LEGAL AND LEGISLATIVE BASIS

Manual for

COURTS-MARTIAL UNITED STATES

•

1951

PROPERTY OF U. S. ARMY
THE JUDGE ADVOCATE GENERAL'S SCHOOL
LIBRARY

P R E F A C E

This pamphlet contains a short history of the preparation of the Manual for Courts-Martial, United States, 1951, together with brief discussions of the legal and legislative considerations involved in the drafting of the book. With minor exceptions, the discussions of the various subjects were written by the officers who prepared the initial drafts of the comparable portions of the manual.

WILLIAM P. CONNALLY, JR.
Colonel, JAGC

19 April 1951

TABLE OF CONTENTS

		Page Number
HISTORY, PREPARATION AND PROCESSING, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951:		
Colonel Charles L. Decker		
CONFERENCES:		
1	Military Jurisdiction; Jurisdiction of Courts-Martial; Habeas Corpus	1
2	Appointment, Personnel of Courts-Martial	21
3	Apprehension and Restraint	30
4	Preparation and Disposition of Charges	40
5a	Trial Procedure	56
5b	Status and Duties of the Law Officer; Findings and Sentence; Revisions; Rehearings	69
5c	Arraignment--Pleas and Motions	80
5d	Oaths and Incidental Matters	95
6	Inferior Courts	110
7a	Initial Review of and Action on Records of Trial	121
7b	Ordering Rehearings--Designating Place of Confinement--Remission--Suspension--Vacation of Suspension	132
7c	The Staff Judge Advocate and Legal Officer	137
7d	Appellate Review--New Trial	146

CONFERENCES--Continued

		Page Number
8	Insanity	165
9a	Punishments	172
9b	Punishments--Table of Maximum Punishments	187
10	Non-Judicial Punishment	204
11a	Rules of Evidence--Part I	210
11b	Rules of Evidence--Part II	223
11c	Rules of Evidence--Part III	235
12a-b	Punitive Articles 77-87	247
12c-d	Punitive Articles 88-106	256
12e-f	Punitive Articles 107-119	264
12g	Punitive Articles 120-127	271
12h	Punitive Articles 128-134	284
	The Executive Order and Ex Post Facto Problems	298

HISTORY, PREPARATION AND PROCESSING, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951

Colonel Charles L. Decker

The history of the drafting and processing of the Manual for Courts-Martial, 1951, is one of careful preparation followed by many careful reviews of each draft.

On 21 February 1950, the Judge Advocates General of the Army, Navy, and Air Force met with the General Counsel, Office of the Secretary of Defense, and decided to proceed on a joint basis in the preparation of a Manual for Courts-Martial to implement the then proposed Uniform Code of Military Justice. Colonel William P. Connally, Jr., Assistant Judge Advocate General for Military Justice, Department of the Army, was instructed to direct the preparation of such a manual.

Colonel Connally assigned to the Special Projects Division, which was under his supervision, those officers of his office who had prepared the Manual for Courts-Martial, U. S. Army, 1949. Assigned were Colonel Charles L. Decker, Chief of Division, Lt. Colonel Waldemar A. Solf, Executive Officer, Major Gilbert G. Ackroyd, Major Kenneth J. Hodson, and Major William H. Conley. A Navy legal officer, Commander William A. Collier, and an Air Force judge advocate, Lt. Colonel Jean F. Rydstrom, were placed on duty with the Division, and each not only acted as a liaison officer but performed a full share in the actual drafting of the book. Subsequently, Major Roger Currier was assigned to the Division to augment the Army complement.

The actual initial drafting was divided into 30 separate projects, which were apportioned among the officers of the division so that each was drafted by an officer considered expert in the particular field. The plan required completion of the initial draft of the entire book, less index, by 15 September 1950. The draft was completed according to plan.

Each of the 30 projects consisted of four parts: the proposed draft for the Manual for Courts-Martial, United States, 1951; a file of those parts of the Manual for Courts-Martial, U. S. Army, 1949, Naval Courts and Boards, 1937, and of the Manual for Courts-Martial, U. S. Coast Guard, 1949, which treated the subject of the project; a table of legal authorities and relevant legislative history; and a brief supporting memorandum explaining the reasoning which underlay the draft itself.

As the draft of each project was approved within the division, it was forwarded to Colonel Connally. Copies of the draft as approved by him were sent for review to a representative of each Judge Advocate General. These representatives were Colonel John E. Curry, USMC, Brigadier General Herbert M. Kidner, USAF, and Colonel Connally. After the drafts were reviewed by the representatives, they or their designated representatives reviewed each project in conference. The draft as finally approved by them was reproduced and forwarded for review to the three Judge Advocates General and the General Counsel, Office of the Secretary of Defense. The Judge Advocates General and the General Counsel held numerous personal conferences in which differing views were thoroughly scrutinized and resolved. The draft of the text and appendices of the manual, as finally approved by the Judge Advocates General, was reproduced and cleared through the various agencies in each department having an interest therein. Final departmental clearance was, of course, indicated by the Secretaries themselves.

After clearance within the Department of Defense, Colonel Decker was designated as Department of Defense representative to effect clearances with the other interested governmental agencies. In addition to the normal study made by the Bureau of the Budget, that office also retained special counsel to make an independent study of the draft. Thereafter the draft was reviewed and cleared by the office of the Attorney General. This review consisted of a study by three experts in criminal law and procedure, as well as further review by other attorneys in the Department of Justice. Thereafter the work was reviewed by the Director of the Archives and transmitted to the Executive Office of the President, where, after due study, the Manual for Courts-Martial, United States, 1951, was duly promulgated as Executive Order 10214 on 8 February 1951.

Conference No. 1

MILITARY JURISDICTION; JURISDICTION OF COURTS-MARTIAL; HABEAS CORPUS

Conducted by
LT. COL. WALDEMAR A. SOLF

References: Chapter 1, Paragraphs 1, 2
Chapter 2, Paragraphs 3, 4g
Chapter 3, Paragraph 5
Chapter 4, Paragraphs 8-16
Chapter 29, Paragraphs 214-218

CHAPTER I - MILITARY JURISDICTION

This chapter will look familar to Army and Air Force personnel--but it may look a little abbreviated to the Navy and the Coast Guard. It differs from the first chapter of NC & B in that its scope is limited to sources of military jurisdiction; not the broader subject of sources of military law. It was felt that the discussion in Chapter I of Naval Courts and Boards relative to the sources of military law was extremely useful and much of it was incorporated in other parts of the Manual. For example, Section 4, "Knowledge of Naval Law required," may be found in paragraph 154a(4). A discussion of the legal effect of custom is to be found in paragraph 213a which discusses the general Article (134).

Sources.--This paragraph states that the sources of military law include the Constitution and International Law. One fairly obvious point is stressed; namely, that the law of war is included in international law. See Ex parte Quirin 317, U. S. 1. International law, apart from the law of war, is also a source of military jurisdiction. Among the classes of cases in which military jurisdiction is affected by international law other than the law of war are the cases involving offenses committed in a friendly foreign country where an armed force is by consent quartered or in passage. This will be discussed in greater detail in connection with paragraph 12.

If you wish to make a note of some of the Constitutional sources of military jurisdiction, the following are most frequently cited:

Grants to Congress:

Article I, Section 8, Clauses 1, 11, 12, 13, 14, 15, 16, 17, 18.

Grants to the President:

Article II, Section 2, Clauses 1 and 2
Section 3

Miscellaneous Grants of Power:

Article IV, Section 4

Fifth Amendment.

2 Exercise.--The first subparagraph restates the classic instanc of the exercise of military jurisdiction enumerated by Chief Justic Chase in his dissenting opinion in Ex parte Milligan, 4 Wall 2; 18 L Ed 281, 287. To the three examples enumerated in that case; namely, military government, martial law, and military law, there h been added in the text a fourth category--the exercise of military jurisdiction by a government with respect to offenses against the l of war. This does not fall under any of the categories enumerated by Chief Justice Chase although it has existed as an exercise of military jurisdiction for years. For instance, Captain Wirtz, the Confederate Commandant of Andersonville Prison was tried and hanged for war crimes committed against Union prisoners of war. See also the modern cases, Ex parte Quirin, 317 U.S. 1; In re Yamashita, 327 U.S. 1, and the various war crimes cases which were not incidents of military government, martial law, or military law proper.

As for the exercise of military jurisdiction by the war courts military commissions, and provost courts--it may be recalled that the 1949 Manual provided:

> "These tribunals are summary in nature, but so far as not otherwise provided have usually been guided by the applicable rules of procedure and of evidence prescribed for courts-martial."

The 1951 Manual on the other hand provides:

> "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."

This change was made in anticipation of the ratification of the Geneva Convention of August 12, 1949 which will alter to a material extent the procedures heretofore applied by military commissions, particularly with respect to the trials of war criminals. Under th present Geneva Convention military war criminals are not entitled t be treated as prisoners of war. However, Article 85 of the new Gen Convention Relative to the Treatment of Prisoners of War provides:

"Prisoners of war prosecuted under the law of Detaining Powers for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."

Among these benefits is Article 102 which provides:

"A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts, according to the same procedure as in the case of members of the armed force of the Detaining Power and, if, furthermore the provisions of the present chapter have been observed."

It would thus appear that unless we are willing to try our own personnel who commit war crimes by military commissions under a more summary procedure than that provided for courts-martial and under civil law rules of evidence--we will have to try enemy prisoners of war accused of war crimes under the same procedure as that prescribed for courts-martial.

Irrespective of whether we use our own court-martial procedure or a more summary one, certain of the safeguards afforded by the Convention exceed those prescribed by the Code and the Manual. Examples:

(1) Under Article 87 a prisoner of war cannot be deprived of his rank nor can there be any mandatory punishment prescribed.

(2) Escape may be treated only as a disciplinary infraction treated under the Articles of the Convention pertaining to disciplinary punishment.

(3) Article 101 prescribes a substantial waiting period before a death penalty may be executed.

(4) Article 103 makes it mandatory that an accused be credited with pretrial confinement on the execution of any sentence to confinement.

(5) Article 105 prescribes considerably longer time for a prisoner of war to prepare for trial than accorded under the code.

These conventions have not yet been ratified, but their ratification in some form is likely. For this reason the text of this paragraph was so drafted that it will not become obsolete and misleading if and when the new conventions are ratified.

In the event the conventions are not ratified, the President or other competent authority may prescribe other procedures consistent with the present Geneva Convention. In the absence of regulations by the President or other competent authority the trial procedure before military commissions will be that prescribed in the Manual. Existing regulations promulgated by military governors will not be affected until the conventions are ratified.

The next two agencies through which military jurisdiction is exercised--courts-martial and commanding officers--will be the subje of detailed discussion in other conferences.

The last agency discussed is Courts of Inquiry. In this subpara graph the President has delegated the power to promulgate regulation dealing with courts of inquiry to the several Secretaries.

CHAPTERS II AND III

JURISDICTION OF COURTS-MARTIAL

3 Article 16 and this paragraph will give very little pause for reflection to Army and Air Force personnel. We have the same three kinds of courts-martial. The Navy and Coast Guard will note immediately that the term "deck court" has disappeared. The deck court has been redesignated the "Summary Court-Martial." This may cause some confusion for a while as that term has heretofore been applied in the Naval service to the intermediate court which is now known as the "Special Court-Martial." The compcsition of these courts-martia will be covered in a later conference.

Our next topic is--Who may convene these courts.

5 Convening authority of General Court-Martial.--At the outset I would like to point out that the term "appointing authority" is no longer used and the statutory language of "convening authority" is used throughout the book. Similarly, the old Army term "reviewing authority" has acquired an entirely different meaning and now perta to all authorities who review courts-martial; it is not limited to the officer who convened the court or his successor in command.

Under Article 22 both the President and the Secretary of a Department are empowered to convene general courts-martial (Article 22a(1)(2)). Both are empowered to authorize commanding officers other than those enumerated in Article 22 to convene general courts Although existing authorization by the President to appoint General Courts-Martial will remain effective after 31 May 1951, it is contemplated by each armed force that new orders will be promulgated empowering commanding officers of certain commands to convene such courts. Army and Air Force personnel will note that the power to convene general courts-martial is no longer vested in a commanding officer simply because there is assigned to his staff, a staff judg

advocate, as was heretofore provided under Article of War 8.

In paragraph 5a(2) it is provided that when general court-martial jurisdiction is conferred on a commanding officer because he is empowered by the President or designated by the Secretary to convene general courts-martial, the convening order will cite such authorization. This is a new provision for the Army and Air Force which was taken from Section 329, Naval Courts and Boards.

It is to be emphasized that this is a procedural requirement for the convenience of those charged with the review of court-martial records. Its omission does not affect the jurisdiction of the court, although such an omission would be a violation of one of the President's procedural regulations.

In this connection it is to be noted that the Manual contains no provision similar to that now found in Section 327, Naval Courts and Boards which provides:

> "As Naval courts-martial are courts of limited jurisdiction, their records must show affirmatively that they have authority to hear and determine cases coming before them for trial."

This provision was not used in view of the Supreme Court's Decision in Givens v. Zerbst, 255, U. S. 11, wherein it was held that as long as a jurisdictional fact exists it may be proved upon collateral attack even though such jurisdictional fact may not appear in the record of trial by court-martial. As a matter of fact one of the points in Givens v. Zerbst was the failure of the record or convening order to show that a post commander had been empowered by the President to convene general courts.

The Navy has applied the rule of Givens v. Zerbst in a case where a jurisdictional fact which in fact existed was omitted from the record (CMO No. 1, 1942, page 124). The Army has long applied this rule (CM 195867, Jones, 2 BR 307).

Paragraph 5a(3) and (4) bring us to a discussion of the accuser's ineligibility to convene a court-martial for the trial of an accused. The Army and the Air Force will find that the term "accuser," as defined in Article 1(11) apparently combines the former concept of "accuser" and "prosecutor," as used in Article of War 8.

Under the code an accuser is:

(1) A person who signs the charges; or

(2) A person who directs that charges nominally be signed and sworn to by another; or

(3) Any other person who has an interest, other than an official interest, in the prosecution of the accused.

This will not effect any radical change in Army and Air Force practice, but it will affect, to some extent, the mast procedures of a commanding officer of a Naval vessel. Major Hodson will discuss these matters further at a later conference.

In paragraph 5a(4) it is stated that whether a person who has not signed the charges is the accuser, is a question of fact. Purely official action is not, ordinarily, sufficient to make a commander an accuser. For example: A commander may without becoming an accuser direct a subordinate to investigate an alleged offense with a view to formulating such charges as the result of the investigation may warrant. He cannot, however, without becoming an accuser, order a subordinate to prefer certain specific charges.

Paragraph 5a(6) carries over the provisions of paragraph 5a, MCM, 1949 relative to the control which a convening authority may lawfully exercise with respect to courts. See Article 37. It is to be noted that the convening authority's power to withdraw charges from a court at any time prior to findings is unlimited. However, if he withdraws charges after evidence on the merits has been received, he is likely to find that jeopardy has attached unless the proceedings are terminated on motion of the accused or for manifest necessity in the interest of justice. See Article 44c; paragraph 56, and paragraph 68d.

5b Convening authority of Special Court-Martial.--The first subparagraph invites attention to Article 23a which lists the commanding officer eligible to convene special courts-martial. The reference to "officers in charge" as used here and elsewhere in the Manual has no application to the Army and the Air Force and pertains exclusively to the Naval service and the Coast Guard.

If you have had occasion to read the House hearings you may remember that there was much discussion about preserving the authority of Coast Guard warrant officers and petty officers who are "officers in charge" in that armed force. The legislative history shows the intent of the House Committee to include such warrant and petty officers within the term "officers in charge" in view of the fact that many isolated stations are commanded by such noncommissioned officers in charge. Of course such person will not be authorized by the Secretary of the Treasury to convene any kinds of courts-martial. Obviously there is no occasion for a petty officer to convene a court-martial composed of commissioned officers. However, the Coast Guard may authorize such petty "officers in charge" to exercise limited powers under Article 15.

Article 23a(3) confers special court-martial jurisdiction on a commanding officer of a "detached battalion" or corresponding unit of the Army. Article 23a(4) confers such jurisdiction on a commanding officer of a "separate squadron" of the Air Force; and Article 23a(6) confers such jurisdiction on 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 the purpose." In paragraph 5b(3) there is a discussion of what is meant by the terms "separate" and "detached." It is made clear that these terms are used in a disciplinary sense, not in a tactical, administrative, or physical sense. Thus, a detached command for the purpose of convening special courts-martial may be physically located across the road from a higher headquarters and still be considered detached. Conversely a unit may be detached for tactical purposes, be located miles away and still not be a detachment in the sense of Article 23.

In the Army and in the Air Force any question as to whether a unit is or is not a detached command will be finally determined by the officer exercising general court-martial jurisdiction over the command. In the Navy and the Coast Guard any such question will be finally determined by the flag or general officer in command or by the senior officer present who designated the detachment.

5c Convening authority of Summary Court-Martial.--Paragraph 5c does not effect any substantial change for the Army or the Air Force. As was heretofore the case, an accuser is not ineligible to convene a summary court-martial or to act as a summary court. However, unless the convening authority is the only officer with a command, he must appoint a subordinate as a summary court. This is a departure from the present Naval practice. Section 692, Note 2, NC & B, provides in part:

> "An officer empowered to order deck courts may at his discretion designate himself as deck court officer, irrespective of his rank, if commissioned, and irrespective of the rank of other officers attached to his command."

The provision of Article 24, which was derived from Article of War 10, permits the convening authority to designate himself as the summary court only when he is the only person present with the command.

CHAPTER IV

JURISDICTION OF COURTS-MARTIAL

8 Source, nature, and requisites of court-martial military jurisdiction.--The scope of this paragraph follows generally that of paragraph 7, MCM 1949. The matters covered in Section 329, NC & B, as to Convening Authorities are found in paragraph 5; matters dealing with the composition of courts and their personnel (Section 330, NC & B) are discussed in paragraphs 4 and 6. The Statute of Limitations (which is not a jurisdictional matter), now discussed in sectic 332, NC & B will be found in paragraph 68.

You will note that the familiar quotation from Grafton v. United States appears in the third subparagraph of 8. This expresses the doctrine that court-martial judgments are not subject to review by civil tribunals except on the sole question of whether the court had jurisdiction. In the last 5 or 10 years there has been a concerted drive to enlarge the scope of collateral review on the theory that a deprivation of due process during the proceedings divests a court-martial of jurisdiction.

Among the lower court cases which have applied this theory to the extent of granting relief are Hicks v. Hiatt, 64 F. Supp. 328 and Shapiro v. U. S., 107 Ct Cl 650; 69 F. Supp. 205. This theory is difficult to square with the established doctrine that jurisdiction to decide includes jurisdiction to make a wrong as well as a right decision, (Fauntleroy v. Lum, 210 U. S. 230, 234, 235; Pope v. U. S., 323 U. S. 1, 14). As pointed out by the Supreme Court in Carter v. McClaughry, 183 U. S. 636:

> "* * * the sentences of court-martial, when affirmed by the military tribunals of last resort, cannot be revised by the civil courts save only when void because of an absolute want of power, and not merely because voidable because of the defective exercise of the power possessed."

It would, therefore, appear that a court which initially has jurisdiction does not lose jurisdiction by making an error. The sound view in the Grafton and Carter cases was reaffirmed by the Supreme Court on 13 March 1950 in Brown v. Hiatt, 339 U. S. 103, 110 wherein Mr. Justice Clark stated for the court:

> "The Court of Appeals also concluded that certain errors committed by the military tribunal and reviewing authorities had deprived respondent of due process. We think the court was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the

sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation, and the competence of the law member and defense counsel. * * * It is well settled that 'by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial. . . The single inquiry, the test, is jurisdiction.' In re Grimley, 137, U.S. 147, 150 (1890). In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision."

This is strong language, but lest we be inclined to relax too much in the security of our citadel, I must invite your attention to the language of Mr. Justice Douglas in Whelchel v. McDonald, 340 U.S. 122, decided on December 4, 1950 in which he said:

"We put to one side the due process issue which respondent presses, for we think it plain from the law governing court-martial procedure that there must be afforded a defendant at some point of time an opportunity to tender the issue of insanity. It is only a denial of that opportunity which goes to the question of jurisdiction. That opportunity was afforded here. Any error that may be committed in evaluating the evidence tendered is beyond the reach of review by the civil courts."

This seems again to open the door of the citadel to the assault of those who believe that a procedural deviation of a court-martial might affect the jurisdiction of the court and deprive it of jurisdiction. The moral seems to be that so long as the military services accord accused persons a fair trial according to military due process, the Supreme Court will adhere to its traditional view as to the scope of collateral review of court-martial judgment; but if it finds a series of cases which shocks its conscience, it may adopt another approach to the problem.

In the last subparagraph the provisions of Article 76 with respect to finality of court-martial judgments are restated. This is comparable to the language of Article of War 50h and the last provision in Article of War 53.

The Army and Air Force have never taken the view that the finality of court-martial judgments as provided in the Articles of War operates to preclude collateral attack on jurisdictional grounds. This view has recently been specifically affirmed by the Supreme

Court in Gusik v. Schilder, 340 U.S. 128, decided on 4 December 1950. The Gusik case also stands for the proposition, which you will find in paragraph 214b, to the effect that the Federal courts will not entertain petitions for a writ of habeas corpus until the accused has exhausted his military remedies for an appeal and for a petition for a new trial.

In the fifth subparagraph it is stated that jurisdiction does not in general depend upon where the offense was committed. To this proposition there is an apparent qualification. If an offense were triable by court-martial only under the Crimes and Offenses not Capital clause of Article 134, such offense must have been committed within the boundaries of the jurisdiction in which the act is a crime.

In this paragraph it is also stated that jurisdiction as to offenses against military law is not affected by the place where the court sits. Thus a court-martial does not have to sit or remain within the Territorial command of the convening authority. See Durant v. Hiatt, 81 F. Supp. 948, affirmed 177 F. 2d 373. It might also happen that the personnel of a court will be transferred from the command of the officer who convened the court after a case had been referred to it for trial. This also does not divest the court of jurisdiction. See CM 316193, Holstein, 65 BR 271, 275.

A different problem may be presented in those cases in which a general court-martial derives its jurisdiction under the law of war as a substitute for a military commission. Such a tribunal, particularly when it sits as a substitute for a local court in enforcing the law of occupied territory, is generally required to sit in such occupied territory. If it enforces the law of war it is generally required to sit in the theater of war or in the country in which the offense took place. This rule will be perpetuated by Article 66 of the Geneva Convention of 12 August 1949 relative to the protection of civilians. Compare, however, with Ex parte Quirin, 317, U. S. 1.

Before going to the next subject, I would like to invite the attention of the Navy officers to the omission of the provisions of Section 327, NC & B, which provided:

> "A particular court-martial has authority to try men specifically ordered by it and has no authority to try a man ordered tried before another court."

The Army Boards of Review have consistently held that approval of a sentence by the proper convening authority effects a ratification of the trial by a court other than one to which the case had been referred. Thus if charges are tried by Court B, although they had

5

been referred to the trial counsel of Court A, appointed by the same convening authority, the error of trial by the wrong court is cured by the convening authority's ratification. This error, moreover, is one of those procedural errors dealing with references for trial which are waived by failure to object prior to plea (Paragraph 69).

9 Jurisdiction as to persons.--Time does not here permit a detailed discussion of each category of persons subject to the code under Article 2.

It is to be noted that Article 2 is not the only statutory provision which confers jurisdiction of the person. Many of these additional provisions will be discussed in connection with paragraph 11.

11 Termination of jurisdiction.--Paragraph 11a states the general rule as to termination of jurisdiction, namely:

> "The general rule is that court-martial jurisdiction over officers, cadets, midshipmen, warrant officers, enlisted persons, and other persons subject to the code ceases on discharge from the service or other termination of such status and that jurisdiction as to an offense committed during a period of service or status thus terminated is not revived by reentry into the military service or return into such status."

This is consistent with the Army precedents of over 100 years standing and with the opinion of the United States Supreme Court in U. S. Ex rel Hirschberg v. Cooke, 336 U. S. 210 (1949). To this general rule there are many exceptions:

Under Article 3a persons who have been discharged or separated from their military status but who have committed serious offenses against the code while they were in a status subject thereto, and for which they cannot be punished in a state, territory, or Federal court, remain liable to trial by court-martial.

As you can see, jurisdiction in such a case depends upon so many factors and is subject to such serious impact on the civilian population that it should not be exercised without the serious legal consideration of the Judge Advocate General and the policy consideration of the Secretary of a Department. Accordingly, the President has directed that jurisdiction under Article 3a will not be exercised without the consent of the Secretary of a Department.

Perhaps the most difficult single jurisdictional fact to be established under Article 3a with respect to offenses committed overseas, is that the offense is not punishable by a civil court. If the offense can be punished by any civil court of the United States, any of its States, Territories, District of Columbia, a court-martial lacks jurisdiction.

Many offenses against Federal law have no territorial limitation. You will find a discussion of such offenses in paragraph 213c under the Crimes and Offenses Not Capital Clause of Article 134. In general it may be said that offenses directly injurious to the operation of Government, such as various frauds against the Government, counterfeiting, treason, etc., are punishable by a Federal court without regard to where committed. See U. S. v. Bowman, 260 U. S. 94, in which it was held that a U. S. District Court had jurisdiction over an alleged conspiracy to defraud the United States which took place in the city (not the harbor) of Rio de Janeiro. Then, too, various offenses are applicable in the Special Maritime and Territorial Jurisdiction of the United States as defined in 18 USC 7.

Another exception to the general rule is that all persons in the custody of an armed force serving sentences imposed by courts-martial remain subject to military law (Art. 2 (7)). If you compare this with Article of War 2e you will note that a prisoner with an executed punitive discharge who is committed to a Federal institution ceases to be subject to military law.

A third exception involves persons who have obtained their discharge by fraud (Article 3b). But before the person alleged to have obtained his discharge by fraud may be tried for an offense committed prior to his fraudulent discharge under this exception, he must be tried and convicted of a violation of Article 83(2). Therefore, the code requires two trials in such a case.

The fourth exception to the general rule involves deserters who have obtained a discharge after a fraudulent enlistment (Article 3c).

The fifth exception stated in the Manual is a somewhat detailed discussion of the proposition that uninterrupted status as a person subject to military law in one capacity or another does not terminate jurisdiction. One reason for this elaboration over the 1949 text was the tendency of some lawyers to read into the Herschberg case a proposition which was not before the Supreme Court. In the Hirschberg case there was a definite, although brief, hiatus. The examples in the text are cases where there is no hiatus but merely a change in particular status within the general status of being a person subject

to military law. The case of persons discharged for the convenience of the Government for the purpose of reenlisting and of persons going from the status of being members of the armed force to that of persons accompanying the armed force without the territorial jurisdiction of the United States were distinguished from the Herschberg case by the Army Board of Review and by the Judicial Council in CM 337089, Aikins, Seevers, 5 BRJC 311.

I would also like to speak briefly about the jurisdiction of courts-martial upon a new trial under Article 73 or Section 12. A person who petitions for a new trial after jurisdiction has otherwise terminated voluntarily submits himself to the jurisdiction of a court-martial in accordance with an act of Congress. If after a court-martial has been ordered, the petitioner should change his mind and decide that he does not wish to stand trial, he may nevertheless be picked up by military authorities and held for trial as though he were a person subject to military law under Article 2.

1c Effect of voluntary absence from trial.--The comparable paragraph of MCM 1949 stated that escape after arraignment would not divest the court of jurisdiction. This language caused some difficulty in cases where the accused was absent without authority from trial although not under circumstances amounting to escape. In Sp CM 1213, Hollings, 5 BR-JC 465 the accused went absent without leave after arraignment. An overly narrow construction of the word "escape" would have resulted in an absurd situation. The Board of Review construed paragraph 10, MCM 1949, consistently with Rule 43 of the Federal rules of criminal procedure which provides in part:

> "* * * in prosecution for offense not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict."

It is to be noted that Rule 43 does not permit the trial to continue in the absence of the accused in a capital case. In military practice, however, no such distinction between capital and non-capital cases has been made. Winthrop in a note on page 393 cites the trial by military commission of H. H. Dodd in Indiana in 1864:

> "Upon trial by military commission of Dodd and others in Indiana, 1864, the court, in the absence of Dodd who had escaped, sentenced him to death and its action was duly approved by the reviewing authority."

The new portion of the text dealing with this subject is patterned after Rule 43 except that no distinction is made between capital and non-capital cases.

12 Exclusive and non-exclusive jurisdiction.--In the first subparagraph it is stated that courts-martial have exclusive jurisdiction of purely military offenses. By purely military offenses are meant those offenses which are not generally denounced by a civil system of justice. They are such offenses as absence without leave, desertion, disrespect towards officers, willful disobedience of officers, and similar offenses of a military character. An offense is not "purely military" merely because it happens to be denounced in one of the punitive articles. With respect to offenses of a civil nature, courts-martial and civil tribunals, both State and Federal, have concurrent jurisdiction. As a matter of comity the jurisdiction which first attaches in any case is, generally, entitled to proceed.

The third subparagraph is identical to the comparable discussi in paragraph 11, MCM 1949. It is based upon the rule of International Law stated by Chief Justice Marshall in Schooner Exchange v. McFadden, 7 Cranch 116 and Chung Chi Chiung v. The King /19397 A. C. 160/. It is to be noted that although a visiting sovereign has the right to exercise exclusive jurisdiction over his troops who are by consent in a foreign country, the visiting sovereign ma waive this right either expressly or by failing to assert it.

In the fourth subparagraph there is restated the provisions o Article 21 which save the concurrent jurisdiction of the war court military commissions and provost courts--with courts-martial. Articles 104, "Aiding the Enemy," and 106, "Spies," are the only articles in which the express provision for concurrent jurisdictio is made. Nevertheless, it does not follow that military commissio cannot try persons subject to military law for other offenses denounced by the code if such offenses are also violations of the law of war or in the case of civilians subject to the code, for violations of the criminal law of occupied territory. In CM 337089 Aikins, Seevers, 5 BR-JC 311, the Army Judicial Council indicated that soldiers may be tried by military commissions under the law o war for violations of the laws of war. In connection with the con current jurisdiction of military commissions, the testimony of General Enoch Crowder, Judge Advocate General of the Army, with respect to Article of War 15 (which is identical to Article 21 of the code) is significant. In 1915 he said:

> "Article 15 is new. We have included in Article 2 as subject to military law a number of persons who are also subject to trial by military commissions /persons accompanying the Armies in the field/. A military commission is our common law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embodied them in the designation

'persons subject to military law' and provided that they might be tried by courts-martial, I was afraid that, having made a special provision for their trial by court-martial (Arts. 12, 13, 14), it might be held that the provision operated to exclude trials by military commission and other war courts; so the new article was introduced * * *. It just saves the war courts the jurisdiction they now have and makes concurrent a jurisdiction with court-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient * * *" (House Report 130, 64th Congress, 1st Session, page 40)

It is to be noted that a military commission does not have jurisdiction of a purely military offense (CM 318380, Yabusaki, 67 BR 265).

13 Reciprocal jurisdiction.--Under Article 17, and subject to a regulation of the President, each armed service has jurisdiction over all persons subject to the code. The President's regulations are found in paragraph 13. The general policy is that reciprocal jurisdiction should be exercised only when the accused cannot be turned over to his own armed force without manifest injury to the service. Subject to this general policy, reciprocal jurisdiction may be exercised as follows:

(1) By a commander of a joint command or joint task force who has been expressly authorized by the President or by the Secretary of Defense to try members of other services.

(2) Such a commander of a joint command may in turn authorize commanders of subordinate joint task forces to convene special and summary courts-martial cases with respect to members of other armed forces under their respective command under such regulations as the superior commander may prescribe. The superior may limit the kinds and types of cases which may be tried under subordinate reciprocal jurisdiction. In view of the superior commander's familiarity with the status of discipline and morale of his joint command, he will be in the best position to determine to what extent such reciprocal jurisdiction should be exercised.

Note that any restriction on the exercise of jurisdiction by one armed force over the personnel of another armed force pertains only to military personnel. Civilians subject to the code under Article 2 (10), (11), and (12) are not "members" of an armed force and may be tried by any armed force irrespective of which force they may be accompanying or serving.

Joint or common trials involving members of different armed forces are discouraged. In paragraph 4g it is provided that at least a majority of the members of the court should be members of the accused's own service. It would be a difficult mathematical feat to provide a majority of members of the armed services of each accused in a joint or common trial where the accused are members of different services.

4g Composition of courts-martial for reciprocal jurisdiction.--In paragraph 4g are stated the rules for the composition of courts-martial for the exercise of recripocal jurisdiction.

The first rule of policy is that members of courts-martial should be members of the accused's own service. When reciprocal jurisdiction is exercised, the convening authority should exhaust all reasonable means for securing as members of the court personnel of the accused's own service. This policy is applicable to members of courts-martial only, not to counsel or to the law officer.

If, for any sound reason, it is impossible to convene a court, all of whose members are members of the accused's service, at least a majority of the members should be members of the accused's armed force unless exigent circumstances render it impracticable to obtain such members without manifest injury to the service.

In order to implement the policy of 4g(1), commanders of joint commands and joint task forces who may exercise reciprocal jurisdiction may appoint as members of courts-martial any members of their command who are members of the accused's armed force. This subparagraph also provides that when reciprocal jurisdiction is exercised by a subordinate commander the superior commander should make available to such subordinates members of the accused's armed force in order that the court may be constituted in accordance with the policy stated in 4g(1).

In extremely rare cases it may be necessary to constitute mixed courts for cases other than those in which the exercise of reciprocal jurisdiction is involved. Such a situation might arise from the absence of eligible persons within the command in which the court is convened. For example there might be an absence of eligible enlisted men within the command, although enlisted men of another armed force may be reasonably available, or it might be necessary to borrow a law officer or counsel for the trial of the case.

In such cases, the mutual concurrence of the Secretaries of the Departments concerned is required before members of other armed forces may be borrowed for court-martial duty. This does not require specific authority for each case. A general authority covering the

particular local situation will be sufficient. When the Secretaries have agreed to permit such a borrowing of personnel, the appointment of personnel for the trial of cases is to be made from members made available for this purpose by their own commanding officers.

14 Jurisdiction of general courts-martial.--a. Persons and offenses.--General courts-martial are the only types of courts-martial which have jurisdiction as to persons and offenses other than those specifically provided by the Uniform Code of Military Justice. As stated before they have concurrent jurisdiction with military tribunals to try any person who by the law of war is subject to trial by military tribunals. Under the law of war they have jurisdiction to try two classes of cases:

(1) Violations of the law of war. This included not only war crimes as that term has been defined and limited to crimes committed against citizens of another state, enemy or neutral, while there are subsisting in the field, forces capable of ejecting the occupant or belligerent, but it also includes offenses against the civilian population of an area under hostile occupation after unconditional surrender. See CM 337089, Aikins, Seevers. Under this clause there is no question that members of our armed forces may be tried for violations of the law of war, either by military tribunals or general courts-martial.

(2) The other classes of cases are "crimes and offenses against the law of territory occupied as an incident of war or belligerency whenever the local civilian authority is superseded in whole or in part by the military authority of the occupying power." With respect to this type of jurisdiction the 1949 Manual apparently contemplated only occupied enemy territory. This was, perhaps, too restrictive because under the law of war a belligerent may establish military government in neutral territory which becomes a battleground as well as in the territory of a friendly ally under similar circumstances. The United States Manual of Civil Affairs, Military Government, FM 27-5, OPNAV 50E-3 recognizes that military government and occupation is not limited to enemy territory

and further that such occupation is governed by the rules of international law and the established customs of war.

The text provides for concurrent jurisdiction of general courts-martial with respect to offenses against the law of territory occupied as an incident of war or belligerency. The distinction between war and belligerency is made to provide for application of the principles of this paragraph to occupation incidental to undeclared war, rebellion wherein the rebels are recognized as belligerents, occupation after unconditional surrender (although not an incident of belligerency, hostile occupation remains an incident of war), and formal military hostilities.

The scope of this paragraph does not include occupation pursuant to a peacetime agreement or other peaceful occupation since the law of war is not involved in such cases.

14b Punishments.--Article 18 provides that when a general court-martial tries a person pursuant to the law of war, it may adjudge any punishment permitted by the law of war. Some of the limitations on punishments prescribed by the Geneva Convention of 27 July 1929 are listed as notes under Article 18 in appendix 2. If the 12 August 1949 Convention is ratified, it will replace the conventions listed in the notes. It is contemplated that appropriate articles of the new convention will be included in the Cumulative Pocket Supplement.

15 Jurisdiction of special courts-martial.--a. Persons and offenses.--Special courts-martial have jurisdiction over all persons subject to military law for non-capital offenses. They also have jurisdiction for capital offenses under certain circumstances. With respect to jurisdiction over capital offenses, the general rule is that an officer exercising general court-martial jurisdiction may cause a capital offense except one for which a mandatory sentence beyond the jurisdiction of a special court-martial to adjudge to be tried by a special court-martial. The Secretary of a Department may modify this rule. It is not now contemplated that the Army or the Air Force will relax it, but the Navy and the Coast Guard will probably authorize officers exercising special court-martial jurisdiction to refer capital offenses except those in violation of Articles 106 and 118(1), (4), to a special court-martial without obtaining the consent of the officer exercising general court-martial jurisdiction. This rule may be adopted by the Navy and the Coast Guard because ships at sea might not have any convenient method of referring such matters to the officer exercising general court-martial jurisdiction.

This paragraph enumerates the offenses which are capital at all times, and those which are capital in time of war only. To constitute "time of war" it is not necessary that there be a formal declaration . War may be formally declared or it may consist of subsisting hostilities between two or more nations or subdivisions of nations, either general, or limited as to area, places, and things. See The Eliza, Bas v. Tingey, 4 Dallas 37, 1 L. Ed. 731; Prize cases, 67 U. S. 635; Hamilton v. McClaughery, 136 F. 445.

The mere fact that an article of the code makes an offense punishable by death does not necessarily mean that it is a capital offense within the meaning of Article 19.

(1) It is not capital if the maximum punishment authorized by the President is less than death; or

(2) If, for the purpose of making a deposition admissible, an officer competent to refer a capital case to trial declares it to be non-capital pursuant to Article 49; or

(3) If, on a rehearing or new trial, a sentence less than death had been adjudged at the prior hearing or trial.

15b Punishments.--One of the matters to be noted with respect to the punitive power of a special court-martial is that it may not adjudge forfeitures in excess of two-thirds pay per month for six months. Therefore, even if a bad conduct discharge is adjudged by a special court-martial, the maximum forfeiture which may be adjudged is two-thirds pay per month for six months.

16 Jurisdiction of summary courts-martial.--Persons, and offenses.--With respect to the jurisdiction of summary courts-martial as to persons and offenses the code provides one substantial change insofar as the Army and Air Force are concerned. Under Article 20 every person subject to trial by summary courts-martial may object to such trial and demand trial by a higher court with one exception. This exception is that persons who have refused punishment under Article 15 may be tried by summary court-martial even if they object. It is also to be noted that paragraph 16a extends the principles of paragraph 15a(2) and (3) with respect to what is a capital offense to the jurisdiction of summary courts-martial.

16b Punishments.--The power to adjudge a reduction to an intermediate grade is new to the Army and Air Force. It is to be noted

that a summary court-martial may not adjudge reduction in a case of a noncommissioned officer or petty officer above the 4th pay grade except to the next inferior grade, nor may it adjudge confinement or hard labor without confinement in a case of such a noncommissioned officer because such a sentence would automatically result in a reduction to the lowest grade.

Conference No. 2

APPOINTMENT, PERSONNEL OF COURTS-MARTIAL

Conducted by
MAJOR ROGER M. CURRIER

References: Paragraphs 3, 4a through f, 6, 7, 36-51 and appendix 4

3, 4b Classification of courts-martial.--All the services now have three types of courts-martial classified as general courts-martial, consisting of a law officer and at least five members, special courts-martial consisting of at least three members, and summary courts-martial consisting of one officer. Two of these terms are new to the Navy and Coast Guard--the special court replacing the former summary court of those services and the summary court taking the place of the deck court.

4a Composition.--This paragraph sets forth the provisions of Article 25 as to who may be appointed and serve as members of courts. Generally this includes any person on active duty with an armed force as defined in the paragraph. As the word "with" instead of the word "in" was used in the article, personnel of the Coast and Geodetic Survey and Public Health Service may be included as eligible for appointment to courts-martial when assigned to and serving with an armed force. This is in accord with Navy practice (NC & B, par. 347).

Although no distinction is made among various classes of armed forces members, the next subparagraph points out certain disqualifications of such members. Availability of other persons may be restricted by departmental regulations. For example, in the Army, AR 60-5 restricts the appointment of chaplains. This is not the case in the Navy.

In the case of enlisted men, even if requested by an accused, they may not serve if they are members of the same unit as the accused. Since a definition of the word "unit" involves jurisdictional matter, departmental definitions were included in the text.

4c The subparagraph on rank of members follows generally MCM, 1949, as modified by Article 25. Following certain Navy practices, the paragraph includes a direction that the senior member of a general or special court should be an officer with the rank of lieutenant of the Navy or Coast Guard or captain of the Army, Air Force, or Marine Corps. This provision also avoids a possibility of courts being composed entirely of warrant officers or enlisted persons. Another policy is announced--that a summary court should be an officer with the rank of captain in the Army, Air Force, or Marine Corps or lieutenant in the Navy or Coast Guard. Thus the former Army policy of appointing field grade officers as summary courts is changed to conform to present Navy policy. The other change from MCM, 1949, as required by the code is a provision for proceeding to trial without enlisted persons if they are not available and cannot be made available without injury to the service. An example of this is where a court appointed on board a Navy ship at sea could not possibly have enlisted men as members because under the Navy definition of "unit", all enlisted persons aboard the ship are members of the same unit. When such a case arises the convening authority must attach a detailed written statement concerning the unavailability of enlisted persons and attach the statement to the record of trial. The strong legislative intent underlying this requirement is contained in the House Hearings in which Mr. Larkin stated:

> "Now we intend that that be part of the legislative history as instructions to commanders and the people that write the manual that it would only be in the most exceptional type of case that they would proceed and it would only be after the commander writes a statement of the conditions he has faced which made it impossible for him to obtain enlisted men and the statement is to go with the record. So it will not just be arbitrary or capricious convenience of his which he could adopt in order to avoid using enlisted men in the event he was the type of commander who wasn't sympathetic with this provision."
>
> (Hearings on HR 2498, House Armed Services Committee, pages 1150 - 1151)

4d The next subparagraph contains a direction that convening authorities shall appoint members who are qualified for duty by reason of age, experience, length of service, and temperament. It may be noted that a requirement for certain years of service has been deleted from the code and also the manual. Experienced persons will always be available in peace time, but in time of war, years of service requirements tend to difficult administration. Language has been added suggesting that in certain types of special court cases a convening authority should give serious consideration to appointi a qualified lawyer as a member of the court.

4e The statutory requirements for the qualifications of law officers are recited in the first subparagraph. They are appointed for general courts only, and must be an officer on active duty, a member of the bar of a Federal court, or the highest court of a State, and certified as qualified by the appropriate Judge Advocate General. Relative to such certification, the fact than an officer is certified as a law member under the articles of war, does not qualify him to act as a law officer within the purview of Article 26. He must be certified under the uniform code. In the Army, SR 605-175-10, 27 February 1951, sets forth the procedures to be followed to obtain such certification. It should be noted that new qualification forms must be accomplished by all qualified officers except officers of the Judge Advocate General's Corps. Disqualifications are next stated. The person cannot be the accuser, a witness for the prosecution, or the investigating officer or counsel in the same case. In this connection an officer who has served as a member of a court should not be appointed law officer of another court involving the same case. Certainly an officer who has sat as a member of a court, and therefore necessarily arrived at some conclusion on the facts, should not be appointed to act in the capacity of a judge in another hearing of the same case. Having served as law officer in the same case might render an appointed law officer subject to a challenge for cause.

4f **This deals with appointment of law officers and members of different units of the same armed force. Such appointments to membership of courts have occurred frequently in the Army. Any convening authority may appoint members of other commands of the same armed force to courts-martial provided a concurrence of the other commander involved is obtained. This concurrence may be oral and need not be shown in the appointing order. The appearance of a member or law officer from another command at a session of a court is evidence of the concurrence of the commander concerned in the appointment.**

6a Let us turn now to the appointment of counsel. Paragraph 6a restates the general statutory provisions and disqualifications for prior participation stated in Art. 27a. A clarifying statement is added to cover the borderline situations of prior participation of a member of the prosecution or defense within the meaning of the statutory disqualification. In at least one recent case the problem presented was whether an officer who was the appointed defense counsel of a court to which a case had been referred, but who stated in open court that he had taken no actual part in the preparation of the case for trial, was qualified to act as trial judge advocate in the trial of that case. The case was held legally sufficient on the grounds that the officer had not acted for the defense. This view is supported by Harvey v. Zuppan, 84 Fed. Supp. 574, a habeas corpus

proceeding wherein it was held that the accused could not complain because the trial judge advocate upon a rehearing had been nominally an assistant defense counsel at the former trial, but where he took no part in the preparation or trial of the former case.

Nevertheless one may presume that an appointed defense counsel will have performed his duty of beginning the preparation of the defense at the earliest possible time, or that at least he has directed an assistant to do this. Consequently, prima facie he should be presumed to have acted for the defense and if he didn't the record should show his non action affirmatively. In a recent application for a new trial, The Judge Advocate General of the Army granted relief because the allied papers showed that the trial judge advocate, who had previously been the defense counsel, had in fact done something as defense counsel although the record was silent on the subject (Memorandum Opinion, Application for New Trial, CM 260159, Levine).

6b The first subparagraph restates the statutory requirements for legal qualifications of trial counsel and defense counsel before a general court-martial as stated in Article 27(b).

The second subparagraph defines the terms "judge advocate" and "law specialists" as used in Article 27(b)(1). The definition of an army judge advocate is taken from MCM 1949, par. 6. It is to be noted that regular officers detailed in the Judge Advocate General's Corps are not included. Such detailed officers will have to be members of the bar of an appropriate court in order to qualify. The Air Force definition is taken from Public Law 775, 80th Congress and the Air Force preface to MCM 1949. The definition of "law specialist" is taken from Article 1(13) of the code. The conclusion of qualification by virtue of certification by the Judge Advocate General is in accord with the present Army practice for showing the qualifications of Law Members. (Appendix 2, MCM 1949.) It is to be noted that the statute authorizes any person who is qualified to act as counsel. Under certain circumstances, Warrant Officers, enlisted persons and civilians could be appointed counsel. The Army, however, in SR 605-175-10, dealing with certifications of law officers and trial and defense counsel, has indicated that only officers will be certified by the Judge Advocate General.

6c As to qualifications of counsel of special courts-martial, the word "officer" instead of "person" has been used in the text, affirmatively limiting the class of persons to be appointed as counsel of inferior courts.

Since requirements for legal qualifications of counsel before special courts-martial exist only when the trial counsel is fully qualified, it is stated that any officer not otherwise disqualified

is competent to act as trial counsel or defense counsel of a special court-martial. The remainder of the first subparagraph states the statutory provisions for equalization of representation for the defense (Article 27c).

6d This paragraph provides for equalization of representation for the defense in the situation where the conduct of the prosecution or defense devolves upon an assistant.

It is to be noted that Articles 38d and e permit assistants who are not qualified as required by Article 27 to take an active part in a trial only under the direction of the trial counsel or the defense counsel.

In general court-martial cases, therefore, if the conduct of either side devolves upon an assistant (i.e., when the counsel is absent) such assistant must be legally qualified.

In a special court-martial, if the officer conducting the prosecution is not a lawyer, there is no need that the officer conducting the defense be one. In such a case he is qualified as required by Article 27 and may act under Article 38(e). But if the officer conducting the prosecution is a lawyer whether he be the trial counsel or an assistant, then whoever conducts the defense as a regularly appointed member of the defense must be similarly qualified. This is now jurisdictional and is not subject to waiver—although, of course, the accused can excuse the personnel of the defense.

7 Appointment of reporters and interpreters.—The appointment of these persons is vested in the convening authority instead of the president of the court. This matter was suggested in the Congressional Committee Hearings on the code because the convening authority would have more authority to obtain qualified personnel. Although he cannot delegate his appointing authority as to other personnel of the court he may delegate it in the case of reporters and interpreters. Of course reporters are necessary on general courts-martial, but their appointment for special and summary courts may be restricted by departmental regulations. In the Army, regulations in the SR 22 series are now in process which will restrict the use of reporters to cases in which under the charges a bad conduct discharge may be adjudged.

36 Paragraph 36 sets forth the manner of effecting appointments. A court-martial is created by an appointing order issued by a convening authority. The appointing order, formerly called a precept in the Navy, designates the kind of court, place and time of original meeting, and enumerates the personnel of the court. Personnel who are required to have special qualifications must have these qualifications stated in the appointing order. Inasmuch as the convening

authority is now the person who appoints reporters and interpreters an authorizing clause relative to such personnel should not be contained in the order.

36c A new provision detailing the action to be taken to provide enlisted personnel for a court is incorporated in subparagraph (2).

37 The next paragraph deals with changes in personnel of courts after appointment. This was placed within the discretion of the convening authority to fill in the gap left in Article 29. The convening authority may detail members in lieu of or in addition to original members or he may change the law officer or counsel.

37c Effecting changes.--Here is implemented the manner in which changes may be made such as by message, despatch, or oral order confirmed later by written orders. The text also contains words of caution regarding the number of amending orders.

38 Relative to the relationship between convening authority and members of courts this paragraph serves to clarify the position of the convening authority with respect to Articles 37 and 98. He may not, directly or indirectly, give instruction to or unlawfully influence any court as to future action. He may, however, give any court appointed by him general instructions as to the state of discipline in the command, duties of personnel of the court, and other legal matters. This should be done through his staff judge advocate or legal officer.

40 We now turn to parts of Chapter IX dealing with duties of the appointed personnel. These paragraphs generally are amplifications of their counterparts in the 1949 Manual. Because of the new provisions for law officers, paragraph 40 is more definitive of the duties of senior members of courts-martial. The senior member appointed to the court or the senior officer presiding over the court during the conduct of a case of course is the president. He is charged with the usual historic duties of setting the time and place of trial, prescribing the uniform, preserving order, handling adjournments, and administering oaths to counsel. He presides over closed sessions of the court and speaks for the court in requesting instructions of the law officer and announcing findings and sentences. Certain of these duties necessarily are carried out in conjunction with or after consultation with the law officer. For example, a recess or an adjournment might be an interlocutory question which must be decided by the law officer. The president of a special court martial has additional duties which devolve upon him because of the absence of any law officer. He assumes the duties similar to those of a law officer of a general court such as ruling upon all interlocutory questions which, of course, are subject to objection by any member of the court and instructing the court as to elements of offenses, presumption of innocence, reasonable doubt, and burden of proof. Finally the senior officer present at the trial of any case authenticates the record of that case as president.

41 Members of courts have duties similar in nature to the duty of a juror in a civil court. Each member has an equal voice and vote upon deliberations and has a legal and military duty to arrive at a decision on findings or on sentences and generally to discharge any duty required under his oath. The subparagraphs dealing with absence and new members are restatements of parts of NC&B and MCM, 1949.

42 Counsel.—Paragraph 42 provides generally for conduct of counsel. Appropriate portions of the canons of ethics of the American Bar Association, some of which are set out in Naval Courts and Boards, are included. The paragraph sets up standards for a military bar.

43 Suspension of counsel.—Under certain circumstances wrongful acts of counsel may constitute grounds for suspension from practice before military courts. Care has been taken to obviate suspensions which might arise from personal dislikes or mistaken zealousness of convening or other authorities. A suspension cannot be effected except by the Judge Advocate General of the armed force concerned. Provision is made for departmental regulations as to how this may be effected. It may be noted that such regulations are required to contain rules defining disqualifying misconduct and the procedures relating to a suspension which procedures must include notice and opportunity to be heard as to the affected person. The Army regulation on the subject is SR 22-130-5, 26 March 1951, which is a new regulation under the military justice series. It contains definitions of misconduct, grounds for suspension, and outlines action to be taken. This includes a hearing by a board composed of lawyer officers who, after giving notice and opportunity to be heard to the counsel in question, report their findings and recommendations to the convening authority. If the convening authority decides that suspension is warranted he forwards the proceedings of the board with his action thereon to the Judge Advocate General who takes appropriate action. The regulation does not prohibit relief from courts-martial as distinguished from suspension in appropriate cases. It should be noted that suspension proceedings are applicable only to persons qualified in the sense of Article 27 and individual counsel selected or provided by an accused. Thus in certain cases, civilian counsel may be subject to suspension. Suspension is a bar to practice in military courts.

44 Duties of trial counsel.—The paragraphs dealing with such duties are taken from MCM, 1949, and expanded. We are all familiar with such duties—preparation of the case,

checking the file, determining the eligibility of all persons concerned to serve, assisting the defense in procuring witnesses, serving the accused--in other words, conducting the trial as any lawyer properly should.

45 The same is true, of course, as to the assistant trial counsel who carries out all orders of the trial counsel and acts as such when the duty devolves upon him.

46 Defense Counsel.--These provisions also have been taken from former manuals and are familiar.

48 This paragraph also is taken substantially from MCM 1949. Individual counsel does not have to be qualified in the sense of Article 27 but if he is a military person he must be available for such duty. Rules for the determination as to availability are set forth. The duties of any counsel for the defense parallel closely the duties of any lawyer to his client and the matters set out in the manual are similar to those in previous service manuals. Certain things have been added, however, such as drafting a clemency petition or an appellate brief.

In addition, there is a subparagraph dealing with the counsel for the accused advising the accused of his appellate rights. This is quite important as there is a time limitation of ten days from the judgment of the court in which the accused may request appellate counsel. Defense counsel therefore should, after a finding of guilty, advise the accused in appropriate cases that he has a right to counsel before the board of review and also under certain conditions may have a right of appeal to the Court of Military Appeals. A proper request, conditioned upon, of course, whether the case is one subject to appellate review, should be obtained in writing and forwarded to the convening authority for attachment to the record of trial.

√ One other point relative to counsel for the accused--although he may examine the record of trial, it is not necessary for him to do so prior to authentication nor is it necessary for him to sign the record.

49, 50, 51 Reporters, Interpreters, Guards, Clerks and Orderlies.--These paragraphs are similar to those contained in MCM 1949, with implementation relative to numbers of copies of records to be prepared. Joint Army-Air Force regulations AR 35-3920, AFR 173-90, 11 January 1950, contain provisions for the compensation of reporters and interpreters. The army special regulations mentioned before relative to limitation on

appointment of reporters also contain a provision for attendance of clerical personnel to assist in the proceedings of any court.

App 4 Appendix 4 sets forth the forms to be used in appointing orders, and appropriate notes for guidance in preparation. These forms will be used by each service subject to the various service regulations or customs pertaining to written orders. For example, in the Navy the precept--now called "appointing order of the convening authority"--was always signed personally by the convening authority whereas, in Army and Air Force orders, the appointing order usually was authenticated by a chief of staff, adjutant general, or adjutant, for the commanding officer. No prohibition as to how the order is thus promulgated is set forth. It is desirable, however, that those portions of the orders stating qualifications of law officers, counsel, and setting forth unit designations of enlisted members, be followed meticulously.

Conference No. 3

APPREHENSION AND RESTRAINT

Conducted by
MAJOR WILLIAM H. CONLEY

References: Chapter V, Paragraphs 17-23
Articles 7-14, 57, 96-98

The material of Chapter V, "Apprehension and Restraint," is predicated primarily upon the provisions of Articles 7 through 14 of the Uniform Code of Military Justice.

Both Chapter VII, Naval Justice, and Chapter V, Manual for Courts-Martial, are captioned "Arrest and Confinement." In this respect, Mr. Larkin, General Counsel for the Secretary of Defense, in his testimony before the House Subcommittee, stated with regard to Article 7:

> "In our study of the Articles of War and the Articles for the Government of the Navy we found a certain duality of meaning in the words 'arrest,' 'restraint,' 'confinement,' * * * and we adopted this scheme to clarify the definitions of those words * * *
>
> "Section (c) specifically is borrowed from subdivision (c) of article of war 68. But it is just a general simplification."

Paragraph 17, "Scope," emphasizes that the discussion of apprehension and restraint deals primarily with the apprehension and restraint of persons subject to the code in connection with trial by court-martial and deals only incidentally, if at all, with the apprehension and restraint of persons for other purposes, types of which are set out as examples in the latter portion of the paragraph.

Paragraph 18a contains the definitions, as prescribed by the indicated articles of the code, of "apprehension," "arrest," and "confinement."

With reference to the definition of apprehension, the cross-reference "174d" pertains to the definition of "custody" as contained in the discussion of "Escape from custody" in paragraph 174d wherein it is provided that:

"Custody is that restraint of free locomotion which is imposed by lawful apprehension. The restraint may be corporeal and forcible or, once there has been a submission to apprehension or a forcible taking into custody, it may consist of control exercised in the presence of the prisoner by official acts or orders."

Article 7 must be read in conjunction with Articles 8 through 14 which codify the general provisions concerning apprehension and restraint of persons subject to the code. In this respect, paragraph 18b, "Basic considerations," contains some salient provisions of the code which place certain limitations on the free use of discretion in the exercise of apprehension and restraint activities.

Paragraph 18b(1) provides that a person subject to the code and accused of an offense against the code may be ordered into arrest or confinement as circumstances may require. It is to be noted that in the first sentence of this subparagraph the words of Article 10, "a person charged with an offense," have been changed in the manual to "a person accused of an offense." This change was made to eliminate the possibility of confusing the "accusation" with the "formal charges." In this respect, the Hearings before the House Subcommittee, page 908, read as follows:

"Mr. Brooks. Then your interpretation of the word there in the first line of that section 'charged' is that it does not really mean formal charges.

"Mr. Larkin. That is right.

"Mr. Brooks. It means suspected--

"Mr. Smart. That is what I would say."

The second and third sentences conform to current practices and tend to explain the provision that confinement should not always be resorted to in cases involving offenses ordinarily tried by summary courts-martial. Concerning the sentence that, "No restraint need be imposed in cases involving minor offenses," paragraph 128b, "Minor offenses," provides:

"Whether an offense may be considered 'minor' depends upon its nature, the time and place of its commission, and the person committing it. Generally speaking the term includes misconduct not involving moral turpitude or any greater degree of criminality than is involved in the average offense tried by summary court-martial."

With reference to the provisions of paragraph 18b(2), which prohibits the placing of members of the armed forces of the United States in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces of the United States, the commentary to Article 12 provides that:

> "AW 16 could be interpreted to prohibit the confinement of members of the armed forces in a brig or building which contains prisoners of war. Such construction would prohibit putting naval personnel in the brig of a ship if the brig contained prisoners from an enemy vessel. This article is intended to permit confinement in the same guard house or brig, but would require segregation."

Further in this respect, Mr. Larkin in his testimony stated:

> "We thought we kept the sense of the present law but made it a little more flexible by saying 'in immediate association' which in effect would mean you could keep them in the same jail by at least segregating them in different cells.
>
> "* * * We have deleted, if you will notice, 'outside the continental limits' and made it apply every place, but prohibit incarceration in close association but not with because 'with' has the connotation that you could not keep them in the same prison and there may be only one.
>
> "Mr. Anderson. Mr. Chairman, is there any place in the code that expresses prohibition against confining our men in foreign jails?
>
> "Mr. Larkin. No; but this one prevents them from being confined with enemy prisoners of war or foreign nationals not members in the same cell."

Article 13, which is based primarily on Article of War 16, provides that, "Subject to the provisions of Article 57, no person, while being held for trial or the results of trial, shall be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to punishment during such period for minor infractions of discipline."

The reference therein to Article 57 is intended to clarify the relation of Article 13 to the effective date of sentences. In

paragraph 18b(3) an attempt was made to spell out, for further clarity, the provisions of Articles 13 and 57 as they relate to the prohibition against punishment or penalty, what restraint is authorized, and the fact that forfeitures become effective on and after the date of approval by the convening authority of a sentence to confinement not suspended and forfeitures. In this respect, the commentary to Article 13 provides:

> "AW 16 has been interpreted to prohibit the enforcement of any sentence until after final approval even though the accused is in confinement after the sentence is adjudged. It is felt that a person who has been sentenced by a court-martial and is in confinement which counts against the sentence should not draw full pay for the period between the date of sentence and the date of final approval."

The provision in Article 13 as to the rigor of restraint, that is, that the arrest or confinement imposed shall not be any more rigorous than the circumstances require to insure his presence, is derived from present practices of all the Services.

Article 13 specifically provides that a person being held for trial or the results of trial may be punished for certain offenses not warranting trial by court-martial. The provisions of that article have been paraphrased in 18b(3) to emphasize that punishment is authorized for infractions of the disciplinary rules of the confinement facility concerned. Such rules, including the authorized punishments, are to be set out in departmental regulations rather than in this manual. Such punishments may include reprimand or warning, extra duty, deprivation of privileges, reduction in conduct grade, segregation on regular or restricted diet, and loss of good conduct time.

It will be noted that the provision of the manual pertaining to the facilities, accommodations, treatment, and training to be accorded prisoners being held for trial or the results of trial is to be implemented in pertinent regulations. This provision was purposely designed to afford the authorities charged with the administration of confinement facilities the opportunity to prescribe, within their judgment, the necessary rules subject, of course, to the prohibition against the imposition of unauthorized punishment or penalties. In this respect, Department of the Army Bulletin #1, 16 January 1951, contains the Uniform Policies and Procedures Affecting Military Prisoners, approved by the Personnel Policy Board, Department of Defense, which become effective 31 May 1951.

The provision concerning forfeiture of pay and allowances is based on paragraph 19a, Manual for Courts-Martial, 1949, as modified by Article 57. It is to be noted that this provision is a restatement of the basic provisions of Article 13. Consideration was given to the effect on Article 13 of Article 57b which provides that any period of confinement included in a sentence shall begin to run from the date adjudged. It was determined that Article 57b did not abolish the guarantees of Article 13 once a sentence of confinement was adjudged and further that to impose, prior to the order of execution, upon an accused any punishment other than confinement, plus forfeitures after approval, would violate Article 13. It was determined that Article 57b merely enunciates the practice now prescribed by regulations, that is, the relating back to the date of sentence as the time when credit for confinement starts. By such an interpretation both Articles 13 and 57b may be given full force and effect. To interpret Article 57b as modifying the treatment to be accorded to prisoners sentenced to confinement, after adjudgment thereof, would not give Article 13 its full force and effect. Thus the pay a prisoner awaiting trial or the results of trial accrues and may be paid, prior to the approval of the sentence, as he may direct. However, although pay which has accrued may not be forfeited, there is no requirement that an accused be permitted to have such funds in his personal possession during such periods of confinement.

In prescribing the authority to apprehend, Article 7b provides:

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

Paragraph 19, "Apprehension," spells out the presidential regulations, authorized by Article 7b, concerning persons empowered to apprehend. The authority of noncommissioned officers of the Army and the Air Force to apprehend offenders has been broadened to correspond to that of petty officers of the Navy. Further, the authority of personnel in the execution of air or military police or shore patrol duties, and such other persons who are properly designated to perform guard or police duties, is spelled out within the spirit of Article 7b, the commentary to which provides in part:

> "Subdivisions (a) and (b) are new and relate in particular to military police."

The second subparagraph prescribes the conditions under which enlisted persons performing police duties should apprehend commissioned

or warrant officer offenders. In case of such an apprehension, notice thereof must be given immediately by the apprehender to an officer to whom he is responsible or to an officer of the air police, military police, or shore patrol.

Paragraph 19b is, in essence, a quotation of Article 7c. This provision of the code is derived from Article of War 68 but differs from that article in that it eliminates the power of the apprehending person to place the offender in "arrest," as currently provided in Article of War 68. Article 7c authorizes the "apprehension" but not the placing in arrest of the offenders subject to the code who take part in quarrels, frays, or disorders.

Paragraph 19c, "Procedural steps to apprehend," provides that an apprehension is effected by clearly notifying the person to be apprehended that he is thereby taken into custody. It has been inserted as an informative directive and also to conform to comparable instructions in paragraph 20d(1) and (2) concerning the procedural steps to arrest and to confine. The procedure conforms to the current practice of the Services.

The commentary to Article 9 provides that, "Subdivision (e) is included to provide for custody of persons apprehended until proper authority is notified." The first sentence of 19d, "Securing custody of alleged offender," is designed to emphasize the variance in the authority to apprehend as contrasted with the authority to arrest or to confine. The second sentence of this paragraph paraphrases the provision of Article 9e that nothing in the article shall be construed to limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified. Although no more force than is necessary under the circumstances should be used to secure the custody of the offender, Article 55 specifically authorizes the use of irons "for the purpose of safe custody." Paragraph 21a, as indicated in the cross reference, prescribes the specific categories of persons who possess authority to arrest or to confine.

Paragraph 20a, "Status of person in arrest," reasserts that arrest is moral restraint imposed by competent authority. The third sentence permits the various Services to prescribe regulations incident to the status of "arrest" and thereby to provide for situations peculiar to the respective Services. The fourth sentence has expanded a somewhat comparable provision of the 1949 Manual so as to emphasize that the act of unauthorized persons placing an accused on duty inconsistent with the status of arrest does not terminate the arrest.

Paragraph 20b, "Restriction in lieu of arrest," is derived from the 1949 Manual, paragraph 19b. When that latter paragraph was prepared, the supporting memorandum therefor indicated that the paragraph was inserted to distinguish between arrest and customary administrative restriction, and, further, to obviate any moot questions which might arise in connection with the two types of restriction as a result of the limitation involved in arrest, that is, that a person in arrest will not be required to perform full military duty; also, that paragraph was inserted as informational matter for officers in lower echelons to point out the advisability of this form of restriction in proper cases. When paragraph 20b was being drafted it was determined that, in order to eliminate the possibility of confusing restriction of the type here under consideration with the "administrative" restriction properly imposed for training, sanitary, or security reasons, the term "restriction in lieu of arrest" should be utilized.

It is to be especially noted that a person properly placed in restriction in lieu of arrest may be required to participate in all military duties and activities of his organization while under such restriction.

Air Force and Army personnel will note that, in consonance with an Air Force opinion (ACM-S 143) dated 5 October 1949, the power to restrict in lieu of arrest has been lodged in "any officer authorized to arrest" rather than in "commanding officers" as provided in the 1949 Manual.

The provisions of 20c, "Confinement prior to trial," consist of a restatement of the provisions of Article 9a, b, and c. The final sentence, which amplifies that portion of Article 10 which provides that any person subject to the code charged with an offense under the code shall be ordered into arrest or confinement as circumstances may require, is consistent with current provisions of the 1949 Manual, paragraph 19c, and N C & B, section 343, concerning confinement deemed necessary in the interest of good order and discipline in view of the nature of the offense or the character or condition of the accused.

Paragraph 20d(1), "Procedure for arresting or confining," incorporates the present practice of the Services that no person shall be ordered into arrest or confinement except for probable cause.

Paragraphs 20d(2) and (3) prescribe the procedure for effecting arrest and confinement. The provisions of Article 11a and b concerning the required written statement of the name, grade, and organization of the prisoner, the alleged offense, and the report of commitment have been spelled out in some detail in paragraphs 20d(3) and 20d(5). According to the testimony given at the Hearings, the purpose of such notice is to insure that the commanding officer is "notified as to who

is being confined so that he can start the necessary processing of the whole case."

