of guilty or in connection with the sentencing proceedings is not, in a subsequent trial of that accused for the same or any other offense, admissible to prove his guilt or to impeach his credibility in regard to his testimony on the issue of guilt or innocence. See 141 for rules applying to proof of statements made through an interpreter. As to the use of former testimony in connection with the sentencing proceedings in a rehearing on the sentence only or in a combined rehearing, see 81*b* (2) and (3).

c. Records of courts of inquiry. See Article 50. The effect of the words "not capital and not extending to the dismissal of a commissioned officer" as used in Article 50 is that if the prosecution uses the record of a court of inquiry to prove part of the allegations in a specification, neither death nor dismissal may be adjudged as a result of a conviction under that specification, but other lawful punishment may be adjudged. The introduction of the record of a court of inquiry by the defense will not affect the punishment which may be adjudged. It may be considered that a person's "oral testimony cannot be obtained" in the sense of Article 50 if the person refuses at the trial to testify concerning the matter in question or if it appears (1) that the person is dead, insane, or too ill or infirm to attend the trial, (2) that he is nonamenable to process and is not otherwise available to testify at the trial, (3) that despite the exercise of due diligence in trying to locate him he cannot be found, or (4) that due to military necessity or other reasonable cause he is unable to attend the trial. A failure to object to the introduction of testimony contained in a record of a court of inquiry on the ground that it does not appear that the oral testimony of the witness cannot be obtained may be regarded as a waiver of that objection. If only part of the testimony of a witness contained in a record of a court of inquiry is offered in evidence by a party, he should be required, at the request of the opposite party, to offer all of the testimony of the witness contained in the record that is relevant to the part offered.

Admissible testimony contained in a record of a court of inquiry is, in the terms of Article 50, "read in evidence." Except for inspection of the record by the president of a special court-martial without a military judge for the purpose of determining the admissibility of its contents, the record itself is not shown to the members of the court. However, after testimony contained in a record of a court of inquiry has been read to the court, a duly authenticated copy of the record or of pertinent parts of the record will be properly marked as an appellate exhibit and included in the record of trial.

The limitations mentioned above and in Article 50 upon the use of testimony contained in a record of a court of inquiry do not apply with respect to statements made before a court of inquiry which are admissible under some

rule of evidence other than that set forth in Article 50. Any such statement, for example, a voluntary confession or admission of the accused or an inconsistent statement of a witness, may be proved by a record or report of the statement in an official or other admissible record or report of the court of inquiry proceedings at which it was made or by other competent evidence. See 141 for rules applying to proof of statements made through an interpreter.

146. MEMORANDA; AFFIDAVITS. ***a. Memoranda.*** Memoranda may be used to enable a witness to supply facts once known by him but now forgotten or only uncertainly or incompletely remembered or to enable a witness to refresh his memory. Memoranda are therefore of two sorts. *First*, if the witness, after having used the memorandum in an attempt to refresh his memory, does not actually remember the facts or events or has only an uncertain or incomplete recollection of them and, accordingly, relies on the recital of the facts or events set forth in the memorandum, as when a witness uses an old diary in this manner, then the witness must be able to state that the memorandum represents his past knowledge possessed at a time when his recollection was reasonably fresh as to the facts or events recorded. It is not necessary that he should himself have made the memorandum if he can state from his present memory that at a time when his recollection was reasonably fresh as to the facts or events recorded he read the memorandum and found it to be correct, or must have done so. If the certainty of the witness that a particular memorandum represents his past recollection rests upon 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 uses the memorandum merely to refresh his present memory or a part of it, then the witness need not have had any previous connection with the memorandum.

Even if not in itself otherwise admissible to prove the truth of the matters stated therein, a memorandum of the first sort may be received in evidence as a record of the past recollection of the witness, and it may be considered to be evidence of the facts or events shown by that past recollection. If it meets the requirements of a memorandum of the first sort, a newspaper account of an incident may be used to establish the past recollection of a witness.

If the memorandum is of the second sort, the party using the memorandum to refresh the memory of the witness may not introduce it in evidence unless it is otherwise admissible. However, the opposite party may introduce it for the purpose of showing that it could not have refreshed the memory of the witness.

A memorandum of either the first or second sort used during the examination of a witness must, upon demand, be shown to the opponent for purposes of inspection and examination of the witness thereon.

See also the last paragraph of 149*c*(1)(*b*).

b. Affidavits. The general rule is that affidavits are not admissible as evidence of the truth of the matters stated therein, for they are hearsay assertions. However, the defense may introduce affidavits, or other written statements, of persons other than the accused concerning the character of the accused. If the defense introduces affidavits or other written statements as to the character of the accused under this subparagraph, the prosecution may, in rebuttal, also

introduce affidavits or other written statements regarding the accused's character. Character evidence of this type may be introduced by the defense or prosecution only if that evidence, aside from the fact of being contained in an affidavit or other written statement, would otherwise be admissible under 138*f*(2). See 75*c* as to the use of affidavits and other written statements in extenuation and mitigation. See also the second paragraph of 137.

147. JUDICIAL NOTICE; DETERMINATION OF FOREIGN LAW. ***a. Judicial notice.*** Certain kinds of matters need not be proved by the formal presentation of evidence, for the existence of these matters may be recognized without formal proof. This recognition is termed judicial notice.

The following are the principal matters of which judicial notice may be taken:

The ordinary divisions of time into years, months, weeks, and other periods; general facts and laws of nature, including their ordinary operations and effects; general facts of history; generally known geographical facts; such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute; such facts as are so generally known, or are of such common notoriety, in the area in which the trial is held that they cannot reasonably be the subject of dispute; and specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of reasonably indisputable accuracy.

The treaties of the United States, and executive agreements between the United States and any State thereof, foreign country, or international organization or agency; and current political or de facto conditions of war and peace.

The laws, and regulations published pursuant thereto, of the United States, of the District of Columbia, and of a State, Commonwealth, or possession of the United States or any political subdivision of such a State, Commonwealth, or possession; the contents of official informational bulletins, manuals, and pamphlets and similar official publications of any agency of the Federal government of the United States; military custom in an armed force of the United States; international law, including the law of war; general maritime law and the law of the air; and the common law.

The political organization and the identity of the principal officials of the United States, of the District of Columbia, and of a State, Commonwealth, or possession of the United States or any political subdivision of such a State, Commonwealth, or possession; the signatures of the principal officials of the Federal government of the United States purportedly written in their respective official capacities; and the signature of a person attesting or otherwise authenticating an official record or copy thereof, or a certificate or statement of the nonexistence of an official record or entry, that is or would be kept under the authority of any department, bureau, agency, office, or court of the Federal government of the United States.

When on a certificate or statement furnishing a final authentication of a foreign official record or copy thereof or of a certificate or statement of the nonexistence of a foreign official record or entry, the signature of a United States secretary of embassy or legation, consul general, consul, vice consul, consular agent, or foreign service officer or of a diplomatic or con-

sular official of the foreign country assigned or accredited to or recognized by the United States.

The seal of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States or any political subdivision of such a State, Commonwealth, or possession; the great seal (seal of state) of any foreign country, the seal of any court or judge or clerk thereof, and the seal of office of any official or office, of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States or any political subdivision of such a State, Commonwealth, or possession; and the seal of a notary public, foreign or domestic.

If not judicially noticeable on a more general basis, any signature, seal, or symbol furnishing an authentication of a foreign or domestic official record or copy thereof, or of a certificate or statement of the nonexistence of a foreign or domestic official record or entry, which is sufficient under the law of the place where the record is or would be kept or under any law of the United States.

The organization of the Department of Defense and the departments, agencies, bureaus, branches, forces, commands, and units thereunder, of the Coast Guard and National Guard and their subordinate commands and units, and of military agencies and units of allies of the United States; the signature of a person attesting or otherwise authenticating an official record or copy thereof, or a certificate or statement of the nonexistence of an official record or entry, that is or would be kept under the authority of any of the foregoing; and, as to the foregoing, their locations, their seals, inked stamps, or other identification marks, and the contents of written regulations, written orders and directives, official informational bulletins, manuals, and pamphlets, and similar official publications issued thereby or pertaining thereto, including general and special orders, circulars, price lists, and court-martial orders.

The signatures of the Judge Advocates General and their deputies and assistants; the signatures of custodians of personnel or fingerprint records of an armed force of the United States and their deputies and assistants; the signatures of custodians of fingerprint records of any department, bureau, or agency of the Federal government of the United States and their deputies and assistants; the signature of any person authorized to administer oaths by Article 136 or any of the provisions of law referred to in Chapter XXII, when affixed to a deposition or any sworn writing to indicate the execution of that authority; the signatures of authorities convening courts-martial, courts of inquiry, or other military courts, commissions, boards, or hearings of the United States, or an ally thereof, and the signatures of authorities acting upon, or giving official notice of, the proceedings or results of the proceedings of these courts, commissions, boards, or hearings; the signatures of persons authenticating records of the proceedings of the above courts, commissions, boards, or hearings, or copies of these records; and the signature of an official of an armed force of the United States, or an ally thereof, when on a certificate or statement furnishing a final authentication of a foreign official record or copy thereof, or of a certificate or statement of the nonexistence of a foreign official record or entry, in accordance with 143*b*(2)(*e*) and (*f*).

The actual duties of a person who has signed a writing in a capacity which would allow judicial notice to be taken of his signature.

The principle of judical notice does not prohibit the court from receiving formal evidence of a matter of which it is authorized to take judicial notice, and in taking or determining the propriety of taking judicial notice of a matter it may resort to any source of relevant information, whether or not that source or information would otherwise be admissible in evidence or was submitted by a party. Unless the matter to be judicially noticed is one of universal knowledge or one of common knowledge in the armed forces of the United States or is a judicially noticeable signature, seal, or inked stamp, a party desiring the court to take judicial notice of a matter should ask the court to do so, at the same time presenting for the court's consideration the source of information upon which he relies with respect to the matter. For instance, when counsel asks the court to take judicial notice of a law of a State of the United States, he should present for the court's consideration an official publication of that State, such as a statute book or book of reports, setting forth the law in question or, if an official publication of the State is not reasonably available, he should present for the court's consideration some other source, such as a generally recognized compilation, treatise, or textbook, setting forth that law. The court is not legally required, however, to reject a source of relevant information on the ground that a more primary source is or may be available. A party intending to ask the court to take judicial notice of a matter on the basis of a certain source of information should give the opposite party sufficient notice to enable him to consider that source and to obtain other sources if he so desires.

If a writing is used by the court in aiding it to take judicial notice of a matter, the record should indicate that the writing was so used, and, unless it is a statute of the United States, an executive order or proclamation of the President of the United States, or an official publication of the Department of Defense, the Departments of the Army, Navy, or Air Force, or the Headquarters of the Marine Corps or Coast Guard, the writing, or pertinent extracts therefrom, should be included in the record of trial as an exhibit.

Because of their inherent nature, some matters can be judicially noticed only in the sense that they may be inferred to exist, to be true, or to be genuine, and this inference can be overcome by adequate contradicting information. Examples of these matters are the various signatures, including the capacity in which the signer purports to sign the writing, and seals of which judicial notice can be taken and other judicially noticeable matters which are reasonably subject to contradiction.

b. Determination of foreign law. For the purpose of this subparagraph (*b*), the term "foreign law" means the laws and regulations of foreign countries and their political subdivisions and of international organizations and agencies. The court—that is, the military judge or the president of a special court-martial without a military judge—will determine foreign law, and such a determination will constitute a ruling on a question of law. In determining foreign law, the military judge or the president of a special court-martial without a military judge should require that it be established either by the testimony of a qualified person who is familiar with that law or by the presentation of materials or sources indicated below.

Although the court may consider any relevant material or source pertaining to foreign law whether or not it was submitted by a party, a party desiring that certain foreign law be determined by the court should present to the military judge or the president of a special court-martial without a military judge the material or source upon which he relies, having first given the opposite party sufficient notice to enable him to consider that material or source and to obtain other materials and sources if he so desires. Any material or source received by the court for use in determining foreign law, or pertinent extracts therefrom, should be included in the record of trial as an exhibit, but testimony as to foreign law should appear in the record where testimony usually appears.

In addition to testimony, materials or sources pertaining to foreign law include, but are not limited to, official publications setting forth foreign law published by the foreign jurisdiction concerned, such as statute books, books of reports, journals, and gazettes; official publications setting forth foreign law published by an agency of the Federal government of the United States; and compilations, treatises, textbooks, and commentaries concerning foreign law. The court is not legally required to reject any relevant material or source pertaining to foreign law on the ground that more primary materials or sources are or may be available.

148. COMPETENCY OF WITNESSES. ***a. General.*** A person of fourteen or more years of age is presumed to be generally competent to be a witness. If, upon an allegation of incompetency with respect to such a person, it does not appear by clear and convincing evidence that a specific ground of incapacity exists, the person should be allowed to testify.

Any known objection to the competency of a person as a witness should be made before he is sworn. If it later appears that he is incompetent, however, an objection on that ground should be sustained or the military judge or the president of a special court-martial without a military judge should on his or its own motion refuse to hear him further and order that any testimony he may have given while incompetent be disregarded.

b. Children. The competency of children as witnesses is not dependent upon their age. A child of any age is competent as a witness if he knows the difference between truth and falsehood, understands the moral importance of telling the truth, and is sufficiently intelligent to observe, recollect, and describe with reasonable accuracy the facts in question. This knowledge, understanding, and intelligence may appear upon such preliminary questioning of the child as the military judge or the president of a special court-martial without a military judge deems necessary or from the appearance of the child and the testimony that he gives in the case. A person below the age of fourteen, however, cannot be presumed to be competent as a witness.

c. Mental infirmity. Although a witness may be suffering from mental infirmity, he is nevertheless competent to testify if he knows the difference between truth and falsehood, understands the moral importance of telling the truth, and has sufficient mental capacity to observe, recollect, and describe with reasonable accuracy the facts in question.

d. Conviction of crime. Conviction of an offense does not disqualify a witness but certain convictions may be shown to diminish his credibility. See 153*b*(2)(*b*).

e. Interest or bias, and competency and privileges of husband and wife, the accused, and accomplices. Interest or bias does not disqualify a witness. For instance, the fact that a person owes a party money or has property interests with or against the 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 also competent witnesses against each other, the general rule is that each is entitled to a privilege prohibiting the use of one spouse as a witness against the other. The privilege also extends to the use of an extrajudicial statement, made by one spouse against the other which is offered as evidence of the maker's own statement to prove the truth of the matter stated. See 140*a*(4) for an example of when a statement of one spouse may be adopted as the statement of the other. There are certain limitations upon the privilege prohibiting the use of one spouse as a witness against the other, and prohibiting the use of one spouse's statement against the other. *First*, the privilege does not exist in favor of the accused spouse when the other spouse is the person or one of the persons injured by the offense charged, as in a prosecution for an assault by one spouse upon the other, for bigamy, unlawful cohabitation, or adultery, for abandonment of the wife or children or failure to support them, for mistreatment of a child of the other spouse, or for forgery by one spouse of the other's signature to a writing when the forgery is an injury to the legal rights of the other. Except as otherwise provided below, this limitation upon the privilege applies only to the accused spouse and only when the offense was committed after the mariage or, if before it, when the offense was unknown to the other spouse at the time of the marriage. *Second*, the privilege does not exist in favor of either spouse and, consequently, cannot be asserted by either—

(1) In a prosecution of the husband for any of the offenses set forth in chapter 117, title 18, United States Code, when the wife is the victim or for any offense involving the using or transporting of the wife for "white slave" or other immoral purposes, regardless of whether the offense was committed before or after the marriage.

(2) In a prosecution under Section 278 of the Immigration and Nationality Act (66 Stat. 230; 8 U.S.C. § 1328; Importation of alien for immoral purpose).

(3) When the marital relationship was entered into with no intention of the parties to live together as husband and wife, but only for the purpose of using the purported marital relationship as a sham, and that relationship remains a sham at the time the testimony or statement of one of the parties is to be introduced against the other.

(4) When, at the time the testimony or statement of one of the parties to the marriage is to be introduced in evidence against the other party, the witness-party is dead or the parties are divorced.

When the privilege exists, the spouse or spouses entitled thereto may consent to waive it either expressly or by implication. If an accused's spouse testifies in his favor, the privilege may not be asserted by either spouse upon cross-examination of the spouse who has so testified, provided the cross-examination is limited to the issues concerning which the spouse has testified on direct exam-

ination and the question of the credibility of the spouse. Also, if the defense, through the testimony of the accused or otherwise, introduces evidence concerning a communication between the accused and his spouse, the accused may not assert the privilege so as to prevent the use of his spouse as a witness in an attempt to contradict that evidence. However, except as indicated in the preceding sentence, an accused who testifies in his own behalf does not, merely by reason of so testifying, waive the privilege as it may apply with respect to the use of his spouse as a witness against him. See 151*b*(2) 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 or to become a witness as to a particular offense charged will not create any inference against him. As to cross-examination of the accused if he testifies, see 149*b*(1).

One of two or more accomplices or conspirators is competent to testify whether he is charged jointly or separately or not at all, whether he is tried jointly, in common, or separately, and whether he is called for the prosecution or for the defense, except that he may assert his privilege not to incriminate himself when that privilege is applicable and has not been waived and, if he is an accused at the same trial, he cannot be called as a witness except upon his own request. See in this connection 150*b* (Compulsory self-incrimination). See also 149*b*(1) as to the extent to which the privilege of self-incrimination is waived by the accused when he testifies.

The fact that an accomplice testifies for the prosecution does not make him afterwards immune to 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 been granted or promised immunity does not make him incompetent as a witness.

149. EXAMINATION OF WITNESSES. ***a. General.*** As to oaths of witnesses, see 114. 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 a ground for rejecting his testimony.

Witnesses other than the accused should be excluded from the courtroom except when they are testifying. However, at the discretion of the military judge or the president of a special court-martial without a military judge, exceptions may be made to this rule. The fact that prior to giving his testimony a witness was present in court under circumstances which might have colored his testimony may be commented upon in argument by either side in relation to the weight to be given to the testimony of the witness. See also 53*f*.

Witnesses usually are 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, and 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 military judge or the president of a special court-martial without a military judge may permit or cause the recall of witnesses, including an accused, at any stage of the proceedings; may permit or cause relevant testimony to be introduced by either party out of its regular order and place; and may

permit or cause a case once closed by either or both sides to be reopened for the introduction of testimony previously omitted. See also 54*b*.

The military judge, or the president of a special court-martial without a military judge, 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 an offense under Article 134, or 133 in a proper case, if the witness is a person subject to the code or an offense under Article 47 if the witness is a person punishable under that article. If the witness is neither subject to the code nor punishable under Article 47, such a refusal may nevertheless constitute an offense under applicable provisions of the law in effect in occupied territory or of foreign law.

It is never necessary for a party to ask questions through the military judge or the president of a special court-martial without a military judge.

A witness should be required to limit his answer to the question asked. He cannot, however, be 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 50*b*.

b. Cross-examination; redirect and recross-examination; examination by the court or a member. (1) *Cross-examination.* Cross-examination of a witness is a matter of right. It should, in general, be limited to the issues concerning which the witness has testified on direct examination and the question of his credibility. Counsel often cannot know in advance what pertinent facts may be brought out on cross-examination, and for that reason it is to some extent exploratory. Reasonable latitude should be given the cross-examiner, even if he is unable to state to the court what facts his cross-examination is intended to develop. The cross-examination of a witness need not be restricted merely because it appears to be repetitious of the questioning or testimony of the witness on direct examination. Leading questions may be used freely on cross-examination.

The extent of cross-examination with respect to a legitimate subject of inquiry is within the discretion of the military judge or president of a special court-martial without a military judge. No obligation is imposed upon the military judge or president of a special court-martial without a military judge to protect a witness, whatever his rank, office, or station in life, from being discredited upon cross-examination, so long as the interrogation falls short of an attempted invasion of his right, properly invoked, not to incriminate himself. The witness should, however, be protected from questions which go beyond the bounds of proper cross-examination merely to harass, annoy, or humiliate him. On the question of his credibility and within the limits imposed by the privilege against self-incrimination with respect to requiring an answer, a witness may be cross-examined concerning any subject touching upon his worthiness of belief. For instance, unless the military judge or president of a special court-martial without a military judge determines as a matter of discretion that the particular subject of the inquiry would be so remote with respect to the credibility of the witness as to be irrelevant, a witness may be cross-examined as to his relation to the parties and the issues in the case, his interest, motives, and inclinations, his way of life, affiliations, associations, acts of misconduct, habits,

and prejudices, his means of obtaining his 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 his physical defects, infirmities, and mental idiosyncrasies. In a proper case, he may be asked whether he has expressed animosity toward the accused, or he may, if a proper foundation has been laid, be asked whether he made a statement inconsistent with his testimony. See 153*b* (Impeachment of witnesses) generally and see 153*b*(2)(*b*) as to limitations applicable to cross-examination concerning acts of misconduct of the witness.

An accused who voluntarily testifies as a witness becomes subject to cross-examination upon the issues concerning which he so testifies and upon the question of his credibility. So far as the latitude of the cross-examination is discretionary with the military judge or president of a specal court-martial without a military judge, a greater latitude may be allowed in his cross-examination than in that of other witnesses. See, however, the last paragraph of 138*g* as to limitations upon cross-examination of the accused concerning other offenses or acts of misconduct. When an accused voluntarily testifies as a witness, he thereby, with respect to the issues concerning which he so testifies, waives the privilege against self-incrimination. Consequently, when an accused voluntarily testifies concerning the issue of his guilt or innocence of an offense for which he is being tried, as when he voluntarily testifies in explanation or denial of such an offense, he cannot, upon cross-examination as to matters relevant to that issue, justify a refusal to answer questions on the ground that his answers might tend to incriminate him. If the accused is on trial for two or more offenses and on direct examination testifies concerning the issue of his guilt or innocence of only one or some of them, he may not be cross-examined with respect to the issue of his guilt or innocence of the offense or offenses concerning which he has not testified unless the cross-examination is relevant to an offense concerning which he testified. If an accused testifies on direct examination only as to matters not bearing upon the issue of his guilt or innocence of any offense for which he is being tried, he may not be cross-examined on the issue of his guilt or innocence at all. See 140*a* as to the right of an accused who has made or is said to have made a confession or admission to testify concerning the involuntary nature of the statement or that the statement was not in fact made by him without thereby subjecting himself to cross-examination upon other issues in the case or upon the truth or falsity of the statement.

(2) *Redirect and recross-examination.* Ordinarily, the redirect examination deals with matters brought out in the cross-examination, but new matters may be developed. The recross-examination should be confined to the issues brought out on the redirect examination.

(3) *Examination by the court or a member.* The general rule is that the court, including the military judge, and its members may ask a witness any question 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, is 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 witnesses, including an accused who has become a witness, the court and its members must be careful not to depart from an impartial role.

In questioning an accused, the court and its members must confine them selves to questions which would be permissible on cross-examination of the ac-

cused by the prosecution. In questioning a witness concerning the character of the accused, the court and its members must confine themselves to matters which could properly be inquired into by the prosecution. See also the first paragraph of 142*d* (Statements of motive, intent, or state of mind or body).

Questions by the court or its members and evidence elicited by these questions are subject to objection on proper grounds by either side. The military judge, or the president of a special court-martial without a military judge, may require members to submit their questions to him either orally or in writing so that a ruling may be made on the propriety of the questions or course of questioning and so that the questions may be asked on behalf of the court in either their original or rephrased form by the military judge, president of the special court-martial without a military judge, or trial counsel. See also 44*g* and 54*b*, and *c*.

c. Leading questions; ambiguous and misleading questions; other objectionable questions. (1) *Leading questions.* (*a*) *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 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 leading even though it includes the prefatory phrase, "Did you or did you not ——?"

(*b*) *Exceptions.* To abridge the proceedings, the witness may be led at once to points upon which he is to testify. The general 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 he saw the accused at a time and place mentioned in the question.

When a witness appears to be hostile to the party calling him or is manifestly unwilling to give evidence, the party calling him may use leading questions. The party calling a witness may also use leading questions in any situation in which the party may impeach that witness (see 153*b*, Impeachment).

When it appears that a witness has made an erroneous statement through a slip of the tongue or other inadvertence, his attention may be directed to the matter by a leading question in order to give him an opportunity to correct the statement if he so desires.

When, from the nature of the case, the mind of the witness cannot be directed to the subject of the inquiry without specifying it, a leading question may be asked for that purpose. Thus, if a witness testifies that he heard the accused make a certain statement on a certain occasion in the hearing of certain other persons and these persons are called to contradict the witness, each of them may be asked whether he heard the accused make the statement on that occasion.

In other cases, the military judge or the president of a special court-martial without a military judge may, as a matter of discretion, allow liberal departures from the rule, as when the witness is obviously embarrassed and timid

through fear of strange surroundings or for other reasons, 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 the inquiry, or when the exact meaning of words used by the witness is obscured by language difficulties. However, in such cases, the witness should not be allowed an opportunity to shape his testimony as he thinks the questioner desires, nor should the witness be allowed an opportunity to shape his testimony to conform to the testimony of other witnesses from suggestions he may gather during the examination.

A witness who is not certain about, or does not recollect, a matter concerning which he is called upon to testify may be permitted, on his direct or other examination, to refresh his present recollection concerning the matter and then to testify from that present recollection or, if he cannot refresh his present recollection, to state that his past recollection as to the matter, possessed at a time when that recollection was reasonably fresh, is represented by certain data. So that he may properly refresh his present recollection or testify concerning his past recollection, data or events having a tendency to aid him in this respect may be brought to his attention and he may be questioned as to the effect of the data or events on his memory. See 146*a* (Memoranda).

(2) *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 the witness, who may thereby be led into making an unintentional misstatement. 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.

(3) *Other objectionable questions.* Questions should not be asked for the purpose of suggesting matters that are known not to exist or that the rules of evidence clearly make inadmissible.

150. DEGRADING AND INCRIMINATING QUESTIONS. ***a. Compulsory self-degradation.*** Under Article 31(c), no person may be compelled to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him. The privilege against compulsory self-degradation applies only to matters not material to the issue, whereas the privilege against compulsory self-incrimination applies to all matters. When a witness refuses to answer a question on the ground that the answer thereto would not be material to the issue and might tend to degrade him, the military judge or the president of a special court-martial without a military judge shall determine whether the question does or does not call for an answer material to the issue and if it is determined that it does, or that the answer could not tend to degrade the witness, the witness may be required to answer the question. A question calls for an answer material to the

issue when the answer might be expected to have some bearing upon any subject of inquiry legitimately before the court, including the credibility of witnesses.

b. Compulsory self-incrimination. The fifth amendment to the Constitution of the United States provides that no person shall be compelled in any criminal case to be a witness against himself. The principle embodied in this provision applies to trials by courts-martial, and it is not limited to the person on trial but extends to any person who may be called as a witness. Also, Article 31(a) provides that no person subject to the code may compel any person 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 may tend to incriminate him, he will not be required to answer unless it clearly appears to the military judge or the president of a special court-martial without a military judge that no answer the witness might make to the question could possibly have the effect of tending to incriminate him or that he has, with respect to the question, waived the privilege against self-incrimination. Although an answer to a certain question might normally be expected to incriminate a witness, he may be required to answer if he has been granted immunity. Also, the witness may be required to answer if, because of former trial, the running of the statute of limitations, or any other reason, he can successfully object to being tried for any offense as to which the answer may supply information tending to incriminate him.

The privilege of a witness to refuse to respond to a question the answer to which may tend to incriminate him is a personal one which the witness may exercise or waive as he may see fit. Such a question is not subject to objection by counsel or by the court, although the military judge, or the president of a special court-martial without a military judge, should advise an apparently uninformed witness that he has a right to decline to make any answer which might tend to incriminate him and that any self-incriminating answer he might make can later be used as evidence against him. A witness who answers a question without having asserted the privilege and thereby admits a self-incriminating fact may, at the trial in which the answer was given, be required to disclose all relevant details with respect thereto, so long as, in testifying in answer to any particular question, there is no real danger of further self-incrimination. The witness may be considered to have waived the privilege to this extent by having made the answer, but such a waiver will not extend to a rehearing or new or other trial. See the last paragraph of 149*b*(1) as to waiver of this privilege by an accused when he testifies.

The fact that a witness has asserted the privilege against self-incrimination in refusing to answer a question cannot be considered as raising any inference unfavorable to either the accused or the Government.

The privilege against compulsory self-incrimination protects a person only from being compelled to testify against himself or to provide the Government otherwise with evidence of a testimonial or communicative nature and does not protect him from being compelled by an order or force to exhibit his body or other physical characteristics as evidence. The privilege is therefore not violated, for example, by the use of compulsion in taking the fingerprints of an accused or other person, in exhibiting or requiring him to exhibit a scar on his body, in placing his feet in tracks or trying clothing or shoes on him or re-

quiring him to do so. Also, the privilege is not violated by the use of compulsion in requiring a person to produce for use as evidence or otherwise a record or writing under his control containing or disclosing matter incriminating him when the record or writing is under his control in a representative rather than a personal capacity, as when it is in his control as the custodian of a non-appropriated fund.

A statement obtained from the accused by compelling him to incriminate himself is inadmissible against him regardless of the person applying the compulsion (see also 140*a* and Art. 31(d)), and any evidence obtained as a result of information supplied by the statement is inadmissible against the accused if the compulsion was applied by, or at the instigation or with the participation of, an official or agent of the United States, or any State thereof or political subdivision of either, who was acting in a governmental capacity. Also, evidence obtained as a result of subjecting the accused to gross and brutal maltreatment—for example, pumping out the contents of his stomach over his protest for the purpose of securing evidence rather than of preserving his health—is inadmissible against him if the maltreatment was administered by, or at the instigation or with the participation of, an official or agent of the United States, or any State thereof or political subdivision of either, who was acting in a governmental capacity. The reason for this latter rule is that to admit evidence of this kind against the accused would violate due process.

151. PRIVILEGED AND NONPRIVILEGED COMMUNICATIONS. ***a. General.*** A privileged communication is a communication made as an incident of a confidential relation which it is the public policy to protect. Since public policy is involved, evidence of such a communication should not be received unless it appears that the privilege has been waived by the person or government entitled to the benefit of it or that the evidence comes from a person or source not bound by the privilege.

b. Certain privileged communications. (1) *Military and state secrets, and informants.* Official communications and documents containing military or state secrets, including diplomatic correspondence, are privileged from disclosure in a court-martial proceeding where in the opinion of the head of the executive or military department or government agency concerned such disclosure would be detrimental to the national interest. The deliberations of courts and of grand or petit juries are privileged, but the results of their deliberations are not privileged. The identity of persons supplying information to public officials engaged in the discovery of crime is privileged against disclosure, and the communications of these informants imparting the information are also privileged to the extent necessary to prevent disclosure of the informant's identity.

The privilege pertaining to the identity and communications of informants may be waived by appropriate governmental authorities. This privilege is no longer applicable once the identity of the informant has been disclosed to those who would have cause to resent his communication. Also, the privilege is not applicable with respect to an informant the disclosure of whose identity is necessary to the accused's defense on the issue of guilt or innocence. Whether such a necessity exists will depend upon the particular circumstances of each case, taking into consideration the offense charged, the possible defenses, the possible significance of the informant's testimony, and other relevant factors.

When the prosecution uses an informant as a prosecution witness, the privilege pertaining to communications made by informants is waived by the Government with respect to statements or reports of the informant which relate to the subject matter of the testimony of the witness, and therefore the privilege cannot be applied in opposition to an attempt by the defense to discover or disclose such a statement or report of the informant. See 153*b* (Impeachment of witnesses). The principles expressed above, however, cannot be applied in opposition to a proper invocation of the privilege pertaining to diplomatic correspondence or to communications the disclosure of which would, in the opinion of the head of the executive or military department or independent governmental agency concerned, be detrimental to the public interest. In this connection, it should not be considered that the mere fact of disclosure of the communications or identity of informants is, of itself and regardless of the nature of the disclosure, detrimental to the public interest.

However, it should be recognized that invocation of such privilege might, depending upon the circumstances of the case, make it impossible to proceed with the trial where to do so would prejudice the substantial rights of the accused. See 33*f*.

(2) *Communications between husband and wife, client and attorney, and penitent and clergyman.* Confidential communications between husband and wife, made while they were husband and wife and not living in separation under a judicial decree, are privileged. However, a confidential communication between husband and wife is not privileged when the marital relationship was a sham at the time the communication was made. See 148*e*(3) as to the meaning of "sham." Communications between a client or his agent and an attorney or his agent, such as the attorney's clerk, stenographer, or other associate, are privileged when made while the relationship of client and attorney existed and in connection with that relationship, unless the communications clearly contemplated the future commission of a fraud or crime, for instance, perjury or subornation of perjury. Military or civilian counsel detailed, assigned, or otherwise engaged to defend or represent a person in a court-martial case or in any military investigation or proceeding are attorneys, and the person is a client, with respect to the client and attorney privilege. Also privileged are communications between a person and a chaplain, priest, or clergyman, or assistant or other agent thereof, of any denomination made in the relationship of penitent and chaplain, priest, or clergyman, either as a formal act of religion or concerning a matter of conscience. The person entitled to the benefit of the privilege pertaining to confidential communications between husband and wife is the spouse who made the communication; the person entitled to the benefit of the client and attorney privilege is the client; and the person entitled to the benefit of the penitent and clergyman privilege is the penitent. A communication made by one spouse to the other, by a client to an attorney, or by a penitent to a clergyman is not within these privileges if it was made intending that it be passed on to someone outside the privileged relationship, nor is a communication between husband and wife, client and attorney, or penitent and clergyman within these privileges if to the knowledge of the spouse making it or the client or penitent it was made in the presence of someone outside the privileged relationship capable of understanding the communication. A person interpreting the communication as the agent of either party thereto and an agent of the client, attorney, or clergyman is not outside the privileged relationship.

The general rule is that the disclosure of a privileged communication between husband and wife, client and attorney, or penitent and clergyman should not be required or permitted unless the person who is entitled to the benefit of the privilege consents to the disclosure of the communication or has otherwise waived the privilege, as when he has consented to a disclosure of the communication at a previous trial or hearing. To this general rule, there are the following exceptions:

The privilege pertaining to confidential communications between husband and wife will not prevent allowing or requiring such a communication to be disclosed at the request of the spouse to whom the communication was made if that spouse is an accused, and this is so even when the spouse who made the communication objects to its disclosure.

The privilege pertaining to a privileged communication between husband and wife, client and attorney, or penitent and clergyman, which is based on a recognition of the public advantage that accrues from encouraging free communication in these circumstances, will not prevent allowing or requiring a person outside the privileged relationship who either by accident or design gained knowledge of the communication to testify concerning it, nor will it prevent the reception in evidence of a writing containing the communication which was obtained by such a person either by accident or design. But see 152. However, this exception to the general rule does not apply if the person outside the privileged relationship who gained knowledge of the privileged communication or who obtained the writing containing it did so, as to a communication between husband and wife, with the connivance of the spouse to whom the communication was made, or, as to a communication between client and attorney or penitent and clergyman, with the connivance of the attorney or clergyman or agent thereof or in any other manner not reasonably to be anticipated by the client or penitent.

Unless he voluntarily testifies concerning the communications, an accused who testifies in his own behalf, or a person who testifies under a grant or promise of immunity, does not, merely by reason of so testifying, waive any privilege pertaining to communications between husband and wife, client and attorney, or penitent and clergyman to which he may be entitled. If the defense introduces evidence concerning a communication between the accused and his spouse, the accused may not assert the privilege pertaining to confidential communications between husband and wife so as to prevent an attempt to contradict that evidence through the testimony of the accused's spouse or by other means.

(3) *Confidential and secret evidence.* The Inspectors General of the various armed forces, and their assistants, are confidential agents of the military or executive departments concerned or of the military commander on whose staff they may be serving. Their investigations are privileged unless a different procedure is prescribed by the authority ordering the investigation. Reports of these investigations and their accompanying testimony and exhibits are likewise privileged and copies thereof need not be furnished to any person other than the authority ordering the investigation or superior authority. However, when application is made to the authority ordering the investigation for permission to examine for use, or to use, in a trial by court-martial or other military course of justice certain testimony, or an exhibit, accompanying the report of investigation, which testimony or exhibit may become material in

the trial or course of justice, for example, to show an inconsistent statement of a witness, he should approve the application unless he is of the opinion that it would be contrary to public policy to divulge the information desired.

In certain cases, it may become necessary to introduce evidence of a confidential or secret nature, as when an accused is on trial for having unlawfully communicated information of such a nature to persons not entitled thereto. In a case of this type, adequate precautions should be taken to insure that no greater dissemination of the confidential or secret evidence occurs than the necessities of the trial require. The courtroom should be cleared of spectators while evidence of this nature is being received or commented upon, and all persons whose duties require them to remain should be warned that they are not to disclose the confidential or secret information. But see 33*f* as to cases which, because of the security risks involved, should not be brought to trial.

c. Certain nonprivileged communications. (1) *Communications by wire or radio.* 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 civilian, of any such means of transmission is likewise not privileged by reason of the means of transmission used. Wire or radio operators, military and civilian, may be ordered or subpoenaed to testify before courts-martial as to wire or radio communications, and telegrams and radiograms may be brought before courts-martial by the usual process. But see 151*b* (1) and the next to the last paragraph of 152.

(2) *Communications to medical officers and civilian physicians.* It is the duty of medical officers to supply medical services to members of the armed forces, to make periodical physical examinations as required by regulations, and to examine persons for appointment and enlistment, and medical officers may be specifically directed to observe, examine, or attend members of the armed forces. This observation, examination, or attendance is official and the information thereby acquired is official. Although the ethics of the medical profession forbid medical officers and civilian physicians to disclose without authority information acquired when acting in a professional capacity, no privilege attaches to this information or to statements made to them by patients.

152. CERTAIN ILLEGALLY OBTAINED EVIDENCE. Evidence is inadmissible against the accused:

If it was obtained as a result of an unlawful search of the person or property of the accused conducted, instigated, or participated in by an official or agent of the United States, or any State thereof or political subdivision of either, who was acting in a Governmental capacity; or

If it was obtained without the freely given consent of the accused as a result of an *unlawful search* of another's premises on which the accused was legitimately present, and the search in question was conducted, instigated, or participated in by an official or agent of the United States, or any State thereof or political subdivision of either, who was acting in a Governmental capacity; or

If it was obtained as a result of a seizure or examination of property of the accused upon an *unlawful search* of anyone's property, unless the presence of the property of the accused was due to trespass, whether or not the accused was present, and the search in question was conducted, instigated, or participated in by an official or agent of the United States, or any

State thereof or political subdivision of either, who was acting in a Governmental capacity.

Evidence obtained as a result of information supplied by illegal acts of the kinds mentioned above is itself considered as having been obtained as a result of the illegal acts. For example, if a search is unlawful because conducted without probable cause and a second search is conducted based on information supplying probable cause discovered during the first search, evidence obtained by the second search is inadmissible against an accused entitled to object to the evidence even if the second search would otherwise be lawful. Evidence is not considered as having been obtained as a result of the illegal acts merely because it would not have come to light but for those acts. Evidence is considered as having been obtained as a result of the illegal acts only if it has been acquired by an exploitation of those acts instead of by means sufficiently distinguishable to be purged of the taint of the illegality.

The defense is free to deny all the elements of the case against the accused without thereby giving leave to the Government to introduce by way of rebuttal evidence which would be inadmissible against the accused under the above rules. If, however, the defense introduces evidence as to other matters, as when the accused testifies on direct examination that he has never committed an offense of the kind in question, contradicting evidence as to those matters which was obtained as a result of an unlawful search may be introduced in rebuttal, even if that evidence would otherwise be inadmissible against the accused because of the unlawful search.

The following searches are among those which are lawful:

A search conducted in accordance with the authority granted by a lawful search warrant.

A search conducted as an incident of lawfully apprehending a person, which may include a search of his person, of the clothing he is wearing, and of property which, at the time of apprehension, is in his immediate possession or control, and a search of the place where the apprehension is made; but a search which involves an intrusion into his body, as by taking a sample of his blood for chemical analysis, may be conducted under this rule only when there is a clear indication that evidence of crime will be found, there is reason to believe that delay will threaten the destruction of the evidence, and the method of conducting the search is reasonable. See the example of an unreasonable method in the last paragraph of 150*b*.

A search incident to a lawful hot pursuit of a person, including, when so incident, a search reasonably necessary to prevent his resistance or escape.

A search of open fields or woodlands, with or without the consent of the owner or tenant.

A search under circumstances demanding immediate action to prevent the removal or disposal of property believed on reasonable grounds to be criminal goods.

A search of one's person with his freely given consent, or of property with the freely given consent of a person entitled in the situation involved to waive the right to immunity from an unreasonable search, such as an owner, bailee, tenant, or occupant as the case may be under the circumstances.

A search of any of the following three kinds which has been authorized upon probable cause by a commanding officer, including an officer in charge,

having control over the place where the property or person searched is situated or found or, if that place is not under military control, having control over persons subject to military law or the law of war in that place:

(1) A search of property owned, used, or occupied by, or in the possession of, a person subject to military law or the law of war, the property being situated in a military installation, encampment, or vessel or some other place under military control or situated in occupied territory or a foreign country.

(2) A search of the person of anyone subject to military law or the law of war who is found in any such place, territory, or country.

(3) A search of military property of the United States, or of property of nonappropriated fund activities of an armed force of the United States.

The commanding officer may delegate to persons of his command, or made available to him, the general authority to order searches upon probable cause, and a search ordered by virtue of any such delegation is to be considered as having been authorized by the commanding officer. Any such delegation should be made to an impartial person. The person who orders a search need not himself make or be present at the search.

The examples of lawful searches set forth above are not intended to indicate a limitation upon the legality of searches otherwise reasonable under the circumstances.

To be lawful even under circumstances that would permit a lawful search, searches by United States or other domestic authorities of a person's house, dwelling, automobile, effects, papers, or person without his freely given consent must be for instrumentalities or fruits of crime, things which might be used to resist apprehension or to escape, property the possession of which is itself a crime, or evidence which there is reason to believe will otherwise aid in a particular apprehension or conviction. This restriction does not apply to administrative inspections or inventories conducted in accordance with law, regulation, or custom.

Probable cause for ordering a search exists when there is reason to believe that items of the kind indicated above as being properly the subject of a search are located in the place or on the person to be searched. Such a reasonable belief may be based on information which the authority requesting permission to search has received from another if the authority ordering the search has been apprised of some of the underlying circumstances from which the informant concluded that the items in question were where he claimed they were and some of the underlying circumstances from which the authority requesting permission to search concluded that the informant, whose identity need not be disclosed, was credible or his information reliable.

When the accused objects to evidence obtained as a result of a search on the ground that the search was unlawful, the burden is on the Government to show, as an interlocutory matter, either that the search was lawful or that for some other reason the search would not render the evidence in question inadmissible against the accused. If the justification for using evidence obtained as a result of a search is that there was a freely given consent to the search, that consent must be shown by clear and positive evidence.

Military courts have no authority to entertain a motion for or to order the return of property obtained as a result of an unlawful search or seizure or to

entertain a motion for or to order the suppression for use as evidence of property or information so obtained, as distinguished from ruling as to whether or not it is admissible against the accused.

Evidence is inadmissable against the accused if it was obtained under such circumstances and in such a place that its use against him would be prohibited by section 2515, title 18, United States Code, pertaining to the prohibition of the use as evidence of certain intercepted wire or oral communications, or by section 605 of the Communications Act of 1934 (82 Stat. 223; 47 U.S.C. § 605), as amended, pertaining to the unauthorized divulgence or publication of wire or radio communications.

See also 140*a* and the last paragraph of 150*b*.

153. CREDIBILITY OF WITNESSES; IMPEACHMENT OF WITNESSES. ***a. Credibility of witnesses.*** The credibility of a witness is his worthiness of belief and may be determined from the acuteness of his powers of observation, the accuracy and retentiveness of his memory, his general manner in giving evidence, his relation to the matter in issue, his appearance and deportment, his friendships and prejudices, and his character as to truth and veracity, from comparison of his testimony with other statements made by him and with the testimony of others, and from other evidence bearing upon his veracity. See in this connection 149*b*(1) (Cross-examination).

The court may ordinarily draw its own conclusions as to the credibility of a witness and attach such weight to his evidence as his credibility may warrant. However, there are cases in which the court would not be warranted in accepting certain testimony as being sufficient to constitute a basis for a determination of guilt. For example, a conviction cannot be based solely upon self-contradictory testimony given by a witness other than the accused, even if a motive on the part of the accused to commit the offense charged is shown, if the contradiction is not adequately explained by the witness in his testimony. Also, a conviction cannot be based upon uncorroborated testimony given by an alleged victim in a trial for a sexual offense or upon uncorroborated testimony given by an accomplice in a trial for any offense, if in either case the testimony is self-contradictory, uncertain, or improbable. Even if apparently corroborated and apparently credible, testimony of an accomplice which is adverse to the accused is of questionable integrity and is to be considered with great caution. See also 210 and 213*f*(4) for special standards applying to proof of falsity in prosecutions for perjury and false swearing. When appropriate, the above rules should, upon request by the defense, be included in the general instructions of the military judge or the president of a special court-martial without a military judge.

In general, a person gains no corroboration merely because he repeats a statement a number of times. Consequently, a witness ordinarily may not be corroborated by showing that he made statements consistent with his testimony. But this is only a general rule, and there are some situations in which consistent statements are admissible to corroborate the witness. If the testimony of a witness has been attacked on the ground that it was due to a certain influence, evidence of his statements or conduct, consistent with his testimony, made or occurring before the creation of that influence, may be introduced for the purpose of corroborating his testimony. For example, if the credibility of a witness has been attacked 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 testimony is admissible for this purpose. Similarly, if his impeachment has been sought on the ground of collusion or corruption, evidence of a consistent statement made by him prior to the collusion or corruption is admissible for the same purpose. Also, if the testimony of a witness has been attacked on the ground that he made one or more inconsistent statements or on the ground that it was a fabrication of recent date, evidence of a consistent statement made by him before there was a motive to misrepresent is admissible to corroborate his testimony.

When in his testimony a witness identifies the accused as being, or not being, a participant in the offense or makes any other relevant identification concerning a person in the courtroom, evidence that on a previous occasion the witness made a similar identification is admissible to corroborate his testimony as to identity, even if the credibility of the witness has not been directly attacked. In such a case, the identifying witness himself and any person who has observed the previous identification may testify concerning it. An identification of an accused or suspect as being a participant in the offense, whether made at his trial or otherwise, which was a *result* of his having been subjected by United States or other domestic authorities to a lineup for the purpose of identification without the presence of counsel for him is inadmissible against the accused or suspect if he did not voluntarily and intelligently waive his right to the presence of counsel. Concerning the determination as to whether the identification was a result of an illegal lineup, see the second paragraph of 152. However, when an identification was made at a lineup conducted in violation of the right to counsel, that identification is a result of the illegal lineup, and a later identification by one present at such an illegal lineup is also a result thereof unless the contrary is shown by clear and convincing evidence.

If a consistent statement of a witness is admissible as an exception to the hearsay rule to prove the truth of the matters stated therein, the statement is also admissible to corroborate his testimony, and this is so even if the statement would not otherwise be admissible for the purpose of corroboration.

See also 142*c* (Fresh complaint and lack of fresh complaint).

Evidence which raises an inference of the truth of other evidence "corroborates" that other evidence.

b. Impeachment of witnesses. (1) *General.* See 149*b*(1) (Cross-examination). Impeachment is the process of attempting to diminish credibility. The credibility of any witness, including an accused who has become a witness 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. Inconsistencies which incidentially develop between witnesses for the same side are not impeachments prohibited by this rule. The general rule is subject to the following exceptions. If a party is compelled to call a witness because the law or the circumstances make his testimony indispensible or if the testimony of a witness proves unexpectedly adverse to the party calling him, the party is permitted to impeach the witness. In the latter case, it must first appear that the party calling the witness has been surprised by adverse testimony given by the witness. If surprise is the only reason for permitting a party to impeach his own witness, the party may directly attack the credibility of the witness only by proof of prejudice, bias, or other motive to misrepresent with respect to the adverse

testimony as to which the party was surprised, or by proof of statements or conduct of the witness inconsistent with that adverse testimony, and may not, for instance, show that the witness has a bad character as to truth or veracity or that the witness has been convicted of crime. The surprise caused by adverse testimony given by a party's own witness which will allow the party to impeach him must be actual, not feigned, surprise. The party must have had an honest belief that the witness would testify as expected. The fact that the party was advised by a person other than the witness that the witness would testify in a certain manner is no basis for a claim of surprise when the witness fails to do so. In this respect, however, the party, unless he is in possession of information indicating that the witness is likely to testify otherwise, may rely upon statements purportedly made by the witness in the course of an official investigation as set forth in a summary of the expected testimony of the witness or in other documents.

Witnesses for the court are not witnesses for the prosecution or defense and may be impeached by either side.

(2) *Various grounds.* (*a*) *General lack of veracity.* For the purpose of impeachment, it may be shown that a witness has a bad character as to truth and veracity. If the credibility of a witness has been attacked, proof that the witness has a good character as to truth and veracity may be introduced. A witness who gives competent testimony concerning a person's character as to truth and veracity may be asked whether he would believe the person on oath. See 138*f*(1) as to methods of proving character.

(*b*) *Conviction of crime.* A witness may be impeached by showing that he has been convicted by a civil or military court of a crime—that is, any offense of a civil or military nature—which involves moral turpitude or otherwise affects his credibility. Proof of the conviction may be made by introducing in evidence an admissible record of the conviction, an admissible copy of such a record, or other competent evidence of the conviction. See also 147*a* as to the taking of judicial notice of court-martial orders. Another permissible method of proving that a witness has been convicted of an offense involving moral turpitude or otherwise affecting his credibility is to question him with reference to convictions of offenses of this type in general or with reference to a conviction of a specific offense of this type. Nonaccusatory questions regarding convictions of offenses of this type in general may properly be asked in an attempt in good faith to impeach the witness even if the questioner has no definite information that the witness has been convicted of any such offense. If, in reply to questioning, the witness admits a conviction, other proof of the conviction is unnecessary. When proof of a conviction of a witness has been received for the purpose of impeaching him, the witness, if he so desires, should be permitted to explain the circumstances of the conviction. Evidence as to any juvenile proceeding, adjudication, or conviction which involved an accused is not admissible against him under the rules provided above. However, see the seventh paragraph herein (153*b*(2)(*b*)) as to when this evidence is admissible against an accused.

See the last paragraph of 138*g* as to the instruction that should be given when evidence of a conviction of the accused is introduced before the findings and is of a kind which is then admissible only for the purpose of impeaching his credibility as a witness.

The following convictions are among those which are considered to be convictions of offenses involving moral turpitude or otherwise affecting credibility:

(1) A conviction by court-martial of an offense for which a punishment of dishonorable discharge or confinement at hard labor for more than one year is authorized, whether or not such a punishment was actually adjudged.

(2) A conviction by a Federal civilian court of a felony, that is, of an offense punishable under the United States Code by confinement for more than one year, whether or not that punishment was actually adjudged.

(3) A conviction by any other court of an offense similar to an offense made punishable by the United States Code as a felony or of an offense characterized by the jurisdiction in question as a felony or as an offense of comparable gravity.

(4) A conviction of any offense involving fraud, deceit, larceny, wrongful appropriation, or the making of a false statement.

Any conviction which has been disapproved, set aside, or otherwise revised, or which is undergoing appellate review, or as to which the time for appeal has not expired is not admissible for impeachment purposes. A pending request to the Judge Advocate General to vacate or modify the findings and sentence of a court-martial under Article 69 (110A) is not a part of the review within the meaning of Article 76 (108). The time limitations upon the introduction of evidence of previous convictions set forth in 75*b*(2) do not apply to impeachment proceedings.

In general it is not permissible, except on cross-examination of a witness who is not the accused, to impeach a witness on the ground that he has committed an offense involving moral turpitude or otherwise affecting his credibility by adducing evidence of the offense not amounting to proof of conviction thereof. However, in a prosecution for a sexual offense in which lack of consent is an element, any evidence, otherwise competent, tending to show the unchaste character of the alleged victim is admissible on the issue of the probability of consent by the alleged victim to the act charged (whether or not the alleged victim has testified as a witness) and on the question of the credibility of the alleged victim, and this is so whether or not there was a conviction of any offense involved. For this purpose, evidence of the alleged victim's lewd repute, habits, ways of life, or associations, and of the alleged victim's specific acts of illicit sexual intercourse or other lascivious acts with the accused or others, is admissible, and this is so whether the circumstances to which that evidence refers existed before or after the commission of the alleged offense, unless the military judge or the president of a special court-martial without a military judge, determines as a matter of discretion that the particular evidence would be so remote with respect to the question of consent or credibility as to be irrelevant. For example, on cross-examination of the alleged victim in a rape case, it would be proper to exclude a question calling for her testimony as to whether, at a time which was thus remote, she had participated in illicit sexual intercourse. On the other hand, it would be improper to prohibit an attempt, on 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 impeaching the credibility of the alleged victim, defense evidence that the victim has an unchaste character is admissible subject to the above conditions,

in a prosecution for any sexual offense, even if consent is not an element of the offense. Evidence that the alleged victim of a sexual offense has a good character as to chastity is admissible for the purpose of showing the probability of lack of consent, when lack of consent is material, or to rebut the implications arising from evidence that the alleged victim has an unchaste character.

It is permissible on cross-examination of any witness other than the accused to adduce, for the purpose of impeaching the witness, evidence that he has committed an offense involving moral turpitude or otherwise affecting his credibility, even if that evidence does not amount to proof of conviction of the offense and even if the witness has not in fact been convicted of the offense. Consequently, any witness other than the accused may, on cross-examination, be questioned concerning the commission by him of an offense of this type; but in cross-examining a witness under this rule the questioner must be in possession of facts which support a genuine belief that the witness has committed the offense to which the questioning relates. An answer denying commission of such an offense may be contradicted by evidence other than the testimony of the witness given at the trial only if the contradicting evidence would be admissible without regard to the answer.

If the accused testifies on direct examination to the effect that he has never, or has not within a certain period of time, committed an offense of any kind or of a certain kind, evidence contradicting that testimony, or any inference which could reasonably be drawn therefrom, may be introduced through cross-examination of the accused or otherwise for the purpose of impeaching his credibility as a witness as well as for the purpose of rebuttal, whether or not he has been convicted of any offense shown by the contradicting evidence. Likewise, if evidence to the effect that the accused has never, or has not within a certain period of time, committed an offense of any kind or of a certain kind is introduced by the defense through witnesses other than the accused, evidence contradicting that defense evidence or any inference which could reasonably be drawn therefrom may be introduced in rebuttal, whether or not the accused has been convicted of any offense shown by the contradicting evidence. If that evidence involves an offense affecting credibility, it may also be considered for the purpose of impeaching the credibility of the accused if he testifies.

If evidence that the accused has committed an offense is admissible for any purpose under 138*g* and the offense affects credibility, that evidence may also be considered for the purpose of impeaching the credibility of the accused as a witness, whether or not he has been convicted of the offense.

For the purpose of impeachment, it may be shown by cross-examination or otherwise that a witness has been given or promised immunity or other advantage; that he is in custody and that his testimony may have been affected by fear or hope of favor growing out of his detention; or that he has charges pending against him for the offense concerning which he has testified or an offense closely related thereto and that his testimony may have been colored by the pendency of these charges.

(*c*) *Inconsistent statements.* A witness may be impeached by showing by any competent evidence that he made a statement, or engaged in other conduct, inconsistent with his testimony or any part thereof, but a foundation must first be laid before introducing evidence of an inconsistent statement if that evidence is admissible only for the purpose of impeachment. The founda-

tion for the introduction of evidence of the making of an inconsistent oral statement is laid by directing the attention of the witness to the time and place of the statement and the person or persons to whom it was made and then asking the witness if he made it. This procedure may also be used as constituting a sufficient foundation in the case of an inconsistent written statement, and, if it is used, the writing need not be shown to the witness. If the witness denies making the inconsistent statement, or testifies that he does not remember whether he made it, or refuses to testify as to whether he made it, competent evidence that he did make it, including competent evidence of the text or substance of the statement, may be introduced. Even if the witness admits making the inconsistent statement, other competent evidence that he made it, including other competent evidence of the text or substance of the statement, may be introduced in addition to the admission. When the inconsistent statement is contained in a writing apparently signed or written by the witness, a sufficient foundation may be laid by showing the writing to the witness and asking him whether the signature is his or whether he was the author of the written statement. If he admits that the signature is his or that he was the author, the writing then becomes admissible in evidence. If he does not make any such admission but either of these facts is otherwise proved, the writing will then become admissible in evidence.

An oral inconsistent statement of a witness may be proved by the testimony of anyone who heard him make it, even if the statement was reduced to writing and the writing is not accounted for. See 141 as to proving an inconsistent statement made through an interpreter.

Proof that a witness made an inconsistent statement generally is admissible only for the purpose of impeaching him. Proof of an inconsistent statement of a witness is admissible to establish the truth of the matters asserted in the statement only if that proof may properly be received as evidence of a voluntary confession or admission of the witness, when he is the accused, or of some statement of the witness which is otherwise admissible as an exception to the hearsay rule, or if the witness testifies that his inconsistent statement is true, not merely that he made it, and thus adopts the statement as part of his testimony. If proof of an inconsistent statement of a witness is admissible merely for the purpose of impeachment, the military judge, or the president of a special court-martial without a military judge, should, when evidence of the inconsistent statement is introduced, instruct the members of the court in open session that the evidence is to be considered only for the purpose of determining the credibility of the witness and not for the purpose of establishing the truth of the matters asserted in the statement.

The fact that the inconsistent statement was made in the course of an investigation or at another trial does not cause evidence of the making of the statement to be inadmissible for the purpose of impeachment. However, an accused who has testified as a witness may not be cross-examined upon, or impeached by evidence of, any statement which was obtained from him in violation of Article 31 or any of the warning requirements in 140*a*(2) or through the use of coercion, unlawful influence, or unlawful inducement. See Article 31(d).

A witness has a right to explain any apparently inconsistent statement made by him and may, if excused from the stand, be recalled for that purpose.

When a witness refuses to testify as to a certain fact, as when he relies on his right not to incriminate himself, or when a witness who gives no material testimony properly subject to impeachment testifies that he has no knowledge, or that he has no recollection, of that fact, it cannot be shown by way of impeachment that at some other time he made a statement as to the fact. The reason for this rule is that proof of such a statement either would not impeach the testimony of the witness at all or would improperly impeach his testimony. However, when the witness merely claims a failure of memory, the statement may be used in a proper attempt to refresh his present recollection or to establish his past recollection. See 146*a* and the last paragraph of 149*c*(1)(b).

(*d*) *Prejudice and bias.* Former quarrels, relationship, friendship, or illicit relations with the accused and other matters showing prejudice, bias, or any motive to misrepresent may be shown to diminish the credibility of the witness, either by cross-examination of the witness himself or by evidence otherwise adduced.

(3) *Effect of impeaching evidence.* Whether the credibility of a witness has been successfully impeached is a question to be decided, during deliberation upon the matter as to which the testimony of the witness was offered, by whoever is responsible for determining that matter, for example, by each member of the court during his deliberation as to his vote upon the matter if the matter is one properly determined by vote. Consequently, the military judge, or the president of a special court-martial without a military judge, should not strike the admissible testimony of a witness or instruct that it be disregarded simply because impeaching evidence with respect to that witness or his testimony has been introduced.

154. MISCELLANEOUS MATTERS—GUILTY STATE OF MIND; STIPULATIONS; OFFER OF PROOF; WAIVER OF OBJECTIONS. ***a Guilty state of mind.*** (1) *General.* A guilty state of mind of one kind or another is a requirement of many offenses. In certain offenses, such as burglary, larceny, and desertion, a specific intent is necessary. In the kind of murder denounced by Article 118(1), a premeditated design to kill must be proved. In some offenses, knowledge of a certain matter is a requirement. For details concerning the various guilty states of mind with respect to specific offenses, see chapter XXVIII (Punitive Articles).

A guilty state of mind may be established either by direct evidence, for example, by words proved to have been used by the offender, or by circumstantial evidence, as by inference from the act itself.

(2) *Effect of insanity, mental defects, and character and behavior disorders.* See 122.

(3) *Effect of drunkenness.* A temporary loss of reason which accompanies and is part of a drunken spree and which is not the result of delirium tremens or some other mental defect, disease, or derangement is not insanity in the legal sense. It is a general rule that voluntary drunkenness not amounting to legal insanity, whether caused by liquor or drugs, is not an excuse for an offense committed while in that condition. However, evidence of any degree of voluntary drunkenness may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, or a premeditated design

to kill if actual knowledge, specific intent, or premeditated design to kill is a requirement of the offense.

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 if that drunkenness would not be a defense to the offense charged.

As to proof of drunkenness, see 138*e* (Opinion evidence) and 191 (Drunk on duty).

(4) *Effect of ignorance or mistake of fact.* Ignorance or mistake of fact on the part of the accused is a defense when any type of knowledge of a certain fact is necessary to establish the offense. However, depending on the offense and facts involved, ignorance or mistake of fact may not be a defense unless the ignorance or mistake is reasonable. A feigned ignorance or mistake is, of course, no ignorance or mistake at all. If a certain fact, although an element of the offense, is one as to which no type of knowledge is required, such as the age of the victim in carnal knowledge (199*b*), ignorance or mistake as to that fact, even if reasonable, will not be a defense but may be shown in extenuation. Some specific applications of these rules appear in chapter XXVIII (Punitive Articles).

(5) *Effect of ignorance or mistake of law.* As a general rule, ignorance or mistake of law, or of properly published regulations or directives of a general nature having the force of law, is not an excuse for the commission of an offense. If, however, to indicate the existence of a requisite intent or for any other reason, actual knowledge of a certain law or of the legal effect of certain known facts is necessary to establish the offense, ignorance or mistake as to that law or legal effect will be a defense. Also, ignorance or mistake of law or the legal effect of certain known facts may be a defense to show the absence of a guilty state of mind involved in an offense when actual knowledge thereof is not necessary to establish the offense. In this instance, however, depending on the offense and facts involved, the ignorance or mistake may not be a defense, unless it is reasonable. A feigned ignorance or mistake of law or the legal effect of certain known facts is, of course, no ignorance or mistake at all. Additionally, except for general orders or regulations, a person cannot be held responsible for a violation of a military regulation or directive unless he had actual knowledge of the regulation or directive. See 171*a* and *b* as to the distinction between general orders or regulations and other military orders.

Even if the offense is one as to which ignorance or mistake of law is not a defense, the ignorance or mistake may nevertheless be shown in extenuation.

b. Stipulations. (1) *As to facts and the contents of writings.* The parties may make a written or oral stipulation as to the existence or nonexistence of any fact. If an accused has pleaded not guilty and the plea still stands, a stipulation which practically amounts to a confession should not be received in evidence. Also, a stipulation which if true would operate as a complete defense to an offense charged should not be received in evidence. A stipulation should not be received in evidence if any doubt exists as to the accused's understanding of what is involved. A party may withdraw from an agreement to stipulate or from a stipulation at any time before the stipulation is received in evidence, and in such a case the stipulation cannot be received in evidence. Also, the military judge or the president of a special court-martial without a military judge may as a matter of discretion permit a party to withdraw from a stipulation which has been received in evidence, and in this event the stipulation must be disregarded by the court. Unless it is properly withdrawn or is ordered stricken

from the record, a stipulation of fact which has been received in evidence may not be contradicted by the parties thereto.

Subject to the above observations as to stipulations of facts, stipulations may be made as to the contents of a writing.

(2) *As to testimony.* The parties may stipulate that if a certain person were present in court as a witness he would give certain testimony under oath. Such a stipulation does not admit the truth of the indicated testimony, nor does it add anything to the weight or the evidentiary nature of the testimony. Stipulated testimony may be attacked, contradicted, or explained in the same way as though the witness had actually so testified in person. The principles set forth in (1) above, as to the reception in evidence of stipulations and as to the withdrawal by a party from agreements to stipulate and from stipulations apply here also.

A written stipulation as to testimony is merely read in evidence. Except for inspection of the writing by the president of a special court-martial without a military judge for the purpose of determining the admissibility of its contents, the writing itself is not shown to the members of the court. However, the writing will be properly marked and incorporated in the record.

(3) *Instructions concerning stipulations received in a joint or common trial.* When in a joint or common trial a stipulation is received which was made by only one or some of the accused, the members of the court should be instructed that the stipulation may be considered only with respect to the accused person or persons who joined in it.

c. Offer of proof. When the court refuses to hear certain testimony offered in behalf of the accused or refuses to receive certain evidence of any kind offered in his behalf, the defense may make a concise statement setting forth 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 for the purpose of aiding reviewing and appellate authorities in arriving at their determination as to whether the exclusion of the evidence in question was proper. No such statement shall be considered as proof of the matters contained therein. See also 57*g*.

d. Waiver of objections. The prosecution or the defense may in court either orally or in writing waive an objection to the admissibility of offered evidence. Unless otherwise indicated by a specific principle of law, such a waiver adds nothing to the weight of the evidence or to the credibility of its source. The military judge or the president of a special court-martial without a military judge may as a matter of discretion 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 that objection. A waiver of an objection does not, however, operate as an express consent if an express consent is required, and a mere failure to object does not amount to a waiver with respect to the admissibility of evidence except as otherwise stated or indicated in this manual.

Chapter XXVIII

PUNITIVE ARTICLES

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156. ARTICLE 77—PRINCIPALS

Discussion. To constitute one an aider and abettor under this article, and hence liable as a principal, mere presence at the scene is not enough nor is mere failure to prevent the commission of an offense; there must be an intent to aid or encourage the persons who commit the crime. The aider and abettor must share the criminal intent or purpose of the perpetrator. If there is a concert of purpose to do a given criminal act, and that act is done by one of the parties, all probable results that could be expected from the act are chargeable to all parties concerned; but in order to make one liable as a principal in such a case, the offense committed must be one embraced by the common venture or an offense likely to result as a natural or probable consequence of the offense directly intended. When the offense charged requires proof of a specific intent or particular state of mind as an element, the evidence must establish that the aider and abettor had the requisite intent or state of mind or that he knew that the perpetrator had the required intent or state of mind. It is possible that the aider and abettor, although sharing a common purpose with the perpetrator, may entertain an intent or state of mind either more or less culpable than that of the perpetrator, in which event he may be guilty of an offense of either greater or less seriousness than the perpetrator. Thus, when a homicide is committed, the actual perpetrator may act in the heat of sudden passion caused by adequate provocation and be guilty of manslaughter, while the aider and abettor who hands a weapon to the perpetrator during the encounter with shouts of encouragement for him to kill the victim may be guilty of murder. On the other hand, if two persons enter into a common purpose to commit robbery by snatching purses in a particular place, and one of the two acts as lookout, sharing only the criminal purpose of the perpetrator to commit robbery, and if the perpetrator, without the knowledge of the lookout, seizes a victim and rapes her after taking her purse, the perpetrator will be guilty of rape and robbery but the aider and abettor will be guilty only of the robbery.

An accused, without intent to kill and without active participation in a homicide, is a principal guilty of a murder committed by those with whom he voluntarily associated himself in the execution of an unlawful design so desperate that it ordinarily involves a hazard to life. Moreover, an accused who plans a burglary which is actually carried out by his associates is a principal in the burglary, and, if his associates shoot and kill the home owner in the course of the burglary, the planner is a principal in the murder as well.

While merely witnessing a crime without intervention does not make a person a party to its commission, if he had a duty to interfere and his noninterference was designed by him to operate and did operate as an encouragement to or protection of the perpetrator, he is a principal.

One who counsels, commands, or procures another to commit an offense subsequently perpetrated in consequence of that counsel, command, or procur-

ing is a principal whether he is present or absent at the commission of the offense. If the offense is effected, although by different means from those counseled, commanded, or procured, as for instance if A hires B to poison C and instead of poisoning him, B shoots C, A is nevertheless guilty of the homicide. Likewise, one who causes an act to be done which if directly performed by him would be punishable by the code is a principal. When the act is done, such a principal is also chargeable with all results that could have been expected to flow as a probable consequence from the act counseled, commanded, procured, or caused to be done.

The person who executes the command of a principal may himself be innocent of any offense, as when a soldier at the command of a superior shoots a man who appears to the soldier to be one of the enemy, but who is known to the superior to be a friend.

For the proper manner of charging a person liable as a principal under this article, see appendix 6.

Proof. See essential elements under the particular offense alleged.

157. ARTICLE 78—ACCESSORY AFTER THE FACT

Discussion. Any person subject to the code who knows that an offense punishable by the code has been committed and who thereafter receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment is an accessory after the fact. Thus a person becomes an accessory after the fact to the escape of a prisoner if, knowing that a prisoner has escaped from confinement, he thereafter voluntarily provides the prisoner with transportation, clothing, money, or other necessaries to enable the prisoner to avoid his pursuers.

The assistance given a principal by an accessory after the fact is not limited to assistance designed to effect the personal escape or concealment of the principal, but includes those acts which are performed to conceal the commission of the offense by the principal. Thus a person is an accessory after the fact if, knowing that a crime has been committed, he assists and aids in concealing or suppressing evidence thereof. However, mere failure to report a known offense will not constitute one an accessory after the fact.

Conviction of the principal of the offense to which the accused is allegedly an accessory after the fact is not a prerequisite to the trial of the accused. Although the proof must establish that a principal committed the offense to which the accused is allegedly an accessory after the fact, evidence of the conviction or acquittal of the principal in a separate trial is not admissible to show that the principal did or did not commit the offense. Furthermore, an accused may be convicted and punished as an accessory after the fact despite the acquittal in a separate trial of the principal whom he allegedly comforted, received, or assisted.

Proof. (*a*) That an offense punishable by the code was committed; (*b*) that the accused received, comforted, or assisted the offender for the purpose of hindering or preventing his apprehension, trial, or punishment; and (*c*) that the accused knew that the person so received, comforted, or assisted was the offender.

158. ARTICLE 79—LESSER INCLUDED OFFENSES

Discussion. If the evidence adduced during a trial fails to prove an offense charged but does prove the commission of an offense necessarily included in that charged, the accused may be found guilty of that included offense. An accused may also be found guilty of an attempt to commit the offense charged or of an attempt to commit an offense necessarily included in the offense charged.

An included offense exists when a specification contains allegations, which are sufficient, either expressly or by fair implication, to put the accused on notice that he must be prepared to defend against it in addition to the offense specifically charged. This requirement of notice is met when the elements of the included offense are necessary elements of the offenses charged, for example, wrongful appropriation where larceny is charged and absence without leave where desertion is charged. Also, this requirement of notice, depending on the allegations in the specification of the offense charged, may be met although an included offense requires proof of an element not required in the offense specifically charged, for example, assault in which grievous bodily harm is intentionally inflicted may be included in assault with intent to murder, although the actual intentional infliction of bodily harm required in the former is not an element of the latter. Similarly, unpremeditated murder (Art. 118(2)) may be included in felony murder (Art. 118(4)); assault with a dangerous weapon may be included in robbery; and riot may be included in mutiny by violence.

When the offense charged is a compound offense comprising two or more included offenses, an accused may be found guilty of any or all of the offenses included in the offense charged. For example, robbery by force and violence includes the offenses of both larceny and assault. Therefore, in a proper case, a court-martial may find an accused not guilty of robbery but guilty of larceny or wrongful appropriation and assault.

If the evidence fails to prove an offense charged but does prove the commission of an offense 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. For example, when a specification alleging burglary in violation of Article 129 is in the usual form and the proof at the trial shows that the act was not done in the nighttime but otherwise establishes all of the elements of housebreaking, the accused may be found not guilty of burglary, but guilty of housebreaking. Such a finding may be worded as follows:

Of the Specification: Guilty, except the words "in the nighttime, burglariously break and enter," substituting therefor the words "unlawfully enter," of the excepted words, not guilty, of the substituted words, guilty.

Of the Charge: Not guilty, but guilty of a violation of Article 130.

When an included offense is found, the finding as to the charge should state a violation of the specific article violated and not a violation of Article 79. For a discussion of "Attempts," see 159. For particular instances of commonly included offenses, see Appendix 12.

159. ARTICLE 80—ATTEMPTS

Discussion. An act, done with the specific intent to commit an offense, amounting to more than mere preparation and tending, even though failing to effect its commission, is an attempt to commit that offense. To constitute an

attempt there must be a specific intent to commit the particular offense accompanied by an overt act which directly tends to accomplish the unlawful purpose. The overt act must be more than mere preparation to commit the offense. Preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement towards the commission of the offense. However, the overt act need not be the last proximate act to the consummation of the offense attempted to be perpetrated. For example, a purchase of matches with the intent to burn a haystack is not an attempt to commit arson, but it is an attempt to commit arson to apply a burning match to a haystack, even though the match may be immediately put out by the rain, blown out by the wind, or otherwise extinguished.

An accused may be guilty of an attempt even though the commission of the intended offense was impossible because of unexpected intervening circumstances or even though the consummation of the intended offense was prevented by a mistake on the part of the accused. The physical impossibility of committing the intended crime does not constitute a defense. For example, if A, without justification or excuse and with intent to kill B, points a gun at him and pulls the trigger, A is guilty of attempt to murder, even though, unknown to him, the gun is defective and will not fire. A person who puts his hand in the pocket of another with intent to steal his billfold is guilty of an attempt to commit larceny, even though the pocket is empty. These examples illustrate that an accused may be guilty of an attempt to commit an offense when he engages in conduct which would constitute the crime, or directly tend to do so, if the attendant facts and legal relationships were as he believed them to be.

Soliciting another to commit an offense does not constitute an attempt.

An accused may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated. See 158 (Lesser included offenses).

An attempt to commit an offense should be charged under this article unless the attempt is specifically denounced by some other article, in which event it should be charged under that article. See Articles 85, 94, 100, 104, 128.

Proof. (*a*) That the accused did a certain act; (*b*) that the act was done with specific intent to commit a certain offense under the code; and (*c*) that the act amounted to more than mere preparation and apparently tended to effect the commission of the intended offense.

160. ARTICLE 81—CONSPIRACY

Discussion. To constitute the offense of conspiracy in violation of Article 81, there must be an agreement between two or more persons to commit an offense under the code and the doing of an act by one or more of the conspirators to effect the object of that agreement.

The agreement in a conspiracy need not be in any particular form nor manifested in any formal words. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play.

The overt act must be an act independent of the agreement to commit the offense. It must be an act done by one or more of the conspirators either at the

time of or following the agreement to commit the offense, and done to carry into effect the object of the agreement. The overt act need not be in itself criminal, but it must be a manifestation that the conspiracy is being executed. Thus, a telephone call by a conspirator to the intended victim of a conspiracy to rob, inviting the intended victim to the scene of the intended crime, would constitute the overt act necessary to complete the offense of conspiracy. An overt act by one conspirator becomes the act of all without any new agreement specifically directed to that act and each conspirator is equally guilty although he does not participate in, or have knowledge of, all of the details of the execution of the conspiracy. Similarly, each conspirator is liable for all of the acts of the other members of the conspiracy done in pursuance of the conspiracy during its existence.

