
**ANALYSIS OF CONTENTS
MANUAL FOR
COURTS-MARTIAL, UNITED STATES
1969, REVISED EDITION**



**HEADQUARTERS, DEPARTMENT OF THE ARMY
JULY 1970**

PREFACE

This analysis of contents contains paragraph by paragraph analysis of the changes made in the Manual for Courts-Martial 1969 and the subsequent changes in the Manual for Courts-Martial 1969 (Revised edition).

This analysis, therefore, replaces the unofficial draft analysis of contents, Manual for Courts-Manual United States 1968, and the draft analysis of contents for the 1969 revised edition, both of which were printed in limited quantities and distributed on a special pin point distribution basis in 1968 and 1969. This combined analysis of content does not purport to be an official publication, but is merely an unofficial aid for determining the thoughts of the drafters of both manuals concerning the meaning and effect of the changes.

A. MCM, 1969

HISTORY. On 7 December 1965, the Judge Advocates General of the Army, Navy, and Air Force agreed to appoint a working group to prepare a draft of a new Manual for Courts-Martial. The mission assigned this group was to make necessary and desirable revisions occasioned by decisions of the Court of Military Appeals and other established and applicable Federal authority as needed to clarify areas where the services had experienced difficulty or which might be difficult for line officers to understand in performing their judicial and administrative functions. Appointed to this working group as senior representatives of the services were Colonel Bruce C. Babbitt of the United States Army, Captain Carlton F. Alm of the United States Navy, and Colonel Harry Ehrlich of the United States Air Force. The Army agreed to assume the administrative responsibility for the preparation and staffing of this proposed draft. Accordingly, Lieutenant Colonel George O. Taylor, Jr. and Major Matthew B. O'Donnell, Jr. were detailed to assist the committee as advisors and administrators. In July 1966, Major O'Donnell was reassigned and replaced by Major Jack G. McKay who assisted the working group for almost eleven months.

The first meeting of the working group took place on 27 December 1965. The procedure followed by the working group was to forward the proposed changes to the Judge Advocates General by individual chapters. After consideration of informal comments on these chapters, they were again presented for the approval of the Judge Advocates General. Thereafter, the Judge Advocates General approved each chapter and appendix individually. When these approvals included reservations they were considered and disposed of by the working group. Subsequently, the textual material was prepared in final form and staffed as an Executive Order for signature of the President of the United States.

During the preparation of this pamphlet, the working group received suggestions, assistance, and contributions from numerous sources. It is impossible to acknowledge all of these many sources. However, it is felt appropriate to express particular appreciation to those that made the most significant contributions. These contributors were The Judge Advocate's General School, United States Army; Colonel V. Homer Drissel, United States Army; Captain Murl A. Larkin, United States Navy; Colonel Myron L. Birnbaum, United States Air Force; and Lieutenant Colonel William P. Tyson Jr., United States Army. Special appreciation is expressed to Colonel Gilbert G. Ackroyd, United States Army. Colonel Ackroyd submitted a proposed draft for Chapter XXVII, Rules of Evidence, which reflected a tremendous amount of work and which significantly eased the burden of the working group. The majority of this chapter as finally agreed upon was taken from Colonel Ackroyd's draft.

SCOPE AND FORMAT. This analysis discusses the changes from the 1951 Manual which were made in this pamphlet by commenting on each chapter and appendix individually. It was compiled by the administrators provided the working group by the Army from notes made by these officers during the course of the group discussions.

The particular paragraphs or subparagraphs of the Manual which are discussed herein are usually designated on the left of each page. Unnumbered paragraphs of the Manual within numbered paragraphs or subparagraphs are referred to as "paragraphs," for example, "See the second paragraph of 73c(1)." A citation such as 73c(1) without further identification refers to a subparagraph in the text of the Manual itself.

GENERAL CHANGES. Numerous minor editorial changes have been made which are not discussed individually in this analysis. Some of these were made for grammatical reasons. Others were made in order to make the language and terminology of the Manual conform with the language and terminology used in the *Uniform Code of Military Justice* as codified in 1956 and the definitions contained in 10 U.S.C. § 101 (1964). For example, when appropriate, "enlisted person" was changed to "enlisted member," "appointed" was changed to "detailed," "appointing" was changed to "convening," and the use of "officer," "commissioned officer," or "warrant officer" was modified to conform with 10 U.S.C. § 101(14)-(16) (1964).

DEFINITIONS. All readers of the Manual should be aware of the meanings usually intended by certain terms which are used throughout. These are set out below.

“Secretary concerned” includes the Secretaries as listed in 10 U.S.C. § 101(8) (1964). See 5a.

“Secretary of a Department” includes the various Secretaries included in the definition of “Secretary concerned” plus the Secretary of Defense.