With reference to the provision of Article 10 that 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, the commentary thereto contains the statement, "The provision as to notification of the accused is new."

Concerning the term "immediate steps," the testimony provides in part:

> "Mr. Larkin. *** That is a direction to the authorities in charge to go forward. It says 'immediate steps.' ***
>
> "The idea was to provide that there be a speedy trial but not one that is so speedy that the man cannot prepare his own defense.
>
> "Mr. DeGraffenried. *** And where we use the word 'immediate' here, that is like using 'forthwith,' which means to go ahead. I believe that is just about as close as we can get to it."

Paragraph 32f(1) of the new manual spells out the procedure for informing the accused of the charges against him.

Paragraph 20e, "Unlawful detention," is a paraphrase of Article 97 which is new.

As provided in paragraph 21a, "Arrest and confinement - Who may arrest or confine," and in Article 9b and c, only a commanding officer to whose authority the individual is subject may order into arrest or confinement an officer, warrant officer, or civilian subject to the code, but any officer may order an enlisted person into arrest or confinement. In the case of an officer, warrant officer, or civilian, the authority may not be delegated, but in the case of an enlisted person the commanding officer of any command or detachment may delegate such authority to the warrant officers, petty officers, or noncommissioned officers of his command. The delegation may be general in nature, such as by written company orders, but the ordinary procedure is to delegate the authority to the first sergeant, the platoon sergeants, or the charge-of-quarters.

It is to be noted that with reference to the arrest or confinement of an officer, warrant officer, or civilian, the term "commanding

officer" refers to a commanding officer of one of the specified categories, while with reference to the arrest or confinement of enlisted persons it refers to the commanding officer of any command or detachment.

The provisions of paragraphs 21b and c concerning the authority of the trial counsel and court to restrain an accused are implemented by paragraph 60, "Attendance and Security of Accused," which provides in part:

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

Paragraph 21d, "Responsibility for restraint after trial," provides that after trial, the trial counsel must promptly notify (44e(2)) the commanding officer to whose command the place of confinement is subject, who, together with any other commander officially concerned with the restraint of the accused, is responsible for his immediate release or the imposition of further restraint, depending upon the circumstances.

Paragraph 22, "Duration and termination," implements the basic provisions of Naval Justice, page 58, and the 1949 Manual, paragraph 21, by spelling out just who is the "proper authority" to release an accused from arrest or confinement. 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 such 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 such officer is the commanding officer described above. The provisions of Articles 96 and 98 concerning the unauthorized release of a prisoner and unnecessary delay in the disposition of any case have been inserted in this paragraph as matter relevant to the general subject.

Concerning the apprehension of deserters by civilians, as presented in paragraph 23, Article 8 is comparable to Article of War 106 and to 34 U.S.C. 1011 which provide, respectively, for arrests by civil authorities in the case of military and naval personnel.

Article 14, "Delivery of offenders to civil authorities," is included in Part II, "Apprehension and restraint," of the code, and has been referred to in 23c as matter pertinent to the general scope of the chapter.

Conference No. 4

PREPARATION AND DISPOSITION OF CHARGES

Conducted by
MAJOR KENNETH J. HODSON

References: Chapters VI and VII; appendices 5, 6, and 7

Chapter VI is implemented by appendix 6 which contains 176 form specifications and a number of additional rules as to the content and form of specifications.

24a Definitions. The definitions adopted in paragraph 24a are consistent with the use of the terms "charges" and "specifications" in the code. The Army-Air rule that the charge refers only to the article of the code the accused is alleged to have violated was adopted because it is similar to Rule 7c, Federal Rules of Criminal Procedure, and also because it is less complicated than the Navy rule that the charge sets forth a descriptive title for the offense alleged in the specification.

24b Additional charges. Although paragraph 24b provides that additional charges may be preferred for newly committed offenses or for newly discovered old offenses, there is no prohibition against preferring charges for an offense that was known at the time the original charges were preferred. A failure to prefer charges promptly for a known offense may be a violation of Article 98, but unless the statute of limitations has run, trial of the offense will not be barred by the delay.

Trial of additional charges. No limitation has been placed on the time when additional charges may be referred for trial to the court before which the original charges are pending. As a practical matter, additional charges should not be referred for trial by the same court if the prosecution has rested its case as to the original charges. It would be futile to try additional charges with the original charges if the sentence has been announced as to the original charges as the court cannot reconsider that sentence with view to increasing its severity (76c).

26b,c Offenses arising out of one transaction. The rule against making one transaction the basis for an unreasonable multiplication of charges and the rule against joining serious and minor offenses are

more liberal in some respects than Rule 8a of the Federal Rules of Criminal Procedure. The Federal joinder rule requires that the offenses charged be of the same or similar character, or be based on the same act or transaction, or two or more acts or transactions constituting part of a common scheme or plan. What is desired in court-martial practice is the application of a reasonable rule. For example, the accused should not be charged with both a principal offense and a lesser included offense. However, a single transaction may be the basis of several offenses if necessary to meet the contingencies of proof. Thus, an accused may be charged with rape and with carnal knowledge in violation of Article 120 if the victim is under the age of sixteen and the expected testimony as to the use of force is not strong. Although an accused may be found guilty of any number of specifications, even though they allege offenses arising out of a single act or omission and do not allege separate offenses (74b(4)), he may be punished only for separate offenses (76a(8)).

26d Joint offenses. In court-martial practice, accused may be charged jointly with the commission of an offense if the proof shows they were acting together in pursuance of a common intent. However, joint participants may be charged separately or jointly. Appendix 6a(8) shows several examples of how joint participants may be charged. It is sometimes better to charge joint participants separately--especially if there is a probability of a severance. Whether charged jointly or separately, the charges may be investigated jointly and, unless a severance is granted, tried jointly.

27 The rules as to the effect of an improper designation of the punitive article in the charge is substantially the same as Rule 7c of the Federal Rules of Criminal Procedure. It follows the opinion in Johnson v. Biddle (1926), 12 F. 2d 366, which involved charging a soldier with murder under an improper Article of War.

With respect to the rule that specific offenses ordinarily should be charged under a specific article rather than as a violation of Article 134, note that many violations of orders or regulations under Article 92 would also be unbecoming conduct under Article 133 or prejudicial or discrediting conduct under Article 134. The general rule is that, if appendix 6 shows the offense to be chargeable under Article 134, the offense may be laid under that article even though it is also a violation of an order or regulation. Otherwise, it ordinarily should be alleged as a violation of Article 92. Although the article under which such an offense is laid ordinarily is immaterial, note that a footnote has been included in the Table of Maximum Punishments (127c) providing that the punishment prescribed for a specific offense will apply even though the offense may be a violation of an order or a regulation and may have been alleged as a violation

of Article 92. Thus, wearing an unauthorized uniform is punishable by one month's confinement and forfeiture of two-thirds of one month's pay, whether it is laid under Article 92 or under Article 134.

28a Drafting of specifications. This paragraph is implemented by appendix 6a. The following matters are noteworthy:

(1) The service number is not included in the specification.

(2) The armed force of the accused is set forth in the specification. This requirement has been added because of the jurisdictional complications which may arise in the trial of persons of different armed forces, and also to insure review by the appropriate agencies. See Article 17.

(3) The forms for specifications in appendix 6a are to be used when appropriate to the offense being charged. Note the provisions of the second sentence of paragraph 1 of appendix 6a:

"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."

(4) Paragraph 28a(3) lays down some broad, general rules as to the manner of alleging offenses. As noted above, the specification forms in appendix 6 do not need to be tested by these rules. Rule 7c of the Federal Rules of Criminal Procedure and the decisions of the Federal courts thereon are the sources of much of this material. If it is concluded that the mere addition of words importing criminality to a specification alleging an act or omission that is not per se an offense will not make an offense of that act or omission, rules evolve that demand all the technical niceties of common law pleading.

To avoid such technicalities, words importing criminality, such as "wrongfully," "unlawfully," etc., have been given a definite meaning. For example, with respect to offenses laid under Article 133 or Article 134, the general rules laid down in paragraph 28a(3) should lead to this result: If, in the light of the

general situation existing at the time and place alleged, the act described can reasonably be considered as being unbecoming an officer and a gentleman, as prejudicial to good order and discipline, or as bringing discredit upon the armed forces, then the addition of an appropriate word importing criminality or wrongfulness is sufficient to apprise the accused that the act charged is alleged to have been committed under unbecoming, discrediting, or disorderly circumstances. Such circumstances may be inferred if applicable law, regulation, or custom or practice having the effect of law, makes such act unlawful. See CM 307097, Mellinger, 60 BR 199, 213.

Although paragraph 28 is to be considered in determining the legal sufficiency of specifications which are not alleged in the forms prescribed in appendix 6a, consideration must also be given to paragraph 87a(2) which lays down the rules for determining the legal sufficiency of a specification upon review of a record.

28c Pleading written instruments. The rule as to the pleading of written instruments is based on recent Federal cases, particularly U. S. v. Starks (1946), 6 F.R.D. 43. That case involved the denial of a motion of a defendant for a dismissal of an indictment charging forgery of an indorsement of a U. S. Treasury check because it failed to set forth the alleged forged instrument in haec verba. The court said, in pertinent part:

"Assuming that at common law an indictment for forgery had to set out in haec verba the document charged to have been forged (citing U. S. v. Heinze (1908), 161 F. 425), it is the view of this court that this requirement no longer prevails under the new Federal Rules of Criminal Procedure. * * * It is no longer necessary to comply with any technical requirements with which the common law was replete in respect to the contents of an indictment. * * * These technicalities have long been outmoded. They are no longer the law in the Federal courts."

Pleading statutes. Note that when an act which is violative of a statute is alleged under Article 133 as unbecoming conduct, or under 134 as prejudicial or service discrediting conduct, there is no requirement that the specification refer to the statute from which the offense stems. However, an obscure statute properly may be referred to in the specification to aid the convening authority, the court, and the appellate agencies in identifying the source of the offense. In such a case, the specification should, nevertheless, set

forth the act or omission of the accused which constitutes the offense. The statute is included in the specification only for purposes of identification.

If the act is alleged as a violation of the third clause of Article 134 as a crime or offense not capital, it quite properly may be alleged as "unlawfully and in violation of" the particular statute (CM 234644, Cavoutte, 21 BR 97). However, an offense may be alleged and found as a violation of the third clause of Article 134 if it is alleged substantially in the words of the statute and it appears that the statute was applicable at the time and place alleged (CM 281884, Mengers, 54 BR 241; CM 312533, Moore, 62 BR 215).

CH VII General. Chapter VII contains a discussion of the various administrative and procedural matters involved in the administration of military justice from the time of the commission of an offense until the final disposition of the offense--either by imposition of non-judicial punishment under Article 15, dismissal of the charge, or reference of the charge to trial by court-martial.

Although anyone subject to the code may prefer charges, the manual establishes a regular procedure to insure the prompt and orderly disposition of offenses committed by persons subject to the code. In establishing a uniform procedure, some problems were confronted. In the Navy, the convening authority preferred charges. As the code provides that the accuser may not act as convening authority of general and special courts-martial (Arts. 22, 23), the Navy rule could not be adopted without divesting convening authorities of their normal power to appoint general and special courts-martial.

Consideration was then given to the adoption of the present Army-Air procedure of having the immediate commander of the accused prefer charges. However, in the Navy, the immediate commander of the accused ordinarily is also the convening authority of special and summary courts-martial. If the Army-Air procedure were adopted without modification, the Navy convening authority usually would lose his power to appoint special courts-martial.

The hearings before the Subcommittee of the House Committee on Armed Services indicated that a commander, if he had only an official interest in a case, could direct a subordinate to prefer such charges as the subordinate was willing to substantiate by the required oath. See paragraph 5a(4) in this connection.

For the foregoing reasons, the procedure for the submission of and action on charges was based on the present Army-Air practice, but

that practice was modified to permit the convening authority in the Navy to avoid becoming an accuser when he has only an official interest in the case.

Preference of charges. Stated briefly, the procedure established by this chapter for the preference of charges is as follows:

a. Ordinarily the commander exercising immediate jurisdiction over the accused under Article 15 will prefer charges.

b. If the immediate commander also exercises court-martial jurisdiction and has only an official interest in the case, he will transmit whatever information he has about the case to a subordinate with the following instruction:

> "for preliminary inquiry and report, including, if appropriate in the interest of justice and discipline, the preferring of such charges as appear to you to be sustained by the expected evidence."

c. If someone other than the immediate commander under Article 15 prefers charges, the charges ordinarily will be transmitted to the immediate commander for his action. However, a superior commander, as he has the power to reserve the appointment of courts to himself (Arts. 22, 23, 24), may restrict the action of the immediate commander. For example, he may limit the immediate commander's action to making a necessary inquiry, attaching appropriate personnel records, and returning the charges with a recommendation for disposition.

Action on charges. Subject to jurisdictional limitations, charges against an accused, if tried at all, should be tried at a single trial by the lowest court that has the power to adjudge an appropriate and adequate punishment (33h). Based on this rule and on the rule as to the preference of charges, chapter VII establishes the following normal, step-by-step procedure for the disposition of an offense committed by a person subject to the code:

a. First step: Preliminary inquiry and consideration of the offense or charge by the commander exercising immediate jurisdiction over the accused under Article 15 (by a subordinate officer of such commander if the latter also exercises court-martial jurisdiction and has only an official interest in the case). Unless otherwise directed by competent superior authority, the immediate commander may prefer or fail to prefer charges, dismiss charges that have been preferred, punish the accused under Article 15, or forward the charges to an officer exercising appropriate court-martial jurisdiction with a recommendation for trial.

b. Second step: Consideration of the charge by the commander exercising immediate summary court-martial jurisdiction over the accused. This commander has essentially the same powers as the immediate commander. In addition, he usually has broader powers under Article 15 and he also has the right to refer the charges to a court appointed by him, or to return them to the immediate commander for disposition. If trial by a court appointed by him is not appropriate, he may forward the charges to a superior commander with a recommendation for trial by an appropriate court-martial, but he will not forward the charges with a recommendation for trial by general court-martial unless the charges have been investigated under Article 32.

c. Third step: Consideration of the charge by the commander exercising general court-martial jurisdiction over the accused. This commander has essentially the same powers as his subordinates. In addition, he has broader powers under Article 15 and he also has the right to refer the charges to a court-martial appointed by him or to return them to a subordinate commander for disposition.

29e Signing and swearing to charges. Article 30 requires charges to be signed and sworn to before an OFFICER OF THE ARMED FORCES (e.g., a commissioned officer or a commissioned warrant officer) who is authorized to administer oaths. The reason for this unusual limitation on the power to administer the oath to charges is not known. Failure to comply with this requirement is not a jurisdictional error but the accused may not be tried on unsworn charges over his objection. See paragraph 67b.

30a Preferring charges against an absent accused. The provisions of the second subparagraph of 30a point up the desirability of preferring charges against an accused who is absent without authority (1) if testimony of witnesses is to be preserved by depositions, or (2) if the running of the statute of limitations is to be stopped by filing sworn charges with an officer exercising summary court-martial jurisdiction over the command which includes the accused. Departmental regulations may prescribe that charges will be preferred against every accused who has been AWOL for a certain length of time.

31c Forwarding charges in exceptional cases. Paragraph 31c provides that in exceptional cases in which the accused is not, strictly speaking, under the command of any military authority inferior to a Department, the charges may be forwarded to the Secretary or to an appropriate area commander. This provision is applicable to those cases which may arise under the code with respect to personnel who may be subject to the code, yet who, because of

their civilian status at the time, are not under any particular commander. For example, such action would be appropriate when jurisdiction under Article 3a is exercised.

32b Preliminary inquiry into charges. The preliminary inquiry mentioned in this paragraph (also in paragraph 33a) is not the formal investigation contemplated by paragraph 34 and Article 32. It is intended that the formal investigation required by Article 32 be directed by an officer who exercises summary court-martial jurisdiction; further, the formal investigation under Article 32 may be conducted only after charges have been preferred. However, if an immediate commander who does not exercise court-martial jurisdiction directs a formal investigation of charges under Article 32, no further investigation may be required if such investigation is adequate in all respects.

The preliminary inquiry mentioned may involve nothing more than considering the file in the case. The interviewing of witnesses or the collection of documentary evidence will not be necessary in every case.

32c Preferring charges. The immediate commander may, after conducting his preliminary inquiry, prefer charges or prefer charges additional to, or different from, those already preferred. This provision is intended to insure that charges will be corrected and made to conform with the expected evidence at the earliest moment. The effect of alterations is discussed in paragraph 33d. If new or different charges are preferred, it is a general rule that all charges be consolidated into one set of charges. There are some exceptions to this rule. For example, the original charges should be retained if they were preferred and depositions taken with respect to them, or if the statute of limitations would have run with respect to the offense if the original charges had not been preferred.

32d Dismissal of charges. As the immediate commander may prefer or fail to prefer charges, it follows that if someone else has preferred charges, the immediate commander should have the authority to dismiss them. Although this rule always existed in the Army and Air Force, it was not specifically stated in the 1949 Manual. As the dismissal of charges prior to trial does not bar trial (Art. 44), a superior commander may prefer, or have preferred, charges alleging the same or different offenses than those dismissed by the immediate commander. Likewise, a superior commander may limit the authority of the immediate commander with respect to dismissal of the charges.

32e Non-judicial punishment. If the accused has committed both minor and serious offenses, the immediate commander may impose punishment under Article 15 for the minor offenses. Thereafter, the serious offenses may be processed for trial by court-martial. However, the punishment of the accused for a minor offense--while other offenses are being processed--should be rather a rare occurrence. It is usually better practice to dispose of all of the charges in a single proceedings.

The immediate commander usually will not impose non-judicial punishment upon officers or warrant officers. The basis for this rule lies in the fact that many small unit commanders have almost the same rank as their junior officers. In view of the injury that may result from the unwarranted imposition of such punishment, it was deemed desirable to permit the officer exercising summary court-martial jurisdiction to act on such cases.

32f(1) Informing accused of charges. The immediate commander of the accused will meet the requirement of Article 10 that the accused be informed of "the specific wrong of which he is accused" and the requirement of Article 30b that he be "informed of the charges against him as soon as practicable" by reading the charges to the accused, giving him a copy, or advising him generally of the charges. The fact that the accused has been so informed will be noted on page 3 of the charge sheet. It is not necessary to inform the accused what disposition is to be made of the charges.

In the Army and Air Force the refusal of the accused to accept punishment under Article 15 will be noted on page four of the charge sheet as this fact will be important if the accused is tried by summary court. The Navy and Coast Guard are not concerned with this provision as Navy and Coast Guard personnel may not demand trial in lieu of punishment under Article 15 (132).

33a Inquiry by officer exercising summary court-martial jurisdiction. Paragraph 33a is applicable when charges have not been preferred. It permits the Navy to process charges without making the convening authority the accuser. Appropriate language directing a subordinate to make an inquiry and to prefer charges is set forth in quotes. Use of this language in all cases will prevent any questions being raised as to whether the convening authority became the accuser by virtue of referral of the matter to a subordinate.

Mast action. No attempt was made in this chapter to incorporate the Navy's present procedure of investigation of an offense at mast. The language of the chapter does not prohibit the use of the mast action, but there is a strong probability that, if a commander hold

a mast for such a purpose, he may become the accuser and divest himself of whatever powers he may have had to convene a special or general court-martial for the trial of the case.

33b Date of receipt of charges by officer exercising summary court-martial jurisdiction. Paragraph 33b establishes the procedure by which proof may be made of the interruption of the running of the statute of limitations. Obviously the entry on page 3 of the charge sheet of the date of receipt of the charges will not be important in many cases. However, entry of such information is already routine in most commands.

33c Directing Article 32 investigation. Paragraph 33c establishes a rule as to the time when the formal investigation under Article 32 is to be conducted. If the offenses charged appear to be so serious that it would be appropriate to recommend trial by general court-martial, the officer exercising summary court-martial jurisdiction will direct an investigation of the charges under Article 32. Except in rare instances, charges should not be forwarded to the officer exercising general court-martial jurisdiction with a recommendation for trial by general court-martial unless an Article 32 investigation has been made. Those rare instances might involve situations in which an "impartial" investigation could not be made. For example, if the officer exercising summary court-martial jurisdiction is the accuser or the only officer present with the command, there might be some doubt as to whether he could conduct an "impartial" investigation.

The officer exercising summary court-martial jurisdiction was made responsible for the conducting of the Article 32 investigation because he usually is nearer the accused and the witnesses.

33c(1) If an investigation of the subject matter has been conducted prior to the time charges were preferred, Article 32 does not require a further formal investigation unless it is demanded by the accused after he is informed of the change. It must appear that at such prior investigation the accused was afforded the opportunities for representation, cross-examination, and presentation prescribed in Article 32b. When such a preliminary investigation of the subject matter is relied upon to meet the requirements of Article 32, the allied papers should contain a statement that the accused was afforded an opportunity to demand a further investigation and his desires in the matter.

33d Alteration of charges. Article 34b provides that "formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence may be made." Any person authorized to act on the charges may make such changes. It is obvious that such changes should be made. It may not be so obvious whether the changed charges should be resworn and whether it is necessary to have a new Article 32 investigation.

33c(2)

At page 1010ff of the hearings of the Subcommittee of the House Committee on Armed Services (H. R. Report No. 37, 81st Cong., 1st Sess.), the following colloquoy appears:

"MR. LARKIN. * * * If it appears from the pre-investigation that the original charge and specification is not sustained or that the investigation has spelled out a different crime, then it will be necessary that the charges and specifications be redrawn and there be a new investigation on the different charge.

"MR. ELSTON. In other words, if a man is charged with being A.W.O.L., they could not change that to desertion?

"MR. SMART. That is a greater offense and a different offense, and I would say 'no.'

"MR. LARKIN. I think that is right.

* * * * *

"MR. ELSTON. On a charge of manslaughter, you could not make it murder in the first degree.

"MR. SMART. You could not change it to a more severe crime, but I think you could make corrections to a lesser and included offense only.

* * * * *

"MR. LARKIN. May I point out that we tried to spell out the idea in the commentary which says:

> 'Changes in the charges may be made in order to make them conform to the evidence brought out in the investigation without requiring that new charges be drawn and sworn to. * * *'

The purpose here is, because your charges and specifications are drawn after the receipt of the original complaint, when there is only a moderate amount of evidence, the next step is this pretrial investigation, which is a very much more extensive investigation and it may be that, as a result of

that greater and more extensive investigation, some technical changes for the purposes of accuracy are necessary. However, if the information adduced in the pretrial investigation is such that it warrants a different charge, then the new charge and specification must be drawn at that point and a new pre-investigation must be held, so that the accused can meet, if he desires, the new charge which he was not aware during the first pre-investigation."

33d Effect of alterations upon oath to charges. Anyone authorized to take action upon charges may alter and revise the charges over the signature of the accuser. However, such alterations may not include "any person, offense, or matter not fairly included in the charges as preferred" unless the altered charges are signed and sworn to by an accuser.

In reviewing a record of trial involving charges which have been altered after they have been sworn to, there may be some question as to whether the altered charges should have been signed and sworn to by an accuser. Such questions usually are eliminated by the failure of the accused to object at the time of trial to being tried on unsworn charges. See 29e and 67b.

33e(2) Effect of alterations upon Article 32 investigation. Paragraph 33e(2) provides that if, at any time after an Article 32 investigation has been conducted, the charges are changed to allege a more serious or essentially different offense, a new investigation should be directed so that the accused may, if he desires, exercise his rights under Article 32 with respect to the new matter. In other words, if (based on the evidence contained in the formal investigation) a charge of AWOL is changed to desertion with intent to remain away permanently, the charges must be sworn to and, thereafter, the accused should be afforded an opportunity to present evidence as to such intent.

33f Disposition of charges involving security matters. Article 43e provides that the Secretary of a Department may extend the normal period of the statute of limitations by certifying to the President that the trial of an offense in time of war is detrimental to the prosecution of the war or inimical to the national security. This article has been implemented, in part, by paragraph 33f which provides, in effect, that if trial of an offense is warranted but might be detrimental to the war effort or inimical to the national security, the officer exercising summary court-martial jurisdiction will

forward the case to the officer exercising general court-martial jurisdiction. Any officer exercising general court-martial jurisdiction may make a final determination in such a case as to whether the charges should be dismissed, referred for trial, or forwarded to the Secretary of the Department.

33i Forwarding charges. If the officer exercising summary court-martial jurisdiction forwards charges with a recommendation for trial by general court-martial, he will cause a copy of the "substance of the testimony" taken on both sides at the investigation to be furnished to the accused. It is not intended that the accused be furnished with a verbatim report of the testimony given before the investigating officer. There is no legal requirement that duplicate copies of documentary evidence be made and furnished to the accused. The matters mentioned in paragraphs 4c and 5a of the investigating officer's report (app. 7) should be furnished to the accused. Local commanders may prescribe that a copy of the investigating officer's report and all of the exhibits therein will be furnished to the accused. The practice in the Army and Air Force has been to furnish such material to the accused after the case has been referred for trial. If the material is furnished before the reference, it is a good practice to obtain the accused's receipt therefore to preclude his requesting the same material after the case is referred for trial.

The officer exercising summary court-martial jurisdiction is required to note the availability of material witnesses. This requirement should alert the commander exercising summary court-martial jurisdiction to retain material military witnesses pending the trial.

33j The provision permitting the trial of two or more accused at a common trial is based on rules 8b and 13 of the Federal Rules of Criminal Procedure.

It is to be emphasized that the exercise of discretion by the convening authority as to whether he shall order a common trial is limited to proper cases. He cannot order a common trial unless it involves offenses which were committed at the same time and place and are generally provable by the same evidence. If he directs a common trial of several accused, against some of whom there are charges which are separate and distinct from those against others, it would be prejudicial error to deny a motion for severance. However, he may strike out such separate offenses in order to permit trial of common offenses at a common trial. Thereafter, if the case warrants such action, he may revive the charges which were stricken and refer them to a court for a separate trial.

Article 32 investigation. The Article 32 investigation is principally a fact finding investigation. It is conducted by an impartial officer who is usually appointed by an officer exercising summary court-martial jurisdiction. Although such an investigation is required in any case which is referred to a general court-martial for trial, it may be conducted in any case. Thus, as a matter of policy, some commands require that such a formal investigation of charges be conducted in any case in which it appears that a bad conduct discharge is warranted. The investigating officer may hear testimony which would not be admissible in a trial by court-martial. If his recommendation is based on evidence which would not be admissible at a trial, the report of investigation should show to what extent and for what reasons the inadmissible evidence was considered.

34a Sufficiency of the investigation. Article 32d provides that the failure to have a pretrial investigation shall not constitute a jurisdictional error. This enactment is based on the opinion of the Supreme Court in Humphrey v. Smith (1949), 336 US 695 (8 Bull. JAG 67), in which the court, after holding that the requirement of such a pretrial investigation was not jurisdictional, said:

> "...We cannot assume that judicial coercion is essential to compel the Army to obey this Article of War. It was the Army itself that initiated the pretrial investigation procedure and recommended congressional enactment of Article 70.
>
> "* * * A reasonable assumption is that the Army will require compliance with the Article 70 investigatory procedure to the end that Army work shall not be unnecessarily impeded and that Army personnel shall not be wronged as the result of unfounded and frivolous court-martial charges and trials. This court-martial conviction resulting from a trial fairly conducted cannot be invalidated by a judicial finding that the pre-trial investigation was not carried on in the manner prescribed by the 70th Article of War."
>
> Note. A.W. 70 was superseded by A.W. 46b which contained requirements similar to those of Article 32, UCMJ. For an excellent discussion of the A.W. 70 investigation and the attacks made on it in the Federal courts, see 18 George Washington Law Review 67.

Paragraph 34a provides that a failure to have a pretrial investigation may result in prejudicing the accused's substantial rights at the trial and thus be the basis for setting aside findings

of guilty. For example, if the investigating officer failed to take action to have the deposition of a defense witness taken or to examine an available witness requested by the accused, the accused might be placed in a position where he could not defend himself at the trial. In such a case, the question of prejudicial error probably would involve an inquiry into the manner in which the pretrial investigation was conducted. In the Humphrey case, supra, the Supreme Court indicated that Federal courts should not inquire into such matters as the pretrial investigation for the purpose of determining due process. However, the doctrine subsequently announced in Whelchel v. McDonald (1950), 340 US 122, indicates that the Federal courts might inquire into whether the denial of due process at the trial resulted from an improper pretrial investigation. Consequently, all staff judge advocates and legal officers are required by paragraph 35c to find that all charges referred to a general court-martial have been properly investigated under paragraph 34 and Article 32. They may not rely upon Article 32d to cure all errors arising out of an improperly conducted investigation.

34c Pretrial counsel. The right of the accused to pretrial counsel must be construed reasonably. He must be given a fair opportunity to obtain counsel of his choice, but if he fails to produce that counsel within a reasonable time, the investigation may proceed with the pretrial counsel appointed by the officer exercising general court-martial jurisdiction.

Except by cross-reference to paragraphs 42b and 48, which pertain to the duties of defense counsel at the trial, the duties of the pretrial counsel are not outlined. The pretrial counsel has no right to object to the testimony of witnesses or to demand a verbatim report of the testimony taken. In performing his duties, the pretrial counsel generally is limited to cross-examining the available witnesses, presenting requests for defense witnesses, presenting defense evidence, and advising the accused as to his rights at the investigation.

34d Availability of witnesses. A difficult problem arising in the pretrial investigation is that of determining whether a witness is "available". The testimony before the Subcommittee of the House Committee on Armed Services with respect to the meaning of "availability" is not helpful. It indicates a failure to understand that the primary and practical restriction on the availability of witnesses arises from these facts: Witnesses may not be paid for attending the investigation; civilians may not be compelled to attend. Thus, the availability of a civilian witness is determined by whether he will attend the investigation voluntarily. In complicated cases involving

serious offenses, it may be necessary for the investigating officer to travel a considerable distance to interview a witness. In such a case, the witness is considered as "available" and the pretrial counsel and the accused, if he desires, should be given an opportunity to accompany the investigating officer.

The last sub-paragraph of paragraph 34d was inserted to give the investigating officer the right to withhold from the accused and pretrial counsel matters of a confidential or security nature which are in the file but which are not material to the inquiry.

34e,f Reports. Two types of reports are authorized. The formal report, an example of which appears in appendix 7, should be made in any case in which the investigating officer recommends trial by general court-martial. The informal type of report will permit the investigating officer to expedite the disposition of a case in which he has recommended dismissal of the charges, disposition under Article 15, or reference to an inferior court for trial. As the recommendations of the investigating officer are advisory only, the officer directing the investigation may require the preparation of a formal report in every case.

35a Action by officer exercising general court-martial jurisdiction. All charges should be investigated before they reach the officer exercising general court-martial jurisdiction. Otherwise, that officer may be forced to consider many cases that should have been dismissed, disposed of under Article 15, or referred to an inferior court for trial. Further, if general court-martial charges must be investigated after they reach the officer exercising general court-martial jurisdiction, needless delays will result.

If the officer exercising general court-martial jurisdiction determines that trial of the charges by general court-martial is not warranted, but that trial by inferior court is warranted, he may appoint the inferior court himself. However, if he transmits charges in such a case to a subordinate commander for disposition, he should not direct such officer to dispose of the charges in a certain way. His advice to the subordinate commander might read substantially as follows:

> "Trial by general court-martial is not deemed appropriate because _____. You are authorized to refer the charges to a court-martial convened by you, or to make other appropriate disposition."

Conference No. 5a

TRIAL PROCEDURE

Conducted by
LT. COL. JEAN F. RYDSTROM

References: Chapter X
Chapter XI
Chapter XVI, Paragraph 82
Appendices 8, 9, 10

A guide to trial procedure may be found in appendix 8a. It is intended that this appendix be used as a guide to practice and procedure before both general and special courts-martial, whether or not the particular case requires that a verbatim record be prepared. The guide would have limited applicability to a summary court-martial, of course, although it is to be used insofar as it might be appropriate, e.g., in regard to an explanation of accused's right as a witness, calling and questioning witnesses, and the like. See paragraph 79a. Appendices 9a and 10a are guides to the preparation of all records of trial by general and special courts-martial, and one or the other is used--depending, not upon whether a general or special court-martial is involved, but, respectively, upon whether a verbatim or summarized record is required to be prepared.

61 Preliminary organization of the court.--A general or special court-martial assembles at its first session in accordance with the orders appointing it (paragraph 59). Such orders, after stating the date and hour of original convening, should state "or as soon thereafter as practicable" (app. 4a). It is not necessary that a court meet initially at the date and hour stated, and as a practical matter, courts ordinarily meet at the call of the president sometime thereafter.

Prior to the court's being called to order at the first session of any case, the law officer or president of a special court-martial should determine that trial will be able to proceed when court opens, i.e., that the accused and a quorum of the court are present, and that the appointed counsel are apparently properly qualified (paragraph 61a). Also, he should consider whether enlisted court members and individual counsel are likely to be requested, and if so, are available. Apparent irregularities in these matters should be discussed with counsel and brought to the attention of the convening authority if necessary. Such an initial determination will greatly facilitate the opening session of the court and will avoid the necessity of formal continuances during the early stages of trial.

Appendix 8a suggests appropriate seating arrangements for general and special courts-martial and, insofar as practicable, the arrangement of courts-martial should conform substantially therewith. Even if the suggested arrangement cannot be followed in a general court-martial, the law officer is to be seated apart from the members (paragraph 61b).

Due to the confusion and the serious errors which can result, a succession of orders amending an appointing order should not be published. If amendments are necessary, they should be kept to a minimum, perhaps two or three, and when more changes must be made, a new court should be appointed. See note 6, appendix 4a. The members and counsel who are still available may, of course, be appointed to the new court.

When the court is called to order, the trial counsel announces by what order the court is convened and a copy of the order is given to the reporter for insertion in the record. The trial counsel then states for the record the names of the persons present and absent, omitting mention of service numbers unless necessary to distinguish between two individuals named in the order (appendix 9a). The reason for the absence of any persons named in the appointing orders need not be stated by trial counsel, but absence at this time is to be distinguished from the absence of a member of the court after arraignment; in that case the reason for the absence must be made a matter of record. See paragraph 41d(4).

Swearing Reporter and Interpreter.--The reporter is then sworn and an interpreter may be sworn at this time or just before he acts. See paragraph 61d. When a reporter is used as such in a special court-martial whose proceedings need not be recorded verbatim--for example, when the maximum punishment which could be imposed for the offenses does not extend to bad conduct discharge--the reporter should also be sworn even though the record is eventually to be prepared in summarized form following appendix 10a.

53i The swearing of an interpreter for an accused who does not understand the English language and desires the services of an interpreter is particularly appropriate at this time. See paragraph 53i. It is not incumbent upon the court or trial counsel to ascertain the necessity or desirability of a separate interpreter for the accused, but upon a showing by the defense that accused does not understand English, it is within the sound discretion of the court as to whether a request for an interpreter will be granted. See 140 ALR 766. In Gonzales v. Virgin Islands (1940; CCA 3d) 109 F (2d) 215, the court stated that, although an accused who was unfamiliar with the language would be entitled under a constitutional provision that "in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him" (see paragraph 139a as to right of

confrontation in courts-martial) to have the testimony of the People's witnesses interpreted to him in order that he might fully exercise his right of cross-examination, it was not mandatory that the court furnish such an interpreter where there was evidence of record showing that the accused, who were Spanish speaking natives of Puerto Rico, were familiar enough with the English language to enable them to understand the proceedings.

A note in appendix 8a points out that as soon as the reporter is sworn, he records verbatim all proceedings had in the case—subject to certain exceptions, and a note in appendix 9a indicates that as soon as a reporter is sworn "the remainder of the record of trial follows the actual proceedings had in court." In short, the preliminary organization of the court and accounting for the accused and persons present and absent is a routine matter. The reporter need not be under oath during that procedure for any notes he might make—such as the hour the court convened, or the members present and absent—are brief preliminary matters which are inserted in the record, pro forma, and authentication of the record establishes that these matters which transpired before the reporter was sworn were, in fact, as stated.

No single article requires that a verbatim record of trial be prepared in a court-martial, but the comment of the Morgan Committee to Article 54 was, "It is intended that records of courts-martial shall contain a verbatim transcript of the proceedings."

Other than the exceptional procedures involved in in- and out-of-court conferences, during which the reporter makes a verbatim record only as directed by the law officer, the reporter records verbatim (see paragraph 49b(1)) everything except (1) the preliminary organization of the court which occurs prior to swearing of the reporter but concerning which he may make notes for the assistance of the trial counsel in preparing the record; and (2) the actual words of the oaths administered, whether to witnesses, members of the court, or otherwise. Appendix 9 requires only that he record the fact that the individual was sworn. For example, the procedural guide sets forth the entire procedure of swearing the court and counsel, showing a statement, "Proceed to convene the court;" trial counsel's statement, "The court will be sworn;" and then the entire oath. The record, compiled in accordance with appendix 9a, however, need show only that the law officer or president stated, "Proceed to convene the court," and then a statement inserted in the record by the reporter, "The members of the court, the law officer, and the personnel of the prosecution and defense were sworn."

The appointed reporter has the further responsibility of recording the time and date of the opening and closing of each session of the

court whether for adjournment, recess, voting, or otherwise, and describing for the record events which transpire, such as that a challenged member withdrew from the court. There are no off-the-record discussions in open court (paragraph 49b(1)). Furthermore, when testimony is ordered stricken, it must nevertheless be reported and transcribed verbatim into the completed record; an inexperienced reporter should be advised that "strike" is a legal "term of art" meaning "disregard" rather than "expunge."

Publicity of trials.--The prohibition in paragraph 53e on the taking of photographs during sessions of court or broadcasting the proceedings is similar to rule 53 of the Federal Rules of Criminal Procedure. Sessions of courts-martial, however, will be open to the public unless security requirements, presentation of obscene matter, or other good reason exists, in which case the convening authority or the court may direct that the public be excluded.

61e Introduction of counsel.--Prior participation of counsel in the case must be carefully observed, particularly, prior participation as a member of the prosecution. See paragraph 61e and f. If it should appear to the court that one of the individuals appointed to the prosecution, whether present in court or not, is disqualified by reason of prior participation, e.g., as investigating officer, law officer, 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, the court should immediately initiate an inquiry into two matters--(1) whether he is disqualified, and (2) whether he has acted for the prosecution. (In connection with prior participation as investigating officer, paragraph 64 expressly excepts a person who had investigated a case in performance of duties as counsel.) Article 27a provides that no person who has previously participated in the case shall act subsequently as trial counsel or assistant trial counsel; paragraph 6a provides that a person appointed as trial counsel is deemed to have acted as a member of the prosecution unless the contrary affirmatively appears of record. Suppose, for example, it appears to the court that the appointed assistant trial counsel and the officer conducting the pretrial investigation under Article 32 are one and the same person. As investigating officer, he is disqualified, and unless there is affirmative evidence that he has not acted for the prosecution in any way, despite his designation as assistant trial counsel, the court will adjourn and report the facts to the convening authority (See Paragraph 61e). An "affirmative" showing that counsel has not acted might be a statement by the individual himself for the record, or a statement by other members of counsel in this regard. Of course, evidence may be presented on the issue.

Action for the prosecution is also of great importance in regard to defense counsel for, by Article 27a, the person who has acted for the prosecution is statutorily ineligible to act for the defense, and the same presumptions apply. See paragraph 6a. Unless there is affirmative evidence to the contrary, a member of the defense who appears to have acted for the prosecution must be excused forthwith, and Article 27a does not permit the accused to request such counsel. When a member of the prosecution has acted for the defense, the court must adjourn and report the matter to the convening authority; when a member of the defense has acted for the prosecution, it is sufficient that he be excused forthwith. The difference in disposition of the two situations, both of which are equally violations of Article 27a, is based upon consideration of prejudice to the rights of accused. If a member of the prosecution has previously acted for accused, the incompatability of the positions and the possibility of prejudice to accused in his defense makes imperative all the corrective action possible. If defense counsel has acted for the prosecution, the possibility of prejudice to the prosecution is not so compelling, but such counsel must be excused by the court for it cannot be a party to a continued violation of Article 27a.

61f Disqualification of defense counsel on the basis of prior participation is similar to that of trial counsel, with the additional ground of prior participation as the accuser (see paragraphs 6a, 61f(4)), and the proviso that accused may expressly request the services of such defense counsel otherwise disqualified, except for counsel who has acted for the prosecution. In the absence of an express request for a defense counsel who has participated previously in the case, the law officer or president of a special court-martial excuses that counsel.

61g Enlisted court members.--Article 25c(1) provides that enlisted persons are eligible to serve on general and special courts-martial for the trial of any enlisted person if, prior to the convening of the court, "the accused personally has requested in writing that enlisted persons serve on it." Appendix 8a shows that the law officer or president of a special court-martial directs, "Proceed to convene the court," whereupon the court, law officer, and counsel are sworn. The convening of the court is then complete (see paragraph 61i), and it is provided that if a written request is not made prior to or at the time of "convening" the court, the accused may not thereafter assert his right to have enlisted members on that court.

One-time swearing of court.--Paragraph 53b requires that the proceedings and the record in each case must be complete without reference to any other case. This requirement is particularly to be noted in connection with the swearing of the court and personnel

thereof, including counsel and reporter, at one time in the presence of a number of accused who are to be tried separately but by the same court. The procedures to be followed in such a case are set forth in appendix 8a, and are not to be confused with joint and common trials and the procedures therein. This one-time swearing of the court for several trials is not specifically required by any of the articles, but the Morgan Committee commented in regard to Article 42, Oaths:

> "The article does not require the court to be resworn in every case. The language would allow a court to be sworn once a day where there is to be more than one trial, if the accused in each trial is present at the time the court is initially sworn."

When a court is sworn in the presence of a number of accused who are to be tried separately, those accused who are not then to be tried are excused after the court, law officer, and members of counsel are sworn, but before challenges. Appendix 8a. The record of trial in the case of each accused would repeat the same procedure up to that point, and the record in the case of an accused who was excused at that point would show merely that he was excused, pursuant to the statement of trial counsel, and the hour and date. The record of his case would reopen with the usual statement of trial counsel, "The prosecution is now ready to proceed in the case of the United States against /the excused accused/who was present during the administration of oaths to the personnel of the court. All parties to his trial who were present when he was excused are again present in court." See also 112c.

The use of this procedure is not encouraged except when the same court and counsel have several relatively simple and short cases to dispose of. Its use will tend to considerable confusion, both in the minds of the court and in the preparation of the record, in those cases where there are different counsel appearing for each accused and some want enlisted court members and some don't.

62 Challenges.--Provisions for challenge under the new code are very similar to those with which the Army and Air Force were familiar under the Articles of War, but these provisions present some changes for the Navy, particularly as to peremptory challenge. The chief thing that Army and Air Force judge advocates must observe is that in joint and common trials, each of the accused must be accorded every right and privilege which he would have if tried separately, including the right to make individual challenges for cause and individual peremptory challenges. See paragraph 53b. Further, while the articles do not provide any exact counterpart to the civilian

"challenge to the array," paragraph 62b provides a somewhat analogous procedure by authorizing a general questioning of the court as a whole concerning the existence or non-existence of facts which may disclose proper ground of challenge for cause. Of course, the court disposes of specific challenges to members individually, and does not receive more than one at a time. See paragraph 62a. For simplification of discussion, the excusing of members might be divided into three categories, resulting from:

(1) Disclosed grounds for challenge,

(2) challenges for cause, and

(3) peremptory challenges.

(1) Grounds for challenge are initially disclosed after the court has convened, when the trial counsel states the general nature of the charges, by whom they were preferred, forwarded, and investigated, and whether the records of the case disclose any ground for challenge of a member. See paragraph 62b. For example, he inquires whether any enlisted member of the court belongs to the same unit as the accused. If the records in the case, or any member, discloses a ground for challenge which is within the first eight listed in paragraph 62f, that member is immediately excused by the president or law officer. The first eight grounds of challenge are those which may go directly to the jurisdiction of the court. If grounds within this group exist, there is no question as to the necessity of excusing the member, hence, the ruling need not be made subject to objection. See paragraph 62c. No problems ordinarily arise upon disclosure by a member or law officer of such a ground of challenge--unless the facts are disputed, in which case the matter should be handled as a challenge for cause.

(2) Challenges for cause may be disposed of simply when the member is challenged for any of these first eight grounds enumerated in 62f, and admits the facts; he may be excused by the law officer or president of a special court-martial forthwith, unless a question is raised. If it is manifest that any other challenge for cause would be unanimously sustained if brought to a vote, as, for example, that a member of the court is an avowed enemy of the accused, such member may be excused by the law officer or president of a special court subject to objection by any member. When these challenges for cause are disputed, they, like other challenges for cause, must be considered by the court and each side permitted to present evidence and argument thereon. Unless the challenge is withdrawn, the court must finally close and vote whether to sustain or not sustain the challenge. The challenged member, of course, withdraws from the court when it votes, as does the law officer.

While he rules upon interlocutory questions arising during presentation of evidence on the challenge, the law officer does not rule finally upon a disputed challenge but permits the court to retire into closed session when satisfied that it has sufficient evidence to make a determination.

Paragraph 62h(2) provides that the law officer or president of a special court-martial shall continue to rule upon interlocutory questions which arise during the hearing of the challenge, even though the challenge be to himself and he testifying as to his own competency at the time.

(3) The peremptory challenge requires no reason or ground therefor to be stated or even to exist, and each accused and the prosecution are each entitled to a peremptory challenge of one member of the court. See 62e. The law officer may not be challenged peremptorily (Article 41b), and a challenge for cause to the law officer that he is not eligible to act as such is closely circumscribed by the provisions of paragraph 62g.

A member challenged peremptorily is excused immediately by the law officer or president of a special court-martial. Ordinarily the challenges for cause of all accused are disposed of before any is asked whether he wishes to exercise his right to a peremptory challenge.

In the JAG Journal of February 1951 published by the Office of The Judge Advocate General of the Navy, there is a very fine article on challenges under the Uniform Code. A statement in that article requires comment, however; that is, that challenges occur relatively infrequently in trials by court-martial and "the incidence of peremptory challenges is actually rare." This statement will perhaps engender in the casual reader a misconception as to the relative importance of the challenge, a misconception which, happily, the author did not share. A frequent use of the peremptory challenge is that by defense counsel who finds nine members sitting on the court. Since conviction requires as many votes of "guilty" of an eight member court as it does of a nine member court, i.e., six votes, he determines that the prosecution's duty of establishing the accused's guilt beyond a reasonable doubt in two-thirds of the members' minds is mathematically more difficult if only eight members are present.

56 Withdrawal of specifications.--Article 44c provides that a proceeding which is terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses

without fault on the part of the accused, subsequent to the introduction of evidence, is a trial. Withdrawal of a specification is not in itself equivalent to an acquittal (paragraph 56c) and in a subsequent trial, the action taken at the first trial must be raised by way of a plea of former jeopardy. The power to withdraw a specification after evidence has been taken on the issue of guilt or innocence is restricted by paragraph 56b to urgent circumstances and only for very plain and obvious causes. See Wade v. Hunter, 336 U. S. 684. The reasons for withdrawal should be clearly stated in the record for reference in the event of future proceedings. As to the authority of a judge to discharge a jury without the defendant's consent, the Federal rule is that such action may be taken only when, taking all the circumstances into consideration, there is a manifest necessity for the act and the ends of public justice would otherwise be defeated. U.S. v. Perez, 22 US 579; Himmel v. U.S., 175 F 2d 924, cert. den., 338 US 860.

These limitations, of course, do not apply to withdrawal of specifications, for any reason, prior to trial or prior to arraignment thereon. In such a case, the withdrawn specification should not, in fairness to the accused, be brought to the attention of the court. See paragraph 56d. If it is withdrawn prior to convening of the court, such a specification should be lined out and the charges and specifications renumbered as necessary; if withdrawn after the convening of the court and before arraignment, it should be mentioned only by number, and this for the information of the court which may otherwise wonder if the charge sheet is in error.

54 Introduction of evidence.--The court may require the production of additional evidence. It should not ordinarily have to take action with a view to obtaining available additional evidence but it may properly do so when the evidence before it appears to be insufficient for a proper determination of the matter before it, or when it is not satisfied that it has received all available admissible evidence on an issue. See paragraph 54b. The trial counsel, unless otherwise directed, handles the interrogation of a witness called by the court. In a general court-martial the law officer rules finally as to whether additional evidence or witnesses will be produced (see paragraph 57b), except that as to a witness expected to testify as to the sanity of the accused, he rules subject to objection of any member. The president of a special court-martial rules that the witness be called or not called "subject to objection of any member." If there is objection, the court closes and determines the matter by majority vote.

The statement of this rule of "majority vote" does not resolve all cases, however. Suppose that the court desired to call a witness, the president ruled, "Subject to objection by any member, X will be called as a witness," a member objected, and the vote to sustain or not sustain the ruling resulted in a tie. Would that vote fail to overturn the president's ruling so that it would stand and the witness be called? Or would that vote fail to express a majority wish that the witness be called, so that, a fortiori, he would not be called? Article 53c furnishes a rule of thumb for such a difficult situation--a tie vote "shall be a determination in favor of the accused" on such a question. Article 53 also provides rules on tie votes on challenges, sanity, and motions for a finding of not guilty, which are, however, different and must be carefully observed in each instance. The situation suggested above in regard to an interlocutory question is perhaps the most difficult which could arise to require application of the rule, for, ordinarily, the request or motion will plainly indicate whom the determination will favor; either trial counsel or defense counsel will make the request, and it will appear that a determination in accordance with defense counsel's position will be a determination in favor of the accused--this because regularity in the presentation of the defense may be assumed until the contrary affirmatively appears. See paragraph 53h. But a similar assumption may be used to resolve in accordance with the rule, the hypothetical situation mentioned above. If defense counsel had wanted the witness, for the defense of accused, it may be assumed he would have made an effort to call him. Since he did not want him, a "determination in favor of accused" on a tie-vote in such case would require that the witness not be called.

App 8a Items of real evidence should be accurately described, and a description thereof substituted in the record of trial in lieu of the evidence itself. Appendix 8a goes into considerable detail in connection with making a matter of record incidents which would not otherwise appear in recorded testimony. It requires that a witness's gestures and motions be described accurately for the record by the reporter, with the members, counsel, and the law officer or president of a special court-martial assisting if necessary. It further provides that unless the testimony of a witness has developed a full and accurate description of an object to be withdrawn later, counsel or the law officer (president of a special court-martial) should give a verbal description of such an object. In this way all parties to the trial have an opportunity to advise in regard to the description if they are not satisfied therewith, and appellate agencies will have a clear word-picture of the item as the court saw it. Appendix 8a also provides an orderly procedure for the disposition of exhibits. The reporter will keep a list of the numbers or letters of exhibits offered for identification by

each side, and when an exhibit is finally admitted into evidence, the words "for identification" are merely stricken from the exhibit. In this way, it will be clear throughout the trial, and in the record for the benefit of a reviewer, exactly what exhibit was being considered by the court at any point during the trial without the necessity of setting up a parallel reference table.

"Parties to the trial" is a new term coined to simplify the record of proceedings when a court opens after an adjournment, closed session, or otherwise. It permits trial counsel to show briefly for the record that no one is absent who should be there. In the ordinary case, there will be no exceptions, particularly as to members of the court whose absence must be shown to have been the result of challenge, physical disability, or order of the convening authority (see paragraph 41d(4)), but it does not prevent absence of an individual who is not required to be there at all times, for example, an assistant counsel who is interrogating a witness. However, the reason for absence after arraignment is to be set forth in the record.

Reference to convening authority.--All problems which are referred to the convening authority are referred by him to his staff judge advocate or legal officer and this includes not only questions arising during trial but those which may arise before or after trial. See paragraph 52. A common example of such a problem is that which arises when a court finds substantial evidence offered it tending to prove the accused guilty of an offense other than that charged. Of course, the court may proceed with the trial and in the example given in paragraph 55a, acquit the accused of stealing the watch, thereafter reporting the matter to the convening authority; or it might suspend trial and refer the matter to the convening authority, whose staff judge advocate should recommend withdrawal of the charge from the court and preparation of new charges, reinvestigation of new specifications, and referral to another court. See paragraph 55c.

Records of trial.--Appendices 9 and 10 set forth a guide for the preparation of records of trial which differ, not because they involve a general or special court, but only because they represent a verbatim or summarized record. As a practical matter, a verbatim record is made in all cases of the type which must be forwarded to The Judge Advocate General and any such record should appear in the form set forth in appendix 9a, b, and c, arranged with the allied papers in accordance with appendix 9e, and additional copies made in accordance with 9f. A special court-martial in which the sentence adjudged does not affect a general or flag officer or involve a bad conduct discharge need not be forwarded to The Judge Advocate General nor need the testimony be set forth verbatim; when directed by the convening authority pursuant to paragraph 7, a reporter need

not be used and such a record may be summarized and arranged as set forth in appendix 10. Whatever form the final record may take, however, the procedure during trial will be that set forth in appendix 8a.

Whether the authentication required is that for a general court-martial--i.e., by the law officer and president, or of a special court-martial--president and trial counsel, the record is prepared by the trial counsel, and it may be kept or written by him or by a reporter acting under his direction. He will insure that all required accompanying papers are securely bound with the record of trial and that the necessary forms--such as the chronology and data sheets--are initiated, exhibits attached, and so on, in accordance with appendices 9e and 10b. Each accused is entitled to an authenticated copy of the record and 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 a year or more, the reporter will prepare an original and two copies of each record and of all documentary exhibits received in evidence besides those made for each accused. In addition to this a convening authority may direct additional copies at his discretion. See paragraph 49b(2).

82 Paragraphs 82d and 82g(1) set forth provisions concerning records of trial which must, for security reasons, be classified. Records should never be classified for such reasons as obscenity and the like, even though the court may have excluded the public from the trial, but should be classified only for reasons of security required by departmental regulations. If the accused's copy of the record contains matter requiring security protection, it is forwarded to the convening authority who withdraws therefrom matter requiring security protection and then returns the expurgated copy of the accused to him with a certificate that certain matter has been deleted and, in the case of a general court-martial, that the complete record may be inspected in the files of The Judge Advocate General.

Appendix 8c covers proceedings in revision and 9d shows a certificate of correction. Revision procedure is that which takes place after final adjournment in a case when the court reconvenes and reconsiders any action it has taken. A certificate of correction of the record is merely a formal way of making a change in the record to make it conform to a fact which actually occurred during the trial. However, errors of transcription and the like are ordinarily corrected by trial counsel prior to authentication of the record and, frequently, as a result of suggestions from defense

counsel who, when practicable, should be permitted to examine the record. See paragraph 82e. Errors may also be corrected at the time of, and by those who perform, authentication of the record.

Conference 5b

STATUS AND DUTIES OF THE LAW OFFICER; FINDINGS AND SENTENCE; REVISIONS; REHEARINGS

Conducted by
MAJOR KENNETH J. HODSON

References: Paragraphs 39, 40b(1), 57, 62f,g,h, 73-77, 80, 81
Appendices 8a, 12, 13

DUTIES OF LAW OFFICER

39 Status of law officer. In determining the status of the law officer, the following testimony, which was presented by a member of the drafting committee to the Senate Subcommittee which considered the Uniform Code of Military Justice, is helpful:

> "Article 26 and Article 27 deserve special mention. The former, which provides for a law officer on general courts-martial, changes the practice of the Navy which has heretofore had no judge on its courts. It also changes the practice of the Army, which has had a law member, in that this official will now act solely as a judge and not as a member of the court, which becomes much like a civilian jury. * * * Another example of uniformity is found in Article 51, which covers the question of voting and rulings. As set out by the provision of the Articles, the law officer now becomes more nearly an impartial judge in the manner of civilian courts. * * *" (Underscoring supplied.)

Similar testimony was presented to the Subcommittee of the House Committee on Armed Services. Because the legislative intent is so clear on this point, the law officer has been charged generally with the responsibility for the fair and orderly conduct of the proceedings.

40b(1) The president of a general court-martial, with few listed exceptions in paragraph 40b(1), is assigned a position similar to that of the foreman of a jury. However, it is provided that he is to be consulted as to the time of trial as he should be familiar with the military situation and the availability of personnel. There was some objection to relegating the president of a general court to this comparatively insignificant position. It was contended that he could not maintain his dignity or the dignity of the proceedings unless he were assigned the usual prerogatives of a presiding officer of the court. On the other hand, it appeared that the average line officer does not wish to perform

legal or quasi-legal duties. Further, it appeared desirable to eliminate the embarassing possibility that a ruling of the president, purportedly as presiding officer, would be overruled by the law officer by virtue of his power to rule finally on almost all interlocutory questions.

40b, 58b, 59 Continuances. As the law officer rules finally on the question of continuances during trial, these paragraphs provide that he is to be consulted by the president of a general court-martial as to the time of trial. It is contemplated that the law officer may, in an appropriate case, conduct an out-of-court hearing prior to the commencement of the trial as to a request for postponement, the taking of a deposition, or any similar matter. His decision at such a hearing will not be final and the aggrieved party may raise the question again in open court in order that the question and ruling may be made a matter of record.

62f, g, h (2) Challenges. Although not a member of the court, the law officer may be challenged for cause under Article 41. However, the general legal qualifications of the law officer are not a proper subject of inquiry under a challenge for cause. If his eligibility is made a subject of challenge the only grounds are his prior participation in the same case and the four enumerated in paragraph 62g. Fishing expeditions are not permitted. To insure the protection of the law officer in this respect, it is provided that the law officer will continue to rule on interlocutory questions which may arise during an inquiry into his own eligibility (62h(2)). These rather stringent rules were inserted because of the past experience of the Army and the Air Force in cases in which the law member has been embarrassed by an unnecessary and unwarranted inquiry into his general legal education. Some such inquiries, usually limited only by the rulings of a president who was no match for clever counsel, have gone so far as to require the law member to answer myriad hypothetical questions of law for hours--sometimes days. In some cases, this harassment was renewed each time the law member ruled adversely to the defense. Such chicanery has now been laid to rest.

57 Interlocutory questions. The procedure for ruling on interlocutory questions is completely new to the Navy. The procedure set forth in the manual is new in part to the Army and Air Force. In a general court-martial, the law officer has been given about the same powers with respect to interlocutory questions as the judge of a civilian court. One restriction on his powers is the fact that his ruling is not final if it involves the question of insanity or a motion for a finding of not guilty. Another restriction--an empty one--

is the provision that he may not rule upon challenges. As to the matter of challenges, appendix 8a permits the law officer (president of a special court-martial) to rule initially when it is manifest that a challenge for cause would be sustained. Without this provision, a void would be created in the proceedings whenever a challenge for cause was made.

57d(2)
57g(2)

The law officer may in a proper case conduct hearings outside the presence or view of the members of the court; examine proffered documents outside the view of the members of the court; recess the court to hear argument, conduct research, or consider written briefs, motions, requests, etc., submitted by counsel.

The Federal rule in this respect is that the trial judge is to determine the admissibility of evidence, but there is no hard and fast rule that the jury must be withdrawn when the question of admissibility is being explored. For example, if the preliminary evidence has no bearing on the guilt or innocence of the accused, the jury need not be excused. It is considered better practice, however, for the jury to retire when the preliminary testimony may influence the jury on an issue which is to be determined by it (Eierman v. U.S. (1930), 46 F. 2d 46; McNabb v. U.S. (1943), 318 U.S.332, 338n, 346).

The manual gives the law officer more discretion than is permitted the judge of a Federal court by including the rule that, except for hearing arguments on proposed additional instructions:

> "* * * there is no requirement in courts-martial that the law officer conduct any hearings out of the presence of the members of the court."

Thus, it is completely within the discretion of the law officer whether he shall hold out-of-court hearings. However, if the offered evidence is admitted, the law officer must give both sides an opportunity to present in open court any competent evidence affecting the weight to be given to the admitted evidence (e.g., see 140a, Confessions and admissions.) If the offered evidence is denied admission counsel may not present the preliminary evidence in open court as the question of whether the law officer's ruling denying admission is correct can be determined by the reviewing authorities from an examination of the appellate exhibits. Counsel and the law officer will take appropriate action to insure that the record contains the appellate exhibits and that the appellate exhibits contain the offer and the ruling thereon. The term "appellate exhibit" has been given to an exhibit which has been attached to the record for the consideration of the reviewing authorities.

Rules as to when and how out-of-court conferences are to be recorded are set forth in paragraph 57g(2). Examples of the manner of conducting such hearings are in appendix 8a.

57d(1) If the members of the court are to vote on an interlocutory question, the law officer may give the court such instructions as will better enable the members to understand the question they are to determine. Note also the provision of this same paragraph that the law officer will rule finally as to whether a member can properly object to his ruling. This provision was inserted to prevent unnecessary and unseemly wrangling between the court and the law officer as to whether the court has a right to object to, or vote on, a particular ruling of the law officer.

57b Meaning of term "court." It was considered unduly burdensome to repeat in every instance involving an interlocutory question that the law officer of a general court-martial or the president of a special court-martial would rule. Accordingly, the manual states in many instances that a particular question is to be decided by the "court." Notwithstanding such statements, if the question is an interlocutory one, the law officer or president will rule as indicated in paragraph 57.

73 Instructing the court--general. The law officer (president of a special court-martial) is required by Article 51c to charge the court as to the presumption of innocence, the rule of reasonable doubt, and the burden of proof. This charge is to be given in the words of the article (App. 8a). In addition the law officer (president) is to "instruct the court as to the elements of the offense." These instructions and charges must be given in every case--even those in which the accused has pleaded guilty.

73a Instructing the court--elements of the offense. The meaning of the phrase, "instruct the court as to the elements of the offense" is not clearly indicated in the legislative history. The drafting committee referred to A.W. 31 and to proposed AGN, Article 24, and stated: "This article is derived from AW 31." A.W. 31 did not contain the phrase in question. Proposed AGN, Article 24, was similar to Rule 30, Federal Rules of Criminal Procedure, in that it required the judge advocate (Navy name for law officer) "in open court, to instruct the court upon the law of the case." It must be concluded, therefore, that Congress did not intend to adopt the Federal rule that "instruction on the law" of the case will be given, but rather that it intended to adopt a much less burdensome rule. The above conclusion is further bolstered by the fact that, as Article 51c makes no distinction between the powers and duties of the president of a special court-martial and the law officer, it is clear that Congress intended

the president and the law officer to give the same instructions as to the elements of the offense. As the president is not required to be a lawyer or to have legal training or experience, it is also clear that the instruction as to the elements of the offense must be limited to material that is within the knowledge of the average line officer. Accordingly, the manual provides that the requirements of Article 51c, with respect to instructing the court as to the elements of the offense, will be met if the instruction includes nothing more than a reading of the pertinent subparagraph entitled "Proof" which appears in the discussion of each of the punitive articles (App. 8a). Thus, to instruct the court as to the elements of the offense of bribery (Art. 134), the law officer (president of a special court) properly could advise the court that it may find the accused guilty if it finds:

> "(a) That the accused did or failed to do the acts, as alleged; and (b) the circumstances as specified."

The president of a special court-martial should always follow this procedure in instructing as to the elements of proof.

Admittedly, such instruction as to the elements of an offense serves only one purpose: It calls the attention of the court to the discussion of the punitive article concerned. In fact, it is a good practice for the law officer (president of a special court-martial) specifically to invite the court's attention to the pertinent paragraph. However, the law officer is not precluded from amplifying his instruction as to the elements of the offense. He may feel that such amplification is necessary, especially with respect to offenses laid under Article 133 or 134, as only a few offenses under Article 134 contain a detailed statement of the elements of proof. If he believes amplified instructions to be necessary, he may usually derive the essential elements of proof--actually the essential facts to be proven--from the specification itself. Thus, to instruct the court as to the elements of proof of the offense of careless discharge of a firearm (a rifle) under Article 134, the law officer might advise the court that it may find the accused guilty if it finds:

> "(a) That, at the time and place alleged in the specification, the accused discharged a rifle, (b) that such discharge resulted from the carelessness 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."

Note that, if the law officer instructs in the language of the specification, he should include in his instruction as to the

elements an offense laid under the first two clauses of Article 134 the matter indicated in (c) above. Similarly, with respect to offenses laid under Article 133, the instruction in the language of the specification should conclude with:

> "That, under the circumstances, the accused's act or omission was unbecoming an officer and a gentleman."

The manual does not contain the usual subparagraph "Proof" as to crimes and offenses not capital laid under the third clause of Article 134. These offenses will be rare and the instructions as to the elements thereof should be prepared with care. Ordinarily, counsel should be asked to submit proposed instructions as to the elements. The trial counsel should be able to furnish the correct elements as the staff judge advocate or legal officer, at the time he referred such a charge to trial, should have advised the trial counsel of the elements of the offense.

73c Instructing the court--additional instructions. The report of the Senate Committee on Armed Services (Sen. Rep. No. 486, 81st Cong. 1st Sess.) contains the following comment with respect to Article 51c:

> "Subdivision (c) prescribes that the law officer of a general court-martial and the president of a special court-martial shall instruct the court as to the elements of the offense and charge the court on presumption of innocence, reasonable doubt as to guilt, reasonable doubt as to degree of guilt, and burden of proof. This subdivision sets out the minimum requirements as to the scope of the instructions. It will not prevent him from charging on additional rules of law which are germane to the case."

The following remarks with respect to the position of the law officer appear at page 1387 ff of the Congressional Record of 2 February 1950 (Vol. 96, No. 23):

> "MR. KEFAUVER. * * * It should be pointed out that under article 51 the court will have the benefit of the law officer's instructions on the elements of the offense, the presumption of innocence, and the burden of proof, and that the same article does not prevent him from giving further instructions on other appropriate matters. * * *
>
> "The Navy has never had a law member or a law officer. Under the Army system, the law member would retire with the court and would advise the court and vote with it. So this is a compromise between the Navy procedure and the Army procedure. * * *

"Answering more directly the question of the distinguished Senator from Missouri, it seems to me that following the jury concept in the matter is a pretty safe thing to do. The law officer is distinguished from a member of the court, and he must be a lawyer. He instructs the court on the record. * * *

"This is merely getting a little closer to the civilian approach in court-martial proceeding. It approaches the judge idea. I think in its general tendency and general aim the pending bill, while not going overboard in attempting to adopt civilian technique, is an attempt to bring the system a little further into harmony with civilian methods. This method of having the law officer instruct, and what he says appear on the record, and not retire and not vote with the court, is exactly what is done in civilian trials before juries today. * * *

"We believe the one particular advantage our proposal has over the procedure whereby the law officer retires with the members of the court into executive session, is that whatever the law officer may say will be on the record, so that the reviewing authorities may see what his attitude about the matter was and what he had to say about it."

From the foregoing, it is clear that Congress intended to permit the law officer and the president of a special court-martial to give instructions additional to those required by Article 51c. Likewise, it is clear that neither the law officer nor the president of a special court-martial is required to give such additional instructions. If it is necessary for the president of a special court-martial to give additional instructions (e.g., as to a lesser included offense), he may do so in closed session, off the record.

Paragraph 73c permits the law officer to give additional instructions "when he deems it necessary or desirable." In giving additional instructions on the whole case or on a particular point, the law officer should not violate the rules pertaining to proper comment by a Federal trial judge. These rules are outlined in broad general terms in 73c(1). Although the Federal rules permit comment on the guilt or innocence of the accused in "extraordinary cases," the law officer should not make such comment in any case. In this connection, note in appendix 8a the concluding instruction that is to be given by the law officer. This concluding instruction eliminates the need for the law officer to waste the time of the court in giving it the usual stock instructions as to reasonable doubt, circumstantial evidence, etc. It also emphasizes the fact that the court is the sole agency for the determination of the facts in the case.

