

106

SEMINARS PRESENTED

DURING THE

ORIENTATION CONFERENCE ON THE

Manual for Courts-Martial, 1949

Held in

THE OFFICE OF

THE JUDGE ADVOCATE GENERAL

WASHINGTON, D. C.

During the Week of

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DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
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SUBJECT: Seminars Concerning the Manual for Courts-Martial, 1949
TO: All Judge Advocates of the Reserve Components

Rec'd 6/55

1. Inclosed for your information are the notes of an orientation conference concerning the Manual for Courts-Martial, 1949, held in this office during the period 7 to 10 December 1948. This conference was attended by staff judge advocates of continental and overseas commands exercising general court-martial jurisdiction.

2. In view of the many requests that have been received from individual judge advocates for copies of the conference notes, the Office of the Executive for Reserve and ROTC Affairs, Department of the Army, acting on a recommendation of this office, has made funds available for the printing of sufficient copies to permit distribution to all judge advocates of the reserve components.

3. The system of justice established by the 1948 Articles and 1949 Manual is a worthy model for all armies and compares most favorably with our civil systems. It is up to each of us to be fully conversant with the new system so that its promise may be fully realized. In this connection, the inclosed notes contain an Article by Article, paragraph by paragraph and phrase by phrase analysis of the new matter contained in the new Manual. I believe that you will find these notes a valuable aid to your study of the manual. It is recommended that you retain these notes for use in connection with any type of individual or unit training that relates to the administration of military justice in the Army.

Sincerely yours,

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

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Opening Remarks by Major General Thomas H. Green
at Conference on the Manual For Courts-Martial, 1949,
Tuesday morning, 7 December 1948, Washington, D. C.

I want to welcome you all here. It is fine to see so many Judge Advocates from all over the world. This is a working conference, I want you all to understand that. I want you to have a good time but I want you to put out every effort and learn all you can here because the future of the Corps depends upon whether or not you do.

We have a new Manual which must be thoroughly understood throughout the Army. That is the reason for this conference. I would like to get on the record who wrote the book. After the last war there were two very difficult controversies - who won the war, and who wrote the Manual for Courts-Martial. The first was never settled. As to the second, to my knowledge there has been a large number of persons who claimed authorship of the Manual. I would just like to run over the list of those who did write the Manual in this instance and have it settled for all time. Here it is: Colonel Decker was in charge of organizing the effort and producing the first draft. Working with him on the various projects were: Major Solf, Major Conley, Major Brack, Major Ackroyd, Colonel Van Benschoten, Colonel Lipscomb, Colonel Funk, Colonel Fratcher, Major Robblee and Major Davis. It was a well coordinated joint effort. General Hoover and Colonel Connally had general supervision and each also wrote sizeable portions. These officers labored without regard to hours. They met every single deadline although there was but slight time to spare in some instances.

I have never known of a project in this Corps that has been worked on harder and with more skill. To these gentlemen and their clerical assistants my hat is off. They have produced a best seller. Already 90,000 copies have been ordered. The trials and tribulations of these gentlemen have been varied and great but it has been well worth it. The entire Army from top to bottom has cooperated fully with us. Everywhere we have gone we have had utmost cooperation and assistance. I am informed that the President will today sign an Executive order implementing the new Manual for Courts-Martial.

During these conferences to be held here Secretary Royall and General Collins will come and talk to us. We have prepared a course of instruction which is calculated to cover the entire subject in the minimum time. The details will be explained to you later.

We have come a long way in the last two years. We are in big time, with a big B and a big T. Whether we stay there depends on you gentlemen. We have a goal to go - let's get at this business and push it over. I am glad to have you here; I hope you have a little fun getting together again but don't forget, this is a working conference. Thank you.

Remarks by Brigadier General Hubert D. Hoover
at Conference on the Manual for Courts-Martial, 1949,
Tuesday morning, 7 December 1948, Washington, D.C.

Gentlemen:

I should like to repeat what General Green just said about your responsibilities in making the amended Articles of War and the revised Manual for Courts-Martial work. If you do not make your labors and the Manual and the Articles "military" you are going to hear from your commanders. If you do not do your utmost to see that the results are "just" you are going to hear from the public and the Congress and other sources as well as from your commanders. This thought brings us pretty close to the true conception of what military justice is. I think it may be worthwhile to go back a little ways and then come up to our present position in this field.

When the writers of the Constitution of the United States gave Congress the power to make rules for the government of the land and naval forces and in the Fifth Amendment exempted courts-martial from the requirement for presentment or indictment of a grand jury in the fashion of the civil courts, they recognized the principle that the military forces need a summary method of enforcing discipline within their ranks. Armies are maintained to win wars and are not maintained to operate a system of justice - so a system of justice in the Army is primarily an adjunct to help the Army win the wars by enforcing discipline. But you can have discipline, and good discipline, and be just about it. That is where the judge advocate comes in most effectively.

It will be interesting to note that prior to World War I the Army had gotten along pretty well with Articles of War which had remained substantially unchanged during the history of the nation. Early in that war there were some riots in Texas called the Houston Riots and after rather prompt trials of some of the offenders the Department commander, as he had authority to do, directed execution of some sentences to death. There was quite a furor about it. It was thought he acted too summarily - that is beside the point - there was a public protest.

General Enoch H. Crowder, The Judge Advocate General, had become Provost Marshal General with the duty of designing and operating the draft. His subordinate, General Ansell, had taken over the operation of the Office of The Judge Advocate General. It is a matter of record that General Ansel took the position that The Judge Advocate General had a right to set aside findings and sentences by courts-martial on legal grounds in such cases as those of the Houston Riots and in all cases. He invoked old Revised Statute 1199 which gave The Judge Advocate General the power to "receive and revise" records of trial by general courts-martial. General Crowder took the position that The Judge Advocate

General did not have the power to set aside a sentence of a court-martial which had been ordered into execution. The issue was clearly drawn.

As a result of this dispute and as a result of the clamor over the Houston Riots executions, the War Department in January of 1918 issued its General Order No. 7 requiring review in the Office of The Judge Advocate General before any serious sentence of a general court-martial should be carried into execution. To implement General Order No. 7 The Judge Advocate General set up a Board of Review in his office. This was the genesis of the Board of Review established by legislation in 1920.

The attacks on military justice did not stop with General Order No. 7. It is also a matter of record that Senator Chamberlain, wartime Chairman of the Senate Military Affairs Committee, supported by the public utterances of General Ansell and others to the effect that courts-martial did not adhere to American principles of criminal law, proposed that the administration of military justice be taken away from the Army and put in some sort of civil tribunal. One specific proposition made was that a court of civil appeals similar to a United States Circuit Court be established for the purpose. General Crowder and the War Department resisted the proposal with all their power and the Army came out with the amended Articles of War of 1920.

In addition to the establishment of a Board of Review with appellate powers there was a statutory requirement for investigation of charges prior to trial. It was at that time also that the concept of a law member with power to rule upon questions of evidence was inserted in the law. The Manual for 1921 followed the enactment of the 1920 Articles and in 1928, based on experience up to that time, the condensed Manual of 1928 was written.

You are all familiar with that volume - it is the one you are working with now. My own view is that it is one of the best books of its kind ever written. It is compact - it is all there. It states the law. But there was great dissatisfaction with it during the war. We found that troop commanders did not have time to read it. The result was the development of Technical Manual 27-255 which was, to make a long story short, designed as a pony to help procedure under the Manual for Courts-Martial.

I want to say at this time that in redrafting the Manual we have attempted to take from the Technical Manual all that was valuable, all that was not repetitious, and put it in the Manual for Courts-Martial where it ought to be. So we have the subject matter all in a single volume. Perhaps there will be additional aids, but in the meantime the new Manual is intended in one volume to take the place of the old system which had two volumes. The Army thinks that the 1928 Manual

did insure justice in trials. It feels that on the whole the Manual did support discipline. Those are the two objectives of any Manual, new or old, or of any Articles of War.

In World War II, when we stop to think of it, we realize that the Army took over the criminal jurisdiction of 10 or 12 million men of the age groups from which most civil criminal problems arise. The Army pretty nearly operated the criminal jurisdiction of the United States during World War II. This was a long period. And let me say here that the Vanderbilt Committee, of which I will speak further in just a moment, made a remarkable report with respect to World War II administration of criminal justice by the Army. It stated, in effect, that courts-martial had rarely acquitted the guilty and had never convicted the innocent. I do not know how you could give better praise to the administration of criminal jurisprudence.

But, in spite of the fairness and success of the administration of military justice during the late war, the old refrain of criticism based on the thesis that military courts did not proceed according to law and convicted and punished accused persons too summarily was revived with the cessation of hostilities. The concentration of criticism this time, however, did not bear upon legality of procedure as much as it did upon alleged basic unfairness. Some accused did, of course, complain on legal grounds. It is noteworthy that we have had habeas corpus proceedings running into the hundreds since World War II. This is not surprising for we still have about five or six thousand prisoners in confinement. We have lost just one habeas corpus proceeding and that was in a case the Department of Justice declined to appeal. It happened to have been a joint case - two accused tried for rape under exactly the same circumstances. A United States District Court released one of the accused on the theory that an investigation had not been properly made. The Department of Justice declined to appeal because it was thought the case was bad on the facts. Habeas was brought in the other case and I am glad to say that the Army went into the Federal District Court and won that one. The successful resistance to attacks on legal grounds is a remarkable record for the Army from the standpoint of adherence to the law and to the conceptions of simple justice as embodied in American jurisprudence.

The criticisms leveled at the Army concentrated on what was called coercion of the courts by reviewing authorities and drifted into the utterly erroneous conception of a "caste system". The thesis was that courts-martial were used arbitrarily and summarily to punish men whom superiors wanted to punish and that the superiors used coercion to bring

about the results they desired. I do not think the criticism was well founded - it certainly was not justified in the great vast majority of cases. It was also asserted that sentences adjudged by courts-martial were unequal - some men would be sentenced to life imprisonment or 20 years while other men would get one year or six months or nothing for the same offense. It was alleged in some quarters that the law member system had become degenerate - that the law member was usually a line officer without particular knowledge of the law. It was alleged that in many cases accused persons were not adequately represented by counsel. It was charged that the practice was to put the most competent man on as trial judge advocate and appoint as defense counsel what was left. These are charges, briefly, that were made against the administration of military justice during World War II.

Soon after General Royall was made Under Secretary of War he brought about the appointment of a committee of civilian lawyers to inquire into the administration of military justice. This occurred in March 1946. The committee was an eminent one headed by Dean Vanderbilt of the Law School of New York University. The members made a thorough study, as complete and painstaking as possible, and the committee reported. The committee started with the premise that I gave you, that on the whole the administration of military justice was good; but it inquired nevertheless into the criticisms that had been made.

Among other things, the Vanderbilt Committee recommended that the power of appointment of courts-martial and of action upon the sentences (except for clemency) be taken away from military commanders and placed in the Judge Advocate General's Department. It recommended the strengthening of the appellate system in the Office of The Judge Advocate General. It recommended that the use of lawyers as law members be made compulsory. It recommended that legally trained counsel be provided in every case. It recommended that the bad-conduct discharge be established - this in the hope that it would replace the dishonorable discharge for purely military offenses, the conception being that it might be less opprobrious than the dishonorable discharge. And the committee recommended the presence of enlisted men on courts-martial. This was perhaps the most radical change advanced. The recommendation was that the detail on courts of enlisted persons be put on an optional basis. The theory was that this step would inspire confidence of enlisted accused in the essential fairness of the courts.

Following the rendition of the Vanderbilt report the War Department prepared a bill for the amendment of the Articles of War which, when introduced in the House of Representatives, became known as H.R. 2575. With some alterations it became law. You are probably more or less familiar with the law. The propositions that The Judge Advocate General

appoint the courts and that the power of acting upon sentences be taken from the reviewing authorities were discarded. The amendments put enlisted men on general and special courts at the option of the accused if an enlisted person. We do not know what effect this provision is going to have. We hope it will be wholly salutary. We know that we have among our enlisted personnel individuals who are capable of complete fairness and objectivity in the trial of their fellow soldiers. It will be largely up to you to see to it that the experiment does work. It may be that we will find that enlisted men on courts will be too harsh to suit the accused. The accused may find that other enlisted persons will punish the accused more severely than the officer would have done. That remains to be discovered. If such a situation should develop we shall find fewer and fewer requests for the presence of enlisted persons on courts. On the whole the effect ought to be salutary - it ought to be a guarantee to the public and to the soldier that he is being tried by men who understand his problems, who have his viewpoint, who cannot be accused of sentencing him or finding him guilty merely because an officer wants it done.

The new Articles provide for legally trained counsel if available; and give the defense a lawyer if the prosecution is so represented. Law members must be lawyers.

A special article of war was written forbidding the censure by reviewing authorities of courts-martial. That article must not be interpreted to prevent reviewing authorities from instructing their courts in their duties. It will be largely up to you gentlemen to see that the proper instruction is given and that the article of war is not violated.

The appellate system in the Office of The Judge Advocate General was materially strengthened although essentially it is still what it was before the amendment. The confirming power is generally lodged in a council of senior officers of this Department. Heretofore, as you know, this confirming power has rested in the President and during the war has been delegated to the Secretary of the Army. Hereafter the power will be exercised in the Office of The Judge Advocate General. Another important change is that all cases involving dishonorable or bad-conduct discharge will go before a Board of Review. We think that the action on these cases can be taken promptly and effectively. It will be your particular problem to see to it that the records reach this office in such shape that corrective action will be unnecessary.

The Manual for Courts-Martial has been rewritten. The men who have done the work on this Manual, the spade work particularly, have worked

Literally day and night, painstakingly and conscientiously. They have striven to make a book that can be understood and readily applied. We want it not to be only useful as a law book but useful to the line officer who has to resort to it when he does not have a judge advocate. Your concentration on making it work, on understanding it, is what will preserve our system. As somebody said a day or two ago, the writing of this Manual and the enactment of the amended Articles of War was the winning of a pretty important battle for the Army; but don't forget that the old war that started back in 1917 is still on and that winning that war will depend on the degree of public confidence that you men inspire by your administration of the Manual for Courts-Martial.

Seminar Leader
Major Paul A. Robblee

The only change in Chapter I of the new manual is found in paragraph 2 which is captioned "Exercise". The following clause is added to the first subparagraph of paragraph 2: "and by a government with respect to offenses against the law of war." The reason for this addition was to amplify the three categories of military jurisdiction defined in Ex Parte Milligan, 71 U.S. 141, in view of the trials of war criminals and saboteurs. In this connection, see Ex Parte Quirin, 317 U.S. 1 (saboteur's case), Ex Parte Yamashita, 327 U.S. 1 (Japanese commanders), and the Dachau trials.

Paragraph 5a, "Appointing Authorities - General Courts-Martial", describes the manner in which general court-martial jurisdiction is vested in the commanding officer of a command. It is therein provided that when an officer of the Judge Advocate General's Corps is assigned as staff judge advocate of a command, as prescribed by The Judge Advocate General in accordance with Article 47, jurisdiction to appoint general courts-martial is vested in the commanding officer of that command. It must be remembered that the mere assignment of an officer of the Judge Advocate General's Corps does not alone vest general court-martial jurisdiction in the commander. For example, if an officer of the Judge Advocate General's Corps is assigned to a command for duty as a claims officer general court-martial jurisdiction is not thereby vested in the commanding officer of the command.

There are no substantial changes in paragraph 5b, "Special Courts-Martial". However, it is important to note that whenever there is a doubt as to 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 of that particular question will be final. This provision was added to this paragraph in the new manual as explanatory matter.

Paragraph 7, "Jurisdiction in General", provides, in effect, that courts-martial proceedings are binding upon all departments, courts, and agencies of the United States, subject only to action upon application for a new trial pursuant to Article 53. It is further stated that only a Federal court has jurisdiction on a writ of habeas corpus to inquire whether a court-martial had jurisdiction over the person and subject matter or whether the court exceeded its powers. In this connection, see Chapter XXX.

There is very little new material contained in paragraph 8, "Jurisdiction in General - Persons". However, it would be well to refer to the footnotes under Article 2, Appendix 1. These notes have been revised and expanded in order to bring them up to date. Particular reference is made to the note, relative to Air Force personnel, which provides that:

"Personnel of the Air Force are not subject to the jurisdiction of Army courts-martial under A.W. 2(a) except as to offenses committed prior to 25 June 1948 (Public Law 775, 80th Congress)."

Paragraph 10, "Jurisdiction in General - Termination", now reads:

"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."

In order to be absolutely consistent it was determined that the words "in the Army" should be added to the text in view of the Hirshberg case wherein the 2d Circuit Court of Appeals, in a habeas corpus matter involving Naval personnel, held that reentry into the service revived Naval court-martial jurisdiction over an offense committed in a prior enlistment. Unquestionably the case will be appealed and there may be some change forthcoming. Nevertheless, the new manual adheres to the rule that court-martial jurisdiction over persons in the military service ceases upon discharge or other separation and that jurisdiction as to an offense committed during the period of service so terminated is not revived by reentry into the military service - with certain exceptions, of course, such as certain offenses under the 94th Article of War. (Note: On 28 February 1949, subsequent to this seminar, the United States Supreme Court decided that a Navy court-martial has no jurisdiction to try an enlisted man for a violation of Article 8 of the Articles for the Government of the Navy, 34 U.S.C. Sec. 1200, Art. 8, committed during a prior enlistment terminated by an honorable discharge, even though he reenlisted on the day following his discharge. (Hirshberg, U.S. ex rel v Cooke, 336 U.S. 210))

In the last subparagraph of paragraph 10, which pertains to the "Effect of Termination of Term of Service", the following is stated:

"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 and may be held after his period of service would otherwise have expired."

This was added to explain further the material in the text of the 1928 Manual.

Paragraph 11, "Jurisdiction in General - Exclusive and Nonexclusive", provides in part:

"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."

This statement constitutes the policy of our Government on this particular subject and was added to the material of the 1928 Manual for general information.

Paragraph 12, "Jurisdiction of General Courts-Martial - Persons and Offenses", as rewritten, omits the phrase excepting officers from the jurisdiction of a general court-martial appointed by the Superintendent of the Military Academy which was contained in that comparable paragraph of the 1928 Manual. The revised paragraph was primarily designed to clarify and explain the question of concurrent jurisdiction of courts-martial and military tribunals.

Paragraph 15 explains the jurisdictional limits of special courts-martial as regards punishment. A bad conduct discharge may be adjudged by a special court-martial in the case of an enlisted person, provided that a complete record of the trial is prepared in the case. Failure to prepare such a record will nullify a sentence to bad conduct discharge. Further, even when a bad conduct discharge is adjudged a special court is limited by Article 13 to the adjudgment of a forfeiture of two-thirds pay per month for six months, and confinement not to exceed six months.

Paragraph 16 concerns the jurisdiction of summary courts-martial. Noncommissioned officers of the first two grades may not be tried by summary court unless they specifically consent thereto in writing. Non-commissioned officers of the third and lower grades may be tried by summary courts-martial if they do not object or, if they have objected, when such trial is subsequently directed by the officer competent to bring them to trial before a special court-martial.

JURISDICTION - PERSONNEL

Seminar Leader
Major Waldemar A. Solf

Next to be considered are the paragraphs dealing with the jurisdictional aspects of personnel.

Paragraph 4a, "Composition - Who may serve", deals with the composition of courts - who may serve thereon. First, it is stated that all officers in the active military service of the United States shall be competent to serve on courts-martial. In this respect Department of the Army Circular No. 201, 1948, seems to imply that reserve officers not on active duty may be given training credit for participation in courts-martial proceedings. Whatever may be the implication of that circular, it is extremely inadvisable to have any reserve officers not on active duty serve on a court-martial.

Article 4 provides that warrant officers are competent to sit for the trial of warrant officers and soldiers. It is optional with the appointing authority whether he desires to put warrant officers on the court for such trials.

Enlisted persons are competent to sit only if requested in writing by an enlisted accused at any time prior to the convening of the court, and when so requested at least one-third of the members of the court, both appointed and sitting, must be enlisted persons unless the accused expressly waives his right. It will be noticed that Article 4 gives the accused the right to make this election at any time prior to the convening of the court. Unless the defense counsel cooperates in getting an early election on this matter from the accused it will create considerable confusion in convening courts, for the accused may otherwise make the request five minutes before the court convenes. In paragraph 45 it is further provided that one of the duties of the defense counsel, when he is first appointed, is to ascertain whether the accused desires enlisted persons on the court. The defense counsel will prepare the necessary requests in writing for the signature of the enlisted accused. Unless an early election is made it appears that a cumbersome procedure will result.

It is to be noted that under Article 16 enlisted persons of the same company or comparable military unit are prohibited from sitting as court-martial members for the trial of a member of the same company or unit.

Paragraph 4d, "Qualifications of members", reiterates provisions of Article 4 pertaining to the qualifications of members. It provides that those best qualified for the duty by reason of age, training, experience, and judicial temperament should be appointed as court members, and that 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 minority membership thereof. The competency of enlisted persons to sit as members makes this provision even more significant than it has been heretofore.

Paragraph 4e pertains to the law member for general courts. The law member must now possess one of two qualifications: (1), he must be an officer of the Judge Advocate General's Corps; or (2), he must be a member of the bar of a Federal court or of the highest court of a State and certified by The Judge Advocate General to be qualified for such detail. That raises the question who is a member of the Judge Advocate General's Corps. Of course a Regular Army officer commissioned in the Judge Advocate General's Corps is a member of the Corps; however, a Regular Army officer commissioned in some other branch of the service and detailed in the Judge Advocate General's Corps is not a member of the Judge Advocate General's Corps for the purpose of being a law member. The reason for that distinction is that under Section 502c of the Officer Personnel Act of 1947, the Secretary of the Army has authority to transfer officers from one branch to another, but only within the same promotion list. When an officer steps out of that promotion list a new appointment is required. Since the establishment of a separate promotion list only a regular judge advocate can be considered a member appointed in the Judge Advocate General's Corps. Other regular officers are not eligible as such to sit as law members unless they are certified by The Judge Advocate General as qualified.

As to nonregular officer lawyers the word "assigned", as used in paragraph 4e, has not acquired the same technical significance. Any officer who is a reserve or National Guard judge advocate, or any AUS officer, commissioned with the view to service in the Judge Advocate General's Corps is considered to be "assigned to the Judge Advocate General's Corps by competent orders" in the language of the manual. However, when a nonregular officer commissioned in some other branch is detailed to the Judge Advocate General's Corps the orders detailing him should state that it is for the performance of judge advocate duties. That is just an added precaution because in the future officers may be detailed to the Corps for the performance of nonlegal duties and such officers, unless qualified as lawyers, are not eligible to serve as law members of general courts-martial.

The order appointing the court will expressly state the qualifications of the law member. It must show that he is an officer of the Judge Advocate General's Corps or that he is properly certified. See Appendix 2 for the form of statement of qualification.

Paragraph 6 pertains to the appointment of the trial judge advocate, defense counsel, and assistants. A mandatory requirement of Article 11, which can not be waived and which affects the composition of the court itself, provides that if the appointed trial judge advocate 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 officer who is appointed as defense counsel must similiary be qualified either as a member of the Judge Advocate General's Corps or as a member of the bar of a Federal court or of the highest court of a State. That does not mean that if the trial judge advocate is a member of the Corps the defense counsel must also be a member of the Corps. He may be any one of the types of officers qualified as a lawyer, in the sense of Article 11, to be a defense counsel. That is the statutory requirement. In addition to the statutory requirement the manual provides that if the conduct of the prosecution devolves upon any officer who is qualified as a lawyer, the accused is entitled to have as a member of the defense a person so qualified. There is one little wrinkle to bear in mind in connection with this matter. In some states, including Pennsylvania and Georgia, all practicing lawyers are not members of the bar of the highest court of the State unless they actually practice before it. Those people are not legally qualified in the sense of Article 11 unless they are members of the bar of a Federal court. (See also in this respect, Trial Procedure, page 36 .)

Paragraph 38c, in the chapter on "Members of Courts-Martial", pertains to the absence of the members. If, at any time in a trial where the accused has requested enlisted members of the court, less than one-third of the membership of the court present are enlisted persons, the court shall not proceed with the trial unless the accused expressly consents thereto.

Concerning the absence of the law member, Article 8 provides that a general court-martial shall not receive evidence upon any matter nor shall it vote upon its findings or sentence in the absence of the law member. As a practical procedure the manual provides that the court will adjourn until the law member is present or until a new law member is regularly detailed and is present. If the circumstances require, the appointing authority should be notified of the law member's absence.

The duties of the law member are stated briefly in paragraph 40. He now has power to act and rule finally on all interlocutory questions except challenges, rulings on motions of findings of not guilty, and on matters pertaining to sanity.

Paragraph 41, "Trial Judge Advocate - Selections; relief; absence". Article 11 provides that no person who has acted as defense counsel, assistant defense counsel, member of a court, or investigating officer in any case shall subsequently act in the same case as trial judge advocate or assistant trial judge advocate. The moral of the provision is: do not appoint as an investigating officer an officer whom you expect to use as a member of the prosecution.

Paragraph 43 concerns the defense counsel. The right of the accused to be represented by a defense counsel who is a lawyer has already been discussed. Paragraph 43 contains an additional requirement of Article 11 that no person who has acted as a member, trial judge advocate, assistant trial judge advocate, or investigating officer in any case shall subsequently act as defense counsel or assistant defense counsel in the same case unless he is expressly requested by the accused. The procedure for ascertaining the accused's election may be found in paragraph 56 and Appendix 5.

Paragraph 45, "Individual Counsel for the Accused". In this paragraph the duties of the individual counsel, including the regularly appointed defense counsel, are discussed in great detail. Of particular importance is the fact that he should ascertain from the accused whether he desires enlisted persons on the court.

A matter of general interest that has been mentioned previously concerns the procedure to be used in appointing enlisted persons as members of the court when duly requested. The tentative approved solution is to appoint two courts, one with a panel of officers or officers and warrant officers; the second to consist of officers plus the required number of enlisted persons. If an accused person properly requests enlisted persons as members of the court the case should be promptly referred to the court including enlisted members.

Q. He is not required to make that request until he is arraigned?

A. He must present his request before the court convenes.

Q. Suppose it is referred to the wrong court - how are you going to get it back?

A. If there is a last minute request for enlisted persons and there is insufficient time to send it back, say 100 miles, to get a new order of reference, take the necessary action to try it before a court which includes enlisted members. The appointing authority, when he approves the action, ratifies the fact that the case was tried by a court other than the one to which it was originally referred.

Q. What objection would there be to appointing one court with enlisted persons on it and then just not notify them to appear unless there is a request for it?

A. There is some thought that it might be objectionable to have provisional members of the court. Of course, the very best solution, if you have the time and if the defense counsel performs his duties properly and notifies all concerned in plenty of time, is simply to amend the order appointing the court by adding enlisted persons for the trial of this particular accused only.

Q. In a case where the offense is committed prior to 1 February and trial is held after 1 February - what is the thought on the question whether an enlisted accused can then have enlisted persons on the court?

A. That is supposedly a privilege that he has, and the ex post facto rule would not operate to his detriment there. He is requesting the enlisted persons.

Q. On 1 February he has that privilege for offenses that were committed prior to that date?

A. That is right. If he desires enlisted persons, he can have them.

Q. It looks like we would have to have that in the record?

A. You would have it in the record. It appears in the form of record, in Appendix 6; and, also, there is an announcement in Appendix 5 where the trial judge advocate states that the accused did or did not request enlisted persons.

Q. How many enlisted persons would you suggest putting on the court in the first instance, what percentage?

A. A little over a third is believed sufficient.

Q. For a court of thirteen members, five enlisted persons at least?

A. Right. Of course, if any enlisted member is a member of the same company or similar unit he is not eligible.

Q. Is it possible that a court might be composed entirely of enlisted persons?

A. Not a general court.

Q. Special?

A. It is possible. That is a matter for the exercise of good judgment on the part of the appointing authority. But as the law member must be an officer, it can not happen in a general court-martial.

PRETRIAL PROCEDURE - ARREST AND CONFINEMENT

Seminar Leader
Major Joseph L. Brack

The new chapter on arrest and confinement follows generally the outline and arrangement of the old manual, but it will be found that some of the text which formerly appeared under the various title headings now appears under different title headings and that the general treatment of various phases of arrest and confinement under broad title headings is now broken down into separate specific paragraphs. The scope and substance have been expanded. The revision in the arrangement of the old text was made for purposes of clarification and simplified reference.

Paragraph 18 on page 14, pertaining to the scope of the chapter, remains unchanged.

Paragraph 19a, on the same page, titled "General and Miscellaneous.- a. Basic considerations", contains a major amendment to this subject by virtue of the new prohibitions which are laid down in Article 16.

The first subparagraph of 19a is substantially the same as the corresponding paragraph of the old manual except for the insertion of a statement emphasizing the fact that the exercise of the authority to order arrest or confinement under Article 69 is not mandatory. This was done by the insertion of the words "and its exercise rests within the discretion of the person vested with power to arrest or confine."

The second, third, and fourth subparagraphs of the old manual were omitted from this paragraph, but their substance is treated in other appropriate paragraphs of this chapter.

Subparagraph two is entirely new and spells out the prohibitions of the new Article 16 governing pretrial confinement of prisoners. Article 16 provides in pertinent part:

"No person subject to military law shall be confined with enemy prisoners or any other foreign nationals outside of the continental limits of the United States, nor shall any defendant awaiting trial be made subject to punishment or penalties other than confinement prior to sentence on charges against him."

The first prohibition, which denounces the confinement of American military prisoners with enemy or foreign prisoners, is explicit and therefore it was deemed unnecessary to amplify it further in the manual. Primarily, it imposes new responsibilities on commanders in foreign countries to see that American military prisoners, enemy prisoners, and other foreign prisoners are properly segregated in prison enclosures. In this respect, any rules or regulations to carry out the administrative requirements necessitated by these prohibitions are properly the subject for Army Regulations and local regulations prescribed by responsible commanders.

The second prohibition, however, which provides -

"nor shall any defendant awaiting trial be made subject to punishments or penalties other than confinement prior to sentence on charges against him." -

although clear as to its object, carries certain far reaching implications which do not clearly appear in the express language of the statutes and therefore required interpretation.

