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## TITLE 3—THE PRESIDENT EXECUTIVE ORDER 10020

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

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

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

HARRY S. TRUMAN

THE WHITE HOUSE,  
December 7, 1948.

No. 238—Part II—1

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### Chapter I—Military Jurisdiction

#### SOURCES—EXERCISE

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

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

The agencies through which military jurisdiction is exercised include:

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

of procedure and of evidence prescribed for courts-martial.

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

*Commanding Officers* exercising disciplinary powers under Article 104.

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

### Chapter II—Courts-Martial

#### CLASSIFICATION—COMPOSITION

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

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

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

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

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

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

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

*c. Rank of members.* An officer may be tried only by a court-martial com-

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

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

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

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

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

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

### Chapter III—Courts-Martial

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

5. **APPOINTING AUTHORITIES—*a. General courts-martial.*** The President of the United States, the Superintendent of the Military Academy and the commanding officers of commands of the Army designated in Article 8 may appoint general courts-martial. The mere assignment of an officer of the Judge Advocate General's Corps to a command does not alone empower the commander thereof to appoint general courts-martial. While an officer of the Judge Advo-

cate General's Corps is assigned as staff judge advocate of a command as prescribed by The Judge Advocate General in accordance with Article 47, jurisdiction to appoint general courts-martial is vested in the commanding officer of that command.

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

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

As Article 8 expressly designates those who have authority to appoint general courts-martial, it follows that no one else has such authority and that anyone having such authority can not delegate or transfer it to another. The authority of a commanding officer to appoint general courts-martial is independent of his rank and is retained by him as long as he continues to be such a commanding officer. The rules as to the devolution of command in case of the death, disability or temporary absence of a commander are stated in army regulations.

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

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

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

A battalion or other unit is "detached" when isolated or removed from the immediate disciplinary control of a superior in such a manner as to make its commander primarily the one to be looked to by superior authority as the officer responsible for the administration of the discipline of the soldiers composing the unit. Whenever there is doubt whether a unit is detached in the sense of Article 9, the

matter will be referred to the officer exercising general court-martial jurisdiction over the command, and his determination shall be final. The term "detached" is used in a disciplinary sense and is not necessarily limited to what constitutes detachment in a physical or tactical sense. For instance, the commanding officer of a field artillery battalion which is part of a division, if responsible directly to the division commander for the discipline of the battalion, may appoint special courts-martial even though there is a division artillery commander who controls the battalion in other matters. The power of the battalion commander to appoint such courts is subject to the power of the division commander to reserve to himself the right to appoint special courts-martial for any or all subordinate units and detachments in his command. However, a subordinate commander may exercise his power to appoint special courts-martial unless a competent superior commander reserves that power to himself and so notifies the subordinate.

*c. Summary courts-martial.* The commanding officers of commands of the Army designated in Article 10 may appoint summary courts-martial, but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable. When but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him (A. W. 10), and no order appointing the court need be issued. When more than one officer is present, a subordinate officer will be appointed summary court-martial.

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

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

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

sel shall be either a member of the Judge Advocate General's Corps or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States (43; A. W. 11).

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

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

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

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

The power of appointment under Article 11 cannot be delegated.

#### Chapter IV—Courts-Martial

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

**7. JURISDICTION IN GENERAL—Source, Nature, and Requisites.** While courts-martial have no part of the jurisdiction set apart under the article of the Constitution which relates to the judicial

power of the United States, they have an equally certain constitutional source. They are established under the constitutional power of Congress to make rules for the government and regulation of the land forces of the United States, and they are recognized in the provisions of the fifth amendment expressly exempting "cases arising in the land and naval forces" from the requirement as to presentment and indictment by grand jury.

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

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

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

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

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

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

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

Various other classes of persons described in particular statutes which,

being of infrequent application, are merely cited in the notes under Article 2, Appendix 1.