A person may be guilty of conspiracy although incapable himself of committing the intended offense. For example, a bedridden conspirator may knowingly furnish the automobile to be used in a robbery, or a guard may conspire with prisoners to effect their escape from confinement.

A conspiracy to commit an offense is a separate and distinct offense from the offense which is the object of the conspiracy, and both the conspiracy and the consummated offense which was its object may be charged, tried, and punished. The commission of the intended offense may also constitute the overt act which is an element of the conspiracy to commit that offense.

If a party to the conspiracy abandons or withdraws from the agreement to commit the offense before the commission of an overt act by any conspirator, he is not guilty of conspiracy under Article 81. An effective withdrawal or abandonment must consist of affirmative conduct which is wholly inconsistent with adherence to the unlawful agreement and which shows that the party has severed all connection with the conspiracy. If a conspirator effectively abandons or withdraws from the conspiracy after the performance of an overt act by one of the conspirators, he remains guilty of conspiracy and of all offenses committed pursuant to the conspiracy up to the time of his abandonment or withdrawal, but he is not liable for offenses committed by the remaining conspirators after his abandoment or withdrawal. Neither the withdrawal of a conspirator from the conspiracy nor the joining of another conspirator creates a new conspiracy or affects the status of the remaining members.

It is not a defense that the means adopted by the conspirators to achieve their object, if apparently adapted to that end, were actually not capable of success, nor that the conspirators were not physically able to accomplish their intended object.

Title 18 U.S.C. denounces conspiracies to commit certain specific offenses which do not require an overt act. These conspiracies should be charged under Article 134.

If all the persons with whom the accused is alleged to have conspired are tried and found not guilty of the same conspiracy, the accused cannot properly be convicted of that conspiracy. If after the trial and conviction of the accused all the persons with whom he was alleged to have conspired have been found not guilty, the conviction of the accused may not stand. The accused may properly be convicted of conspiracy, however, if the evidence establishes that a conspiracy existed between the accused and other alleged conspirators, named or described in the specification, who have not been and are not later tried and acquitted.

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 under the code; and (*c*) that one or more of the persons named or described performed an act to effect the object of the conspiracy, as alleged.

161. ARTICLE 82—SOLICITATION

Discussion. A solicitation in violation of this article is complete when a solicitation is made or advice is given with the wrongful intent to influence another or others to commit any of the four offenses named in the article. It is not necessary that the person or persons solicited or advised act upon the solicitation or advice. If after the solicitation or advice the offense of desertion or mutiny is attempted or committed or the offense of misbehavior before the enemy or sedition is committed, the accused shall be punished with the punishment provided for the commission of the offense solicited or advised. If the offense of desertion or mutiny is not attempted or committed, or if the offense of misbehavior before the enemy or sedition is not committed, the accused shall be punished as a court-martial may direct.

Solicitation may be accomplished by other means than by word of mouth or writing. Any act or conduct which reasonably may be construed as a serious request or advice to commit one of the offenses named in the article may constitute solicitation. It is not necessary that the accused act alone in the solicitation or in the advising; he may act through other persons in committing this offense.

Solicitation to commit offenses other than violations of the articles enumerated in this article may be charged as violations of Article 134.

Proof. (*a*) That the accused solicited or advised a certain person or persons to commit the offense, as alleged.

If the offense solicited or advised was attempted or committed, there shall be added an additional element of proof: (*b*) That the offense solicited or advised was (committed) (attempted) as the proximate result of the solicitation or advice.

As to proof of the commission or attempted commission of the offense solicited or advised, see 157 (Proof).

162. ARTICLE 83—FRAUDULENT ENLISTMENT, APPOINTMENT, OR SEPARATION

Discussion. A fraudulent enlistment, appointment, or separation is one procured by means of either a knowingly false representation in regard to any of the qualifications or disqualifications prescribed by law, regulation, or orders for the specific enlistment, appointment, or separation, or a deliberate concealment in regard to any of those disqualifications.

The misrepresentation or concealment may be with regard to matters which, if truthfully stated or revealed, would induce an inquiry by the recruiting appointing, or separating officer concerning the qualifications or disqualifications for enlistment, appointment, or separation, such as answers to questions as to previous service, previous applications for enlistment or appointment, or dependents.

An essential element of the offense of fraudulent enlistment or appointment is that the accused shall have received pay or allowances thereunder.

Accordingly, a member of the armed forces who enlists or accepts an appointment without being regularly separated from a prior enlistment or appointment should be charged under this article only if he has received pay or allowances under the fraudulent enlistment or appointment. Acceptance of food, clothing, shelter, or transportation from the government constitutes receipt of allowances. However, whatever is furnished the accused while in custody, confinement, arrest, or other restraint pending trial for fraudulent enlistment or appointment is not considered an allowance.

A person who procures himself to be enlisted, appointed, or separated by means of several misrepresentations and concealments as to his qualifications for the one enlistment, appointment, or separation so procured, commits but one offense under Article 83.

After apprehension, an accused who is charged with having fraudulently obtained his discharge from an armed force is subject to the code while in the custody of the armed forces for trial upon the fraudulent discharge. See Article 3(b). As to offenses committed before a fraudulent discharge, see 11.

The receipt of pay or allowances should be proved by direct evidence if this evidence is reasonably available, but may be proved by circumstantial evidence, such as by showing that the accused was on duty under the enlistment or appointment a sufficient time to warrant the inference that he had been fed or sheltered, or both.

If concealment of a discharge of any type is alleged, the service record is admissible evidence of the fact, type, and date of discharge. See 143*b*(2)(*b*).

Proof. (*a*) The enlistment, appointment, or separation of the accused in or from an armed force; (*b*) that the accused knowingly misrepresented or deliberately concealed a certain material fact or facts regarding his qualifications for enlistment, appointment, or separation; (*c*) that his enlistment, appointment, or separation was procured by that knowingly false representation or deliberate concealment; and, in a case of fraudulent enlistment or appointment, (*d*) that under that enlistment or appointment the accused received either pay or allowances, or both, as alleged.

163. ARTICLE 84—EFFECTING UNLAWFUL ENLISTMENT, APPOINTMENT, OR SEPARATION

Discussion. The accused must know that the enlistment, appointment, or separation effected by him was of a person whose enlistment, appointment, or separation was prohibited by law, regulation, or order. It must be proved that the enlistment, appointment, or separation when effected was prohibited by law, regulation, or order and that the accused knew that the person whose enlistment, appointment, or separation he effected was ineligible for the enlistment, appointment, or separation.

Proof. (*a*) That the accused effected the enlistment, appointment, or separation of the person named, as alleged; (*b*) that this person was ineligible for the enlistment, appointment, or separation because it was prohibited by law, regulation, or order; and (*c*) that the accused knew of these facts at the time of the enlistment, appointment, or separation.

164. ARTICLE 85—DESERTION

a. DESERTION

Discussion. Under Article 85(a) a member of the armed forces is guilty of desertion when he:

Without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently, or

Quits his unit or organization or place of duty with intent to avoid hazardous duty or to shirk important service.

Under Article 85(b) any commissioned officer of the armed forces who, after tender of his resignation and before notice of its acceptance, quits his post or proper duties without leave and with intent to remain away therefrom permanently is guilty of desertion.

A prisoner whose dismissal or dishonorable or bad-conduct discharge has been executed, although he may be subject to military law under Article 2(7), is not a "member of the armed forces" within the meaning of Article 85.

(1) *Absence without authority with intent to remain away permanently.* Both the absence without authority and the intent to remain away permanently are essential elements of the offense. The offense is complete when the person absents himself without authority from his unit, organization, or place of duty with the intent to remain away therefrom permanently. It is not necessary that the person absent himself entirely from military jurisdiction and control, and the fact that such an intent is coupled with a purpose to report for duty elsewhere, or to enlist or accept an appointment in the same or another armed force, does not constitute a defense. A prompt repentance and return, while material in extenuation, is no defense. Unless an intent to remain away permanently from his unit, organization, or place of duty exists at the inception of, or at some time during the absence, the person cannot be a deserter guilty of desertion in violation of Article 85(a)(1).

Although enlisting or accepting an appointment in the same or another armed force without being regularly separated and without disclosing that fact or entering a foreign armed service without authorization is evidence of an intent to remain away permanently, this conduct does not of itself constitute the offense of desertion. If, without being regularly separated from one of the armed forces, a person enlists or accepts an appointment in the same or another armed force, his presence in the military service under such an enlistment or appointment is not in itself a return to military control with respect to his former enlistment or appointment, although a return may be effected through his voluntary disclosure of the facts or through the discovery of the facts without his aid. If a person while in desertion enlists or accepts an appointment in the same or another armed force and deserts while serving under that enlistment or appointment, he is amenable to trial for both desertions.

(2) *Quitting unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service.* The "hazardous duty" or "important service" may include service such as duty in a combat or other dangerous area; embarkation for certain foreign or sea duty; movement to a port of embarkation for that purpose; entrainment for duty on the border or coast 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. Whether a duty is hazardous or a service

is important depends entirely upon the circumstances of the particular case. For example, overseas service is not important service merely because it is performed overseas. On the other hand, service may be important outside a combat area or even in peacetime. Basic training, for example, may be important service when the use of a soldier who has not completed that training has been substantially restricted by law or regulation. What constitutes hazardous duty or important service is a question of fact for the court-martial to decide.

Proof. *Desertion by absence with intent to remain away permanently.* (*a*) That without authority the accused absented himself from his unit, organization, or place of duty; (*b*) that he intended, at the time of absenting himself or at some time during his absence, to remain away permanently from his unit, organization, or place of duty; and (*c*) that his desertion was of a duration and was terminated, as alleged.

Desertion by quitting unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service. (*a*) That the accused quit his unit, organization, or place of duty; (*b*) that he did so with intent to avoid hazardous duty or to shirk important service; and (*c*) that his desertion was of a duration, as alleged.

Desertion by quitting post or duties prior to notification of acceptance of resignation. (*a*) That the accused was a commissioned officer of an armed force and had tendered his resignation; (*b*) that before notice of the acceptance of his resignation, he quite his post or proper duties without leave; (*c*) that he did so with intent to remain away permanently from his post or proper duties; and (*d*) that his desertion was of a duration and was terminated, as alleged.

Absence without authority (*Absence without leave*). Absence without leave is usually shown by entries in the morning report in the case of the Army, the unit military strength balance report in the case of the Air Force, and by entries in the service record or unit personnel diary in the case of the Navy, Marine Corps, and Coast Guard. However, entries that administratively refer to an accused as a "deserter" are not evidence of intent to desert. When the dates of the inception of an unauthorized absence and of a later return to military control are shown, it may be inferred that a continuous unauthorized absence existed for the entire period. Return to military control may be effected by return to any of the armed forces whether or not the accused is a member of that armed force.

When an absentee is taken into custody by civilian authorities at the request of the military authorities, the absence is terminated at that time. When an absentee is in the hands of civilian authorities for other reasons and these authorities make him available for return to military control, the absence is terminated when the military authorities are advised of his availability.

Intent in desertion by absence with intent to remain away permanently. To be guilty of desertion under Article 85(a)(1) or Article 85(b), a person must have had, either at the inception of the absence or at some time during it, an intent to remain away permanently. A court-martial must be satisfied beyond reasonable doubt of the existence of this intent based upon all the facts and circumstances of the case, including any inferences which may be drawn therefrom. A plea of guilty of absence without leave to a charge of desertion does not in itself raise any inference of such an intent and is not in itself a sufficient basis for a conviction of desertion.

Among those circumstances from which an inference that an accused intended to remain absent permanently may logically be drawn are that the period of absence was of a prolonged duration; that the accused attempted to dispose of his uniform or other military property; that he purchased a ticket for a distant point or was arrested or surrendered at a considerable distance from his station; that while absent he was in the neighborhood of military posts or stations and did not surrender to the military authorities; that he was dissatisfied in his company or on his ship or with the military service; that he had made remarks indicating an intention to desert the service; that he was under charges or had escaped from confinement at the time he absented himself; that just before absenting himself he stole money, civilian clothes, or other property that would assist him in getting away; or that without being regularly separated from an armed force he enlisted or accepted an appointment in the same or another armed force without fully disclosing the fact that he had not been regularly separated or entered any foreign armed service without being authorized by the United States. If the inference is drawn, evidence introduced in rebuttal of the inference must be weighed against it. Thus, 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 must be weighed against any inference of an intent to desert. Testimony by the accused that he intended to return is not conclusive of the actual existence of an intent to return, as the court may believe or reject the testimony of any witness in whole or in part. The fact that a person 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 person 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 circumstances would tend to negate 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.

Intent in desertion by quitting unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service. In proving a specification alleging that the accused quit his unit or 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 the 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 the 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 a duration and under such circumstances as to raise an inference that the accused knew or had reasonable cause to know that he would miss a certain hazardous duty or important service.

b. ATTEMPTING TO DESERT

Discussion. An attempt to desert is an overt act beyond mere preparation toward accomplishing a purpose to desert. Once the attempt is made, the fact that the person desists, either of his own accord or otherwise, does not cancel

the offense. The offense of attempting to desert is complete, for example, if the person, intending to desert, hides himself in an empty freight car on a military reservation, intending to effect his escape by being taken away in the car. Entering the car with the intent to desert is the overt act. See the discussion of desertion. For a more detailed discussion of attempts, see 159.

Proof. (*a*) That the accused made the attempt by doing an overt act or acts; and (*b*) that the attempt was made with the intent to desert. See the comments under proof of desertion.

165. ARTICLE 86—ABSENCE WITHOUT LEAVE

Discussion. See 164*a*. This article is designed to cover every case not elsewhere provided for in which any member of the armed forces is through his own fault not at the place where he is required to be at a prescribed time. Specific intent is not an element of this offense and proof of the unauthorized absence alone is sufficient to establish a prima facie case. Specific intent is, however, a necessary element of the proof of certain matters in aggravation when alleged in connection with absence without leave. Thus, if it is alleged that an unauthorized absence was with intent to avoid maneuvers or field exercises, it must be proved that the accused absented himself without authority for the purpose of avoiding maneuvers or field exercises. The first part of this article—relating to the 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 member of the armed forces failing to report for kitchen police or as a messman. The second part of the article applies to leaving the place of duty after reporting. A place of duty is not appointed within the meaning of this article unless the accused knew or had reasonable cause to know of the order purporting to appoint that place of duty.

A member of the armed forces turned over to the civil authorities upon request under Article 14 is not absent without leave while held by them under that delivery. Also, when a member of the armed forces, being absent with leave, or absent without leave, is held, tried, and acquitted by civil authorities, his status as absent with leave, or absent without leave, is not thereby changed, however long he may be held. If a member of the armed forces 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 type of court to which the case should be referred, or, in the event of conviction, the punishment to be imposed. When, however, a man on authorized leave is unable to return at the expiration thereof through no fault of his own, he has not committed the offense of absence without leave, there being an excuse for the absence in such a case.

A prisoner whose dismissal, dishonorable, or bad-conduct discharge has been executed is no longer a member of the armed forces within the meaning of Article 86. Accordingly, such a prisoner may not be charged with absence without leave under Article 86 but should, if the facts warrant, be charged with escape from confinement under Article 95, or an offense under Article 134. Until actual execution of the dishonorable or bad-conduct discharge, the pris-

oner is subject to Article 86, even though the dishonorable or bad-conduct discharge may have been ordered executed.

Proof. *If the accused fails to go to or goes from his appointed place of duty.* (*a*) That a certain authority appointed a certain time and place of duty for the accused, as alleged; (*b*) that the accused knew or had reasonable cause to know of that time and place; and (*c*) that, without authority, the accused failed to go to the appointed place of duty at the time prescribed, or, having so reported, went from that place.

If the accused is charged with absenting himself without leave. (*a*) That the accused absented himself for a certain period from his unit, organization, or place of duty at which he was required to be, as alleged; and (*b*) that the absence was without authority from anyone competent to give him leave.

If the accused is charged with absenting himself without leave from his guard, watch, or duty section with intent to abandon the same. (*a*) That the accused absented himself from his guard, watch, or duty section, as alleged; (*b*) that the absence of the accused was without authority; and (*c*) that the accused intended to abandon his guard, watch, or duty section.

If the accused is charged with absenting himself without authority with intent to avoid maneuvers or field exercises. (*a*) That the accused absented himself for a certain period from his unit, organization, or place of duty at which he was required to be; (*b*) that the absence of the accused was without authority; (*c*) that the accused knew or had reasonable cause to know that the absence would occur during a part of a period of maneuvers or field exercises; and (*d*) that the accused intended to avoid all or part of a period of maneuvers or field exercises.

In connection with proof of absence without leave, see 143 (Documentary Evidence) and 164*a* (Discussion of absence without leave as an element of desertion).

166. ARTICLE 87—MISSING MOVEMENT

Discussion. Article 87 denounces "Missing Movement" as the offense committed by any person subject to the code who through neglect or design misses the movement of a ship, aircraft, or unit with which he is required to move in the course of duty.

The word "movement" as used in Article 87 does not include practice marches which are to be of short duration with a return to the point of departure contemplated, nor does it include minor changes in location of ships, aircraft, or units, as when a ship is shifted from one berth to another in the same shipyard or harbor or when a unit is moved from one barracks to another on the same post.

"Through neglect" means the omission by a person to take such measures as are appropriate under the circumstances to assure that he will be present with his ship, aircraft, or unit at the time of a scheduled movement, or his doing of some act without giving attention to its probable consequences in connection with the prospective movement, such as a departure from the vicinity of the prospective movement to such a distance as would make it likely that he could not return in time for the movement.

In order to be guilty of the offense, the accused must have known, or have had reasonable cause to have known, of the prospective movement which he is alleged to have missed. Knowledge of the exact hour or even of the exact date of

the scheduled movement is not required. It is sufficient if the approximate date was known to the accused. However, there must always be a causal connection between the conduct of the accused and the missing of the scheduled movement. Knowledge of the scheduled movement may be proved by remarks made by the accused to others or by testimony that the accused was informed, directly or indirectly, of the prospective movement. For example, proof that the accused was notified of the prospective movement may consist of evidence that he was present at a roll call, muster, or other formation at which the information was given orally. Proof of general knowledge in the accused's organization of the prospective movement of the ship, aircraft, or unit would justify an inference by a court of the necessary knowledge on the part of the accused.

That the accused actually missed the movement may be proved by documentary evidence, as by a proper entry in a log or a morning report. This fact may also be proved by the testimony of personnel of the ship, aircraft, or unit (or by other evidence) that the movement occurred at a certain time, together with evidence that the accused was physically elsewhere at that time.

Proof. (*a*) That the accused was required in the course of duty to move with a ship, aircraft, or unit; (*b*) that the accused knew or had reasonable cause to know of the prospective movement of the ship, aircraft, or unit; (*c*) that, at the time and place alleged, the accused missed the movement of the ship, aircraft, or unit; and (*d*) that the accused missed the movement through design or neglect, as alleged.

167. ARTICLE 88—CONTEMPT TOWARD OFFICIALS

Discussion. Article 88 denounces the use by any commissioned officer of the armed forces of contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of the Treasury, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present.

This article covers both words which are contemptuous in themselves, such as abusive epithets, denunciatory or contemptuous expressions, or intemperate or malevolent comments upon official or personal acts, and words which are contemptuous because of the connection in which they are used and the surrounding circumstances.

The official or group against whom the words are used must be occupying one of the offices or be one of the groups named in Article 88 at the time of the offense. "Congress" does not include a member as an individual; "legislature" does not include its members individually; nor does "governor" include a "lieutenant governor." However, it is immaterial whether the words are used against the official in his official or private capacity.

The language must be contemptuous and must, by an act of the accused, come to the knowledge of a person other than the accused. If not personally contemptuous, adverse criticism of one of the officials or groups named in the article in the course of a political discussion, even though emphatically expressed, may 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, giving broad circulation to a written publication containing contemptuous words of the kind made punishable by this article, or the utterance of contemptuous words of this kind in the presence of military subordinates, would constitute an aggravation of the offense.

Truth or falsity of the statements may be immaterial, since the gist of the offense is the contemptuous character of the language and the malice with which it is used.

Proof. (*a*) That the accused used the words alleged against an official or group named in the article; and (*b*) that these words were contemptuous, either in themselves or by virtue of the circumstances under which they were used.

168. ARTICLE 89—DISRESPECT TOWARD A SUPERIOR COMMISSIONED 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 commissioned officer. It may consist of acts or language, however expressed, and it is immaterial whether they refer to the superior as an officer or as a private individual.

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.

It is not necessary that the "superior commissioned officer" be in the execution of his office at the time of the disrespectful behavior. As defined by Article 1(5), a "superior commissioned officer" is a commissioned officer who is superior in rank or command. With respect to a person who is a member of one armed force, a commissioned officer of another armed force who is duly placed in the chain of command over that person is, within the meaning of Article 89, "*his* superior commissioned officer"; but an officer of another armed force would not be "*his* superior commissioned officer" merely because of higher rank. The officer toward whom the disrespectful behavior is directed need not, however, be in the chain of command over the accused if both are members of the same armed force and the officer is superior in rank, but not inferior in command, to the accused. Under certain circumstances, a superior commissioned officer may not be senior in rank; for instance, a line officer, though inferior in rank, may be the commanding officer, and thus the superior of a staff officer, such as a medical officer, in the organization.

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.

If the accused did not know that the person against whom the acts or words were directed was his superior commissioned officer, he may not be convicted of a violation of this article.

Proof. (*a*) That the accused did or omitted to do certain acts or used certain language to or concerning a certain commissioned officer, as alleged; (*b*) that the behavior involved in these acts, omissions, or words was under certain circumstances, or in a certain connection, or with a certain meaning, as alleged; (*c*) that the officer toward whom the acts, omissions, or words were directed was the superior officer of the accused; (*d*) that the accused at the time knew that the person toward whom the acts, omissions, or words were directed was his superior commissioned officer; and (*e*) that under the circumstances, the behavior was disrespectful to that superior officer.

169. ARTICLE 90—ASSAULTING OR WILLFULLY DISOBEYING SUPERIOR COMMISSIONED OFFICER

a. STRIKING OR ASSAULTING SUPERIOR COMMISSIONED OFFICER

Discussion. The phrase "his superior commissioned officer" in Article 90 has the same meaning as it does in Article 89. See 168. If the accused did not know the officer to be his superior commissioned officer, he may not be convicted of this offense.

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 drawing of any weapon 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 proscribed. The raising in a threatening manner of a firearm, whether or not loaded, of a club, or of any 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." 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. The commanding officer on board a ship or the comanding officer of a unit in the field is generally considered to be on duty at all times. See 191.

A discharged prisoner or other civilian subject to military law (see Art. 2) and under the command of a commissioned officer is subject to the provisions of this article.

In a prosecution for striking or assaulting a superior commissioned officer in violation of this article, an accused may establish a defense by proof that the striking or other act of violence was done in legitimate self-defense (216*c*) or in the proper discharge of some duty.

Proof. (*a*) That the accused struck a certain commissioned officer, or drew or lifted up a weapon against him, or offered violence against him, as alleged; (*b*) that the officer was the superior commissioned officer of the accused at the time; (*c*) that the superior commissioned officer was in the execution of his office at the time; and (*d*) that the accused at the time knew the officer was his superior commissioned officer.

b. DISOBEYING SUPERIOR COMMISSIONED OFFICER

Discussion. The willful disobedience contemplated is such as shows an intentional defiance of authority, as when an enlisted person is given a lawful command by a commissioned 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 not a vio-

lation of this article but may be an offense under Article 92. 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 90, although carrying out that intention may be. See 168 as to the meaning of the phrase "his superior commissioned officer."

The order must relate to military duty and be one which the superior commissioned 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 may be inferred to be lawful and it is disobeyed at the peril of the subordinate. See 57*b* as to the manner of determining the legality of an order. Acts involved in the disobedience of an illegal order might under some circumstances be charged as insubordination under Article 134.

The fact that obedience to a command would involve 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 regulations of an armed force, is not an offense under this article, but may be under Article 92. Likewise, a nonperformance by a subordinate of any mere routine duty may be a violation of Article 92 or Article 134, as the case may be, but not of this article.

As long as it is understandable, 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 commissioned 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 lawful command from a certain commissioned officer, as alleged; (*b*) that this officer was the superior officer of the accused; (*c*) that the accused willfully disobeyed the command; and (*d*) that the accused at the time knew the officer was his superior commissioned officer.

170. ARTICLE 91—INSUBORDINATE CONDUCT TOWARD WARRANT OFFICER, NONCOMMISSIONED OFFICER, OR PETTY OFFICER

a. GENERAL DISCUSSION

Article 91 has the same general objects with respect to warrant officers, noncommissioned officers, and petty officers as Articles 89 and 90 have with respect to commissioned officers, namely, to insure obedience to their lawful orders, and to protect them from violence, insult, or disrespect. The offenses denounced by this article are those committed by a subordinate in his relations to one senior to him. For example, a warrant officer would not be guilty under Article 91 for disobeying the order of a noncommissioned officer or a petty officer, but, if a warrant officer were to fail to obey the lawful order of an armed forces policeman of lower grade in the execution of his duty, he would be guilty of an offense under Article 92. An assault by a prisoner whose separa-

tion from the service has been accomplished, or by any other civilian subject to military law, upon a warrant officer, a noncommissioned officer, or petty officer should be charged under Article 134.

If the accused did not know that the person assaulted was his superior, he may not be convicted of a violation of this article. This lack of knowledge is not a defense, however, as to an included offense which does not depend upon seniority.

The terms "willfully disobeys," "lawful," and "in the execution of his office" are used in the same sense as in Article 90; and the term "order" is used in the same sense as "command" in Article 90.

b. ASSAULTING A WARRANT OFFICER, NONCOMMISSIONED OFFICER, OR PETTY OFFICER

Discussion. See 170*a*. For the definition of assault, see 207*a*.

Proof. (*a*) That the accused enlisted person or warrant officer struck or assaulted a certain warrant officer, noncommissioned officer, or petty officer as alleged; (*b*) that the assault was committed while the warrant officer, noncommissioned officer, or petty officer was in the execution of his office; (*c*) that at the time the warrant officer, noncommissioned officer, or petty officer was the superior of the accused; and (*d*) that the accused knew at the time that the warrant officer, noncommissioned officer, or petty officer was his superior.

c. DISOBEYING A WARRANT OFFICER, NONCOMMISSIONED OFFICER, OR PETTY OFFICER

Discussion. See discussion under 170*a*. The article does not include an acting noncommissioned officer or acting petty officer, nor does it include a military policeman or member of the shore patrol who is not in fact a warrant officer, noncommissioned officer, or petty officer. An order from a warrant officer, noncommissioned officer, or petty officer in the execution of his office may be inferred to be a lawful order. See 57*b* as to the manner of determining the legality of an order.

Proof. (*a*) That the accused enlisted person or warrant officer received a certain lawful order from a certain warrant officer, noncommissioned officer, or petty officer, as alleged; (*b*) that at the time the warrant officer, noncommissioned officer, or petty officer was the superior of the accused; (*c*) that the accused at the time knew that the warrant officer, noncommissioned officer, or petty officer was his superior; and (*d*) that the accused willfully disobeyed the order.

d. TREATING WITH CONTEMPT OR BEING DISRESPECTFUL IN LANGUAGE OR DEPORTMENT TOWARD A WARRANT OFFICER, NONCOMMISSIONED OFFICER, OR PETTY OFFICER

Discussion. The word "toward" read in connection with the phrase "while that officer is in the execution of his office" limits the application of this part of the article to behavior and language within the sight or hearing of the warrant officer, noncommissioned officer, or petty officer concerned.

Proof. (*a*) That the accused did or omitted to do acts, or used language, under certain circumstances, or in a manner, or with an intended meaning, as alleged; (*b*) that the behavior or language was used toward and within the sight or hearing of a certain warrant officer, noncommissioned officer, or petty officer;

(*c*) that at the time the warrant officer, noncommissioned officer, or petty officer was the superior of the accused; (*d*) that the accused at the time knew that the warrant officer, noncommissioned officer, or petty officer was his superior; and (*e*) that the warrant officer, noncommissioned officer, or petty officer was in the execution of his office at the time.

171. ARTICLE 92—FAILURE TO OBEY ORDER OR REGULATION

a. VIOLATION OR FAILURE TO OBEY A LAWFUL GENERAL ORDER OR REGULATION

Discussion. General orders or regulations are those orders or regulations generally applicable to an armed force which are properly published by the President or by the Secretary of Defense, of Transportation, or of a military department, and those orders or regulations generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof which are issued by an officer having general court-martial jurisdiction, a general or flag officer in command, or a commander superior to one of these. A general order or regulation issued by a commander with authority under Article 92(1) retains its character as a general order or regulation when another officer takes command, until it expires by its own terms or is rescinded by separate action, and this is true even if it is issued by an officer who is a general or flag officer in command and command is taken by another officer who is not a general or flag officer. A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it. See 57*b* as to the manner of determining the legality of the order or regulation. Article 92(1) contains no requirement that any kind of knowledge be either alleged or proved in a prosecution thereunder for violating or failing to obey a general order or regulation.

Proof. (*a*) That there was a certain general order or regulation; (*b*) that the accused had a duty to obey it; and (*c*) that the accused violated or failed to obey the order or regulation.

b. FAILURE TO OBEY OTHER LAWFUL ORDER

Discussion. This section contemplates all other lawful orders which may be issued by a member of the armed forces, violations of which are not chargeable under Article 90, Article 91, or Article 92(1). It includes the violation of regulations which are not general regulations as discussed in 171*a*. In order to be guilty of this offense, a person must have had a duty to obey the order and must have had actual knowledge of the order. The accused's knowledge of the order may be proved directly, that is, by showing that the order was actually communicated to the accused, or it may be proved circumstantially, that is, by showing facts from which the members of the court may infer that the accused had knowledge of the order. Circumstantial evidence includes evidence that the order was generally known in the command, that it had been posted at such a time and place that the accused would be likely to have read it, and similar circumstances tending to prove the knowledge. See 138*b*. Failure to obey the lawful order of one not a superior is chargeable under this article, provided the accused had a duty to obey the order. Examples of orders which a person might have a duty to obey, even though issued by one not a superior, are lawful orders of a sentinel or of members of the armed forces police.

The particular order, or specific portion thereof, the accused is charged with having violated should be set forth in the specification in order that the accused may be fully apprised of the offense he is alleged to have committed.

Proof. (*a*) That a certain lawful order was issued by a member of the armed forces; (*b*) that the accused had knowledge of the order; (*c*) that it was the duty of the accused to obey the order; and (*d*) that the accused failed to obey the order.

c. DERELICTION IN THE PERFORMANCE OF DUTIES

Discussion. A duty may be imposed by regulation, lawful order, or custom of the service. A person is derelict in the performance of his duties when he willfully or negligently fails to perform them, or when he performs them in a culpably inefficient manner. When the failure is with full knowledge of the duty and an intention not to perform it, the omission is willful. When the nonperformance is the result of a lack of ordinary care, the omission is negligent. Culpable inefficiency is inefficiency for which there is no reasonable or just excuse. Thus, if it appears that the accused had the ability and opportunity to perform his duties efficiently, but performed them inefficiently nevertheless, he may be found guilty of this offense. However, an accused may not be charged under this article, or punished otherwise, if his failure in the performance of his duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency. For example, a recruit who has earnestly applied himself during rifle training and throughout record firing may not be punished because he fails to qualify with the weapon; nor may a sergeant who, however inefficient, has made an honest effort to maintain direction, be punished for becoming lost with his squad on a maneuver; nor may an artillery battery commander who has zealously applied himself to the instruction of his battery in firing be punished because his battery fails to achieve a satisfactory score in a firing test.

Proof. (*a*) That the accused had certain prescribed duties; and (*b*) that he was derelict in the performance of those duties.

172. ARTICLE 93—CRUELTY AND MALTREATMENT

Discussion. Article 93 provides for the punishment of any person subject to the code who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders.

"Any person subject to his orders" means not only those persons under the direct or immediate command of the accused but extends to all persons who by reason of some duty are required to obey the lawful orders of the accused, whether he is in the direct chain of command over the person or not.

The cruelty, oppression, or maltreatment must be real, although not necessarily physical. To assault and to subject to improper punishment are examples of this offense.

The imposition of necessary or proper duties and the exaction of their performance will not constitute this offense even though the duties are arduous or hazardous or both.

Proof. (*a*) That a certain person was subject to the orders of the accused; and (*b*) that the accused was cruel toward, or oppressed, or maltreated that person, as alleged.

173. ARTICLE 94—MUTINY AND SEDITION

a. MUTINY

Discussion. Article 94(a)(1) defines two distinct types of mutiny, both requiring an intent to usurp or override military authority. One consists of the creation of violence or disturbance with this intent, and may be committed by one person acting alone or by more than one. The other, consisting of a refusal in concert with any other person to obey orders or otherwise do one's duty, imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority. This concert of insubordination need not be preconceived, nor is it necessary that the act of insubordination be active or violent. It may consist simply in a persistent and concerted refusal or omission to obey orders, or to do duty, with an insubordinate intent, that is, with an intent to usurp or override lawful military authority. The intent may be declared in words, inferred from acts done, or inferred from surrounding circumstances.

Proof. (*a*) That the accused created violence or a disturbance, or that he refused, in concert with another person or persons, to obey orders or otherwise do his duty; and (*b*) that he did so with intent to usurp or override lawful military authority.

b. SEDITION

Discussion. Sedition is the creating, in concert with another or others, of revolt, violence, or other disturbance against lawful civil authority, with intent to cause the overthrow or destruction of that authority. It differs from mutiny in that it implies a resistance to civil power, as distinguished from military power.

Proof. (*a*) That in concert with another person or persons the accused created revolt, violence, or disturbance against lawful civil authority; and (*b*) that he did so with intent to cause the overthrow or destruction of that authority.

c. FAILURE TO PREVENT OR SUPPRESS A MUTINY OR SEDITION

Discussion. This section of the article requires that persons subject to the code do their "utmost" to prevent and suppress acts of mutiny or sedition being committed in their presence. The word "utmost" imports taking those measures to prevent or suppress a mutiny or sedition which may properly be called for by the circumstances of the situation, having in mind the rank and responsibilities or the employment of the individual concerned. When extreme measures are necessary under the circumstances, the use of a dangerous weapon or the taking of life may be justified, providing excessive force is not used. See 216*a* concerning justification.

Proof. (*a*) That an offense of mutiny or sedition was committed in the presence of the accused; and (*b*) that the accused failed to do his utmost to prevent and suppress the mutiny or sedition.

d. FAILURE TO REPORT A MUTINY OR SEDITION

Discussion. A failure to take "all reasonable means" to inform includes a failure to take the most expeditious means available. When the 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 taking place, these circumstances will be sufficient to charge the accused with such "reason to believe" as will render him culpable under this article. A failure to

report an impending mutiny or sedition is not an offense in violation of Article 94, but it may be an offense in violation of Article 134.

Proof. (*a*) That an offense of mutiny or sedition occurred; (*b*) that the accused knew or had reason to believe that the offense was taking place; and (*c*) that he failed to take all reasonable means to inform his superior commissioned officer or commanding officer of the offense.

e. ATTEMPTED MUTINY

Discussion. See 159 (Attempts). An individual may harbor an intent to mutiny and may commit some overt act tending to accomplish that purpose and so be guilty of an attempted mutiny, whether or not a mutiny actually followed.

Proof. (*a*) That the accused committed an overt act or acts which proximately tended to accomplish a mutiny; and (*b*) that the act or acts were committed with the intent to mutiny.

174. ARTICLE 95—RESISTANCE, BREACH OF ARREST, AND ESCAPE

a. RESISTING APPREHENSION

Discussion. Resisting apprehension consists of an active resistance to the restraint attempted to be imposed by the person apprehending. The resistance may be accomplished by flight or by assaulting or striking the person attempting to apprehend. Mere words of remonstrance, argument or abuse, and attempts to escape from custody after the apprehension is complete, will not constitute the offense of resisting apprehension although they may constitute other offenses.

A person cannot be convicted of a violation of this article if the attempted apprehension was illegal. See 57*b* as to the manner of determining the legality of the attempted apprehension. If the accused had no reason to believe that the person attempting to apprehend him was empowered to do so, this fact may be interposed as a defense. See Articles 7 and 8 as to the authority of certain persons to apprehend.

Proof. (*a*) That one lawfully authorized to do so attempted to apprehend the accused; and (*b*) that the accused resisted the apprehension, as alleged.

b. BREACH OF ARREST

Discussion. The distinction between arrest and custody or 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 (18*a*; 20*a*). Custody and confinement import some physical restraint (18*a*; 20*c*).

The offense of breach of arrest is committed when the person in arrest infringes the limits set by orders, and the intention or motive that actuated him is immaterial to the issue of guilt. 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, custody, or confinement was illegal. See 57*b* as to the manner of determining the legality of the arrest, custody, or confinement. However, the circumstances of a breach of an illegal restraint may subject the person breaking the 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

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 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 175*a*. The word "neglect" is here used in the same sense as the word "negligence."

Negligence is a relative term. It is 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.

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 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 175*a* and *b*. An escape was suffered through design when it was intended or when it resulted from conduct so wantonly devoid of care that no reasonable inference may be drawn from it but that the escape was contemplated as a probable result of the course of conduct followed.

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 committed to the charge of the accused; (*b*) that the design of the accused was 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.

176. ARTICLE 97—UNLAWFUL DETENTION

Discussion. Any person subject to the code who, except as provided by law, apprehends, arrests, or confines any person is guilty of unlawful detention under Article 97.

Any unlawful restraint of another's freedom of locomotion will result in a violation of this article. The offense may be committed by one who, being duly authorized to apprehend, arrest, or confine others, exercises this authority unlawfully, or by one not so authorized who effects the restraint of another unlawfully. There need be no actual force exercised in imposing the apprehension, arrest, or confinement. The apprehension, arrest, or confinement must be against the will of the person restrained.

A reasonable belief by the person imposing it that the restraint was lawful is a defense.

For persons authorized to apprehend, arrest, or confine, see 19 and 21.

Proof. (*a*) That the accused apprehended, arrested, or confined a certain person, as alleged; and (*b*) that the accused was not authorized by law to do so.

177. ARTICLE 98—NONCOMPLIANCE WITH PROCEDURAL RULES

a. UNNECESSARY DELAY IN DISPOSING OF CASE

Discussion. The purpose of this section of Article 98 is to insure expedition in the disposition of cases of persons accused of offenses under the code by providing for the punishment of those responsible for unnecessary delay in the disposition of these cases. A person can be responsible for a delay in the disposition of a case only when his duties require him to act with respect thereto.

Proof. (*a*) That the accused to his knowledge was charged with certain duties in connection with the disposition of a case of a person accused of an offense under the code; (*b*) that delay occurred in the disposition of the case; and (*c*) that under the circumstances the delay was unnecessary and that the accused was responsible therefor.

b. KNOWINGLY AND INTENTIONALLY FAILING TO ENFORCE OR COMPLY WITH PROVISIONS OF THE CODE

Discussion. This section of the article does not apply to cases of bona fide error of law or procedure made before, during, or after a trial. It is designed to punish deliberate and intentional failure to enforce or comply with the provisions of the code regulating the proceedings before, during, and after trial. See particularly Articles 31 and 37.

Proof. (*a*) That the accused knowingly and intentionally failed to enforce or comply with a certain provision of the code regulating some proceeding before, during, or after a trial, as alleged; and (*b*) that the accused had the duty of enforcing or complying with that provision of the code.

178. ARTICLE 99—MISBEHAVIOR BEFORE THE ENEMY

a. RUNNING AWAY BEFORE THE ENEMY

Discussion. "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 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 or immediate area of combat which is not a part of a tactical operation then going on or in immediate prospect is not "before or in the presence of the enemy" within the meaning of this article. The "running away" must be to avoid actual or impending combat. It need not, however, be the result of fear.

Proof. (*a*) That the accused was before or in the presence of an enemy; (*b*) that he misbehaved himself by running away; and (*c*) that the running away was with intent to avoid actual or impending combat.

b. SHAMEFULLY ABANDONING, SURRENDERING, OR DELIVERING UP

Discussion. This provision concerns primarily commanders chargeable with responsibility for defending a command, unit, place, ship, or military property. Abandonment by a subordinate would ordinarily be charged as running away.

The words "deliver up" are synonymous with "surrender."

Surrender or abandonment of a command, unit, place, ship, or military property by a person charged with its defense can be justified only by the utmost necessity or extremity. Surrender or abandonment without this 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 command, unit, place, or ship, or certain military property; (*b*) that without justification he abandoned it or surrendered it; and (*c*) that this act occurred while the accused was before or in the presence of the enemy.

c. ENDANGERING THE SAFETY OF A COMMAND, UNIT, PLACE, OR MILITARY PROPERTY THROUGH DISOBEDIENCE, NEGLECT, OR INTENTIONAL MISCONDUCT

Discussion. Carelessness or negligence, or other conduct below the standard reasonably expected of the individual under the circumstances, constitutes "neglect" as used in the article. Intentional misconduct implies a wrongful intention and not a mere error in judgment. Under this clause may be charged any act of insubordination, neglect, or intentional misconduct committed by an officer or enlisted person before or in the presence of the enemy which endangers the safety of any command, unit, place, or military property which it is his duty to defend.

Proof. (*a*) That it was the duty of the accused to defend a certain command, unit, ship, or place, or certain military property; (*b*) that he committed certain disobedience, neglect, or intentional misconduct, as alleged; (*c*) that thereby he endangered the safety of the command, unit, place, ship, or military property; and (*d*) that this act occurred while the accused was before or in the presence of the enemy.

d. CASTING AWAY ARMS OR AMMUNITION

Proof. (*a*) That the accused was before or in the presence of the enemy; and (*b*) that he cast away certain arms or ammunition, as specified.

e. COWARDLY CONDUCT

Discussion. Cowardice is misbehavior through fear. Fear is a natural feeling of apprehension when going into battle and the mere display of apprehension would not constitute the offense, but the refusal or abandonment of a per-

formance of duty before or in the presence of the enemy as a result of fear does constitute the offense.

Proof. (*a*) That the accused committed an act of cowardice, as alleged; (*b*) that this act occurred while the accused was before or in the presence of the enemy; and (*c*) that this act was the result of fear.

f. QUITTING PLACE OF DUTY TO PLUNDER OR PILLAGE

Discussion. The essence of this offense is quitting the place of duty with intent to plunder or pillage. The mere quitting with that purpose is sufficient, even if the plunder or pillage is not consummated.

"Place of duty" includes any place of duty, whether permanent or temporary, fixed or mobile. The words "plunder or pillage" mean to seize or appropriate public or private property unlawfully.

Proof. (*a*) That the accused while before or in the presence of the enemy quit his place of duty; and (*b*) that his intention in so quitting was to seize or appropriate public or private property unlawfully.

g. CAUSING 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.

Proof. (*a*) That an alarm was caused in a certain command, unit, or place under control of the armed forces; (*b*) that conduct of the accused caused the alarm; (*c*) that the alarm was caused without any reasonable or sufficient justification or excuse; and (*d*) that this act occurred while the accused was before or in the presence of the enemy.

h. WILLFULLY FAILING TO DO UTMOST TO ENCOUNTER, ENGAGE, CAPTURE, OR DESTROY ENEMY TROOPS, COMBATANTS, VESSELS, AIRCRAFT, OR ANY OTHER THING

Proof. (*a*) That the accused was serving before or in the presence of the enemy; (*b*) that he had a duty to encounter, engage, capture, or destroy certain enemy troops, combatants, vessels, aircraft, or a certain other thing, as alleged; and (*c*) that he willfully failed to do his utmost to perform that duty.

i. NOT AFFORDING ALL PRACTICABLE RELIEF AND ASSISTANCE

Discussion. This offense is limited to a failure to afford relief and assistance to forces "engaged in battle." When this condition does not exist, this offense cannot be committed. "All practicable relief and assistance" means all relief and assistance which should be afforded within the limitations imposed upon one by reason of his own specific task or mission. If that task or mission might not brook delay or deviation in order to afford relief and assistance to others, no offense is committed by failing to afford this relief and assistance.

Proof. (*a*) That certain troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies were engaged in battle and required relief and assistance; (*b*) that the accused was in a position and able to render relief and assistance to these troops, combatants, vessels, or aircraft; (*c*) that the accused failed to afford all practicable relief and assistance, as alleged; and (*d*) that, at the time, the accused was before or in the presence of the enemy.

179. ARTICLE 100—SUBORDINATE COMPELLING SURRENDER

a. SUBORDINATE COMPELLING OR ATTEMPTING TO COMPEL COMMANDER TO SURRENDER OR ABANDON PLACE, PROPERTY, OR COMMAND

Discussion. In order to constitute an offense under this article, the surrender or abandonment must be compelled or attempted to be compelled by acts rather than words.

The offenses here contemplated are similar to a mutiny or attempted mutiny designed to bring about the surrender or abandonment. Unlike some cases of 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 is not complete until the place, military property, or command is abandoned or given up to the enemy. The offense of attempting to compel a surrender or abandonment does not require actual abandonment or surrender, but there must be some act done with this purpose in view, even if it falls short of an actual accomplishment of the purpose. The words "to give it up to an enemy" are synonymous with "surrender."

Proof. (*a*) That a certain commander was in command of a certain place, vessel, aircraft, or other military property or of a body of members of the armed forces; and (*b*) that acts of the accused compelled the commander to give it up to the enemy or to abandon it, or were done with the intent or purpose of compelling the commander to give it up to the enemy or to abandon it.

b. STRIKING THE COLORS OR FLAG

Discussion. To "strike the colors or flag" is to haul down the colors or flag in the face of the enemy or to make any other offer of surrender. It is a traditional wording for an act of surrender. The offense is committed by any one subject to the code who assumes to himself the authority to surrender a military force or position when he is not authorized to do so either by competent authority or by the necessities of battle. If continued battle has become fruitless and it is impossible to communicate with higher authority, these facts will constitute proper authority to surrender. The offense may be committed wherever there is sufficient contact with the enemy to give the opportunity of making an offer of surrender and it is not necessary that an engagement with the enemy be in progress.

It is unnecessary to prove that the offer was received by the enemy or that it was rejected or accepted. The sending of an emissary charged with making the offer of surrender is an act sufficient to prove the offer, even though the emissary does not reach the enemy.

Proof (*a*) That there was an offer of surrender to an enemy, as alleged; (*b*) that the accused made or was responsible for the offer; and (*c*) that the accused did not have proper authority to make the offer.

180. ARTICLE 101—IMPROPER USE OF COUNTERSIGN

a. DISCLOSING 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.

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 accused in time of war disclosed the parole or countersign to a certain person, known or unknown; and (*b*) that this person was not entitled to receive it.

b. GIVING A PAROLE OR COUNTERSIGN DIFFERENT FROM THAT AUTHORIZED

Proof. (*a*) That in time of war the accused knew he was authorized and required to give a certain parole or countersign; and (*b*) that he gave to a person entitled to receive and use this parole or countersign a different parole or countersign.

181. ARTICLE 102—FORCING A SAFEGUARD

Discussion. A safeguard is a detachment, guard, or detail posted by a commander for the protection of persons, places, or property of the enemy, or of a neutral affected by the relationship of belligerent forces in their prosecution of war or during circumstances amounting to a state of belligerency. 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. The effect of a safeguard is to pledge the honor of the nation that the person or property shall be respected by the national armed forces.

Provided that the accused was or should have been aware of the existence of the safeguard, any trespass on the protection of the safeguard will constitute an offense under the article, whether the safeguard was imposed in time of war or in circumstances amounting to a state of belligerency short of a formal state of war.

A safeguard is not a device adopted by a belligerent to protect its own property or nationals or to insure order within its own forces, even if those forces are in a theater of combat operations, and the posting of guards or of off-limits signs does not establish a safeguard unless the protection thereby afforded is in furtherance of an undertaking by a commander to protect enemy or neutral persons or property.

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.

182. ARTICLE 103—CAPTURED OR ABANDONED PROPERTY

a. FAILING TO SECURE CAPTURED ENEMY PROPERTY

Discussion. Immediately upon its capture from the enemy, public property becomes the property of the United States. Neither the person who takes it nor any other person has any private right in this property. On the contrary, every person subject to military law has an immediate duty to take such steps as are reasonably within his powers to secure this property for the service of the United States and to protect it from destruction or loss.

Proof. (*a*) That certain public property was taken from the enemy; and (*b*) that the accused failed to do what was reasonable under the circumstances to secure this property for the service of the United States.

The provisions of the article which are discussed in the following subparagraphs are broader than those discussed in *a* in that they pertain to private property as well as to public property.

b. FAILING TO REPORT AND TURN OVER CAPTURED OR ABANDONED PROPERTY

Discussion. Reports of receipt of captured or abandoned property are to be made directly 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*) that the accused failed to report to proper authority the receipt thereof, and failed to turn it over to proper authority as required.

c. DEALING IN CAPTURED OR ABANDONED PROPERTY

Discussion. All persons subject to the code are forbidden to buy, sell, trade, or in any way deal in or dispose of captured or abandoned property whereby they receive or expect some profit, benefit, or other advantage to themselves or anyone directly or indirectly connected with them. The code 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 is done for the purpose or in the hope of benefit or advantage, pecuniary or otherwise.

Proof. (*a*) That the accused bought, sold, traded, or otherwise dealt in or disposed of certain public or private captured or abandoned property; and (b) that by so doing the accused received or expected some profit, benefit, or advantage to himself or to a certain person or persons connected in a certain manner with himself, as alleged.

d. ENGAGING IN LOOTING OR PILLAGING

Discussion. The words "looting or pillaging" mean unlawfully seizing or appropriating property which is located in enemy or occupied (friendly or enemy) territory and is either left behind or is owned by, or in the custody of, the enemy or occupied state, its inhabitants, or persons who are under its protection or who, immediately before the place where the act occurred had been occupied, were under the protection of the enemy or occupied state. The unauthorized removal or appropriation of any part of the equipment of a

seized or captured vessel or the unlawful seizure or appropriation of property owned by or in the custody of the officers, crew, or passengers on board a seized or captured vessel, constitutes the offense of looting or pillaging wherever the vessel may be located at the time of the offense.

Proof. (*a*) That the accused unlawfully seized or appropriated certain property; (*b*) that the property was located in enemy or occupied territory, or that it was on board a seized or captured vessel; and (*c*) that the property was left behind or that it was owned by, or in the custody of, the enemy or occupied state or a person having a certain status with respect to the enemy or occupied state, or that it was part of the equipment of a seized or captured vessel, or was owned by, or in the custody of the officers, crew, or passengers on board a seized or captured vessel, as alleged.

183. ARTICLE 104—AIDING THE ENEMY

This article denounces offenses by all persons whether or not otherwise subject to military law. The trial of offenders may be by court-martial or by military commission.

a. AIDING OR ATTEMPTING TO AID THE ENEMY

Discussion. "Enemy" imports civilians as well as members of military organizations and does not restrict itself to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and of all the citizens of the other.

It is not a violation of this article, however, to furnish to prisoners of war subsistence, quarters, and other comforts or aid to which they are lawfully entitled.

To aid 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.

Proof. That the accused either directly or indirectly aided or attempted to aid the enemy with certain arms, ammunition, supplies, money, or other thing, as alleged.

b. HARBORING OR PROTECTING THE ENEMY

Discussion. See 183*a*. An enemy is harbored or protected when, without proper authority, he is shielded, either physically or by use of any artifice, aid, or representation, from any injury or misfortune which in the chance of war may befall him. It must appear that the offense is knowingly committed.

Proof. (*a*) That the accused, without proper authority, harbored or protected a certain person; (*b*) that the person so protected was an enemy; and (*c*) that the accused had knowledge of that fact.

c. GIVING INTELLIGENCE TO THE ENEMY

Discussion. See 183*a*. 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, without proper authority, knowingly conveyed to the enemy certain information, as alleged; and (*b*) that the information was true or implied the truth, at least in part.

d. COMMUNICATING, CORRESPONDING, OR HOLDING INTERCOURSE WITH THE ENEMY

Discussion. Communication, correspondence, or holding intercourse with the enemy 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 intercourse or 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, without proper authority, communicated, corresponded, or held intercourse with a certain person; (*b*) that this person was an enemy; and (*c*) that the accused had knowledge of this fact.

184. ARTICLE 105—MISCONDUCT AS PRISONER

a. ACTING WITHOUT AUTHORITY TO THE DETRIMENT OF ANOTHER FOR THE PURPOSE OF SECURING FAVORABLE TREATMENT

Discussion. This offense covers all unauthorized conduct by a prisoner of war in the hands of the enemy which tends to ameliorate his condition to the detriment of other prisoners. This conduct may be the reporting of plans of escape being prepared by others or the reporting of secret food caches, equipment, or arms. The acts must be related to the captors, and tend to have the probable effect of bestowing upon the accused some favor with, or advantage from, the captors. The act of the accused must be contrary to law, custom, or regulation. Escape from the enemy is regarded as authorized by custom. An escape, therefore, which results in closer confinement or other measures against fellow prisoners still in the hands of the enemy is not an offense under this article. The act of the accused must be to the detriment of his fellow prisoners either by way of closer confinement, reduced rations, physical punishment, or other harm.

Proof. (*a*) That without proper authority the accused acted in a manner contrary to law, custom, or regulation, as alleged; (*b*) that the act was committed while the accused was in the hands of the enemy in time of war; (*c*) that the purpose of the act was to secure favorable treatment of the accused by his captors; and (*d*) that other prisoners held by the enemy suffered some detriment as the proximate result of the accused's act, as alleged.

b. MALTREATING PRISONERS WHILE IN A POSITION OF AUTHORITY

Discussion. The source of the authority is not material. It may arise from the military rank of the accused, through designation by the captor authorities,

or from voluntary election or selection by other prisoners for their self-government.

The maltreatment must be real, although not necessarily physical, and it must be without justifiable cause. Abuse of an inferior by inflammatory and derogatory words may, through mental anguish, constitute this offense. To assault, to strike, to subject to improper punishment, or to deprive of benefits would constitute a maltreatment if done without justifiable cause.

Proof. (*a*) That the accused maltreated a prisoner held by the enemy, as alleged; (*b*) that the act occurred while the accused was in the hands of the enemy in time of war; (*c*) that the accused held a position of authority over the person maltreated; and (*d*) that the act was without justifiable cause.

185. ARTICLE 106—SPIES

Discussion. The words "any person who in time of war" bring within the jurisdiction of general courts-martial and military commissions all persons of whatever nationality or status who commit the offense of lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces of the United States, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere.

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 members of a military organization not wearing disguise, dispatch drivers, whether members of a military organization or civilians, and persons in ships or 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 may be inferred from evidence of a deceptive insinuation of the accused among our forces, but 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, is admissible to rebut this inference.

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 armed force 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 104 with giving intelligence to or communicating with 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 as alleged, 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.

186. ARTICLE 107—FALSE OFFICIAL STATEMENTS

Discussion. Official documents and official statements include all documents and statements made in the line of duty. A statement made by a suspect or an accused person during an interrogation is not official within the meaning of this article if he did not have an independent duty or obligation to speak concerning the matter under inquiry. However, if he did have such an independent duty or obligation to speak, as in the case of a custodian who is required to account for property in his custody, a statement made by him during an interrogation into this matter is official, even though he had the right to refuse to make a statement under Article 31(b). See 213*f*(4) regarding statements made under oath.

The false representation must be made officially with the intent to deceive, and it must be one which the accused does not believe to be true. The relative rank of the person intended to be deceived is immaterial if that person was authorized in the execution of his office to require the statement or document from the accused. The expectation of material gain is not one of the essential elements of the offense, nor is it necessary that the false statement be material to the issue under inquiry. If the falsity is in respect to a material matter, it may be considered as some evidence of the necessary intent to deceive, while immateriality may tend to show an absence of this intent.

Proof. (*a*) That the accused signed a certain official document or made a certain official statement, as alleged; (*b*) that the document or statement was false in certain particulars, as alleged; (*c*) that the accused knew it to be false at the time of signing or making it; and (*d*) that the false document or statement was made with the intent to deceive.

187. ARTICLE 108—MILITARY PROPERTY OF UNITED STATES—LOSS, DAMAGE, DESTRUCTION, OR WRONGFUL DISPOSITION

a. SELLING OR OTHERWISE DISPOSING OF MILITARY PROPERTY

Discussion. Article 108 applies to the act of any person subject to the code, and it is immaterial whether the property sold, disposed of, destroyed, lost, or damaged had been issued at all or whether the property was issued to someone other than the accused.

Proof. (*a*) That the accused sold or otherwise disposed of certain property, as alleged; (*b*) that the sale or disposition was without proper authority; (*c*) that the property was military property of the United States; and (*d*) the value of the property, as alleged.

For a discussion of proof of value, see 200*a*(7).

b. WILLFULLY OR THROUGH NEGLECT DAMAGING, DESTROYING, OR LOSING MILITARY PROPERTY

Discussion. See 187*a*. A willful damage, destruction, or loss is one that is intentionally occasioned. Loss, destruction, or damage is occasioned through neglect when it is the result of a want of such attention to the nature or foreseeable 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 inferred that the damage, destruction, or

loss shown, unless satisfactorily explained, was due to the neglect of the accused. This rule, however, applies only to items of individual issue.

Proof. (*a*) That, without proper authority, the accused damaged or destroyed certain property in a certain way, or lost it, as alleged; (*b*) that the property was military property of the United States; (*c*) that the damage, destruction, or loss was willfully caused by the accused in a certain manner, as alleged; or that the damage, destruction, or loss was the result of neglect on the part of the accused; and (*d*) the value of the property destroyed or lost, or the amount of damage, as alleged.

For a discussion of proof of value, see 200*a*(7).

c. SUFFERING THE LOSS, DAMAGE, DESTRUCTION, SALE, OR WRONGFUL DISPOSITION OF MILITARY PROPERTY

Discussion. See 187*a*. The loss, damage, destruction, sale, 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, or a member of the boat crew, who seeing a small boat tied alongside, allows the boat to be damaged or lost by chafing or striking. A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a loss, damage, destruction, sale, 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; or loaning it to a person, known to be irresponsible, by whom it is damaged.

Although there may be no direct evidence that the property in question was military property of the United States, circumstantial evidence that the property was of a type and kind issued for use in, or furnished and intended for, the military service of the United States, might, together with other proved circumstances, warrant the court in inferring that it was such military property of the United States.

In the case of loss, destruction, sale, or wrongful disposition, the value of the property controls the limit of punishment which may be adjudged therefor, but in the case of damage, the amount of damage instead of the value of the property damaged is controlling. As a general rule, the amount of damage is the estimated or actual cost of repair by the governmental agency normally employed in such work, or the cost of replacement, as shown by government price lists or otherwise, whichever is the lesser. For a further discussion of proof of value, see 200*a*(7).

Proof. (*a*) That certain military property of the United States was lost, damaged, destroyed, sold, or wrongfully disposed of in the manner alleged; (*b*) that the loss, damage, destruction, sale, or disposition was suffered by the accused without proper authority, through a certain omission of duty on his part; (*c*) that this omission was willful or negligent as alleged; and (*d*) the

value of the property lost, destroyed, sold, or wrongfully disposed of, or the amount of damage, as alleged.

188. ARTICLE 109—PROPERTY OTHER THAN MILITARY PROPERTY OF UNITED STATES—WASTE, SPOIL, OR DESTRUCTION

a. WASTING OR SPOILING PROPERTY OTHER THAN MILITARY PROPERTY OF THE UNITED STATES

Discussion. This portion of Article 109 proscribes the willful or reckless waste or spoilation of the real property of another. The terms "wastes" and "spoils" as used in this article refer to such wrongful acts of voluntary destruction of or permanent damage to real property as burning down buildings, burning piers, tearing down fences, or cutting down trees. This destruction is punishable whether done willfully, that is intentionally, or recklessly, that is through a culpable disregard of the foreseeable consequences of some voluntary act.

Proof. (*a*) That the accused willfully or recklessly wasted or spoiled certain real property in the manner alleged; (*b*) that the property was that of another person, as alleged; and (*c*) the value of the property wasted or spoiled, as alleged.

For a discussion of proof of value, see 200*a*(7).

b. WILLFULLY AND WRONGFULLY DESTROYING OR DAMAGING OTHER THAN MILITARY PROPERTY OF THE UNITED STATES

Discussion. This portion of Article 109 proscribes the willful and wrongful destruction or damage of the personal property of another. 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. Damage consists of any physical injury to the property. To constitute an offense under this section, the destruction or damage of the property must have been willful and wrongful. As used in this section "willfully" means intentionally and "wrongfully" means contrary to law, regulation, lawful order, or custom. Willfulness may be shown by direct evidence, as by remarks of the accused at the time, or circumstantially, as by the manner in which the acts were done.

In the case of destruction, the value of the property destroyed controls the limit of punishment which may be adjudged therefor, but in the case of damage, the amount thereof instead of the value of the property damaged is so controlling. As a general rule, the amount of damage is the estimated or actual cost of repair by artisans employed in this work who are available to the community wherein the owner resides, or the replacement cost, whichever is the lesser.

Proof. (*a*) That the accused destroyed or damaged certain personal property, as alleged; (*b*) that the property was that of another person, as alleged; (*c*) that such destruction or damage was willful and wrongful; and (*d*) the value of the property destroyed or the amount of damage done, as alleged.

For a discussion of proof of value, see 200*a*(7).

189. ARTICLE 110—IMPROPER HAZARDING OF VESSEL

Discussion. As used in this article, "willfully" means intentionally and "wrongfully" means contrary to law, regulation, lawful order, or custom. "Neg-

ligence" under this article means the failure to exercise the care, prudence, or attention to duties, which the interests of the Government require to be exercised by a prudent and reasonable person under the circumstances. This negligence may consist of the omission to do something the prudent and reasonable person would have done, or the doing of something he would not have done under the circumstances. The words "to suffer" mean to allow or to permit, and a ship is willfully suffered to be hazarded by one who, although not in direct control of the vessel, knows a danger to be imminent but takes no steps to prevent it, as by a plotting officer of a ship under way who fails to report to the officer of the deck a radar target which he observes to be on a collision course with, and dangerously close to, his own ship. A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a foreseeable danger. "Hazard" means to put in danger of loss or injury. Actual damage to, or loss of, a vessel of the armed forces by collision, stranding, running upon a shoal or a rock, or by any other cause, is conclusive evidence that the vessel was hazarded although not of the fact of culpability on the part of any particular person. "Stranded" means run aground so that the vessel is fast for a time. If a vessel "touches and goes," she is not stranded; if she "touches and sticks," she is. A shoal is a sand, mud, or gravel bank or bar that makes the water shallow.

No person is relieved of culpability who fails to perform such duties as are imposed upon him by the general responsibilities of his grade or rank, or by the customs of the service for the safety and protection of vessels of the armed forces, simply because these duties are not specifically enumerated in a regulation or an order. However, a mere error in judgment such as a reasonably able person might have committed under the same circumstances, will not constitute an offense under this article.

Proof. (*a*) That a vessel of the armed forces was hazarded in a certain manner, as alleged; and (*b*) that the accused, by certain acts or omissions, as alleged, willfully and wrongfully, or negligently, caused or suffered the vessel to be so hazarded.

190. ARTICLE 111—DRUNKEN OR RECKLESS DRIVING

Discussion. Article 111 defines the offense of drunken or reckless driving as operating any vehicle while drunk, or in a recklesss or wanton manner.

Operating a vehicle includes not only driving or guiding it while in motion, either in person or through the agency of another, but also the setting of its motive power in action or the manipulation of its controls so as to cause the particular vehicle to move. The term "vehicle" applies to all types of land transportation (1 U.S.C. § 4), whether or not motor driven or passenger-carrying. Drunken or reckless operation of water and air transportation may be alleged under other articles of the code, as appropriate.

As to the meaning of "drunk," see 191.

The operation of a vehicle is "reckless" when it exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. Recklessness is not determined solely by reason of the happening of an injury, or the invasion of the rights of another, nor by proof alone of excessive speed or erratic operation, but all these factors may be admissible and relevant as bearing upon the ultimate question: Whether, under all the circumstances, the

accused's manner of operation of the vehicle was of that heedless nature which made it actually or imminently dangerous to the occupants, or to the rights or safety of others. It is driving with such a high degree of negligence that if death were caused, the accused would have committed involuntary manslaughter, at least.

"Wanton" includes "reckless," but in describing the operation of a vehicle, it may, in a proper case, connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense (see 197*d*).

While the same course of conduct may constitute both drunken and reckless driving, the article proscribes these as separate offenses, and both offenses may be charged. However, as recklessness is a relative matter, evidence of all the surrounding circumstances which made the operation dangerous, whether alleged or not, may be competent. Thus, on a charge of reckless driving, evidence of drunkenness might be admissible as establishing one aspect of the recklessness, and evidence that the vehicle exceeded a safe speed, at a relevant prior point and time, might be admissible as corroborating other evidence of the specific recklessness charged. Similarly, on a charge of drunken driving, relevant evidence of recklessness might have probative value as corroborating other proof of drunkenness.

The condition of the surface on which the vehicle is operated, the time of day or night, the traffic, and the condition of the vehicle are often matters of prime importance in the proof of an offense charged under this article, and where they are of importance, may properly be alleged.

Proof. (*a*) That the accused was operating a certain vehicle, as alleged; (*b*) that he was drunk while operating the vehicle; or, that he operated it in a reckless or wanton manner, as alleged; and, if alleged, (*c*) that the accused thereby caused the vehicle to injure the victim, as alleged.

191. ARTICLE 112—DRUNK ON DUTY

Discussion. Article 112 sets forth the offense of being found drunk on duty. The term "duty" as used in this article means military duty, but every duty which an officer or enlisted person may legally be required by superior authority to execute is necessarily a military duty.

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 or physical faculties is drunkenness within the meaning of the article.

It is necessary that accused be found drunk while actually on the duty alleged, and the fact that he became drunk before going on duty, although material in extenuation, does not affect the question of his guilt. If, however, he does not undertake the responsibility or enter upon the duty at all, his conduct does not fall within the terms of this article, nor does that of a person who absents himself from his duty and is found drunk while so absent. Included within the article is drunkenness while on duty of an anticipatory nature such as that of an aircraft crew ordered to stand by for flight duty, or of an enlisted person ordered to stand by for guard duty.

Within the meaning of this article, when in the actual exercise of command, the commanding officer of a post, or of a command, or of a detachment in the field is constantly on duty. Also, within the meaning of this article, the com-

manding officer on board his ship is constantly on duty. In the case of other officers or enlisted persons the term "on duty" relates to duties of routine or detail, in garrison, at a station, 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 as "off duty" or "on liberty."

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, or of the watch, are on duty during their entire tour within the meaning of this article.

Proof. (*a*) That the accused was on a certain duty, as alleged; and (*b*) that he was found drunk while on that duty.

192. ARTICLE 113—MISBEHAVIOR OF SENTINEL OR LOOKOUT

Discussion. This article defines three kinds of misbehavior committed by sentinels or lookouts: Being found drunk or sleeping upon post, or leaving it before being regularly relieved. As to the meaning of "drunk," see 191.

A post is not limited by an imaginary line, but includes, according to orders or circumstances, such surrounding area as may be necessary for the proper performance of the duties for which the sentinel or lookout was posted. The sentinel or lookout 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 may be convicted of a violation of this article. The offense of leaving post is not committed when a sentinel or lookout goes an immaterial distance from the point, station, area, or object which was prescribed as his post, unless he goes such a distance that his ability fully to perform the duty for which he was posted is impaired.

A sentinel or lookout is on post within the meaning of this article not only when he is at a post physically defined, as is ordinarily the case in garrison or aboard ship, but also, for example, when he is stationed in observation against the approach of an enemy, or is detailed to use any equipment designed to locate friend, foe, or possible danger, or at a designated place to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work.

This article does not include an officer or enlisted person of the guard, or of a ship's watch, not posted or performing the duties of a sentinel or lookout, nor does it include a person whose duties as a watchman or attendant do not require that he be constantly alert.

The fact that the sentinel or lookout is not posted in the regular way is not a defense. It is sufficient, for example, if he has taken his post in accordance with proper instruction, whether or not formally given.

Proof. (*a*) That the accused was posted or on post as a sentinel or lookout, as alleged; (*b*) that he was found drunk while on his post, or was found sleeping while on his post, or that he left his post before being regularly relieved; and, if alleged, (*c*) that it was committed in an area designated as authorizing entitlement to special pay for duty subject to hostile fire.

193. ARTICLE 114—DUELING

a. FIGHTING DUEL

Discussion. A duel is a combat between two persons for private reasons fought with deadly weapons by prior agreement.

Proof. (*a*) That the accused fought another person for private reasons 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. Urging 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.

194. ARTICLE 115—MALINGERING

Discussion. Malingering is defined in this article as feigning illness, physical disablement, mental lapse or derangement, or intentionally inflicting self-injury, for the purpose of avoiding work, duty, or service. The injury may be inflicted by nonviolent as well as by violent means and may be accomplished by any act or omission which produces, prolongs, or aggravates any sickness or disability. Thus, voluntary starvation which results in debility is a self-inflicted injury and when done for the purpose of avoiding work, duty, or service constitutes a violation of Article 115.

The essence of this offense is the design to avoid performance of any work, duty, or service which may properly or normally be expected of one in the military service. Whether to avoid all duty, or only a particular job, it is the purpose to shirk which characterizes the offense. Hence, the nature or permanency of a self-inflicted injury is not material on the question of guilt, nor is the seriousness of a physical or mental disability which is a sham. Evidence of the extent of the self-inflicted injury or feigned disability may, however, be relevant as a factor indicating the presence or absence of the purpose.

A qualified medical expert may testify concerning his opinion as to whether a purported illness of the accused was feigned (see 138*e*), and such an opinion may be regarded as evidence upon that question.

Proof. (*a*) That the accused was assigned to, or was aware of his prospective assignment to, or availability for, the performance of work, duty, or service, as alleged; (*b*) that the accused feigned illness, physical disablement, mental lapse or derangement, or intentionally inflicted injury upon himself, as alleged; and (*c*) that his purpose in doing so was to avoid the work, duty, or service alleged.

195. ARTICLE 116—RIOT OR BREACH OF PEACE

a. RIOT

Discussion. A riot is a tumultuous disturbance of the peace by three or more persons assembled together in furtherance of a common purpose to execute some enterprise of a private nature by concerted action against any who might oppose them, committed in such a violent and turbulent manner as to cause or be calculated to cause public terror. It is immaterial whether the act intended was of itself lawful or unlawful. Furthermore, it is not necessary that the common purpose be determined before the assembly. It is sufficient if the assemblage begins to execute in a tumultuous manner a common purpose formed after it assembled.

Proof. (*a*) That the accused was a member of an assembly of three or more persons; (*b*) that the accused and at least two other members of the assembly assembled in furtherance of a common purpose to execute some enterprise of a private nature by concerted action against any who might oppose them; (*c*) that the assembly or some of its members committed a tumultuous disturbance of the peace, as alleged; and (*d*) that the tumultuous disturbance of the peace caused or was calculated to cause public alarm or terror.

b. BREACH OF THE PEACE

Discussion. In military law, a "breach of the peace" is an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature.

Not every type of disorder or misconduct is a breach of the peace. For example, a soldier appearing in an unclean uniform in a public place might commit an offense in violation of Article 134, but this act would not ordinarily tend to a disturbance of the peace. The acts or conduct contemplated by this article are those which disturb the public tranquility or impinge upon the peace and good order to which the community is entitled. The words "community" and "public" include within their meaning a military organization, post, camp, ship, or station.

Engaging in an affray, unlawful discharge of firearms in a public street, and the use of vile or abusive words to another in a public place are a few instances of the type of conduct which may constitute a breach of the peace. The fact that opprobrious words are true, or used under provocation, is not a defense, nor is tumultuous conduct excusable because incited by others. As to self-defense, see 216*c*.

Proof. (*a*) That the accused caused or participated in a certain act of a violent or turbulent nature, as alleged; and (*b*) that the peace was thereby unlawfully disturbed.

196. ARTICLE 117—PROVOKING SPEECHES OR GESTURES

Discussion. This article makes punishable the use of provoking or reproachful words or gestures towards another person subject to the code.

As used in this article, "provoking" and "reproachful" describe those words or gestures which are used in the presence of the person to whom they are directed and which tend to induce breaches of the peace. As thus used they do not comprehend reprimands, censures, reproofs and the like which may

properly be administered in the interests of training, efficiency, or discipline in the armed forces.

Proof. That the accused wrongfully used certain provoking or reproachful words or gestures towards another person subject to the code, as alleged.

197. ARTICLE 118—MURDER

Discussion. *a. General.* The killing of a human being is unlawful when done without justification or excuse. See 216*a*, *b*, and *c*. The determination of whether an unlawful killing constitutes murder or a lesser offense (see 198) depends upon the circumstances under which it occurred. The offense is committed at the place of the act or omission although the victim may have died elsewhere. Whether death occurs at the time of the accused's act or omission, or at some time thereafter, it must have followed from an injury received by the victim which resulted from the act or omission.

Among the offenses which may be included in a particular charge of murder are manslaughter, negligent homicide in violation of Article 134, assault with intent to murder, and certain forms of assault.

Voluntary drunkenness (154*a*(2)) not amounting to legal insanity may reduce premeditated murder (Art. 118(1)) to unpremeditated murder (Art. 118(2) or (3)) but it will not operate to reduce it to manslaughter, nor to reduce unpremeditated murder to manslaughter.

b. Premeditation. 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 intent to kill someone and consideration of the act intended. It is not necessary that the intention to kill shall have been entertained for any particular or considerable length of time. When a fixed purpose to kill has been deliberately formed, it is immaterial how soon afterwards it is put into execution. The existence of premeditation may be inferred from the circumstances surrounding the killing.

Proof. (*a*) That the victim named or described is dead; (*b*) that his death resulted from the unlawful act or omission of the accused, as alleged; and (*c*) that the accused had a premeditated design to kill.

c. Intent to kill or inflict great bodily harm. An unlawful killing without premeditation is also murder when the person had either an intent to kill or an intent to inflict great bodily harm. Great bodily harm refers to serious injuries; it does not include minor injuries such as a black eye or a bloody nose (see 207*b*). It may be inferred that a person intends the natural and probable consequences of an act purposely done by him. Hence, if a person does an intentional act likely to result in death or great bodily injury, it may be inferred that he intended death or great bodily harm. The intent need not be directed toward the person killed, nor must it exist for any particular time before commission of the act or have previously existed at all. It is sufficient that it existed at the time of the act or omission (except if death is inflicted in the heat of a sudden passion caused by adequate provocation—see 198*a*). For example, a person perpetrating housebreaking who strikes and kills the householder attempting to block his flight can be guilty of murder even if he did not see the householder until the moment before striking the fatal blow.

Proof. (*a*) That the victim named or described is dead; (*b*) that his death resulted from the unlawful act or omission of the accused, as alleged; and (*c*) that the accused intended to kill or inflict great bodily harm.

d. Act inherently dangerous with wanton disregard of human life. Engaging in an act inherently dangerous to others, without any intent to cause the death of, or great bodily harm to, any particular person, or even with a wish that death may not be caused, may also constitute murder if the performance of the act shows a wanton disregard of human life. Such a disregard is characterized by a heedlessness of the probable consequences of the act or omission, an indifference that death or great bodily harm is likely to ensue. Examples might be throwing a live grenade toward others in jest or flying an aircraft very low over a crowd to make it scatter.