“Open session” means a session at which the military judge and/or court members, counsel, and the accused, and, if any, reporters are present. Of course, when appropriate, a witness, interpreter, or other party assisting the court may also be present.

“Closed session” means a session at which only the court members are present.

“Open court” means that spectators are permitted.

“Closed court” means that spectators are excluded.

“Out of the presence of the court members” or “out of the hearing of the court members” refers to an out-of-court hearing or in-court conference as appropriate in the situation involved. See appendix 8a.

B. MCM, 1969 (Rev.)

HISTORY. On 11 September 1968, the President promulgated Executive Order No. 11430, the Manual for Courts-Martial, United States, 1969 to be effective 1 January 1969. Six weeks later, on 24 October 1968, he signed the Military Justice Act into law. Except for two provisions which were effective immediately, the Act went into effect on 1 August 1969. The Manual for Courts-Martial 1969 had to be revised prior to that date to implement the Act. The revised manual was titled Manual for Courts-Martial, United States, 1969, Revised edition.

The Department of Defense, by a memorandum signed by the Deputy Secretary of Defense on 16 October 1968, designated the Secretary of the Army as Executive Agent for DOD with overall responsibility for preparing and staffing within the Executive Branch an Executive Order amending the Manual to conform to the new Act which the President was expected to sign shortly. The memorandum stated that the proposed Executive Order would be submitted to the Secretary of Defense no later than 15 February 1969.

By memorandum dated 21 October 1968, the Secretary of the Army delegated his authority as Executive Agent for DOD to the Judge Advocate General of the Army and specifically authorized formation of an Ad Hoc Joint Department of Defense Committee for the accomplishment of this mission.

The Judge Advocate General determined that an *ad hoc* committee was the most effective way to draft the proposed Executive Order and such a committee was formed during the week of 21-25 October 1968.

The Army members were—

Col Dale R. Booth—USA Judiciary, Chairman
LTC James A. Mounts—Military Justice Div., OTJAG
Maj Philip Suarez—Asst. Exec., OTJAG

The Navy members were—

Capt Charles McDowell—Admin. Law Div., OJAG
Cdr Walter Andry—Mil. Justice Div., OJAG
Lt Homer E. Moyer—Mil. Justice Div., OJAG

The Air Force members were—

Col Carl Goldschlager—Chairman B/R OTJAG AF
LTC Jean Morris—Mil. Justice Div., OTJAG AF
Maj Frank Moniz—Appellate Gov't Div., OTJAG AF

SCOPE. The revision of the Manual for Courts-Martial, United States, 1969 was confined, with exception of the input of the Standing Committee, to changes required by the "Military Justice Act of 1968." Numerous minor editorial changes required by the Act and a few grammatical changes have been made which are not discussed individually in this analysis. The term "Law Officer" has been replaced by "Military Judge" wherever it appears in the text of the January Manual. "Convening" has been replaced by "Assembling" when referring to the formal commencement of proceedings after the gathering of the court whether the court includes members or the military judge alone. "Court Members" has replaced "Court" when appropriate to emphasize the duality of the court composed of members and military judge. The term "court" has been used when referring to the court composed of the military judge alone in recognition of his new and expanded role, although its use in the generic sense has been retained when that meaning of the term is evident from the context. The Committee found no acceptable abbreviation or "key" that would distinguish the special court-martial with a military judge detailed from the special court-martial composed of members only. It was necessary to add the words "without a military judge" to "special courts-martial" to distinguish between these two types of special courts-martial.

In addition, a Standing Committee was appointed within the various services to keep the manual updated and to provide necessary input to the Ad Hoc Committee which was beyond the scope of the Military Justice Act itself. This committee was composed of—

John C. Wasson, Colonel, USAF.

William J. Chilcoat, Colonel, JAGC, USA.

Joseph E. Ross, Captain, JAGC, USN.

Myron G. Sugarman, Captain, JAGC, USA, Recorder.

The Committee provided draft changes to paragraphs *75d*, *76b(1)*, *140b* *144d*, *145b*, *145c*, *149b(1)*, *153a*, *153b(1)*, of the MCM, 1969 (Rev.).

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 DEPARTMENT OF THE ARMY
 WASHINGTON, D. C., 28 July 1970

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CHAPTER 1
MILITARY JURISDICTION

Paragraph
2

Exercise. In the first sentence, “within its territory or a portion thereof” was substituted for “of a locality” as martial law, by definition, can be exercised only in domestic territory.