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

**9. JURISDICTION IN GENERAL—Contempts.** A military tribunal may punish as for contempt any person who uses any menacing words, signs, or gestures in its presence or who disturbs its proceedings by any riot or disorder (A. W. 32). See 109 (Contempts).

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

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

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

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

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

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

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

it was held that the discharge did not terminate his amenability to trial for the offense.

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

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

**11. JURISDICTION IN GENERAL—Exclusive and nonexclusive.** Courts-martial have exclusive jurisdiction of purely military offenses. But a person subject to military law is, as a rule, subject to the law applicable to persons generally, and if by an act or omission he violates an Article of War and the local criminal law, the act or omission may be made the basis of a prosecution before a court-martial or before a proper civil tribunal, and in some cases before both. See 68. The jurisdiction which first attaches in any case is, generally, entitled to proceed. For limitation as to the crimes of murder and rape, see Article 92.

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

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

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

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

13. JURISDICTION OF GENERAL COURTS-MARTIAL — *Punishments.* General courts-martial have the power to adjudge any punishment authorized by law or the custom of the service (A. W. 12) within certain limitations. The more important limitations are: certain punishments are mandatory under the law, for example, that prescribed by Article 95; the discretion of courts-martial to adjudge punishments may be limited under Article 45; the death penalty can be imposed only when specifically authorized (A. W. 43); and certain kinds of punishments are prohibited (A. W. 41).

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

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

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

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

the penalty in the event of conviction must either be death or imprisonment for life.

15. JURISDICTION OF SPECIAL COURTS - MARTIAL — *Punishments.* Special courts-martial can not adjudge death, dishonorable discharge or dismissal, confinement in excess of six months, or forfeiture of more than two-thirds pay per month for a period of not exceeding six months (A. W. 13). Subject to approval of the sentence by an officer exercising general court-martial jurisdiction (A. W. 47d), and subject to appellate review by The Judge Advocate General and appellate agencies in his office (A. W. 50e), a special court-martial may adjudge a bad conduct discharge in the case of an enlisted person, but a bad conduct discharge shall not be adjudged by a special court-martial unless a complete record of the proceedings of, and testimony taken by, the court is prepared in the case (A. W. 13). Even when a bad conduct discharge is adjudged, a special court-martial is limited by Article 13 to the adjudgment of a forfeiture of two-thirds pay per month for six months. As to other limitations see 115-117 (Punishments).

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

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

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

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

The maximum amounts of confinement and forfeiture (or of confinement and detention) may be imposed together in one sentence. Since confinement and restriction to limits are both forms of deprivation of liberty, only one of those

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

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

#### Chapter V—Arrest and Confinement

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

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

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

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

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

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

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

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

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

(3) *Procedural steps to confine.* A person to be confined is placed under guard and taken to the guardhouse or

other place of confinement. The authority ordering confinement will deliver to the commander of the guard or to the prison officer a written statement of the name, grade, and organization of the prisoner and of the Articles of War which he has allegedly violated. See AR 600-355. Unless such a written statement is delivered with the prisoner, the commander of the guard may refuse to receive the prisoner (A. W. 71).

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

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

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

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

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

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

*c. In quarrels, frays or disorders.* All officers, warrant officers and noncommissioned officers have power to part and quell all quarrels, frays and disorders among persons subject to military law and to order officers who take part in the same into arrest and other persons subject to military law into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith (A. W. 68).

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

custody or command the accused is at the time.

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

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

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

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

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

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

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

**Chapter VI—Preparation of Charges**

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

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

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

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

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

A person subject to military law can not legally be ordered to prefer charges to which he is unable truthfully to make the required oath on his own responsibility, but he may legally be ordered by a proper superior to prefer such charges as in the subordinate's opinion he may properly substantiate by the required oath. See 5a.

**26. WHEN PREFERRED.** When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct (A. W. 70). When it is intended to prefer charges, they should be preferred without unnecessary delay. An accumulation or saving up of charges through improper motives is prohibited; but when a good reason exists, (as when in the

interest of discipline it is advisable to exhibit a continued course of conduct), a reasonable delay is permissible if the person concerned is not in arrest or confinement. See 21.