Proof. (*a*) That the victim named or described is dead; (*b*) that his death resulted from the unlawful act or omission of the accused, as alleged; and (*c*) that the accused was engaged in an act inherently dangerous to others, evincing a wanton disregard of human life.

e. Commission of certain offenses. A homicide committed during the perpetration or attempted perpetration of burglary, sodomy, rape, robbery or aggravated arson also constitutes murder, and it is immaterial that the slaying may be unintentional or even accidental. The law recognizes that the commission or attempted commission of these offenses is likely to result in homicide, and when an unlawful killing occurs as a consequence of the perpetration or attempted perpetration of one of these offenses, the killing is murder. The perpetration or attempted perpetration of the burglary, sodomy, rape, robbery, or aggravated arson, as the case may be, may also be charged in a separate specification.

Proof. (*a*) That the victim named or described is dead; (*b*) that his death resulted from the act or omission of the accused, as alleged; and (*c*) that the accused was engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson.

198. ARTICLE 119—MANSLAUGHTER

a. VOLUNTARY MANSLAUGHTER

Discussion. An unlawful killing, although done with an intent to kill or inflict great bodily harm (see 197*c*), is not murder but voluntary manslaughter if committed in the heat of sudden passion caused by adequate provocation. Heat of passion may be produced by fear as well as rage. The law recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion caused by the provocation, although not in necessary defense of life nor to prevent bodily harm (see 216*c*), he may strike a fatal blow before he has had time to control himself. While the law does not excuse the homicide because of the provocation, it does not hold him guilty of murder.

The provocation must be 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, judged by the standard of a reasonable man, sufficient cooling time elapses between the provocation and the killing, it is murder, even if the passion of the particular accused persists.

Examples of acts which may constitute adequate provocation are assault and battery inflicting great or grievous bodily harm, an unlawful imprison-

ment, 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 act, voluntary manslaughter only has been committed. Insulting or abusive words or gestures, a slight blow with the hand or fist, and trespass or other injury to property are not, standing alone, considered adequate provocation.

Among the offenses which may be included in a particular charge of voluntary manslaughter are involuntary manslaughter, negligent homicide in violation of Article 134, assault with intent to commit voluntary manslaughter, aggravated assault, assault and battery, and assault.

Proof. (*a*) That the victim named or described is dead; (*b*) that his death was caused by an unlawful act or omission of the accused; (*c*) that, at the time of the killing, the accused intended to kill or inflict great bodily harm; and, when considered as a lesser offense to murder, (*d*) that the act or omission of the accused was committed under and because of a heat of sudden passion caused by adequate provocation.

b. INVOLUNTARY MANSLAUGHTER

Discussion. Involuntary manslaughter is an unlawful homicide (see 197*a*) committed without an intent to kill or inflict great bodily harm; it is an unlawful killing by culpable negligence, or while perpetrating or attempting to perpetrate an offense other than burglary, sodomy, rape, robbery, or aggravated arson, directly affecting the person.

Culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. Thus, the basis of a charge of involuntary manslaughter may be a negligent act or omission which, when viewed in the light of human experience, might foreseeably result in the death of another, even though death would not, necessarily, be a natural and probable consequence of the act or omission.

Acts which may amount to culpable negligence 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; and carelessly leaving poisons or dangerous drugs where they may endanger life.

When there is no legal duty to act there can 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.

By an offense directly affecting the person is meant one affecting some particular person as distinguished from an offense affecting society in general. Among offenses directly affecting the person are the various types of assault, battery, false imprisonment, voluntary engagement in an affray, and maiming.

Among the offenses which may be included within a particular charge of involuntary manslaughter are negligent homicide in violation of Article 134, assault and battery, and assault.

Proof. (*a*) That the victim named or described is dead; (*b*) that his death resulted from the act or omission of the accused, as alleged; and (*c*) that this

act or omission of the accused constituted culpable negligence, or occurred while the accused was perpetrating or attempting to perpetrate an offense directly affecting the person other than burglary, sodomy, rape, robbery, or aggravated arson, as alleged.

199. ARTICLE 120—RAPE AND CARNAL KNOWLEDGE

a. RAPE

Discussion. Rape is the commission of an act of sexual intercourse by a person with a female not his wife, by force and without her consent. It may be committed on a female of any age. Any penetration, however slight, is sufficient to complete the offense (Art. 120c).

Force and lack of consent are indispensable to the offense. Thus, if the female consents to the act, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a woman in possession of her mental and physical faculties fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she did in fact consent. Consent, however, will not be inferred if resistance would be futile, or where resistance is overcome by threats of death or great bodily harm, nor will it be inferred if she is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in the act of penetration will suffice. All the surrounding circumstances are to be considered in determining whether a woman gave her consent, or whether she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm.

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."

If there is actual consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the woman is of unsound mind or unconscious to an extent rendering her incapable of giving consent, the act is rape. Likewise, the acquiescence of a female child of such tender years that she is incapable of understanding the nature of the act, is not consent. A woman's prior lack of chastity is not a defense, but see 153*b*(2)(*b*) as to the admissibility of evidence of her unchaste character.

Among the offenses which may be included in a particular charge of rape are assault with intent to commit rape, assault and battery, and assault.

Proof. (*a*) That the accused had sexual intercourse with a certain female not his wife; and (*b*) that the act was done by force and without her consent.

b. CARNAL KNOWLEDGE

Discussion. Carnal knowledge is defined as the commission of an act of sexual intercourse under circumstances not amounting to rape, by a person with a female not his wife who has not attained the age of 16 years. As in rape, any penetration is sufficient to complete the offense (Art. 120(c)).

It is no defense that the accused is ignorant or misinformed as to the true age of the female, or that she was of prior unchaste character; it is the fact of the girl's age and not his knowledge or belief which fixes his criminal responsibility. Evidence of these matters should, however, be considered in determining an appropriate sentence.

An accused does not violate this article by committing an act of sexual intercourse with a female of 16 years or over. However, if the statute of a jurisdiction denounces sexual intercourse with a female under a certain age greater than 16 years, the violation of such a statute within the territorial limits of the jurisdiction by a person subject to the code may constitute conduct of a nature to bring discredit upon the armed forces in violation of Article 134.

Proof. (*a*) That the accused had sexual intercourse with a certain female not his wife; and (*b*) that she had not attained the age of 16 years.

200. ARTICLE 121—LARCENY AND WRONGFUL APPROPRIATION

a. LARCENY

Discussion. (1) *General.* Under the provisions of Article 121, a person is guilty of larceny if he wrongfully takes, obtains or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind, with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner. A wrongful taking with intent permanently to deprive includes the common law offense of larceny; a wrongful obtaining with intent permanently to defraud includes the offense formerly known as obtaining by false pretense; and a wrongful withholding with intent permanently to appropriate includes the offense formerly known as embezzlement. Any of the various acts denounced as larceny by Article 121 may be charged and proved under a specification alleging that the accused stole the property in question.

Property which is taken, obtained, or withheld by severing it from real estate is within the class of property which may be the subject of larceny. Also within this class of property are writings which represent value, such as commercial paper.

(2) *Taking, obtaining, or withholding.* There must be a taking, obtaining, or withholding of the property by the thief. For instance, there is no taking if the property is connected to a building by a chain and the property has not been disconnected from the building; and property is not "obtained" by merely acquiring title thereto without exercising some possessory control over it. As a general rule, however, any movement of the property or any exercise of dominion over it by any means is sufficient if accompanied by the requisite intent. Thus, if a person entices another's horse into his own stable without touching the animal, or procures a railroad company to deliver to him another's trunk by changing the check on it, or obtains the delivery of another's goods to a person or place designated by him, or has the funds of another transferred to his own bank account, he is guilty of larceny if other elements of the offense are present. A person may "obtain" the property of another by acquiring possession without title, and one who already has possession of the property of another may "obtain" it by thereafter acquiring title thereto. A "withholding" may arise as a result of a failure to return, account for, or deliver property to its owner when a return, accounting, or delivery is due, even if the owner has made no demand for the property, or it may arise as a result of devoting property to a use not authorized by its owner. Generally, this is so whether the person withholding the property acquired it lawfully or unlawfully. See 200*a*(6). However,

acts which constitute the offense of unlawfully receiving, buying, or concealing stolen property (see 213*f*(14)) or of being an accessory after the fact (see 157) are not included within the meaning of the word "withholds." Therefore, neither a receiver of stolen property nor an accessory after the fact can be convicted of larceny on the theory that with knowledge of the identity of the owner he withheld the stolen property from the possession of the owner. The taking, obtaining, or withholding must be of specific property. A debtor does not withhold specific property from the possession of his creditor by failing or refusing to pay a debt, for the relationship of debtor and creditor does not give the creditor a possessory right in any specific money or other property of the debtor.

(3) *Ownership of the property.* Article 121 requires that the taking, obtaining, or withholding be from the possession of the owner or of any other person. Care, custody, management, and control are among the legal definitions of possession. The term "owner" refers to the person who, at the time of the taking, obtaining, or withholding, had the superior right to possession of the property in the light of all conflicting interests therein which are involved in the particular case. For instance, an estate is the true owner of its property as against a trustee of the estate charged with larceny of the property, and an organization is the true owner of its funds as against the custodian of the funds charged with larceny thereof. The phrase "any other person" means any person—even a person who has stolen the property—who has possession or a greater right to possession than the accused. In pleading a violation of this article, the ownership of the property may be alleged to have been in any person other than the accused who, at the time of the theft, was a general owner or a special owner thereof. A general owner of property is a person who has title to it, whether or not he has possession of it; whereas a special owner, such as a borrower or hirer, is one who does not have title but who does have possession, or the right to possession, of the property. The word "person," as used in referring to one from whose possession property has been taken, obtained, or withheld, and to any owner of property, includes (in addition to a natural person) a government, a corporation, an association, an organization, and an estate. Such a person need not be a legal entity.

(4) *Wrongfulness of the taking, obtaining, or withholding.* The taking, obtaining, or withholding of the property must be wrongful. As a general rule, a taking or withholding of property from the possession of another is wrongful if done without the consent of the other, and an obtaining of property from the possession of another is wrongful if the obtaining is by false pretense. However, such an act is not wrongful if it is authorized by law or apparently lawful superior orders, nor, generally, is such an act wrongful if done by a person who has a right to the possession of the property either equal to or greater than the right of the one from whose possession he takes, obtains, or withholds it. However, even if the person taking, obtaining, or withholding the property has a right of possession equal to or greater than that of the person from whose possession the property is taken, obtained, or withheld, the act is wrongful if it is done with the intent to charge him with the value of the property. Thus, if A delivers his property to B as a bailee and subsequently takes the property with intent to charge B with its value, the taking is wrongful. An owner of property who takes or withholds it from the possession of another, without the consent of the other, or who obtains it therefrom by false pretense, does so wrongfully

if the other has a superior right to possession of the property, such as a lien. A person who takes, obtains, or withholds property as the agent of another has the same rights and liabilities as does his principal, but he may not be charged with a guilty knowledge or intent of the principal to which he was not a party.

(5) *False pretense.* With respect to obtaining property by false pretense, the false pretense may be made by means of any act, word, symbol, or token. The pretense must be in fact false when made and when the property is obtained, and it must be knowingly false in the sense that it is made without a belief in its truth. A false pretense is a false representation of past or existing fact. In addition to other kinds of facts, the fact falsely represented by a person may be his or another's power, authority, or intention. Thus, a false representation by a person that he presently intends to perform a certain act in the future is a false representation of an existing fact—his intention—and thus a false pretense.

Although the pretense need not be the sole cause inducing the owner to part with his property, it is necessary that it be an effective (and intentional) cause of the obtaining. A false representation made after the property was obtained will not result in the commission of an offense denounced by Article 121.

A larceny is committed when a person obtains the property of another by false pretense and with intent to steal, even though the owner neither intended nor was requested to part with title to the property. Thus a person who gets possession of the watch of another by pretending that he is going to use it for a short time and then return it, but who really intends to sell it, is guilty of larceny.

(6) *Intent.* The offense of larceny requires that the taking, obtaining, or withholding by the thief be accompanied by an intent permanently to deprive or defraud another of the use and benefit of property or permanently to appropriate the property to his own use or the use of any person other than the owner. These intents are collectively called an intent to steal. Although a person has acquired possession of property by a taking or obtaining which was not wrongful or which was without the concurrence of an intent to steal, he nevertheless can commit larceny of the property if after the taking or obtaining he forms an intent to steal it and wrongfully withholds it with that intent. For example, if a person obtains the vehicle of another by hiring it and thereafter decides to keep the vehicle permanently, and pursuant to that decision either fails to return it at the appointed time or uses it for a purpose not authorized by the terms of the hiring, he has committed larceny, even though at the time he obtained the vehicle he fully intended to return it after using it according to the agreement of hire.

The existence of an intent to steal must, in most cases, be inferred from the circumstances. Thus, if a person secretly takes property, hides it, and denies that he knows anything about it, an intent to steal may be inferred; but if he takes it openly, and returns it, this would tend to negative such an intent. Proof of a subsequent sale of the property may show an intent to steal, and, therefore, evidence of such a sale may be introduced to support a charge of larceny. An intent to steal may be inferred from a wrongful and intentional dealing with the property of another in a manner likely to cause him to suffer a permanent loss thereof.

Although the taking, obtaining, or withholding need not be for the benefit of the thief himself, a person who divests another of property intending only to restore it to the possession of the owner, as when he takes stolen property from a thief with that intent, does not commit larceny or wrongful appropriation.

An intention to pay for the property stolen or otherwise to replace it with an equivalent is not a defense, even though such an intention existed at the time of the theft, and, once a larceny is committed, a return of the property or payment for it is no defense. If, however, the accused takes money or a negotiable instrument having no special value above its face value, with the intent to return an equivalent amount of money, the offense of larceny is not committed although wrongful appropriation (200*b*) may be.

(7) *Value.* Value is a question of fact to be determined on the basis of all of the competent evidence presented. When the property allegedly stolen is an item issued or procured from Government sources, the price listed in an official publication for that property at the time of the theft is admissible as evidence of its value. However, the item allegedly stolen must be shown to have been, at the time of the theft, in the condition upon which the value indicated in the official price is predicated. The price listed in the official publication is not conclusive as to the value of the item, and other competent evidence is admissible on the question of its condition and value.

As a general rule, the value of other stolen property is to be determined by its legitimate market value at the time and place of the theft. If this property, because of its character or the place where it was stolen, had no legitimate market value at the time and place of the theft or if that value cannot readily be ascertained, its value may be determined by its legitimate market value in the United States, as of the time of the theft, or by its replacement cost at that time, whichever is the lesser. Market value may be established by proof of the recent purchase price paid for the article upon the legitimate market involved; or by testimony or other admissible evidence emanating from any person who is familiar through training or experience with the market value in question. The owner of the property may testify as to its market value if he is familiar with its quality and condition, the circumstance that he is not otherwise qualified to express an opinion on the question of the market value of the property, if this is the case, going only to the weight to be given to his testimony and not to its admissibility. When the character of the property clearly appears in evidence, as when, for instance, it is exhibited to the court, the court, from its own experience, may infer that it has some value. If as a matter of common knowledge the property is obviously of a value substantially in excess of $100, as in the case of an automobile in good condition or a large collection of precious stones, the court may find a value of more than $100. Writings representing value may be considered to have the value which they represented—even though contingently—at the time of the theft.

If an owner of property, or someone acting in his behalf, steals it from a person who has a superior, but limited, interest in the property, such as a lien, and the theft is committed without intending to charge that person with the value of the property, the value for punishment purposes shall be that of the limited interest.

(8) *Miscellaneous.* A taking or withholding of lost property by the finder is larceny if accompanied by an intent to steal and if a clue to the identity of the

general or special owner, or through which such identity may be traced, is furnished by the character, location, or marking of the property, or by other circumstances.

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 persons 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.

Proof. (*a*) That the accused wrongfully took, obtained, or withheld from the possession of the owner or of any other person the property described in the specification; (*b*) that the property belonged to a certain person named or described; (*c*) that the property was of the value alleged, or of some value; and (*d*) that the taking, obtaining, or withholding by the accused was with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner.

b. WRONGFUL APPROPRIATION

Discussion. See generally 200*a*. Article 121 defines the offense of wrongful appropriation in the same way that larceny is defined, except that the wrongful taking, obtaining, or withholding need be with intent to deprive, defraud, or appropriate only temporarily. A charge of wrongful appropriation is necessarily included in a charge of larceny.

Instances of the offense of wrongful appropriation are: Taking the automobile of another without permission or lawful authority, with intent to drive it a short distance and then return it or cause it to be returned to the owner; obtaining a service weapon by falsely pretending to be about to go on guard duty, the weapon being thus obtained with intent to use it on a hunting trip and thereafter effect its return; and, while driving a government vehicle on a mission to deliver supplies, withholding the vehicle from the government service by deviating from the assigned route without authority, with intent to visit a friend in a nearby town and thereafter restore the vehicle to its lawful use.

An inadvertent exercise of control over the property of another will not result in a wrongful appropriation. For example, a person is not guilty of this offense who fails to return a borrowed boat at the time agreed upon because he inadvertently lost his direction and went aground on a sand bar.

Proof. (*a*) That the accused wrongfully took, obtained, or withheld from the possession of the owner or of any other person the property described in the specification; (*b*) that the property belonged to a certain person named or described; (*c*) that the property was of the value alleged, or of some value; and (*d*) that the taking, obtaining, or withholding by the accused was with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner.

201. ARTICLE 122—ROBBERY

Discussion. Robbery is the taking, with intent to steal, of anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or prop-

erty or the person or property of a relative or member of his family or of anyone in his company at the time of the robbery.

The particular thing must be taken from the person of another or in his presence, but to be in his presence it is not necessary that the property taken be located within any certain distance of the victim. 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 that room and steal the valuables, they have committed robbery.

For a robbery to be committed by force or violence, there must be actual force or violence to the person, preceding or accompanying the taking against his will, and it is immaterial that there is no fear engendered in the victim. Any amount of force is enough to constitute robbery if the force 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, even though the person had no knowledge of the act; or when a man is knocked insensible and his pockets rifled; or when a guard steals property from the person of a prisoner in his charge after handcuffing him on the pretext of preventing his escape.

For a robbery to be committed by putting the victim in fear, there need be no actual force or violence, but there must be demonstrations of force or menaces by which the victim is placed in such fear that he is warranted in making no resistance. The fear must be a reasonably well-founded apprehension of present or future injury, and the taking must occur while the apprehension exists. The injury apprehended may be death or bodily injury to the person himself or to the person of a relative or member of his family or of anyone in his company at the time, or it may be the destruction of his habitation or other injury to his property or that of a relative or member of his family or of anyone in his company at the time of sufficient gravity to warrant his giving up the property demanded by the assailant.

Robbery includes "taking with intent to steal"; hence, a larceny by taking is an integral part of a charge of robbery and must be proved at the trial. See 200*a*(4). When the evidence falls short of proving the force or fear or other facts necessary to robbery but does prove a larceny by taking, the accused, by proper exceptions and substitutions, may be found guilty of larceny. Conversely, depending on the facts alleged and proved, if the evidence fails to prove the larceny, the accused may be found guilty of some degree of assault, including assault consummated by a battery, assault with a dangerous weapon, assault in which grievous bodily harm is intentionally inflicted, or assault with intent to commit robbery. If the evidence fails to prove larceny but proves wrongful appropriation, the accused may be found guilty of the latter and, in an appropriate case, may be found guilty of both wrongful appropriation and an appropriate degree of assault, as discussed above, as lesser included

offenses of a single specification of robbery. In an appropriate case a finding of attempt to commit robbery is permissible (158).

Proof. (*a*) The larceny of the property (see *Proof* under 200*a*, but proof of specific value may be omitted); (*b*) that the larceny was from the person or in the presence of the person alleged to have been robbed; and (*c*) that the taking was against his will, by means of force or violence or by putting in fear, as alleged.

202. ARTICLE 123—FORGERY

Discussion. Forgery is the false making or altering with intent to defraud of any signature to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; or the uttering, offering, issuing, or transferring, with intent to defraud, of such a writing known by the offender to be so made or altered.

While forgery may be committed either by falsely making a writing or by knowingly uttering a falsely made writing, there are certain elements common to both aspects of forgery. These are (*a*) a writing falsely made or altered, (*b*) an apparent capability of the writing as falsely made or altered to impose a legal liability on another or to change his legal right or liability to his prejudice, and (*c*) an intent to defraud.

As regards the false making or altering of a writing, "false" refers not to the contents of the writing or to the facts stated therein but to the making or altering of it. Hence, forgery is not committed by the genuine making of a false instrument even when made with intent to defraud. Thus, a person who, with intent to defraud, signs his own signature as the maker of a check drawn on a bank in which he does not have money or credit does not commit forgery. Although the check falsely represents the existence of the account, it is what it purports to be, a check drawn by the actual maker, and therefore it is not falsely made. See, however, 202A. Likewise, if a person makes a false signature of another to an instrument, but adds the word "by" with his own signature thus indicating authority to sign, the offense is not forgery even if no such authority exists. False recitals of fact in a genuine document, as, an aircraft flight report which is "padded" by the one preparing it, do not constitute the writing a forgery.

Signing the name of another to an instrument having apparent legal efficacy without authority and with intent to defraud is forgery as the signature is falsely made. The distinction is that in this case, the falsely made signature purports to be the act of one other than the signer. Likewise, a forgery may be committed by a person signing his own name to an instrument. For example, when a check payable to the order of a certain person comes into the hands of another of the same name, he commits forgery if, 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 and signs it with a fictitious name as drawer.

The writing must be one which would, if genuine, apparently impose a legal liability on another, as a check or promissory note, or change his legal right or liability to his prejudice, as a receipt. Some other instruments which may be the subject of forgery are orders for delivery of money or goods, rail-

road tickets, and military orders directing travel. A writing falsely made includes an instrument that may be partially or entirely printed, engraved, written with a pencil, or made by photography or other device. A writing may be falsely "made" by materially altering an existing writing, by filling in a paper signed in blank, or by signing an instrument already written.

With respect to the apparent legal efficacy of the writing falsely made or altered, the writing must appear either on its face or from extrinsic facts to impose a legal liability on another, or to change a legal right or liability to the prejudice of another. If under all the circumstances the instrument has neither real nor apparent legal efficacy, there is no forgery. Thus, the false making, with intent to defraud, of an instrument affirmatively invalid on its face is not forgery nor is the false making or altering, with intent to defraud, of a writing which could not impose a legal liability, as a mere letter of introduction. However, the false making of another's signature on an instrument, with intent to defraud, is forgery, even if there is no resemblance to the genuine signature and the name is misspelled.

In order to constitute forgery by altering a writing, the alteration must effect a material change in the legal tenor of the writing. Thus an alteration whereby any obligation is apparently increased, diminished, or discharged is material. Examples of material alterations in the case of a promissory note are changing the date, amount, or place of payment. If a genuine writing has been delivered to the accused and while in his possession is later found to be altered, it may be inferred that the writing was altered by him.

The intent to defraud need not be directed toward anyone in particular nor be for the advantage of the offender. It is immaterial that nobody was actually defrauded, or that no further step was made toward carrying out the intent to defraud other than the false making or altering of a writing.

In proving forgery, the instrument itself should be produced, if available. That the signature to a written instrument was falsely made 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 drawer of a check, evidence of falsity may include evidence that the purported drawer of the check has no account in the bank upon which the check was drawn.

Proof. (*a*) That a certain signature or writing was falsely made or altered, as alleged; (*b*) that the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; (*c*) that it was the accused who so falsely made or altered the signature or writing or uttered, offered, issued, or transferred it, knowing it to have been so made or altered; and (*d*) that the intent of the accused was to defraud.

202A. ARTICLE 123a—MAKING, DRAWING, OR UTTERING CHECK, DRAFT, OR ORDER WITHOUT SUFFICIENT FUNDS

Discussion. Article 123a denounces certain "bad check" offenses. It makes punishable by court-martial the making, drawing, uttering, or delivering of any check, draft, or order for the payment of money upon any bank or other depository, either—

(1) for the procurement of any article or thing of value, with intent to defraud; or

(2) for the payment of any past due obligation, or for any other purpose, with intent to deceive;

knowing at the time of the making, drawing, uttering, or delivering that the maker or drawer has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of that check, draft, or order in full upon its presentment.

The written instruments covered by this article include any check, draft, or order for the payment of a sum of money drawn upon any bank or other depository, whether or not the drawee bank or depository is actually in existence. The phrase "bank or other depository" includes any business regularly but not necessarily exclusively engaged in public banking activities. The words "making" and "drawing" are synonymous, and refer to the acts of writing and signing the instrument. "Uttering" and "delivering" have similar meanings. Both "uttering" and "delivering" mean transferring the instrument to another, but "uttering" has the additional meaning of offering to transfer. A person need not himself be the maker or drawer of an instrument in order to violate this article if he utters or delivers it. For example, if a person holds a check which he knows to be worthless, and utters or delivers the check to another, he may be guilty of an offense under this article despite the fact that he did not draw the check himself.

To constitute an offense under this article, the instrument must be made, drawn, uttered, or delivered, with the requisite knowledge of insufficient funds or credit, either for the procurement of an article or thing of value with intent to defraud, or for the payment of any past due obligation or for any other purpose with intent to deceive. "For the procurement" means for the purpose of obtaining any article or thing of value. It is not necessary that an article or thing of value actually be obtained, and the purpose of the obtaining may be for the accused's own use or benefit or for the use or benefit of another. "For the payment" means for the purpose or purported purpose of satisfying in whole or in part any past due obligation. It is not requisite that payment be legally effected. "For any other purpose" includes all purposes other than the payment of a past due obligation or the procurement of any article or thing of value. For example, it includes satisfying or purporting to satisfy an obligation arising from an illegal transaction, such as an illegal gambling game, and paying or purporting to pay an obligation which is not yet past due. The check, draft, or order, whether made or negotiated for the procurement of an article or thing of value or for the payment of a past due obligation or for some other purpose, need not be intended or represented as payable immediately. For example, the making of a post dated check, delivered at the time of entering into an installment purchase contract and intended as payment for a future installment, would, if made with the requisite intent and knowledge, be a violation of this article.

"Article or thing of value" extends to every kind of right or interest in property, or derived from contract, including interest and rights which are intangible or contingent or which mature in the future. A "past due obligation" is an obligation to pay money which has legally matured prior to the making, drawing, uttering, or delivering of the instrument.

The accused must have knowledge, at the time he makes, draws, utters, or delivers the instrument, that the maker or drawer, whether the accused or another, has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of the instrument in full upon its presentment. "Sufficient funds" refers to a condition in which the account balance of the maker or drawer in the bank or other depository at the time of the presentment of the instrument for payment is not less than the face amount of the instrument and has not been rendered unavailable for payment by garnishment, attachment, or other legal procedures.

"Credit" means an arrangement or understanding, express or implied, with the bank or other depository for the payment of the check, draft, or order. An absence of credit includes those situations in which an accused writes a check on a nonexistent bank or on a bank in which he has no account. "Upon its presentment" refers to the time the demand for payment is made upon presentation of the instrument to the bank or other depository on which it was drawn.

"Intent to defraud" means an intent to obtain, through a misrepresentation, an article or thing of value and to apply it to one's own use and benefit or to the use and benefit of another, either permanently or temporarily. An "intent to deceive" means an intent to mislead, cheat, or trick another by means of a misrepresentation made to that order for the purpose of gaining an advantage for one's self or for a third person or of bringing about a disadvantage to the interests of the person to whom the representation was made or interests represented by that person. It may be inferred that every check, draft, or order carries with it a representation that the instrument will be paid in full by the bank or other depository upon presentment by a holder when due.

It should be noted that, under this article, two times are involved: (1) the time when the accused makes, draws, utters, or delivers the instrument; and (2) the time when the instrument is presented to the bank or other depository for payment. At time (1), the accused must possess the requisite intent and must know that the maker or drawer does not have or will not have sufficient funds in, or credit with, the bank or other depository for payment of the instrument in full upon its presentment when due. With respect to (2), if it can otherwise be shown that the accused possessed the requisite intent and knowledge at the time he made, drew, uttered, or delivered the instrument, neither proof of presentment nor refusal of payment is necessary, as when the instrument is one drawn on a nonexistent bank. The provisions of this article with respect to establishing *prima facie* evidence of knowledge and intent by proof of notice and nonpayment within five days is a statutory rule of evidence. The failure of an accused who is a maker or drawer to pay the holder the amount due within five days after receiving either oral or written notice from the holder of a check, draft, or order, or from any other person having knowledge that such check, draft, or order was returned unpaid because of insufficient funds, is *prima facie* evidence (1) that the accused had the intent to defraud or deceive as alleged; and (2) that the accused knew at the time he made, drew, uttered, or delivered the check, draft, or order that he did not have or would not have sufficient funds in, or credit with, the bank or other depository for the payment of such check, draft, or order upon its presentment for payment. *Prima facie* evidence is that proof which, if unrebutted, is sufficient to

establish the accused's intent to defraud or deceive and of his knowledge of insufficient funds in or credit with the bank or other depository.

The failure to give the notice referred to in Article 123a, or payment by the accused, maker, or drawer to the holder of the amount due within five days after such notice has been given, merely precludes the prosecution from availing itself of the statutory rule of evidence. Proof of notice to the accused that a check, draft, or order has been returned unpaid because of insufficient funds is not an element of the offense.

Offenses involving dishonorable failure to maintain sufficient funds for payment of checks upon presentment, in violation of Article 134, may be included offenses under Article 123a, not requiring proof of fraudulent or deceitful intent.

As to permissible methods of proving banking entries, see 143*b*(3). As to the authentication of checks, drafts, or orders returned with payment refused and the admissibility of these returned instruments, see the third paragraph of 144*c*.

Proof. *When the instrument is given for the procurement of an article or thing of value.* (*a*) That the accused made, drew, uttered, or delivered a check, draft, or order payable to a named person or organization, as alleged; (*b*) that he did that act for the purpose of procuring an article or thing of value; (*c*) that the act was committed with intent to defraud; and (*d*) that at the time of making, drawing, uttering, or delivering of the instrument he knew that he or the maker or drawer had not or would not have sufficient funds in, or credit with, the bank or other depository for the payment thereof upon presentment.

When the instrument is given for the payment of a past due obligation, or for any other purpose. (*a*) That the accused made, drew, uttered, or delivered a check, draft, or order payable to a named person or organization, as alleged; (*b*) that he did that act for the purpose or purported purpose of effecting the payment of a past due obligation or for some other purpose, as alleged; (*c*) that the act was committed with intent to deceive; and (*d*) that at the time of making, drawing, uttering, or delivering of the instrument, he knew that he or the maker or drawer had not or would not have sufficient funds in, or credit with, the bank or other depository for the payment thereof upon presentment.

203. ARTICLE 124—MAIMING

Discussion. Maiming is the inflicting upon the person of another, with intent to injure, disfigure, or disable, an injury which seriously disfigures his person by any mutilation thereof, destroys or disables any member or organ of his body, or seriously diminishes his physical vigor by the injury of any member or organ. For example, it is maiming to put out a man's eye, to cut off his hand, foot, or finger, or to knock out his front teeth, as these injuries destroy or disable those members or organs. Likewise, it is maiming to cut off an ear or to scar a face with acid, as these injuries seriously disfigure the person. It is also maiming to injure an internal organ so as to seriously diminish the physical vigor of a person.

A disfigurement need not mutilate any entire member to come within the article, nor be of any particular type, but must be such as to impair per-

ceptibly and materially the victim's comeliness. The disfigurement, diminishment of vigor, or destruction or disablement of any member or organ must be a serious injury, one of a substantially permanent nature. The offense is complete if such an injury is inflicted, however, even though there is a possibility that the victim may eventually recover the use of the member or organ, or that the disfigurement may be cured by surgery.

The means of inflicting the injury are immaterial to proof of the offense although they may be considered on the question of intent. Infliction of the type of injuries specified in this article upon the person of another may support an inference of the intent to injure, disfigure, or disable. The offense requires only a general criminal intent to injure and not a specific intent to maim. Thus, one commits the offense who intends only a slight injury, if in fact he does inflict injury included within the terms of Article 124. If the injury is done under circumstances which would justify or excuse homicide, the offense of maiming is not committed. See 216*a*, *b*, and *c*.

Among the offenses which may be included in a particular charge of maiming are aggravated assault, assault and battery, and assault.

Proof. (*a*) That the accused inflicted upon a certain person the injury alleged; (*b*) that the injury seriously disfigured his person, or destroyed or disabled an organ or member, or seriously diminished his physical vigor by the injury to an organ or member; and (*c*) that the accused had an intent to injure, disfigure, or disable the person.

204. ARTICLE 125—SODOMY

Discussion. Sodomy is the engaging in unnatural carnal copulation, either with another person of the same or opposite sex, or with an animal. Any penetration, however slight, is sufficient to complete the offense, and emission is not necessary.

It is unnatural carnal copulation for a person to take into his or her mouth or anus the sexual organ of another person or of an animal; or to place his or her sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation in any opening of the body of an animal.

Proof. (*a*) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal, as alleged; and, if alleged, (*b*) that the act was done by force and without the consent of the other person or was done with a child under the age of 16 years.

205. ARTICLE 126—ARSON

a. AGGRAVATED ARSON

Discussion. Aggravated arson is the willful and malicious burning or setting on fire (1) of an inhabited dwelling whether occupied at the time or not, or (2) of any other structure, movable or immovable, wherein to the knowledge of the offender there is at the time a human being.

In aggravated arson, danger to human life is the essential element; in simple arson, it is injury to the property of another. In either case, it is immaterial that no one is, in fact, injured. A person may be guilty of aggravated arson even against his own dwelling, whether as owner or tenant. It must be

shown that the accused set the fire willfully and maliciously, that is, not merely by negligence or accident.

An inhabited dwelling includes the outbuildings that form part of the cluster of buildings used as a residence. A shop or store is not an inhabited dwelling unless occupied as such, nor is a house that has never been occupied or which has been temporarily abandoned.

Aggravated arson may also be committed by burning or setting on fire any other structure, movable or immovable, such as a theater, church, boat, trailer, tent, auditorium, or any other sort of shelter or edifice, whether public or private, wherein to the knowledge of the offender there is at the time a human being. It may be inferred that the offender had this knowledge when the nature of the structure, as a department store or theater during hours of business, or other circumstances are shown to have been such that a reasonable man must have known of the presence of human beings therein at the time.

It is not necessary that the dwelling or structure be consumed or materially injured; it is enough if fire is actually communicated to any part thereof. Any actual burning or charring is sufficient, but a mere scorching or discoloration by heat is not.

For the offense of aggravated arson, the value and ownership of the dwelling or other structure are immaterial, but should ordinarily be alleged and proved to permit the finding in an appropriate case of the included offense of simple arson.

Proof. (*a*) That the accused burned or set on fire the inhabited dwelling, or other structure, as alleged; (*b*) that this dwelling or structure was of a value and belonged to a certain person, as alleged; (*c*) that the act was willful and malicious; and if not an inhabited dwelling, (*d*) that the accused had knowledge there was a human being in the structure at the time.

b. SIMPLE ARSON

Discussion. Simple arson is the willful and malicious burning or setting fire to the property of another under circumstances not amounting to aggravated arson.

The offense includes burning or setting fire to real or personal property of someone other than the offender and, as in aggravated arson, it must be shown that the accused set the fire willfully and maliciously.

Proof. (*a*) That the accused burned or set fire to certain property of another, as alleged; (*b*) that the property was of the value alleged, or of some value; and (*c*) that the act was willful and malicious.

206. ARTICLE 127—EXTORTION

Discussion. Extortion is the communication of threats to another with the intention thereby to obtain anything of value, or any acquittance, advantage, or immunity. The offense is complete upon communication of the threat with the requisite intent, and evidence of the actual or probable success or failure of the extortion is immaterial to the determination of guilt.

A threat may be communicated orally or in writing, so long as it is received by the intended victim. An acquittance is a release or discharge from an obligation. An intent to obtain any advantage or immunity may include an intent to make a person do an act against his will.

The threat in extortion may be a threat to do any unlawful injury to the person or property of the individual threatened or of any member of his family or any other person held dear to him; a threat to accuse the individual threatened, or any member of his family or any other person held dear to him, of any crime; a threat to expose or impute any deformity or disgrace to the individual threatened or to any member of his family or any other person held dear to him; a threat to expose any secret affecting the individual threatened or any member of his family or any other person held dear to him; or a threat to do any other harm.

Proof. (*a*) That the accused communicated certain threats to another, as alleged; and (*b*) that he intended to unlawfully obtain something of value, or any acquittance, advantage, or immunity, as alleged.

207. ARTICLE 128—ASSAULT

a. ASSAULT

Discussion. An assault is an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated. Thus, an offer to do bodily harm to another, as distinguished from an attempt to do such harm, is a putting of the other in reasonable apprehension that force will at once be applied to his person. Pointing an unloaded pistol which the assailant knows to be unloaded at another is not an attempt to do bodily harm with the pistol, for the assailant is cognizant of his inability to shoot the victim; yet such an act may be an assault if the victim is aware of the attack and is put in reasonable apprehension of bodily injury. On the other hand, 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 apprehension, may nevertheless be an assault in the form of an attempt to do bodily harm. Some other examples of acts which may constitute an assault are raising a stick over another's head as if to strike him and causing him to apprehend that he will be struck, striking at another with a cane or fist, assuming a threatening attitude and hurrying toward another so as to cause him to apprehend bodily harm, and drawing a pistol from a holster or pocket with an actual or apparent—to the person assailed—intent to use it. Preparation not amounting to an overt act, such as picking up a stone without any attempt or offer to throw it, does not constitute an assault, nor does the mere use of threatening words.

If the circumstances known to the person menaced clearly negative an intent to do bodily harm 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. For example, if A raises a stick and shakes it at B within striking distance saying, "If you weren't an old man, I would knock you down," no assault has been committed. However, an offer to inflict bodily injury upon another instantly if he does not comply with a demand which the assailant has no lawful right to make is an assault. Thus, if A points a pistol at B and says to him, "If you don't hand over your watch I will shoot you," A has committed an assault upon B.

An assault may consist of a culpably negligent act or omission which foreseeably might and does cause another reasonably to apprehend that force will at once be applied to his person. See 198*b* (Involuntary 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. Thus, if a person loads his rifle with what he believes to be a good cartridge and, pointing it at another, pulls the trigger, he may be guilty of assault although the cartridge was in fact so defective that it did not explode. Likewise, if a person in a house shoots through the roof at a place where he believes a policeman is concealed, he may be guilty of an assault even though the policeman is at another place on the roof.

If there is a demonstration of violence coupled with an apparent ability to inflict bodily injury, so as to cause the person at whom it was directed reasonably to apprehend bodily injury unless he retreats to secure his safety, and under these 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 the injury. Thus, to aim a pistol at a man at such a distance that it clearly could not injure would not be an assault.

An assault in which the attempt or offer to do bodily harm is consummated by the infliction of that harm is called a battery. A battery is defined as an unlawful, and intentional or culpably negligent, application of force to the person of another by a material agency used directly or indirectly. It may be 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. A man who fondles against her will a woman not his wife commits a battery, and so does a person who, being excused in using force, uses more force than is required. Sending a missile into a crowd may be a battery on anyone whom the missile hits. If a culpably negligent act or omission causes bodily harm to another, it may constitute a battery. If bodily harm is inflicted unintentionally and without culpable negligence, however, the offense is not committed. It is not a battery to lay hands on another to attract his attention or to seize another to prevent a fall.

The force applied in a battery may have been directly or indirectly set in motion. Thus a battery can be committed by inflicting bodily injury on a person through striking the horse on which he is mounted or the vehicle in which he is present, as well as by striking him directly.

Proof of a battery will support a conviction of assault, for an assault is necessarily included in a battery.

In order to constitute an assault the act of violence must be unlawful. It must be done without legal justification or excuse (see 216*a* and *b*) and without the lawful consent of the person affected. With respect to the excuse of self-defense, see 216*c*.

Proof. (*a*) That the accused attempted or offered with unlawful force or violence to do bodily harm to a certain person, as alleged, or (*b*), in the case of a consummated assault, that with unlawful force or violence he did bodily harm to a certain person, as alleged.

b. ASSAULTS PERMITTING INCREASED PUNISHMENT BASED ON STATUS OF VICTIM

Discussion. The maximum permissible punishment for certain assaults under Article 128(a) is increased when the victim has a particular status or is performing a special function. See Section A, 127*c*, Table of Maximum

Punishments. Assaults with this characteristic are discussed below. See 213*f*(1) for a discussion of assaults with intent to commit certain offenses of a civil nature and indecent assaults.

(1) *Assault upon a commissioned officer, warrant officer, noncommissioned officer, or petty officer.* This is an assault committed upon a commissioned officer of the armed forces of the United States, or of a friendly foreign power, or upon a warrant officer, noncommissioned officer, or petty officer. Knowledge by the accused that the person assaulted was a commissioned officer of the United States or of a friendly foreign power, or a warrant officer, noncommissioned officer, or petty officer is an essential ingredient of this offense. It is not necessary that the victim be superior in rank or command to the accused, that he be in the same armed force, or that he be in the execution of his office at the time of the assault.

Proof. (*a*) That the accused assaulted a certain person, as alleged; (*b*) that the person was a commissioned, warrant, noncommissioned, or petty officer, as alleged; and (*c*) that the accused knew that the person was a commissioned, warrant, noncommissioned, or petty officer, as alleged.

(2) *Assault upon a sentinel or lookout in the execution of his duty, or upon a person in the execution of police duties.* This is an assault committed upon a sentinel or lookout in the execution of his duty, or upon a person who, in the execution of his office, was performing Air Force security police, military police, shore patrol, or civil law enforcement duties.

Proof. (*a*) That the accused assaulted a certain person, as alleged; (*b*) that the person was a sentinel or lookout in the execution of his duty or was a person who then had and was in the execution of Air Force security police, military police, shore patrol, or civil law enforcement duties, as alleged; and (*c*) that the accused knew at the time of the assault that the person was a sentinel or lookout in the execution of his duty or was a person who then had and was in the execution of Air Force security police, military police, shore patrol, or civil law enforcement duties, as alleged.

(3) *Assault consummated by a battery upon a child under sixteen years of age.* This is an assault consummated by a battery upon a child under the age of sixteen years.

Proof. (*a*) That the accused, with unlawful force or violence, did bodily harm to a certain person; and (*b*) that this person was under the age of sixteen years.

c. AGGRAVATED ASSAULT

Discussion. Article 128(b) defines two kinds of aggravated assault. One is an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm. The other is an assault, with or without a weapon, in which the assailant intentionally inflicts grievous bodily harm.

See 213*f* (Various types of offenses under Article 134) as to assaults with intent to commit certain offenses of a civil nature and indecent assaults.

(1) *Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm.* A weapon is dangerous when used in such a manner that it is likely to produce death or grievous bodily harm. By "grievous bodily harm" is meant serious bodily injury. The phrase "or other means or force" may include any means or instrumentality not normally con-

sidered a "weapon." When the natural and probable consequence of a particular use of any means or force would be death or grievous bodily harm, it may be said that the means or force is "likely" to produce that result. The use to which a certain kind of instrument is ordinarily put is of no importance with respect to the question of its method of employment in a particular case. Thus a bottle, a beer glass, a rock, a sugar bowl, a piece of pipe, a piece of wood, boiling water, drugs, or a rifle butt may be used in a manner likely to inflict death or grievous bodily harm. On the other hand, an unloaded pistol, when presented as a firearm and not as a bludgeon, is not a dangerous weapon or a means or force likely to produce grievous bodily harm, whether or not the assailant knew it was unloaded.

With respect to the offense of aggravated assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm, it is not necessary that death or grievous bodily harm be actually inflicted.

Proof. (*a*) That the accused assaulted (see proof of assault) a certain person with a certain weapon, means, or force; and (*b*) that the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

(2) *Assault in which grievous bodily harm is intentionally inflicted.* "Grievous bodily harm" does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs and other serious bodily injuries.

When grievous bodily harm has been inflicted by means of intentionally using force in a manner likely to achieve that result, it may be inferred that grievous bodily harm was intended. For example, intentionally knocking a person from a height, such as a grandstand, so that the resulting fall breaks his leg, is an aggravated assault. On the other hand, striking a person with a fist in a sidewalk fight, and thereby causing him to fall in such a fashion that his head happens to hit the curbstone and his skull is fractured, is not an aggravated assault if no serious injury was inflicted by the blow itself for, although the fractured skull occurred under such circumstances that had the victim died as a result of the fracture the offense might have been involuntary manslaughter (see Art. 119(b)(2)), that injury nevertheless was not a likely, that is, a natural and probable, consequence of the assailant's act.

It is possible, however, to commit this kind of aggravated assault with the fists, as when the victim is held by one of several assailants while the others beat him with their fists and break his nose or jaw.

Proof. (*a*) That the accused assaulted (see proof of assault) a certain person; (*b*) that grievous bodily harm was thereby inflicted upon such person; and (*c*) that the grievous bodily harm was intentionally inflicted.

208. ARTICLE 129—BURGLARY

Discussion. Burglary is the breaking and entering in the nighttime of the dwelling house of another, with intent to commit an offense punishable under Articles 118 through 128, except 123a. These offenses are murder, manslaughter, rape and carnal knowledge, larceny and wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, and assault. In addition, an intent to commit an offense which, though not covered by Articles 118 through 128, necessarily includes an offense within one of these articles satisfies the intent

element of this article. This would include, for example, assaults punishable under Article 134, which necessarily include simple assault under Article 128.

It is immaterial whether the offense intended is committed or even attempted. If the offense 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 also used 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 at the time of the alleged offense; 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 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 the requisite intent 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 in the house an offense punishable under Articles 118 through 128, except 123a. If, after the breaking and entering, the accused commits one or more of these offenses, it may be inferred that he intended to commit the offense or offenses at the time of the breaking and entering. If the available evidence appears to warrant such

action, the actual commission of the offense alleged in the burglary specification to have been intended may 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 the breaking and entering were done in the nighttime; and (*c*) that the breaking and entering were done with the intent to commit the alleged offense therein.

209. ARTICLE 130—HOUSEBREAKING

Discussion. Housebreaking is the unlawful entering of the building or structure of another with intent to commit a criminal offense therein. The article is not violated by one who enters lawfully, though with intent to commit an offense. 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 one of the offenses made punishable under Articles 118 through 128. The intent to commit some criminal offense is an essential element of housebreaking and must be alleged and proved in order to support a conviction of this offense. Any act or omission which is punishable by courts-martial, except an act or omission constituting a purely military offense, is a "criminal offense."

The word "building" includes a room, shop, store, office, or apartment in a building. As used in this article, the word "structure" refers only to those structures which are in the nature of a building or dwelling. Examples of these structures are a stateroom, hold, or other compartment of a vessel, an inhabitable trailer, an inclosed goods truck or freight car, a tent, and a houseboat. It it not necessary that the building or structure be in use at the time of the entry. As to what constitutes an entry, see 208 (Burglary).

The principles of the last sentence of the discussion in 208 (Burglary) are applicable to housebreaking.

Proof. (*a*) That the accused unlawfully entered a certain building or structure of a certain other person as specified; and (*b*) that he intended to commit a criminal offense therein, as alleged.

210. ARTICLE 131—PERJURY

Discussion. Perjury is the willful and corrupt giving, in a judicial proceeding or in a course of justice and upon a lawful oath or in any form allowed by law to be substituted for an oath, of any false testimony material to the issue or matter of inquiry. "Judicial proceeding" includes a trial by court-martial and "course of justice" includes an investigation conducted under Article 32.

The testimony must be false and must be willfully and corruptly given; that is, it must appear that the accused gave the false testimony willfully and that he did not believe it to be true. 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 is 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. Thus, if a witness swears that he does not remember certain matters when in fact he does or

testifies that in his opinion a certain person was drunk when in fact he entertains the contrary opinion, he commits perjury if the other elements of the offense are present.

The oath must be one required or authorized by law and must be duly administered by one authorized to administer it. When a form of oath has been prescribed a literal following of that form is not essential; it is sufficient if the oath administered conforms in substance to the prescribed form. An oath includes an affirmation when 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, unless he was forced to answer over a valid claim of privilege.

The false testimony must be with respect to a material matter, but that matter need not be the main issue in the case. Thus, perjury may be committed by giving 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 false 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. Whether the allegedly false testimony was with respect to a material matter is a question of law to be determined as an interlocutory question. See 57*b*.

If the accused is charged with having committed perjury before a court-martial, it must be shown that the court-martial was duly detailed and constituted. Ordinarily this may be shown by introducing in evidence pertinent parts of the record of trial of the case in which the perjury was allegedly committed or by the testimony of a person who was counsel, the military judge, or a member of the court in that case to the effect that the court was so detailed and constituted.

The falsity of the allegedly perjured statement cannot, except with respect to matters which by their nature are not susceptible of direct proof, be proved by circumstantial evidence alone, nor can the falsity of the statement be proved by the testimony of a single witness unless that testimony directly contradicts the statement and is corroborated by other evidence, either direct or circumstantial, tending to prove the falsity of the statement. However, documentary evidence directly disproving the truth of the statement charged to have been perjured need not be corroborated if the document is an official record shown to have been well known to the accused at the time he took the oath or if it appears that the documentary evidence had sprung from the accused himself—or had in any manner been recognized by him as containing the truth—before the allegedly perjured statement was made.

The fact that the accused did not believe his statement to be true may be proved by testimony of one witness without corroboration or by circumstantial evidence.

Proof. (*a*) That the accused took an oath or its equivalent in a certain judicial proceeding or course of justice, as alleged; (*b*) that the oath was administered to the accused in a matter in which an oath was required or authorized by law; (*c*) that the oath was administered by a person having authority to do so; (*d*) that upon the oath the accused willfully gave the testimony alleged; (*e*) that the testimony was material; (*f*) that the testimony was false; and (*g*) that the accused did not believe the testimony to be true.

211. ARTICLE 132—FRAUDS AGAINST THE UNITED STATES

a. MAKING A FALSE OR FRAUDULENT CLAIM

Discussion. A claim is a demand for a transfer of ownership of money or property and does not include requisitions for the mere use of property.

Making a claim is a distinct act from presenting it. A claim may be made in one place and presented in another. The mere writing of a paper in the form of a claim, without any further act to cause the paper to become a demand against the United States or an officer thereof, does not constitute "making" a claim. However, any act placing the claim in official channels constitutes "making" a claim, even if that act does not amount to "presenting" the claim.

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 with knowledge of its fictitious or dishonest character. This article does not proscribe claims, however groundless they may be, that are believed by the maker to be valid, nor claims that are merely made negligently or without ordinary prudence. See also the discussion in 211*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 for official action, but only so much of the claim as respects the articles not lost is false within the meaning of this article.

Proof. (*a*) That the accused made a certain claim against the United States or an officer thereof, as alleged; (*b*) that the claim was false or fraudulent in the particulars specified; and (*c*) that when the accused made the claim he knew that it was false or fraudulent in these particulars.

b. PRESENTING FOR APPROVAL OR PAYMENT A FALSE OR FRAUDULENT CLAIM

Discussion. See *Discussion* in 211*a*.

False and fraudulent claims include not only those containing some material false statement, but also claims which the claimant 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.

The claim must be presented, directly or indirectly, to some person having authority to approve or pay it. A false claim may be tacitly presented, as when a person who knows he is not entitled to certain pay accepts it nevertheless, without disclosing his disqualification, even though he may not have made any verbal representation as to his entitlement to the pay. Instances of such an act are: An enlisted person approaching the pay table when his name is called and drawing pay for a period during which he was absent without leave, without disclosing the absence; and an officer cashing a pay check which includes an amount for a dependency allowance, knowing and not informing the proper authorities that there had been a change in his dependency status which resulted in his having no right to the allowance paid.

Other examples of this offense are presenting to a disbursing officer a false final statement, knowing it to be false, and presenting a voucher claiming rations or rental allowances for dependents known not to exist.

Proof. (*a*) That the accused 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 or an officer thereof, as alleged; (*b*) that the claim was false or fraudulent in the particulars alleged; and (*c*) that when the accused presented the claim he knew it was false or fraudulent in these particulars.

c. MAKING OR USING A FALSE WRITING OR OTHER PAPER IN CONNECTION WITH CLAIMS

Discussion. See 211*a* and *b*. The false or fraudulent statement must be material, that is, it must have a tendency to mislead governmental officials in their consideration or investigation of the claim. The offense of making a writing or other paper known to contain a false or fradudulent statement for the purpose of obtaining the approval, allowance, or payment of a claim is complete when the writing or paper is made for that purpose, whether or not any use of the paper has been attempted and whether or not the claim has been presented.

Proof. (*a*) That the accused made or used a certain writing or other paper, as alleged; (*b*) that certain material statements in the writing or other paper were false or fraudulent, as alleged; (*c*) that the accused knew the statements were false or fraudulent; and (*d*) that the act of the accused was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States or an officer thereof, as specified.

d. FALSE OATH IN CONNECTION WITH CLAIMS

Discussion. See 211*a* and *b*.

Proof. (*a*) That the accused made an oath to a certain fact or 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; and (*d*) that the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States or an officer thereof, as alleged.

e. FORGERY OF SIGNATURE IN CONNECTION WITH CLAIMS

Discussion. See 211*a* and *b*. See also 202 (Forgery). 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 as specified; or that he used the forged or counterfeited signature of a certain person, knowing the signature to be forged or counterfeited, as alleged; and (*b*) that his act was for the purpose of obtaining the approval, allowance, or payment of a certain claim against the United States or an officer thereof, as alleged.

f. DELIVERING LESS THAN AMOUNT CALLED FOR BY RECEIPT

Discussion. With respect to this offense it is immaterial 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 armed forces thereof, as alleged; (*b*) that he obtained a certificate or receipt for a certain amount or quantity of that money or property, as alleged; (*c*) that for the certificate or receipt he knowingly 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 certificate or 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 armed forces 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 section of the article; and if he signs the paper without this knowledge, it may be inferred that he intended to defraud the United States.

Proof. (*a*) That the accused was authorized to make or deliver a paper certifying the receipt from a certain person of certain property of the United States furnished or intended for the armed forces thereof, as alleged; (*b*) that he made or delivered to that person a certificate of receipt, as alleged; (*c*) that he made or delivered the certificate without having full knowledge of the truth of a certain material statement or statements therein; (*d*) that his act was done with intent to defraud the United States; and (*e*) the amount involved, as alleged.

212. ARTICLE 133—CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN

Discussion. The conduct contemplated may be that of a commissioned officer of either sex or of a cadet or midshipman. 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 as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally, seriously compromises his standing as an officer. 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, of indecency or indecorum, or of lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet ideal moral standards, but there is a limit of tolerance below which the individual standards of an officer, cadet, or midshipman cannot fall without seriously compromising his standing as an officer, cadet, or midshipman or his character as a gentleman. This article contemplates conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising. This article includes acts made

punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman. Thus a commissioned officer who steals property violates both this article and Article 121.

Instances of violation of this article are knowingly making a false official statement; dishonorable failure to pay debts; opening and reading the letters of another without authority; 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; committing or attempting to commit a crime involving moral turpitude; and failing without a good cause to support his family.

Whenever the offense charged is the same as a specific offense set forth in the manual, the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional requirement that the act or omission constitutes conduct unbecoming an officer and gentleman.

Proof. (*a*) That the accused did or omitted to do the acts, as alleged; and (*b*) that, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman.

213. ARTICLE 134—GENERAL ARTICLE

a. GENERAL

Discussion. Article 134 makes punishable all acts not specifically proscribed in any other article of the code when they amount to disorders or neglects to the prejudice of good order and discipline in the armed forces or to conduct of a nature to bring discredit upon the armed forces, or constitute noncapital crimes or offenses denounced by enactment of Congress or under authority of Congress. If conduct of this nature is specifically made punishable by another article, it should be charged as a violation of that article; and if it is not specifically made punishable by another article, it should be charged as a violation of Article 134. But see 212. The specification alleging a violation of Article 134 need not expressly allege that the conduct was a disorder or neglect, or that it was of a nature to bring discredit upon the armed forces, or that it constituted a crime or offense not capital. Under a specification alleging a violation of Article 134, a finding of guilty may properly be returned if the court-martial is convinced beyond a reasonable doubt that the acts of the accused constituted a disorder or neglect to the prejudice of good order and discipline in the armed forces, that his conduct was of a nature to bring discredit upon the armed forces, or that his conduct violated an applicable statute enacted by or under authority of Congress. The same conduct may constitute a disorder or neglect to the prejudice of good order and discipline in the armed forces and at the same time be of a nature to bring discredit upon the armed forces. Although evidence presented at the trial of an offense alleged under Article 134 may be insufficient to establish the commission of a crime or offense not capital, it may nevertheless be sufficient to establish a disorder or neglect to the prejudice of good order and discipline or service-discrediting conduct and thus support a conviction. See 213*d*.

b. DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE IN THE ARMED FORCES

Discussion. The disorders and neglects punishable under this clause of Article 134 include those acts or omissions to the prejudice of good order and discipline not specifically mentioned in other articles.

"To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, the article does not contemplate these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable.

Instances of prejudicial disorders and neglects in the case of an officer are rendering himself unfit for duty by excessive use of intoxicants or drugs; drunkenness; and allowing a member of his command to go on duty knowing him to be drunk.

Instances of prejudicial disorders and neglects in the case of enlisted persons are appearing in improper uniform; wrongfully abusive use of military vehicles; careless discharge of firearms; and impersonating an officer.

A *breach of a custom of the service* may result in a violation of this clause of Article 134. In its legal sense the word "custom" imports something more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common consent have attained the force of law in the military or other community affected by them. There can be no such thing as a custom that is contrary to existing law or regulation. A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been long abandoned. Many customs of the service are now set forth in regulations of the various armed forces. Violations of these customs should be charged under Article 92 as violations of the regulations in which they appear.

It is a violation of this article wrongfully to possess or use marihuana or a habit forming narcotic drug. Possession or use of marihuana or a habit forming narcotic drug may be inferred to be wrongful unless the contrary appears. A person's possession or use of a drug is innocent when the drug has been duly prescribed for him by a physician and the prescription has not been obtained by fraud, when he possesses it in the performance of his duty, or when his possession or use of marihuana or a narcotic drug is without knowledge of the presence or the nature of the substance (see 154*a*(4)). If an issue is raised by the evidence as to whether possession or use by an accused charged with this offense was innocent on one of these grounds, a showing that it was not innocent on that ground becomes a requirement of proof.

c. CONDUCT OF A NATURE TO BRING DISCREDIT UPON THE ARMED FORCES

Discussion. "Discredit" as here used means "to injure the reputation of." This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem. Any discreditable conduct not denounced by a specific article of the code is punishable under this clause. Acts in violation of local civil law may be punished if they are of a nature to bring discredit upon the armed forces. Included within the conduct which may be found to be within the proscription of this

clause are adultery, bigamy, negligent homicide, fleeing the scene of an accident, indecent acts, and dishonorable failure to pay debts.

d. GENERAL REQUIREMENTS OF PROOF UNDER ARTICLE 134

The proof required for conviction of an offense under Article 134 depends upon the nature of the misconduct charged. If the conduct is punished as a crime or offense not capital (213*e*), the proof must establish every element of the crime or offense as required by the applicable law. One element of proof common to every case tried under Article 134, except one tried as a crime or offense not capital, is that the conduct of the accused, under the circumstances, was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. This element is common to all the offenses discussed in 213*f* and should be included in instructions as to the elements of these offenses, in addition to their specific elements. Subject to the foregoing, an offense under either of the first two clauses of Article 134 requires the following proof:

(1) That the accused did or failed to do the acts, as alleged; and

(2) That under the circumstances his conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

e. CRIMES AND OFFENSES NOT CAPITAL

Crimes and offenses not capital which are referred to and made punishable by Article 134 include those acts or omissions, not made punishable by another article, which are denounced as noncapital crimes or offenses by enactments of Congress or under authority of Congress and made triable in the Federal civil courts.

State and foreign laws are not included within the crimes and offenses not capital referred to in Article 134 and violations thereof may not be prosecuted as such except insofar as State law becomes Federal law of local application under section 13 of title 18 of the United States Code. 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 discipline or conduct of a nature to bring discredit upon the armed forces and so be punishable under the first or second clause of Article 134.

For the purpose of court-martial jurisdiction, the laws which may be applied under the clause, "crimes and offenses not capital," are divided into two groups:

(1) *Crimes and offenses of unlimited application.* Certain noncapital crimes and offenses denounced by the United States Code, such as counterfeiting (18 U.S.C. § 471), various frauds against the Government not denounced by Article 132, 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 134 to all persons subject to the code regardless of where the wrongful act or omission occurred. The Narcotic Drugs Import and Export Act (21 U.S.C. §§ 171–185) falls within this group, being applicable to the importation of proscribed drugs not only into areas over which the United States is sovereign but also into territories subject to the control of the United States for a special purpose, including military installations on foreign soil.

(2) *Crimes and offenses of local application.* Those noncapital crimes and offenses which are listed in the United States Code but which are limited in their applicability to the special maritime and territorial jurisdiction of the United States as defined in the United States Code, those applicable within the continental United States, and those included in the law of the District of Columbia, in the law of a Commonwealth, Territory or possession 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 another article of the code, are made applicable under Article 134 to all persons subject to the code who commit these crimes or offenses within the geographical boundaries of the areas in which they are applicable. For the law applicable in a reservation or a place over which the United States has exclusive jurisdiction or concurrent jurisdiction with a State, see 18 U.S.C. § 13. A person subject to the code cannot be prosecuted under the third clause of Article 134 for having committed a crime or offense, not capital, if the act occurred in a place where the law in question did not apply. For example, a person cannot be prosecuted under the third clause of Article 134 for having committed a crime or offense, not capital, 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, regardless of where committed, in a proper case be prosecuted under the first or second clause of Article 134 as a disorder or neglect to the prejudice of good order and discipline or as an offense of a nature to bring discredit upon the armed forces.

f. VARIOUS TYPES OF OFFENSES UNDER ARTICLE 134

(1) ASSAULTS INVOLVING INTENT TO COMMIT CERTAIN OFFENSES OF A CIVIL NATURE

Discussion. See 207 (Assault). The assaults here designated as being punishable under Article 134 are those perpetrated with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking. An assault with intent to commit an offense is not necessarily the equivalent of an attempt to commit the intended offense, for an assault can be committed with intent to commit an offense without achieving that degree of proximity to consummation of an intended offense which is essential to an attempt. See 159.

Some of these assaults will be discussed below.

(*a*) *Assault with intent to murder.* This is an assault committed with a specific intent to kill, under such circumstances that, if death resulted therefrom, the offense of murder would have been committed. To constitute an assault with intent to murder with a firearm, it is not necessary that the weapon be discharged; and in no case is the actual infliction of injury necessary. Thus, 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 unknown reason the actual consummation of the murder by the means employed is impossible is not a defense if the means are apparently adapted to the end in view. Thus, if a

person intending to murder another loads his rifle with what he believes to be a live cartridge and aims and discharges his rifle at the other, it is no defense that, by accident, he used a dummy cartridge.

The intent to murder need not be directed against the person assaulted if the assault is committed with intent to murder some person. If the accused, intending to murder A, shoots at B, mistaking him for A, he is guilty of assaulting B with intent to murder him. Also, if a man fires into a group with intent to murder someone, he is guilty of an assault with intent to murder each member of the group.

(*b*) *Assault with intent to commit voluntary manslaughter.* This is an assault committed with a specific intent to kill under such circumstances that, if death resulted therefrom, the offense of voluntary manslaughter would have been committed. There can be no assault with intent to commit involuntary manslaughter, for involuntary manslaughter is not a crime capable of being intentionally committed.

(*c*) *Assault with intent to commit rape.* This is an assault committed by a man with a specific intent to have sexual intercourse with a woman not his wife by force and without her consent. The accused must have intended to overcome any resistance by force, actual or constructive, and to penetrate the woman's person. Any lesser intent will not suffice. Indecent advances and importunities, however earnest, not accompanied by such an intent, do not constitute this offense, nor do mere preparations to rape not amounting to an assault. Thus, if a man, intending to rape a woman, conceals himself in her room to await a favorable opportunity to execute his design, but before the opportunity arises is discovered and flees, he is not guilty of an assault with intent to commit rape.

No actual touching is necessary. If a man enters a woman's room and gets in the bed where she is for the purpose of raping her, he commits the offense under discussion although he does not touch the woman.

Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted.

Lesser offenses that may be included in a charge of assault with intent to rape are indecent assault and assault.

(*d*) *Assault with intent to rob.* This is an assault committed with a specific intent to steal property by taking it from the person or in the presence of another, against his will, by means of force or violence or putting him in fear. The fact that the accused intended to take only money and that the person he intended to rob had none is not a defense.

(*e*) *Assault with intent to commit sodomy.* The assault must be against a human being and must be committed with a specific intent to commit sodomy. Any lesser intent, or different intent, will not suffice.

Proof. (*a*) That the accused assaulted a certain person, as alleged; (*b*) that the accused at the time of the assault had a specific intent to kill, as required for murder or voluntary manslaughter, or to commit rape, robbery, sodomy, arson, burglary, or housebreaking, as alleged; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) INDECENT ASSAULT.

Discussion. See 207 (Assault). An indecent assault is the taking by a man of indecent, lewd, or lascivious liberties with the person of a female not his wife without her consent and against her will, with intent to gratify his lust or sexual desires. In a proper case indecent assault may be an included offense of assault with intent to commit rape.

Proof. (*a*) That the accused assaulted a certain female not his wife by taking indecent, lewd, or lascivious liberties with her person; (*b*) that the acts were done with intent to gratify the lust or sexual desires of the accused; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(3) 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 specific 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. When the accused is charged with taking indecent liberties, the liberties must be taken in the physical presence of the child, but it is not essential that the evidence show physical contact between the accused and the child. Thus, one who with the requisite intent exposes his private parts to a child under the age of sixteen years may be found guilty of this offense. Nonconsent by the child to the act or conduct is not essential to this offense, nor is consent a defense.

Proof. (*a*) That the accused took certain immoral, improper or indecent liberties with a certain child, as alleged; or that he performed a certain lewd or lascivious act upon or with the body of a certain child, as alleged; (*b*) that the child was under the age of 16 years, as alleged; (*c*) that the intent of the accused was to arouse, appeal to, or gratify the lust or passions or sexual desires of the accused or the child or both, as alleged; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(4) FALSE SWEARING

Discussion. False swearing is the making under lawful oath, not in a judicial proceeding or course of justice, of any false statement, oral or written, not believing the statement to be true. It may consist, for example, in making a false oath to an affidavit. The oath may be taken before any person authorized by law to administer oaths. See Article 136 and chapter XXII as to the authority of certain persons to administer oaths, and see 147*a* as to taking judicial notice of the signatures of persons authorized to administer oaths. An oath includes an affirmation when the latter is authorized in lieu of an oath.

The principles set forth in the last two paragraphs of the discussion of perjury in 210 apply also to false swearing.

Proof. (*a*) That the accused took an oath or its equivalent, as alleged; (*b*) that the oath was administered to the accused in a matter in which an oath was required or authorized by law; (*c*) that the oath was administered by a

person having authority to do so; (*d*) that upon this oath the accused made or subscribed a certain statement, as alleged; (*e*) that the statement was false; (*f*) that the accused did not believe the statement to be true; and (*g*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(5) DISLOYAL STATEMENT UNDERMINING DISCIPLINE AND LOYALTY

Discussion. Certain disloyal statements by military personnel may lack the necessary elements to constitute an offense under 18 U.S.C. §§ 2385, 2387, and 2388, but nevertheless, under the circumstances, be punishable as conduct to the prejudice of good order and discipline or conduct reflecting discredit upon the armed forces. Examples are 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*) that the accused at the time of making the statement did so with the design alleged; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(6) MISPRISION OF A FELONY

Discussion. A person who has knowledge of the actual commission of a felony by another and who conceals and does not as soon as possible make known the same to the civil or military authorities is guilty of misprision of the felony. Any offense of a civil nature punishable under the authority of the code by death or by confinement for a term exceeding one year is a felony. A mere failure or refusal to disclose the felony without some positive act of concealment does not make one guilty of this offense. Making a false entry in an account book for the purpose of concealing a felonious theft committed by another, and intimidating a witness of a felony, are examples of a positive act of concealment.

Proof. (*a*) That the accused had knowledge of the actual commission of a felony by another; (*b*) that he concealed and did not as soon as possible make known the felony to the civil or military authorities; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(7) DISHONORABLE FAILURE TO PAY DEBTS

Discussion. A dishonorable failure to pay a just debt under circumstances which bring or tend to bring discredit upon the armed forces or which are prejudicial to good order and discipline in the armed forces is an offense under this article. More than mere negligence in the nonpayment is necessary. The failure to pay must be characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude toward one's just obligations.

For a debt to form the basis for this offense, the accused must not have had a defense, or an equivalent offset or counterclaim, either in fact or according to his belief, at the time alleged. The offense should not be charged if there

was a genuine dispute between the parties as to the facts or law relating to the debt which would affect the obligation of the accused to pay. The offense is not committed if the creditor or creditors involved are satisfied with the conduct of the debtor with respect to payment.

The length of the period of nonpayment and any denial of his indebtedness which the accused may have made may tend to prove that his conduct was dishonorable, but the court-martial may convict only if it finds from all of the evidence that his conduct was in fact dishonorable.

A commissioned officer may be tried for this offense under either Article 133 or Article 134, as the circumstances may warrant.

Proof. (*a*) That the accused was indebted to a certain person or entity in a certain sum, as alleged; (*b*) that the debt became due and payable on or about a certain date, as alleged; (*c*) that at the time alleged while the debt was still due and payable, the accused dishonorably failed to pay the debt; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(8) DISHONORABLE FAILURE TO MAINTAIN FUNDS FOR PAYMENT OF CHECKS

Discussion. One who, having made and uttered a check, thereafter dishonorably fails to maintain sufficient funds in or credit with the drawee bank for its payment upon presentment, is chargeable under this article. This offense differs from the offense denounced by Article 123a in that there need be no intent to defraud or deceive at the time of making, drawing, uttering or delivery, and that the accused need not know at that time that he did not or would not have sufficient funds for payment. The gist of the offense lies in the conduct of the accused after uttering the instrument.

Mere negligence in maintaining one's bank balance is insufficient as a basis for this offense, and the accused's conduct must reflect bad faith or gross indifference in this regard. As in 213*f*(7), dishonorable conduct of the accused is necessary, and the other principles discussed in 213*f*(7) likewise apply.

Proof. (*a*) That the accused made and uttered a certain check, as alleged; (*b*) that thereafter the accused dishonorably failed to maintain funds in or credit with the drawee bank for payment of the check upon its presentment for payment in due course; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(9) BIGAMY

Discussion. Bigamy is the contracting of another marriage by one who already has a lawful spouse living. If a prior marriage was void, it will have created no status of "lawful spouse." However, if it was merely voidable and has not been voided by competent court action, this circumstance is no defense. A belief that a prior marriage has been terminated by divorce, death of the other spouse, or otherwise, constitutes a defense only if the belief was reasonable (154*a*(4)).

Proof. (*a*) That, at the time and place alleged, the accused married a certain person, as alleged; (*b*) that, at the time of this marriage there existed a prior valid marriage entered into by the accused with another person, as

alleged, which prior marriage was then undissolved; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(10) COMMUNICATING A THREAT

Discussion. This offense consists of wrongfully communicating an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future. The communication may be made to the person threatened or to another. To establish the threat it is necessary to show that the declaration in question was made. It is not necessary, however, that the accused actually entertained the intention stated in the declaration. However, a declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose, or which contradict the expressed intent to commit the act, does not constitute this offense. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving injury to another.

Proof. (*a*) That the accused communicated certain language expressing a present determination or intent wrongfully to injure another person, as alleged, presently or in the future; (*b*) that the communication was made known to that person or to a third person, as alleged; (*c*) that the communication was wrongful and without justification or excuse; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(11) FALSE AND UNAUTHORIZED PASSES, PERMITS, DISCHARGE CERTIFICATES, AND IDENTIFICATION CARDS

Discussion. Certain acts with respect to military or official passes, permits, discharge certificates, or identification cards may be punishable under this article. The wrongful use, possession, sale, or other disposition of a false or unauthorized pass, permit, discharge certificate, or identification card with knowledge that it was false or unauthorized may be charged under this article. Although it is not necessary that the use, possession, sale, or disposition of the document be with an intent to deceive or defraud, the use or possession of a false or unauthorized document with such an intent is an aggravating circumstance authorizing more severe punishment. See 127*c*. See also 202A for a definition of intent to deceive and intent to defraud. The false making or altering of a military or official pass, permit, discharge certificate, or identification card may also be charged under this article. As to this offense, there is no requirement of knowledge or of an intent to deceive or defraud. The phrase "military or official pass, permit, discharge certificate, or identification card" includes, as well as the more usual forms of these documents, all documents issued by any governmental agency for the purpose of identification and copies and facsimiles thereof.

Proof. *Wrongful use or possession of a false or unauthorized pass, permit, discharge certificate, or identification card.* (*a*) That the accused wrongfully used or had in his possession a certain military or official pass, permit, discharge certificate, or identification card, as alleged; (*b*) that the pass, permit, discharge certificate, or identification card was false or unauthorized as

alleged, which prior marriage was then undissolved; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

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Proof. (*a*) That the accused communicated certain language expressing a present determination or intent wrongfully to injure another person, as alleged, presently or in the future; (*b*) that the communication was made known to that person or to a third person, as alleged; (*c*) that the communication was wrongful and without justification or excuse; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

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Proof. *Wrongful use or possession of a false or unauthorized pass, permit, discharge certificate, or identification card.* (*a*) That the accused wrongfully used or had in his possession a certain military or official pass, permit, discharge certificate, or identification card, as alleged; (*b*) that the pass, permit, discharge certificate, or identification card was false or unauthorized as

alleged; (*c*) that the accused knew that the pass, permit, discharge certificate, or identification card was false or unauthorized, as alleged; (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces; and, if alleged, (*e*) that the use or possession was with intent to deceive or defraud.

Wrongful sale or disposition of a pass, permit, discharge certificate or identification card. (*a*) That the accused wrongfully sold or disposed of a certain military or official pass, permit, discharge certificate, or identification card, as alleged; (*b*) that the pass, permit, discharge certificate, or identification card was false or unauthorized, as alleged; (*c*) that the accused knew that the pass, permit, discharge certificate, or identification card was false or unauthorized, as alleged; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Falsely making or altering a pass, permit, discharge certificate, or identification card. (*a*) That the accused wrongfully and falsely made or altered a certain military or official pass, permit, discharge certificate, or identification card, as alleged; and (*b*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(12) NEGLIGENT HOMICIDE

Discussion. Negligent homicide is any unlawful homicide which is the result of simple negligence. Simple negligence is a lesser degree of carelessness than culpable negligence. See 198*b*. It is the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care for the safety of others which a reasonably prudent man would have exercised under the same or similar circumstances.