This provision merely indicates that prisoners awaiting trial are not to be subjected to any punishments other than confinement prior to sentence. It therefore became necessary to determine what "punishments and penalties" are prohibited and to what particular time in the course of an action the phrase "prior to sentence" refers. The interpretation of these provisions depends upon the legislative intent. An indication of what punishments were intended to be prohibited by this amendment appears, in part, in the Congressional Record in the remarks of Congressman Fulton who introduced the amendment. Referring to a visit he made in 1946 to a disciplinary training center in Pisa, Italy, where he found certain conditions which he thought should be abolished, he stated:

"I have seen men held for months under physical punishment conditions who were not even tried yet. They were deprived of beds; they were deprived of sufficient clothing for their boards; they were forced to sleep on boards. They were put under this disciplinary training, gotten up for special inspections, forced to work as if they had already been convicted. I said to those boys when I was at that training camp, 'I will try to see first that you are not confined with these enemy prisoners and certainly that you are not punished before you have been sentenced.' Now I want it in the

Articles of War to see that it never occurs again, because when you find American prisoners not even segregated from Nazi prisoners, using the same toilet facilities, in the same barbed-wire inclosure, with no separation, being forced to associate with people they were just fighting against shortly before, perhaps the committee had better adopt this amendment and see that it never occurs again."

Upon the basis of these remarks it was decided that this amendment and the words "punishments and penalties" were intended to refer to the treatment, accommodations, facilities and training which are to be accorded to unsentenced prisoners as distinguished from prisoners serving sentences. Paragraph 19a accordingly so provides.

The prohibition against "punishments and penalties" is further construed to apply to forfeiture of pay and allowances prior to sentence. This construction was based on the principle that since a sentence does not become effective until it is promulgated by orders authorizing its execution, the phrase "prior to sentence" must be interpreted to refer to the time the sentence is ordered into execution. Consequently, since a forfeiture is clearly a punishment it necessarily falls within the prohibition of the article. This interpretation is clearly set out in the manual which provides:

"Prisoners whose sentences have not been approved and ordered executed will be distinguished from prisoners who are serving sentences." and "they will not forfeit pay or allowances during the period of confinement except pursuant to sentence ordered executed."

The pay of such a prisoner accrues, and may be paid to creditors, his family, or as he may direct prior to execution of sentence. However, although his pay may not be forfeited, there is no requirement that he be permitted to have funds in his personal possession during confinement.

Paragraph 19b, titled "Arrest defined - status of persons in arrest", is new in context except for that provision in the middle of the first subparagraph which reads:

"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)."

In revising this chapter, the stated provision was extracted from paragraph 21 of the old manual and inserted here as a matter pertinent to this topic heading. Since neither the 1921 or 1928 Manual nor the technical manual contained a definition of "arrest", such a definition,

in the military sense, was inserted as a matter of substantive law to distinguish the basic features of civil and military arrests. This distinction is expressed in the statement that military arrest is binding merely by virtue of a moral obligation to obey the order of arrest and not, as in civil procedure, by issuance of a warrant or physical seizure of the person arrested.

Other new material added concerns the status of a person in arrest, the incidents of arrest as promulgated by Army Regulations, and the effect of performance of military duties by a person in arrest on his status of arrest.

The second subparagraph of 19b refers to administrative restrictions and is new. It was primarily inserted for the purpose of indicating the difference between arrest and administrative restriction and, secondly, as informational matter for officers in lower echelons to point out the advisability of this form of restraint in proper cases. This provision follows the concepts of military arrest and administrative restriction laid down in CM 319857, Dingley, 69 BR 153.

Paragraph 19c, titled "Confinement defined - status of confinement prior to trial", is a new provision. Here confinement is defined and a statement is added concerning the precautionary considerations which should be understood before exercising this means of restraint. It is expressly stated that:

"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."

Paragraph 19d, "Procedure for arresting or confining", is essentially new to the manual. Except for the sentence relating to preliminary inquiry into the offense required prior to the arrest or confinement of a soldier, all of the succeeding new material pertaining to the procedural steps to arrest and to confine was taken from TM 27-255. Subparagraphs (2) and (3) merely spell out the manner in which an arrest and confinement is to be imposed.

Continuing to paragraph 20a, page 16, "Who may arrest or confine", the first two subparagraphs are substantially the same as those in the old manual. Subparagraphs 20b to 20f, relating to the authority of military police to arrest, the authority of persons other than military police to arrest in quarrels, frays or disorders, the authority of the trial judge advocate to restrain an accused about to be tried, the authority of courts-martial to restrain, and the responsibility for restraint after trial, have been added as matters pertinent to the general topic.

Paragraph 21, dealing with the duration and termination of arrest, is new and was derived, in part, from TM 27-255. Generally, it provides that a delay in preferring charges does not automatically release a person from arrest; that the release to be effective must be authorized by the person who imposed the arrest, and, in case of confinement, by the officer in command of the place of confinement.

Paragraphs 22 and 23, concerning the arrest of deserters by civilians, are substantially the same as the corresponding provisions of the old manual.

PRETRIAL PROCEDURE - PREPARATION OF CHARGES

Seminar Leader
Major Waldemar A. Solf

Chapter VI, "Preparation of Charges", page 19, contains no substantial changes in paragraphs 24, 25 and 26. In paragraph 27, "General Rules and Suggestions", the manual takes cognizance of the aider and abetter rule stated in Title 18, U.S.C., Section 2 - it previously was contained in the old Title 18, U.S.C., Section 550. That statute provides that:

"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".

That rule has been actually used in court-martial procedures for the last twenty years. The old manual, however, prescribed that it should not be used in cases of desertion or absence without leave on the theory that those offenses can not be committed jointly. It is believed that the real reason underlying the rule of the 1928 Manual - it was not so stated in the 1921 Manual or in Winthrop - was the difficulty of proving concurrence of intent or state of mind in a desertion case. That can not be accomplished just by introducing a couple of morning reports in the record. The aider and abetter rule is applicable in any case where there is evidence of a concurrence of criminal intent.

Paragraph 29, "Drafting of Specifications". There has been no substantial change here except clarification for the benefit of line officers. Some emphasis has been added to the effect that words importing criminality, such as "wrongfully" or "unlawfully", should be used to describe the accused's acts if the alleged acts are not criminal per se.

Paragraph 30, concerning the general provisions pertaining to the submission of and action upon charges, has been substantially rewritten for the sake of clarity. Complaints have been received from line officers that they could not understand the provisions of that paragraph. Consequently an attempt has been made to revise it so that anybody could understand it. There has been no change in substance.

However, attention is invited to the paragraph captioned "Basic Consideration" which has been expanded slightly. First, it is stated that:

"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".

That is an expression of the effect of the new Article 24 which prescribes that whenever a statement is obtained it must be preceded by action in accordance with this formula. That does not affect the old rule that a spontaneous statement is voluntary even if not preceded by a warning. For example, if a soldier walks into an orderly room, requests permission to talk to the company commander and confesses to an offense, his confession is voluntary, of course. Article 24 is not going to affect judge advocates or the processes of charges because it has been SOP for CID investigators and investigating officers to make a prescribed warning before taking a statement.

Paragraph 31, "Signing and Swearing to Charges". There has been a change in the affidavit which is contained in Appendix 3. It is no longer necessary for the accuser to state specifically whether he has personal knowledge or has obtained his knowledge on the basis of information and belief. Either way is all right. The purpose of the provision of the article requiring a sworn charge is that the accuser knows either by investigation or by personal knowledge the facts constituting the basis for the charge.

Some changes have been made in paragraph 34, "Action by Officer Exercising Court-Martial Jurisdiction". Subparagraph 34c, "Alterations", provides that officers exercising court-martial jurisdiction may make corrections of obvious errors before charges are forwarded. However, if such corrections amount to the changing of the substance of the specification or add a new element, the charges must be redrafted and sworn to by an accuser.

Similarly, in subparagraph 34d, which deals with "Investigations", it is provided that if an investigation has already been conducted before the record reaches the officer exercising court-martial jurisdiction he need not make another investigation unless, as a result of the investigation, it appears that a more serious or entirely different offense should be charged, in which event he should cause an investigation to be made as to that additional element.

Paragraph 34g, "Forwarding; reference for trial", provides that the signed indorsement on the charge sheet may include any proper instructions to the court. Among the instructions which are to be set out in detail is the matter of the employment of the reporter in special court-martial cases, namely, that it is routine for a reporter to be present at special court-martial cases wherein a bad conduct discharge may be adjudged unless the appointing authority directs the contrary.

Another important addition is that the manual, in paragraph 34i, now takes cognizance of common trials. Technical Manual 27-255 provided that common trials were authorized if the appointing authority directed the common trial and if the accused consented thereto. That rule has been changed to comply with rules 8 and 13 of the Federal Rules of Criminal Procedure. It is now provided that the common trial may be directed in any case in which the offenses occurred at the same time and place and are generally provable by the same evidence. As to such closely related offenses the accused does not have an absolute right to a severance. However, offenses which are not closely related must not be joined in a common trial of this nature. For example, suppose A and B are charged with larceny which may be provable by the same evidence, and B is also charged with an assault, which has nothing at all to do with the charge of larceny. Although the larceny may be tried at a common trial, the assault case can not be tried in that common trial. It may be prejudicial to A but B can not object to a common trial on that ground.

Paragraph 25, "Investigations of charges", has not been changed materially. Cognizance has been taken of the large number of habeas corpus suits in which it is alleged that there has been a failure in the investigation required by the old Article 70. The manual now provides:

"Any failure to comply substantially with the requirements of Article 46b which results in prejudice to the accused's substantial rights at the trial *** may require a delay in disposition of the case or disapproval of the proceedings."

It is the Army view that the investigation required by Article 46b is procedural and not jurisdictional. Minor defects in the conduct of the investigation do not constitute prejudicial error. It is only when the defect reaches into the trial itself and stains the trial in such a way as to deprive the accused of the right to prepare his trial or properly to conduct his defense that it might become prejudicial error. In this connection Congress has gone along with this interpretation, and in the committee hearings it was stated:

"In our consideration on the subject of military justice we have been guided by the principle that the basic right of the accused should be protected without encumbering the military system with such a maze of technicalities, that it would fail in its purpose. Upon this premise we have concluded an investigation should precede every general court-martial trial but that the investigation should be considered sufficient, if it has substantially protected the rights of the accused. To hold otherwise would subject every general court-martial case for reversal for jurisdictional error on purely technical grounds."

The amendment of Article 25 providing for pretrial depositions may create more situations where a failure of the investigating officer to perform his duty properly would result in prejudicial error. The new Article 25 provides a means for preserving the testimony of a witness who will not be available at the trial for any reason. If by failure of the investigating officer to take proper steps to see to it that a deposition requested by the accused is taken, and as a result of such failure a vital defense witness is lost, there might be prejudicial error. In this connection depositions may be authorized by any officer competent to appoint a court appropriate for the trial of the offense. In case an offense falls within the jurisdiction of a special court-martial, an officer competent to appoint a special court-martial may direct that the deposition be taken.

Another major change occasioned by Article 46b is the provision that the accused is entitled to be represented by counsel at the pre-trial investigation. It is emphasized in the manual that this right must be construed reasonably and that the accused can not unduly delay the investigation by asking for counsel who is not reasonably available. He must be given a fair opportunity to procure counsel of his choice and if he has failed to produce that counsel within a reasonable time the investigation may proceed. He has a right to civil counsel of his own selection, but at his own expense. He may also select military counsel provided that such counsel is reasonably available. The rule as to determining availability is the same as that applied to requests for defense counsel. The requested counsel's commanding officer is the one who determines whether counsel is available, subject to appeal to the next superior. Finally, if the accused desires but does not request counsel as provided in one of the two mentioned situations, he must be furnished counsel appointed by the officer exercising general court-martial jurisdiction over the command. In view of the fact that many, if not most, investigations will be directed by officers who do not exercise general court-martial jurisdiction, some means should be devised for providing such counsel without unduly delaying the investigation. In conformance with the procedure prescribed in the manual, it is suggested that the officer who directs the investigation get on the phone right away and call his staff judge advocate recommending the name of an available counsel. An informal appointment should be sufficient. In large territorial commands with widely scattered stations, such as an Army, it may be found advisable to appoint one or two standing defense counsel at each station. In that event, the counsel is readily available, without further formality or delay, to represent an accused whenever a proper request is made.

PLEAS AND MOTIONS

Seminar Leader
Major Waldemar A. Solf

This hour will be devoted to that part of trial procedure which deals primarily with pleas and motions. However, it is pertinent first to point out some items contained in Chapter X, page 45.

Paragraph 49g, "Explanation of rights of accused", now takes cognizance of the rule which has prevailed in practically all jurisdictions, that is, the explanation of the meaning and effect of a plea of guilty, the right of the accused to remain silent, make a statement, or testify, and various other matters will be explained to the accused.

In paragraph 50, "Closed Sessions", the rule as to spectators has been somewhat changed in accordance with the directive of the Secretary of the Army based on the Vanderbilt Committee Report. So far as may be practicable, courts-martial trials will be public, subject, of course, to the right to close them in the interest of security or for other good reasons, as when testimony as to obscene matters is expected to be brought out in the trial.

With reference to paragraph 51, which deals with the interlocutory questions other than challenges, it is now provided that the law member rules finally in open court on all interlocutory questions except challenges, motions for a findings of not guilty, and certain matters pertaining to insanity. As to those excepted matters he rules subject to objection by any member of the court.

Concerning the question of insanity, it is self-evident that he can not rule finally upon the question whether the accused lacks the requisite mental capacity to stand trial. Neither can he rule finally whether the accused was mentally responsible at the time of the offense. Further than that, if any person on either side moves the court to give priority to the mental question or to make an inquiry into the accused's mental condition, the ruling thereon is subject to objection by any member of the court. However, if the defense or the prosecution in a proper situation were to introduce evidence on the question of insanity, such action is similar to any other matter of evidence and the law member's ruling as to the admissibility thereof is final and conclusive on the court.

Paragraph 52, dealing with continuances, has been slightly revised to emphasize the fact that the accused has an absolute and fundamental right to prepare for trial, and that the failure to grant a continuance, where it affects the accused's right to prepare for trial, may result in fatal error.

Chapter XIII, "Pleas and Motions", page 80, contains a very radical change in the manual.

The 1949 Manual abolishes special pleas, pleas in abatement, and pleas in bar. In lieu thereof rules 11 and 12 of the Federal Rules of Criminal Procedure have been adopted. Paragraph 63, "Pleas and Motions", now provides that any defense or objection which can be raised without trial of the general issue should be raised by a motion to dismiss or by a motion for appropriate relief at some time before the plea is entered. In the first subparagraph of 64a it is provided that such a defense or objection may be referred to the appointing authority before trial or by motion to the court before a plea is entered.

The reason for the departure from special pleas is this: Article 38, which gives the President the authority to prescribe procedural rules, lays down the legislative policy that those rules should, so far as practicable, follow the rules of Federal district courts for the trial of criminal cases. That legislative policy is one reason for following the Federal rules. Another reason is that special pleas, as such, are rarely used in most civilian jurisdictions, and it was believed that most judge advocates with a civilian law background would be more familiar with rules comparable to the Federal rules. Finally, Winthrop, and before him Simmons, have stated that the common law special pleas have no place in military jurisprudence, and that in actuality these matters are really handled as motions. Upon the basis of the foregoing precedents and policies, pleas in abatement and pleas in bar have been abolished.

Paragraph 64, "Motions Raising Defenses and Objections", contains the outline of the basic principles which divide into two classes the matters that can be raised before trial, just as rule 12 does. First, there are defenses and objections which may be raised. These are the ones which formerly were raised by a plea in bar. They are matters affecting the jurisdiction of the court, statute of limitations, former trial, pardons, constructive condonation of desertion, former punishment, promised immunity, lack of jurisdiction, and failure of the charges to allege an offense. As before indicated, these matters should be asserted before a plea is entered but failure to do so does not constitute a waiver. However, failure to assert any such defense or objection - except lack of jurisdiction or failure of the charges to allege an offense - before the hearing is concluded does constitute a waiver. Of course, if there is no jurisdiction or if the charges do not allege an offense the entire proceedings are a nullity.

Paragraph 64**b** deals with matters which must be raised or be considered waived. These were previously raised by a plea in abatement. They are formal defects which, for some reason, interfere with the proper preparation for trial on the part of the accused. The matters which must be so raised by a motion for appropriate relief before a plea is entered include defects in the preference of the charges, reference for trial, form of the charges and specifications, the investigation or other pretrial proceedings other than objections going to the jurisdiction of the court, or the failure of the charges to allege an offense. Failure to assert any such objection before a plea is entered constitutes a waiver of the defect but, and here again we follow the Federal rule, the court may for good cause shown grant relief from the waiver. For example, if it appears that the accused has failed to raise a proper objection, due to inadvertance on the part of his counsel, the court may, in its discretion, grant relief.

Paragraph 64**c** concerns the form and content of the motion and provides, just as the 1928 Manual did, that the substance and not the form and designation of the motion controls. The motion raising a defense or objection shall include all defenses and objections then available and known to the accused. Such motion should be made before the plea is entered and the hearing should be had at that time, but the court may, in its discretion, defer the hearing until later in the proceedings.

Paragraph 64**d**, "Time of Making Motions", reiterates what has already been said and points out a distinction between the above discussed type of motion and one predicated upon the evidence, for example, *res judicata*, or a motion for a finding of not guilty.

Paragraph 64**f**, which deals with the effect of the ruling on the motion, or, more particularly, what the appointing authority does if the case has been terminated by rulings on motions, contains a clarification of the provisions of the 1928 Manual. It is now unambiguously provided that the appointing authority may not return a record of trial to the court for reconsideration of any motion which amounts to a finding of not guilty, such as the granting of a motion for a finding of not guilty or the granting of a motion to dismiss because of lack of mental responsibility at the time of the offense. Under such circumstances the reviewing authority's hands are tied.

As to other motions which do not of themselves amount to a finding of not guilty, the appointing authority may, if he disagrees, return the record to the court with a statement of his reasons for disagreeing and with instructions to reconvene and reconsider. It is stated, as the old manual provided, that if the point of disagreement is solely one

of law, such as a question as to the jurisdiction of the court, the court will accede to the views of the appointing authority. On the other hand, if the matters as to which the appointing authority disagrees constitute matters of fact, such as whether there has been a manifest impediment with respect to the statute of limitations, the court is enjoined to exercise its own discretion in reconsidering the motion.

If the appointing authority finds that the action of the court was proper but that the defect raised by the motion can be cured, he will take such steps as are necessary to cure the defect and return the record to the court for trial. If, on the other hand, he agrees with the court and the ruling on the motion is such as to constitute a bar to further prosecution he should publish an appropriate order and terminate the proceedings. If the appointing authority does not wish to return the record of trial to the court, for example, in a case where he concurs in the court's ruling that the accused lacks the requisite mental capacity but he is advised by a psychiatrist that the accused will have recovered in a reasonable period of time, he may decide not to close the case because it may be desirable to reopen it at some future time. In that event he should send the case, without action, to The Judge Advocate General and if the situation is clarified in the future he can refer the case to another court for trial at a later time.

The discussion of motions to dismiss begins in paragraph 65. Generally, a motion to dismiss is comparable to the old plea in bar of trial. The first one which is discussed in detail is for lack of jurisdiction or failure of the charges to allege an offense. They are considered together because in essence it is all a matter of jurisdiction. If the charges do not allege an offense of which a court-martial may take cognizance there is no jurisdiction of the subject matter. Clarification of this subject emphasizes that in occupied enemy territory a general court-martial may take cognizance of offenses which, strictly speaking, are not violations of the Articles of War as such. Such offenses may be violations of local law under the concurrent jurisdiction of a general court-martial or a military tribunal of another type.

The statute of limitations is discussed in paragraph 67. The most significant change with respect to the statute is the new provision of Article 39 that in time of war the Secretary of the Army may extend the running of the statute of limitations to the end of the war plus six months in any case in which he deems that the trial of the case would be inimicable to the Nation's security. This authority is vested solely in the Secretary of the Army.

Another change in paragraph 67 provides that absence without leave and desertion are not continuing offenses for the purpose of computing time under the statute of limitations or for the purpose of determining whether the offense was committed in time of war. The implication is that for other purposes those offenses may be considered as continuing offenses. In this respect attention is invited to the following cases: CM 245991, Cruff, 29 BR 361; CM 235559, Bartold, 22 BR 121; and CM 329210, Massey. When read together those three cases indicate that it is the current view of this office that a lesser included offense of desertion which began at a time later than that alleged but within the period alleged may be carved out of a specification alleging desertion for a longer period of time.

Q. How can you do that if it is not a continuing offense?

A. The theory is that it is a continuing offense except for the purpose of the statute of limitations. Actually, the old writers, the Attorney General and Winthrop, have stated that desertion is not a continuing offense in cases concerning the statute of limitations. Both the Attorney General and Winthrop, however, have stated that the continuing offense is not the desertion but the absence without leave. So it would appear that all the old writers are in agreement that absence without leave is a continuing offense.

Q. They all say there must be an act of desertion?

A. With respect to the desertion itself. I am digressing now, but there was a case, I do not recall the citation but it was a short holding case, coming from Italy. The accused was charged with desertion on, say, 15 March 1944. The only evidence in the record consisted of a morning report from his organization which showed him missing in action on that date and a pretrial statement in which he stated that he was captured by the Germans. Sometime after his capture he had managed to escape because of an Allied bombing raid. Well, it was possible for him to have escaped a year later and far behind the German lines - and he was under no duty to worm his way through the lines and rejoin the American forces. However, it was alleged that the desertion was terminated by apprehension some time in 1947, some two years after the war ended, and that the accused could have, under those circumstances, returned to military control in May, 1945. So much of the findings of desertion as involved a finding of desertion from the date of the cessation of hostilities as alleged were approved.

With further reference to the statute of limitations it is now provided that whenever the issue of the statute appears before the court the accused will be advised by the court of his right to assert it in bar of trial or in bar of punishment.

Digressing further from the immediate topic here under discussion, turn to page 75. That portion of 78a captioned "Acquittal; Statute of Limitations" contains a discussion of the more troublesome problem which occurs when the accused is charged with an offense which is not barred by the statute of limitations but is found guilty of a lesser included offense which is so barred. The recent opinions of this office indicate that in the event of such a contingency it is now a mandatory requirement that the court advise the accused of his right to assert the statute of limitations in bar of punishment. If the accused asserts the statute in bar of punishment he has, in a sense, been found guilty and convicted by the court; however, in 87b, on page 91, it is provided that in such a case the reviewing authority will disapprove the finding. There probably will not be any sentence to disapprove but he should disapprove the findings.

Q. Suppose he is being tried for desertion that started in 1945 and the court acquits him of desertion and finds him guilty of a lesser included offense of AWOL - at what point are you going to inform the accused of his right to plead that?

A. Right after the findings. When the court opens to receive evidence of previous convictions it should advise him of his right to assert the statute in bar of punishment.

Q. Then they should advise him that he has been acquitted of the other?

A. That is right. However, supposing that he has pleaded guilty to the lesser included offense and has received a proper explanation of the meaning and effect of the plea of guilty, including the statute of limitations, then it is all washed up. He has waived it.

Turn now to paragraph 68, "Motions to Dismiss - Former Trial", on page 62. In the paragraph which begins at the top of page 63 it is stated that:

"In general, once a person is tried in the sense of Article 40, he can not without his consent be tried for another offense if either offense is necessarily included in the other and if the two offenses differ from each other in degree only."

In construing the comparable part of the old manual it was possible to argue that a man charged with assault and battery and acquitted or convicted could raise the defense of former trial if he subsequently was charged with murder arising out of the same transaction. That, of course, does not constitute former trial in any jurisdiction in the world. The new manual has clarified that problem so that a trial for homicide by

murder may be interposed in bar of a subsequent trial for the same homicide for manslaughter; absence without leave and desertion are a bar to each other because, essentially, they involve the same unauthorized absence but differ from each other only as to the state of mind of the accused. With that clarification it was necessary, in paragraph 68, to introduce the defense of res judicata. Many lawyers and some text writers say there is no such defense as res judicata in criminal cases, but attention is invited to a case wherein the problem is thoroughly discussed and many Federal cases are cited - CM 306858, Lawton, 28 BR ETO 293. In that case the accused had been tried in a common trial for a murder committed in a riot. Several people were killed and others were injured. Many of the accused were convicted but Lawton was acquitted. His defense was that he was not present at the scene - he had an alibi. Subsequently, he was brought to trial for assault with intent to commit murder at the same time and at the same place and the same riot. He entered a plea of what he called former trial. The Board of Review held that the substance of his plea was res judicata and that he presented it properly. Paragraph 72b, page 68, provides that the doctrine of res judicata is the rule that any issue of fact or law which has been finally determined by a court of competent jurisdiction upon a contest can not again be disputed between the same parties in subsequent litigation even if the second trial is for another offense. The doctrine has been adopted in the manual, but with one limitation - the prosecution can not use it. Only an accused who has been acquitted in a case wherein the issues were precisely the same may assert such final adjudication as a defense in a subsequent trial. Ordinarily, there is no opportunity for him to do so until sufficient evidence has gone into the record to show that the issues are the same. At that stage of the case he can introduce the old record of trial in evidence to show that the same issue has been considered by the previous court, and the court should then acquit him. That matter is discussed in paragraph 72b.

The new manual contains a clarification of the problem of constructive condonation of desertion. In paragraph 69b it is clearly and unambiguously stated that if an officer competent to appoint a general court-martial restores an accused to duty and at the same time directs that he remain subject to trial for the offense, such a restoration does not constitute constructive condonation of desertion and the accused remains subject to trial therefor.

Paragraph 70 contains a discussion of motions for appropriate relief. Those are the old pleas in abatement and cover matters which in some way or other hinder the accused in the preparation of his defense. The first one that is discussed in detail, "Defects in charges and specifications", appears as it was in the 1928 Manual.

A discussion of paragraph 70c, "Defects arising out of the pretrial investigation", is deemed appropriate. The office has been more or less plagued with a large number of habeas corpus suits concerning alleged defects in the pretrial investigation. Since 1943 it has been the view of this office that the investigation is procedural only and that any defect in the investigation which does not actually reach into and taint the trial itself does not amount to prejudicial error. That theory has been adopted both here and in paragraph 35a, which pertains to the pretrial investigation, and is in accord with the express intent of Congress. It will be noted that in Report No. 1034, 80th Congress, First Session, on page 7, the committee discussed this matter and made this proposal and suggestion:

"Should the pretrial investigation be made mandatory and should the accused be furnished counsel at such investigation? Discussion. The question presents a more difficult problem than is apparent. In our consideration of the subject of military justice, we have been guided by the principle that the basic rights of an accused should be protected without incumbering the military system in such a maze of technicalities that it fails in its purpose. Upon this premise, we have concluded that an investigation should precede every general court-martial trial but that the investigation should be considered sufficient if it has substantially protected the rights of the accused. To hold otherwise would subject every general court-martial case to reversal for jurisdictional error on purely technical grounds."

Paragraph 70c of the new manual provides that the court should sustain a motion only if the accused shows that the defect in the conduct of the investigation has in fact prevented him from properly preparing for trial or has otherwise injuriously affected his substantial rights. If the motion is sustained the court may grant a continuance to enable the accused to prepare his defense or may return the record to the court with instructions to proceed with the trial.

Some of the conferees may remember attempting to think of situations where something that happened in the pretrial investigation could possibly have the effect of prejudicial error. The solutions were very far fetched. However, a clear situation is now apparent - if the investigating officer is remiss in his duties concerning the taking of a pretrial deposition which the accused desires, and as a result of that failure a witness is lost, you have a case which may necessitate a disapproval.

There is one other item to bear in mind in connection with this subject - whenever the accused does not, prior to entering a plea, assert a defect in the pretrial investigation the present procedure provides that he waives the objection.

Concerning motions to sever, paragraph 70d contains no substantial change except that cognizance has been taken of common trials. That item will be considered in the discussion of the preparation of charges.

The changes in paragraph 71, "Pleas", consist primarily of matters of clarification. A plea of not guilty admits nothing as to the jurisdiction of the court and nothing as to the merits of the case but it does constitute a waiver of any defense of misnomer. Those two items are very closely related, particularly if the accused is described as being a person subject to military law. It is now provided that in all cases in which a plea of guilty is entered the court will advise the accused of the meaning and effect of such plea. Included in the form of that advice, which is set out in Appendix 5, is a statement as to the elements of the offense to which the accused pleads guilty. In order that the record will show that the accused has intelligently made his election, if he decides to adhere to the plea of guilty, the new manual further provides that any other necessary explanation will be made if the accused later takes an inconsistent attitude.

There has been no change at all with respect to motions for a finding of not guilty.

Paragraph 73, "Nolle Prosequi", reasserts, in effect, the view of this office that the entry of a nolle prosequi does not constitute former jeopardy regardless of the time that the nolle prosequi is entered.

However, in the case of *Wade v. Hunter* the Circuit Court of Appeals for the 10th Circuit has taken a view that is somewhat different. That court has held that if a case is withdrawn from a court arbitrarily it does constitute former jeopardy but that the doctrine of imperious necessity should be more liberally construed in courts-martial cases.

Q. How about the *Hunter* case? That was decided in favor of the Government.

A. It was decided in favor of the Government not on the theory that there was no former jeopardy in the case but on the theory that there was imperious necessity. That was the basis of that opinion which is not in accordance with the views of this office. In cognizance of the

Wade case the new manual provides that an entry of a nolle prosequi will not be exercised arbitrarily or unfairly to the accused. For instance, when evidence has been received in support of the specification and it appears that through lack of diligence in the preparation thereof the evidence may be insufficient to sustain a finding of guilty and that a finding of not guilty is imminent, a nolle prosequi will not be employed to circumvent such findings with a view toward subsequent trial for the same offense. That is only a rule of fairness. No opinion is expressed here as to what the reaction of the appellate agencies would be in the event that some record discloses that a nolle prosequi was entered late in the proceedings solely for the purpose of circumventing an imminent finding of not guilty. Such a circumstance might result in a holding that the reviewing authority abused his discretion.

Finally, with reference to paragraph 74, "Action Where Evidence Indicates An Offense Not Charged", it will be remembered that the 1928 Manual presented the situation where an accused was charged with the larceny of a watch but the proof showed that the article taken was a compass. The court thereupon adjourned and tossed the matter into the lap of the reviewing authority. There the paragraph stopped without indicating the action to be taken by the reviewing authority. The new manual has been expanded to indicate that when such a situation arises the reviewing authority should cause appropriate charges to be initiated anew and referred to a court none of whose members participated in the former trial.

TRIAL PROCEDURE

Seminar Leader
Major Joseph L. Brack

During this session the principal changes which appear in the new manual in connection with trial procedure will be indicated, starting with Chapter XI at page 50.

Paragraph 53, "Assembling", remains unchanged.

Paragraph 54, "Seating of Personnel and Accused", retains all of the old text but the last three sentences pertaining to arrangement of the personnel of the court and the reference to a diagram of such arrangement, which appears in Appendix 5, has been added.