CHAPTER 2

CLASSIFICATION—COMPOSITION OF COURTS-MARTIAL

Paragraph

4a

General. Recognizes that general and special courts may be constituted of the Military Judge (MJ) alone subject to the requirements of Art. 16. As changed, it no longer relates only to the number of members so that title and position of the paragraph was changed from “*b. Number of Members.*” to “*a. General.*” A request for trial by the MJ alone will normally be made after a case has been referred to a court composed of an MJ and members. Art. 16 allows an accused to request trial by the MJ alone up to assembly of the court, and Art. 18 requires that a capital case be referred as non-capital before an MJ alone has jurisdiction to try it. Thus, the articles contemplate that the accused will decide whether he wishes to request trial by the MJ alone after referral, at which time he may compare trial by the MJ alone with trial by that MJ and members. This is the most orderly procedure for processing requests for trial by the MJ alone since referral to a specified court constitutes proof for the record that the accused knew the identity of the MJ prior to making his request and avoids the possible appearance of improper pressure upon the accused to request trial by the MJ alone.

4b

Who may serve as members. This paragraph deals with eligibility of members of the armed forces to serve on courts-martial. It was formerly designated 4a. See notes to 4a.

In the third sentence of the first paragraph, “who is not a member of the same unit as the accused” was inserted to conform with Art. 25(c)(1). It is provided that an enlisted accused may request enlisted members on the court-martial at any time prior to assembly even though Art. 25(c)(1) provides that the right of an enlisted accused to request enlisted members may lapse at the “conclusion of a session called by the military judge under . . . Art. 39(a) prior to trial.” The right to request trial by the Military Judge alone is not lost until assembly of the court, so the accused has the right to request enlisted members up to that time. Requests for enlisted members are rare and the position taken in the manual will not substantially increase administrative burdens.

In the first sentence of the third paragraph, “or other” was added after “new.” This covers situations where the original proceedings were declared invalid for lack of jurisdiction or for failure to allege an offense. See 92b.

In the fourth paragraph, the definition of “a unit” of the Marine Corps is new. In the first sentence of the fifth paragraph, “suspension from rank” was deleted as a reason for being ineligible to sit as a member of a court-martial. “Suspension from rank” was deleted as a punishment. See comments on 126i.

4c

Rank of members. No substantive changes were made. However, the paragraphing was changed, and the last sentence of the second paragraph is a transposition of the second paragraph in MCM, 1951.

Paragraph

4d *Qualification of members.* The second paragraph, which suggested the detail of a lawyer as a member of a special court-martial in complicated cases, was deleted to avoid placing presidential approval on a practice that led to difficulties in the past. See *United States v. Sears*, 6 USCMA 661, 20 CMR 377 (1956). In appropriate cases an MJ should be detailed to the court.

4e *Military Judge of a court-martial.* This paragraph was changed to provide for MJ detailed to SPCM as well as GCM. It also incorporates the expanded designation and qualification provisions of amended Art. 26.

In the second sentence of the last paragraph, after "a rehearing (92a) or a new trial (109, 110)," the words, "or other (92b) trial", were added. See comments to 4a and paragraph 92b.

4f The term "general court-martial" was deleted from the first sentence since an MJ may be detailed to a special as well as a general court-martial.

4g(1) *Detail of Military Judges and members from other armed forces—General policy.* The first and second sentences were transposed. The first sentence now allows a convening authority to detail as military judge any qualified officer who is available to him, not just qualified officers under his command.

In the second sentence "ordinarily are" was substituted for "should be" to prevent the establishment of a policy that members of a court-martial be of the same armed force as the accused. In the third sentence, "when" was substituted for "whenever it is necessary to convene" to avoid this limitation in the detailing of members to a court-martial who are not of the same armed force as the accused.

The effect of this change with changes in 4g(2), discussed below, is that the detail of members of armed forces different from that of the accused is at the discretion of the convening authority when he is properly authorized to utilize them, except for the limitation provided when they would constitute a majority.

4g(2) *Joint command or joint task force.* This title was substituted for "Appointment of members and law officers from within a joint command or joint task force," and this subparagraph was reworded so that the convening authorities to whom it applies may detail as members of a court-martial persons who are available to them as well as members of their commands. The former second sentence was deleted to avoid possible conflict with 4g(1).

Consideration was given to substituting "joint force" for "joint command." This substitution was not made as the terms "joint command," and "joint task force," are used in a generic sense and the term "joint command" includes a "joint force." "Joint command" is not defined in the Dictionary of United States Army Terms, Army Regulation 320-5 (23 April 1965), as changed by Change No. 2 (1 Feb 1966), or in the Dictionary of United States Military Terms for Joint Usage, JCS Pub. 1 (1 Jan 1966). However, the term "joint force" is presently defined in each at page 220 and page 103, respectively, as follows:

A general term applied to a force which is composed of significant elements of the Army, the Navy or the Marine Corps and the Air Force, or any two of these Services, operating under a single com-

Paragraph

mander authorized to exercise unified command or operational control over such joint forces. This essentially is the sense in which "joint command" is used.