Proof. (*a*) That the person named or described is dead; (*b*) that his death was unlawfully caused by the acts or omissions of the accused, as alleged; (*c*) that the acts or omissions of the accused constituted negligence; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(13) OFFENSES AGAINST CORRECTIONAL CUSTODY

Discussion. Escape from correctional custody is the act of a person undergoing the punishment of correctional custody pursuant to Article 15 (131*c*(4)) who, before being set at liberty by proper authority, casts off any physical restraint imposed by his custodian or by the place or conditions of custody. Breach of restraint during correctional custody is the act of a person undergoing the punishment who, in the absence of physical restraint imposed by a custodian or by the place or conditions of custody, breaches any form of restraint imposed during this period. See 57*b* as to the manner of determining the legality of the imposition of correctional custody.

Proof. *Escape from correctional custody.* (*a*) That the accused was duly placed in correctional custody; (*b*) that, at the time and place alleged, the accused freed himself from the physical restraint of his correctional custody, as alleged, before having been released therefrom by proper authority; and

(*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Breach of correctional custody. (*a*) That the accused was duly placed in correctional custody; (*b*) that while in such correctional custody, a certain restraint was imposed upon the accused; (*c*) that, at the time and place alleged, the accused broke this restraint, before having been released from the correctional custody or relieved of the restraint by proper authority; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(14) RECEIVING STOLEN PROPERTY

Discussion. "Receiving stolen property" is the receiving, buying, or concealing of any article or thing of value, the property of another person, with knowledge that the article or thing has been stolen.

While an actual thief is not criminally liable for receiving the property he has stolen, one who may be criminally responsible as a principal to the larceny, when not the actual thief (156), can be convicted of knowingly receiving the stolen property under Article 134. Thus, if A procures B to steal several items, agreeing to pay him a certain price for them, and B subsequently steals them and delivers them to A, A can be found guilty of knowingly receiving stolen property despite the fact that his conduct would make him guilty of larceny as a principal.

Proof. (*a*) That the accused received, bought, or concealed certain property of a value alleged; (*b*) that the property belonged to another person named or described; (*c*) that the property had been stolen; (*d*) that the accused then knew that the property had been stolen; and (*e*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Chapter XXIX

MATTERS OF DEFENSE

GENERAL—MOTIONS IN BAR OF TRIAL—SPECIAL DEFENSES

214. GENERAL. For the purpose of this chapter, matters of defense include: (1) various motions by the defense in bar of trial which, while ordinarily not relating to the guilt or innocence of the accused, may result in a dismissal of the charges; (2) certain special defenses which deny, either wholly or partially, the criminal responsibility of the accused.

Except for a motion raising the question of the accused's mental responsibility at the time of the alleged offense, motions in bar of trial do not reach the issue of the accused's guilt or innocence of the offense charged. When successful, they result in a dismissal of the charges to which they relate or a continuance of the trial without an actual determination of the guilt or innocence of the accused. Included among these matters are motions to dismiss for lack of jurisdiction or because of the running of the period of the statute of limitations and motions based on former jeopardy, pardon, constructive condonation of desertion, former punishment, and denial of a speedy trial. These are discussed in 215.

Special defenses, sometimes called affirmative defenses, are those which, although not denying that the objective acts charged were committed by the accused, do deny, either wholly or partially, criminal responsibility for those acts. Thus, in a larceny prosecution the defense may be based on evidence showing that the accused mistakenly believed that he had the owner's permission to take the article, or that he mistakenly believed the article was his, or that he was too drunk to form the requisite intent, or that he was forced to take the article by another who threatened him with immediate death or grevious bodily harm if he did not do so, or that he was not mentally responsible for the act. In these examples, the special defenses of mistake of fact, mistake of law, inability to form the requisite intent, coercion, and insanity, respectively, are raised for the consideration of the members of the court. For a discussion of drunkenness and mistake of fact or law, see 154*a*(3), (4), and (5). For a discussion of mental responsibility, see 120*b*. Other defenses of this specialized nature are discussed in 216. The defenses of mistaken identity, alibi, and good character are not special defenses, as they tend to deny the commission by the accused of the objective acts charged.

The burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the Government, both with respect to those elements of the offense which must be established in every case and with respect to issues involving special defenses which are raised by the evidence.

A special defense may be raised by evidence presented by either the defense or the prosecution, or at the request of the members of the court. Thus, in a larceny trial, the issue of lack of intent to steal may be raised by the testimony

of prosecution witnesses as to the intoxication of the accused at or about the time of the alleged theft. However, evidence raising a special defense usually is presented by the defense. When any special defense is raised by the evidence, the members of the court-martial must be instructed as to the defense and that they may not find the accused guilty of the offense affected thereby unless they are convinced beyond a reasonable doubt that the basis of the special defense does not exist. See 73 and 154*a*(3), (4), and (5).

215. MOTIONS IN BAR OF TRIAL. ***a. Lack of jurisdiction.*** Court-martial proceedings without jurisdiction over either the person or the offense charged are a nullity. See 9, 11, and 68*b*.

b. Former jeopardy. No person may, without his consent, be tried a second time for the same offense (Art. 44(a)). No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification is a trial in the sense of Article 44 until the finding of guilty has become final after review of the case has been fully completed (Art. 44(b)). Thus, if the convening authority disapproves the findings and sentence of a court-martial, he may, except where there is a lack of sufficient evidence in the record to support the findings, order a rehearing (Art. 63(a)). Likewise, if the Court of Military Review or the Court of Military Appeals sets aside the findings and sentence of a court-martial, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing (Arts. 66(d), 67(e)).

A proceeding which, after the introduction of evidence on the issue of the guilt or innocence of the accused but before a finding, is dismissed or terminated by the convening authority or on a motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of Article 44(c). The word "terminated" as used herein means a final conclusion of the hearing and not a mere continuance for the purpose of obtaining additional evidence or for any other purpose. Except as provided in Article 44(c), a proceeding is not a trial in the sense of Article 44 if, because of urgent military necessity or other good cause in the interest of justice, it was terminated before findings (56). As to the effect of a declaration of a mistrial, see 56*e*(3).

The commission of certain acts may constitute an offense under the code and also an offense under other Federal criminal statutes. These offenses are considered to be the same in the sense of Article 44. Accordingly, the same acts constituting an offense against the United States cannot, after the accused has been tried by a court deriving its authority from the United States, be made the basis of a trial by court-martial for the same acts without his consent. However, the commission of certain acts may also constitute an offense under the code and an offense under State or foreign law. These offenses are not the same within the sense of Article 44. Thus, trial by a State or foreign court does not bar a subsequent trial by court-martial. However, the authority to try an accused by court-martial under those circumstances may be limited by regulations of the Secretary of a Department. Additionally, the authority to try an accused by court-martial following a trial in a foreign court may be limited by treaty or international agreement.

In general, once a person has been tried for an offense in the sense of Article 44, he cannot without his consent be tried for an offense necessarily included

therein. When once tried for a lesser offense, an accused cannot be tried for a major offense which differs from the lesser offense 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 71*b*, however, for an example of a case in which the doctrine of res judicata may be asserted after acquittal of an included offense. A trial for absence without leave (Art. 86) bars trial for the same absence charged as desertion and vice versa if the same enlistment is involved in both cases, as both offenses involve the same unauthorized absence. But when a person in the military service 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.

c. Former punishment. Punishment imposed under Article 15 will bar a subsequent trial by court-martial for a *minor* offense for which the punishment was imposed. Likewise, punishment for a minor disciplinary infraction imposed under Article 13, or regulations issued thereunder, is a bar to a later court-martial trial for that offense. In either of these instances, a serious crime resulting from the same act or omission of the accused may subsequently be tried by court-martial. Whether an infraction punished under Article 13 is minor is determined by a consideration of the same factors as in the case of Article 15 punishment. See 128*b* for a discussion of the meaning of "minor offense" under Article 15. Even in a case in which former punishment is not a bar to a subsequent trial by court-martial, evidence thereof is relevant in determining the sentence to be adjudged.

d. Statute of limitations. Except for certain offenses for which there is no limitation as to time (Art. 43(a)), a person charged with an offense under the code is not liable to be tried by court-martial unless the statute of limitations has been tolled (Art. 43(d)), extended (Art. 43(e)), or suspended (Art. 43(f)), if sworn charges have not been received by the officer exercising summary court-martial jurisdiction over the command within the period of time—either two or three years after the commission of the offense—specified in Article 43.

Certain offenses, such as 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. Absence without leave (Art. 86), desertion (Art. 85), and fraudulent enlistment (Art. 83(1)) are not continuing offenses and are committed, respectively, on the date the person absents himself, deserts, or first receives pay or allowances under the enlistment. Although the crime of conspiracy is not a continuing offense, it is not committed within the meaning of the statute of limitations until the last overt act is committed by any conspirator. If sworn charges have been received by an officer exercising summary court-martial jurisdiction over the command within the period of the statute, the charges may be amended on the original charge sheet after the period has ended if the amendment does not change the nature of the offense charged. See 33*d*. However, if new charges are drafted or if the amendment changes the nature of the offense charged the statute of limitations will

apply and upon motion by the accused will bar prosecution for that offense. See 68*c*.

In applying this statute the court will be guided by the crime or offense as described in the specification, and not by the article stated in the charge. Thus, if an offense properly chargeable under Article 121 is erroneously charged under Article 134, the limitation is nevertheless three years rather than two years.

e. Speedy trial. An accused is entitled to be tried within a reasonable time after being placed under a restraint such as restriction, arrest, or confinement or after charges are preferred. See Article 10. If trial is unreasonably delayed, the accused is entitled upon timely motion to dismissal of the affected charges. Ordinarily, only the time after the inception of the accused's restraint or after the preferring of charges is considered for this purpose, and any delay in preferring charges, if the accused has not been restrained, is considered only in connection with the statute of limitations. If the delay in bringing the accused to trial has been unreasonable and has precluded his obtaining a fair trial or has seriously interfered with the preparation of his defense, he may have been denied due process.

When the accused's right to a speedy trial is in issue, the prosecution has the burden of accounting for the time which it took to bring the accused to trial. Generally, imposition of restraint or preferring of charges, whichever was first, starts the period of time for which the Government must account for proceeding with reasonable dispatch in bringing the accused to trial.

Matters to be considered in determining whether the time elapsed has been unreasonable include, for example: whether the accused has earlier demanded trial and, if so, when; whether any portion of the delay was at the instance of the defense; how much time was reasonably required for pretrial processing, investigation, and preparation; whether the delay or any part thereof was arbitrary or oppressive; and whether the accused was in pretrial restraint and, if so, the nature of that restraint. See 68*i*.

f. Pardon. See 68*e*.

g. Constructive condonation of desertion. See 68*f*.

h. Grant or promise of immunity. See 68*h*.

216. SPECIAL DEFENSES. ***a. Justification.*** A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful. The duty may be imposed by statute, regulation, or orders. Thus, the use of force by a policeman in the proper execution of a lawful apprehension, when reasonably necessary, is justified because the duty to apprehend is imposed by lawful authority.

b. Excuse: Accident or misadventure. A death, injury, or other event which occurs as the result of an accident or misadventure in doing a lawful act in a lawful manner is excusable. For other instances of excuse, see *c* through *g* below.

c. Self-defense. The defense of self-defense when the accused intended to kill or to inflict grievous bodily harm is composed of two elements. First, the surrounding circumstances must have been such that reasonable grounds existed to apprehend that death or grievous bodily harm was about to be inflicted on the accused or on a person he could lawfully defend and the accused must in

fact have had such an apprehension. Secondly, the accused must have believed that the force he used was necessary for protection against death or grievous bodily harm.

The test for the first element, insofar as it related to reasonableness, is whether, considering all the circumstances, a reasonable, prudent person would believe that there was ground to apprehend death or grievous bodily harm. This test is objective in nature, and accordingly such matters as emotional instability or drunkenness on the part of the accused are irrelevant in this connection. On the other hand, such matters as the relative height, weight, general build of the antagonists and the possibility of a safe retreat are ordinarily relevant with respect to this test. The test for the second element, that the accused believed the force which he used was necessary to protect against death or grievous bodily harm, is subjective in nature. The accused is not objectively limited to the use of reasonable force. Accordingly, such matters as the accused's emotional control and intelligence are relevant in determining his actual belief as to the force necessary to repel the attack. See also 138*f*(3) as to evidence admissible on the issue of self-defense.

Self-defense is a defense of necessity. Unless the accused had withdrawn in good faith, he is generally not entitled to this defense if he was an aggressor, engaged in mutual combat, or provoked an attack upon himself. If the accused uses force in excess of that believed by him to be necessary for defense, he becomes an aggressor and is not entitled to this defense.

When there is reasonable ground for the apprehension of an injury less than death or grievous bodily harm, the accused is entitled to use such force as he believes necessary to defend against this injury so long as this force is less than that which can reasonably be thought likely to produce grievous bodily harm or death. If, in using this lesser degree of force, an unintentional death results which would not have been reasonably anticipated, this death is excusable. The issue is whether, had the victim not died as a result of the encounter, the accused would be amenable to punishment for assault and battery.

d. Obedience to apparently lawful orders. An order requiring the performance of a military duty may be inferred to be legal. An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and understanding would know to be illegal, or in a wanton manner in the discharge of a lawful duty, is not excusable.

e. Entrapment. Entrapment is a defense which exists when the criminal design originates with Government agents, or persons cooperating with them, and they implant in the mind of an innocent person the disposition to commit the alleged offense and thus induce its commission. What is meant by "innocent" in this connection is the absence of a predisposition or state of mind which readily responds to the opportunity furnished by the Government agents or persons cooperating with them to commit the forbidden act with which the accused is charged. "Innocent" in the context of entrapment means that the accused would not have perpetrated the crime with which he is presently charged but for the enticement of one of these persons. The fact that persons acting for the Government merely afford opportunities or facilities for the commission of the offense does not constitute entrapment. Entrapment occurs only when the criminal conduct was the product of the creative activity of law-enforcement officials. See 138*g*(6).

f. Coercion or duress. Except when he kills an innocent person, a person cannot properly be convicted for committing an act for which he would otherwise be criminally responsible if his participation in it is caused by the degree of coercion or duress recognized in law as a defense. This degree of coercion or duress is a reasonably grounded fear on the part of the actor that he would be immediately killed or would immediately suffer serious bodily injury if he did not commit the act. The fear compelling the act must be of immediate death or serious bodily injury and not of an injury in the future or of an injury to reputation or property. The threat must continue throughout the perpetration of the act. If the accused has a reasonable opportunity to avoid committing the act without subjecting himself to the threatened danger, his act is not excusable.

g. Physical or financial inability. The inability of an accused through no fault of his own to comply with the terms of an order to perform a military duty constitutes a defense. Thus, one who has suffered an injury which incapacitates him to the extent that he is physically not able to carry out an order is not guilty of willful disobedience or failure to obey that order. Also, a soldier who is given an order to purchase required uniforms but is unable to do so because of inability to obtain the necessary funds is not guilty of willful disobedience or failure to obey that order. However, if the physical or financial inability of the accused occurred through his own fault or design after the accused had knowledge of the order or duty imposed, it will not constitute an excuse.

Appendix 1

CONSTITUTION OF THE UNITED STATES

1787

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[1] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Caroline five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other officers; and shall have the sole Power of Impeachment.

[2] **Section 3.** The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and, if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make témporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

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[1] *This clause has been affected by the 14th and 16th amendments.*

[2] This section has been affected by the 17th amendment.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpise, they shall be an Ooath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[3] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered

[3] This clause has been affected by the 20th amendment.

on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

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

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

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

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[4] The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[4] This clause has been affected by the 12th amendment.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President; declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the

other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

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

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Articles in Addition to, and Amendment of, the Constitution of the United States of America, Proposed by Congress, and Ratified by the Legislatures of the Several States Pursuant to the Fifth Article of the Original Constitution

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall

be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a Member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

AMENDMENT XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The elec-

tors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

[5] AMENDMENT XVIII

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XIX

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

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[5] This article was repealed by the 21st amendment.

AMENDMENT XXI

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XXII

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

AMENDMENT XXIII

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXIV

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXV

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the Executive departments or of such other body as Congress may by law provide,

transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Appendix 2

UNIFORM CODE OF MILITARY JUSTICE

The Uniform Code of Military Justice was enacted as part of the act of 5 May 1950,[1] which contained 16 additional sections. It was thereafter revised, codified, and enacted into law as part of title 10, United States Code, by the act of 10 August 1956, and has subsequently been further amended.[2] This appendix sets forth the code as thus codified and amended. The articles which have been amended between 10 August 1956 and 23 October 1968 are hereafter designated by an asterisk. The articles which have been amended by the act of 24 October 1968[3] (Military Justice Act of 1968) are hereafter designated by a double asterisk. See title 10, United States Code, for details regarding these amendments. Other portions of title 10, including definitions, and other statutes, to which military personnel should have ready access, are set forth in appendix 3.

Chapter 47. UNIFORM CODE OF MILITARY JUSTICE

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Subchapter I. GENERAL PROVISIONS

Sec.	Art.	
801.	1	Definitions.
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805.	5	Territorial applicability of this chapter.
806.	6	Judge advocates and legal officers.

§ 801. Art. 1. Definitions

In this chapter:

*(1) "Judge Advocate General" means, severally, the Judge Advocates General of the Army, Navy, and Air Force and, except when the Coast Guard is operating as a service in the Navy, the General Counsel of the Department of Transportation.

(2) The Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Navy, shall be considered as one armed force.

(3) "Commanding officer" includes only commissioned officers.

(4) "Officer in charge" means a member of the Navy, the Marine Corps, or the Coast Guard designated as such by appropriate authority.

(5) "Superior commissioned officer" means a commissioned officer superior in rank or command.

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[1] 64 Stat. 108 (1950).
[2] See 10 U.S.C. § 801–940.
[3] P.L. 90–632 (82 Stat. 1335).

(6) "Cadet" means a cadet of the United States Military Academy, the United States Air Force Academy, or the United States Coast Guard Academy.

(7) "Midshipman" means a midshipman of the United States Naval Academy and any other midshipman on active duty in the naval service.

(8) "Military" refers to any or all of the armed forces.

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

(10) "Military judge" means an official of a general or special court-martial detailed in accordance with section 826 of this title (article 26).

(11) "Law specialist" means a commissioned officer of the Coast Guard designated for special duty (law).

(12) "Legal officer" means any commissioned officer of the Navy, Marine Corps, or Coast Guard designated to perform legal duties for a command.

(13) "Judge Advocate" means an officer of the Judge Advocate General's Corps of the Army or the Navy or an officer of the Air Force or the Marine Corps who is designated as a judge advocate.

§ 802. Art. 2. Persons subject to this chapter

The following persons are subject to this chapter:

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

NOTE. National Guard personnel performing duty in their State National Guard status under sections 502–505 of title 32, United States Code, are not subject to trial by courts-martial under the provisions of Article 2(1).

(2) Cadets, aviation cadets, and midshipmen.

(3) Members of a reserve component while they are on inactive duty training authorized by written orders which are voluntarily accepted by them and which specify that they are subject to this chapter.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

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

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

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

*(8) Members of the Environmental Science Services Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

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

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

NOTE. The words "in the field" imply military operations with a view to an enemy (14 Ops. Atty Gen. 22 (1872)), and it has been said that in view of the technical and common acceptation of the term, the question of whether an armed force is "in the field" is not to be determined by the locality in which it may be found, but rather by the activity in which it may be engaged at any particular time (Hines v. Mikell, 259 F. 28, 34 (4th Cir. 1919)). Thus forces assembled in temporary cantonments in the United States for the purpose of training preparatory for service in the actual theater of war were held to be "in the field" (Hines v. Mikell, supra) and a merchant ship and crew engaged in transporting troops and supplies to a battle zone were held to constitute a military expedition "in the field" (McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943); In re Berue, 54 F. Supp. 252 (S.D. Ohio 1944)). See also *Ex parte Gerlach,* 247 F. 616 (S.D.N.Y. 1917; Hearings before a Subcommittee of the Committee on Armed Services, House of Representatives, Eighty-first Congress, First Session, H.R. 2498, 7–31 March, 1, 2, and 4 April 1949, pp. 872, 873.

One may be considered to be "accompanying" an armed force although he is not directly employed by such force or by the Government but works for a contractor engaged on a military project or serves on a merchant ship carrying war supplies or troops (Perlstein v. United States, 151 F. 2d 167 (3d Cir. 1945), Cert. Dism., 328 U.S. 822 (1946); In re DiBartolo, 50 F. Supp. 929 (S.D.N.Y. 1943); In re Berue, supra; McCune v. Kilpatrick, supra). In those cases, however, in which a civilian has been held to have been "accompanying" an armed force, it has appeared that he has either moved with

a military operation or that his presence within a military installation or theater was not merely incidental but was connected with or dependent upon the activities of the armed force or its personnel. He must, in order to come within this class of persons subject to military law, "accompany" the armed force in fact. Although a person "accompanying" an armed force may be "serving with" it as well, the distinction is an important one, for even though a civilian's contract with the Government may have come to an end before he has committed an offense, so that it may be said he is no longer "serving with" an armed force, jurisdiction may remain on the ground that he is accompanying an armed force because of his continued connection with a military community (Perlstein v. United States. supra; Grewe v. France, 75 F. Supp. 433 (E.D. Wis. 1948)). CM 329933, *Miquiabas,* 7 Bull. JAG (Army) 125 at 126 (1948).

*(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: the Canal Zone, Puerto Rico, Guam, and the Virgin Islands.

NOTE. The United States Supreme Court has held unconstitutional the exercise of court-martial jurisdiction over civilians in time of peace. (Reid v. Covert, 354 U.S. 1 (1957); McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960)).

*(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the following: the Canal Zone, Puerto Rico, Guam, and the Virgin Islands.

§ 803. Art. 3. Jurisdiction to try certain personnel

(a) Subject to section 843 of this title (article 43), no person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia, may be relieved from amenability to trial by court-martial by reason of the termination of that status.

NOTE. This article has been held to be unconstitutional to the extent that it purports to extend court-martial jurisdiction over persons who, although subject to the code at the time of the commission of the offense, later ceased to occupy that status. (Toth v. Quarles, 350 U.S. 11 (1955)). This article is still applicable to such persons, however, if they subsequently return to the status of a person subject to the code. (United States v. Winton, 15 USCMA 222, 35 CMR 194 (1965); United States v. Gallagher, 7 USCMA 506, 22 CMR 296 (1957)). See *United States* v. *Wheeler,* 10 USCMA 646, 28 CMR 212 (1959).

(b) Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is, subject to section 843 of this title (article 43), subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the armed forces for that trial. Upon conviction of that charge he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge.

(c) No person who has deserted from the armed forces may be relieved from amenability to the jurisdiction of this chapter by virtue of a separation from any later period of service.

§ 804. Art. 4. Dismissed officer's right to trial by court-martial

(a) If any commissioned officer, dismissed by order of the President, makes a written application for trial by court-martial, setting forth, under oath, that he has been wrongfully dismissed, the President, as soon as practicable, shall convene a general court-martial to try that officer on the charges on which he was dismissed. A court-martial so convened has jurisdiction to try the dismissed officer on those charges, and he shall be considered to have waived the right to plead any statute of limitations applicable to any offense with which he is charged. The court-martial may, as part of its sentence, adjudge the affirmance of the dismissal, but if the court-martial acquits the accused or if the sentence adjudged, as finally approved or affirmed, does not include dismissal or death, the Secretary concerned shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issue.

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

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

(d) If an officer is discharged from any armed force by administrative action or is dropped from the rolls by order of the President, he has no right to trial under this article.

§ 805. Art. 5. Territorial applicability of this chapter

This chapter applies in all places.

§ 806. Art. 6. Judge advocates and legal officers

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

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

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

Subchapter II. APPREHENSION AND RESTRAINT

Sec. Art.
807. 7. Apprehension
808. 8. Apprehension of deserters.
809. 9. Imposition of restraint.
810. 10. Restraint of persons charged with offenses.
811. 11. Reports and receiving of prisoners.
812. 12. Confinement with enemy prisoners prohibited.
813. 13. Punishment prohibited before trial.
814. 14. Delivery of offenders to civil authorities.

§ 807. Art. 7. Apprehension

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

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

(c) Commissioned officers, warrant officers, petty officers, and noncommissioned officers have authority to quell quarrels, frays, and disorders among persons subject to this chapter and to apprehend persons subject to this chapter who take part therein.

§ 808. Art. 8. Apprehension of deserters

Any civil officer having authority to apprehend offenders under the laws of the United States or of a State, Territory, Commonwealth, or possession, or the District of Columbia may summarily apprehend a deserter from the armed forces and deliver him into the custody of those forces.

§ 809. Art. 9. Imposition of restraint

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

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

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

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

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

§ 810. Art. 10. Restraint of persons charged with offenses

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

§ 811. Art. 11. Reports and receiving of prisoners

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

(b) Every commander of a guard or master at arms to whose charge a prisoner is committed shall, within twenty-four hours after that commitment or as soon as he is relieved from guard, report to the commanding officer the name of the prisoner, the offense charged against him, and the name of the person who ordered or authorized the commitment.

§ 812. Art. 12. Confinement with enemy prisoners prohibited

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

§ 813. Art. 13. Punishment prohibited before trial

Subject to section 857 of this title (article 57), no person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

§ 814. Art. 14. Delivery of offenders to civil authorities

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

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

Subchapter III. NONJUDICIAL PUNISHMENT

***§ 815. Art. 15. Commanding officer's nonjudicial punishment**

(a) Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, limitations may be placed on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers and warrant officers exercising command

authorized to exercise those powers, the applicability of this article to an accused who demands trial by court-martial, and the kinds of courts-martial to which the case may be referred upon such a demand. However, except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment. Under similar regulations, rules may be prescribed with respect to the suspension of punishments authorized hereunder. If authorized by regulations of the Secretary concerned, a commanding officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his powers under this article to a principal assistant.

(b) Subject to subsection (a) of this section, any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

(1) upon officers of his command—

(A) restriction to certain specified limits, with or without suspension from duty, for not more than 30 consecutive days;

(B) if imposed by an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command—

(i) arrest in quarters for not more than 30 consecutive days;

(ii) forfeiture of not more than one-half of one month's pay per month for two months;

(iii) restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(iv) detention of not more than one-half of one month's pay per month for three months;

(2) upon other personnel of his command—

(A) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than three consecutive days;

(B) correctional custody for not more than seven consecutive days;

(C) forfeiture of not more than seven days' pay;

(D) reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;

(E) extra duties, including fatigue or other duties, for not more than 14 consecutive days;

(F) restriction to certain specified limits, with or without suspension from duty, for not more than 14 consecutive days;

(G) detention of not more than 14 days' pay;

(H) if imposed by an officer of the grade of major or lieutenant commander, or above—

(i) the punishment authorized under subsection (b)(2)(A);

(ii) correctional custody for not more than 30 consecutive days;

(iii) forfeiture of not more than one-half of one month's pay per month for two months;

(iv) reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but an enlisted member in a pay grade above E–4 may not be reduced more than two pay grades;

(v) extra duties, including fatigue or other duties, for not more than 45 consecutive days;

(vi) restrictions to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(vii) detention of not more than one-half of one month's pay per month for three months.

Detention of pay shall be for a stated period of not more than one year but if the offender's term of service expires earlier, the detention shall terminate upon that expiration. No two or more of the punishments of arrest in quarters, confinement on bread and water or diminished rations, correctional custody, extra duties, and restriction may be combined to run consecutively in the maximum amount imposable for each. Whenever any of those

punishments are combined to run consecutively, there must be an apportionment. In addition, forfeiture of pay may not be combined with detention of pay without an apportionment. For the purposes of this subsection, 'correctional custody' is the physical restraint of a person during duty or nonduty hours and may include extra duties, fatigue duties, or hard labor. If practicable, correctional custody will not be served in immediate association with persons awaiting trial or held in confinement pursuant to trial by court-martial.

(c) An officer in charge may impose upon enlisted members assigned to the unit of which he is in charge such of the punishments authorized under subsection (b) (2) (A)–(G) as the Secretary concerned may specifically prescribe by regulation.

(d) The officer who imposes the punishment authorized in subsection (b), or his successor in command, may, at any time, suspend probationally any part or amount of the unexecuted punishment imposed and may suspend probationally a reduction in grade or a forfeiture imposed under subsection (b), whether or not executed. In addition, he may, at any time, remit or mitigate any part or amount of the unexecuted punishment imposed and may set aside in whole or in part the punishment, whether executed or unexecuted, and restore all rights, privileges, and property affected. He may also mitigate reduction in grade to forfeiture or detention of pay. When mitigating—

(1) arrest in quarters to restriction;

(2) confinement on bread and water or diminished rations to correctional custody;

(3) correctional custody or confinement on bread and water or diminished rations to extra duties or restriction, or both; or

(4) extra duties to restriction;

the mitigated punishment shall not be for a greater period than the punishment mitigated. When mitigating forfeiture of pay to detention of pay, the amount of the detention shall not be greater than the amount of the forfeiture. When mitigating reduction in grade to forfeiture or detention of pay, the amount of the forfeiture or detention shall not be greater than the amount that could have been imposed initially under this article by the officer who imposed the punishment mitigated.

(e) A person punished under this article who considers his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The superior authority may exercise the same powers with respect to the punishment imposed as may be exercised under subsection (d) by the officer who imposed the punishment. Before acting on an appeal from a punishment of—

(1) arrest in quarters for more than seven days;

(2) correctional custody for more than seven days;

(3) forfeiture of more than seven days' pay;

(4) reduction of one or more pay grades from the fourth or a higher pay grade;

(5) extra duties for more than 14 days;

(6) restriction for more than 14 days; or

(7) detention of more than 14 days' pay;

the authority who is to act on the appeal shall refer the case to a judge advocate of the Army, Navy, Air Force, or Marine Corps, or a law specialist or lawyer of the Marine Corps, Coast Guard, or Treasury Department for consideration and advice, and may so refer the case upon appeal from any punishment imposed under subsection (b).[4]

(f) The imposition and enforcement of disciplinary punishment under this article for any act or omission is not 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.

(g) The Secretary concerned may, by regulation, prescribe the form of records to be kept of proceedings under this article and may also prescribe that certain categories of those proceedings shall be in writing.

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[4] See 80 Stat. 938 (1966), 49 U.S.C.A. § 1655 (b) (1966), which transferred the Coast Guard to the Department of Transportation during peacetime.

Subchapter IV. COURT-MARTIAL JURISDICTION

Sec. Art.
816. 16. Courts-martial classified.
817. 17. Jurisdiction of courts-martial in general.
818. 18. Jurisdiction of general courts-martial.
819. 19. Jurisdiction of special courts-martial.
820. 20. Jurisdiction of summary courts-martial.
821. 21. Jurisdiction of courts-martial not exclusive.

§ 816. Art. 16. Courts-martial classified

The three kinds of courts-martial in each of the armed forces are—

**(1) general courts-martial, consisting of—

**(A) a military judge and not less than five members; or

**(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests in writing a court composed only of a military judge and the military judge approves;

**(2) special courts-martial, consisting of—

**(A) not less than three members; or

**(B) a military judge and not less than three members; or

**(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1) (B) so requests; and

**(3) summary courts-martial, consisting of one commissioned officer.

§ 817. Art. 17. Jurisdiction of courts-martial in general

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

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

818. Art. 18. Jurisdiction of general courts-martial

**Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. However, a general court-martial of the kind specified in section 816(1) (B) of this title (article 16(1) (B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

819. Art. 19. Jurisdiction of special courts-martial

**Subject to section 817 of this title (article 17), special courts-martial have jurisdiction to try persons subject to this chapter for any noncapital offense made punishable by this chapter and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months. A bad-conduct discharge may not be adjudged unless a complete record of the proceedings and testimony has been made, counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) was detailed to represent the accused, and a military judge was detailed to the trial, except in any case in which a military judge could not be detailed to the trial because of physical conditions or military exigencies. In any such case in which a military judge was not detailed to the trial, the convening authority shall make a detailed written statement, to be appended to the record, stating the reason or reasons a military judge could not be detailed.

820. Art. 20. Jurisdiction of summary courts-martial

**Subject to section 817 of this title (article 17), summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.

§ 821. Art. 21. Jurisdiction of courts-martial not exclusive

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

Subchapter V. COMPOSITION OF COURTS-MARTIAL

Sec. Art.
822. 22. Who may convene general courts-martial.
823. 23. Who may convene special courts-martial.
824. 24. Who may convene summary courts-martial.
825. 25. Who may serve on courts-martial.
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827. 27. Detail of trial counsel and defense counsel.
828. 28. Detail or employment of reporters and interpreters.
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§ 822. Art. 22. Who may convene general courts-martial

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

(1) the President of the United States;

(2) the Secretary concerned;

(3) the commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps;

(4) the commander in chief of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the United States;

(5) the commanding officer of an air command, an air force, an air division, or a separate wing of the Air Force or Marine Corps;

(6) any other commanding officer designated by the Secretary concerned; or

(7) any other commanding officer in any of the armed forces when empowered by the President.

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

§ 823. Art. 23. Who may convene special courts-martial

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

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

(2) the commanding officer of a district, garrison, fort, camp, station, Air Force base, auxiliary air field, or other place where members of the Army or the Air Force are on duty;

(3) the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;

(4) the commanding officer of a wing, group, or separate squadron of the Air Force;

(5) the commanding officer of any naval or Coast Guard vessel, shipyard, base, or station; the commanding officer of any Marine brigade, regiment, detached battalion, or corresponding unit; the commanding officer of any Marine barracks, wing, group, separate

squadron, station, base, auxiliary air field, or other place where members of the Marine Corps are on duty;

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

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

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

§ 824. Art. 24. Who may convene summary courts-martial

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

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

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

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

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

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

§ 825. Art. 25. Who may serve on courts-martial

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

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

**(c)(1) Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

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

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

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

****826. Art. 26. Military judge of a general or special court-martial**

**(a) The authority convening a general court-martial shall, and, subject to regulations of the Secretary concerned, the authority convening a special court-martial may, detail a military judge thereto. A military judge shall preside over each open session of the court-martial to which he has been detailed.

**(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

**(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail by the convening authority, and, unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

**(d) No person is eligible to act as a military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

**(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

§ 827. Art. 27. Detail of trial counsel and defense counsel

**(a) For each general and special court-martial the authority convening the court shall detail trial counsel and defense counsel, and such assistants as he considers appropriate. No person who has acted as investigating officer, military judge or court member in any case may act later as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense, nor may any person who has acted for the defense act later in the same case for the prosecution.

(b) Trial counsel or defense counsel detailed for a general court-martial—

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

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

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

**(1) The accused shall be afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies. If counsel having such qualifications cannot be obtained, the court may be convened and the trial held but the convening authority shall make a detailed written statement, to be appended to the record, stating why counsel with such qualifications could not be obtained;

**(2) if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel detailed by the convening authority must be a person similarly qualified; and

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

§ 828. Art. 28. Detail or employment of reporters and interpreters

Under such regulations as the Secretary concerned may prescribe, the convening authority of a court-martial, military commission, or court of inquiry shall detail or employ qualified court reporters, who shall record the proceedings of and testimony taken before that court or commission. Under like regulations the convening authority of a court-martial,

military commission, or court of inquiry may detail or employ interpreters who shall interpret for the court or commission.

829. Art. 29. Absent and additional members

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

**(b) Whenever a general court-martial, other than a general court-martial composed of a military judge only, is reduced below five members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than five members. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides.

**(c) Whenever a special court-martial, other than a special court-martial composed of a military judge only, is reduced below three members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than three members. The trial shall proceed with the new members present as if no evidence had previously been introduced at the trial, unless a verbatim record of the evidence previously introduced before the members of the court or a stipulation thereof is read to the court in the presence of the military judge, if any, the accused and counsel for both sides; and

**(d) If the military judge of a court-martial composed of a military judge only is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed, subject to any applicable conditions of section 816(1)(B) or (2)(C) of this title (article 16(1)(B) or (2)(C)), after the detail of a new military judge as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced or a stipulation thereof is read in court in the presence of the new military judge, the accused, and counsel for both sides.

Subchapter VI. PRE-TRIAL PROCEDURE

Sec. Art.
830. 30. Charges and specifications.
831. 31. Compulsory self-incrimination prohibited.
832. 32. Investigation.
833. 33. Forwarding of charges.
834. 34. Advice of staff judge advocate and reference for trial.
835. 35. Service of charges.

§ 830. Art. 30. Charges and specifications

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

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

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

(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

§ 831. Art. 31. Compulsory self-incrimination prohibited

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

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

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

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

§ 832. Art. 32. Investigation

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

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. At that 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 investigtaing officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

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

(d) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error.

§ 833. Art. 33. Forwarding of charges

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

§ 834. Art. 34. Advice of staff judge advocate and reference for trial

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

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

§ 835. Art. 35. Service of charges

**The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had. In time of peace no person may, against his objection, be brought to trial or be required to participate by himself or counsel in a session called by the military judge under section 839(a) of this title (article 39(a)), in a general court-martial case within a period of five days after the service of charges upon him or in a special court-martial within a period of three days after the service of the charges upon him.

Subchapter VII. TRIAL PROCEDURE

Sec. Art.
836. 36. President may prescribe rules.
837. 37. Unlawfully influencing action of court.
838. 38. Duties of trial counsel and defense counsel.
839. 39. Sessions.
840. 40. Continuances.
841. 41. Challenges.
842. 42. Oaths.
843. 43. Statute of limitations.
844. 44. Former jeopardy.
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847. 47. Refusal to appear or testify.
848. 48. Contempts.
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850. 50. Admissibility of records of courts of inquiry.
851. 51. Voting and rulings.
852. 52. Number of votes required.
853. 53. Court to announce action.
854. 54. Record of trial.

§ 836. Art. 36. President may prescribe rules

(a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

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

§ 837. Art. 37. Unlawfully influencing action of court

**(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

**(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member as a member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

§ 838. Art. 38. Duties of trial counsel and defense counsel

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

**(b) The accused has the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available or by the defense counsel detailed under section 827 of this title (article 27). Should the accused have counsel of his own selection, the defense counsel, and assistant defense counsel, if any, who were detailed, shall, if the accused so desires, act as his associate counsel; otherwise they shall be excused by the military judge or by the president of a court-martial without a military judge.

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

(d) An assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when he is qualified to be a trial counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon the trial counsel of the court. An assistant trial counsel of a special court-martial may perform any duty of the trial counsel.

(e) An assistant defense counsel of a general or special court-martial may, under the direction of the defense counsel or when he is qualified to be the defense counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon counsel for the accused.

839. Art. 39. Sessions

**(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of—

**(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

**(2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;

**(3) if permitted by regulations of the Secretary concerned, holding the arrangement and receiving the pleas of the accused; and

**(4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court.

These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record.

**(b) When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and in cases in which a military judge has been detailed to the court, the military judge.

840. Art. 40. Continuances

**The military judge or a court-martial without a military judge may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.

841. Art. 41. Challenges

**(a) The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The military judge, or, if none, the court, shall determine the relevancy and validity of challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

**(b) Each accused and the trial counsel is entitled to one peremptory challenge, but the military judge may not be challenged except for cause.

§ 842. Art. 42. Oaths

**(a) Before performing their respective duties, military judges, members of a general and special courts-martial, trial counsel, assistant trial counsel, defense counsel, assistant

defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully. The form of the oath, the time and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary concerned. These regulations may provide that an oath to perform faithfully duties as a military judge, trial counsel, assistant trial counsel, defense counsel, or assistant defense counsel may be taken at any time by any judge advocate, law specialist, or other person certified to be qualified or competent for the duty, and if such an oath is taken it need not again be taken at the time the judge advocate, law specialist, or other person is detailed to that duty.

§ 843. Art. 43. Statute of limitations

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

(b) Except as otherwise provided in this article, a person charged with desertion in time of peace or any of the offenses punishable under sections 919–932 of this title (articles 119–132) is not liable to be tried by court-martial if the offense was committed more than three years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

(c) Except as otherwise provided in this article, a person charged with any offense is not liable to be tried by court-martial or punished under section 815 of this title (article 15) if the offense was committed more than two years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command or before the imposition of punishment under section 815 of this title (article 15).

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

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

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

(1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not;

(2) committed in connection with the acquisition, care, handling, custody, control, or disposition of any real or personal property of the United States; or

(3) committed in connection with the negotiation, procurement, award, performance, payment, interim financing, cancellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency;

is suspended until three years after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

§ 844. Art. 44. Former jeopardy

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

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

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

845. Art. 45. Pleas of the accused

**(a) If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the

plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

**(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty of the charge or specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

§ 846. Art. 46. Opportunity to obtain witnesses and other evidence

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

§ 847. Art. 47. Refusal to appear or testify

(a) Any person not subject to this chapter who—

(1) has been duly subpenaed to appear as a witness before a court-martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such a court, commission, or board;

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

(3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpenaed to produce;

is guilty of an offense against the United States.

(b) Any person who commits an offense named in subsection (a) shall be tried on information in a United States district court or in a court of original criminal jurisdiction in any of the Territories, Commonwealths, or possessions of the United States, and jurisdiction is conferred upon those courts for that purpose. Upon conviction, such a person shall be punished by a fine of not more than $500, or imprisonment for not more than six months, or both.

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

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

§ 848. Art. 48. Contempts

A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both.

§ 849. Art. 49. Depositions

**(a) At any time after charges have been signed as provided in section 830 of this title (article 30), any party may take oral or written depositions unless the military judge or court-martial without a military judge hearing the case or, if the case is not being heard, an authority competent to convene a court-martial for the trial of those charges forbids it for good cause. If a deposition is to be taken before charges are referred for trial, such an authority may designate commissioned officers to represent the prosecution and the defense and may authorize those officers to take the deposition of any witness.

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

(c) Depositions may be taken before and authenticated by any military or civil officer

authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

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

(1) that the witness resides or is beyond the State, Territory, Commonwealth, or District of Columbia in which the court, commission, or board is ordered to sit, or beyond 100 miles from the place of trial or hearing;

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

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

(e) Subject to subsection (d), testimony by deposition may be presented by the defense in capital cases.

(f) Subject to subsection (d), a deposition may be read in evidence in any case in which the death penalty is authorized but is not mandatory, whenever the convening authority directs 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.

§ 850. Art. 50. Admissibility of records of courts of inquiry

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

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

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

851. Art. 51. Voting and rulings

**(a) Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a military judge upon questions of challenge, shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

**(b) The military judge and, except for questions of challenge, the president of a court-martial without a military judge shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused, or by the president of a court-martial without a military judge upon any question of law other than a motion for a finding of not guilty, is final and constitutes the ruling of the court. However, the military judge or the president of a court-martial without a military judge may change his ruling at any time during the trial. Unless the ruling is final, if any member objects thereto, the court shall be cleared and closed and the question decided by a voice vote as provided in section 852 of this title (article 52), beginning with the junior in rank.

**(c) Before a vote is taken on the findings, the military judge or the president of a court-martial without a military judge shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them—

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

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

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

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

**(d) Subsections (a), (b), and (c) do not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence. The military judge of such a court-martial shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

§ 852. Art. 52. Number of votes required

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

**(2) No person may be convicted of any other offense, except as provided in section 845(b) of this title (article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.

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

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

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

**(c) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote, but a determination to reconsider a finding of guilty or to reconsider a sentence, with a view toward decreasing it, may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence. A tie vote on a challenge disqualifies the member challenged. A tie vote on a motion for a finding of not guilty or on a motion relating to the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

§ 853. Art. 53. Court to announce action

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

§ 854. Art. 54. Record of trial

**(a) Each general court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge. If the record cannot be authenticated by the military judge by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or by that of a member if the trial counsel is unable to authenticate it by reason of his death, disability, or absence. In a court-martial consisting of only a military judge the record shall be authenticated by the court reporter under the same conditions which would impose such a duty on a member under this subsection. If the proceedings have resulted in an acquittal of all charges and specifications or, if not affecting a general or flag officer, in a sentence not including discharge and not in excess of that which may otherwise be adjudged by a special court-martial, the record shall contain such matters as may be prescribed by regulations of the President.

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

(c) A copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as it is authenticated.

Subchapter VIII. SENTENCES

Sec. Art.
855. 55. Cruel and unusual punishments prohibited.
856. 56. Maximum limits.
857. 57. Effective date of sentences.

858. 58. Execution of confinement.
858a. 58a. Sentences: reduction in enlisted grade upon approval.

§ 855. Art. 55. Cruel and unusual punishments prohibited

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

§ 856. Art. 56. Maximum limits

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

857. Art. 57. Effective date of sentences

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

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

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

**(d) On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in his sole discretion defer service of the sentence to confinement. The deferment shall terminate when the sentence is ordered executed. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned.

§ 858. Art. 58. Execution of confinement

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

(b) The omission of the words "hard labor" from any sentence of a court-martial adjudging confinement does not deprive the authority executing that sentence of the power to require hard labor as a part of the punishment.

§ 858a. Art. 58a. Sentences: reduction in enlisted grade upon approval

(a) Unless otherwise provided in regulations to be prescribed by the Secretary concerned, a court-martial sentence of an enlisted member in a pay grade above E–1, as approved by the convening authority, that includes—

(1) a dishonorable or bad-conduct discharge;
(2) confinement; or
(3) hard labor without confinement;

reduces that member to pay grade E–1, effective on the date of that approval.

(b) If the sentence of a member who is reduced in pay grade under subsection (a) is set aside or disapproved, or, as finally approved, does not include any punishment named in subsection (a) (1), or (3), the rights and privileges of which he was deprived because

of that reduction shall be restored to him and he is entitled to the pay and allowances to which he would have been entitled, for the period the reduction was in effect, had he not been so reduced.

Subchapter IX. REVIEW OF COURTS-MARTIAL

Sec. Art.
859. 59. Error of law; lesser included offense.
860. 60. Initial action on the record.
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§ 859. Art. 59. Error of law; lesser included offense

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

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

§ 860. Art. 60. Initial action on the record

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

§ 861. Art. 61. Same—General court-martial records

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

§ 862. Art. 62. Reconsideration and revision

(a) If a specification before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action.

(b) Where there is an apparent error or omission in the record or where the record shows improper or inconsistent action by a court-martial with respect to a finding or sentence which can be rectified without material prejudice to the substantial rights of the accused, the convening authority may return the record to the court for appropriate action. In no case, however, may the record be returned—

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

(2) for reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of this chapter; or

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

§ 863. Art. 63. Rehearings

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

(b) Each rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon a rehearing the accused may 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 may be imposed, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory.

§ 864. Art. 64. Approval by the convening authority

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

§ 865. Art. 65. Disposition of records after review by the convening authority

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

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

(c) All other special and summary court-martial records shall be reviewed by a judge advocate of the Army, Navy, Air Force, or Marine Corps, or a law specialist or lawyer of the Coast Guard or Department of the Treasury, and shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation.[5]

866. Art. 66. Review by Court of Military Review

**(a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge shall determine on which panels of the court the appellate judge assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

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

**(c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of

[5] See note 4 *supra*.

witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

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

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

**(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Military Review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the office of the Judge Advocates General and by Courts of Military Review.

**(g) No member of a Court of Military Review shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Military Review, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces if qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces shall be retained on active duty.

**(h) No member of a Court of Military Review shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

§ 867. Art. 67. Review by the Court of Military Appeals

*(a) (1) There is a United States Court of Military Appeals established under article I of the Constitution of the United States and located for administrative purposes only in the Department of Defense. The court consists of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of fifteen years. The terms of office of all successors of the judges serving on the effective date of this Act shall expire fifteen years after the expiration of the terms for which their predecessors were appointed, but any judge appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor. Not more than two of the judges of the court may be appointed from the same political party, nor is any person eligible for appointment to the court who is not a member of the bar of a Federal court or the highest court of a State. Each judge is entitled to the same salary and travel allowances as are, and from time to time may be, provided for judges of the United States Court of Appeals, and is eligible for reappointment. The President shall designate from time to time one of the judges to act as chief judge. The chief judge of the court shall have precedence and preside at any session which he attends. The other judges shall have precedence and preside according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age. The court may prescribe its own rules of procedure and determine the number of judges required to constitute a quorum. A vacancy in the court does not impair the right of the remaining judges to exercise the powers of the court.

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

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

(4) Any judge of the United States Court of Military Appeals who is receiving retired pay may become a senior judge, may occupy offices in a Federal building, may be provided with a staff assistant whose compensation shall not exceed the rate prescribed for GS-9 in the General Schedule under section 5332 of title 5, and, with his consent, may be called

upon by the chief judge of said court to perform judicial duties with said court for any period or periods specified by such chief judge. A senior judge who is performing judicial duties pursuant to this subsection shall be paid the same compensation (in lieu of retired pay) and allowances for travel and other expenses as a judge.

**(b) The Court of Military Appeals shall review the record in—

**(1) all cases in which the sentence, as affirmed by a Court of Military Review, affects a general or flag officer or extends to death;

**(2) all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and

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

(c) The accused has 30 days from the time when he is notified of the decision of a board of review[6] to petition the Court of Military Appeals for review. The court shall act upon such a petition within 30 days of the receipt thereof.

(d) In any case reviewed by it, the Court of Military Appeals may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the board of review.[6] In a case which the Judge Advocate General orders sent to the Court of Military Appeals, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Military Appeals shall take action only with respect to matters of law.

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

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

(g) The Court of Military Appeals and the Judge Advocates General shall meet annually to make a comprehensive survey of the operation of this chapter and report to the Committees on Armed Services of the Senate and of the House of Representatives and to the Secretary of Defense, the Secretaries of the military departments, and the Secretary of the Treasury, the number and status of pending cases and any recommendations relating to uniformity of policies as to sentences, amendments to this chapter, and any other matters considered appropriate.[7]

§ 868. Art. 68. Branch offices

**The Secretary concerned may direct the Judge Advocate General to establish a branch office with any command. The branch office shall be under an Assistant Judge Advocate General who, with the consent of the Judge Advocate General, may establish a Court of Military Review with one or more panels. That Assistant Judge Advocate General and any Court of Military Review established by him may perform for that command under the general supervision of the Judge Advocate General, the respective duties which the Judge Advocate General and a Court of Military Review established by the Judge Advocate General would otherwise be required to perform as to all cases involving sentences not requiring approval by the President.

§ 869. Art. 69. Review in the office of the Judge Advocate General

**Every record of trial by general court-martial, in which there has been a finding of guilty and a sentence, the appellate review of which is not otherwise provided for by section 866 of this title (article 66), shall be examined in the office of the Judge Advocate General. If any part of the findings or sentence is found unsupported in law, or if the Judge Advocate General so directs, the record shall be reviewed by a Court of Military Review in accordance with section 866 of this title (article 66), but in that event there may be no further review by the Court of Military Appeals except under section 867(b)(2) of this

[6] See note 3 *supra*.
[7] See note 4 *supra*.

title (article 67(b)(2)). Notwithstanding section 876 of this title (article 76) the findings or sentence, or both, in a court-martial case which has been finally reviewed, but has not been reviewed by a Court of Military Review may be vacated or modified, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused.

§ 870. Art. 70. Appellate counsel

(a) The Judge Advocate General shall detail in his office one or more commissioned officers as appellate Government counsel, and one or more commissioned officers as appellate defense counsel, who are qualified under section 827(b)(1) of this title (article 27(b)(1)).

**(b) Appellate Government counsel shall represent the United States before the Court of Military Review or the Court of Military Appeals when directed to do so by the Judge Advocate General.

**(c) Appellate defense counsel shall represent the accused before the Court of Military Review or the Court of Military Appeals—

(1) when he is requested to do so by the accused;

(2) when the United States is represented by counsel; or

(3) when the Judge Advocate General has sent a case to the Court of Military Appeals.

**(d) The accused has the right to be represented before the Court of Military Appeals or the Court of Military Review by civilian counsel if provided by him.

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

§ 871. Art. 71. Execution of sentence; suspension of sentence

(a) No court-martial sentence extending to death or involving a general or flag officer may be executed until approved by the President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence, as approved by him, except a death sentence.

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

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

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

§ 872. Art. 72. Vacation of suspension

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

(b) The record of the hearing and the recommendation of the officer having special court-martial jurisdiction shall be sent for action to the officer exercising general court-martial jurisdiction over the probationer. If he vacates the suspension, any unexecuted part of the sentence, except a dismissal, shall be executed, subject to applicable restrictions in section 871(c) of this title (article 71(c)). The vacation of the suspension of a dismissal is not effective until approved by the Secretary concerned.

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

§ 873. Art. 73. Petition for a new trial

**At any time within two years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before a Court of Military Review or before the Court of Military Appeals, the Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise the Judge Advocate General shall act upon the petition.

§ 874. Art. 74. Remission and suspension

(a) The Secretary concerned and, when designated by him, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures other than a sentence approved by the President.

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

§ 875. Art. 75. Restoration

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

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

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

§ 876. Art. 76. Finality of proceedings, findings, and sentences

The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74), and the authority of the President.

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§ 877. Art. 77. Principals

Any person punishable under this chapter who—

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

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

is a principal.

§ 878. Art. 78. Accessory after the fact

Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder

or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct.

§ 879. Art. 79. Conviction of lesser included offense

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

§ 880. Art. 80. Attempts

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

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

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

§ 881. Art. 81. Conspiracy

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

§ 882. Art. 82. Solicitation

(a) Any person subject to this chapter who solicits or advises another or others to desert in violation of section 885 of this title (article 85) or mutiny in violation of section 894 of this title (article 94) shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of section 899 of this title (article 99) or sedition in violation of section 894 of this title (article 94) shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct.

§ 883. Art. 83. Fraudulent enlistment, appointment, or separation

Any person who—

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

(2) procures his own separation from the armed forces by knowingly false representation or deliberate concealment as to his eligibility for that separation;

shall be punished as a court-martial may direct.

§ 884. Art. 84. Unlawful enlistment, appointment, or separation

Any person subject to this chapter who effects an enlistment or appointment in or a separation from the armed forces of any person who is known to him to be ineligible for that enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct.

§ 885. Art. 85. Desertion

(a) Any member of the armed forces who—

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

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

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

is guilty of desertion.

(b) Any commissioned officer of the armed forces who, after tender of his resignation and before notice of its acceptance, quits his post or proper duties without leave and with intent to remain away therefrom permanently is guilty of desertion.

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

§ 886. Art. 86. Absence without leave

Any member of the armed forces who, without authority—

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

(2) goes from that place; or

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

shall be punished as a court-martial may direct.

§ 887. Art. 87. Missing movement

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

§ 888. Art. 88. Contempt toward officials

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of the Treasury, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.[8]

§ 889. Art. 89. Disrespect toward superior commissioned officer

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

§ 890. Art. 90. Assaulting or willfully disobeying superior commissioned officer

Any person subject to this chapter who—

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

§ 891. Art. 91. Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer

Any warrant officer or enlisted member who—

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

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

(3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office;

shall be punished as a court-martial may direct.

§ 892. Art. 92. Failure to obey order or regulation

Any person subject to this chapter who—

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

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

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

shall be punished as a court-martial may direct.

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[8] See note 4 *supra*.

§ 893. Art. 93. Cruelty and maltreatment

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

§ 894. Art. 94. Mutiny or sedition

(a) Any person subject to this chapter who—

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

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

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

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

§ 895. Art. 95. Resistance, breach of arrest, and escape

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

§ 896. Art. 96. Releasing prisoner without proper authority

Any person subject to this chapter who, without proper authority, releases any prisoner committed to his charge, or who through neglect or design suffers any such prisoner to escape, shall be punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with law.

§ 897. Art. 97. Unlawful detention

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

§ 898. Art. 98. Noncompliance with procedural rules

Any person subject to this chapter who—

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or

(2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused;

shall be punished as a court-martial may direct.

§ 899. Art. 99. Misbehavior before the enemy

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

(1) runs away;

(2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend;

(3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property;

(4) casts away his arms or ammunition;

(5) is guilty of cowardly conduct;

(6) quits his place of duty to plunder or pillage;

(7) causes false alarms in any command, unit, or place under control of the armed forces;

(8) willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy; or

(9) does not afford all practicable relief and assistance to any troops, combatants,

vessels, or aircraft of the armed forces belonging to the United States or their allies when engaged in battle;

shall be punished by death or such other punishment as a court-martial may direct.

§ 900. Art. 100. Subordinate compelling surrender

Any person subject to this chapter who compels or attempts to compel the commander of any place, vessel, aircraft, or other military property, or of any body of members of the armed forces, to give it up to an enemy or to abandon it, or who strikes the colors or flag to an enemy without proper authority, shall be punished by death or such other punishment as a court-martial may direct.

§ 901. Art. 101. Improper use of countersign

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

§ 902. Art. 102. Forcing a safeguard

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

§ 903. Art. 103. Captured or abandoned property

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

(b) Any person subject to this chapter who—

(1) fails to carry out the duties prescribed in subsection (a);

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

(3) engages in looting or pillaging;

shall be punished as a court-martial may direct.

§ 904. Art. 104. Aiding the enemy

Any person who—

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

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

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

§ 905. Art. 105. Misconduct as prisoner

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

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

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

shall be punished as a court-martial may direct.

§ 906. Art. 106. Spies

Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.

§ 907. Art. 107. False official statements

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

§ 908. Art. 108. Military property of United States—Loss, damage, destruction, or wrongful disposition

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

(1) sells or otherwise disposes of;

(2) willfully or through neglect damages, destroys, or loses; or

(3) willfully or through neglect suffers to be lost, damaged, destroyed, sold, or wrongfully disposed of;

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

§ 909. Art. 109. Property other than military property of United States—Waste, spoilage, or destruction

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

§ 910. Art. 110. Improper hazarding of vessel

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

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

§ 911. Art. 111. Drunken or reckless driving

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

§ 912. Art. 112. Drunk on duty

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

§ 913. Art. 113. Misbehavior of sentinel

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

§ 914. Art. 114. Dueling

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

§ 915. Art. 115. Malingering

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

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

(2) intentionally inflicts self-injury;

shall be punished as a court-martial may direct.

§ 916. Art. 116. Riot or breach of peace

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

§ 917. Art. 117. Provoking speeches or gestures

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

§ 918. Art. 118. Murder

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

(1) has a premeditated design to kill;

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

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

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

§ 919. Art. 119. Manslaughter

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

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

(1) by culpable negligence; or

(2) while perpetrating or attempting to perpetrate an offense, other than those named in clause (4) of section 918 of this title (article 118), directly affecting the person;

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

§ 920. Art. 120. Rape and carnal knowledge

(a) Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

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

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

§ 921. Art. 121. Larceny and wrongful appropriation

(a) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind—

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

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

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

§ 922. Art. 122. Robbery

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

§ 923. Art. 123. Forgery

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

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

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

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

***§ 923a. Art. 123a. Making, drawing, or uttering check, draft, or order without sufficient funds**

Any person subject to this chapter who—

(1) for the procurement of any article or thing of value, with intent to defraud; or

(2) for the payment of any past due obligation, or for any other purpose, with intent to deceive;

makes, draws, utters, or delivers any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time that the maker or drawer has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of that check, draft, or order in full upon its presentment, shall be punished as a court-martial may direct. The making, drawing, uttering, or delivering by a maker or drawer of a check, draft or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in the drawee's possession or control, is prima facie evidence of his intent to defraud or deceive and of his knowledge of insufficient funds in, or credit with, that bank or other depository, unless the maker or drawer pays the holder the amount due within five days after receiving notice, orally or in writing, that the check, draft, or order was not paid on presentment. In this section, the word 'credit' means an arrangement or understanding, express or implied, with the bank or other depository for the payment of that check, draft, or order.

§ 924. Art. 124. Maiming

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

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

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

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

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

§ 925. Art. 125. Sodomy

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

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

§ 926. Art. 126. Arson

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

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

§ 927. Art. 127. Extortion

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

§ 928. Art. 128. Assault

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

(b) Any person subject to this chapter who—

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

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

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

§ 929. Art. 129. Burglary

Any person subject to this chapter who, with intent to commit an offense punishable under sections 918–928 of this title (articles 118–128), breaks and enters, in the nighttime, the dwelling house of another, is guilty of burglary and shall be punished as a court-martial may direct.

§ 930. Art. 130. Housebreaking

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

§ 931. Art. 131. Perjury

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

§ 932. Art. 132. Frauds against the United States

Any person subject to this chapter—

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

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

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

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

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

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

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

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

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

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

§ 933. Art. 133. Conduct unbecoming an officer and a gentleman

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

§ 934. Art. 134. General article

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

Subchapter XI. MISCELLANEOUS PROVISIONS

Sec. Art.
935. 135. Courts of inquiry.
936. 136. Authority to administer oaths and to act as notary.
937. 137. Articles to be explained.
938. 138. Complaints of wrongs.
939. 139. Redress of injuries to property.
940. 140. Delegation by the President.

§ 935. Art. 135. Courts of inquiry

(a) Courts of inquiry to investigate any matter may be convened by any person authorized to convene a general court-martial or by any other person designated by the Secretary concerned for that purpose, whether or not the persons involved have requested such an inquiry.

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

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

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

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

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

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

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

§ 936. Art. 136. Authority to administer oaths and to act as notary

**(a) The following persons on active duty may administer oaths for the purposes of military administration, including military justice, and have the general powers of a notary public and of a consul of the United States, in the performance of all notarial acts to be executed by members of any of the armed forces, wherever they may be, by persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Canal Zone, Puerto Rico, Guam, and the Virgin Islands, and by other persons subject to this chapter outside of the United States:

(1) All judge advocates of the Army, Navy, Air Force, and Marine Corps.

(2) All law specialists.

(3) All summary courts-martial.

(4) All adjutants, assistant adjutants, acting adjutants, and personnel adjutants.

(5) All commanding officers of the Navy, Marine Corps, and Coast Guard.

(6) All staff judge advocates and legal officers, and acting or assistant staff judge advocates and legal officers.

(7) All other persons designated by regulations of the armed forces or by statute.

(b) The following persons on active duty may administer oaths necessary in the performance of their duties:

(1) The president, military judge, trial counsel, and assistant trial counsel for all general and special courts-martial.

(2) The president and the counsel for the court of any court of inquiry.

(3) All officers designated to take a deposition.

(4) All persons detailed to conduct an investigation.

(5) All recruiting officers.

(6) All other persons designated by regulations of the armed forces or by statute.

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

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

§ 937. Art. 137. Articles to be explained

Sections 802, 803, 807–815, 825, 827, 831, 837, 838, 855, 877–934, and 937–939 (articles 2, 3, 7–15, 25, 27, 31, 37, 38, 55, 77–134 and 137–139) of this chapter shall be carefully

explained to each enlisted member at the time of his entrance on active duty, or within six days thereafter. They shall be explained again after he has completed six months of active duty, and again at the time when he reenlists. A complete text of the Uniform Code of Military Justice and of the regulations prescribed by the President thereunder shall be made available to any person on active duty upon his request, for his personal examination.

§ 938. Art. 138. Complaints of wrongs

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

§ 939. Art. 139. Redress of injuries to property

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

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

§ 940. Art. 140. Delegation by the President

The President may delegate any authority vested in him under this chapter, and provide for the subdelegation of any such authority.

Appendix 3

STATUTES TO WHICH MILITARY PERSONNEL SHOULD HAVE READY ACCESS

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a.

DEFINITIONS AND RULES OF CONSTRUCTION

The following are definitions prescribed in title 10 and title 1, United States Code, which apply to the Uniform Code of Military Justice and to other provisions of title 10:

TITLE 10—ARMED FORCES

CHAPTER 1. DEFINITIONS

§ 101. Definitions.

In addition to the definitions in sections 1–5 of title 1, the following definitions apply in this title:

(1) "United States", in a geographic sense, means the States and the District of Columbia.

(2) "Territory" means any Territory organized after this title is enacted, so long as it remains a Territory.

(3) "Possessions" includes the Virgin Islands, the Canal Zone, Guam, American Samoa, and the guano islands, so long as they remain possessions, but does not include any Territory or Commonwealth.

(4) "Armed forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(5) "Department", when used with respect to a military department, means the executive part of the department and all field headquarters, forces, reserve components, installations, activities, and functions under the control or supervision of the Secretary of the department. When used with respect to the Department of Defense, it means the executive part of the department, including the executive parts of the military departments, and all field headquarters, forces, reserve components, installations, activities, and functions under the control or supervision of the Secretary of Defense, including those of the military departments.

(6) "Executive part of the department" means the executive part of the Department of Defense, Department of the Army, Department of the Navy, or Department of the Air Force, as the case may be, at the seat of government.

(7) "Military departments" means the Department of the Army, the Department of the Navy, and the Department of the Air Force.

(8) "Secretary concerned" means—

(A) the Secretary of the Army, with respect to matters concerning Army;

(B) the Secretary of the Navy, with respect to matters concerning the Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Navy;

(C) the Secretary of the Air Force, with respect to matters concerning the Air Force; and

(D) the Secretary of the Treasury, with respect to matters concerning the Coast Guard when it is not operating as a service in the Navy.[1]

(9) "National Guard" means the Army National Guard and the Air National Guard.

(10) "Army National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that—

(A) is a land force;

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[1] See 80 Stat. 938 (1966), 49 U.S.C.A. § 1655(b) (1966), which transferred the Coast Guard to the Department of Transportation during peacetime.

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

(11) "Army National Guard of the United States" means the reserve component of the Army all of whose members are members of the Army National Guard.

(12) "Air National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that—

(A) is an air force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

(13) "Air National Guard of the United States" means the reserve component of the Air Force all of whose members are members of the Air National Guard.

(14) "Officer" means commissioned or warrant officer.

(15) "Commissioned officer" includes a commissioned warrant officer.

(16) "Warrant officer" means a person who holds a commission or warrant in a warrant officer grade.

(17) "Enlisted member" means a person in an enlisted grade.

(18) "Grade" means a step or degree, in a graduated scale of office or military rank, that is established and designated as a grade by law or regulation.

(19) "Rank" means the order of precedence among members of the armed forces.

(20) "Rating" means the name (such as "boatswain's mate") prescribed for members of an armed force in an occupational field. "Rate" means the name (such as "chief boatswain's mate") prescribed for members in the same rating or other category who are in the same grade (such as chief petty officer or seaman apprentice).

(21) "Authorized strength" means the largest number of members authorized to be in an armed force, a component, a branch, a grade, or any other category of the armed forces.

(22) "Active duty" means full-time duty in the active military service of the United States. It includes duty on the active list, full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned.

(23) "Active duty for a period of more than 30 days" means active duty under a call or order that does not specify a period of 30 days or less.

(24) "Active service" means service on active duty.

(25) "Active status" means the status of a reserve commissioned officer, other than a commissioned warrant officer, who is not in the inactive Army National Guard or inactive Air National Guard, on an inactive status list, or in the Retired Reserve.

(26) "Supplies" includes material, equipment, and stores of all kinds.

(27) "Pay" includes basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay, but does not include allowances.

(28) "Shall" is used in an imperative sense.

(29) "May" is used in a permissive sense. The words "no person may . . ." mean that no person is required, authorized, or permitted to do the act prescribed.

(30) "Includes" means "includes but is not limited to".

(31) "Inactive-duty training" means—

(A) duty prescribed for Reserves by the Secretary concerned under section 206 of title 37 or any other provision of law; and

(B) special additional duties authorized for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.

It includes those duties when performed by Reserves in their status as members of the National Guard.

(32) "Spouse" means husband or wife, as the case may be.

(33) "Regular", with respect to an enlistment, appointment, grade, or office, means enlistment, appointment, grade, or office in a regular component of an armed force.

(34) "Reserve", with respect to an enlistment, appointment, grade, or office, means enlistment, appointment, grade, or office held as a Reserve of an armed force.

(35) "Original", with respect to the appointment of a member of the armed forces in a regular or reserve component, refers to his most recent appointment in that component that is neither a promotion nor a demotion.

NOTE. The following extract of title 1, United States Code, sets forth the definitions first referred to in title 10, above:

TITLE 1—GENERAL PROVISIONS

CHAPTER 1. RULES OF CONSTRUCTION

§ 1. Words denoting number, gender, and so forth.

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

words importing the singular include and apply to several persons, parties, or things;

words importing the plural include the singular;

words importing the masculine gender include the feminine as well;

words used in the present tense include the future as well as the present;

the words "insane" and "insane person" and "lunatic" shall include every idiot, lunatic, insane person, and person non compos mentis;

the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

"officer" includes any person authorized by law to perform the duties of the office;

"signature" or "subscription" includes a mark when the person making the same intended it as such;

"oath" includes affirmation, and "sworn" includes affirmed;

"writing" includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.

§ 2. "County" as including "parish", and so forth.

The word "county" includes a parish, or any other equivalent subdivision of a State or Territory of the United States.

§ 3. "Vessel" as including all means of water transportation.

The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

§ 4. "Vehicle" as including all means of land transportation.

The word "vehicle" includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land.

§ 5. "Company" or "association" as including successors and assigns.

The word "company" or "association", when used in reference to a corporation, shall be deemed to embrace the words "successors and assigns of such company or association", in like manner as if these last-named words, or words of similar import, were expressed.

b.

STATUTES APPLICABLE TO ALL OF THE ARMED FORCES

10 U.S.C. § 501

§ 501. Enlistment oath: who may administer.

Each person enlisting in an armed force shall take the following oath:

"I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God."

This oath or affirmation may be taken before any commissioned officer of any armed force.

10 U.S.C. § 972

§ 972. Enlisted members; required to make up time lost.

An enlisted member of an armed force who—

(1) deserts;

(2) is absent from his organization, station, or duty for more than one day without proper authority, as determined by competent authority;

(3) is confined for more than one day while awaiting trial and disposition of his case, and whose conviction has become final;

(4) is confined for more than one day under a sentence that has become final; or

(5) is unable for more than one day, as determined by competent authority, to perform his duties because of intemperate use of drugs or alcoholic liquor, or because of disease or injury resulting from his misconduct;

is liable, after his return to full duty, to serve for a period that, when added to the period that he served before his absence from duty, amounts to the term for which he was enlisted or inducted.

10 U.S.C. § 1161

§ 1161. Commissioned officers: limitations on dismissal.

(a) No commissioned officer may be dismissed from any armed force except—

(1) by sentence of a general court-martial;

(2) in commutation of a sentence of a general court-martial; or

(3) in time of war, by order of the President.

(b) The President may drop from the rolls of any armed force any commissioned officer (1) who has been absent without authority for at least three months, or (2) who is sentenced to confinement in a Federal or State penitentiary or correctional institution after having been found guilty of an offense by a court other than a court-martial or other military court, and whose sentence has become final.

28 U.S.C. § 1442a

§ 1442a. Members of armed forces sued or prosecuted.

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

10 U.S.C. 1552

§ 1552. Correction of military records: claims incident thereto

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury[2] may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's

[2] See Note 1, *supra*.

service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid—

(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Administrator of Veterans' Affairs.

c.

STATUTES APPLICABLE TO ARMY AND AIR FORCE

10 U.S.C. § 3811 and § 8811

§ 3811. Army enlisted members; discharge certificate; limitations on discharge.

(a) A discharge certificate shall be given to each lawfully inducted or enlisted member of the Army upon his discharge.

(b) No enlisted member of the Army may be discharged before his term of service expires, except—

(1) as prescribed by the Secretary of the Army;

(2) by sentence of a general or special court-martial; or

(3) as otherwise provided by law.

NOTE. 10 U.S.C. § 8811 is identical with the foregoing, except that the words "Air Force" appear wherever "Army" appears in § 3811.

10 U.S.C. § 4711 and § 9711

§ 4711. Inquests.

(a) When a person is found dead under circumstances that require investigation, at a place garrisoned by the Army and under the exclusive jurisdiction of the United States, the commanding officer shall direct a summary court-martial to investigate the circumstances of the death.

(b) In conducting an investigation under subsection (a), the summary court-martial may summon witnesses and examine them upon oath.

(c) The summary court-martial shall promptly submit to the commanding officer a report of the investigation and findings as to the cause of death.

NOTE. 10 U.S.C. § 9711 is identical with the foregoing, except that the words "Air Force" appear where "Army" appears in § 4711.

10 U.S.C. § 4712 and § 9712

§ 4712. Disposition of effects of deceased persons by summary court-martial.

(a) Upon the death of—

(1) a person subject to the court-martial jurisdiction of the Army or the Air Force at a place or command under the jurisdiction of the Army; or

(2) an inmate of the Soldiers' Home who dies in an Army hospital outside the District of Columbia when sent from the Home to that hospital for treatment;

the commanding officer of the place or command shall permit the legal representative or the surviving spouse of the deceased, if present, to take possession of the effects of the deceased that are then in camp or quarters.

(b) If there is no legal representative or surviving spouse present, the commanding officer shall direct a summary court-martial to collect the effects of the deceased that are then in camp or quarters.

(c) The summary court-marial may collect debts due the decedent's estate by local debtors, pay undisputed local creditors of the deceased to the extent permitted by the money of the deceased in the court's possession, and shall take receipts for those payments, to be filed with the court's final report to the Department of the Army.

(d) As soon as practicable after the collection of the effects and money of the deceased, the summary court-martial shall send them at the expense of the United States to the living person highest on the following list who can be found by the court:

(1) Surviving spouse or legal representative.
(2) Son.
(3) Daughter.
(4) Father, if he has not abandoned the support of his family.
(5) Mother.
(6) Brother.
(7) Sister.
(8) Next of kin.
(9) Beneficiary named in the will of the deceased.

(e) If the summary court-martial cannot dispose of the effects under subsection (d) because there are no persons in those categories or because the court finds that the addresses of the persons are not known or readily ascertainable, the court may convert the effects of the deceased, except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, into cash, by public or private sale, but not until 30 days after the date of the death of the deceased.

(f) As soon as practicable after the effects have been converted into cash under subsection (e), the summary court-martial shall deposit all cash in the court's possession and belonging to the estate with the officer designated in regulations, and shall send a receipt therefor, together with any will or other papers of value, an inventory of the effects, and articles not permitted to be sold, to the executive part of the Department of the Army for transmission to the Soldiers' Home.

(g) The summary court-martial shall make a full report of the transactions under this section, with respect to the deceased, to the Department of the Army for transmission to the General Accounting Office for action authorized in the settlement of accounts of deceased members of the Army.

NOTE. 10 U.S.C. § 9712 is identical with the foregoing, except that the word "Army" appears where "Air Force" appears in subsection (a)(1) of § 4712, and "Air Force" appears wherever "Army" appears in § 4712.

37 U.S.C. § 804

§ 804. Enlisted members of the Army or Air Force: pay and allowances not to accrue during suspended sentence of dishonorable discharge.

Pay and allowances do not accrue to an enlisted member of the Army or the Air Force who is in confinement under sentence of dishonorable discharge, while the execution of the sentence to discharge is suspended.

d.

STATUTES APPLICABLE TO THE NAVAL SERVICE

10 U.S.C. § 5947

§ 5947. Requirement of exemplary conduct.

All commanding officers and others in authority in the naval service are required to show in themselves a good example of virtue, honor, patriotism, and subordination; to be vigilant in inspecting the conduct of all persons who are placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Navy, all persons who are guilty of them; and to take all necessary and proper measures, under the laws, regulations, and customs of the naval

service, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.