Paragraph 55, "Attendance and Security of Accused", retains the text in the old manual but the last two sentences of the first subparagraph are new. The purpose of the new matter is to require the president of the court to prescribe the proper dress or uniform to be worn by an accused, and to require an accused officer or soldier to wear his insignia of rank or grade and to authorize the wearing of any decorations, emblems, or ribbons to which he is entitled. This change was suggested by officers in the field who felt that the failure of an accused to wear a neat and proper uniform with insignia of rank or grade could needlessly create an unfavorable impression upon the court and thus operate to his prejudice.

Paragraph 56, "Introduction of the Accused and Counsel", et cetera, contains one of the principal changes affecting trial procedure by reason of the new statutory requirement concerning the qualification of counsel prescribed in Article 11. Before considering this new procedure, attention is invited to the pertinent language used in Article 11 and particularly to the interpretation of that language. The second proviso of Article 11, at page 277, provides:

"That in all cases in which the officer appointed as trial judge advocate shall be a member of the Judge Advocate General's Corps, or an officer who is a member of the bar of a Federal court or of the highest court of a State, the officer appointed as defense counsel shall likewise be a member of the Judge Advocate General's Corps or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States."

Note particularly that the express language of the statute only refers to "the officer appointed as trial judge advocate" and to "the officer appointed as defense counsel". Consequently, by a strict interpretation of the language used, the mandatory requirement of that proviso only applies to the legal qualifications of the regularly appointed defense counsel as measured by the legal qualifications of the officer designated in the appointing order as trial judge advocate. There is nothing in that proviso to indicate that its mandatory requirement was intended to apply to the assistant trial judge advocate or to the assistant defense counsel. All that is required by the proviso is that if the officer who is appointed as trial judge advocate is a lawyer qualified in the sense therein specified then the officer who is appointed as defense counsel must be similarly qualified. This is a mandatory requirement affecting the composition of the court and it should be reflected in the order appointing the court. The third subparagraph of paragraph 6, on page 6, so provides. In this respect, it constitutes a jurisdictional requirement because before the court can act the accused must be accorded the full benefit of this statutory right. It is specifically designed for his protection. Therefore, being a jurisdictional matter, i.e., a provision which imposes a limitation upon the qualification and competency of a court, it is subject to the general rules of statutory construction which permit a strict construction or interpretation of the meaning of such statutes. Accordingly, for jurisdictional purposes and for jurisdictional purposes alone, this proviso is strictly construed. That means that insofar as the competency or jurisdiction of the court is concerned the requirement of Article 11 is satisfied once it is shown that the legal qualifications of the regularly appointed defense counsel, as defined in Article 11, equal the legal qualifications of the trial judge advocate.

You will find, however, that aside from the strict interpretation placed on the second proviso of Article 11 for jurisdictional purposes, a far more liberal interpretation is accorded to it in paragraph 43a, on page 40 of the manual, principally to further the aims of military justice. There the purpose of this proviso is defined as insuring to the accused "the right, subject to express waiver, to be represented at his trial by a legally qualified lawyer in every case in which the prosecution is conducted by an officer so qualified." For this reason, Article 11 has two aspects: first, its jurisdictional aspect; and second, its objective purpose. Paragraph 56 is designed to prescribe a procedure to implement both in practice.

Continuing with paragraph 56, the new procedure affecting the qualifications of counsel is set out in the first two subparagraphs on pages 51 and 52. The first subparagraph deals with the jurisdictional requirement of Article 11 as it affects the composition of the court. It provides:

Whenever a quorum and the accused are present for the trial of a new case and before the court convenes, each member of the prosecution who is not by the order appointing the court shown to be a member of the Judge Advocate General's Corps or a member of the bar of a Federal court or of the highest court of a State of the United States will prepare and submit to the law member of a general court-martial or the president of a special court-martial a certificate stating whether he is or is not so qualified. If any member of the prosecution certifies that he is a legally qualified lawyer in the sense of Article 11, each regularly appointed member of the defense whose qualifications are not shown by the appointing order and any individual defense counsell will also prepare and submit a similar certificate."

The significant feature of this procedure emphasizing the jurisdictional requirement of Article 11 then follows:

"In this connection, if the appointed trial judge advocate is a lawyer qualified in the sense of Article 11, the regularly appointed defense counsel must be so qualified, and this particular requirement cannot be waived by the accused, * * *"

Here again it is noted that this provision merely refers to the legal qualifications of the regularly appointed defense counsel as measured by the legal qualifications of the appointed trial judge advocate as distinguished from any assistant or individual defense counsel and assistant trial judge advocate. Therefore, it is only the qualification of the officer designated in the appointing order as defense counsel to which the mandatory requirement of Article 11 refers. In this connection, the requirement is jurisdictional and cannot be waived by the accused. In other words, when the court assembles for the trial of a new case, assuming a quorum and the accused are present, but before the court convenes, if the order appointing the court does not show that all members of the prosecution are lawyers qualified in the sense of Article 11, this informal, preliminary procedure must be taken to determine whether the court is constituted in accordance with the jurisdictional requirements of that article. If after this action is taken it is found that the legal qualifications of the regularly appointed defense counsel do not meet the legal qualifications of the appointed trial judge advocate as defined in Article 11, the court can not legally convene and the matter must be returned to the convening authority for appropriate action. On the other hand, if the certificates submitted by the members of the prosecution indicate that none of them are lawyers

qualified in the sense of Article 11 then obviously the members of the defense would not be required to file certificates of their qualifications since there is no disparity in the qualifications of counsel for the prosecution. However, if any member of the prosecution is shown to be a qualified lawyer under Article 11 then each member of the defense, including individual counsel, must submit a certificate of his legal qualifications.

Various situations might be disclosed through this procedure affecting the legal competency of the court to organize. First, it may appear that none of the members of the prosecution are qualified lawyers in which case the court may organize.

Second, both the trial judge advocate and the regularly appointed defense counsel are qualified and the court may organize.

Third, the trial judge advocate is a qualified lawyer but the appointed defense counsel is not similarly qualified in which case the court can not organize.

Fourth, the trial judge advocate is qualified, the appointed defense counsel is not legally qualified but one or more of the assistant or the individual counsel is qualified. Since the appointed defense counsel is not qualified the jurisdictional requirement of Article 11 is not met. Consequently, and notwithstanding the qualifications of any of the assistant defense or individual counsel, the court can not organize because the mandatory requirement of Article 11 can not be waived.

Fifth, neither the trial judge advocate nor the appointed defense counsel are qualified but one or more of the assistant trial judge advocates and one or more of the assistant defense counsel or individual counsel are qualified. Here, since neither the trial judge advocate nor the defense counsel are qualified and the accused is represented by qualified counsel, be he appointed or individual counsel, the jurisdictional requirement or Article 11 is satisfied as is its objective purpose stated in 43a and therefore the court may organize.

The next situation brings us into the procedure prescribed in the second subparagraph of 56.

If the trial judge advocate is not a lawyer but one of his assistants is a lawyer while none of the members of the defense is a lawyer, the court may convene inasmuch as the trial judge advocate is not a lawyer and consequently the mandatory requirement of Article 11 is not applicable.

However, before the court can proceed with the trial the procedure outlined in the second subparagraph must be complied with in order to effectuate the objective purpose of Article 11 as defined in 43a. Accordingly, this procedure is designed to assure to the accused the right to be represented by qualified counsel in every case in which the prosecution is so represented. Thus it is provided that -- if the certificates submitted show that any member of the prosecution is a qualified lawyer and that no member of counsel for defense present at the trial, including individual counsel, is similarly qualified, the officer to whom the certificates have been submitted will announce that fact and will explain to the accused his right to such counsel. Then the accused must be asked whether he is willing to proceed to trial without counsel so qualified as a lawyer. If the accused states that he is willing to proceed to trial the proceedings will continue. If not, the court will adjourn pending procurement of defense counsel who is legally qualified as stated in paragraph 6.

Paragraph 56 is further amended by the inclusion of a provision in the third subparagraph, in conformity with Article 11, which provides that if the defense counsel, his assistants or individual counsel have previously participated in the same case in any capacity as a member, trial judge advocate or investigating officer that fact must be announced in open court by the trial judge advocate who will also explain that such officer is disqualified under Article 11 to act as defense counsel unless expressly requested by the accused. Under such circumstances the accused will be asked in open court whether he desires to retain such counsel notwithstanding his disqualification.

In paragraph 57, "Excusing Members. a. Disclosing Grounds for Challenge", page 53, the second sentence of the first subparagraph has been added. It provides:

"The fact that a member has participated in the investigation of the case or that he has forwarded charges with a recommendation concerning trial by court-martial is among the grounds for challenge which should be so disclosed."

By virtue of this provision it is now required that the trial judge advocate disclose such a disqualifying fact in order to give the accused full opportunity to exercise his right of challenge intelligently.

The next change appears in paragraph 58, "Challenges", subparagraph b on page 54. That part of the title heading which reads "Relief of Member of Prosecution for Cause" and the text following the first sentence to the end of that subparagraph is new. This new provision pertaining to the relief of members of the prosecution for cause was inserted at this point to implement the fifth proviso of Article 11 which now makes

it conclusive that any person who has previously participated in a case either as a member, defense counsel, assistant defense counsel or investigating officer is ineligible to act as a member of the prosecution in the same case.

Paragraph 58d, "Peremptory Challenges", was amended by expressly stating that "in a common trial each accused is entitled to one peremptory challenge", as distinguished from a joint trial where all accused are entitled to but one challenge. It is strictly a supplemental provision inserted to state the general rule on this subject which was not fully covered in the old manual.

Subparagraph 58e, "Challenges for cause - grounds for", has been revised by the addition of two new grounds for challenge for cause and the renumbering of the sixth to ninth grounds for challenge as they appeared in the old manual. The sixth ground for challenge is new and has been added pursuant to Article 16 which provides that:

"No enlisted person may sit as a member of a court-martial for the trial of another enlisted person who is assigned to the same company or corresponding military unit."

The eighth ground for challenge has been added as a corollary to the new provision inserted in paragraph 57 which makes the participation in an investigation of a case by a member or the forwarding of charges by him with a recommendation for trial a ground for challenge.

The changes in the chapter on pleas and motions and in paragraphs 73 and 74 will be covered in a subsequent conference.

The next change to be considered is in paragraph 75a, "Introduction of Evidence - General duties of the court", on page 73. In the old manual the explanation of the accused's right to remain silent, to testify as a witness or to make an unsworn statement was left to the discretion of the court. This has been changed from a discretionary duty to a required duty so that it is now provided that:

"The court will explain to the accused his right to remain silent", et cetera.

This paragraph was further amended by expressly providing that "Whenever it appears warranted, the court should advise the accused of his right to testify for a limited purpose." An example was also inserted to illustrate an instance when such explanation should be made.

Paragraph 75d, "Views and inspections", on page 72, is entirely new and was added at the suggestion of officers in the field. Because of the wide divergence in the rules of procedure and the law of evidence applied in various civil jurisdictions on this subject it was recommended that the military justice system adopt the strictest view in order to lessen the possibility of prejudicial error. The procedure and statement of law prescribed in this paragraph represent the strict view.

The principal provisions laid down in this paragraph are: (1) Views and inspections may be resorted to only in exceptional cases where necessary to enable the court better to understand the evidence; (2) The view itself is not evidence; (3) A view or inspection is authorized only if conducted in the presence of accused; (4) The escort who conducts the court to the scene of the view may point out pertinent features but may not make a statement in the nature of evidence or argument; (5) The court should not hear witnesses or take evidence at the view but statements of members, counsel, escort or accused must be recorded verbatim; (6) Reenactments of events of the crime are prohibited. The form of oath to be administered to an escort in proper cases is also prescribed in this paragraph.

In paragraph 78b, "Findings as to the charges", on page 76, the fourth subparagraph was added to point out and illustrate an exception to the general rule that a finding under a wrong or different article than that charged is immaterial. The rule here stated is based on the case of CM 324945, Moore, 74 BR 37, wherein it was held that a court may not find an offense as a violation of an Article of War under which it was not charged solely for the purpose of increasing the authorized punishment or for the purpose of saving the jurisdiction of the court. The examples cited illustrate the rule.

Under paragraph 78d, "Procedure", on page 77, the first subparagraph is new and was inserted pursuant to the requirements of Article 31 which provides that at the conclusion of a case and before the court retires to vote on the findings the law member of a general court, or president of a special court, will, in open court, advise the court with respect to the rules of evidence concerning the presumption of innocence, reasonable doubt, degree of guilt which must be found, and the burden of proof.

The third subparagraph of 78d, on page 78, was amended by a provision which permits the court to reconsider a finding of guilty on its own motion at any time before the record of trial has been authenticated and transmitted to the reviewing authority. That insertion starts in the middle of the fifth line of the second paragraph on page 78. This, of course, only applies to findings of guilty and not to findings of not guilty. The rule is based on the cases of CM 259672, McIver, 38 BR 395, and CM 316193, Holstein, 65 BR 271.

Paragraph 80a, "Sentence - General - Basis for Determining", was amended to emphasize the responsibility of each member of the court to determine a proper limit of punishment for an offense according to the requirements of the case and the dictates of his own judgment. It is further provided that the maximum punishment will be reserved for aggravated offenses or for offenses where evidence of previous convictions of similar or greater gravity is shown. As a guide to the determination of proper sentences and for the purpose of securing greater uniformity in punishments imposed for similar offenses it is provided that penalties adjudged in similar cases may be considered and that more severe punishments may be imposed in similar cases to meet the needs of local conditions. In order to discourage courts from imposing maximum punishments with the idea that the reviewing authority will reduce it an express instruction of caution is required to be given to the court to exercise their own discretion in fixing the limit of punishment and not to adjudge excessive sentences in reliance upon the mitigating action of the reviewing or higher authority.

Paragraph 80b, "Procedure", on page 81, was amended by the insertion of the first three sentences in the second subparagraph. The 1928 Manual did not spell out the procedure to be followed in determining which of several proposed sentences will be voted on first. The procedure, however, was covered in Technical Manual 27-255, and for the purpose of convenience was adopted and incorporated in the 1949 Manual. It provides that any member who desires to propose a sentence submits it on a slip of paper to the president and the court then votes on the proposed sentences, beginning with the lightest, until a sentence is adopted by the required number of votes.

Similarly, no procedure was prescribed in the 1928 Manual in cases of mandatory punishments where the number of votes required under Article 43 was not cast on the first ballot. The procedure prescribed in the last two sentences of paragraph 80b, which were taken from paragraph 309 of the 1921 Manual, was incorporated in the 1949 Manual to cover this required action. This rule provides that if the requisite number of votes to support a mandatory sentence is not cast on the first ballot a second ballot will be taken and if the number of votes required is still lacking the court must reconsider its findings and find the accused not guilty, or guilty of a lesser included offense.

REVIEWING AUTHORITY

Seminar Leader
Major Paul A. Robblee

This subject has to do with the action by the reviewing authority and covers paragraphs 87 through 94 of the new manual.

The second paragraph of 87a, "Who is the Reviewing Authority", has been revised in the new manual to conform with Article 47d, and provides that:

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

Actually, there are two approving authorities. There must be an approval by the convening authority and then a subsequent review and approval, in accordance with the provisions of Article 47d, by the officer exercising general court-martial jurisdiction.

Paragraph 3, under 87a, has been added to simplify and clarify the definitions or distinctions between an "officer commanding for the time being" and "a successor in command". There are no other substantial changes in 87a.

Paragraph 87b concerns the powers and duties of the reviewing authority. There have been numerous changes and additions including the provision that no reviewing authority other than the President is authorized to commute a sentence. That statement is new in the 1949 Manual and may possibly cause some confusion. It is, however, a correct statement in that no other reviewing authority is authorized by statute to commute a sentence. The President may appoint a court, may be the reviewing authority, and inasmuch as he has statutory authority to commute he may do so.

A discussion of Article 88 will be found on page 92. This article is new and represents one of the more important changes in the new manual. The paragraph closely follows the wording of the statute and provides, in effect, that the commanding officer may give instructions to courts relative to rules of evidence, burden of proof, and presumption of innocence. He can not, however, either

directly or indirectly, give instructions to or unlawfully influence a court as to the future action to be taken in a case before the court. Censure or admonishment of the court or any of its members in respect to any judicial action is forbidden by the article. In addition, Article 88 provides that all persons subject to military law are forbidden to attempt to coerce or unlawfully influence any military commission or member thereof as to findings or sentence in any case, or the action of any appointing, reviewing, or confirming authority with respect to his judicial acts. When the Military Justice Bill was being considered by the Congress, General Hoover testified as follows concerning this subject:

"We will allow the court-martial to receive instructions from the appointing authority or from proper persons where the instructions did not relate to a particular case. We would allow, it is contemplated, the appointing authority to advise the court of the prevalence of a particular kind of offense in the command. We would allow proper instructions of the court orienting the members with the general situation."

The section concerning reference of general and special courts-martial records to staff judge advocates for review and advice is substantially the same as that in the 1928 Manual except that it is now specifically stated that the reviewing authority will not approve a sentence unless upon conviction established beyond a reasonable doubt of an offense made punishable by the Articles of War. It is further stated that in case of disagreement between the reviewing authority and his staff judge advocate on the question whether a conviction of an offense is established beyond a reasonable doubt, the record of trial should be transmitted by the reviewing authority to The Judge Advocate General for his advice. With the record should be sent an expression of the opinion of the reviewing authority together with the opinion of the staff judge advocate.

In the section captioned "Advisory Instructions" there are two new paragraphs which have reference to dishonorable and bad conduct discharges. It is stated that dishonorable discharge should be reserved for those convicted of felonies and serious military offenses, and that although a bad conduct discharge may be imposed in any case in which a dishonorable discharge may be imposed it is primarily designed as a punishment for bad conduct. As an example of the latter situation there is the case of the accused who has been repeatedly convicted of minor offenses and punitive separation from the service is necessary.

Under the section "Ordering Execution of Sentence; Mitigation", et cetera, it is provided that a sentence as mitigated may not provide for confinement in excess of one year without dishonorable or bad conduct discharge. Two matters are noted with reference to mitigation of sentences. It is provided that a dishonorable discharge may be

mitigated to a bad conduct discharge but that a bad conduct discharge may not be mitigated. Further, a fine may not be mitigated to a forfeiture or vice versa. This latter statement is based on the Board of Review's holding in the case CM 313848, Beezley, 63 BR 309.

This section, in accordance with Article 51, also provides that no suspension of a sentence to dishonorable or bad conduct discharge shall be vacated until the appellate procedures required under Articles 48 and 50 have been completed.

Paragraph 87g. is divided into three subheadings covering general, special, and summary courts-martial records. The sections pertaining to the disposition of general and summary courts-martial records are substantially the same as those in the 1928 Manual. However, as to special courts-martial the 1949 Manual provides that, ordinarily, special courts-martial orders will be issued by the convening authority except in cases in which the convening authority approves a sentence to bad conduct discharge. In such cases, after approving the bad conduct discharge the convening authority will forward the record to the officer authorized to appoint a general court-martial for the command who will thereafter process the case in accordance with the provisions of Articles 47 and 50g. If the officer exercising general court-martial jurisdiction approves the sentence to bad conduct discharge the record and allied papers will be forwarded to The Judge Advocate General as in general courts-martial cases.

Paragraph 88 concerns the confirming authority. Confirming power is vested in the President, the Secretary of the Army, a Judicial Council with the concurrence of The Judge Advocate General or the Assistant Judge Advocate General in charge of a branch office, a Judicial Council and in no other officer or officers. Confirming powers are prescribed in Articles 48 and 49. It is to be noted that the Assistant Judge Advocate General in charge of a branch office, the Board of Review and Judicial Council of such office may confirm sentences not required to be confirmed by the President but, pursuant to Article 50c, the power of remission shall not be exercised by the Assistant Judge Advocate General in charge of a branch office.

Paragraph 89 pertains to the ordering of rehearings and contains a reference to Article 52 as well as to the provisions of the manual relative to new trials found in paragraphs 101 and 102. Article 52 provides, in effect, that the reviewing or confirming authority or The Judge Advocate General may direct a rehearing when a sentence is disapproved by a reviewing or a confirming authority, or when a sentence is vacated by act of the Board of Review, the Judicial Council or The Judge Advocate General.

In paragraph 91 it is provided that the officer exercising general court-martial jurisdiction over the command has supervisory power over special and summary courts-martial therein. In view of this fact he may direct the appointing authority of those courts to take such corrective or modifying action as is deemed necessary. This statement is supported by an opinion (SPJGJ 1943/19599; 4 BULL. JAG 9) dated 18 January 1945, wherein it is stated:

"* * * the officer exercising such general court-martial jurisdiction has legal authority thereupon to direct the reviewing authority of such special court to take supplemental or corrective action to vacate the findings of guilty and the sentence."

It is further stated in paragraph 91 that if the sentence of a special court-martial provides for bad conduct discharge the officer exercising general court-martial jurisdiction must take the same action as in a general court-martial case, and that a special court-martial record involving bad conduct discharge shall be filed in the Office of The Judge Advocate General (Articles 13, 47d, and 50a).

Paragraph 92 provides, in effect, that when the record of trial of a special court-martial involving a bad conduct discharge has been forwarded by a reviewing authority to higher authority and an error of the type mentioned in paragraph 87b, under the sections pertaining to correction of error and revision proceedings, is found the record ordinarily will be returned to the reviewing authority for correction or for revision.

Paragraph 93, as rewritten, incorporates a minor change to the effect that when there is a change in the status of an officer as the result of a court-martial sentence in a case not requiring confirmation, such as restriction or suspension from rank or command, The Adjutant General will be advised by prompt means rather than by telegraph alone as was the case under the rule in the old manual.

Paragraph 94 in the new manual is substantially the same as it was in the old. There are, however, two exceptions. A provision has been added to the effect that although the suspension of a sentence generally may be vacated at any time during a soldier's enlistment no order suspending the execution of a dishonorable or bad conduct discharge may be vacated until the confirming or appellate action required by Articles 48 and 50 has been completed. That portion of paragraph 94 which pertains to old Article 44 does not appear in the new manual because of the deletion of the old article.

(See also Appellate Review Procedure.)

EVIDENCE

Seminar Leader
Major Gilbert G. Ackroyd

Only the changes and additions made in the 1949 Manual will be mentioned in this seminar.

In the first subparagraph of paragraph 124 of the 1949 Manual, appearing on page 150, there has been added to the basis for the rules of evidence to be applied by courts-martial, the common law. In the 1928 Manual the rules of evidence were based on those in that manual and then on those generally recognized in the trial of criminal cases in the Federal courts. Under the new manual the common law rules of evidence may be followed where they are not in conflict with first, of course, the manual, and second, the Federal rules. Common law rules of evidence may be found in the Federal decisions, the State decisions or elsewhere. It should be determined that any such rule is "generally recognized" before it is used in courts-martial.

In the second subparagraph, the exception permitting relaxation of the rules of evidence in certain cases has been confined to interlocutory matters having to do with procedure, that is, "the propriety of proceeding with the trial."

The last subparagraph of 124 has been clarified to indicate that the court can limit the number of witnesses only where the expected testimony is merely cumulative. This power may not be exercised in an arbitrary manner.

Paragraph 125a, "Presumptions", page 150. The presumption as to malice (page 151) has been restated. Malice may be presumed when a homicide is caused by the use of a deadly weapon in a manner likely to result in death. This is only an example, however, and malice may also be presumed when a deadly weapon is used in a manner likely to result in death even though no homicide results, as in a case of assault with intent to murder.

To the presumption of continuing existence there has been added the inference of past existence which may arise from a certain state of facts. Such an inference is recognized in the Federal courts and an example thereof has been given.

The presumption of larceny from possession of recently stolen goods has been enlarged to include burglary, robbery, and other crimes which include a theft. That is, for example, if a person is found in recent possession of the fruits of that type of crime, such as a burglary, it may be presumed that he was the one who committed the burglary.

The next presumption now appears in the manual for the first time. It may be presumed that one who has assumed the custodianship of the property of another has stolen such property if he does not or can not account for or deliver it at the time an accounting or delivery is required. This presumption was applied in many cases arising during World War II.

The last subparagraph of paragraph 124, page 152, deals with the rule that presumptions play in the proof of a case. Rebutting evidence, no matter how direct, does not necessarily destroy a presumption and the court may consider the presumption along with all the other evidence in the case, including the presumption of innocence.

The next change occurs in the second subparagraph of "Opinion Evidence", page 153, dealing with expert witnesses. The final sentence - "Proof of such qualification may be waived expressly or by failure to object to the reception in evidence of testimony of an expert nature." - has been added to the old text. Of course, it is still advisable to train counsel to qualify their expert witnesses.

The next subparagraph is entirely new. It has been inserted as a guide in eliciting expert testimony. How is the opinion of the expert placed before the court? The rule adopted was taken from the American Law Institute's "Model Code of Evidence" and permits counsel to ask an expert for his relevant opinion without resort to the hypothetical question. After the expert has expressed his opinion, he may be required, either on direct or cross-examination, to state the data upon which it was based. If, in stating such data, he goes into matters which are inadmissible on the issue of whether the accused committed the act charged, such matters are not to be considered on that issue and the law member should so instruct the court. The hypothetical question approach has also been authorized for those who want to use it.

The second subparagraph of "Bad Character of the Accused", on page 153, is new. It indicates what type of character evidence is admissible on behalf of the accused and what type is admissible on rebuttal by the prosecution.

The next subparagraph, page 154, has been slightly changed. In the 1928 Manual it was said that once the accused took the stand it might be shown by way of impeachment that his reputation for truth and veracity was bad. The new manual points out that in addition to other methods of impeachment it may also be shown that he has been convicted of a crime involving moral turpitude or affecting his credibility. Such evidence, of course, is admissible only on the question of impeachment.

The next subparagraph, "Evidence of other acts of the accused", has been enlarged to include two additional situations in which such evidence is admissible. First, it "is admissible if it tends to establish the identity of the accused as the perpetrator of the offense in question." In the next subparagraph there is an example of this situation - the

burglary of two adjoining buildings. Second, such evidence is admissible "to refute the accused's claim that his participation in the act charged was the result of accident or mistake."

Paragraph 126, "Hearsay Rule", page 155. "Hearsay" has been re-defined to point out that whether certain evidence is or is not hearsay is to be determined with respect to the particular trial in which the question arises. For example, former testimony is given under oath, in court, under cross-examination and the accused has confronted the witness. Yet former testimony is hearsay, even though in certain cases it may come within one of the exceptions to the hearsay rule. It has also been pointed out that in military practice hearsay does not become evidence even though it is received without objection.

On page 156 appears a new example of hearsay. "X is unable to identify A as her assailant at the trial of A for the rape of X, but M is able to testify that on the date following the rape X declared at a line up that A was her assailant and pointed at him." The principle set forth in this example is to be applied only in a case where the victim fails to identify the accused. If the victim does identify the accused, then testimony that she also identified him at the line up is admissible in corroboration. This latter rule will be explained under the discussion of credibility of witnesses in paragraph 139a.

Paragraph 127, "Confessions and Admissions", page 156. The discussion of confessions and admissions has been materially changed due to the fact that the new Article 24 makes no distinction between confessions and admissions. It had formerly been asserted that involuntary admissions might be received in evidence, but this is no longer so. As a procedural matter, however, confessions and admissions have been differently treated. The record of trial must affirmatively show that a confession is voluntary whereas an admission may be received without such showing if it does not appear that it was obtained by coercion or unlawful influence (page 157). However, it is better to instruct trial judge advocates to introduce evidence of the voluntary nature of admissions as well as confessions.

Article 24 forbids the use in evidence of statements obtained from an accused person or a witness unless it appears that he was aware of his right not to make any statement regarding the offense involved, and that any statement made may be used as evidence against him in a trial by court-martial (page 157). Now, if the accused in the course of a casual conversation with a friend confesses to a crime, such a confession has not been obtained from him and it may be regarded as voluntary even though the friend did not break in on the conversation to warn the accused of his right against self-incrimination. Generally speaking, however, a confession or admission obtained from an accused is not admissible unless before he made it he had been warned that he need not say anything and that anything he did say might be used against him in a trial by court-martial. Some examples of coercion or unlawful influence in obtaining a confession or admission are set forth on page 158.

It has been pointed out that the ruling of the law member admitting a confession or admission in evidence is not conclusive as to the voluntary nature of the statement but merely places it before the court for its consideration. Each member of the court, in his deliberation on the findings of guilt or innocence, may come to his own conclusion as to the voluntary nature of the accused's statement.

On page 159 it has been stated that an accused can not be convicted upon his uncorroborated confession. Other confessions or admissions of the accused can not be considered as corroborative evidence. The corroborative evidence must be substantial and must establish that the offense charged has probably been committed.

Paragraph 127a, "Acts and statements of conspirators and accomplices", page 159. The discussion of acts and statements of conspirators and accomplices has been completely rephrased and to some extent enlarged in scope. The rule has been laid down that confessions and admissions of conspirators and joint actors (not made in pursuance of the common design or act) are admissible only against the one who made them. They are not admissible against the others even as evidence corroborative of the confessions of such others. The same is true of convictions or unsworn statements of conspirators. See CM 325056, Balucang, 74 BR 67; 7 Bull. JAG 14.

On page 160 appears a new paragraph (127c) relating to statements made through interpreters and the basis for the introduction of such statements in evidence.

Paragraph 128, "Dying Declarations; Res Gestae; Fresh Complaint", page 161. The law applicable to fresh complaint in cases involving sexual offenses is set forth in paragraph 128c. Fresh complaints are generally admissible only in corroboration of the victim. They are admissible as substantive evidence, however, if made as spontaneous exclamations. See *Beausoliel v. United States*, 107 F. 2d 292.

Paragraph 129a, "Proving contents of writing", page 162. In the first subparagraph the best evidence rule is stated. It is then indicated that certain types of documents are admissible as duplicate originals and are not within the best evidence rule. In the Army, perhaps the best example of duplicate originals are orders which are run off on a mimeograph machine for distribution to inferior units. Each copy is an original and may be admitted without accounting for the stencil even over objection. In the case of photostats, however, it must be shown that they are identical with the original before they may be admitted as duplicate originals unless they are business entries. Business entries will be discussed later.

An objection to a document on the ground that it is not the best evidence must be asserted at the time the document is offered in evidence; otherwise, it will be waived.

Exceptions to the best evidence rule are discussed on pages 162-164.

The rule as to the admissibility of copies of official records has been elaborated upon for the purpose of making it clear that the copy must be an exact copy. Resumes will not be received in evidence as a general rule (page 163). For example, an extract copy of the morning report must contain all the information relied upon in the extract portion. An extract copy of a morning report which indicates that an unnamed person has gone AWOL is not cured by an authenticating certificate indicating that the extract relates to a named person, for such certificate is a resume and inadmissible for this purpose.