4g(3)

All other Convening Authorities. This title was substituted for "Appointment from commands of other armed forces." The requirement of concurrence of the Judge Advocates General concerned was substituted for concurrences of the Secretaries concerned. The example of a Navy law specialist being appointed as law officer in the trial of an airman was deleted because under 4g(1) this can now be accomplished without the secretarial authorization. This subparagraph was specifically made subject to 4g(1).

CHAPTER 3

COURTS-MARTIAL

Paragraph

5a

Convening authorities. In subparagraph (1) the definition of “Secretary concerned” was added.

In the second sentence of subparagraph (3), “who is superior in rank of that accuser or, if in the same chain of command, who is superior in command to that accuser” was inserted. Therefore, “another competent convening authority” must be senior in rank to the accuser if they are not in the same chain of command, but only senior in command if they are in the same chain of command. See *United States v. La Grange*, 1 USCMA 342, 3 CMR 76 (1952) where it was held that an officer junior to the accuser and one not in normal chain of command did not have authority to appoint the court-martial because of Article 22(b). In *United States v. Haygood*, 12 USCMA 481, 482, 31 CMR 67, 68 (1961), the Court wrote in reference to the words “superior competent authority” in Article 22(b) as follows: “. . . we leave for future resolution the question whether that phrase embraces only those officers who are senior in both rank and command.”

In subparagraph (5), the addition of the exception to the general rule against delegation was inserted as Article 140 permits the President to delegate any authority vested in him under the Code.

5b

Special courts-martial. In subparagraph (1), the first sentence was reworded and made to include “any other commanding officer empowered by the Secretary concerned” as a person who can convene a special court-martial. In the second sentence, “Coast Guard” was deleted as the Coast Guard does not now have an “officer in charge of a command” who may convene a special court-martial.

5c

Summary courts-martial. Changes analogous to those in 5b(1) were made.

6a

Detail of trial counsel, defense counsel, assistants in general. The second and third sentences of the first paragraph are new. The second requires detailed counsel to be commissioned officers. See *United States v. Long*, 5 USCMA 572, 18 CMR 196 (1955); *United States v. Goodson*, 1 USCMA 298, 3 CMR 32 (1952). The third sentence points out that the accused may be represented by individual counsel.

The last paragraph was reworded, and its application broadened to allow any convening authority to detail as counsel any qualified officer regardless of armed force with the concurrence of the appropriate commanding officer. This sentence had applied only to commanding officers of joint commands or joint task forces, and limited them to their own commands when detailing an officer of another armed force as counsel.

6b

Qualification of counsel of general courts-martial. In the second paragraph, the definition of a “judge advocate of the Army” and a “judge

Paragraph

advocate of the Air Force” was changed to conform with the language in 10 U.S.C. § 3072 (1964) and 10 U.S.C. § 8067(g) (1964), respectively. The definition of a “Judge Advocate of the Navy” was added pursuant to PL 90-179, 10 U.S.C. 5148.

6c

Qualification of counsel of Special Courts-Martial. This paragraph incorporates the counsel requirements of Art. 27. An accused must be offered representation by counsel qualified in the sense of Art. 27 (b) prior to trial. There is no requirement that this offer be made prior to the issuance of the convening order. Non-lawyer counsel may be detailed initially and qualified counsel subsequently added in the event the accused accepts the offer of such counsel. Conversely, qualified counsel may be detailed, and if the accused declines representation by qualified counsel, such counsel need not be present at trial, subject to the restrictions of 15b and 61f.

The “physical conditions or military exigencies” exception has been narrowly defined (1) to implement Congressional intent and (2) to conform it with the analogous provision of 4c. The discussion of “physical conditions or military exigencies” parallels that given to the same phrase in paragraph 4c of the MCM, 1969 with the additional requirement that the convening authority explain why trial had to be held at that time and place. The legislative history of 4c was considered in drafting this paragraph of the Manual. See page 8, Senate report. The statement that counsel could not be obtained must be made prior to trial and appended to the record of trial as an appellate exhibit. This prevents unnecessary delay and realistically implements Congressional intent.

The third sentence of the third paragraph is new and provides that if the assistant trial counsel has legal qualifications, the assistant defense counsel must have equal qualifications.

6d

Qualification of assistant trial counsel and assistant defense counsel. The paragraph was generally rewritten. The second and third sentences of the first paragraph of MCM, 1951 were deleted in view of the changes in 45 and 47 concerning the duties of assistant trial counsel and assistant defense counsel. This removes the implication that an assistant counsel who is a non-lawyer can participate in a trial by general court-martial if the principal counsel is present.

In the second paragraph, words were deleted which limited the inquiry into the qualifications of individual defense counsel to those cases in which the accused did not desire the services of the regularly detailed counsel, as this inquiry should also be made when the accused desires the services of the regularly detailed defense counsel.

7

Detail or employment of reporters and interpreters. The last sentence of the first paragraph is new, and provides that no person may act as reporter or interpreter in any case in which he is an accuser. *United States v. Martinez*, 11 USCMA 224, 29 CMR 40 (1960); *United States v. Moeller*, 8 USCMA 275, 24 CMR 85 (1957).