942479 O - 51 - 6

Although not so provided in the Manual, the law officer should advise counsel well in advance of the conclusion of the case if he intends to call upon them for proposed instructions. Similarly, upon request of counsel, he should advise them prior to the time of their closing arguments what, if any, instructions he intends to give the court.

The following rules might well be adopted by the law officer in giving additional instructions:

a. Recognize the fact that the members of the court usually are more experienced in legal matters than is the average civilian jury, and that it may consult the manual in closed session.

b. Don't give any additional instructions unless they are "necessary or desirable" to aid the court in making its findings.

c. In lieu of giving instructions on a certain point, the law officer properly may invite the court's attention to appropriate portions of the manual and note in the record that a copy of the manual is available for the court's examination.

d. If additional instructions are given, they should be given in the language of the manual whenever possible.

e. In lieu of giving additional instructions before the court closes to make its findings, advise the court that under paragraph 74e it may open and request additional instructions if it is in doubt as to the applicability of the law or the effect of certain evidence.

f. Most important, in determining whether to give additional instructions, and in giving them, keep in mind the injunction of paragraph 39a: "* * * he (the law officer) should not be tempted to the unnecessary display of learning or a premature judgment."

FINDINGS AND SENTENCE

74f Form of finding. The provision of Article 39 that the law officer and the reporter may be called before the court for the purpose of putting the findings in proper form is new. Any discussion between the court and the law officer at this time is to be recorded verbatim. The law officer should put the findings in proper form in any case in which findings by

exceptions and substitutions are made. If, after conferring with the president, the law officer is in doubt as to what offense the court intended to find, he should give it proper instructions, and advise the court to close and reconsider its findings, and to make a new finding that is not ambiguous. However, if there is a clear indication that the court has found the accused not guilty of a particular offense, it cannot thereafter, under the guise of clarifying an ambiguous finding, find the accused guilty of that offense.

75b(2) Previous convictions. The rule for determining admissible previous convictions--a compromise solution--is new to all the armed forces. It will apply to any case involving an accused who is convicted of an offense committed on and after 31 May 1951. Certain ex post facto matters affecting the Army and Air Force are treated in the conference on the executive order. Only those convictions of offenses committed within three years of the commission of an offense of which convicted may be considered. As a general rule, the previous convictions must relate to offenses committed during a current enlistment, voluntary extension of enlistment, etc. The term "voluntary extension of enlistment" pertains to present Navy enlistment procedures (Arts. C-1406 and C-10304, BUPERS Manual). Such a "voluntary extension of enlistment" creates a new enlistment for the purpose of determining whether previous convictions are admissible. Note the following exceptions to the general rule:

a. To prevent consideration of previous convictions for offenses committed in a prior period of service, the prior period of service must have terminated honorably. Thus, if the accused received an administrative discharge which was other than "honorable," any convictions for offenses committed during the period so terminated could be considered if they are within the three-year limitation.

b. If a current enlistment or period of service is extended by act of law, such as the Service Extension Act of 1941 or the Extension of Enlistments Act of 1950, a new enlistment or period of service is not created. Thus, in the case of a man whose enlistment normally would have expired on 31 August 1950 but who was retained in the service by virtue of the Extension of Enlistments Act of 1950, a conviction of an offense committed in June 1950 could be considered at a trial at which he was convicted of an offense committed in June 1951.

74b(4) Maximum punishment. The accused may be found guilty of all offenses arising out of the same transaction, regardless

of whether such offenses are separate. It follows that the convening authority need not disapprove a finding of guilty of one specification merely because it alleges the same offense alleged in a companion specification. Under this rule, an accused could be found guilty of both a principal offense and an offense lesser included therein.

76a(8) Although he may be found guilty of all offenses arising out of one transaction, the accused may be punished only for separate offenses. These two rules are taken, generally, from the decisions of the Federal courts. The rule that offenses are separate if each offense requires proof of an element not required to prove the other is commonly referred to as the "Blockburger rule," having been taken from the opinion of the Supreme Court in Blockburger v. United States (1932), 284 U.S. 299.

Both of the foregoing rules are new to all the armed forces. The Army and Air Force previously have followed the rule that, although the accused could be found guilty of any number of specifications alleging offenses arising out of one transaction, he could be punished only with "reference to the act or omission in its most important aspect." See MCM, 1949, par. 80a. The "most important aspect" rule is stated in Naval Courts and Boards (Sec. 451), but it is considered advisory only. The Navy has recently commenced to follow the Blockburger rule, but, instead of applying it to the sentence as it is applied by the Federal courts, has applied the rule to the findings. Thus, if an accused were convicted of a single larceny charged in multiple specifications (200a(7)), the present Navy rule would require the disapproval of findings of guilty of all but one specification. Applying the rule announced in paragraph 76a(8) to such a case, an accused legally could be found guilty of each of the multiple specifications alleging the single larceny, but the sentence would be limited to that authorized for one specification (the one authorizing the most severe sentence). One of the principal reasons for adopting the Blockburger rule is that we may now look to the Federal courts for precedent. It will also eliminate the need for unnecessary corrective action by reviewing authorities in that, if the sentence is supported by a good specification, it will be unnecessary to determine whether the offenses are separate.

REVISION PROCEDURE

80 There is nothing new in the procedure as to revision of a record of trial except for the requirement that all personnel--

including counsel for both sides, the law officer, and the accused--must be present. This requirement resulted from the wording of Article 39. With respect to membership of the court, the procedure is the same as that now in existence in all the armed forces. That is, new members may not be added to the court for revision proceedings. However, new counsel and new law officers may be appointed for the purpose of the revision proceedings. If they are so appointed, it is not necessary that the record of trial be read to them. It is sufficient if they familiarize themselves with those portions of the record which will enable them to carry out their duties, if any.

REHEARING PROCEDURE

81 The Army-Air rehearing procedure was adopted. Rehearings, by that name, are new to the Navy but the actual proceedings are similar to the Navy's present new trial provisions (Sec. 477, NC & B). It is provided that the law officer (president of a special court-martial) may examine the record of the original hearing if necessary to enable him to rule properly upon the questions arising at the rehearing. This provision permits the law officer (president of a special court-martial) to examine the review of the staff judge advocate or legal officer or the decision of the board of review or Court of Military Appeals if they are attached to the record. Note also that a part of the record, including the review of the staff judge advocate or legal officer or the decision of the board of review or Court of Military Appeals, may be read to the court when necessary for it to pass on a ruling made subject to objection under Article 51b.

One provision that is new to all the forces is that which permits the trial counsel to advise the court of the sentence adjudged at the original trial. This advice is necessary since the court may not adjudge a sentence in excess of or more severe than that adjudged at the original hearings (Art. 63).

CMA says this is not prope

Conference 5c

ARRAIGNMENT—PLEAS AND MOTIONS

Conducted by
LT. COL. WALDEMAR A. SOLF

References: Chapter XI, Paragraph 65
Chapter XII, Paragraphs 66-71
Appendix 2, Articles 43, 44, 45, 62, 63, 66d, 67e
Appendix 8a, Arraignment

65 Arraignment.—Paragraph 65 was taken without too much change from paragraph 62, MCM 1949. Arraignment is the procedure which begins the trial proper. It consists of reading or otherwise bringing to the attention of the court and the accused the charges upon which he is to be tried and calling upon him to plead. This is consistent with Rule 10, Federal Rules of Criminal Procedure. Procedural deviations from this procedure do not necessarily affect the validity of the arraignment. See CM 335328, Scott, 2 BR-JC 115, Garland v. Washington, 232 U.S. 642.

In most court-martial jurisdictions it has been customary to prepare, in advance, copies of the charges and specifications and to distribute them to the members of the court, the accused, and counsel. In most cases this was done before arraignment—immediately when the court assembled for the trial of the case. This custom permitted the members to examine the charges prior to challenges. This enabled them to recognize more readily whether grounds for challenge existed than would be possible from the trial counsel's oral statement of the general nature of the charges. However, when specifications which had been withdrawn or which were about to be nol prossed come to the attention of the court this practice resulted in possible unfairness to the accused. Consequently, the new manual provides that the copies of charges and specifications will be distributed to the court at the time of arraignment. No charges or specifications which have been ordered withdrawn should be shown the court, nor should the accused be arraigned on them. If, at the time of arraignment, a member discovers a cause for challenge against him which he had not disclosed, he should of course disclose it at this time.

If you look at Appendix 8a you will note that immediately after the trial counsel asks the accused how he pleads, he will say:

"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."

This of course stems from the rules we are about to consider—namely, that motions are generally made prior to pleas.

CHAPTER XII—PLEAS AND MOTIONS

The Morgan Committee which drafted the Uniform Code indicated that the chapter in the 1949 manual dealing with the procedure for raising special defenses and objections by motions was approved by the Committee as a sound basis for a similar provision to appear in the regulations implementing the code. The 1949 manual abolished special pleas—pleas in abetement and pleas in bar. In lieu thereof the procedure prescribed by Rules 11 and 12, Federal Rules of Criminal Procedure, were adopted insofar as practicable for court-martial practice. Briefly stated the reasons advanced for the change in the supporting memorandum for Chapter XIII of the 1949 manual were:

1. Article of War 38 [which is similar to Article 36] in giving the President the authority to prescribe procedural rules, announced the general legislative policy that those rules should, so far as practicable, follow the rules of Federal District courts for the trial of criminal cases.

2. Special pleas, as such, are rarely used in modern civilian jurisdictions, and it was believed that most military lawyers with a civilian background would be more familiar with rules similar to those used in Federal courts.

3. Colonel Winthrop had stated many years ago that common law special pleas had no place in military jurisprudence, and that, although labeled special pleas, these matters had really been treated as motions.

66 In paragraph 66, the general paragraph, it is stated that pleas in courts-martial procedure are pleas of guilty, not guilty, and pleas corresponding to permissible findings of lesser included offenses or findings by exceptions and substitutions. The matter of entering a plea of guilty to a lesser included offense is new to the Navy but it is clearly consistent with the legislative intent as expressed in the commentary to Article 45.

Consideration was given to authorizing the plea of nolo contendere which is used in Federal procedure and which is also authorized in present naval practice (Sec. 412, NC & B). The purpose of this plea is to avoid any admission of guilt which might be used as an admission in a civil proceedings. It was not adopted, however.

1. During the House Hearings the representative of the Department of Defense told the House committee that it would not be used (p. 1054).

2. There is considerable authority in the adjudicated cases that a sentence adjudged under such a plea does not amount to a conviction. Thus in Olzewski v. Goldberg, 223 Mass. 27, it was held that such a sentence could not be used as a basis for impeaching the credibility of a witness on the grounds of a conviction of a felony. It was also feared that such cases could not be used as a "previous conviction" in the consideration of a sentence adjudged at a later trial.

If the accused wishes to protect himself against the admission inherent in a plea of guilty with respect to liability in a civil suit, he might accomplish that result by entering a plea of not guilty or by standing mute. If he does not wish to contest the prosecution's case he need not introduce any evidence.

67 Paragraph 67 follows Rule 12b. It provides that any defense or objection which is capable of determination without trial of the general issue may be raised either before trial, by reference to the convening authority, or by motion to the court before a plea is entered.

At the conference on the 1949 Manual a question was raised as to whether reference to the convening authority before trial precludes renewal of the motion to the court. The new manual makes it clear that reference to the convening authority is without prejudice to renewal of the assertion by motion to the court.

67a Defenses and objections which may be raised.-- Rule 12b divides these pretrial motions into 2 categories--those which may be raised before a plea, and those which must be raised before a plea. The manual uses the same headings.

The motions which may be raised before plea are those previously treated as pleas in bar, such as statute of limitations,

former jeopardy, pardon, constructive condonation of desertion, promised immunity, lack of jurisdiction, or failure of the charges to allege any offense. Such matters may be raised at any time during the trial, although it is better practice to raise them before plea. However, with certain exceptions, if they are not raised during the hearing they are deemed waived. Of course, lack of jurisdiction or failure of the charges to allege an offense render the whole proceedings void and such objection cannot be waived at any time.

67b Defenses and objections which must be raised.—This paragraph follows Rule 12b(2) and deals with matters which must be raised before pleas or be considered waived. Generally these are the matters which were considered proper as pleas in abatement. They are formal defects which, for any reason, interfere with the proper preparation for trial by the accused. These matters include defects in the preferring of charges, reference for trial, form of the charges and specifications, and defects in any pretrial proceeding. Failure to assert any such objection before a plea is entered constitutes a waiver, but in accordance with Rule 12, the court may for good cause shown grant relief from the waiver.

67c Form and content of motion.—This is substantially similar to paragraph 64c, MCM 1949. In accordance with the expressed legislative intent, it is made mandatory that an accused not represented by counsel be advised of any apparently available defense or objection

The substance of the motion, not the form, is controlling.

67d Time of motion.—This paragraph differentiates between the motions discussed above and those predicated upon the evidence, such as a motion for a finding of not guilty, or a motion to dismiss on grounds of res judicata. These latter motions are made either at the close of the prosecution's case or at the close of all the evidence.

67e Hearing on the motion.—Ordinarily the court will hear and determine the merits of a motion when it is made, affording to each side an opportunity to be heard. With the exception stated in the manual, the burden is on the defense to support his motion by a preponderance of the evidence.

There are, however, occasions when the hearing on a motion may be deferred. For example, an accused may wish to make a motion in order to avoid waiver, but may need some time to prepare for the hearing on the motion. The court may then proceed to trial reserving to the accused the right to produce evidence in support of his motion at a later time. A more

usual situation is one where the motion raises matters which should more properly be considered by the court in connection with its determination of the issue of guilt or innocence. For example, if the accused moves to dismiss on grounds of the statute of limitations asserting that the offense was committed at an earlier time than that alleged, the proper ruling would be to leave the matter for the court to determine on the basis of the evidence. Of course, if the prosecution puts in no evidence at all tending to show that the offense was committed within the period of limitations, the law officer might sustain the motion after the prosecution has rested.

The question of mental responsibility might also be so closely contested that the law officer might appropriately leave the matter to the judgment of the court in its findings on the general issue.

67f Effect of ruling on motion.—This paragraph is about the same as 64f, MCM 1949. Briefly it provides that the court may continue with the trial if, after disposing of all motions, there remains before the court any specification which was not stricken or dismissed. If the court cannot proceed further because of its ruling on a motion it will submit its record so far as had to the convening authority. The convening authority may, if he disagrees with the court, return it for reconsideration of any ruling except one which amounts to a finding of not guilty. This provision was in MCM 1949 and it now has statutory recognition in Article 62a. If the matter as to which the court and the convening authority are in disagreement is a question of law—such as if a charge alleges an offense—the court will accede to the views of the convening authority; if the matter is one of fact, the court will exercise its sound discretion. If the convening authority can cure the defect which was the basis of the ruling, he may return the record after effecting a cure, with instructions to proceed with the trial. If he does not wish to return the record he should generally terminate the proceedings by the publication of appropriate orders.

68 Motions to dismiss.—The motion to dismiss is one raising a defense or objection in bar of trial. We will now proceed to consider some specific motions to dismiss:

68c Statute of limitations.—The statute of limitations effects some substantial changes for all the services. Article 43 provides that the period of limitations will end when sworn

charges are received by an officer exercising summary court-martial jurisdiction. Under the Articles of War the period of limitations ended at arraignment. Under the Articles for the Government of the Navy the period of limitations ended upon "the issuing of the order for such trial" (AGN 61 and 62). In Naval practice the convening authority signed the charges and referred them for trial on the same document after an investigation had been held. Thus any similarity between Article 43 and AGN 61 and 62 is only superficial. In actual practice the period of limitations will end at an earlier period than it would have ended heretofore under either the Articles of War or the Articles for the Government of the Navy.

In effect this may mean that there will be virtually no statute of limitations as to AWOL and desertion cases if departmental regulations will authorize the forwarding of charges to the various departments when the absentee is dropped from the unit as a deserter. When they are received by the Secretary of the Department (who exercises summary court-martial jurisdiction over the command which includes the accused) or his representative, the running of the statute is stopped. See 30e.

In the first subparagraph reference is made to Article 43. You will note that in time of war or national emergency the Secretary may, under Article 43e, certify to the President that the trial of certain charges is detrimental to the national security and thus extend the statute of limitations to six months after the termination of hostilities. In time of war, under Article 43f, there is an automatic suspension of the running of the statute of limitations until three years after the termination of hostilities in certain fraud cases. This means that the statute of limitations as to fraud against the government committed in time of war does not begin to run until 3 years after the termination of hostilities. In other words a prosecution may be begun within 5 or 6 years after the cessation of hostilities depending upon whether the statute of limitations is 3 or 2 years. See pp. 1045-1046 of the House Hearings.

The second subparagraph makes it clear that if the old statute of limitations has run by 31 May 1951, Article 43 will not revive liability. However, if the old statute has not run before 31 May, then the provision of Article 43 will supersede the old statute. See U. S. v. Fraidin, 63 F. Supp. 27. In this connection, prior to 1 February 1949 the statute of limitations as to absence without leave—wartime or peacetime—was two years. On that date the amended Article of War

39 removed any limitation on wartime AWOL. The same is true of Article 43 of the code. World War II was terminated with respect to AW 58 (and its lesser included offense, AW 61) by P.L. 239, 25 July 1947. Assume that Private A went AWOL on 1 July 1947. At that time the statute of limitations was two years. Less than two years later, on 1 February 1949, the statute of limitations on wartime AWOL was abolished. A is picked up on 31 May 1951 and charged with AWOL. Can he assert the statute of limitations? (See ACM 1659 SCHAUF, CMR 325, 328 cited in the note under Art. 43a in App. 2.)

The third subparagraph discusses in detail how the statute of limitations is stopped. Note that, in order to stop the running of the statute, sworn charges must be received by any officer exercising summary court-martial jurisdiction over the command which includes the accused. The stopping of the period of limitation may be shown by the signed receipt of that officer or his representative as prescribed in 33b.

With respect to a continuing offense, such as wrongful cohabitation or maintaining a nuisance, the accused cannot avail himself of the statute of limitations for those portions of the offense which are not within the bar of the statute of limitations. Note, however, that AWOL, desertion, and fraudulent enlistment are not continuing offenses. As to these offenses the statute begins to run on the date the accused absents himself, deserts, or receives pay under the fraudulent enlistment. Consequently a court cannot, by exceptions and substitutions, find that the accused went AWOL or deserted at a later time than that alleged when it appears that the charges are barred by the statute of limitations. However, if the statute of limitations is not involved the court may, by exceptions and substitutions change the date of the initial absence, but in such a case it may not award a greater punishment than that authorized by the charges on which the accused was arraigned. For example, if an accused in Korea were charged with AWOL from 1 August 1950 (when the limitation on punishment was still in effect) until 31 May 1951, and on his trial the only competent evidence was that he was in an AWOL status on 15 August 1950, the court might find that the absence began on 15 August 1950, but it would be limited to the imposition of dishonorable discharge, confinement for 6 months and total forfeiture.

In the fifth subparagraph it is provided that whenever it appears that the statute of limitations has run against an

offense charged or a portion of a continuing offense, the court must advise the accused of his rights in the premises unless it appears of record affirmatively that he is aware of his rights. Similarly, if he pleads guilty to a lesser included offense against which the statute has run, such an explanation must be made. If the court has found the accused guilty of a lesser included offense against which the statute has run, such an explanation must also be made and if the accused successfully asserts the statute it operates in bar of punishment. The court, in such a case, should revoke its findings of guilty.

In the sixth subparagraph it is stated that the burden is on the prosecution to show any interruption of the period of limitation. Under naval practice the burden rests on the accused not only to show that he comes within the provisions of the statute of limitations but also that he is not within their exception. The Army rule, on the other hand, provided that the burden is upon the prosecution to show any manifest impediment which interrupted the running of the statute of limitations. The Army view was supported by Federal authorities. See Capone v. Aderhold, 65 F. 2d 130; Brouse v. United States, 68 F. 2d 294.

In the last subparagraph there is a discussion of waiver of the statute of limitations. If an accused pleads guilty to an offense or a lesser included offense after explanation of the right to assert the statute of limitations, his plea is a waiver, but only so long as the plea stands. However, as long as the plea stands the accused cannot, after a finding of guilty, assert the statute of limitations as a bar to punishment.

It is also made clear that the statute of limitations need not be raised by motion but may be taken advantage of under a plea of not guilty by introducing evidence to the effect that the offense took place at a time when it was barred by the statute of limitations. This was derived from Naval Courts and Boards. Note, however, that the accused must inform the court that he is relying on the statute of limitations. Otherwise his failure to do so during the hearing constitutes a waiver.

68d Former jeopardy. As Article 44c provides for attachment of jeopardy before findings are final, the title of the paragraph has been changed to Former jeopardy instead of Former trial as it appeared in MCM 1949.

Under AW 40 no proceeding in which there was a finding of guilty was a trial in the sense of that article until the findings became final. In other words a rehearing might properly have been ordered in any case in which there was a finding of guilty. This is no longer true under the code. Under Articles 63a, 66d, and 67e rehearings are forbidden if the sentence is disapproved "for lack of sufficient evidence in the record to support the findings." Major Hodson will say more about this in Conference 7c.

Another significant change is that contained in Article 44c which provides:

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

It appears that Congress intended jeopardy to attach in every case where the proceedings are terminated, without fault of the accused, by the convening authority or the prosecution because of "failure of available witnesses or evidence" after evidence on the general issue had been received. However, if the proceedings are terminated by the convening authority for any other reason "because of manifest necessity in the interest of justice" jeopardy does not attach. Thus, if the trial is terminated because of enemy action, or the death or illness of the members of the court, or if a mistrial is declared because of matters prejudicial to the accused or the Government, jeopardy does not attach. See 56b, Wade v. Hunter, 336 U.S. 684; Perez v. U.S., 9 Wheat 579.

In the fifth subparagraph it is stated in part:

> "In general, once a person is tried for an offense in the sense of Article 44 he cannot without his consent be tried for an offense necessarily included therein."

It is, of course, readily apparent that when an accused is tried for an offense he is also tried for every offense included therein. The paragraph then goes on to say:

> "When once tried for a lesser offense, an accused cannot be tried for a major offense which differs from a lesser offense in degree only."

Suppose that A drives his car past B's house at 8:05 a.m., after having carefully ascertained that B customarily leaves his house at precisely 8:05 in the morning and makes a dash for a bus stop across the street. On the morning in question B makes his customary dash and A drives the car into him. B is seriously injured and dies. A is tried for involuntary manslaughter by court-martial. His defense was that he was using due care, but he was nevertheless found guilty. After the trial A has one or two drinks too many and boasts that his act was a carefully premeditated plan to kill B. Thereupon A is tried for murder.

Question: Can he successfully assert former jeopardy? (Answer: Yes.)

Suppose that at the time of trial B had not died and A was tried for assault and battery. A was found guilty. After B died can A successfully assert former jeopardy? (Answer: No.)

What if A had been acquitted of assault and battery, could he assert former jeopardy? (Answer: No.)

What might he, however, successfully assert? (Answer: Res judicata.)

71b Res judicata is the doctrine that any issue of fact or law put in issue and finally determined by any court of competent jurisdiction cannot be disputed between the same parties in a subsequent trial even if the second trial is for another offense. It was first recognized in military law in CM 306858 Lawton, 28 BR (ETO) 293.

In that case Lawton and others were tried jointly for a murder perpetrated during a riot in England. Lawton's defense was an alibi and he was acquitted. He was later brought to trial for a felonious assault committed during the same riot. At the trial he pleaded former jeopardy but the board of review recognized that his plea really amounted as a motion to dismiss on grounds of res judicata. After considerable research the board found that res judicata was a defense in Federal criminal cases and Lawton's conviction was reversed.

Res judicata differs from former jeopardy in these important respects:

a. Jeopardy applies only to the same offense, its lesser included offenses, and some (but not all) offenses in which the offense charged is included.
Res judicata, on the other hand, is a defense to any issue or element of an offense previously adjudicated between the same partie.

b. Jeopardy might attach before a sentence is final—but res judicata requires a final determination.

c. Jeopardy applies to either a conviction or an acquittal—but res judicata in military law is

applicable only to an acquittal. Logically res judicata might be a two edged sword. But it would be extremely undesirable if the prosecution were to assert it in a criminal case in order to preclude an accused from defending as to some issue which another court had resolved against him. Consequently the text makes it clear that res judicata is a defense. The prosecution is precluded from asserting it except, that if jurisdiction is based on a conviction of fraudulent separation in violation of Article 83(2) the defense will be precluded from attacking the jurisdiction of the second court on the ground that the accused's separation from the service was not fraudulent.

A motion to dismiss on the grounds of res judicata should be made at the conclusion of the prosecution's case or at the close of all the evidence for the court cannot otherwise determine whether the issues of fact in the case on trial are the same as those in the former trial.

68c Pardon.—It is to be noted that constructive pardon has been deleted on the basis of an opinion by the Attorney General in 31 Atty. Gen. 419 which held that there is no such thing as a constructive pardon.

68g Former punishment.—This is new to the Navy and the Coast Guard. Under the provisions of Article 15e disciplinary punishment is a defense in bar of trial for minor offenses. Note this is only for minor offenses and if punishment has been erroneously imposed for a major offense under Article 15, the defense of former punishment is not available. It would, however, be a matter of mitigation.

69 Motion to grant appropriate relief.—In this paragraph there are discussed the matters formerly regarded as pleas in abatement. They cover matters which in some way hinder the accused in the preparation of his defense. These are waived unless asserted before a plea is entered, but the court may grant relief from the waiver.

69b The first ground discussed in detail is a defect in the charges and specifications. If the charges do not state any offense, the court lacks jurisdiction of the subject matter and a motion to dismiss is indicated. However, if the charges do allege an offense but are defective in some manner of form or do not properly apprise the accused of sufficient facts or details to enable him to properly prepare his defense, he may raise the objection of a motion for appropriate relief.

A variety of courses are available to the court, which should use its commen sense in determining which one to take. If the court is convinced that the defect did not mislead the accused, it may direct an appropriate amendment and proceed immediately with the trial. One example when this course is obviously appropriate is when it appears that a good specification is erroneously laid under the wrong charge.

If the court believes the defect to be such as to mislead the accused it may do one of three things:

a. Direct that the defective specification be stricken, or
b. Amend the defective specification and continue the case for a reasonable time to enable the accused to prepare for trial, or

c. Continue the case to enable the trial counsel to refer the matter to the convening authority.

For the sake of clarity and to provide guidance to the court in determining which course to follow there is a rather detailed discussion of some instances when it might be appropriate to follow these various courses.

69c Defects arising out of the pretrial investigation.—Article 32d and the Supreme Court's decision in Humphrey v. Smith 336 U.S. 695 (1949) settled the long standing question as to whether compliance with the requirements for a pretrial investigation is jurisdictional. It is not. But both the statute and the Supreme Court indicate that it is the duty of all those concerned with the administration of military justice to comply with the terms of the statute.

If a substantial failure to comply with the provisions of Article 32 and the provisions of paragraph 34 actually affects injuriously the accused's substantial rights at the trial he may assert the matter by motion. If the motion is sustained, the convening authority may return the record to the court with instructions to proceed with the trial after taking necessary action to cure the defect. Occasion for this relief will be rare.

69d Motion to sever.—Major Hodson has discussed some of the more common grounds for the motion in Conference 4. One of the occasions for a mandatory severance is when one of two enlisted co-accused requests that enlisted persons sit on the court and the other one doesn't. In such a case a severance must be granted whether or not a motion is made.

70a Pleas.—The first subparagraph restates the provisions of Article 45a. If an accused refuses to plead, vitiates a plea of guilty, or makes any irregular pleading, a plea of not guilty shall be entered in the record and the court shall proceed as though the accused had pleaded not guilty. It is made clear that a plea of guilty to a lesser included offense is not an "irregular plea."

The second subparagraph restates the provision of Article 45b to the effect that a plea of guilty may not be received as to any offense for which the death penalty may be adjudged—but it is made clear that a plea of guilty may be accepted as to a non-capital offense, which is necessarily included in the capital offense charged.

The discussion as to the waiver inherent in a plea has been discussed earlier during the conference. Note, however, that by standing mute the accused does not waive anything. If an accused stands mute, he does not even waive any objection as to identity, and the prosecution must be very careful to prove idenity. Note also that any admission or waiver inherent in a plea of guilty has effective existence only so long as the plea stands.

In the fifth subparagraph it is stated that a plea of guilty does not exclude the taking of evidence and in the event that there be aggravating or extenuating circumstances not clearly shown by the specification and plea, any available and admissible evidence as to such circumstances may be introduced. This is derived from paragraph 71, MCM 1949. In the Army, the practice has been for the prosecution to introduce evidence of a prima facie case not only to insure that the accused will not be convicted on an improvident plea but also to show the court the circumstances of the offense so that the court may more intelligently assess a proper punishment. In the Navy conviction generally follows immediately after a plea of guilty. Matters in aggravation and extenuation—not only with respect to the background, character, and record of the accused but also with respect to the offense itself—were presented after findings. In order that both the Army and the Navy might continue their present practices the word "should" in the 11th line of page 108 has been changed to "may." The Army's policy has not been changed in this respect.

Since pleas of guilty to lesser included offenses are new to the Navy it is provided that if an accused enters such a plea the prosecution will proceed to prove the offense charged. It was felt by the Navy representatives that in the absence

of such a provision the civilian practice of "copping a plea" by agreement between the prosecution and the accused might become prevalent.

70b Procedure.—This paragraph states the procedure to be followed and explanations to be made whenever a plea of guilty is entered. There is also a discussion as to the procedure to be followed whenever it appears that the accused has entered his plea improvidently or without understanding of its meaning and effect. If the accused vitiates his plea the prosecution will be given an opportunity to reopen its case and introduce any evidence it may have withheld because of the plea.

71 Motions predicated upon the evidence.—Earlier in the discussion of pleas and motions reference was made to certain motions which may appropriately be made only after some evidence had been introduced. The two most common ones are:

1. Motions for a finding of not guilty which is based upon failure of the prosecution to make a prima facie case of any offense charged or included, and

2. Motions to dismiss on the ground of res judicata which was discussed in connection with former jeopardy.

71a Motion for a finding of not guilty.—The discussion of the motion for a finding of not guilty is generally derived from paragraph 72a, MCM 1949. However, it has been redrafted in accordance with Rule 29, Federal Rules of Criminal Procedure. The text makes it clear that this motion properly may be made either at the end of the prosecution's case or at the end of all the evidence. It is also made clear that after the denial of such a motion at the end of a prosecution's case, the accused may offer evidence in his own behalf, but only at the risk of curing any defect in the prosecution's case. In other words, under the harmless error rule, if a conviction is sustainable by the whole record, the accused cannot, after curing the defect, complain if the court erroneously denied his motion when made. This is in accord with the practices followed by Federal courts. In Leyer v. United States, 183 F. 102 at page 104 the court said:

"If the whole record indicates that a verdict of guilty was justified it is immaterial that evidence essential to conviction was voluntarily introduced by the defendant himself. There is no force in the contention that the denial of the motion to direct

acquittal at the close of the case 'would in effect shift the burden of proof, and the defendant would be compelled to go forward and prove his innocence before the prosecution had succeeded in proving his guilt.' Defendant was not compelled to go forward. If the prosecution failed to make out its case, he could quite safely rest upon his exception, knowing that, even if the jury should find a verdict against him on such imcomplete proof, it would be promptly set aside."

The last sentence of paragraph 71a makes it clear that the ruling itself amounts to a finding of not guilty unless there is an objection to the ruling. In other words, the court need not go through the formality of voting on findings.

Conference 5d

OATHS AND INCIDENTAL MATTERS

Conducted by
MAJOR WILLIAM H. CONLEY

References: Chapter XXII, Paragraphs 112-114
Chapter XXIII, Paragraphs 115-119
Articles 42, 46, 49, 51b, 52, 135, 136
Appendices 8a, b, 9, 10, 13, 17-19

OATHS

In addition to the provisions of Article 42, "Oaths," and Article 136, "Authority to administer oaths and to act as a notary," chapter XXII is compiled, in great part, from the material contained in Naval Courts and Boards, appendix E, and chapter XXIII, Manual for Courts-Martial, 1949.

112a The practices of all Services currently provide for the administration of an affirmation in lieu of an oath, in appropriate cases. The provisions in paragraph 112a concerning the omission of the words, "So help you God," in the case of an affirmation is derived from Article of War 19 and is inserted as a general instruction for all personnel.

When the decision was made that chapter XXII was to consist only of matters pertaining to oaths in military justice procedure and that matters concerning the administration of oaths in other military activities such as courts of inquiry and boards of officers were to be presented in different publications, for instance, departmental regulations, manuals, or pamphlets, it was also determined that chapter XXII should contain a cross-reference to Article 135e which provides:

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

112b With reference to the persons required to be sworn, the first two sentences of paragraph 112b are virtual quotations of Articles 42a and b, except that in the first sentence it is provided that, in addition to the personnel required by Article 42a to be sworn, individual counsel also shall be sworn. This provision was inserted in view of the requirements of Article 42a that the defense counsel and the assistant defense counsel must be sworn.

The references to the administration of oaths to persons giving depositions and to the escort on views and inspections by the court have been consolidated in paragraph 112b.

112c Article 42a requires that the specified officials and clerical assistants of the court shall, "in the presence of the accused," take an oath or affirmation to perform their duties faithfully.

In the commentary to Article 42, the Morgan Committee stated:

> "The article does not require the court to be resworn in every case. The language would allow a court to be sworn once a day where there is to be more than one trial, if the accused in each trial is present at the time that the court is initially sworn."

In conformity with the expressed intent of the draftors that the repeated administration of oaths to the specified personnel of the court should be dispensed with, provided that such personnel of the court did not change, paragraph 112c contains an abrupt deviation from the current rule that the prescribed oaths must be administered in and for each case. Paragraph 112c,"Oaths to be taken in the presence of accused," provides, alternatively, either (1) for the administration of the required oaths in each case, or (2) for the administration of the required oaths at the first session of the court when the court sits for more than one trial and the accused in each trial is present in the court at the time the officials and clerical assistants thereof are initially sworn, such oaths to be effective for the trials of all accused then before the court. See also in this respect, paragraph 61h, "Administration of oaths."

112d The procedure for administering oaths conforms to the present practices of all Services. Paragraph 112d consists, principally, of material from Naval Courts and Boards, appendix E-3.

The second subparagraph, which requires personnel to stand during the administration of oaths, conforms to the above quoted provisions of paragraph 61h and presents little, if any, change from current practices.

113 The Morgan Committee's commentary to Article 136, "Authority to administer oaths and to act as notary," provides:

> "This article is a combination and modification of A. W. 114 and A.G.N., Article 69. Only certain persons specified are given notarial powers, as it is believed inappropriate that persons having temporary powers to administer oaths should notarize legal instruments which

may have tragic legal consequences if incorrectly drawn. The persons specified in subdivision (a) are believed to have legal experience or experience in personnel matters. Commanding officers of the Navy and Coast Guard are included in subdivision (a) as Navy and Coast Guard commands do not have adjutants and personnel adjutants."

In view of the quoted provisions concerning personnel possessing notarial powers, it was determined, in preparing paragraph 113, "Authority to Administer Oaths," to refer to Article 136a by cross-reference and to set out verbatim only the provisions of Article 136b.

Concerning the cross-reference to Article 49c, that article provides that:

> "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."

The footnotes to Article 136 in appendix 2 contain examples of persons authorized to administer oaths pursuant to departmental regulations or to statute as referred to in Article 136a and b. Those footnotes also contain the provision that under Article 30a only officers, including commissioned warrant officers, are authorized to administer an oath to charges. In this respect, see paragraph 29e, "Signing and swearing to charges."

114 Concerning the forms of the various oaths, as presented in paragraph 114, the commentary to Article 42 provides:

> "The oaths are not specified in the code as it is felt that the language of the oaths is suitable matter for regulations."

Actually, the prescribed oaths vary but little from those now utilized by each of the Services.

The phrase, "Subject to the provisions of 112c," which appears in 114, refers to the provision in paragraph 112c that the personnel of the court who are required to act under oath during the trial must be sworn in the presence of the accused either (1) at the beginning of the trial of each accused or (2) at the first session of the court when the court sits for more than one trial and the accused in each trial is present in the court at the time the officials and clerical assistants thereof are initially sworn.

The provision that a person who testifies "shall be examined on oath or affirmation * * * in the following form * * *" is subject to the exception expressed in 112 that persons who recognize peculiar forms or rites as obligatory may be sworn in their own manner which they declare to be binding. When read in conjunction with each other, each of those provisions may be given full force and effect.

Although Article 53 requires the findings and sentence to be announced as soon as determined, the oath of counsel contains a provision designed to prevent the overzealous counsel from prematurely divulging the findings or sentence discovered through improper or inadvertent means.

The form of the oath of the escort on views and inspections permits the inclusion of the appropriate terminology concerning the view or inspection of the premises, place, article, or object concerned.

The oath administered by the investigating officer to witnesses in an investigation under Article 32 is written in the alternative, that is, "(statement given by you is)(evidence you are about to give shall be)," in view of the provisions of 34d, "Submission and action upon charges--Witnesses."

The oath of a person whose testimony is taken by deposition has been included in the marginal notes of appendix 18, "Interrogatories and Depositions," for ready reference by any authority, military or civilian, who may be designated to take the deposition.

INCIDENTAL MATTERS

The topics presented in chapter XXIII include (1) the attendance of witnesses, (2) the employment of expert witnesses, (3) the procedure for the taking of depositions, (4) contempts, and (5) expenses of courts-martial.

115a Article 46, "Opportunity to obtain witnesses and other evidence," is set out verbatim in the first subparagraph of 115a, "Attendance of Witnesses."

The second subparagraph contains a definition of the term "subpoena" and provides that a subpoena cannot be used to compel a witness to appear at a pretrial investigation. In this respect, see paragraph 34d, "Witnesses."

As to witnesses before courts of inquiry, a subject which will be included in a separate publication, Article 135f provides:

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

With reference to the power of the summary court to compel the attendance of witnesses, the term "trial counsel" includes the term "summary court-martial." Paragraph 79b, "Summary courts-martial--Power to obtain evidence," provides:

"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 * * * and to take depositions in proper cases * * *."

The fourth subparagraph implements the initial provisions of Article 46 that the trial counsel, defense counsel, and the courts-martial shall have equal opportunity to obtain witnesses and other evidence. The trial counsel is required to provide for the attendance of witnesses, whether prosecution or defense witnesses, who have personal knowledge of the material facts at issue and whose personal attendance is necessary. The cross-reference to Article 49d, which article prescribes the conditions under which a deposition, to be admissible, may be taken, is intended for consideration when determining whether the personal appearance of the desired witness is necessary.

The fourth sentence, which provides that the trial counsel will take the same timely and appropriate action to provide for the appearance of defense witnesses whose testimony before the court is material and necessary, is based on the sentence in the commentary to Article 46 that the article was intended to insure equality between the parties in securing witnesses. However, experience has shown that some defense counsel present arbitrary and unreasonable requests for witnesses merely for the purpose of creating confusion, diversion, or delay. In order to curb such practices, it is provided that the trial counsel, who, as is stated in paragraph 44g(1), is prohibited from performing any act inconsistent with a genuine desire to have the whole truth revealed, will screen defense counsel's request for witnesses. In case the trial counsel and the defense counsel disagree whether it is necessary that the requested witness be subpoenaed, the matter will be referred to the convening authority or to the court, depending upon whether the court is in session. It is believed that the provisions of this paragraph may be relied upon as a rule of thumb concerning the authority for denying the personal attendance of a witness who, because of distance or position, that is, status or duty assignment, should not be required to attend personally. In the case of such a disagreement between the trial counsel and the defense counsel, the

defense counsel will be required to show, in the manner indicated in this paragraph, that the personal attendance of the witness is necessary.

115b Paragraph 115b, "Military witnesses," provides that as to the attendance of witnesses who are in the military service and stationed at or so near the place of the meeting of the court that travel at government expense would not be involved may be obtained by notification, oral or otherwise, by the trial counsel. Provision has been made for formal notice through channels, provided any Service determines to use such formal procedure.

The provision as to a military witness, whose attendance would require travel at government expense, proceeding to the situs of the court in accordance with orders issued by the appropriate superior conforms to current practices of the Services.

Military personnel who are retired or otherwise in an inactive duty status are subpoenaed in the same manner as civilian witnesses, no travel orders being issued in such cases.

115c As provided in 115c, the production of documents which are in the control of military authorities is effected through military channels, no legal process being required.

115d(1) In paragraph 115d(1), "Civilian witnesses--Issue, service, and return of subpoena," the content of Article 46 is presented in a paraphrased version to emphasize that ordinarily the trial counsel is the agent for issuing a subpoena, at government expense, for a civilian whose testimony is material. By virtue of his capacity as trial counsel of the court-martial, he can compel, in appropriate cases, the attendance of a civilian witness who has been properly subpoenaed and who is found in any part of the United States, its Territories, and possessions, regardless of where the court-martial is convened.

Articles 46 and 47 of the code eliminate the restrictions imposed by Article 42(c), Articles for the Government of the Navy, on the power of a naval court to punish a witness who is found beyond the State, Territory, or District where such naval court is ordered to sit, and who willfully neglects to obey the subpoena.

The preparation of the subpoena in duplicate conforms to present practices of all Services. The form of the subpoena, which is set out in appendix 17, has been approved as a Department of Defense form and will be available to all Services for

use in conjunction with the new manual. For purposes of illustration, the form in appendix 17 has been filled out using sample entries pertaining to a member of the Navy. The form was designed so that it could be used whether the subpoena was required for a civilian witness, as a subpoena duces tecum, or for a civilian witness whose deposition is to be taken. Also, by striking out inapplicable words and inserting applicable words, the subpoena form may be used to summon a witness to appear and testify before courts of inquiry as provided in Article 135f.

In military procedure, formal service often is neither advisable nor necessary. To expedite the most economical method of service, the trial counsel may mail the properly prepared subpoena, in duplicate, to the witness, with the request that the witness sign the acceptance of service and return one copy, the original. Experience has shown that frequent delays can be eliminated by the trial counsel's use of a penalty return envelope addressed to the trial counsel in that capacity rather than to him by name.

Similarly, the procedure for effecting formal service is comparable to that currently prescribed by all Services.

Service of the subpoena will ordinarily be made by persons subject to military law but legally may be made by others. Without exception, it is the rule that formal service must be made by personal delivery to the witness. Service having been executed, the original copy of the subpoena, with the proof of service made thereon as indicated in the form, will be promptly returned, addressed to the trial counsel of the court as trial counsel thereof, rather than to that officer by name.

The power of the appropriate commander of occupied enemy territory to compel the attendance of a civilian witness in response to a subpoena issued by a trial counsel is established in the Manual for Courts-Martial, 1949, in paragraph 105b.

115d(2) Paragraph 115d(2), "Neglect or refusal to appear," asserts the existing requirement that prior to maintaining a prosecution under Article 47 the witness must be paid or tendered fees and mileage as required by the current practices of all Services and as prescribed in Rule 17(d), Rules of Criminal Procedure.

115d(3) Before issuing a warrant of attachment, as provided in 115d(3), "Warrant of Attachment," to compel the attendance of a witness who willfully neglects or refuses to attend and testify before a court-martial, the trial counsel must first consult the convening authority or the court depending on whether the court has been

convened. This conforms to the present Navy rule but is more stringent than the Army and Air Force rule which currently provides that the trial counsel "may" consult the court in such a case.

The warrant, in an appropriate case, will be issued and dispatched by the trial counsel rather than by the president of the court. The warrant will be accompanied by the listed documents.

116 Concerning paragraph 116, "Employment of Experts," it was determined that both time and money could be saved by permitting the convening authority, rather than the Secretary of a Department, to authorize the employment and to fix the fee of the requested expert. In this respect, the Comptroller General has stated (MS. Comp. Gen., B-49109, 25 June 1945) that "retroactive authorization by the appointing authority of the employment of an expert, in a situation where only the trial judge advocate had agreed to an expert's fee prior to the testimony, was insufficient to permit payment of anything more than ordinary witness fees."

117a Article 49a provides in part:

> "At any time after charges have been signed as provided in article 30, any party may take oral or written depositions unless an authority competent to convene a court-martial for the trial of such charges forbids it for good cause."

Neither the code nor the Morgan Committee's commentary contains any definition of the terms "deposition," "written interrogatories," "written deposition," or "oral deposition." The first subparagraph of 117a, "Depositions," consists of definitions of those terms.

Paragraph 117 is intended to set forth only matters pertaining to the procedure for taking depositions. A cross-reference has been inserted directing attention to those paragraphs which pertain to the introduction and use of depositions in evidence.

For instructional purposes, an approved Department of Defense form for depositions has been partially illustrated in appendix 18. The form of the oath to be administered to the deponent is included in the marginal notes on that form.

In providing for competent personnel to represent both the prosecution and the defense in taking a deposition, the provision

of the 1949 Manual, 106, that the trial counsel and the defense counsel, or assistants, of an existing court will be utilized has been retained. Similarly, in order fully to protect the rights of the accused, it is provided that the officer detailed to represent the defense in taking a deposition must possess at least equivalent legal qualifications as those possessed by the officer representing the prosecution.

In order to obviate questions that would arise in case one of the parties is unavailable for personal service, it has been provided that the required "reasonable notice" of the taking of a deposition for the prosecution may be given to the accused, his counsel (civilian or military), or the officer designated to represent the accused in the taking of the deposition. Similarly, 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. This provision for service of notice on counsel conforms to the cases cited in the footnotes to Rules 26-31, Federal Rules of Civil Procedure, which are referred to in Rule 15, "Depositions," Federal Rules of Criminal Procedure.

It is re-emphasized that with relation to the taking of depositions, the term "trial counsel" includes a summary court-martial.

117b The procedure for taking depositions on written interrogatories (117b) varies little from the current practices of the various Services. It will be noted, however, that the party desiring the deposition will submit his list of written interrogatories to opposing counsel rather than to "the opposite party" or to "the court." Likewise, in addition to submitting cross-interrogatories, opposing counsel will note any objections on the papers prior to submission thereof to the convening authority or to the law officer, depending upon whether the court is in session. As the ruling on the objections is an interlocutory matter which will be determined finally by the law officer, it was determined that there was no reason to require the papers to be submitted to the court for consideration. Also, initial submission of the papers to the law officer rather than to the convening authority will relieve the commander of the additional administrative burden of processing such papers. However, it is the convening authority who must forbid the taking of the depositions if he deems good cause exists therefor. It is foreseen that a situation may arise where the court is not in session and the exigencies of the service render it impossible to refer the papers to the convening authority. In such a case, it is provided that the papers may be referred by expeditious means to "competent authority"

who, pursuant to Article 49a, is an authority competent to convene a court-martial for the trial of the charges.

The statement that, "When the defense in a capital case submits interrogatories, cross-interrogatories may be submitted to the same effect as in a case not capital," is predicated upon Article 49e which provides that:

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

117c The procedure prescribed in 117c for the sending out of interrogatories conforms to the present practices of the Services, provision being made for the transmitting of the papers to qualified civilian or military personnel for the actual taking.

With reference to the statement that the voucher will be accompanied by "the required number" of copies of the orders appointing the court, departmental regulations prescribe what the required number shall be.

117d Paragraph 117d prescribes no change in existing procedure concerning the action by the person receiving the deposition for taking, except that Air Force and Army personnel will notice the additional item that it may be left to the person designated to take the deposition to indicate the time and place of taking and that a civilian who performs travel to give his deposition is entitled to the same fees as if he had attended personally before the court at the place the deposition was taken. Navy personnel will notice the admonition that in all cases the taking of a deposition will be expedited and that in the event that a deposition cannot be taken promptly the person receiving the interrogatories will immediately advise the officer who sent them out of the delay and the approximate date the deposition will be taken.

117e The procedure for obtaining the appearance of a civilian as well as a military witness whose deposition is desired is set out in 117e, "Suggestions for person taking deposition." The instruction that the interrogatories be read and explained to the witness is intended as an aid for the non-legal officer. Included are instructions for the administration of the required oaths, for the procedure to be followed in case objections are noted at the time of the examination, for the examination by the witness of the transcribed testimony, and for the explanation by the officer taking the deposition in case the witness refuses to sign or fails to sign because of illness or inability to be located.

117f Upon receipt of the deposition (117f), the trial counsel becomes the legal custodian thereof and is charged with notifying and permitting the defense to examine it before trial.

117g Article 49a provides for the taking of "oral depositions" but does not define the term "oral depositions." As a consequence, the terminology of Rule 26, Federal Rules of Civil Procedure, that any party may take testimony by deposition upon "oral examination" has been incorporated in 117g, "Depositions on oral examination."

It is realized that the circumstances of a particular case might require that a deposition be taken before charges are referred for trial and, thus, before the accused has become a "party" to whom notice is required to be given. In this respect attention is again invited to the provisions of 30e concerning the action to be taken when an accuser, investigating officer, or commander to whom sworn charges have been referred believes that a witness whose testimony may be perpetuated by the taking of a deposition will not be available at a subsequent stage of the proceedings. Provision is made herein for the perpetuation of testimony by deposition on oral examination before charges are referred for trial. In such a case an authority competent to convene a court for the trial of the charges may direct officers, preferably experienced counsel of an existing court, to take the required depositions.

The procedure for taking depositions on oral examination after charges have been referred for the trial is quite similar to that prescribed for the taking of depositions on written interrogatories. The party desiring the deposition must submit to opposing counsel a written outline of the points desired to be covered. Opposing counsel may note objections and submit the points he desires to be covered on cross-examination. Although the law officer, if the court is in session, will examine the papers so submitted, only an authority competent to convene a court for the trial of the charges may forbid the taking of such depositions.

The person to whom the papers are sent for the actual taking of the deposition will follow, generally, the same procedure as that prescribed for the taking of a deposition on written interrogatories in that he should, if practicable, detail officers (preferably experienced counsel) to represent both sides in propounding the oral questions which upon being propounded will be reduced to writing as will the answers. The accused is entitled to be represented by individual counsel in such cases.

118 A general discussion of "Contempts" is presented in 118a.

Article 48 provides, in part, "A court-martial * * * may punish for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder," and the maximum authorized punishment therefor shall not exceed confinement for 30 days, or a fine of $100, or both.

The Morgan Committee's commentary to Article 48 provides:

> "This article is derived from A.W. 32. The proposed A.G.N. article 35 would require contempts by persons not subject to this code to be tried in civil courts. It is felt essential to the proper functioning of a court, however, that it have direct control over the conduct of persons appearing before it."

Article of War 32 has been construed (MCM, 109) as vesting in general, special, and summary courts-martial the power to punish for contempt. This construction has been applied to the term "a court-martial" as it appears in Article 48.

With reference to the words "any person" as used in Article 48, the House Subcommittee Hearings (page 1060) provide:

> "Mr. Chairman, I think that there are two things that should be clarified for the record here. One is that this section contemplates the right to punish for contempt civilians who may be testifying or appearing as counsel in a court-martial case. Secondly, while the article does not say so, it anticipates that the military court may punish summarily.
>
> "MR. RIVERS. Civilians?
>
> "MR. SMART. That is correct.
>
> "MR. RIVERS. Not subject to it?
>
> "MR. SMART. When civilians come before a court-martial they must be bound by the same rules of decorum as the other people before it."

In view of the foregoing, the term "any person" in 118a has been construed in the same sense that the term was construed when it was a part of Article of War 32. There the term included all persons whether or not otherwise subject to military law, except the members of the court which included the law member. Under this construction, the members and the law officer are excepted.

These persons remain punishable as provided in 41b. Counsel, whether regularly appointed or special, are included in the term "any person."

The interpretation of conduct which constitutes "direct contempts" and "indirect or constructive contempts" is similar to the interpretation of those terms as used under Article of War 32 (MCM, 109). The procedure for punishing a person not subject to military law for an indirect or constructive contempt or for neglect or refusal to appear or testify is as prescribed in Article 47, that is, by trial in a United States district court or other specified court of original criminal jurisdiction. With reference to persons subject to military law, appendix 6c, "Forms for charges and specifications," contains a form of a specification (form 164) for wrongful refusal to qualify or to testify as witness. Similarly, the Table of Maximum Punishments (Art. 134) authorizes a sentence of dishonorable discharge, total forfeitures, and confinement at hard labor for five years upon conviction thereof.

Pursuant to a request of a member or any party to the trial, the law officer of a general court-martial, the president of a special court-martial, or a summary court-martial may warn a person that his conduct is such that his persistence therein will likely result in his being held in contempt of court.

118b Paragraph 118b contains a detailed procedure for contempt proceedings. In case of conduct constituting a contempt within the meaning of 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 the opportunity to explain his conduct; however, his mere insistence that his language or behavior was proper does not necessarily purge him of contempt. In considering the authorized summary procedure for contempt proceedings, it was determined that the preliminary question as to whether a person should or should not be held in contempt would be disposed of in the same manner as a motion for a finding of not guilty, the ruling of the law officer thereon being made subject to objection by any member of the court as provided in Article 51b. In case there is no objection to the law officer's preliminary ruling that the person be held in contempt, no further action is required on the part of the court which will resume its regular proceedings; however, a verbatim report will be made of this portion of the contempt proceedings, as indicated in appendix 8b, "Contempt Procedure."

If there is objection by any member of the court to the preliminary ruling of the law officer, the court will close and vote upon this interlocutory question in the manner prescribed in 57f, to wit, orally, beginning with the junior in rank,

the question to be decided by a majority vote.

If, as a result of either the vote of the court or the ruling of the law officer that is not objected to, there has been a preliminary determination that the person be held in contempt the court will again close to determine by secret written ballot whether he shall be held in contempt and in the event of conviction an appropriate punishment. Concurrence of two-thirds of the members present at the time the vote is taken is required both to hold the person in contempt and to punish him for contempt. This provision concerning the required vote is based upon the intent to protect the rights of the person charged with contempt just as fully as the rights of any accused before the court are protected. It is to be noted that Section B, 127c (Permissible additional punishments) provides that a fine may always be imposed upon any member of the armed services as punishment for contempt.

The president announces in open court the court's determination whether the person has been held in contempt and the punishment, if any, adjudged.

With reference to the summary nature of the contempt procedure, the House Subcommittee Hearings (page 1060) further provide:

> "MR. BROOKS. Is there any appeal from this?
> "MR. SMART. There is none. There is a limited punishing power and there is no appeal. It is a summary citation for contempt.
> "MR. BROOKS. This is 30 days for each successive or each offense, plus the fine of $100?
> "MR. LARKIN. I should say so."

In conformity with the requirement of general military procedure, the automatic review by the convening authority is required in contempt cases. In the event of a proceeding in contempt, the court, prior to resuming the original proceedings, will cause a record to be made in and as a part of the regular record of the case by the court showing the facts concerning the contempt and the proceedings held with reference to it. An example of such proceedings is set out in appendix 8b. That example contains detailed instructions concerning the manner in which the person is warned of his conduct and advised of his opportunity to show cause why he should not be held in contempt, the preliminary ruling of the law officer, the procedure involved whether or not an objection is made by a member of the court to the preliminary ruling by the law officer, the proceedings of the court in closed session to determine whether the person should be held in contempt

and the assessment of proper punishment, if any, the announcement by the president in open court of the court's decision and any punishment imposed, and the direction to resume the regular proceedings.

As a further protection of the rights of the person held in contempt, it is required that any punishment assessed by the court must be approved by the convening authority who may, pending his formal review of the contempt proceedings, require the person to undergo any confinement imposed. The requirement that written notification of the approved holding and punishment in the contempt proceeding be furnished to the persons concerned with the execution of the punishment is designed to expedite the administrative phases of the execution of the punishment.

The provision for causing the removal of the offender and referring the case for prosecution before a civil or military court is a continuance of the procedure currently authorized.

118c The convening authority is in a better position than the commanding officer to carry out the administrative details involved in executing punishment adjudged for contempt and, as such, shall designate the place of confinement as provided in 118c.

119 Regulations pertaining to the expenses of courts-martial will be prescribed in appropriate departmental regulations.

Conference No. 6

INFERIOR COURTS

Conducted by
MAJOR ROGER M. CURRIER

15a Jurisdiction of Special Courts-Martial.--Persons and offenses.--The first subparagraph restates the first sentence of Article 19. It is to be noted that special courts-martial are given the power to try capital cases under such regulations as the President may prescribe instead of when the officer exercising general court-martial jurisdiction over the command authorizes it. According to the commentary, the change was made because:

> "The Navy proposes this procedure so that prior blanket authority may be obtained for capital offenses to be tried by special courts aboard ships where circumstances make it desirable, since it is not practicable to refer such a case to the officer with general court-martial jurisdiction."

Accordingly the text continues the practice now used in the Army and Air Force for requiring the consent of the officer exercising general court-martial jurisdiction before a capital case may be referred to a special court-martial, but also authorizes the Secretary of a Department to authorize, by regulations, trial of capital offenses without reference to an officer exercising general court-martial jurisdiction. Of course, violations of Articles 106 (Spies) and 188(1) and (4) (Premeditated and felony murder) can never be tried by a special court-martial since the mandatory punishment is beyond the jurisdiction of special courts-martial.

It is contemplated that the Secretary of the Navy will permit trial by special court-martial without reference to higher authority in cases involving some capital offenses. In this connection, the Code makes capital the following offenses:

Capital at all times

Art. 94 - Mutiny or sedition
Art. 110a - Willfully hazarding a vessel

Art. 118(1) - Premeditated murder
Art. 118(4) - Felony murder
Art. 120(a) - Rape

Capital in time of war

Art. 85 - Desertion
Art. 90 - Assaulting or willfully disobeying a superior officer
Art. 99 - Misbehavior before the enemy
Art. 100 - Subordinate compelling surrender
Art. 101 - Improper use of countersign
Art. 102 - Forcing a safeguard
Art. 104 - Aiding the enemy
Art. 106 - Spies
Art. 113 - Misbehavior of sentinel

The second and third paragraphs state that a capital offense is one for which a GCM may adjudge the death penalty. The explanation makes it clear that although capital by statute, nevertheless, if the table of maximum punishments, or the sentence in a previous hearing, or the direction of the convening authority with respect to depositions prevents the imposition of the death penalty, the case is no longer capital.

15b Punishments.--This paragraph follows substantially the scope of MCM, 1949, paragraph 15 as modified by Article 19.

16a Jurisdiction of summary courts-martial.--Persons and offenses. This paragraph restates the provisions of Article 20. The principles of paragraph 15a with respect to what is a capital offense are made applicable to summary courts-martial. Of course, as stated in Article 20, no authority has power to refer a case for which the death penalty may be adjudged to a summary court.

It may be noted that relative to objection to trial if an accused has not been permitted to refuse punishment under Article 15, the language of the statute is: "* * * trial shall be ordered by a special or general court-martial * * *." Although this apparently would make such trial mandatory, it must be construed in connection with powers and duties of commanding officers and convening authorities as to proper disposition of charges. Since, for minor offenses, charges may be dismissed or punishment imposed under Article 15, it is felt that either reference to a higher court or other disposition of charges is appropriate in such cases.

16b Punishments.--The first subparagraph restates the last sentence of Article 20 and points up the problem created by the insertion in Articles 18, 19, 20 the term "any punishment not forbidden by the code." The reasons for the change are stated as follows in the commentary to Article 18:

> "The punishments which may be adjudged are changed from those 'authorized by law or the customs of the service' to those 'not forbidden by this Code' because the law and custom of each of the services differ."

In this connection Articles for the Government of the Navy 30, 35, and 64b authorize reduction to the next inferior grade as an authorized punishment. Indeed reduction to any lower grade is not authorized unless accompanied by a punitive discharge or confinement in excess of three months. On the other hand the Army and Air Force rule in the past has been that stated in MCM, 1949, par. 116d:

> "Authorized punishment for enlisted personnel include reduction to the lowest enlisted grade from any higher grade. Reduction to an intermediate grade by sentence of court-martial is not authorized."

The reason for the Army-Air Force rule appears to be that a court-martial has no power to fill an appointive office. Nevertheless, in view of the commentary, it does not appear likely that the draftsmen of the Code intended to place any limitation on the present Navy practice of reducing enlisted men to the next lower grade. It is to be noted, however, that by increasing the jurisdiction of a summary court to include all noncommissioned officers, adherence to the present Army rule would enable a summary court to reduce a master sergeant to the lowest enlisted grade. Thus a limitation on reduction has been included as to "first three graders."

The second subparagraph restates the rule with respect to the apportionment of different punishments of the same general type in one sentence which is now stated in MCM, 1949, par. 17. It is to be noted that whereas Article of War 14 authorized restriction to limits for 3 months, Article 20 will reduce this to 2 months. It would, therefore, appear that Congress now intends 2 months restriction to be the equivalent or 1 month's confinement. Accordingly, a court in adjudging 1/2 of the authorized confinement (15 days) will no longer be able to adjudge 45 days restriction since that would be 3/4 of the authorized restriction.

78 Paragraph 78 dealing with procedure of special courts-martial is taken from paragraph 82, MCM, 1949, with additional provisions as to duties of the president. Since there is no law officer on the special court the president rules on all interlocutory questions other than challenges, subject to objection by other members, and gives instructions to the court before findings as to elements of offenses, presumption of innocence, reasonable doubt, and burden of proof.

79 Paragraphs on summary courts-martial also are taken from the comparable provisions of MCM, 1949, with certain implementations. The summary court, of course, has the same power as trial counsel of a special or general court to issue subpoenas and take depositions. A provision has been added that in obtaining witnesses, he will take action similar to that taken by trial counsel. New matters included in procedure are provisions for advising an accused as to his right to object to trial if he has not been permitted to refuse punishment under Article 15 for the offense charged. In the Navy, since the accused has no right to elect to refuse punishment under Article 15, the only question which would be determined is whether the accused objected to trial by summary court without the necessity of reasons. Of course, if the accused objects the file must be returned to the convening authority for appropriate action. In the Army and Air Force if the accused objects and it appears that he has been permitted and has elected to refuse punishment under Article 15 for all the offenses alleged, the summary court will proceed with the trial, but if he has not been permitted to make an election under Article 15, the summary court must return the file to the convening authority.

Incorporated also are directions that elements of proof and reasonable doubt should be considered by the court in arriving at findings and the accused should be allowed to produce matters in mitigation and extenuation before sentence. The findings and sentence will be announced by the court as soon as determined. Names of witnesses which appear on the charge sheet but who were not called to testify should be deleted by the summary court and names and addresses of witnesses who did not appear on the charge sheet but did testify should be added. If a summary of evidence is required by the convening authority, this should be attached to the record. It is probable that the Navy will require this summary as formerly, in deck court cases, if the accused filed an appeal, the summary was forwarded with the record.

A form for the record of trial by summary court is contained in appendix 11 and is a part of the Department of Defense Form for Charge Sheets.

Incidentally, the Department of Defense numbers for the forms appearing in the various appendices have just been made available and are as follows: Appendix 5 contains the form for the Charge Sheet and is Department of Defense Form 458; Appendix 7, The Investigating Officer's Report, is DD Form 457; Appendix 16, Report of Proceedings to Vacate Suspension, DD Form 455; Appendix 17, Subpoena for Civilian Witness, DD Form 453; Appendix 18, Interrogatories and Deposition, DD Form 456; and Appendix 19, Warrant of Attachment, DD Form 454. All these forms will bear the date 1 March 1951.

83 Records of trial - Inferior courts-martial.—The very brief paragraph 86, MCM, 1949, was enlarged in an attempt to spell out, as to records of trial by special courts-martial:

(1) those records which must be recorded verbatim,

(2) those records which may be recorded verbatim, and

(3) those records which will not be recorded verbatim.

Incorporated is material taken from the headnotes of the present appendix 7, MCM.

I am advised that the Air Force and the Navy contemplate using a reporter in all cases when the maximum authorized punishment involves a BCD, but that they contemplate prescribing regulations that such records need not be reported verbatim if a BCD is not actually adjudged. The paragraph was drafted with the view of permitting almost any regulation to be promulgated and, at the same time, prescribing a satisfactory procedure which could be followed in the absence of regulation. It has been the Army's experience that a number of the records of trial by special court-martial involving a BCD were improperly prepared because of a failure to understand that they are to be prepared in the same manner as a record of trial by general court-martial. Army regulations in the SR 22 series are now in process limiting the appointment of reporters to those cases in which a punitive discharge may be adjudged.

83b (2) In view of the scarcity of reporters, it seemed appropriate to permit a summary of the record in a case in which a BCD was not adjudged even though a reporter was present at the trial. Any case deemed important enough to warrant a verbatim record may be so recorded if the convening authority desires. The provision for destruction of the notes of the proceedings is believed appropriate as appellate review and the record itself is ordinarily not complicated.

83b (3) The rule as to preparation of the record permits the use of a clerk to record the proceedings. This is a common practice in reporting special courts-martial cases in the Army, especially in those commands having a volume of work.

83b (4) The rule as to preparation of copies is stated here. It was deemed desirable to state the rule since the requirement that the accused be furnished a copy of the record in all cases tried by special (summary in Navy) courts-martial is new. The last sentence of the paragraph was added to take care of a particular class of cases. The appellate review of cases involving general or flag officers includes automatic consideration of the case not only by a board of review, but also by the Court of Military Appeals. This circumstance requires the preparation of two additional copies of the record. Some day there may be a special court-martial case involving a general or flag officer. If one of you is responsible for the administration of the case, do not forget to forward two extra copies of the record.

83c The complete rule as to authentication of special court-martial records is stated here in view of the inapplicability of certain provisions for authentication of general courts-martial. It appears appropriate to have trial counsel as one of authenticators as this confirms a practice of all forces at present.

91b This paragraph is a modification of paragraph 87, MCM, 1949, but material with respect to promulgation of orders and appellate review is now covered elsewhere.

It is provided that four copies of the order, if any, be forwarded to the staff judge advocate or legal officer. It is proposed that regulations will be issued covering the distribution of such orders and that such regulations will provide that, after corrective action is taken, one copy of the order, with the action of the staff judge advocate or legal officer thereon, will be transmitted to the convening authority and another to the chief custodian of the personnel records of the armed force concerned. Such regulations are now in process in the Army.

91c This is an implementation of the third subparagraph of paragraph 87c, MCM, 1949. It is provided that two copies of the record will be forwarded to the staff judge advocate or legal officer in order that one of these copies, after corrective action, if any, has been taken, may be forwarded to the chief custodian of personnel records of the armed force concerned under appropriate departmental regulations. Such regulations insuring that a copy of the record, as corrected on appellate review, will be filed in the office of the Adjutant General, will be promulgated shortly in the Army SR 22 series.

94a (1) General.--This paragraph reaffirms the proposition stated in paragraph 91, MCM, 1949, and MCM, 1928, to the effect that the officer exercising general court-martial jurisdiction over a command has supervisory powers over inferior courts therein. Although historically the proposition has been subject to much debate and controversy (See Winthrop's Military Law and Precedents, 2d Ed., p. 489; Op. JAG 202.26, Aug. 30, 1932, Dig Op JAG, 1912-40, Sec. 403(5) overruled by SPJGJ, 1943/19599, 18 Jan 1945; it is now well settled in the Army and the Air Force that such supervisory power is lawful and that it includes the power to vacate illegal sentences and sentences not supported by the evidence. Article 65 does not restrict such supervisory power and the commentary to Article 65c contemplates that it be left to departmental regulations subject only to the provision that cases not subject to appellate review be examined by a judge advocate, law specialist or lawyer of the Coast Guard.