There are some exceptions to the rule excluding resumes. One of them is that when the head of an executive establishment, department or agency, or a person designated by him for the purpose, shall certify that it is contrary to public policy to publish the actual document or an extract therefrom, a resume of its contents may be received (page 168). In the 1928 Manual this exception was limited to a certificate furnished by The Adjutant General. It has now been enlarged to include the head of any governmental executive department so that some evidence of the contents of highly confidential documents might be produced in cases where no evidence at all could be obtained if a resume were not acceptable. See paragraph 137b of the 1949 Manual.

The next exception to the resume rule is that relating to certificates of identity furnished by The Adjutant General (page 163). This exception was taken from the 1928 Manual wherein it appeared under the discussion of Article 54 (paragraph 129, page 141). The rule as to certification of lack of record (bottom of page 163) has been taken from Rule 44(b), Federal Rules of Civil Procedure. Rule 44 has been adopted by Rule 27, Federal Rules of Criminal Procedure.

Paragraph 129b, "Authentication", page 164. To the discussion of authentication of private writings (first subparagraph), as it appeared in the 1928 Manual, has been added the sentence, "A reply, however, is not to be considered as evidence of the genuineness of the message to which the reply was purportedly made."

The rule as to proving genuineness of handwriting has been altered to indicate that specimens may be established as such by evidence raising a reasonable inference as to their genuineness. For example, if an accused had been officer of the day there would be a reasonable inference that a signature in the guard book purporting to be his and made while he was on duty was in fact his signature.

Paragraph 129b, "Authentication of Official Records", page 164. The subparagraph on authentication of official records is entirely new. Official records of any unit under the National Military Establishment and of any executive department or independent agency of the Federal Government may be authenticated by an attesting certificate without further authentication. No seal is required, although, of course, authentication may be by seal as before.

Official records of possessions, Territories, States, and their political subdivisions may be authenticated by the great seal of the United States, or the great seal of the possession, Territory or State in which the record is kept, or by any authentication provided for by the law of the place where the record is kept, or by any law of the United States. In this connection, it will be noticed later that courts-martial may now take judicial notice of the law, and regulations having the force of law, of the several States and their political subdivisions.

Foreign official records may be authenticated by the great seal of the foreign country concerned, by any authentication provided for by the law of the place where the record is kept, or by any law of the United States. Foreign official records may also be authenticated by the usual certificate of a foreign service officer. In countries in which United States forces are stationed or through which they are passing or which is occupied by United States forces or an ally thereof, the authenticating certificate of the commander, or his deputy, of the forces concerned may be substituted for that of the foreign service officer. Translations accompanying such foreign official records, although hearsay, may be received in evidence subject to objection by counsel or by any member of the court.

The last subparagraph having to do with authentication (page 166) provides for authentication by testimony. This is probably the oldest mode of authentication known to common law, to wit: the examined copy.

Paragraphs 130a and b, "Official writings" and "Official records", page 166. Paragraph 117a of the 1928 Manual provided that official records were admissible in evidence "except as to entries not based on personal knowledge." This phrase was widely interpreted to mean that such a record, to be admissible in evidence, has to be based on the personal knowledge of the official who made the record. In CM 320957, Boone, 70 BR 223, 225, it was pointed out that no such interpretation was necessary and that both at common law and under the 1928 Manual the only requirement was that there be a duty to record and that the matter recorded be based on the personal knowledge of the recording official's informant. This last element was usually covered by the

presumption of official regularity. The Advisory Committee on Military Justice in its report recommended "the elimination of the confusing reference to personal knowledge" and this recommendation was approved by the Secretary of the Army. Consequently, in the new official record rule (page 166 of the Manual) there is no reference to personal knowledge, and an official record is admissible if the person making it had the duty to record and the duty to know or to ascertain through customary and trustworthy channels of information the truth of the matters recorded. It will be noted that there is a prima facie presumption that demographic statistics, foreign and domestic, are recorded pursuant to an official duty to record and to know or ascertain the truth of the matters recorded.

Paragraph 130c, "Business entries", page 167. The business entry rule is taken directly from Title 28, U.S.C., Section 1732 (formerly 28 U.S.C. 695 - Federal shop book rule). Such entries need not be made or kept pursuant to official duty so long as they are made or kept in the usual course of business and it was the usual course of the business in question to make or keep them. "Business", of course, includes, among other functions, military administration.

Paragraph 130d, "Limitations as to admissibility of official records and business entries", page 168. There are certain limitations to the admissibility of official records and business entries. The first limitation is that an official record or business entry must relate to a fact, act, transaction, occurrence or event. A record or entry of opinion is not admissible.

The next limitation is that if the record is made principally with a view to prosecution or other legal action during the course of an investigation into alleged unlawful or improper conduct, it is not admissible. Consequently, an investigating officer's report and the accompanying summary of the expected testimony of witnesses may not be received in evidence. This limitation does not require the exclusion of morning report entries as to absence without leave or guard report entries as to escape from confinement, for such entries are made principally for the purpose of accounting for the strength of personnel and for other purposes of military administration.

Paragraph 130e, "Maps and photographs", page 169. To the discussion of this subject in the 1928 Manual has been added the rule that such documents, maps, photographs, etc., are admissible when they come within either the official record or business entry exception to the hearsay rule. In other words, testimonial authentication of maps, photographs, etc., is not the only way of establishing their admissibility in evidence.

Paragraph 131a, "Depositions", page 169. The discussion of testimony taken by deposition has been considerably enlarged. There is added a provision that upon a rehearing or new trial a case is not capital within the meaning of Article 25 if the sentence adjudged at the original hearing or trial was other than death.

There have been quite a few changes in the procedure of adducing testimony taken by deposition. If only a part of a deposition is offered in evidence by a party, the other party (including the prosecution in a capital case) may require him to offer all of it which is relevant to the part offered. Thus, the defense, even in a capital case, may be required to introduce all those parts of the deposition which are relevant to the part it has offered, but in a capital case the defense may not be required to offer the other parts, nor may the prosecution offer such other parts. This is so even though the deposition was taken on behalf of the defense. If, for example, the accused is on trial for murder and rape, both being tried as capital offenses, and offers deposition testimony with respect to the murder only he may not be required to offer those parts of the deposition which refer to the rape charge, nor may the prosecution do so.

All objections to testimony by deposition are to be finally determined when the testimony is offered in evidence. It does not matter whether the objections previously have or have not been taken and overruled. For example, if the interrogatories had been submitted to the court at some prior time the court must pass on whatever objections are raised even though they were presented and ruled upon at the time the interrogatories were first submitted.

Provision has been made for taking copies of business entries by deposition (page 170). This is the military equivalent of Title 18, U.S.C., Sections 3491-3494 (formerly 28 U.S.C. 695 b-d).

Paragraph 131b, "Former testimony", page 170. The 1928 Manual provided that the former testimony of an absent witness could not be introduced in a capital case without the consent of the accused unless the witness was dead or beyond the reach of process. Insanity of the witness has been added as a ground for admitting his former testimony in a capital case.

Paragraph 132a, "Memoranda", page 171. The language of this subparagraph has been changed mainly for the purpose of clarification. The example of "past recollection recorded" in the 1928 Manual was "an old account book". This has been changed to "diary", for an account book would generally be admissible under the business entry rule today. It has also been pointed out that even a newspaper article can be used to actually refresh a witness's recollection.

Paragraph 132b, "Affidavits", page 172. Affidavits are generally admissible only on behalf of the defense and only for the purpose of showing matters in mitigation. This exception to the general rule has long been recognized in military law.

Paragraph 133a, "Judicial notice", page 172. Courts-martial may take judicial notice of "the signatures and duties of persons attesting official documents, or copies thereof, made or kept under the authority of an executive department or independent bureau, agency or office of the United States." The reason for this rule is that an official record of any such Government agency may now be authenticated by an attesting certificate not under seal and there would be little point in permitting such authentication if the court could not take judicial notice of the attesting officer's signature.

Judicial notice may be taken of executive agreements between the United States and any State and between the United States and any foreign country. Since the Army is part of the executive branch of the Government, courts-martial should take notice of such agreements as they would a treaty.

The laws, and regulations having the force of law, of the United States, the possessions, Territories, and the several States and their political subdivisions are now properly the subject of judicial notice. Courts-martial may take judicial notice of the law of a State, et cetera, even though they are not sitting in the place the law of which they are asked to take judicial notice.

Military courts may take judicial notice of the laws and regulations having the force of law in effect in any country or territory or political subdivision thereof occupied by the Armed Forces of the United States. Such law, in effect, exists by authority of the United States. Military tribunals which are trying persons for offenses against the laws of any such country must, in order to function properly, take judicial notice of the laws they are required to enforce.

Judicial notice may be taken of the seals of notaries public, foreign and domestic. Consequently, if a deposition is taken before a foreign notary his seal may be judicially noticed.

If the court takes judicial notice of an official publication of a department, agency, command or unit of the National Military Establishment inferior to the Departments of the Army, Navy or Air Force, the record of trial must accurately reflect the content of the official publication, or portions thereof, so judicially noticed. This provision has been inserted in the manual so that appellate authorities will have before

them all the matters which lead, or possibly lead, to the decision in the case. Sometimes it has been found to be next to impossible to obtain copies of directives of inferior commands which, as certain records of trial rather vaguely indicated, had been judicially noticed. It will be seen that judicial notice is not limited to publications of the Army and Army units, but extends to all units under the National Military Establishment. It is no longer of any importance that the unit in question is inferior to the authority appointing the court.

Paragraph 133b, "Foreign Law", page 173. This subparagraph is entirely new in the 1949 Manual. The first paragraph is but a restatement of the existing law on the subject, including the ramifications caused by application of the best evidence rule.

The second subparagraph, relating to the method of getting a foreign law book before the court, is a rule adapted to the needs of the military service. It is not necessary to authenticate a foreign law book by seal, et cetera. Once it is shown to have come from a public office - such as a public library - it may be accepted for what it is worth and for what it purports to be.

Paragraph 134, "Competency of Witnesses", page 174. In subparagraph b (page 175) it is stated that the court should make sure that any minor witness under the age of 14 years is a competent witness. The reason therefor is that the competency of a witness under that age is not presumed at common law.

"Interest or bias", paragraph 134d. A person who is an avowed friend or enemy of the accused, or who is an enemy national, is not thereby disqualified as a witness. The phrase "or who is an enemy national" has been added to put at rest whatever argument there might have been on this score.

The rule as to the "competency" of one spouse to testify against the other has been changed. This is not really a rule of competency but rather a rule of privilege. Where one spouse has been injured by an offense charged against the other there is no privilege and the injured spouse may be compelled to testify (Rex v Lapworth, (1931) KB 117). The contrary rule appearing in the 1928 Manual was derived from Title 28, U.S.C., Section 633, which statute was repealed by Public Law 773 - 80th Congress. The common law rule has been adopted in the 1949 Manual.

Paragraph 135, "Examination of Witnesses", page 176. The new rule as to cross-examination (subparagraph b, page 177) has been taken from *Alford v U.S.*, 282 U.S. 687.

The rights of an accused person on cross-examination have been more fully set out than they were in the 1928 Manual. In this connection, see also page 158 of the 1949 Manual.

Paragraph 135c, "Leading questions", et cetera, page 178. The exceptions permitting leading questions in certain cases have been extended to include direct examination of a witness who is obviously embarrassed and is timid through fear of strange surroundings, or a witness who, because of his age or mental infirmity, is laboring under obvious difficulties in directing his mind toward the subject matter of inquiry. Also, the use of memoranda is permitted to refresh the recollection of a witness when it has become exhausted.

Paragraph 136, "Immaterial, Degrading and Incriminating Questions", page 180. Under Article 24 no witness or deponent need answer any question not material to the issue or when such answer might tend to degrade him. At first glance, the language of Article 24 might be held practically to destroy the right of full cross-examination, by way of permitting a witness to refuse to answer a material question on the ground that the answer might tend to degrade him. Such, of course, was not the intent of Congress. Congress intended only that a witness should not be compelled to answer an immaterial question whether or not it might tend to degrade him, and consequently the appropriate interpretation has been given to the wording of the act by inserting the parenthetical statement in the first sentence of the discussion of "Immaterial questions and compulsory self-degradation", paragraph 136a, page 180.

Paragraph 137, "Privileged and Non-Privileged Communications", page 181. It will be noticed that a new privilege has been added, to wit: communications between chaplain and communicant. This rule was taken from an opinion of this office (SPJGJ 1943/1944; 5 Bull. JAG 4) dated 28 February 1944.

It has been indicated in the discussion of the attorney and client privilege that military counsel are attorneys within the meaning of the rule.

The question as to how far the rule of privilege extends in the case of persons who overhear or see privileged communications has been clarified.

"Confidential and Secret Evidence", page 182. A rule of procedure has been laid down to be followed in cases where it is desired to use Inspector General's reports in evidence.

Paragraph 137c, "Certain Nonprivileged Communications", page 183. Communications by wire or radio are not privileged simply because of the means of transmission used.

Paragraph 138, "Certain Illegally Obtained Evidence", page 183. Here have been set out the rules relating to the inadmissibility of evidence obtained as a result of unlawful searches and seizures and wiretapping. Evidence obtained through information supplied in such illegally obtained evidence is likewise inadmissible. (Fruit of the poisonous tree doctrine - *Silverthorne Lumber Co. v U.S.*, 251 U.S. 385; *Nardone v U.S.*, 308 U.S. 338. It would seem that the fruit of the poisonous tree doctrine will not be applied in the case of information supplied by a forced confession: par. 127a, MCM, 1949, p. 157; *U.S. v Bayer*, 331 U.S. 532, 540.)

Paragraph 138a, "Credibility of witnesses", page 184. There has been some extension of the discussion of credibility in general. As to the question of corroboration, or reestablishing the credibility of a witness, by proof of prior consistent statements, the rule of the Model Code of Evidence has been adopted. It will be noticed however (last subparagraph) that where a witness testifies on the issue of identity, his testimony may be corroborated by proof that he made a prior similar identification even though his credibility has not been directly attacked (CM 316705, *Hayes*, 65 BR 373, 388).

Paragraph 139b, "Impeachment of witnesses", page 185. It is now provided that if surprise is the only reason for permitting a party to impeach his own witness, the party may attack the credibility of the witness only by proof of prior inconsistent statements and may not show that the witness has a poor reputation for truth and veracity, that he has been convicted of crime, et cetera.

In the last subparagraph of the general discussion of impeachment appears the statement that witnesses for the court are not witnesses for the prosecution or defense and may be impeached by either side. That is the Federal rule. It has been applied in cases where the prosecution had a witness whose expected testimony was known to be unfavorable to the Government's case (and who had made a pretrial statement unfavorable to the defense's case), but nevertheless, his testimony was such that it had to be presented, for if it were not the jury would immediately wonder why this witness, who was so often mentioned in the testimony, was not called to the stand. In the Federal courts in such a case the prosecution has asked the court to call the witness as a court's witness. The court would then do so and thereafter both sides could cross-examine, and impeach, the witness (*Litsinger v U.S.*, 44 F.2d 45).

"General lack of veracity", page 185. Only a person who knows the general reputation of a witness for truth and veracity at first hand may testify concerning the same. An investigator who has been sent to the witness's community to look into the reputation of the witness may not relate his findings in evidence. Such findings are hearsay.

"Conviction of crime", page 186. It is not permissible to show the commission of a crime for purposes of impeachment other than by proof of conviction of the crime. There is an exception to the rule, however, in the case of a prosecution for common law rape or assault with intent to commit such rape. In this type case it is permissible to show the unchaste character of the prosecutrix by proof that she has committed lewd acts with the accused or others, both for the purpose of attacking her credibility and to evidence the probability of her having consented to the act charged (CM 318548, Hernandez; 6 Bull. JAG 67; CM 324987, Whalen, 74 BR 43, 44).

Of course, it may be shown for the purpose of impeachment that the witness is in custody and that his testimony was affected by fear or favor growing out of his detention (Alford v U.S., 282 U.S. 687).

"Inconsistent Statements", page 187. The 1928 Manual made a distinction between proof of oral inconsistent statements of a witness and written inconsistent statements. In the case of written statements there was a requirement that the writing be shown to the witness as a preliminary to asking him if he made the statement. This requirement stems from the rule in the Queen's Case (2 B&B 284, 286), which rule has been severely criticized (Wigmore on Evidence, 3rd Ed., Sec. 1259, et seq.) and has been deleted from the text of the 1949 Manual. The reason for the criticism was that once the witness saw opposing counsel had the writing he would know that he had been found out, whereas if he did not know counsel had the writing he would, if he were untruthful, deny that he had made the statement and it could then be shown that the witness dallied with the truth not only once but twice.

It is to be borne in mind that proof that a witness not the accused made an inconsistent statement is admissible only for the purpose of impeaching him. The inconsistent statement is not admissible as substantive evidence against the accused nor even as corroborative evidence of the accused's confession (CM 328857, Cockerham, 77 BR 221).

Because of the provisions of the new Article 24, neither an accused who has testified in his own behalf nor any witness may be cross-examined upon, or impeached by, proof of any statement which was obtained from him by the use of coercion or unlawful influence.

If a witness refuses to testify as to a certain fact or testifies that he has no recollection as to such fact he can not be impeached by proof that at some other time he made a statement as to the fact in question. The reason for this rule is that there is no testimony to impeach in the first case, and in the second case the fact that the witness had made a pretrial statement would not serve to contradict his claim that his memory had failed him at the trial (CM 323083, Davis, 72 BR 23, 33). Of course, if the witness simply claims a failure of memory his prior statement may be used in an effort to refresh his recollection.

"Effect of Impeaching Evidence", page 188. Since, in the usual case, the credibility of a witness is to be decided by each member of the court, during his deliberation as to his vote upon the matter with respect to which the witness's testimony was offered, the law member should not strike from the record the testimony of any witness just because he thinks it has been successfully impeached.

Paragraph 140a, - "Intent - Ignorance of Law", page 189. A person subject to military law is presumed to have knowledge of orders and directives of the Department of the Army, and of the overseas theatre or overseas or Territorial department in which he is stationed, in the same manner as he is presumed to have knowledge of the laws set forth in the United States Code (CM 307097, Mellinger, 60 BR 199, 216). However, actual or constructive knowledge must be shown in the case of orders or directives of inferior commands.

Paragraph 140c, "Offer of proof", page 190. Provision has been made for the procedure of making an offer of proof. This procedure is commonly used in the civil courts for the purpose of bringing to the attention of appellate tribunals various contested matters arising during the course of the trial.

SPECIAL AND SUMMARY COURTS

Seminar Leader
Major Paul S. Davis

This hour will be devoted to a discussion of inferior courts, that is, special and summary courts. The subject will be divided into three parts: first, jurisdiction; second, procedure; and third, records and review.

With reference to the jurisdiction of special courts-martial, turn to paragraph 14 on page 12, and paragraph 15 on pages 12 and 13 of the manual. Two major changes have been made concerning the jurisdiction of special courts. First, officers are no longer excepted from the jurisdiction of special courts-martial. That is governed by the amended Article 13 and by the two mentioned paragraphs of the manual. Prior to the recent amendment of Article 13 officers were subject to trial by special courts-martial except that they might be excepted therefrom by regulations prescribed by the President. The 1928 Manual contained a provision excepting commissioned officers and persons of equivalent, relative, or assimilated rank from the jurisdiction of special courts-martial. Under the provisions of the amended Article 13 any person subject to military law is subject to trial by special courts-martial, and there no longer is any authority for such limitation on that jurisdiction. This amendment of Article 13 has required some changes in paragraph 14 of the new manual but such changes are largely by way of omission.

The second important change in the jurisdiction of special courts-martial is the authorization to adjudge bad conduct discharge. That authority is summarized in paragraph 15 of the manual on page 12. Subject to approval of the sentence by the officer exercising general court-martial jurisdiction, and subject to appellate review by The Judge Advocate General and appellate agencies in his office, a special court-martial may adjudge a bad conduct discharge in the case of an enlisted person, but, and this is very important, 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. Even when a bad conduct discharge is adjudged, a special court-martial continues to be limited by Article 13 to the adjudgment of a forfeiture of two-thirds pay per month for six months.

Although the amount of an authorized forfeiture is so limited where a bad conduct discharge is adjudged by a special court-martial, the effect of the execution of a bad conduct discharge after final approval of the sentence is to separate the accused from the military service and to terminate his right to further pay as of that date. However, such termination is not effected by virtue of Article 13 but by operation of law.

Reference one other point relating to the jurisdiction of the special courts, turn to the Articles of War in Appendix 1 and refer to Article 9 on page 276. There has been a change in the wording of this article which prescribes the various authorities who may appoint special courts-martial. In addition to the commanding officer of any garrison, fort, camp, station, et cetera, and of the various newly specified units, it is therein provided that the commanding officer of any "group of detached units placed under a single commander for this purpose", that is, special court-martial jurisdiction, may appoint special courts-martial. Thus, it is now possible to place a group of detached units, that are not under any single commander for any other purpose, under a commander for special court-martial jurisdiction so that the commander will possess such jurisdiction irrespective of whether he has any other command responsibilities. This may be helpful either where there are various detached units which are scattered or where such units are attached to some higher headquarters which prefers not to exercise special court-martial jurisdiction.

Concerning the jurisdiction of summary courts-martial, important changes have been made both in the amended articles and in the manual. With reference to the jurisdiction of summary courts to try noncommissioned officers, Article 14 contains one important change and other changes are prescribed in the manual. They are contained in paragraph 13 on page 13. Briefly summarized, the new material provides that a summary court may now try any noncommissioned officer if he does not object; if he objects and if he is a noncommissioned officer of the first two grades he can not be tried by a summary court, but if he is of the third or lower grade he may be tried even if he does object, provided that the case thereafter is referred to the officer possessing special court-martial jurisdiction and that officer directs that the trial proceed. That is a change in both the article and the manual. Article 13 formerly provided that a noncommissioned officer could not, if he objected, be brought to trial before a summary court-martial without the authority of the officer competent to bring him to trial before a general court-martial. Other changes which have been made in the text of the new manual provide that persons of actual, relative, or assimilated rank above that of the third enlisted grade are excepted from the jurisdiction of summary courts-martial, but noncommissioned officers of the first two grades may be tried thereby if they specifically consent thereto in writing.

The procedure of special courts-martial is governed primarily by that prescribed for general courts-martial, as is pointed out in paragraph 82a of the manual. That particular paragraph has been expanded to point out the principal distinction in procedure between special and general courts - that is, in general courts the law member rules on interlocutory questions other than challenges, and in the special courts the president makes such rulings subject to objection by other members.

Brief mention may be made concerning certain changes in procedure which result from provisions of the new articles which are applicable both to general and special courts. These matters are discussed more fully in other sessions of the conference but they should be borne in mind in connection with the procedure of special courts.

First, with reference to the trial judge advocate and defense counsel, if the trial judge advocate is a lawyer, the defense counsel must also be a lawyer. The law now specifically authorizes appointment of assistant trial judge advocates and assistant defense counsel for special as well as general courts. In any case in which a trial judge advocate is a qualified lawyer, the order appointing the court will expressly show the qualifications of both the trial judge advocate and the defense counsel, in order to insure compliance with the requirements of Article 11 and the new manual (see App. 2b, p. 306).

Second, pursuant to the provisions of Article 4 enlisted persons are now eligible to serve on both general and special courts for the trial of enlisted persons. They must be appointed when duly requested by an enlisted accused and shall comprise not less than one-third of the court. Similarly, warrant officers are eligible to serve on both general and special courts for the trial of warrant officers and enlisted persons.

Third, the provisions of Article 31 which require the law member or the president of a special court to instruct the court concerning the presumption of innocence, burden of proof, and reasonable doubt as to the guilt of the accused apply equally to general and special courts.

Fourth, the procedure for a new trial, pursuant to Article 53 and paragraphs 101 and 102 of the manual, apply in the cases of general courts and in those special court cases which resulted in an approved sentence including a bad conduct discharge.

Finally, with reference to the unlawful influencing of the action of a court the provisions of Article 88 apply to general and special

courts alike. That subject is discussed in paragraph 87b on page 92 of the manual.

Of particular importance in all special court-martial proceedings will be the procedure in cases wherein a bad conduct discharge may be adjudged. In paragraph 87b the two subparagraphs which begin at the bottom of page 94 and the top of page 95 contain a discussion of the difference between dishonorable and bad conduct discharge. This particular part of the text pertains to the action of the reviewing authority, but it is also equally applicable to the appointing authority in referring cases to a court authorized to adjudge such a sentence. Briefly, a bad conduct discharge is considered less severe than a dishonorable discharge and is designed primarily as a punishment for bad conduct as distinguished from punishment for serious offenses of a civil nature and serious military offenses. It is appropriate as punishment for an accused who has been convicted repeatedly of minor offenses and whose punitive separation from the service appears to be necessary.

Of importance to the mentioned procedure is the requirement of Article 13 that a bad conduct discharge shall not be adjudged by a special court-martial unless a complete record of the proceedings of, and testimony taken by, the court is taken in the case. A copy of the record is to be given to the accused or may, for his benefit, be included in the record, depending on whether he asks for it. This is provided in paragraph 56 on page 52, and is also outlined in Appendix 6 which is the form for record of trial.

Paragraph 46, on page 43, pertains to the appointment, duties and compensation of a reporter. These provisions of the manual authorize the appointment of a reporter in all courts-martial cases except summary courts-martial and special courts-martial cases wherein a bad conduct discharge is not authorized or wherein the appointing authority directs that a reporter will not be used. Thus, in a case referred to a special court wherein a bad conduct discharge is not authorized, no reporter is authorized. If a bad conduct discharge is authorized under the Table of Maximum Punishments the reporter will be used unless the appointing authority directs otherwise. Bad conduct discharge may be adjudged in any case wherein dishonorable discharge is authorized.

Referring to a new requirement of Article 13, a verbatim record must be kept before a special court-martial may adjudge a bad conduct discharge. The technique for appointing a reporter in such a case is this: a reporter is authorized, without any further formality, in any special court-martial case in which a bad conduct discharge is authorized punishment, and it is routine for him to participate unless the appointing authority, by first indorsement of the charges, instructs that the case be tried without a reporter. That was so provided because it was felt that if it were put the other way around, that is,

if the appointing authority were required to take affirmative action in order to provide a reporter, the appointing authority would be subject to the criticism of attempting to indicate to the court that he desired a sentence including a bad conduct discharge. Attention is invited to one other item in this paragraph - the third subparagraph was left purposely vague as to statutory authority for the employment and compensation of enlisted reporters. The reason is that Title 10, U.S.C., Section 644, does not authorize the detail of enlisted personnel as reporters in special courts-martial cases, and Section 699 of that same title does not authorize any compensation for them in such cases. Remedial legislation has been requested and perhaps the Congress will pass a bill which will plug that loophole. In the meanwhile, enlisted reporters are not entitled to any compensation for services in special courts-martial cases. It is believed, however, that they may be detailed to act as reporters as part of their military duties, and it may be well to keep a report of their services for compensation purposes in the event the statute, if it is passed, authorizes retroactive payment.

Article 115, pertaining to the appointment of reporters and interpreters, is phrased in permissive terms. It provides that the president of a court-martial shall have power to appoint a reporter who shall record the testimony before the court and may set down the same, in the first instance, in shorthand. Paragraph 46b, on page 43, provides that the proceedings may be taken down in the first instance in shorthand or by mechanical recording device. One other point concerning the reporter: authorization therefor need not be shown in the appointing order (par. 46b, p. 44).

The procedure of summary courts-martial is spelled out in detail in paragraph 82b on pages 83 to 85. In the 1928 Manual there is very little discussion of summary court procedure, except the provision that it follows the general court-martial procedure as far as applicable. That provision has proved by experience to be rather confusing, or at least insufficient, because most summary court officers are not fully trained in the administration of military justice. In order to assist the summary court officer, a digest of most of the matters which have to do with the procedure in the ordinary summary court cases has been included in this paragraph. Subjects therein discussed include the function of the summary court, the procedure before trial, the procedure at the trial, the handling of witnesses, arraignment, pleas, conduct of the trial, and preparation of the record. Much of this material is contained in Technical Manual 27-255, and the substance thereof, with such changes as are necessary to reflect the changes in the jurisdiction over noncommissioned officers, is now contained in the new manual.

The 1949 Manual spells out the procedure to be observed if a noncommissioned officer objects to trial, depending upon whether he is a noncommissioned officer of the first two grades or a lower grade (par. 82b(3), page 84). In this connection, turn to the Form For Record of Trial by Summary Court in Appendix 8, page 362. The top part of that form is substantially similar to the present form which comprises page 4 of the charge sheet. Just below the space for charges, pleas, findings, and sentence, there is a space for the signature of the accused, if he is a noncommissioned officer, specifically indicating his consent or objection to trial by summary court. The next three spaces, with three numbered paragraphs, are to be filled in by the summary court officer to the extent that they are applicable. Paragraph 1 is for use if the accused is a noncommissioned officer of the first two grades and objects to trial by summary court. It also serves as an indorsement for transmittal of the charges to the appointing authority. Paragraph 2 is to be used if the accused is a noncommissioned officer of the third or lower grade and has objected to trial by summary court. The summary court must indicate therein whether the trial was thereafter directed by the officer exercising special court-martial jurisdiction. In that connection the word "thereafter" is very important. The fact that the case was originally referred for trial by an officer competent to refer it to a special court-martial is not sufficient if the accused objects to trial by summary court. There must be a new reference to the appointing authority or, if he does not have special court-martial jurisdiction, to the officer who does have such jurisdiction, for determination whether the trial will proceed. That reference and direction may be accomplished informally so long as actual authority has been obtained and is so shown on the form. Paragraph 3 will be used to show whether the meaning and effect of a plea of guilty was explained to the accused. Next is a space wherein the number of previous convictions considered will be indicated.

With reference to the procedure for the processing of records and the review of sentences, it is noted that in summary court cases and in special court cases wherein bad conduct discharge has not been adjudged the procedure is the same as that prescribed in the 1928 Manual. After action by the appointing authority, the records of trial of such special and summary courts will be transmitted to the officer exercising general court-martial jurisdiction for examination in the office of the staff judge advocate. The authority therefore is contained in paragraphs 91 and 92, pages 102 and 103, which contain changes designed to clarify and amplify the subject of the duties and responsibilities of the staff judge advocate and the powers and responsibilities of the commander after such records have been received. It is now provided that the officer exercising general court-martial jurisdiction may and ordinarily will return records to the convening authority, that is, the authority appointing such special or summary court, in cases wherein corrective

action is deemed desirable. However, if circumstances warrant, the officer exercising general court-martial jurisdiction may himself take the necessary action without sending the case back.