As to the oath for the reporter, the specific reference to 114 was changed to Chapter XXII generally in view of the complete statutory change as to oaths found in the amended Art. 42(a).

CHAPTER 4

JURISDICTION OF COURTS-MARTIAL

Paragraph

8 *Sources, nature, and requisites.* The third paragraph, which dealt with the scope of review of courts-martial by civil courts, was deleted as inappropriate; also it was probably dated by *Burns v. Wilson*, 346 U.S. 137 (1953). See paragraph 108.

9 *Jurisdiction as to persons.* The first sentence of the first paragraph was reworded, and a reference to the statute providing for courts-martial jurisdiction over patients in the Army and Navy General Hospital at Hot Springs, Arkansas was deleted as this hospital was deeded to Arkansas. The last sentence of the first paragraph is new. As for the proposition that civilians cannot be tried under this article in peacetime, see *McElroy v. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957). The target of this sentence was carefully limited to Article 2(11); and it does not relate to the extent of jurisdiction over civilians relative to the law of war under Article 18.

11b *Termination of jurisdiction. Exceptions.* The last sentence of the first exception is new and was substituted for a sentence which required Secretarial consent before exercising jurisdiction under Article 3(a). This requirement was because of adverse publicity which could possibly flow from a trial of a civilian. See page 11, *Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951*, and Army Reg. 22-110 (21 Sep. 1955). The requirement of Secretarial consent was deleted as civilians cannot be tried under Article 3(a). *Toth v. Quarles*, 350 U.S. 11(1955). The new sentence recognizes that Article 3(a) retains vitality in certain cases, for example, where the accused has reenlisted. *United States v. Winton*, 15 USCMA 222, 35 CMR 194 (1965); *United States v. Gallagher*, 7 USCMA, 506, 22 CMR 296 (1957).

The third exception was changed to conform to the language of Article 3(b). It was not the legislative intent that a person be subject to the Code during the interval between his fraudulent discharge and his apprehension. Both the House and Senate reports on the Code provide as follows:

“Subdivision (B) [of Article 3] is the statutory expression of the law as set out in the Manual for Courts-Martial, paragraph 10, and Naval Courts and Boards, section 334. It differs from a similar provision in Article 5 (a) of the proposed amendments of the Articles for the Government of the Navy in that it provides that a person who obtains a fraudulent discharge is not subject to this code for offenses committed during the period between the date of the fraudulent discharge and subsequent apprehension for trial by military authorities.” (S. Rep. No. 486, 71st Cong., 1st Sess. 8 (1949); H. R. Rep. No. 491, 81st Cong., 1st Sess. 11-12 (1949)).

See also Hearings on HR 2498 before a Subcommittee of the Committee on Armed Services, House of Representatives, 81st Cong., 1st Sess. 85-86 (1949).

The third sentence of the fifth exception was deleted. See *United States v. Ginyard*, 16 USCMA 512, 37 CMR 132 (1967).

The fourth sentence of the fifth exception, which stated in effect that a member discharged in a foreign country was amenable to trial for offenses committed before his discharge if his status as a person subject to the Code was not interrupted, was deleted. See *McElroy v. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957).

The last sentence of the fifth exception was made to apply to any "discharged prisoner in the custody of an armed force" by deleting the word "dishonorably."

11c Paragraph was changed to correct the statement that trial commences in the accused's presence "by arraignment."

Trial may commence with an Art. 39(a) session held prior to assembly without arraignment. Arraignment is retained as the time subsequent to which the accused's voluntary absence does not terminate the jurisdiction of the court.

11d *Effect of termination of term of service.* The next to the last sentence is new. CM 384814, *Mansbarger*, 20 CMR 449 (1955).

12 *Exclusive and nonexclusive jurisdiction.* The last sentence of the first paragraph was deleted as it was contrary to various status of forces agreements.

The third paragraph was revised in light of *Wilson v. Girard*, 354 U.S. 524, 529 (1957).

13 *Reciprocal jurisdiction.* The last sentence of the first paragraph was added to provide for the same delegation of authority to the Secretary of Defense as in Exec. Order No. 10428, 18 Fed. Reg. 408 (1953). See *United States v. Hooper*, 5 USCMA 391, 18 CMR 15 (1955), for the validity of this delegation.

14a Added last paragraph reflects jurisdictional limitations imposed by Art. 18 on a GCM constituted by an MJ alone. See *U.S. v. Jackson*, 390 U.S. 570.