10 U.S.C. § 5951

§ 5951. Continuation of authority after loss of vessel or aircraft.

If the crew of any naval vessel or naval aircraft are separate from their vessel or aircraft because of its wreck, loss, or destruction, all the command and authority given to the officers of the vessel or aircraft remain in full force until the crew are discharged or reassigned.

10 U.S.C. § 5952

§ 5952. Marine Corps organizations on vessels: authority of officers.

When an organization of the Marine Corps is embarked in any vessel, not as part of the authorized complement of the vessel, the authority of the officers of that organization is the same as though the organization were serving at a naval station. However, this section does not impair the paramount authority of the commanding officer of a vessel over the vessel and all persons embarked in it.

10 U.S.C. § 6031

§ 6031. Chaplains: divine services.

* * * * * * *

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

(c) All persons in the Navy and in the Marine Corps are enjoined to behave themselves in a reverent and becoming manner during divine service.

10 U.S.C. § 6408

§ 6408. Navy and Marine Corps; warrant officers, W-1: limitation on dismissal.

(a) No officer who holds the grade of warrant officer, W-1, may be dismissed from the Navy or the Marine Corps except in time of war, by order of the President.

(b) The President may drop from the rolls of the Navy or the Marine Corps any officer who holds the grade of warrant officer, W-1, who—

(1) has been absent without authority for at least three months; or

(2) is sentenced to confinement in a Federal or State penitentiary or correctional institution after having been found guilty of an offense by a court other than a court-martial or other military court, and whose sentence has become final.

e.

STATUTES APPLICABLE TO THE COAST GUARD

14 U.S.C. § 508

§ 508. Deserters; payment of expenses incident to apprehension and delivery; penalties.

* * * * * * *

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

f.

TECHNICAL SECTIONS OF ACT OF 10 AUGUST 1956

NOTE. The act of 10 August 1956 revised, codified, and enacted into law title 10, United States Code, Armed Forces, and title 32, United State Code, National Guard.[3] Certain technical sections of the act, Public Law 1028, 84th Congress, are set forth below.

[3] 70A Stat. 1 (1956).

Saving and Severability Clauses

§ 49. (a) In sections 1–48 of this Act, it is the legislative purpose to restate, without substantive change, the law replaced by those sections on the effective date of this Act. However, laws effective after March 31, 1955, that are inconsistent with this Act shall be considered as superseding it to the extent of the inconsistency.

(b) References that other laws, regulations, and orders make to the replaced law shall be considered to be made to the corresponding provisions of sections 1–48.

(c) Actions taken and offenses committed under the replaced law shall be considered to have been taken or committed under the corresponding provisions of sections 1–48.

(d) If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

(e) In chapter 47 of title 10, United States Code, enacted by section 1 of this Act, no inference of a legislative construction is to be drawn from the part in which any article is placed nor from the catchlines of the part or the article as set out in that chapter.[4]

* * * * * * *

Effective Date of Uniform Code of Military Justice

§ 51. Chapter 47 of title 10, United States Code, enacted by section 1 of this Act, takes effect January 1, 1957.[5]

Repeal Provisions

§ 53. The following laws are repealed except with respect to rights and duties that matured, penalties that were incurred, and proceedings that were begun, before the effective date of this Act and except as provided in section 49: * * * [Sections 1,6–11, 13, and 14(f) of the Act of 5 May 1950. Repeal of section 1 (Uniform Code of Military Justice) is effective on the effective date of chapter 47 of title 10, United States Code, enacted by section 1 of this Act.] [6]

g.

TECHNICAL SECTION OF ACT OF 15 JUNE 1968

§ 2. The United States Court of Military Appeals established under this Act is a continuation of the Court of Military Appeals as it existed prior to the effective date of this Act, and no loss of rights or powers, interruption of jurisdiction, or prejudice to matters pending in the Court of Military Appeals before the effective date of this Act shall result. A judge of the Court of Military Appeals so serving on the day before the effective date of this Act shall, for all purposes, be a judge of the United States Court of Military Appeals under this Act.[7]

h.

TECHNICAL SECTION OF THE ACT OF 24 OCTOBER 1968

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Military Justice Act of 1968".

§ 3. (a) Whenever the term law officer is used, with reference to any officer detailed to a court-martial pursuant to section 826(a) (article 26(a)) of title 10, United States Code, in any provision of Federal law (other than provisions amended by this Act) or in any regulation, document, or record of the United States, such term shall be deemed to mean military judge.

(b) Whenever the term board of review is used, with reference to or in connection with the appellate review of courts-martial cases, in any provision of Federal law (other

[4] 70A Sta. 640 (1956).
[5] *Ibid.*
[6] 70A Stat. 641, 680 (1956).
[7] 82 STAT. 179 (1968).

than provisions amended by this Act) or in any regulation, document, or record of the United States, such term shall be deemed to mean Court of Military Review.

§ 4. (a) Except for the amendments made by paragraphs (30) and (33) of section 2, this Act shall become effective on the first day of the tenth month following the month in which it is enacted.

(b) The amendment made by paragraph (30) of section 2 shall become effective upon the date of enactment of this Act.

(c) The amendment made by paragraph (33) shall apply in the case of all court-martial sentences approved by the convening authority on or after, or not more than two years before, the date of its enactment.

Appendix 4

FORMS FOR ORDERS CONVENING COURTS-MARTIAL

a. GENERAL COURT-MARTIAL CONVENING ORDERS.

(1) *Convening orders.*

_____

(Designation of command of officer convening court-martial)

_____

(Place) (Date)

NOTE 1. The heading of orders convening general courts-martial (including letterhead, place, date, etc.) may be as indicated, or as prescribed in regulations of the Secretary of a Department. This appendix shows only the content required to be set forth in all convening orders. Abbreviations authorized in the department may be used.

A general court-martial is hereby convened. It may proceed (at) (on board) _____ to try such persons as may properly be brought before it. The court will be constituted as follows:

MILITARY JUDGE

(Captain) (Colonel) _____, (*) certified, designated, and assigned in accordance with Article 26 (b) and (c) (and previously sworn in accordance with Article 42(a)).

MEMBERS

(Captain) (Colonel) _____, (*)
(Commander) (Lieutenant Colonel) _____, (*)
(Commander) (Lieutenant Colonel) _____, (*)
(Lieutenant Commander) (Major) _____, (*)
(Lieutenant Commander) (Major) _____, (*)
(Lieutenant) (Captain) _____, (*)

COUNSEL

(Lieutenant Commander) (Major) _____, (*) TRIAL COUNSEL certified in accordance with Article 27(b) (and previously sworn in accordance with Article 42(a)).

(Lieutenant) (Captain) _____, (*) ASSISTANT TRIAL COUNSEL, not certified in accordance with Article 27(b).

(Lieutenant Commander) (Major) _____, (*) DEFENSE COUNSEL, certified in accordance with Article 27(b) (and previously sworn in accordance with Article 42(a)).

(Lieutenant) (Captain) _____, (*) ASSISTANT DEFENSE COUNSEL, not certified in accordance with Article 27(b).

NOTE 2. Convening orders may be signed personally by the officer having authority to convene the general court-martial or may be authenticated in any manner prescribed in regulations of the Secretary of a Department.

NOTE 3. Legal qualifications and status as to certification of the military judge and all appointed counsel are shown in the convening orders. See 4*e*, 6*b* and *d*. Additionally, unless otherwise provided by regulations of the Secretary concerned, the convening order shall also show if the certified legal personnel have previously taken a prescribed oath to perform their duties faithfully in accordance with Article 42(a). Sec. 36*b*. As to limitations on who may conduct the defense, see 48*a*.

NOTE 4. (*) The further identification of the officer members of the court, the military judge, and counsel, by service number, organization, etc., will be as prescribed in regulations of the Secretary of a Department or as is customary in the particular service.

NOTE 5. When a commanding officer is designated by the Secretary concerned pursuant to Article 22(a)(6) or empowered by the President pursuant to Article 22(a)(7) to convene general courts-martial (5*a*(2)), the convening order will cite such authorization in the first paragraph:

"Pursuant to authority contained in (para _____, General Orders _____, Dept _____, _____ 19__)' (SECNAV ltr ser _____ of _____ 19__) (_____), a general court-martial is hereby convened", etc.

NOTE 6. A succession of orders modifying a convening order may result in serious errors. When practicable, it should be avoided by convening a new court. See 37*c*(1). It is not deemed advisable to issue an order dissolving a court-martial, and when a new court is convened to replace one in existence, the following sentence should merely be added, below the names of the personnel of the court (36*b*), to order convening the new court:

"All cases in the hands of the trial counsel of the general court-martial convened by _____, in which trial proceedings have not begun or in which accused has not requested trial by the military judge alone, will be brought to trial before the court hereby convened."

(2) *Order amending convening orders.*

(*a*) *Adding members.*

NOTE 7. For heading and closure, see Notes 1 and 2 above.

NOTE 8. When an enlisted person has requested enlisted members on the court which tries him, the following may be used when his case has already been referred to a court without enlisted membership to the number of one-third. See 36*c*(2)(*a*). This general type of order may also be modified and used to detail additional officer members to the court (37*a*). The text of such a convening order in the Army might read as follows:

The following members are detailed to GCM convened by CMCO _____ Hq 61st Inf Div (for the trial of PRIVATE _____, RA 12 345 678, Co A, 1st Bn, 61st Inf, only) (for the trial of enlisted persons who make a timely request, pursuant to Article 25(c) that enlisted persons serve on it).

Master Sergeant _____ Co B, 1st Bn, 61st Inf
Master Sergeant _____ Hq Btry, 3d FA Bn (How)
Sergeant First Class _____ Co C, 2d Bn 1st Inf
Sergeant _____ Co B, 3d Bn, 1st Inf

NOTE 9. Additional members may be detailed for one specified case only, or for all cases which may come before the court.

NOTE 10. An order detailing enlisted persons as members of a general court-martial must show the *unit* to which each is assigned. See 4*a*, 36*b*, and Article 25(c).

(*b*) *Replacing military judge.*

NOTE 11. For heading and closure, see Notes 1 and 2 above. This form may be modified to replace a member of the court or counsel.

(Captain) (Colonel) _____, (*Note 4 above), certified designated, and assigned in accordance with Article 26 (b) and (c) (and previously sworn in accordance with Article 42(a)), is detailed military judge of the general court-martial convened by _____, vice (Captain) (Colonel) _____, (*Note 4 above), relieved.

b. SPECIAL COURT-MARTIAL CONVENING ORDERS

NOTE 12. Same as for general court-martial, except that a military judge may or may not be detailed. If a military judge is detailed, the order need only state that he is certified in accordance with Article 26(b) and that he was previously sworn (see Note 3). The manner of stating legal qualifications of counsel is different. Qualifications of counsel or their lack of qualifications in the sense of Article 27 must be shown in the convening order (6*c* and *d*). If counsel is qualified to act as counsel before a general court-martial (Art. 27(c)(1)), the phrase, "certified in accordance with Article 27(b)" will be used. If counsel is a judge advocate, a law specialist, or a member of the bar of a Federal court or the highest court of a State (Art. 27(c)(2)), but has not been certified in accordance with Article 27(b), the phrases, "judge advocate," "law specialist," or member of the bar of _____," respectively, will be used. If counsel has none of the foregoing legal qualifications, the phrase, "not a lawyer in the sense of Article 27," will be

Appendix 5

CHARGE SHEET

CHARGE SHEET

PLACE		DATE
ACCUSED *(Last name, First name, Middle initial) (List aliases when material)*	SERVICE NUMBER	GRADE OR RANK AND PAY GRADE
ORGANIZATION AND ARMED FORCE *(If the accused is not a member of any armed force, state other appropriate description showing that he is subject to military law)*	DATE OF BIRTH	PAY PER MONTH
	CONTRIBUTION TO FAMILY OR QUARTERS ALLOWANCE *(MCM, 126h (2))*	BASIC $
		SEA OR FOREIGN DUTY $
		TOTAL $

RECORD OF SERVICE

INITIAL DATE OF CURRENT SERVICE	TERM OF CURRENT SERVICE

PRIOR SERVICE: ____ YEARS ____ MONTHS ____ DAYS *(As to each prior period of service, give inclusive dates of service and Armed Force, if available.)*

DATA AS TO WITNESSES

(Summary Court Officer will line out and insert names as applicable (MCM, 79a) and initial changes)

NAME OF WITNESS	ADDRESS	WITNESSES FOR	
		PROSECUTION	ACCUSED

DOCUMENTS AND OBJECTS

LIST AND DESCRIBE *(If not attached to charges, note where it may be found)*

DATA AS TO RESTRAINT

NATURE OF ANY RESTRAINT OF ACCUSED	DATE	LOCATION

Charge : Violation of the Uniform Code of Military Justice, Article

Specification

If this space is insufficient for all charges and specifications, they will be set forth numerically, front to back, on separate sheets attached to this page.

2

CHARGE SHEET

NAME, GRADE, AND ORGANIZATION OF ACCUSER	SIGNATURE

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 signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either 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.

GRADE AND ORGANIZATION OF OFFICER _____ SIGNATURE _____

OFFICIAL CHARACTER, AS ADJUTANT, SUMMARY COURT, ETC. *(MCM, 29a, and Article 30a and 136)* _____ TYPED NAME _____

Officer administering oath must be a commissioned officer.

DATE _____

I have this date informed the accused of the charges against him *(MCM, 32i(1))*.

NAME, GRADE, AND ORGANIZATION OF IMMEDIATE COMMANDER _____ SIGNATURE _____

DESIGNATION OF COMMAND OF OFFICER EXERCISING SUMMARY COURT-MARTIAL JURISDICTION _____ PLACE _____ DATE _____

The sworn charges above were received at_____hours, this date *(MCM, 33b)*.

FOR THE[1] _____

NAME, GRADE, AND OFFICIAL CAPACITY OF OFFICER SIGNING _____ SIGNATURE _____

1ST INDORSEMENT

DESIGNATION OF COMMAND OF CONVENING AUTHORITY _____ PLACE _____ DATE _____

Referred for trial to the_____ court-martial convened by _____

_____, _____19___, subject to the following instructions:[2]

BY[1] _____ of _____
COMMAND OR ORDER

NAME, GRADE, AND OFFICIAL CAPACITY OF OFFICER SIGNING _____ SIGNATURE _____

I have served a copy hereof on each of the above-named accused, this_____ day of _____, 19___

NAME, GRADE, AND ORGANIZATION OF TRIAL COUNSEL _____ SIGNATURE _____

[1] *When an appropriate commander signs personally, inapplicable words are stricken out.* [2] *Relative to proper instructions which may be included in the indorsement of reference for trial, see MCM, 33j(1). If none, so state.*

3

Fill in blank numbers of pertinent charges and specifications or "all specifications and charges," as may be appropriate for use unless departmental regulations prevent such election *(MCM, 32f(2))*.

☐ THE ACCUSED HAS BEEN PERMITTED AND HAS ELECTED TO REFUSE PUNISHMENT UNDER ARTICLE 15 AS TO

☐ THE ACCUSED HAS NOT BEEN OFFERED PUNISHMENT UNDER ARTICLE 15 AS TO

NAME, GRADE, AND ORGANIZATION OF OFFICER EXERCISING ARTICLE 15 JURISDICTION	SIGNATURE

RECORD OF TRIAL BY SUMMARY COURT-MARTIAL	CASE NUMBER *(Inserted by convening authority)*

TO BE FILLED IN BY SUMMARY COURT AS APPLICABLE

1. WAS THE ACCUSED ADVISED IN ACCORDANCE WITH PARAGRAPH 79*d*, MCM? ☐ YES

2. THE ACCUSED HAVING REFUSED TO CONSENT IN WRITING TO TRIAL BY SUMMARY COURT-MARTIAL, THE CHARGES ARE HEREWITH RETURNED TO THE CONVENING AUTHORITY.

NAME, GRADE, AND ORGANIZATION OF SUMMARY COURT OFFICER	SIGNATURE

TO BE FILLED IN BY THE ACCUSED

I ☐ CONSENT ☐ OBJECT TO TRIAL BY SUMMARY COURT-MARTIAL

SIGNATURE OF ACCUSED

SPECIFICATIONS AND CHARGES	PLEAS	FINDINGS	SENTENCE OR REMARKS

NUMBER OF PREVIOUS CONVICTIONS CONSIDERED *(MCM, 75b(2))*

PLACE AND DATE OF TRIAL	DATE SENTENCE ADJUDGED

NAME, GRADE, ORGANIZATION, AND ARMED FORCE OF SUMMARY COURT OFFICER *(MCM, 4g)*	SIGNATURE

Enter after signature, "Only officer present with command", if such is the case.

TO BE FILLED IN BY CONVENING AUTHORITY (MCM, 89, and app. 14a.)

ORGANIZATION	PLACE	DATE

ACTION OF CONVENING AUTHORITY

NAME, GRADE, AND ORGANIZATION OF CONVENING AUTHORITY	SIGNATURE

ENTERED ON APPROPRIATE PERSONNEL RECORDS IN CASE OF CONVICTION. (MCM, 91c)

NAME, GRADE, AND DESIGNATION OF OFFICER RESPONSIBLE FOR ACCUSED'S RECORDS	SIGNATURE

NOTE: Summary of evidence, if required by the convening or higher authority, will be attached on separate pages.

Appendix 6

FORMS FOR CHARGES AND SPECIFICATIONS

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a. **INSTRUCTIONS.**

1. Use of forms. These forms are to be used in drafting charges and specifications, not only for the offenses specifically provided for, but as they may be adapted to like offenses. The suggested forms do not as a matter of law exclude other methods of alleging the same offenses, but the appropriate form listed with a punitive article setting forth a specific offense is prescribed for use, when properly completed, as a sufficient allegation of that offense. Except to fill in the blanks with the information required, such a form should not ordinarily be added to or deviated from. As to general principles of drafting specifications when an offense is not provided for herein, see 28.

2. Abbreviations. Dates and times should be written in Arabic numerals, and the designation of organization or command may include Roman or Arabic numerals and the abbreviations "U.S." and "USS." Otherwise, abbreviations should not be used in specifications.

3. Numbering of charges and specifications. When there is more than one charge, the charges should 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*b*) 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.

4. Name and description of the accused. The name of the accused as stated in the specification should include his first 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 the Uniform Code of Military Justice (*e.g.*, see Arts. 104, 106), should be accompanied by such descriptive language of rank, grade, armed force, organization, or position as will show that he is a person subject to the code, and therefore subject to the jurisdiction of the court as to persons. The service number of the accused is not alleged in the specification. In the ordinary case of an enlisted member, for example, the specification would read, "In that Private John J. Smith, U.S. Army, Company A, 1st Battalion, 7th Infantry, did," etc.; or "In that Yeoman Third Class James P. Jones, U.S. Navy, USS ————, did," etc.; or "In that Airman First Class Harold L. Brown, U.S. Air Force, Headquarters Section, 402d Bombardment Group, did," etc. A person on active duty belonging to a reserve component of the Navy, Marine Corps, or Coast Guard should be described as such; for example, "In that Lieutenant Charles L. White, U.S. Naval Reserve, USS ————, on active duty, did," etc.

In the case of persons subject to the code under Article 2, subsections (3) through (12), or subject to trial by court-martial under Article 3 or 4, a description of the accused's position or status which will indicate the basis of jurisdiction of a court-martial should be averred; *e.g.*, John Jones, (Captain, U.S. Air Force Reserve, on inactive duty training authorized by written orders which were voluntarily accepted by him, which orders specified he was subject to the Uniform Code of Military Justice) (a person in custody of ———— serving a sentence imposed by a court-martial) (a member of the Public Health Service assigned to and serving with ————) (a person within ————, an area under the control of the Secretary of ————) (a person convicted of having obtained a fraudulent discharge) (a former major, U.S. Army, who was dismissed by order of the President and has made a written application for trial by court-martial), etc.

5. Use of aliases. If the accused is known by more than one name, as when without discharge a person enlists two or more times, each time under a different name, he should be charged under the name he admits to be his true name. If there be no such admission, he should be charged under the name, etc., pertaining to his first unterminated enlistment with the other names, under aliases; thus, "Private John P. Smith, U.S. Army, Company B, 2d Battalion, 7th Infantry, alias Seaman John Brown, U.S. Coast Guard."

6. In case of change of rank or grade. When the rank or 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 Seaman A B, U.S. Navy, then gunner's mate third class, U.S. Navy did," etc.

7. Time and place of offense. The time and place of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand what particular act or omission he is called upon to defend. It is proper pleading to allege in a specification that a certain offense occurred "on or about" a certain day, "at or near" a certain place, or, if it is necessary to be more explicit as to the time, "at or about" a certain hour, using a 24-hour clock, *e.g.*, "at or about 2300 hours." These phrases are to be construed reasonably in the light of the circumstances of each particular case. When the act (or acts) specified extends over a considerable period of time it is proper to allege it (or them) as having occurred, for example, "from about 15 June 1967 to about 4 November 1967." So, also, it is proper to allege that an offense was committed while "enroute" between certain points.

8. Form of specification in joint offense. In the case of a joint offense (26*d*) 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 A and B are joint perpetrators of an offense and it is intended to charge and try both at the same trial, they should be charged in a single specification as follows:

> "In that (A) and (B), acting jointly and in pursuance of a common intent, did (here allege place, time, and offense)."

If it is intended that B 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 desirable to show in the specification that A was a joint actor with him, even though A is not to be tried with B, B may be charged as follows:

> "In that (B) did, in conjunction with (A), (here allege place, time, and offense)."

Note that when several persons are to be tried in a common trial, as distinguished from a joint trial, each is charged separately on individual charge sheets (26*d*; 33*l*).

9. Principals. When a person has not himself directly committed an offense, but is liable for its commission as a principal under Article 77, he may be charged as though he himself had committed the acts which constitute the offense.

10. Person against whom offense committed. In the case of an offense against the person or property of a person, the first name and surname of that person should be stated, if known. Military rank or grade should be alleged if important to the offense, as in an allegation of disobedience of the command of a superior officer; or if the person has no military position, it may otherwise be necessary to allege his status, as in an allegation of using provoking words towards a person subject to the code (see Art. 117). Address, station, or military organization of the person against whom the offense was committed need not ordinarily be alleged.

If the name of the person against whom the offense was committed is not known, he may be described as "a person whose name is unknown."

11. Value. When the value of property or other amount is material with respect to the amount of punishment which may be adjudged upon conviction of an offense, the value or amount should be alleged, for in such a case increased punishments that are contingent upon value may not be adjudged unless there is an allegation, as well as proof, of a value which will support the punishment. See, for a discussion of value, 200 *a*(7) (Larceny). If several articles of different kinds are the subject of the offense, the value of each article should be stated, followed by a statement of the aggregate value. An example of proper pleading in this respect would be that the accused stole "one shirt, value of about $_____; one pair of shoes, value of about $_____; and one blanket, value of about $_____;

of a total value of about $_____." The value should be stated as "value $2.08" if known exactly; or "value of about $5.00" if not so exactly known, as in the case of used items of property. These principles apply equally to allegations of amount.

12. Law of war. In the case of a person subject to trial by general court-martial by the law of war (see Art. 18), the Charge should be: "Violation of the Law of War"; or "Violation of _____, _____," referring to the local penal law of the occupied territory. See 14. However, the erroneous designation of an article of the Uniform Code of Military Justice in such a case does not affect the jurisdiction of the court.

13. Descriptions. In describing property generic terms should be used and details not necessary to a statement of the elements of the offense should be omitted. For example, in alleging property stolen, damaged or destroyed, the property should be described as "a radio," "an automobile," "a watch," and descriptive details such as make, model, color, and serial number should be omitted. In alleging weapons used in offenses of violence, the weapon should be described as "a knife," "a pistol," or "a rifle," without adding other unnecessary descriptive words. Details necessary to complete the offense must, however, be alleged; for example, if possession of only certain types of knives is prohibited by a general regulation, the critical characteristic must be included in alleging a violation (*e.g.*, "a knife with a blade more than 3 inches long").

14. Documents. Where documents must be alleged, as in the case of regulations and written orders allegedly violated (Art. 92(1) and (2)), bad checks (Arts. 123a and 134), and documents wrongfully possessed or used (Art. 134), the document may be set forth word for word or it may be described, in which case the description must be sufficient to permit the accused to be fully aware of the offense charged. For action where the accused claims that he has not been adequately informed of the offense charged, see 69*b*. In dealing with checks and other brief documents, word for word pleading is usually preferable. When regulations and other directives are alleged by description, care must be used to correctly identify the document and the precise portion or portions allegedly violated.

b. **SPECIMEN CHARGES.**

Charge I: Violation of the Uniform Code of Military Justice, Article 83.

Specification: In that Private Richard Roe, U.S. Army, Company A, 2d Battalion, 2d Infantry, alias Private John Doe, U.S. Army, Company B, 1st Battalion, 29th Infantry, did under the name of John Doe, at Fort Jay, New York, on or about 24 October 1967, by means of deliberate concealment of the fact that he was then a private in said Company A, 2d Battalion, 2d Infantry, procure himself to be enlisted as a private in the Army and did thereafter at Fort Jay, New York, receive allowances under the enlistment so procured.

Charge II: Violation of the Uniform Code of Military Justice, Article 85.

Specification: In that Private Richard Roe, U.S. Army, Company A, 2d Battalion, 2d Infantry, alias Private John Doe, U.S. Army, Company B, 1st Battalion, 29th Infantry, did, on or about 6 June 1967, without authority and with intent to remain away therefrom permanently, absent himself from his organization, to wit: Company A, 2d Battalion, 2d Infantry, and did remain so absent in desertion until he was apprehended on or about 4 November 1967.

Charge III: Violation of the Uniform Code of Military Justice, Article 134.

Specification 1: In that Private Richard Roe, U.S. Army, Company A, 2d Battalion, 2d Infantry, alias Private John Doe, U.S. Army, Company B, 1st Battalion, 29th Infantry, was, at Chicago, Illinois, on or about 5 June 1967, drunk and disorderly in uniform in a public place, to wit: Joe's Tavern, located at 935 Blank Street in said city.

Specification 2: In that Private Richard Roe, U.S. Army, Company A, 2d Battalion, 2d Infantry, alias Private John Doe, U.S. Army, Company B, 1st Battalion, 29th Infantry, did, at Fort Sheridan, Illinois, on or about 5 June 1967, wrongfully and willfully discharge a firearm, to wit: a carbine, in the day room of Company A, 2d Battalion, 2d Infantry, under circumstances such as to endanger human life.

c. FORMS FOR SPECIFICATIONS.

ARTICLE 78

Accessory after the fact

1. In that _____, knowing that (at) (on board) _____, on or about _____ 19__, _____ had committed an offense punishable by the Uniform Code of Military Justice, to wit: _____, did, (at) (on board) _____, on or about _____ 19__, in order to (hinder) (prevent) the (apprehension) (trial) (punishment) of the said _____, (receive) (comfort) (assist) the said _____ by _____.

ARTICLE 80

Attempts

2. In that _____ did, (at) (on board) _____, on or about _____ 19__, attempt to (escape from lawful confinement in _____) (steal _____, of a value of (about) $_____, the property of _____) (_____).

ARTICLE 81

Conspiracy

3. In that _____ did, (at) (on board) _____, on or about _____ 19__, conspire with _____ (and _____) to commit an offense under the Uniform Code of Military Justice, to wit: (larceny of _____, of a value of (about) $_____, the property of _____) (_____), and in order to effect the object of the conspiracy the said _____ (and _____) did _____.

ARTICLE 82

Solicitation

4. In that _____ did, (at) (on board) _____, on or about _____ 19__, by (here state the manner and form of solicitation or advice), (solicit) (advise) _____ (and _____) to (desert in violation of Article 85) (mutiny in violation of Article 94),* [and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about _____ 19__, (at) (on board) _____, (attempted) (committed) by _____ (and _____)].

*If the offense solicited or advised is not attempted or committed, omit the words contained in brackets.

5. In that _____ did, (at) (on board) _____, on or about _____ 19__, by (here state the manner and form of solicitation or advice), (solicit) (advise) _____ (and _____) to commit (an act of misbehavior before the enemy in violation of Article 99) (sedition in violation of Article 94), *[and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about _____ 19__, (at) (on board) _____, committed by _____ (and _____)].

*If the offense solicited or advised is not committed, omit the words contained in brackets.

ARTICLE 83

Fraudulent enlistment or appointment

6. In that _____ did, (at) (on board) _____, on or about _____ 19__, by means of [knowingly false representations that (here state the fact or facts material to qualification for enlistment or appointment which were represented), when in fact (here state the true fact or facts)] [deliberate concealment of the fact that (here state the fact or facts disqualifying the accused for enlistment or appointment which were

concealed)], procure himself to be (enlisted as a _____) (appointed as a _____) in the (here state the armed force in which the accused procured the enlistment or appointment), and did thereafter, (at) (on board) _____, receive (pay) (allowances) (pay and allowances) under the (enlistment) (appointment) so procured.

Fraudulent separation

7. In that _____ did, (at) (on board) _____, on or about _____ 19__, by means of [knowingly false representations that (here state the fact or facts material to eligibility for separation which were represented), when in fact (here state the true fact or facts)] [deliberate concealment of the fact that (here state the fact or facts concealed which made the accused ineligible for separation)], procure himself to be separated from the (here state the armed force from which the accused procured his separation).

ARTICLE 84

Effecting unlawful enlistment, appointment or separation

8. In that _____ did, (at) (on board) _____, on or about _____ 19__, effect [the (enlistment) (appointment) of _____ as a _____ in (here state the armed force in which the person was enlisted or appointed)] [the separation of _____ from (here state the armed force from which the person was separated)], then well knowing that the said _____ was ineligible for such (enlistment) (appointment) (separation) because (here state facts whereby the enlistment, appointment, or separation was prohibited by law, regulation, or order).

ARTICLE 85

Desertion with intent to remain away permanently

9. In that _____ did, on or about _____ 19__, without authority and with intent to remain away therefrom permanently, absent himself from his (unit) (organization) (place of duty), to wit: _____, located at (_____) (APO _____), and did remain so absent in desertion until (he was apprehended) on or about _____ 19__.

Desertion with intent to avoid hazardous duty or shirk important service

10. In that _____ did, on or about _____ 19__, with intent to (avoid hazardous duty) (shirk important service), namely: _____, quit his (unit) (organization) (place of duty), to wit: _____, located at (_____) (APO _____), and did remain so absent in desertion until on or about _____ 19__.

Desertion prior to acceptance of resignation

11. In that _____, having tendered his resignation and prior to due notice of the acceptance of the same, did, on or about _____ 19__, without leave and with intent to remain away therefrom permanently, quit his (post) (proper duties), to wit: _____, and did remain so absent in desertion until (he was apprehended) on or about _____ 19__.

Attempt desertion

12. In that _____ did, (at) (on board) _____, on or about _____ 19__, attempt to [absent himself from his (unit) (organization) (place of duty) to wit: _____, without authority and with intent to remain away therefrom permanently] [quit his (unit) (organization) (place of duty), to wit: _____, located at _____, with intent to (avoid hazardous duty) (shirk important service) namely _____] [_____].

ARTICLE 86

Failing to go to or leaving place of duty

13. In that _____ did, (at) (on board) _____, on or about _____ 19__, without authority, (fail to go at the time prescribed to) (go from) his appointed place of duty, to wit: (here set forth the appointed place of duty).

Absence from unit, organization, or place of duty

14. In that _____ did, on or about _____ 19__, without authority, absent himself from his (unit) (organization) (place of duty at which he was required to be), to wit: _____, located at (_____) (APO _____), and did remain so absent until on or about _____ 19__.

Absence from unit, organization, or place of duty with intent to avoid maneuvers or field exercises

15. In that _____ did, on or about _____ 19__, without authority and with intent to avoid (maneuvers) (field exercises), absent himself from his (unit) (organization) (place of duty at which he was required to be), to wit: _____, located at (_____) (APO _____), and did remain so absent until on or about _____ 19__.

Abandoning watch or guard

16. In that _____, being a member of the _____ (guard) (watch) (duty section), did, (at) (on board) _____, on or about _____ 19__, without authority, go from his (guard) (watch) (duty section) with intent to abandon the same.

ARTICLE 87

Missing movement

17. In that _____ did, (at) (on board) _____, on or about _____ 19__, through (neglect) (design) miss the movement of (Aircraft No. _____) (Flight 11) (the USS _____) (Company A, 1st Battalion, 7th Infantry) (_____), with which he was required in the course of duty to move.

ARTICLE 88

Contempt toward officials by commissioned officer

18. In that _____ did, (at) (on board) _____, on or about _____ 19__, [use (orally and publicly) (_____) the following contemptuous words] [in a contemptuous manner, use (orally and publicly) (_____) the following words] against the [(President) (Vice President) (Congress) (Secretary of _____)] [(Governor) (legislature) of the (State of _____) (Territory of _____) (_____), a (State) (Territory) (_____) in which he, the said _____, was then (on duty) (present)], to wit: "_____," or words to that effect.

ARTICLE 89

Disrespect to superior commissioned officer

19. In that _____ did, (at) (on board) _____, on or about _____ 19__, behave himself with disrespect toward _____, his superior commissioned officer, by (saying to him, "_____," or words to that effect) (contemptuously turning from and leaving him while he, the said _____, was talking to him, the said _____) (_____).

ARTICLE 90

Striking superior commissioned officer

20. In that _____ did, (at) (on board) _____, on or about _____ 19__, strike _____, his superior commissioned officer, who was then in the execution of his office, (in) (on) the _____ with (a) (his) _____.

Drawing or lifting up a weapon against superior commissioned officer

21. In that _____ did, (at) (on board) _____, on or about _____ 19__, (draw) (lift up) a weapon, to wit: a _____, against _____, his superior commissioned officer, who was then in the execution of his office.

22. In that _____ did, (at) (on board) _____, on or about _____ 19__, offer violence against _____, his superior commissioned officer, who was then in the execution of his office by _____.

Offering violence to superior commissioned officer

23. In that _____, having received a lawful command from _____, his superior commissioned officer, to _____, did, (at) (on board) _____, on or about _____ 19__, willfully disobey the same.

Willful disobedience of superior commissioned officer

ARTICLE 91

24. In that _____ did, (at) (on board) _____, on or about _____ 19__, (strike) (assault) _____, his superior _____ officer, who was then in the execution of his office, by _____ him (in) (on) (the _____) with (a) (his) _____.

Assault on warrant, noncommissioned, or petty officer

25. In that _____, having received a lawful order from _____, his superior _____ officer, to _____, did, (at) (on board) _____, on or about _____ 19__, willfully disobey the same.

Willful disobedience of warrant, noncommissioned, or petty officer

26. In that _____, (at) (on board) _____, on or about _____ 19__, [did treat with contempt] [was disrespectful in (language) (deportment) toward] _____, his superior _____ officer, who was then in the execution of his office, by (saying to him, "_____ _____ _____," or words to that effect) (spitting at his feet) (_____).

Contempt or disrespect toward warrant, noncommissioned, or petty officer

ARTICLE 92

27. In that _____ did, (at) (on board) _____, on or about _____ 19__, (violate) (fail to obey) a lawful general (order) (regulation), to wit: [paragraph _____, (Army) (Air Force) Regulation _____, dated _____ 19__] [General Order No. _____, U.S. Navy, dated _____ 19__] [_____], by _____.

Violating general order or regulation

28. In that _____, having knowledge of a lawful order issued by _____, to wit: [paragraph _____, (_____th Combat Group Regulation No. _____) (_____th Air Base Group Regulation No. _____) (_____), (USS _____, Instruction _____), dated _____] [_____], an order which it was his duty to obey, did, (at) (on board) _____, on or about _____ 19__, fail to obey the same by _____.

Violating other written order or regulation

NOTE: Specification No. 27 alleges a violation of Article 92(1); Specification No. 28 is appropriate for alleging under Article 92(2) a violation of any written order or regulation which is not "general" in the sense of Article 92(1). See 171 *a, b*.

29. In that _____, having knowledge of a lawful order issued by _____ (to submit to certain medical treatment) (to _____) (not to _____) (_____), an order which it was his duty to obey, did, (at) (on board) _____, on or about _____ 19__, fail to obey the same.

Failure to obey lawful order

30. In that _____, (at) (on board) _____, (on or about _____ 19__) (from about _____ 19__ to about _____ 19__), was derelict in the performance of his duties in that he [(negligently) (willfully) failed to (inspect the report of fuel on board said ship for the twenty-four hour period ending on _____) (inspect the guard) (wind and compare all chronometers on board the said _____) as it was his duty to do] [(negligently) (willfully) failed

Derelict in duty

to (perform complete motor maintenance on _____ as it was his duty to do thereby permitting the water in the radiator to become seriously low) (inspect properly the engine on Aircraft No. _____ as it was his duty to do thereby clearing it for flight with a loose sparkplug) (keep properly the accounts of _____ as it was his duty to do by neglecting to verify the monthly bank balances for comparison with cash deposited) (_____)] [_____].

ARTICLE 93

Cruelty toward or oppression or maltreatment of any person subject to his orders

31. In that _____, (at) (on board) _____, on or about _____ 19__, [was cruel toward] [did (oppress) (maltreat)] _____, a person subject to his orders, by (kicking him in the stomach) (confining him for twenty-four hours without water) (_____).

ARTICLE 94

Mutiny

32. In that _____, with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at) (on board) _____, on or about _____ 19__, [refuse, in concert with (_____) (and) (_____) (others whose names are unknown), to (obey the orders of _____ to _____) (perform his duty as _____)] [create (violence) (a disturbance) by (attacking the officers of the said ship) (barricading himself in Barracks T–7, firing his rifle at _____, and exhorting other persons to join him in defiance of _____)' (_____)].

Sedition

33. In that _____, with intent to cause the (overthrow) (destruction) (overthrow and destruction) of lawful civil authority, to wit: _____, did, (at) (on board) _____, on or about _____ 19__, in concert with (_____) (and) (_____) (others whose names are unknown), create (revolt) (violence) (a disturbance) against such authority by (entering the Town Hall of _____ and destroying property and records therein) (marching upon and compelling the surrender of the police of _____) (_____).

Failure to suppress or report mutiny or sedition

34. In that _____ did, (at) (on board) _____, on or about _____ 19__, fail to [do his utmost to prevent and suppress a (mutiny) (sedition) among the (soldiers) (sailors) (airmen) (_____) of _____, which (mutiny) (sedition) was being committed in his presence, in that (he took no means to compel the dispersal of the assembly)' (he made no effort to assist _____ who was attempting to quell the mutiny) (_____)] [take all reasonable means to inform his superior commissioned officer or his commanding officer, of a (mutiny) (sedition) among the (soldiers) (sailors) (airmen) (_____) of _____, which (mutiny) (sedition) he the said _____ (knew) (had reason to believe) was taking place].

Attempted mutiny

35. In that _____, with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at) (on board) _____, on or about _____ 19__, attempt to [create (violence) (a disturbance) by _____] [_____].

ARTICLE 95

Resisting apprehension

36. In that _____ did, (at) (on board) _____, on or about _____ 19__, resist being lawfully apprehended by _____, (an armed force policeman) (_____).

Breaking arrest

37. In that _____, having been duly placed in arrest (in quarters) (in his company area) (_____), did, (at) (on board) _____, on or about _____ 19__, break said arrest.

38. In that _____ did, (at) (on board) _____, on or about _____ 19__, escape from (the lawful custody of _____) (lawful confinement in _____).

Escape from custody or confinement

ARTICLE 96

39. In that _____ did, (at) (on board) _____, on or about _____ 19__, [without proper authority release] [through (neglect) (design) suffer] _____, a prisoner committed to his charge (to escape).

Releasing prisoner without authority; suffering prisoner to escape

ARTICLE 97

40. In that _____ did, (at) (on board) _____, on or about _____ 19__, unlawfully (apprehend _____) (place _____ in arrest) (confine _____ in _____).

Unlawful detention

ARTICLE 98

41. In that _____, being charged with the duty of [(investigating) (taking immediate steps to determine the proper disposition of) charges preferred against _____, a person accused of an offense under the Uniform Code of Military Justice] [_____], was, (at) (on board) _____, on or about _____ 19__, responsible for unnecessary delay in (investigating said charges) (determining the proper disposition of said charges) (_____), in that he (did _____) (failed to _____) (_____).

Unnecessary delay in disposing of case

42. In that _____, being charged with the duty of _____, did, (at) (on board) _____, on or about _____ 19__, knowingly and intentionally fail to (enforce) (comply with) Article _____, Uniform Code of Military Justice, in that he _____.

Failing to enforce or comply with code

ARTICLE 99

43. In that _____ did, (at) (on board) _____, on or about _____ 19__, (before) (in the presence of) the enemy, run away (from his company) (and hide) (_____), (and did not return until after the engagement had been concluded) (_____).

Misbehavior before the enemy:
—Running away

44. In that _____ did, (at) (on board) _____, on or about _____ 19__, (before) (in the presence of) the enemy, shamefully (abandon) (surrender) (deliver up) _____, which it was his duty to defend.

—Shamefully abandoning, etc., command, etc.

45. In that _____ did, (at) (on board) _____, on or about _____ 19__, (before) (in the presence of) the enemy, endanger the safety of _____, which it was his duty to defend, by (disobeying an order from _____ to engage the enemy) (neglecting his duty as a sentinel by engaging in a card game while on his post) (intentional misconduct in that he became drunk and fired flares, thus revealing the location of his unit) (_____).

—Endangering safety of command, etc.

46. In that _____ did, (at) (on board) _____, on or about _____ 19__, (before) (in the presence of) the enemy, cast away his (rifle) (ammunition) (_____).

—Casting away arms or ammunition

47. In that _____, (at) (on board) _____, on or about _____ 19__, (before) (in the presence of) the enemy, was guilty of cowardly conduct as a result of fear, in that _____.

—Cowardly conduct

48. In that _____ did, (at) (on board) _____, on or about _____ 19__, (before) (in the presence of) the enemy, quit his place of duty for the purpose of (plundering) (pillaging) (plundering and pillaging).

—Quitting place of duty to plunder or pillage

—Causing false alarm

49. In that _____ did, (at) (on board) _____, on or about _____ 19___, (before) (in the presence of) the enemy, cause a false alarm in (Fort _____) (the said ship) (the camp) (_____) by [needlessly and without authority (causing the call to arms to be sounded) (sounding the general alarm)] [_____].

—Failing to do utmost to encounter, etc. enemy troops, etc.

50. In that _____, being (before) (in the presence of) the enemy, did, (at) (on board) _____, on or about _____ 19___, by (ordering his own troops to halt their advance) (_____), willfully fail to do his utmost to (encounter) (engage) (capture) (destroy), as it was his duty to do, (certain enemy troops which were in retreat) (_____).

—Failing to afford relief

51. In that _____ did, (at) (on board) _____, on or about _____ 19___, (before) (in the presence of) the enemy, fail to afford all practicable relief and assistance to (the U.S.S. _____, which was engaged in battle and had run aground, in that he failed to take her in tow) (certain troops of the ground forces of _____, which were engaged in battle and were pinned down by enemy fire, in that he failed to furnish air cover) (_____) as he properly should have done.

ARTICLE 100

Compelling surrender or striking colors or flag

52. In that _____ did, (at) (on board) _____, on or about _____ 19___, [(compel) (attempt to compel) _____, the commander of _____, (to give it up to the enemy) (to abandon said _____, by _____] [without proper authority, strike the (colors) (flag) to the enemy].

ARTICLE 101

Improper use of countersign

53. In that _____ did, (at) (on board) _____, on or about _____ 19___, disclose the (parole) (countersign), to wit: _____, to _____, a person who was not entitled to receive it.

54. In that _____ did, (at) (on board) _____, on or about _____ 19___, give to _____, a person entitled to receive and use the (parole) (countersign), a (parole) (countersign), namely: _____, which was different from that which, to his knowledge, he was authorized and required to give, to wit: _____.

ARTICLE 102

Forcing a safeguard

55. In that _____ did, (at) (on board) _____, 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) (_____)] [_____].

ARTICLE 103

Failing to secure public property taken from enemy

56. In that _____ did, (at) (on board) _____, on or about _____ 19___, fail to secure for the service of the United States certain public property taken from the enemy, to wit: _____, of a value of (about) $_____.

Captured or abandoned property

57. In that _____ did, (at) (on board) _____, on or about _____ 19___, fail to give notice and turn over to proper authority without delay certain (captured) (abandoned) property which had come into his (possession) (custody) (control), to wit: _____, of a value of (about) $_____.

58. In that _____ did, (at) (on board) _____, on or about _____ 19__, (buy) (sell) (trade) (deal in) (dispose of) (_____) certain (captured) (abandoned) property, to wit: _____, of a value of (about) $_____, thereby (receiving) (expecting) a (profit) (benefit) (advantage) to (himself) (_____, his accomplice) (_____, his brother) (_____). —Dealing in

59. In that _____ did, (at) (on board) _____, on or about _____ 19__, engage in (looting) (pillaging) (looting and pillaging) by unlawfully (seizing) (appropriating) _____, [property which had been left behind] [the property of _____, (an inhabitant of _____) (_____)]. Looting and pillaging

ARTICLE 104

60. In that _____ did, (at) (on board) _____, on or about _____ 19__, (aid) (attempt to aid) the enemy with (arms) (ammunition) (supplies) (money) (_____), by (furnishing and delivering to _____, members of the enemy's armed forces _____) (_____). Aiding the enemy

61. In that _____ did, (at) (on board) _____, on or about _____ 19__, without proper authority, knowingly [(harbor) (protect) _____, an enemy, by (concealing the said _____ in his house) (_____)] [(give intelligence to) (communicate with) (correspond with) (hold intercourse with) the enemy (by informing a patrol of the enemy's forces of the whereabouts of a military patrol of the United States forces) (by writing and transmitting secretly through the lines to one_____, whom he, the said _____, knew to be an officer of the enemy's armed forces, a communication in words and figures substantially as follows, to wit: _____) (indirectly by publishing in _____, a newspaper published at _____, a communication in words and figures as follows, to wit: _____, which communication was intended to reach the enemy) (_____)].

ARTICLE 105

62. In that _____, while in the hands of the enemy, did, (at) (on board) _____, on or about _____ 19__, without proper authority and for the purpose of securing favorable treatment by his captors, (report to the commander of Camp _____ the preparations by _____, a prisoner at said camp, to escape, as a result of which report the said _____ was placed in solitary confinement) (_____). Misconduct as prisoner

63. In that _____ did, (at) (on board) _____, on or about _____ 19__, while in the hands of the enemy and in a position of authority over _____, a prisoner at _____, as (officer in charge of prisoners at _____) (_____), maltreat the said _____ by (depriving him of _____) (_____) without justifiable cause. Maltreatment of prisoner

ARTICLE 106

64. In that _____ was, (at) (on board) _____, on or about _____ 19__, found (lurking) (acting) as a spy (in) (about) (in and about) _____, [a (fortification) (post) (base) (vessel) (aircraft) (_____) within the (control) (jurisdiction) (control and jurisdiction) of an armed force of the United States, to wit: _____] [a (shipyard) (manufacturing plant) (industrial plant) (_____) engaged in work in aid of the prosecution of the war by the United States] [_____], for the purpose of (collecting) (at- Spying

tempting to collect) information in regard to the [(numbers) (resources) (operations) (_____) of the armed forces of the United States] [(military production) (_____) of the United States] [_____], with intent to impart the same to the enemy.

ARTICLE 107

Signing false official document; making false official statement

65. In that _____ did, (at) (on board) _____, on or about _____ 19__, with intent to deceive, [sign an official (record) (return) (_____), to wit: _____] [make to _____ an official statement, to wit: _____], which (record) (return) (statement) (_____) was (wholly false) (false in that _____), and was then known by the said _____ to be so false.

ARTICLE 108

Selling or disposing of military property

66. In that _____ did, (at) (on board) _____, on or about _____ 19__, without proper authority, (sell to _____) (dispose of by _____) _____, of a value of (about) $_____, military property of the United States.

Damaging, destroying or losing military property

67. In that _____ did, (at) (on board) _____, on or about _____ 19__, without proper authority, [(willfully) (through neglect)] [(damage by _____) (destroy by _____) (lose)] _____, of a value of (about) $_____, military property of the United States *[the amount of said damage being in the sum of (about) $_____].

Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of

68. In that _____ did, (at) (on board) _____, on or about _____ 19__, without proper authority, (willfully) (through neglect) suffer _____, of a value of about $_____, military property of the United States, to be (lost) (damaged by _____) (destroyed by _____) (sold to _____) (wrongfully disposed of by _____) *[the amount of said damage being in the sum of (about) $_____].

*This allegation should be used when damage is alleged.

ARTICLE 109

Non-military property, wasting, spoiling, destroying or damaging of

69. In that _____ did, (at) (on board) _____, on or about _____ 19__, [(willfully) (recklessly) waste] [(willfully) (recklessly) spoil] [willfully and wrongfully (destroy) (damage) by _____] _____, of a value of (about) $_____, the property of _____. *[the amount of said damage being in the sum of (about) $_____].

*This allegation should be used when damage is alleged.

ARTICLE 110

Hazarding or suffering to be hazarded any vessel, willfully and wrongfully

70. In that _____ did, on _____ 19__, while serving as _____ aboard the _____ in the vicinity of _____, willfully and wrongfully (hazard the said vessel) (suffer the said vessel to be hazarded) by (causing the said vessel to collide with _____) (allowing the said vessel to run aground) (_____).

Hazarding of vessel, negligently

71. In that _____, on _____ 19__, while serving in command of the _____, making entrance to (Boston Harbor), did negligently hazard the said vessel by failing and neglecting to maintain or cause to be maintained an accurate running plot of the true position of said vessel while making said approach, as a result of which neglect the said _____, at or about _____ hours on the day aforesaid, became stranded in the vicinity of (Channel Buoy Number Three).

72. In that _____, on _____ 19__, while serving as navigator of the _____, cruising on special service in the

_____ Ocean off the coast of _____, notwithstanding the fact that at about midnight, _____ 19__, the northeast point of _____ Island bore abeam and was about six miles distant, the said ship being then under way and making a speed of about ten knots, and well knowing the position of the said ship at the time stated, and that the charts of the locality were unreliable and the currents thereabouts uncertain, did then and there negligently hazard the said vessel by failing and neglecting to exercise proper care and attention in navigating said ship while approaching _____ Island, in that he neglected and failed to lay a course that would carry said ship clear of the last aforesaid island, and to change the course in due time to avoid disaster; and the said ship, as a result of said negligence on the part of said _____, ran upon a rock off the southwest coast of _____ Island, at about _____ hours, _____ 19__, in consequence of which the said _____ was lost.

73. In that _____, on _____ 19__, while serving as navigator of the _____ and well knowing that at about sunset of said day the said ship had nearly run her estimated distance from the _____ position, obtained and plotted by him, to the position of _____, and well knowing the difficulty of sighting _____ from a safe distance after sunset, did then and there negligently hazard the said vessel by failing and neglecting to advise his commanding officer to lay a safe course for said ship to the northward before continuing on a westerly course, as it was the duty of the said _____ to do; in consequence of which the said ship was, at about _____ hours on the day above mentioned, run upon _____ Bank in the _____ Sea, about latitude _____ degrees, _____ minutes, north, and longitude _____ degrees, _____ minutes, west, and seriously injured.

Suffering a vessel to be hazarded, negligently

74. In that _____, while serving as combat intelligence center officer on board the _____, making passage from Boston to Philadelphia, and having, between _____ and _____ hours on _____ 19__, been duly informed of decreasing radar ranges and constant radar bearing indicating that the said _____ was upon a collision course approaching a radar target, did then and there negligently suffer the said vessel to be hazarded by failing and neglecting to report said collision course with said radar target to the officer of the deck, as it was his duty to do, and he the said _____, through said negligence, did cause the said _____ to collide with the _____ at or about _____ hours on said date, with resultant damage to both vessels.

ARTICLE 111

Drunken or reckless operation of vehicle

75. In that _____ did, (at) (on board) _____, on or about _____ 19__, (in the motor pool area) (near the Officers' Club) (on _____ Street between _____ and _____ Avenues) (_____) operate a vehicle, to wit: (a truck) (a passenger car) (_____), [while drunk] [in a (reckless) (wanton) manner by (attempting to pass another vehicle on a sharp curve) (driving at a speed in excess of 50 miles per hour on the sidewalk and wrong side of said street) (_____)] (and did thereby cause said vehicle to (strike and) injure _____).

ARTICLE 112

Drunk on duty

76. In that _____ was, (at) (on board) _____, on or about _____ 19__, found drunk while on duty as _____.

ARTICLE 113

Misbehavior of sentinel or lookout

77. In that _____, on or about _____ 19__, (at) (on board) _____, (in an area designated as authorizing entitlement to special pay for duty subject to hostile fire), being (posted)' (on post) as a (sentinel) (lookout) (at Warehouse No. 7) (on Post No. 11) (for radar observation) (_____) [was found (drunk) (sleeping) upon his post] [did leave his post before he was regularly relieved].

ARTICLE 114

Dueling

78. In that _____ (and _____) did, (at) (on board) _____, on or about _____ 19__, fight a duel (with _____), using as weapons therefor (pistols) (swords) (_____).

Promoting a duel

79. In that _____ did, (at) (on board) _____, 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).

Conniving at fighting a duel

80. In that _____, being officer of the (day) (deck) (at) (on board) _____ and having knowledge that _____ and _____ intended and were about to engage in a duel near _____, did, (at) (on board) _____, on or about _____ 19__, connive at the fighting of said duel by knowingly permitting _____, one of the parties to said proposed duel, to leave _____ and go toward the place appointed for said duel at the time which he, _____, then knew had been appointed therefor.

Failing to report a duel

81. In that _____, having knowledge that a challenge to fight a duel (had been sent) (was about to be sent) by _____ to _____, did, (at) (on board)' _____, on or about _____ 19__, fail to report that fact promptly to the proper authority.

ARTICLE 115

Malingering; self-inflicted injury

82. In that _____ did, (at) (on board) _____, (on or about _____ 19__) (from about _____ 19__ to about 19__), for the purpose of avoiding (his duty as officer of the day) (his duty as aircraft mechanic) (work in the mess hall) (service as an enlisted person) (_____) [feign (a headache) (a sore back) (illness) (mental lapse)' (mental derangement) (_____)] [intentionally injure himself by _____].

ARTICLE 116

Riot

83. In that _____ did, (at) (on board) _____, on or about _____ 19__, (cause) (participate in) a riot by unlawfully assembling with (_____ and _____) (and) (others to the number of about _____ whose names are unknown) for the purpose of (resisting the police of _____) (assaulting passers-by) (_____), and in furtherance of such purpose did (fight with said police) (assault certain women, to wit: _____) (_____).

Breach of the peace

84. In that _____ did, (at) (on board) _____, on or about _____ 19__, (cause) (participate in) a breach of the peace by [wrongfully engaging in a fist fight in the dayroom with _____] [using the following (profane) (indecent) (_____) language (toward _____), to wit: "_____", or words to that effect] [wrongfully shouting and singing in a public place, to wit: _____] [_____].

ARTICLE 117

Provoking speeches or gestures

85. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully use (provoking) (reproachful) (words, to wit: "_____", or words to that effect) (and) (gestures, to wit: _____) towards (Sergeant _____, U.S. Air Force) (Harold Brown, a person serving with the Army of the United States in the field) (_____, Captain, U.S. Navy).

ARTICLE 118

Murder

86. In that _____ did, (at) (on board) _____, on or about _____ 19__, [with premeditation] [while (perpetrating) (attempting to perpetrate) _____], murder _____ by means of (shooting him with a rifle) (pushing him over a cliff) (running into him with an automobile) (_____).

NOTE. In charging murder under sections (2) and (3) of Article 118, all material inclosed in brackets is omitted.

ARTICLE 119

Voluntary manslaughter

87. In that _____ did, (at) (on board) _____, on or about _____ 19__, willfully and unlawfully kill _____ by _____ him (in) (on) the _____ with a _____.

Involuntary manslaughter

88. In that _____ did, (at) (on board) _____, on or about _____ 19__, [by culpable negligence] [while (perpetrating) (attempting to perpetrate) an offense directly affecting the person of _____, to wit: (maiming) (a battery) (_____)] unlawfully kill _____ by _____ him (in) (on) the _____ with a _____.

ARTICLE 120

Rape and carnal knowledge

89. In that _____ did, (at) (on board) _____, on or about _____ 19__, (rape _____) *(rape _____, a female under the age of 16 years) (commit the offense of carnal knowledge with _____).

*If this allegation is used, carnal knowledge can be an included offense of rape.

ARTICLE 121

Larceny

90. In that _____ did, (at) (on board) _____, on or about _____ 19__, steal _____, of a value of (about) $_____, the property of _____.

Wrongful appropriation

91. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully appropriate _____, of a value of (about) $_____, the property of _____.

ARTICLE 122

Robbery

92. In that _____ did, (at) (on board) _____, on or about _____ 19__, by means of (force) (violence) (force and violence) (and) (putting him in fear) steal from the (person) (presence) of _____, against his will, (a watch) (_____), of a value of (about) $_____, the property of _____.

ARTICLE 123

Forgery

93. In that _____ did, (at) (on board) _____, on or about _____ 19__, with intent to defraud, falsely [make (in its entirety) (the signature of _____ as an indorsement to) (the signature of _____ to) (_____) a certain (check)' (writing) (_____) in the following words and figures, to wit: _____] [alter a certain (check) (writing) (_____) in the following words and figures, to wit: _____, by (adding thereto _____) (_____)], which said (check) (writing) (_____) would, if genuine, apparently operate to the legal prejudice of another *[and which _____ (could be) (was) used to the legal prejudice of _____, in that _____].

94. In that _____ did, (at)' (on board) _____, on or about _____ 19 __, with intent to defraud, (utter) (offer) (issue) (transfer) a certain (check) (writing) (_____) in the following words and figures, to wit: _____, a writing which would, if genuine, apparently operate to the legal prejudice of another, [which said (check) (writing) (_____)] [the signature to which said (check) (writing) (_____)'] [_____] was, as he, the said _____, then well knew, falsely (made) (altered) *[and which _____ (could be) (was) used to the legal prejudice of _____, in that _____].

*This allegation should be used when the document specified is not one which by its nature would clearly operate to the legal prejudice of another, for example, an insurance application. The manner in which the document could be or was used to prejudice the legal rights of another should be set forth in the last blank.

ARTICLE 123a

Check, worthless, with intent to defraud

95. In that _____ did, (at) (on board) _____, on or about _____ 19__, with intent to defraud and for the procurement of [lawful currency] (and) [_____ (an article) (a thing) of value], wrongfully and unlawfully [(make) (draw)] [(utter) (deliver) to _____,] a certain (check) (draft) (order) for the payment of money upon the (_____ Bank) (_____ depository) in words and figures as follows, to wit: _____, then knowing that (he) (_____), the (maker) (drawer) thereof, did not or would not have sufficient funds in or credit with such (bank) (depository) for the payment of the said (check)' (draft) (order) in full upon its presentment.

Check, worthless, with intent to deceive

96. In that _____ did, (at) (on board) _____, on or about _____ 19__, with intent to deceive and (for the payment of a past due obligation, to wit: _____) (for the purpose of _____) wrongfully and unlawfully [(make) (draw)] [(utter) (deliver) to _____,] a certain (check) (draft) (order) for the payment of money upon (_____ Bank) (_____ depository), in words and figures as follows, to wit: _____, then knowing that (he) (_____), the (maker) (drawer) thereof did not or would not have sufficient funds in or credit with such (bank) (depository) for the payment of the said (check) (draft) (order) in full upon its presentment.

ARTICLE 124

Maiming

97. In that _____ did, (at) (on board) _____, on or about _____ 19__, maim _____ by (crushing his foot with a sledge hammer) (_____).

ARTICLE 125

98. In that _____ did, (at) (on board) _____, on or about _____ 19__, commit sodomy with _____ *(, a child under the age of sixteen years) *(, by force and without the consent of the said _____). **Sodomy**

*Either or both of these allegations may be used to allege aggravation (see Section A, 127*c* as to punishment).

ARTICLE 126

99. In that _____ did, (at) (on board) _____, on or about _____ 19__, willfully and maliciously (burn) (set on fire) [an inhabited dwelling, to wit: (the residence of _____) (_____, the property of _____)] [, knowing that a human being was therein at the time, (the Post Theater) (_____, the property of _____)], of a value of (about) $_____. **Aggravated arson**

100. In that _____ did, (at) (on board) _____, on or about _____ 19__, willfully and maliciously (burn) (set fire to) (an automobile) (_____), the property of _____, of a value of (about) $_____. **Simple arson**

ARTICLE 127

101. In that _____ did, (at) (on board) _____, on or about _____ 19__, with intent unlawfully to obtain ($100) (_____), communicate to _____ a threat to (kidnap his son, _____) (accuse _____ of having committed sodomy) (_____). **Extortion**

ARTICLE 128

102. In that _____ did, (at) (on board) _____, on or about _____ 19__, assault _____ by (striking at him with a _____) (_____). **Assault**

103. In that _____ did, (at) (on board) _____, on or about _____ 19__, assault _____, a commissioned officer of [_____, a friendly foreign power] [the United States (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard)], by _____. **—Upon a commissioned officer**

NOTE. That the accused did not know the commissioned officer to be such is a defense to this kind of assault—but not to an included assault in which the official position of the victim is immaterial.

104. In that _____ did, (at) (on board) _____, on or about _____ 19__, assault _____, a (warrant) (noncommissioned) (petty) officer of the United States (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard), by _____. **—Upon a warrant, noncommissioned, or petty officer**

NOTE. That the accused did not know the warrant, etc., officer to be such is a defense to this kind of assault—but not to an included assault in which the official position of the victim is immaterial.

105. In that _____ did, (at) (on board) _____, on or about _____ 19__, assault _____, a person then having and in the execution of (Air Force security police) (military police) (shore patrol) (civil law enforcement) duties, by _____. **—Upon a person in the execution of police duties**

106. In that _____ did, (at) (on board) _____, on or about _____ 19__, [(attempt) (threaten) to] (unlawfully strike) (assault) _____, a (sentinel) (lookout) in the execution of his duty, [(in) (on) the _____] with (a) (his) _____. **—Upon a sentinel or lookout**

107. In that _____ did, (at) (on board) _____, on or about _____ 19__, unlawfully (strike) (_____) _____ (on) (in) the _____ with _____. **Assault (consummated by a battery)**

Assault (consummated by a battery) upon a child under the age of 16

108. In that _____ did, (at) (on board) _____, on or about _____ 19__, unlawfully (strike) (_____) _____, a child under the age of sixteen years, (in) (on) the _____ with _____.

Assault, aggravated:
—With a dangerous weapon, means, or force

109. In that _____ did, (at) (on board) _____, on or about _____ 19__, commit an assault upon _____ by (shooting) (striking) (cutting) (_____) (at him)' (him) (in) (on) (the _____) with [a dangerous weapon] [a (means) (force) likely to produce grievous bodily harm], to wit: a (pistol) (pickax) (bayonet) (club) (_____)'.

—Inflicting grievous bodily harm

110. In that _____ did, (at) (on board) _____, on or about _____ 19__, commit an assault upon _____ by (shooting) (striking) (cutting) (_____) (him) (in) (on) the _____ with a (club) (rock)' (brick) (_____) and did thereby intentionally inflict grievous bodily harm upon him, to wit: a (broken leg) (deep cut) (fractured skull) (_____).

ARTICLE 129

Burglary

111. In that _____ did, at _____, on or about _____ 19__, in the nighttime, burglariously break and enter the (dwelling house) (_____ within the curtilage) of _____, with intent to commit (murder) (larceny) (_____) therein.

ARTICLE 130

Housebreaking

112. In that _____ did, (at)' (on board) _____, on or about _____ 19__, unlawfully enter the (dwelling) (room) (bank) (store) (warehouse) (shop) (tent) (stateroom) (_____) the property of _____, with intent to commit a criminal offense, to wit: _____, therein.

ARTICLE 131

Perjury

113. 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 board) _____, on or about _____ 19__, willfully, corruptly, and contrary to such (oath) (affirmation), (testify) (depose) in substance that _____, which (testimony) (deposition) was upon a material matter and which he did not then believe to be true.

ARTICLE 132

Making false claim

114. In that _____ did, (at)' (on board) _____, on or about _____ 19__, [by preparing (a voucher) (_____) for presentment to _____, an officer of the United States duly authorized to (approve) (allow) (pay) (approve, allow, and pay) such claim] [_____], make a claim against the (United States) (finance officer at _____) (_____) 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 the amount of $_____ in that _____ and was then known by the said _____ to be (false) (fraudulent) (false and fraudulent).

Presenting false claim

115. In that _____ did, (at) (on board) _____, on or about _____ 19__, by presenting (a voucher) (_____) to _____, an officer of the United States duly authorized to (ap-

prove) (pay) (approve and pay)' such claim, present for (approval) (payment) (approval and payment) a claim against the (United States) (finance officer at _____) (_____) 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 the amount of $_____ in that _____, and was then known by the said _____ to be (false) (fraudulent)' (false and fraudulent).

Making or using false writing

116. In that _____, for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States in the amount of $_____, did, (at) (on board) _____, on or about _____ 19__, (make) (use) (make and use) 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 false oath

117. In that _____, for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did, (at) (on board) _____, on or about _____ 19__, make an oath [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 or counterfeiting signature

118. In that _____, for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did, (at) (on board) _____, on or about _____ 19__, (forge) (counterfeit) (forge and counterfeit) the signature of _____ upon a _____ in words and figures as follows: _____.

Using forged signature

119. In that _____, for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did, (at) (on board) _____, on or about _____ 19__, use 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

120. In that _____, having (charge) (possession) (custody) (control) of (money) (_____) of the United States, (furnished) (intended) (furnished and intended) for the armed forces thereof, did, (at) (on board) _____, on or about _____ 19__, knowingly deliver to _____, the said _____ having authority to receive the same, (an amount) (_____), which, as he, _____, then knew, was ($_____) (_____) less than the (amount) (_____) for which he received a (certificate) (receipt) from the said _____.

Making receipt without knowledge of the facts

121. 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 armed forces thereof, did, (at) (on board) _____, on or about _____ 19__, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States, (make) (deliver) (make and deliver) to _____ such a writing, in words and figures as follows: _____, the property therein certified as received being of a value of (about) $ _____.

ARTICLE 133

Copying or using examination paper

122. In that _____ did, (at) (on board) _____, on or about _____ 19__, while undergoing a written examination on the subject of _____, wrongfully and dishonorably (receive) (request) unauthoried aid by [(using) (copying) the examination paper of _____] [_____].

Drunk or disorderly

123. In that _____ was, (at) (on board) _____, on or about _____ 19__, in a public place, to wit: _____, (drunk) (disorderly) (drunk and disorderly) while in uniform, to the disgrace of the armed forces.

Failing, dishonorably, to pay debt

124. In that _____, being indebted to _____ in the sum of $ _____ for _____, which amount became due and payable (on) (about) (on or about) _____, did, (at) (on board) _____, from _____ 19__ to _____ 19__, dishonorably fail to pay said debt.

Failure to keep promise to pay debt

125. 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 board) _____, on or about _____ 19__, dishonorably fail to keep said promise.

ARTICLE 134

Abusing public animal

126. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully (kick a public horse in the belly) (_____).

Adultery

127. In that _____ (, a married man,) did, (at) (on board) _____, on or about _____ 19__, wrongfully have sexual intercourse with _____, (a married woman) (a woman) not his wife.

Assault: —Indecent

128. In that _____ did, (at) (on board) _____, on or about _____ 19__, commit an indecent assault upon _____ by _____, with intent to gratify his (lust) (sexual desires).

—With intent to commit certain offenses

129. In that _____ did, (at) (on board) _____, on or about _____ 19__, with intent to commit (murder) (voluntary manslaughter) (rape) (robbery) (sodomy) (arson) (burglary) (housebreaking), commit an assault upon _____ by _____.

Bigamy

130. In that _____ did, at _____, on or about _____ 19__, wrongfully and bigamously marry _____, having at the time of his said marriage to _____ a lawful wife then living, to wit: _____.

Bribery and graft: —Asking, accepting, or receiving

131. In that _____, being at the time (a contracting officer for _____) (the personnel officer of _____) (_____), did, (at) (on board) _____, on or about _____ 19__, wrongfully and unlawfully (ask) (accept) (receive) from _____, (a contracting company engaged in _____) (_____), (the sum of $_____) (_____, of a value of (about) $_____) (_____), [with intent to have his (decision) (action) influenced with respect to] [(as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by him the said _____ in relation to] an official matter in which the United States was and is interested, to wit: (the purchasing of military supplies from _____) (the transfer of _____ to duty with _____) (_____).

132. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully and unlawfully (promise) (offer) (give) to _____, (his commanding officer) (the claims officer of _____) (_____), (the sum of $_____) (_____, of a value of (about) $_____) (_____), [with intent to influence the (decision) (action) of the said _____ with respect to] [(as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by the said _____ in relation to] an official matter in which the United States was and is interested, to wit: (the granting of leave to _____) (the processing of a claim against the United States in favor of _____) (_____).

—Promising, offering, or giving

133. In that _____ did, (at) (on board) _____, on or about _____ 19__, willfully and maliciously (burn) (set fire to) (a dwelling) (a barn) (an automobile), the property of _____, with intent to defraud (the insurer thereof, to wit: _____) (_____).

Burning with intent to defraud

134. In that _____ did, (at) (on board) _____, on or about _____ 19__, make and utter to _____ a certain check, in words and figures as follows, to wit: _____, (for the purchase of _____) (in payment of a debt) (for the purpose of _____), and did thereafter dishonorably fail to (place) (maintain) sufficient funds in the _____ Bank for payment of such check in full upon its presentment for payment.

Check, worthless, making and uttering (by dishonorably failing to maintain sufficient funds)

135. In that _____, while duly undergoing the punishment of correctional custody, did, (at) (on board) _____, on or about _____ 19__, escape from correctional custody.

Correctional custody; —escape from

136. In that _____, while duly undergoing the punishment of correctional custody, did, (at) (on board) _____, on or about _____ 19__, breach the restraint imposed thereunder by _____.

—breach of restraint during

137. In that _____ did, (at) (on board) _____, on or about _____ 19__, willfully, maliciously, and without justifiable cause (communicate to _____) (publish) (circulate among _____) a defamatory statement in writing concerning _____, a member of the U.S. (Army) (_____), (substantially) as follows: _____.

Criminal libel

138. In that _____, being indebted to _____ in the sum of $_____ for _____, which amount became due and payable (on) (about) (on or about) _____ 19__, did, (at) (on board) _____, from _____ 19__ to _____ 19__, dishonorably fail to pay said debt.

Debt, dishonorably failing to pay

139. In that _____ did, (at) (on board) _____, on or about _____ 19__, with design to [promote (disloyalty) (disaffection) (disloyalty and disaffection) among (the troops) (the civilian populace) (the troops and the civilian populace)] [(interfere with) (impair) the (loyalty,) (morale) (and) (discipline) of members of the Armed Forces of the United States], utter to _____ the following statement, to wit: "_____", or words to that effect, which statement was disloyal to the United States.

Disloyal statements

140. In that _____ was, (at) (on board) _____, on or about _____ 19__, (drunk) (disorderly) (drunk and disorderly) [in (command) (quarters) (station) (camp) (_____)] [on board ship] [in uniform in a public place, to wit: _____] [_____].

Disorderly, drunkenness —In command, quarters, etc., under service discrediting circumstances

141. In that _____, a (sentinel) (_____) in charge of prisoners, did, (at) (on board) _____, on or about _____

—Drinking liquor with prisoner

19___, unlawfully drink intoxicating liquor with _____, a prisoner under his charge.

—Drunk, prisoner found

142. In that _____, a prisoner, was, (at) (on board) _____, on or about _____ 19___, found drunk.

—Incapacitating oneself for performance of duties through prior indulgence in intoxicating liquors

143. In that _____ was, (at)' (on board) _____, on or about _____ 19___, as a result of previous indulgence in intoxicating liquor, incapacitated for the proper performance of his duties.

Drugs, habit forming, or marihuana:
—Wrongful possession
—Wrongful use, transfer, or sale

144. In that _____ did, (at) (on board) _____, on or about _____ 19___, wrongfully have in his possession _____ ounces, more or less, of (a habit forming narcotic drug, to wit: _____) (marihuana).

145. In that _____ did, (at)' (on board) _____, on or about _____ 19___, wrongfully (use) (transfer) (sell) (a habit forming narcotic drug, to wit: _____) (marihuana).

—Wrongful introduction into military unit, etc.

146. In that _____ did, (at) (on board) _____, on or about _____ 19___, wrongfully introduce _____ ounces, more or less, of (a habit forming narcotic drug, to wit: _____) (marihuana) into a military (unit) (base) (station) (post) (ship) (aircraft) (_____), to wit: _____, for the purpose of (use) (transfer)' (sale) (_____).

False or unauthorized pass offenses

147. In that _____ did, (at) (on board) _____, on or about _____ 19___, wrongfully [and falsely (make) (forge) (alter by _____) (counterfeit) (tamper with by _____)] [sell to _____] [give to _____] [dispose of by _____] [(use) (have in his possession)] *[with intent to (defraud) (deceive)] (a certain instrument purporting to be) (a)' (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (identification card) (_____) in words and figures as follows: _____, [he, the said _____, then well knowing the same to be (false)' (unauthorized) (_____)].

*In alleging possession or use, the allegation of intent to defraud or to deceive identifies the more serious offense; if this allegation is omitted, an offense of lesser gravity is charged. See Section A, 127c, and 213f(11).

False pretenses, obtaining services under

148. In that _____ did, (at) (on board) _____, on or about _____ 19___, with intent to defraud, falsely pretend to _____ that _____, then knowing that the pretenses were false, and by means thereof did wrongfully and unlawfully obtain from _____ services, of a value of (about) $_____, to wit: _____.

False swearing

149. In that _____ did, (at) (on board) _____, on or about _____ 19___, (in an affidavit)' (in _____), wrongfully and unlawfully (make) (subscribe) under lawful (oath) (affirmation) a false statement in substance as follows: _____, which statement he did not then believe to be true.

Firearm, discharging:
—Through carelessness

150. In that _____ did, (at) (on board) _____, on or about _____ 19___, through carelessness, discharge a (service rifle) (_____) in the (squadroom) (tent) (barracks) (_____ compartment) (_____)' of _____.

—Willfully, under such circumstances as to endanger life

151. In that _____ did, (at) (on board) _____, on or about _____ 19___, wrongfully and willfully discharge a firearm, to wit: _____, (in the mess hall of _____) (_____), under circumstances such as to endanger human life.

Fleeing scene of accident

152. In that _____, being (the driver of) (a passenger in) (the senior officer in) (_____ in) a vehicle at the time of (an accident) (a collision) in which said vehicle was involved, did, at _____, on or about _____ 19___, (wrongfully and unlaw-

fully leave) *(by _____, aid and abet the driver of the said vehicle in wrongfully and unlawfully leaving) the scene of the (accident) (collision) without [rendering assistance to _____, who had been struck (and injured) by the said vehicle] [making (his) *(the driver's) identity known].

*These allegations are appropriate when the accused was not the driver of the vehicle.