In any case where a special court-martial has adjudged a bad conduct discharge, the officer appointing the special court has no authority to order that sentence into execution. He is limited to acting upon the record of trial by approving or disapproving the sentence. If he approves a sentence which includes a bad conduct discharge the record must then be sent to the officer exercising general court-martial jurisdiction. That is provided in paragraph 91 on page 102, and is also discussed in paragraph 87c beginning at the bottom of page 97. After the record involving a bad conduct discharge is received by the officer exercising general court-martial jurisdiction it is processed in the same manner as a general court-martial case. It is first referred to the staff judge advocate who reviews it and writes his review as in general court-martial cases.

If the officer exercising general court-martial jurisdiction approves the sentence of bad conduct discharge the record will be forwarded to the Office of The Judge Advocate General in the same manner as any general court-martial record. It will then be examined by a Board of Review as provided in Article 50g and in paragraph 87c, page 97.

Appendix 10, page 366, contains the forms for action by the reviewing authority. Note particularly the form under the heading "Special courts-martial" on page 367. This form is to be used by the appointing officer of the special court-martial in those cases wherein he approves a sentence to bad conduct discharge. For example, this form for action might be used by a regimental commander to approve a sentence to bad conduct discharge prior to transmittal of the record to division or other higher headquarters where the form for action prescribed for general courts-martial cases will be used.

The form for courts-martial orders are shown in Appendix 11, starting on page 368. Orders promulgating the proceedings in a special court-martial case wherein bad conduct discharge is adjudged will be published by the officer exercising general court-martial jurisdiction to whom the record is forwarded for approval pursuant to Article 47d. See paragraph a(3) on page 370. The form is that shown in paragraph a(1) on page 368, except that the action of the convening authority, for example, a regimental commander in an infantry division, will be shown immediately after the entry as to the date upon which the sentence was adjudged, as set out in the form in paragraph a(3) on page 370. Except for the foregoing, the ordinary form of a general court-martial order will be followed in such a case. Note, however, that the order will be called a special court-martial order since it promulgates action of a special court-martial.

PUNITIVE ARTICLES
AW 54 - 86

Seminar Leader
Major Paul S. Davis

The 1948 amendments to the Articles of War made very few changes in the punitive articles. Accordingly, the changes made in this portion of the text of the manual have, generally speaking, not been substantial. Most of the changes which have been made are based on experience with the 1928 Manual and are inserted for the purposes of clarification and the reflection of opinions of The Judge Advocate General or Boards of Review.

Also included is some discussion of each of the punitive articles. In the interests of brevity, discussion concerning those articles of least frequent use was omitted in the 1928 Manual. Experience has indicated that questions concerning many of those articles arose with sufficient frequency to warrant some discussion of each such article. To a large extent, the discussion of these articles is patterned after that contained in the 1921 Manual, but with substantial clarification and condensation.

Paragraph 142 - Article 54 - Fraudulent Enlistment. A new subparagraph has been included (last subparagraph before "Proof", pp. 194-195) to clarify the material pertaining to pay and allowances. It is designed to make clear that acceptance of food, clothing, shelter, or transportation from the Government, unaccompanied by restraint of the accused, constitutes receipt of allowances within the contemplation of this article.

Paragraph 143 - (New) - Article 55 - Officer Making Unlawful Enlistment. This article was not discussed in the 1928 Manual. Except for some rearrangement and condensation, the text of the new manual follows generally that in the 1921 Manual.

Paragraph 144 - (New) - Article 56 - False Muster. The discussion of this article follows Winthrop's definition of false muster. It summarizes the opinion, published in 6 Bull. JAG 236, wherein it was stated that a morning report is not the equivalent of the muster roll, and that the muster roll is now obsolete. As the effect of that opinion is to render the article obsolete at the present time, the elements of proof are not set forth.

Paragraph 145 - (New) - Article 57 - False Returns and Omission to Render Returns. The discussion of this article is based on material in Winthrop (pages 555-556) and the 1921 Manual. The third sentence reflects the opinion, published in 4 Bull. JAG 232, wherein it was stated that a false entry in the books of a unit fund is within the scope of this article.

Paragraph 146 - Article 58 - Desertion. A new subparagraph has been included (page 197) to emphasize that a general prisoner whose dishonorable discharge has been executed is not subject to this article. That statement reflects the opinion contained in Dig. Op. JAG, 1912-40, section 416 (11), CM 224904, Huff, CM ETO 4029, Hopkins, 11 BR (ETO) 273, and CM 316591, Murrery. In this connection it may be mentioned that merchant seamen and other civilians accompanying or serving with the armies of the United States in time of war are subject to military law under Article 2 and may be charged with desertion. The courts have sustained holdings to this effect in Ex parte Falls, 251 Fed. 415, and McCune v. Kilpatrick, 53 Fed. Supp. 80.

In the paragraph captioned "Absence without leave with intent to avoid hazardous duty or with intent to shirk important service", page 198, the language has been amplified to include other illustrations, reflecting wartime opinions, of "hazardous duty" or "important service". Among these illustrations are duty in a combat or other dangerous area, embarkation for foreign duty, and movement to a port of embarkation.

A new clause has been added at the end of the fourth sentence under the heading "Absence Without Leave" (page 199) to clarify conditions under which a soldier who, during one enlistment, again enlists in another unit becomes a deserter under the provisions of Article 28.

A new paragraph has been added on page 200 elaborating upon the type of proof required under a specification alleging intent to avoid hazardous duty or to shirk important service. In this connection, consideration should also be given to the provisions of the new manual relating to evidence (paragraph 130b, page 166) in which it is provided that to the extent that such facts are clearly shown in the morning report or other official records of the command pursuant to law, regulations, or custom requiring the recording of such facts, a duly authenticated copy of the morning report or other official record is prima facie evidence of the facts therein set forth.

Paragraph 147 - Article 59 - Advising, Persuading or Assisting Desertion. This paragraph contains no change.

In connection with the general subject matter of desertion, judge advocates may bear in mind the contents of the Criminal Code, as recently codified in Title 18, U.S.C., Section 2, wherein it is provided that any person who aids, abets, counsels, induces, procures, or causes a criminal act by another is equally guilty as a principal.

Paragraph 148 - (New) - Article 60 - Entertaining a Deserter. Article 60 applies to commanding officers who retain in their command any deserter "from the military or naval service or from the Marine Corps." Although the Air Force is now a separate service it continues to constitute part of the "military or naval service" as used in this article. Accordingly, entertaining a deserter from the Air Force may be charged hereunder.

Paragraph 149 - Article 61 - Absence Without Leave. The text of this important paragraph consists primarily of that of the 1928 Manual. However, the third paragraph on page 202 has been added and contains a discussion of the amenability of general prisoners to the provisions of this article. This paragraph reflects the rule announced in an opinion, contained in 5 Bull. JAG 92, to the effect that where the dishonorable discharge of a general prisoner has been executed he is in confinement only because of compulsion and not because of military duty, and accordingly can not be considered absent without leave under this article. However, until actual execution of the dishonorable discharge a general prisoner is subject to Article 61.

An additional paragraph has been added under "Proof" on page 203 to set forth the elements of proof where the accused is charged with absenting himself with the intent to avoid maneuvers.

It is noted that paragraph 117c on page 133 contains a discussion of the rule to be used in computing time of absence without leave.

Paragraph 150 - (New) - Article 62 - Disrespect Toward the President, Vice President and Certain Other Officials. This article has been the subject of relatively infrequent application. The discussion in the new manual is similar to that in Winthrop (pp. 565-566) and the 1921 Manual. Expression of a positive opinion is avoided as to whether disrespectful language in a private conversation is within the scope of this article. However, the new manual attempts to discourage prosecution based on private conversations or purely political arguments as distinguished from statements intended to be personally disrespectful.

Paragraph 151 - Article 63 - Disrespect Toward a Superior Officer. The text of this paragraph has been clarified to emphasize that a superior officer need not be in the chain of command over the accused, nor need he be in the execution of his office, but that it is ordinarily sufficient that he be an officer senior in rank to the accused.

Paragraph 152 - Article 64 - Assaulting and Disobeying Superior Officer. On page 205, two new sentences have been added to the discussion of assaulting a superior officer. The first new sentence refers specifically to the rule that a commanding officer in the field in the actual exercise of command is generally considered to be on duty at all times. The other sentence makes it clear that a discharged general prisoner or other civilian subject to military law and under the command of an officer is subject to the provisions of this article (see CM 252812, Scott, 34 BR 197).

On page 206, a new sentence has been included in the fifth paragraph of the discussion of willful disobedience. That sentence provides that the order must be directed to the subordinate personally. This provision is designed to clarify the manual in accordance with existing practice and to emphasize the distinction between particular orders and standing orders.

Paragraph 153 - Article 65 - Assaulting or Disobeying a Warrant Officer or a Noncommissioned Officer. The first paragraph on page 207 has been expanded to point out that the article applies only to military personnel so that an assault by a general prisoner whose dishonorable discharge has been executed, or by any other civilian subject to military law, upon a warrant officer or a noncommissioned officer should be charged under Article 96.

A new sentence has been added in section (b), page 207, to emphasize that this article does not include an acting noncommissioned officer or a military policeman who is not in fact a noncommissioned officer. Disobedience of a proper order of an acting noncommissioned officer or of a military policeman below noncommissioned officer grade should be charged under Article 96. Concerning acting noncommissioned officers, see Dig. Op. JAG, 1912-1940, Section 423(2), especially CM 202117 and CM 201648.

Paragraph 154 - Article 66 - Mutiny and Sedition. Except for a rearrangement of the material contained in the 1928 Manual there has been no substantial change in this paragraph. The general introductory discussion has been inserted as subparagraph "a. General".

Most of the cases arising under Article 66 have involved mutiny or attempted mutiny. Cases involving sedition have occurred very infrequently. In this connection reference may be made to the new Criminal Code, Title 18, U.S.C., Sections 2384, 2385, and 2388.

Paragraph 155 - Article 67 - Failure to Suppress or Give Information of Mutiny or Sedition. There has been no change in the discussion of this article.

Paragraph 156 - Article 68 - Quarrels, Frays and Disorders. There has been no change in the text of this paragraph. Changes in Army Regulations relating to the grade tables of noncommissioned officers should be borne in mind in administering this article.

Paragraph 157 - Article 69 - Arrest or Confinement. In the first paragraph cross references have been inserted to paragraph 19 wherein the general subject of arrest and confinement is discussed.

A new phrase has been inserted in the next to the final sentence of the second paragraph of the discussion of "Breach of Arrest", page 211, pointing out that violation of an administrative restriction imposed in the interests of training, discipline, or medical quarantine, which does not constitute arrest or confinement, should be charged under Article 96. A cross reference concerning authority to release from arrest has also been included in the text.

Paragraph 158 - (New) - Article 70 - Unnecessary Delays in Investigating or Disposing of Charges. In revising the Articles of War Congress deleted from Article 70 what might be considered the administrative and procedural provisions pertaining to the investigation and disposition of charges. Those provisions are now found in the new Article 46. Article 70 retains the punitive provision concerning any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion.

The discussion of the article points out that it applies only to officers and is applicable only when the accused has been placed in arrest or confinement. It applies to an investigating officer as well as to any officer who is required to act in connection with court-martial charges or their disposition. Thus it may be applicable to the accuser, any commanding officer or other officer through whom the charges pass, a trial judge advocate, or any other officer responsible for unnecessary delay in such proceedings.

A new form of specification (number 34) has been included in Appendix 4 to cover situations and persons not included in the form contained in the 1928 Manual.

Paragraph 159 - (New) - Article 71 - Refusal to Receive or Keep Prisoners. The discussion of this article follows generally that of the 1921 Manual and provides that a provost marshal or commander of a guard may, in his discretion, but upon his own responsibility, receive a prisoner

without an account of the charge against him or other due formality of commitment.

Paragraph 160 - (New) - Article 72 - Failure to Render Report of Prisoners. Article 72 is largely self-explanatory. The material contained in the manual consists principally of a summarization of the elements of proof.

Paragraph 161 - Article 73 - Releasing a Prisoner Without Proper Authority. The text of this paragraph is substantially the same as that of the 1928 Manual. Two changes have been inserted. First, a new sentence has been added at the top of page 214 pointing out that normally the lowest authority competent to release a prisoner is the commanding officer of the command of which the prison, stockade or guard is a part. Second, a new paragraph has been included on page 214 and is designed to prevent the recurrent error of charging a guard with releasing a prisoner without authority and charging the prisoner with escape from confinement in the same case. It is stated, however, that the offense of escape from confinement and that of suffering a prisoner to escape through neglect or design may arise out of the same occurrence.

Paragraph 162 - (New) - Article 74 - Delivery of Accused Military Personnel to Civilian Authorities. This material contains no discussion of Army policy concerning the release of accused military personnel to civilian authorities. The current applicable Army regulation concerning such policy is AR 600-355 (par. 5(b)). In wartime it has generally been the policy to decline to turn over military personnel to civilian authorities unless the offense charged is a most serious one, such as a felony of such character as would disqualify the offender for military service, and then only when the commanding officer believes that the available evidence establishes a prima facie case. The new text emphasizes the fact that the punitive provisions of Article 74 apply only to commanding officers and only in time of peace. The provisions of the article concerning the use of the commander's "utmost endeavor" to effect such delivery are discussed and defined.

Paragraph 163 - Article 75 - Misbehavior Before the Enemy. The discussion under subtitle "a" has been changed by the inclusion of the sentence that "Self-maiming may be within this clause."

Also added to the text of the material are brief discussions concerning the following newly included offenses, and resumes of the requisite elements of proof thereof:

- (1) Shamefully abandoning or delivering up any command;
- (2) Endangering the safety of a command by misconduct, disobedience or neglect;
- (3) Speaking words inducing others to misbehave, run away or abandon, deliver up or endanger the safety of any command;
- (4) Casting away arms or ammunition;
- (5) Quitting post or colors to plunder or pillage;
- (6) Occasioning false alarms.

Paragraphs 164 through 168 - (New) - Articles 76 through 80. These articles cover various war offenses, for the most part of relatively infrequent application. Article 76 pertains to subordinates compelling any commander to surrender; Article 77 concerns the improper use of the parole or countersign; Article 78 covers cases of forcing a safeguard; Article 79 pertains to neglect to secure or misappropriation of captured enemy property; Article 80 forbids dealing in captured or abandoned property. The new manual includes a brief discussion of such offenses and the requisite elements of proof for each offense. The substance of the text material follows in general the provisions of the 1921 Manual except for some condensation and rearrangement of format.

Paragraph 169 - (New) - Article 81 - Relieving, Corresponding With, or Aiding the Enemy. The discussion of Article 81 has been added in the 1949 Manual and deals with the important offenses of corresponding with or otherwise assisting the enemy. It applies to all persons whether or not otherwise subject to military law. In general the discussion in the manual follows that in Winthrop and in the 1921 Manual. In connection with this paragraph reference may be made to the opinion, published in 5 Bull. JAG 206, wherein it was stated that correspondence with an enemy prisoner of war does not of itself necessarily constitute "holding correspondence with the enemy" in violation of Article 81.

Paragraph 170 - Article 82 - Spies. There has been no change in this paragraph other than to change the phrase "dispatch riders" to "dispatch drivers".

Paragraph 171 - Article 83 - Willful or Negligent Loss or Damage to Military Property. A new sentence has been added to the text material to emphasize that this article concerns only military property belonging to the United States.

In the discussion on page 224 concerning the inference that the property was issued for use in the military service the phrase "together with other proved circumstances" has been inserted in order to furnish additional protection to the accused.

Paragraph 172 - Article 84 - Waste or Unlawful Disposal of Military Property. The discussion of this article has been expanded by the inclusion of two new sentences which provide that the article applies only to soldiers, and that officers or others guilty of similar offenses should be charged under other indicated articles.

The second subparagraph of section b, dealing with the presumption of neglect in cases where property has been issued to an accused and is found to be damaged, has been changed by the inclusion of a new sentence which provides that the mentioned presumption applies only to items of individual issue. This is in accord with the established rule that negligence on the part of the accused in the operation of a vehicle cannot be presumed (6 Bull. JAG 124).

Paragraph 173 - Article 85 - Drunk on Duty. There has been no change in the text of this paragraph. The provisions of Article 85 have been modified so that the penalty of dismissal in the case of an officer is no longer mandatory upon conviction under this article in time of war.

Paragraph 174 - Article 86 - Misbehavior of Sentinel. The discussion of this article has been expanded by the inclusion of new material concerning the posting of sentinels. This included material reflects the wartime opinions which provide that where a sentinel has taken his post in accordance with proper instructions no further posting is required. Similarly, the elements of proof under each of the three offenses discussed in this paragraph have been revised to provide that the accused "was posted or on post" as a sentinel.

Section c, which pertains to leaving post before being properly relieved, has been changed to include the provision that if the sentinel goes such a distance from his post that his ability to perform his duty as a sentinel is impaired, he is guilty of leaving his post.

PUNITIVE ARTICLES
AW 87, 89, 90, 91 and 92

Seminar Leader
Colonel Birney M. Van Benschoten

Articles 87, 90, and 91 have seldom been used of late. No record could be found in this office of any charges under Article 87. Of course, records prior to the first World War are very incomplete. The article deals with the laying of an imposition by a commanding officer of a camp or group upon any victuals or other necessaries of life brought into such camp or post for sale. It may be that it has not been used because it has not been discussed in the manual. There is a tendency to charge offenses established by a particular set of facts under articles of war that are clear to the soldier or officers in the field who draws the charges. The Vanderbilt Committee recommended the repeal of the Articles 87 and 91 as obsolete. They were not repealed. We attempted to discuss each one very briefly so that it may be used if the required facts appear. In discussing Article 87 it was attempted to give a broad construction to the word "necessaries" - a much broader conception than is given in the civil law in domestic relations cases involving necessaries, because a soldier's essential requirements are furnished to him in the field by the Government. Winthrop suggested that the article should apply to anything offered for sale on a post through a post exchange or other similar agency, and that interpretation was adopted in the manual. There is one opinion in the office which provides that liquor sold through a post exchange was a "necessary" within the meaning of Article 87. This may be used as a guide. The interpretation given in the manual is that anything offered for sale through a post exchange or similar agency is a "necessary" within the article. Dismissal is the minimum sentence under the article; that may be important in determining whether to use the article in lieu of Article 95, which also prescribes dismissal, or in lieu of Article 96 which establishes no minimum. In stating that the minimum is dismissal, there is one qualification - Article 44 provides that in time of war reduction of an officer to the lowest enlisted grade is permissible in lieu of dismissal whenever dismissal is authorized.

Article 89, which deals with waste, spoil, wrongful destruction of property, depredation and riot was amended. In that portion of the article dealing with the destruction of property the description of the destruction denounced was changed from "willful" to "wrongful". The qualifying phrase "unless by order of his commanding officer" was deleted.

General Hoover, in his testimony before the House Subcommittee considering the proposed amendments to the Articles of War, stated:

"The change in this article is not of great consequence, but it is intended to clarify the meaning. . . It would appear any intentional destruction of property would be willful, and the effect therefore is quite broad. . . The purpose of the change is one of clarification only."

The change from the word "willful" to "wrongful" was meant not to change the law but to clarify it. Because any intentional act was necessarily willful, some might interpret the article too broadly to cover intentional acts that were not wrongful.

The word "wrongful" occasioned considerable concern in preparing the discussion because Article 89 is the basis for the assessment of liability under Article 105. Did the use of the phrase "wrongful destruction of property" now bring within the article negligent destruction of property? If so, then it would open up Article 105 and the assessment of liability thereunder to damages resulting from the negligent destruction of property, contrary to the present rule. It was determined that it was not meant to do so, that "wrongful" means "wrongful and willful". The element of willfulness remains. To be an offense under Article 89, destruction of property must have been wrongful and willful, and it is so stated in the manual.

Consideration was given to the extension of Article 89. Concerning that portion of it dealing with depredation - it was suggested that the theft of property should be a basis for the assessment of liability under Article 105, as it was under interpretation of this office from 1928 to 1930. Research and much consideration was given to that and it was finally decided not to change the present interpretation which excludes theft from the depredations denounced by Article 89. This is mentioned to show how the articles were taken apart and reconsidered so that any incorrect interpretation might be avoided in the future. But nothing was altered without considerable research, and seldom was anything new put into the analysis of the articles if they worked properly.

As to Article 90, the 1921 Manual provides that the provoking speeches and gestures there denounced are those directed toward another person subject to military law. I am told that at West Point that has been the interpretation given in instruction throughout the period of existence of the article, and that that is the common understanding of the Army. That is therefore the interpretation adopted in the

analysis of the manual. The offense can be committed only by speeches or gestures directed toward another person subject to military law - not any other person, but another person subject to military law - not necessarily a soldier, but any persons subject to military law.

Article 91, denouncing dueling, has not been used since 1887. But the recommendation of the Vanderbilt Committee that it be repealed as obsolete was denied by Congress - and perhaps rightly. It is just possible that one reason why we have not been troubled with that offense is that the article is still in existence. The denunciation of conniving toward dueling places upon all persons subject to military law an obligation to report to appropriate authorities any evidence, any suggestion, any indication that anyone is submitting a challenge or is suggesting to another that a challenge should be given. It is very broad. The obligation rests upon every person subject to military law to report any suggestion that a duel might take place.

Q. Suppose persons decided to fight it out with weapons or fists?

A. It must be with deadly weapons to be a duel.

Q. But no formality - one man says, "Let's get a gun and shoot it out." - that is a duel?

A. Right.

Article 92 has been amended to classify murder for purposes of punishment. The definition of murder is not changed. That which constituted murder before the amendment is still murder. But murder has been classified for purposes of punishment. Premeditated murder can be punished as it was before the amendment, by death or life imprisonment, nothing else. But if not premeditated, murder may be punished only by life imprisonment or any other sentence a court-martial may adjudge - not by death. The prescribed punishment for rape was changed to eliminate the limitation of a minimum punishment. Rape may be punished by death or any other punishment a court-martial may adjudge.

A difficulty rests in the determination of premeditated murder. What constitutes premeditation? Most statutes that classify murder into degrees - and most state statutes do, the Federal Criminal Code does, the District of Columbia Code does - provide that murder in the first degree is either murder premeditated or murder committed during or as the result of the commission of a felony. Some read "any felony"; other list rape, robbery, burglary, arson - the violent common law felonies. Most of them delete larceny which, although a common law felony, is not necessarily violent in nature. Another group of statutes lists the violent common law felonies and in addition some

statutory felonies. Diligent research indicates that Article 92 is the only statute setting up degrees of murder that lists only premeditated murder as murder in the first degree. Consideration was given to an interpretation that murder committed as a result of a violent common law felony was necessarily a premeditated murder. But just before Congress passed the amended Articles of War, it reenacted Title 18 of the United States Code, the Federal Criminal Code, which provides that "First degree murder is murder premeditated or committed in the course of or as a result of arson, rape, robbery or burglary." By its use of the word "or" Congress indicated very clearly that it considered that premeditation was not a necessary characteristic of murder resulting from these violent common felonies. That is the interpretation taken by this office and set forth in the manual. The circumstances of the commission of a violent common law felony may show premeditation of the crime of murder. But it must positively be shown. It does not necessarily follow from the commission of the violent common law felony.

A large number of cases - indeed most cases that discuss premeditation - use the words "premeditation" and "deliberation" - obviously meaning the same thing by both words. Others hold that premeditation means nothing more than "malice aforethought". If it means nothing more than malice aforethought there was no purpose in using it in the article for malice aforethought is a necessary element of all murders. It has repeatedly been held that the commission of a violent common law felony establishes the malice aforethought necessary for murder. The interpretation adopted in the manual is that premeditation means something more than malice aforethought. Premeditation and deliberation mean the same thing. To be premeditated a murder must have been deliberately planned. There must have been a specific design to kill someone - not necessarily a design to kill the person whose death actually resulted, but a deliberation upon a consideration of the killing of someone. On page 231 of the manual these words were written as the best interpretation of premeditation:

"A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intention to kill someone and consideration of the act intended. Premeditation imports substantial, although brief, deliberation or design. For example, if in the course of an attempt to rape, the assailant deliberately chokes his victim until she suffocates, the deliberate nature of his act reveals premeditation, even though he may have entered upon the attempt

intending no other harm. But if, in attempting to run from her assailant, the victim falls from a cliff and is killed, premeditation is lacking. A murder is without premeditation if a fire is started by arson, and a person is burned to death whose presence in the building was unknown to the arsonist."

That is enough to establish malice aforethought, but specific design to kill someone has not been established. Some cases hold that deliberation or premeditation may be as rapid as thought itself, that it may occur in an instant. Others say an appreciable lapse of time must occur - time in which to deliberate. The interpretation adopted in the manual is that time is not the essential element. There must have been time to form a specific intent to kill, to turn that over in the mind, to deliberate upon it, to consider it. The choking of someone takes time. On the other hand, the shooting of someone does not necessarily take time. There is a case in which a policeman tapped a man on the shoulder to ask him a question. The policeman just tapped him on the shoulder from behind. The person tapped swung around and shot instantly. That was held not a premeditated murder. It is impossible to recite a rule of the thumb for the detection of premeditation. It is very difficult to put into words the exact dividing line.

Q. Have you decided that a murder in the commission of one of those common law felonies is definitely not premeditated?

A. No, sir, I do not mean to say that. It is not necessarily premeditated murder simply because committed in the course of a violent common law felony. But the circumstances surrounding the offense may affirmatively show that it was a premeditated murder.

Q. How in the world would you ever get a murder in arson and not call it murder in the first degree?

A. To take a good sound cause for premeditated murder as the result of arson, if an arsonist knows that people are in the house, and knowing that he locks the doors from the outside and sets the house afire, and the occupants are burned to death, the arsonist has committed a premeditated murder.

Q. That would be the murder - the murder would be the primary offense there?

A. Yes, murder being a greater offense than arson, it might be considered the primary offense. Of course they are both serious offenses, and it would be appropriate to charge both offenses.

Q. Well, with this example in here you will never be able to charge anybody with premeditated murder.

A. Oh, I believe you can indeed. In the example to which you refer the arsonist did not know anyone was in the house. There is no evidence that he had formed any specific intention to kill someone. He was determined to burn down the house and because of the possibility that someone might be in it, and because of the possibility that a fireman might be killed in attempting to put out the fire, malice aforethought is shown and the offense of murder established.

You will find opinions of civil courts that hold that murder committed as a result of arson is first degree murder. Article 92 does not say that, it is not necessarily murder in the first degree. It is murder in the first degree only if premeditation is shown - premeditation of the offense of murder. Under Article 92 such premeditation does not necessarily result from the commission of an arson. The statutes of the state of which you are no doubt thinking, on the other hand, may declare any murder committed as the result of arson to be murder in the first degree. Article 92 is different from most of the criminal statutes. We must apply it as it stands.

PUNITIVE ARTICLES

AW 93

Seminar Leader
Major Gilbert G. Ackroyd

The discussion of manslaughter begins on page 233. It has been pointed out in the new discussion of manslaughter that voluntary manslaughter is intentional homicide. Consequently even though a particular homicide has been committed in the heat of passion caused by provocation it is not voluntary manslaughter unless the act which occasioned it was intentionally committed. See CM 327731, Adams, 7 Bull. JAG 81.

On page 234 there is a new definition of involuntary manslaughter. In the 1928 Manual it was stated that involuntary manslaughter was homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, et cetera. This language was open to the interpretation that homicide unintentionally caused in the commission of an unlawful act amounting to a felony would be murder and not manslaughter. This is not necessarily true today because the word felony connotes a crime which is punishable by confinement for a certain length of time, and not necessarily an act inherently dangerous to human life. See 18 U.S.C. 1. Consequently, in the 1949 Manual the phrase "not inherently dangerous to human life" has been substituted for the phrase "not amounting to a felony."

The discussion in the new manual also contains a definition of culpable negligence (page 234). It has further been pointed out that negligent homicide may be a lesser included offense in involuntary manslaughter.

The discussion of the crime of mayhem (page 234) has been altered to indicate that mayhem is a hurt which results in a loss or permanent disability of the part of the body injured. Injuries which merely temporarily disable are not mayhem.

The discussion of the crime of arson has not been changed (page 235).

The discussion of the crime of burglary (page 236) has not been materially altered. However, it does contain a new definition of felony in accordance with 18 U.S.C. 1.

The discussion of the offenses of housebreaking (page 237) and robbery (page 238) remains as it was in the 1928 Manual.

The provisions of the new Article 93 making embezzlement and larceny one and the same offense necessitated a completely new discussion of the offense of larceny or stealing. It is now unnecessary to determine whether the property came into the hands of the thief by trespass or by a breach of trust or bailment. Considerations having to do with the nice distinctions between possession and custody are no longer of any importance. In framing the new definition of the crime of stealing it was necessary to choose a word which would at one and the same time denote the "taking", which is the beginning of a larceny, and the "conversion", which is the beginning of every embezzlement. For this purpose the word "appropriation" was used. It is a word well known to military lawyers. It has always been considered to encompass either a taking or a conversion and has been used in the same manner by common law writers (Regina v. Trebilcock, 7 Cox CC 408, 411; Moore v. U.S., 160 U.S. 268, 269).

When there is added to a wrongful appropriation (wrongful in the sense that it is without the consent of the owner) an intent to deprive the owner permanently of his property the new offense of larceny has been committed. On page 240 there is a discussion of this intent. The word "permanently" does not mean that the thief must have intended to keep the property forever and a day, but merely means something more than a temporary appropriation. Consequently a person may be guilty of larceny even though he intends to return the property ultimately if that intent depends on a future condition or consideration which may never happen.

A discussion of the rules to be applied in determining value in larceny will be found on page 241. The last subparagraph of that discussion indicates that where, in a trial for larceny, it appears that the accused intended to deprive the owner only temporarily of his property he may be found guilty of the lesser included offense of wrongful appropriation of the property in violation of Article 96. Perhaps under the new form of specification for larceny this is the only lesser included offense, and the lesser offenses heretofore found under the old forms of larceny and embezzlement specifications, that is, wrongful taking and carrying away or wrongful conversion, may not be included in an allegation that the accused did feloniously steal the property. The old forms of specifications for larceny and embezzlement should no longer be used.

The discussion of the crimes of perjury (page 241) and forgery (page 243) has not been changed from that of the 1928 Manual.

The new discussion of the crime of sodomy (page 244) has been taken from section 104, Public Law 615, 80th Congress.

"Assault with intent to commit any felony" (page 244). There is a new discussion of assault, and assault and battery. The new discussion of assault indicates that this offense rests upon two distinct legal theories. In the first place, an assault is a putting in fear of immediate bodily injury. It is also, however, an attempt to do bodily injury. Thus if A should be walking down the street and B shoots at him, but B's shot goes wild and A does not know that B has shot at him, although there may be no putting in fear, there has nevertheless been an assault because an attempt has been made to inflict bodily injury upon A. On the other hand, if B approaches A face to face and points at him an object which A reasonably believes to be a pistol there is an assault because A is put in fear. This is so although the pistol may be nothing more than a toy gun and although there may not, under a strict interpretation of the law, be an attempt.