15b *Punishments.* The first part of the second sentence was deleted to remove the inference that a special court-martial may adjudge a bad-conduct discharge only is approved by a general court-martial convening authority or other appellate authority. The second part of this sentence was revised to require a "verbatim" record. Article 19 requires only a "complete" record. In MCM, 1951, 15b and 83a were inconsistent. While the Court recognized that Article 19 does not require a "verbatim" record, it chose the verbatim requirement of 83a, MCM, 1951, over the less stringent requirement of 15b, MCM, 1951. *United States v. Whitman*, 3 USCMA 179, 11 CMR 179 (1953). Thus, the use of "verbatim" does not require a change in present practice and removes the inconsistency with 83a. In *United States v. Nelson*, 3 USCMA 482, 486, 13 CMR 38, 42 (1953), after the Court accepted the definition of verbatim as being "word for word; in the same words," it then stated that it would apply this definition sensibly as "a strict application would transform a com-

Paragraph

monsense provision into an impossible requirement." The Court applied the test that "if the transcript is sufficiently complete to present all material evidence bearing on all issues, minimal standards have been met and we will not reverse." *Nelson* was cited by the Court with approval when it applied this test in *United States v. Donati*, 14 USCMA 235, 242, 34 CMR 15, 22 (1963).

Two additional requirements before a BCD can lawfully be adjudged by an SPCM were imposed by the new Act. 19:

(1) Counsel qualified in the sense of Art. 27(b) must be detailed, and

(2) An MJ must be detailed to the court unless one cannot be obtained due to physical conditions and military exigencies. It is not enough that the MJ be detailed, that is, that he be listed on the convening order. He must be present at trial; an accused may not waive or decline the presence of an MJ. The meaning of the phrase "physical conditions and military exigencies" is discussed in the notes to 6c. If the convening authority intends that a BCD be authorized and an MJ is not present, the convening authority must have, attempted prior to trial, to obtain an MJ and failed. In such a case, a statement must be completed explaining that such an attempt to obtain an MJ was made but that an MJ could not be obtained. It must also state what reasons required trial to be held at that time and at that place, despite the absence of an MJ. This statement must be presented at trial as an appellate exhibit and it is subject to review. If an MJ is not present and such a statement is not furnished, the president of the SPCM should know that a BCD is not authorized and his instructions to the court on maximum punishment will not include a BCD. Moreover, the case may be referred initially as a non-BCD SPCM. See 33j. If the requirements of Art. 19 are not met, a BCD may not be adjudged even though it might be otherwise authorized. See Senate report, pp 5 and 6.

16a

Jurisdiction of Summary Courts-Martial—Persons and Offenses. Changed to incorporate the right, now provided by Art. 20, of a person to object to trial by summary court-martial, even after he has refused non-judicial punishment. A cross reference to paragraph 132 was added for completeness.

16b

Punishments. The second sentence of the first paragraph was changed and conformed in substance to Exec. Order No. 11081, 28 Fed. Reg. 945 (1963), which amended paragraph 16b by substituting "enlisted persons" for "noncommissioned or petty officers."

The last paragraph was deleted as the power of a summary courts-martial to adjudge a reprimand or admonition is adequately covered in 126f.

CHAPTER 5

APPREHENSION AND RESTRAINT

Paragraph

- 17 *Scope.* A reference to correctional custody under the revised Article 15 was added.
- 18b(3) *Basic considerations.* The word “restriction” was added in two places in the second sentence for clarity and to foreclose the possibility of confusion.
- The former last two sentences were deleted. These sentences dealt with the effective date of forfeitures and the convening authority’s action in regard thereto. This material is covered elsewhere in the MCM in detail and is not related to the other subject matter of this subparagraph, that is, restraint.
- 19a *Who may apprehend.* The first paragraph was amended to authorize criminal investigators to apprehend persons subject to the Code.
- 20a *Status of person in arrest.* The phrase “within the specific limits of his arrest” was deleted from what now is the next to the last sentence because it improperly implied a limitation on the duties which may be required of a person in arrest. ACM S-1894, *Hunt*, 3 CMR 573 (1952).
- The last sentence, a cross reference to 131c(3), is a new addition. The significance of this cross reference is to point out that different rules apply as to duties that may be performed while in arrest in quarters as a punishment under Article 15. Particularly, it should be noted that the Secretary concerned has full authority to prescribe duties that may be performed by a commissioned or warrant officer undergoing this punishment under Article 15. Also, there is no limitation under Article 15 on requiring performance of full military duty.
- 20d(1) *Preliminary inquiry into offense prior to arresting or confining.* The second paragraph is a completely new addition. The first sentence of this paragraph is based upon *United States v. Teague*, 3 USCMA 317, 12 CMR 73 (1953) and *United States v. Petroff—Tachomakoff*, 5 USCMA 824, 19 CMR 120 (1955). The remainder of the paragraph is based upon *United States v. Howard*, 2 USCMA 519, 10 CMR 17 (1953).
- 23 *Apprehension of deserters by civil authorities.* This paragraph has been substantially modified. The material formerly contained in the first paragraph of 23b as to the arrest of deserters by civilians has been deleted. The legality of such a procedure is highly questionable, particularly since the best authority for these arrests is dicta in *Kurtz v. Moffit*, 115 U.S. 487 (1885). Additionally, it is felt that there is no necessity for dealing with this subject in the MCM and that citizen arrests should not be encouraged. Accordingly, the paragraph has been assigned a title suitable for its revised content and all subparagraphing has been abolished.