Gambling with subordinate

153. In that (Sergeant) (_____) _____ (, boatswain's mate first class, U.S. Navy,) (,_____,) did, (at) (on board) _____, on or about _____ 19__, gamble with (Private) (_____) _____ (, seaman apprentice, U.S. Navy) (,_____).

Homicide, negligent

154. In that _____ did, (at) (on board) _____, on or about _____ 19__, unlawfully kill _____, [by negligently _____ the said _____ (in) (on) the _____ with a _____] [by driving a (motor vehicle) (_____) against the said _____ in a negligent manner] [_____].

Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official

155. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully, willfully, and unlawfully impersonate a [(commissioned officer) (warrant officer) (noncommissioned officer) (petty officer) (agent of superior authority) of the (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard)] [an official of the Government of _____] by [publicly wearing the uniform and insignia of rank of a (lieutenant of the _____) (_____)] [showing the credentials of _____] [_____] (with intent to defraud _____ by _____).

Indecent acts with a child

156. In that _____ did, (at) (on board) _____, on or about _____ 19__, [take (immoral) (improper) (indecent) liberties with] [commit a (lewd) (lascivious) act (upon) (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) (appeal to) (gratify) the (lust) (passions) (sexual desires) of the said _____ (and _____).

Indecent exposure

157. In that _____ did, (at) (on board) _____, on or about _____ 19__, while (at a barracks window) (_____) willfully and wrongfully expose in an indecent manner to public view his _____.

Indecent, insulting, or obscene language communicated to a female or a child under the age of 16 years

158. In that _____ did, (at) (on board) _____, on or about _____ 19__, (orally) (in writing) communicate to _____, a (female) (child under the age of 16 years), certain (indecent) (insulting) (obscene) language, to wit: _____.

Indecent, lewd acts with another

159. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully commit an indecent, lewd, and lascivious act with _____ by _____.

Mail, taking, opening, secreting, destroying, or stealing

160. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully and unlawfully take certain mail matter, to wit: (a) [letter(s)] [postal card(s)] [package(s)]. addressed to _____, [out of the (_____ Post Office _____) (orderly room of _____) (unit mail box of _____) (_____)] [from _____] before (it) (they) (was) (were) (delivered) (actually received) (to) (by) the person(s) to whom (it) (they) (was) (were) directed, with design to [obstruct the correspondence] [pry into the (business) (secrets)] of _____.

161. In that _____ did, (at) (on board) _____, on or about _____ 19__, [wrongfully and unlawfully (open) (secret) (destroy)] [steal] certain mail matter, to wit: (a) [letter(s)] [postal

card(s)] [package(s)] addressed to _____, which said [letter(s)] [_____] [(was) (were) then [in the (_____ Post Office _____) (orderly room of _____) (unit mail box of _____) (custody of _____) (_____)] [on the (bunk of _____) (_____)]] [had previously been committed to _____, (a representative of _____,) an official agency for the transmission of communications,] before said [letter(s)] [_____] (was) (were) (delivered) (actually received) (to) (by) the person(s) to whom (it) (they) (was) (were) directed.

Mails, depositing, etc., obscene matter in

162. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully and knowingly (deposit) (cause to be deposited) in the (United States) (_____) mails, for mailing and delivery to _____, a (letter) (picture) (_____) (containing) (portraying) (suggesting) (_____) certain obscene, lewd, and lascivious matter, to wit: _____.

Misprision of felony

163. In that _____, having knowledge that _____ had actually committed a felony (at) (on board) _____, on or about _____ 19__, to wit: (the murder of _____) (_____), did, from about _____ 19__, to about _____ 19__, wrongfully and unlawfully conceal such felony and fail to make the same known to the civil or military authorities.

Nuisance, committing

164. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully (urinate) (defecate) (_____) [on the floor of the squadroom] [on the (deck) (bulkhead) of _____] [_____].

Obstructing justice

165. In that _____ did, (at) (on board) _____, on or about _____, 19__, wrongfully and unlawfully endeavor to [impede (a trial by court-martial) (an investigation) (_____)] [influence the actions of _____, (a member of the court-martial) (the military judge of the court-martial) (a trial counsel of the court-martial) (a defense counsel of the court-martial) (an officer responsible for making a recommendation concerning disposition of charges) (an officer responsible for taking action with respect to the findings and sentence of the court-martial) (_____)] [(influence) (alter) the testimony of _____ as a witness before (a court-martial) (an investigating officer) (_____)] in the case of _____, by [(promising) (offering) (giving) to the said _____, (the sum of $_____) (_____, of a value of (about) $_____)] [communicating to the said _____ a threat to _____] [_____], (if) (unless) he, the said _____, would [(vote to acquit the said _____) (_____) (recommend dismissal of the charges against the said _____) (disapprove the findings and sentence in the case of _____ and order the charges dismissed)] [(wrongfully refuse to testify) (testify falsely concerning _____) (_____)] [(at such trial) (before such investigating officer)] [_____].

Pandering

166. In that _____ did, (at) (on board) _____, 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 (him) (her) by the said _____.

167. In that _____ did, (at) (on board) _____, 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) (_____).

Parole, violation of

168. In that _____, a prisoner on parole, did, (at) (on board) _____, on or about _____ 19__, violate the conditions of his parole by _____.

Perjury, statutory

169. In that _____, having taken a lawful oath [in a proceeding before (a board of officers) (a court of inquiry) concerning _____] [upon the making of an affidavit as to _____] [_____], a case in which a law of the United States authorized an oath to be administered, that [he, the said _____, would (testify) (declare) (depose) (certify) truly] [a written (declaration) (deposition) (certificate) subscribed by him was true], did, (at) (on board) _____, on or about _____ 19__, willfully and contrary to such oath (state) (subscribe) a material matter, to wit: _____, which matter he did not then believe to be true.

Perjury, subornation of

170. In that _____ did, (at) (on board) _____, on or about _____ 19__, procure _____ to commit perjury by inducing him, the said _____, to take 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, the said _____, would (testify) (depose) (_____) truly, and to (testify) (depose) (_____) willfully, corruptly, and contrary to such (oath) (affirmation) in substance that _____, which (testimony)' (deposition) (_____) was upon a material matter and which the said _____ did not then believe to be true.

Prisoner, allowing to do unauthorized act

171. In that _____, (a sentinel) (overseer) (_____) in charge of prisoners, did, (at) (on board) _____, on or about _____ 19__, *wrongfully allow* _____, *a prisoner under* his charge, to [(go to) (enter) (go to and enter) an unauthorized place, to wit: _____] [(hold unauthorized conversation with _____) (loiter) (neglect his task by _____) (obtain intoxicating liquor) (_____)].

Public record, altering, concealing, removing, mutilating, obliterating, or destroying

172. In that _____ did, (at) (on board) _____, on or about _____ 19__, willfully and unlawfully [(alter) (conceal) (remove) (mutilate) (obliterate) (destroy)] [appropriate with intent to (alter)' (conceal) (remove) (mutilate) (obliterate) (destroy) (steal)] a public record, to wit: [the (descriptive list) (rough deck log) (quartermaster's note book) of _____] [_____].

Quarantine, medical, breaking

173. In that _____, having been duly placed in medical quarantine (in the isolation ward, _____ Hospital) (_____), did (at) (on board) _____, on or about _____ 19__, break said medical quarantine.

Refusing, wrongfully, to testify

174. In that _____, being in the presence of (a) (an) [(general) (special)' court-martial] [duly appointed board of officers] [officer conducting an investigation under Article 32, Uniform Code of Military Justice] [officer taking a deposition] [_____] (of) (for) the United States, of which _____ was (military judge) (president) (_____), (and having been directed by the said _____ to qualify as a witness) (and having qualified as a witness and having been directed by the said _____ to answer the following questions put to him as a witness, "_____"), did, (at) (on board) _____, on or about _____ 19__, wrongfully refuse (to qualify as a witness) (to answer said questions)'.

Restriction, breaking

175. In that _____, having been duly restricted to the limits of _____, did, (at) (on board) _____, on or about _____ 19__, break said restriction.

Sentinel, lookout, offenses against or by

176. In that _____, (a prisoner), did, (at) (on board) _____, on or about _____ 19__, wrongfully [use the following (threatening) (insulting) (threatening and insulting)' language]

[behave in (a) (an) (insubordinate) (disrespectful) (insubordinate and disrespectful) manner] toward _____, a (sentinel) (lookout) in the execution of his duty, ["_____," or words to that effect] [by _____].

177. In that _____, while posted as a (sentinel) (lookout), did, (at) (on board) _____, on or about _____ 19__, (loiter)' (wrongfully sit down) on his post.

Soliciting another to commit an offense

178. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully (solicit) (induce) _____ (to disobey a general regulation, to wit: _____) (to steal _____, of a value of (about) $_____, the property of _____) (to _____), by _____.

NOTE. See Article 82 for certain solicitations which should be charged under that article.

Stolen property, knowingly receiving, buying, concealing

179. In that _____ did, (at) (on board) _____, on or about _____ 19__, unlawfully (receive) (buy)' (conceal) _____, of a value of (about) $_____, the property of _____, which property, as he, the said _____, then well knew, had been stolen.

Straggling

180. In that _____ did, at _____, on or about _____ 19__, while accompanying his organization on (a practice march) (maneuvers) (_____), without just cause, straggle.

Threat, communicating

181. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully communicate to _____ a threat to (injure _____ by _____) (accuse _____ of having committed the offense of _____) (_____).

Transporting, unlawfully, a vehicle or aircraft in interstate or foreign commerce

182. In that _____ did, (at) (on board)' _____, (between _____ and _____) on or about _____ 19__, unlawfully transport (a motor vehicle) (an aircraft) in (interstate) (foreign) commerce, then knowing the said (motor vehicle) (aircraft) to have been stolen.

Unclean accouterment, arms, or uniform

183. In that _____ was, (at) (on board) _____, on or about _____ 19__, found with an unclean (rifle) (uniform)' (_____), he being at fault in failing to maintain such property in a clean condition.

Uniform, unclean, improper appearing in

184. In that _____ did, on or about _____ 19__, wrongfully appear (at) (on board) _____ (without his _____) (in an unclean _____) (with an unclean _____) (_____).

Unlawful entry

185. In that _____ did, (at) (on board) _____, on or about _____ 19__, unlawfully enter the (dwelling house) (garage) (warehouse) (tent) (vegetable garden) (orchard) (stateroom) (_____) of _____.

Weapon, concealed, carrying

186. In that _____ did, (at) (on board) _____, on or about _____ 19__, unlawfully carry a concealed weapon, to wit: a _____.

Wearing unauthorized insignia, decoration, badge, ribbon, or lapel button

187. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully and without authority wear upon his (uniform) (civilian clothing) [the insignia of grade of a (master sergeant of _____) (chief gunner's mate of _____)] [the Combat Infantryman Badge] [the Distinguished Service Cross] [the ribbon representing the Silver Star] [the lapel button representing the Legion of Merit] [_____].

Wrongful cohabitation

188. In that _____ did, (at) (on board) _____, from about _____ 19__, to about _____ 19__, wrongfully cohabit with _____, a woman not his wife.

Appendix 7

INVESTIGATING OFFICER'S REPORT

INVESTIGATING OFFICER'S REPORT *(Of charges under the provisions of Article 32, Uniform Code of Military Justice, and paragraph 34, Manual for Courts-Martial, U.S.)*			3d INDORSEMENT
FROM: *(Grade, name and organization of investigating officer)* Major Adam A. Adamson, 1st Bn, 61st Inf			DATE OF REPORT 1 Dec 1967
TO: *(Title and organization of officer who directed report to be made)* Commanding Officer, 1st Bn, 61st Inf, Fort Compton, Texas			
GRADE AND NAME OF ACCUSED Private Ben B. Benson	SERVICE NUMBER RA 11 111 111	ORGANIZATION Co A, 1st Bn, 61st Inf	DATE OF CHARGES 20 Nov 1967

(Check appropriate answer)	YES	NO
1. IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 32, UNIFORM CODE OF MILITARY JUSTICE, AND PARAGRAPH 34, MANUAL FOR COURTS-MARTIAL, I HAVE INVESTIGATED THE CHARGES *(Exhibit 1)* APPENDED HERETO. *(If, and as soon as, it is determined the accused elects not to be represented by counsel or by qualified counsel during the investigation, the investigating officer will complete in ink items 1 through 4, except 4f, and will ask the accused to sign item 4e.)*	X	
2. AT THE OUTSET OF THE INVESTIGATION I READ TO THE ACCUSED THE PROVISIONS OF ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE, AND ALSO ADVISED HIM:	X	
a. OF THE NATURE OF THE OFFENSE(S) CHARGED AGAINST HIM	X	
b. OF THE NAME OF THE ACCUSER	X	
c. OF THE NAMES OF THE WITNESSES AGAINST HIM SO FAR AS KNOWN BY ME.	X	
d. THAT THE CHARGES WERE ABOUT TO BE INVESTIGATED BY ME	X	
e. OF HIS RIGHT, UPON HIS REQUEST, TO HAVE COUNSEL REPRESENT HIM AT THE INVESTIGATION, EITHER--	X	
(1) CIVILIAN COUNSEL, IF PROVIDED BY HIM, OR	X	
(2) MILITARY COUNSEL OF HIS OWN SELECTION, IF SUCH COUNSEL BE REASONABLY AVAILABLE, OR	X	
(3) COUNSEL, QUALIFIED UNDER ARTICLE 27*(b)*, APPOINTED BY THE OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION	X	
f. OF HIS RIGHT TO CROSS-EXAMINE ALL AVAILABLE WITNESSES AGAINST HIM	X	
g. OF HIS RIGHT TO PRESENT ANYTHING HE MIGHT DESIRE IN HIS OWN BEHALF, EITHER IN DEFENSE OR MITIGATION	X	
h. OF HIS RIGHT TO HAVE THE INVESTIGATING OFFICER EXAMINE AVAILABLE WITNESSES REQUESTED BY HIM	X	
i. OF HIS RIGHT TO MAKE A STATEMENT IN ANY FORM	X	
j. OF HIS RIGHT TO REMAIN SILENT OR TO REFUSE TO MAKE ANY STATEMENT REGARDING ANY OFFENSE OF WHICH HE WAS ACCUSED OR CONCERNING WHICH HE IS BEING INVESTIGATED	X	
k. THAT ANY STATEMENT MADE BY HIM MIGHT BE USED AS EVIDENCE AGAINST HIM IN A TRIAL BY COURT-MARTIAL	X	
3. *a.* THE ACCUSED REQUESTED MILITARY COUNSEL BY NAME	X	
b. NAME AND GRADE OF SUCH COUNSEL: Carl C. Carlson, Captain, JAGC — ORGANIZATION: Hq, Fort Compton, Texas		
c. MILITARY COUNSEL REQUESTED BY NAME WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(*b*), UNIFORM CODE OF MILITARY JUSTICE	X	
d. IF ANSWER TO PRECEDING ITEM WAS "NO", ACCUSED WAS INFORMED THAT SUCH UNQUALIFIED COUNSEL MAY NOT REPRESENT HIM AT ANY GENERAL COURT-MARTIAL	NA	
e. MILITARY COUNSEL REQUESTED BY NAME WAS REASONABLY AVAILABLE. *(If not available, explain in item 18, having reference to paragraph 34c, Manual for Courts-Martial.)*	X	
f. THE ACCUSED STATED HE WOULD BE REPRESENTED BY CIVILIAN COUNSEL		X
g. NAME AND ADDRESS OF SUCH COUNSEL: NA — MEMBER OF THE BAR OF		
h. *(This item to be used by accused's civilian counsel only)* *Place and date* I HEREBY ENTER MY APPEARANCE FOR THE ABOVE-NAMED ACCUSED AND REPRESENT THAT I AM A MEMBER OF THE BAR OF _____ *(Signature of Counsel)*		
4. *a.* THE ACCUSED REQUESTED THAT COUNSEL BE APPOINTED BY THE GENERAL COURT-MARTIAL AUTHORITY TO REPRESENT HIM		X
b. NAME AND GRADE OF SUCH APPOINTED COUNSEL: NA — ORGANIZATION		
c. APPOINTED COUNSEL *(as in b above)* WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(*b*), UNIFORM CODE OF MILITARY JUSTICE	NA	
d. IF ANSWER TO PRECEDING ITEM *(4c)* IS "NO", ACCUSED SPECIFICALLY WAIVED COUNSEL WITH SUCH QUALIFICATIONS	NA	
e. *(To be signed by accused if answer to 3a and 4a, or 3c, or 4c was "NO". If accused fails to sign, investigating officer will explain circumstances in detail in item 18)* *Date* I HAVE BEEN INFORMED OF MY RIGHT TO REPRESENTATION AT THE INVESTIGATION BY COUNSEL QUALIFIED UNDER ARTICLE 27(*b*), UNIFORM CODE OF MILITARY JUSTICE. I HEREBY WAIVE MY RIGHT TO (SUCH QUALIFIED COUNSEL) (COUNSEL). *(Signature of Accused)*		

NOTE: If additional space is required for any item, enter the additional material on a separate sheet. Be sure to identify such material with the proper numerical and, when appropriate, lettered heading *(Example, "5c")*. *Securely attach any additional sheet to the form and add a note in the appropriate item of the form: "See additional sheet."* *Any matters considered pursuant to paragraph 34, MCM, which are not identifiable with some other heading in the form should be entered in item 18.*

(Check appropriate answer continued)	YES	NO
f. COUNSEL FOR THE ACCUSED WAS PRESENT THROUGHOUT THE INVESTIGATION *(If the accused waives the right to have counsel present throughout all or a part of the investigation after having requested counsel, state the circumstances and the particular proceedings conducted in the absence of such counsel)*	X	
5. a. IN THE PRESENCE OF THE ACCUSED I HAVE INTERROGATED ALL AVAILABLE WITNESSES UNDER OATH OR AFFIRMATION AND HAVE EXAMINED ALL DOCUMENTARY EVIDENCE ON BOTH SIDES.	X	
b. I HAVE REDUCED THE MATERIAL TESTIMONY GIVEN BY EACH SUCH WITNESS UNDER DIRECT AND CROSS-EXAMINATION TO A SWORN OR AFFIRMED WRITTEN STATEMENT EMBODYING THE SUBSTANCE OF THE TESTIMONY TAKEN ON BOTH SIDES.	X	
c. THE SWORN OR AFFIRMED WRITTEN STATEMENTS OF SUCH WITNESSES ARE APPENDED HERETO AS INDICATED:	X	

NAME AND GRADE OF WITNESSES WHO WERE PRESENT	ORGANIZATION OR ADDRESS	EXHIBIT NUMBER
Dodd D. Dodson, Captain	Co A, 1st Bn, 61st Inf	2
Evan E. Evanson, Specialist 4	Co A, 1st Bn, 61st Inf	3
Ford F. Fordson, Corporal	400th MP Co	4

	YES	NO
6. a. THE SUBSTANCE OF THE EXPECTED TESTIMONY OF EACH OF THE FOLLOWING ABSENT WITNESSES WHOSE PRESENCE WAS NOT REQUESTED BY THE ACCUSED, OR WHO, HAVING BEEN REQUESTED, WERE NOT AVAILABLE, OR FOR WHOM THE REQUEST WAS WITHDRAWN, WAS OBTAINED FROM SUCH WITNESSES IN THE FORM OF A SWORN OR AFFIRMED WRITTEN STATEMENT, OR WAS STIPULATED TO BY THE ACCUSED IN WRITING. SUCH STATEMENTS OR STIPULATIONS ARE APPENDED HERETO AS INDICATED:	X	

NAME AND GRADE OF ABSENT WITNESSES	ORGANIZATION OR ADDRESS	EXHIBIT NUMBER
Greg G. Gregson	10 Main Street, Albemarle, Texas	5

	YES	NO
b. A COPY OF EACH SUCH WRITTEN STATEMENT HAS BEEN SHOWN TO THE ACCUSED.	X	
c. IF AN ABSENT WITNESS IS REQUESTED BY THE ACCUSED BUT IS NOT AVAILABLE, ENTER A PROPER EXPLANATION		

7. a. THE FOLLOWING DOCUMENTS HAVE BEEN EXAMINED, SHOWN TO THE ACCUSED, AND ARE APPENDED AS INDICATED *(describe documents)*	EXHIBIT NUMBER
Extract copy of morning report, Co A, 1st Bn, 61st Inf for 1 October 1967	6
Statement of accused, 15 November 1967	7
b. IF ANY DOCUMENTS MADE AVAILABLE TO THE INVESTIGATING OFFICER WERE NOT EXAMINED OR WERE EXAMINED BUT NOT SHOWN TO THE ACCUSED, OR WERE EXAMINED BUT ARE NOT APPENDED, STATE THE REASONS	

	YES	NO
8. a. THE FOLLOWING DESCRIBED REAL EVIDENCE WAS EXAMINED, SHOWN TO THE ACCUSED, AND IS NOW PRESERVED FOR SAFEKEEPING AS INDICATED: One .45 caliber pistol, now in the custody of the Commanding Officer, Co A, 1st Bn, 61st Inf.	X	
b. IF CERTAIN REAL EVIDENCE WHICH WAS EXAMINED WAS NOT SHOWN TO THE ACCUSED, STATE THE REASONS		

(Check appropriate answer continued)	YES	NO
9. THE ACCUSED AFTER HAVING BEEN INFORMED OF HIS RIGHT TO MAKE A STATEMENT OR REMAIN SILENT:		
a. STATED THAT HE DID NOT DESIRE TO MAKE A STATEMENT		X
b. MADE A STATEMENT APPENDED HERETO *(Exhibit* 8 *)*.	X	
c. THE CIRCUMSTANCES OF THE TAKING OF ANY CONFESSION OR ADMISSION OF ACCUSED WERE INQUIRED INTO BY ME AND SUCH CONFESSION OR ADMISSION APPEARS TO HAVE BEEN OBTAINED IN ACCORDANCE WITH ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE, AND/OR THE 5TH AMENDMENT. *(Where appropriate, attach statement of person taking confession or admission showing circumstances of taking)*	X	
d. THE ACCUSED, AFTER BEING ADVISED THAT HE DID NOT HAVE TO MAKE ANY STATEMENT WITH RESPECT TO IT, WAS SHOWN THE CONFESSION OR ADMISSION AND DID NOT CONTEST IT AS BEING NOT IN COMPLIANCE WITH ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE. *(If the confession or admission was contested, attach accused's explanation of the circumstances.)*	X	
10. a. THERE WERE REASONABLE GROUNDS FOR INQUIRING INTO THE MENTAL RESPONSIBILITY OF THE ACCUSED AT THE TIME OF THE ALLEGED OFFENSE *(MCM, 120b)*		X
b. THERE WERE REASONABLE GROUNDS FOR INQUIRING INTO THE MENTAL CAPACITY OF THE ACCUSED AT THE TIME OF THE INVESTIGATION *(MCM, 120d)*		X
c. IF GROUNDS FOR INQUIRY AS TO THE ACCUSED'S MENTAL CONDITION EXISTS, STATE REASONS THEREFOR AND ACTION TAKEN		
d. A REPORT OF A (BOARD OF MEDICAL OFFICERS) (PSYCHIATRIST) IS APPENDED *(Exhibit)*		X
11. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL. *(If any essential witness(es) will not be so available, list name, address, reason for nonavailability, and recommendation, if any, whether a deposition should be taken. List estimated date of separation and/or transfer, if pertinent and available)* Corporal Ford F. Fordson, 400th MP Co, is scheduled for transfer to Hawaii on or about 15 Dec 1967. Recommend that a deposition be taken.		X
12. EXPLANATORY OR EXTENUATING CIRCUMSTANCES ARE SUBMITTED HEREWITH. 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 severe punishment. Both the company commander and the first sergeant state that he has been an excellent soldier.	X	
13. a. I HAVE INVESTIGATED AND FIND 1 PREVIOUS CONVICTION(S) OF OFFENSES COMMITTED WITHIN THE six YEARS NEXT PRECEDING THE COMMISSION OF AN OFFENSE WITH WHICH THE ACCUSED IS NOW CHARGED *(MCM, ,par 75b(2))*	X	
b. AN EXTRACT COPY OF THE ACCUSED'S MILITARY RECORDS OF PREVIOUS CONVICTIONS IS APPENDED *(Exhibit* 9 *)*	X	
14. IN ARRIVING AT MY CONCLUSIONS I HAVE CONSIDERED NOT ONLY THE NATURE OF THE OFFENSE(S) AND THE EVIDENCE IN THE CASE, BUT I HAVE LIKEWISE CONSIDERED THE AGE OF THE ACCUSED, HIS MILITARY SERVICE, AND THE ESTABLISHED POLICY 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.	X	
15. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM AND THE MATTERS CONTAINED THEREIN ARE TRUE, TO TH BEST OF MY KNOWLEDGE AND BELIEF. *(If the answer is "NO", explain and indicate recommended action on additional sheet).*	X	
16. ANY INCLOSURES RECEIVED BY ME WITH THE CHARGES AND NOT LISTED ABOVE AS AN EXHIBIT ARE SECURELY FASTENED TOGETHER AND APPENDED HERETO AS ONE EXHIBIT *(Exhibit* 10 *If no such inclosures were received, check "NO".)*	X	
17. *(Check appropriate box ONLY if trial is recommended)* TRIAL BY [X] GENERAL [ ] SPECIAL [ ] SUMMARY COURT-MARTIAL IS RECOMMENDED.	X	

18. REMARKS *(If more space is required, attach additional sheets. Check ☐ YES ☐ NO if additional sheets are attached)*

Examples of matters to be covered here are:

1. Discussion of evidence, credibility of witnesses, and sufficiency of proof.

2. Explanation of delays in completing investigation.

3. Recommendations to dismiss, reduce, or otherwise change any specification.

4. Statement of any anticipated defenses and any expected difficulties in proving specifications on which trial is recommended.

5. Any other recommendations.

6. Any other matters which should be known to the convening authority and subsequent reviewing authorities.

19. I HAVE NO PREVIOUS CONNECTION WITH THIS CASE OR ANY CLOSELY RELATED CASE. *(If any connection is indicated, attach a full explanation.)* I AM NOT AWARE OF ANY REASONS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. *(If any reasons appear to exist, attach a statement giving full details.)*

TYPED NAME, GRADE, AND ORGANIZATION OF INVESTIGATING OFFICER	SIGNATURE
Adam A. Adamson, Major, 1st Bn, 61st Inf	Adam A. Adamson

Appendix 8

PROCEDURES FOR TRIALS BEFORE GENERAL COURTS-MARTIAL; CONTEMPT AND REVISION PROCEDURES FOR GENERAL AND SPECIAL COURTS MARTIAL

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a. PROCEDURE FOR ARTICLE 39(a) SESSION OF A GENERAL COURT-MARTIAL

NOTE. The following procedure may be used prior to assembly when there is no approved request by the accused for trial by MJ alone. If such request has been received and approved, the MJ should use the procedure in App. 8*b*. After service of charges, subject to Article 35, the MJ may call an Article 39(a) session attended by the accused, trial counsel and defense counsel prior to assembly of the court and without the presence of its members.

Certain portions of this suggested procedure may be inapplicable in an Article 39(a) session held after assembly (e.g. request for trial by MJ alone).

Session called to order

MJ: This Article 39(a) session is called to order.

NOTE. The reporter records all proceedings verbatim (49*b*, 53*d*), subject to the exceptions set forth in appendix 9 and herein. He is responsible for keeping a record of the hour and date of each opening or closing of the session, whether for recess, adjournment, or otherwise, for insertion in the record.

NOTE. The MJ should examine the convening order to ascertain that the TC and DC are apparently qualified.

Convening orders and referral of charges

TC: The court is convened by _____ (as amended by _____), a copy of which has been furnished the military judge, counsel, and the accused, and to the reporter for insertion at this point in the record. The charges have been properly referred to this court for trial and were served on the accused on _____.

TC: (The following corrections are noted in the convening orders: _____)

NOTE. Distribution of the convening orders should be made sufficiently in advance with a request that TC be notified of errors, if any, therein. Only minor changes such as typographical errors or changes of grade due to promotion since the issuance of the orders can be made in this way. Any correction which affects the identity of the individual concerned must be made by an amending order.

Persons present

TC: The following persons named in the convening orders are present:

Persons absent

TC: The members and the following persons named in the convening orders are absent:

Presence of accused

TC: The prosecution is ready to proceed with the trial in the case of the United States against _____
(Name, rank, organization of the accused
_____
_____
read from the
_____,
Charge Sheet)
who (is) (are) present in court.

Reporter detailed

TC: _____ has been detailed reporter for this court (and will now be sworn) (and has previously been sworn).

NOTE. The oath need not be given to the reporter if previously sworn, and the record so reflects (see Art. 42).

Legal qualifications of prosecution

TC: The legal qualifications (and status as to oaths) of all members of the prosecution are correctly stated in the convening orders (except that _____).

NOTE. If the TC is not qualified as prescribed by Article 27(b), the session will adjourn and the MJ will report the matter to the convening authority. At least one member of the prosecution present in court must be qualified as prescribed by Article 27(b), and no person not so qualified may conduct the prosecution during the trial. See 6*b* and 45*a*.

Prior participation by member of prosecution

TC: No member of the prosecution named in the convening orders has acted as investigating officer, military judge, court member, or a member of the defense in this case, or as counsel for the accused at a pretrial investigation or other proceedings involving the same general matter.

NOTE. If any member of the prosecution appears to be disqualified, the MJ will take the action indicated in 61*e*. See 6*a*.

Inquiry concerning Article 38(b)

MJ: Have you informed the accused of his rights concerning counsel as set forth in Article 38(b)?

DC: Yes (No) sir.

MJ: _____, you have the right to be represented at this trial by a civilian lawyer provided by you at your own expense. Do you understand?

ACCUSED: Yes (No) sir.

MJ: You also have the right to be represented free of charge by a military lawyer of your own selection if he is reasonably available. Do you understand?

ACCUSED: Yes (No) sir.

MJ: If you are represented by counsel of your own selection, civilian or military, (name of detailed defense counsel and assistant, if any) will act as associate counsel, if you wish, or (he) (they) may be excused with your consent. Do you understand?

ACCUSED: Yes (No) sir.

NOTE. If the accused answers any of the inquiries concerning his rights under Article 38(b) in the negative, the MJ should inquire fully into the matter, and, if appropriate, adjourn the session for a reasonable time to allow the accused the opportunity to obtain individual counsel.

DC introduced

MJ: By whom will the accused be defended?

DC: The accused is to be defended by (_____, the detailed defense counsel) (and), (_____, the detailed assistant defense counsel) (and) (_____, individual counsel).

Qualifications of DC

MJ: Will counsel representing the accused state whether the legal qualifications (and status as to oaths) of the detailed members of the defense are other than as stated in the convening orders (and will individual counsel state his legal qualifications)?

DC: The legal qualifications (and status as to oaths) of all detailed members of the defense are correctly stated in the convening orders (except that _____).

IC: I am (a member of the bar of _____) (certified by The Judge Advocate General of the _____ under Art. 27(b) and I have (not) been properly sworn.)

NOTE. If the individual counsel is not qualified under 48*a*, the MJ will advise the accused:

Unqualified IC

MJ: _____, does not possess the necessary legal qualifications to act as your counsel for the trial of this case. You may be represented by the detailed (defense counsel) (and) (assistant defense counsel) who (is) (are) properly qualified, or you may attempt to obtain another individual counsel who is properly qualified. What do you desire?

ACCUSED: I desire [to proceed with the detailed (defense counsel) (and) (assistant defense counsel)] [the opportunity to obtain another individual counsel].

NOTE. If the accused does not desire to proceed with detailed counsel, the MJ will adjourn the session for a reasonable time to allow the accused the opportunity to obtain another individual counsel. See 58*c*.

Prior participation by DC

TC: Has any member of the defense (including individual counsel) acted as the accuser, a member of the prosection, investigating officer, military judge, or member of the court in this case?

DC: (No counsel for the defense has so acted.) (_____, a member of the defense, has acted as _____.)

NOTE. If a member of the defense has participated in the same case as a member of the prosecution, he will be excused forthwith (61*f*(4)). See 6*a*. In other cases, the MJ will advise the accused:

Explanation to accused

MJ: _____, (the regularly detailed defense counsel) (_____), previously has acted as _____ in this case. He may not now act as a member of the defense unless expressly requested by you. Do you expressly request his services in this case?

Action when counsel not desired

ACCUSED: I do (not).

NOTE. If he does so request, the proceedings continue. If he does not request the services of the counsel, the MJ will excuse him.

NOTE. If the excusing of counsel not desired by the accused, because of prior participation (Art. 27(a)), deprives the accused of counsel having the requisite legal qualifications (48*a*) or of qualified detailed counsel (6*b*), and the accused desires the services of such a detailed counsel in addition to those of his qualified IC, the MJ will adjourn the session and report the matter to the convening authority (61*f*(4)).

NOTE. When the accused is represented by qualified IC, he may state (Art. 38(b)):

Excusing counsel not desired

ACCUSED: I (do not) desire the (regularly detailed defense counsel) (and) (assistant defense counsel) to act (as associate counsel) in this case.

NOTE. Counsel not desired by the accused will be excused at this time (61*f*(3)). If the accused has no individual counsel and one or more detailed members of the defense is present and is not to act in the case, the member who is to conduct the defense should make an announcement similar to the foregoing, whereupon the counsel who are not to act will be excused.

MJ: It appears that counsel for both sides have the requisite qualifications.

TC: All personnel of the court required to be present have been sworn (except _____).

NOTE. If the military judge, trial counsel or defense counsel have not been previously sworn, the following procedure applies.

MJ sworn

TC: You, _____, do swear (or affirm) that you will faithfully and impartially perform, according to your conscience and the laws applicable to trials by courts-martial, all the duties incumbent upon you as military judge of this court. So help you God.

MJ: I do.

NOTE. The military judge administers the oath to the members of the prosecution, who raise their right hands:

Prosecution sworn

MJ: You, _____ and _____, do swear (or affirm) that you will faithfully perform the duties of trial counsel in the case now in hearing. So help you God.

TC: (AND ASST TC): I do.

NOTE. The oath is then administered by the military judge to the members of the defense, including individual counsel, who raise their right hands:

Defense sworn

MJ: You, _____, _____, (and Mr. _____), do swear (or affirm) that you will faithfully perform the duties of defense (and individual) counsel in the case now in hearing. So help you God.

*DC (ASST DC AND IC): I do.

Disclosing grounds for challenge

NOTE. The TC now states the general nature of the charges and discloses every ground for challenge believed by him to exist in the case (62*b*).

—Nature of charge

TC: The general nature of the charges in this case is _____; the charges were preferred by _____; forwarded with recommendations as to disposition by _____ (_____) (and _____); and investigated by _____. The military judge will not be a witness for the prosecution.

*From this point on, "DC" refers to the counsel who is conducting the defense.

NOTE. All persons who have forwarded the charges should be stated.

—grounds disclosed

TC: If the military judge is aware of any matters which he believes may be a ground for challenge by either side against him, he should now state such matters.

Challenges: —procedure

NOTE. Before exercising their right to challenge for cause, the TC and DC may question the MJ to determine the existence of facts which may be the basis for a challenge for cause (62*b*). As to limitations on inquiry into the eligibility of MJ, see 62*g*.

—by prosecution

TC: The prosecution (has no challenge for cause against the military judge) (challenges the military judge on the ground _____).

—by defense

TC: Does the accused desire to challenge the military judge for cause?

DC: No. (The accused challenges the military judge for cause on the ground _____).

MJ: The challenge is (sustained) (denied).

NOTE. See 62*b* as to disclosing grounds for challenge. If disclosed grounds for challenge are undisputed and are within the first eight grounds enumerated in 62*f*, the MJ must excuse himself forthwith. If the grounds disclosed are other than the first eight grounds, the MJ may excuse himself. When the MJ excuses himself, he will adjourn the session and report the matter to the convening authority for action (62*c*, 62*h*(4)).

NOTE. In every case in which the Article 39(a) session is held prior to assembly and the death penalty may not be adjudged, either because it is not authorized or because the case has been referred for trial as noncapital, the MJ should make the following inquiry:

Inquiry into request for MJ alone

MJ: The accused has not submitted a request in writing for trial before a military judge alone. Has he been advised of his right to submit such request?

DC: He has (not).

MJ: Does the accused desire to request trial by me alone?

DC: He does (not).

NOTE. If the accused has not been so advised, the MJ should insure that the accused is properly advised and given an opportunity to submit a request should he desire to do so. See 53*d*(2), 61*g* and Article 16.

NOTE. If the accused requests trial by the MJ alone, and the MJ approves the request, the MJ may announce that the court is assembled and proceed with trial of the case (app 8*b*). Any request will be attached to the convening orders which are to be inserted in the record. If accused expressly declines to submit a request for trial by the MJ alone, or the MJ denies the request, the MJ should proceed as follows:

NOTE. When the accused is an enlisted person, the MJ should ask:

Request for enlisted membership

MJ: Has the accused been advised of his right to have enlisted persons included in the membership of this court?

DC: He has (not).

NOTE. If the accused has not been so advised, the MJ should insure that the accused is properly advised and given an opportunity to submit a request should he desire to do so. See 61*h*. When the accused has been previously advised, the MJ should inquire:

MJ: Has the accused made a request in writing that the membership of the court include enlisted persons?

TC: The accused has (not) made such a request (which is herewith submitted to the court).

MJ: (This request will be attached to the convening orders which are to be inserted in the record.)

NOTE. If such a request has been made and requirements for enlisted membership do not appear to have been met, the MJ will inquire into the matter to insure compliance prior to assembly of the court. See 61*h* and Article 25(c).

NOTE. The Article 39(a) session continues. The MJ may proceed to dispose of interlocutory motions raising defenses and objections, ruling upon other matters that may legally be ruled upon by the MJ, and performing other procedural functions which do not require the presence of court members. He may also, if permitted by regulations of the Secretary concerned, hold the arraignment, receive pleas and enter findings of guilty upon an accepted plea of guilty (See app 8*b* for procedure). See 53*d* and 70*b*. The MJ should rule on all questions of the admissibility of evidence at this session. Evidence may be admitted at this time for subsequent consideration

by the members rather than simply marked for identification. Motions for appropriate relief are waived if they are not made prior to plea or prior to the conclusion of any Article 39(a) session held prior to assembly, whichever occurs earlier (67*b* and 69*a*). Motions to dismiss should ordinarily be made before a plea is entered (67*a* and 68*a*).

NOTE. At the conclusion of the session, the MJ should state:

MJ: This session is (recessed) (adjourned).

b. *TRIAL PROCEDURE FOR GENERAL COURTS-MARTIAL

NOTE. This procedure guide may be used for a trial by a court composed of a MJ and members or of a MJ alone. When the MJ is sitting alone, he should make appropriate omissions from the procedure.

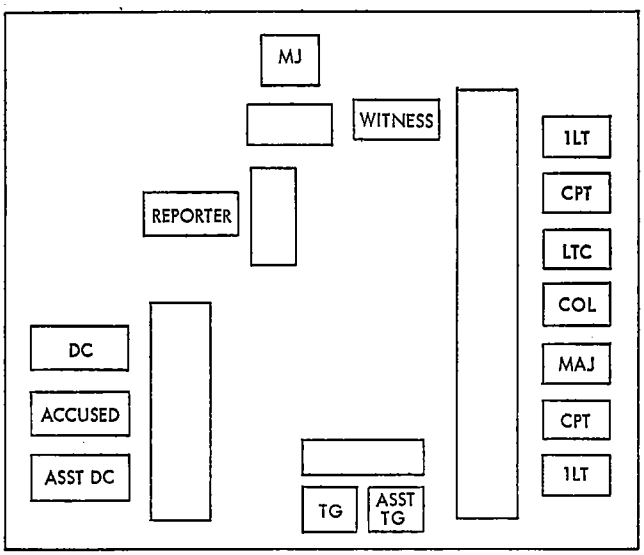
Informal inquiry

NOTE. Prior to the MJ's calling a general court-martial to order, he should examine the convening order, determine that the accused and a quorum are present, including one-third enlisted persons if they have been requested, and that the detailed trial counsel and defense counsel are apparently qualified. See 36*c*(2). He should also verify the qualifications of any individual counsel. See 48*a*. Witnesses should be excluded from the courtroom except when they testify. See 53*f*. Matters resolved at an Article 39(a) session need not be considered anew if the circumstances remain unchanged and accused is not deprived of any rights, such as the right to request, prior to assembly, trial by military judge alone, or the right of an enlisted person to request enlisted court members. See Article 16.

Seating

NOTE. The members, if any, are seated alternately to the right and left of the president according to rank. The MJ is seated apart from the members. An acceptable seating arrangement appears below:

General Court-Martial



Court called to order

MJ: The court will come to order.

NOTE. The reporter records all proceedings verbatim (49*b*, 53*d*), subject to the exceptions set forth in appendix 9 and herein. He is responsible for keeping a record of the hour and date of each opening or closing of the court, whether for recess, adjournment, or otherwise, for insertion in the record.

Convening orders

TC: The court is convened by _____, (as amended by _____,) a copy of which has been furnished to the military judge, each member of the court, counsel, and the accused (and to the reporter for insertion at this point in the record).

TC: (The following corrections are noted in the convening orders: _____ _____.)

NOTE. Only minor changes such as typographical errors or changes of grade due to promotion since the issuance of the orders can be made in this way. Any cor-

*Procedural guides for special and summary court-martial may be provided in regulations of the Secretary of a Department and will, so far as practicable, conform to that provided herein for general court-martial. See 78 and 79.

rection which affects the identity of the party concerned must be made by an amending order.

Persons present

TC: The following persons named in the convening orders are present:

The following persons named in the convening orders are absent:

Persons absent

Presence of accused

TC: The prosecution is ready to proceed with the trial in the case of the United States against _____

(Name,

_____

rank, organization of the accused read from the

_____, who (is) (are) present in court.

Charge Sheet)

Detail of Reporter

TC: _____ has been detailed reporter for this court (and will now be sworn) (and has previously been sworn).

NOTE. The reporter rises and stands with right hand raised; the TC raises his right hand, faces the reporter and administers the oath. The oath need not be given to the reporter or other court-martial personnel if they were previously sworn and the record so reflects (Art. 42).

Reporter sworn

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

REPORTER: I do.

Interpreters

NOTE. Any interpreter used is similarly introduced and may be sworn at this point or just before he acts if he has not been previously sworn. See 114*e* as to the form of the oath. See 50 concerning the types of interpreters that may be utilized.

NOTE. If an Article 39(a) session had been held prior to this time and the qualifications of counsel had been verified therein, the TC may state the following and the detailed inquiry may be deleted.

Reaffirmation of qualifications of counsel

TC: The status as to oaths, prior participation, and legal qualifications of all members of the prosecution is the same as was announced at the prior session of this trial held on _____. Is the status as to oaths, prior participation and legal qualifications of all members of the defense the same as it was at that session?

DC: It is (except _____).

Legal qualifications of prosecution

TC: The legal qualifications (and status as to oaths) of all members of the prosecution are correctly stated in the convening orders (except that _____).

NOTE. If the TC is not qualified as prescribed by Article 27(b), the court will adjourn and report the matter to the convening authority. At least one member of the prosecution present in court must be qualified as prescribed by Article 27(b), and no person not so qualified may conduct the prosecution during the trial. See 6*b* and 45*a*.

Prior participation by member of prosecution

TC: No member of the prosecution named in the convening orders has acted as investigating officer, military judge, court member, or a member of the defense in this case, or as counsel for the accused at a pretrial investigation or other proceedings involving the same general matter.

NOTE. If any member of the prosecution appears to be disqualified, the MJ will take the action indicated in 61*e*. See 6*a*.

Inquiry concerning Article 38(b)

MJ: Have you informed the accused of his rights concerning counsel as set forth in Article 38(b)?

DC: Yes (No) sir.

MJ: _____, you have the right to be represented at this trial by a civilian lawyer provided by you at your own expense. Do you understand this right?

ACCUSED: Yes (No) sir.

MJ: You also have the right to be represented free of charge by a military lawyer of your own selection if he is reasonably available. Do you understand this right?

ACCUSED: Yes (No) sir.

MJ: If you are represented by counsel of your own selection, civilian or military, (name of detailed defense counsel and assistant, if any) will act as associate counsel, if you wish, or (he) (they) may be excused with your consent. Do you understand this right?

ACCUSED: Yes (No) sir.

NOTE. If the accused answers any of the inquiries with respect to his rights under Article 38(b) in the negative, the MJ should inquire fully into the matter, and, if appropriate, adjourn the session for a reasonable time to allow the accused the opportunity to obtain another individual counsel. If an Article 39(a) session had previously been held, and the MJ had ascertained therein that the accused understood his rights under Article 38(b), the MJ need not inquire into the matter again at this time.

MJ: By whom will the accused be defended?

DC: The accused is to be defended by (_____, the detailed defense counsel) (and), (_____, the detailed assistant defense counsel) (and) (_____, individual counsel).

DC introduced

MJ: Will counsel representing the accused state whether the legal qualifications (and status as to oaths) of the detailed members of the defense are correctly stated in the convening orders (and will individual counsel state his legal qualifications and status as to oaths)?

Qualifications of DC

DC: The legal qualifications (and status as to oaths) of all detailed members of the defense are correctly stated in the convening orders (except that _____).

IC: I am (a member of the bar of _____) (certified by The Judge Advocate General of the _____ under Article 27(b) and I have (not been previously sworn).

NOTE. If the individual counsel is not qualified under 48*a*, the MJ will advise the accused:

MJ: _____, does not possess the necessary legal qualifications to act as your counsel for the trial of this case. You may be represented by the detailed (defense counsel) (and) (assistant defense counsel) who (is) (are) properly qualified, or you may attempt to obtain another individual counsel who is properly qualified. What do you desire?

Unqualified IC

ACCUSED: I desire [to proceed with the detailed (defense counsel) (and) (assistant defense counsel)] [the opportunity to obtain another individual counsel].

NOTE. If the accused does not desire to proceed with detailed counsel, the MJ will adjourn the court for a reasonable time to allow the accused the opportunity to obtain another individual counsel. See 58*c*.

TC: Has any member of the defense (including individual counsel) acted as the accuser, a member of the prosecution, investigating officer, military judge, or member of the court in this case?

Prior participation by DC

DC: (No counsel for the defense has so acted.) (_____, a member of the defense, has acted as _____.)

NOTE. If a member of the defense has participated in the same case as a member of the prosecution, he will be excused forthwith (61*f*(4)). See 6*a*. In other cases, the MJ will advise the accused:

MJ: _____, (the regularly detailed defense counsel) (_____), previously has acted as _____ in this case. He may not now act as a member of the defense unless expressly requested by you. Do you expressly request his services in this case?

Explanation to accused

ACCUSED: I do (not).

NOTE. If he does so request, the proceedings continue. If he does not request the services of the counsel, the MJ will excuse him.

Action when counsel not desired

NOTE. If the excusing of counsel not desired by the accused, because of prior participation (Art. 27(a)), deprives the accused of counsel having the requisite legal qualifications (48*a*), or of qualified detailed counsel (6*b*), and the accused desires the services of such a detailed counsel in addition to those of his qualified IC, the MJ will adjourn the court and report the matter to the convening authority (61*f*(4)).

NOTE. When the accused is represented by qualified IC, he may state (Art. 38(b)):

Excusing counsel not desired

ACCUSED: I (do not) desire the (regularly detailed defense counsel) (and) (assistant defense counsel) to act (as associate counsel) in this case.

NOTE. Counsel not desired by the accused will be excused at this time (61*f*(3)). If the accused has no individual counsel and one or more detailed members of the defense is present and is not to act in the case, the member who is to conduct the defense should make an announcement similar to the foregoing, whereupon the counsel who are not to act will be excused.

MJ: It appears that counsel for both sides have the requisite qualifications.

NOTE. In every case in which the death penalty may not be adjudged, either because it is not authorized or because the case has been referred for trial as noncapital, the MJ should ask the two questions listed below.
If the MJ had previously ascertained at an Article 39(a) session of this trial that the accused had been advised of his right to request trial by the MJ alone, the first question may be omitted.

Inquiry into request for military judge alone

MJ: The accused has not submitted a request in writing for trial before a military judge alone. Has he been advised of his right to submit such a request before assembly of the court?

*DC: He has (not).

MJ: Does the accused desire to request trial by me alone?

DC: He does (not).

NOTE. If the accused has not been so advised the MJ should insure that the accused is properly advised and given an opportunity to submit a request should he desire to do so. See 53*d*, 61*g* and Article 16.

NOTE. If the accused requests trial by military judge alone and the MJ approves the request, the MJ should excuse the members from further duty in the case and announce that the court is assembled for the trial of the case. Any request will be attached to the convening orders which are to be inserted in the record. If the accused expressly declines to submit a request for trial by the military judge alone, or the MJ denies the request the MJ should proceed as follows:

NOTE. When the accused is an enlisted man, the MJ should ask the two questions listed below. If the MJ had previously ascertained at an Article 39(a) session of this trial that the accused had been advised of his right to the presence of enlisted members, the first question may be omitted.

Request for enlisted membership

MJ: Has the accused been advised of his right to have enlisted persons included in the membership of this court?

DC: He has (not).

NOTE. If the accused has not been so advised the MJ should insure that the accused is properly advised and given an opportunity to submit a request should he desire to do so. See 61*h*. When the accused has been previously advised, the MJ should inquire:

MJ: Has the accused made a request in writing that the membership of this court include enlisted persons?

TC: The accused has (not) made such a request (which is herewith submitted to the court).

MJ: (This request will be attached to the convening orders which are to be inserted in the record.)

NOTE. If such a request has been made and requirements for enlisted membership do not appear to have been met, the MJ will adjourn the court and report the matter to the convening authority. See 61*h* and Article 25(e).

Preliminary instructions

NOTE. At this point the MJ may give the court preliminary instructions to assist them during the course of the trial. These instructions are particularly desirable if the court has not previously heard other cases, but they may be given

*From this point on, "DC" refers to the counsel who is conducting the defense.

in any case. The contents of these instructions are discretionary with the MJ, but they should be limited to a general discussion of the duties of the personnel of the court and matters concerning the proper conduct of the trial.

NOTE. If any personnel of the court-martial must be sworn, the MJ should see that it is done as indicated below. If all personnel of the court-martial have been previously sworn, the TC should so state and the MJ may then announce that the court is assembled.

TC: All personnel of the court have been sworn (except _____).

MJ: The members of the court will now be sworn. **Members sworn**

TC: The members will be sworn. All persons please rise.

NOTE. All persons in the courtroom stand while the oath is administered to the members of the court, MJ, and counsel. See 112*d*. Each member raises his right hand as his name is called by the TC in administering the following oath:

TC: You (name(s) of member(s)) do swear (or affirm) that you will faithfully perform all the duties incumbent upon you as a member of this court; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by courts-martial, the case of (the accused now before this court) (any accused brought before you); and that you will not disclose or discover the vote or opinion of any particular member of the court upon a challenge or upon the findings or sentence unless required to do so in due course of law. So help you God.

EACH MEMBER OF THE COURT: I do.

NOTE. If the MJ has not previously been sworn, the members lower their hands but remain standing while the TC administers the oath to the MJ, who raises his right hand.

TC: You (name of military judge) do swear (or affirm) that you will faithfully and impartially perform, according to your conscience and the laws applicable to trials by courts-martial, all the duties incumbent upon you as military judge of this court. So help you God. **MJ sworn**

MJ: I do.

NOTE. If any members of the prosecution have not previously been sworn, the MJ administers the oath to them as they raise their right hands:

MJ: You, Captain _____ and Lieutenant _____, do swear (or affirm) that you will faithfully perform the duties of trial counsel in the case now in hearing. So help you God.

TC AND ASST TC: I do.

NOTE. If any members of the defense have not previously been sworn the oath is then administered to them by the MJ as they raise their right hands:

MJ: You, Major _____, Lieutenant _____, (and Mr. _____,) do swear (or affirm) that you will faithfully perform the duties of defense (and individual) counsel in the case now in hearing. So help you God. **Defense sworn**

DC (ASST DC AND IC): I do.

NOTE. All persons except the TC are then seated.

MJ: The court is assembled.

NOTE. If it appears that any witnesses in the case are present in the courtroom, the MJ should announce:

MJ: Unless they are required to be present for other reasons, all persons expecting to be called as witnesses in the case of _____ will withdraw from the courtroom.

NOTE. The TC now states the general nature of the charges and discloses every ground for challenge believed by him to exist in the case (62*b*). When any charge or specification has been withdrawn, the TC should insure that the court is not made aware that the withdrawn charge or specification was ever preferred. See 56*d*. If the MJ denied a challenge against himself at an Article 39(a) session held prior to **Disclosing grounds for challenge**

assembly, the challenge may be renewed at this time only for good cause such as newly discovered evidence. (62*d*)

—nature of charge

TC: The general nature of the charges in this case is _____; the charges were preferred by _____; forwarded with recommendations as to disposition by _____ (_____) (and _____); and investigated by _____. Neither the military judge nor any member of the court will be a witness for the prosecution.

NOTE. All persons who have forwarded the charges should be stated.

—grounds disclosed by records

TC: The records of this case disclose [no grounds for challenge] [grounds for the challenge of _____ for the following reasons: he (is not eligible to serve as _____) (is the accuser) (was the investigating officer) (forwarded the charges with recommendation as to disposition) (has previously participated in the case as _____) (is an enlisted member of the same unit as accused) (_____)].

—grounds disclosed by enlisted members

TC: Records indicate that the accused is a member of _____. If any enlisted member of the court is now a member of the same unit, it is requested that he so state.

—grounds disclosed by members

TC: If any member of the court or the military judge is aware of any matters which he believes may be a ground for challenge by either side against him, he should now state such matters. If a statement is to be made, it should be made so as to state the general nature of the matter and not any specific facts which might tend to disqualify other members when heard by them.

NOTE. See 62*b* as to disclosing grounds for challenge. If disclosed grounds for challenge are undisputed and are within the first eight grounds enumerated in 62*f*, the MJ must excuse himself or the member challenged forthwith. If the grounds disclosed are other than the first eight grounds, and relate to the MJ, he may excuse himself. If they relate to a member, his ruling on the challenge is made within his sole discretion. See Art. 41 and 62.

Challenges: —procedure

NOTE. Before exercising their right to challenge for cause, the TC and DC may question the MJ and members of the court, either individually or as a group, to determine the existence of facts which may be the basis for a challenge for cause (62*b*). It is optional with the counsel conducting the inquiry whether a member being questioned shall be required to answer under oath. See 114*g* for the form of the oath. As to limitations on inquiry into the eligibility of MJ see 62*g*. The MJ may direct that the examination of the MJ or a member be conducted out of the presence of the remaining members of the court. 62*b*.

The TC may present to the members prior to challenges copies of the charges and specifications *upon which the accused is to be arraigned* if the DC consents.

See 62*h* concerning the procedure to be followed on challenges. A challenged member will be afforded the opportunity to make a statement with respect to the challenge. When the MJ has been challenged, he shall continue to rule on interlocutory questions arising during the hearing even though he may at that time be making a statement as to his competency. After the hearing on a challenge for cause has been completed, the MJ will determine the relevancy and validity of the challenge.

Challenges for cause should be made immediately following assembly of the court, but the MJ may allow a challenge for cause to be presented at any stage of the proceedings. Challenges for cause may again be presented, even though once overruled, if for good cause such as newly discovered evidence (62*d*).

—by prosecution (for cause)

TC: The prosecution (has no) challenges for cause (_____ on the ground _____).

(peremptory)

TC: The prosecution (has no peremptory challenge) (desires to challenge peremptorily _____).

NOTE. As to peremptory challenges, see 62*e*. When the right to make a peremptory challenge is exercised, the challenged member will be excused forthwith.

—by defense

TC: Does (any of) the accused desire to challenge any member of the court or the military judge for cause?

NOTE. When there is more than one accused, the challenges of each for cause are ordinarily disposed of before their peremptory challenges are made.

DC: No. (The accused challenges _____ for cause on the ground _____.) (for cause)

TC: Does (any of) the accused wish to exercise his right to one peremptory challenge against any member? (peremptory)

NOTE. Each accused is entitled to one peremptory challenge.

DC: The accused, _____, (has no peremptory) challenges (_____ _____ peremptorily). (_____).

NOTE. See 56 concerning limitations on withdrawing all or less than all charges and specifications after a trial has commenced and for action to be taken at this or any other time when less than all of them are withdrawn after the court has been made aware of their existence. Withdrawal of charges

NOTE. If the accused has not been arraigned at an Article 39(a) session, the military judge will announce:

MJ: The accused will now be arraigned. Arraignment

NOTE. The TC now should present to the members of the court and the MJ copies of only those charges and specifications *upon which the accused is to be arraigned,* unless distributed earlier with the consent of DC. —distribution of charges and specifications

TC: All parties to the trial have been furnished with a copy of the charges. Does the accused desire that they be read?

DC: The accused (waives the reading of the charges) (desires that the charges be read).

NOTE. If the accused desires that the charges be read, the TC now reads the charges and specifications on which the accused is to be tried, with the name and description of the accuser, the affidavit, and the reference for trial. They are copied verbatim into the record at this point, regardless of whether the accused waives the actual reading of the charges and specifications. If the accused waives the reading of the charges, the MJ should rule on the waiver and the TC should make the following summary: —charges and specifications read

MJ: The reading of the charges may be omitted. —waiver of reading charges

TC: The charges are signed by _____, a person subject to the code, as accuser; are properly sworn to before a commissioned officer of the armed forces authorized to administer oaths; and are properly referred to this court for trial by _____, the convening authority.

TC: The charges were served on the accused by (me) (_____) 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 accused may object to this defect in service (Art. 35). See 58c. If he does so, the court must grant a continuance at this point.

MJ: _____, I now ask you, how do you plead? Before receiving your pleas, I advise you that any motions to dismiss any charge or to grant other relief should be made at this time. —end of arraignment

NOTE. The arraignment is complete when the accused is asked how he pleads. Neither pleas nor motions are part of the arraignment (65*a*).

NOTE. If the accused had been arraigned at an Article 39(a) session held prior to assembly, the following procedure should be used in lieu of the above:

MJ: The accused was arraigned at a session conducted on _____. (The trial counsel will now distribute copies of the charges.)

NOTE. TC should present to the members copies of only those charges and specifications *upon which the accused has been arraigned* unless distributed earlier with the consent of DC.

NOTE. Motions for appropriate relief are waived if they are not made prior to plea or prior to the conclusion of any Article 39(a) session held prior to assembly, whichever occurs earlier (67*b* and 69*a*). Motions to dismiss should ordinarily be made before a plea is entered (67*a* and 68*a*). All proceedings and action on motions will be recorded. See 53*d*, 66, 67, 68, 69, and 122. Any explanation of the accused's right to move that a charge be dismissed because barred by the statute of limitations (53*h*, 68*e*), and the accused's response thereto, will be recorded. Motions

DC: The defense has (no) motions to be made.

NOTE. At this point the MJ may hold a hearing out of the presence of the court members to determine the substance of any motions and the procedure to be followed in disposing of them.

DC: The defense [moves that Specification _____, Charge _____, be dismissed because of former acquittal, on _____, by a court-martial convened pursuant to _____, dated _____, 19____, of the charge of _____ (reciting charge and specification in full)] [moves that _____].

Hearing on motion

NOTE. The MJ rules on all interlocutory questions arising during the proceedings. Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty or upon any interlocutory question other than the factual issue of mental responsibility of the accused is final and constitutes the ruling of the court. See 57 and 71*a*.

NOTE. The ruling on a motion may be:

Ruling on motion

MJ: (Subject to objection by any member of the court,) the motion is (denied) (granted). (The accused will not be required to plead to Specification _____, Charge _____.)

Voting on rulings

NOTE. Before entertaining an objection to a ruling on the factual issue of mental responsibility, the MJ will give appropriate instructions. If a member objects, the court will close and vote orally, beginning with the junior in rank. The court determines by a majority vote whether the ruling is sustained. A tie vote on these motions is a determination against the accused (57*f*; Art. 52(c)).

Amendment of charges

NOTE. 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 69*b*(3). For example, after a motion to sever is granted, the formal amendment may be in the following form:

Form of amendment after severance

MJ: Each specification is formally amended by striking out the words "and _____," the accused who is not now to be tried, and the words "acting jointly and in pursuance of a comon intent," and by inserting after the word "did," the words "in conjunction with _____," the accused who is not now to be tried. Trial will proceed on the charges as amended.

Request for hearing on guilty plea

NOTE. When no motions are made or when the DC indicates that he has no further motions, the disposition of pleas will follow. If the accused entered his pleas at an Article 39(a) session prior to assembly and his pleas have been accepted, the TC should announce the pleas.

TC: At a session of this trial held on _____ the accused entered the following pleas: _____.

NOTE. If the accused pleaded guilty at an Article 39(a) session held prior to assembly, and findings of guilty were entered, the MJ should announce the findings at this time if permitted by regulations of the Secretary concerned.

HEARING ON PROPOSED GUILTY PLEA(S)

DC: The accused intends to plead guilty to (_____).

Form of explanation of plea of guilty

NOTE. In any case in which a plea of guilty is to be entered, the MJ should explain the meaning and effect of the guilty plea. This should be done out of the presence of the court members in the manner set forth in 70*b*(2) and (3). The following inquiry and explanation may be used:

MJ: Have you had sufficient opportunity to consult with your counsel regarding your plea(s) in this case?

—consultation with DC

ACCUSED: Yes (No), sir.

NOTE. If the answer is "no," the necessary time will be made available for consultation.

—statute of limitations

NOTE. If the accused pleads guilty to a lesser included offense against which the statute of limitations has apparently run, the MJ should insure that the accused is aware of his right to interpose the statute in bar of trial as to that offense (53*h*, 68*c*).

NOTE. The MJ may consult with the TC and DC as to their opinions of the maximum authorized punishment for the offenses to which the accused plans to plead guilty and allow them to submit legal authority if there is disagreement.

MJ: The maximum authorized punishment for the offense(s) to which you propose to plead guilty is (normally) (_____). —determination of punishment

NOTE. If a bad-conduct discharge would be authorized only if the accused is convicted of two or more offenses the confinement for which is six months or more, the accused should be so informed (Section B, 127c). If the maximum punishment would be increased by proof of admissible prior convictions after findings (75b(2); Section B, 127c), the advice should include the prospective effect of proof of these convictions. This supplementary advice may take the following form: "*However, [if the court receives evidence of two or more previous convictions adjudged during the three years next preceding the commission of any offense to which you plead guilty, the maximum punishment would be: a bad-conduct discharge, confinement at hard labor for _____, forfeiture of all pay and allowances, (and reduction to the lowest enlisted grade; (and)] [if the court receives evidence of three or more previous convictions adjudged during the year next preceding the commission of any offense to which you plead guilty excluding periods of unauthorized absence, the maximum punishment would be: a dishonorable discharge, confinement at hard labor for _____, forfeiture of all pay and allowances, (and reduction to the lowest enlisted grade)].*" —advice as to punishment —effect of previous convictions on punishments

MJ: Do you understand that the maximum authorized punishment for the offense(s) to which you plan to plead guilty is as I have just explained?

NOTE. If it appears that the accused was previously of the opinion that the maximum authorized punishment was other than determined by the MJ for the offense or offenses to which he plans to plead guilty, he will be given an opportunity to consult further with the DC and thereafter express any changes in his proposal to plead guilty. —accused's understanding of punishment

MJ: _____, you have proposed to plead guilty to (Specification _____, Charge _____) (the lesser included offense of _____) (all the specifications and charges). By so doing, you will admit every act or omission and every element alleged with respect to the offense (offenses) to which you plead guilty. Your plea will subject you to (a) finding(s) of guilty without further proof of, (that) (those) offense(s), in which event you may be sentenced by the court to the maximum punishment authorized for (it) (them). You are legally entitled to plead not guilty and place the burden upon the prosecution of proving your guilt of (that) (those) offense(s). Your plea of guilty will not be accepted unless it appears that you understand its meaning and effect and that you are voluntarily pleading guilty because you are convinced that you are in fact guilty. If you are not convinced that you are in fact guilty, you should not allow any other considerations to influence you. —general explanation

MJ: Do you understand this explanation of the meaning and effect of your plea of guilty?

ACCUSED: (Yes, sir). (_____).

MJ: Are you voluntarily pleading guilty?

ACCUSED: (Yes, sir). (_____). —additional explanation

MJ: Are you convinced that you are in fact guilty?

ACCUSED: (Yes, sir). (_____).

NOTE. If the MJ considers it appropriate or if required by the Secretary concerned, further inquiry and a more detailed explanation may be conducted. This may include, for example, a detailed explanation of the elements of the offenses, inquiry into the reason for the guilty pleas, and inquiry into and explanation of any agreement involved in connection with the pleas.

MJ: Understanding the things we have discussed, do you still desire to plead guilty as previously indicated? —verification of guilty plea

ACCUSED: Yes, sir. (I desire to plead _____). —acceptance of guilty plea

NOTE. If the accused persists in his proposal to plead guilty and the MJ finds cause to doubt its providence, he may discuss the question further. In any case, the MJ should advise the DC of his decision as to accepting or rejecting the guilty pleas:

MJ: [The plea(s) of guilty will be accepted.] [The plea(s) of guilty (to _____) will not be accepted (because _____)].

TERMINATION OF HEARING

NOTE. The pleas are now entered in the presence of the court members. The accused and his counsel rise while entering the pleas. In joint and common trials, each accused will plead separately.

DC: The accused: _____, pleads:
To all Specifications and Charges: (Not guilty) (Guilty)

or

—guilty to one specification

To Specification 1 of the Charge: Guilty
To specification 2 of the Charge: Not guilty
To the Charge: Guilty

or

—with exceptions and substitutions

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 _____: (Guilty) (Not guilty, but guilty of a violation of Article _____).

etc.

MJ: The plea(s) of guilty (is) (are) (is not) (are not) accepted.

Erroneous advice

NOTE. If a plea of guilty has been entered and it appears later that the accused was erroneously advised that the maximum punishment was other than that legally authorized for the offense or offenses to which he pleaded guilty, the MJ should advise him of the correct maximum punishment and give him an opportunity to withdraw his plea of guilty. See 70*b* for other situations which may warrant the withdrawal of an accepted guilty plea.

NOTE. Findings of guilty of the charge and specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote after a plea of guilty has been accepted by the MJ (70*b*). Findings are entered when the MJ announces that the accused has been found guilty in accordance with his plea. A sample announcement which may be used when the accused has pleaded guilty to all charges and specifications is as follows:

MJ: _____, it is my duty as military judge to inform you that, in accordance with your pleas of guilty, this court finds you, of all the specifications and charges: Guilty.

Presentation of prosecution case

TC: The prosecution has (no) (an) opening statement.

NOTE. No opening statement is required, and none should be made unless it will clarify the procedure to be followed by the TC. See 44*g*(2) as to matters that may be included in this statement when one is made. In this connection, also see 44*f*(3).

Oral stipulation

TC: With the consent of the accused, the prosecution and defense stipulate _____.

NOTE. Prior to the acceptance of any stipulation, the MJ should determine that the accused joins in the stipulation. See 154*b*.

MJ: The stipulation is (not) accepted.

Introduction of witness

TC: The prosecution calls as a witness _____.

NOTE. When the witness is sworn, he raises his right hand, and the TC administers the oath.

Oath of witness

TC: 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.

WITNESS: I do.

NOTE. A witness may be sworn by the oath indicated or by any oath recognized by his religion, or by such acts or ceremony as he declares binding on his conscience (112*d*). As to the competency of witnesses in general, see 148*a*.

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 the TC, whether the witness is called by him, by the defense, or by the court.

Formal questions

TC: State your full name, (grade, organization, station, and armed force) (occupation and residence).

WITNESS: _____.

TC: Do you know the accused?

WITNESS: _____.

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, and to state the name of the accused, if he knows. In appropriate cases, it will not be necessary to ask the second question, such as when the identity of the accused has already been established.

Direct examination

NOTE. Questions and answers are recorded exactly as spoken. Physical events which occur, and witnesses' identifications and illustrations given by motions, by gestures, or by reference to persons or other physical objects within the court's view, will be described as accurately as possible by the reporter, with assistance of the TC, DC, and MJ if necessary. If a witness points or gestures the record must indicate what he points to or how he gestures.

Use of interpreter

NOTE. At the beginning of testimony given through an interpreter, the record will indicate that an interpreter was used, but the questions and answers are recorded in the manner indicated above. See 114*e* as to form of oath and 50*b* as to technique of questioning through an interpreter.

NOTE. At the conclusion of direct examination the TC announces:

TC: The prosecution has no further questions.

Cross-examination

NOTE. After the prosecution has concluded the direct examination of a witness, the DC cross-examines or declines to cross-examine the witness. See 149*b*(1).

DC: The defense has no (further) questions.

Redirect and recross-examination

NOTE. If the defense cross-examines the witness the TC may conduct a redirect examination; after he has concluded, the DC may similarly conduct a recross-examination. See 149*b*(2). When both the TC and DC have concluded their questions the TC asks the court:

Examination by the court

TC: Are there any questions by the court?

NOTE. Any member wishing to question the witness first secures the permission of the MJ. The MJ may limit questioning and may require questions to be submitted to him in writing (149*b*(3)). Written questions, whether or not allowed by the MJ, should be appended to the record as appellate exhibits. See 54*b*.

If either the TC or DC wishes to ask further questions of the witness after his examination has been turned over to the court, permission of the MJ should be secured. These requests should, in general, be granted, subject to the MJ's discretionary power to limit or reject superfluous interrogation. However, if new matter, not properly the subject of cross-examination of the witness on his previous testimony, is elicited by questions of the court or its members, both parties will be permitted to cross-examine the witness upon the new matter. See 149*b*(3).

When questioning of the witness is concluded, the MJ announces:

Excusing witness

MJ: The witness is excused (, subject to recall).

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. In an appropriate case (53*f*), the witness may be instructed as follows:

Warning witness

MJ: You are instructed not to discuss your testimony in this case with anyone except the counsel or the accused. You will not allow any witness in this case to talk to you about the testimony he has given or which he intends to give. If anyone, other than counsel or the accused, attempts to talk to you about your testimony in this case, you should make the circumstances known to the counsel for the side originally calling you as a witness.

Recalled

NOTE. When a witness is recalled, the TC reminds the witness, after he has appeared before the court:

TC: You are reminded that you are still under oath.

Objections:

NOTE. Objections are treated as follows:

TC: What was the accused carrying?

DC: Objection. Any answer to that question is immaterial.

—argument

NOTE. After hearing pertinent argument, if any, either before the members of the court or out of their presence as appropriate (see 57*g*(2)), the ruling should be made in substantially the following form:

—ruling

MJ: The objection of defense counsel is (sustained) (overruled).

Striking testimony:

NOTE. Any remarks or testimony ordered stricken are nevertheless *fully recorded,* although they are not considered by the court as evidence (82*b*(2)). For example:

TC: What was the color of the hat that the accused was wearing?

WITNESS: According to what the police officers told me, he was wearing a black Homburg.

—motion

DC: I move that answer be stricken as hearsay.

—ruling

MJ: The answer will be stricken, and the court is instructed to disregard it.

Admission for limited purpose

NOTE. The MJ should give such further instructions in this regard as he deems appropriate. When evidence is admitted only for a limited purpose, the MJ should give appropriate limiting instructions. See 57*a*(2), 138*g*, 140*a*, and 153*b*(2)(*c*).

Exhibits:

NOTE. If documentary evidence or other material things had been admitted in evidence at previous Article 39(a) session of the trial, counsel may with the permission of the military judge simply read or show the evidence to the court members. If the documentary evidence or other material things have not previously been admitted in evidence, the following procedure should be followed:

—marking for identification

DC: Request that the reporter mark this exhibit for identification.

NOTE. The reporter is responsible for keeping a list of exhibits marked for identification, and also as finally admitted in evidence. Prosecution exhibits should be *numbered* consecutively; defense exhibits should be *lettered* consecutively. To clarify the proceedings in regard to exhibits, they should not be renumbered or relettered when admitted in evidence, but should be admitted by the same number or letter they bore "for identification," even though omissions thereby appear in the sequence of numbers or letters of exhibits finally admitted. Ordinarily, the words "for identification" are simply lined out when the exhibit is admitted in evidence.

The reporter will mark on the exhibit, or a tag affixed thereto, the appropriate number or letter and state, for example:

REPORTER: This will be Defense Exhibit C for identification.

NOTE. The exhibit is shown to the other side, which is given an opportunity to examine it.

—identification

DC (TO WITNESS): Do you recognize Defense Exhibit C for identification?

WITNESS: I do.

DC: What is it?

WITNESS: It is a watch (letter) I found in the accused's pocket when I searched him.

DC: How do you recognize it as being the same one?

WITNESS: _____.

NOTE. When counsel is ready to offer the exhibit in evidence, he states to the court:

—offer

DC: Defense Exhibit C for identification is offered in evidence as Defense Exhibit C [and permission is requested to withdraw it at the conclusion of the trial and substitute (a written description) (true copy) (photograph) therefor].

—objection

TC: I object because _____.

NOTE. An exhibit need not be offered in evidence at the time referred to by the witness, and may be held for introduction later in the trial. However, opposing counsel must be given an opportunity to examine it in order that proper cross-examination of the witness in regard to the exhibit may be conducted.

NOTE. After the offer is made, cross-examination may be conducted by opposing counsel, and other evidence may be offered and arguments made by either side prior to a ruling by the MJ as to whether the exhibit will be admitted in evidence. At his discretion, with or without request by either counsel, the MJ may direct that these arguments be heard in an out-of-court hearing. See 57*g*(2).

—ruling

MJ: The objection is (sustained) (overruled). [Defense Exhibit C for identification is admitted in evidence as Defense Exhibit C] [and a (description) (true copy) (photograph) may be substituted].

NOTE. Unless the testimony of a witness has developed a full and accurate description of an object to be withdrawn later (54*d*), counsel or the MJ should at this time give a verbal description of the object for the record. Any description substituted for real evidence should be accepted by both sides. If there is any disagreement, it will be resolved by a ruling of the MJ.

—description of article for the record

NOTE. If an exhibit is marked for identification but not admitted in evidence, either it, or a description, true copy, or photograph thereof should be appended to the record (54*d*).

NOTE. If a writing which is to be attached to the record is read to the court in its entirety, the record need only state that the exhibit was read, and it is unnecessary to quote the writing verbatim in the record. However, when there are any deletions, interpolations, or alterations in the reading, or if it is interrupted by other matters, the record should reflect the exact circumstances.

NOTE. Properly authenticated official records and banking entries are marked by the reporter and shown to opposing counsel. See 143*b*(2) and (3) concerning their authentication. In an appropriate case the offer may be as follows:

—authenticated official records and banking entries

TC: Prosecution Exhibit 17 for identification, a duly authenticated extract copy of the morning report of _____, is offered in evidence as Prosecution Exhibit 17.

NOTE. Prior to the acceptance of a written stipulation the MJ should determine that the accused joins in the stipulation. See 154*b*. A written stipulation of facts or of the content of a writing are offered and admitted in the normal manner prescribed for prosecution and defense exhibits, and they may be both read and submitted to the members of the court. When a written stipulation of testimony or other testimony contained in documentary form, such as a deposition, is ruled admissible, the document or an appropriate part thereof is read in evidence, it is marked as an appellate exhibit for appending to the record, and the document itself is not shown to the members of the court. See 145 and 154*b*(2).