According to the commentary, Art. 65c was framed in such a way as to provide elasticity to meet the needs of the various services:

> "Subdivision (c) permits the review of other special and summary courts-martial to be prescribed by regulations, subject to the requirement that all such records shall be reviewed by a specialist or judge advocate (or lawyer in a Coast Guard case). The reason for this provision is that the volume of cases, the availability of law specialists and judge advocates, and the feasibility of reviewing records in the field may differ in the various armed forces."

Accordingly, the general paragraph has been so framed that the Secretary of a Department, may, by regulation or otherwise, designate any other authority, in addition to the officer immediately exercising general court-martial jurisdiction to exercise supervisory powers over inferior courts. Thus the Navy or the Coast Guard may, if they desire, designate The Judge Advocate General or the General Counsel of the Treasury, to cause a review to be made of inferior court records, or designate the commander of a service force or base command to supervise inferior courts when it would not be expeditious to send such records to the officer exercising general court-martial jurisdiction.

94a (2) Review of records of trial pursuant to Article 65c.--This is based generally on the procedure prescribed in paragraph 91, MCM, 1949, as modified, to provide for the exercise of supervisory powers by any authority designated by the Secretary of a Department

as well as by the officers exercising general court-martial jurisdiction over the command. However, objections were presented to a provision whereby the supervisory authority might direct the convening authority to take corrective action, although under the code there is no objection to advising the convening authority when fatal error is found and a rehearing appears advisable. The Navy view is that once the convening authority has taken his action he is functus officio and any proper corrective action should be taken by superior authority. This view is based on the Articles for the Government of the Navy which expressly required review by the next superior in command. The Articles of War, on the other hand, did not expressly require review by higher authority, but the Manual for Courts-Martial did require such review. In MCM, 1949, paragraph 91, it was made clear that corrective action could be effected either by the convening authority or by the superior. In view of the Navy rule the text provides that corrective action be taken by the superior himself instead of directing the subordinate to take the action, except when a rehearing, proceedings in revision, or a corrected action is required.

Article 61 provides in part that if a trial by general court-martial results in an acquittal the review by the staff judge advocate shall be limited to jurisdictional matters. Although there is no comparable statutory provision with respect to inferior courts, it is believed that the same general principle ought to be applied with respect to such inferior courts.

The power of the supervisory authority to set aside findings of guilty and sentences as the result of the review by his legal officer or judge advocate as provided in paragraph 91, MCM, 1949, is retained. Statutory authority for the procedure may be found in Articles 74(a) and 75(a). Although Article 74(a) provides that the Secretary of a Department may designate an Under Secretary, Assistant Secretary, Judge Advocate General or commanding officer to remit or suspend the unexecuted portion of a sentence, it is believed that the President may, by regulations, effect what the statute authorizes the Secretary to do. Moreover, the Judge Advocate General of the Army has taken the position that superior authority, including the Department of the Army, may vacate inferior court sentences and restore rights. Thus in JAGJ 1946/440, MEISACK, the War Department vacated a sentence by a special court-martial to reduction in grade and forfeiture because investigation, after the sentence has been fully executed, disclosed prejudicial error.

It is also provided that the convening authority may, as authorized by the supervisory authority, withdraw his former action,

disapprove the sentence and order a rehearing. This was not permitted under the Articles of War. In the Navy "new trials" were granted only upon the request of the accused (Sec 477, NC & B). The power to order a rehearing must be considered in connection with the prohibition against former jeopardy. Article 44 provides in pertinent part:

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

Since under the provision of Article 65c, the records of inferior courts:

> "shall be reviewed by a judge advocate of the Army or Air Force, a law specialist of the Navy, or a law specialist of the Coast Guard or Treasury Department***"

it follows that the review of the case has not been fully completed when the convening authority of the inferior court has taken the action thereon. Accordingly, it is not a violation of Article 44 to direct a rehearing before the case has become final upon a completion of the review.

There remains for consideration, however, the question as to whether the supervisory authority has power to order a rehearing. The authorities expressly authorized to direct rehearings before the sentence has become final are the convening authority (Art. 63a), the Board of Review (Art. 66d), and the Court of Military Appeals (Art. 67c). Other authorities who must act on certain records are not given this power (President, Art. 71a; Secretary of a Department, Art. 71b). It would, therefore, seem that insofar as rehearings may be directed in this type of case, it must be directed by an authority expressly given that power by the statute. Accordingly, the text provides that the supervisory authority may authorize the convening authority to take the action but he may not himself order a rehearing.

Another problem is presented by the fact that a rehearing may operate to the substantial detriment of the accused in that unless he is given credit for executed portions of the original sentence, he may actually be punished more severely than if the original sentence has been allowed to stand.

As pointed out by the Supreme Court in Ex parte Lange, 85 U.S. 175: 175:

"The petitioner, then, having paid into the court the fine imposed upon him of two hundred dollars, and that money having passed into the Treasury of the United States, and beyond the legal control of the court * * * and also having undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on the same verdict? To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing.

"The force of this proposition cannot be better illustrated than by what occurs in the present case if the second judgment is carried into effect. The law authorizes imprisonment not exceeding one year or a fine not exceeding two hundred dollars. The court, through inadvertence, imposed both punishments, when it could rightfully impose but one. After * * * the prisoner had suffered five days of his one year's imprisonment, the court changed its judgment by sentencing him to one year's imprisonment from that time. If this latter sentence is enforced it follows that the prisoner in the end pays his two hundred dollars fine and is imprisoned one year and five days, being all that the first judgment imposed on him and five days' imprisonment in addition. And this is done because the first judgment was confessedly in excess of the authority of the court."

The objection pointed out in the Lange case is avoided in the text by providing expressly that the accused will be credited with any executed portion of the original sentence by the person having the administrative duty of executing the sentence after a rehearing ordered pursuant to this paragraph.

With respect to proceedings in revision, it is believed to be improper for the supervisory authority to refer such matters directly to the court although there does not appear to be any objection to returning the record to the convening authority with instruction to reconvene the court for proceedings in revision. It is noted that Article 62a provides that only the convening authority may return a record to the court for such proceedings. (Compare Article of War 40 which provides that "no authority shall return a record of trial to any court-martial for reconsideration of - [certain specified findings or sentences].") There is no other provision in the code whereby an appellate agency or any authority

other than the convening authority may direct proceedings in revision. This is in accord with present Naval practice (NC & B, Sec 684, Note 88).

94a (3) Review of special court-martial records pursuant to Article 65b.--With respect to special court-martial sentences which include an approved sentence to bad conduct discharge, Article 65b provides the following alternative methods for review after action by the convening authority:

(1) Review and action by the officer exercising general court-martial jurisdiction over the command as now provided in Articles of War 13, 36, and 47d.
(2) Direct transmittal to The Judge Advocate General for review by a board of review.

The alternative method of direct transmittal to The Judge Advocate General was proposed by the Navy because ships with special court-martial jurisdiction frequently are so far removed from the commander who exercises general court-martial jurisdiction that it would be more expeditious to send the record directly to The Judge Advocate General. The text provides that such direct transmittal is authorized only when permitted by the officer exercising general court-martial jurisdiction. He ought to be permitted to exercise his supervisory powers if he desires. He will have the information at his disposal to determine which course is most expeditious. Moreover, he, and not the subordinate, will know whether a judge advocate or legal officer is present for duty.

The text also provides that direct transmittal may be restricted or limited by the Secretary of a Department. Army regulations will be promulgated shortly limiting the direct forwarding of such records.

The next to the last sentence is a restatement of the last sentence of Article 65b. The parenthetical remark is intended to show that if the court is convened by an officer exercising general court-martial jurisdiction, he need not send the record to a superior who is also competent to appoint a general court-martial.

94b Filing. This is based on the provisions of Article 65c. The problem of disposition of records of inferior courts not subject to appellate review differs in the various services. Accordingly, it has been left to Departmental regulations subject to the provisions of 44 U.S.C., Section 366-380. The basic act dealing with the disposition of official records has been cited to provide ready reference for any one who might have to refer to it in the course of his duties. But the various amendments have been omitted for the reason that there have already been 3 amendments since 1943. Army regulations on the subject are now in process as discussed in connection with paragraph 91.

Conference 7a

INITIAL REVIEW OF AND ACTION ON RECORDS OF TRIAL

Conducted by
MAJOR KENNETH J. HODSON

References: Chapter XVII
Appendices 14, 15

General. Chapter XVII was organized to permit the various powers and duties of the convening authority to be discussed in sequence of events so far as that was possible. It contains more detailed provisions with respect to the powers and duties of the convening authority than are found either in the Manual for Courts-Martial, 1949, or Naval Courts and Boards. The detailed rules were incorporated to insure that convening authorities of inferior courts-martial would be able to perform their review functions without the assistance of a judge advocate or legal specialist as well as to secure uniformity of action in all armed forces. In great part, the detailed rules are but a codification of rules of custom now existing in the armed forces.

84a Definition of terms. The term "convening authority," as applied to the officer taking initial action on a record of trial, is new to the Army and Air Force which had referred to such officer as the "reviewing authority." The use of the term "convening authority" is required because of the language of Articles 60 through 67. Also the term "reviewing authority," as used in Article 59b and other articles, now includes a convening authority, a board of review, the Court of Military Appeals, the President, and the Secretary of a Department. These designations are similar to those now in use in the Navy (Sec. 471, NC & B).

84b Normal convening authority. The normal convening authority is the officer who convened the court, an officer commanding for the time being, or a successor in command. Such commander should, if practicable, review and take action on a record of trial by a court-martial convened by him or his predecessor in command. The term "officer commanding for the time being" was recognized in this paragraph because the term was used in Article 60. However, it is included in the term "successor in command" as the latter term includes the commander who succeeds temporarily, as well as the commander who succeeds permanently, to command.

Ordinarily it is not necessary or appropriate for the convening authority to indicate in his action whether he is acting as the officer who convened the court, as an officer commanding for the time being, or as a successor in command. However, if one command is absorbed by another command, the commander of which does not exercise general court-martial jurisdiction, the successor commander, in acting on a record of trial by a court-martial convened by his predecessor, should indicate in his action, not only that he is "Commanding" the successor command, but also that he is the "Successor in command to (name of absorbed command)." If the successor commander exercises general court-martial jurisdiction, it is not necessary to indicate that he is taking his action as a "successor in command."

84c Officer exercising general court-martial jurisdiction. This paragraph does not create any jurisdictional limitations on the power under Article 60 of an officer exercising general court-martial jurisdiction to take initial action as convening authority on any record of trial--whether it be by general, special, or summary court-martial. This paragraph, together with paragraph 84b, merely establishes a policy that the "normal" convening authority should act in a case if practicable. If it is not practicable for the "normal" convening authority to act, he is to forward the case--through the chain of command--to an officer exercising general court-martial jurisdiction, giving the reason for his failure to act. This procedure is intended to keep an Army case in Army channels, an Air Force case in Air Force channels, and a Navy case in Navy channels. It should also prevent a staff judge advocate or legal officer from shifting his work to another command without a good reason.

84d Action when bad conduct discharge is adjudged by special court-martial. This paragraph, together with 94a(3), implements Article 65b with respect to the disposition of special court-martial records involving a bad conduct discharge which has been approved by an officer exercising special, but not general, court-martial jurisdiction. Such a record is to be forwarded to the officer exercising general court-martial jurisdiction "over the command" or, if authorized by such an officer, the record may be forwarded directly to The Judge Advocate General. Such direct transmittal should be authorized only in exceptional cases and for good reasons; direct transmittal may be limited by Departmental regulations.

86a,b Miscellaneous powers and duties of convening authority. The outline of the general powers and duties of the convening authority should help officers who exercise inferior court-martial jurisdiction.

Article 64 provides that unless the convening authority indicates otherwise "approval of the sentence shall constitute approval of the findings and sentence." Paragraph 86a interprets that provision to mean "approval of the findings of guilty" since Article 61 provides that the review of an acquittal should be limited to questions of jurisdiction. It is provided in paragraph 86b(2) that findings of not guilty or rulings amounting to findings of not guilty should neither be approved nor disapproved.

To simplify the action of the convening authority, it is provided that the disapproval of a sentence, without more, shall constitute disapproval of all findings of guilty. This rule satisfies the requirements of Article 63a that both the findings and sentence be disapproved when a rehearing is ordered. See Form 24, appendix 14.

86c,d Certificate of correction; revision. The certificate of correction, long a part of Army-Air procedure, has been included because it simplifies the correction of clerical errors in a record of trial. Although a revision proceeding may be used for the correction of clerical errors, it is a far more complicated procedure than the procedure involved in obtaining a certificate of correction. A certificate of correction may be made by any two persons who could have authenticated the record, whereas revision proceedings require at least a quorum of the members who were present at the time the findings and sentence were entered.

Procedure in revision is useful chiefly to correct inconsistencies in the findings or sentence. Several examples of the proper use of revision proceedings are given in this paragraph. Article 62b lists several matters which are not properly the subject of revision proceedings.

87a(2) Legal sufficiency of specification. The test to be applied in determining the legal sufficiency of a specification was derived from the language of the Federal courts. See, for example,

Woolley v. U. S. (1938), 97 F. 2d 258,
Nye v. U. S. (1943), 137 F. 2d 73,
U. S. v. Josephson (1947), 165 F. 2d 82,
Todorow et al v. U. S. (1949), 173 F. 2d 439,
Ross v. U. S. (1950), 180 F. 2d 160.

In determining the legal sufficiency of specifications, note the language of the first paragraph of appendix 6a which provides in effect that the form specifications, when properly completed, are sufficient allegations of the offenses to which they relate.

Consequently, the rule laid down in this paragraph is not important in determining the legal sufficiency of an offense that is alleged in the language prescribed in the forms in appendix 6.

87a(3) Sufficiency of the evidence. Article 64 directs the convening authority to approve

> "only such findings of guilty * * * as he finds correct in law and fact and as he in his discretion determines should be approved." (Underscoring supplied.)

To implement this provision, the convening authority has been given the same authority as a board of review with respect to weighing the evidence, judging the credibility of witnesses, and determining controverted questions of fact. Before he can approve a finding of guilty he must determine that guilt was established beyond a reasonable doubt, applying the same rules that are to be applied by the court in determining this question. See 74a.

87a(4) Modification of findings. Although this paragraph speaks only of the authority of the convening authority to find the accused guilty of a lesser included offense, he may also approve findings by exceptions or exceptions and substitutions, so as to find the accused guilty of an offense, differing from the offense charged only with respect to immaterial variances in dates or places, or with respect to matters of aggravation. See Land v. U. S. (1949), 177 F. 2d 346. Note, however, that he will not use the same terms the court would have used in finding the accused guilty by exceptions and substitutions. Instead, he will approve "only so much" of the offense as involves a finding of guilty of a modified specification. Approval of a lesser included offense is accomplished in the same manner.

87b This paragraph implements Article 62b(2) by laying down several ground rules as to the action that is to be taken when findings as to a charge are inconsistent with the findings as to a specification under the charge.

87c Effect of error on the findings. The language of the harmless error rule announced in this paragraph (particularly in the third and fourth subparagraphs) is new to the Manual for Courts-Martial and Naval Courts and Boards. It is based on the language of Mr. Justice Rutledge in the majority opinion in Kotteakos v. U. S. (1946), 328 U.S. 750. That opinion was based on the Federal harmless error rule which is similar to the harmless error rule in Article 59a. The effect of an error on the sentence is not mentioned. Most errors which affect the

sentence only, and not the findings, may be eliminated by revision proceedings or, in a proper case, by approval of a less severe sentence.

88c Power of commutation. These paragraphs deal with the approval of all or a part of the sentence and thus implement the provisions of Article 64. The convening authority, unless he is the Secretary or the President (Art. 71), has no power to commute a sentence.

Approval of a part of the sentence. The general rule as to approval of a part of a divisible sentence is that the part approved must (1) be included in the sentence adjudged by the court and (2) must be a sentence that the court legally could have adjudged. However, the convening authority may approve a part of a divisible mandatory sentence (i.e., confinement for life adjudged under Article 118(1) or (4). If the sentence adjudged by the court is not divisible (e.g., death, dismissal), but the convening authority determines that the sentence, although legal, is too severe, he may return the record to the court for revision proceedings or he may recommend in his action that the sentence be commuted by the proper authority. See Form 37, Appendix 14c. However, if the convening authority determines that the legally sustained findings of guilty will not support a non-divisible sentence, but would support a less severe sentence, he should return the record to the court with directions to reconsider the sentence in the light of the legally sustainable findings. Thus, if the court adjudged the death penalty and the convening authority determined that the findings of guilty upon which the sentence was based cannot be sustained, but that a finding of guilty of a lesser included offense can be sustained, he should return the record of trial to the court with the direction that it reconsider the sentence and adjudge an appropriate sentence based on the legally sustained findings of guilty. If revision proceedings were impracticable in such a case, a rehearing of the lesser included offense could be ordered, or the record could be forwarded without action to the Judge Advocate General as it appears that the President, acting as an officer exercising general court-martial jurisdiction, could commute the sentence under the authority of Article 71a.

88d Execution of sentences. The convening authority, unless he is the Secretary of a Department, has not been authorized to execute a sentence adjudged at a new trial. Except in the case of a new trial, 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 or bad conduct discharge, or confinement for one year or more.

Note in this respect that the convening authority should not suspend that portion of a single sentence to confinement that is in excess of 11 months and 29 days and order the remainder of the sentence to confinement into execution.

88e Suspension of execution. Both the Army-Air and the Navy types of suspensions are authorized. The advantage of the Army-Air type of suspension (i.e., suspension of a BCD or DD pending release of accused from confinement) is that it may permit the convening authority to order the remainder of the sentence into execution. Such action may be desirable, especially when the sentence involves a short (less than one year) period of confinement which may be served prior to the completion of the appellate review; otherwise the accused might get credit for his entire sentence to confinement even though in the status of an "unsentenced prisoner." Another advantage of this type of suspension is that it puts the onus upon the accused to prove that he is entitled to be restored to duty, rather than on the military authorities to prove that he is not entitled to be restored. Note the provision (Form 39, appendix 14c) which is to be included in the action of the convening authority in such a case to the effect that appellate review must be completed before a BCD or DD may be executed. This provision should serve as a warning to prison and brig officers that they must be advised of the completion of appellate review before a punitive discharge may be issued. The advantage of the Navy type of suspension (i.e., suspension for a definite period at the end of which the unexecuted part of the sentence is remitted) is that it simplifies administration and also gives the accused a goal toward which to work. It encourages him to behave--during the period of suspension at least.

Departmental regulations may limit the use of the various types of suspensions.

88e (2)(c) Suspending or deferring forfeitures. When a sentence involves confinement not suspended and forfeitures, the forfeiture will apply to pay accruing on and after the date of the approval of the sentence (126h(5)). However, the convening authority is empowered by Article 71d to suspend any sentence except death. Consequently, he may always suspend the execution of the forfeitures in such a case. If he does not desire to suspend the execution of the forfeitures in a particular case but does wish to continue the accused in a pay status pending completion of appellate review, he may defer the applicability of the forfeitures (Note to Form 27, appendix 14b).

To aid disbursing officers in determining the date of application of forfeitures, the convening authority--unless he orders forfeitures executed, deferred, or suspended--is required to state in his action, on a case involving an approved sentence to forfeitures and confinement not suspended, that the forfeitures will apply to pay accruing on and after the date of the action (Note to Form 27, appendix 14b).

89 Forms of action and related matters. This paragraph contains the basic rules from which the forms of action in appendix 14 have been derived. In the case of a joint or common trial, the convening authority should take a separate action for each accused. This procedure will simplify the promulgation of a separate court-martial as to each accused. See appendix 15a.

App. 14 Appendix 14a and b sets forth in considerable detail examples of almost every form of action which the convening authority of a summary or special court-martial may take. Appendix 14b also includes several forms of action to be taken under Article 65b by the officer exercising general court-martial jurisdiction upon a record of trial by special court-martial. Appendix 14c, although it contains a number of forms of action which are pertinent to a record of trial by general court-martial, incorporates, by reference, some of the forms of action that are prescribed for a record of trial by special court-martial. Thus, according to the first instructional note of appendix 14c,

> "Forms of action 11-26 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."

The important words in the note are "as approved." If a general court-martial adjudges confinement and partial forfeitures for six months, but does not adjudge a punitive discharge, it is clear that forms 11-26 are appropriate. These forms are also appropriate, for example, if a sentence involving death, dismissal, dishonorable or bad conduct discharge, or confinement for one year or more, although adjudged by the court, is not approved by the convening authority.

89a,b Signature of convening authority. The action of the convening authority, or any supplementary or corrective action taken by him, is to be signed personally by the convening authority.

89b Modification of action.--To give some degree of stability to the action of the convening authority and to insure that he will not modify his action pending appellate review unless he obtains prior approval of a superior reviewing authority, it is provided that he may, on his own motion, recall or modify his own action only if it has not been published or the accused notified officially. Any supplementary or corrective action taken by him thereafter is to be directed by a superior reviewing or supervisory authority.

The provision permitting the modification of an action that is "incomplete, ambiguous, void, or inaccurate" refers to the same matters as the provision found in paragraph 95 authorizing corrective action when the convening authority's action is "incomplete, ambiguous, or contains clerical errors."

89c(2) Reasons for disapproval of findings of guilty.--The reasons for the disapproval of findings of guilty must be stated if a rehearing is ordered. The reasons for disapproval of findings of guilty may be stated in other cases. However, there is no intention of adopting the Navy rule that reasons for a disapproval will be stated in every case (NC & B, Sec. 642, note 66). The rule to be followed is that reasons for the disapproval of a finding should be stated only when they will be of assistance to persons charged with duties in connection with the administrative disposition of the accused thereafter.

89c(7) Crediting accused when acting on rehearings.--The convening authority may approve an appropriate punishment adjudged at a rehearing without regard to whether any part of the prior sentence has been served or executed. However, Article 75a has been construed as requiring that any portion of a sentence adjudged upon a rehearing or a new trial that has been executed or served is to be credited to the accused in computing the term or amount of punishment actually to be served or executed under the new sentence. In the case of a new trial, the Secretary will credit the accused. In the case of a rehearing, the convening authority, if he approves any part of the sentence adjudged at the rehearing, will direct in his action that the accused be credited with the amount of the former sentence served or executed between the date it was adjudged and the date it was disapproved or set aside. Note that under Article 57b a sentence to confinement begins to run from the date it was adjudged. Forms 18 and 38, appendix 14, indicate the language that is to be used in directing the crediting of the accused.

If any executed or served portion of the original sentence is not included in the approved rehearing sentence, the convening authority will include a statement in his action restoring to the accused all rights, privileges, and property affected by that portion of the original executed or served sentence that is not included in the approved rehearing sentence. Forms 9 and 23, appendix 14, indicate the language that is to be used in crediting the accused.

90 Orders and related matters.—A court-martial order generally will be issued by the convening authority who takes initial action on a record of trial by special or general court-martial; generally, this order will be issued at the time the initial action is taken. However, in the case of a bad conduct discharge adjudged by a special court appointed by a commander who does not exercise general court-martial jurisdiction, the officer exercising general court-martial jurisdiction will issue the court-martial order when he takes his action on the case. It follows that, if the record in such a case is forwarded directly to the Judge Advocate General under the provisions of paragraph 94a(3), the court-martial order will be issued by the special court-martial convening authority at the time he takes his action. These rules with respect to the issuance of court-martial orders were adopted so that in every case forwarded to the Judge Advocate General there would be a promulgating order. If a rehearing is ordered by the convening authority, he will promulgate an order; when he takes action on the rehearing, he will promulgate another order.

Date of court-martial order.—The court-martial order will always bear the date upon which the convening authority took action on the case except when a special court-martial order promulgating an approved sentence of a bad conduct discharge is issued by an officer exercising general court-martial jurisdiction. In the latter case the order will bear the date upon which the officer exercising general court-martial jurisdiction took his action. Of course, if the convening authority takes no action (e.g., an acquittal) the court-martial order will bear the date it is published.

Separate order as to each accused.--In the case of a joint or common trial, separate orders are to 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 issued need be shown. See appendix 15a.

90e Summary court; orders; numbering. As the armed forces do not have uniform types of orders, an order issued subsequent to the initial action in a summary court-martial case is to be promulgated in such orders as may be prescribed by departmental regulations.

The convening authority of a summary court-martial is to number each record at the time it is submitted to him for his action. The manner of numbering is left to the discretion of the convening or higher authority. Unless otherwise prescribed, a command should number its summary court-martial cases in sequence during a calendar year.

91 Disposition of the record. This paragraph contains the rules as to the disposition of the three kinds of record of trial, as well as certain general rules as to the contents and arrangement of the records. Additional provisions in this regard are to be found in appendices 9 and 10.

91a Géneral courts-martial. To assist in the expeditious appellate review of records of trial which are forwarded to the Judge Advocate General, it is provided that, in any case which is to be submitted to a board of review under Article 66, the record will be forwarded in triplicate.

Note that a general court-martial record ordinarily is not transmitted to the Judge Advocate General by a letter of transmittal. However, if the convening authority has taken an action contrary to that recommended by his staff judge advocate or legal officer, the record should be transmitted by a letter containing an explanation of the convening authority's action. There is no requirement that such a letter be signed personally by the convening authority.

91b,c 94a(1) Forwarding inferior court-martial records. Note that, under the authority of Article 65c and paragraph 94a(1) the Secretary of a Department may prescribe that records of trial by summary court-martial and those by special court-martial not involving approved sentences to bad conduct discharge be forwarded by the convening authority to a supervisory authority other than the officer exercising general court-martial jurisdiction over the command.

91b Special courts-martial. Four copies of the court-martial order promulgating the result of a trial by special court-martial are to be attached to the record when it is

forwarded to the supervisory authority. It is contemplated that departmental regulations will provide for the disposition of these copies. It has been proposed in the Army that, after action of the staff judge advocate upon the record of trial, one copy of the court-martial order with a notation of the action of the staff judge advocate thereon will be returned to the convening authority. Another copy similarly annotated will be forwarded to the chief custodian of the personnel records of the Army.

91c Summary courts-martial. Unless otherwise prescribed by departmental regulations, two copies of each record of trial by summary court-martial will be forwarded. Departmental regulations will provide for the disposition of these copies. It has been proposed in the Army that one copy of such a record, with a notation of the action of the staff judge advocate thereon, will be forwarded to the chief custodian of the personnel records of the Army.

Conference No. 7b

ORDERING REHEARINGS--DESIGNATING PLACE OF CONFINEMENT--REMISSION--SUSPENSION--VACATION OF SUSPENSION

Conducted by
MAJOR KENNETH J. HODSON

References: Paragraphs 89c(5) and (6), 92, 93, 96, 97; appendices 14 and 15

REHEARINGS

92 The rehearing provisions of the code are new to all the armed forces. A rehearing may be ordered by the convening authority to whom the record is forwarded for initial action (including the officer exercising general court-martial jurisdiction with respect to a special court-martial case involving a bad conduct discharge), a board of review, or the Court of Military Appeals. The rehearing may be ordered if the findings of guilty and the sentence are disapproved unless "there is lack of sufficient evidence in the record to support the findings." The commentary of the drafting committee construed the phrase "evidence in the record" as follows:

> "The phrase 'evidence in the record' is intended to authorize rehearings where the prosecution has made its case on evidence which is improperly admitted at the trial, evidence for which there may well be an admissible substitute."

The provisions of 92 are consistent with the intent of the drafting committee. The evidence, although improper, must have been admitted to be "in the record." Paragraph 82i provides, in effect, that the requirement that there be "evidence in the record" does not preclude a rehearing in a case in which the record of trial cannot be prepared properly because of the loss of the record or the reporter's notes. However, a rehearing may not be ordered in such a case unless the offenses as to which a rehearing is ordered are supported by the summary of evidence which is included in the substitute record. Unless the accused

pleads guilty, a rehearing may not be ordered with respect to a trial by summary court-martial unless a record was made of the evidence considered by the court. Articles 66 and 67 provide that a board of review and the Court of Military Appeals are empowered to order a rehearing. In such a case the order of the board or the court is usually transmitted to the convening authority who took the initial action on the record. He is empowered, after considering the matter, to proceed with a rehearing or to dismiss the charges. In other words, the "order" of the board of review or the Court of Military Appeals amounts to nothing more than an authorization for a rehearing.

Reasons for disapproval of the findings and sentence must be included in the convening authority's action if a rehearing is ordered. It is contemplated that the reasons for disapproval of the findings of guilty be specific. For example, it would be improper to state "The findings and sentence are disapproved because of errors in the record." If the findings and sentence are disapproved and a rehearing is not ordered, the action will note dismissal of the charges.

Distinction is made between a rehearing and other trials which may have been ordered because the first court-martial lacked jurisdiction of the person or the offense. The commentary of the drafting committee points out that the statutory restrictions of Article 63 are not applicable in such cases. The text incorporates the provisions of the commentary of the drafting committee but provides that charges in such cases should be referred to a court none of whose members participated in the first trial. This provision is implemented in 62f(7) which establishes this as a jurisdictional ground of challenge.

PLACE OF CONFINEMENT OR CUSTODY

89c (5), 93 When confinement is involved, the authority ordering its execution will designate a place of confinement as prescribed in departmental regulations. Thus, if the sentence involves confinement, a place of confinement would be designated by the convening authority of a summary court-martial and by the convening authority of a special court-martial unless the sentence also involves an unsuspended BCD. There is no statutory restriction with respect to designating a federal institution (penitentiary, reformatory, etc.) as a place of confinement in any case involving an offense committed on and after 31 May 1951. Note, however, that the limitations of Article of War 42 are

applicable to Army and Air Force cases involving offenses committed before 31 May 1951. It appears that the designation of a penitentiary as the place of confinement for a "non-penitentiary" offense committed prior to 31 May 1951 might be construed as increasing the punishment therefor and thus be a violation of the prohibition against ex post facto laws. As the Navy was not restricted by a statute similar to Article of War 42 it will experience no transitional problems with respect to designation of the proper place of confinement.

89c (6) It is important that the accused's whereabouts be known at all times during the period of appellate review (e.g., so that a copy of the board of review decision may be served upon him). Accordingly, a place of temporary custody (89c(6)) or a place of confinement (89c(5)) will be designated in the action of the convening authority in all cases which are forwarded to the Judge Advocate General if an approved sentence is involved.

Although it is desirable that the accused be retained in the command of the convening authority exercising general court-martial jurisdiction it is obvious that this may be impracticable in many cases. For example, a combat unit should not be required to be responsible for prisoners during the long period that will be required to complete appellate review. The advantage in retaining the accused in the custody of his local command is that it simplifies a revision proceeding or a rehearing, and it insures more expeditious service upon the accused of such matters as the decision of the board of review.

96 If, in any case in which the approved sentence is subject to initial review by a board of review under Article 66, the place of confinement or custody is changed prior to the time when the accused has been notified of the decision of the board of review, the officer ordering such change will notify the appropriate Judge Advocate General. Note that 89c(6) provides that in all cases forwarded to the Judge Advocate General which involve approved sentences the convening authority will designate a place of temporary custody or a place of confinement. However, unless the approved sentence is subject to initial review by a board of review under Article 66, the convening authority is not required by 96 to report any change in the place of custody.

REMISSION AND SUSPENSION

97a Except for the third subparagraph of 97a, which contains general rules as to suspensions and the various factors affecting

them, the provisions of 97a are not applicable to the convening authority at the time he takes initial action on a record of trial. They are generally applicable to subsequent action on a sentence which has been approved and executed or suspended.

The power to remit or suspend the unexecuted portion of a sentence--except one which has been approved by the President--has been left entirely to departmental regulations with the following exception: The unexecuted portion of sentences of summary courts-martial and those of special courts-martial not including a bad conduct discharge may be remitted or suspended (1) by the officer exercising supervisory power over inferior courts, or (2) by a commanding officer of the accused who can convene a court of the kind that adjudged the sentence.

Three types of suspension are recognized. They are the same as those discussed in 88e. A suspension, although it may extend beyond a period of confinement imposed, may not extend beyond a period of enlistment or service. Likewise death or non-fraudulent discharge serves to remit any unexecuted portion of a suspended sentence. Departmental regulations may place additional limitations on the period of suspension.

VACATION OF SUSPENSION

97b This paragraph is a restatement of Article 72 and is new to all armed forces. The important feature of the procedure established by Article 72 is that a suspended sentence involving a bad conduct discharge adjudged by special court-martial and any sentence adjudged by general court-martial may not be vacated without a hearing conducted personally by the officer exercising special court-martial jurisdiction over the "probationer". Article 72a makes no provision for the delegation of the power and duty to hold the hearing on the alleged violation of probation. It is obvious, however, that many commanders exercising special court-martial jurisdiction will not have sufficient time to conduct such hearings in their entirety. Thus, appendix 16, which contains a form of a report of such a hearing, indicates clearly that the initial stages of the hearing can be conducted by an officer appointed by the officer exercising special court-martial jurisdiction. This preliminary hearing will be conducted in the presence of the accused and the accused will be entitled to have counsel represent him, either counsel of his own choice if reasonably available or counsel furnished by the officer exercising special court-martial jurisdiction.

After the preliminary hearing has been conducted, if the officer exercising special court-martial jurisdiction deems that vacation of the suspended sentence is warranted, he will conduct a formal hearing in the presence of the accused and, if he desires, counsel. This formal hearing may be brief. The accused will be given an opportunity to consider the report of the preliminary hearing, object thereto, and submit new matter. If the officer exercising special court-martial jurisdiction, after holding such a hearing, deems vacation of the suspended sentence to be warranted, he will forward the report of the hearing, with a recommendation to that effect, to the officer exercising general court-martial jurisdiction over the command. The latter officer may vacate the suspension of any sentence except one which includes a dismissal; a suspension of a dismissal must be approved by the Secretary of the Department.

No order of vacation shall be effective with respect to any sentence until after the completion of the appellate review required by Articles 66 and 67.

Although Article 72 and paragraph 97b provide that the officer exercising special court-martial jurisdiction will forward the report of the hearing and his recommendations thereon to the officer exercising general court-martial jurisdiction, there is no requirement that he forward such report unless he deems vacation of the suspension to be warranted under the circumstances. However, as the findings and recommendations of the officer exercising special court-martial jurisdiction are advisory only, competent superior authority may prescribe that the report and recommendations will be forwarded in any case.

Conference No. 7c

THE STAFF JUDGE ADVOCATE AND LEGAL OFFICER

Conducted by
MAJOR KENNETH J. HODSON

References: Articles 6, 34, 61;
paragraphs 35, 85

Definition. The term "legal officer" is defined in Article 1(14) as "any officer in the Navy or Coast Guard designated to perform legal duties for a command." The code does not define the term "staff judge advocate." The manual contemplates that the staff judge advocate or legal officer will be the senior judge advocate or senior legal specialist, respectively, performing military justice duties on the staff of an officer exercising general court-martial jurisdiction. In other words, these officers have the same status and almost the same duties as the staff judge advocate under the Articles of War.* In this connection, note that neither the code nor the manual requires an officer exercising general court-martial jurisdiction to have a staff judge advocate or legal officer. Paragraphs 85a and 94a(3) recognize the possibility that he may not have such a legal adviser.

Qualifications. The code does not prescribe any legal qualifications for the staff judge advocate or legal officer. In fact, Article 136 indicates that a staff judge advocate need not be a judge advocate; that a legal officer need not be a legal specialist. Article 6a, however, provides that all judge advocates of the Army and Air Force and law specialists of the Navy and Coast Guard are to be assigned upon the recommendation of the Judge Advocate General. It may be assumed, therefore, that the staff judge advocate or legal officer ordinarily will have the basic qualifications of a judge advocate or law specialist.

---

*For a more comprehensive account of the status and duties of the staff judge advocate, see "The Convening Authority and His Staff Judge Advocate" in the December 1950 Military Review, a publication of the Command and General Staff College, Fort Leavenworth, Kansas.

With respect to disqualifications, Article 6c provides generally that any person who has acted as the investigating officer or as law officer or as a member of the court, prosecution, or defense in any case may not subsequently act as staff judge advocate or legal officer to any reviewing authority upon the same case. This provision, as the drafting committee pointed out, is for the purpose of securing impartial review. Consequently, although not mentioned in Article 6c, it follows that any person who has acted in a partisan capacity (e.g., accuser, pretrial counsel for the accused) should not act subsequently as the staff judge advocate or legal officer in the same case.

Is a person who has acted as staff judge advocate or legal officer disqualified for the performance of other military justice duties? The code does not contain any disqualifying provisions of this nature, but paragraphs 62f(11) and (12) provide that the fact that any person has acted or will act as the legal officer or staff judge advocate is available as a ground for challenge against a member or law officer of the court. There is no provision in the code or manual which would disqualify a staff judge advocate or legal officer from acting as counsel for the prosecution or the defense. If he did act as counsel, he would, of course, be precluded from acting as staff judge advocate or legal officer on the same case.

Assignment and status. The effect of Article 6a is to put judge advocates and law specialists under the control of the Judge Advocate General of the armed force of which they are members. Their assignment for duty is to be made upon the recommendation of the Judge Advocate General. The hearings before Congress indicated that orders assigning judge advocates and law specialists do not have to be issued by the Judge Advocate General but may be issued by the Adjutant General or Bureau of Naval Personnel based upon the recommendations of the Judge Advocate General.

Article 6b not only authorizes direct communication within military justice channels but also enhances the position of judge advocates and legal officers by requiring direct communication on military justice matters between such officers and their commanding officers. Although Article 6b provides that the staff judge advocate or legal officer is authorized to communicate with the staff judge advocate or legal officer of a superior or subordinate command, this provision does not prevent communication between staff judge advocates or legal officers of commands which are not in the same chain of command.

Thus, it is a common practice in the Army for the staff judge advocate of one command to contact the staff judge advocate of an adjoining command for the purpose of expediting the disposition of cases. For example, inquiries with respect to the availability of witnesses, depositions, or individual counsel, or with respect to transfer of cases from one jurisdiction to another are often made by direct contact between judge advocates of adjoining or equivalent commands.

Relations with the convening authority. There is a clear indication in Article 6b that a staff judge advocate or legal officer is responsible to his commander for the proper disposition of all "matters relating to the administration of military justice" arising in the command. As he is a staff officer, the staff judge advocate or legal officer may act only in the name of his convening authority. Completed staff action requires that many functions of his commander can and should be performed by the staff judge advocate or legal officer, without in each instance conferring with the commander. The extent to which the commander permits his staff judge advocate or legal officer to perform such functions will largely depend upon the confidence which he places in the ability of his staff judge advocate or legal officer. After he knows the policy of the convening authority with respect to a particular kind of case, it should not be necessary for the staff judge advocate or legal officer to get the convening authority's approval before disposing of a similar case. A standing operating procedure usually will be established with respect to those military justice matters which the convening authority wishes brought to his personal attention. In general, to insure the expeditious disposal of court-martial matters as well as to free himself from the mass of administrative detail connected with the exercise of court-martial jurisdiction, the convening authority--depending upon the confidence he has in his legal adviser--may authorize his staff judge advocate or legal officer to take final action in every military justice matter except those requiring the personal signature of the convening authority, those involving a matter of particular importance to him (e.g., a case which has received, or may receive, attention in the public press), or those involving a recommended action that deviates from his policy.

If, under the standing operating procedure mentioned above, a matter is to be brought to the attention of the convening authority, the staff judge advocate or legal officer normally will take the pertinent papers (e.g., charges, record of trial, etc.) personally to the convening authority, and give him a concise report and recommendation; thereafter, he will carry the convening authority's decision into effect. In

the event a convening authority finds his military justice duties too onerous to permit personal consultation with his staff judge advocate or legal officer, he should cure the situation by taking action to have other commanders exercise all or a part of his jurisdiction. He should not try to evade the clear-cut mandate of the statute pertaining to direct communication with his staff judge advocate or legal officer. In this connection, General Eisenhower, while serving as the Supreme Commander, SHAEF, personally listened to the advice of his theater judge advocate on each of the 764 death and dismissal cases upon which he was required to act as confirming authority.

35 Duties before trial. Article 34a provides:

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

The effect of Article 6b and 34a, as implemented by paragraphs 35b and c, is to place upon the staff judge advocate or legal officer the responsibility for advising his commander as to the proper disposition of charges. The staff judge advocate or legal officer should take appropriate action to the end that all necessary preliminary matters will have been disposed of before a case is presented to the commander for action. The following are some examples of the preliminary actions which might be taken by the staff judge advocate or legal officer: Having the charges investigated or re-investigated under Article 32; redrafting the charges to allege a more serious or essentially different offense for the signature of an accuser, and reference of the redrafted charges for a new investigation under Article 32; redrafting the charges over the signature of the accuser to eliminate obvious errors and to make them conform to the evidence as provided in Article 34b; arranging for an examination of the accused's mental condition. This is not intended to be an exhaustive list of examples - the list covers, however, salient questions that may arise in the mind of a new staff judge advocate or legal officer.

When he has completed the necessary preliminary action and the charges are ready for action by the convening

authority, the staff judge advocate or legal officer will prepare a written advice if it appears to him that trial by general court-martial is warranted. Article 34a, as implemented by paragraphs 35 b and c of the manual, provides generally that the advice is to be submitted in such manner and form as the convening authority may direct except that the staff judge advocate or legal officer must find:

1. Whether there was substantial compliance with the provisions of Article 32;

2. Whether each specification alleges an offense under the code; and

3. Whether the allegation of each offense is warranted by the evidence indicated in the report of investigation.

The advice will include a signed recommendation of the action to be taken by the convening authority. The findings and recommendations of the staff judge advocate or legal officer are advisory only. The convening authority may accept them or reject them, in whole or in part.

Although not required by the code or the manual, the advice of the staff judge advocate or legal officer should list the elements of any offense that is to be referred to trial if a detailed statement of the elements of proof of that offense is not in the manual. Such a listing, for example, would be appropriate as to any offense under Article 133 and as to many offenses under Article 134. Similarly, if the trial will involve a question of law the solution to which is not to be found in the manual (e.g., entrapment), the advice may well contain a brief statement of the law in point. Such information will aid the trial counsel in presenting correct proposed instructions if the law officer calls for such instructions. An alternate solution is to include such information in a separate memorandum addressed to the trial counsel.

The staff judge advocate or legal officer may determine as a result of his examination of the charges and allied papers, that they should be referred to an inferior court for trial, disposed of under Article 15, dismissed, or forwarded to another jurisdiction for action. In such a case, unless he is required by his convening authority to do so, he need not prepare a formal written advice. Instead he should prepare the action that will effect his recommendation. For example, if an Army or Air Force staff judge advocate recommends punishment under Article 15, he should prepare a letter

for the convening authority's signature--if such action is appropriate in the command--notifying the accused of the intended imposition of punishment.

85 Review of records of trial. Article 61, as implemented by paragraph 85, provides that prior to acting on a record of trial by general court-martial or a record of trial by special court-martial which involves a bad conduct discharge, the convening authority will refer it to his staff judge advocate or legal officer for review and advice. If he has no staff judge advocate or legal officer or if the one he has is ineligible, the convening authority may request the assignment of an eligible staff judge advocate or legal officer, or he may forward the record to the Judge Advocate General for advice or to an officer exercising general court-martial jurisdiction for action as prescribed by Article 60 and paragraph 84c.

The review of the staff judge advocate or legal officer is to be in writing. It is to contain at least the following:

1. A summary of the evidence;

2. An opinion of the adequacy and weight of the evidence;

3. A statement of the effect of errors or irregularities; and

4. A specific recommendation as to the action to be taken by the convening authority.

Reasons for the opinions and recommendation will be stated. If the record involves an acquittal, the review will be limited to a determination of whether the court had jurisdiction. Although not necessary to a determination of the question of jurisdiction, the review may include a brief summary of the evidence and comment as to any procedural errors or irregularities. Such comment is valuable for the instruction of the law officer and the trial counsel if they have committed errors of law during the trial. The staff judge advocate or legal officer ordinarily will attach to his review the action that has been prepared for the convening authority's signature.

Before presenting the record, his review, and the proposed action to the convening authority, the staff judge advocate or legal officer will take necessary preliminary steps to insure that the record of trial is complete and correct and that the record is ready in all respects for the

initial action of the convening authority. When necessary or appropriate, he may, for example, obtain a certificate of correction, direct action in revision, or cause the accused to be brought before a board of medical officers for the purpose of determining his sanity. If a rehearing is authorized, the staff judge advocate or legal officer--before presenting the record to the convening authority for action--should cause an inquiry to be made to determine whether a rehearing will be practicable.

The review of the staff judge advocate or legal officer is in the nature of a privileged communication between a lawyer and his client. The findings and recommendations are advisory only. As the convening authority is responsible for the action taken by him, he may accept or reject the findings and recommendations, in whole or in part. As a general rule, however, he should follow the advice of the staff judge advocate or legal officer with respect to such matters as (1) the effect of errors or irregularities on the proceedings, (2) the adequacy of the evidence, and (3) the legality of the sentence. If in disagreement with the staff judge advocate or legal officer on these questions, the convening authority may transmit the record of trial with an expression of his own views to the Judge Advocate General for advice. If the action of the convening authority is 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. This letter of transmittal need not be signed personally by the convening authority.

Two copies of the review of the staff judge advocate or legal officer are attached to any record of trial that is forwarded to the Judge Advocate General. In the interest of instruction in military justice, the law officer and the trial counsel may be furnished copies of reviews in cases in which they have participated. A copy of the review should also be furnished to the convening authority of a subordinate command who has taken initial action and forwarded a record of trial involving an approved bad conduct discharge adjudged by a special court-martial.

Miscellaneous duties. In addition to preparing the pretrial advice, reviewing records of trial, and performing the duties that are connected therewith, the staff judge advocate or legal officer is generally chargeable with the prompt and fair administration of military justice in his command. Among his specific responsibilities are the following:

1. Before trial.--Selecting personnel for appointment as law officers, members, and counsel

of court-martial appointed by his convening authority; detailing pretrial counsel for the accused; taking action to insure the prompt disposition of offenses and charges at all levels of command.

2. During trial.--Taking action to insure the availability of sufficient reporters in the command; advising the convening authority whether a capital case should be treated as not capital; conferring with counsel or the law officer with respect to unusual delays in the commencement and completion of trials; assisting in the procurement of depositions and witnesses; taking action on questions referred to the convening authority by the court during trial; advising the convening authority whether immunity should be granted to one accused to permit use of his testimony against an accomplice; disposing of requests for individual counsel for the accused.

3. After trial.--Arranging the record for transmittal to the Judge Advocate General; taking action as directed by the Judge Advocate General to expedite the completion of appellate review, (e.g., serving decisions of the boards of review on, and making appellate advisory counsel available to, the accused if the latter is in his command; notifying the Judge Advocate General if an accused is transferred from his command before notification of the decision of the board of review, etc.); determining, in a case in which the place of confinement was not designated at the time of the initial action in a case, whether, under existing regulations, the accused is to be confined in a Federal institution.

4. Duties with respect to the review of inferior court records. If the officer exercising general court-martial jurisdiction is the supervisory authority with respect to records of trial by summary court-martial and those by special court-martial which do not involve a bad conduct discharge, his staff judge advocate or legal officer will be responsible for reviewing such records in accordance with the provisions of paragraph 94a(2). The convening authority usually delegates to his staff judge advocate or legal officer the full power of determining the legality of such proceedings and initiating the necessary corrective action in that regard. If the staff judge advocate or legal officer determines that the sentence in a

particular case is more severe than sentences in similar cases in the command, or that the sentences approved by a particular subordinate commander are consistently more severe than those approved in other similar cases in the command, he may recommend to the convening authority that such sentences be mitigated or suspended and, in an appropriate case, that administrative action be taken to insure that sentences in the command are relatively uniform.

Conference No. 7d

APPELLATE REVIEW--NEW TRIAL

Conducted by
LT. COL. WALDEMAR A. SOLF

References: Chapter XIX, Paragraph 96
Chapter XX, Paragraphs 98-108
Chapter XXI, Paragraphs 109-111
Appendices 14, 15a and b
Articles 60, 63, 64-76

Chapter XX

APPELLATE REVIEW--EXECUTION OF SENTENCES

Historical Background

Historically military law was regarded as summary in nature. By the term "summary," I assume, was meant not that trial procedure was unfair, hasty, or unsolicitous of the rights of the accused, but rather that the institution of the proceedings was relatively more swift than in civilian procedure and that punishment swiftly followed a sentence.

In 1776 a Committee of the Continental Congress composed of Thomas Jefferson, John Adams, John Rutledge, James Wilson, and R. R. Livingston prepared a set of Articles of War patterned almost entirely upon the British Articles. In his autobiography1/ John Adams wrote:

> "This report was made by me and Mr. Jefferson, in consequence of a letter from General Washington, sent by Colonel Tudor, Judge Advocate General, representing the insufficiency of the articles of war, and requesting a revision of them. Mr. John Adams and Mr. Jefferson were appointed a committee to hear Tudor, and revise the articles. It was a very difficult and unpopular subject, and I observed to Jefferson, that whatever alteration we should report with the least energy in it, or the least tendency to a necessary discipline of the Army, would be opposed with as much vehemence, as if it were the most perfect; we might as well, therefore, report a complete system at once, and let it meet its fate. Something perhaps might be gained. There was extant one system of articles of war which had carried two empires to the head

1/Works of John Adams, Vol. III, pp. 68-69, Autobiography, Monday August 19, 1776.

of mankind, the Roman and the British; for the British Articles of War were only a literal translation of the Roman. It would be in vain for us to seek in our own inventions, or the records of warlike nations, for a more complete system of military discipline. It was an observation founded in the undoubted facts, that the prosperity of nations had been in proportion to the discipline of their forces by sea and land; I was, therefore, for reporting the British Articles of War, totidem verbis. Jefferson, in those days, never failed to agree with me, in every thing of a political nature, and he very courteously concurred in this. The British Articles of War were, accordingly, reported, and defended in Congress by me assisted by some others, and finally carried. That laid the foundation of a discipline which, in time, brought our troops to a capacity of contending with British veterans, and a rivalry with the best troops of France."

These articles with minor modifications worked well, summary though they were, until World War I. Early in that war some troops stationed near Houston, Texas, engaged in a riot and a mutiny. Some of the offenders were promptly brought to trial by court-martial for mutiny. The trial lasted several days and was carefully, fairly, and scrupulously conducted. Each night the stenographic transcription of the day's proceedings was brought to the Department judge advocate, who wrote his review as the trial progressed. On the last day several of the mutineers were found guilty and some were sentenced to death. That night the review was completed. The sentences were approved and confirmed by the Department commander pursuant to his authority under Article 48 of the 1916 code to confirm death sentences in time of war, and the next morning the sentences were carried into execution.

This was summary justice--but too summary for a citizen Army of the twentieth century. The summary disposition of the Houston riot case created quite a reaction among the public and also in the War Department. Very promptly thereafter the War Department promulgated General Order No. 7, 1918, which required review by a board of review in the Office of the Judge Advocate General or in a branch office before any serious sentence by court-martial could be carried into execution. General Order No. 7 served as a pattern for appellate review in the Army. Its essential provisions became statutory in 1920 as Article of War 50½. It was modified by Article of War 50 in the 1948 revision of the Articles of War which empowered the boards of review to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact. A judicial council for the further review of serious cases, with power to consider the propriety as well as the legality of sentences was also created.

The Navy's present appellate review system, like that prescribed by General Order No. 7, is not statutory.

Prerequisites To Execution Of Sentences

This brings us to the next development--the Uniform Code of Military Justice. The prerequisites to the execution of court-martial sentences as approved by the convening authority are these:

Sentences extending to death or involving a general or flag officer may not be executed until they are:

1. Affirmed by a board of review (Art. 66b, c),
2. Affirmed by the Court of Military Appeals (Art. 67b(1)), and
3. Approved by the President (Art. 71a).

Sentences extending to dismissal may not be executed until they are:

1. Affirmed by a board of review (Art. 66b),
2. Affirmed by the Court of Military Appeals if reviewed by it pursuant to Article 67b(2) or (3), and
3. Approved by the Secretary of the Department (Art. 71b).

Sentences to dishonorable or bad conduct discharge, or confinement for one year or more, or any sentence which includes an unsuspended punitive discharge may not be executed until they are:

1. Affirmed by the board of review (Arts. 71c, 72b), and
2. Affirmed by the Court of Military Appeals if reviewed by it pursuant to Article 67b(2) or (3) (Art. 71c).

Review In Other Cases

All other sentences by court-martial, unless suspended, may be ordered into execution by the convening authority when he approves a sentence (Art. 71d). These latter sentences, however, are reviewed by higher authorities, as you have seen in the conference on inferior courts; and general court-martial sentences, which do not involve general or flag officers, extend to death, dismissal, discharge, or confinement for a year or more, are reviewed in the Office of the Judge Advocate General subject to being referred to a board of review which may affirm the sentence in whole or in part or set it aside like any other sentence reviewed by it under Article 66.

The Appellate System

The most convenient way to become oriented in the operation of the appellate system of the code is to follow the progress of the various types of cases on the chart.

Review Under Article 69

Let us follow the progress of the simplest case--a general court-martial case in which the sentence as approved by the convening authority does not require automatic review by a board of review. Such a case might be one in which the sentence extends to confinement for six months and partial forfeitures or, in the case of an officer, a reprimand and forfeitures.

When the convening authority approves such a sentence he will order its execution or suspension, publish an order of execution as indicated in appendices 14 and 15, and forward the original of the record to the Office of the Judge Advocate General of the accused's armed force for examination pursuant to Article 69. If the examiner finds the record correct in law and fact and the Judge Advocate General finds no objection to the findings and sentence the matter is ended and the case goes to file. The convening authority will be advised of the finding. Suppose, however, that the examiner decides that the record is not correct to support the sentence. In such a case, if the Judge Advocate General agrees with the examiner, the case is forwarded to a board of review. If the accused had not conditionally requested representation before the board under paragraph 48j(3) the Judge Advocate General will notify the accused of the reference to the board of review in order to enable him to get representation, provided, of course, that he acts promptly. The board of review will act on the case in the same manner as it would act in any case coming to it automatically under Article 66. The appellate review ends with the action of the board of review unless the Judge Advocate General orders the case forwarded to the Court of Military Appeals. The accused does not have the right in such a case to petition the Court of Military Appeals for a grant of a review. If the case is forwarded to the Court by the Judge Advocate General he must advise the accused and the appellate defense counsel of his action.

Review Of Cases Involving Punitive Discharge Or Confinement For 1 Year Or More

Next let us follow the progress of cases in which a bad conduct discharge, or a dishonorable discharge, and confinement is adjudged. We will pick up the case with the action of the officer exercising general court-martial jurisdiction (or with a Navy officer authorized to forward special court-martial cases directly to the Judge Advocate General's office). In this discussion we are not concerned whether the record involves a general or special court-martial case.

If the sentence involves confinement for less than a year and the convening authority decides to suspend the discharge he will publish an order of execution with respect to the confinement at hard labor and forfeitures and order the suspension of the discharge. If the sentence to confinement is for a year or more or if the convening authority decides not to suspend the discharge he will publish a preliminary court-martial order showing the charges, findings, the sentence, and his action on the record. He will not order any part of the sentence into execution. See forms in appendices 14c and 15a.

The convening authority must also make up his mind, in accordance with Departmental regulations, as to what disposition to make of the accused with respect to temporary custody pending completion of the appellate review. His action must show the temporary custody, for, as you will see, it will become crucial that the Judge Advocate General know where he can get ahold of the accused after the board of review has acted. If the accused is transferred from the command designated as having temporary custody the Judge Advocate General must be notified promptly. This is covered in paragraph 96.

Another thing the staff judge advocate or legal officer should do before the record is forwarded is to determine whether or not the accused wants appellate counsel. Under paragraph 48j(3) the accused has 10 days after sentence is adjudged to make up his mind whether he desires to be represented by the appellate defense counsel before the board of review. Ordinarily the request, if any, should accompany the record. If the accused does not make such a request the board of review need not delay the disposition of the case, and if it has acted before a belated request reaches it the accused is deemed to have waived his rights to appellate counsel.

When all these things have been accomplished the record of trial, in triplicate, with preliminary order, request for counsel, etc., is forwarded to the Judge Advocate General of the accused's armed force.

When the record reaches that office the original will go to the board of review and the copies will go to appellate government and appellate defense counsel. If the accused has requested representation or if the Judge Advocate General so directs, appellate counsel--or civilian counsel provided by the accused--will be given sufficient time to prepare their argument and file briefs. After hearing any argument and considering any briefs, the board of review will consider the correctness of the record in law and fact. Like the present Army and Air Force boards of review it has the power to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact with due regard to the fact that the court heard

and saw the witnesses. It may decide not only whether the sentence is legal but also whether it is appropriate.

Affirmation by board of review.--Let us first assume that the board of review has affirmed the sentence in whole or in part. The record and the decision of the board of review will be considered by the Judge Advocate General or one of his assistants to determine whether or not he should forward the case to the Court of Military Appeals. If the Judge Advocate General decides to forward the case he will notify the accused and his appellate counsel of his order and give them an opportunity to be represented before the Court of Military Appeals. The Judge Advocate General may also consider the propriety of the sentence, and if he deems that any mitigating action under Article 74 is appropriate he may forward the record to the Secretary or, if the Secretary has authorized him to exercise power to remit or suspend, he may take such action as the Secretary may have authorized.

If the Judge Advocate General agrees with the decision of the board of review and finds no reason for taking either mitigating action or forwarding the case to the Court of Military Appeals he will send two copies of the board of review's decision to the officer exercising general court-martial jurisdiction over the command which includes the accused at that time. He will instruct that officer to cause a copy of the decision to be served on the accused. This copy will bear an indorsement advising the accused that he has 30 days from the date of notice to petition the Court of Military Appeals, through the officer exercising general court-martial jurisdiction, and through the Judge Advocate General, for a grant of review on questions of law only. If the accused has been transferred from the command of the convening authority a copy of the decision of the board of review will be furnished the original convening authority for his information. Two copies of the accused's receipt for the decision of the board of review will be forwarded to the Judge Advocate General's office so that the Judge Advocate General and the Court of Military Appeals will be in a position to know when the appeal period starts and when it will end.

If the accused does not forward his petition for a grant of review within 30 days, the officer then exercising general court-martial jurisdiction (or such other authority as may have been designated by the department) will publish a supplementary court-martial order which will refer to the initial order and order the sentence as affirmed or modified into execution. See forms in appendix 15b.

If, without modifying the action of the convening authority, the board of review affirms a sentence to suspended discharge and confinement for less than one year, no supplementary order of execution is necessary.

If the accused files a timely petition for a review it must be promptly forwarded to the Judge Advocate General. The latter will extract sufficient copies for appellate counsel and then forward it to the Court of Military Appeals.

Under Article 67c, the Court of Military Appeals has 30 days within which to decide whether it will grant a review. Bear in mind that the court cannot consider any question except one of law. If the petition attacks the weight of the evidence or the propriety of a severe but legal sentence, the Court of Military Appeals has no appellate jurisdiction.

If the Court of Military Appeals grants a review, no order of execution can be promulgated until the court has finally disposed of the case. It acts only with respect to findings and sentences as approved by the convening authority and as affirmed or set aside as incorrect in law by the boards of review. The court need not consider any matters except those raised by the accused's petition or by the Judge Advocate General.

The action of the court might be in the form of a setting aside of the sentence with or without a rehearing--or it might involve a return of the record to the board of review for further proceedings.

Setting aside by the board of review.--Let's go back to the board of review. Suppose the board sets aside a sentence. It may order a rehearing, subject to the limitations covered in Conference 7b, or it may dismiss the charges. The case goes to the Judge Advocate General who will decide whether he wants to forward the case to the Court of Military Appeals. If he decides to forward the case he will notify the accused and appellate defense counsel. If he does not deem review by the court necessary he sends the decision to the convening authority for necessary action. Ordinarily, if the board has dismissed the case, the decision will go to the officer exercising general court-martial jurisdiction over the accused who will publish the necessary orders based on the forms in appendix 15b. If a rehearing is ordered by the board, the decision will ordinarily go to the original convening authority who will decide whether or not a rehearing is practicable. If he decides that it is impracticable he will dismiss the charges. Even when a rehearing is ordered--and this is a change for the Army and Air Force--a supplementary order will be published in order to make of record the period of confinement for which the accused may receive credit on the execution of any sentence adjudged on the rehearing. See the last form of Appendix 15b.

If charges are dismissed, all rights, privileges, and property of which the accused has been deprived, except on executed dismissal

or discharge, will be restored in the supplementary order (Art. 75). The mentioned exceptions occur in new trial cases which will be discussed later in this conference.

Review Of Dismissal Cases

A case in which the sentence involves the dismissal of an officer, cadet, or midshipman is processed just like the cases we have just discussed up to the point of notice on the accused of the decision of the board of review in cases in which the dismissal is affirmed. If the accused does not file a timely petition for a review through the officer exercising general court-martial jurisdiction over him, the latter must notify the Judge Advocate General promptly. This is not in the Manual but will probably appear in regulations. When such notice has been received, or if a timely petition is forwarded and the Court of Military Appeals has disposed of the case, the Judge Advocate General will forward the record to the Secretary of the Department for his action.

The Secretary has the power to approve, disapprove, remit, or commute the sentence or any part thereof. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. The order promulgating the Secretary's action in such a case will be published by the Department. Of course, the preliminary order and any supplementary order in cases wherein the sentence has been set aside are published in the field as in other cases.

Review Of Presidential Cases

Lastly, we will take a brief look at cases involving a sentence to death or involving a general or flag officer. If the board of review sets aside such a sentence it follows the course we have indicated for other cases. It either goes back to the field for a rehearing or is dismissed unless the Judge Advocate General forwards it to the Court of Military Appeals.

If the board affirms the sentence it will go automatically to the Court of Military Appeals with the Judge Advocate General's recommendations in the premises. If the Court sets the sentence aside, it may either order a rehearing, subject to the usual limitations, or dismiss the proceedings. If it affirms the sentence, the case goes to the Secretary of the Department for the action of the President. The President takes the final action in the case. He has the power to approve, disapprove, commute, or to suspend sentences, but he may not suspend a death sentence. Orders promulgating the President's action are published by the Departments.

Court-Martial Orders

The manner of promulgating court-martial sentences by a preliminary order and by a later order announcing the results of affirming action will probably appear familiar to the Navy. However, Army and Air Force officers will wonder why it was necessary to depart from the old procedure of publishing only one court-martial order promulgating the entire proceedings and final results of action on a record of trial. Let me review this feature.

In paragraph 99 it is provided that a general or special court-martial order promulgating findings, sentence, and action of the convening and higher authority will be published in the field before the record of trial is forwarded to the Judge Advocate General. Thereafter, when the sentence becomes final a supplementary order of execution is published.

The reasons for adopting this procedure were to facilitate expeditious action upon a sentence. Boards of review will inevitably be slower in acting upon records in view of the provision in Article 70 for free appellate counsel than was the case heretofore. Writing briefs and preparing for arguments in many cases takes time. Heretofore, after action by the board of review the sentence was ordinarily in such shape that it could be immediately ordered into execution. Under the new procedure a 30 day appeal period plus time for notice intervenes, and if a timely petition for a review is filed, the order of execution cannot be promulgated until the Court of Military Appeals has acted. This might entail a very long time.

In most cases arising overseas or on board a ship the accused, of necessity, will have been transferred out of the command of the convening authority by the time the sentence can be carried into execution. Therefore, it would be more expeditious to provide that the final order of execution may be issued by the officer exercising general court-martial jurisdiction over the accused at the time the case becomes final rather than to engage in a time consuming correspondence with the original convening authority. If the accused is transferred from the command in which the trial was held, it is desirable that a court-martial order showing the status of the case and his status accompany him. The preliminary order accomplishes this requirement. When the board of review has acted, the Judge Advocate General can expeditiously transmit its decision to the officer who now has control over the prisoner, thus starting the appeals period to run at a much earlier date than it would if a copy of the decision of the board of review was sent to the original convening authority who would have to transmit it by successive indorsement to the place where the accused is to be found. When the case becomes final, a simple order of execution referring to the

942479 O - 51 - 11

original order and providing explicitly what sentence has been affirmed and is ordered executed will be sufficient.

The forms for such an order in appendix 15b are intended to be used only with respect to orders of execution promulgated in the field. If for any reason the order of promulgation is issued by the Department concerned, the Department is free to use whatever form it desires. Perhaps the Navy will continue to publish orders of execution in the Department by means of en bloc orders as is the present practice.

Need For Expeditious Action

From a consideration of the entire appellate procedure and its ramifications it can readily be seen that expeditious action on the part of all those concerned in the administration of military justice is essential to prevent a breakdown of the system. If a substantial percentage of say, 15,000 prisoners per year petition the Court of Military Appeals for a review, the court, which consists of only three judges, may well become overburdened. Frivolous appeals should be discouraged. It should be emphasized by all concerned that the Court of Military Appeals can entertain only matters of law, and without discouraging meritorious appeals, accused persons should be advised by their counsel that if their records of trial do not present any substantial question of law their petitions for appeal are a waste of time.

Another point which must be emphasized to administrative personnel concerning the processing of prisoners is that it is highly essential that the Judge Advocate General of the armed force concerned be kept advised of any change in the temporary custody of the accused as required by paragraph 96. You can readily see the delays which will occur if the Judge Advocate General, relying upon the statement in the action of the convening authority, dispatches a decision of the board of review to a place to which the accused has either not been sent, or from which he has departed. Such incidents will probably add a month or more to the time necessary for the final disposition of the case. All this time the accused will remain an unsentenced prisoner, but he will continue to receive credit on any confinement adjudged.

The soundest way to prevent a breakdown in the appellate system and to preserve military manpower is to take very seriously the policy announced in paragraph 30f:

> "Subject to jurisdictional limitations, charges against an accused, if tried at all, should be tried at a single trial

by the lowest court that has the power to adjudge an appropriate and adequate punishment."

The policies announced in paragraph 129 relating to disciplinary punishment, if adhered to, will also serve to cut down the court-martial rate.

Chapter XXI

NEW TRIAL AND RELATED MATTERS

Historical Background

In introducing the subject of new trials it is well to consider some recent history. At the end of World War II there was the customary post-war reaction to the administration of military justice in the Army. Some people felt that during the war, when some ten or twelve million men and women had become persons subject to military law, miscarriages of justice were bound to arise. It was also felt that the Army's appellate system, operating in high gear and perhaps on a mass production basis, must have overlooked some miscarriages of justice. To provide a remedy for these cases, which proved to be rare, Article of War 53 was enacted as a part of the 1948 revision of the Articles of War.

This article provided that under such regulations as the President might prescribe the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, to grant a new trial or to vacate a sentence and restore rights, privileges, and property lost as a result of an executed sentence. It further provided that in such cases the Judge Advocate General is authorized to substitute for an executed dismissal, dishonorable discharge, or bad conduct discharge, a form of discharge authorized for administrative issuance. Application was required to be made within one year after final disposition of the case upon initial appellate review except that in World War II cases, application must be submitted within one year after such appellate review, or within one year after the termination of the war, whichever is the later date. An accused was permitted only one application. The provisions of Article of War 53 applied only to general court-martial cases and to special court-martial cases in which there had been adjudged a bad conduct discharge.