Paragraph

The first paragraph was formerly the first paragraph of 23a. The former second paragraph of 23a has been deleted. That paragraph indicated that the right of the United States to apprehend and bring to trial a deserter was paramount to any right of control over him by a parent on the ground of his minority. This was no longer an accurate statement of the law in view of *United States v. Overton*, 9 USCMA 684, 26 CMR 464 (1958) and *United States v. Blanton*, 7 USCMA 664, 23 CMR 128 (1957). The present second paragraph was formerly the second paragraph of 23b and the third paragraph replaces the former 23c.

CHAPTER 6

PREPARATION OF CHARGES

Paragraph

24b

Definition of additional charges. The third sentence was changed and the last sentence was added to make it unquestionably clear that charges cannot be added after arraignment. *United States v. Davis*, 11 USCMA 407, 29 CMR 223 (1960). See 37c(1).

26c

Joining minor and serious offenses. A cross reference to 30g and 33h was added at the end of this subparagraph to indicate that the joining of minor and serious offenses is also subject to the general rule that all known charges should be tried at a single trial as stated in those subparagraphs.

26d

General rules and suggestions regarding joint offenses. In the next to the last sentence of the last paragraph, the words "except upon his own request" have been substituted in place of "for the prosecution upon his consent." See 18 U.S.C. § 3481 (1964).

28a(3)

Contents of specification. The second sentence was restated as a general rule. The sentence as written in the former Manual bound drafters of specifications to a standard which was too rigid, and which practice indicates need not be literally followed in all instances. For example, the form specifications for rape, carnal knowledge, larceny, and maiming do not specifically set out all the individual essential elements (app 6c), although it might be said that these elements are included by implication. Additionally, the Court of Military Appeals has held that the sufficiency of a specification may be determined by other tests. In *United States v. Autrey*, 12 USCMA 252, 30 CMR 252 (1961), the test applied was whether the specification stated the facts in sufficient particularity to apprise the accused of the crime against which he must defend and to enable him to avoid a second prosecution for the same offense. In *United States v. Chaney*, 12 USCMA 378, 30 CMR 378 (1961), the test was whether the specification followed the language of the statute defining the offense and the form specification prescribed in the Manual.

The former third sentence was deleted. That sentence indicated that a specification must exclude every reasonable hypothesis of innocence. It was felt that this sentence was not literally true in all cases and presented the danger of being misunderstood by laymen using the MCM.

The present third sentence, a cross reference to appendix 6c, is a new addition. The purpose of this addition is to qualify the general rule in the preceding sentence by showing that, if abbreviated pleadings are used, the ones in the appendix are the ones to be used.

28b

Each specification to allege but one offense. The third sentence was modified to illustrate that conjunctive pleading is permissible when more than one means are used to commit an offense. See Fed. R. Crim. P. 7(c).

CHAPTER 7

SUBMISSION OF AND ACTION UPON CHARGES

Paragraph

29d

Preparation of charge sheet. The sentence, "Charges will be prepared as prescribed by regulations of the Secretary of a Department," was substituted for this entire subparagraph as this matter was viewed as best left to regulations.

30

Basic considerations. Subparagraph *b* is a new addition which was added because of the decision in *Miranda v. Arizona*, 384 U.S. 436 (1966) and *United States v. Tempia*, 16 USCMA 629, 37 CMR 249 (1967). The subparagraphs following *b* have been redesignated accordingly.

The second paragraph of the former *e* (now *f*) was deleted. Its advice about preferring charges in AWOL cases to stop the running of the statute of limitations is now covered by the new second sentence of 32c. Its statements about depositions were dated by *United States v. Jacoby*, 11 USCMA 428, 29 CMR 244 (1960), which recognized the right of an accused to be present with his counsel at the taking of a deposition; and the matter about holding the charges and allied papers with the service record of the accused pending his return to military control was viewed as a subject best left to regulations.

The language in *g* (formerly *f*) was changed to emphasize that the referral of all known offenses to one trial is discretionary and not mandatory with the convening authority. As for the possible need of this emphasis, see the statement in dictum by Judge Ferguson that the referral of all known offenses is mandatory. *United States v. Showalter*, 15 USCMA 410, 413, 35 CMR 382, 385 (1965).