A discussion of battery may be found on page 244. A battery always includes an assault.

The discussion of assault with intent to murder (page 246), assault with intent to commit manslaughter (page 246), assault with intent to commit rape (page 246), assault with intent to rob (page 247), and assault with intent to commit sodomy (page 247) remains unchanged.

There has been no alteration of the discussion of assault with intent to do bodily harm with a dangerous weapon (page 247), but the discussion of assault with intent to do bodily harm (page 248) has been enlarged to point out that the intent to do bodily harm necessary for a conviction of this type of assault must be an intent to do great bodily harm and not merely to inflict a minor physical injury.

PUNITIVE ARTICLES
AW 94-96

Seminar Leader
Colonel Birney M. Van Benschoten

Paragraph 181h of the manual provides that:

"Stealing and sale of the same property are separate offenses and should be charged in separate specifications."

Stealing and sale of the same property are usually separate offenses. If they are separate, they should be charged separately. If the sale is the only offending act, however, the accused should be charged only once.

Paragraph 180i concerns the purchasing or receiving in pledge of property of the United States. It is intended for clarification purposes only. There is no change in the law. That the accused knew the soldier pledging or selling the property to be a member of the described class has been clearly set forth as a separate element of the offense. It was present before but it was coupled with another element.

Conspiracy is discussed in paragraph 180j. Paragraph 3 of the old Article 94 denounced conspiracy to defraud the Government by making, presenting, or collecting a false claim. That paragraph remains. But in the next to the last paragraph of the amended Article 94 Congress has now denounced conspiracy to commit any offense under Article 94 - a much broader type of conspiracy. For most purposes, at least, the old paragraph 3, although still present, is absorbed by the new paragraph. It is barely conceivable that a case may arise in which the accused have conspired to conspire to defraud the Government by collecting a claim. It is doubted that such a case will arise. These two provisions of the article are similar to two paragraphs in the Federal Criminal Code. Section 83, Title 18, United States Code, corresponds to the third subparagraph of the 94th Article of War. Section 88 corresponds to the next to the last subparagraph, the new conspiracy provision. In Section 83 of the Federal Criminal Code, no overt act is required for conspiracy. In Section 88, which was enacted later, an overt act is required. It has been held that Section 88 superseded Section 83, and that its enactment resulted in the requirement of an overt act for all conspiracy under the Federal Criminal Code. On the day after Congress amended the Articles of War, it reenacted the Federal Criminal Code - Title 18 of the United States Code - with these provisions. On the preceding day it enacted the amendment to Article 94 denouncing the corresponding conspiracy but did not there require an overt act. This

matter is pointed out in the hope that by first confusing you with the parallelism of the Federal Criminal Code and Article 94 we can finally make the distinction clear, so that you will not later be confused by someone who brings up the corresponding provisions of the Federal Criminal Code in which an overt act is held to be necessary.

Under Article 94 no overt act need be alleged or proved for a conspiracy. In Article 96 conspiracy is discussed under "crimes and offenses not capital", based upon the Federal Criminal Code. That conspiracy requires commission of an overt act, which must be alleged and proved, because it is based upon the Federal Criminal Code.

That is not the only kind of conspiracy for which conviction can be had under Article 96. If committed in a place where the common law applies, common law conspiracy requiring no overt act can be charged under Article 96.

In addition, there is one case in the office which arose in Italy - where the common law does not apply - in which no overt act was alleged to the conspiracy. In the opinion it was stated that the act was conduct of a nature to the prejudice of good order and military discipline, and that the allegation was, therefore, adequate to allege an offense under Article 96.

A brief summarization of the status of conspiracy as an offense under the articles may serve to clarify the matter. An overt act need not be alleged and need not be proved for any conspiracy whatsoever under either Article 94 or Article 96, with one single exception. That exception arises when the allegation of conspiracy is based upon the Federal Criminal Code, as a crime or offense not capital. Then and then only need an overt act be alleged and proved.

Q. Is there a form of specification for that exception in the manual here? What I am trying to determine is what the differences are between the various forms of specifications and how you would tell that you are pleading it under this particular exception. As I recall, it seems to me that they are very much alike. I am trying to figure out what changes would exist in the specification to bring it under that exception. It seems to me if you just used the general specification, that would cover the same factual situation.

A. If you use the general specification, alleging no overt act, and the offense occurred in a place where the common law applies, your allegation adequately describes an offense. In a place where the common law does not apply, unless you allege it to be conduct of a nature to the prejudice of good order and military discipline, you may be bound to show that it comes under the "crimes or offenses not capital" portion of Article 96. Not necessarily, of course. You are not always required to allege that the described conduct was of a nature to the prejudice of good order and military discipline to place the charge under that portion of Article 96. But the circumstances may not show conduct of a nature to the prejudice.

Q. I suppose you have in mind a military reservation where the jurisdiction is solely and exclusively in the Government?

A. Consider the case that arose in Italy. Had not the act there alleged been found to be conduct of a nature to the prejudice of good order and military discipline the specification would have been deficient because the common law did not apply there. The Federal Criminal Code could have been used for the purpose, but they did not allege an overt act.

Q. The same factual situation might cover any of the three forms?

A. That is certainly true. You must consider the place where the offense arose.

Paragraph 181k deals with the continuing jurisdiction over accused who have been separated from the service since commission of certain offenses. That provision of the 94th Article of War has been broadened. Previously, it applied only to officers. It now applies to any person who was formerly in the service, and it now applies for any offense denounced by Article 94, or for stealing or failing properly to account for any money or property held in trust by an accused for enlisted persons or as its official custodian while in the military service.

For your own personal information your attention is invited to the notes at the end of Article 94 in Appendix 1, page 298. These notes appeared in the old manual. Reference is made to the Joly case wherein it was held that this provision for continuing jurisdiction after separation from the service will not be held unconstitutional because it has been enforced for a long period of time. There is a later case, full information concerning which you may not possess. The lack of full knowledge of that case might possibly embarrass you should defense counsel in a case concerning this continuing jurisdiction raise the point and cite the case. That case is United States ex rel Flannery v. Commanding General, Second Service Command, 69 Federal Supplement 661 (1946), in which the District Court for the Southern District of New

York stated that the Joly case was wrong and sustained the writ of habeas corpus. That opinion is reported and will no doubt be found by defense counsel and used. The order sustaining the writ was reversed by the Second Circuit Court of Appeals several days after the opinion of the District Court. The reversal was upon a stipulation and without opinion. The only way you can secure information concerning that reversal is by writing either to the Clerk of the Second Court of Appeals or to this office.

It is the view of the Department of the Army that the Joly case should be followed - that the continuing jurisdiction applies. That is the procedure we should follow. Subsequent to the Flannery case, of course, Congress reenacted this portion of Article 94 and broadened its scope, indicating that it believed that part of Article 94 still to be the law. That is the position of this office. I pass this historical information on simply for your personal information.

Paragraph 182, "Article 95." Article 95 has not been amended. The discussion is altered only by stating that the conduct contemplated may be that of an officer of either sex, and that when applied to a female officer, conduct unbecoming a "gentleman" means conduct unbecoming a "gentlewoman".

Paragraph 183, "Article 96." Article 96 has not been amended. There are no changes in substance in the discussion. There are attempts in several places to clarify, some expansion of discussion, but no changes in substance.

The discussion of Article 96 provides that laws of the Territories, such as Hawaii and Alaska, are applicable to the "crimes and offenses not capital" portion of Article 96 - the second portion of the discussion under limited jurisdiction - as to offenses committed within those areas.

Paragraph 117, which sets up maximum punishments, provides that if the table of punishments does not list an offense clearly related to an offense committed, then the Federal Criminal Code (Title 18, United States Code), or the Code of the District of Columbia may be used to determine the maximum punishment, but does not provide that territorial laws may be used to determine the maximum punishment. Therefore, territorial laws are usable only in deciding that an offense is a crime or offense not capital under Article 96, and not for the purpose of determining maximum punishments.

In answer to another question, an act which would be an offense under the laws of the State or foreign country in which committed is not per se a violation of Article 96. It may be a violation of Article 96 if it is conduct to the discredit of the military service, but it is not necessarily a violation of Article 96 simply because it was a violation of the local law.

If the English law should provide that writing a letter in lead pencil is a crime and a soldier in England wrote a letter in lead pencil, he would not necessarily have committed an offense under Article 96. His act would be a violation of Article 96 only if it was of a nature to the discredit of the military service.

Q. That same rule applies in any State? Texas?

A. That is right.

Q. In addition to charges being a violation of the State of Texas?

A. You would never charge it to be a violation of the laws of the State of Texas unless you were punishing him in the civil courts. You would charge him with having committed this act to the discredit of the military service.

PUNISHMENTS (A)

Seminar Leader
Major William H. Conley

This hour will be devoted to pointing out briefly the nature and purpose of the bad conduct discharge, the additional offenses that have been included in the Table of Maximum Punishments and in the text of the chapter concerning punishments, and the material pertaining to the reduction of officers.

With reference to the term "bad conduct discharge" which appears throughout Chapter XXVI, beginning on page 126, attention is invited to the brief discussion that has been inserted in the material pertaining to the reviewing and confirming authority in paragraph 87b on page 94, subtitle "Advisory Instructions". Therein it is stated that:

"Dishonorable discharge should be reserved for those who should be separated from the service under conditions of dishonor, after having been convicted of offenses usually recognized by the civil law as felonies, or of offenses of a military nature requiring severe punishment."

The next paragraph provides that:

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

In distinguishing the dishonorable discharge from the bad conduct discharge General Hoover, in his testimony before the House Subcommittee on Legal Affairs, stated:

"It is a matter of degree. It is a lesser punishment, as we conceive it, than the dishonorable discharge. Its usefulness would apply particularly to the military offense type of cases as distinguished from the felony type cases."

Paragraph 115, "General Limitations", page 126. The first subparagraph includes material that is contained in the revised Article 16

which provides, among other things, that no accused shall be confined with enemy prisoners or foreign nationals outside the continental limits of the United States, or required to undergo any punishment or penalties, other than confinement, prior to the order directing execution of the approved sentence. Paragraph 19a, page 14, briefly prescribes the facilities, accommodations and treatment that shall be afforded an accused whose sentence has not been so promulgated. In paragraph 115 it is further provided that such an accused will not be required to observe duty hours or training devised as punitive measures, or required to perform duties that are imposed as punishments, or to wear the uniform of a sentenced prisoner prior to promulgation of the approved sentence. The balance of paragraph 115 is taken verbatim from the 1928 Manual.

Paragraph 116, "Miscellaneous Limitations and Comments", page 126. In the first subparagraph of 116a the phrase "except as noted below" refers to the revised Article 44 which provides that when a sentence to dismissal may lawfully be adjudged in the case of an officer the sentence may, in time of war, under such regulations as the President may prescribe, adjudge in lieu thereof reduction to the grade of private. The term "private" has been interpreted by this office to mean the lowest enlisted grade. The final sentence of that same subparagraph reads:

"Upon conviction of premeditated murder in violation of Article 92, dishonorable discharge and forfeitures may be adjudged with life imprisonment."

That, of course, is predicated upon case law construing the old Article of War 92.

In the second paragraph of 116a, page 127, the final sentence, which provides that the death penalty can not be adjudged if the appointing authority has directed that the case be treated as not capital, has been added to the material contained in that comparable paragraph of the 1928 Manual.

A definite change is contained in the next paragraph which provides that:

"In adjudging the sentence of death a court-martial will not prescribe the method of execution, which will be prescribed by the confirming authority."

That change was designed to eliminate the recurring difficulties arising from the lack of qualified personnel and special facilities required for an execution. The balance of that paragraph is paraphrased from the material of the 1928 Manual concerning the usage of the service in determining the method of execution, that is, shooting or hanging, in death cases.

The final paragraph of 116a, page 127, is new and provides that:

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

It was inserted to emphasize the authority of a general court-martial to adjudge a bad conduct discharge.

Paragraph 116b, "Special and summary courts-martial", page 127. The first subparagraph has been changed by the addition of the phrases "Although a special court-martial may adjudge bad conduct discharge (A.W. 13)". Also added to that paragraph is a sentence which provides that the table of substitutions may be used as a guide in apportionment. Attention is particularly invited to the final sentence in that first paragraph of 116b which reads:

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

That provision recurs throughout this chapter because it is desired to emphasize that although the manual refers, in the Table of Maximum Punishments and elsewhere, to the adjudication of a bad conduct discharge and forfeiture of all pay and allowances due after the date of the order directing execution of the approved sentence, a special court-martial is limited, in adjudging a bad conduct discharge, to the adjudgment of a forfeiture of two-thirds pay per month for six months and to confinement at hard labor for six months.

In paragraph 116c, "Officers and Warrant Officers", page 128, the references to the Army Nurse Corps and aviation cadets have been deleted from the title and also from the discussion. The Army Nurse Corps has been incorporated in the Regular Army and aviation cadets are now subject to the jurisdiction of the Air Force.

Paragraph 116c contains the provision that: "Except as noted hereafter, an officer can not be reduced in grade." That exception refers to the authority to adjudge reduction to the lowest enlisted grade in lieu of dismissal in time of war and under such regulations as the President may prescribe. That paragraph also specifically provides that an officer can not be sentenced to bad conduct discharge. The final sentence of that first paragraph provides that the separation from the service of a warrant officer by sentence of a court-martial is effected by dishonorable discharge. Cases have been repeatedly received in this office wherein warrant officers have been sentenced to dismissal.

In the second subparagraph of 116c, page 128, the second sentence provides that in no case shall a sentence to confinement in the case of an officer or a warrant officer exceed the maximum prescribed for soldiers in the Table of Maximum Punishments. That new material is based upon a recommendation of the Under Secretary of War that the table be expanded to cover officers and enlisted persons alike. This change is made to comply with that recommendation without including officers under the provisions of the table proper.

The third subparagraph of 116c, page 128, contains the regulations under which an officer may be reduced to the lowest enlisted grade pursuant to Article 44. Those regulations provide that in time of war when compulsory induction laws are in effect an accused officer, if within the age limits for induction and otherwise qualified to serve as a soldier -- and by that is meant morally, mentally, physically, and otherwise qualified -- may be sentenced to be reduced to the lowest enlisted grade in lieu of dismissal, but that such reduction should be adjudged only when dismissal, without other punishment, would otherwise be adjudged by the court.

In paragraph 116d, "Enlisted persons; general prisoners", page 128, the language that previously read "enlisted men" has been changed to "enlisted persons". In this paragraph reference is now made to persons of other than the lowest enlisted grade, rather than to noncommissioned officers and privates first class. This change was made in order to eliminate the ever recurring problems occasioned by changes in Army Regulations concerning grade status titles. In the final sentence of the first paragraph of 116d it is provided that: "Reduction to an intermediate grade by sentence of court-martial is not authorized." Many cases wherein such a sentence has been adjudged are still being referred to this office.

Except for the new provisions pertaining to bad conduct discharge, the second paragraph of 116d is merely a paraphrase of the language contained in the 1928 Manual pertaining to appropriate punishments that may be adjudged in the case of a prisoner under a suspended sentence to dishonorable discharge, or in the case of a prisoner who has been separated from the service by dishonorable discharge.

Paragraph 116e, "Reprimand; admonition", page 129, is taken verbatim from the 1928 Manual.

With the exception that the first sentence of paragraph 116f, "Restriction to limits", page 129, is paraphrased, the material in that paragraph is also taken from the 1928 Manual.

Paragraph 116g, "Forfeiture, fines; detention of pay", page 129, has been considerably enlarged, primarily with material contained in Technical Manual 27-255. In the second sentence of the first subparagraph of 116g it is now provided that in determining the amount of a forfeiture or fine, particularly a large fine, the ability of the accused to pay should be considered. It was considered advisable to insert that provision as a guide to be used in determining the proper amount of a forfeiture or fine.

The third paragraph of 116g contains a sentence which reads:

"A general court-martial is not limited as to the amount of forfeiture it may adjudge, but in the case of an enlisted person it may not adjudge a forfeiture of more than two-thirds pay per month for twelve months" -- a change from the old provision of six months -- "unless it also sentences the accused to dishonorable or bad conduct discharge."

That change was predicated upon a recommendation submitted by the Under Secretary of War. A comparable change is also contained in paragraph 117b, "General limitations", page 131, wherein it is provided that:

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

"* * *

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

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

"* * *"

Reverting to the fourth paragraph of 116g, page 129, it is noted that this paragraph contains the following material taken from Technical Manual 27-255:

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

The next paragraph provides that all courts-martial shall have power to adjudge fines instead of forfeitures not only in those instances wherein fines are expressly authorized, but, subject to the limitations prescribed in the Table of Maximum Punishments, in all cases in which the applicable article of war authorizes punishment as a court-martial may direct. That material also is taken from the mentioned technical manual. This paragraph further contains new material which provides that:

"If a punishment is prescribed for an offense in the Table of Maximum Punishments, there is no authority for the imposition of a fine, either in addition to, or in lieu of, the prescribed punishment unless the case falls within the provisions of 'Permissible additional punishments.'"

In Section B, paragraph 117c, "Permissible additional punishments", pages 142-143, it is provided that a fine may be adjudged against any enlisted person, in lieu of forfeitures, for any offense listed in the Table of Maximum Punishments for which dishonorable discharge is authorized provided a dishonorable discharge is also adjudged in the case. That statement is qualified to some extent by the next sentence which reads:

"A fine should not ordinarily be adjudged against an officer, warrant officer, or enlisted person unless the accused was unjustly enriched by reason of an offense of which he is convicted involving loss to the United States or violative of military directives."

Those provisions were inserted as authority for the imposition of a fine in lieu of forfeitures in the case, for example, of embezzlement by a finance officer or in the case of black marketeering. With reference to the mentioned material pertaining to the imposition of a fine in lieu of forfeitures, it has been determined that a reasonable fine, not necessarily limited by the amount of the authorized forfeiture, would constitute a proper sentence in an appropriate case.

The fifth paragraph of 116g, page 130, also provides that in order to enforce collection a fine is usually accompanied in the sentence by a provision that the person fined shall be imprisoned until the fine is paid or until a fixed portion of time considered as an equivalent punishment has expired. See Appendix 9, forms 18 and 19.

Paragraph 116h, "Suspension from rank, command or duty", page 130. Sentences to loss of rank or promotion are no longer authorized because such sentences would be in conflict with the provisions of the Officer Personnel Act of 1947. Consequently, the provisions of the 1928 Manual pertaining to such sentences have been deleted from the material appearing here. The final sentence of 116h specifically provides that such sentences are not authorized. Otherwise, the material contained in 116h is the same as in the corresponding paragraph of the 1928 Manual.

Paragraph 116i, "Confinement at hard labor; hard labor", page 130. The material of the 1928 Manual has been expanded, primarily from material taken from Technical Manual 27-255. In the first paragraph it is provided that:

"Only under unusual circumstances should confinement at hard labor be adjudged against a soldier without a sentence to forfeiture or fine."

That change was made with the intention that it would protect the interests of an accused's dependents in appropriate cases such as the case of an enlisted accused who, having a large family, had allotted the bulk of his pay to family allowance.

Hard labor without confinement will be adjudged only in the cases of soldiers. That provision does not specifically appear in the 1928 Manual but it was deemed appropriate to clarify the problem in the new manual.

Referring to hard labor without confinement paragraph 116i provides that normally the immediate commanding officer of an accused will designate the amount and character of the work to be performed.

Paragraph 117, "Maximum Limits of Punishments", page 131. Paragraph 117a provides that the limitations prescribed in the Table of Maximum Punishments, although not binding upon courts sentencing officers, warrant officers, and civilians subject to military law, may, subject to two exceptions, be used as a guide in determining appropriate punishment for such persons. One of the two mentioned exceptions appears in paragraph 116c, to wit: in no case shall a sentence to confinement in the case of an officer or warrant officer exceed the maximum prescribed for soldiers in a comparable case. The other exception, which is contained in Section B, paragraph 117c, "Permissible additional punishments", page 143, pertains to the authority to adjudge a fine in cases of unjust enrichment. It also is now provided in 117a that the maximum authorized penalties will be applied insofar as applicable in the cases of enlisted prisoners of war.

Paragraph 117b, "General limitations", page 131. Here again appears the limitation that a special court-martial can not adjudge confinement in excess of six months or forfeitures in excess of two-thirds pay per month for six months.

The provisions of the next paragraph that a court shall not, by a single sentence which does not include dishonorable or bad conduct

discharge, adjudge forfeiture of pay in an amount greater than two-thirds thereof for twelve months or confinement at hard labor for a period greater than twelve months have already been indicated as having been made as the result of the recommendation of the Under Secretary of War.

The final sentence in 117b is a cross-reference to the material concerning pay that is subject to forfeiture.

In the first subparagraph of 117c, "Maximum Punishments", page 132, it is provided that the maximum punishment prescribed in the table should be restricted to those cases in which, due to aggravating circumstances, the greatest permissible punishment should, in the discretion of the court, be adjudged. That provision was inserted as a guide for the nonlegal officers who will be using the manual. That paragraph further provides that if an offense not listed in the table is included in an offense which is listed and is also closely related to some other listed offense, the lesser punishment prescribed for either the included or closely related offense will prevail as the maximum limit of punishment.

The next paragraph, page 132, provides that offenses not listed in the table of punishments, and not included within an offense listed or closely related to either, remain punishable as authorized by Title 18, United States Code, or by the Code of the District of Columbia, whichever prescribed punishment is the lesser, or as authorized by the custom of the service. The two last mentioned changes are predicated upon the established procedure of the Military Justice Division of this office.

In prescribing pay that is subject to forfeiture, the first paragraph on page 133 provides in part:

"In computing the maximum amount of forfeiture in dollars (see forms of sentences, App. 9) the base pay of the soldier (of the reduced grade if the sentence carries a reduction) plus pay for length of service (and overseas pay if no confinement is adjudged) will be taken as the basis."

That paragraph further provides that:

"Unless dishonorable or bad conduct discharge is adjudged the monthly contribution of a soldier to family allowance will be deducted in determining the amount of pay subject to forfeiture."

Both of the last quoted sentences are similar to material contained in Technical Manual 27-255, and were included in the manual to clarify problems concerning pay that is subject to forfeiture.

In the third paragraph on page 133 it is provided that bad conduct discharge may be adjudged upon conviction of any offense for which dishonorable discharge is authorized in the table, thus clarifying the authority of the court to adjudge this new type of discharge.

The final paragraph of text on page 133 provides that immediately upon a declaration of war subsequent to the effective date of this manual the prescribed limitations on punishment for violations of Articles 58, 59, 61, 64, and 86 will be automatically suspended and will not apply until the formal termination of such war or until restored by Executive order prior to such formal termination. That paragraph was inserted so that in the event of war the mentioned limitations will be automatically removed without any time lag occasioned by the issuance of a new Executive order as was the case in the last war.

The Table of Maximum Punishments, page 134, contains a new column pertaining to bad conduct discharge and forfeiture of all pay and allowances due after the date of the order directing the execution of the approved sentence. Approximately thirty-five new offenses have been included in the table, primarily under Article 96. The entries "Month" and "Day" in the forfeiture columns on pages 134 and 135 are typographical errors and should read, as they do throughout the balance of the table, "Months" and "Days". Similarly, it is noted that "Forfeiture" is misspelled in the right hand column on page 134. (The newly included offenses were then pointed out.)

The first two paragraphs of Section B, "Permissible additional punishments", page 142, have been changed to include the provisions concerning bad conduct discharge, so that now both dishonorable and bad conduct discharges are considered and bad conduct discharge is authorized therein. The final sentence of the first paragraph on page 143 is a cross reference to the material containing the limitation of a special court-martial to adjudge forfeiture of not more than two-thirds pay per month for a period not exceeding six months even though a bad conduct discharge is adjudged.

The provisions of the second paragraph on page 143, concerning the adjudication of a fine in lieu of forfeitures and the adjudication of a fine in cases of unjust enrichment, have previously been considered in the discussion of paragraph 117a concerning the use of the table as a guide in the determination of appropriate sentences for officers, warrant officers and civilians subject to military law.

The final paragraph on page 143 has been changed by the substitution of the term "soldier of other than the lowest enlisted grade" in place of the term "noncommissioned officer or a private, first class." The requirement of the 1928 Manual concerning confinement at hard labor for a period of more than 5 days has been deleted. In the case of conviction of a soldier of other than the lowest enlisted grade, the court, in its discretion, may adjudge reduction to the lowest enlisted grade in addition to the punishments otherwise authorized.

PUNISHMENTS (B)

Seminar Leader
Colonel Birney M. Van Benschoten

The items which will be mentioned this hour are to some extent repetitious, but it is believed that repetition of some of these remarks under the Punishments chapter is not undesirable. Several items in the chapter might cause difficulty or might possibly be misinterpreted. This discussion will include such items.

Article 16 now provides that

"No person subject to military law shall be confined with enemy prisoners or any other foreign nationals outside the continental limits of the United States."

That statement is repeated in paragraph 115 of the manual. Taken literally it could be reduced to absurdity. Some foreign nationals are subject to military law. The same persons may be members of two classes, the members of one of which, it would appear, may not be confined with members of the other class. Much consideration was given to the possibility of qualifying that in the manual. It was finally decided that the words of Congress could not well be qualified in the manual and that the common-sense interpretation of this provision must be left to commanders in the field. We must rely upon them to use their common sense and good judgment. Certainly no Federal court would require more. We believe that this phrase means, "No American soldier will be confined with enemy prisoners or with foreign nationals."

Yesterday the question was asked: "Can a soldier under a sentence which has not yet been approved be worked in a work detail with soldiers who are undergoing punishment?" Under the provisions of Article 16 a soldier cannot be punished, other than by confinement, prior to the time his sentence is approved by the reviewing authority. Prior to such time the accused cannot be required to perform work that constitutes punishment or put on any work detail with prisoners who are undergoing punishment. The interpretation is that such work in the same detail with prisoners who are undergoing punishment, who are working supposedly at hard labor, cannot properly be interpreted to be military duty - it is punishment if performed with prisoners who are undergoing punishment.

Q. Suppose there are two details, one detail with people having been sentenced and working at hard labor, and one detail with people

whose sentences have not been approved and detailed at, say, kitchen police?

A. Kitchen police detail is a military duty. Cutting the grass is another. Although the actual work done may be the same, if required to be done with prisoners being punished by hard labor it ceases to be a mere military duty and becomes punishment. It is perhaps a fine line of distinction, but we have to draw such lines at times.

Q. I'd like to ask about confinement with foreign nationals in the same prison?

A. Article of War 16 provides that persons subject to military law should not be confined with foreign nationals or with enemy prisoners outside the continental limits of the United States.

Q. Foreign nationals are the ones that I am interested in.

A. That caused considerable difficulty amongst us. If applied literally, it could be carried to absurdity, because some foreign nationals are subject to military law. Consideration was given to attempting to define that further - to qualify it further. It was decided that that should not be done in the manual because in attempting to qualify in words you are changing the Article of War. It must be interpreted with common sense and it was decided that officers in the field certainly will use common sense in doing that. I think that Congress meant simply that our soldiers will not be confined with enemy nationals.

Q. In the same cells and cell blocks?

A. Right.

Q. But in the same stockade?

A. If they are segregated, although in the same stockade, there is no objection. The purpose is to avoid their having to live together. We must depend upon officers in the field to use common sense.

Article 44 permits reduction of officers to the ranks in lieu of dismissal in time of war. The manual qualifies that. It is to be applied only if the accused comes within the age limits for induction into the Army at the time of the reduction, and only when dismissal would otherwise be the only sentence given. It is not to be coupled with confinement. The purpose, of course, is to avoid the hiatus that existed in some instances in the past war when an accused officer was dismissed from the service, came back to the States, earned good pay in a war plant for awhile, and eventually was inducted into the Army

as an enlisted man. When that may be expected to occur, reduction to the ranks is appropriate. If the accused has committed a heinous offense making his further service even as an enlisted man inappropriate he should be dismissed, not reduced to the ranks. Only when his offense is such that he can no longer properly serve as an officer but can properly serve as a soldier should he be reduced to the ranks.

A special court-martial has no jurisdiction to adjudge total forfeitures. An offense may carry as a possible maximum punishment bad conduct, discharge, forfeiture of all pay and allowances due after the date of the order, and perhaps a period of confinement. In such a case special court-martial can adjudge a bad conduct discharge, confinement up to six months, and forfeitures of two-thirds pay per month for a period not exceeding six months. It is appropriate for a special court-martial to adjudge forfeitures with a bad conduct discharge, particularly if it also adjudges confinement. It is believed that it should do so in the event of confinement because in many such cases the execution of the bad conduct discharge will be suspended pending termination of the period of confinement. It is perfectly appropriate for a special court-martial to adjudge bad conduct discharge, confinement for a period of six months, and forfeiture of two-thirds pay per month for a period of six months, even though the bad conduct discharge may be executed and the accused's pay status thus terminated. There is always the possibility that he may be left in a pay status for a period of six months.

A question was raised in one of the other hours concerning the date that forfeitures become effective. The amended Article 16 provides that no punishment can be imposed upon a soldier other than confinement prior, as the article reads, to the sentence. This office interprets that to mean prior to approval of the sentence. Forfeitures, therefore, will not begin until the date of the approval of the sentence. Under present regulations the accused is not in a pay status pending approval of the sentence. Those regulations will be changed to comply with this interpretation of Article 16. After 1 February 1949 the accused will be in a full pay status until the date the sentence is approved. His confinement begins as of the date the sentence was adjudged. By a gratuity, under existing regulations, the confinement period relates back to the date the sentence was adjudged. The forfeiture period does not relate back to the date the sentence was adjudged. Therefore the period of confinement and the period of forfeitures are not necessarily concurrent. Confinement for a term of six months may begin on the 1st of February, if that is the date a sentence is adjudged, and be completed on the 1st of August, disregarding deductions of time for good behavior. If the sentence is approved on the 1st of March, the forfeitures begin on the 1st of March, and if also adjudged for a period of six months they continue until the 1st

of September. The accused, being in a pay status throughout the month of February, would have a full month's pay available for collection upon his release from confinement. The total amount forfeited is, of course, not affected by the date forfeitures become effective. Unless the accused involves himself in a big crap game the night he is released from confinement he will have approximately the same amount for his use during the remaining month of reduced pay status as he would have had if he earned it during the month instead of during the month of confinement before the forfeiture became effective.

Q. I understood that forfeitures would begin, the sentence would begin at the date of the promulgation of the order. Now, you said that forfeitures begin at the date of the approval of the sentence.