In spite of the clamor concerning the administration of military justice less than 1/3 of 1% of the persons tried in the Army and the Air Force since 7 December 1941 have felt so strongly that they were the victims of an injustice that they took the trouble to apply for a new trial. The number who presented meritorious grounds for such relief were infinitesimal.

Article of War 53 was applicable only to the Army and the Air Force. In considering the Uniform Code of Military Justice Congress felt that similar relief with respect to possible wartime injustices arising in the Navy and the Coast Guard should be accorded to the personnel of those services. Consequently section 12, a substantial reenactment of Article of War 53, was adopted and made applicable to all of the services. It became effective on 5 May 1950 and is applicable only to cases involving offenses committed during World War II. It is provided that with respect to section 12 and Article of War 53, World War II is deemed to end as of 31 May 1951, the date the Code and the Manual become effective.

Article 73 And Section 12 Compared

In order to come under the provisions of section 12 an offense must have been committed on or after 7 December 1941 and before midnight of the night 30-31 May 1951. It does not matter when the trial is held; the critical factor is when the offense was committed. Persons who commit offenses on or after 31 May 1951 have no remedy under section 12 and conversely persons who commit offenses before 31 May 1951 have no remedy under Article 73, the permanent new trial provision of the code. The service man who deserts on 30 May 1951 and is apprehended ten years later will have one year after final disposition of the case on appellate review to petition the Judge Advocate General for relief under section 12. If he deserts the next day, 31 May 1951, he will have to proceed under Article 73.

The general provisions of paragraph 110 which provides the regulations for new trials under section 12 stem largely from Chapter XXII, MCM, 1949, and Executive Order No. 10190, 8 December 1950, which implements section 12 with respect to the Navy and the Coast Guard. Since most of you are familiar with these provisions, it will be well only to point out wherein the relief under section 12 differs from the relief afforded by Article 73.

Grounds for relief.--First of all the relief under section 12 is "for good cause shown" whereas the ground for relief under Article 73 is limited to "newly discovered evidence or fraud on the court." Good cause under section 12 is deemed to exist only if all the facts and circumstances of the case and the matters presented with the petition convinces the Judge Advocate General that an injustice has resulted from the findings and sentence. An error constitutes "good cause" only if it had a substantial contributing effect upon the findings of guilty or the sentence. Newly discovered evidence and

fraud on the court are grounds for relief under either section. Paragraph 109d states what constitutes newly discovered evidence or fraud on the court and gives some examples.

The Chief of the Army New Trial Division has recently stated that upon occasions applicants for a new trial under Article of War 53 have presented rather novel views as to what constitutes good cause. Such reasons for relief have been given as that it was expensive to confine the prisoner, that a case was tried on Friday the thirteenth, following a tornado, and a week after the death of President Roosevelt, that an applicant should be released to marry the mother of his child, and that the perpetrator of a rape should be freed because he had merely violated a minor Army Regulation (Article of War 92).

Needless to say the Judge Advocate General disagreed with the applicants in these cases.

Type of relief.--The relief which may be granted differs under the two provisions. Under section 12 the Judge Advocate General may not only grant a new trial but he may also, without ordering a new trial, vacate findings and sentences, and restore rights, privileges, and property affected. He may also substitute for an executed discharge or dismissal, a form of administrative discharge. In actual practice, experience has shown that when an accused convinces the Judge Advocate General that meritorious grounds for relief exist, there is usually no need to go through the formality of a new trial. New trials under Article of War 53 have been very rare. Under Article 73 relief is limited to the granting of a new trial. It is, however, stated in paragraph 109f that if the Judge Advocate General is of the opinion that meritorious grounds for clemency action under Article 74 have been established but that a new trial is not indicated, he may transmit the petition and related papers to the Secretary of a Department with his recommendations in the premises for remission, suspension, or for the substitution of an administrative form of discharge for a discharge or dismissal heretofore executed.

Time allowed for petition.--Another difference between these two sections is the time permitted for a petition. Under section 12 a petition may be presented within one year of final action on the record on appellate review, or at any time before 31 May 1952, whichever is the later date. Under Article 73 the petition must be filed within one year after action by the convening authority.

Who may act on a petition.--Still another difference pertains to who may act on the petition. Under section 12 the Judge Advocate General acts on the petition. Under Article 73 the Judge Advocate General acts, unless the case is before the board of review or the

Court of Military Appeals. If the case is thus under review, the board of review or the Court of Millitary Appeals will act on the petition. One problem under section 12 which is clarified by the Manual is, which Judge Advocate General will act on the petition with respect to offenses committed by persons who were members of the Army Air Corps when it was part of the Army during World War II, and who will act on Coast Guard cases when the Coast Guard is part of the Navy. In paragraph 110c it is stated that the Judge Advocate General of the Air Force will act on petitions of persons who were members of the Air Corps, the Army Air Forces, or the United States Air Force at the time of trial. Petitions submitted by those members of the Coast Guard who were serving in the Coast Guard at the time of trial will be acted upon in the department in which the Coast Guard is serving at the time the petition is submitted.

Conduct of new trials.--Most of what I have discussed up to this point is of direct interest to the New Trials Division in the various Judge Advocate Generals' offices. The actual conduct of the trial and action of the convening authority will be of more direct interest to staff judge advocates and legal officers.

Please refer to paragraph 109g, Conduct of the new trial (under Article 73).

First of all, by Presidential Regulation the rule as to the composition of courts for rehearings stated in Article 63b is extended to New Trials. Persons who were members of the court which first tried the case are not eligible to sit as members on a new trial. An accused may not be tried for any offense of which he was found guilty on the first trial and -- because this is an extraordinary remedy - it is also stated that no new offense may be added for trial in the new trial. Finally the sentence adjudged may not exceed the sentence adjudged upon the former trial. In this respect the military rule is more lenient than that of Federal courts in which there have been some cases where an accused person was sentenced to death upon a new trial, although the sentence he received on the original trial was to life imprisonment. The limitations on membership, offenses which may be tried, and sentences which may be imposed are equally applicable to new trials under Article 73 and section 12.

Now we come to an important difference. This involves whether an accused must be credited with executed portions of the original sentence on the execution of the new sentence. As I have indicated earlier, the general rule in Federal courts is that the granting of a new trial vacates the original sentence and the new trial may be held without any limitations based on the original sentence. The accused waives double jeopardy and may receive a more severe sentence than that adjudged originally. The entire sentence may be executed

anew. This was also the view of the Judge Advocate General Office of the Army, except that under Article of War 53, as construed by him, the new sentence might not exceed the original sentence adjudged. However, the accused might be required to serve the entire sentence adjudged on a new trial. The time served under a previous sentence was considered for clemency only. This rule is carried over with respect to new trials under section 12.

With respect to new trials as to offenses committed after the Uniform Code of Military Justice goes into effect, consideration of Article 75a was required. This article provides:

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

In the report by both the Senate and House Committee relative to Article 75a the following explanation is made:

> "If a new trial or rehearing is ordered, restoration is to be made in regard to such part of the original sentence as is not adjudged upon the new trial or rehearing."

Congress evidently contemplated that the executed portion of a sentence may be included in a new sentence. Since restoration must be made as to such part of the original sentence as is not adjudged on a new trial, it follows, by necessary implication, that Congress intended the accused to be credited with any executed portion of the original sentence in determining how much of a sentence adjudged at the new trial is actually to be executed.

This brings us to the question of who should do the crediting, - the court, the convening authority, or the persons charged with the administrative execution of sentence?

If the court were to do the crediting in its sentence, many absurd situations might arise. Suppose that an accused has served all of his original sentence and, in order to vindicate his honor, he asks for, and receives, a new trial. He is again convicted. If the court were to do the crediting in its sentence no sentence could be adjudged, and it would be impossible to ascertain what the court considers an appropriate sentence. Consequently paragraph 109g(3) provides that the court will adjudge whatever it deems to be an appropriate sentence for the offense and that it should not take into consideration any credit for the prior execution of the sentence.

Consideration was given to requiring that the convening authority should compute the credit to which the accused might be entitled. It was felt that this would involve consideration of many fairly complicated problems which could be solved only by access to all of the accused's personnel records. For example, the convening authority would have to ascertain whether or not the accused had been absent in escape during the prior execution of a sentence to confinement; or whether there was any other inoperative time. Questions of abatement for good time would enter into the computation. He would have to ascertain just how much of a forfeiture had or had not been collected. These complications ruled out crediting by the convening authority. This left only the persons charged with the duty of executing the new sentence - who usually have ready access to all pertinent records. (See par. 109l)

Action of convening authority and secretary of a department.-- You will recall that with respect to original sentence, and sentences adjudged on rehearings, that the officer who takes final action on the record will restore all rights, privileges, and property affected by any sentence which has been disapproved or set aside. When we come to the matter of new trials we find that the Secretary of a Department is the only authority competent to give relief with respect to an executed dishonorable discharge or bad conduct discharge. He, alone, has the power under Article 75 to substitute an administrative discharge for an executed punitive discharge. He has similar powers with respect to an executed dismissal, and the President alone has power to reappoint a dismissed officer under Article 75c. Therefore, it appears that a good deal if not all of the restoration must, by law, be effected by the Secretary of a Department or by the President. Restoration with respect to other portions of a sentence may present fairly complicated problems which require access to departmental records. Therefore, the Manual provides in paragraphs 109h to k:

a. The convening authority will not order any portion of a sentence adjudged upon a new trial into execution although he will approve or disapprove the sentence, in whole or in part, as in other cases,

b. Irrespective of the sentence or the type of court which imposed it the record of trial of a new trial will be sent to the Judge Advocate General's Office,

c. Final action will be taken by the Secretary of the Department, and

d. Orders of execution, restoration, etc. will be effected as a result of the action of the Secretary or the President, and will be promulgated by Departmental orders.

Sentences adjudged under section 12.--Our next problem is, what is the crediting requirement under Section 12? In paragraph 110h the principles of paragraphs 109g(1) and (2) are made applicable to new trials under section 12 but not the principles of 109g(3). Thus the rule applicable under Article of War 53 is carried forward to section 12 under the authority of section 4 of the act, which provides that:

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

If you will turn back to paragraph 81b you will notice that since the accused is not entitled to mandatory credit, the court upon a new trial under section 12, may consider the previous execution of the sentence as a matter in mitigation.

In paragraph 110i it is stated that the convening authority on a new trial under section 12 may also consider the executed portion of the original sentence as a matter in mitigation. He will not, however, order any such sentence into execution. Here again the Secretary of the Department will take the final action.

Right Of Dismissed Officer To Trial By Court-Martial

Paragraph 111 is concerned with a very rare situation. In section 10 of the Act there are reenacted the provisions of Article of War 118 with respect to the President's power, in time of war, to dismiss an officer.

Article 4 of the Code stems from the old RS 1230. The revised statute provided that an officer dismissed by order of the President in time of war had the right to demand a court-martial. If the court-martial did not adjudge dismissal or death, or if the President failed to convene a court within six months, the dismissal became void.

In the few instances when RS 1230 was invoked the courts cast grave doubt as to its constitutionality. Under Article II, section 12 of the Constitution, the President, with the advice and the consent of the Senate, was given the power to appoint officers of the United States. RS 1230 purported to give a court-martial the power to appoint an officer. Moreover if no court martial was convened, an

appointment would purportedly have been effected by operation of law. The Supreme Court consistently avoided the constitutional question whenever the problem was presented by finding that a dismissed officer, who filed a claim for pay, was not entitled to pay since his position vacancy had been filled by a new appointment before he could claim relief under RS 1230. Sometimes the Supreme Court went so far as to say that the former officer was guilty of laches in waiting as long as three months to apply for a court-martial. See Wallace v. United States, 55 Ct Cl, 369; affirmed 257 U.S. 541.

Article 4 of the Code is consistent with the Constitution in that it does not purport to reappoint such a dismissed officer to his commissioned status either by action of the court-martial or by operation of law. It merely provides that if the President fails to convene a court-martial, or if a court-martial acquits the accused, or adjudges a sentence less than dismissal or death, the Secretary shall substitute for the dismissal an administrative form of discharge. If the dismissed officer is to get back on the rolls at all the President alone may reappoint him. Notice that upon any such reappointment the dismissed officer becomes an inferior officer of the United States because Congress did not require that his appointment be made with the advice and consent of the Senate. But the officer won't mind his inferior status very much because he will get back such rank as the President thinks he would have attained had he not been dismissed, and he will be entitled to all back pay and allowances.

Conference No. 8

INSANITY

Conducted by
LT. COL. WALDEMAR A. SOLF

References: Chapter XXIV, Paragraphs 120 through 124
Chapter X, Paragraph 57
Chapter XXVII, Paragraph 89c(2)

Matters dealing with insanity are becoming increasingly more popular in criminal law and court-martial practice. I don't know whether criminologists or psychiatrists are in a better position to explain why there is such a rising incidence in mental instability, but whatever the reason may be, it was thought of sufficient importance in the writing of the 1949 Manual to devote an entire chapter to this subject.

120a Insanity as used in this chapter is defined as pertaining to two conditions:

1. Lack of mental responsibility, that is inability to distinguish right from wrong or inability to adhere to the right. This affects the question of guilt or innocence.

2. Lack of mental capacity, that is inability to understand the nature of the proceedings and intelligently to conduct or cooperate in the defense of the case. This affects the fairness of the trial.

120b Lack of mental responsibility.--This paragraph was based upon paragraph 110b, MCM 1949. The standard for determining mental responsibility remains unchanged insofar as the Army, Air Force, and Coast Guard are concerned, but the irresistible impulse test is new to the Navy. However, the discussion has been somewhat expanded to clarify the following conditions inherent in the standard:

1. The inability to distinguish right from wrong or to adhere to the right must be the result of mental (as distinguished from moral) defect, disease, or derangement.

2. The inability to distinguish right from wrong or adhere to the right must be complete and not merely partial.

The first proposition was thoroughly discussed in the 1949 Manual. The weight of authority in military as well as civil cases is that the defense of insanity with respect to lack of mental responsibility is available only where the mental condition is the result of disease, destruction, or malfunction of the mental functions as contrasted with the moral or character functions of the nervous system. This distinction becomes important when one considers the numerous psychopathic cases in which the defense of irresistible impulse might be raised. Many psychiatrists do not hesitate to testify that a sex psychopath or any person subject to criminal tendencies cannot resist--or has tremendous difficulty in resisting--the impulse which leads him to commit a sex or other type of offense. The explanatory provisions in MCM 1949 have been of great help in keeping psychiatrists and courts from applying the irresistible impulse test to criminals who are merely antisocial.

The second proposition pertaining to the rule that mental irresponsibility must be complete requires further elaboration. Traditionally it has been stated that to constitute irresponsibility, a mental disorder must completely deprive the accused of ability to distinguish right from wrong or to adhere to the right. Mental disease, as such, is not always sufficient to constitute lack of mental responsibility. The right or wrong test is derived from Daniel M'Naghten's case (1843), 8 English Reprint 718, in which the House of Lords held that the defense of insanity was available only when the accused, within the framework of his insanity, believed that he was doing a lawful act. The example used in the text was derived from the M'Naghten case. It shows that insanity is a defense when the accused, laboring under a delusion, kills in what he believes to be self-defense, but not when his delusion causes him to kill in revenge for some imagined injury to his reputation. Thus a man might be a paranoid and still be criminally responsible if he knows his acts are unlawful and if he can resist the impulse to commit the unlawful act.

Heretofore the Navy did not recognize the defense of irresistible impulse. The Army, Air Force, and Coast Guard, on the other hand, recognized that a truly irresistible impulse which is a result of mental disease is a defense. Colonel Winthrop recognized this defense in 1898. See pages 294 to 296, Winthrop's Military Law and Precedents. The Federal courts have also recognized the defense. In Smith v. United States, 36 F. 2d 548, the Court of Appeals for the District of Columbia reversed a murder conviction in which the trial court had failed to instruct the jury as to the irresistible impulse test:

> "We think the charge erroneous in point of law in that it ignores the modern well established doctrine of irresistible impulse. The English rule, followed by the American courts in their early history and, still adhered

to in some States, was that the degree of insanity which one must possess at the time of the commission of crime in order to exempt him from punishment must be such as to distinctly deprive him of understanding and memory. This harsh rule is no longer followed by the Federal courts or by most of the State courts. The modern doctrine is that the degree of insanity which will relieve the accused of the consequences of a criminal act must be such as to create in his mind an uncontrollable impulse to commit the offense charged. This impulse must be such as to override reason and judgment and obliterate the sense of right and wrong to the extent that the accused is deprived of the power to choose between right and wrong. The mere ability to distinguish right from wrong is no longer the correct test either in civil or criminal cases where the defense of insanity is interposed."

The irresistible impulse test was assumed by the Supreme Court to be part of the correct standard of mental responsibility in Fisher v. United States, 328 U.S. 463.

You will find a very good discussion of the whole subject of insanity in the sense we are using the term in a joint Army and Air Force publication, TM 8-240 and AFM 160-142, Psychiatry in Military Law. This pamphlet will guide both military lawyers and military psychiatrists along the lines of the approved doctrines. In connection with the irresistible impulse test this pamphlet, at page 5, states a very useful rule of thumb which should, however, be applied with caution:

"If the medical officer is satisfied that the accused would not have committed the act had there been a civil or military policeman at his elbow, he will not testify that the act occurred as a result of an 'irresistible impulse.' No impulse that can be resisted in the presence of a high risk of detection or apprehension is really very 'irresistible.'"

120c Mental capacity at time of trial.--This paragraph discusses briefly mental capacity. Mental capacity pertains only to the accused's ability to understand the nature of the proceedings and to participate intelligently in his defense. It does not go to the question of guilt or innocence, but merely to the capacity to stand trial. Therefore, an accused should not be acquitted solely because he lacks mental capacity. Instead, the proceedings should be abated.

121 Inquiry before trial.--If it appears to anyone connected with pending charges that there is reason to believe that the accused is or was insane, the matter should be investigated, and if possible disposed

of, before trial. A report should be made through appropriate channels to the commander who is in a position to direct or request an examination by a psychiatrist or by a board of medical officers. If a board is used at least one member should be a psychiatrist.

The board or the psychiatrist should be furnished all necessary data pertaining to the offense and should be fully informed of the reasons for doubting the accused's sanity. The report should include answers to the three questions propounded in paragraph 121 but it should not ordinarily be limited to the "Yes" or "No" answers to those questions. Insofar as Army and Air Force psychiatric reports are concerned the report should follow the form prescribed in Section IV, paragraph 18 of TM 8-240, AFM 160-42. It is particularly important that this report be complete because the factual observations of the psychiatrist contained in the report are admissible under the official records and business entry exceptions to the hearsay rules whereas the opinions of psychiatrists including the answer to the three questions stated in paragraph 121 are not generally admissible. Of course, recitals of previous criminal acts of the accused and statements of witnesses as to the circumstance of the offense charged do not come within these exceptions to the hearsay rule so as to allow their reception in evidence as a part of the report (MCM 1951, par. 144d).

It is to be noted also that an examination similar to that discussed in this paragraph may be requested or ordered at any stage of the proceedings before, during, or after trial.

122a Presumption of sanity; reasonable doubt, burden of proof.--In paragraph 122a there is a discussion of the presumption of sanity and the burden of proof. The burden of proving the sanity of the accused is always on the prosecution, but the accused is presumed initially to be sane and to have been sane at the time of the offense. In the absence of any indication to the contrary, it is not necessary for the court to inquire into the matter of sanity or for the prosecution to introduce any evidence on this issue. When, however, substantial evidence tending to show that the accused is insane or was insane is introduced, the issue of sanity becomes an essential one in the case. But unless such evidence is of such nature that it cannot reasonably be disbelieved, it does not necessarily rebut the presumption of sanity. The court may always consider the presumption of sanity together with all the evidence in the case in arriving at its determination (Davis v. U. S., 160 U.S. 469, 487). If, after considering the evidence and the presumption of sanity, a reasonable doubt as to the mental responsibility of the accused remains the court must find the accused not guilty. If a reasonable doubt as to the mental capacity of the accused remains the court will adjourn and transmit the record so far as it has proceeded to the convening authority.

122b Procedure.--This paragraph deals with procedures to be followed in the determination of the mental issue. The issue of responsibility may be raised either as an interlocutory matter or on the general issue. As an interlocutory matter, it is frequently raised by asking the court to make an inquiry into the accused's mental condition after presenting to the court sufficient evidence to show that the sanity of the accused is an issue in the case. The law officer or the president of a special court-martial rules, subject to objection, whether an inquiry shall be made by the court. If his ruling is objected to, the court votes on the matter (Art. 51b). A tie vote is a determination against the accused (Art. 52c). If after an inquiry is had the law officer or president of a special court-martial rules on the ultimate question of sanity, that ruling is also subject to objection. If the ruling is that the accused lacked mental responsibility and it is not objected to, that ruling amounts to a finding of not guilty and the court need not go through the formality of voting on a finding. If the question of mental responsibility is raised as an interlocutory matter and the law officer feels that the evidence on both sides is substantial he may defer his ruling and leave the decision of the question to the court in connection with its finding of guilt or innocence. His procedure in such a case would be not to sustain the motion to dismiss on grounds of insanity. This points up the proposition that when the question of sanity is resolved against the accused as an interlocutory matter, the court should consider the question of insanity in connection with its findings on the general issue.

Very frequently evidence on the merits has a direct bearing on the issue of sanity. For example, in a murder case a psychiatrist may testify that the accused could not distinguish right from wrong. The court should weigh the opinion against the other evidence in the case which might show that the act of the accused in fleeing from the scene of the crime, or his acts in attempting to conceal the body, or his intimidation of witnesses is strong evidence to the effect that he knew his act to be wrong.

Irrespective of an adverse ruling on an interlocutory question relating to an inquiry by the court into the accused's mental condition, the parties are free to introduce evidence on the issue of sanity on their own motion. Any ruling of the law officer on evidence introduced by the parties on the question of insanity is not subject to objection. It is just like any other ruling on evidence. In this connection it might be well to consider what Mr. Justice Douglas had to say about the accused's absolute right to tender the issue of insanity in Whelchel v. McDonald, 340 U. S. 122:

"* * * we think it plain from the law governing court-martial procedure that there must be afforded a defendant at some point of time an opportunity to tender the issue of insanity. It is only a denial of that opportunity which goes to the question of jurisdiction."

If, as an interlocutory matter, the court finds that the accused is mentally irresponsible the convening authority is precluded from doing anything about it. However, if he disagrees with the court as to a ruling that the accused lacked mental capacity he may return the record to the court with instructions to reconsider the matter and if appropriate proceed with the trial. Similarly, if he finds that the accused's lack of capacity was temporary and that he has recovered his capacity, he may likewise return the record to the court.

122c Evidence.--This paragraph deals with the evidentiary aspect of the inquiry into the accused's mental condition. The 1949 Manual provided a special rule permitting the introduction of opinions as to the mental conditions found in a report of a board of medical officers, provided the officers making the report were made available for questioning by the prosecution, the defense, or the court. This rule did not accomplish its purpose of facilitating trials since the report was not admissible unless the members making it were available for call as witnesses. If either side objected to the introduction of the report it was necessary to grant a continuance, thus delaying the orderly disposition of trials. For this reason the 1951 Manual provides that opinions in the report of medical officers are not admissible in evidence as exceptions to the official record or business entry rules. In this regard we are following the rule in the Federal courts which have excluded such documentary opinion evidence coming both from Army and Navy medical records, whether offered as business entries (New York Life Insurance Company v. Taylor, 147 F. 2d 294) or as official records (England v. U. S., 174 F. 2d 466). The Navy, heretofore, has also adhered to the stricter view recognizing that opinions as to mental conditions are not such precise determinations of fact as would permit reception of a diagnosis of a more simple physical ailment (CMO #6, 1924, p. 5; CMO #1, 1949, p. 5). It is to be noted, however, that the complete report might be introduced by stipulation, or, in a proper case, as a memorandum of past recollection recorded.

The text also provides that, on the preliminary issues of whether an inquiry into the accused's mental condition should be made by the court, the law officer or the president of a special court-martial may examine the entire report. If the ruling on this question is objected to, the court may examine the entire report for the same limited purpose.

123 Effect of mental impairment or deficiency upon sentence.--In this paragraph it is provided that the court may consider evidence properly introduced which falls short of raising a reasonable doubt as to the sanity of the accused either as a matter in mitigation or in aggravation of the sentence. One instance of aggravation might be found in the case of a sex psychopath where the interest of society would require that he be confined for as long a period as possible. Similarly, a person with homicidal tendencies should not be given a short term of confinement. On the other hand, if the accused is suffering from a temporary mental or neurological condition which diminishes his ability to adhere to the right the court might consider this as a matter in extenuation. Sometimes a psychoneurosis occasioned by combat conditions which falls short of amounting to insanity would warrant a court in giving the accused a much lighter sentence than the circumstances of the combat offense would otherwise warrant.

124 Action by convening or higher authority.--This paragraph points out that two types of problems may confront the convening authority or higher authority:

> 1. The evidence may be such that he entertains a reasonable doubt as to the accused's sanity. In that event he should disapprove the findings of guilty and the sentence affected by such doubt.
>
> 2. Sometimes the record, or matters appearing outside the record, may suggest that a further inquiry be made into the accused's sanity. In such a case the convening or higher authority should take the action prescribed in paragraph 121, and order a mental examination.

This paragraph makes it clear that the authority reviewing the record is not necessarily affected by a reasonable doubt as to the accused's sanity merely because he directs a further examination in the interest of justice.

Conference 9a

PUNISHMENTS

Conducted by
MAJOR WILLIAM H. CONLEY

References: Chapter XIX, Paragraph 97c
Chapter XXV, Paragraphs 125, 126
Articles 1(5), 12-14, 18-20, 49, 50, 52, 55-58, 63, 71, 106, 118

The first hour of this conference on punishments will be devoted to a general discussion of the limitations on the various types of punishments which courts-martial may adjudge. Chapter XXV does not contain the provisions of the manual pertaining to the basis for determining a proper sentence, the advice of the law officer to the court as to the maximum punishment in a particular case, the procedure for voting and deliberating on a particular case, or the technical forms of sentences, which material is contained, primarily, in chapter XIII, "Matters Related to Findings and Sentence," and appendix 13, "Forms of Sentences."

125 "General Limitations." In every case where the court has found the accused guilty, it is the duty of each member of the court to vote for a legal and adequate punishment without regard to his opinion or vote as to the guilt or innocence of the accused. Once the question of guilt has been determined by the court, each member is required to accept that finding; the only matter left for his consideration is the determination of an adequate and proper punishment. A court which automatically imposed the maximum sentence in every case is not performing its proper and legal function. In this respect, 76a(4), "Sentence--Basis for Determining," provides:

> "Courts will, however, exercise their own discretion, and will not adjudge sentences known to be excessive in reliance upon the mitigating action of the convening or higher authority."

In no case may the punishment adjudged by the court exceed such limits as the President may prescribe pursuant to Article 56.

The prohibition expressed in Article 12 against the confinement of members of the United States armed forces in immediate association with enemy prisoners or other foreign nationals not

members of the armed forces of the United States applies both to pretrial restraint and to post-trial confinement.

Article 12 does not prohibit confinement of our personnel in confinement facilities containing enemy prisoners of war or foreign nationals not members of the armed forces of the United States but it does prohibit the confinement of these categories of personnel in the same cell.

Although an accused, while awaiting the results of trial, may be subject to loss of pay by forfeiture in those cases of a sentence to forfeiture and confinement not suspended, Article 13 prohibits the imposition of any punishment or penalty, other than arrest or confinement, prior to the order directing execution of the sentence.

Until a sentence is ordered into execution, an accused will not be required to observe duties devised as punitive measures, nor to observe training schedules devised as punitive measures, nor to perform punitive labor, nor to wear other than the uniform prescribed by his Service for unsentenced prisoners.

Regardless of his status as a sentenced or an unsentenced prisoner, an accused is always subject to minor punishments, as prescribed in pertinent regulations, for infractions of disciplinary regulations.

Article 55 prohibits both the adjudging of a sentence and the infliction upon a person subject to the code of cruel and unusual punishments.

Because many strictly military duties may properly be required to be performed by prisoners, the new manual provides that "formal military duties" and "duties requiring the exercise of a high sense of responsibility," as contrasted with "military duties" as provided in the Manual for Courts-Martial, 1949, will not be imposed as punishment by courts-martial. Examples of such prohibited duties include assignment to a guard of honor or to guard or watch duties.

With respect to sentences including confinement on bread and water or diminished rations and sentences to solitary confinement, attention is invited to the Morgan Committee Commentary to Article 18, "Jurisdiction of general courts-martial," wherein it is stated:

> "The punishments which may be adjudged are changed from those 'authorized by law or the customs of the service' to those 'not forbidden by this code' because

the law and customs of each of the services differ. Cruel and unusual punishments are forbidden in the code; other punishments which may be adjudged will be made uniform by the regulations prescribed by the President under article 56."

It is pertinent to note that all Navy courts-martial are currently authorized to adjudge both solitary confinement on bread and water and solitary confinement (AGN 30, 35, 64b).

Concerning the cross-references to chapter XXVI, "Non-Judicial Punishment," paragraph 131b(3)(e) contains the provision of Article 15a(2)(e) that authorizes confinement on bread and water or diminished rations for a period not exceeding three consecutive days in the case of an Army or Air Force enlisted person attached to or embarked in a vessel. A sentence to confinement on bread and water or diminished rations or to solitary confinement is prohibited in the case of Air Force or Army personnel but is authorized for Navy personnel.

126 "Miscellaneous Limitations." Punishment as adjudged by the court must be in conformity with the article prescribing the offense. For example, in time of war, death or such other punishment as the court-martial may direct is authorized upon conviction of the offenses denounced in Articles 85 (Desertion), 90(Assaulting or willfully disobeying superior officer), and 113 (Misbehavior of sentinel). However, upon conviction of any of those offenses in time of peace, the court is prohibited from adjudging death but may adjudge any punishment other than death with the exception, of course, of prohibited punishments.

Although the code may expressly authorize the death penalty in a certain case, death cannot be adjudged if the President, pursuant to Article 56, has prescribed a lesser punishment. Similarly, although the code may authorize a much more severe punishment upon conviction of a certain offense, the punishment so authorized cannot be adjudged by the court if the applicable limit of punishment prescribed by the President is less than that prescribed by the code. For instance, upon conviction of peacetime desertion, Article 85 authorizes such punishment other than death as a court-martial may direct. However, the Table of Maximum Punishments imposes limitations on the punishment authorized by the article in that the table provides a maximum punishment of dishonorable discharge, total forfeitures, and confinement at hard labor for three years in an ordinary case of peace-time desertion terminated by apprehension.

Although the death penalty may be authorized but not made mandatory by the code, Article 49f prohibits the court from

adjudging a death sentence if the convening authority has directed that the case be treated as not capital.

Paragraph 92, "Ordering Rehearing," contains that portion of Article 63b which provides, in part:

> "* * * no sentence in excess of or more severe than the original sentence shall be imposed unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings or unless the sentence prescribed for the offense is mandatory (Art. 63b)."

Paragraph 109g(2), "Conduct of new trial," provides that upon a new trial no sentence in excess of or more severe than the original sentence as approved or affirmed shall be adjudged.

The prohibition against the imposition of a sentence to death or dismissal in those cases where the sworn testimony of a court of inquiry is read in evidence pursuant to Article 50 is similar to the present provisions of Article of War 27 and Article 60, Articles for the Government of the Navy. In this respect the commentary to Article 50 provides:

> "The effect of the use of the words 'not capital and not extending to the dismissal of an officer' is that if the prosecution uses a record of a court of inquiry to prove part of the allegations in one specification, neither death nor dismissal may be adjudged as a result of a conviction under that specification. The introduction of the record of a court of inquiry by the defense shall not affect the punishment which may be adjudged."

Because of the frequent lack of facilities whereby a death sentence may be executed, the method of execution will not be prescribed by the court. Whereas the Manual for Courts-Martial, 1949, provides that the method of execution shall be prescribed by the "confirming" authority, the new manual provides that a "sentence to death which has been finally ordered executed will be carried into execution in the manner authorized or prescribed in the service concerned."

With respect to prescribing the method of execution, 88d, "Execution of sentence," provides that:

> "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 being disregarded."

As a result of numerous inquiries whether dishonorable discharge is included in a death sentence, it was determined to insert herein the provision that a dishonorable discharge is by implication included in a death sentence. This rule is predicated upon a series of opinions (JAGA 1946/10582, 28 Feb 1947; SPJGA 1945/9511, 13 Sep 1945) including a case (CM 238138, Brewster, 24 BR 173) wherein the Army Board of Review, in discussing a sentence wherein the accused upon conviction of murder was sentenced to dishonorable discharge, total forfeitures, and death by hanging, stated:

> "Since the death penalty operates per se to dishonorably discharge the soldier * * * that portion of the sentence adjudging dishonorable discharge does not violate Article of War 50½ /which provided that upon a rehearing no sentence in excess of or more severe than the original sentence shall be enforced/ * * *"

Similarly, it was determined that there should be inserted in this same paragraph the rule that when life imprisonment is adjudged the court should also adjudge dishonorable discharge and total forfeitures. Concerning this latter rule, the opinion has been expressed (CM 320408, LaFlore, 69 BR 343) that upon conviction for murder or rape in violation of Article of War 92 it is within the power of the court to adjudge dishonorable discharge and total forfeitures with life imprisonment (CM 244445, Lakas, 2 BR (ETO) 709).

126b, c — The jurisdictional limitations on the types and amounts of punishment which the three classifications of courts-martial may adjudge are again set out in 126b and c (see 14b, 15b, and 16b).

Concerning special courts-martial, Article 18 expressly includes death in those punishments which are beyond the jurisdiction of the court to adjudge. Another new entry is the prohibition against hard labor without confinement in excess of three months.

With reference to summary courts-martial, it is noted that Article 20 includes in the specifically prohibited punishments hard labor without confinement in excess of 45 days and reduces the authorized period of restriction to limits to two months.

Many suggestions were received that provision be made to provide suitable limitations in the new manual to govern punishment of noncommissioned officers by summary courts-martial. It was agreed that the desired protection could be accomplished by providing that in the case of noncommissioned or petty officers

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.

126d Paragraph 126d, "Officers and warrant officers," consists, primarily, of limitations prescribed by the President pursuant to the authority of Article 56.

A court-martial may not sentence either an officer or a warrant officer to be reduced in rank or to bad conduct discharge. The separation from the service of an officer by sentence of court-martial is effected by dismissal; that of a warrant officer is effected by dishonorable discharge. No officer or warrant officer shall be sentenced to confinement or to total forfeitures unless the sentence includes dismissal in the case of an officer or dishonorable discharge in the case of a warrant officer.

In no case shall a sentence to confinement in the case of an officer or warrant officer exceed the maximum prescribed for enlisted persons in the Table of Maximum Punishments. This rule extends to officers and warrant officers the provisions of the table insofar as the limitations on confinement are concerned without specifically including officers and warrant officers as persons who are subject to the table in general. Under the new code, a court-martial is no longer authorized to sentence an officer to be reduced to an enlisted grade. In chapter XX, "Appellate Review--Execution of Sentence," 100c(1)(b) provides that an officer who in time of war or national emergency is reduced to any enlisted grade by virtue of a communtation of a sentence of dismissal may be required to serve for the duration of the war or emergency and six months thereafter.

126e In view of the agreement between the Service representatives to refrain from using the term "general prisoner" in the new manual, that term, as it appears in the 1949 Manual, has been replaced by a reference to "prisoners sentenced to punitive discharge."

Paragraph 126e contains a modification of the Navy procedure concerning the reduction to the lowest enlisted grade by certain sentences. In Army and Air Force procedure, the rule is firmly established that in the case of an enlisted person of other than the lowest pay grade a sentence, which as ordered executed or as finally approved and suspended, includes either punitive discharge, confinement, or hard labor without confinement, immediately upon being ordered executed or upon being finally approved and suspended reduces the enlisted person to the lowest enlisted pay grade. The

basis for this rule is that the status of a prisoner sentenced to punitive discharge, confinement, or hard labor is incompatible with the honorable status of a noncommissioned officer and that it is prejudicial to discipline that an enlisted man should be subjected to a degrading punishment while still holding the office of a noncommissioned officer. To use a Navy example, in the case of a petty officer 2d class, any court-martial sentence which, as ordered executed or as finally approved and suspended, includes either (1) dishonorable discharge, (2) dishonorable discharge suspended on a period of probation, (3) bad conduct discharge, (4) bad conduct discharge suspended on a period of probation, (5) confinement, (6) confinement suspended on a period of probation, (7) hard labor without confinement, or (8) hard labor without confinement suspended on a period of probation, automatically, upon being ordered executed or finally approved and suspended, reduces the petty officer to seaman recruit, with pay commensurate with his cumulative service.

If a court were to sentence an E-5 (sergeant) to be confined at hard labor for three months and to be reduced to the grade of E-4 (corporal), the automatic reduction to the lowest pay grade rule would apply upon the sentence being ordered executed or finally approved and suspended. In case of such a sentence an appropriate action on the part of the convening authority would be to return the record to the court for revision.

The provision that in case of such an automatic reduction "the rate of pay of the person so reduced shall be commensurate with his cumulative service" is predicated upon pertinent provisions of the Career Compensation Act of 1949 (act 12 Oct 1949, 63 Stat. 802) which, in providing the method for computing the basic pay of enlisted personnel of the uniformed services, prescribes eight pay grades, E-1 through E-7, the E-1 grade being subdivided into two classifications: (1) under four months' service, and (2) over four months' service. Thus the provision of the manual providing that an enlisted person with over four months' service can be reduced only to the applicable classification of the lowest pay grade, that is, with pay for over four months' service, conforms to the requirements of the Career Compensation Act, supra, and to the policy determination in the matter.

The authority of a court-martial to sentence an enlisted person to be reduced to an inferior or intermediate grade is firmly established in Navy procedure but is new to the Air Force and the Army. In a memorandum opinion dated 2 May 1950, the

Chief, Military Affairs Division, Office of the Judge Advocate General (Army), after tracing the historical development of the prohibition against reduction to an inferior or intermediate grade, stated that previous opinions which raised objections to such a reduction had been based upon administrative prohibitions or, in the case of reduction by sentence of a court-martial, upon an express prohibition in the manual or an omission of such punishment from the category of authorized punishments. It was noted that the new code authorizes courts-martial to adjudge any punishment not forbidden by the code, that reduction to an intermediate or inferior grade is not among the punishments prohibited by the code, and that reduction to the next inferior grade is expressly authorized as a non-judicial punishment under Article 15. It was concluded that as the purpose of the revised wording of Articles 18, 19, and 20 was to obviate differences in authorized punishments, which differences were based on the varying laws and customs of the Services, no legal objection was perceived to implementing the articles of the code by regulations prescribed by the President establishing reduction to an intermediate or inferior grade as a punishment authorized by the Congress.

The provision concerning reduction to an inferior or intermediate grade does not prohibit reduction to the lowest grade in an appropriate case.

126f Any court-martial may adjudge a reprimand or an admonition (126f) as punishment upon any person subject to the code, but the court will not specify the wording of the reprimand or admonition which, as provided in 89c(8), will be included in the action of the convening authority.

126g Except that restriction to the limits (126g) will not be adjudged in excess of two months (as contrasted with the three month limitation provided in 116f, MCM, 1949), there is no limitation either as to the court-martial which may adjudge this punishment or as to the persons subject to the code upon whom it may be imposed. An accused is never exempt from performing his military duties because of a sentence to restriction.

126h Forfeitures, as such, are specifically provided as authorized punishment in Articles 15, 19, and 20. The portions of this chapter concerning forfeitures, fines, and detention of pay consist primarily of pertinent general principles and a minimum of regulatory material.

126h(1) No punishment--whether it be death, dismissal, dishonorable discharge, bad conduct discharge, or confinement--automatically results in the forfeiture or deprivation of any pay or allowances. If the court intends to adjudge a forfeiture, fine, or detention

of pay, it must be adjudged in express terms. Loss of pay must be stated in dollars, or dollars and cents, not in fractions of months' or days' pay. A sentence to forfeit "10 days' pay" or to forfeit "two-thirds of one months' pay" would be improper.

The jurisdiction of courts-martial being entirely penal or disciplinary, they have no power to adjudge the payment of damages or the collection of private debts. A court-martial has no power to assign or appropriate the pay of an accused to reimburse the Government or any agency or any person, or to require an accused to pay any debt or to satisfy any obligation.

126h(2) Any military person convicted by any court-martial may be sentenced to forfeiture of pay or, when appropriate, to pay and allowances. However, allowances are forfeited only when the sentence includes forfeiture of all pay and allowances; such a penalty will be adjudged only when the accused is also sentenced to punitive discharge or dismissal. An approved sentence to forfeiture operates to relieve the Government, to the extent expressly provided in the sentence, of its obligation to pay the amount forfeited (JAGA 1948/3826, 5 May 1948, and cases cited therein). Unless total forfeitures are adjudged, the amount of the forfeiture must not only be expressly stated in terms of dollars and cents per month or day, but the number of months or days for which the forfeiture is to run must also be expressly stated in the sentence. See appendix 13, "Forms of Sentences," form 4. A lump sum forfeiture results in a forfeiture of not more than two-thirds of the accused's pay for one month. For example, in the case of an enlisted person receiving $75 a month, a sentence to forfeit an amount equal to two-thirds of his pay for six months expressed as a lump sum--i.e., "to forfeit $300" rather than "to forfeit $50 per month for 6 months"--results in a forfeiture of only $50. Similarly, a sentence to be confined at hard labor for six months and "to forfeit $50 per month," is indefinite as to the amount of forfeiture which should have been specifically expressed as "$50 per month for 6 months."

Subject to the provisions of Article 57a, a forfeiture applies to pay and allowances which accrue during the enlistment or other engagement or obligation of service in which the accused is serving at the time the sentence is adjudged.

Army and Air Force personnel will note that the provision in 116g of the 1949 Manual which provides that in the case of an enlisted person a general court-martial "may not adjudge a forfeiture of more than two-thirds pay per month for twelve

months unless it also sentences the accused to dishonorable or bad conduct discharge" has been changed to reduce the "twelve months" to "six months."

Articles 19 and 20 restrict special and summary courts-martial from adjudging forfeitures in excess of two-thirds pay per month for a period exceeding six months, and two-thirds of one month's pay, respectively.

In computing the maximum amount of forfeiture in dollars and cents, the basic pay of the accused (of the reduced grade if the sentence carries a reduction) plus sea or foreign duty pay (if no confinement is adjudged) will be taken as the basis of computation. The phrase "maximum amount of forfeiture" as used in this rule applies to the total amount of forfeiture resulting from the sentence (JAGJ 1951/1652, 27 Feb 1951).

Unless dishonorable or bad conduct discharge is adjudged, an enlisted person's monthly contribution to family allowance or basic allowance for quarters (Class Q allotment) will be deducted prior to computing the net amount of monthly pay subject to forfeiture. The phrase "net amount of pay subject to forfeiture" refers to the rate per month at which the forfeiture may be adjudged and thereby differs from the phrase "maximum amount of forfeiture" which, as has been stated, refers to the total amount of forfeiture resulting from the sentence.

The maximum amount of forfeiture per month to be adjudged in the case of a partial forfeiture will be computed by considering the accused's base pay at his reduced grade and for his cumulative years of service, less the amount the accused, at his reduced grade, is required by law to contribute to the Class Q allotment (JAGJ 1950/6513, 12 Dec 1950).

Regarding the proper method of computing one day's pay for the purpose of forfeiting an enlisted person's pay, the question was asked whether one day's pay is to be considered one-thirtieth of his monthly pay or one-thirtieth of his monthly pay less any deduction for Class Q allotment. In the opinion (JAGJ 1946/7955, 26 Jan 1951) it was pointed out that the Army policy of not subjecting an enlisted person's family allowance contribution to forfeiture merely provides a limitation on the maximum forfeiture per month, that is, that a forfeiture in any month may not exceed two-thirds of the enlisted person's pay less his monthly contribution to family allowance, and has no application in determining a day's pay as that term is used in the Table of Maximum Punishments. Thus, the final provision of the

directive that unless dishonorable or bad conduct discharge is adjudged the monthly contribution of an enlisted person to family allowance or to basic allowance for quarters will be deducted should be interpreted as meaning that such allowances shall be deducted prior to computing the net amount of monthly pay subject to forfeiture. However, the total amount of forfeiture that can be collected in any one month must not exceed two-thirds of the difference between monthly pay and the Class Q allotment (JAGJ 1951/1652, 27 Feb 1951).

126h(3) Whereas a forfeiture deprives the accused of the specified amount of his "pay," a fine (126h(3)) makes him pecuniarily liable in general to the United States for the amount specified in the sentence, regardless of whether the accused receives any pay. Any court-martial has power to adjudge a fine in lieu of a forfeiture in every case where punishment is authorized as a court-martial may direct, except that as provided in Section B, 127c, in the case of an enlisted person a fine will not be adjudged in lieu of a forfeiture unless a punitive discharge is also adjudged. A fine, rather than a forfeiture, ordinarily is the proper monetary penalty to be adjudged against a civilian subject to the code. As provided in Section B, 127c, a fine should not ordinarily be adjudged against a member of the armed forces unless the accused was unjustly enriched by means of an offense of which he is convicted. In such a category, of course, would be the finance officer who absconds with government funds, and the black marketeer. [As provided in Article 48, a fine may always be imposed as punishment for contempt. Concerning the imposition of additional confinement in the alternative upon failure to pay the fine, the total period of confinement adjudged (including the alternative confinement added for failure to pay the fine) shall not exceed the jurisdictional limitation of the court. For example, in the case of a special court-martial the combined periods of the sentence to confinement and the alternative confinement upon failure to pay the fine shall not exceed six months.]

126h(4) Detention of pay is not specifically authorized by the code as a type of punishment, as it was in Article of War 14.

Paragraph 127b, "General limitations," limits any court, in a single sentence, from adjudging against an accused either (1) detention of pay at a rate greater than two-thirds of his pay per month, or (2) detention of pay in an amount greater than two-thirds of his pay for three months.

126h(5) Paragraph 126h(5), which pertains to the effective dates of sentences to forfeiture, fine, or detention of pay, differs from Article 57a in one particular in that it provides that in an approved sentence of forfeiture which includes confinement not suspended, the forfeiture "will" apply, while the article provides that the forfeiture "may" apply, to pay and allowances becoming due on and after the date the sentence is approved by the convening authority. This change was made in order to give full force and effect both to Article 57a and to Article 13, the commentary to which provides:

> "It is felt that a person who has been sentenced by court-martial and is in confinement, which counts against the sentence, should not draw full pay for the period between the date of sentence and the date of final approval."

The effective date of a forfeiture is subject to the convening authority's power to defer or suspend the effective date of the forfeiture by providing specifically therefor in his action as provided in 88e(2)(c).

Article 57a further provides that no forfeiture shall extend to any pay or allowances accrued before the date the sentence is approved by the convening authority. A sentence to forfeiture other than forfeiture combined with confinement not suspended, and a sentence to fine or detention of pay becomes effective on the date the sentence is ordered executed (Art. 57c).

126i As provided in 126i, sentences to suspension from rank, suspension from command, and suspension from duty are authorized only in the case of Army or Air Force personnel.

Sentences to loss of rank or loss of promotion are not authorized in any case. However, in time of war or national emergency a sentence of dismissal may be commuted to reduction to any enlisted grade as provided in Article 71b and 100c(1)(b).

Sentences to loss of numbers, lineal position, or seniority are not authorized in the case of Army or Air Force personnel.

126j In addition to providing that any person subject to trial by court-martial may be sentenced to confinement at hard labor in an appropriate case, 126j reiterates that confinement at hard labor will not be adjudged in the case of an officer or warrant officer unless the sentence includes dismissal or dishonorable discharge, as appropriate, and that a sentence to confinement does not automatically result in any fine or

forfeiture. It is contrary to policy that an accused should serve a sentence as serious as confinement at hard labor without some loss of pay being adjudged, unusual circumstances excepted.

In every instance in which confinement at hard labor is authorized in the Table of Maximum Punishments, forfeiture is also authorized. The table prescribes limitations on the periods for which confinement may be adjudged in the case of enlisted persons, and 126d provides that in no case shall a sentence to confinement in the case of an officer or warrant officer exceed the maximum prescribed for enlisted persons by the table.

A general court-martial cannot adjudge more than six months' confinement in the case of an enlisted person without also sentencing him to dishonorable or bad conduct discharge (127b). Pursuant to Articles 19 and 20, neither a special nor a summary court-martial can adjudge confinement in excess of their jurisdictional limitations, i.e., six months and one month, respectively (126c).

The place of confinement will not be designated by the court. In 93, "Place of confinement," it is provided that the authority who orders a sentence to confinement into execution shall designate the place of confinement in accordance with pertinent departmental regulations. See also 89c(5).

Article 57b requires that a sentence to confinement begin to run on the date it is adjudged, even though the accused is not actually in confinement, but that periods during which the sentence to confinement is suspended shall be excluded in computing the service of the term of confinement. As provided in 97c, "Interruptions of execution of a sentence," a sentence to confinement, hard labor without confinement, restriction to limits, deprivation of privileges, or suspension from rank, command, or duty is continuous until the term expires, with certain exceptions which include (1) delivery under Article 14 to civil authorities of a person undergoing a sentence of court-martial, provided conviction in a civil tribunal results after such delivery, and (2) periods during which the person undergoing a sentence of a court-martial is absent without authority, or is absent under a parole which proper authority has suspended or 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 a petition for a writ of habeas corpus under a court order which is later reversed by a competent tribunal.

Another point to be noted in this respect is the method of executing multiple sentences to confinement. When the proposed joint regulation, "Military Sentences to Confinement," was reviewed, it was recommended that the draft regulation be changed to provide that:

> "When a prisoner serving a sentence to confinement adjudged by a court-martial on or after 31 May 1951 is convicted by a court-martial for another offense and sentenced to a term of confinement, the subsequent sentence, upon being ordered into execution, will begin to run as of the date adjudged and will interrupt the running of the prior sentence. After the subsequent sentence has been fully executed, the prisoner will resume the service of any unremitted interrupted sentence to confinement. In determining priority of sentences within the meaning of this paragraph if the sentence was adjudged before 31 May 1951, the date the sentence was ordered executed will be used; if the sentence was adjudged on or after 31 May 1951, the date the sentence was adjudged will be used. When the suspension of a sentence is vacated, the unexecuted portion of the sentence to confinement will begin to run on the date the vacation of the suspension becomes effective, and the execution thereof will interrupt the running of any other sentence to confinement which the prisoner may be serving at the time."

With reference to those cases in which one or more sentences to confinement is adjudged prior to 31 May 1951, it was recommended that the proposed regulation be changed to provide:

> "* * * A sentence which includes confinement without discharge, followed by a sentence including both confinement and discharge, whether or not the discharge is suspended, will be regarded as having terminated upon the date the sentence including discharge takes effect, leaving to be executed only the discharge and confinement adjudged by the second sentence. A prisoner in confinement under sentence including discharge, whether or not the discharge is suspended, who receives a subsequent sentence or sentences to confinement adjudged prior to 31 May 1951, either with or without discharge, will serve all of the sentences consecutively. A prisoner in confinement under a sentence including discharge, whether or not the discharge is suspended, who receives a subsequent sentence or sentences to confinement, adjudged on or after 31 May 1951, will, subject to any limitation as to the designation of the place of confinement,

serve all of the sentences in the manner prescribed in paragraph 3b(1)" /which provides for the mentioned interruption of the running of the prior sentence/.

Confinement without hard labor will not be adjudged. Article 58b provides that omission of the words "hard labor" in any sentence of confinement shall not be construed as depriving the authority executing the sentence of the power to require hard labor as a part of the punishment.

126k A sentence to perform hard labor without confinement (126k) requires the accused to perform hard labor in addition to his regular duties for the number of months or days expressly provided in the sentence. It may be adjudged only in the case of an enlisted person, and in no case can any court adjudge hard labor without confinement in excess of three months--the jurisdictional limitation of a summary court is 45 days. The accused is not to be excused from his assigned duties so that he may perform the hard labor, the very purpose of the sentence being to exact work of a laborious nature from him during such time as may be available after he has completed his other tasks. Upon completion of the daily assignment, the accused should be permitted to take leave or liberty to which he properly is entitled.

Conference 9b

PUNISHMENTS

Conducted by
MAJOR WILLIAM H. CONLEY

References: Chapter XIII, Paragraphs 76a, 88b
Chapter XXV, Paragraph 127c
Articles 48, 56, 77-134
Appendix 13

This conference will include a discussion of the second general subdivision of chapter XXV, the maximum limits of punishments prescribed by the President pursuant to Article 56, the principal portion of which consists of the Table of Maximum Punishments.

127a In 127a, "Maximum Limits of Punishments--Persons and Offenses," cognizance is again taken of the fact that all of the services do not use the term "general prisoner" and, as in 126e, that term has been superseded here by the term "prisoners sentenced to punitive discharge." Recognition was also taken of the fact that the current provisions of NC & B, sections 451 and 475, concerning limitations of punishments prescribed by the President apply to commissioned and enlisted personnel alike. It was noted that Article 56 is based on Article of War 45 under which, in the 1949 Manual, the Table of Maximum Punishments applies, as such, to "soldiers and general prisoners." In view of the foregoing and because officers and warrant officers are now subject to trial by special and summary courts-martial and to non-judicial punishment under Article 15, it was determined that the new manual should apply specifically to enlisted persons and to prisoners sentenced to punitive discharge, but that it should be used as a guide in determining punishment in the case of officers, warrant officers, air cadets, midshipmen, and civilians subject to military law, except that as provided in 126d in no case shall a sentence to confinement in the case of an officer or warrant officer exceed the maximum prescribed for enlisted persons by the Table of Maximum Punishments, and except that as provided in section B, 127c, a fine may always be imposed upon any member of the armed forces as punishment for contempt.

127b General limitations.--This paragraph specifies that the limitations of 127 must be read in conjunction with all other

applicable limitations. It is reiterated that special courts-martial cannot adjudge confinement in excess of six months nor forfeiture of pay in excess of two-thirds pay per month for six months, and that summary courts-martial may not adjudge sentences to confinement, hard labor without confinement, or reduction except to the next inferior grade in the specified cases.

Army and Air Force officers will note that the 12 month ceiling provided in the 1949 Manual has been reduced to six months both as to the maximum amount of forfeiture and as to the period of confinement that may be adjudged in a sentence that does not include a dishonorable or bad conduct discharge. The six months period of confinement limitation does not apply in the case of a prisoner whose punitive discharge has been executed, a civilian, or a prisoner of war.

The final subparagraph of 127b is a paraphrase presentation of that portion of the act of 22 May 1928 (45 Stat. 698), as amended (10 U.S.C. 875a; M.L., 1949, sec. 1521), which provides that one-third of an enlisted person's pay must be left for his use after the deduction of authorized stoppages and forfeitures.

127c With the exception of those few offenses for which a mandatory or an alternatively prescribed punishment is required, the new punitive articles provide for punishment "as a court-martial may direct." However, by Article 56, the President is authorized to establish limits of punishments for offenses which otherwise would be left to the discretionary determination of the court. By the Table of Maximum Punishments set out in 127c, "Maximum punishments," the President has established such limits for many offenses. The punishment provided in that table for any listed offense is simply the maximum punishment that may be imposed therefor; it is not a required punishment and the court, in any case, may adjudge less than the limit set out in the table for the offense. The limit of punishment provided in the table for an offense is applicable not only to the listed offense but is also applicable to any lesser included offense if the lesser included offense is not specifically listed, and is further applicable to any unlisted offense which is closely related to either. If an unlisted offense is included in a listed offense and is also closely related to some other listed offense, the lesser punishment prescribed for either the lesser included or closely related offense will prevail as the maximum limit of punishment.

For the purpose of achieving a uniformity of sentences as well as affording a substantial protection of the rights of an accused, it is provided that an offense not listed in the table

or not included within a listed offense, or not closely related to either remains punishable as authorized by the United States Code or the Code of the District of Columbia, whichever prescribed punishment is the lesser, or in the absence of any punishment prescribed by those statutes then as authorized by the custom of the service. To obtain instructions for determining the maximum punishment for an offense which is not covered by the table, the court will look to Federal statutes for the basis of punishment, it being recognized that the majority of Federal offenses are listed in Title 18 of the United States Code but that some are listed in various other titles. By requiring a reference to the United States Code or to the Code of the District of Columbia, it is sought to insure that comparable offenses will not be punishable in military law to any greater extent than in civil jurisdictions of the United States.

The provision that the maximum punishment prescribed for an offense should be restricted to those cases in which, due to aggravating circumstances, the greatest permissible punishment should be imposed conforms to subparagraph 76a(2), "Sentence--Basis of determining."

The limits of punishment prescribed by the table are for each separate offense, not for each separate charge. In this connection, 76a(8), "Sentence--Basis for determining," reads:

> "The maximum authorized punishment may be imposed for each of two or more separate offenses arising out of the same act or transaction. The test to be applied in determining whether the offenses of which the accused has been convicted are separate in this: The offenses are separate if each offense requires proof of an element not required to prove the other. Thus, if the accused is convicted of escape from confinement (Art. 95) and desertion (Art. 85)--both offenses arising 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. An accused may not be punished for both a principal offense and for an offense included therein because it would not be necessary in proving the included offense to prove any element not required to prove the principal offense."

For several separate and distinct offenses, even though they be alleged in the same charge, the court, in its discretion, may

adjudge in its sentence the aggregate of the limit of punishment for each separate and distinct offense in a case. For example, if an accused were convicted of resisting apprehension, for which the maximum authorized punishment is bad conduct discharge, total forfeitures, and confinement at hard labor for one year, and is convicted of a subsequent breach of arrest, for which bad conduct discharge, total forfeitures, and confinement at hard labor for six months is prescribed, and is convicted of a still later escape from confinement, for which a dishonorable discharge, total forfeitures, and confinement at hard labor for one year is authorized, all of the offenses being alleged under a single charge in violation of Article 95, the court, in its discretion, would be authorized to adjudge the aggregate of the authorized punishments which, in this example, would be dishonorable discharge, total forfeitures, and confinement at hard labor for two and one-half years.

In determining the maximum punishment for two or more separate and distinct but like offenses against property, values as found in different specifications cannot be aggregated, as if alleged in a single specification, for the purpose of increasing the maximum punishment. For example, if a thief goes into a room and takes property belonging to various persons, there is but one larceny which should be alleged in but one specification and for which the maximum authorized punishment would depend upon the total value of the various articles which were the subject of the one act of larceny. However, if the thief were to steal one article of a value of $25, and at a subsequent time he were to steal another article worth $17.50, and on a third occasion were to steal a different article of a value of $10, and if all three offenses were charged in separate specifications under a single charge in violation of Article 121, Larceny, the court would be prohibited from aggregating the three values, that is, a total of $55, for the purpose of adjudging dishonorable discharge, total forfeitures, and confinement at hard labor for five years, as is authorized in the table upon conviction of larceny of property of a value of $50 or more. Instead, in the example case, the court would be authorized to adjudge dishonorable discharge, total forfeitures, and a total period of confinement at hard labor for two years, that is, one year for the larceny of the $25 article, six months for the larceny of the $17.50 article, and six months for the larceny of the $10 article.

Whereas the Table of Maximum Punishments lists the maximum punishment in terms of punitive discharge, confinement at hard labor, or forfeiture, or a combination thereof, it contains no reference to lesser forms of punishment such as hard labor without confinement, restriction to limits, or detention of pay which

have been demonstrated to be both appropriate and desirable punishment for many minor offenses. Consequently, unless dishonorable or bad conduct discharge is adjudged, the court in its discretion may substitute at certain prescribed rates lesser punishments for those listed in the Table of Maximum Punishments. The prescribed rates are contained in a table, commonly referred to by Army and Air Force personnel as the "Table of Substitutions," which has been redesignated the "Table of Equivalent Punishments." This table is of a special importance in cases of minor offenses in that by substituting such punishments as additional forfeitures, or hard labor without confinement, or restriction to the limits, the accused will be adequately punished for the minor offense and at the same time will be available for the full performance of his regularly assigned duties.

The Table of Equivalent Punishments has been changed to include an entry concerning confinement on bread and water or diminished rations, such entry pertaining to Navy and Coast Guard personnel only.

The court--but not the convening or a higher authority--may, in appropriate cases, make the authorized substitutions in the case of enlisted personnel only.

Army and Air Force personnel will note that the "restriction to limits" entry has been changed from "3 days" to "2 days." In that respect, under Article of War 14 a summary court could not adjudge confinement at hard labor in excess of one month nor could it adjudge restriction to limits in excess of 3 months, a ratio of 1 to 3. Under Article 20, a summary court-martial cannot adjudge confinement at hard labor in excess of one month nor can it adjudge restriction in excess of 2 months, a ratio of 1 to 2. The 1 to 2 ratio also conforms to the illustration in 16b, "Jurisdiction of Summary Courts-Martial," concerning the apportionment of confinement and restriction in one and the same sentence.

The examples given in the discussion of the Table of Equivalent Punishments were selected at random and are by no means all inclusive of the various combinations that may be adjudged.

The use of substituted punishments is subject to various limitations. For example, in the case of a noncommissioned or petty officer above the fourth enlisted pay grade, a summary court-martial cannot by substitution or otherwise adjudge confinement at hard labor or hard labor without confinement. Similarly, no court may, by substituted punishments, exceed its

jurisdictional limitations in regard either to the amount of or to the type of punishment. Thus, if the authorized punishment for an offense were confinement at hard labor for one month and forfeiture of two-thirds pay for one month, a summary court could not adjudge additional forfeitures in lieu of any part of the confinement since it is beyond the jurisdiction of a summary court to adjudge a forfeiture of more than two-thirds of one month's pay. Similarly, if the authorized punishment for an offense were confinement at hard labor for two months and forfeiture of two-thirds pay per month for two months, no court could substitute restriction to the limits for all of the confinement (that is, 2 x 60, or 120 days) since in no case may restriction be imposed in excess of two months.

As provided in 16b, "Jurisdiction of Summary Courts-Martial--Punishments," since confinement and restriction to limits are both forms of deprivation of liberty, only one of those punishments may be adjudged in the maximum amount in any one sentence. An apportionment must be made if it is desired to adjudge both 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 may 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. It is to be remembered that in such a case the period of confinement is served first, the less severe form of deprivation of liberty, that is restriction, is served thereafter.

Experience has indicated the propriety of continuing the instruction that a bad conduct discharge may be adjudged upon conviction of any offense for which dishonorable discharge is authorized by the table.

The purpose of the provision concerning the automatic suspension of limitations on punishment prescribed in the table for violations of Articles 82 (Solicitation), 85 (Desertion), 86 (Absence without leave), 87 (Missing movement), 90 (Assaulting or willfully disobeying superior officer), 113 (Misbehavior of sentinel or lookout), and 115 (Malingering), is to avoid any time lag which would otherwise be occasioned by the requirement of the issuance of a new Executive order to accomplish the suspension as was the case at the beginning of the last war.

An Executive order is currently being processed which, effective 31 May 1951, will suspend the limitations upon punishments for violations of Articles 82, 85, 86(3), 87, 90, 91(1) and (2), 113, and 115, by persons under the command of, or within

any area controlled by, the Commander-in-Chief, Far East, or any of his successors in command.

The descriptions of offenses contained in the table are condensed for convenience of arrangement and are intended solely to identify the portions of the manual and the offenses to which they pertain without defining any such offense. In the case of discrepancy between a heading or description in the table and any other part of the manual, such other part shall be controlling. The description of offenses in the table does not purport to define either the elements of proof of or the form of pleading for the various offenses listed therein.

TABLE OF MAXIMUM PUNISHMENTS

It has been pointed out in the discussion of 126h(2), "Forfeiture," that the term "forfeiture of all pay and allowances," as it appears in the punitive discharge columns of the table, is construed to mean the forfeiture of all pay and allowances becoming due on and after the date the sentence is approved by the convening authority.

At the request of one of the service representatives, it was agreed that for reference purposes all of the punitive articles except Articles 88 and 133 should be noted in the table. Article 88, "Contempt towards officials," and Article 133, "Conduct unbecoming an officer and a gentleman," apply solely to officers, and as the table is not applicable, as such, to officers, those two articles have been excluded.

In those instances where the indicated article provides a mandatory or an alternatively prescribed punishment, for example, death in the case of spying or death or life imprisonment in the case of premeditated murder, the article is listed with a cross-reference to see that article.

Whenever, in describing an authorized punishment, the reference is to dishonorable or bad conduct discharge and a period of confinement, it is to be interpreted as including the total forfeiture provision contained in the pertinent columns of the table.

77 Article 77.--Principals.--Article 77 defines the term "principal" but contains no provision concerning a punishment. The punishment prescribed in the table, that is, "the maximum punishment authorized for the commission of the offense," is based on 18 U.S.C. 2b.

78 Article 78.--Accessory after the fact.--The limit of punishment prescribed in Note 2 for this offense is similar to that prescribed in 18 U.S.C. 3. In order to make certain the maximum period of confinement authorized in cases where life imprisonment is authorized for the principal, specific provision is made that the maximum period of confinement shall not exceed 10 years in any case.

79 Article 79.--Conviction of lesser included offense.--The first subparagraph of 127c provides that the punishment prescribed for each offense listed in the table is prescribed as the maximum punishment for that offense and for any lesser included offense if the latter is not listed.

80 Article 80.--Attempts.--Although it was contended that the punishment for attempts should not exceed that prescribed in 18 U.S.C. 1113 for attempts to commit murder or manslaughter, the service representatives finally determined to prohibit the death penalty and to limit the period of confinement to a 20 year maximum.

81 Article 81.--Conspiracy.--It was determined that the concerted action and design required in the offense of conspiracy fully justified the imposition of the punishment authorized for the offense which is the object of the conspiracy, except that in no case shall the death penalty be imposed. See 18 U.S.C. 371.

82 Article 82.--Solicitation.--In view of the differing provisions of Article 82a and 82b, this offense is listed in the table in two parts. If the offenses are committed, and in the case of desertion or mutiny, if committed or attempted, the punishment shall be that provided for the commission of the offense proper. The limit on soliciting desertion is based upon 18 U.S.C. 1381. 18 U.S.C. 2387 pertains to an offense comparable to soliciting or advising mutiny and provides for a fine and confinement for 10 years. 18 U.S.C. 2385 prescribes an offense comparable to soliciting or advising sedition and provides for a fine and confinement for 10 years. Dishonorable discharge and confinement for 10 years are prescribed for soliciting or advising an act of misbehavior before the enemy, if the act is not committed.

83 Article 83.--Fraudulent enlistment.--The first entry pertains to activities in or association with subversive organizations. The five year period of confinement is comparable to the imprisonment authorized by section 15b, Internal Security Act of 1950 (P.L. 831, 81st Cong.). The punishment

for "Other cases of" is similar to that provided in the 1949 Manual. Fraudulent separation is a new offense prescribed by Article 83. It was considered to be more serious than an ordinary case of fraudulent enlistment in that the accused is attempting to evade service. Dishonorable discharge and confinement for five years are prescribed.

84 Article 84.--Unlawful enlistment, appointment, or separation.--This offense is derived from AW 55, "Officer making unlawful enlistment." On the basis of the dismissal authorized in AW 55 it was determined that dishonorable discharge and the five year period of confinement authorized for the person who, under Article 83, fraudulently enlists or fraudulently procures his separation should be prescribed as the punishment.