—written stipulations and other admissible documentary testimony

NOTE. Before the confession or admission of the accused can be introduced in evidence against him, there must be an affirmative showing that it was voluntary (140*a*). If the MJ considers it necessary, he may satisfy himself that the accused is aware of his right to testify for the limited purpose of showing the circumstances under which the statement was made or that he did not in fact make the statement without subjecting himself to cross-examination upon other issues (149*b*). The MJ may do this, out of the hearing of the court members, by inquiring of the DC as to whether the accused has been so advised or by explaining the right to the accused in accordance with 53*h* and 140*a* as follows:

—confessions; admissions

MJ: _____, the prosecution has offered in evidence a statement allegedly made by you and has introduced evidence tending to show that it was voluntarily made by you. As the accused in the case you have the right at this time to introduce any evidence you may desire relevant to the circumstances under which the statement was obtained or relevant as to whether the statement was or was not in fact made by you. You also have the right to take the stand at this time as a witness for the limited purpose of testifying as to these matters. If you do that, whatever you say will be considered and weighed as evidence by the court just as is 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 statement or as to whether the statement was or was not in fact made by you, 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 statement 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.

—(explanation of accused's right to limit his testimony)

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 the statement was voluntary or that it was in fact made by you, nor can your silence be commented upon in any way by the trial counsel in addressing the court. Do you understand your rights?

ACCUSED: Yes, sir. (_____.)

MJ: Proceed.

Excluding members:

NOTE. As previously indicated, certain motions may be properly made out of the presence of the court members. Additionally, other matters should be conducted out of their presence, view, or hearing. See, for example, 53*h*, 57*a*(2), 57*g*(2), and 73*d*. The procedure for an in-court conference requested by counsel may be as follows:

—in-court conference

DC(TC): I would like to confer with the military judge out of the hearing of the members of the court.

MJ: Counsel for both sides, the accused, and the reporter will come forward.

NOTE. In-court conferences and any action thereon are normally recorded verbatim. See 39*c*.

—out-of-court hearing

NOTE. The out-of-court hearing rather than the in-court conference is appropriate for dealing with matters which will require more than a short period of time to resolve. When the MJ decides to hear a matter out of the presence of the members, he should advise them that an out-of-court hearing is required and of the approximate time that will be required to conduct it. He should then declare a recess or adjournment as may be appropriate. The hearing should be held in substantially the following manner:

(opening of hearing)

MJ: This out-of-court hearing will come to order. Let the record show that during the (adjournment) (recess), this hearing is being held out of the presence of the members of the court. It is attended by the military judge, the accused, counsel for both sides, and the reporter.

(conduct and recording of hearing)

NOTE. The necessary proceedings are now held. They are recorded and incorporated in the record as indicated in 57*g*(2). Prior to concluding the hearing, if he makes a ruling or decision at this time, the MJ should announces it.

(termination of hearing)

MJ: This out-of-court hearing is terminated.

Adjournment or recess

NOTE. In the event of adjournment (a period extending beyond the same day) or a recess, the procedure should be substantially as follows:

MJ: The court will (adjourn) (recess) until _____ hours (, _____ 19___).

Reassembling

MJ: The court will come to order.

NOTE. If the place of trial is changed, or the court reassembles at a place other than that where it adjourned, the TC will so state for the record. See 54*e* as to views and inspections.

***Accounting for* personnel after adjournment or recess**

TC: All parties to the trial who were present when the court (adjourned) (recessed) are again present in the court (except _____).

NOTE. The term "parties to the trial," as used above, includes the military judge, counsel, the accused, the reporter, and, when appropriate, the members of the court and the interpreter. It also includes a witness who was not excused prior to the adjourning, recessing, or closing of the court. If a member of the court is absent from a session at which the presence of members is required after assembly, the absence must be shown to have been the result of challenge, physical disability, or the order of the convening authority (41*d*(4); Art. 29(a)). The reason for the absence must be reflected in the record even if it resulted from removal by the convening authority (see 37*b*).

Absence of member

TC: Let the record reflect that _____ is absent because (he is seriously ill) (he has been removed from the court by order of the convening authority because _____. I request that this copy of _____ orders, No. _____, dated _____, be appended to the record).

New member:

TC: Captain _____ is now present and has been detailed to the court by _____.

NOTE. If such a member was detailed by the same orders as convened the court, it will be so announced; if by an order not previously incorporated in the record, the trial counsel will announce:

TC: A copy of the orders detailing Captain _____ will be attached to the orders convening the court which are to be inserted in the record.

NOTE. Proceedings concerning excusing, swearing, and challenging of the new member are substantially as for original members. If the individual joins the court as a member, the trial continues:

MJ: The record of all prior proceedings in this case which were held in the presence of the court members will be read to the new member by the reporter. —reading record

NOTE. After the record is read:

MJ: The proceedings having been read to date, the (trial counsel) (defense counsel) may proceed.

NOTE. When the prosecution has completed its case:

TC: The prosecution rests. Prosecution rests

NOTE. The DC may appropriately make any motion for a finding of not guilty at this time or after the defense has rested, or both. The MJ rules finally on a motion for a finding of not guilty (57, 71*a*, Art. 51(b)). Motion for a finding of not guilty

DC: The defense has (no) (an) opening statement. Presentation of the defense case

NOTE. The defense presents an opening statement, if desired, and introduces stipulations, witnesses, and material evidence in a manner similar to that followed by the TC, except that the TC administers the oath to all witnesses and asks the first formal questions. The DC then takes over direct examination, and the further examination of the witness continues in the normal manner. See 149*b*.

NOTE. The accused may take the stand as a witness in his own behalf, but only at his own request. If he elects to remain silent, no comment can be made upon his silence. If he testifies concerning certain specifications only, cross-examination by the TC and the court must be limited accordingly. See 148*c*, 149*b*(1), and 150*b*. When the accused elects to testify, the DC should announce: Accused as a witness:

DC: The accused elects to take the stand and testify as a witness in his own behalf. His testimony will (concern all the charges and specifications) (be limited to _____).

NOTE. The MJ may assume that the accused has been correctly advised of his rights to testify. However, when he considers it necessary, he may, out of the hearing of the court members, inquire of the DC as to whether the accused has been advised of his rights, or give the explanation below or both (53*h*). —explanation of rights

MJ: _____, 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 as is the testimony of other witnesses, and you can be cross-examined on your testimony by the trial counsel and the court. (*The following may be used if there is more than one specification:* If your testimony should concern less than all of the offenses charged against you and you do not desire to or do not testify concerning the others, then you may be questioned about the whole subject of those offenses concerning which you do testify, but you will not be questioned about any offenses concerning which you do not testify unless the cross examination is relevant to an offense concerning which you did testify.

Second, 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 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 counsel in addressing the court.

Take time to consult with your counsel and then advise the court whether you wish to testify or to remain silent.

DC: The accused _____

NOTE. Should the accused elect to take the stand as a witness, the TC will administer the oath and ask the following preliminary question, after which the procedure follows that of other defense witnesses:

TC: State your full name, rank, organization, and station. —preliminary questions

ACCUSED: _____

TC: Are you the accused in this case?

ACCUSED: Yes, sir.

NOTE. When he defense has completed its case:

Defense rests

DC: The defense rests.

Rebuttal

NOTE. The TC may call or recall witnesses in rebuttal; thereafter, the DC may call or recall witnesses in rebuttal. Upon completion of any rebuttal testimony, the TC should announce:

TC: The prosecution has no further evidence to offer. Does the defense have any further evidence to offer?

DC: It does (not).

Recall and reopening the case

NOTE. The MJ may permit or cause the recall of any witness, including the accused, and the reopening of the case by either or both sides for the introduction of testimony previously omitted (140*c*).

Witness called by court

TC: Does the court wish to have any witnesses called or recalled?

MJ: It does (not).

NOTE. The right of the members of the court to cause the recall of a witness or to call for additional evidence is subject to an interlocutory ruling by the MJ as to the propriety therefor. See 54*b*.

Unless the MJ directs otherwise, the TC will conduct the direct and redirect examination of witnesses called by the court in the same manner as if the witness had been called by the prosecution. However, the MJ may permit the court members to question the witness directly, or he may do so himself, at any time after the TC has asked the initial formal questions. See 149*b*(3) for details concerning the proper examination of a witness by the court or a member and for limitations which the MJ may place on this examination.

Hearing on instructions

NOTE. Before arguments, the MJ may hold a hearing out of the presence of the court for the purpose of discussing proposed and requested instructions. See 73.

Arguments by counsel

TC: The prosecution waives opening argument. (_____)

NOTE. See 72. The TC 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; they may be oral or written. Either the TC or DC may call to the attention of the court any matters likely to be overlooked by it, and make any reasonably pertinent argument on the facts of the case and how they relate to the law involved. Oral arguments are recorded verbatim. A written argument will be attached as an exhibit for the side which presented it.

NOTE. If there are more than one accused, the counsel for each accused may make separate argument.

After arguments or waiver thereof:

Conclusion of case

MJ: Has the prosecution anything further to offer?

TC: It has (not).

MJ: Has the defense anything further to offer?

DC: It has (not).

Charge to court:

NOTE. Before the court retires into closed session the MJ will, in open session, instruct the court (Art. 51(c)).

—guilty pleas

NOTE. If there is an accepted plea of guilty to an offense and a finding of guilty has not been entered without vote, the MJ may invite the attention of the court to the fact that no further proof of the offense to which the plea relates need be introduced by the prosecution to warrant a finding of guilty of that offense (73*a*).

—not guilty pleas

NOTE. The instructions given by the MJ will necessarily vary in each case because of the different facts and circumstances involved. The MJ shall give the mandatory instructions required by 73 and Article 51(c) and any additional instructions required by the law in light of the circumstances of the case. When an issue is raised as to the admissibility of a confession or admission, he should instruct the court as to the effect of his ruling admitting the statement and the duty of the court in this regard. See 140*a*. In addition the MJ may instruct, on his own initiative or request of counsel, upon any additional matters which he considers appropriate. For example, see the matters covered in 73*c*, 74*a*, and 74*d*.

(concluding charge)

NOTE. The MJ may appropriately conclude his instructions with the following additional charge:

MJ: The final determination as to the weight of the evidence and the credibility of the witnesses in this case rests solely upon you members of the court. You must disregard any comment or statement made by me during the course of the trial which may seem to indicate an opinion as to the guilt or innocence of the accused, for you alone have the independent responsibility of deciding this issue. Each of you must

impartially resolve the ultimate issue as to the guilt or innocence of the accused in accordance with the law, the evidence admitted in court, and your own conscience.

NOTE. The MJ may provide the court with a findings worksheet to assist the court in making its findings. If used, the findings worksheet should be attached to the record as an appellate exhibit.

Court closed for findings Closed session

MJ: The court will be closed.

NOTE. Only the members of the court will be present during deliberation and voting (74*d*(1)). If a separate room is provided for deliberation by the members, all members retire to this room. Otherwise, all persons including the MJ leave the courtroom except the members of the court. Neither the MJ nor counsel may consult with the members in closed session. Advice of the MJ may be sought when necessary, but the court will be opened and the advice will be obtained in open session in the presence of both counsel and the accused. These proceedings shall be made a part of the record. See 74*e* and Articles 26(b) and 39.

Voting on findings

NOTE. When the court has been closed the members deliberate and vote on the findings. See 74 for the method of voting; the number of votes required, and rules applicable to reconsideration of the findings.

Additional advice on findings

NOTE. After a general court-martial has finally voted on the findings in closed session, the court may open and ask the MJ for assistance so that it may put the findings in proper form. (74*f*(1)) Advice may also be requested in open session at any time before a final vote is taken on findings in any case of doubt which may arise (74*e*).

The president, before announcing the findings, may present them to the MJ to permit him to examine them for defects in form. If it appears to the MJ that the court has made an ambiguous or inconsistent finding, he may give the court additional instructions. Before doing so, he should advise both sides of the circumstances requiring the additional instructions and permit argument thereon. See 74*d*(3) concerning reconsideration of findings and 74*g* regarding correction of incorrectly announced findings.

Findings announced:

MJ: The court will come to order.

TC: All parties to the trial who were present when the court closed are now present (except _____).

NOTE. If the accused is found not guilty of all specifications, the president announces:

—acquittal

PRES: _____, it is my duty as president of this court to advise you that the court in closed session and upon secret written ballot has found you not guilty of (the) (all) Specification(s) and Charge(s).

MJ: The court will adjourn to meet on future call.

NOTE. Only the required fraction of votes should be announced, not the actual number of members who concurred in the findings of guilty (74*g*).

—conviction

PRES: _____, it is my duty as president of this court to inform you that the court in closed session 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 you: [Of (all) the Specification(s) and Charge(s): Guilty] [Of Specification _____, Charge _____: (Guilty) (Not guilty). Of charge _____: (Guilty) (Not guilty). Of Specification _____, Charge _____: Guilty, except the words "_____" and "_____" (, substituting therefor, respectively, the words "_____" and "_____," of the excepted words, not guilty, of the substituted words, guilty). Of Charge _____: (Guilty) (Not guilty, but guilty of a violation of Article _____)].

(itemized)

(with exceptions and substitutions)

NOTE. If the accused has been tried by the MJ alone and only general findings are involved, the MJ will announce as listed below. For special findings see 74*i*, and appendix 8*f*.

—acquittal by MJ alone

MJ: _____, it is my duty as military judge to advise you that this court finds you not guilty of (the) (all) Specification(s) and Charge(s). The court will adjourn to meet on future call.

—conviction by MJ alone

MJ: _____, it is my duty as military judge to inform you that this court finds you: [Of (all) the Specification(s) and Charge(s): Guilty] [Of Specification _____, Charge _____: (Guilty) (Not guilty). Of Charge _____: (Guilty) (Not Guilty). Of Specification _____, Charge _____: Guilty, except the words "_____" and "_____" (, substituting therefor, respectively, the words "_____" and "_____", of the excepted words, not guilty, of the substituted words, guilty). Of Charge _____: (Guilty) (Not guilty, but guilty of a violation of Article _____)].

NOTE. For further instructions as to the forms of findings, see 74 *b* and *c*; for example of proper findings, see the pertinent portions of 158 and appendices 10*a* and 15*a*.

Presentence procedure

MJ: The court will now hear the personal data concerning the accused shown on the charge sheet, and any other information from his personnel records relevant to sentencing and will receive evidence of previous convictions, if any.

Personal data from charge sheet:

TC: The first page of the charge sheet shows the following data concerning the accused: _____

—verified by accused

TC: Does the accused have any objection to the data as read?

DC: (He does not.) (The accused objects to _____)

NOTE. If any of the data are in error, corrections should be made. Errors claimed by the accused which the TC is not readily able to verify will, if of minor importance, be noted in the record and no further action taken upon them; if of material importance the MJ may direct verification of the error claimed before the court proceeds to vote upon the sentence.

Evidence of previous convictions

NOTE. If the TC has no evidence of admissible previous convictions, he should state:

TC: I have no evidence of previous convictions.

NOTE. If the TC has evidence of admissible previous convictions, it is marked, offered in evidence, and admitted in the same manner as prescribed above for *other* documentary evidence. See 75b(2).

Summary of information from personnel records for sentencing purposes.

NOTE. At this time the TC may present to the MJ any personnel records of the accused or copies or summaries thereof as provided in paragraph 75*d*. The MJ will determine what information from these records is relevant to the imposition of an appropriate sentence. If before court members, the TC will read the relevant information to them or have the documents marked as exhibits, made a part of the record, and presented to the court members.

Matter in aggravation, mitigation, or extenuation

NOTE. This is the proper time for counsel to introduce matter in aggravation, if admissible (see 75*b*(3)), and matter in extenuation or mitigation and for the accused to make a statement if he desires 75*c*).

Rights of accused

NOTE. The MJ may assume that the accused has been correctly advised of his rights to testify. However, when he considers it necessary, he may, out of the hearing of the court members, inquire of the DC as to whether the accused has been advised of his rights, or give the explanation below, or both (53*h*):

MJ: _____, you are advised that you may now present evidence in extenuation or mitigation of the offense(s) of which you stand convicted. You may, if you wish, testify under oath as to these matters, or you may remain silent, in which case the court will not draw any inferences from your silence. In addition, you may, if you wish, make an unsworn statement in mitigation or extenuation of the offense(s) of which you stand convicted. This unsworn statement is not evidence, and you cannot be cross-examined upon it, but the prosecution may offer evidence to rebut anything contained in the statement. The statement may be oral or in writing, or both. You may make it yourself, or it may be made by your counsel, or by both of you. Consult with your counsel and advise the court what you desire to do.

DC: The accused _____.

NOTE. Any oral statement made by the accused or his counsel will be recorded verbatim. Any statement submitted in writing need only be attached as a defense exhibit.

NOTE. After presentation of matters in extenuation and mitigation by the defense and rebuttal by the prosecution, if any, counsel for both sides may present argument for an appropriate sentence. See 75*c*. **Arguments**

NOTE. Before closing the court for deliberation and voting on the sentence, the MJ shall instruct the court as required by 76*b*(1) and any other matters required by law. In addition the MJ may instruct, on his own initiative or request of counsel, upon any additional matters which he considers appropriate. For example, see the various other matters contained in 76. He may provide the court with a sentence work sheet similar to that in appendix 13 to assist the court in formulating its sentence, but if used it should be appended to the record as an appellate exhibit. See 81 for rules relating to rehearings and new and other trials. **Sentence instructions**

MJ: The court will be closed. **Court closed for sentence**

NOTE. Only the members of the court will be present during deliberation and voting (76*b*(2)). For this purpose, the members may retire to another room or all persons other than the members may be cleared from the courtroom. The MJ should not enter this closed session for any reason; however, the court may be given additional instructions in open session when it so requests or when the MJ considers it appropriate (76*b*(4)).

NOTE. See 76*b*(2) concerning the method of voting, 76*b*(3) for the number of votes required, and 76*d* regarding sentence reconsideration. **Voting on sentence**

NOTE. The sentence must be within the maximum limits prescribed in chapter XXV. As to rehearings and new and other trials, see 81*d* and Article 63. The court will adjudge a single sentence for all the offenses of which the accused was found guilty. A separate sentence must be adjudged for each accused. **Limitation on sentence**

MJ: The court will come to order. **Court opens**

NOTE. The president, before announcing the sentence, may present it, in writing, to the MJ for his examination. If the MJ notes any ambiguity or apparent illegality, he should bring the irregularity to the attention of the court. See 76*c* concerning reconsideration of sentence.

TC: All the parties to the trial who were present when the court closed are now present (except _____). **Sentence**

PRES: _____, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, (two-thirds) (three-fourths) (all) of the members present at the time the vote was taken concurring, sentences you: _____.

NOTE. It is customary for the accused to stand immediately before the officer announcing the sentence.

NOTE. As in the case of findings, only the required fraction of votes should be announced, not the actual number of members who concurred in the sentence.

NOTE. See 76*c* concerning the action of the MJ on any ambiguous or illegal sentence, sentence reconsideration, and correction of any incorrectly announced sentence. **Improper sentence**

NOTE. If the accused has been tried by the MJ alone the MJ announces:

MJ: _____, it is my duty as military judge to inform you that this court sentences you to _____.

MJ: Has the prosecution any other cases to try at this time?

TC: I have nothing further.

MJ: The court will adjourn to meet on future call. **Adjournment**

c. CONTEMPT PROCEDURE. See 118 and Article 48.

NOTE. The following is applicable to general and special courts-martial.

NOTE. When it becomes necessary for a court to take summary action on a contempt (118*a*), an example of its proceedings would be:

MJ (PRES): The proceedings in the case now before the court will be suspended. _____, you (have used menacing words and gestures in the presence of this court) (have disturbed the proceedings of this court by (riotous and) (disorderly conduct) (_____). As the record will show, you (have been warned repeatedly about your conduct) (have persisted in disturbing the proceedings of this court) (_____). For example, you (have threatened the court with action you will take against it because of its rulings;) (have been contemptuous and insolent in your objections and arguments;) (_____). **Advising offender**

Opportunity to show cause

You now have an opportunity to show cause why you should not be held in contempt.

NOTE. After hearing pertinent argument and evidence, if any, the following ruling will be made:

Court composed of MJ alone

MJ: The court holds you (not) guilty of contempt [and adjudges the following punishment: (to pay to the United States a fine of $50 and to be confined at hard labor for 10 days) (_____)].

Preliminary ruling

NOTE. In a court-martial with members, the following procedure is applicable after evidence, if any, has been presented, pertinent arguments have been heard, and such instructions have been given as will enable the members to understand the issue before them and the legal standards and procedure by which they will determine it if objection is made to the preliminary ruling (118*b*):

MJ (PRES): Subject to objection by any member of the court, it is my ruling that you should (not) be held in contempt.

NOTE. If, as a result of a ruling of the MJ or the president of a special court-martial without a MJ that is not objected to, there has been a preliminary determination that the person involved not be held in contempt, the court will resume its regular proceedings.

Voting on preliminary ruling

NOTE. If any member objects to a ruling of the MJ or the president of a special court-martial without a MJ, the court will close and determine by majority vote whether the ruling shall be sustained. See 118*b*. A tie vote shall be a determination in favor of the person involved.

Closed session

NOTE. If, as a result of the vote of the court, or a ruling of the MJ or the president of a special court-martial without a MJ that is not objected to, there has been a preliminary determination that the person involved be held in contempt, the MJ, or the president should give any instructions he considers appropriate, and the court will determine in closed session whether the person involved should be held in contempt, and, in the event it so determines, will assess a punishment. See 118*a*. Thereafter, the court opens and:

Holding of contempt and punishment

PRES: It is my duty as president of this court to inform you that the court, in closed session and upon secret written ballot, [has held you not guilty of contempt of this court] [two-thirds of the members present at the time the vote was taken concurring, holds you guilty of contempt of this court. And also in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, adjudges the folowing punishment: (To pay to the United States a fine of $50 and to be confined at hard labor for 10 days) (_____)]:
MJ (PRES): Proceed with the case.

d. **REVISION PROCEDURE.** See 80 and Article 62.

NOTE. The following is applicable to general and special courts-martial, and should be modified when these proceedings are conducted by a MJ alone.

Proceedings in revision

(MJ) (PRES): The court will come to order.

TC: All parties who were present when the court adjourned are now present (except _____). (Additionally, the following are present in the capacity indicated: _____.)

NOTE. No mention need be made of those who were not present at the close of the previous session unless they are now present. No member will sit in revision proceedings who was not present at the close of the last session attended by members, but all members who were present at the last session should be there. However, valid proceedings may be conducted when a quorum is present, if any absent member or members have been properly excused. See 41*d*(4) and Article 29(a). See 80*b* regarding the presence of other parties to the trial and the requirement that proceedings in revision may be taken only by the MJ who adjudged the findings and sentence, if trial was by MJ alone.

—directed by

TC: These proceedings in revision have been (directed by the following communication: _____ which will be inserted at this point in the record) (undertaken by the court on its own motion in order to _____).

NOTE. The MJ, or the president of a special court-martial without a MJ should give the court any instructions necessary for the proper accomplishment of the revision action, and he also may be requested by the court to give additional instructions concerning pertinent matter about which it is in doubt (80*c*). The case will not be reopened by calling witnesses or otherwise.

(MJ) (PRES): The court will be closed.

NOTE. After deliberation, action, and voting as is appropriate, the proceedings continue. **Court votes**

(MJ) (PRES): The court will come to order.

TC: All parties who were present when the court closed are now present (except _____).

PRES: The court in closed session 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, revokes its former findings and substitutes therefor the following findings: _____ **New findings**

NOTE. The findings should then be announced in one of the forms prescribed in appendix 8*b*.

PRES: The court in closed session and upon secret written ballot, (two-thirds) (three-fourths) (all) of the members present at the time the vote was taken concurring, revokes its former sentence and substitutes the following therefor: _____. **New Sentence**

NOTE. The sentence should be stated in one of the forms prescribed in appendix 13.

PRES: The court was closed and upon secret written ballot, (a majority) (two-thirds) (three-fourths) (all) of the members concurring the court adheres to its former _____. **Adherence to former action**

(MJ) (PRES): The court will adjourn to meet on future call. **Adjournment**

NOTE. The record is authenticated in the same manner as the record of trial. See appendix 9*b*.

e. FORM FOR REQUEST FOR TRIAL BEFORE MILITARY JUDGE ALONE

Headquarters, _____

United States of America v. _____	Request for Trial Before Military Judge Alone (Art. 16, UMCJ)

I have been informed that (*name and rank of military judge*) is the military judge detailed to the court-martial to which the charges and specifications pending against me have been referred for trial. After consulting with my defense counsel, I hereby request that the court be composed of the military judge alone. I make this request with full knowledge of my right to be tried by a court-martial composed of (commissioned) officers (and enlisted personnel).

_____, 19____. _____.
(Dated) Accused

Prior to the signing of the foregoing request, I advised fully the above accused of his right to trial before a court-martial composed of (commissioned) officers (and of his right to have such court consist of at least one-third enlisted members not of his unit upon his request).

_____, 19____. _____.
(Dated) Defense Counsel

Argument is (not) requested. _____.
Trial Counsel

I approve (disapprove) the foregoing request for trial before me alone.

_____, 19____. _____.
(Dated) Military Judge

f. SAMPLE FORMAT FOR SPECIAL AND GENERAL FINDINGS

United States of America v Sergeant Jean Birdbath: 000-00-000, US Army, Company A, 2nd Battalion, 2d Infantry.	Headquarters, III Corps, Ft Hood. SPECIAL AND GENERAL FINDINGS

On 7 January 1970 charges were preferred against the accused, Sergeant Jean Birdbath, 000-00-000, alleging desertion on or about 15 August 1968 from his organization, to wit: Company A, 2d Battalion, 2d Infantry, located at Ft Hood, Texas, until he was apprehended on or about 28 December 1969 in violation of Article 85, UCMJ.

On 15 January 1970 the accused was served with a copy of the charges, which were referred to trial by general court-martial by the Commanding General, III Corps, on 12 January 1970. Thereafter, the accused, after consultation with counsel and knowing the identity of the military judge, requested in writing under Article 16(1)(B), UCMJ, that he be tried by a court composed only of a military judge.

On 15 February 1970 the accused having appeared with counsel, entered a plea of not guilty to desertion but guilty to the lesser included offense of absence without leave, in violation of Article 86, UCMJ.

The issues raised by said pleading were duly heard before this court on 16 February 1970 and evidence received from the Government and the accused.

This court decides and finds as follows:

SPECIAL FINDINGS

1. The accused, Sergeant Jean Birdbath, at all the times herein mentioned was and now is a member of the United States Army.

2. The accused, Sergeant Jean Birdbath, did on 15 August 1968, absent himself without proper authority from his organization, to wit: Company A, 2d Battalion, 2d Infantry, located at Ft Hood, Texas.

3. The accused, Sergeant Jean Birdbath, intended at the time of absenting himself, to remain away permanently from his organization.

4. The accused, Sergeant Jean Birdbath, remained so absent until 28 December 1969, when he was apprehended at San Francisco, California.

5. The testimony of Sergeant Richard Roe, a witness for the defense, was unworthy of belief. Sergeant Roe, a friend of the accused stated that accused told him he intended to return to his unit after a short absence. Sergeant Roe's answers were given in a halting, hesitant and evasive manner. His friendship for the accused, his demeanor on the stand, and inconsistencies in his testimony convinced me that he was not telling the truth.

6. Prosecution evidence supporting the element of intent to remain absent permanently was most compelling. It was shown that the accused attempted to dispose of his uniform at the time he absented himself; that he used an assumed name during his unlawful absence; that he accepted permanent civilian employment, and that he expressed dissatisfaction with military service.

7. Upon the evidence in this case the accused is guilty beyond reasonable doubt of desertion terminated by apprehension as charged in the specification of the charge.

GENERAL FINDINGS

Sergeant Birdbath, it is my duty as military judge to inform you that this court finds you of the specification and charge: Guilty.

Dated: 17 February 1970. GREGORY HALL
Military Judge

g. SUMMARY

The summaries of records of the accused for presentencing purposes (75*d*) will be authenticated as follows:

CERTIFICATION: I certify that I am the official custodian of the personnel records of the above-named service member and that the above information has been truly and accurately extracted and summarized therefrom.	
Typed name, grade, and position of custodian	Signature of Custodian

Appendix 9

GUIDE FOR PREPARATION OF RECORD OF TRIAL BY GENERAL COURT-MARTIAL AND BY SPECIAL COURT-MARTIAL WHEN A VERBATIM RECORD IS PREPARED

---

a. RECORD OF TRIAL

Erasures

NOTE. Erasures or interlineations should be initialed by those who authenticate the record.

Margins

Pages will be numbered at the bottom; margins of 2½ inches will be left at the top to permit binding, and 1 inch at the bottom and left side of each page, using legal size paper.

Marginal notes

Words on the margins of this appendix are not part of the form of record.

Record to be complete

As a general rule, all proceedings in the case should be recorded verbatim, including oral arguments, subject to the instructional notes and examples shown in appendix 8 and herein. Also see 39*c*, 57*g*(2), and 73*d* in this connection.

Use of guide

This appendix is not a complete record of trial. It is to be used by the reporter and trial counsel as a guide in the preparation of the completed record of trial in all general and special court-martial cases in which a verbatim record is prepared. See 82 for instructions pertaining to the preparation of a record of trial by general court-martial and 83 for instructions pertaining to the preparation of a record of trial by special court-martial. The reporter and trial counsel should also consult appendix 8, as it shows the manner in which many items of procedure should be recorded.

Title

RECORD OF TRIAL

of

_____

(Last name, first name, middle initial) (Service number) (Rank or grade)

_____

(Organization and armed force) (Station or ship)

by

_____ COURT-MARTIAL

Convened by _____

(Title of convening authority)

_____

(Command of convening authority)

Tried at

_____ on _____ 19__

(Place or places of trial) (Date or dates of trial)

NOTE. The title should be followed by an index. The form for this index will be as prescribed in publications of the Secretary of a Department. However, it should cover important phases of the trial, witnesses who testified, and exhibits that are appended to the record.

COPIES OF RECORD

Copies of record

——————— copy of record furnished the accused as per attached certificate or receipt.

——————— copy(ies) of record forwarded herewith.

RECEIPT FOR COPY OF RECORD

Receipt for record

I hereby acknowledge receipt of a copy of the above-described record of trial, delivered to me at ——————— this ——————— day of ———————, 19——.

———————————————
(Signature of accused)

CERTIFICATE

———————, ———————, 19——.
(Place) (Date)

Certificate in lieu of receipt

I certify that on this day delivery of a copy of the above-described record of trial, including all exhibits admitted in evidence or descriptions thereof, was made to the accused, ——————— at ———————
(Name of accused) (Place of delivery)
———————, by ———————
(Means of effecting delivery, i.e., mail, messenger, etc.)
and that the receipt of the accused had not been received on the date this record was forwarded to the convening authority. The receipt of the accused will be forwarded as soon as it is received.

———————————————
(Signature of trial counsel)

Convening orders

Proceedings of a ——————— court-martial which met (at) (on board) ———————, at ——— hours, ——————— 19——, pursuant to the following orders:

NOTE. Here insert a copy of the orders convening the court and copies of any amending orders. Any request of an enlisted accused for enlisted court members will be inserted immediately following the convening orders, together with any declaration of the nonavailability of such enlisted persons (36*c*(2)).

Any request for trial by military judge alone (53*d*(2), 61*g*) or statement that qualified defense counsel (6*c*) or military judge (15*b*) could not be obtained will also be inserted at this point.

PERSONS PRESENT

PERSONS ABSENT

Accounting for personnel

NOTE. List military judge, if any, and all members of the court, prosecution, and defense as present or absent, as announced by the trial counsel. The record of an Article 39(a) session or trial by the military judge alone need only reflect that the members are absent and need not list the absent members by name. Only rank or grade and name should be shown unless service number is necessary to distinguish between two persons.

Presence of accused

The following named accused (was) (were) present: ———————
———————————————.

Swearing reporter

The detailed reporter, ———————, (was sworn) (had previously been sworn).

NOTE. The remainder of the record of trial follows the actual proceedings in court. The reporter records all the proceedings verbatim, subject to the instructions set forth in appendix 8 and herein.

Time of session

NOTE. The reporter should note and record the time and date of the beginning and ending of each session of the court, including the opening and closing of the court during trial. For example:

The (court) (session) was called to order at ——— hours, ——————— 19——.
The (court) (session was) (adjourned) (recessed) at ——— hours, ——————— 19——.
The court (closed) (opened) at ——— hours, ——————— 19——.

Administration of oaths

NOTE. It is not necessary to record verbatim the oath actually used, whether it be administered to a witness, a challenged member, the military judge, counsel, or the court members. Regardless of the form of oath, affirmation, or ceremony by which the conscience of the witness is bound (112*d*; app. 8*b*), only the fact that a witness took an oath or affirmation is to be recorded. However, if preliminary qualifying questions are asked a witness prior to the administration of an oath (see, for example, 148*b*), the questions and answers should be recorded verbatim. These preliminary questions and answers do not eliminate the requirement that an oath be administered. The following are examples of the recording of the administration of various oaths.

The detailed interpreter, _____, (was sworn) (had previously been sworn).

The (members of the court) (the military judge) and the personnel of the prosecution and defense (were sworn) (had previously been sworn).

(The challenged member was sworn to testify concerning his competency to act as a member of the court, and testified as follows:)

Accounting for personnel during trial

NOTE. After the reporter is sworn, he will record verbatim the statements of the trial counsel with respect to the presence or absence of personnel of the court, counsel, and the accused. The reporter should note whether, when a witness is excused, he withdraws from the courtroom or, in the case of the accused, whether he resumes his seat. Similarly, if the military judge excuses a member as a result of challenge and the member withdraws the reporter should note this fact in the record. In a special court-martial without a military judge, if a challenged member withdraws from the court while it votes on a challenge, is excused as a result of challenge, or resumes his seat after the court has voted on a challenge, the reporter should note this fact in the record.

Examples of the manner in which such facts should be recorded are as follows:

The (witness withdrew from the courtroom) (accused resumed his seat at the counsel table).

_____, the challenged member, withdrew from the court.

_____ resumed his seat as a member of the court.

Recording testimony

NOTE. The testimony of a witness will be recorded verbatim in a form similar to that set forth below for a prosecution witness:

_____ was called as a witness for the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:
Q. State your full name, (etc.) _____
A. _____.
Q. _____?
A. _____.

CROSS-EXAMINATION

Questions by the defense:
Q. _____?
A. _____.

REDIRECT EXAMINATION

Questions by the prosecution:
Q. _____?
A. _____.

RECROSS-EXAMINATION

Questions by the defense:
Q. _____?
A. _____.

EXAMINATION BY THE COURT

Questions by (the military judge) (court member's name):
Q. _____?
A. _____.

REDIRECT EXAMINATION

Questions by the prosecution:
Q. _____?
A. _____.

RECROSS-EXAMINATION

Questions by the defense:
Q. _____?
A. _____.

Out-of-court hearings and Article 39(a) sessions

NOTE. Out-of-court hearings and Article 39(a) sessions should be recorded and incorporated in the record of trial. See 53*d* and 57*g*(2).

b. AUTHENTICATION OF RECORD OF TRIAL

(1) *By general or special court-martial with members and a military judge*

Military Judge

_____

(Captain) (Colonel) _____
Military Judge [or (LTJG) (1 LT). *_____, Trial Counsel, because of (death) (disability) (absence) of the military judge] [or (LCDR) (Major) *_____, a member in lieu of the military judge and trial counsel because of (death) (disability) (absence) of the military judge, and of (death) (disability) (absence) of the trial-counsel]

(2) *By general or special court-martial consisting of only a military judge*

Military Judge

_____

(Captain) (Colonel) *_____
Military Judge [or (LTJG) (1 LT), *_____, Trial Counsel, because of (death) (disability) (absence) of the military judge] [or the court reporter in lieu of the military judge and trial counsel because of (death) (disability) (absence) of the military judge and of (death) (disability) (absence) of the trial counsel]

(3) *By special court-martial without a military judge* _____

President

_____

(CDR) (LTC) *_____
President [or (LTJG) (1 LT) *_____
Trial Counsel, because of (death) (disability) (absence) of the president] [or (LT) (CPT) *_____
a member in lieu of the president and the trial counsel because of (death) (disability) (absence) of the president and of (death) (disability) (absence) of the trial counsel]

*NOTE. The further identification of members, MJ, or counsel as to grade organization, etc., will be as indicated in the orders convening the court. If there is any change therein, the identification should show the present grade and organization followed by "formerly _____."

c. EXAMINATION OF RECORD BY DEFENSE COUNSEL

NOTE. When the defense counsel has examined the record of trial prior to its being forwarded to the convening authority, the following form is appropriate:

Form

"I have examined the record of trial in the foregoing case.

_____

(Captain) (Lieutenant) _____, Defense Counsel"

d. CERTIFICATE OF CORRECTION

_____ 19___.

Form

United States
v.
_____
_____

The record of trial in the above case, which was tried by the _____ court-martial convened by _____, dated _____ 19___, (at) (on board) _____, on _____ 19___, is corrected by the insertion on page _____, immediately following line _____, of the following:

Correction

"The detailed reporter, _____, was sworn."

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 certificate of correction is authenticated as indicated above for the record of trial in the case.

Accused's receipt for certificate

Copy of the certificate received by me this _____ day of _____, 19___.

_____
(Signature of accused)

Disposition in record

NOTE. The certificate of correction will be bound at the end of the original record immediately before the action of the convening authority.

e. **ARRANGEMENT OF ORIGINAL RECORD WITH ALLIED PAPERS.**

See 82*b*(5) concerning appendages to the record of trial. When forwarded to the appropriate Judge Advocate General, a record of trial by general or special court-martial will be arranged in the sequence required in publications of the Secretary of a Department.

f. **ADDITIONAL COPIES OF RECORD.**

A copy of the record of proceedings in court, including copies of all exhibits received in evidence or descriptions thereof will be prepared for each accused. In general and special court-martial cases in which the sentence adjudged affects a general or flag officer, or extends to death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more, two additional complete copies of the record will be prepared. In this connection, see 49*b*(2), 82, and 83*a*. When copies of the record are required to be forwarded to the convening authority or to the appropriate Judge Advocate General they will be bound separately and inclosed with the original record of trial. In this connection, see 82*g*(2).

Appendix 10

GUIDE FOR PREPARATION OF RECORD OF TRIAL BY GENERAL COURT-MARTIAL AND BY SPECIAL COURT-MARTIAL WHEN A VERBATIM RECORD IS NOT PREPARED*

a. RECORD OF TRIAL WITH A MILITARY JUDGE

NOTE. See first three marginal notes at beginning of appendix 9*a*. If a verbatim record is not prepared (see 7, 82*b*(1), and 83*b*), a summarized report of testimony, objections, and other proceedings is permitted. In the event of an acquittal of all charges and specifications, or termination of the proceedings prior to findings with prejudice to the Government, the record may be further summarized and need only contain sufficient information to establish lawful jurisdiction over the accused and the offenses.

The procedure in special courts-martial will follow that provided in regulations of the Secretary of the Department which will, so far as practicable, conform to that prescribed in appendices 8*a* and 8*b* for trials by general courts-martial. See 78 and 79. This appendix is to be used as a general guide; the actual record may depart from it in numerous particulars. The manner of summarizing several items of procedure is shown in appendix 9*a*.

NOTE. All records of trial should begin as follows:

Title

RECORD OF TRIAL
of

_____
(Last name, first name, middle initial) (Service Number) (Grade)

_____
(Organization and armed force) (Station or ship)
by
_____ COURT-MARTIAL
Convened by _____
(Title of convening authority)

_____
(Command of convening authority)
Tried at
_____ on _____ 19__
(Place or places of trial) (Date or dates of trial)

COPIES OF RECORD

Copies of record

_____ copy of record furnished the accused as per attached receipt.

_____ copy(ies) of record forwarded herewith.

RECEIPT FOR COPY OF RECORD

Receipt for record

I hereby acknowledge receipt of a copy of the above-described record of trial, delivered to me at _____ this ____ day of _____, 19__.

_____
(Signature of accused)

PROCEEDINGS OF A _____ COURT-MARTIAL

Article 39(a) session

(1) *ARTICLE 39(a) SESSION.* The summarized record of an Article 39(a) session should proceed as follows:

*But see 82*b*(1) and 83*b* as to the authority of the Secretary of a Department.

Convening orders

The military judge called the Article 39(a) session to order (at) (on board) _____, at ____ hours _____, 19__, pursuant to the following orders:

NOTE. Here insert a copy of the convening orders and copies of any amending orders. Any request of an enlisted accused for enlisted court members will be inserted immediately following the convening orders, together with any declaration of the nonavailability of such enlisted persons. Any request for trial by the military judge alone (53*d*(2), 61*g*) or statement that qualified defense counsel (6*c*) or military judge (15*b*) could not be obtained will also be inserted at this point.

Time of Session

NOTE. The reporter should note and record the time and date of the beginning and ending of each session of the court.
For example:

The session was called to order at ____ hours, _____ 19__.
The session (adjourned) (recessed) at ____ hours, _____ 19__.

Military judge and counsel present and absent

PERSONS PRESENT

PERSONS ABSENT

Accused and defense counsel present

The accused and the following (regularly detailed defense counsel and assistant defense counsel) (counsel introduced by him) were present:

Swearing reporter; interpreter

The following detailed (reporter) (and) (interpreter) (was) (were) (had previously been) sworn:

NOTE. Applicable only when a reporter or interpreter is used.

Qualification of prosecution counsel

The trial counsel stated that the legal qualifications and status as to oaths of all members of the prosecution were correctly stated in the convening orders except as indicated below.

Prior participation of prosecution counsel

The trial counsel further stated that no member of the prosecution had acted as investigating officer, military judge, court member, or as a member of the defense in this case, or as counsel for the accused at a pretrial investigation or other proceeding involving the same general matter except as indicated below.

NOTE. If a member of the prosecution is disqualified because of prior participation, the disqualifying fact will be shown, together with the action taken under 61*e*.

Inquiry concerning Article 38(b)

The military judge ascertained that the detailed defense counsel had informed the accused of his rights concerning counsel as set forth in Article 38(b). The military judge asked the accused if he understood that he had the right to be represented by civilian counsel if the accused provided him: that he had the right to be represented by military counsel of his own selection if reasonably available; and that if he did have counsel of his own selection, his detailed defense counsel and assistant defense counsel would act as associate counsel if the accused so desired.

The accused responded that he understood his rights with respect to counsel.

Qualification of defense counsel

The defense counsel stated that the legal qualifications and status as to oaths of all members of the defense were correctly stated in the convening orders except as indicated below.

NOTE. Legal qualifications of a counsel for the defense not shown in the convening orders, including individual counsel, will be shown. If the detailed defense counsel of a special court-martial which could not adjudge a bad-conduct discharge was not qualified under Article 27(b), the record should reflect that the accused had been afforded the opportunity to be represented by qualified counsel and he had declined or that qualified counsel could not be obtained.

Prior participation of defense counsel

The defense counsel stated that no member of the defense had acted as the accuser, a member of the prosection, investigating officer, military judge, or member of the court in this case except as indicated below.

NOTE. If a member of the defense has acted as a member of the prosecution, the record will show that he was excused and withdrew from the court. If a member of the defense acted in another capacity, the record will show that the military judge explained to the accused that this 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 (61*f*(4)). Appendices 8*a* and 8*b* show the procedure to be taken.

Defense excused

The following detailed members of the defense were excused by the military judge at the express request of the accused: _____.

Personnel sworn

The military judge, and the personnel of the prosecution and defense who were not previously sworn in accordance with Article 42(a) were sworn.

The prosecution and each accused were extended the right to challenge the military judge for cause.

Challenge: military judge

The military judge was (not) challenged for cause (by _____) (on the ground that _____).

NOTE. The record should show the grounds for the challenge, a summary of evidence presented, if any, and the action taken.

Request for trial by military judge alone
No Request

The military judge ascertained that the accused had been advised of his right to request trial by the military judge alone and that the accused did not desire to submit such a request.

NOTE. If the accused requests trial by the military judge alone, the action on the request should be indicated as follows:

Request

The military judge (approved) (disapproved) the accused's request that he be tried by the military judge alone.

NOTE. If the military judge approved the accused's request for trial before the military judge alone, the record should reflect, "The Article 39(a) session was terminated and the military judge announced that the court was assembled." The proceedings following assembly should then be summarized, using the applicable portions of this guide. Appendix 10*a*(2).

Disapproval of request

NOTE. If the military judge disapproves the accused's request for trial by the military judge alone, the fact of such disapproval must be recorded, and if the military judge gives any reason for the disapproval, the reason should be summarized.

NOTE. When the accused does not submit a request for trial before the military judge alone or such request is disapproved, the continuing proceedings would be summarized as follows:

NOTE. If the accused is an enlisted person:

Enlisted membership

The trial counsel announced that the accused had (not) made a request in writing that the membership of the court include enlisted persons. The defense counsel announced that the accused had been advised of his rights in this respect prior to trial and had stated that he did (not) desire enlisted persons as court members.

NOTE. All further proceedings disposing of interlocutory matters, including rulings upon the admissibility of evidence will be summarized. Exhibits admitted in evidence, or offered but excluded, should be identified in the summarization (82*b*(5), 83). Matters relating to arraignment, pleas, and entry of findings will be summarized as indicated in Appendix 10*a*(2).

The session adjourned at _____ hours, _____ 19—.

(2) *OTHER SESSIONS.*

Convening orders

The court was called to order (at) (on board) _____ at _____ hours, _____ 19 _____, pursuant to the following orders:

NOTE. Here insert a copy of the convening orders and copies of any amending orders. Any request of an enlisted accused for enlisted court members will be inserted immediately following the convening orders, together with any declaration of the nonavailability of such enlisted persons. Any request for trial by the military judge alone (53*d*(2), 61*g*) or statement that qualified defense counsel (6*c*) or military judge (15*b*) could not be obtained will also be inserted at this point. If the above documents were previously inserted in the record of an Article 39(a) session of the case, they need not be re-inserted at this point.

Time of session

NOTE. If all convening orders were inserted in the record at the Article 39(a) session, the record need only reflect, "The court met (at) (on board) _____, at _____ hours _____ 19___, pursuant to the orders previously inserted in the record."

NOTE. The reporter should note and record the time and date of the beginning and ending of each session of the court, including the opening and closing of the court during trial.

For example:
The court was called to order at _____ hours, _____ 19_____.
The court (adjourned) (recessed) at _____ hours, _____ 19_____.
The court (closed) (opened) at _____ hours, _____ 19_____.

Military judge, members of the court, and counsel present and absent

PERSONS PRESENT

PERSONS ABSENT

Accused and defense counsel present

The accused and the following (regularly detailed defense counsel and assistant defense counsel) (counsel introduced by him) were present:

Swearing reporter; interpreter

The following detailed (reporter) (and) (interpreter) (was) (were) (had previously been) sworn:

NOTE. Applicable only when a reporter or interpreter is used.

NOTE. If an Article 39(a) session had been held prior to this time and the qualifications of counsel had been verified therein, the record at this point may simply reflect:

The trial counsel stated that the status as to prior participation and legal qualifications of all members of the prosecution was the same as was announced at the prior session of this trial held on _____.

The defense counsel stated that the status as to prior participation and legal qualifications of all members of the defense was the same as was announced at the prior session of this trial held on _____.

NOTE. If qualifications of counsel had not previously been verified, the record should reflect:

Qualification of prosecution counsel

The trial counsel stated that the legal qualifications and status as to oaths of all members of the prosecution were correctly stated in the convening orders except as indicated below.

Prior participation of prosecution counsel

The trial counsel further stated that no member of the prosecution had acted as investigating officer, military judge, court member, or as a member of the defense in this case, or as counsel for the accused at a pretrial investigation or other proceeding involving the same general matter except as indicated below.

NOTE. If a member of the prosecution is disqualified because of prior participation, the disqualifying fact will be shown, together with the action taken under 61*e*.

Inquiry concerning Article 38(b)

The military judge ascertained that the detailed defense counsel had informed the accused of his rights concerning counsel as set forth in Article 38(b). The military judge asked the accused if he understood that he had the right to be represented by civilian counsel if the accused provided him; that he had the right to be represented by military counsel of his own selection if reasonably available, and that if he did have counsel of his own selection, his detailed defense counsel and assistant defense counsel would act as associate counsel if the accused so desired.

The accused responded that he understood his rights with respect to counsel.

NOTE. The inquiry concerning the accused's knowledge of his rights under Article 38(b) need not be made at this time if it had been made at a prior Article 39(a) session.

Qualification of defense counsel

The defense counsel stated that the legal qualifications and status as to oaths of all members of the defense were correctly stated in the convening orders except as indicated below.

NOTE. Legal qualifications of all counsel for the defense not shown in the convening orders, including individual counsel, will be shown. If the detailed defense counsel of a special court-martial which could not adjudge a bad-conduct discharge was not qualified under Article 27(b), the record should reflect that the accused had been afforded the opportunity to be represented by qualified counsel and declined or that qualified counsel could not be obtained.

Prior participation of defense counsel

The defense counsel stated that no member of the defense had acted as the accuser, a member of the prosecution, investigating officer, military judge, or member of the court in this case except as indicated below.

NOTE. If a member of the defense has acted as a member of the prosecution, the record will show that he was excused and withdrew from the court. If a member of the defense acted in another capacity, the record will show that the military judge explained to the accused that this 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 (61*f*(4)). Appendices 8*a* and 8*b* show the procedure to be taken.

Defense excused

The following detailed members of the defense were excused at the express request of the accused:

Request for trial by military judge alone

No request

The military judge ascertained that the accused had been advised of his right to request trial by the military judge alone and that the accused did not desire to submit such a request.

NOTE. If the accused requested trial by the military judge alone, the action on the request should be indicated as follows:

Request

The military judge (approved) (disapproved) the accused's request that he be tried by the military judge alone.

NOTE. If the military judge approved the accused's request for trial before the military judge alone, the record should reflect that the military judge immediately announced that the court was assembled. The proceedings following assembly should then be summarized, using the applicable portions of this guide.

Disapproval of request

NOTE. If the military judge disapproves the accused's request for trial by the military judge alone, the fact of such disapproval must be recorded, and if the military judge gives any reason for the disapproval, the reason should be summarized.

NOTE. When the accused does not submit a request for trial before the military judge alone or such request is disapproved, the continuing proceedings would be summarized as follows:

NOTE. If the accused is an enlisted person, the record should reflect.

Enlisted membership

The trial counsel announced that the accused had (not) made a request in writing that the membership of the court include enlisted persons. The defense counsel announced that the accused had been advised of his rights in this respect prior to trial and had stated that he did (not) desire enlisted persons as court members.

NOTE. The second statement concerning defense counsel's announcement should be omitted if the military judge had previously ascertained at an Article 39(a) session that the accused had been advised of his right to the presence of enlisted members, and if the military judge did not again inquire into this matter at the session with members present.

Personnel

The military judge, members of the court, and the personnel of the prosecution and defense who were not previously sworn in accordance with Article 42(a) were sworn.

Challenges

Each accused was extended the right to challenge any member of the court or the military judge for cause and to exercise one peremptory challenge against any member.

The following members of the court (and the military judge) were excused and withdrew for the reasons stated opposite their respective names:

Captain _____ (excused without challenge as being the accuser).

Lieutenant _____ (excused upon challenge for cause by the accused).

Lieutenant _____ (excused upon peremptory challenge by the accused).

There was no contest with respect to the challenging of any of the members for cause except as indicated below.

NOTE. Insert a summary of the proceedings with respect to each contest. For example, if a member or the military judge was challenged for cause, but was not excused from the court, the record will show the grounds for the challenge, a summary of evidence presented, if any, and the action of the military judge.

Arraignment at Article 39(a) session

NOTE. If the arraignment took place at the Article 39(a) session and the accused pleaded therein, the record need only reflect, "The military judge announced that the accused had been arraigned at a previous session of this trial held on _____."

The accused pleaded as follows:

To all the Specifications and Charges: (Not Guilty) (Guilty)

or

To the Specification of Charge I: (Not Guilty) (Guilty)

To Charge I: (Not Guilty) (Guilty)

etc.

NOTE. If the accused pleaded guilty at an Article 39(a) session, and findings of guilty were entered, the record should also reflect that the military judge reported the findings to the members.

Arraignment

The accused was then arraigned upon the following charges and specifications:

NOTE. Insert the charge sheet here. Use the accused's copy of the charge sheet to prepare his copy of the record. If sufficient copies of the charge sheet are not available, copy verbatim from pages 2 and 3 of the charge sheet the charges and specifications and the name and description of the accuser, the affidavit, and the reference to the court for trial.

Convening authority identified

_____ was in command on the date of the reference for trial.
(Name and rank)

Motions

NOTE. The substance of any motions made by the defense before pleas are entered will be recorded, together with the ruling of the military judge thereon.

Pleas

NOTE. The pleas of the accused will be entered in the following form:

The accused pleaded as follows:

To all the Specifications and Charges: (Not Guilty) (Guilty)

To charge I: (Not Guilty) (Guilty)

etc.

Explanation of plea of guilty

NOTE. When there is a guilty plea and the military judge has explained its meaning and effect (70*b*), the record should show:

The military judge explained to the accused the meaning and effect of his plea of guilty, after which the accused answered that he understood (but persisted in his plea of guilty) (and stated that he desired to change his plea of guilty to not guilty) (—).

NOTE. When authorized by regulations of the Secretary concerned, findings of guilty of any charge and specification may be entered immediately without vote after a plea of guilty has been accepted and the record should so reflect if this has been done. The findings are entered by the announcement of the military judge that the accused has been found guilty in accordance with his plea (70*b* and appendix 8*b*).

PRESENTATION OF PROSECUTION CASE

Opening statement

The trial counsel made (an) (no) opening statement.

NOTE. The record will contain a summary of the testimony presented. An example of the manner in which testimony may be summarized follows:

Testimony

The following witnesses for the prosecution were sworn and testified in substance as follows:

Sgt. Richard Roe, Co. C. 1st Bn. 31st Inf, Fort Sill, Oklahoma.

DIRECT EXAMINATION

I know the accused, Sam Snooker, who is in the military service and a member of my company. We both sleep in the same barracks. When I went to bed on the night of October 7, 1969, I put my wallet under my pillow. The wallet had $7.00 in it; a $5.00 bill and two $1.00 bills. Sometime during the night something woke me up but I turned over and went to sleep again. When I woke up the next morning, my wallet was gone.

CROSS-EXAMINATION

I don't know the serial numbers on any of the bills. One of the $1.00 bills was patched together with scotch tape and one of the fellows told me that the accused had used a $1.00 bill just like that in a poker game the day after my wallet was missing.

Objection and ruling

Upon objection by the defense, so much of the answer of the witness as pertained to what he had been told was stricken.

Introduction of exhibits

The prosecution offered in evidence a duly authenticated extract copy of the morning report of Company C. 1st Bn, 31st Infantry, which contained entries pertaining to the accused for the dates 20 and 24 October 1969.

The defense objected to the admission of this document on the ground that the reporting officer had no personal knowledge of the facts reported therein. After argument by counsel for both sides, the extract copy was admitted in evidence as Prosecution Exhibit 1.

NOTE. If Prosecution Exhibit 1 had previously been admitted in evidence at an Article 39(a) session of the case, the prosecution may have simply presented it to the court and the record should reflect:

With the permission of the military judge, the prosecution presented Prosecution Exhibit 1, which had previously been admitted in evidence, to the court.

PRESENTATION OF DEFENSE CASE

The defense counsel made (an) (no) opening statement.

NOTE. If the military judge advised the accused of his right to testify or to remain silent, the record should so reflect, indicating also that such advice was given at a hearing held out of the presence of the court members.

Testimony

The following witnesses for the defense were sworn and testified in substance as follows:

Stipulation

The defense offered in evidence a stipulation entered into between the trial counsel, defense counsel, and the accused. There being no objection, the stipulation was admitted in evidence as Exhibit _____.

Closing arguments

The prosecution made (an) (no) argument.

The defense made (an) (no) argument.

The prosecution made (a) (no) closing argument.

Instructions

The military judge instructed the court in accordance with paragraph 73 of the MCM, including the elements of each offense, the presumption of innocence, reasonable doubt, and burden of proof as required by Article 51(c).

Findings

Neither the prosecution nor the defense having anything further to offer, the court was closed at _____ hours, _____ 19 ___. Thereafter the court opened at _____ hours, _____ 19 ___. The president announced that, in closed session and upon secret written ballot (the accused was found not guilty) (two-thirds of the members present at the time the vote was taken concurring in each finding of guilty), the accused was found:

Of all the Specifications and Charges: Guilty.

or

Of the Specification of Charge I: Guilty.

Of Charge I: Guilty.

Of the Specification of Charge II: Not Guilty.
Of Charge II: Not Guilty.

etc.

Findings by the military judge alone

NOTE. In a trial by the military judge alone, there would be no instructions given, but the military judge may make general and special findings. Any request for special findings should be summarized, and if submitted in writing, the request should be attached as an appellate exhibit. The general findings must be announced in open court with all parties present and may be recorded in the record in the following form, together with any special findings announced at that time (74*i*):

Announcement

The military judge announced the following general (and special) findings (and directed that _____ be appended to the record as appellate exhibit _____) (filed an opinion or memorandum of decision, appellate exhibit _____, a copy of which was furnished to counsel for both sides) [and stated that the special findings (and opinion or memorandum of decision) would be furnished to the reporter prior to authentication for insertion in the record as appellate exhibit _____]:

Of all the Specifications and Charges: Guilty

or

Of the Specification of Charges I: Guilty.
Of Charge I: Guilty
Of the Specification of Charge II: Not Guilty
Of Charge II: Not Guilty.

NOTE. All general findings should be recorded as indicated above. Special findings delivered orally should be summarized. Any written findings, opinion or memorandum of decision should be appended to the record as an appellate exhibit and copies furnished to counsel for both sides.

Data as to service, etc.

The trial counsel read the data as to age, pay, service, and restraint of the accused as shown on the charge sheet. The defense counsel stated that (data were correct) (_____). (The trial counsel stated that he had no evidence of previous convictions to submit.) (The attached evidence of previous convictions was offered) (and admitted) (in evidence as Prosecution Exhibit _____). The defense counsel stated that (the accused had no objection to the evidence of previous convictions) (_____).

Evidence in extenuation or mitigation

After the accused was advised by the military judge of his right to present evidence in extenuation or mitigation, (the defense counsel stated that he had nothing further to offer.) (the defense presented the following matters:)

Instructions on sentence

The military judge instructed the court that the maximum permissible punishment which could be adjudged for the offense(s) of which the accused had been found guilty was: _____, and further instructed with respect to the specific facts of this case in accordance with paragraph 76 of the MCM.

NOTE. If the military judge announces what he considers to be the maximum permissible punishment in a case tried by him above, the record should reflect the stated maximum.

Sentence announcement by President

Neither the prosecution nor the defense having anything further to offer, the court was closed at _____ hours, _____ 19____. Thereafter, the court opened at _____ hours, _____ 19____. The president announced that in closed session and, upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, the accused was sentenced:

To _____

NOTE. Announcement of sentence in a trial by the military judge alone may be recorded as follows:

Sentence announcement by military judge

The court opened at _____ hours, _____ 19____. The military judge informed the accused that the court sentenced him to:

NOTE. For adjournment, authentication, examination by defense counsel, and action of the convening authority see subsequent items in this appendix pertaining to the record in a trial with members.

NOTE. Any special findings, opinion or memorandum of decision, which the military judge directed to be included in the record as an appellate exhibit should be appended prior to authentication.

The court adjourned at _____ hours, _____ 19_____. **Adjournment**

NOTE. he record will be authenticated as indicated in 82*b*, 83*a* or 83*b* as appropriate. **Authentication**

I have examined the record of trial in the foregoing case. **Examination by defense**

_____
(Captain) lieutenant) _____, Defense Counsel

ACTION OF CONVENING AUTHORITY **Action**

_____
(Command of convening authority)

_____
(Station or Ship)

_____ 19 _____

In the foregoing case of

NOTE. Here enter the action taken by the convening authority on the findings and sentence. See appendix 14*b*.

_____
(Signature of convening authority)
(Major General) (Commander)

b. RECORD OF TRIAL BY SPECIAL COURT-MARTIAL WITHOUT A MILITARY JUDGE*.

NOTE. See first three marginal notes at beginning of appendix 9*a*. If a verbatim record is not prepared (see 7 and 83*b*), a summarized report of testimony, objections, and other proceedings is permitted. Either party may, however, submit his arguments in writing to be attached as exhibits, appropriate reference being made at the proper place in the record.

The procedure in court will follow that provided in regulations of the Secretary of the Department which will, so far as practicable, conform to that prescribed in appendix 8*b* for trials by general courts-martial. See 78 and 79. This appendix is to be used as a general guide; the actual record may depart from it in numerous particulars. The manner of summarizing several items of procedure is shown in appendix 9*a*.

RECORD OF TRIAL **Title**

of

_____
(Last name, first name, middle initial) (Service number) (Grade)

_____
(Organization and armed force) (Station or ship)

by

SPECIAL COURT-MARTIAL

Convened by _____
(Title of convening authority)

_____
(Command of convening authority)

Tried at

_____ on _____ 19_____
(Place or places of trial) (Date or dates of trial)

COPIES OF RECORD

_____ copy of record furnished the accused as per attached receipt. **Copies of record**

_____ copy (ies) of record forwarded herewith.

*But see 83*b* as to the authority of the Secretary of a Department.

RECEIPT FOR COPY OF RECORD

Receipt for record

I hereby acknowledge receipt of a copy of the above-described record of trial, delivered to me at _____ this _____ day of _____, 19_____.

_____
(Signature of accused)

PROCEEDINGS OF A SPECIAL COURT-MARTIAL

Convening orders

The court met (at) (on board) _____, at _____ hours _____ 19_____, pursuant to the following orders:

NOTE. Here insert a copy of the convening orders and copies of any amending orders. Any request of an enlisted accused for enlisted court members, together with any declaration of the nonavailability of such enlisted persons, will be inserted immediately following the orders. Any statement that qualified defense counsel could not be obtained will also be inserted at this point (6c).

Time of session

NOTE. The reporter should note and record the time and date of the beginning and ending of each session of the court, including the opening and closing of the court during trial.

For example:
The court was called to order at _____ hours, _____ 19_____.
The court (adjourned) (recessed) at _____ hours, _____ 19_____.
The court (closed) (opened) at _____ hours, _____ 19_____.

Members of the court and counsel present and absent

PERSONS PRESENT

PERSONS ABSENT

Accused and defense counsel present

The accused and the following (regularly detailed defense counsel and assistant defense counsel) (counsel introduced by him) were present:

Swearing reporter; interpreter

The following detailed (reporter) (and) (interpreter) (was) (were) (had previously been) sworn:

NOTE. Applicable only when a reporter or interpreter is used.

Qualification of prosecution counsel

The trial counsel stated that the legal qualifications and status as to oaths of all members of the prosecution were correctly stated in the convening orders except as indicated below.

Prior participation of prosecution counsel

The trial counsel further stated that no member of the prosecution had acted as investigating officer, military judge, court member, or as a member of the defense in this case, or as counsel for the accused at a pretrial investigation or other proceeding involving the same general matter except as indicated below.

NOTE. If a member of the prosecution is disqualified because of prior participation, the disqualifying fact will be shown, together with the action taken under 61e.

Inquiry concerning Article 38(b)

The president ascertained that the detailed defense counsel had informed the accused of his rights concerning counsel as set forth in Article 38(b).

The president asked the accused if he understood that he had the right to be represented by civilian counsel if the accused provided him; that he had the right to be represented by military counsel of his own selection if reasonably available, and that if he did have counsel of his own selection, his detailed defense counsel and assistant defense counsel would act as associate counsel if the accused so desired.

The accused responded that he understood his rights with respect to counsel.

Qualification of defense counsel

The defense counsel stated that the legal qualifications and status as to oaths of all members of the defense were correctly stated in the convening orders except as indicated below.

NOTE. *Legal qualifications of all counsel for the defense not shown in the convening orders, including individual counsel, will be shown. If the detailed defense counsel was not qualified under Article 27(b), the record should reflect that the accused had been afforded the opportunity to be represented by qualified counsel and declined or that qualified counsel could not be obtained.*

Prior participation of defense counsel

The defense counsel stated that no member of the defense had acted as the accuser, a member of the prosecution, investigating officer, military judge, or member of the court in this case except as indicated below.

NOTE. If a member of the defense has acted as a member of the prosecution, the record will show that he was excused and withdrew from the court. If a member of the defense acted in another capacity, the record will show that the president explained to the accused that this 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 (61*f*(4)). Appendices 8*a* and 8*b* show the procedure to be taken.

Defense excused

The following detailed members of the defense were excused at the express request of the accused:

NOTE. If the accused is an enlisted person, the record should reflect:

Enlisted membership

The trial counsel announced that the accused had (not) made a request in writing that the membership of the court include enlisted persons. The defense counsel announced that the accused had been advised of his rights in this respect prior to trial and had stated that he did (not) desire enlisted persons as court members.

Personnel sworn

The members of the court and the personnel of the prosecution and defense who were not previously sworn in accordance with Article 42(a) were sworn.

Challenges

Each accused was extended the right to challenge any member of the court for cause and to exercise one peremptory challenge against any member.

The following members of the court were excused and withdrew for the reasons stated opposite their respective names:

Captain _____ (excused without challenge as being the accuser).

Lieutenant _____ (excused upon challenge for cause by the accused).

Lieutenant _____ (excused upon peremptory challenge by the accused).

There was no contest with respect to the challenging of any of the members for cause except as indicated below.

NOTE. Insert a summary of the proceedings with respect to each contest. For example, if a member was challenged for cause, but was not excused from the court, the record will show the grounds for the challenge, a summary of evidence presented, if any, and the action of the court.

Arraignment

The accused was then arraigned upon the following charges and specifications:

NOTE. Insert the charge sheet here. Use the accused's copy of the charge sheet to prepare his copy of the record. If sufficient copies of the charge sheet are not available, copy verbatim from pages 2 and 3 of the charge sheet the charges and specifications and the name and description of the accuser, the affidavit, and the reference to the court for trial.

Convening authority identified

_____ was in command on the date of the reference for trial.
Name and rank

Motions

NOTE. The substance of any motions made by the defense before pleas are entered will be recorded, together with the ruling of the court thereon.

Pleas

NOTE. *The pleas of the accused will be entered in the following form:*

The accused pleaded as follows:

To all the Specifications and Charges: (Not Guilty) (Guilty).

or

To the Specification of Charge I: (Not Guilty) (Guilty).
To Charge I: (Not guilty) (Guilty).

etc.

Explanation of plea of guilty

NOTE. When there is a guilty plea the president should explain the meaning and effect of a plea of guilty (70*b*), and the record should show:

The president of the court explained to the accused the meaning and effect of his plea of guilty, after which the accused answered that he understood (but persisted in his plea of guilty) (and stated that he desired to change his plea of guilty to not guilty) (——————).

NOTE. When authorized by regulations of the Secretary concerned, findings of guilty of any charge and specification may be entered immediately without vote after a plea of guilty has been accepted and the record should so reflect if this has been done. The findings are entered by the announcement of the president that the accused has been found guilty in accordance with his plea (70*b* and appendix 8*b*).

PRESENTATION OF PROSECUTION CASE

Opening statement

The trial counsel made (an) (no) opening statement.

NOTE. The record will contain a summary of the testimony presented. An example of the manner in which testimony may be summarized follows:

Testimony

The following witnesses for the prosecution were sworn and testified in substance as follows:

Sgt Richard Roe, Co C, 1st Bn, 31st Inf, Fort Sill, Oklahoma.

DIRECT EXAMINATION

I know the accused, Sam Snooker, who is in the military service and a member of my company. We both sleep in the same barracks. When I went to bed on the night of October 7, 1969, I put my wallet under my pillow. The wallet had $7.00 in it; a $5.00 bill and two $1.00 bills. Sometime during the night something woke me up but I turned over and went to sleep again. When I woke up the next morning, my wallet was gone.

CROSS-EXAMINATION

I don't know the serial numbers on any of the bills. One of the $1.00 bills was patched together with scotch tape and one of the fellows told me that the accused had used a $1.00 bill just like that in a poker game the day after my wallet was missing.

Objection and ruling

Upon objection by the defense, so much of the answer of the witness as pertained to what he had been told was stricken.

Introduction of exhibits

The prosecution offered in evidence a duly authenticated extract copy of the morning report of Company C, 1st Bn, 31st Infantry, which contained entries pertaining to the accused for the dates 20 and 24 October 1969.

The defense objected to the admission of this document on the ground that the reporting officer had no personal knowledge of the facts reported therein. After argument by counsel for both sides, the extract copy was admitted in evidence as Prosecution Exhibit 1.

PRESENTATION OF DEFENSE CASE

The defense counsel made (an) (no) opening statement.

Explanation of accused's rights

The accused was advised by the president of his right to testify or to remain silent.

Testimony

The following witnesses for the defense were sworn and testified in substance as follows:

Stipulation

The defense offered in evidence a stipulation entered into between the trial counsel, defense counsel, and the accused. There being no objection, the stipulation was admitted in evidence as Exhibit ——————.

Closing arguments

The prosecution made (an) (no) argument.

The defense made (an) (no) argument.

The prosecution made (a) (no) closing argument.

The president instructed the court in accordance with paragraph 73 of the MCM, including the elements of each offense, the presumption of innocence, reasonable doubt, and burden of proof as required by Article 51(c). **Instructions**

Neither the prosecution nor the defense having anything further to offer, the court was closed. Thereafter, the court opened and the president announced that, in closed session and upon secret written ballot, (the accused was found not guilty) (two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, the accused was found: **Findings**

Of all the Specifications and Charges: Guilty.

or

Of the Specification of Charge I: Guilty.
Of Charge I: Guilty.
Of the Specification of Charge II: Not guilty.
Of Charge II: Not guilty.

etc.)

The trial counsel read the data as to age, pay, service, and restraint of the accused as shown on the charge sheet. The defense counsel stated that (the data were correct) (_____). (The trial counsel stated that he had no evidence of previous convictions to submit.) (The attached evidence of previous convictions was offered) (and admitted) (in evidence as Prosecution Exhibit _____.) The defense counsel stated that (the accused had no objection to the evidence of previous convictions) (_____). **Data as to service, etc.**

After the accused was advised by the president of his right to present evidence in extenuation or mitigation, (the defense counsel stated that he had nothing further to offer.) (the defense presented the following matters:) **Evidence in extenuation or mitigation**

The president instructed the court that the maximum permissible punishment which could be adjudged for the offense(s) of which the accused had been found guilty was: _____, and further instructed with respect to the specific facts of this case in accordance with paragraph 76 of the MCM. **Instructions on sentence**

Neither the prosecution nor the defense having anything further to offer, the court was closed at _____ hours, _____ 19__. Thereafter, the court opened at _____ hours, _____ 19__. The president announced that in closed session and, upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, the accused was sentenced: **Sentence announcement by President**

To _____

The court adjourned at _____ hours, _____ 19__. **Adjournment**

NOTE. The record will be authenticated as prescribed by the Secretary of a Department. **Authentication**

I have examined the record of trial in the foregoing case. **Examination by defense**

_____

(Captain) (Lieutenant) _____, Defense Counsel

ACTION OF CONVENING AUTHORITY **Action**

_____

(Command of convening authority)

_____

(Station or ship)

_____ 19__.

In the foregoing case of

NOTE. Here enter the action taken by the convening authority on the findings and sentence. See appendix 14*b*.

(Signature of convening authority)
(Major) (Lieutenant Colonel) ( )
Commanding

c. ARRANGEMENT OF ORIGINAL RECORD WITH ALLIED PAPERS.

When forwarded by the convening authority a record of trial by court-martial is arranged in the sequence required in publications of the Secretary of a Department.

d. ADDITIONAL COPIES OF RECORD.

A copy of the record of proceedings in court, including copies of all exhibits received in evidence or descriptions thereof will be prepared for each accused.

Appendix 11

FORM FOR RECORD OF TRIAL BY SUMMARY COURT-MARTIAL

Fill in blank numbers of pertinent charges and specifications or "all specifications and charges," as may be appropriate for use unless departmental regulations prevent such election *(MCM, 32f(2))*.

☐ THE ACCUSED HAS BEEN PERMITTED AND HAS ELECTED TO REFUSE PUNISHMENT UNDER ARTICLE 15 AS TO

☒ THE ACCUSED HAS NOT BEEN OFFERED PUNISHMENT UNDER ARTICLE 15 AS TO

NAME, GRADE, AND ORGANIZATION OF OFFICER EXERCISING ARTICLE 15 JURISDICTION	SIGNATURE
Ivan I. Ivanson, Major, USAF Commander, 6666th Supply Squadron	Ivan I. Ivanson

RECORD OF TRIAL BY SUMMARY COURT-MARTIAL	CASE NUMBER 43 *(Inserted by convening authority)*

TO BE FILLED IN BY SUMMARY COURT AS APPLICABLE

1. WAS THE ACCUSED ADVISED IN ACCORDANCE WITH PARAGRAPH 79*d*, MCM? ☒ YES

2. THE ACCUSED HAVING REFUSED TO CONSENT IN WRITING TO TRIAL BY SUMMARY COURT-MARTIAL, THE CHARGES ARE HEREWITH RETURNED TO THE CONVENING AUTHORITY.

NAME, GRADE, AND ORGANIZATION OF SUMMARY COURT OFFICER	SIGNATURE

TO BE FILLED IN BY THE ACCUSED

I ☒ CONSENT ☐ OBJECT TO TRIAL BY SUMMARY COURT-MARTIAL

SIGNATURE OF ACCUSED: John J. Johnson

SPECIFICATIONS AND CHARGES	PLEAS	FINDINGS	SENTENCE OR REMARKS
Sp. 1, Ch. I	G	G	To be confined at hard labor for one month and to forfeit $70.00 per month for one month.
Sp. 2, Ch. I	NG	NG	
Ch. I	G	G	
Sp., Ch. II	NG	NG	
Ch. II	NG	NG	

NUMBER OF PREVIOUS CONVICTIONS CONSIDERED *(MCM, 75b(2))*: 1

PLACE AND DATE OF TRIAL	DATE SENTENCE ADJUDGED
Randolph AFB, Texas	5 December 1969

NAME, GRADE, ORGANIZATION, AND ARMED FORCE OF SUMMARY COURT OFFICER *(MCM, 48)*	SIGNATURE
King K. Kingson, Lieutenant Colonel, USAF Headquarters, 600th Support Group	King K. Kingson

Enter after signature, "Only officer present with command", if such is the case.

TO BE FILLED IN BY CONVENING AUTHORITY (MCM, 89, and app. 14a)

ORGANIZATION	PLACE	DATE
Headquarters, 600th Support Group	Randolph AFB, Texas	6 December 1969

ACTION OF CONVENING AUTHORITY

Approved and order executed. The Base Confinement Facility, Randolph Air Force Base, Texas, is designated as the place of confinement.