A. The order of promulgation is normally dated the same date as the approval of the sentence.

Q. Which is it?

A. The date of the promulgation of the order. Is that not correct, Colonel Decker?

Lt. Col. Decker: The date of the promulgation of the order should be the date of the approval of the sentence.

Q. It should be, but sometimes it isn't.

Lt. Col. Decker: It becomes effective upon the official promulgation, but the promulgation should always be dated as of the date the sentence is approved. That, by the way, has been the standing practice.

Q. Yes, unless you get some order not to do it, like we have had.

Lt. Col. Decker: In any event, the effective date of the sentence is the date of promulgation of the order.

In this respect, this office, in an opinion (CSJAGJ 1948/9053) dated 3 June 1949, concurred in a revised draft of AR 35-2460, "Court-Martial Forfeitures - Enlisted Men", paragraphs 1b and 6e of which respectively provide:

"b. A forfeiture, fine or detention becomes legally effective on the date the sentence adjudging it is promulgated. Beginning with the day following the date of the order directing execution of the approved sentence the forfeiture will be charged against the enlisted person's account, the monthly rate of the forfeiture being prorated on a daily basis from the day after the date of the order directing execution of the approved sentence until the entire amount adjudged

has been satisfied or the enlisted person is separated from the service. See MCM, 1949, pars. 19a, 117c, and Appendix 9."

* * * * *

"e. Effective date. A sentence of dishonorable or bad conduct discharge and forfeitures of all pay and allowances becomes effective as to forfeiture on the day following the date of the order directing execution of the approved sentence. See MCM, 1949, pars. 19a, 116g, 117c, and Appendix 9."]

Colonel Van Benschoten: But the period of confinement, by a gratuity, relates back to the date the sentence was adjudged. That is the one exception to the rule that the sentence begins on the date the sentence was approved.

Q. Is there something in the manual where that can be tied down as to the date the sentence of confinement begins?

A. It is not in the manual. It is in regulations. Of course, those may be changed.

Q. You may as well know that we had a contrary expression on that, and we want that as clear as possible.

A. Under present regulations the confinement begins as of the date the sentence was adjudged. That is not a change from the present practice.

A bad conduct discharge can not be adjudged in the case of a warrant officer. A warrant officer can be discharged, as a result of a sentence by court-martial, only by a dishonorable discharge - an officer by dismissal, a warrant officer by dishonorable discharge, and an enlisted person by either dishonorable or bad conduct discharge. The warrant officer is still in a peculiar class.

As prescribed in paragraph 116c, confinement for officers is limited by the Table of Maximum Punishments. Other punishments are not so limited.

Confinement and forfeitures up to twelve months may now be adjudged without a punitive discharge - twelve months rather than six as prescribed in the 1928 Manual.

Paragraph 117c provides that a declaration of war automatically suspends the limits of the table as to Articles 58, 59, 61, 64, and 86. But this does not apply to the war that is now existing for some purposes.

Q. You consider this self-executing?

A. Yes, sir. It is self-executing upon the declaration of a new war. It is self-executing as to all of the listed articles. All of Article 61 is now included.

Statutory rape is listed in the Table of Maximum Punishments which authorizes a maximum confinement of fifteen years.

Wrongful taking and using a motor vehicle is listed - it is the last item in the Table of Maximum Punishments. Dishonorable discharge and confinement for two years are authorized.

There are two forms of specifications in Appendix 4, numbered 159 and 189, for alleging the wrongful taking and using of a motor vehicle. Number 159 is in the language of the Code of the District of Columbia which provides for penitentiary confinement. The same maximum punishment applies to both forms of specifications but the language of number 159 would authorize penitentiary confinement. Number 189 is the language of common parlance and would not authorize penitentiary confinement.

If a dishonorable discharge is adjudged, Section B, "Permissible additional punishments", provides that a fine may be adjudged in lieu of forfeitures. "In lieu of" does not mean that the fine is limited by the provision of the Table of Maximum Punishments concerning forfeitures.

APPELLATE REVIEW

Seminar Leader
Major Waldemar A. Solf

The scheduled conference for this hour concerns appellate review. It will be noticed that a new chapter on that subject is added in the new manual. It is written in very general terms and is calculated to give all who are interested an idea of just how appellate review functions, and should be a very useful thing to the staff judge advocate when the appointing authority calls him in and says, "Just what happens in these cases when they get out of this office?" He can then be referred to Chapter XXI.

First of all, it would be well to consider the changes in Article 48. Who is the confirming authority and what cases always require confirmation? The President is the only confirming authority in cases involving a death sentence or general officers. That does not involve a change from the old Article 48 except to the extent that the commander in the field, such as a theater commander, no longer has any confirming powers. The Judge Advocate General and a Judicial Council composed of three general officers of the Judge Advocate General's Corps constitute the confirming authority in all cases involving dismissal of an officer, reduction of an officer to the ranks pursuant to Article 44, and dismissal or suspension of a cadet, or imprisonment for life. All cases involving such sentences must be confirmed, and the confirming authority is The Judge Advocate General and the Judicial Council.

In cases of disagreement between the Judicial Council and The Judge Advocate General the cases are referred to the Secretary of the Army who becomes the confirming authority.

The Judicial Council may constitute the confirming authority in the type of case which was formerly called a "50½ case", and which we probably will now call a "50e case", that is, a case involving dishonorable or bad conduct discharge, whether suspended or not suspended, or confinement in the penitentiary. Under certain circumstances, a case of that nature may be referred to the Judicial Council for confirming action either by the Board of Review or by The Judge Advocate General. The Judicial Council will function as a confirming authority in such a case unless one of two things happens: (1) If The Judge Advocate General desires to participate in the case he must participate in the confirming action; (2) If the action of the Judicial Council is not unanimous, The Judge Advocate General will participate in the confirming action. In the latter case, if The Judge Advocate General disagrees with the majority of the Judicial Council the case is transmitted to the Secretary of the Army for confirmation.

There is a significant change concerning cases involving imprisonment for life. Such cases always require confirming action. In that connection it might be well to note that if a sentence of life imprisonment is adjudged and the appointing authority wishes to reduce it, he may disapprove a part of the sentence even though the case requires confirmation. However, he must be very careful to disapprove and not to remit or mitigate. Under Article 51 the power to remit or mitigate is vested only in certain authorities competent to order the sentence into execution and, since the case requires confirmation, the reviewing authority does not have the power to remit or mitigate that type of case. However, he may disapprove it in whole or in part. That action is incident to his power to approve under Article 47f. In drawing up any such action, be very careful that it is provided that "so much of the sentence to confinement as is in excess of ___ years is disapproved." A form for that action is set forth in Appendix 10 at paragraph b 3 together with a note of explanation why it should be done that way.

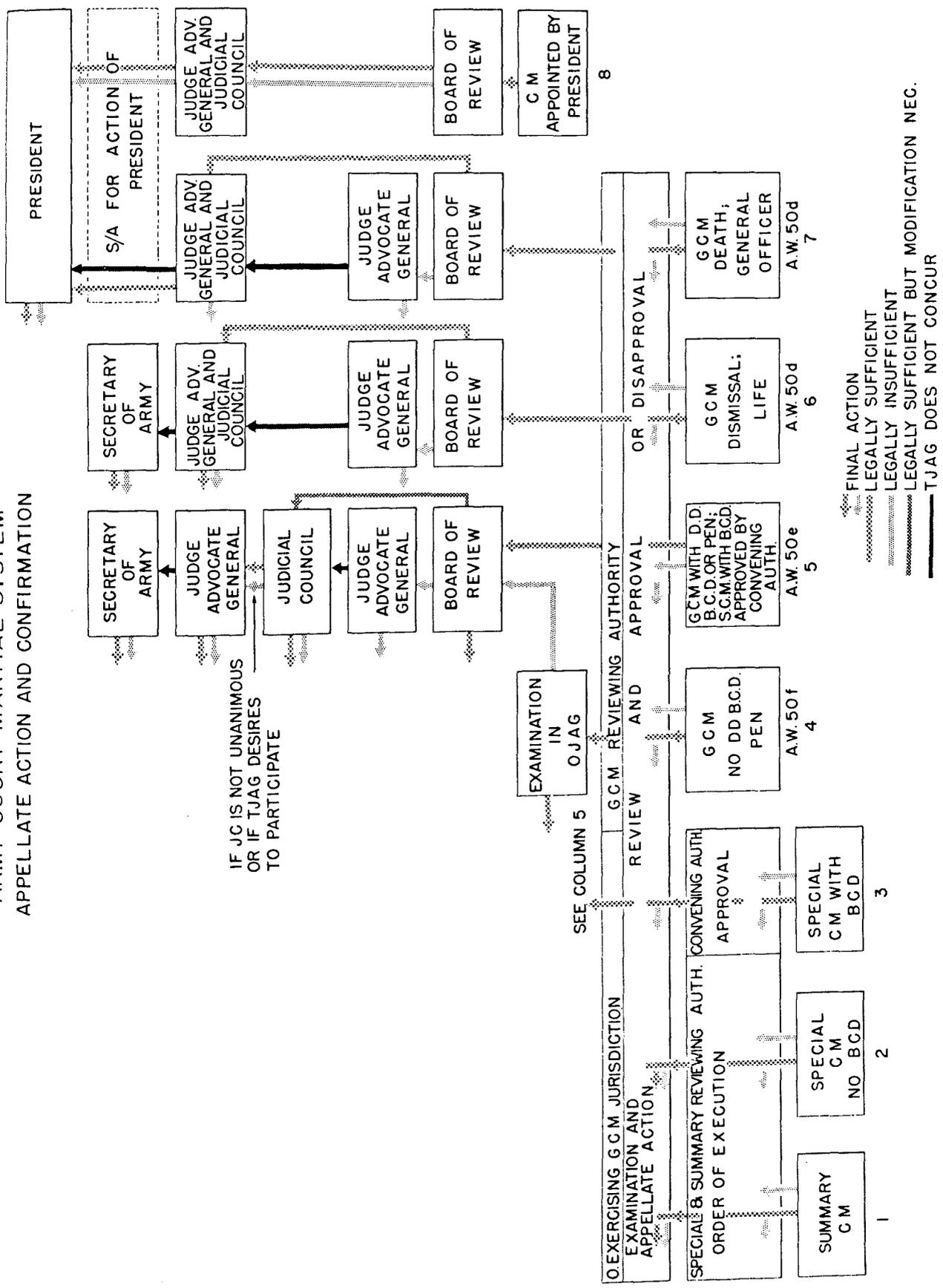
The orders involving cases which always require confirmation under Article 48, namely, death cases, cases involving general officers, life imprisonment cases, officer cases involving dismissal, and cadet cases involving dismissal or suspension will be promulgated by the Department of the Army. However, The Judge Advocate General may transmit any record of trial in which confirming action has been taken to the reviewing authority for the publication of necessary general or special court-martial orders or direction of a rehearing.

In other cases; the 50e cases, which may be subject to confirming action the orders may be published by the Department of the Army, or the record may be sent back to the field for action by the reviewing authority who is thereby afforded the opportunity of deciding whether he should order a rehearing in the event confirming action amounts to a disapproval. That is substantially the way it has been handled in the past.

Probably the best way to get a bird's eye picture of the appellate review system in the Army is by an inspection of the charts which have been prepared and distributed for this purpose.

It is to be noted that Article 50f prescribes the appellate procedure for a general court-martial case involving neither punitive discharge nor penitentiary confinement. If such a case is held legally sufficient by the staff judge advocate and is approved by the reviewing authority, the reviewing authority will publish an order and transmit the case to the Office of The Judge Advocate General. There it will be examined in the Examination Branch and if found legally insufficient it will be sent to a Board of Review to be processed in accordance with Article 50e.

ARMY COURT-MARTIAL SYSTEM
APPELLATE ACTION AND CONFIRMATION



FINAL ACTION
LEGALLY SUFFICIENT
LEGALLY INSUFFICIENT BUT MODIFICATION NEG.
TJAG DOES NOT CONCUR

APPELLATE REVIEW AND CONFIRMING ACTION

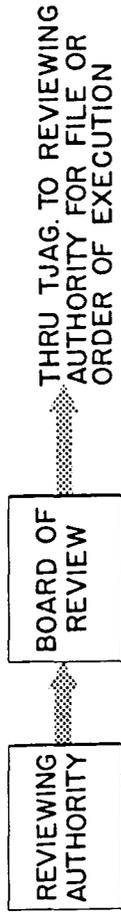
CHART-1

A. W. 50e CASES INVOLVING:

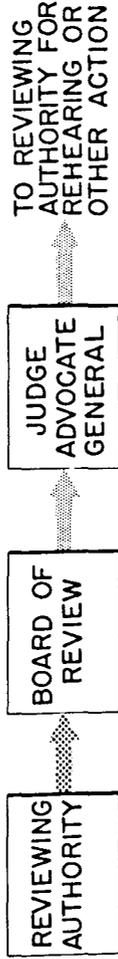
- (1) DISHONORABLE DISCHARGE
- (2) BAD CONDUCT DISCHARGE
- (3) PENITENTIARY CONFINEMENT

} 5531 IN FY 1948
96.69% OF TOTAL CASES
SUBJECT TO APPELLATE
REVIEW

A. CASES HELD LEGALLY SUFFICIENT BY BOARD OF REVIEW:



B. CASES HELD LEGALLY INSUFFICIENT IN WHOLE OR IN PART:



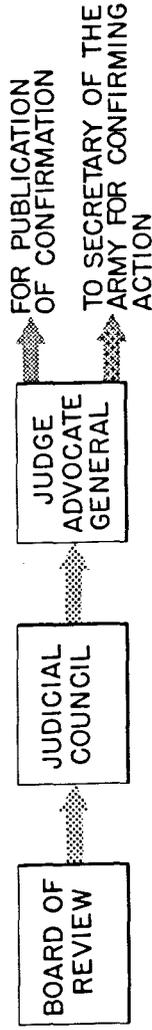
C. CONFIRMING ACTION:

CONFIRMING ACTION BY THE JUDICIAL COUNCIL MAY BE REQUIRED WHEN:

- (1) BOARD OF REVIEW DEEMS MODIFICATION OF SENTENCE NECESSARY
- (2) JUDGE ADVOCATE GENERAL DEEMS MODIFICATION OF SENTENCE NECESSARY
- (3) JUDGE ADVOCATE GENERAL DOES NOT CONCUR IN HOLDING OF BOARD

NOTE:

THE JUDGE ADVOCATE GENERAL PARTICIPATES IN THE CONFIRMING ACTION IF HE SO DIRECTS OR IF THE JUDICIAL COUNCIL IS NOT UNANIMOUS



- LEGALLY SUFFICIENT
- LEGALLY INSUFFICIENT
- TJAG CONCURS
- TJAG DOES NOT CONCUR

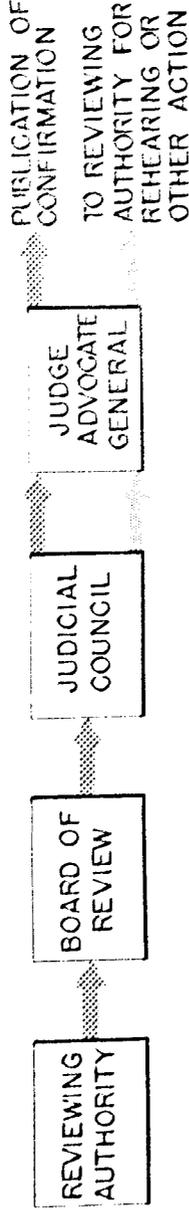
CONFIRMATION CASES INVOLVING:

- (1) IMPRISONMENT FOR LIFE 40 IN FY 1948
- (2) DISMISSAL OF AN OFFICER
OTHER THAN A GENERAL OFFICER 129 IN FY 1948
- (3) DISMISSAL OR SUSPENSION
OF A CADET 0 IN FY 1948

169 IN FY 1948

% 3 OF CASES SUBJECT
TO APPELLATE REVIEW

A. OPINION OF LEGAL SUFFICIENCY BY BOARD OF REVIEW AND CONFIRMING ACTION:



B. CASES HELD LEGALLY INSUFFICIENT BY BOARD OF REVIEW WITH CONCURRENCE OF THE JUDGE ADVOCATE GENERAL:



NOTE: IF THE JUDGE ADVOCATE GENERAL DOES NOT CONCUR IN HOLDING OF LEGAL INSUFFICIENCY HE TRANSMITS IT TO JUDICIAL COUNCIL. THENCE ACTION IS AS SHOWN IN A.

C. CASES WHERE THE JUDGE ADVOCATE GENERAL DOES NOT CONCUR IN THE DETERMINATION OF THE JUDICIAL COUNCIL:

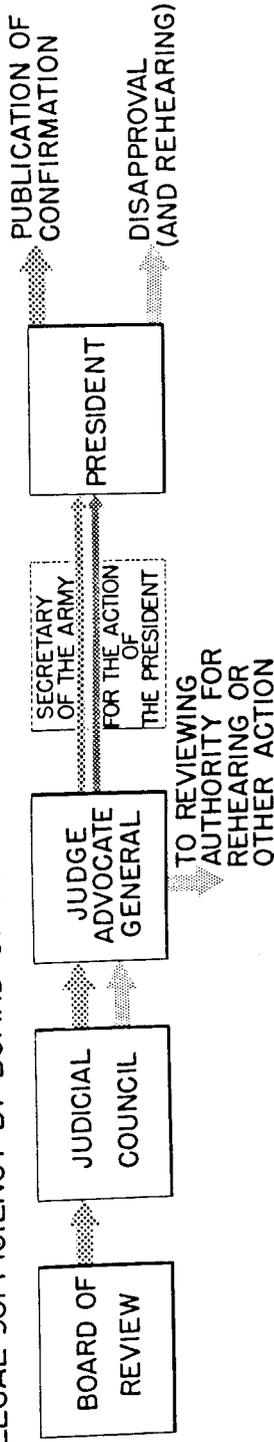


..... LEGALLY SUFFICIENT
 -.-.- LEGALLY INSUFFICIENT
 - - - - - NON CONCURRENCE

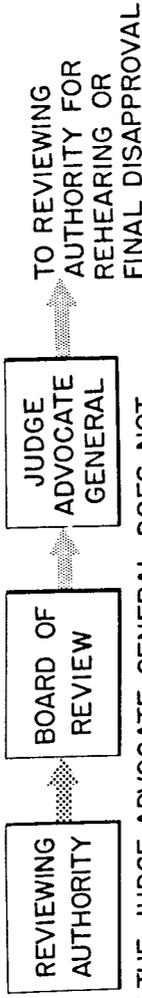
CASES REQUIRING PRESIDENTIAL CONFIRMATION

(1) DEATH SENTENCES 19 IN FY 1948 } 0.31% OF CASES SUBJECT TO APPELLATE REVIEW
 (2) GENERAL OFFICERS 0 IN FY 1948 }

A. OPINION OF LEGAL SUFFICIENCY BY BOARD OF REVIEW AND CONFIRMING ACTION



B. CASES HELD LEGALLY INSUFFICIENT BY BOARD OF REVIEW WITH CONCURRENCE OF THE JUDGE ADVOCATE GENERAL



NOTE: IF THE JUDGE ADVOCATE GENERAL DOES NOT CONCUR IN HOLDING OF LEGAL INSUFFICIENCY HE TRANSMITS CASE TO JUDICIAL COUNCIL. THENCE ACTION IS AS SHOWN IN A. ABOVE

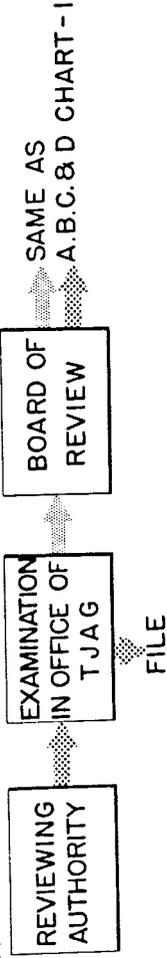
CHART-IV

SENTENCES OF COURTS CONVENED BY THE PRESIDENT 0 IN FY 1948



CHART-V

ALL OTHER GENERAL COURT MARTIAL CASES 1359 IN FY 1948



LEGALLY SUFFICIENT
 LEGALLY INSUFFICIENT
 NON CONCURRENCE

The 50^a cases consist of general courts-martial cases involving dishonorable discharge, bad conduct discharge or penitentiary confinement, or special court-martial cases involving bad conduct discharge. In such cases, if the execution of the punitive discharge is suspended, an order may be published in the field in the same manner as under the old procedure. However, the case is still subject to appellate review by the Board of Review. If the Board of Review holds the case legally sufficient it will transmit its holding through The Judge Advocate General to the reviewing authority for publication of necessary orders in the event the order of execution has been withheld, or for his information in the event he has already published an order.

In the event the case is held legally insufficient by the Board of Review the case is transmitted to The Judge Advocate General for his judicial action; if he concurs in the holding of legal insufficiency the case will be returned to the field for rehearing or such other action as may be appropriate.

That brings up the problem involving an apparent, but not real, conflict between Article 40 and Article 52. Article 40 forbids a second trial for the same offense, and defines the term "trial" by providing that no proceeding in which an accused has been found guilty by a court-martial shall be held to be a trial in the sense of Article 40 until the reviewing, and if there be one, the confirming authority shall have taken final action upon the case. The reviewing authority publishes his order at this time. Under the old practice, which was predicated on the language of Article 50¹/₂, that order constituted final action as far as the reviewing authority was concerned, and there could be no rehearing in that case. Under the new procedure neither the Board of Review nor The Judge Advocate General is a confirming authority in this type of case - actually there is no confirming authority therefor. However, under the present provisions of Articles 50 and 52 the order published by a reviewing authority does not constitute final action until the appellate review procedure has been completed. Consequently, there is no real conflict between Article 40 and Article 52, but upon a first reading and a reflection of the old practice there might appear to be a conflict.

To continue with the processing of this type case, assume that the Board of Review or The Judge Advocate General considers the case to be legally sufficient but that, in the interest of justice, some modification is necessary. Either the board or The Judge Advocate General may refer the case to the Judicial Council for confirming action. The mentioned modification may, perhaps, be in the form of commutation. Suppose, for example, that a fine of two thousand dollars has been adjudged against

a young officer in a case where it would be a real hardship if he were required to pay that two thousand dollar fine in one payment. In such a case it may be desired to commute the fine to a forfeiture. Only the confirming authority has the power to commute the sentence. In the case under consideration the Judicial Council is authorized to effect the commutation.

In the event that The Judge Advocate General should disagree with the holding of the Board of Review as to the legal sufficiency, the case will be referred to the Judicial Council for its action. The action of the council is final unless the decision is not unanimous or unless The Judge Advocate General has indicated that he desires to participate in the case. In either event the case is transmitted to The Judge Advocate General. If he agrees with the Judicial Council, that agreement constitutes the confirming action; if he does not agree with the Judicial Council the case is transmitted to the Secretary of the Army who takes the confirming action.

Next for consideration are those cases previously referred to as the "48 cases". Those cases involve dismissal of an officer or life imprisonment. Upon approval by the reviewing authority such a case is sent to the Board of Review. If held legally insufficient by the Board of Review and by The Judge Advocate General the case and the holding are returned to the reviewing authority for rehearing or other appropriate action. If the Board of Review holds the record legally sufficient, the case, instead of being forwarded to The Judge Advocate General, will be sent to the Judicial Council which, in conjunction with The Judge Advocate General, constitutes the confirming authority. In the event of a disagreement between The Judge Advocate General and the Judicial Council, the case is transmitted to the Secretary of the Army for confirmation.

The same procedure applies in a case involving a death sentence or a general officer. If the Board of Review holds the case legally insufficient the case is transmitted to The Judge Advocate General. In the event The Judge Advocate General concurs with the board the case is returned to the reviewing authority for rehearing or such other action as may be deemed appropriate. If the Board of Review holds the record legally sufficient it is transmitted to The Judge Advocate General and the Judicial Council. If they both concur that the case is legally insufficient the case will be returned to the reviewing authority. On the other hand, if they either disagree as to the legal sufficiency or concur as to legal sufficiency the case is transmitted to the President through the Secretary of the Army.

A case involving trial by a court appointed by the President must be referred to the President before final action is taken.

It is to be remembered that if a special court-martial case involves a bad conduct discharge adjudged by a court appointed by an officer who does not exercise general court-martial jurisdiction the case, in addition to being approved by the appointing authority, must be approved by the officer exercising general court-martial jurisdiction. Thereafter, the case will be processed in the same manner as 50e cases.

Q. Suppose a special court-martial adjudged a bad conduct discharge, the appointing authority approves it, it comes up to the officer exercising general court-martial jurisdiction who finds it legally insufficient? Is that final action taken down there? What happens, can we refer it back for retrial?

A. You can only refer it back for a rehearing if the officer exercising general court-martial jurisdiction disapproves the entire sentence. He may do that if he disapproves the entire sentence. If he disapproves only the bad conduct discharge the case is treated like any special court-martial case, just as an ordinary special court-martial case as in the past.

Q. Who issues the order on that?

A. The officer exercising general court-martial jurisdiction.

Q. He issues the order and passes it finally?

A. That is right.

Q. They don't correct the first order issued?

A. The appointing authority with special court-martial jurisdiction does not issue an order if a bad conduct discharge is approved.

Q. All he does is take an action?

A. He just takes an action. The regimental commander appointing a special court-martial does not issue an order if a bad conduct discharge is approved because he does not have the power to order the execution of the sentence; the officer exercising general court-martial jurisdiction will issue an order only if he suspends the execution of the sentence. Otherwise, he will withhold his action and forward it for appellate review. In general, even if approved, the order should be published by the officer exercising general court-martial jurisdiction. The form

therefor will be found in Appendix 11. It is, in general, similar to a general court-martial order except that the action of the convening authority is shown by the additional provision that the sentence was approved by the appointing authority on such and such a date. See form a (3) in Appendix 11 for that provision.

Q. Let's take the case of a soldier tried for desertion and given a sentence of three years. If the commanding general who is the reviewing authority wants to reduce that to one year he no longer remits it but says, "I disapprove all in excess of one year"?

A. No, he can go right ahead and remit. It is only in the case where there is a life sentence involved that he has to disapprove it.

Q. In any other case, can he do just like he is doing now?

A. Just exactly as he does now under the 1928 Manual.

Q. Now, the second proposition - if he suspends the dishonorable discharge does he publish the order?

A. He does.

Q. But will he still continue to publish an order if he should suspend the dishonorable discharge or would he publish an order at the time he approves the action in either case, whether he orders the dishonorable discharge executed or suspended?

A. Are you talking about the general court-martial jurisdiction?

Q. I am.

A. If he approves the dishonorable discharge he should do just as he does now under the 1928 Manual - withhold the order of execution and send the case up pursuant to Article 50a. If he suspends execution of the sentence he should publish his order.

Q. He wants to suspend the dishonorable discharge features of it.

A. If he wants to suspend the dishonorable or bad conduct discharge feature of it, or any feature which requires appellate review, he will publish the order suspending the execution of the sentence and send the record up just as he has done in the past, but the record will be treated differently when it reaches this office. Instead of being examined in the Examination Branch it will be examined by the Board of Review and subjected to the entire appellate review procedure.

Q. Is there anyone above that who could order the dishonorable discharge to be executed?

A. A dishonorable discharge can not be ordered executed until the appellate action has been taken; in other words, you can not vacate the order of suspension until this entire procedure under Article 50 has been completed.

Q. If the dishonorable discharge is approved by the reviewing authority, he then withholds the execution just like he does now?

A. That is right.

Q. If you have a suspended dishonorable discharge with the order published, and later a rehearing is held what do you do about getting the old order off the books?

A. It should be vacated by a general court-martial order in accordance with the action of the appellate agency which vacates the sentence. These orders will be published by the reviewing authority.

Q. Now, with reference to the life sentence of a general court-martial jurisdiction - all the reviewing authority does is approve the sentence and withhold execution like he does the dishonorable discharge now?

A. He should approve and forward it just as he would now in an officer dismissal case.

Major Davis: I would like to discuss some of the questions which were raised yesterday. With reference to the power of the reviewing authority in a case where a bad conduct discharge has been adjudged it was asked whether the officer exercising general court-martial jurisdiction orders a rehearing if he finds a defect in the proceedings? Article 52 provides, in part, that when any reviewing or confirming authority disapproves a sentence he may authorize or direct a rehearing. Paragraph 89 of the new manual provides, in pertinent part, that a rehearing may not be ordered by an authority empowered to take that action if, upon taking his final action, he approves part of the sentence. Conversely, a rehearing may be directed if the reviewing authority disapproves the whole sentence.

It is not believed that the question covered the case where the sentence did not include bad conduct discharge. I assume, Major Solf, that there has been no change in the law on that; in other words, if the sentence has been ordered executed, a rehearing will not be directed even though a defect is discovered later as to the sentence of a special court-martial.

Major Solf: Yes, I think you are right there. I think that provision only covers appellate review.

Major Davis: Article 52 contains terms concerning the disapproval of a sentence by a reviewing or confirming authority. In a case where the sentence does not include a bad conduct discharge the officer exercising general court-martial jurisdiction is not a reviewing authority in the sense of Article 52.

Major Solf: That is right.

PETITION FOR NEW TRIAL

Seminar Leader
Colonel Birney M. Van Benschoten

Article 53 is, of course, entirely new. It is discussed in paragraphs 101 and 102, pages 108 to 110, of the 1949 Manual. The article provides that The Judge Advocate General in his discretion and under regulations made by the President - and paragraphs 101 and 102 of the manual are the regulations - may, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review, grant a new trial, vacate any sentence, restore rights, privileges, property, and substitute an administrative separation from the service for a dismissal, dishonorable discharge, or bad conduct discharge previously executed. Disposition upon initial appellate review is completed when all action required under Article 50 and any confirmation required by Article 48 are completed. The appellate review contemplated by the article is the appellate review provided by Articles 50 and 48. That is stated in the middle of paragraph 101.

No appellate review is provided for summary court-martial cases or for special court-martial cases unless a bad conduct discharge has been approved by the reviewing authority. Therefore, Article 53 applies only to general court-martial cases and to special court-martial cases in which bad conduct discharge has been approved. By the phrase "any court-martial case", the article means any general court-martial case, or any special court-martial case in which bad conduct discharge has been approved. The review of summary and special court-martial records by a staff judge advocate of a general court-martial jurisdiction, required by paragraph 91 of the manual, is not appellate review within the meaning of this article.

The time limitation within which application must be made is one year after final disposition upon initial appellate review or within one year after final termination of World War II as to cases which arose during World War II, whichever is the later. That means that all World War II general court-martial cases come within the article, and application may be made at any time before the completion of one year after official termination of the war - and the termination of the war has not yet occurred. Anyone who was convicted and sentenced by general court-martial during the past war and up to the present time may still make application under the new Article 53 at any time until the end of one year after termination of the war, or one year after completion of initial appellate review if that is later.