85 Article 85.--Desertion.--The punishment prescribed for desertion with intent to avoid hazardous duty or to shirk important service is the same as that prescribed in the 1949 Manual. It was determined that the various gradations in the 1949 Manual concerning the time element, that is, desertion after not more or more than six months in the service, could well be eliminated in order to obviate the errors that have frequently confronted courts and boards of review by reason of the time computation now required. The three and two year periods of confinement in other cases of desertion were accepted as reasonable punishments in view of the common experience of the services. Army and Air Force personnel will note that the entries of the 1949 Manual concerning desertion in the execution of conspiracy or in the presence of an unlawful assemblage which the troops may be opposing do not appear in the new table. It is suggested that the first of those deleted entries might properly be an offense under Article 81, "Conspiracy," and that the latter appears to be the equivalent of desertion with intent to avoid hazardous duty or to shirk important service. Attempted desertion is specifically prescribed in Article 85 and, consequently, is presented here rather than in Article 80, "Attempts."

In this general respect, the commentary to Article 85 provides:

> "AW 59 (Advising or aiding another to desert) and AW 60 (Entertaining a deserter) have been deleted as they are now covered by Article 77 (Principals) and 78 (Accessory after the fact), respectively."

86 Article 86.--Absence without leave.--The entries under this offense have been presented so as to show the various provisions of the new article, that is, without proper authority failing to

go to or going from his appointed place of duty, or without proper authority absenting himself from unit, organization, or other place of duty. The punishments prescribed for the various offenses conform closely to those prescribed for comparable offenses in the 1949 Manual.

87 Article 87.--Missing movement.--This article is based on the proposed AGN, Article 9(57). The Navy recommendation as to punishment for the two entries under this article have been adopted.

89 Article 89.--Disrespect towards superior officer.--The service representatives agreed to increase the six months' confinement and forfeitures provided in the 1949 Manual to include bad conduct discharge.

90 Article 90.--Assaulting or willfully disobeying officer.--The punishments provided under this article are common both to the 1949 Manual and NC & B.

91 Article 91.--Insubordinate conduct towards warrant officer or noncommissioned officer.--In view of the new dignity and importance of the office of warrant officer, dishonorable discharge and confinement for five years have been prescribed for striking or assaulting a warrant officer in the execution of his office, and the punishment for willful disobedience of the lawful order of a warrant officer has been increased to dishonorable discharge and confinement for two years. The service representatives agreed that contemptuous deportment or disrespectful language toward a warrant officer or a noncommissioned or petty officer in the execution of his office should be increased to bad conduct discharge and confinement for six and three months, respectively.

92 Article 92.--Failure to obey order or regulation.--This article is derived from Navy practice. The Navy table provides for dishonorable discharge and confinement for two years which were accepted as the authorized punishment. Bad conduct discharge and confinement for six months, which are prescribed in Article 91 for willful disobedience of the lawful order of a noncommissioned or petty officer, were also adopted as the maximum punishment for knowingly failing to obey "any other lawful order" under Article 92. The footnote, which applies to the first two entries under Article 92, is designed to eliminate the confusion which could result from a contention that a violation of other specifically listed offenses, for example, disobedience of a superior officer under Article 90, or willful disobedience of the lawful order of a warrant officer or noncommissioned or petty officer under Article 91, or wrongfully appearing in civilian clothing under Article 134, should be punished as a violation of Article 92.

93 Article 93.--Cruelty and maltreatment.--This offense is listed in the Navy table and the Navy recommendation of dishonorable discharge and confinement for one year was adopted.

94 Article 94.--Mutiny or sedition.--No maximum punishment has been prescribed.

95 Article 95.--Arrest and confinement.--The punishments for the three offenses listed under Article 95 are the result of adjustments of the punishments currently prescribed in the respective tables.

96 Article 96.--Releasing prisoner without authority.--The maximum punishment prescribed for the offenses listed under Article 96 are also the result of adjustments of the punishments listed in current tables.

97 Article 97.--Unlawful detention of another.--Dishonorable discharge and confinement for three years were accepted as appropriate.

98 Article 98.--Noncompliance with procedural rules.--In view of the importance with which Congress, in enacting this specific article, must have regarded its purpose and intent, bad conduct discharge and confinement for six months were prescribed.

99-102 Articles 99-102.--Misbehavior before the enemy; Subordinate compelling surrender; Improper use of countersign; Forcing a safeguard.--No maximum punishment has been prescribed.

103 Article 103.--Captured or abandoned property.--This offense is not listed in current tables. However, to establish a guide for uniformity of sentences the punishment for the various gradations of this offense are the same as those prescribed in the 1949 Manual for selling or wrongfully disposing of military property in violation of AW 84, except that bad conduct discharge is authorized when the value is $20 or less.

Looting and pillaging.--No limitations are prescribed.

104 Article 104.--Aiding the enemy.--No maximum is prescribed.

105 Article 105.--Misconduct as prisoner.--As provided in the commentary to Article 105, this article is new and stems from abuses of this nature arising out of World War II. Any punishment other than death is prescribed for the offense.

106 Article 106.--Spies.--The death sentence is mandatory upon conviction of spying.

107 Article 107.--False official statements.--The commentary to this article provides that Article 107 is based upon AW 56 and 57, for both of which dismissal is prescribed. On the basis thereof, dishonorable discharge and confinement for one year has been prescribed. With reference to making any other false official statement, the bad conduct discharge and confinement for six months provided in the 1949 Manual have been increased to dishonorable discharge and confinement for one year in the case of noncommissioned or petty officers, while the punishment for any other enlisted person is the same as that now prescribed in the 1949 Manual.

108 Article 108.--Military property of the United States--Loss, damage, destruction, or wrongful disposition.--The offenses listed under this article are comparable to the offenses listed under AW 83 and 84 in the 1949 Manual. The maximum punishments herein prescribed are based primarily upon those prescribed in the 1949 Manual except that in each instance where bad conduct discharge was authorized, dishonorable discharge will be authorized in the new manual. In conformity with the discussion of the elements of proof of offenses under Articles 108 and 109, it is to be noted that appropriate entries in the table include the phrase "of a value or damage" inasmuch as, pursuant to the terminology of the article, the measure of punishment should be related to the amount of either damage or value in such cases.

109 Article 109.--Property other than military property of the United States--Waste, spoil, or destruction.--The maximum punishment authorized for violations of this article are the same as those prescribed for willfully damaging or destroying military property of the United States under Article 108.

110 Article 110.--Improper hazarding of vessel.--No maximum punishment is prescribed in the table for willfully and wrongfully hazarding or suffering to be hazarded a vessel. However, negligently hazarding or negligently suffering to be hazarded a vessel is listed in the Navy table and the punishment therein prescribed was adopted.

111 Article 111.--Drunken or reckless driving.--It was recommended that a greater variance in punishment than that contained in the 1949 Manual should be prescribed for the offense of drunk or reckless driving resulting in personal injury as contrasted with such acts not resulting in personal injury. The maximum authorized punishment has been set as dishonorable discharge and confinement for one year and as bad conduct discharge and confinement for six months, respectively, for the two offenses.

112 Article 112.--Drunk on duty.--The Navy table uses a single entry for this offense. The punishment approximates that prescribed in current tables.

113 Article 113.--Misbehavior of sentinel.--This offense is entered as a single entry, the more severe punishment of the 1949 Manual being adopted.

114 Article 114.--Dueling.--This offense, which is not entered in the 1949 Manual table, is punishable under the Navy table by dishonorable discharge and confinement for one year which have been prescribed herein.

115 Article 115.--Malingering.--The first entry, feigning illness, physical disablement, mental lapse, or derangement, is punishable by dishonorable discharge and confinement for one year, the present Navy maximum. The dishonorable discharge and confinement for seven years authorized for intentional self-inflicted injury are currently prescribed for all services.

116 Article 116.--Riot or breach of peace.--The dishonorable discharge and confinement for ten years authorized for riot are based upon Army cases. The Air Force representative recommended confinement and forfeitures for six months for breach of the peace in view of the violent aspect of this offense as described in the punitive article material.

117 Article 117.--Provoking speeches or gestures.--This offense is based upon AW 90 for which the 1949 Manual prescribes confinement and forfeitures for three months.

118 Article 118.--Murder.--No maximum is prescribed.

119 Article 119.--Manslaughter.--The Navy recommended adoption of the same punishment as that now prescribed in the 1949 Manual.

120 Article 120.--Rape and carnal knowledge.--No limitation is prescribed for rape. Carnal knowledge is specifically included in this article. The punishment prescribed in the 1949 Manual has been adopted.

121 Article 121.--Larceny and wrongful appropriation.--The punishment prescribed in the 1949 Manual has been adopted for the larceny entries. Wrongful appropriation is specifically covered in this article and is set out in the table in the manner used in the 1949 Manual, the punishments therein prescribed having been adopted.

122-125 Articles 122-125.--Robbery; Forgery; Maiming; and Sodomy.--The Navy recommended the same punishments as those now prescribed in the 1949 Manual.

126 Article 126.--Arson.--The punishment for aggravated arson is based upon 18 U.S.C. 81. With reference to simple arson, the recommended punishments are derived from Title 22, District of Columbia Code, section 403.

127 Article 127.--Extortion.--18 U.S.C. 872 provides for a fine of $5000 and imprisonment for not more than three years.

128 Article 128.--Assault.--The entries "Assault," "Assault (consummated by a battery)," and the first entry under "Assault, aggravated," that is, "With a dangerous weapon or other means or force likely to produce death or grievous bodily harm," are similar to the entries under AW 96 in the 1949 Manual. The punishments for the offenses are the same as those prescribed in the 1949 Manual. The second entry under aggravated assault, that is, "Intentionally inflicting grievous bodily harm, with or without a weapon," is comparable to the offense now denounced under AW 93 and for which dishonorable discharge and confinement for five years are authorized.

129 Article 129.--Burglary.--The dishonorable discharge and confinement for ten years conforms to current tables.

130 Article 130.--Housebreaking.--The service representatives agreed to adopt dishonorable discharge and confinement for five years as the maximum punishment.

131 Article 131.--Perjury.--The currently prescribed punishment of dishonorable discharge and confinement for five years has been adopted.

132 Article 132.--Frauds against the Government.--The punishments herein prescribed are the same as those prescribed under AW 94 in the 1949 Manual.

134 Article 134.--General article.--Entries under this article consist primarily of entries currently appearing under AW 96 in the 1949 Manual. For the purpose of this conference, the discussion of entries under Article 134 will consist of an indication of newly added, deleted, or amended entries. In many instances the entries have been rephrased so as to preface each with a key word in order that they may be easily located in alphabetical sequence.

Aiding a prisoner to escape has been deleted and is now covered by Article 77 read in conjunction with Article 95.

The entry in the 1949 Manual, "Allowing a prisoner to receive or obtain intoxicating liquor,"has been deleted, but a more comprehensive entry has been substituted, "Prisoner, allowing to do an unauthorized act."

Simple assault has been deleted as that offense is now denounced by Article 128. However under "Assault," entries pertaining to assault with intent to commit voluntary manslaughter, robbery, sodomy, arson, burglary, housebreaking, murder, or rape have been included as it was determined that such offenses were covered by Article 134 rather than by Article 128. Entries have been added concerning an assault upon a warrant officer, non-commissioned or petty officer, not in the execution of his office, or assault upon any person performing prescribed police duties, such person being in the execution of his office. In this respect it is to be noted that the current "knowing him to be such" provision under the AW 96 entry has been deleted.

Assault and battery is covered by Article 128 except assault and battery upon a child under 16 years of age.

Attempting to escape from confinement has been deleted. Attempts are now punishable under Article 80.

The entry concerning bribes or graft is new.

Making and uttering a bad check has been included, excepting from its provision, however, a bad check used as a means of obtaining property under false pretenses which is a violation of Article 121. The worthless check entry under Article 134 covers both deceitfully giving a check in payment of a pre-existing debt, and giving a check and failing to maintain sufficient funds to meet payment.

Obtaining money or property by check without sufficient funds has been deleted as that offense is now covered by Article 121.

Conspiracy is now covered in Article 81.

Uttering disloyal statements undermining discipline and loyalty is a new entry.

Willfully destroying private property is punishable under Article 109.

Under the entry "Drunk" appears the new offense of "Incapacitating self to perform duties through prior indulgence in intoxicating liquor."

The "Drunk and disorderly" entry contains a new offense applicable to such conduct "Aboard ship."

Failing to obey a lawful order is covered by Article 92.

False imprisonment is prohibited by Article 97.

False official report or statement appears under Article 107.

Gambling in quarters in violation of orders and introduction of liquor into command, quarters, station, or camp, in violation of orders are covered by Article 92.

The entry pertaining to marihuana or a habit forming drug has been changed to provide for both wrongful possession or use.

Communicating indecent, insulting, or obscene language to a female is new as is indecent or lewd acts with another.

Depositing obscene or indecent matter in the mails is newly prescribed.

Misprision of a felony is added.

Obtaining money or other property under false pretenses is covered in Article 121.

Statutory perjury is included in the discussion of Article 134 in the Punitive Articles and is inserted in the table.

Operating a vehicle while drunk or in a reckless manner appears under Article 111.

Self-maiming has been deleted as the offense of self-inflicted injury is covered in Article 115.

Disobedience of a lawful order of a sentinel is denounced by Article 92, as is the offense of failing to obey the lawful order of a sentinel.

Communicating a threat is new.

Uttering a forged instrument has been deleted as that offense is denounced by Article 123(2).

Violation of standing orders is covered by Article 92.

Wrongful carnal knowledge of a female below the age of 16 is included in Article 120.

Wrongful taking or taking and using appears under Article 121.

Sec. B, 127c

Section B consists of permissible additional punishments not provided elsewhere in the Punishments chapter.

If an accused is found guilty of one or more offenses for none of which dishonorable or bad conduct discharge is authorized, proof of two or more previous convictions will authorize bad conduct discharge and forfeiture of all pay and allowances, and if the confinement authorized for such offense or offenses is less than three months, confinement at hard labor for three months is also authorized. The sentence that, "In such a case no forfeiture shall be imposed for any period in excess of the period of confinement so adjudged," is designed to eliminate that type of sentence which appeared in a recently processed case wherein a special court, on the basis of five previous convictions, adjudged a bad conduct discharge, confinement at hard labor for four months, and two-thirds forfeiture for six months.

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 the operation of the substitutions permitted by the Table of Equivalent Punishments, for the two or more offenses is six months or more will authorize bad conduct discharge and forfeiture of all pay and allowances in addition to the period of confinement so authorized. For example, if an accused were convicted of discharging a firearm through carelessness, for which confinement at hard labor for three months and forfeiture of two-thirds pay per month for three months is authorized, and were also convicted of allowing a prisoner to do an unauthorized act, for which the same maximum punishment is prescribed, a general court in an otherwise appropriate case would be authorized to sentence the accused to bad conduct discharge, forfeiture of all pay and allowances, and confinement at hard labor for six months. Of course, the jurisdictional limitations of special and summary courts would not permit those courts to adjudge the sentence given in the example.

A fine may be adjudged in lieu of forfeitures provided a punitive discharge is also adjudged.

The new manual incorporates the Navy provision concerning reduction to an inferior grade as an additional punishment, excepting of course those cases of noncommissioned or petty officers above the fourth enlisted pay grade when sentenced by a summary court.

Reprimand or admonition may be adjudged as an additional punishment in any case.

Conference No. 10

NON-JUDICIAL PUNISHMENT

Conducted by
MAJOR ROGER M. CURRIER

128 Authority-General.--The authority to impose disciplinary punishment under Article 15 is hedged with provisions for departmental regulations. The reasons therefor are stated in the commentary as follows:

> "This recognizes that the authority to administer all the punishments specified may be necessary in one armed force and needlessly broad in another. This problem can be illustrated by reference to one punishment, namely restriction to specified limits. This punishment would be an effective sanction at a camp or post, but would carry little weight on a ship at sea.
>
> "Subdivision (b) also empowers the Secretary of the Department to permit members of the armed force to elect trial by court-martial in place of proceedings under the article. This recognizes a difference in present practice among the armed forces. The Navy allows no election on the theory that the commanding officer's punishment relates entirely to discipline, not crime; furthermore, in the Navy the officer who has summary court-martial jurisdiction is the same officer who imposes punishment under the article. In the Army, on the other hand, a company commander with power under the article ordinarily will not have summary court-martial jurisdiction."

An attempt has been made in the preparation of the text to reconcile differences in policy and procedure in order that separate departmental regulations may be kept to a minimum. The major difference deals with the right to elect trial by court-martial in lieu of non-judicial punishment and the separate procedural regulations necessary are contained in paragraph 133.

This first paragraph has been subdivided into subparagraphs for the sake of clarity. Matters dealing with Policy

and Effect of Errors which were included in paragraph 118, MCM, 1949, are treated as separate paragraphs.

128a Who may impose non-judicial punishment.--The first subparagraph is a restatement of provisions of Article 15a which confer power on commanding officers to impose disciplinary punishments. Illustrations as to what types of commands are contemplated as included in paragraph 118, MCM, 1949, have been deleted from the statute and also from the text (see AW 104). Article 15b provides that the Secretary of a Department may place limitations on the categories of commanding officers who are authorized to exercise these powers. In the absence of such limitations any commanding officer may exercise the power with respect to any person under his command.

It is not contemplated that power under Article 15 extends to power of punishment of persons of another armed force who may be temporarily attached to a given command. For example, air force personnel attached to an army hospital will not be under the command of the army officer in command of the hospital within the purview of Article 15. On the other hand, army personnel of a unit attached to another army command for disciplinary purposes would be subject to imposition of punishment under Article 15 by the officer commanding the unit to which attached.

The use of "commanding officer" in the statute will effect a change in the power of a Marine company commander. He is regarded as a commanding officer but did not, under the provisions of A.G.N. 25, possess the power to impose disciplinary punishment.

Under the provisions of Article 15c the Secretary of a Department, may by regulation provide for the exercise of powers under Article 15 by "officers in charge." "Officers in charge" as contemplated by this section exist only in the Navy and the Coast Guard and as between those services the definition of the term differs. In the Navy they may be only commissioned officers and in the Coast Guard they may be warrant officers or petty officers in charge of small coast guard stations. It is clear that Congress intended to vest such petty officers with power under this Article (See House Hearings, Tab 2, pp 953-954).

Since the Army and the Air Force do not have "officers in charge" the text makes it clear that Article 15c pertains only to the Navy and Coast Guard.

128b Minor offenses.--Since Punishment under Article 15 is a bar to trial by court-martial with respect to minor offenses

only (Art. 15e), whereas it was not such a bar in the Navy heretofore, it was considered essential that some discussion as to what is a minor offense be included in the text. This subparagraph is derived largely from the second subparagraph of paragraph 118, MCM, 1949. Felony type Articles are included as offenses which are not minor. It is also provided that any offense for which confinement for one year or more is authorized is not minor. Instead of the example of threatening or assaulting a sentinel used in MCM, 1949, protracted absence without leave has been used as a non minor military offense.

128c Nonpunitive measures.--This is derived from the third subparagraph of paragraph 118, MCM, 1949.

129 Policies generally applicable.--The first subparagraph is derived from MCM, 1949, and is in accord with the long standing policy of all the armed services.

The second subparagraph is new, but also is in accord with the long standing custom of all the armed services particularly insofar as it encourages a superior commander to call infractions of discipline on the part of enlisted persons to the attention of the accused's immediate commanding officer rather than take action himself. The converse of the policy, relating to the Army and Air Force practice of notifying an officer exercising special court-martial jurisdiction (i.e., Regimental or Group Commander) of offenses committed by officers, is not as pertinent to the Navy as it is to the other services since the immediate commanding officer of the ship also exercises special court-martial jurisdiction. However, the policy is as pertinent to the Marines as to the Army or the Air Force. The last sentence provides that if the commanding officer to whom a case is so forwarded deems that a punishment beyond his jurisdiction to impose (i.e., reduction of noncommissioned officers or forfeiture of pay with respect to officers) is indicated, he may forward the matter to a competent superior.

130 Effect of errors.--This is derived from the last subparagraph of paragraph 118, MCM, 1949.

131 Punishments.--In the paragraph are stated the punishments authorized to be imposed under Article 15. These punishments enumerated may be imposed upon military personnel of any of the services unless otherwise restricted by departmental regulations. For Army and Air Force people it is well to note here that a selection of punishment must be made as no combination of punishments is allowed, except that admonition or reprimand may be imposed in any case. Withholding of privileges and

extra duties may be imposed for two weeks instead of one and forfeitures imposed in officer cases are limited to one-half of one month's pay instead of the three months authorized under Article of War 104. Relative to extra duties, extra fatigue has not been used in the Army as a punishment for noncommissioned officers because of the consideration of degradation of rank. However, the Navy has exercised extra duty punishments for petty officers upon the theory that certain duties would not affect or degrade the rank of the individual. Therefore, a limitation is included that the punishment of extra duty not be such as to degrade the rank of a noncommissioned or petty officer. For noncommissioned officers and petty officers there is a punishment added which has been used in the Navy but is new to the Army and Air Force--that is, a reduction in grade. The limitation of the reduction to the next inferior grade is that the grade from which demoted is, under departmental regulations, within the promotion authority of the commanding officer imposing the punishment or within the authority of a commander subordinate to him. Several questions arose when this paragraph was being written as to promotion and demotion authority. For example, under Army regulations the commanding officer of an Infantry Regiment would have promotion authority of certain noncommissioned officer grades whereas his division commander would not. This would seem to indicate that the division commander could not therefore impose punishment under Article 15 of a reduction in grade whereas a regimental commander could. A study of the code and the Congressional hearings indicates, however, that the intent of the Congress was that stated in the paragraph, that any senior commander may impose the same punishment as a commander subordinate to him. In the Army a further limitation is placed on one grade reductions of noncommissioned officers--that is, the rank of the commander imposing it must be at least the rank of major. As we have discussed before, however, a reduction could be accomplished under the article by, for instance, a captain company commander referring a particular case to his lieutenant colonel battalion commander.

As to other enlisted personnel, all the previous punishments discussed--with the exception of forfeitures--may be imposed and in addition, if a person is attached to or embarked in a vessel he may be confined for a period of seven consecutive days or for a period of three consecutive days on bread and water or diminished rations. Confinement on bread and water has been used by the Navy for some time. It is new to the Army and Air Force and at the Congressional hearings it was indicated that the Army and Air Force did

not desire to employ this kind of punishment. The Navy, on the other hand, had a point of great merit in the fact that restriction, to a man on a vessel at sea, was hardly a punishment and some special type of confinement or other punishment might be necessary in some cases for the sake of discipline. The law is now so written that punishments of the nature described may be imposed upon any military person while embarked in a vessel. Thus, in a proper case, Army or Air Force personnel could be punished by confinement on diminished rations while on a transport or other ship. We may note here that while Army and Air Force courts-martial cannot adjudge such punishment a commanding officer may, in an appropriate case, under Article 15.

132 Right to demand trial.--Article 15b of the code gives the Secretary of a Department the power to limit the right of an accused to refuse punishment under the article and demand trial. Such regulations are set forth in paragraph 132. In the Army and Air Force no punishment may be imposed upon any member of the Army or Air Force under Article 15 if the accused has demanded trial by court-martial. Punishment may not be imposed while the demand is in effect, but acceptance of punishment is a waiver of any right to demand trial. As to the Navy and Coast Guard no person may so demand trial in lieu of Article 15 punishment. Because of this difference in rights to demand trial between the services separate procedures relative to imposition of punishment have also been included in the manual.

133 Procedure.--Procedures set forth for the Army and Air Force are similar to those which now obtain including a notification to the individual concerned as to what the charge is, an instruction as to his right to demand trial, warning in an appropriate case as to self-incrimination, and the right to submit matters in defense or mitigation. This matter may be in writing in any case and will be in writing as to officers or warrant officers.

In the Navy and Coast Guard in the ordinary case, the commanding officer will inquire at mast as to any minor offenses allegedly committed. The Navy commander also will inform the accused of his right against self-incrimination and after hearing, in which the accused may submit matters in defense or mitigation, the commander may impose punishment. As we have said before, in the Navy and Coast Guard there is no right to demand trial. If the findings of a board or a court of inquiry indicate punishment under Article 15 to be appropriate, the commander may punish the accused after calling him to the mast and informing him of the facts.

134 Appeals.--Paragraph 134 deals with appeals and is a restatement of Army rules. All persons the subject of punishment under

Article 15 may appeal to the next superior authority if they think the punishment is unjust. The next superior commander may confirm or remit or mitigate any punishment imposed, but during the appeal the accused will continue to undergo the punishment.

135 Restoration.--Paragraph 135 contains new matter. Article 15d not only permits an officer who has imposed punishment to remit or suspend the unexecuted portion thereof but also to set it aside completely and restore all rights adversely affected by that portion of the punishment already executed. This provision will serve to afford a remedy to an accused in that rare case where punishment was imposed upon an innocent person. Some slight difficulties might arise in some few cases. It would be a simple matter, for instance, to restore a forfeiture or restore rank to a reduced noncommissioned officer, but not quite so easy to restore diminished rations, except perhaps over a period of time.

135b Records of punishment.--This paragraph provides that all punishments will be recorded. In the case of officers or noncommissioned officers this is a simple matter inasmuch as the entire case will already have been reduced to writing. In the case of enlisted persons, however, the great majority of cases will be conducted orally and a record of the case must be accomplished. Such records have long been used by all the services--the so-called company punishment book of the Army and the log of the Navy. The Navy log, however, was a chronological record and the Army company punishment book had the advantage of being a record pertaining solely to non-judicial punishment.

App. 3 Appendix 3 sets forth the forms of records of punishment for all the services--paragraph a for enlisted persons and b for officers. The unit punishment book in appendix 3a is practically identical to the type of record long kept in the Army. There is one addition which it has been found through experience will be helpful--that is a column which indicates, through the insertion of his initials by the accused, that his rights have been explained to him, and he understands them. Some commands in the Army have been plagued with complaints to Inspectors General by various personnel that they have been forced to undergo punishment supposedly administered under the 104th Article of War of which they had no prior knowledge. This additional column is designed to obviate that difficulty.

Appendix 3b contains forms appropriate to the Army and Air Force in which demand for trial may be made, and a separate form for the Navy which contains no provisions as to trial.

Conference 11a

RULES OF EVIDENCE

Conducted by
MAJOR GILBERT G. ACKROYD

This discussion of the Rules of Evidence will follow the sequence of the paragraphs in chapter XXVII of the Manual for Courts-Martial, United States, 1951.

Part I

137 General.--The authority for the rules of evidence promulgated by the President stems from Article 36 of the Uniform Code. It will be noticed that Article 36 prescribes that the rules of evidence ordinarily are to follow the rules generally recognized in the trial of criminal cases in the United States district courts, but that the President need not adopt any particular fule followed by those courts if he does not deem it practicable to do so. When searching for a particular rule of evidence to be applied in a trial by court-martial, the sources of authority are as follows: First, the Manual for Courts-Martial; second--if the rule in question is not found in the first source--the rules of evidence generally recognized in the trial of criminal cases in the United States district courts; and third--if the rule in question is not found in either the first or second sources--the common law.

In the second subparagraph of paragraph 137 it has been indicated that the rules of evidence may be relaxed with respect to interlocutory matters relating to the propriety of proceeding with the trial or to the availability of witnesses. This is in accord with the general law (Wigmore, § 1414*).

In the third subparagraph of paragraph 137 there is a definition of materiality and relevancy. The definition of materiality will be found to have its chief importance with respect to interpretations of Article 31c, which provides that no person shall be compelled to make a statement which is not material to the issue and may tend to degrade him. The definition of relevancy is a definition of legal relevancy, not a definition of logical relevancy. When courts speak of relevant evidence as being admissible they do not mean that it is admissible merely because it has some logical bearing upon an issue in the case. Evidence which does have a logical bearing on an issue in the case is nevertheless often

* All citations to Wigmore in this discussion of the Rules of Evidence are to sections in the Third Edition of Wigmore on Evidence.

excluded for the reason that it is too far-fetched or remote to have any appreciable value as proof and consequently might tend to mislead or confuse the triers of fact. Although relevant in a logical sense, such evidence is often characterized by the courts as being "irrelevant," meaning irrelevant in a legal sense. The legal sense of the word is the meaning which is to be given to the word relevant wherever it appears in this chapter.

The last subparagraph of paragraph 137 provides that the court may in the exercise of a sound discretion refuse to receive evidence which is merely cumulative. The adverb "merely" is intended to be a rigorous limitation upon the power of the court in this respect, and that power should be exercised only when it appears that the cumulative evidence excluded would clearly have no effect on the outcome of the case, and when to receive it would be nothing but a waste of the court's time.

138a Presumptions.--At the outset it has been indicated that ordinarily presumptions are nothing but logical inferences of fact which may be drawn from a showing of other facts. It has also been indicated that once the facts from which an inference may be drawn have been shown, the inference does not automatically disappear merely because evidence tending to contradict the inferred fact or the facts upon which the inference is based has been introduced. However, if the contradicting evidence is such that reasonable men could not disbelieve it, then the inference so contradicted may not properly be drawn; and if it is drawn in the fact of contradicting evidence of this kind, any finding based on the inference will be upset on appellate review. This latter rule is that laid down in CM 335898, Charles, 2 BR-JC 311, 313, 8 Bull. JAG 127.

Some examples of those presumptions which are nothing more than justifiable inferences have been set forth. All but two of them come from paragraph 125a of the Manual for Courts-Martial, 1949. The two added presumptions are the presumption applying to the residence of a deponent and the presumption in bad check cases. The presumption as to the residence of a deponent remaining unchanged has been taken from ACM 2080, Thompson, and the presumption as to intent in bad check cases is one which has often been applied in military cases (CM 330282, Dodge, 78 BR 345, 354; CM 307125, Keller, 60 BR 335, 345, 5 Bull. JAG 213).

The last subparagraph of paragraph 138a points out that there are some matters which courts are bound to presume in the absence of proof to the contrary, that is, that there are some presumptions which are more than mere justifiable inferences. An example of such a presumption would be the presumption of innocence.

138b Direct and circumstantial evidence.--In this paragraph the definitions of direct evidence and circumstantial evidence are set forth. It has also been indicated that there is no general rule for contrasting the weight of circumstantial and direct evidence, even though a unique rule does apply in weighing the circumstantial evidence itself. See the last subparagraph of paragraph 74a(3).

138c Real evidence.--The main purpose of this paragraph is to indicate that when real evidence is introduced in a case a description thereof should be preserved for the record so that appellate authorities can consider it intelligently.

138d Testimonial knowledge.--It will be noted that under the testimonial knowledge rule it has been stated that a witness may testify as to his own age, including the date of his birth. Such evidence is generally held admissible not because it is an exception to the hearsay rule, or because it is an exception to the opinion rule, but rather because throughout his entire life the witness has had such an intimate acquaintance with the matter of his age that it may be said that he speaks thereof as of his own knowledge (Wigmore, § 667).

138e Opinion testimony.--The first subparagraph states the general rule relating to the expression of opinion by a witness, but points out that if an impression gathered by a witness is of a kind commonly encountered and is such that it cannot adequately be conveyed to the court by the mere recitation of the facts which were responsible for his forming the impression, such impression may be stated by the witness even though it amounts to an opinion. This exception, if it may be called an exception, indicates quite clearly that the so-called opinion rule is nothing but a rule of thumb which is to be applied with common sense in each particular case rather than with any degree of technical precision based on an attempted logical distinction between what is fact and what is opinion. The examples of admissible impressions of the kind mentioned above have been taken from paragraph 125d of the 1949 Manual. See also Wigmore, § 1918. It is also indicated in this subparagraph that witnesses are not expected to be able to testify with positive or absolute certainty with respect to matters concerning which they are qualified to testify. This rule is expressed in paragraph 68 of chapter VI of the British Manual of Military Law in language somewhat similar to that used in the text of the Manual. It is also recognized in Wigmore, § 658.

The matter relating to expert witnesses set forth in the second and third subparagraphs has been taken largely from the similar material found in paragraph 125b of the 1949 Manual. However, there has been added a statement that the law officer (or the president

of a special court-martial) should instruct the court as to the proper emphasis to be placed on expert testimony when such testimony appears to be itself evidence as to some issue in the case but is actually inadmissible as evidence on that issue and might improperly influence the court if it were considered as such evidence, as when a psychiatrist in his testimony on the question of mental responsibility delves into the background of the accused and incidentally discloses matters which would be inadmissible and prejudicial for any purpose other than to test the accuracy of the expert's opinion. The rule as to eliciting an expert's opinion without first asking him a hypothetical question is that set forth in Rule 409 of the American Law Institute's Model Code of Evidence.

138f(1) Character evidence.--Proof of character.--It will be noted that under the rule set forth in this paragraph, character may be proved by the opinion of a person who has personal knowledge of the character of the individual in question as well as by evidence of reputation. In short, the old rule (see par. 139b, MCM 1949, and § 302, NC & B) that character is reputation, and only reputation, has been abandoned. Character relates to what a person is, not merely what he is reputed to be. Of course, reputation may still be shown for the purpose of raising an inference as to the actual existence of the character involved. The rule here announced is not a new rule, but was the early common law rule. In the United States, because of some misunderstood passages found in early textbooks, character came to be understood (by, as Wigmore puts it, "some obscure process") as meaning exclusively "reputation" and not a person's actual qualities. On this subject Wigmore states (§ 1986):

> "The Anglo-American rules of evidence have occasionally taken some curious twistings in the course of their developings; but they have never done anything so curious in the way of shutting out judicial light as when they decided to exclude the person who knows as much as can humanly be known about the character of another, and have steadily admitted the second hand, irresponsible product of multiplied guesses and gossip which we term 'reputation.'"

The remarks concerning the necessary qualifications of reputation witnesses have been taken from Commonwealth v. Baxter, 267 Mass. 591, 166 NE 742.

138f(2) Character of the accused.--The material here set forth has been taken from paragraph 125b of the 1949 Manual.

138f(3) Character of persons other than the accused.--It was thought desirable to insert a discussion of this matter in the Manual because cases in which this point is raised are by no means of infrequent occurrence. The text has been derived from Wigmore, sections 63

and 246. It will be noticed that if the issue of provocation, self-defense, or defense of another is raised, the prosecution may introduce evidence of the victim's peaceable character even if the defense has not first introduced evidence that the victim had a violent character.

138g Evidence of other offenses or acts of misconduct of the accused.--Usually evidence that the accused has committed other offenses or acts of misconduct is inadmissible, for such evidence would ordinarily run afoul of the rule prohibiting the raising of an inference of guilt by showing that the accused is a bad or vicious person and might well have committed the act charged. However, if evidence of other acts of the accused has some relevant value other than to show the disposition of the accused, then such evidence is generally admissible. The examples given in this paragraph have been largely taken from paragraph 125b, MCM 1949. The example involving evidence of the stolen pistol left at the scene of the burglary in (1) is new and may be found in Eagles v. U. S., 25 F. (2d) 546. The third example in (1), relating to identification of the accused as the offender by evidence of prior use of the same fraudulent scheme used in the case in question; the example under (2), relating to proof of plan or design; and the first and third examples under (3), relating to proof of knowledge in a receiving case and to proof of intent in a larceny case, respectively, are all new, but are of familiar application. The example under (5) which deals with proof of prior poisoning to show absence of accident or mistake in the poisoning case in question has been taken from a long line of English cases all of which are cited and discussed in People v. Molineux, 168 N. Y. 264, 61 NE 286, 297. As was pointed out in the Molineux case, in cases of this kind a claim of accident or mistake must be raised, at least by implication, before evidence of other acts to show absence of accident or mistake can be received.

139a Hearsay rule.--The definition of the hearsay rule is approximately that set forth in paragraph 126a of the 1949 Manual except that the definition of the rule set forth in this Manual points out more clearly the fact that a statement is hearsay if it is not made by the author before the court at the particular trial in which it is offered to prove its truth. It has also been indicated that statements to which the hearsay rule may apply may consist of acts as well as words, and an example of a hearsay statement consisting of acts may be discovered in the third subparagraph of paragraph 139b. It will be noted that the Army and Air Force rule that hearsay does not become competent evidence because received without objection has been retained. Although no such rule is expressed in NC & B, substantially the same result is achieved by Navy case law holdings to the effect that hearsay evidence will not sustain a conviction even though no objection was made to its introduction. See MM-MIMS, Solomon Lee/A 17-20, I (1-16-50) CMcK; mas 169447.

139b The illustrations of the application of the hearsay rule found in paragraph 139b have, for the most part, been taken from paragraph 126b of the 1949 Manual, except that they have been rephrased so that they will be more accurately stated.

140a Confessions and admissions.--No attempt has been made to draw any strict line between what may be considered an admission as distinguished from a confession in any particular case. If it is apparent that a person's statement, although self-incriminatory, does not amount to an acknowledgment of guilt of an offense in the light of all the circumstances in the case such a statement may be considered a mere admission. It will be noted that paragraph 140a also does not attempt to lay down any hard and fast rules for determining whether a confession or admission was voluntary. It will usually be found necessary, in each case, to consult all the facts and circumstances surrounding the making of a statement by the accused to determine whether or not the statement was or was not in fact the result of alleged duress or coercion. Some general guides in this respect are set forth, however. The instances of coercion, unlawful influence, and unlawful inducement found on page 158 of the 1949 Manual have been retained, and two other instances (obtaining the statement without preliminary warning in certain cases, and obtaining the statement in violation of Article 31) have been added.

As to obtaining a confession or admission by interrogation or request without giving a preliminary warning of the right against self-incrimination, it should be noticed that Article 31b does not expressly deal with the admissibility of confessions or admissions so obtained by persons other than those "subject to this code." It should also be noticed that the kind of interrogation or request subject to the prohibition of 31b is obviously an interrogation or request made during the course of an official investigation in which the accused is at least a suspect. Article 31b could not reasonably be construed to require that a warning be given in the course of an investigation in which the accused was considered to be merely a witness, or that a warning be given in the course of a casual conversation between two barracks mates. It remains to be considered why Congress limited the force of this legislation to interrogation or request by a "person subject to this code." Although this question was discussed in the Congressional hearings upon the Uniform Code of Military Justice (see pages 983-993 of the House Hearings), there appears to have been no general agreement on the subject. It may well be that the words "person subject to this code" in Article 31b were used merely because Congress did not desire in this military code to legislate with respect to policemen who are not subject or could not be made subject to the code, especially having in mind the provisions of Article 98 (non-

compliance with procedural rules). [Since it would appear to be both logically and morally indefensible, from the standpoint of making rules for determining the admissibility of confessions and admissions, to require that the accused or suspect be advised of the right against self-incrimination when he is interrogated or requested to make a statement by persons who are subject to the code, but to dispense entirely, and in every case, with such a requirement when he is interrogated or requested to make a statement by persons (who may be military investigators) who are not subject to the code, the text of the Manual has been so phrased that civilian military investigators not subject to the code, and other investigators not subject to the code who are acting in an official capacity, must give a warning in those cases of interrogation or request in which the accused or suspect is not aware of the right against self-incrimination.] It will be noticed that in the case of an interrogation or request by a person who is subject to the code the fact that the person interrogated, or requested to make a statement, may have been well aware of his right not to incriminate himself (an accused lawyer, or example) is immaterial, and if a statement is obtained from such a person in violation of Article 31b it is, by reason of the express provisions of Article 31d, inadmissible.

The third subparagraph of paragraph 140a indicates that all promises and threats are not per se coercion, unlawful influence, or unlawful inducement. See Lyons v. Oklahoma, 322 U. S. 596, 603, and Bayer v. United States, 331 U. S. 532, both of which cases deal with the admissibility of confessions taken after prior inadmissible confessions were obtained.

It will be noticed that the fifth subparagraph sets forth the procedure for introducing evidence of a confession or admission. In the ordinary case a confession must affirmatively be shown to be voluntary before it can be received in evidence, whereas mere admissions can usually be received without such preliminary proof. The reason for the distinction is that admissions are generally only minor links in the chain of proof of guilt. With the exception of thos cases in which a definite issue with respect to voluntariness is raised by some indication that the particular admission in question was in fact involuntary, it would be impracticable, from a procedural aspect, to require a preliminary showing of the voluntary nature of admissions.

The remainder of the text concerning confessions and admissions contains various rules of common application in the Federal courts.

The rule as to failure to deny an accusation being considered incriminating evidence under certain circumstances may be found in Sparf and Hansen v. United States, 156 U. S. 51, 56, and the limitation upon that rule in the case of silence when in arrest or

custody or under investigation is expressed in United States v. LoBiondo, 135 F. (2d) 130. It will be noticed that in the eleventh subparagraph of paragraph of 140a the "best evidence" rule which was formerly applied in the Army and Air Force to oral confessions or admissions which had been reduced to writing (see the next to the last subparagraph of 127a, MCM 1949) has been abandoned, for it was essentially an illogical application of the parol evidence rule to criminal practice (see Wigmore, § 1332(2)). In the subparagraph dealing with corroboration of confessions and admissions it has been indicated that judicial confessions and admissions need not be corroborated, nor need statements made before or in pursuance of the act (Warszower v. United States, 312 U. S. 342).

It has been pointed out that a confession or admission not made at the trial and not made by the accused is not admissible as a confession or admission (Donnelly v. United States, 228 U. S. 245, 272). In the case cited it was held that an accused could not show in his defense that another person had made an extra-judicial confession as to the offense charged. Obviously, however, this rule does not forbid the reception in evidence of hearsay statements which are admissible without regard to the fact that they are confessions or admissions.

The last subparagraph of paragraph 140a has been taken from the opinion of the Judicial Council of the Army in CM 339494, Clifford, 9 Bull. JAG 16. The interpretation given in that case to Article of War 24, as amended, would seem to apply with equal force and effect to Article 31b of the Uniform Code.

140b Acts and statements of conspirators and accomplices.--In this paragraph the principles of law applying to the admissibility of acts and statements of conspirators and accomplices have been stated. It will be noticed that a statement made by an accomplice in pursuance of the common venture is admissible under this rule even though no conspiracy is charged. It should also be noticed that in a trial of two or more accused, if a statement of one of them which is admissible against him but not against the other or others is received, the law officer (or the president of a special court-martial) should instruct the court as to the limited use of the statement. It has been held that failure to give such an instruction may, under certain circumstances, amount to fatal error (CM 275792, Blair, 48 BR 151; CM 287995, Nichols, 29 BR (ETO) 67). The prohibition against using against an accused a conviction of an accomplice is taken from Kirby v. United States, 174 U. S. 47. In this respect it should be noted that paragraph 157 of the Manual forbids use of the conviction of the principal to establish against an alleged accessory after the fact the essential fact that the offense has been committed by the principal.

141 Statements made through interpreters.--This subject is of considerable importance in trials by courts-martial, especially those taking place in foreign lands, for in such trials the use of interpreted testimony is a common, rather than an unusual, occurrence. The agency rule is that mentioned by Wigmore in section 1810(2) of his work. The rules as to what makes an interpreter another person's agent have been taken from Commonwealth v. Vose, 157 Mass. 393, 32 NE 355; Guan Lee v. United States, 198 F. 596; and CM 328416, Pierce, 77 BR 71, 86, 7 Bull. JAG 130. The principles applying to the admissibility of evidence given through an interpreter at a former trial are stated in Wigmore, section 1810(1). In this connection it should be noted that if the interpreter is available as a witness at the instant trial but the witness at the former trial is not available, then the testimony at the former trial is proved by calling the interpreter as a witness, although, of course, he may use the record of the former trial as an aid to his memory. People v. Lewandowski, 143 Cal. 574, 77 Pac. 467, is authority for the proposition that a deposition taken through an interpreter is admissible when the deposition is otherwise receivable under statutory authority.

142a Dying declarations.--This paragraph has been taken almost verbatim from the second subparagraph under Proof in Paragraph 179a (Murder), MCM, 1949, except that the apparent reference in that paragraph to the applicability of the best evidence rule has been omitted, for that rule should have no application to an oral dying declaration which has been reduced to writing. See CM 313689, Davis, 63 BR 215, 226. This paragraph is also in substantial accordance with section 188, NC & B.

142b Spontaneous exclamations.--The matter concerning spontaneous exclamations is new, and will supplant the material concerning res gestae found in paragraph 128b, MCM, 1949, and section 189, NC & B. In this paragraph it has been stated that the term res gestae is not to be used as descriptive of any rule of evidence. Modern text writers and modern decisions of the courts recognize that the term has been misleading, in that it encompasses a wide variety of rules which concern the admissibility of extra-judicial statements and acts. The real difficulty encountered by considering the term res gestae to be descriptive of a rule of evidence lies in the fact that the various and sundry items of evidence encompassed in the term res gestae often have separate and distinct requirements and limitations as to admissibility. Says Wigmore (§ 1767):

> "The phrase 'res gestae' has long been not only entirely useless, but even positively harmful. It is useless, because every rule of evidence to which it has ever been applied exists as a part of some other well-established principle and can be

explained in terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology. No rule of evidence can be created or applied by the mere muttering of a shibboleth. There are words enough to describe the rules of evidence. Even if there were no accepted name for one or another doctrine, any name would be preferable to an empty phrase so encouraging to looseness of thinking and uncertainty of decision."

See also United States v. Matot, 146 F(2d) 197.

It will be noticed that an utterance, to be admissible under the spontaneous exclamation exception to the hearsay rule, need not be contemporaneous with the event which brought it forth, so long as the exciting influence of the event has not been dissipated. Also, the person who made the utterance need not have been a participant in the act, it being sufficient if he was a mere spectator. Of course, the person who heard the spontaneous exclamation being made and who relates it to the court need not even have been a spectator to the event. See Wigmore, §§ 1750, 1755, and United States v. Edmonds, 63 F. Supp. 968.

It is not necessary to the admissibility of a spontaneous exclamation that the person who made it be dead or otherwise unavailable as a witness. Also, unlike dying declarations which may be contemplative utterances, spontaneous exclamations may be admissible even if made by persons who would have been incompetent as witnesses (Wigmore, § 1751). However, if the utterance would have been inadmissible as testimony aside from the question as to the competency as a witness of the person who made it, as when the witness had no personal knowledge of the matter stated or could not have testified because of the privilege prohibiting the use of one spouse as a witness against the other (Wigmore, § 1751(a) and (c)(3)), then the utterance is not admissible as a spontaneous exclamation. The event which gave rise to the utterance need not be the act charged (Wigmore, § 1753).

At the time this manual was being written it was suggested that a purported exception to the hearsay rule, found in Rule 512(a), Model Code of Evidence, be adopted. This rule indicates that an observer's description of an event while it is taking place in his presence is admissible as an exception to the hearsay rule, even if the event is not an exciting one. The suggestion that this purported exception be incorporated in the Manual was not adopted, for it would appear not to have the sanction of the oath substitute which is present in one form or another in all true exceptions to the hearsay rule.

942479 O - 51 - 15

142c Fresh complaint.--The paragraph on fresh complaint has been taken from paragraph 128c, MCM, 1949. It will be noticed from a perusal of the text that evidence of fresh complaint which is admissible as evidence of a spontaneous exclamation may be received as an exception to the hearsay rule. In this connection, see Beausoliel v. United States, 107 F. (2d) 292, and Brown v. United States, 152 F. (2d) 138.

142d Statements of motive, intent, or state of mind or body.--The rule as to statements of motive, intent, or state of mind or body has been largely taken from Wigmore, § 1714. Says Wigmore:

> "Applied specifically to the present Exception, the judicial doctrine has been that there is a fair necessity, for lack of other better evidence, for resorting to a person's own contemporary statements of his mental or physical condition. It is indeed possible to obtain by circumstantial evidence (chiefly of conduct) some knowledge of a human being's internal state of pain, emotion, motive, design, and the like; but in directness, amount, and value, this source of evidence must usually be decidedly inferior to the person's own contemporary assertions. It might be argued, however, that the person's own statements on the stand would amply satisfy the need for his testimonial evidence. The answer is that statements of this sort on the stand, where there is ample opportunity for deliberate misrepresentation and small means for checking it by other evidence or testing it by cross-examination, are comparatively inferior to statements made at times when circumstances lessened the possible inducement to misrepresentation."

The rule of exclusion prohibiting the reception of evidence of statements of motive, intent, or state of mind or body which amount to an accusation that the accused committed the act charged or that the act charged was committed has been taken from Sheppard v. United States, 290 U. S. 96. In that case, Sheppard had been tried and convicted for murdering his wife by poisoning her. There had been admitted in the trial certain statements made by the deceased to her nurse to the effect that her husband had poisoned her. Although these statements were not received for the limited purpose of showing the deceased's will to live and to negative thereby the contention of the accused that his wife had committed suicide, it is quite obvious from a reading of the case that the Supreme Court would not have sanctioned the admissibility of the statements even if they had been offered for such limited purpose. After deciding that the statements were not admissible as dying declarations, the court said:

"It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to someone else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."

The admissibility of evidence of a statement disclosing motive, intent, or state of mind or body may or may not constitute an exception to the hearsay rule, depending upon the nature of the statement (Wigmore, § 1750).

It has been pointed out that the rule providing for the admissibility of evidence of a statement as to motive intent, or state of mind or body does not authorize proof of these matters, as they pertain to one person, by evidence of a disclosure thereof made in another person's statement. The example given (but not the result) is that found in the case of State v. Farnam, 82 Or. 211, 161 Pac. 417, 427. In that case the statement of the victim of the homicide to the effect that the accused intended to visit her on the night of the homicide was received in evidence for the purpose of proving that the accused did in fact intend to visit her on that night, thus raising an inference that the accused was present at the scene of the homicide at some time during the night on which it was committed. The case has been much criticized, and had apparently been based upon a misunderstanding of the principles laid down by the Supreme Court of the United States in Mutual Life Insurance Company v. Hillmon, 145 U. S. 285, 295. In that case evidence of a declaration by a person that he intended to go upon a journey with another was admitted for the purpose of showing the probability that he did go upon the journey. In the Hillmon case the intent shown by the statement was the intent of the person who made it, whereas in the Farnam case the intent shown was that of a person other than the one who made the statement. That the Farnam case is not in accordance with the views of the Supreme Court is apparent from remarks concerning the Hillmon case made by that court in the Sheppard case, supra. In the Sheppard case the Supreme Court stated, "The ruling in that case /the Hillmon case/ marks the high-water line beyond which courts have been

unwilling to go. It has developed a substantial body of criticism and comment." Of course, if the statement in question is one supplying or producing, rather than disclosing, a relevant motive, intent, or state of mind or body on the part of a person other than the one who made the statement, then evidence of the statement is admissible under general principles, there being no attempt here to use the statement to prove facts by considering the statement to be true. An example which clearly points out why evidence of such a statement would be admissible is given in the illustration in the second subparagraph of paragraph 139b.

The last subparagraph of paragraph 142d relating to the inadmissibility of 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, has been taken from Rule 513, Model Code of Evidence.

Conference No. 11b

RULES OF EVIDENCE

Conducted by
MAJOR GILBERT G. ACKROYD

Part II

143a(1) Proving contents of a writing.--The rule set forth in subparagraph (1) of paragraph 143a is the rule known as the "best evidence rule". The text has been taken from paragraph 129a, MCM, 1949. It will be noticed that if a document is inadmissible for the purpose of proving the truth of the matters stated therein because it is hearsay, a copy of the document or other secondary evidence concerning it does not become admissible for that purpose merely because no objection is made on the ground of the best evidence rule. See Baltimore American Insurance Company v. Pecos Mercantile Company, 122 F(2d) 143, 146.

143a(2) Subparagraph (2) of 143a sets forth certain exceptions to the best evidence rule. Most of these exceptions have been taken from the subparagraph entitled "Exceptions" in paragraph 129a, MCM, 1949. Added to the exceptions set forth in the 1949 Manual is the exception appearing in the first subparagraph under (2) pertaining to documents in the hands of the accused. See M'Knight v. U. S., 115 F 972, 980.

The exception to the best evidence rule relating to calculations made from numerous or bulky documents has been phrased with a view to pointing up the fact that the writings used in the calculations must themselves be admissible. This principle was brought out by the Judicial Council (Army) in the recent case of CM 334097, Anderson, 4 BR-JC 347, 366, 8 Bull JAG 122.

In the exception relating to official records it has been indicated that a military office is a "public office." The exception as to certificates of the chief custodians of personnel records, and their deputies and assistants, concerning fingerprint comparison is similar to that found on page 163 of the 1949 Manual, expanded to take into consideration all the armed forces, and it will be noticed that this exception has been further expanded so that such a certificate may emanate from any department, bureau,

or agency of the United States in which fingerprint records are officially kept on file. The reason for this is that military fingerprints are sometimes kept by the FBI. The rule relating to the admissibility of a certificate of lack of public record is the same as that found in the last subparagraph of paragraph 129a, MCM, 1949. However, there has been added a statement to the effect that if a purported fact or event is of a kind required by law, regulation, or custom to be recorded, proof that there is no official record thereof may be received as evidence that the fact did not exist or that the event did not occur (Ches. and Del. Canal Co. v. U.S., 250 U.S. 123, 129). See also CM 337950, Deyo, 4 BR-JC 175, 182, 8 Bull JAG 191.

143b(1) Authentication of writings.--General.--The first subparagraph of (1) contains a short and concise statement as to what is meant by authentication and a warning as to when a writing may and may not be authenticated by hearsay certificates. The second subparagraph of (1), relating to proof of the genuineness of letters and telegrams, has been taken from the first subparagraph of paragraph 129b, MCM, 1949. With respect to telegrams, section 205, NC & B, provides "In court-martial cases the original telegram, and consequently the one that must be produced to satisfy the 'best evidence' rule, is the one deposited at the sending office. The received copy can only be given in evidence on a showing that the original is lost, - - -." This rule has been abrogated by the second subparagraph of paragraph 143b(1) of the 1951 Manual, for, if the telegram can be considered to be genuine, its contents can be proved not only by the original but also, without accounting for the original, by the received or any other copy made in the regular course of business of a transmitting or receiving agency, since all are "telegrams." The third subparagraph of (1) has been taken from the second and third subparagraphs of paragraph 129b, MCM, 1949, and added to that material has been the rule pertaining to opinion evidence concerning handwriting found in section 228, NC & B. The fourth subparagraph of (1) sets forth the rule relating to the admissibility of altered writings. The law there expressed is that generally followed in the civil courts (Wigmore, § 2525, and see § 199, NC & B). The fifth subparagraph of (1) contains provisions for a preliminary presentation of evidence re authentication.

143b (2)(a) Official records.--General.--Under this title has been inserted a discussion of the rules applying to authentication of official records. This discussion has been extended considerably beyond the scope of the comparable matter found in paragraph 129b, MCM, 1949, and in section 196, NC & B, but the extension was deemed advisable because of the very frequent use of official records as evidence in court-martial practice.

At the outset, it may be stated that consideration was given to proposing a simplified rule for authentication of all official records, foreign and domestic. However, no such simplified rule was adopted, for to do so would certainly be barren of results and would probably add to the confusion which already exists in this area of the law of evidence. The difficulty inherent in adopting such a rule is that the people who would read and have authority to follow it would not always be, and indeed infrequently would be, the persons who do the authenticating. Obviously, officials of States of the United States and of foreign countries must abide by their own laws pertaining to authentication of documents and would ordinarily have no authority to follow other rules. Furthermore, recourse to the various Federal statutes or rules of court on the subject has not been a particularly satisfactory way of solving the problem. In the case of records of a State of the United States, the Federal statutes simply provide for a mode of authentication which other States must accept under the full faith and credit clause (28 USC 1739; 10 RCL, Evidence, § 311), and in the case of foreign official records, a form of authentication is provided (28 USC 1741) which diplomatic and consular officials quite often do not follow because of long-standing custom to the contrary (New York Life Ins. Co. v. Aronson, 38 F. Supp. 687; Duncan v. U. S., 68 F (2d) 136, 140; CM 326147, Nagle, 75 BR 159, 169, 7 Bull JAG 16). Rule 44(a) of the Civil Rules (adopted by Rule 27 of the Criminal Rules) provides several methods of authenticating official documents, foreign and domestic, but quite often the particular authentication in question is not done in accordance with the rule and a legal problem as to the document's admissibility remains. In short, for many years Federal courts have been accepting certain types of authentication which are well known to the common law and which are relied upon as being legally efficacious by public officers who actually make the authentication, but many of these rules are not found in the statutes or rules of procedure and are discovered only be extensive legal research, the facilities for which are sometimes not available to commands in the field. The use of common law methods of authentication is authorized by Rule 44(c) of the Civil Rules, which rule has been adopted by Rule 27 of the Criminal Rules. With this in mind the text relating to the authentication of official records combines, under separate headings for Federal, State, and foreign records, the rules of the common law (as accepted by the Federal courts), the Federal statutes, and the Federal rules of court.

In the first subparagraph under (2)(a) the terms to be used in the discussion of authentication are defined in much the same manner as they were in the first paragraph appearing under the title "Official Records" in paragraph 129b, MCM, 1949. The second subparagraph under (2)(a) contains information as to who may be

considered a custodian of an official record, and as to the presumption of an attesting officer's authority arising from a duly authenticated attestation. See Wigmore, § 2161-2162.

143b (2)(b) Military records.--The paragraph under this heading sets forth the mode of authenticating military records, and records of the Department of Defense and of United States military agencies in general. This paragraph has been taken from the second paragraph appearing under the title "Official Records" in paragraph 129b, MCM, 1949, except that the rules respecting the authentication of records of non-military governmental agencies of the United States will be found under the following discussion of authentication of official records of the United States (see particularly the next to the last method of authentication under United States records).

143b (2)(c) United States records.--Under this heading, the rules concerning authentication of official records of the United States, its Territories and possessions, and the District of Columbia are set forth. The first and second methods of authentication have been taken from the rules relating to the authentication of United States records appearing on page 165, MCM, 1949. The third method concerns authentication under seal of a court of record. This is a common law method of authentication which can be used when the forum can take judicial notice of the seal of the court of record in question (that is why this method is omitted in the case of records of foreign countries). Records thus authenticated are admissible even though the judge of the court does not certify that the attesting official is who he purports to be, the seal alone supplying this verification. See Wigmore, §§ 1679(1)(c), and 2164(2); Soo Hoo Yee v. United States, 3 F(2d) 592, 596; and Turnbull v. Peyson, 95 U. S. 418, 423. The fourth method provides for authentication by attesting certificate under seal of the governmental agency in which, or under the supervision of which, the record is kept. This method includes the several means of authentication provided by the various Federal statutes relating to records kept in Federal agencies (28 USC 1733--Government records and papers; 28 USC 1744--Patent Office documents; 31 USC 46--Records of General Accounting Office). This method also provides for attestation not under seal in the case of records kept under the authority of Federal governmental agencies, such records being considered to be on a par in this respect with records kept by agencies of the Department of Defense. The fifth method concerns authentication by attesting certificates authenticated under the seal of public officers having a seal and having duties where the record is kept. This method has been taken from Rule 44(a) of the Civil Rules, adopted by Rule 27 of the Criminal Rules.

143b (2)(d) State records.--The material under this heading sets forth the rules applying to the authentication of the official records of States and their political subdivisions. The first and second methods of authentication have been taken from similar rules found on page 165, MCM, 1949. The third method is the same with respect to State records as the third method under United States records, and the authority for each is the same. The fourth method comes from Rule 44(a) as did the fifth method under United States records.

143b (2)(i) Foreign records.--Under this heading, the rules pertaining to authentication of foreign records are set forth. The first three rules have been taken from similar material found on page 165, MCM, 1949, except that with respect to the third rule--which comes from Rule 44(a) and 28 USC 1741--it has been pointed out that there must be an attesting certificate which the authenticating certificate accompanies. The reason for this qualification is that diplomatic officials do not attest true copies; they merely authenticate the certificates of those who have attested or, in some cases, have authenticated. Diplomatic officials do not examine registries and make true copies.

The fourth rule provides for several common law methods of authenticating foreign records. Despite all the statutes enacted by Congress and the rules of procedure adopted by the Supreme Court, it seems that these methods of authentication have become so customary in international practice that they are the usual, rather than the exceptional, methods used. It will be noticed that Rule 44(a) is not complied with in the case of an authentication under the provision in question, for the diplomatic official has not certified that the custodian is the custodian but certifies only that the foreign authentication of the attesting certificate is genuine. Nevertheless, this provision does set forth proper common law means of authentication. See Barber v. International Company, 73 Conn. 584, 48 Atl. 758, 764; New York Life Insurance Company v. Aronson, 38 F. Supp. 687; Duncan v. United States, 68 F (2d) 136, 140; CM 326147, Nagle, 75 BR 159, 169, 7 Bull JAG 16.

The second paragraph under (e) sets forth a permissible manner of authenticating the records of a foreign country in which armed forces of the United States are stationed or through which they are passing, or which is occupied by armed forces of the United States or an ally thereof. This provision has been taken from the paragraph appearing on the top of page 166, MCM, 1949, except that again it has been stated that there must be a basic attesting certificate.

143b (2)(f) Miscellaneous.--With some amplification and clarification, the rules contained under this heading have been taken from the similar rules set forth in the last three subparagraphs of paragraph 129b, MCM, 1949.

144a Official writings.--This paragraph has been taken from paragraph 130a, MCM, 1949. The rule there stated is merely an application of the hearsay rule.

144b Official records.--The official record exception to the hearsay rule has been stated in much the same manner as it was stated in paragraph 130b of the 1949 Manual. However, the statement of the rule in the 1949 Manual was considered to be somewhat open to question in that it included within the statement of the rule itself the presumption that the person having the duty to make the record, and to know or ascertain the facts, performed that duty properly. This matter has been clarified in the 1951 Manual by deleting this presumption from the statement of the rule and inserting in that statement the requirement that the record be made "in the performance of" the official duties. Following the statement of the rule, the various prima facie presumptions which are applied in the case of official records have been set forth. The first presumption is that a person who had a duty to record, and to know or ascertain the truth of the matters recorded, performed that duty properly. It has been held that when this presumption of regularity is conclusively rebutted by evidence which cannot reasonably be disbelieved showing that the record was not in fact made pursuant to the duty, then the record cannot be received in evidence as an official record (see CM 331033, Alvarado, 80 BR 1). The second presumption applying to official records is that a duly authenticated record (or copy of a record) of an event required to be recorded by law, regulation, or custom itself serves as a prima facie indication that the record was made by a person so required to make it. This must be so, for some official records are not required to be signed by the person who made them, and the only signature which may appear with respect to a given copy of an official record may be that of the custodian of the record appearing in his attesting certificate. See Wigmore, § 2158. The third presumption is that relating to records of vital or other commonly recorded statistics. This presumption was also stated in the last subparagraph of paragraph 130b, MCM, 1949.

In the 1949 Manual it was stated that although a service record might be an official record certain entries therein were nevertheless subject to objection on the ground that they were secondary evidence; that is, on the ground that such entries were

compiled from other records. The new text states that no such objection is available in the case of a record which meets the requirements of the official record exception to the hearsay rule. This would appear to be the general law on the subject (Wigmore, § 1641). In this connection it is interesting to note that the Navy customarily proves absence without leave by entries in the service record, even though these entries are usually derived from an original entry in a log or other record (CMO 5-1946, p. 182, 183).

144c Business entries.—The matter concerning business entries found in paragraph 130c of MCM, 1949, and based on 28 USC 1732, has been incorporated in the text of paragraph 144c of the 1951 Manual. There has been added, however, an admonition to the effect that copies of business entries, if not themselves made as business entries, are generally subject to objection on the ground of the best evidence rule. See CM 338303, Pierce, 6 BR-JC 237, 9 Bull. JAG 19.

144d Limitations as to the admissibility of official records and business entries.—The first limitation, that is the opinion limitation, has been taken from the first paragraph of paragraph 130d, MCM, 1949, and an example to the effect that a psychiatric report as to mental condition falls within the opinion limitation has been inserted. Records as to mental condition have been held not to be admissible under the business entry rule in New York Life Insurance Company v. Taylor, 147 F(2d) 297, 303, and in England v. United States, 174 F(2d) 466, 469. See also on the question of psychiatric reports, paragraph 122c, MCM, 1951.

The second limitation, or group of two limitations, growing out of the requirement that there be a duty to know or ascertain the truth in the case of official records, and that the entry must have been made in the regular course of a business in the case of a business entry, was not stated in the 1949 Manual. The remarks with respect to the duty to know or ascertain the truth are based on the very nature of the official record exception to the hearsay rule. The remarks as to the regular course of business limitation are based on Palmer v. Hoffman, 318 U.S. 109. Palmer v. Hoffman was a negligence case growing out of a grade-crossing accident. The railroad company defendant offered in evidence a written statement made by the engineer of the train concerning his version of the accident and contended that the statement was made in the regular course of business in accordance with 28 USC 695 (now 28 USC 1732). Because of statutory provisions in the State where the accident occurred, it was apparently the custom of the railroad to require such statements from employees involved in accidents. The trial court excluded the statement and both the Circuit Court of Appeals and the Supreme Court held that it was properly excluded. The Supreme Court said:

"If the Act is to be extended to apply not only to a 'regular course' of a business but also to any 'regular course' of conduct which may have some relationship to business, Congress, not this Court, must extend it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight, not its admissibility. That provision comes into play only in case the other requirements of the Act are met. * * * It [the Act] should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. But 'regular course' of business must find its 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."

The example given to which these limitations apply is the familiar one of the pathologist's entry in an autopsy report as to whether the death was caused by homicide, accident, or suicide. It will be noticed that in paragraph 130d of the 1949 Manual such an entry was excluded on the ground that it was an expression of opinion. That ground, however, would not have been sufficient to exclude such an entry had it been based on reports made to the pathologist by others, for it is expressly stated in the business entry rule that the fact that a particular entry was not based on the personal knowledge of the entrant shall not affect its admissibility. The ground upon which the pathologist's entry as to homicide, accident, or suicide is excluded is, as stated in the present text, a combination of the opinion limitation and the limitations discussed in the second subparagraph of paragraph 144d. See CM 323197, Abney, 72 BR 149, 156, 7 Bull JAG 17.

The third limitation is that applying to writings or records made principally with a view to prosecution or other disciplinary or legal action. This limitation has been taken from the second subparagraph of paragraph 130d, MCM, 1949. It has been indicated that certain records used by the armed forces to prove absence without leave and escape from confinement are not subject to the limitation, and that depositions and records of trial (former testimony) are also not subject thereto.

The last subparagraph of paragraph 144d points out that a news account of an incident is not admissible as an official record or business entry to prove the incident, and the authority for this rule is contained in New York Life Insurance Company v. Taylor, 147 F(2d) 297.

144e Maps and photographs.--This paragraph has been taken from paragraph 130e, MCM, 1949.

145a Depositions.--The material concerning depositions is much the same as that contained in paragraph 131a, MCM, 1949. A few changes have been made, however. In the first place it has been pointed out that in a trial on several specifications the proceedings as to each constitute a separate "case," and that 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 such testimony is not material to the capital case, or (when it is material to the capital case) if the cases do not involve the same criminal transaction and the law officer instructs the court in open session that such testimony is not to be considered as material to the capital case. This is, generally speaking, the law as set forth in CM 242082, Reid, 26 BR 391, 399, 3 Bull JAG 54. The Reid case, however, did not impose any limitation excluding deposition testimony because of the cases involving "the same criminal transaction," as does the text in the 1951 Manual. This limitation has been inserted so that the court may not be confronted with the necessity of attempting to perform a mental feat beyond the compass of ordinary minds.