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

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

One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person. A soldier should not be charged with both disorderly conduct and assault if the disorderly conduct consisted in making the assault, or with both a failure to report for a routine scheduled duty, such as reveille, and with absence without leave if the failure to report occurred during the period for which he is charged with absence without leave. The larceny of several articles should not be alleged in several specifications, one for each article, when the larceny of all of them can properly be alleged in one specification (130a). If a soldier willfully disobeys an order to do a certain thing, and persists in his disobedience when the same order is given by the same or other superior, a multiplication of charges of disobedience should be avoided (152b). There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses.

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

A joint offense is one committed by two or more persons acting together in pursuance of a common intent. Anyone who commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal; and anyone who causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such. But an accessory after the fact cannot be charged as a principal. A person whose only connection with a larceny was that he received the stolen goods, knowing them to be stolen, cannot be charged with the larceny, although he may be charged with wrongfully receiving stolen property. Offenders are properly joined only if there is a common unlawful design or purpose; the mere fact that several persons happen to have committed the same types of offenses at the same time, although material as tending to show concert, does not

necessarily establish it. The fact that several soldiers happen to have absented themselves without leave at about the same time will not, in the absence of evidence indicating a conspiracy, justify joining them in one specification, for they may merely have been availing themselves of the same opportunity of leaving.

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

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

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

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

A statement in simple and concise language of the facts constituting the offense. The facts so stated will include all the elements of the offense sought to be charged. In this connection, see the fourth subparagraph of 87b. Any intent, or state of mind such as guilty knowledge, expressly made an essential element of an offense should be alleged; thus a misappropriation in violation of Article 94 should be alleged as "knowingly and willfully" done. If the alleged acts of the accused are not in themselves criminal or contrary to the custom of the service but are made an offense by statute (including Articles 95 and 96) or regulations, words importing criminality such as "wrongfully", "unlawfully", "without authority", "dishonorably" or "feloniously", depending upon the nature of the particular offense involved, should be used to describe the accused's acts.

To a reasonable extent matters of aggravation may be recited. If applicable, the wording of the appropriate Article of War or other statute should be used in preference to a supposedly equivalent expression. In charging a person with being found drunk on duty, the specification should not allege that he was found intoxicated on duty.

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

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

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

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

#### Chapter VII—Submission of and Action Upon Charges

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

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

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

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

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

*c*. After the immediate commanding officer has preferred charges or has re-

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

*d*. The officer exercising summary court-martial jurisdiction may also dispose of offenses under Article 104 for which he deems such action proper. He then either disposes of the remainder of the charges by referring them to a summary court, or, if he exercises special or general court-martial jurisdiction, he may refer the charges to such courts subject to the limitations stated below under *Basic Considerations*. If he does not have special or general court-martial jurisdiction and desires to recommend trial by a court of one of these classes he forwards the charges with his recommendation to the commander authorized to appoint the particular kind of court which he believes should dispose of the case.

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

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

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

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

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

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

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

Fifth: When it appears to any accuser, or investigating officer, or commander to whom charges are forwarded in a particular case that a witness then available may not be so available at a subsequent stage of the proceedings or that because of distance or other reasons the disposition of the case may be delayed pending the taking of depositions, he will

promptly make the matter known to the officer competent to appoint a court-martial appropriate for the trial of the offense charged so that depositions may be taken in accordance with the third proviso of Article 25. See 106.

*Exceptional cases*. In exceptional cases in which the accused is not, strictly speaking, under the command of any military authority inferior to the Department of the Army, for example, military attaches or retired personnel not on active duty, the general principles of this paragraph are applicable; but the charges may, according to the particular circumstances, be forwarded either to the Department of the Army or to the commanding officer of the territorial command in which the accused may be.

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

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

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

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