The question arose in our discussions as to whether The Judge Advocate General should be required to notify the accused of the date of final disposition of his case upon initial appellate review because there may be instances in which he will not have that information. The order promulgating the sentence may occur at an earlier date. It was decided that The Judge Advocate General should not have that obligation. There is no need for him to start any proceedings under this article. It is not part of the appellate review procedure. Article 53 sets up a peculiar and unusual remedy for special circumstances, and the volition must be that of the accused to start the procedure operating. If he wants to know the date of final disposition of his case - the beginning of the one year period - he may write and ask. He will be answered, but he is not given that information automatically.

Cases in which death sentences have been adjudged and confirmed by the President caused much concern. Consideration was given to the possible inappropriateness of giving The Judge Advocate General power to change the results of a sentence that has been confirmed by his commanding officer, the President. Extended research was required into that subject to determine whether the President, by the regulations mentioned in the 53rd Article of War, could take away from The Judge Advocate General's jurisdiction cases in which he, the President, has confirmed the sentences. The determination was that the President has no power to reduce the jurisdiction given to The Judge Advocate General by the Congress. That jurisdiction is absolute and can be changed only by the Congress. The Judge Advocate General has the power under Article 53 to consider any case properly brought before him; and the President, in these paragraphs of the manual, does not attempt to reduce that jurisdiction - to take away from it cases confirmed by the President.

The most objectionable kind of cases within that group, however, have been avoided by the definition of "good cause". Only upon good cause shown may The Judge Advocate General grant a remedy. The last sentence of paragraph 101, page 108 of the manual, reads:

"In cases in which sentences have been confirmed by the President pursuant to Article 48, matters relating to issues of alleged error or injustice which were before the President at the time of confirmation will not, in the absence of newly discovered evidence bearing upon such issues, establish sufficient cause for relief under Article 53."

Matters relating to issues that were before the President at the time of confirmation and determined by him will not establish good cause for relief unless something new is brought in that was not before the President - some newly discovered evidence. It was decided that that does not prejudice the accused in any respect and leaves the statutory

discretion of The Judge Advocate General unimpaired.

Good cause must be established before The Judge Advocate General is authorized to act. The second subparagraph of 101 provides:

"Good cause for granting a new trial, for vacation of a sentence, or for other remedy, shall be deemed to exist only if within the discretion of The Judge Advocate General all the facts and information before him, including the record of trial, the petition and other matter presented by the accused, affirmatively establish that an injustice has resulted from the findings or sentence."

The burden rests upon the accused to establish affirmatively that an injustice has resulted from the findings or sentence. The Judge Advocate General in making his determination may consider anything without limitation. He may use his discretion.

The petition must be that of the accused. The Judge Advocate General is given jurisdiction upon application of the accused. A petition cannot, therefore, be submitted after the death of the accused. It cannot be his application after his death.

The petition must be in writing. Paragraph 102 prescribes the form. It must be in writing and it must be under oath or affirmation by the accused, or by a person possessing the power of attorney of the accused for this purpose, or by a person possessing the authorization of a court of law to sign the petition as representative of the accused. The latter provision covers cases of incompetency or insanity. A petition can still be presented on behalf of the accused if presented by a representative authorized by a court of law to do so. The language is general - a court of law. It may be a foreign court, if it is a court which possesses jurisdiction to authorize a person to represent the accused. The authority must be shown to The Judge Advocate General. He must be satisfied that the person signing or presenting the petition on behalf of the accused is authorized in one of these manners: (1) by the accused's power of attorney or (2) by a court of law to represent the accused and to present this particular petition.

The reason for tying that down so tightly is that the accused is given an opportunity to invoke Article 53 only once; the article provides that only one application will be considered as to each case. It means, of course, as to each accused for each case. Only one petition will be considered, and The Judge Advocate General wants to know that this request before him is the petition. He wants to avoid embarrassment for himself and possible prejudice to the accused resulting from a letter from Senator Jones saying:

"Willie Smith's mother told me about Willie's case, in which he was charged and convicted of rape, and that although the girl consented submission of evidence of her consent was not permitted in court. Please take this up under Article 53. Although initial appellate review has long since been completed, you have power to do it under 53. Please remedy this injustice."

That is not an application under Article 53, and will not be considered. The Judge Advocate General now may rely upon the Executive order to answer Senator Jones and very politely say he will be happy to consider an application, but it must be an application meeting requirements of Chapter XXII of the manual, because "I must know that this is the one application of the accused." He has only one chance. He cannot try again. It is desired to eliminate the possibility of the accused saying, "That was not my application; I am presenting my application now."

The petition may be submitted by the accused or his counsel or representative whether he is still in the service or has been separated. Separation from the service is immaterial. Paragraph 102 provides that insofar as practicable certain information will be in the petition. That is a guide. It would be appreciated if you would impress upon any persons who may inquire concerning the initiation of procedure under Article 53 that the form should be followed. The Judge Advocate General will no doubt be lenient in considering petitions that are not typewritten and in which the lines are not double spaced, but the form set forth in paragraph 102 is an attempt to lead applicants to use the most desirable form, setting forth name, serial number, date of trial, remedy sought, sentence finally approved or confirmed, statement of any later clemency, description of findings or sentence deemed unjust and full statement of the fact, ruling, or error relied upon as good cause for the remedy sought.

The petition should be accompanied by the affidavit of every witness the accused would expect to use upon a new trial. Hearings upon evidence will not be granted by The Judge Advocate General. Evidence must be presented in written form, preferably by affidavit.

Paragraph 102 provides that:

"Upon written request and within his discretion The Judge Advocate General may allow oral argument upon a petition."

It is not contemplated that such hearings will be freely granted but he may in his discretion grant such hearings before himself or before an officer or officers designated by him.

It is contemplated that a separate division will be set up in the office to handle matters under Article 53, and that any hearings of oral argument will be before officers in that division designated by The Judge Advocate General for the purpose. They will report to him, with no powers of decision themselves. The power granted by the article is to The Judge Advocate General. Much consideration was given to setting up a particular board of officers, with a title, for the purpose of hearing such arguments, and to the appointment of counsel for the Government. It was decided not to do that by Executive order in the manual. The desire was to avoid tying The Judge Advocate General to a particular procedure until it is seen how many cases there will be and how the article will work.

The Judge Advocate General may prescribe his own rules of procedure. He is not tied by the Executive order. The Executive order does provide that he may make or cause to be made any further investigation he deems necessary or desirable or may secure or cause to be secured any additional evidence. He can provide investigators on behalf of the Government, on behalf of the accused, and on behalf of himself.

The question was raised in another conference whether the accused is entitled to military counsel in proceedings under Article 53. No, there is no provision for that. This is not part of his trial or part of his appellate procedure. It is a particular special remedy given to him which he must operate on his own hook. Any counsel must be secured by him. If a new trial is granted, he will then be entitled to military counsel as in any trial by court-martial.

The officer to appoint the court in any new trial granted by The Judge Advocate General will be an officer possessing power to appoint an appropriate court-martial and who is designated for that purpose by The Judge Advocate General.

Delay in the execution of a sentence to permit an application under the article is not required. Paragraph 102 provides that specifically for the protection of commanders. The presentation of a petition does not operate to stay execution. In many State and Federal statutes providing for appeals, the presentation of an appeal automatically stays execution of the sentence. In the rules for the Federal courts approved by Congress, such a stay is provided. Congress did not so provide in Article 53, and the Executive order does not so provide. It provides, on the contrary, that presentation of a petition does not stay execution. Commanders are expected to use common sense and good judgment. The exigencies of the military service do not exist in civilian life. They create a different situation, and there are times when the stay of an execution would be most detrimental to the service.

The requirement of a stay has, therefore, been carefully avoided. Under most circumstances, a death sentence should not be carried out pending completion of any application the accused may have made or may be about to make under Article 53; but there may be occasions when the exigencies of the service require that the death sentence be executed, and there is nothing in the act and nothing in the Executive order of the manual that requires such a stay. Whether a stay of execution should be granted rests within the good judgment and sound common sense of commanders.

Q. Can this application be amended after he has filed it?

A. Oh yes, there is nothing to prevent that.

Q. The requirement of form is sworn affidavits, but if he should later discover there were other witnesses he wanted to present, could he send them in?

A. The Judge Advocate General would undoubtedly be lenient in such a situation; but if all action has been completed on that accused's application he can not then start over again. Until it is completed, The Judge Advocate General may be expected to be very lenient.

Q. To what extent do you think the subordinate commanders like the division commanders will have much concern or connection with this particular Article of War 53?

A. I expect they will be concerned only to the extent that persons ask them what can be done to help soldiers who have been convicted by courts-martial.

Q. When a new trial has been granted, is it subject to all the same procedures?

A. Yes, the trial will follow the manual procedure for any court-martial.

Q. Only one new trial- can't later call for a new trial to that trial, can they?

A. Yes. That is another case. I see no reason why the accused can not use Article 53 again as to that case. He could not use it again as to the first case, but he can use it as to the case resulting from the new trial. Some injustice may be done in that trial that would be a basis for remedy under Article 53.

Q. Does that limitation that the retrial can't result in a greater penalty than the first one apply in 53?

A. Yes, indeed, sir. That would apply in any case. You cannot increase the penalty. That, I believe, would be a constitutional requirement.

Q. In other words, the rules for rehearing would be the same on a new trial?

A. Substantially so, yes sir.

Q. I am bothered with the question of double jeopardy.

A. There is no problem of double jeopardy. The accused has been convicted. He is simply getting a new trial as he might get in a civil court after a conviction. There is no double jeopardy. Of course, if the accused has been acquitted, Article 53 has no application as to any offense for which he was acquitted. It is applicable only to offenses of which he was convicted.

DISCIPLINARY POWER OF COMMANDING OFFICER

Seminar Leader
Major Waldemar A. Solf

The next topic for discussion concerns the disciplinary power of a commanding officer under Article 104. Paragraph 118, which deals with the authority and policy and effect of errors, contains no substantial change. It follows almost verbatim the language of the introductory paragraph of Article 104.

Paragraph 119a, which deals with authorized punishments, has been changed. First, with reference to enlisted persons other than noncommissioned officers, there is no substantial change except the clarification which was effected by the article itself, namely: that any combination of the authorized punishments may be imposed as disciplinary punishment. There is a further provision that punishment may be imposed only for seven consecutive calendar days, or as the article puts it, "for not exceeding one week from the date imposed."

Paragraph 119b deals with noncommissioned officers. In addition to the old requirement that they will not be subjected to hard labor or degrading punishment, it is now provided that extra fatigue is no longer an authorized punishment for them. This provision may, in some cases, work a difficulty on companies consisting of highly rated specialists but the over-all policy of attempting to increase the morale and bolster the prestige of noncommissioned officers will be benefited, it is believed, by this provision.

Paragraph 119c contains a substantial change with respect to officers. It will be recalled that in the past officers of the grade of major and above were not, under any circumstances, subject to forfeitures under the 104th Article of War, and that under prescribed circumstances company grade officers were subject to forfeitures of not more than one-half of one month's pay. The new article provides that any officer exercising general court-martial jurisdiction may impose a forfeiture upon a warrant officer or a commissioned officer of his command below the grade of brigadier general of not more than one-half of his pay, not including allowances, per month for three months. This punishment against any officer applies in wartime or in peace. A form of letter imposing such punishment on a lieutenant colonel is set out in Appendix 15, page 379.

Q. What is the effective date of that?

A. For offenses committed after the 1st of February 1949. That is clearly stated in the Executive order. The increase of the punishment for any offense committed prior to 1 February 1949 is not

authorized under any provision of this manual.

Paragraph 119d deals with the execution of the punishment and provides, as did the old paragraph 106, that the accused's immediate commanding officer has the duty to supervise the execution of the punishment regardless of who imposed it. The old paragraph 106 also provided that the immediate commanding officer was authorized to suspend the execution of the sentence. It appeared to be a bit anomalous, though, to have a battalion commander suspend the execution of a forfeiture imposed by the division commander upon a lieutenant in the battalion. Consequently, paragraph 122 now provides that the officer who imposed the punishment, his successor in command, any higher authority, and any officer exercising general court-martial jurisdiction over the command which includes the accused may suspend, remit or mitigate any unexecuted portion of the punishment. The latter provision, namely, that any officer exercising general court-martial jurisdiction over a command which includes the accused may suspend, mitigate or remit the unexecuted portion of the punishment covers the situation which occurs when an officer is transferred from one command to another and it is deemed appropriate to suspend the execution of a part of the punishment.

A minor procedural change has been made in paragraph 120. It is now provided therein that the commander, in advising the accused that he intends to impose punishment, should, in addition to the customary warning statements of his right to demand trial, advise the accused that he may submit such matters as he desires in mitigation, extenuation or defense. That is a practical recognition of the fact that an accused may feel that although he really is not guilty of the offense charged he still does not wish to stand trial. Under such circumstances he may desire to bring to the attention of the commanding officer matters in extenuation or defense. Occasionally, however, such a procedure could result in the accused making a statement which might be self-incriminating. In such a case where there is any danger of that result, and usually in the case of any enlisted person, the advice that he may offer evidence in defense or extenuation should be coupled with a warning of his right against self-incrimination under the 24th Article of War. Notice that the paragraph provides that such warning should be given "in appropriate cases".

Q. Where does this warning of the 24th Article of War come in that you mentioned?

A. Assume that the company commander, in advising a soldier that he is about to impose punishment, says, "You may tell me of any matter that you wish to offer in mitigation, extenuation or defense." At the same time it is believed to be advisable that he advise the soldier, "You are not required to make any statement, and any statement you make

may be used against you in a trial by court-martial" because accused might say, "Well, Captain, I wasn't really absent without leave. I was off with somebody else and we decided to rob a bank." A more serious offense is indicated by that statement and it probably will be decided to try the individual. In case of such a trial and in the event that he had not been so warned of his rights the accused would, of course, raise the fact that his statement was not voluntary.

Q. Going back to 119 concerning the combination of punishments-- has there been any discussion about the matter that was raised before about combining seven days restriction to specified limits and extra fatigue for those seven days?

A. The statute, I believe, is clear on that.

Q. Is that prohibited?

A. The statute provides that:

"The disciplinary punishments authorized by this article may include admonition or reprimand, or the withholding of privileges, or extra fatigue, or restriction to certain specified limits, or hard labor without confinement or any combination of such punishments for not exceeding one week from the date imposed."

The combination provision means that the sentence may include both restriction and extra fatigue at the same time.

With reference to the combination of authorized punishments, General Hoover, in his testimony before the House Subcommittee during the hearings on H.R. 2575, stated in part:

"We also changed the wording (of Article 104) slightly to make it clear that the various punishments such as admonition, reprimand, withholding of privileges, extra fatigue, or restriction may be combined in any one case. We have had some difficulty in interpreting this article to permit more than one of these forms of punishment. Since they are not of severe character in any case, it is thought desirable that any combination of them may be used."

Those remarks are clear evidence of the Congressional intent.

Q. Can you give three and one-half days of two of those punishments to run for three and one-half days and it will all be over in three and one-half days?

A. Certainly if you want to. You can give it for seven days.

Q. You can give all of them?

A. You can give all of them for seven days.

Q. Can you combine all of them?

A. It is difficult to see how it is possible to combine extra fatigue and hard labor. It is difficult to distinguish between the two, anyway. In so far as it is possible you can combine them.

With reference to the question whether the punishment may be deferred - it can not legally be deferred. It must begin on the date after the sentence. It can not run for more than seven consecutive calendar days under any circumstances. Supposing the punishment is imposed in the evening of a certain day. Of course, it starts to run the next day anyway, but you can not defer the effective date of the punishment because the statute provides a limitation of "not exceeding one week from the date imposed."

One other point concerns the question whether noncommissioned officers may be punished under the 104th Article of War by a sentence requiring supervision of extra fatigue. In the first place that is not one of the authorized punishments. It is the supervision of a military duty and should not be imposed as punishment. A sentence adjudging extra fatigue is expressly forbidden in the case of noncommissioned officers. Although noncommissioned officers may be administratively required to perform extra fatigue they may not be required to perform it as a punishment.

INSANITY

Seminar Leader
Major Paul A. Robblee

The general topic of insanity covers a very large field. It is here proposed to invite attention to the few changes that are contained in the new chapter on insanity. The chapter is XXV, on page 121 of the manual. At the suggestion of General Hoover, consideration was given to the consolidation of all the matters concerning insanity in one chapter. That chapter contains the substance of paragraphs 35c, 41d, 63, 75, and 78 of the 1938 Manual. It is primarily a revision of the general subject of insanity. There are, however, a few additions which are inserted by way of explanation and amplification only.

Paragraph 110 is concerned primarily with a general consideration of insanity and contains definitions and explanations of the meaning of the terms "lack of mental responsibility" and "lack of mental capacity". It is therein stated that a person is not mentally responsible in a criminal sense for an offense unless at the time of the offense he was so far free from mental defect, disease, or derangement as to be able concerning the act charged both to distinguish right from wrong and to adhere to the right. On that question, see CM 244490, Peaca, 28 BR 309, and CM 271889, Barbera, 46 BR 275.

As to mental capacity at the time of the trial, it is provided that no accused person should be brought to trial unless he has sufficient capacity to understand the nature of the proceedings against him and to intelligently conduct or cooperate in his defense. The following will be found in the last two sentences of paragraph 110b and did not appear in the 1928 Manual:

"The phrase 'mental defect, disease, or derangement' comprehends those irrational states of mind which are the result of deterioration, destruction or malfunction of the mental, as distinguished from moral, faculties. Thus a mere defect of character, will power, or behavior, as manifested by one or more offenses or otherwise does not necessarily indicate insanity, even though it may demonstrate a diminution, or impairment in ability to adhere to the right in respect to the act charged."

In this connection, reference is again made to the Barbera case and particularly to The Judge Advocate General's 1st Indorsement to that case.

Also, in this connection, attention is invited to Clark and Marshal on Crimes, 4th Edition, paragraph 87, wherein it is stated that:

"Whenever irresistible impulse is relied on as a defense, care must be taken to distinguish between insane irresistible impulse, that is irresistible impulse resulting from disease of the mind, and mere moral perversion and passion. The expression moral insanity is often used, but, strictly speaking, it is not insanity at all. It is merely a perverted or abnormal condition of the moral system where the mind is sound. It is well settled that there is no exemption from responsibility merely because of moral insanity or because of ungovernable passion sometimes called emotional insanity."

The last two sentences in paragraph 110b of the manual were inserted because of the fact that recently there has been an increasing number of cases wherein the defense has attempted to prove so-called "moral insanity".

Paragraph 111 is a combination of paragraph 35c of the 1928 Manual and paragraph 39 of Technical Manual 27-255 and prescribes the procedure to be followed in the event that prior to trial it appears to the commanding officer considering disposition of charges, the investigating officer, trial judge advocate, or defense counsel that there is reason to believe that the accused is insane. There is no particular change in procedure involved in this paragraph.

Paragraph 112a incorporates the essential elements of paragraph 78a of the 1928 Manual concerning reasonable doubt. In addition, it points out that the burden of establishing mental responsibility is always on the prosecution but that the presumption of sanity usually provides the necessary proof until a reasonable doubt appears from all the evidence. In this connection, see CM 314876, Rollinson, 64 BR 23; CM 294675, Minnick, CM ETO 12855.

Paragraph 112a also provides:

"Although the issue of insanity is usually raised by the defense by producing evidence of mental irresponsibility or lack of capacity, it is the duty of the court to call for evidence on this matter whenever there is reasonable indication that such inquiry is warranted."

Paragraph 112b is in substantially the same form as paragraph 63 of the 1928 Manual. The paragraph provides that when it appears that

accused may be insane,

"A request, suggestion, or motion that inquiry be had may be made by any member of the court, prosecution, or defense. The law member may rule, subject to objection by any member of the court and final determination by the court, as to whether an inquiry should be made."

This provision is authorized by Article 31. If an inquiry is decided upon and it is determined that the accused is not mentally responsible, the court will enter a finding of not guilty as to the proper charge and specification. If the court finds the accused mentally responsible for his acts but at the time of trial lacking requisite mental capacity, it will record such findings. In both cases the proceedings will be forwarded to the appointing authority.

Paragraph 112c pertains to evidence. The purpose of this paragraph is to point out that there is nothing unusual about evidence concerning the sanity of the accused. Properly qualified lay testimony is admissible although expert opinion may be entitled to greater weight. Such entries on the original signed report of a board of medical officers or any other medical record as pertain to entries of facts which are properly admissible under the official record or business entry exceptions to the hearsay rule may be received in evidence. Opinions, as to the mental condition of the accused, contained in the report of a board of medical officers may be introduced provided the officers who made the report are available for examination as witnesses by the prosecution, defense, or the court. Documentary supporting data is not admissible. Of course, the entire report may be received by stipulation.

In connection with paragraph 112c it is deemed advisable to cite the following cases: *New York Life Insurance Company vs Taylor*, 147 Federal 2nd, 297; CM 329968, Mowell and Otwell, 78 BR 233; CM 323197, Abney, 72 BR 149; and *Hadley vs Ross*, 54 Pacific, 2nd, 933.

The *New York Life Insurance Company vs Taylor* case is the authority for the foregoing rule stated in the manual. In this case the court said in part:

"The opinions as to mental condition of the accused contained in the report of a board of medical officers may be received in evidence, provided the officers making such report are made available for examination as witnesses by the prosecution, defense, or the court."

Paragraph 113 concerns the effect of mental impairment or deficiency on the sentence and provides, in effect, that when

FUNCTIONS OF THE STAFF JUDGE ADVOCATE

Seminar Leader
Major Joseph L. Brack

The changes in the amended Articles of War and in the manual which will now be considered deal particularly with two phases of the staff judge advocate's duties. The first phase deals with his functions prior to referral of charges for trial by general court-martial, and the second deals with his functions in connection with the record of trial prior to final action by the reviewing authority.

Under the new Articles of War these functions are predicated upon the requirements prescribed in Article 47, sections (b) and (c), and upon the provisions of the manual contained in paragraphs 35b and 87b, respectively.

Turning first to Article 47, on page 286, titled "Action by Convening Authority.", subparagraph (b) "Reference for trial.", it is therein provided that:

"Before directing the trial of any charge by general court-martial the convening authority will refer it to his staff judge advocate for consideration and advice; and no charge will be referred to a general court-martial for trial unless it has been found that a thorough and impartial investigation thereof has been made as prescribed in the preceding article, that such charge is legally sufficient to allege an offense under these articles, and is sustained by evidence indicated in the report of investigation."

The first requirement stated in that provision was formerly contained in Article 70 and constituted the sum and substance of the requirement pertaining to the function of the staff judge advocate in regard to the charges prior to their reference for trial. The balance of that provision was added in the recent revision of the articles and is the specific matter which is to be noted as it affects the functions of the staff judge advocate. Actually, this new matter imposes no additional functions upon the staff judge advocate in this respect. His advice to the appointing authority regarding the sufficiency of the charges and of the evidence to support the charges always had, as a matter of practice, included consideration of the requirements which are now expressly prescribed in Article 47(b). However, his opinion as to the sufficiency or insufficiency of the charges in this regard was not necessarily conclusive or binding upon the appointing authority. In other

words, if the appointing authority did not concur in the opinion and recommendation of his staff judge advocate he was not bound to follow such recommendation and could, notwithstanding the advice of the staff judge advocate, direct trial on the charges. Such a procedure was permissible under paragraph 35h of the 1928 Manual because it merely provided that:

"No appointing authority shall direct the trial of any charge by general court-martial until he has considered the advice of his staff judge advocate based on all the information relating to the case, * * *".

Consequently, after he had considered the advice of his staff judge advocate the requirements of that provision and of Article 70 were satisfied and the appointing authority was then at liberty to take such action on the charges as he deemed appropriate. In this respect the recommendations of the staff judge advocate were purely advisory. By virtue of the amendment in Article 47(b), which requires that no charge will be referred to a general court for trial unless the prerequisites therein stated were complied with, the discretionary powers of the convening authority are substantially curtailed in this respect and the findings of the staff judge advocate, i. e., his advice and recommended action, assume greater influence, force and effect.

Although Article 47(b) does not expressly or directly confer upon the staff judge advocate the function of making the prescribed findings, it is quite obvious and only reasonable to infer that such being a legal function it necessarily devolves upon the staff judge advocate. Accordingly, paragraph 35h, on page 32, which implements Article 47(b), so construes this provision as indicated in the third subparagraph which provides that the advice of the staff judge advocate shall include a written and signed statement as to his findings concerning the requirements prescribed in Article 47(b), and shall further include a signed recommendation of the action to be taken by the appointing authority. Such recommendation must accompany the charges if they are referred to trial.

Concerning the second phase of the staff judge advocate's function turn to Article 47 on page 286. Section (c) thereof deals with the action of the convening authority on the record of trial. This section supercedes the provision formerly contained in Article 46 and prescribes two new requirements.

The first requirement, as it affects the functions of the staff judge advocate, provides that a record of trial by special court-martial in which a bad conduct discharge has been adjudged and approved by the authority appointing the court must be referred to

the staff judge advocate for review and advice. This requirement is a corollary to Article 13 which vests jurisdiction in a special court-martial to adjudge a bad conduct discharge subject to approval of the sentence by an officer exercising general court-martial jurisdiction and subject to appellate review by The Judge Advocate General and appellate agencies in his office.

The second requirement introduces two limitations on the reviewing authority's action in approving the sentence. Prior to its amendment Article 46 merely provided that no sentence of a court-martial shall be carried into execution until it had been approved by the officer appointing the court. This provision is restated, in substance, in Article 47(d). Neither the old Article 46 nor paragraph 87b of the 1928 Manual precluded the reviewing authority from approving a sentence notwithstanding the opinion of his staff judge advocate as to the legal sufficiency of the record to support it, the only requirements thereunder being that before taking action on the record he was to refer it to his staff judge advocate for review and advice and that before the sentence was executed it had to be approved by him. Consequently, the power of the reviewing authority to approve or to order execution of a sentence was unrestricted and he could accept or ignore the opinion of his staff judge advocate as he saw fit. Article 47(c) now limits the discretionary power of the reviewing authority in this respect by the prohibition that no sentence shall be approved unless upon conviction established beyond reasonable doubt, and unless the record of trial has been found legally sufficient to support it. Thus, the effect of this new requirement is to lend greater influence to the findings and recommendations of the staff judge advocate. Paragraph 87b, page 93, which implements Article 47(c), accordingly provides that when a reviewing authority is in disagreement with his staff judge advocate as to whether a conviction of an offense is established beyond reasonable doubt he should transmit the record, with his and the staff judge advocate's views, to The Judge Advocate General for advice.

PROBLEMS ARISING DURING TRANSITIONAL PERIOD

Seminar Leader
Colonel Birney M. Van Benschoten

Considering, for a moment, problems of the period of change over from the old Articles of War to the amended Articles of War and from the old manual to the new manual, attention is invited to Title II of the Selective Service Act of 1948 (Public Law 759, 80th Congress). Section 245 thereof provides:

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

The last proviso of Executive Order 10020, 7 December 1948, provides that the maximum punishment for an offense committed prior to 1 February 1949 shall not exceed the applicable limit in effect at the time of the commission of such offense. That is obvious to a lawyer; it is constitutional. Similarly, that Executive order further provides in pertinent part:

"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"

Again the basis is constitutional.

As to offenses committed before 1 February, conviction for which and approval of sentence for which does not occur until after 1 February, the lesser of the two penalties provided by the old articles and manual or by the amended articles and new manual should be considered the maximum. As to offenses committed before 1 February, if the sentence is not approved until after 1 February, the lesser of the two maxima should be deemed the maximum.

The first proviso in the Executive order reads:

"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"

Legally, therefore, an investigation completed before 1 February is sufficient. If I were the staff judge advocate of a command in which an investigation were completed before 1 February and trial was not had until after 1 February, and the investigation did not comply with the requirements of the new article and the new manual - as, for example, if the accused was not given an opportunity to be represented by counsel - I should avoid any possible objection by sending the charges back for another investigation to comply with the new requirements. The Executive order provides the investigation is legally sufficient. But if I were the staff judge advocate, I believe I would avoid the possibility of the question by having another investigation. This period of changeover will be brief and there should be little need for leaving any such matter open even to unsupportable objection in the civilian courts.

It is urgently recommended that you use every effort to clean up any trials that have started before 1 February. If you think some will not be completed before 1 February, wait until after that date to arraign the accused. Do not have any cases in the process of trial if you can possibly avoid it. The Executive order provides that any step begun before 1 February may be completed in accordance with the old manual; but it is urgently recommended that you use every effort to avoid the possibility of any question being raised on that point.

There is one exception that should be noted to the statement that the lesser of the two maxima should be considered the maximum for an offense committed before 1 February. On page 133 of the manual there is a note listing the Executive orders which at the beginning of the war suspended the Table of Maximum Punishments as to Articles of War 58, 59, part of 61, and 86. It lists the subsequent Executive orders terminating those suspensions. The Executive order of 19 January 1946, which terminated the suspension of limitations on those articles as to offenses committed after 19 January 1946, unless committed in occupied enemy territory, and the subsequent order terminating all suspensions, saved the suspension of the maximum as to offenses committed before that date, during the period of hostilities. You will recall that this saving clause is directed primarily toward wartime desertion. The last sentence in that note reads:

"Nothing contained in this manual or the order of its promulgation is to be construed as altering the effect of the foregoing Executive orders."

The suspension of the maximum as to wartime desertion committed during hostilities remains in effect. The new manual does not alter that.

Offenses committed within those articles during that period of hostilities before 19 January 1949 remain wartime offenses for which the Table of Maximum Punishments is suspended, even though tried after 1 February. As to all other offenses, the lesser of the two tables of maximum punishments should be applied.

Do not try officers by special courts-martial for offenses committed before 1 February. It is probable that the new act would be ex post facto as to that situation. Do not send charges to a special court-martial with a reporter for offenses committed before 1 February for which a bad conduct discharge may now be adjudged. The amended articles would probably be ex post facto as to that situation also. These are temporary situations that will last but a short period of time.

It is the view of this office that enlisted persons should not be tried by special courts-martial, with a reporter present and acting, for offenses committed prior to 1 February 1949. Enlisted persons should not be given a bad conduct discharge by special courts-martial for offenses committed prior to 1 February 1949. One way to indicate that a bad conduct discharge is not to be adjudged in the case is to provide in the written indorsement that the case will be tried without a reporter.

In a case where the offense is committed prior to 1 February and the trial is conducted subsequent to 1 February, an enlisted accused who has duly requested enlisted members on the court is entitled to have such members serve on the court for the trial of his case.

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