In the fourth subparagraph of paragraph 145a it has been stated that certain objections may be considered to have been waived under certain circumstances if not presented at the time interrogatories were presented to the opposite party or to the court or at the time the deposition was taken. This rule has been taken from Rule 32(c) of the Civil Rules, adopted by Rule 15(f) of the Criminal Rules. If a party was not present by counsel or other representative at the taking of the deposition, he cannot be considered as having failed, at the taking of the deposition, to make an objection.

The material as to waiver of objections appearing in the next to the last subparagraph of paragraph 145a follows to some extent the similar material found in the last subparagraph of 131a, MCM, 1949. The variance between the present text and the 1949 version results from a comparison of Article of War 25 with Article 49 of the Uniform Code. The 1949 Manual spoke of waiver of an objection "on the ground that it [the deposition] was not authorized by Article 25" because that Article authorized the taking of the deposition only when the witness was, at the time of the taking, unavailable at the place of trial or about to become so. See also Article 68 of the Articles for the Government of the Navy. Article 49 attacks the problem from a different angle--it must appear at the trial that the witness is then unavailable, the question of his availability at the place of trial at the time of taking the deposition being immaterial. Hence the different wording in the text of the 1951 Manual.

It will be of particular interest to the Navy to note that it is no longer required, as it was under section 215, NC & B, that the trial counsel take the stand as a witness to identify the deposition. This requirement has been omitted from the 1951 Manual because of the fact that depositions are documents which authenticate themselves by reason of the court being able to take judicial notice of the seal or signature of the official who took the deposition.

The last subparagraph of paragraph 145a, concerning statements made by deponents which are admissible for some reason other than the fact that they were made during the course of the taking of a deposition, has been inserted to obviate the confusion which often exists with respect to this matter. See Wigmore, §§ 1387 and 1416.

145b Former testimony.--The discussion of former testimony in paragraph 145b follows generally the discussion of the same subject matter appearing in paragraph 131b, MCM, 1949. It will be noticed that former testimony given at a trial shown by the objecting party to be void because of lack of jurisdiction cannot be used. The reason for this is that the oath upon which the so-called testimony was given was void and there really has been no former testimony. See Jessup v. Cook, 6 N.J.L. 435, 438, and see also CM 321643, Rowell, 70 BR 327, 6 Bull JAG 179. However, since such a collateral attack cannot, as a practical matter, be permitted to be raised for the first time on appellate review, the burden of thus collaterally attacking the former proceeding falls on the objecting party at the trial.

A provision for waiver has been inserted in the first subparagraph which is similar to that provided in case of depositions. Also, in the second subparagraph, it has been indicated that former testimony may be proved by any person who heard it being given, even when the record of the former trial is available to prove the testimony. The best evidence rule does not apply with respect to proving former oral testimony. See Meyers v. United States, 171 F(2d) 800, 812; Wigmore, § 1330--fact that stenographer is official does not make transcript preferred mode of proof.

The next to the last subparagraph of paragraph 145b, relating to statements made at a former trial which are admissible under some rule of evidence other than that pertaining to former testimony, has been inserted for the same reason, and has been based on the same authority, as applies in the case of the similar provision, in paragraph 145a, relating to statements made by deponents which are admissible for some reason other than the fact that they were

made during the course of the taking of a deposition. The last subparagraph of section 218, NC & B, arrives at the same conclusion with respect to the question here discussed. See also Boitano v. United States, 7 F(2d) 325.

The last subparagraph of paragraph 145b, that dealing with the introduction of records of a court of inquiry, is derived from the Morgan Report Commentary under Article 50 and from section 220, NC & B.

146a Memoranda.--Paragraph 132a, MCM, 1949, has been used as the basis for the text of paragraph 146a. A learned discussion on the subject of memoranda may be found in Bendett v. Bendett, 315 Mass. 59, 52 N.E. (2d) 2, although in Massachusetts a memorandum of the first kind is not physically received in evidence but is merely read to the court or jury.

146b Affidavits.--This paragraph has been taken from paragraph 132b, MCM, 1949. It will be noticed that with respect to the character of the accused and matters in extenuation of a possible sentence, the defense, if it so desires, may introduce affidavits or other written statements. This has been a long-standing custom in both the Army and the Air Force (see 3 Greenleaf on Evidence, 16th Ed., § 501) and now becomes law for all the armed forces. The reason for the rule is that in the military service accused persons are frequently tried thousands of miles away from home, and in such cases it would hardly be reasonable to require the defense to go through the formalities of procuring depositions from the accused's home community with respect to his character and matters in extenuation of the sentence.

147a Judicial notice.--This paragraph is approximately the same as paragraph 133a, MCM, 1949. Added to the examples (in MCM, 1949) of matters of which a court-martial may take judicial notice are the signatures of the Judge Advocates General and their deputies and assistants, the signatures of the chief custodians of the personnel records of the various armed forces and their deputies and assistants, and the signatures of the custodians of fingerprint records of any department, bureau, or agency of the United States and their deputies and assistants. The signatures of the Judge Advocates General and their deputies and assistants were added as being proper matters of judicial notice because of the fact that many communications having to do with the administration of military justice are signed by them. The signatures of the chief custodians of personnel records, the signatures of the custodians of fingerprint records of departments, bureaus and agencies of the United States, and the signatures of the deputies and assistants of both categories of officials had to be included

because under paragraph 143a(2) such persons have been given authority to sign certificates as to fingerprint comparisons. Also added are the signatures of persons authorized to administer oaths by Article 136 or by any of the provisions of law referred to in chapter XXII, when affixed to a deposition or any sworn document to indicate the execution of such authority. The reason for this addition is that as a practical matter it would, in the ordinary case, be futile to authorize such persons to administer oaths, especially in the case of such persons who do not have a seal of office, if judicial notice of their signatures could not be taken. It has been further provided that courts-martial will be able to take judicial notice of the signatures of persons authenticating records of the proceedings of military courts and commissions of the armed forces of the United States, and of the signatures and duties of United States military officers who authenticate foreign official records and copies thereof pursuant to the authority contained in paragraph 143b(2)(e).

It should be noticed that section 309, NC & B, limits the taking of judicial notice of the laws of a State, Territory, or possession to taking judicial notice of the laws of the State, Territory, or possession within which the court is sitting, and restricts taking judicial notice of military regulations and orders to taking judicial notice of those published local regulations and orders that apply generally in the command which convened the court. No such restrictions are imposed by the provisions of paragraph 147a, MCM, 1951. In the final paragraph under judicial notice the various provisions contained in paragraph 133a, MCM, 1949, concerning the duty of the court to include in the record of trial certain documents of which it has taken judicial notice, have been combined so that they will all be found in one place. These provisions, in MCM, 1951, are directory and not mandatory.

147b Foreign law.--No substantial change has been made from the material on this subject appearing in paragraph 133b, MCM, 1949. In the second subparagraph it has been indicated that public libraries are proper public offices from which to obtain legal publications containing evidence of foreign law. The various applications of the best evidence rule to proof of foreign law are discussed in CM 330803, Berechid, 79 BR 171, 7 Bull JAG 180.

Conference No. 11c

RULES OF EVIDENCE

Conducted by
MAJOR GILBERT G. ACKROYD

Part III

148a Competency of witnesses.--General.--It has been stated that the general competency, mental and moral, of a witness of 14 or more years of age is always presumed. The comparable paragraph (134a) in the 1949 Manual speaks of the presumption of competency of an "adult" witness, but does not define the term "adult." It was thought advisable to be more explicit in the 1951 Manual, and the age of 14 was chosen, of course, because of the rule that the fact of capacity is not presumed in the case of a person under the age of 14. See Wigmore, § 508. This matter had, however, been covered under the heading Children in paragraph 134b of the 1949 Manual.

148b Children.--This paragraph has been taken from paragraph 134b, MCM, 1949. A similar statement of the law appears in section 241, NC & B.

148c Mental infirmity.--This paragraph sets forth the law relating to mental infirmity as affecting the competency of a witness. See Wharton's Criminal Evidence, 11th Ed., § 1174, and the cases therein cited.

148d Conviction of crime.--The law pertaining to this subject is stated in the same manner as it was in paragraph 134c, MCM, 1949, except that it is stated in the new text that certain convictions may be shown to diminish the credibility of the witness. This, of course, is in accord with the provisions of paragraph 153b(2)(b), MCM, 1951.

148e Interest or bias.--Generally speaking, the discussion appearing in this paragraph was taken from paragraph 134d, MCM, 1949. It will be noticed that in the 1951 text, as in the 1949 text, the general rule prohibiting the use of one spouse as a witness against the other is treated as a privilege and not as a rule of competency. See Wigmore, § 2227 et seq.; United States v. Mitchell, 137 F (2d) 1006, 1008. It will also be noticed that this privilege does not exist, and that the spouse--if he or she is otherwise competent as a witness--occupies no exceptional status and may be required to testify, if he or she is the victim of the transgression with which the other spouse is charged. See Rex v. Lapworth, (1931) 1 KB 117; 28 RCL, Witnesses, section 68. It has been indicated that the privilege prohibiting the use of one spouse as a witness against the other applies whether the witness was sworn or unsworn. Says Wigmore (§ 2233), "So, too, it would

seem that hearsay declarations by the wife or husband such as would ordinarily be receivable under some exception to the hearsay rule should be excluded when offered against the other spouse." Of course, Wigmore does not mean to say that such declarations may not be receivable when the privilege does not exist, for instance, in a case in which the declarant is the injured spouse. Added to the instances in which the privilege does not exist has been forgery by one spouse of the other's signature to a writing when the writing would, if genuine, apparently operate to the prejudice of such other. Also added to the discussion of the husband and wife privilege is a statement to the effect that when one spouse testifies in favor of the other, the privilege cannot be asserted to defeat cross-examination (Wigmore, § 2242).

The remainder of the discussion in paragraph 148e is similar to the discussion found in the last three subparagraphs of paragraph 134d, MCM, 1949.

149a **Examination of witnesses.**—General.--This paragraph has been taken from paragraph 135a, MCM, 1949, and deals for the most part merely with the order of examining witnesses.

149b(1) Cross-examination; redirect and recross-examination; examination by the court or a member.--Cross-examination.--The discussion of cross-examination has been largely taken from paragraph 135b, MCM, 1949, although the second subparagraph, relating to the extent of cross-examination, has been somewhat amplified with respect to matters which may be gone into in testing the credibility of a witness. See generally Alford v. United States, 282 US 687, and CM 317327, Durant (Kathleen), 66 BR 277, 300, 7 Bull JAG 181. The last subparagraph of paragraph 149b(1) deals in detail with the limitations upon cross-examination of an accused.

149b(2) Redirect and recross-examination.--It has been pointed out that new matters may be developed on redirect examination, and that the recross-examination may extend to the issues brought out on the redirect examination, so that with respect to matters developed on redirect examination the cross-examiner will have the same latitude on recross-examination as he has on cross-examination.

149b(3) Examination by the court or a member.--This material follows closely the similar material set forth on page 178, MCM, 1949, except that it has been necessarily rephrased because of the fact that the law officer is not a member of the court.

149c(1) Leading questions; ambiguous and misleading questions; other objectionable questions.--Leading questions.--Subsection (a) of

this paragraph states the general rule prohibiting the use of leading questions on direct examination and subsection (b) sets forth the exceptions to this rule. The exceptions are essentially the same as those found in paragraph 135c, MCM, 1949, and in section 277, NC & B. However, added to the discussion in the 1949 Manual concerning the exceptions to the general rule prohibiting leading questions on direct examination is the rule which permits refreshing the recollection of the witness, or establishing his past recollection, when the memory of the witness has been exhausted. See section 280, NC & B; Hyde v. United States, 225 U.S. 347, 377; United States v. Freundlich, 95 F(2d) 376; United States v. Rappy, 157 F(2d) 964; Wigmore, §§ 744 and 777.

149c (2),(3) Ambiguous and misleading questions; other objectionable questions.--The material set forth under these headings has been taken from paragraph 135c, MCM, 1949.

150a Compulsory self-degradation.--This paragraph sets forth the manner in which refusals to answer questions based on Article 31c are to be handled. It will be noticed that even though the question is material only with respect to the credibility of a witness, it must nevertheless be answered. This was the rule adopted with respect to the privilege against compulsory self-degradation in paragraph 136a of the 1949 Manual, and the difference in wording between Article 31c and Article of War 24 does not appear to require a different rule. Section 261c, NC & B, allowed a witness to claim the privilege against self-degradation "in a case where his answer could have no effect upon the case except to impair his credibility." Under the rule set forth in the 1951 Manual, the witness cannot assert this privilege in such a case.

150b Compulsory self-incrimination.--This paragraph has been taken from paragraph 136b, MCM, 1949, and the only material departures from that paragraph appear in the fourth and fifth subparagraphs of paragraph 150b, MCM, 1951. In the fourth subparagraph it is stated that a witness who answers a question without having asserted the privilege and thereby admits a self-incriminating fact may be required to make a full disclosure, however self-incriminating, of the matter to which that fact relates. This provision is based on the theory of waiver and was taken from Wigmore, § 2276, and United States v. St. Pierre, 132 F(2d) 837. This provision was written, and the manual was promulgated, before the decision of the Supreme Court in the case of Rogers v. United States, _____ U. S. _____, was announced. In that case the court appeared to lay down the rule that a witness who admits a self-incriminating fact without having asserted the privilege may be required to disclose the details, so long as, with regard to each succeeding question concerning any such detail, there is no real danger of further self-incrimination. It is believed that the rule as stated in the 1951 Manual may readily be interpreted, and should be interpreted, in accordance with the rule laid down by the Supreme Court in the Rogers case.

In the fifth subparagraph of paragraph 150b it has been stated that the prohibition against compelling a person to give evidence against himself relates only to the use of compulsion in obtaining from him a verbal or other communication in which he expresses his knowledge of a matter and does not forbid compelling him to exhibit his body or other physical characteristics as evidence when such evidence is material. This rule is derived from Holt v. United States, 218 US 245, in which the court stated:

> "Another objection is based upon an extravagant extension of the Fifth Amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statement inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."

In those jurisdictions which follow the doctrine of the Holt case (some States of the United States do not), objections based upon a contention that forced exhibitions of bodily characteristics violate the prohibition against compulsory self-incrimination are not sustained. See, for example, McFarland v. United States, 150 F(2d) 593--"benzedrine" blood test performed on accused by military order and without his consent to determine whether certain stains on his body were blood stains not violative of prohibition against compulsory self-incrimination; People v. Tucker, ___ Cal. App. ___, 198 Pac (2d) 941--blood sample taken from accused while unconscious and without his consent for purpose of making blood alcohol test not violative of prohibition against compulsory self-incrimination; Schmidt v. District Attorney of Monroe County, 255 App. Div. 353, 8 NYS (2d) 787, and Green Lake County v. Domes, 247 Wis. 90, 18 NW (2d) 348--compulsory physical examinations of suspected drunken drivers admissible. See also, for military cases, CM 326834 Kendall, 75 BR 313, and CMO 1-1944 (Navy), p 15--taking blood sample from person without his consent does not violate prohibition against compulsory self-incrimination; CM 337189 Harris, 7 BR-JC 393, 414--held by Judicial Council (Army) that requiring person to utter words for purpose of voice identification not a violation of prohibition against compulsory self-incrimination.

151a Privileged and nonprivileged communications.--General.--This paragraph has been taken from paragraph 137a, MCM, 1949, the wording having been somewhat changed to indicate more clearly that the privilege pertaining to the communication in question may be waived by the person or government entitled to the benefit of the privilege, and also that the communication may be disclosed through evidence emanating from a person or a source not bound by the

privilege.

151b(1) Certain privileged communications.--State secrets and police secrets.--In this paragraph the general rules pertaining to state secrets and police secrets are set forth. In accordance with the federal law on the subject it has been pointed out that the informant privilege does not warrant the exclusion from evidence of statements of informants which are inconsistent with or might otherwise be used to impeach their testimony as witnesses. It follows that this privilege cannot be applied in opposition to an attempt to discover or disclose such a statement through an examination of a witness or otherwise. See United States v. Krulewitch, 145 F(2d) 76.

151b(2) Communications between husband and wife, client and attorney, and penitent and clergyman.--The privilege pertaining to confidential communications between husband and wife, and client and attorney, have been stated in much the same way as they were in paragraph 137b, MCM, 1949, and in sections 238(3) and 239 of NC & B. It has been pointed out that the privilege pertaining to confidential communications between husband and wife applies only when the communication was made while the parties were husband and wife and not living in separation under judicial decree (Wigmore, § 2335). The privilege relating to confidential communications between penitent and clergyman was not recognized in NC & B but was stated in a more limited form in paragraph 137b, MCM, 1949. It will be noticed that in the 1951 Manual the penitent and clergyman privilege is not limited to a communication made to a chaplain as it was in the 1949 Manual.

The second paragraph of (2) states the general rule prohibiting disclosure of such privileged communications and sets up some of the exceptions to that general rule which might be encountered in trials by court-martial. The first exception, that applying in cases in which one of the spouses is an accused, has been taken from Wigmore, § 2338(4). In the cited section of his work Wigmore states, "In many cases involving a charge of crime brought against a spouse, marital communications may become the key to the case. It is plain that where either spouse needs the evidence of communications (by either to the other) in a trial involving a controversy between them, the privilege should cease, or a cruel injustice may be done." Although the cases arising under this exception often do involve a controversy between the spouses, there would seem to be no reason why this should be a necessary element of the exception.

The second exception has been taken from paragraph 137b, MCM, 1949, and it has been indicated that this exception applies not only with respect to testimony by an outside party concerning the communication overheard or seen by him, but also with respect to receiving in evidence the communication itself when it is contained in a writing which was obtained by an outside party. See 63 ALR 120.

151b(3) Confidential and secret evidence.--This matter has been taken from similar matter appearing on page 182, MCM, 1949. The privilege relating to investigations of the Inspectors General has been enlarged so as to include all the armed forces. Added to the discussion of confidential and secret evidence as it appears in the 1949 Manual is the paragraph concerning the procedure which may be followed by the court when confidential or secret evidence must be received, with a cross-reference to paragraph 33f indicating that there may be certain cases which, because of the security risks involved, should not be brought to trial at all.

151c Certain nonprivileged communications.--The discussion concerning the nonprivileged character of communications by wire or radio and communications to medical officers and civilian physicians found in this paragraph has been taken from paragraph 137c, MCM, 1949. In section 240, NC & B, it had also been stated that communications to medical officers and civilian physicians are not privileged.

152 Certain illegally obtained evidence.--In this paragraph the rules pertaining to the inadmissibility of evidence obtained as a result of an unlawful search and seizure, and as a result of "wire tapping," have been discussed. The rule relating to the inadmissibility of evidence obtained as a result of unlawful search and seizure is laid down in Silverthorne Lumber Company v. United States, 251 U.S. 385, and the rule relating to the inadmissibility of evidence obtained as a result of "wire tapping" may be found in Nardone v. United States, 308 U.S. 338. No attempt has been made in this manual to lay down any independent military rules to be followed by courts-martial with respect to evidence obtained as a result of "wire tapping," for the inadmissibility of evidence obtained by "wire tapping" appears to rest solely upon a statutory foundation and that foundation may be shaken in the future by amendatory legislation. Consequently, those who read the manual are referred, in this respect, to the Federal law on the subject as it may have application to wire tapping cases at the time in question. It has been indicated that courts-martial have no authority to suppress illegally obtained evidence (as distinguished from excluding it), and that consequently the rule applied in the Federal civil courts to the effect that an objection on the ground that certain evidence was illegally obtained may be waived if not made on a motion to suppress before trial does not apply. The statement that evidence obtained by a lawful search is inadmissible if that search was conducted because of information derived from a preceding unlawful search of the proscribed kind has been taken from a Navy case (Advance CMO No. 11-Navy-22 Dec 1949, p. 85).

The remarks of Mr. Justice Jackson in United States v. Bayer, 331 U. S. 532, 540, would appear to be an indication that the doctrine of the Silverthorne and Nardone cases will not be applied to evidence derived from information supplied by an illegally obtained confession.

The second subparagraph of paragraph 152 sets forth certain examples of searches which are lawful. All these examples, with the exception of the military search example, may be found set forth in the table of search cases in Harris v. United States, 331 U. S. 145. The example of a lawful military search is derived from the similar example set forth in the second subparagraph of paragraph 138, MCM,1949. Military searches of this kind have been held lawful in Grewe v. France, 75 F. Supp. 433, and in Best v. United States, 184 F (2d) 131. It will be noticed that the example of a lawful military search given is not intended to be all inclusive or to preclude the legality of other types of military searches made in accordance with military custom.

153a Credibility of witnesses.--Generally speaking, this paragraph is but a paraphrase of paragraph 139a, MCM,1949. The statement that a conviction cannot be sustained solely on the self-contradictory testimony of a particular witness, even though motive to commit the offense is shown, if the contradiction is not adequately explained by the witness in his testimony is taken from CM 319322, Spencer, 68 BR 243, 246, and the authorities therein cited. It has also been mentioned that a conviction cannot be based upon the uncorroborated testimony of an alleged victim in a trial for a sexual offense, or upon the uncorroborated testimony of a purported accomplice in a trial for any offense, if in either case such testimony is self-contradictory, uncertain, or improbable. This rule has often been applied by the boards of review. See CM 260611, Wilkinson, 39 BR 309, 326; CM 243927, Strong, 28 BR 129, 146; CM 298830, Pridgen, 7 BR (ETO) 225, 245; CM 267651, Boswell, 44 BR 35, 42; and CM 259987, Loudon, 39 BR 104, 114.

The rules set forth in the next to the last subparagraph of paragraph 153a as to reestablishing the credit of a witness whose testimony has been impeached, or attacked, have been taken from Rule 106, Comment c(7)(a), of the Model Code of Evidence. See also Ellicott v. Pearl, 10 Pet. 411, 438, 440--may not show consistent statement made after inconsistent statement.

In the last subparagraph of paragraph 153a the rule relating to corroboration of the testimony of an identifying witness by a showing that he made a previous similar identification is set forth.

Such corroborative evidence is admitted, even though the credibility of the identifying witness has not been directly attacked, on the theory that since identification testimony is so inherently susceptible to mistake and suggestion, proof of a previous similar identification by the witness has substantial evidential value. See CM 316705, Hayes, 65 BR 373, 388, and CM 318341, Wolford, 67 BR 233, 235, 6 Bull JAG 9.

153b(1) Impeachment of witnesses.--General.--The discussion under the heading "General" is much the same as the similar discussion in paragraph 139b, MCM, 1949, and the matter relating to impeaching one's own witness is not materially different from the similar discussion in section 303, NC & B. An indication as to what constitutes such surprise as will permit a party to impeach his own witness has been inserted. See, with respect to this question, CM 258070, Smith, 1 BR(ETO) 377, 388.

The rule that witnesses for the court are not witnesses for the prosecution or defense and may be impeached by either side is a rule applied by the Federal Courts so that the court may, with fairness to both sides, obtain the testimony of an important witness whom neither side desires to call as his own witness. See Litsinger v. United States, 44 F (2d) 45.

153b (2)(a) Various grounds.--General lack of veracity.--In addition to setting forth the general rules pertaining to proof of the character of the witness as to truth and veracity, this paragraph contains a provision permitting the introduction of proof of the good character of the witness as to truth and veracity after a showing that the witness has been convicted of a crime affecting his credibility, or that the witness has an unchaste character, as well as after a showing that the witness has a bad character as to truth and veracity. See Wigmore, § 1106.

153b (2)(b) Conviction of crime.--It has here been stated that before introducing proof of a conviction of a crime affecting his credibility, the witness may first be questioned with reference to the conviction sought to be shown. The requirement in paragraph 139b, page 186, of the 1949 Manual that the witness must first be questioned with respect to the conviction does not appear to be good law (Wigmore, § 980, Note 5). No such requirement had been set forth in the discussion of this question in section 301, NC & B.

With respect to the second subparagraph of (2)(b) it has been indicated (in the first sentence) that cross-examination is not limited by the general rule requiring proof of the conviction in order to impeach a witness by showing that he has committed a crime. Authority for this proposition is set forth in Wigmore, § 981. The

rule permitting the raising of an inference of consent in rape and similar cases by showing the whole catalogue of the alleged victim's lascivious propensities is not, with respect to some of its aspects, the majority rule among the States of the United States. However, the rule stated is one which has obtained considerable recognition. It was adopted by the board of review in the Army in 1947, and was inserted in the 1949 Manual, because it seemed more suitable to the requirements of military jurisprudence than did more restricted rules on the same subject, and it was accepted by all the services for insertion in the 1951 Manual for the same reason. See CM 318548, Hernandez, 71 BR 403, 405, 6 Bull JAG 67, and CM 324987, Whaley, 74 BR 43, 44. It has also been indicated in this paragraph that evidence of the lewd character of the alleged victim in any sexual offense may be shown for the purpose of impeachment, and that evidence of good character as to chastity may be shown either for the purpose of indicating the probability of lack of consent when lack of consent is material or to rebut the implications arising from contrary evidence. See Wigmore, §§ 62 and 924(a).

153b(2)(c) Inconsistent statements.--The discussion of impeachment by proof of inconsistent statements has been taken more or less from the similar material found on page 187, MCM 1949. The 1949 Manual, however, did not clearly differentiate between the procedure used in the case of oral inconsistent statements and that used in the case of written inconsistent statements. In the corresponding discussion found in section 299, NC & B, it was indicated that the procedure applicable with respect to oral statements must also be used in the case of inconsistent written statements. The rule stated in the 1951 Manual will permit the use of either (or both) of two methods of laying a foundation in the case of a written inconsistent statement:

(1) The procedure followed with respect to oral inconsistent statements may be used in which case the writing need not be shown to the witness; or

(2) The writing may be shown to the witness and he may be asked whether he made the written statement.

The latter procedure was at one time, but is not now, the only procedure which could be used to lay a foundation for proof of an inconsistent written statement (see Wigmore, § 1259 et seq.) and, of course, satisfies the principle of fairness to the witness because of the fact that if he is the author of the written statement he will ordinarily recognize it when it is shown to him.

The second subparagraph under the heading Inconsistent statements provides that an oral inconsistent statement of a witness may be proved by anyone who heard him make it, even though the statement was reduced to writing and the writing is not accounted for. The best evidence rule has no application to proof of such a statement (Wigmore, § 1332).

The third subparagraph under Inconsistent statements in the 1949 Manual stated that proof that a witness not the accused made an inconsistent statement is admissible only for the purpose of impeaching him. This statement is not entirely correct. Some inconsistent statements made by witnesses who are not accused persons in the case might well be admissible under some exception to the hearsay rule to prove the truth of the matters stated—for example, a statement of a witness who was an accomplice of the accused which was made in pursuance of the joint venture. The use of the phrase "not the accused" in the 1949 Manual also indicated that if the witness was the accused his statement would be admissible to prove the truth of the matters stated. Although in most cases this would be so, it would not be so if the statement was involuntary. The new text (third subparagraph) has taken care of these defects and also contains an admonition to the law officer (or the president of the special court-martial) as to the instruction to be given when inconsistent statements are received only for the purpose of impeachment.

The last subparagraph under Inconsistent statements in the 1951 Manual has been somewhat rephrased (with respect to the form in which it appeared on the top of page 188 of the 1949 Manual) for the purpose of permitting the impeachment, in some cases, of a witness who testifies that he has a failure of recollection. If such a witness, for instance, had given material testimony in the case which was subject to impeachment, and a day or two before the trial had made a statement indicating that his recollection was perfectly clear at that time with respect to a matter as to which he now claims a failure of memory, proof of that statement should certainly be admissible to impeach him. See Wigmore, § 1043.

153b (2)(d) Prejudice and bias.--This paragraph is essentially the same as the comparable paragraph appearing on page 188, MCM 1949.

153b(3) Effect of impeaching evidence.--The text with reference to this matter has been taken from similar material found on page 188, MCM 1949, with some amplification in the interest of accuracy and clarity.

154a(1) Intent.--General.--This paragraph contains a general discussion with respect to intent.

154a(2) Drunkenness.--The statement as to ordinary drunkenness not being an excuse for crime on the ground of insanity has been taken from CM 319168, Poe, 68 BR 141, 171. The rule stated in the text with respect to voluntary drunkenness being considered as affecting mental capacity to entertain a specific intent, or to premeditate a design to kill, approximates the rule on this subject laid down in section 152, NC & B. It will be noticed, however, that paragraph 140a, MCM 1949, states that voluntary drunkenness may be considered as affecting mental capacity to entertain a specific intent or state of mind. The phrase "state of mind" was apparently used because in Army practice drunkenness, if sufficiently severe, could reduce the offense of murder to the offense of voluntary manslaughter. See CM 284389, Creech, 16 BR (ETO) 249, 258, and CM 305302, Mendoza, 20 BR (ETO) 341, 344. It appears that this Army practice derived its impetus from the fact that before the passage of the revised Articles of War, effective 1 February 1949, there had been no degrees of murder and the mandatory sentence was death or life imprisonment. Even though the revised Article of War 92 did provide for punishment as a court-martial might direct in the case of murder not premeditated, the 1949 Manual carried on the old tradition. The 1951 Manual follows the rule of the Federal courts that voluntary intoxication, however gross, is not to be considered as bearing upon the ability of the accused to harbor general criminal intent. For example, in the Federal courts, voluntary intoxication is not considered as affecting a person's mental capacity to entertain malice aforethought. In such courts, as will now be the case in military courts, voluntary drunkenness may be raised as a defense only in cases involving specific intent or premeditation. See Bishop v. United States, 107 F(2d) 297, and McAffee v. United States, 111 F(2d) 199, 205.

154a(3) Ignorance of fact.--It has been indicated that there may be some offenses as to which ignorance of fact is not available as a defense. See United States v. Balint, 258 U. S. 250.

154a(4) Ignorance of law.--The 1949 Manual (page 189) stated that ignorance of law was not an excuse for a criminal act. Section 4, NC & B, contained the same implication with respect to certain kinds of Naval law. The maxim, "Ignorantia legis nemine excusat," is not of quite so broad an application. It is a general rule that if a special state of mind on the part of the accused, such as a specific intent, constitutes an essential element of the offense charged, an honest and reasonable mistake of law, including an honest and reasonable mistake as to the legal effect of known facts, may be shown for the purpose of indicating the absence of such a state of mind. See Cotter v. State, 36 NJL 125, and cases there cited. This paragraph (Ignorance of law) also indicates that there are certain military

regulations of which a person is not presumed to have knowledge. This latter material was taken from the similar material found under the heading "Ignorance of law" appearing on page 189, MCM 1949, and is somewhat broader, with respect to the categories of those regulations of which knowledge may be presumed, than the rule relating to this subject set forth in section 4, NC & B.

154b Stipulations.--The provisions concerning stipulations are practically the same as those set forth in paragraph 140b, MCM 1949. NC & B did not provide for the use of stipulations, but it appears that stipulations both as to facts and testimony were made use of in actual practice before Naval courts. See CMO 9-1946, p. 327.

154c Offer of proof.--NC & B made no provision for offers of proof. Paragraph 140c, MCM 1949, on the other hand, permitted both the prosecution and the defense to make offers of proof. However, there would appear to be no reason for extending this privilege to the prosecution, since the government has no appeal as to evidence rulings, and the possibility of prejudicial error might be greatly increased by so extending it. One wonders, for example, what would be the effect of the prosecution making an offer of proof in open court as to a confession of the accused. It is for these reasons that offers of proof have been restricted, in the 1951 Manual, to the defense.

154d Waiver of objections.--This paragraph amounts to a sort of catch-all provision to cover all cases of obvious waiver which do not fall within any of the explicit provisions for waiver found elsewhere in the chapter on evidence. The wording of the paragraph follows that of paragraph 140d, MCM 1949. There is no comparable paragraph in NC & B.

Conference 12a-b

PUNITIVE ARTICLES (77-87)

Conducted by
COMMANDER WILLIAM A. COLLIER

References: Chapter XXVIII, Paragraphs 156-166

In general the punitive articles cover offenses which are familiar by name to the members of all the armed forces. Their specific provisions, however, present many changes. In some instances the fundamental concepts of the offense are different from those now held. In others the changes, while not so far-reaching, contain important departures from the present laws governing the armed forces.

156 Principals.—The first of these, Article 77, is titled Principals. In an exact sense this is not a punitive article but instead constitutes a definition of principals. This statutory definition of principals, which embraces persons other than the actual perpetrators of the offense, is fairly new to the armed services. However, the legal concept which this definition sets forth is one which has become well established in military law. The 1949 Manual for Courts-Martial contains a similar definition of principals, and the judicial opinions defining the culpability of aiders and abettors have been comparable among the armed forces and are in accord with Article 77. Therefore the provisions of Article 77 and of the text in the 1951 Manual which discuss this article present no substantial change for any of the services. It is clear that mere presence at the scene of an offense is not enough to constitute one an aider or abettor. The aider or abettor must have an intent to aid or encourage the commission of an offense and must share the criminal intent or purpose of the perpetrator. The person who executes the command of a principal may himself be innocent of any offense. For example a soldier would not be culpable under the article if, at the command of a superior, he shoots a man who appears to the soldier to be an enemy but who is known to the superior to be a friend. A similar result would obtain when an irresponsible child or an insane person is the one counseled or commanded to commit an offense.

157 Accessory After The Fact.—Article 78 provides a statutory definition of an accessory after the fact in language which is derived from title 18, U.S.C., § 3, and which conforms in general to the present views of the armed forces on the subject. It does present a change for the Army and Air Force in that under Article of War 60, the offense of receiving or entertaining deserters could be committed only by a commanding officer.

Under Article 78 any person subject to the code who commits such an act will be punishable as an accessory after the fact. The broad scope of this article is stressed in the Manual by pointing out that the assistance given to a principal by an accessory after the fact includes not only assistance designed to effect the personal escape or concealment of the principal but also those acts which are performed to conceal the commission of the offense. It is to be noted that a mere failure to report a known offense will not constitute one an accessory after the fact under Article 78. It is an essential element of proof that the accused actually or constructively knew that the person received, comforted, or assisted was the offender. Under a specification alleging the accused to be an accessory after the fact, the Government has the burden of establishing beyond a reasonable doubt that a principal had committed the offense as to which the accused is allegedly such an accessory. In order to establish this essential fact it is not necessary to prove the conviction or arrest of the principal, but evidence of conviction of the principal (such as a record thereof) cannot be used to establish against an alleged accessory the fact that the principal actually committed the offense. There are opinions of Federal district courts which hold otherwise, but the 1951 Manual follows a principle laid down by the Supreme Court in the case of Kirby v. United States, 174 U.S. 47 (1899).

158 Lesser included offenses.--Article 79 follows the language of Rule 31(c), Federal Rules of Criminal Procedure, and also is in accord with the present views of the armed forces, including the concept that the accused may, with certain exceptions, be found guilty of an attempt to commit either the offense charged or an offense necessarily included therein. The definition of a lesser included offense which is set forth in the 1951 Manual embodies the definition contained in the judicial decisions of the armed forces and presents no substantial change. Appendix 12 presents a Table of Commonly Included Offenses listing certain principal offenses and offenses necessarily included in them. The list is not all-inclusive and cannot be applied mechanically in every case. The table is a general guide only, and each case must be tested by the definition of a lesser included offense which is set forth in the discussion of Article 79.

159 Attempts.--While Article 80 provides for the specific substantive offense of an "attempt," certain exceptions to charging an attempt as a violation of this article are found in Articles 85, 94, 100, 104, and 128 (that is, Desertion, Mutiny or Sedition, Subordinate compelling surrender, Aiding the enemy, and Assault). These articles specifically include the offense of an attempt to commit the principal offenses which they denounce. The provision of Article 80 that "Any person subject to this code may be convicted of an attempt to

commit an offense although it appears on the trial that the offense was consummated" is in accord with the judicial decisions of the Army and the Air Force, but is different from naval practice which has been that "one proven actually to have committed an offense cannot be found guilty of an attempt to do so" (Sec. 43 NC&B). Subject to this exception the provisions of this article conform to the concepts of this offense which are presently held by the armed forces and expressed in their judicial decisions. Accordingly an accused is guilty of an attempt under the Uniform Code if he has committed acts requisite to constitute an attempt even though of his own accord he desisted before the consummation of the intended offense. (See F.B. Sayre, Criminal Attempts, (1927-28) 41 Harvard Law Review 821, 847.) It should be noted that soliciting another to commit an offense does not constitute an attempt.

160 Conspiracy.—Article 81, Conspiracy, provides that "Any person subject to this code who conspires with any other person or persons to commit an offense under this code shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct." Under the last provision of the article, an agreement to do an unlawful act or to do a lawful act in an unlawful way will not constitute the offense of conspiracy under Article 81 unless some member of the conspiring group does an overt act to effect the object of the conspiracy. Article of War 94, Article 14 of the A.G.N., and Article 213 in the Manual for Courts-Martial of the Coast Guard all provide that the mere entry into a corrupt agreement for the purpose of defrauding the United States Government constitutes the offense of conspiracy even without the performance of an overt act. As to this offense under Article 132 of the Uniform Code the Morgan Report specifically states:

> "The conspiracy clause has been omitted as that offense is now covered by Article 81. It is to be noted that an overt act to effect the object of the conspiracy is now required."

However, because of the serious nature of certain offenses, the mere agreement to commit them is considered to be so reprehensible as to require punishment in civilian life and, from the military standpoint, to constitute a punishable offense under Article 134. Some of the more common offenses of this nature are provided for as statutory conspiracies in title 18, U.S.C., 1946 ed., which includes Section 241, "Conspiracy against rights of citizens"; Section 757, procuring escape of "Prisoners of war or enemy aliens"; Section 2271, "Conspiracy to destroy vessels"; and Section 2384, "Seditious conspiracy"; and no overt act is required to consummate those

offenses. As these offenses are still on a common law footing, of course they may be tried by military courts under the general Article 134.

161 Solicitation. Article 82 provides for the offense of solicitation, but limits its application to the solicitation of only four offenses, that is, to any person subject to the code who solicits or advises another (a) to desert in violation of Article 85, (b) to mutiny in violation of Article 94, (c) to commit an act of misbehavior before the enemy in violation of Article 99, or (d) to commit sedition in violation of Article 94.

Neither the Articles of War nor the Articles of the Government of the Navy provided for "Solicitation" as a general substantive offense, although both of the applicable statutes denounced the persuading or enticing of another to desert. While Article 82 is limited in its application to the enumerated offenses, solicitation to commit some other offense may constitute conduct to the prejudice of good order and discipline or service discrediting conduct and as such may be charged under Article 134. It is not necessary that the person or persons solicited or advised act upon such solicitation or advice in order to constitute the offense (United States v. Galleanni, 245 F. 977; Commonwealth v. Flagg, 135 Mass. 545). However, that fact may affect the punishment which may be adjudged, for if after the solicitation or advice the offense of desertion or mutiny is attempted or committed, or if thereafter the offense of misbehavior before the enemy or sedition is committed, the accused shall be punished with the punishment which is 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 means other than by word of mouth or by writing. Any conduct which reasonably may be construed as a serious request or advice to commit an offense may constitute solicitation.

162 Fraudulent Enlistment, Appointment, or Separation. Subdivision (1) of Article 83 is in substance the same as Article of War 54, but with the addition of the wording which makes the offense applicable to officers as well as to enlisted persons; and the 1951 Manual adopts in general the language of paragraph 142 in the 1949 Manual which is also in general accord with the present provisions of NC&B. Sec. 103, Naval Courts and Boards, in part provides that where the accused fraudulently enlists without a discharge from another enlistment

in the Navy or Marine Corps, the offense is complete without the accused's receipt of pay or allowances under his new enlistment. Article 83 provides that in all offenses of fraudulent enlistment or appointment, the receipt of pay or allowances under the fraudulent enlistment or appointment is an essential element. 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 restraint pending trial for fraudulent enlistment or appointment is not considered an allowance. Article 22(b), A.G.N., requires that all offenses of fraudulent enlistment must be tried by GCM, but there is no such jurisdictional limitation in Article 83 of the Uniform Code.

Subdivision (2) of Article 83 incorporates the proposed A.G.N. Article 9 (34) which relates to one who procures his own separation by fraudulent means.

164 Effecting unlawful enlistment, appointment, or separation. Article 84 prohibits any person subject to the code from knowingly effecting an enlistment or appointment in or separation from the armed forces of any person who is ineligible for such enlistment, appointment, or separation because it is prohibited by law, regulation, or order. This article is derived from Article of War 55, but its scope is expanded to apply to all persons subject to the code instead of to officers only, and also to include the unlawful appointment of officers and the unlawful separation of men and officers. The comparable statute in the Navy, Article 19, A.G.N., applies only to officers who knowingly enlist into the naval service war time deserters, insane or intoxicated persons, or minors (under certain conditions).

164a Desertion. The Morgan Report states that Article 85 defining "Desertion" consolidates the provisions of the Articles of War and the Articles for the Government of the Navy relating to desertion, with the exception of Article of War 59 (Advising or Aiding Another to Desert) and Article of War 60 (Entertaining a Deserter) the provisions of which are now carried forward, respectively, by Article 77 (Principals) and Article 78 (Accessory after the fact).

In general, this article presents few changes over the present law in the Army and Air Force, but it presents a major change in the Navy's concept of the offense of desertion as now denounced by Articles 4 and 8, A.G.N. One of the essential elements of the offense under these naval articles is that the desertion be from the naval service and not merely from a certain ship or station. None of the provisions of Article 85 of the Code makes such total absence from military control

an element of the offense of desertion. In the Army and Air Force absence from the service of the United States is an element of desertion, but for a member of those forces the particular place of service is the "service of the United States," and total absence from military jurisdiction and control is not a requisite factor of the offense.

Subdivision (a)(1) of Article 85 provides that any member of the armed forces of the United States who without proper authority goes or remains absent from his place of service, organization, or place of duty with intent to remain away therefrom permanently is guilty of desertion. This is in accord with Article of War 58 but, as mentioned, differs from Articles 4 and 8, A.G.N., in that it will not be essential to prove that the accused absented himself entirely from military jurisdiction and control. If a man leaves his ship without authority and has the intent to remain away from her permanently, he is guilty of desertion under subdivision (a)(1) even though he steps ashore on a naval base and does not leave that base thereafter. Both the absence without authority and the intent to remain away permanently from his place of service, organization, or place of duty, are essential elements of the offense.

Subdivision (a)(2) of Article 85 provides that any member of the armed forces of the United States who quits his unit or organization or place of duty with intent to avoid hazardous duty or to shirk important service is guilty of desertion. This provision is in accord with the provisions of Article of War 28 but in its broad application is new to the Navy. The more limited naval provision on this matter is contained in Subdivision (14) of Article 4, A.G.N., which provides that the punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service who, in time of battle, deserts his duty or station, or entices others to do so.

The concept of hazardous duty or important service is not limited under Article 85 to duty or service in a combat area. These terms embrace a wide field, including employment in aid of the civil power in protecting property, or quelling or preventing disorder in time of great public disaster, and embarkation for foreign duty or duty beyond the continental limits of the United States or for sea duty.

Subdivision (a)(3) of Article 85 provides that a member of the armed forces is guilty of desertion if, without being regularly separated from one of the armed forces, he 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 so regularly separated or enters any foreign armed service except when authorized by the United States. In the Army and Air Force, Article of War 28 denounced similar acts when such were committed by enlisted persons, but did not apply to such conduct of officers or warrant officers as does the Uniform Code. This is not to say that an officer's accepting an appointment in one armed service without having been regularly separated from another would not have been a triable offense under the Articles of War; but of itself it would not have constituted desertion. Subdivision (a)(3) of Article 85 has no exact counterpart in the Articles for the Government of the Navy, under which a person who has the intent to permanently abandon his pending contract of enlistment and who absents himself without authority or is then absent without authority from naval jurisdiction is guilty of desertion.

Under the Uniform Code a member of an armed force who is absent without proper authority, and who then enlists or accepts an appointment in the same or another armed force, may be guilty of committing desertion under Subdivision (a)(1) of Article 85, that is, by being absent without authority with intent to remain away permanently, the intent being evidenced by his act of enlisting or accepting an appointment or entering a foreign armed service. Subdivision (a)(3) covers the situation where an unauthorized absence is not necessarily involved; the accused could be on an authorized leave or liberty and his wrongful act of enlistment or accepting an appointment, or entry into the service of a foreign armed service, without more would complete the offense of desertion.

The provisions of subdivision (b) of Article 85 correspond to the current provisions of the Articles of War and the A.G.N. and disciplinary laws for the Coast Guard.

164b Attempting to Desert. As in cases of attempts generally, here also under subdivision (c) of Article 85 in the particular case of an attempt to desert there must be an overt act which is more than mere preparation toward accomplishing that offense. However, once the attempt is made, the fact that conscience or some more tangible force causes the offender to stop short of actual desertion does not cancel the offense inherent in the attempt.

165 Absence Without Leave. With a few changes in wording, Article 86 corresponds to Article of War 61. "Fails to repair" as used in Article of War 61 is expressed in Article 86 as "fails to go," and "absents himself from his command, guard, quarters, station, or camp" is now expressed as "absents

himself or remains absent from his unit, organization, or other place of duty at which he is required to be at the time prescribed." The essential element stated in Article of War 61, that the absence must be "without proper leave," is stated in the text of Article 86 as absence "without proper authority."

To the Navy the provisions of Article 86 present the new concept of having an unauthorized absence without necessarily involving a total absence from military control. One who left his ship or other specifically appointed duty, but who remained within the confines of a naval shipyard or naval base, might be guilty of conduct to the prejudice of good order and discipline--but he was not guilty of an unauthorized absence. Under the Uniform Code a sailor ordered to report at a certain time to a cleaning station on the forecastle of a destroyer and, without proper authority, fails to so report or having so reported leaves that cleaning station without proper authority, may be guilty of absence without leave although he is at that time physically present on the fantail of that same ship. This is equally true of course of the soldier or airman, who, though still on a post or base, without proper authority fails to report for kitchen police at the time ordered, or who without proper authority leaves such duty after reporting. To the Army and Air Force this of course is a familiar view of the offense of Absence without leave.

Under subdivision (3) of Article 86 if it is charged that an accused absented himself from his ship (that is, from his "unit") without proper authority, it would be a defense that he actually was at that time on board her although it would be no defense that he was at that time on a Navy dock adjacent to that ship. The phrase "place of duty," as used in Article 86 subdivisions (1) and (2), refers to a specifically appointed place such as the first floor of barracks A or compartment C-105, on board the U.S.S. _____, whereas the phrase "other place of duty," as used in conjunction with the terms "unit" and "organization" in Article 86 subdivision (3), is a generic term designed to cover the broader concepts of a general place of duty as might be contained within the terms "command," "quarters," "station," "base," "camp," or "post." Article 86 is designed to cover every case not elsewhere provided for in which any member of the armed forces, through his own fault, is 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 is alone sufficient to establish a prima facie case. Under subdivisions (1) and (2) of Article 86, a place of duty is not an appointed one unless the accused has actual or constructive knowledge of the order purporting to

appoint such place of duty. Knowledge is "actual" when it is conveyed directly to the accused. It is "constructive" when it is shown that the order was so published that the accused in the ordinary course of events, or by the exercise of ordinary care, would have secured knowledge of the order. The place of duty, of course, may be appointed for one person only or as a rendezvous for several.

As to members of the armed forces who either are turned over for trial by the military to the civil authorities or are apprehended and tried by civil authorities without the member's prior return to military jurisdiction, the new manual restates the rules currently followed in all of the armed forces. As is now true in all of the services the status of absence without leave is not changed by his inability to return through sickness, lack of transportation, or other disability. But when a man on an authorized leave is unable to return at the expiration of his leave through no fault of his own, he is not guilty of absence without leave.

166 Missing Movement. As a specific statutory provision, the offense of missing movement, Article 87, is new to all of the services although acts such as those denounced by Article 87 have not gone unpunished in any of them. In the Navy the offense of deliberately missing ship is now tried under Article 22, A.G.N., and in the Army and in the Air Force similar offenses are tried under Article of War 61. As stated in the Morgan Report Article 87 is taken from proposed A.G.N., Article 9 (57).

Article 87 encompasses not only a deliberate missing of some required movement but also one which occurs through neglect. The definition contained in the 1951 Manual is derived from definitions of "through neglect" which appear in paragraphs 171 and 172b, 1949 Manual, and Section 69, Naval Courts and Boards. To be guilty of the offense of missing movement the accused must have known or had cause to know of the prospective movement he is alleged to have missed, although it is not necessary that he know the exact hour or even the exact date of the scheduled movement. It is sufficient if the approximate date is known to the accused, and proof of general knowledge in the accused's organization of the prospective movement would justify the assumption by a court of the necessary knowledge on the part of the accused.

PUNITIVE ARTICLES (88-106)

Conducted by
COMMANDER WILLIAM A. COLLIER

167 Contempt towards officials.--Article 88 is derived from Article of War 62. Article of War 62 and the discussion thereof contained in paragraph 150 of the 1949 Manual are in accord with the present naval practice on this subject, although there is no specific provision in the Articles for the Government of the Navy regarding this offense. In the Navy the offense is now triable as a violation of one of the general articles. Article 88 is more restrictive than Article of War 62 in that the former applies to officers only while the latter applies to all persons subject to military law.

168 Disrespect towards a superior officer.--Article 89 is primarily a restatement of the provisions of law currently governing the armed forces in regard to this offense. The article, however, does not include the provision contained in Article 8 (6), A.G.N., "while in the execution of his office", and the present requirement of naval law, that the superior be present and in the execution of his office at the time the offense is committed, will no longer apply. In the 1951 Manual the analysis and definition of the terms "superior officer" and "his superior officer" are in accord with the present holdings of all of the armed forces except for the provisions relating to superiority as between personnel of different armed forces, and except that, at present, the Navy includes warrant officers and petty officer in the term "superior officer". A principal defense still available to a person accused of this offense is that the accused did not know that the person against whom the acts or words were directed was his superior officer.

169a Striking or assaulting superior officer.--The provision of subdivision (1) of Article 90 is essentially the same as the one now contained in Article 4 (3), A.G.N., and in Article of War 64. The word "assaults" as used in Article 4, A.G.N., is supplanted in the Uniform Code by the phrase "draws or lifts up any weapon or offers any violence against him" in conformity with the present terminology of Article of War 64; but the change is only in wording and not one of substance. Article

of War 64 provided that this offense was punishable when the assault or battery was committed "on any pretense whatsoever". This last phrase has been omitted from Article 90, but the omission presents no real change to the Army or Air Force because those services have always recognized certain defenses to the offense. It is to be noted that a discharged prisoner or other civilian subject to military law and under the command of an officer is subject to this provision.

169b Disobeying superior officer.—Subdivision (2) of Article 90 is identical with the provisions of Article of War 64 and Article 4(2), A.G.N.; and the discussion of this offense appearing in the 1951 Manual is derived from that contained in paragraph 152 of the 1949 Manual and section 47, NC & B, as modified by Change #11. The mentioned Change #11 established the fact that if the order to a person is to be executed in the future, the failure to execute that order when the time comes constitutes the offense of disobedience of orders, and not conduct to the prejudice of good order and discipline as had been held previously by the Navy.

170 Insubordinate conduct towards noncommissioned officer.—As mentioned above, section 47, NC & B, defines the words "superior officer" as including petty and noncommissioned officers. This is not the case under the Uniform Code where the term officer, defined by statute, is construed to refer to a commissioned officer. However, the offenses against petty and noncommissioned officers contemplated by section 47 are encompassed within the offense of insubordinate conduct towards a noncommissioned officer under Article 91 which 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. It does, however, limit the offenders against whom it is directed to warrant officers or enlisted persons instead of including "any person subject to the code", as provided in Articles 89 and 90.

Article 91 denounces those offenses committed by a subordinate in his relations to one senior to him. A military senior, of course, may be punished for assaulting or striking a subordinate, and in certain instances (e.g., when the subordinate is an armed force policeman) for disobeying his lawful order, but these are offenses under other articles such as Articles 92, 93, 128, or 134. Similarly, an assault by a

civilian subject to military law upon a warrant officer, a noncommissioned officer, or petty officer should be charged under Article 134. Subdivision 3 of Article 91, denouncing contemptuous and disrespectful language or deportment toward a warrant officer, or noncommissioned or petty officer, employs the phrase "while such officer is in the execution of his office". This limits the application of this part of the article to language or behavior within the sight or hearing of the person toward whom it is used.

171 Failure to obey order or regulation.—Article 92 is derived from proposed Articles 9 (30) and 9 (19), A.G.N., and is broader than the present Article 8 (20), A.G.N., Violating general order or regulations and Article 8 (9), A.G.N., Neglect of orders and culpable inefficiency. Under the present Army and Air Force practice offenses of this nature would be charged under Article of War 96. Article 92 is made up of three parts, the first part being directed against any person subject to the code who violates or fails to obey any lawful general order or regulation. The second part is directed against any such person who having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the same, this section contemplating all other lawful orders which may be issued by a member of the armed forces, violations of which are not chargeable under Article 90 or 91. The third part is directed against any person subject to the code who is derelict in the performance of his duties. As a specific punitive provision, this latter sub-section is new to the Army and Air Force, but has been known to the Navy as neglect of duty (Sec. 105, NC & B) and culpable ineffiency in the performance of duty (Sec. 67, NC & B).

Dereliction in the performance of duties may be evidenced either by a willful or negligent failure to perform a duty imposed by regulation, lawful order, or custom of the service or by performance of such duty in a culpably inefficient manner. Culpable ineffiency is inefficiency for which there is no reasonable or just excuse, and if it appears that the accused had the ability and opportunity to perform his duties efficiently but nevertheless performed them inefficiently, he may be found guilty of this offense. It is no offense, however, if the failure to perform the duty is caused by ineptitude or incapacity alone.

172 Cruelty and maltreatment.--Article 93 is derived from proposed Article 9 (12), A.G.N., and is identical with the present Article 8 (2), A.G.N. The present Army and Air Force practice is to charge an offense of this nature under Article of War 96. The discussion in the 1951 Manual defining the phrase "any person subject to his orders" is based on present holdings by the armed forces regarding such offenses, and although the maltreatment, oppression, or cruelty must be real, it may be mental as well as physical.

173 Mutiny and sedition.--Article 94 is derived from Articles of War 66 and 67, and the text of the 1951 Manual adopts in general the language of paragraphs 154 and 155 of the 1949 Manual which discuss these articles of war. The death penalty has been removed for the offense of "attempted sedition", and the words "excites, causes, or joins" have been omitted as being unnecessary since persons taking such actions are triable either as principals under Article 77 or as guilty of solicitation under Article 82.

A change in the Navy's definition of "mutiny" is effected by the provision in Article 94 that the offense must be committed "in concert with" another person or persons, except when violence or disturbance is created. Section 46, NC & B holds:

> "To constitute mutiny, it is not necessary that there should be a concert of several persons, though it will be rare that this is lacking."

A change for the Army and Air Force is effected by the applicability of subdivision (a) (3) of Article 94 to all persons subject to the Uniform Code instead of only to officers and soldiers as was the case under Article of War 67. All other persons presently subject to military law who are guilty of failure to suppress mutiny or sedition are chargeable under Article of War 96 in the Army and Air Force.

The word "utmost" as it is used in subdivision (a) (3) of Article 94 should be given a reasonable interpretation based on the action that properly may be called for by the circumstances of the situation, having in mind the rank and responsibilities or the employment of the individual concerned. A failure to take "all reasonable means" to inform his superior or commanding officer includes a failure to take the most expeditious means available, and whether an accused had "reason

to believe" that an offense of mutiny or sedition was taking place is to be tested by whether a reasonable man knowing the same facts as the accused and being in the same or similar circumstances would have believed that a mutiny or sedition was taking place. It should also be noticed that Article of War 67 used the phrase "having reason to believe that a mutiny or sedition is to take place", whereas Article 94 (a) (3) uses the phrase "has reason to believe is taking place."

174 Arrest and confinement.--Article 95 is derived from the punitive aspect of Article of War 69 and is in accord with similar provisions in the Navy and Coast Guard. Resisting apprehension is now known to the Navy as resisting arrest and is tried under Article 22, A.G.N. At present there is no specific punitive article in the Army or Air Force comparable to Article 95 covering resisting apprehension. In the past, although similar offenses could have been tried by the Army and Air Force under the general article, few cases of this nature seem to have arisen, and therefore the first part of this article may present a comparatively new field of offenses in the Army and Air Force. It should be specifically noted that a person cannot be convicted of resisting apprehension if the attempted apprehension was in fact illegal.

175 Releasing prisoner without proper authority.--Article 96 is derived from Article of War 73 and is in accord with the comparable Navy provisions. Article 8 (18), A.G.N., limited the specific offense to those offenders who were "rated or acting as master at arms", but in the case of persons other than those rated or acting as master at arms, the offense would have been alleged in the Navy as culpable inefficiency in the performance of duty or as aiding the escape of a person under arrest. Aside from this difference, Article 96 presents no change in the current concepts of similar offenses held by all of the armed forces.

176 Unlawful detention of another.--The provisions of Article 97 are in accord with those presently discussed in Section 101, NC & B, and with the opinions in the Army and Air Force discussing similar offenses which are now tried under Article of War 96. Any unlawful restraint of another's freedom of locomotion will result in a violation of this article.

177 Noncompliance with procedural rules.--The first provision in Article 98 against unnecessary delay embodies the substance of Article of War 70 but is enlarged to include persons other than officers. An offense in violation of the first part of this article can occur, for instance, when an officer who has been

assigned the investigation of an offense unnecessarily delays the the investigation or when a commanding officer unnecessarily delays the proper disposition of charges.

Paragraph (2) of this article is directed against a failure to comply with procedural provisions and is new as a specific punitive clause. It will provide a means for enforcing such provisions as are contained in Article 37 which prohibits unlawfully influencing the action of a court or Article 31 which prohibits compulsory self-incrimination. Under the Articles of War or the Articles for the Government of the Navy, deliberate interference with the functions of a court-martial or other intentional violations of this knnd would fall under the general articles (A.W. 96, A.G.N. 22); thus the new code reflects the increased emphasis placed on prohibitions against compulsory self-incrimination and unlawfully influencing the court.

178 Misbehavior before the enemy.--The provisions of Article 99 correspond with those in Article of War 75 and Article 4 (12-20), A.G.N. The generic provision of Article of War 75 against an officer or soldier "who, before the enemy, misbehaves himself" has not been incorporated in Article 99, but it is believed that the new article specifically covers all conduct punishable in this respect; note, for instance, the broad scope of item (3) directed against endangering the safety of a command, unit, place, or military property through disobedience, neglect, or intentional misconduct. Attention may be invited to the fact that the clause "before or in the presence of the enemy" applies to each of the nine subdivisions of the article.

179 Subordinate compelling surrender.--Article 100 consolidates Article of War 76 "Subordinates Compelling Commander to Surrender" and Article 4 (12), A.G.N., "Striking flag or treacherously yielding", but its heading is indicative only of the first portion of the article. The second part of the article deals with the offense of any person subject to the code who surrenders or attempts 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. (In this connection, it is to be noted that section 3 of Public Law 506, 5 May 1950, provides that no inference of a legislative construction is to be drawn from catch lines in the Uniform Code.)

180 Improper use of countersign.--The provision against improper use of countersign in Article 101 is based upon Article of War 77

and is new to the Navy. In the second part of this article, directed against giving a parole or countersign different from that authorized, the words "to his knowledge" have been added to cover the situation when a person misunderstood the countersign or parole received by him. Article 101 is directed against a negligent as well as a deliberate offender.

181 Forcing a safeguard.--Article 102 corresponds to Article of War 78, but the words "in time of war" have been deleted in order to cover situations where a safeguard has been placed but a formal state of war does not exist. The provision is new to the Navy, but the subject was considered in the September 1950 issue of the JAG Journal. The discussion in the 1951 Manual is extended considerably to provide a more detailed definition of a "safeguard" and is based upon material set forth in paragraphs 241-242 of the Rules of Land Warfare (FM 27-10) and CMO MTO 4846 Owens, 6 BR (NATO-MTO) 29.

182 Captured or abandoned property.--The provisions of Article 103 regarding captured or abandoned property consolidate Articles of War 79 and 80 and correspond to parts of Articles 8 (16), 16, and 17, A.G.N. Paragraph 3 of subdivision (b), directed against looting and pillaging, has been added since "it was felt that conduct of this nature should be specifically covered." The definition in the new manual of looting or pillaging is based in part upon the case of CM 310446, Ruppel, 61 BR 291, 5 Bull JAG 205, which indicated that looting or pillaging need not necessarily be accomplished by force or violence.

183 Aiding the enemy.--Jurisdiction of a court-martial or military commission under Article 104 extends over all persons regardless of whether they are otherwise subject to military law. The article corresponds to Article of War 81 but is in terms of "aiding" rather than "relieving" the enemy. Related provisions in the A.G.N. are Articles 4 (4) and (5).

184 Misconduct as prisoner.--Article 105 denounces acts which will constitute an offense new to all of the armed forces and stems from abuses which arose during World War II.

The first part of the article is directed against any person subject to the code who while in the hands of the enemy in time of war, without proper authority and in a manner contrary to law, custom, or regulation, acts to the detriment of other persons of whatever nationality held by the enemy as civilian or military prisoners, for the purpose of securing favorable treatment to

himself. Escape from the enemy, however, is regarded as authorized by custom, and therefore an escape which results in punitive measures being taken against fellow prisoners still in the hands of the enemy is not an offense under this article. Obviously, too, an escape is not an act done "for the purpose of securing favorable treatment by his captors". The second part of the article concerns any person subject to the code who, while in the hands of the enemy in time of war and while in a position of authority over other persons of whatever nationality held by the enemy as civilian or military prisoners, maltreats such persons without justifiable cause.

185 Spies.--Article 106 is derived from Article of War 82 which is generally in accord with naval law on the same subject. The specific provision of this article relating to a person's lurking as a spy or acting as a spy in or about any shipyard, any manufacturing plant, or any other place or institution engaged in work in aid of the prosecution of war by the United States is a recognition of the importance of industrial plants and other manufacturing units engaged in the war effort. This article applies only in time of war. In time of peace spies would be charged under Article 134 for the acts which are denounced by the espionage provisions of title 18, U.S.C.

PUNITIVE ARTICLES (107-119)

Conducted by
COMMANDER WILLIAM A. COLLIER

186 False official statements.--Article 107 is derived in part from Articles of War 56 and 57 and is closely related to similar provisions of law now governing the Navy and the Coast Guard. This article is broader in scope than the specified articles of war in that it applies to all persons subject to the code instead of only to officers, and also it is not limited (where documents are involved) to particular types of documents and extends to oral statements. On the other hand, it does not cover the second sentence of Article of War 57 which is directed against a deliberate or negligent failure to render a return, nor does this article include the clauses of Articles of War 56 and 57 which provide for the mandatory punishment of dismissal.

Articles 8 (14) and 8 (1), A.G.N., (False musters, Falsehood), which are comparable to Article 107 do apply to every person in the Navy.

187 Military property of United States.--Loss, damage, destruction, etc.--Article 108 consolidates Articles of War 83 and 84 and corresponds to Article 8 (15) and part of Article 14 (8), A.G.N. As far as its first subdivision is concerned (selling or otherwise disposing of military property), the offense denounced is separate and distinct from that of larceny, which is punishable under Article 121. The distinction made by Article of War 84 between issued and nonissued military property no longer exists. However, the fact that the property in question was of a type and kind issued for use in the military service might, together with other circumstances, raise an inference that the property was military property. See generally on this question, CM 319591, Pogue, 68 BR 385, 398, and CM 327060, Graulau, 76 BR 35, 7 Bull JAG 34.

Article 108, applying to all persons subject to the Uniform Code, is more extensive than Article of War 84 which applied only to "soldiers." With reference to the maximum punishment for offenses under this article, the Table of Maximum Punishments in the new manual varies the punishment

according to the value of the property involved, following the current Army and Air Force practice. Furthermore, as far as damage (as distinguished from loss) is concerned the punishment is modified by regarding as controlling the amount of the damage rather than the total value of the property.

188 Property other than military property.--Waste, spoil, destruction.--Article 109 is derived from Article of War 89 and encompasses private property as well as nonmilitary Government property. As far as the offenses of wasting and spoiling are concerned, the offenses involve real property only, this restrictive interpretation being in accord with current Army law and based upon the historical concept of "waste" and "spoil."

The provisions of Article of War 89 relating to orderly behavior, reparation, and riot have not been included in Article 109 as the reparation aspect is dealt with in Article 139, corresponding to Article of War 105, and riot is covered by Article 116. Corresponding to the provisions implementing Article 108, the new manual varies the maximum punishment for offenses in violation of Article 109 according to the value of the property destroyed or, in cases of damage, according to the amount of damage.

189 Improper hazarding of vessel.--Article 110 is derived from Articles 4(10) and 8(11), A.G.N., and is directed against willful as well as negligent acts or omissions. The term "hazarding" embraces stranding and destruction, and stranding is conclusive evidence of the fact that the vessel was hazarded although not of the fact of culpability on the part of any particular person. Cases of hazarding a vessel, though involving actual damage or destruction, should be pleaded uder Article 110 as the more serious offense rather than under Article 108.

The high standard of strict responsibility for the safety of a ship and her crew that is imposed upon naval officers was expressed in Naval Digest, 1916, p. 410, "Navigation," paragraph 16, and in CMO 5-1930, 3. The discussion of negligence and the other definitions contained in the new manual are taken from the corresponding provisions of Naval Courts and Boards (Sec. 69), and the qualifying remarks as to the distinction between negligence and mere error of judgment are in accord with the present provision of the Coast Guard Manual for Courts-martial (Article 245). The definition of "suffer" is taken from CMO 186-1919, 24.

190 Drunken or reckless driving.--The word "drunk" as used in Article 111 has the meaning set forth in paragraph 191 of the 1951 Manual. It will be noted that the text of this

article uses the term "operates" rather than the word "driving" which appears in the catch line. The term "operate" is controlling, and is somewhat wider than the word "drive". In Commonwealth v. Clarke, 1926, 254 Mass. 566, 150 NE 829, for instance, the defendant was held to have "operated" his car in a situation in which the engine was not running, when he entered the car to lock the transmission and in order to do this threw the clutch over from the reverse to neutral, causing the car, then at rest on a slight incline, to move forward about four feet. The definition in the new manual of the term "vehicle" follows the Federal definition of that term contained in Title 1 U.S.C. § 4 in that it is not limited to motor vehicles; however, it is not limited as is the Federal definition to means of transportation on land.

191 Drunk on duty.--The provisions of Article 112 are derived from Article of War 85, although the phrase "other than a sentinel or look-out" has been inserted because drunkenness on duty of a sentinel or look-out is punishable under Article 113. Article 112 differs somewhat from current Navy law, Article 8(1), A.G.N., which denounces drunkenness in general. Under this naval provision the fact that the offender was on duty at the time constitutes merely an aggravating circumstance; but under Article 112 the fact that the offender is on duty when found drunk is an essential element. Drunkenness in certain other situations is chargeable under Articles 133 or 134 (see app. 6c, Forms #115, #132, et seq., MCM 1951). It is an element of the offense of being found drunk on duty that the accused was found drunk while actually on the duty alleged; and if an accused while sober absented himself from his duty and was found drunk while so absent, his conduct would not be chargeable under this article.