NAME, GRADE, AND ORGANIZATION OF CONVENING AUTHORITY	SIGNATURE
Lars L. Larson, Colonel, USAF Commander, 600th Support Group	Lars L. Larson

ENTERED ON APPROPRIATE PERSONNEL RECORDS IN CASE OF CONVICTION. (MCM, 91c)

NAME, GRADE, AND DESIGNATION OF OFFICER RESPONSIBLE FOR ACCUSED'S RECORDS	SIGNATURE
Matthew M. Matthewson, Captain, USAF Personnel Officer	Matthew M. Matthewson

NOTE: Summary of evidence, if required by the convening or higher authority, will be attached on separate pages.

4

Appendix 11

FORM FOR RECORD OF TRIAL BY SUMMARY COURT-MARTIAL

Fill in blank numbers of pertinent charges and specifications or "all specifications and charges," as may be appropriate for use unless departmental regulations prevent such election *(MCM, 32f(2))*.

☐ THE ACCUSED HAS BEEN PERMITTED AND HAS ELECTED TO REFUSE PUNISHMENT UNDER ARTICLE 15 AS TO

☒ THE ACCUSED HAS NOT BEEN OFFERED PUNISHMENT UNDER ARTICLE 15 AS TO

NAME, GRADE, AND ORGANIZATION OF OFFICER EXERCISING ARTICLE 15 JURISDICTION	SIGNATURE
Ivan I. Ivanson, Major, USAF Commander, 6666th Supply Squadron	Ivan I. Ivanson

RECORD OF TRIAL BY SUMMARY COURT-MARTIAL	CASE NUMBER 43 *(Inserted by convening authority)*

TO BE FILLED IN BY SUMMARY COURT AS APPLICABLE

1. WAS THE ACCUSED ADVISED IN ACCORDANCE WITH PARAGRAPH 79*d*, MCM? ☒ YES

2. THE ACCUSED HAVING REFUSED TO CONSENT IN WRITING TO TRIAL BY SUMMARY COURT-MARTIAL, THE CHARGES ARE HEREWITH RETURNED TO THE CONVENING AUTHORITY.

NAME, GRADE, AND ORGANIZATION OF SUMMARY COURT OFFICER	SIGNATURE

TO BE FILLED IN BY THE ACCUSED

I ☒ CONSENT ☐ OBJECT TO TRIAL BY SUMMARY COURT-MARTIAL

SIGNATURE OF ACCUSED: John J. Johnson

SPECIFICATIONS AND CHARGES	PLEAS	FINDINGS	SENTENCE OR REMARKS
Sp. 1, Ch. I	G	G	To be confined at hard labor for one month and to forfeit $70.00 per month for one month.
Sp. 2, Ch. I	NG	NG	
Ch. I	G	G	
Sp., Ch. II	NG	NG	
Ch. II	NG	NG	

NUMBER OF PREVIOUS CONVICTIONS CONSIDERED *(MCM, 75b(2))*: 1

PLACE AND DATE OF TRIAL	DATE SENTENCE ADJUDGED
Randolph AFB, Texas	5 December 1969

NAME, GRADE, ORGANIZATION, AND ARMED FORCE OF SUMMARY COURT OFFICER *(MCM, 48)*	SIGNATURE
King K. Kingson, Lieutenant Colonel, USAF Headquarters, 600th Support Group	King K. Kingson

Enter after signature, "Only officer present with command", if such is the case.

TO BE FILLED IN BY CONVENING AUTHORITY (MCM, 89, and app. 14a)

ORGANIZATION	PLACE	DATE
Headquarters, 600th Support Group	Randolph AFB, Texas	6 December 1969

ACTION OF CONVENING AUTHORITY

Approved and order executed. The Base Confinement Facility, Randolph Air Force Base, Texas, is designated as the place of confinement.

NAME, GRADE, AND ORGANIZATION OF CONVENING AUTHORITY	SIGNATURE
Lars L. Larson, Colonel, USAF Commander, 600th Support Group	Lars L. Larson

ENTERED ON APPROPRIATE PERSONNEL RECORDS IN CASE OF CONVICTION. (MCM, 91c)

NAME, GRADE, AND DESIGNATION OF OFFICER RESPONSIBLE FOR ACCUSED'S RECORDS	SIGNATURE
Matthew M. Matthewson, Captain, USAF Personnel Officer	Matthew M. Matthewson

NOTE: Summary of evidence, if required by the convening or higher authority, will be attached on separate pages.

4

Appendix 12

TABLE OF COMMONLY INCLUDED OFFENSES

NOTE. When, in addition to the offense charged, the allegations in a specification are sufficient to place an accused on notice that he may have to defend against another offense, this additional offense is called an included offense. An included offense is not an operative factor in a trial unless placed in issue by the evidence. Once in issue, the court must be instructed on the included offense, and the accused may be found guilty of it. See 158 for a discussion of included offenses.

In regard to the following table, the charging of an accused with certain offenses always includes certain other offenses; for example, the charge of desertion always includes the offense of absence without leave. However, consideration of the particular allegations in the offense charged is often necessary before a determination can be made that a certain offense is included, for example, whether the offense of carnal knowledge is included in a charge of rape is controlled by whether the age of the victim is alleged to be less than 16 years. The following table generally does not include attempts, but an accused may be found guilty of an attempt to commit any offense charged (Art. 79) except when the offense, such as negligent homicide, cannot be intentionally committed. Also, it does not include those offenses which properly may be found by means of exceptions or exceptions and substitutions (74*b*(2)), but which differ from the offenses charged only with respect to the elimination or reduction of words of aggravation. For example, depending upon the proof, desertion terminated by apprehension properly may be found as desertion terminated in a manner not specified; similarly, larceny of property of a value of more than $100 properly may be found as larceny of property of a value of $100 or less and more than $50, or a value of $50 or less. In such a case, although the offense found would be the same offense as that charged, a lesser punishment might be authorized. In this connection, see Section A. 127*c*.

In view of the foregoing, the following table cannot be an all-inclusive list, cannot be applied mechanically, and is to be considered only as suggestive of possible offenses which may be included in the offense charged.

Article	Offense Charged	Article	Included Offense
85	Desertion with intent to remain away permanently.	86	Absence without authority.
85	Desertion—Quitting unit, organization or place of duty with intent to avoid hazardous duty or shirk important service.	86	Absence without authority.
87	Missing movement through design.	86 87	Absence without authority. Missing movement through neglect.
87	Missing movement through neglect.	86	Absence without authority.
89	Disrespect toward superior officer.	117	Using provoking or reproachful speech.
90	Striking superior officer in execution of his office.	90 128 128	Drawing or lifting up a weapon or offering violence to superior officer in execution of his office. Assault; assault and battery. Assault or assault and battery upon commissioned officer.

Article	Offense Charged	Article	Included Offense
90	Drawing or lifting up a weapon or offering violence to superior officer in execution of his office.	128 128	Assault, assault with dangerous weapon. Assault upon a commissioned officer.
90	Willfully disobeying lawful order of superior officer.	92 89	Failure to obey lawful order. Disrespect to superior officer.
91	Striking warrant, noncommissioned, or petty officer in execution of his office.	91 128 128 128	Assault upon warrant, noncommissioned, or petty officer in execution of his office. Assault; assault and battery. Assault or assault and battery with dangerous weapon. Assault or assault and battery upon warrant, noncommissioned, or petty officer.
91	Assault upon warrant, noncommissioned, or petty officer in the execution of his office.	128 128 128	Assault. Assault with dangerous weapon. Assault upon warrant, noncommissioned, or petty officer.
91	Willfully disobeying lawful order of warrant, noncommissioned, or petty officer.	92	Failure to obey lawful order.
91	Treating with contempt or being disrespectful in language or deportment toward, warrant, noncommissioned, or petty officer in execution of his office.	117	Using provoking or reproachful speech.
94	Mutiny—Refusal to obey orders from proper authority in concert with others with intent to override military authority.	90 91 92	Willful disobedience of commissioned officer. Willful disobedience of warrant, noncommissioned, or petty officer. Failure to obey lawful order.
94	Mutiny—Creation of violence or disturbance in concert with others, with intent to override military authority.	116 116 134	Riot. Breach of peace. Disorderly conduct.
94	Sedition.	116 134	Breach of peace. Disorderly conduct.
95	Breach of arrest.	134	Breach of restriction.
96	Suffering a prisoner to escape through design.	96	Suffering a prisoner to escape through neglect.

Article	Offense Charged	Article	Included Offense
99	Running away before the enemy.	85(2) 86	Desertion. Absence without authority; going from appointed place of duty.
99	Cowardly conduct.	85(2) 86(3) 99	Desertion. Absence without authority. Running away before the enemy.
99	Quitting place of duty to plunder or pillage.	86(2)	Going from appointed place of duty.
99	Endangering safety of command through disobedience of orders.	92	Failure to obey lawful order.
108	Willfully damaging military property.	108	Damaging military property through neglect.
108	Willfully suffering military property to be damaged.	108	Through neglect suffering military property to be damaged.
108	Willfully destroying military property.	108 108 108	Through neglect destroying military property. Through neglect damaging military property. Willfully damaging military property.
108	Willfully suffering military property to be destroyed.	108 108 108	Through neglect suffering military property to be destroyed. Through neglect suffering military property to be damaged. Willfully suffering military property to be damaged.
108	Willfully losing military property.	108	Through neglect, losing military property.
108	Willfully suffering military property to be lost.	108	Through neglect, suffering military property to be lost.
108	Willfully suffering military property to be sold.	108	Through neglect, suffering military property to be sold.
108	Willfully suffering military property to be wrongfully disposed of in a certain alleged manner.	108	Through neglect, suffering military property to be wrongfully disposed of in the manner alleged.
110	Willfully and wrongfully hazarding a vessel in a certain alleged manner.	110	Negligently hazarding a vessel in the manner alleged.
110	Willfully and wrongfully suffering a vessel to be hazarded in a certain alleged manner.	110	Negligently suffering a vessel to be hazarded in the manner alleged.

Article	Offense Charged	Article	Included Offense
113	Drunk on duty as a sentinel.	112	Drunk on duty.
116	Riot.	116 134	Breach of peace. Disorderly conduct.
116	Breach of peace.	134	Disorderly conduct.
118	Murder, with premeditated design to kill; or murder while engaged in perpetration of offenses listed in Article 118(4).	118	Murder.
118	Murder, as defined in Article 118(1), (2), (3), or (4).	119 128 134 134 134	Voluntary or involuntary manslaughter. Assault; assault and battery; aggravated assault. Assault with intent to commit murder. Assault with intent to commit voluntary manslaughter. Negligent homicide.
119	Voluntary manslaughter.	119 128 134 134	Involuntary manslaughter. Assault; assault and battery; aggravated assault. Assault with intent to commit voluntary manslaughter. Negligent homicide.
119	Involuntary manslaughter.	128 134	Assault; assault and battery. Negligent homicide.
120	Rape.	120 128 134 134 134	Carnal knowledge. Assault; assault and battery. Assault with intent to commit rape. Indecent assault. Taking indecent, lewd and lascivious liberties with the person of a female.
120	Carnal knowledge.	134	Indecent acts or liberties with a female under 16.
121	Larceny.	121	Wrongful appropriation.
122	Robbery.	121 121 128 128 128 134	Larceny. Wrongful appropriation. Assault; assault and battery. Assault with a dangerous weapon. Assault intentionally inflicting grievous bodily harm. Assault with intent to rob.

Article	Offense Charged	Article	Included Offense
123a	Making, drawing, uttering or delivering a check, draft, or order without sufficient funds with intent to defraud or with intent to deceive.	134	Making, drawing, uttering or delivering a check, draft, or order, and thereafter wrongfully and dishonorably failing to maintain sufficient funds.
124	Maiming.	128 128 128	Assault; assault and battery. Assault with a dangerous weapon. Assault intentionally inflicting grievous bodily harm.
125	Sodomy.	134 134	Indecent, lewd, and lascivious acts with another. Assault with intent to commit sodomy.
126	Aggravated arson.	126	Simple arson.
127	Extortion.	134	Communicating a threat.
128	Assault upon a commissioned, warrant, noncommissioned, or petty officer of the Air Force, Army, Coast Guard, Navy, or a friendly foreign power, not in the execution of his office.	128	Assault; assault and battery.
128	Assault upon any person who, in the execution of his office, is performing air police, military police, shore patrol, or civil law enforcement duties.	128	Assault; assault and battery.
128	Assault intentionally inflicting grievous bodily harm.	128 128	Assault; assault and battery. Assault with a dangerous weapon.
128	Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm.	128	Assault; assault and battery.
128	Assault and battery.	128	Assault.
128	Assault and battery upon a child under age of 16.	128	Assault; assault and battery.
129	Burglary.	130 134	Housebreaking. Unlawful entry.
130	Housebreaking.	134	Unlawful entry.
134	Assault, indecent.	128	Assault; assault and battery.

Article	Offense Charged	Article	Included Offense
134	Assault with intent to commit voluntary manslaughter.	128 128 128	Assault; assault and battery. Assault intentionally inflicting grievous bodily harm. Assault with a dangerous weapon.
134	Assault with intent to commit robbery, sodomy, arson, or housebreaking.	128 128	Assault; assault and battery. Assault with a dangerous weapon.
134	Assault with intent to commit burglary.	128 128 134	Assault; assault and battery. Assault with a dangerous weapon. Assault with intent to commit housebreaking.
134	Assault with intent to murder.	128 128 128 134 134	Assault; assault and battery. Assault with a dangerous weapon. Assault intentionally inflicting grievous bodily harm. Assault with intent to commit voluntary manslaughter. Willful or careless discharge of a firearm.
134	Assault with intent to rape.	128 134	Assault; assault and battery. Indecent assault.
134	False or unauthorized military or official pass, permit, discharge certificate, or identification card, possessing with intent to deceive.	134	False or unauthorized military or official pass, permit, discharge certificate, or identification card, possessing without intent to deceive.
134	Discharging a firearm wrongfully and willfully, under circumstances as to endanger life.	134	Discharging a firearm through carelessness.
134	Impersonating an officer, warrant officer, noncommissioned, or petty officer, or agent of superior authority with intent to defraud.	134	Impersonating an officer, warrant officer, noncommissioned, or petty officer, or agent of superior authority without intent to defraud.
134	Mails, taking, opening, abstracting, secreting, destroying, stealing, or obstructing.	121 121	Larceny. Wrongful appropriation.
134	Communicating a threat.	117	Using provoking speeches.

Appendix 13

FORMS OF SENTENCES

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a. **ANNOUNCEMENT OF SENTENCE IN COURT WITH MEMBERS.** In announcing the sentence, the president of the court should announce:

"_____, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, (two-thirds) (three-fourths) (all) of the members present at the time the vote was taken concurring, sentences you _____."

The actual sentence should now be announced following one of the forms contained in *c*, below, or any necessary modification or combination thereof. Each of the forms of punishment prescribed in *c* are separate, that is, the adjudging of one form of punishment is not contingent upon any other punishment also being adjudged. The forms in *c*, however, may be combined and modified so long as the punishment adjudged is not forbidden by the code and does not exceed the maximum authorized by this manual (see chapter XXV) in the particular case being tried. In announcing a sentence consisting of combined punishments, the president may, *for example,* state:

"To be dishonorably discharged from the service, to be confined at hard labor for one year, to forfeit all pay and allowances, and to be reduced to the grade of Private, E–1;" or

"To be discharged from the service with a bad-conduct discharge, to be confined at hard labor for six months, and to forfeit $35.00 per month for six months;" or

"To be dismissed from the service, to be confined at hard labor for one year, and to forfeit all pay and allowances;" or

"To perform hard labor for one month and to forfeit $25.00 per month for one month."

b. **ANNOUNCEMENT OF SENTENCE IN COURT WITH MILITARY JUDGE ALONE.** In announcing the sentence, the military judge should announce:

"_____, it is my duty as military judge of this court to inform you that this court sentences you to _____." The actual sentence should now be announced following one of the forms contained in *c*, below, or any necessary modification or combination thereof. Any case in which the death penalty may be adjudged cannot be tried by a military judge alone (14*a*).

c. **SINGLE PUNISHMENT FORMS.**

For punitive separation

1. To be dishonorably discharged from the service.[1]
2. To be discharged from the service with a bad-conduct discharge.[2]
3. To be dismissed from the service.[3]

NOTE. Periods of confinement should not be expressed in terms of months in excess of 11; for example, a period of 12 months is properly expressed as "one year" and a period of 1½ years is properly expressed as "one year and six months."

Pertaining to deprivation of liberty or death penalty

4. To be restricted to the limits of _____ for _____ (days) (months).[4]
5. To perform hard labor for _____ (days) (months).[5]
6. To be confined at hard labor for [_____ (days) (months) (years)] [the length of your natural life].[6]
7. To be confined on (bread and water) (diminished rations) for _____ days.[7]

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[1] Applicable in the case of enlisted members or warrant officers other than commissioned warrant officers (126*d* and *e*).

[2] Applicable in the case of enlisted members only. See 126*e* and 127*a* and *c*(4).

[3] Applicable in the case of commissioned officers and commissioned warrant officers only (126*d*).

[4] Not to exceed two months (126*g*).

[5] Not to exceed three months if adjudged by a general or special court-martial; and not to exceed forty-five days if adjudged by summary court-martial. See 126*k*.

[6] May be adjudged against commissioned and warrant officers by a general court-martial only (126*d*). See 126*j*.

[7] Confinement may only be adjudged against enlisted members attached to or embarked in a vessel and shall not be imposed in excess of three days (125).

8. To be put to death.

Pertaining to financial penalty

NOTE. Forfeitures, fines, and detentions should be expressed in even dollars.

9. To have $_____ per month for _____ months detained for a period of _____ (months) (year).[8]

10. To forfeit ($_____ per month for _____ months) (all pay and allowances).[9]

11. To pay to the United States a fine of $_____, [and to be[10] (further) confined at hard labor until said fine is so paid, but for not more than _____ (months) (years)[10] (in addition to the _____ (months) (years) hereinbefore adjudged)].[11]

For reduction in grade or loss of numbers, lineal position, or seniority

12. To be reduced to the grade of (corporal) (radioman second class) (_____).[12]

13. To (lose _____ unrestricted numbers) (be placed at the foot of the _____'s list of present date and to remain there until he shall have lost _____ unrestricted numbers (lose _____ unrestricted line officer running mate numbers).[13]

14. To lose _____ month's seniority in the date of his warrant (as machinist) (_____), and to lose corresponding rank in the list of (machinists) (_____) of the (Navy) (_____).[14]

Admonition and Reprimand

15. To be admonished.[15]

16. To be reprimanded.[15]

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[8] See 126*h*(4) as to limitations.

[9] See 126*h*(2) for limitations in the case of enlisted members and for the meaning of the phrase "to forfeit all pay and allowances." 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 (Art. 19).

[10] To be used if confinement is also adjudged as part of the sentence other than for enforcing the collection of the fine.

[11] See 126*h*(3) and Section B, 127*c*.

[12] See 16*b* and 126*e*.

[13] Not an authorized punishment in the case of Army and Air Force personnel (126*i*). Officers of the other armed forces may be sentenced to a loss of numbers. The sentence placing the officer at the foot of the list, with the proviso that he is to remain in that position until he has lost the required numbers, is to be used when his position on the list will not permit his losing the adjudged numbers in grade at the time the sentence is adjudged.

[14] Not an authorized punishment in the case of Army and Air Force personnel (126*i*). In the case of warrant officers of the other armed forces, when promotion is based upon length of service in grade, loss of seniority for a specified period of time should be adjudged in lieu of a loss of numbers.

[15] See 126*f* and Section B, 127*c*.

Appendix 14

FORMS FOR ACTION BY CONVENING AUTHORITY

Show headquarters or ship, place, and date of action. Signature is followed by grade, unit, and the words "Commander," "Commanding" or "Officer in Charge." The use of these forms is not mandatory and they are not intended to provide for every case; but whenever appropriate, these forms, or a combination or modification of them, should be used.

The place of confinement should be designated only after consulting pertinent regulations of the Secretary of a Department. See 89*c*(5).

a. **SUMMARY COURTS-MARTIAL.**

Forms 1–11 may be used by the convening authority who takes action on the record of trial by summary court-martial:

Approval —Execution

1. Approved and ordered executed. (_____ is designated as the place of confinement.)

—Partial

2. The finding of guilty of Specification 2, Charge I, is disapproved. Only so much of the sentence as provides for _____ is approved and ordered executed. (_____ is designated as the place of confinement.)

Approval—deferment terminated by action ordering sentence executed. (See 88*f*).

3. Approved and ordered executed. The service of the sentence to confinement at hard labor for ____ days was deferred on _____. _____ is designated as the place of confinement.

Approval—deferment terminated by rescission

4. Approved and ordered executed. The service of the sentence to confinement at hard labor for ____ days was deferred on _____ and the deferment was rescinded on _____. _____ is designated as the place of confinement.

NOTE. Ordering the execution of the sentence terminates the deferment of confinement. The confinement at this time may be suspended but it may not be further deferred.

—Of rehearing (see 89*c*(7)(*a*))

5. Approved and ordered executed. The accused will be credited with any portion of the punishment served or executed from _____, 19__ to _____, 19__ under the sentence adjudged at the former trial of this case.

Suspension (see 88*e*(2)) —Entire sentence; conditional remission

6. Approved and suspended for _____ months, at which time, unless the suspension is sooner vacated, the sentence will be remitted without further action.

NOTE. When a sentence which includes deferred confinement is approved but suspended, the deferment is thereby terminated, and only the suspension of the sentence to confinement is operative. Deferment of confinement and suspension of the same period of confinement cannot exist concurrently. When confinement which has been deferred is approved but suspended, the dates of the deferment should be included in the initial action.

—Partial; conditional remission

7. Approved and ordered executed, but the (confinement) (_____) is suspended for _____ months, at which time, unless the suspension is sooner vacated, the sentence to _____ will be remitted without further action.

Disapproval —Charges dismissed

8. Disapproved. The charges are dismissed.

—Order of rehearing

9. It appears that the following error was committed: _____. This error being materially prejudicial to the substantial rights of the

accused under the circumstances of this case, the findings of guilty and the sentence are disapproved, and a rehearing is directed before a summary court-martial to be hereafter designated.

NOTE. The reason for disapproval must be stated in the action if a rehearing is ordered (Art. 63(a)).

—Of rehearing; restoration of rights (see 89c(7)(a))

10. Disapproved. The charges are dismissed. All rights, privileges, and property of which the accused has been deprived by virtue of the execution of the sentence adjudged at the former trial of this case on _____, 19___ will be restored.

NOTE. Under Article 75(a) the authority setting aside or disapproving a sentence must order a restoration of all rights, privileges, and property affected by any executed portion of a sentence which has been set aside or disapproved unless a rehearing is ordered and such executed portion is included in the sentence adjudged upon a rehearing. It follows that if a rehearing of a summary court-martial case is ordered pursuant to 94*a*(2) after the original sentence has been ordered into execution, any rights, privileges, and property affected by the former sentence must be restored if the rehearing results in an acquittal or a disapproval of the sentence adjudged.

If the rehearing results in an acquittal, the convening authority should omit from the action shown above the words, "Disapproved. The charges are dismissed."

Withdrawal of previous action (see 89*b*; 94*a*(2))

11. In the foregoing case of _____, the action taken by (me) (my predecessor in command) on _____, 19___ is withdrawn and the following substituted therefor: _____.

b. SPECIAL COURTS-MARTIAL.

(1) *Special court-martial sentences in cases which do not involve an approved sentence to bad-conduct discharge.* Forms 12–31 are appropriate for use in special court-martial cases in which the sentence, as approved, does not include a bad-conduct discharge. They are also appropriate for use with respect to general court-martial sentences which, as approved, do not affect a general or flag officer, or extend to death or dismissal, or include a punitive discharge or confinement for one year or more.

Approval —Execution

12. In the foregoing case of _____, the sentence is approved and will be duly executed. (_____ is designated as the place of confinement.)

—Partial; execution

13. In the foregoing case of _____, only so much of the sentence as provides for _____ is approved and will be duly executed. (_____ is designated as the place of confinement.)

—Partial; disapproval of findings

14. 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.)

—Partial; lesser included offense and substituted findings (see 87*a*(4))

15. In the foregoing case of _____, only so much of the findings of guilty of Charge I and its specification is approved as finds that the accused absented himself without proper authority from the (organization) (_____) alleged at the place and time alleged and remained so absent until _____, in violation of Article 86. Only so much of the sentence as provides for _____ is approved and will be duly executed. (_____ is designated as the place of confinement.)

16. 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.)

17. In the foregoing case of _____, only so much of the finding of guilty of Specification 1, Charge I, is approved as finds that the accused did, at the time and place alleged, wrongfully appropriate the property described, of the value and ownership alleged. Only so much of

the sentence as provides for _____ is approved and will be duly executed. (_____ is designated as the place of confinement.)

18. In the foregoing case of _____, only so much of the findings of guilty of Charge I and its specification is approved as finds that the accused did, at the time and place alleged, wilfully and maliciously attempt to set fire to a haystack, the property of _____, of some value not in excess of $50.00, in violation of Article 80. Only so much of the sentence as provides for _____ is approved and will be duly executed. (_____ is designated as the place of confinement.)

—Of rehearing (see 89c(7)(a))

19. In the foregoing case of _____, the sentence is approved and will be duly executed. (_____ is designated as the place of confinement.) The accused will be credited with (confinement from _____, 19__ to _____, 19__ and) any (other) portion of the punishment served or executed from _____, 19__ to _____, 19__ under the sentence adjudged at the former trial of this case.

Suspension conditional remission (see 88e(2))

20. In the foregoing case of _____, the sentence is approved, but the execution thereof is suspended for _____ months, at which time, unless the suspension is sooner vacated, the sentence will be remitted without further action.

21. In the foregoing case of _____, the sentence is approved and will be duly executed, but the execution of that portion thereof adjudging (forfeitures of pay.) (confinement) is suspended for _____ months, at which time, unless the suspension is sooner vacated, the suspended portion of the sentence will be remitted without further action.

Disapproval —Charges dismissed

22. In the foregoing case of _____, the sentence is disapproved and the charges are dismissed.

—Reason stated (see 89c(2))

23. In the foregoing case of _____, it appears from the record of trial that, although trial of the specification of the charge was barred under the provisions of Article 43, the accused was not advised of his rights in the premises. The findings of guilty and the sentence are disapproved and the charges are dismissed.

NOTE. Under 89c(2) the convening authority may state the reasons for disapproval of the findings and sentence in certain cases even when he does not order a rehearing. Such statement of reasons for disapproval is generally appropriate where the disapproval of a finding of guilty may affect future administrative action.

—Of rehearing restoration of rights (see 89c(7)(a))

24. In the foregoing case of _____, the findings of guilty and the sentence are disapproved and the charges are dismissed. All rights, privileges, and property of which the accused has been deprived by virtue of the execution of the sentence adjudged at the former trial of this case on _____, 19__ will be restored.

NOTE. See also note under form 10.

—Order of rehearing (see 92a)

25. In the foregoing case of _____, it appears from the record of trial that (the confession of the accused was not shown to have been voluntarily made) (Exhibit 1, an improperly authenticated extract copy of a morning report, was erroneously received in evidence over the objection of the defense) (the prosecution erroneously cross-examined the accused on the merits after he had taken the stand for a limited purpose only) (the testimony of A as to the out-of-court identification of the accused by B was erroneously received in evidence) (_____). Under the circumstances of this case, this error is materially prejudicial to the substantial rights of the accused. For this reason, the sentence is disapproved and a rehearing is ordered before another court-martial to be hereafter designated.

—Order of rehearing on sentence only

26. In the foregoing case of _____, it appears from the record of trial that (_____ was erroneously received in evidence) (_____). Under the circumstances of the case this error is materially prejudicial to the substantial rights of the accused as to the sentence only. For this reason, the findings are approved and a rehearing as to sen-

tence only is ordered before another court-martial to be hereafter designated.

Jurisdictional error (see 92*b*)

27. In the foregoing case of _____, it appears from the record of trial that (the person who signed the charges sat as a member of the court) (an enlisted person who is a member of the same unit as the accused sat as a member of the court) (the members of the court-martial who tried the case were not sworn) (the specification of the charge fails to allege any offense) (_____). In view of the provisions of Article _____ the proceedings, findings, and sentence are invalid. Another trial is ordered before another court-martial to be hereafter designated.

—Confinement in lieu of discharge

28. In the foregoing case the sentence is approved but the bad-conduct discharge is changed to the lesser punishment of confinement at hard labor for 6 months. The sentence as changed is approved and will be duly executed. _____ is designated as the place of confinement.

Approval—confinement deferred on trial date (see 88*f*)

29. In the foregoing case of _____ the sentence is approved and will be duly executed. The service of the sentence to confinement at hard labor for _____ (days) (months) was deferred on _____. _____ is designated as the place of confinement.

Approval—confinement deferred after trial date

30. In the foregoing case of _____, the sentence is approved and will be duly executed. The service of the sentence to confinement at hard labor _____ (days) (months) was begun on _____ and was deferred on _____. _____ is designated as the place of confinement.

Withdrawal of previous action (see 89*b*)

31. See Form 11.

(2) *Sentences including an approved sentence to bad-conduct discharge.* Forms 32–40 are applicable to cases tried by special courts-martial convened by an officer who does not exercise general court-martial jurisdiction when the sentence as approved includes a bad-conduct discharge.

Approval —Forwarding under Article 65(b)

32. In the foregoing case of _____, (the sentence) (only so much of the sentence as provides for bad-conduct discharge and _____) is approved. The record of trial is forwarded for action under Article 65(b).

—Forfeitures and confinement

NOTE. When confinement, not suspended or deferred, is approved together with forfeitures, the forfeitures apply to pay and allowances becoming due on and after the date of the action of the convening authority unless he defers such application for good cause (88*d*(3); Art. 57(a)). For the purpose of clarity, if confinement, unsuspended or deferred, and forfeitures are approved one of the following should be added to the form of action:

"The forfeitures shall apply to pay becoming due on and after the date of this action," or

"The application of the forfeitures is deferred until (the sentence is ordered into execution) (_____)."

Suspension —Of bad-conduct discharge (see 88*e*(2)(*b*))

33. In the foregoing case of _____, (the sentence is approved and will be duly executed, but the execution of that portion thereof adjudging bad-conduct discharge is suspended for the period of confinement and ___ months thereafter, at which time, unless the suspension is sooner vacated, the bad-conduct discharge shall be remitted without further action. (_____ is designated as the place of confinement.) The record of trial is forwarded for action under Article 65(b).

—Entire sentence

34. In the foregoing case of _____, the sentence is approved, but the execution thereof is suspended for _____ months, at which time, unless the suspension is sooner vacated, it shall be remitted without further action. The record of trial is forwarded for action under Article 65(b).

Action by officer exercising general court-martial jurisdiction

NOTE. The officer exercising general court-martial jurisdiction to whom the record of trial is forwarded under Article 65(b) may, in general, use the forms of actions indicated in forms 41–49 below except that, if the convening authority has modified, suspended or deferred the sentence, the superior should refer to the sentence as approved in the manner indicated in form 37.

35. In the foregoing case of _____, the sentence is approved. The service of the sentence to confinement at hard labor for _____ (days) (months) (was deferred on _____) (is deferred effective this date) and will not begin until such time as the sentence is ordered into execution, unless such deferment is sooner rescinded. The record of trial is forwarded for action under Article 65(b).

Approval—confinement deferred on trial date or date of action (See 88f)

36. In the foregoing case of _____ the sentence is approved. The service of the sentence to confinement at hard labor for _____ (days, months) was deferred on _____ and the deferment (was rescinded on _____) (is rescinded effective this date). _____ is designated as the place of confinement. The record of trial is forwarded for action under Article 65(b).

Approval—confinement deferred and deferment rescinded prior to or on date of action

NOTE. When the service of the sentence to confinement is deferred prior to or at the time the initial action is taken, the following should, in appropriate cases, (see 88*d*(3)) be added to the form of the action:

"The application for forfeitures is deferred until the sentence is ordered into execution, unless the deferment of confinement is sooner rescinded."

The deferment is terminated when the sentence is ordered into execution. The confinement at this time may be suspended but it may not be further deferred. When a sentence which includes deferred confinement is approved but suspended, the deferment is thereby terminated, and only the suspension of the sentence to confinement is operative. Deferment of confinement and suspension of the same period of confinement cannot exist concurrently. When confinement which has been deferred is approved but suspended, the dates of the deferment should be included in the initial action.

37. In the foregoing case of _____, the (sentence) (only so much of the sentence) as (approved) (suspended) (approved and suspended) (approved and deferred) by the convening authority (as provides for _____) is (approved _____) (_____).

—Approval

38. In the foregoing case of _____, the findings of guilty and the sentence as approved by the convening authority are disapproved and the charges are dismissed. The accused will be released from the confinement adjudged by the sentence in this case and all rights, privileges, and property of which the accused has been deprived by virtue of the findings and sentence so disapproved will be restored.

—Disapproval of sentence ordered into execution by convening authority

39. See 25 above.

—Disapproval; order of rehearing

40. See 24 above.

—Disapproval of rehearing

c. GENERAL COURTS-MARTIAL.

Cases forwarded for examination under Article 69. Forms of action 12–29 above are generally applicable to general court-martial cases in which the sentence as approved does not affect a general or flag officer, extend to death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more.

Cases forwarded for review by a Court of Military Review.

41. In the foregoing case of _____, the sentence is approved.

Approval

NOTE. For the purpose of clarity, if confinement, unsuspended, or undeferred, and forfeitures are approved, one of the following should be added at this point:

(*a*) "The forfeitures shall apply to pay and allowances becoming due on and after date of this action," or

(*b*) "The application of the forfeitures is deferred until (the sentence is ordered into execution) (_____)."

Confinement and forfeitures (see 88*d*(3))

The record of trial is forwarded to the (Judge Advocate General of the _____) (Commandant, United States Coast Guard) for review by a Court of Military Review. Pending completion of appellate review the accused will be (retained in this command) (confined in _____) (transferred to the command of _____).

Remarks as to forwarding

—Temporary custody

42. In the foregoing case of _____, only so much of the sentence as provides for _____ is approved. (The forfeitures shall

—Partial

apply to pay and allowances becoming due on and after the date of this action.) (The application of the forfeitures is deferred until _____.) The record of trial is forwarded to the (Judge Advocate General of the _____) (Commandant, United States Coast Guard) for review by a Court of Military Review. Pending completion of appellate review the accused will be _____ (see form 41 above).

NOTE. See forms 14–18 for other examples of partial approval.

—Mitigation of dishonorable discharge

43. In the foregoing case of _____, only so much of the sentence is approved as provides for bad-conduct discharge, confinement at hard labor for one year, and forfeiture of all pay and allowances. The forfeitures shall apply to all pay and allowances becoming due on and after the date of this action. The record of trial is forwarded to the (Judge Advocate General of the _____) (Commandant, United States Coast Guard) for review by a Court of Military Review. Pending completion of appellate review _____ (see form 41 above).

—Confinement in lieu of discharge

44. In the foregoing case of _____, the dishonorable discharge is changed to confinement at hard labor for _____ (thereby making the period of confinement at hard labor as approved total _____ months). The sentence as changed is approved. The record of trial is forwarded to the (Judge Advocate General of the _____) (Commandant, United States Coast Guard) for review by a Court of Military Review. Pending completion of appellate review the accused will be _____ (see form 41 above).

—Of rehearing

45. In the foregoing case of _____, the sentence is approved. The accused will be credited with (confinement from _____, 19__ to _____, 19__ and) any (other) portion of the punishment served or executed from _____, 19__ to _____, 19__ under the sentence adjudged at the former trial of this case. The record of trial is forwarded to the (Judge Advocate General of the _____) (Commandant, United States Coast Guard) for review by a Court of Military Review. Pending completion of appellate review the accused will be _____ (see form 41 above).

Suspension —Punitive discharge; confinement for less than one year

46. In the foregoing case of _____, the sentence is approved and will be duly executed, but the execution of that portion thereof adjudging (dishonorable discharge) (bad-conduct discharge) is suspended for the period of confinement and _____ months thereafter, at which time, unless the suspension is sooner vacated, the suspended portion shall be remitted without further action. _____ is designated as the place of confinement. The record of trial is forwarded to the (Judge Advocate General of the _____) (Commandant, United States Coast Guard) for review by a Court of Military Review.

—Entire sentence

47. In the foregoing case of _____, the sentence is approved, but the execution thereof is suspended for __ months, at which time, unless the suspension is sooner vacated, the sentence shall be remitted without further action. The record of trial is forwarded to the (Judge Advocate General of the _____) (Commandant, United States Coast Guard) for review by a Court of Military Review. Pending completion of appellate review the accused will be (retained in this command) (_____).

Approval—confinement deferred on trial date or date of action (See 88f)

48. In the foregoing case of _____, the sentence is approved. The service of the sentence to confinement at hard labor for _____ (months, years) (was deferred on _____) (is deferred effective this date) and will not begin until such time as the sentence is ordered into execution, unless such deferment is sooner rescinded. The record of trial is forwarded to the (Judge Advocate General of the _____) (Commandant, United States Coast Guard) for review by a Court of Military Review. Pending completion of appellate review the accused will be _____ (see form 41 above).

Approval—confinement deferred and deferment rescinded prior to or on date of action

49. In the foregoing case of _____, the sentence is approved. The service of the sentence to confinement at hard labor for _____ (months) (years) was deferred on _____ and the deferment (was rescinded on _____) (is rescinded effective this date). The record of trial is forwarded to the (Judge Advocate General of the _____) (Commandant, United States Coast Guard) for review by a Court of Military Review. Pending completion of appellate review the accused will be _____ (see form 41 above).

NOTE. Where the service of the sentence to confinement is deferred prior to or at the time the initial action is taken, the following should, in appropriate cases, (see 88*d*(3)), be added to the form of the action:

> "The application of forfeitures is deferred until the sentence is ordered into execution, unless the deferment of confinement is sooner rescinded."

Ordering the execution of the sentence terminates the deferment. The confinement at this time may be suspended but it may not be further deferred. When a sentence which includes deferred confinement is approved but suspended, the deferment is thereby terminated, and only the suspension of the sentence to confinement is operative. Deferment of confinement and suspension of the same period of confinement cannot exist concurrently. When confinement which has been deferred is approved but suspended, the dates of the deferment should be included in the initial action.

d. FORMS FOR ACTIONS APPROVING AND SUSPENDING PUNISHMENTS MENTIONED IN ART. 58a AND RETAINING ACCUSED IN PRESENT OR INTERMEDIATE GRADE.

Under the authority of Article 58a, the Secretary concerned may, by regulation, limit or specifically preclude the reduction in grade which would otherwise be effected under that Article upon the approval of certain court-martial sentences by the convening authority. The Secretaries concerned may provide in regulations that if the convening or higher authority taking action on the case suspends those elements of the sentence that are specified in Article 58a the accused may be retained in the grade held by him at the time of the sentence or in any intermediate grade. The following forms of action may be utilized by convening or higher authority in effecting actions authorized by the Secretary concerned in regulations pursuant to the authority of Article 58a.

If the convening authority or higher authority when taking action on a case in which the sentence includes a punitive discharge, confinement, or hard labor without confinement desires to approve the sentence and to retain the enlisted member in the grade held by him at time of sentence or in any intermediate grade, he may do so if permitted by regulations of the Secretary concerned whether or not the sentence also includes a reduction to the lowest enlisted grade, by utilizing one of the following forms of action. The first action, 50, is appropriate when the sentence does not specifically provide for reduction. The second and third actions, 51 and 52 are appropriate when the sentence specifically provides for reduction to the grade of E–1, the action set forth in 51 being intended for a case in which the accused is to be probationally retained in the grade held by him at the time of sentence, and the action set forth in 52 for a case in which he is to serve probationally in an intermediate grade.

50. In the foregoing case of _____, the sentence is approved and will be duly executed but the execution of so much thereof as provides for [(dishonorable) (bad-conduct) discharge], [confinement], [hard labor without confinement], [_____] is suspended until _____, at which time, unless the suspension is sooner vacated, the suspended portions of the sentence will be remitted without further action. The accused will (continue to) serve in the grade of _____ unless the suspension of the [(dishonorable) (bad-conduct) discharge], [confinement], [hard labor without confinement] is vacated, in which event the accused at that time will be reduced to the grade of E–1.

51. In the foregoing case of _____, the sentence is approved and will be duly executed but the execution of so much thereof as provides for [(dishonorable) (bad-conduct) discharge], [confinement], [hard labor without confinement], [_____], and reduction to the grade of E–1, is suspended until _____, at which time, unless the suspension is sooner vacated, the suspended portions of the sentence will be remitted

without further action. The accused will continue to serve in the grade of _____ unless the suspension of the [(dishonorable) (bad-conduct) discharge], [confinement], [hard labor without confinement], or reduction to the grade of E–1, is vacated, in which event the accused at that time will be reduced to the grade of E–1.

52. In the foregoing case of _____, the sentence is approved and will be duly executed but the execution of so much thereof as provides for [(dishonorable) (bad-conduct) discharge], [confinement], [hard labor without confinement], [_____], and that portion of the reduction to E–1, which is in excess of a reduction to the grade of _____ is suspended until _____, at which time, unless the suspension is sooner vacated, the suspended portions of the sentence will be remitted without further action. The accused will serve in the grade of _____ unless the suspension of the [(dishonorable) (bad-conduct) discharge], [confinement], [hard labor without confinement], or reduction to the grade of E–1, is vacated, in which event the accused at that time will be reduced to the grade of E–1.

Appendix 15

FORMS FOR COURT-MARTIAL ORDERS

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a. **FORMS FOR INITIAL PROMULGATING ORDERS.**

The following is a form applicable in promulgating the results of trial and the action of the convening authority in all general and special court-martial cases. Omit the marginal side notes in drafting orders.

General (Special) Court-Martial Order No. _____ } (Headquarters) (USS) _____, 19__. **Heading**

Before a general (special) court-martial which convened at (on board) _____ (Place) pursuant to _____ (Description of convening orders), (as amended by _____ (Description of amending orders, if any),) was arraigned and tried [on a (rehearing) (new trial), the former proceedings having been published in—CMO No. _____, _____ (Hq) (USS) _____, 19__]: **Authority** **Arraignment**

_____ _____ _____ _____ _____ **Accused**

(Grade) (Name) (Service No.) (Armed force) (Unit)

Charge I: Violation of the Uniform Code of Military Justice, Article _____. **Charges**

Specification 1: (Set forth specification verbatim from the charge sheet if not amended during trial—or if amended during trial, as so amended—unless it was withdrawn by the convening authority before arraignment. Such withdrawal may be shown as follows:

Withdrawn by order of the convening authority before arraignment.)

Specification 2: _____

Charge II: Violation of the Uniform Code of Military Justice, Article _____.

Specification: _____

PLEAS **Pleas**

To *Specification* 1, Charge I: Not guilty.
To *Specification* 2, Charge I: Guilty.
To Charge I: Guilty.
To the *Specification*, Charge II: Not guilty.
To Charge II: Not guilty.

or

To all the *Specifications* and Charges: Not guilty (Guilty).

NOTE. If a plea is not entered to a specification or charge owing, for example, to the fact that the court sustained a motion to dismiss, the fact will be briefly stated under "Pleas," as shown in the following example. In such a case the specification or charge need not be listed under "Findings." **Charges dismissed on motion**

To *Specification* 2, Charge I: Dismissed on motion of defense on ground of former jeopardy.

FINDINGS **Findings**

Of *Specification* 1, Charge I: Guilty.
Of *Specification* 2, Charge I: Guilty.
Of Charge I: Guilty.

Of the *Specification*, Charge II: Not guilty.
Of Charge II: Not guilty.

or

Of all the *Specifications* and Charges: Guilty.

NOTE. If a specification or charge is dismissed or withdrawn after a plea has been entered, the fact will be stated under "Findings." If dismissed on motion of the prosecution or withdrawn by the convening authority after evidence on the merits has been received, a notation to this effect should be made setting forth the reasons for such dismissal or withdrawal. Examples:

Of *Specification* 1. Charge I: Motion for finding of not guilty sustained.
Of *Specification* 2, Charge I: Dismissed on motion of defense on grounds of *res judicata*.
Of the *Specification* of the Charge: Withdrawn by order of the convening authority after evidence on the merits had been received because of military necessity occasioned by enemy action.

Acquittal

In the event of findings of not guilty of all charges and specifications:

Of all the *Specifications* and Charges: Not guilty.
The findings were announced on _____, 19__.

Sentence

SENTENCE

To be discharged from the service with a bad-conduct discharge, to forfeit $_____ pay per month for six months, and to be confined at hard labor for _____. (_____ previous convictions considered.)

Date

The sentence was adjudged on _____.

ACTION

Action of convening authority

(Copy action of convening authority verbatim, including heading, date, and signature. See appendix 14 for appropriate forms.)

Action of the officer exercising general court-martial jurisdiction (if appropriate)

ACTION OF THE OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION

HEADQUARTERS

_____

_____

_____, 19__

In the foregoing case of _____ the sentence as approved (and suspended) by the convening authority is approved. The record of trial is forwarded to the Judge Advocate General of the _____ for review by a Court of Military Review. Pending completion of appellate review the accused will be confined in _____.

_____

Major General, U.S. _____
Commanding

NOTE. Orders promulgating the proceedings of special court-martial cases, which include an approved sentence to bad-conduct discharge will be published by the officer who forwards the record of trial to the Judge Advocate General. If the record is so forwarded by an officer exercising general court-martial jurisdiction to whom the record has been forwarded pursuant to Article 65(b), his action will be copied verbatim immediately after the action of the convening authority.

Authentication

NOTE. The order will be authenticated as prescribed by the Secretary of a Department.

Joint or common trials

NOTE. In the case of a *joint or common* trial separate orders should be issued for each accused. Joint specifications will be copied verbatim but only the pleas, findings, sentence, and action pertaining to the accused as to whom the order is promulgated need be shown.

b. FORMS FOR SUPPLEMENTARY ORDERS PROMULGATING RESULTS OF AFFIRMING ACTION.

NOTE. Court-martial orders publishing the final results of a new trial and of proceedings in cases in which the President or the Secretary concerned has taken final action are promulgated by departmental orders. In other cases the final action may be promulgated by an appropriate convening

authority, or by an officer exercising general court-martial jurisdiction over the accused at the time of final action, or by the Secretary concerned. See 107. The following forms may be used where such a promulgating order is published in the field. If a sentence *as ordered into execution or suspended* by the convening authority is affirmed without modification and there has been no modification of the findings, no supplementary promulgating order is required.

See *a* above. **Heading**

In the (general) (special) court-martial case of _____, the sentence to bad-conduct discharge, forfeiture of _____ _____, and confinement at hard labor for _____, as promulgated in (General) (Special) Court-Martial Order No. _____, (Headquarters) (Commandant, _____ Naval District) _____, dated _____, 19__, has been affirmed pursuant to Article (66) (67). The provisions of Article 71(c) having been complied with, the sentence will be duly executed. (_____ is designated as the place of confinement.) (_____.) **Sentence —Affirmed**

NOTE. As to the designation of places of confinement, see the applicable regulations of the Secretary of a Department.

or

In the (general) (special) court-martial case of _____, only so much of the sentence promulgated in (General) (Special) Court-Martial Order No. _____, (Headquarters) (Commandant, _____ Naval District) _____, dated _____, 19__, as provides for _____, has been affirmed pursuant to Article (66) (67). The provisions of Article 71(c) having been complied with, the sentence as thus modified will be duly executed. (_____ is designated as the place of confinement.) (_____.) **—Affirmed in part**

or

In the (general) (special) court-martial case of _____, pursuant to Article (66) (67), the findings of guilty of Charge II and its specification have been set aside and only so much of the sentence promulgated in (General) (Special) Court-Martial Order No. _____, (Headquarters) (Commandant, _____ Naval District) _____, dated _____, 19__, as provides for _____ has been affirmed. Article 71(c) having been compiled with, the sentence as thus modified will be duly executed. (_____ is designated as the place of confinement.) (_____.)

or

In the (general) (special) court-martial case of _____, the proceedings of which were promulgated in (General) (Special) Court-Martial Order No. _____, (Headquarters) (Commandant _____ Naval District) _____, dated _____, 19__, the findings of guilty of Charge I and its specification, and so much of the sentence as is in excess of _____ have been set aside and the sentence, as thus modified, has been affirmed pursuant to Article (66) (67) and will be duly executed. Article 71(c) having been complied with, all rights, privileges, and property of which the accused has been deprived by virtue of the findings of guilty and that portion of the sentence so set aside will be restored. **—Affirmed in part; prior order of execution set aside in part**

or

In the (general) (special) court-martial case of _____, pursuant to Article (66) (67), the findings of guilty and the sentence as promulgated by (General) (Special) Court-Martial Order No. _____, (Headquarters) (Commandant, _____ Naval District) _____, dated _____, 19__, were set aside on _____, 19__. (The charges are dismissed. All rights, privileges, and property of which the accused has been deprived by virtue of the findings of guilty and the sentence so set aside will be restored.) (A rehearing is ordered before another court-martial to be hereafter designated.) **Findings and sentence set aside** **—Charges dismissed** **—Rehearing ordered**

See *a* above. **Authentication**

c. FORMS FOR ORDERS REMITTING OR SUSPENDING UNEXECUTED PORTIONS OF SENTENCE.

Heading See *a* above.

Remission; suspension (see 97*a*) The unexecuted portion of the sentence to _____, in the case of _____, promulgated in Special Court-Martial Order No. _____, (this headquarters) (this ship) (Headquarters _____) (USS _____), _____, 19__, is (remitted) (suspended for _____ months, at which time, unless the suspension is sooner vacated, the unexecuted portion of the sentence will be remitted without further action).

Summary courts-martial NOTE. Any order remitting or suspending the unexecuted portion of a sentence by summary court-martial or promulgating any other action taken on a summary court-martial case subsequent to the initial action of the convening authority will be promulgated in such orders as may be prescribed by the Secretary of a Department.

Authentication See *a* above.

d. FORMS FOR ORDERS SETTING ASIDE ILLEGAL SENTENCE.

Heading See *a* above.

Setting aside

—By officer having supervisory authority

—Entire sentence Pursuant to the authority of paragraph 94, MCM, the findings of guilty and the sentence in the special court-martial case of _____, as promulgated in Special Court-Martial Order No. _____, (Headquarters) (USS) _____, _____, 19__, are set aside. All rights, privileges, and property of which the accused has been deprived by virtue of the findings of guilty and the sentence so set aside will be restored.

or

—In part Pursuant to the authority of paragraph 94, MCM, the findings of guilty of Charge I and its specification and so much of the sentence as is in excess of _____, in the special court-martial case of _____, as promulgated in Special Court-Martial Order No. _____, (Headquarters) (USS) _____, _____, 19__, are set aside. All rights, privileges, and property of which the accused has been deprived by virtue of the findings of guilty and that portion of the sentence so set aside will be restored.

—By convening authority NOTE. If, pursuant to 94*a*(2), the convening authority withdraws his previous action, disapproves the findings of guilty and the sentence, and dismisses the charge or directs a rehearing in a case in which a promulgating order of execution has previously been published, he shall publish a new promulgating order as shown in *a* above. The action shall be followed by the following notation:

—Revocation of prior order Special Court-Martial Order No. _____, this (headquarters) (ship), _____, 19__, is rescinded.

Authentication See *a* above.

e. FORMS FOR ORDERS VACATING SUSPENSION.

NOTE. Orders promulgating the vacation of the suspension of a dismissal will be published by departmental orders of the Secretary concerned. Vacations of any other suspension of a general court-martial sentence, or of a special court-martial sentence which as approved and affirmed includes a bad-conduct discharge, will be promulgated by the officer exercising general court-martial jurisdiction over the probationer (Art. 72(b)). The vacation of suspension of any other sentence may be promulgated by an appropriate convening authority under Article 72(c). See 97*b*.

Heading See *a* above.

Vacation of suspension

—Under Article 72(c) So much of the order published in Special Court-Martial Order No. _____, this (headquarters) (ship), _____, 19__, as suspends execution of the sentence to (confinement) (forfeiture of pay) (_____) in the case of _____ is vacated. The unexecuted portion of the sentence to _____ will be duly executed.

So much of the order published in General Court-Martial Order No. _____, this headquarters, dated _____, 19__, as suspends execution of the sentence in the case of _____ is vacated pursuant to Article 72. The sentence will be carried into execution.

—General court-martial sentence forwarded for examination under Article 69

So much of the order published in (General) (Special) Court-Martial Order No. _____, (this Headquarters) (Commandant, _____ Naval District) dated _____, 19__, as suspends execution of the sentence to (dishonorable discharge) (bad-conduct discharge) (_____) in the case of _____ is vacated pursuant to Article 72. Article 71(c) having been complied with, the sentence to _____ will be duly executed.

—Sentence including a punitive discharge or confinement for one year or more

See *a* above.

Authentication

f. FORMS FOR ORDERS DEFERRING THE SERVICE OF A SENTENCE TO CONFINEMENT

NOTE. When deferment of a sentence to confinement at hard labor, or any unserved portion thereof, is granted after the convening authority has taken his action in the case, the deferment will be promulgated in a supplementary order. See 88*f*.

The unserved portion of the sentence to confinement at hard labor for _____ (months, years) in the case of _____, promulgated in (Special) (General) Court-Martial Order No. _____ (this headquarters) (this ship) (Headquarters _____) (USS _____), _____ 19_____, is deferred until such time as the sentence is ordered into execution, unless the deferment of confinement is sooner rescinded.

Deferment—after convening authority's action

NOTE. In appropriate cases (see 88*d*(3)) the following should be added to the form of the order:

"The application of the remaining forfeitures is deferred until the sentence is ordered into execution, unless the deferment of confinement is sooner rescinded."

g. FORMS FOR ORDERS RESCINDING DEFERMENT.

NOTE. When any deferment previously granted is rescinded after the convening authority has taken his action in the case, such rescission also will be promulgated in a supplementary order. See 88*g*.

The deferment of that portion of the sentence that provides for confinement at hard labor for _____ (months)(years) in the (special) (general) court-martial case of _____, as promulgated in (Special) (General) Court-Martial Order No. _____, (this headquarters) (this ship) (Headquarters _____) (USS _____), _____ 19_____, is rescinded. The (sentence) (unserved portion of the sentence) to confinement will be served. (_____ is designated as the place of confinement) (pending completion of appellate review the accused will be _____).

Rescission-deferment effected by or reflected in action of convening authority

So much of the orders published in (Special) (General) Court-Martial Orders No. _____ (this headquarters) (this ship) (Headquarters _____) (USS _____), _____19 _____, as deferred the service of the sentence to confinement at hard labor in the case of _____ is rescinded. The (sentence) (unserved portion of the sentence) to confinement will be served. (_____ is designated as the place of confinement) (pending completion of appellate review the accused will be _____).

Rescission-deferment promulgated in supplementary orders

NOTE. In appropriate cases (see 88*d*(3)) the following should be added to the form of the order:

"The (remaining) forfeitures shall apply to pay and allowances becoming due on and after the date of this rescission."

Appendix 16

RECORD OF PROCEEDINGS TO VACATE SUSPENSION

There is set forth below a copy of a form for the record of proceedings to vacate a suspension as required under Article 72. The officer exercising special court-martial jurisdiction over the probationer may either hold the entire hearing himself or designate a qualified officer to conduct a preliminary hearing subject to review of the officer exercising special court-martial jurisdiction. If such a preliminary hearing is held, the probationer will be given an opportunity to examine the record of proceedings and to present any objections to the officer exercising special court-martial jurisdiction. The probationer, if he so desires, shall be represented by counsel at both the preliminary and final hearings.

As a guide, sample entries pertaining to a member of the Air Force have been entered. Items 1 to 18, inclusive, may be completed by an officer designated to hold a preliminary hearing who shall affix his signature in space 19.

REPORT OF PROCEEDINGS TO VACATE SUSPENSION

TO: (Title and organization of officer exercising general court-martial jurisdiction)	FROM: (Title and organization of officer exercising special court-martial jurisdiction)
Commander 5000th Support Wing APO San Francisco 99999	Commander 5001st Support Group APO San Francisco 99999

LAST NAME - FIRST NAME - MIDDLE INITIAL OF PROBATIONER	GRADE	SERVICE NUMBER	ORGANIZATION
Dice Morris L.	Airman Basic	AF 00000000	5001st Support Squadron

1: DATA AS TO TRIAL BY COURT-MARTIAL

a. TRIAL WAS BY
☐ GENERAL COURT-MARTIAL
☒ SPECIAL COURT-MARTIAL

b. CONVENED BY (Title and organization of convening authority)
Commander, 5001st Support Squadron

c. PLACE COURT WAS CONVENED
Brown Air Force Base
APO San Francisco 99999

d. DATE OF TRIAL
1 September 1967

e. CHARGES AND SPECIFICATIONS (Summarized)

Absence without leave from 1 June 1967 to 2 August 1967 in violation of Article 86, Uniform Code of Military Justice.

f. FINDINGS

Guilty as charged.

g. SENTENCE

To be discharged from the service with a bad-conduct discharge, to forfeit $50.00 of his pay per month for six months, and to be confined at hard labor for six months.

h. ACTION OF CONVENING AUTHORITY

The sentence was approved as adjudged. The Confinement Facility, Brown Air Force Base, was designated as the place of confinement.

_____ CMO NO. _____, Hq _____, dated _____

i. ACTION OF HIGHER AUTHORITY

On 10 September 1967, the Commander, 5000th Support Wing, approved the sentence but suspended the execution of the sentence to bad-conduct discharge for the period of confinement and six months thereafter at which time the discharge will be remitted unless sooner vacated. As thus suspended, the sentence was ordered executed.

On 15 October 1967, the sentence, as suspended, was affirmed by the board of review.

j. FINAL ORDERS OF PROMULGATION

SP CMO NO. 52, Hq 5000th Support Wing, dated 10 Sep 1967 (Exhibit 1).

k. ACTION IN MITIGATION OR PETITION FOR NEW TRIAL

None

NOTE: If a prepared form is used and additional space is required for any item, enter the additional material on a separate sheet. Be sure to identify such material with the proper numerical and, when appropriate, lettered heading (Example, "7c"). Securely attach any additional sheet to the form and add a note in the appropriate item of the form: "See additional sheet." Any matters which are not identifiable with some other heading in the form should be indicated in Item 23, Remarks, or, if added on an additional sheet, such sheet will be referred to and identified in Item 23.

1

2. ALLEGED VIOLATION OF PROBATION *(Brief statement and date)*

Information indicates misconduct on the part of Airman Basic Dice subsequent to the foregoing special court-martial sentence by escape from confinement on or about 10 November 1967, in violation of Article 95, as alleged in the charges attached hereto (Exhibit 2).

CHECK APPROPRIATE ANSWER	YES	NO
3. PURSUANT TO THE PROVISIONS OF ARTICLE 72, UNIFORM CODE OF MILITARY JUSTICE, AND PARAGRAPH 97b, MANUAL FOR COURTS-MARTIAL, A HEARING WAS HELD ON THE ALLEGED VIOLATION OF PROBATION.	X	
4. AT THE OUTSET OF THE HEARING THE PROBATIONER WAS ADVISED:		
a. OF THE NATURE OF THE ALLEGED VIOLATION OF PROBATION.	X	
b. OF THE NAME OF THE PERSON ALLEGING THE VIOLATION OF PROBATION.	X	
c. OF THE NAMES OF THE WITNESSES AGAINST HIM SO FAR AS KNOWN.	X	
d. THAT A HEARING AS TO THE ALLEGED VIOLATION OF PROBATION WAS ABOUT TO BE HELD.	X	
e. OF HIS RIGHT, UPON HIS REQUEST, TO HAVE COUNSEL REPRESENT HIM AT THE HEARING, EITHER		
(1) CIVILIAN COUNSEL, IF PROVIDED BY HIM, OR	X	
(2) MILITARY COUNSEL OF HIS OWN SELECTION, IF SUCH COUNSEL BE REASONABLY AVAILABLE, OR	X	
(3) MILITARY COUNSEL APPOINTED BY AN OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION OVER THE COMMAND.	X	
f. OF HIS RIGHT TO CROSS-EXAMINE ALL AVAILABLE WITNESSES AGAINST HIM.	X	
g. OF HIS RIGHT TO PRESENT ANYTHING HE MIGHT DESIRE ON HIS OWN BEHALF, EITHER IN DEFENSE OR MITIGATION.	X	
h. OF HIS RIGHT TO HAVE THE OFFICER CONDUCTING THE HEARING EXAMINE AVAILABLE WITNESSES REQUESTED BY HIM.	X	
i. OF HIS RIGHT TO MAKE A STATEMENT IN ANY FORM.	X	
j. THAT HE WAS NOT REQUIRED TO MAKE ANY STATEMENT REGARDING THE ALLEGED VIOLATION OF PROBATION.	X	
k. THAT ANY STATEMENT MADE BY HIM MIGHT BE USED AS EVIDENCE AGAINST HIM.	X	
5. THE PROBATIONER REQUESTED MILITARY COUNSEL OF HIS OWN SELECTION.		X
a. NAME *(and rank)* OF REQUESTED MILITARY COUNSEL / b. ORGANIZATION OR ADDRESS		
c. MILITARY COUNSEL REQUESTED BY THE PROBATIONER WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(b), UCMJ.	NA	
d. MILITARY COUNSEL REQUESTED BY THE PROBATIONER WAS REASONABLY AVAILABLE *(If not available, explain under Item 23. See par 34c, MCM)*	NA	
5. *"(Upon being advised of the unavailability of counsel requested in paragraph 5, supra),* THE PROBATIONER REQUESTED THAT A MILITARY COUNSEL BE APPOINTED BY THE OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION OVER THE COMMAND."	X	
a. NAME *(and rank)* OF APPOINTED COUNSEL: John Doe, First Lieutenant / b. ORGANIZATION: Hq 5000th Support Wing		
c. APPOINTED COUNSEL WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(b), UNIFORM CODE OF MILITARY JUSTICE.	X	
7. PROBATIONER STATED HE WOULD BE REPRESENTED BY CIVILIAN COUNSEL PROVIDED BY HIM.		X
a. NAME AND ADDRESS OF CIVILIAN COUNSEL / b. CIVILIAN COUNSEL IS A MEMBER IN GOOD STANDING OF THE FOLLOWING BAR(S):		
c. *TO BE USED BY PROBATIONER'S CIVILIAN COUNSEL ONLY*		
I HEREBY ENTER MY APPEARANCE FOR THE ABOVE-NAMED PROBATIONER AND REPRESENT THAT I AM A MEMBER IN GOOD STANDING OF THE FOLLOWING BAR(S):		
DATE / PLACE / SIGNATURE OF COUNSEL		
8. COUNSEL REQUESTED BY OR MADE AVAILABLE TO THE PROBATIONER WAS PRESENT AS COUNSEL THROUGHOUT THE HEARING *(If the probationer waives the right to have counsel present throughout all or part of the investigation after having requested counsel, state the circumstances and the particular proceedings conducted in the absence of such counsel.)*	X	
9. *(To be signed by probationer if answer to 5, 6, and 7, or if answer to 5c and 7b was "No". If probationer fails to sign, officer conducting the hearing will explain under Item 23.)* I HAVE BEEN INFORMED AND UNDERSTAND MY RIGHT TO REPRESENTATION AT THIS HEARING BY QUALIFIED MILITARY COUNSEL OF MY OWN SELECTION, IF REASONABLY AVAILABLE, BY CIVILIAN COUNSEL PROVIDED BY ME, OR BY QUALIFIED MILITARY COUNSEL APPOINTED BY AN OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION OVER THE COMMAND. I HEREBY KNOWINGLY WAIVE MY RIGHT TO SUCH ☐ QUALIFIED MILITARY COUNSEL ☐ CIVILIAN COUNSEL.		
DATE / SIGNATURE OF PROBATIONER		

2

CHECK APPROPRIATE ANSWER *(Continued)*	YES	NO
10a. THE PROBATIONER WAS AFFORDED THE OPPORTUNITY TO OBTAIN AVAILABLE WITNESSES REQUESTED BY HIM AND TO CROSS-EXAMINE ALL AVAILABLE WITNESSES.	X	
b. IN THE PRESENCE OF THE PROBATIONER I INTERROGATED UNDER OATH OR AFFIRMATION ALL AVAILABLE WITNESSES AND EXAMINED DOCUMENTARY EVIDENCE ON BOTH SIDES.	X	
c. THE MATERIAL TESTIMONY GIVEN BY EACH SUCH WITNESS UNDER DIRECT AND CROSS-EXAMINATION WAS REDUCED TO A SWORN OR AFFIRMED WRITTEN STATEMENT EMBODYING THE SUBSTANCE OF THE TESTIMONY TAKEN ON BOTH SIDES.	X	
d. THE WRITTEN SWORN OR AFFIRMED STATEMENTS OF SUCH WITNESSES ARE APPENDED HERETO AS INDICATED:	X	

NAME *(and grade)* OF WITNESSES WHO WERE PRESENT	ORGANIZATION OR ADDRESS	EXHIBIT NO.
Richard L. Smith, Technical Sergeant	5001st Support Squadron	3
Lewis Banter, Airman First Class	5001st Support Squadron	4
William Long	Engineer Section, Brown Air Force Base	5

11a. THE SUBSTANCE OF THE EXPECTED TESTIMONY OF EACH OF THE FOLLOWING WITNESSES, WHOSE PRESENCE WAS NOT REQUESTED BY THE PROBATIONER, OR WHO, HAVING BEEN REQUESTED, WERE NOT AVAILABLE, OR FOR WHOM THE REQUEST WAS WITHDRAWN, WAS OBTAINED IN THE FORM OF A SWORN OR AFFIRMED STATEMENT OR WAS STIPULATED TO BY THE PROBATIONER IN WRITING. SUCH SWORN OR AFFIRMED STATEMENTS OR STIPULATIONS ARE APPENDED HERETO AS INDICATED.	NA	

NAME *(and grade)* OF ABSENT WITNESSES	ORGANIZATION OR ADDRESS	EXHIBIT NO.
None		

b. A COPY OF EACH SUCH SWORN OR AFFIRMED WRITTEN STATEMENT HAS BEEN SHOWN TO THE PROBATIONER.	NA	
c. IF AN ABSENT WITNESS IS REQUESTED BY THE PROBATIONER BUT IS NOT AVAILABLE, ENTER A PROPER EXPLANATION.		

None

12. THE FOLLOWING DOCUMENTS HAVE BEEN EXAMINED, SHOWN TO THE PROBATIONER, AND ARE APPENDED AS INDICATED *(describe documents)*:	EXHIBIT NO.		
SPCMO No. 52, Hq 5000th Support Wing, 10 Sep 1967	1	X	
Extract copy of unit military strength balance report 5001st Support Squadron for 2 Aug 1967	6	X	
Extract copy of unit military strength balance report 5001st Support Squadron for 10 Sep 1967	7	X	
Extract copy of guard report, 5001st Combat Defense Squadron, 10 Nov 1967	8	X	

13. THE FOLLOWING REAL EVIDENCE WAS EXAMINED, SHOWN TO THE PROBATIONER, AND IS NOW PRESERVED FOR SAFEKEEPING AS INDICATED:	X	
Hacksaw blade - retained in custody of the Director of Security and Law Enforcement, 5001st Support Group	X	
IF CERTAIN REAL EVIDENCE WHICH WAS EXAMINED WAS NOT SHOWN TO THE PROBATIONER, STATE THE REASONS.		

None

14. THE PROBATIONER AFTER HAVING BEEN INFORMED OF HIS RIGHT TO MAKE A STATEMENT OR REMAIN SILENT:		
a. STATED THAT HE DID NOT DESIRE TO MAKE A STATEMENT.	X	
b. MADE A STATEMENT APPENDED HERETO *(Exhibit*		X

3

CHECK APPROPRIATE ANSWER *(Continued)*	YES	NO
15a. THERE ARE REASONABLE GROUNDS FOR A BELIEF THAT THE PROBATIONER IS NOW, OR WAS AT THE TIME OF THE COMMISSION OF THE ALLEGED VIOLATION OF PROBATION, MENTALLY DEFECTIVE, DISEASED OR DERANGED.		X
b. IF THERE ARE GROUNDS FOR SUCH A BELIEF, STATE REASONS THEREFOR AND ACTION TAKEN. None		
c. A REPORT OF A *(board of medical officers) (psychiatrist)* IS APPENDED *(Exhibit)*.		X
16. EXPLANATORY OR EXTENUATING CIRCUMSTANCES: Prior to his escape and since his return to military control, the probationer's conduct while in confinement has been satisfactory. His escape may have been attributable to the influence of a fellow prisoner. Information indicates that probationer is easily led, particularly in matters tending toward the breach of discipline.		
17. REHABILITATION IS BELIEVED LIKELY.		X

18. PERSONAL DATA

a. PRESENT AGE	b. BASIC PAY PER MONTH	c. ALLOTMENTS PER MONTH
22 6/12	$129.00	None

d. INITIAL DATE AND TERM OF CURRENT SERVICE: Enlisted 15 March 1965 for four years

e. 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.)*: None

f. CHARACTER OF SERVICE PRIOR TO OFFENSE OF WHICH CONVICTED: Good

g. CHARACTER OF SERVICE WHILE ON PROBATION, PRIOR TO ALLEGED VIOLATION OF PROBATION: Satisfactory

h. PREVIOUS CONVICTIONS WHETHER OR NOT CONSIDERED AT TRIAL: None

i. INTELLIGENCE SCORE: 83

j. CIVILIAN BACKGROUND

(1) MARITAL STATUS: ☐ MARRIED ☒ SINGLE

(2) NUMBER OF DEPENDENTS: None

(3) EDUCATION: Completed 9 years of school

(4) EMPLOYMENT: Unskilled laborer in rubber factory earning about $50.00 per week

(5) CRIMINAL RECORD: Evidence of none

(6) EXPLANATORY COMMENTS: A personal interview with the probationer, after sentence by court-martial disclosed that his father died when he was 16. His mother, two brothers, and one sister live in Akron, Ohio.

k. MILITARY RECORD *(Brief statement of training, combat, awards, decorations, delinquencies, etc.)*: After enlisting on 15 March 1965, probationer received basic training at Lackland Air Force Base. On 1 August 1965 he was assigned to 3000th Supply Squadron and on 1 March 1967 transferred to 5001st Support Squadron.

R. MILITARY RECORD *(Brief statement of training, combat, awards, decorations; delinquencies; etc.) (Continued)*

His records indicate that his efficiency and character were considered to be good.

19. TYPED NAME, RANK, AND ORGANIZATION OF OFFICER CONDUCTING HEARING *(If other than officer exercising special court-martial jurisdiction)*[1]	DATE
Richard T. Johnson Major, USAF 5001st Support Group	1 December 1967 SIGNATURE Richard T. Johnson

20. HEARING BEFORE OFFICER EXERCISING SPECIAL COURT-MARTIAL JURISDICTION[1]

The foregoing report of proceedings of the preliminary hearing has been submitted to the probationer *(and his counsel)*[2]. The probationer *(and his counsel)*[2] appeared before me and was *(were)* given an opportunity to object to any item in the report and to submit any additional matter in extenuation, mitigation, or defense. Any objections and other matters submitted by him are set forth below *(Appended as Exhibit No.* 9)[2].

[1] *Applicable only if a preliminary hearing is conducted by an officer other than the officer exercising special court-martial jurisdiction. In appropriate cases, enter "Not applicable."*
[2] *Line out if not applicable.*

21. RECOMMENDATION OF OFFICER EXERCISING SPECIAL COURT-MARTIAL JURISDICTION

IT IS RECOMMENDED THAT THE FOLLOWING DISPOSITION BE MADE OF THIS CASE *(Check appropriate entry or entries)*:

a. [X] THAT THE SUSPENSION OF THE SENTENCE TO bad-conduct discharge

BE VACATED.

b. [X] THAT THE UNEXECUTED PORTION OF THE SENTENCE BE CARRIED INTO EXECUTION.

c. [ ] THAT THE PROCEEDINGS TO VACATE THE SUSPENSION BE DROPPED.

d. [ ] *(State other recommended disposition)*

22. TYPED NAME, RANK, AND ORGANIZATION OF OFFICER EXERCISING SPECIAL COURT-MARTIAL JURISDICTION	DATE
Robert G. Strong Colonel, USAF 5001st Support Group	3 December 1967
	SIGNATURE Robert G. Strong

23. REMARKS

6

Appendix 17

SUBPOENA

SUBPOENA FOR CIVILIAN WITNESS

General [1] Court-Martial of the United States, U. S. Naval Station, San Diego, California [2]

The President of the United States, to Claude M. Rickaby [3]

You are hereby summoned and required to appear on the 16th day of July, 1969, at 9 o'clock A. M., (before _____ designated to take your deposition for use)[5] before a general[6] court-martial of the United States, at Building 73, U. S. Naval Station, San Diego, California [7], convened by an order of the Commandant, Eleventh Naval Dist., San Diego, California [8], dated 11 June 1969, to testify as a witness for the defense [9] in the case of United States v. Tom T. Tucker, Seaman Apprentice, U. S. Navy [10] (and bring with you _____).[11]

Failure to appear and testify is punishable by a fine of not more than $500 or imprisonment for a period not exceeding six months, or both.

Bring this subpoena with you and do not depart from the court without proper permission.

Subscribed at U. S. Naval Station, San Diego, Calif. this 10th day of July, 1969.

Daniel C. O'Brien [12]
SIGNATURE, GRADE, AND OFFICIAL STATUS
DANIEL C. O'BRIEN
Captain, USMC
Trial Counsel

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.

_____ PLACE _____ DATE, 19____

I hereby accept service of the above subpoena. [13]

_____
SIGNATURE OF WITNESS

Personally appeared before me, the undersigned authority, [14] Captain Osmer P. Fox, who, being first duly sworn according to law, deposes and says that at Marysville, Ohio, on 11 July 19____, he personally delivered to Claude M. Rickaby in person a duplicate of the within subpoena.

Osmer P. Fox
SIGNATURE AND GRADE

SUBSCRIBED AND SWORN to before me at Fort Wilson, Ohio, this 11th day of July, 19 69.

Valentine Quode
SIGNATURE, GRADE, AND OFFICIAL STATUS
VALENTINE QUODE
Lieutenant Colonel, JAGC

[1] *General, special, or summary court-martial.*

[2] *Place where process is issued.*

[3] *Name of witness.*

[4] *When used, enter name and grade of person designated.*

[5] *Line out, when inappropriate, "(before _____ designated to take your deposition for use)."*

[6] *General, special, or summary court-martial.*

[7] *Place where court is to assemble.*

[8] *Appropriate authority.*

[9] *Prosecution or defense, as appropriate.*

[10] *Name, etc., of accused or other subject of investigation.*

[11] *Line out, when inappropriate, "and bring with you _____." When appropriate describe documents or objects which the witness is required to produce before the court.*

[12] *To be subscribed by trial counsel, recorder, etc.*

[13] *When service is BY MAIL the witness will be requested to subscribe this acknowledgement of acceptance on one copy and to return same to the officer who issued the subpoena.*

[14] *This proof of service will be filled out when service is personal, and the copy thus completed will be returned to the officer issuing the subpoena.*

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