192 Misbehavior of sentinel or look-out.--The language use in Article 113 is substantially that of Article of War 86, though the word "look-out" has been added to cover Navy terminology. Although the general provisions of Article 8(1), A.G.N., encompassed drunkenness by sentinels as well as other persons in the Navy, the first part of Article 113 has no specific counterpart in Navy law. Article 4(8), A.G.N., is a provision broader than the second part of Article 113 since it encompasses sleeping while on any kind of watch duty, for instance, while on watch as officer of the deck, but such offense should now be charged as a violation of either Article 92 or Article 134. Similarly, Article 4(9), A.G.N., is broader than the third part of this article which is directed specifically against a sentinel or look-out who leaves his post before being regularly relieved. Under the Uniform Code a person on a different duty who leaves his station before

being regularly relieved should be charged, depending upon the circumstances, under Article 86(2), 92, or 134. Certain misbehavior by sentinels which does not fall under Article 113, such as loitering on post, should be charged under Article 134 (see app. 6c, Form #168, MCM 1951).

193 Dueling.--The provisions of Article 114 are derived primarily from Article of War 91 and present no change of substance to the Army and Air Force. Article 114 is broader in scope than Article 8(5), A.G.N., since it also covers the offenses of promoting or conniving at fighting a duel and, when having knowledge of a challenge sent or about to be sent, of failing to report that fact promptly to the proper authority. However, the general discussion which is contained in the 1951 Manual is in accord with the Navy decisions and with the definitions of the offense which appear in the Naval Digest of 1916.

It should be pointed out that mutual combat fought with fists does not constitute a duel.

194 Malingering.--Article 115 presents no substantial change for the Army and Air Force in which services the offense of feigning illness, disability, or insanity with the intention of evading duty is now charged under Article of War 96, as is also any willfully and wrongfully self-inflicted injury which results in temporary or permanent impairment of ability to perform military duty. Self-maiming has also been held to constitute misbehavior before the enemy under Article of War 75 or mayhem under Article of War 93. In the Navy, feigning sickness, physical disablement, or mental lapse or derangement for the purpose of escaping duty or work is now charged as malingering under Article 22d, A.G.N. Section 104, NC&B, in discussing this offense states that "To constitute the offense the pretension must have been successful." Such will not be the case under Article 115 since the essence of the offense is the design to avoid work, duty, or service whether or not the accused actually evaded certain duties by means of the pretense.

195 Riot or breach of peace.--Article 116 denounces riot as does Article of War 89 but is a new provision and deviates from the legislative technique found in other punitive articles of the Uniform Code in that it does not define "riot" or "breach of the peace." In the Navy, riot and other similar offenses such as affray and disorder were regarded as offenses in violation of the general article (Article 22(a), A.G.N.), and "riot" was defined in Section 92, NC&B. The definition of "riot" in the new manual is based upon the common law definition but has been modified so as to link riot to breach of

the peace, making breach of the peace an essential element and a lesser included offense. It is not required that the rioters complete their entire purpose, but they must have begun to execute it. The example in the second subparagraph of paragraph 195a of the new manual is taken from Aron v. City of Wausau, 98 Wis. 592, 74 NW 354.

As a specific offense, "breach of the peace" is a new offense in military justice. The term "breach of the peace" was used in paragraph 177 of the 1949 Manual to describe provoking words or gestures as words or gestures of a nature to induce breaches of the peace, and Section 92, NC&B, referred to breach of the peace as an element of "riot." Many offenses previously charged under Article of War 96 or Article 22, A.G.N., are now chargeable as breaches of the peace under Article 116.

196 Provoking speeches or gestures.--Offenses similar to those within Article 117 are now denounced by Article of War 90 and Article 8(3), A.G.N. The discussion of Article of War 90 in paragraph 177 of the 1949 Manual provides that the words or gestures, to be punishable under that article, must be of a nature to induce breaches of the peace, and although this factor is not mentioned in Article 117 it has been incorporated in the discussion of the offense in the 1951 Manual as a logical test of whether the words or gestures which are used in the presence of the person to whom they are directed are "provoking" or "reproachful."

197 Murder.--In comparing Article 118 with Article of War 92 and Article 6, A.G.N., it will be noted first that certain jurisdictional limitations have been deleted. Article of War 92 limited court-martial jurisdiction in time of peace to murder committed outside the geographical limits of the States of the Union and of the District of Columbia; and Article 6, A.G.N., similarly limited court-martial jurisdiction in time of war as well as in time of peace. Under Article 118 the jurisdiction of courts-martial over the crime of murder is no longer subject to such limitations.

Article 118 specifically defines, as murder, four categories of homicide, while neither Article of War 92 nor Article 6, A.G.N., contained an explicit definition. In declaring murder punishable, the two last mentioned articles adopted the common law definition of murder, i.e., murder is the unlawful killing of a human being with malice aforethought, express or implied. While the definition in paragraph 179 of the 1949 Manual does not contain the words "express or implied," the discussion therein of "malice aforethought" left no doubt but that there was recognized, as murder, a

homicide committed with express or implied malice. The implied malice of the common law encompassed an intent to inflict great bodily harm (now covered by Article 118(2)), and further encompassed the so-called felony murder, i.e., a homicide committed during the perpetration or attempted perpetration of a felony inherently dangerous to human life. It will be noticed that felonies of this kind are now listed restrictively by Article 118(4).

The other common law categories of implied malice concerned cases in which a death was caused while a person was resisting a lawful arrest or obstructing an officer in an attempt to suppress a riot or affray, or in which the death resulted from an intentional and unjustifiable act or omission of a legal duty, the natural tendency of which act or omission was to cause death or great bodily harm to some person. In Article 118(3) is found a related category.

The substitution of a specific definition for the common law definition has brought about another variation in the concept of murder, namely, the omission of the "year and a day" limitation. While paragraph 179 of the 1949 Manual and Section 53, NC&B, adhered to the common law requirement that death must result within a year and a day of the act or omission that caused it, it has been recognized that today's state of medical science renders the "year and a day" rule archaic. The decisive question is whether there is proximate causal connection between the wound and the death.

While Article 118 does not specifically set forth different degrees of murder, the differences in punishment prescribed make a clear distinction between premeditated and felony murder on the one hand and the remaining categories of murder on the other.

There is a marked distinction between certain conduct which may result in murder in violation of Article 118(3), such as throwing a live grenade toward another in jest or flying an aircraft very low over a crowd to make it scatter, and the somewhat related conduct which, if death were caused thereby, would support only a charge of involuntary manslaughter in violation of Article 119(b)(1), such as being culpably negligent in discharging a pistol (see Hyde v. State, a 1935 Alabama case, 160 So. 237). The principal difference between the offenses denounced by Article 118(3) and Article 119(b)(1) are found in the nature of the conduct, i.e., whether or not death was a probable consequence of the act, and in the accused's state of mind, i.e., whether or not such evidenced a wanton disregard of human life.

The specimen specification for murder (app. 6c, form #85) is a short form type of pleading sanctioned by the Supreme Court's similar form of a murder indictment set forth in Form 1 of the Federal Rules of Criminal Procedure (see Ochoa v. United States, 167 F. 2d 341). As previously indicated the list of lesser included offenses in the 1951 Manual is not all-inclusive and does not mention attempted murder which can be an offense distinguishable from assault with intent to commit murder.

198 Manslaughter.--Article of War 93 listed the term "manslaughter" among various crimes and thereby adopted the common law concept of voluntary and involuntary manslaughter. Article 119 of the Uniform Code adheres to the distinction and defines the two types of manslaughter. There is no substantial difference between the old and the new law concerning voluntary manslaughter.

As far as the offense of involuntary manslaughter is concerned, the terminology used in Article 119 to define the offense differs considerably from the common law terminology, but in substance the difference in definition is not very great. Under the common law, as under Article 119(b)(1), the first of the two types of involuntary manslaughter arises from culpable negligence. The second type of involuntary manslaughter at common law arises from the commission of a criminal act malum in se but not amounting to a felony of a kind which would naturally tend to cause death or great bodily harm to another person. The criminal act must not be a felony of this kind as otherwise the resulting homicide would constitute a felony murder. To illustrate, if a homicide results from a simple assault and battery, as from striking the victim with a fist--or with a weapon not of a deadly type--in such a way as would not be likely to cause death or great bodily harm, and the assailant has no intent to kill or inflict great bodily harm, the offense is involuntary manslaughter at common law. Such a situation would constitute involuntary manslaughter also under Article 119(b)(2) despite the difference in terminology. The phrase "an offense, other than those specified in paragraph (4) of article 118" corresponds to the common law rule which excludes certain felony offenses, and the phrase "directly affecting the person" is the result of an endeavor to define the distinction between malum in se and malum prohibitum. The phrase "affecting the person" may be found in Section 1050 of the New York Penal Law which contains a comparable provision with respect to involuntary manslaughter.

Conference No. 12g

PUNITIVE ARTICLES, 120 - 127

Conducted by
LT. COL. JEAN F. RYDSTROM

Article 120a.--RAPE

199a The offense of rape as set forth in Article 120 represents no substantial change from the offense at common law. There are, however, some changes for the services. For example, for the Army, the geographical limitations in peace time for a trial by court-martial of a rape charge, which used to appear in AW 92, have been removed; for the Coast Guard, it is a new offense since it was formerly held beyond the jurisdiction of a Coast Guard court-martial to try (MCM, Coast Guard, p. 93); and for the Navy, the death penalty may now be imposed by a general court-martial (See Section 121, NC & B).

Article 120 now expresses in words the principle that the offenses of rape and carnal knowledge may be committed by a person only with a female not his wife. This raises the question of whether a husband could be charged with rape of his wife. If another person had intercourse with her by force and without her consent, and the husband aided and abetted him in doing so, he would be a principal under Article 77, and appendix 6a(9) provides that a person liable as a principal may be charged as though he himself had committed the act which constituted the offense. By the very terms of Article 120, however, he could not himself commit the offense against his wife, and there would be presented the specification in such a case, "that Joe Doaks did, on or about a certain date at a certain place, rape Mary Doaks," a woman whom the proof would show to be his wife.

State courts have been faced with this situation with indictments drawn under statutes similar to Article 120, and have generally sustained convictions of the husband as a principal in the second degree. The rationale is that a man could be guilty of such an offense at common law, and that the statutes on the subject are nothing more than an adoption of the integral parts of the common-law definition of rape. In this connection, see State v. Digman, (W. Va.) 5 SE 2d 113; and the annotation in 131 ALR at 1325 which discusses the criminal responsibility of one cooperating in an offense which he is incapable of committing personally. Article 77 obliterates the distinction between

principals in first and second degree, important at common-law both in pleading and proof, and it seems to follow necessarily that such an offense would properly be charged in the usual form of specification, the inconsistency being more apparent than real. See Haggerty v. U. S., 5 F (2d) 224.

The second paragraph of 199a recognizes the well-established rule that actual resistance is not essential to show lack of consent. Fear of death or great bodily harm is frequently used as a test of the reasonableness of the fear which permits a woman to fail or cease physical resistance, and all surrounding circumstances must be considered. People v. Yannucci, 283 NY 546, 29 NE 2d 185. Wharton suggests (1 Cr. Law, 12th Ed., Sec. 701) that a woman's fear is to be gaged by her capacity to resist under the particular circumstances, and gives as an example the father who established a "reign of terror" in his home, and was held guilty of rape of his daughter who submitted passively to him through terror.

Article 120b.--CARNAL KNOWLEDGE

199b While the words "carnal knowledge" have been used in their generic sense in the services in the past, they are now a "term of art," since Article 120b states that a person who does the acts proscribed therein, is guilty of "carnal knowledge." It should be noted that carnal knowledge is defined as "sexual intercourse under circumstances not amounting to rape." In other words, if the intercourse is obtained by force and without the woman's consent, the offense is rape no matter what her age. This thought is emphasized in paragraph 199a in which it is stated that rape may be committed on a female of any age. Of course, also, the acquiescence of a female child who is of such tender years that she is incapable of understanding the nature of the act is not consent, and the offense may be charged as rape rather than carnal knowledge. (See CM 233543, McFarland, 20 BR 15)

In some jurisdictions the offense of carnal knowledge may be committed only against a girl of prior chaste character. Article 120b is not so limited, and the girl's lack of chastity or the accused's ignorance of her age is no defense to him. See People v. Marks, 130 NYS 524.

The last paragraph of paragraph 199b recognizes the fact that, although Article 120b sets at 16 years, the age of consent of a girl to intercourse with persons in the military service, we still have the general article, 134, under which persons subject to the code may be tried by courts-martial for their acts which

bring discredit upon the armed forces because committed in violation of local statutes. Ordinarily, the decision to prosecute for statutory rape should depend upon whether the facts show a violation of the standard set forth in Article 120b, but the way is necessarily open, however, under Article 134, for the exceptional case in which violation of a local statute brings such discredit on the service as to require prosecution by court-martial.

Attention is invited to specification 88 in appendix 6c which shows a short form pleading of the offenses of rape and carnal knowledge. As "rape" and "carnal knowledge" are defined in Article 120, they are terms of art, and when alleged in a specification carry with them, by necessary implication, all constituent elements of these offenses. It is as necessary to prove that the female is not the accused's wife under such a specification as though that allegation were set forth verbatim--otherwise, the offense of rape or carnal knowledge is not proved. In connection with the necessary proof of the girl's age in the offense of carnal knowledge, she herself can testify to that fact. See paragraph 138d.

In regard to the legal sufficiency of such short form pleadings under Article 120, appendix 6a(1) which is a part of the Executive Order, prescribes these forms for use. This prescription of them by the President pursuant to Article 36 has the force and effect of law insofar as the administration of military justice is concerned, and may be likened to a statute prescribing short form indictments or informations. Such statutes are usually sustained by the courts. See 42 CJS, Sec. 90b; annotation in 69 ALR 1392; and People v. Bogdanoff, 254 NY 16, 171 NE 890, in which the court said, "We may not hold that the framers of the Constitution intended that all the formalities of the old common-law indictments must forever remain inviolate."

200a(1) Article 121.--LARCENY

Article 121 closely follows the first part of Section 1290 of the New York Penal Law. The other parts of the New York statute further define and explain the offense, somewhat as does the first paragraph of 200a where it is stated that under a simple allegation that the accused stole the property, may be charged and proved any of the various acts denounced as larceny. Section 1290a of the New York Penal Law has a similar provision that proof of any act denounded as larceny will sustain an indictment for stealing the property, but with an exception that if the stealing is by false pretense, it must be so alleged before

evidence of the false pretense may be received. This exception appears an unwarranted restriction. For example, a New York court felt constrained to hold, apparently in view of the exception (People v. Ginsburg, 84 NYS 2d 520), that if accused were charged with stealing property by false pretense he could not be convicted if, in the first instance, he obtained title or possession to the property lawfully--an offense which would have been embezzlement at common law.

The discussion of larceny in paragraph 200a and specification 89 in appendix 6c avoid this difficulty, conforming to the larceny statutes of many states. Such simplified statutes are not necessarily modern--in fact, Massachusetts has been operating under a statute combining larceny, embezzlement, and false pretense, with a simplified indictment similar to the specification in the manual, since 1899, and no difficulties like those in New York appear to have arisen in the administration of justice. The view of Massachusetts courts is (Comm. v. Althause, 200 Mass. 32, 93 Ne 202),

> "The Commonwealth is at liberty to make out larceny in any way in which the facts stated show that a larceny was committed, whether it was a larceny at common law, or by embezzlement, or by obtaining property by false pretenses."

200a(2) Subparagraph (2), concerning the taking, obtaining or witholding, sets forth a number of technical considerations involved in larceny. The fact that gaining possession of property, without title, is alone sufficient to constitute larceny under Article 121 is implicit in the article inself, and the Morgan Committee stated the article was specifically intended to cover the crime of larceny by trick. This is further discussed in the last subparagraph of the discussion of "false pretense." This discussion also indicates that larceny may be committed when money is borrowed with an intent not to repay it. It has been held that if one is already in possession of property, thereafter acquiring title by false pretense, there is a sufficient "obtaining" to constitute larceny, for in such case, the actual delivery of the property to the thief is not necessary for him to obtain dominion over it. See Allen v. State, 21 Ohio App. 403, 153 NE 218. That larceny under Article 121 includes the devoting of property to a use not authorized by its owner, was clearly intended by the Morgan Committee, for in its comment to Article 132 on frauds against the United States, the Committee advised Congress that it had covered misappropriation in Article 121. The fact that an embezzlement-type larceny may be committed even though the owner has made no demand for the property does not, of course, eliminate the necessity for proof that there existed a duty upon the thief

to return the property. The rule merely recognizes that the prosecution need not be able to show that the owner demanded a return of the property in order to establish that an embezzlement was, in fact, committed. See Fullerton v. Canal Zone, 8 F 2d 968.

200a(3) In regard to Subparagraph (3), ownership of the property, note the broad language of Article 121 which covers stealing from the possession "of the true owner or of any other person." Definitions of "true owner" and "any other person" are set forth, but in the ordinary case, the distinctions need give little concern since it is sufficient if the person alleged as the owner at the time has any right to the property superior to that of the accused, whether it be as general or special owner.

200a(4) Subparagraph (4) covers the wrongfulness of the initial taking, obtaining, or withholding, and it is pointed out that larceny does not result if the one taking the property has a right to it at least equal to the one from whom taken. For example, the crime of larceny is not committed by a creditor who obtains payment of a liquidated debt from the debtor by false pretenses. In such a case, a New York court said (People v. Thomas, 3 Hill (NY) 169), "A false representation by which a man may be cheated into his duty is not within the statute." An owner may, however, commit larceny if he takes or obtains his property from another when that other has a superior right at the time of possession of the property, as in the case of a bailment or a lien. See Hall v. U. S., 277 Fed 19. However, in such a case, the value involved in the offense is that of the limited interest only. See last subparagraph of 200a.

200a(5) Subparagraph (5) sets forth the "obtaining" type of larceny, that by false pretense. In addition to misrepresentations of other kinds of facts which may constitute a false pretense, the fact falsely represented by a person may be his opinion or his intention. Much has been written as to whether the expression of a false opinion or a false promise to do something in the future could constitute a false pretense. The earlier view was that false opinions and false promises did not amount to false pretenses and this is still the law in some jurisdictions. For example, in a case decided under Section 1290 of the New York Penal Law, People v. Karp, 298 NY 213, 81 NE 2d 817, Karp promised a number of people that for a certain sum, which was paid to him in each case, he would insert their names and business advertisements in a telephone directory to be published and distributed by him. He apparently had no intention of ever publishing such a directory, and the Appellate Division sustained his conviction, holding that the proof was sufficient to show that Karp had the intention of committing a theft at the time he made the false representations.

The New York Court of Appeals, however, in a very brief, per curiam, opinion reversed the conviction, holding that larceny could not be predicated upon a promise, or upon an expression of intention not meant to be fulfilled.

This decision is not in accordance with the modern view of obtaining by false pretense, for it is rather generally held that the state of a man's mind is an existing fact, and that if he misrepresents that fact, he has made a misrepresentation which, other elements being present, may subject him to a conviction for larceny. With respect to false opinions, the modern view is perhaps best expressed in the case of State v. Grady, 147 Miss. 446, 111 So. 148. With respect to the modern view of false promises, see Smith v. Fontana, 48 F. Supp. 55; and Comm. v. Walker, 108 Mass. 309, in which the court said, flatly,

> "A man's intention is a matter of fact, and may be proved as such . . . A false pretense as to [what a buyer intends to do with certain goods] would not be less material than a false pretense that the buyer owns certain property."

Of course, it is not true that every promise to do something in the future which the promisor fails to perform, is a false pretense, but when such a promise is a misrepresentation of the accused's state of mind by reason of the fact that he did not intend to execute the promise at the time he made it, the promise may logically and reasonably be held a false pretense.

Obtaining property by check may constitute larceny if at the time of uttering the check the maker did not intend to have sufficient funds in the bank to meet payment of the check, and the offense should be charged simply in accordance with specification 89 or 90 in appendix 6c. This intention may be presumed when it is shown that the maker did not have sufficient funds in the bank available to meet payment of the check upon its presentment in due course. See paragraph 138a. In this connection, however, it should be noted that only something of value can be the subject of larceny, and if a worthless check were given for a past-due indebtedness, there would be no present value and no violation of Article 121. The note following specification 129 in appendix 6c covers this more fully. Further, such an offense under Article 134 would not appear to a lesser included offense in larceny.

200a(6) Subparagraph (6) sets up the basis for the abbreviated specification of larceny, providing that an "intent to steal," includes all the permanent-type "intents" of larceny, whether to deprive another of his property as in larceny, or to defraud him

of it as in false pretense, or to appropriate it to the thief's own use, as in embezzlement. The subtleties of distinction between these intents are of little moment under the simple allegation of stealing, and the necessity of former considerations of "custody", "possession", whether the victim intended to part with title as well as possession, and the like, are eliminated because an allegation of "steal" is established by proof of any of the acts included within the Article.

The important consideration is that accused must be shown to have wrongfully and intentionally dealt with the property of another in a manner likely to cause him to suffer a permanent loss thereof. For this reason, it is larceny if the accused takes the property of another even though he intends thereafter to return the property upon the happening of a future contingency (Truslow v. State, 95 Tenn. 189, 31 SW 987) or hides the property with intent to retain it until a reward is offered (Berry v. State, 31 Ohio State 219).

In regard to the proof of value of property stolen, the owner may testify as to its market value, the circumstance that he is not otherwise qualified to express an opinion going only to the weight to be given his testimony. This is the Federal rule. See Caten v. Salt City Movers, 149 F (2d) 423.

200b Article 121.--WRONGFUL APPROPRIATION

The offense of wrongful appropriation is distinguished from the offense of larceny only by a lesser intent; i.e., the wrongful taking, obtaining, or withholding of the property must be done with intent to deprive, defraud, or appropriate only temporarily. Everything said about larceny applies equally to wrongful appropriation, with the exception of the duration of the intent.

201 Article 122.--ROBBERY

The Morgan Committee stated that robbery under Article 122 conformed basically to the common law, but that the class of persons manaced had been enlarged. Robbery may be committed by putting a person in fear of future injury to the property of a relative. The statute appears to closely follow Section 2120 of the New York Penal Law.

If you have considered Article 127 on Extortion, you have perhaps wondered as to the difference between an attempted robbery, for example, in which the accused sought to obtain $100 by putting the victim in fear of future injury to his son; and

extortion committed by communicating threats to injure the victim's son with intent to obtain $100. It has been said that in order to constitute robbery, the property must be taken against the will and without the consent of the person, while in extortion the property is obtained with his consent, People v. Barondess, 16 NYS 436. This distinction, however, while well-recognized (e.g., see 46 Am. Jur., Robbery, Section 3), is not quite real: In both offenses the victim surrenders his property unwillingly--if there is consent in extortion, it is a consent wrung from the victim. Perhaps a distinction is that robbery requires an intimidation of the victim which is greater than the threat in extortion; but this would not necessarily be so, and there are probably many cases in which the particular facts would establish a violation of either article. The chief thing to remember is that in extortion, the offense is complete when the accused communicates a threat with the requisite intent, whether he obtains anything or not, while in robbery there must be an actual larceny by taking.

It is said that the fear of injury to property must be of sufficient gravity to warrant the victim giving up his property. While it might appear that if the victim did, in fact, give up his money because of a fear of injury to property, the offense would necessarily be complete, it is only reasonable that the fear of injury engendered in the victim be such as would have caused a reasonable man under the circumstances to have given up his money.

Robbery includes larceny, but by the terms of Article 122, it is only one particular type of larceny, a "taking" with intent to steal. If robbery were charged, and the evidence showed no force or fear but rather that accused had been entrusted with the property which he wrongfully withheld from the owner, i.e., the old common law embezzlement, there could be no robbery, nor the included offense of larceny by taking.

It is clear that proof of robbery committed either by force alone, or through putting the victim in fear, is sufficient to sustain the offense. This is demonstrated by the example given of the person whose attention is diverted by a confederate of a pickpocket; in this situation, the victim could have no fear since he had no knowledge that he was being robbed. See People v. Glynn, 7 NYS 555, 25 NE 953.

It is a long established rule in pleading robbery that it is proper to allege that it occurred "by force and violence and by putting in fear," but that proof of either force or fear will sustain the charge, the one not proved being disregarded as surplusage. This was true both at common law and under

statutory forms of robbery. See 46 Am. Jur., Robbery, Section 3; Tomlinson v. United States, 93 F (2d) 652. Naval Courts and Boards, Section 123, showed separate specifications for each, whereas the Army practice was invariably to allege both force and fear in every case. See appendix 4, MCM, 1949.

In recognition of the language of Article 122, however, model specification 91 in appendix 6c permits an allegation of either (1) force and violence alone or fear alone--and proof of the one alleged will sustain the charge, or (2) an allegation of both. In charging robbery, it is still considered entirely proper to allege both force and fear and permit the prosecution to prove either or both without any requirement of election. In fact, if there is the slightest doubt as to whether the robbery was committed by putting the victim in fear, or was committed by force, I would recommend that both be alleged in order to avoid any problem of variance between allegations and proof.

202 Article 123.--FORGERY

In the case of forgery, the Committee adopted almost verbatim the common law definition which was set forth in paragraph 180i, MCM, 1949. Thus, there has been retained for our use the common law requirements that there be a specific intent to defraud, and a writing which might operate to the legal, as distinguished from some other, prejudice of another. For comparison, consider Section 22-1401 of the DC Code which requires an intent to defraud or injure another, and that the writing be one which might operate simply to the prejudice of another.

Observe that "falsity" in forgery refers to the falsity of making or altering a writing, not to the falsity of the material contained in the writing itself. This point was perhaps best expressed in an old English case, In re Windsor, 122 English reprint 1288: "Telling a lie does not become forgery because it is reduced to writing." This point was recognized in Section 102, NC & B, and also in paragraph 180i, MCM, 1949, but the Army manual then obscured the point by a number of references to "false writings" or "instruments" that were false. For a further discussion of this, see the annotations in 41 ALR 229; 174 ALR 1327. In Goucher v. State, 204 NW 967, a Nebraska court declared,

> "The genuine making of a false instrument is not generally a forgery . . . The decisions are nearly unanimous that the making of a false instrument is not within a criminal statute directed against the false making of an instrument . . . This is not a mere play on words, it is a substantive distinction."

Under a Federal statute forbidding the alteration of a bond or other writing with intent to defraud the United States, in a case where the accused argued that his primary purpose was to defraud a private citizen, it has been held sufficient that the acts "frustrate the administration of a statute or tend to impair or impede a governmental function." See Head v. Hunter, 144 F (2d) 449. Such a case, however, is decided upon the basis of the particular Federal statute involved, and appears to be no authority for a decision under Article 123, which includes the elements of common law forgery, that a charge of forgery could be sustained by proof less, or other, than that the false making or alteration would, if genuine, impose a legal liability on another or change his legal right or liability to his prejudice. Compare CM 318342, Irvin, 67 BR 253.

203 Article 124.--MAIMING

The comment of the Morgan Committee was that Article 124 is broader in scope than common law mayhem; it "includes injuries which would not have the effect of making the person less able to fight". While "mayhem" and "maiming" are not synonymous, maiming under Article 124 appears to include everything that would have been mayhem at common law.

Under Article 124, in determining whether an injury constitutes maiming, we can no longer use the common law test that it rendered the victim less able in fighting either to defend himself or to annoy his adversary. Article 124 looks only to maintaining the integrity of the person, the natural completeness and comeliness of the human members and organs, and the preservation of their functions. It undoubtedly requires something more than the minimum injury which could constitute "grievous bodily harm" referred to in Article 128, Assault. The difference is indicated by the permanency of the injury required in maiming. See 36 Am. Jur., Mayhem § 4, and for a collection of the cases under the various maiming statutes, 16 ALR 958, supplemented in 58 ALR 1320.

It should be noted that Article 124 does not appear to require an intent to seriously injure, or a specific intent to maim, as do some State statutes. See Smith v. State, 87 Fla. 502, 100 So. 738. It requires only that the injury inflicted, for example, be serious. Hence, it could be no defense to a charge of maiming that the accused intended only a slight injury, if in fact, he did inflict serious harm.

204 Article 125.--SODOMY

Article 125 is similar in some respects to Article 740-89, Louisiana Code of Criminal Law and Procedure, but the Louisiana Code includes as sodomy, any use of the genital organ, whereas Article 125 is specifically limited to those cases in which there is some penetration. Further, Article 125 would, by its terms, appear not to include among its subjects, birds or dead bodies which are specifically covered in some sodomy statutes. See Section 690 of the New York Penal Code. For a reference as to acts which constitute unnatural carnal copulation, see Section 22-3502 of the DC Code.

Model Specification 95, Appendix 6c, is brief, merely advising accused that at a certain time and place, with a certain person or animal, he committed sodomy, leaving to the evidence a determination of how the particular offense may have been committed. The Army practice set forth in the MCM, 1949, was to allege specifically whether per os or per anum, and that it was against the order of nature, but in drawing a specification for inclusion in the MCM, 1951, a simplified pleading was sought. Model Specification 95 is basically that set forth in Section 108, Naval Courts and Boards. The Navy had only a further particularization as to the place, for example, "in the hold of said ship", a particularization which might not be necessary if a broader allegation of place was sufficiently precise to identify the particular offense and apprise the accused of the particular act against which he was to defend. See Appendix 6a(7). In connection with the specification, you might consider the annotation in 5 ALR 2d 557, and the case of Kelly v. People, 192 Ill. 119, 61 NE 527, in which the court held that an indictment which charged simply that accused committed the crime against nature with a named male person, sufficiently informed him of the offense charged, "the manner of committing the offense being too indecent to set forth" in the indictment or in a bill of particulars.

205 Article 126a.--AGGRAVATED ARSON

205a The comment of the Morgan Committee was:

> "This article divides arson into two categories. Subdivision (a) is essentially common law arson, but is enlarged to cover structures other than dwellings in view of the fact that the essence of the offense is danger to human life. In subdivision (b) the offense is essentially against the property of someone other than the offender."

This statement points up a number of substantial differences between Article 126 and common law arson. For example, the latter could be committed only against a habitation, and that habitation had to belong to another. Under Article 126b, any property of another will suffice, and under 126a it may even be the arsonist's property.

The article requires "knowledge of the offender" that there is in a structure other than an inhabited dwelling, a human being at the time the act is committed. In the absence of a confession, such matters as the accused's intent and knowledge must always and necessarily be inferred. The discussion points out that his knowledge may be inferred in the offense of arson if a reasonable man similarly situated must have known of the presence of a human being.

Article 740-51 of the Louisiana Code of Criminal Law and Procedure refers to setting fire to any structure "wherein it is foreseeable that human life may be endangered." While it is said the "knowledge" required by Article 126a may be inferred, the terms of that article do not permit us to say that it is sufficient under the Uniform Code that accused might have foreseen the presence of a human being in the structure as one might in Louisiana. For arson under the Code, something more must appear--at least, the constructive knowledge of a reasonable man.

Article 126b--SIMPLE ARSON

205b While simple arson may involve any property, you will discover that almost every case of arson in the books involves dwelling houses or buildings, this because of the common law background of the offense of arson whose principles most of the states have adopted without the modernization we have in Article 126. The Discussion does not attempt to define "another" in regard to burning "the property of another", for it would appear to be at least as inclusive as the ownership in larceny which includes very nearly anyone other than the thief himself. See 200a(3).

Specification 96 follows the statutory language of Article 126a and permits an allegation in aggravated arson either that accused did "burn" or "set on fire" the property. You will also note that Specification 97 for simple arson also follows the statutory language of Article 126b and permits either "burn" or "set fire to" the property. Why there is this distinction in the statute between "burn", "set on fire", and "set fire to" is not at all apparent. The cases which discuss the burning sufficient to constitute arson disclose no valid or necessary distinction between "burning" and either of the other two. For example, to constitute burning a building it has been held "sufficient if fire is actually communicated

to any part thereof, however small," (see Woolsey v. State, 30 Tex. App. 346); and "it is unnecessary that the fire should continue for any specified time" (see State v. Pisanno, 107 Conn. 630, 141 Atl 600); and it is immaterial whether it was put out or went out of itself (see Miller on Criminal Law, § 106). While there is some authority that "burn" and "set fire to" are not synonymous, the great weight of authority is to the contrary. See annotation in 1 AIR 1164.

The Morgan Committee commented that their statutory arson was essentially that of the common law; the common law was not troubled by subtleties of distinction in this regard and there is no indication in the hearings before Congressional committees of an intent to draw a distinction between "burning", "setting on fire", or "setting fire to". There appears to be no reason why facts which would otherwise establish arson could not be proved under a single allegation that accused "did burn" the dwelling or the property. In this connection, however, it has been held an averment that accused "set fire to and burned a certain building" was not improper as charging two offenses. See State v. Jones, 106 Mo. 302, 17 SW 366.

Article 127--EXTORTION

206 The Article does not specify the type of threat which the law will consider of sufficient gravity to constitute the crime of extortion; nor does it specifically require that the threat be unlawful. Query, is it extortion for a creditor to threaten his debtor with prosecution for failure to repay a long overdue debt? Article 127 could not have been intended to constitute such conduct the crime of extortion, hence, the proof and specification require that the threat be unlawful. See in this connection, the cases cited with Section 22-2305 of the District of Columbia Code.

The discussion sets forth the types of threats which are considered sufficient to constitute the offense. See the annotation to Article 740-66 of the Louisiana Code of Criminal Law and Procedure.

Conference No. 12h

PUNITIVE ARTICLES, 128-134

Conducted by
LT. COL. JEAN F. RYDSTROM

Article 128a--ASSAULT

207a The definition of assault in Article 128a follows that in paragraph 180k, MCM, 1949, and the discussion of assault is, consequently, closely patterned upon that in the MCM, 1949. While the discussion in paragraph 207a makes a distinction between an attempt and an offer as the basis of a charge of assault, an offer being the putting of another in reasonable fear that force will at once be applied to his person, this distinction will generally be of little concern to an accuser, or to the court during trial, for Specification 99 in appendix 6c requires merely the allegation of a "term of art"--assault--and the proof may show either that accused actually intended to commit a battery upon another, or that he put another in reasonable fear of immediate bodily harm.

The example which demonstrates these two aspects of assault, pointing an unloaded pistol at another, has not been unanimously agreed upon by all courts as being an assault. Wharton suggests the true rule to be that there must be some adaptation of the means to the end, and it is enough if this adaptation be apparent, so as to impress or alarm a person of ordinary reason. Wharton Criminal Law, 12th ed., Assaults, § 802. One explanation of why some courts hold that pointing an unloaded pistol at another is not an assault, lies in the assault statute of the particular jurisdiction. Some of these statutes provide that an assault is an unlawful attempt, coupled with the present ability, to commit a violent injury on the person of another. See 6 CJS, p. 936. Paragraph 207a does not require that present ability, and we follow the Federal rule in regard to assault. See Price v. United States, 156 Fed. 950. For a holding that pointing an unloaded pistol at another was not an assault, see People v. Sylva, 143 Cal. 62, 76 Pac. 814; for a holding that assault was committed where the victim did not know that the weapon pointed at him was unloaded, see People v. Tremaine, 222 NYS 432.

In addition to an intentional attempt to commit a battery on another, an assault may arise from a culpably negligent act or omission. This is said to be so only as to the "putting in fear" type of assault, however, since the intent to do bodily harm to another, an essential element of the "attempt" type of assault, is entirely lacking when the injury is the result of a culpably negligent act.

A battery is defined, in effect, as a consummated assault. While Article 128a does not specifically cover a battery other than in the statement "whether or not the attempt or offer is consummated," the President may prescribe a greater punishment for assault consummated by the infliction of harm than for the mere attempt or offer, and such an offense is logically punishable under Article 128 rather than under the general article. A battery, also, may be committed either intentionally or through culpable negligence, but the distinction between attempt and offer which is made in a simple assault is not necessary in battery because of the actual unlawful infliction of bodily harm. See 4 Am. Jur., Assault and Battery, §§ 3, 5, and 6. For a discussion of battery committed by culpable negligence, see Commonwealth v. Hawkins, 157 Mass. 551, 32 NE 862; and when committed by motor vehicles, see 99 AIR 835.

On the basis of culpable negligence, there are similar statements appearing in the discussion of several of the punitive articles. Suppose Barney Fireball drives his yellow convertible down a crowded city street at a high rate of speed, weaving from side to side. If the police nab him right away, he might be held guilty of reckless driving in violation of Article 111, since paragraph 190a defines reckless driving as that operation of a vehicle which exhibits a culpable disregard of foreseeable consequences to others from the act involved. But suppose that he careens toward Mary Jones who reasonably fears for her life; such conduct might constitute an assault as a culpably negligent act or omission under paragraph 207a which foreseeably might and does cause another reasonably to fear that force will at once be applied to his person. Now suppose that Barney's car bumps into her—that might be a consummated assault, a battery committed by culpable negligence. And finally, suppose that the bump kills her—that might be held involuntary manslaughter under paragraph 198b, a homicide committed by a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of such act. Of course, if his driving were of a nature which was more dangerous, likely to produce death or great bodily harm, it might be aggravated assault, or, if a homicide occurred, murder.

207b Article 128b refers to "grievous" bodily harm, while Article 118(2) on murder refers to "great" bodily harm, and the definitions of the two words contained respectively in paragraphs 207b and 197e both indicate a similar type of injury. Grievous bodily harm has been defined to mean an injury of a graver or more serious character than that inflicted in an ordinary battery, or a serious injury of an aggravated nature which, however, need not be permanent. See State v. Bowers, 178 Minn. 589, 228 NW 164; 6 CJS p. 936. There is no indication, in the hearings on the Uniform Code, of a Congressional intention to draw a distinction between "great" and "grievous" bodily harm in the two articles, words which, although they vary from statute to statute in different jurisdictions, always seem to define much the same type of injury regardless of the particular word used.

Paragraph 207b(1) defines a means or force likely to produce death or grievous bodily harm, referred to in Article 128b, as meaning a means or force whose use in a particular instance would naturally and probably result in death or grievous bodily harm. This definition ties in with the discussion of an intentional killing as murder (see paragraph 197e). That pointing an unloaded pistol at another is not aggravated assault (although it might be simple assault as that offense is defined), was held in Price v. United States, 156 F 950. A pistol is not dangerous as a firearm, nor is it, in itself, a means or force likely to produce death or grievous bodily harm, when it is not loaded.

Article 128b(2) refers to intentionally inflicted grievous bodily harm. To prove this type of aggravated assault, the character of the weapon or means used would not, of course, need to be established, but evidence of the means used might, however, be very material, and would be admissible as showing what must have been accused's intention at the time of inflicting the injury. A man is presumed to intend the natural and probable consequences of his act, and if he intentionally inflicts injury by a means whose natural and probable results would be grievous bodily harm, it may be inferred that he intended such result. Accused may not, however, be held liable under Article 128b(2) for injuries which are not the natural and probable consequences of his act, and therefore not intended. State v. Shaver, 197 Ia. 1028, 198 NW 329, is a case very similar to the sidewalk fight used as the example in the discussion.

In specification 101, appendix 6c, a weapon is alleged to be dangerous, or the other means or force is alleged to be likely to produce grievous bodily harm. The discussion makes clear, however, that a weapon is dangerous when its use is likely to produce death

or grievous bodily harm and the elements of proof of aggravated assault under Article 128b(1) simplify this further by merely requiring facts and circumstances which show that the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

Article 129--BURGLARY

208 Burglary as defined in Article 129 includes all the common law elements, but the offenses intended to be committed in the dwelling house were limited to certain Articles only. The discussion in paragraph 208 represents no substantial departure from that appearing in the MCM, 1949, and Naval Courts and Boards.

With reference to the penultimate paragraph and the point made that "insertion into the house of an instrument, except merely to facilitate further entrance," it has been held that where an accused raised a window and thrust a crow-bar under the shutter which was six inches inside, no further entry being made, there was not a sufficient entry to constitute burglary. Rex v. Rust, 1 Moody CC (Eng) 184. But breaking into a dwelling with an instrument and thereafter thrusting the instrument into the building for the purpose of committing the ulterior crime has been held to constitute a sufficient entry without accused having entered the building at all. See State v. Crawford, 8 ND 539, 80 NW 193. Similarly, putting a gun into a hole or window broken with intent to murder, though the hand not be inserted, has been held sufficient. 2 Wharton Criminal Law, 12th Ed., page 1286.

The breaking and entering need not be on the same night, as was pointed out in Section 96, Naval Courts and Boards, and it has been held in a case where a hole was broken in a building by accused on one night with an intent to return another night and commit a felony, that the burglary was complete when accused did return on a subsequent night through the hole so made. People v. Gibson, 58 Mich, 368, 25 NW 316.

In some latitudes it may be impossible to commit the crime of burglary at any time of the night. The Army recently had a case of alleged burglary in Alaska in which the proof showed the breaking and entry were attempted between 10 and 11 o'clock at night. This was after sunset, during a period known to the experts as "astronomical twilight," but the evidence showed that throughout the period there was at all times sufficient light to discern a man's face, even up to a distance of 200 feet. The common law (on which the discussion in paragraph 208 is based)

942479 O - 51 - 20

limits nighttime to the period when there is not sufficient daylight to discern a man's face. Hence, the Board of Review was required to reduce the case to housebreaking because there had been no "nighttime" for the purposes of burglary. CM 343407, 9 Bull JAG 229.

Article 130--HOUSEBREAKING

209 The Morgan Committee adopted the Article on housebreaking from paragraph 180e, MCM, 1949, but enlarged the scope of the Article by requiring the unlawful entry to be of a building "or structure of another." Most housebreaking statutes which use the term "structure" do so at the end of a listing of certain kinds of buildings, vehicles, or other specifically named structures, and under such statutes, it is held that the meaning of "other structure" is limited by the principle of ejusdem generis. While that principle may not be applied to Article 130, paragraph 209 places limitations upon the word "structure" which conform with most statutory enactments on the offense. For definitions of "structure" see 12 CJS 684.

The word "structure" is one of the broadest words in the English language (United States v. Warden, 29 F Supp 486). A Texas court has said, "a structure is that which is built or constructed; an edifice or a building of any kind. In the widest terms, any production or piece of work, artifically built up, or composed of parts joined together in some definite manner," and held to be a structure within the Texas housebreaking statute, an edifice constructed by placing two forked poles in the ground, resting another upon them and stretching a wagon sheet over the top, closing one end, and placing an old door and some boxes at the other. Favro v. State, 39 Tex. Cr. Rep. 452, 46 SW 192.

The offense intended to be committed in housebreaking may be any act or omission "punishable by courts-martial, except an act or omission constituting a purely military offense." This limitation does not appear in Naval Courts and Boards, but has long been used in the discussion of housebreaking in the Army. Military offenses are mentioned but not defined in 33h, 76a(6) and (7). There appears to be only one published case in the Army or Air Force which discusses this particular point, an old case which I believe misinterpreted it--CM 199062, Doiron, 3 BR 317. The point involved merits consideration. In that case it was alleged that accused unlawfully entered the garage of another with intent to remove an automobile without the owner's consent. The Board stated that this intended offense appeared to be "joyriding" which was clearly a disorder prejudicial to good order and military discipline and

therefore cognizable by courts-martial under AW 96, but reasoned that the offense had also to be a criminal offense of a civil nature at the place were the act occurred. Since the offense of "joyriding" was not an offense within the particular State nor the subject of a Federal statute of general application, the Board concluded it was not a criminal offense for the purposes of housebreaking.

This decision, it is submitted, represented a misconstruction of the definition of "criminal offense," a definition almost the same then as now appears in paragraph 209. That Board assumed that since a "criminal offense" for the purposes of housebreaking could not be of a purely military nature, it had necessarily to be one of a civil nature at the time and place of the act in order to constitute a "criminal offense" at all. But note the language used--"any act or omission which is punishable by courts-martial, except an act or omission constituting a purely military offense." If the act is punishable by courts-martial (as the Board stated "joyriding" was), and if it is not a purely military offense (as the Board recognized in pointing out that the particular state did not have a statute on the subject), all elements of a "criminal offense" are met for the purposes of housebreaking--and there is no need to look further and determine whether the act is an offense of a civil nature at the locus delicti, a fact which is wholly immaterial.

Article 131--PERJURY

210 The discussion of perjury in this paragraph which is patterned on paragraph 180b, MCM 1949, appears to present no substantial change in the offense as it was set forth in Section 115, Naval Courts and Boards, and Article 227, MCM, Coast Guard. In the first paragraph it is stated that a "course of justice" includes an investigation conducted under Article 32. In civil practice, hearings before grand juries or arbitrators are held to be "courses of justice" under somewhat similar statutes. See Comm. v. Warden, 11 Metc. (Mass.) 406; Wharton's Crim. Law, 12th Ed., Sec 1533.

The phrase "did not believe to be true" is the key to understanding the Discussion and Proof. The second subparagraph requires that the false testimony be willfully and corruptly given--that is, that the accused did not believe it to be true. Hence, the phrase becomes a "term of art" and, as Item f of the Proof, requires evidence that the testimony was false and willfully and corruptly given.

"It is perjury where one swears wilfully and corruptly to a matter which he, according to his own lights, has no probable cause for believing, since a man is guilty of perjury if he knowingly and wilfully swears to a particular fact, without knowing at the time that the assertion is true, supposing that his purpose is corrupt." Wharton's Crim. Law, 12th Ed., Perjury § 1512. To prove

that accused did not believe his testimony true, i.e., that it was false and willfully and corruptly given, it is ordinarily sufficient simply to prove the truth, and facts and circumstances from which it may be inferred that accused must have been aware of the truth. However, sworn testimony by a witness that he knows a thing to be true when, in fact, he knows nothing about it at all or is not sure about it, regardless of the truth of the fact to which he testifies, has long been recognized as perjury. In such a case, proof of the truth alone will not suffice. For example, a conviction of perjury has been upheld where accused testified that he was with two parties in a certain field when they made an oral contract and it was established that the contract was made but that accused was not in the field at all with the parties and had no personal knowledge of the contract. People v. McKinney, 3 Park Cr. Rep. (NY) 510.

In connection with the last subparagraph of paragraph 210, which covers the "oath against oath" rule recognized in perjury, the statement that documentary evidence directly disproving the truth of the statement charged to have been perjured need not be corroborated, is based upon an old Supreme Court case which is frequently quoted, United States v. Wood, 39 U. S. 430. See also Hamer V. United States, 271 US 627. It has been suggested that the type of official record which would be so well known to an accused that no corroboration of its contents would be necessary to prove beyond any doubt the falsity of accused's oath, is an official record which could not be made without his knowledge, such as his conviction by a court of record, or a bond which he signed in a judicial proceeding. CM 331723, Sowder, 80 BR 139. Documentary evidence originating from the accused himself might be a letter he had written, and documentary evidence recognized by him as containing the truth might consist of a letter to him from an accomplice in accordance with which he had acted, assuming in both these cases that the letters existed before, and with circumstances prove the falsity of, the allegedly perjured testimony. If the letter were written after the allegedly perjured testimony, of course, the question of a confession or admission would be involved.

There is one type of "inconsistent statements" case which might be noted. In Behrle v. United States, 100 F. 2d 714, accused made a written statement to the police about a certain murder, but at the trial of the murder case said he "remembered nothing". At his trial for perjury he asserted the rule that a conviction of perjury cannot be sustained solely on the contradictory sworn statements of the accused; in other words, the rule that when a defendant has made two distinct statements under oath, one directly the reverse of the other, it is not sufficient to produce the one in

evidence to prove the other to be false. Wharton's Criminal Law, 12th Ed, Perjury § 1583. The court said the rule was not involved and sustained his conviction of perjury for testifying that he remembered nothing; it noted that direct proof that he did remember was impossible, and held circumstantial evidence that he did remember sufficient to prove the falsity of his sworn statement that he did not. The circumstantial evidence consisted of his testimony before a grand jury in accordance with his original statement to the polide which he had further amplified prior to trial.

In paragraph 213d(4), the offense of false swearing as a violation of Article 134 is discussed. It is shown in appendix 12 as a lesser included offense of perjury and covers those cases in which the false testimony is not material, or is not given in a judicial proceeding or course of justice. It is alleged in accordance with Specification 139, appendix 6c. "Statutory perjury" is covered in Specification 159; this offense is patterned in 18 U.S.C. 1621, and the falsity must be as to a material matter. It need not, however, be given in a course of justice or judicial proceeding; it may be committed before any competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered. Perjury as a violation of Article 131 may be committed only in giving false testimony upon a lawful oath, whereas "statutory perjury" may consist of subscribing as true any written testimony, deposition, declaration, or certification contrary to such oath.

Article 132--FRAUDS AGAINST THE GOVERNMENT

211a MAKING A FALSE OR FRAUDULENT CLAIM

The Morgan Committee stated in part, "This Article has revised and rearranged the comparable Army and Navy provisions to eliminate repetitious and superflous material . . . The provisions relating to embezzlement, stealing, misappropriation, and pledges have been omitted as the said offenses are now covered by Article 121 (Larceny) or Article 108 (Wrongful Disposition of Military Property). . . "

It is stated in paragraph 211a that "making a claim is a distinct act from presenting it. A claim may be made in one place and presented in another." This distinction is made in Article 132(1), between Section (A), which covers making any claim, and Section (B), presenting for approval or payment any claim. As to what acts would be sufficient to support a charge of "making" a claim as distinguished from "presenting" a claim, a brief review of the history of these terms appears necessary.

This same statement has appeared in the Manuals for Courts-Martial, 1921, 1928, and 1949, and appears to be based upon a statement of Colonel Winthrop in his Military Law and Precedents (2d Ed. 1920 reprint, Note 25, p. 698):

"That the making and presenting are distinct offenses under this statute, so that the making of a false claim may be completed in a distant State while the presenting of the same may be committed at Washington, D. C.,--see Ex parte Shaffenburg, 4 Dillon 271," (Fed. Cas. No. 12, 696 (1877)).

In that case, the court dealt with that portion of the Revised Statutes similar to what is now 18 U.S.C. 287, referring to "whoever makes or presents" a false claim. The Shaffenburg case involved a marshal in Colorado who prepared and swore to a false affidavit of claim in Colorado and had it approved by a Federal judge there. He then caused it to be presented to the Treasury Department in Washington for payment. He was tried in Colorado for making a false claim, and he contested jurisdiction of the Federal court there claiming no offense was committed until presentment of the claim in Washington. The court said:

"The statute distinguishes between the making and the presenting of a fraudulent account or bill. It makes each a distinct offense. It may be that the offense of presenting a false bill or account to the Treasury Department in Washington can only be prosecuted in the courts of the District of Columbia, but the offense of making a false bill or account may be prosecuted in a judicial district in which the fraudulent claim is made. What constitutes or consummates the making of a false claim, within the meaning of the statute, may be difficult to define so as to embrace within the definition all cases that might arise. For the purposes of the present application, it is sufficient to say that we are of the opinion that the facts averred . . . /show/ the making, in such district, of a false and fraudulent bill, within the meaning and purpose of the statute."

"Making a claim" within the meaning of the Criminal Code has been judicially defined as the "asking or demanding . . . from the Government of payment for services." United States v. Bittinger (DC Mo., 1875), 24 Fed. Cas. No. 14, 599. The Shaffenburg case does not indicate what acts alone might constitute "making a claim," and no Federal case has been discovered which supports a view that a claim can be "made" without, in some manner, presenting it or causing its submission, i.e., without making of it a "demand." In fact, a charge in one count of making and presenting a false claim against the United States has been held not bad for duplicity as charging two offenses:

"The gist of the offense /is/ the obtaining, or attempting to obtain, money from the United States by means of a fraudulent claim, and the acts charged /are/ but different steps in the commission of such offense, although either alone is made punishable." Bridgeman v. United States, 140 F. 577.

211b PRESENTING FOR APPROVAL OR PAYMENT A FALSE OR FRAUDULENT CLAIM

A claim may be tacitly presented. This proposition was discussed in CM 336812, Milano, 3 BR-JC 225. It is a necessary approach to such cases as are shown as examples, cases in which a person defrauds the Government by accepting money which he knows he could not lawfully claim. It might be said that in these cases, accused's "claim" is found in his acceptance of the money, for the paying procedures operate on the assumption that a person who meets certain conditions presents a recurring claim. This claim is automatically paid when presented, the acceptance thereof constituting a tacit representation that the conditions for payment have been met.

Article 133--CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN

212 The chief point of interest in Article 133 is that dismissal is no longer a mandatory punishment. The Morgan Committee originally provided that an officer violating the article would be "dismissed from the armed forces," and this was approved by the House Subcommittee. However, it was amended in the House of Representatives by a motion from the floor (Congressional Record, 81st Congress, Vol. 95, No. 79, 5 May 1949, p. 5843). The Representative offering the amendment briefly stated that there were many offenses which were relatively minor but which could be construed as conduct unbecoming an officer and a gentleman, and the punishment should be left up to the discretion of the court-martial. The amendment was adopted without further discussion.

Article 134--GENERAL ARTICLE

213a DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE IN THE ARMED FORCES

A formal discussion in the Manual of "breach of custom" as a disorder or neglect is new to the Army and Air Force, but is familiar to the Navy in Section 3 of Naval Courts and Boards. Such a discussion, besides its applicability in this connection, will serve many useful purposes throughout the Manual; for example, it assists in understanding paragraph 143a(2) which discusses official records required by law, regulation, or custom to be kept on file in a public office.

In United States v. Buchanan, 8 How. 83, the Supreme Court of the United States quoted with approval the provisions of the Louisiana Code as to custom:

"Customs result from a long series of actions, customarily repeated, which have, by such repetition and by uninterrupted acquiescence, acquired the force of a tacit and common consent."

While "common consent" forms the basis of custom, a custom once established has an application more binding than mere consent. Naval Courts and Boards called custom "compulsory," and paragraph 213a defines it as a practice which has attained the force of law.

Section 3, Naval Courts and Boards also contained a discussion of usage:

"Military practices or usages of service, although long continued, are not customs and have none of the obligatory force which attaches to customary law. The fact that such usages exist, therefore, can never be pleaded in justification of conduct otherwise criminal or reprehensible, or be relied upon as a complete defense in a trial by court-martial . . . Custom is not to be confused with usage. The former has the force of law--the latter is merely a fact. There may be usage without custom, but there can be no custom unless accompanied by usage."

The presumption arising from possession of marihuana or a habit forming narcotic drug finds precedent in 21 U.S.C. 174, where it is said that when the defendant is shown to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to support conviction unless the defendant explains the possession of the narcotic to the satisfaction of the jury. The presumption in paragraph 213a is limited to "habit forming" narcotic drugs. This is for the same reason that marihuana has been included within the presumption--because of its inherent characteristics:

"The known deleterious effect upon human conduct and behavior caused by its use renders its possession prejudicial to good order and military discipline." Sp CM 350, 8 Bull JAG (Army) 196."

213b CONDUCT OF A NATURE TO BRING DISCREDIT UPON THE ARMED FORCES

This is the "catch-all" in military law. (See the statement in the first subparagraph--"So also any discreditable conduct not elsewhere made punishable by any specific article or by one of the other clauses of Article 134 is punishable under this clause.")

This clause of Article 134 has a very interesting history. It was added to the general article after World War I, and the then Judge Advocate General of the Army who urged its inclusion was asked by one of the members of the Military Affairs Committee the purpose of this "vague language":

"That was inserted for a single purpose. We have a great many retired noncommissioned officers and soldiers distributed throughout the body of our population and a great many retired officers. If the retired officer does anything discreditable to the service or to his official position we can try him. . . for 'conduct unbecoming an officer and a gentleman'. We cannot try the noncommissioned officer or soldier under that article, nor can we try him for conduct prejudicial to the good order and military discipline; because the act of a man on the retired list, away from any military post, cannot be reasonably said to affect military discipline." (Revision of the Articles of War, 1912-1920, p. 83)

By judicial interpretation these "vague words" have since been expanded from the narrow construction placed on them by their author to the point where they have been used as the legal justification to sustain convictions for practically any offense committed by one in the military service which is not either specifically denounced by some other article, or is not a crime or offense not capital or a disorder or neglect to the prejudice of good order and discipline. It has been said, however, that an act which may be considered a violation of this clause must be one which, because of its nature and the circumstances under which it was committed, directly affected the reputation or credit of the military service. CM 276559, Francis, 48 BR 373, dissenting opinion.

There are, of course, few wrongful acts which may not, in some wise, be thought to injure the reputation of the service if a subjective test alone is used. It has been said that "every case of violation /of the general articles/ involves, fundamentally, a consideration of the culpability of the conduct in question according to its military significance under the circumstances of the case" (CM 283737, Macintyre, 55 BR 175), and it would appear that the acts and the circumstances must be viewed objectively to determine whether there has been, in fact, a direct injury to the reputation of the armed forces, rather than a remote injury which might conceivably have resulted.

213c CRIMES AND OFFENSES NOT CAPITAL

The discussion limits "crimes and offenses not capital" to those which are denounced by enactments of Congress and made triable

in Federal courts. State laws are not included except under the Federal "assimilating" statute, 18 U.S.C. 13. This limitation does not appear in the terms of Article 134 itself and caused some initial difficulty in the presentation of the code to the Senate Subcommittee (Senate Report #486, p. 32), but the limitation is well established. For a suggestion of the development of the limitation, see CM 240176, Freimuth, 25 BR 379. As to the interpretation of "offenses not capital," see Winthrop, Military Law and Precedents, 1920 Reprint, 2d Edition, page 721.

213d VARIOUS TYPES OF OFFENSES UNDER ARTICLE 134

Paragraph 213d discusses a few of the offenses which may be charged and punished under Article 134. Besides the offenses discussed herein there are, of course, many others which may, in a proper case, constitute a violation of one of the three clauses of Article 134. Appendix 6c, in Specifications 118 through 176, sets forth some of these, but the mere fact of inclusion of a specification for a particular act in appendix 6c, is not what makes that act an offense. Offenses are denounced only by specific statute (ACM 2927, Jaekley)--those which we are discussing, by Article 134--and there are necessarily many other acts which may constitute disorders or neglects, or conduct discreditable to the armed forces, which are not discussed or covered by any sample specification.

213d(1) The Morgan Committee noted that Article 128, Assault, differed from present service practice in that assaults with intent to commit specific crimes were omitted from that Article, and said, "Such assaults could be punished under Article 80 (Attempts), or, if the intent is doubtful, under this Article." The general article by its very terms, however, covers all offenses "not specifically mentioned" in the code, and it was deemed advisable to set forth the elements of some of these particular assaults which are made with intent to commit some of the more serious crimes.

For a discussion of the distinction between an assault with intent to commit a specific crime and an attempt to do so, see United States v. Barnaby, 51 Fed 20; Cirul v. State, 83 Tex. Cr. 8, 200 SW 1088. An example of the distinction between the two was suggested by General Green (Hearings before the Senate Subcommittee, p. 277): "A person can assault another (e.g., a watchman) with intent to commit a felony (e.g., a housebreaking) without having gone far enough with respect to the intended felony to constitute an attempt to commit it." For example, the watchman might be at such a distance from the warehouse that the overt act could be held no more than mere preparation to commit the offense. See paragraph 159.

Conversely, certain facts may establish an attempt but not an assault. For example, under subparagraph (c) of this paragraph, a man is said not to be guilty of an assault with intent to commit rape where he conceals himself in a woman's room to await a favorable opportunity to execute his intent to rape her, but is discovered and escapes. Those facts appear to establish a violation of Article 80, Attempts, as defined in paragraph 159. See Wharton's Criminal Law, (12th Edition), page 305.

213d(6) Misprision of a felony is the concealment of a felony without giving any degree of maintenance to the felon. United States v. Perlstein, 126 Fed 2d 789. It differs from Article 78, Accessory after the Fact, in that the latter requires receiving, comforting, or assisting the offender with the purpose of preventing his apprehension. See Neal v. United States, 102 Fed 2d 643.

The definition of misprision follows very closely that in 18 U.S.C. 4; the statement that a mere refusal to disclose the fact without some positive act of concealment does not constitute the offense is the interpretation of the Federal courts. Neal v. United States, 102 Fed 2d 643. It has been said that some meaning must be given to the word "conceal" as used in this offense, and an indictment must allege something more than a mere failure to disclose--such as suppression of evidence, harboring of a criminal, intimidation of a witness, or other positive act designed to conceal from the civil or military authorities the commission of the felony. Bratton v. United States, 73 Fed 2d 795.

Despite the broad nature of Article 134 and the numerous types of offenses which are embraced therein as disorders or neglects, or discreditable conduct, an Army Board of Review noted that "misprision of a misdemeanor" was not a civil crime, and held it not an offense in violation of AW 96. CM 203989, Fox, 7 BR 315. The Board quoted the words of Chief Justice Marshall in Marbury v. Brook, 7 Wheat 556: "It may be the duty of a citizen to accuse every offender and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man." This subparagraph on misprision does not attempt to include the offense which was apparently embraced in Section 73, Naval Courts and Boards, "Apprehending offenders." That section was based upon paragraph 17 of the eighth Article for the Government of the Navy, a specific statutory provision which is not incorporated in the new code. There may be cases in which mere failure to report an offense might constitute a violation of Article 134, but those cases must rest upon their peculiar facts.

THE EXECUTIVE ORDER AND EX POST FACTO PROBLEMS

Conducted by
MAJOR GILBERT G. ACKROYD

1. General. Although the Uniform Code of Military Justice and the Manual for Courts-Martial, United States, 1951, become effective on 31 May 1951, various provisions of the code, and the provisos in Executive Order 10214 promulgating the manual, require that the old provisions of law continue operative for certain purposes and in certain cases. Sometimes this is done as a matter of necessity--to avoid the taint of ex post facto--and sometimes as a matter of convenience for the purpose of avoiding confusion. The purpose of this discourse will be to discuss briefly the various provisos of the Executive Order and some of the ex post facto problems which will arise when the Uniform Code and the new manual go into effect.

2. The provisos of the executive order.

a. First proviso. Under the first proviso any investigation, trial in which arraignment has been had, or other action begun prior to May 31 may be completed in accordance with the old law. In this respect, action upon the record of trial by the convening authority is an action separate and distinct from the trial of the case, and review of the record of trial by the board of review is in turn an action action separate and distinct from both the trial and action by the convening authority. Consequently, even if arraignment has been had prior to 31 May, action by the convening authority must be conducted under the new procedure if not begun prior to 31 May and so must review by the board of review if it is not begun prior to that date.

b. The second proviso. Under the second proviso the new law cannot make punishable any act done or omitted prior to 31 May which was not punishable when done or omitted. The difficulties which might arise under this proviso will be obviated if the requirements of the fourth and last proviso are followed. This will be made apparent in the following discussion of the mentioned fourth proviso.

c. Third proviso. In the third proviso it is stated that the maximum punishment for an offense committed prior to 31 May 1951 shall not exceed the applicable limit in effect at the time of the commission of such offense. Several consequences flow from this:

(1) In the case of an offense committed prior to 31 May, the limitations upon punishment in effect in the armed force concerned at the time of the commission of the offense will apply.

(2) With respect to an offense committed prior to 31 May, neither the Uniform Code nor the new manual can legally increase the punishment either in amount or degree. It follows from this that if the accused is convicted of an offense in violation of the Articles of War committed prior to 31 May for which, under the provisions of Article of War 42, he could not be sentenced to confinement in a Federal penitentiary, his sentence to confinement may not be ordered to be served in a penitentiary by reason of the provisions of Article 58 of the Uniform Code, even though the trial took place and the sentence was adjudged on or after 31 May. See Medley, Petitioner (1890), 134 U.S. 160.

(3) Effect of new previous conviction rule with respect to enlisted persons and general prisoners (Army and Air Force). A bad conduct discharge and the accompanying penalties authorized by Section B of the 1951 Table of Maximum Punishments may not be adjudged, even on or after 31 May, for an offense in violation of the Articles of War committed prior to 31 May 1951 unless such punishment would have been authorized under the 1949 Manual. In other words, as to an offense in violation of the Articles of War committed prior to 31 May such a punishment cannot be based on two previous convictions; nor upon five previous convictions, one or more of which may not have been admissible as a previous conviction under the rule in par. 79c, MCM, 1949.

d. The fourth proviso. Under the fourth proviso any act done or omitted prior to 31 May which constitutes an offense in violation of the Articles of War, the Articles for the Government of the Navy, or the discipling laws of the Coast Guard must be charged as such and not as a violation of the Uniform Code, although if the trial takes place on or after 31 May the new procedure will be used. Since Public Law 506 is entitled an act "to unify, consolidate, revise and codify" the old statutory provisions pertaining to military justice in all the armed forces, it might be said that the Uniform Code may be considered nothing more than an amendment to all and each of those statutes, and that a person would be amenable to trial on an appropriate charge and specification laid under the Uniform Code even though he had committed the acts which constituted the offense prior to 31 May 1951. See People v. Stevenson, 103 Cal App 82, 284 Pac 487. It was thought, however, that such a pleading would cause considerable unnecessary controversy, would require a series of opinions by the boards of review and the Court of Military Appeals as to whether, case by case, particular articles of the Uniform Code proscribed offenses which were the same as those heretofore existing, and would mislead courts into imposing maximum punishments which were not authorized at the time the offense was committed. As an example of the latter objection, if a soldier had wrongfully obtained by false pretense property of a value of more than $50 prior to May 31, 1951, and was charged with larceny in violation of Article 121 under a specification alleging merely that he stole the property, the court might, after finding him guilty, impose a punishment of five years (see the new Table of Maximum Punishments) whereas under the Table of Maximum Punishments in the 1949 Manual for Courts-Martial the punishment could only be three years. It seems that nothing would be gained by laying the charge under the Uniform Code in the case of offenses committed prior to 31 May 1951, for it would ultimately be necessary to determine the nature of the offense under former law in order to determine whether the punishment was excessive.

Also, there is a considerable difference, in the definition of offenses, between the punitive

articles found in the Uniform Code and those found in the present laws governing the armed forces. For example: Under Article 88 of the Uniform Code the use of contemptuous words against the President, Vice-President, Congress and other officials by an enlisted person is not made an offense, whereas under Article of War 62 it is. It would, accordingly, be inappropriate to charge an enlisted soldier under Article 88 with respect to such an offense committed before the 31st of May 1951. Similarly, if a person subject to the Articles of War should commit a homicide while perpetrating a housebreaking prior to May 31, 1951, he could be charged with murder in violation of Article of War 92, whereas under Article 118 of the Code the homicide could be charged only as involuntary manslaughter unless it could be established that the perpetrator (1) had a premeditated design to kill, or (2) intended to kill or inflict great bodily harm, or (3) was engaged in an act which was inherently dangerous to others and evinced a wanton disregard of human life. If a person subject to the Articles of War breaks and enters in the nighttime a dwellinghouse with intent to kidnap, he would be guilty of burglary under Article of War 93, whereas he could only be charged with housebreaking under the Uniform Code (see Arts. 129 and 130). There are probably many more such differences, applicable to the Navy and Coast Guard as well as to the Army and Air Force.

In view of the matters mentioned above, it was decided that all offenses in violation of the Articles of War, the Articles for the Government of the Navy, or the discipling laws of the Coast Guard, committed before May 31, 1951, should be charged as such and not as violations of the Uniform Code.

3. Applicability of ex post facto rule as applied to trial by summary court-martial (Army and Air Force). If a person commits an offense in violation of the Articles of War prior to 31 May and is brought to trial before a summary court-martial after 31 May, he may refuse to be tried by such court if he could have refused trial by summary court-martial prior to 31 May (see par. 16, MCM 1949), even if he has been offered and has refused non-judicial punishment. See Sp CM9, Mc Neely, 2 BR-JC 371; Thompson v Utah, 170 U.S. 343,351.

☆U. S. GOVERNMENT PRINTING OFFICE : O—1951