31

Action by persons having knowledge of a suspected offense. Everything after the second sentence was deleted. The procedure which was outlined did not represent current practice. Usually the accuser, unless he is a commander, does not participate in the administrative handling of the case and merely brings the incident to the attention of the appropriate authorities.

32

Action by commander exercising immediate jurisdiction under Article 15. The introductory paragraph and 32a are, in substance, the same as in the former Manual. The substance of the former 32a was placed in the first two sentences of the introductory paragraph for emphasis. In addition, the term "warrant officer" is used in the introductory paragraph to conform with 128a which provides that a warrant officer exercising command and, under certain conditions, an "officer in charge" in the Navy, Marine Corps, and Coast Guard, may exercise Article 15 authority.

32a

General. This subparagraph, which makes 32 and its subparagraphs subject to the basic considerations stated in 30, is a transposition of part of the material that was in the introductory paragraph.

Paragraph

32b

Preliminary Inquiry. The fourth and fifth sentences were adapted from the former fourth sentence. The change removes any implication that general exploratory searches are proper.

32c

Preferring charges. The second sentence was deleted because of the change in 29d. A new second sentence was inserted. See the comment on the changes in 30e.

32e

Nonjudicial punishment. The second to last sentence is the same as the amendment to this subparagraph by Exec. Order No. 11081, 28 Fed. Reg. 945 (1963), which removed the limitation of this sentence to just noncommissioned or petty officers.

32f(3)

Forwarding charges—Minor offenses. The last sentence, which stated that the forwarding of charges without a letter of transmittal by the commander exercising immediate Article 15 jurisdiction was a recommendation for trial by summary court-martial, was deleted as it is no longer appropriate. It was inserted in the Manual at a time when a summary court-martial could impose far more serious punishment than could be imposed under Article 15. In this connection, see the first clause of the sentence comprising this subparagraph.

32f(4)(c)

Forwarding charges—Serious offenses. “Personnel records” was substituted for “service records” as “personnel records” is a generic term which includes any records in which a record of previous convictions are entered. In accordance with Army usage, “service records” formerly referred to a particular portion of the personnel records.

33a

Preliminary inquiry by officer exercising summary court-martial jurisdiction. In the second sentence of the second paragraph, “as appropriate” was inserted after “will take the action outlined in 32” as all of 32 may not be applicable.

33b

Date of receipt. In the first sentence, “against a member of his command” was deleted, as an unnecessary qualification.

33d

Alterations. In the first sentence, “are formally correct” was inserted.

33e(1)

Effect of investigation of subject matter before charges preferred. In the first sentence after “if the accused was present at the investigation,” the words “of that charge” were deleted to conform more closely to the language of Article 32(c).

33f

Dismissal of charges. No change of substance was made. The reference to Article 43(e), which had been the second sentence of the second paragraph, was transposed to be the last sentence of the second paragraph. In the first sentence of the second paragraph the words, “who, if he concurs in such finding, will forward the case through the chain of command to the Secretary of the appropriate department,” were deleted. The forwarding of charges to the Secretary concerned was covered by the addition of this action to the next to last sentence of the second paragraph.

33g

Nonjudicial punishment. In the third sentence, “he may return the case to the immediate commander for appropriate action” was substituted for “he may direct the immediate commander of the accused to take appropriate action,” to avoid the implication that the higher command may direct the action of the lower commander. The fourth and fifth

Paragraph

sentences are the same as in the amendment to this subparagraph by Exec. Order No. 11081, 28 Fed. Reg. 945 (1963), which substituted them for the former last sentence of 33g.

33h

Disposition of the charges by trial. In the second sentence, “and at the discretion of the convening authority” and “ordinarily” were inserted for the same reason given in regard to the rewording of 30g (formerly 30f).

In the sixth sentence, “as well as the established policies of superior authority” was deleted as a matter to be considered in deciding upon a course of action or recommendation in order to remove any implication of improper command influence.

The seventh sentence, which stated that the convening authority “should not hesitate in a proper case involving offenses of a purely military nature, to dismiss the charges (32d) or refer them to an inferior court-martial for trial,” was deleted as this implies that there is a different standard where the offense is not purely military in nature. The eighth sentence was deleted to remove any implication that he was not free to exercise his own discretion in cases involving moral turpitude.

33i

Forwarding charges. In the first sentence, “in accordance with the regulation of the Secretary concerned” was substituted for “(ordinarily through the chain of command).” The second sentence is new. In regard to the concept that where the forwarding officer is an accuser, the convening authority must be superior in rank or command, see *United States v. Pease*, 3 USCMA 291, 12 CMR 47 (1953), and *United States v. LaGrange*, 1 USCMA 342, 3 CMR 76 (1952).

33j(1)

Reference for trial—Manner of reference. In the third sentence, “Art. 49f” was deleted to remove the implication that the convening authority may direct that a capital case be treated as not capital only when depositions are used.

An example of an instruction which may be used in the indorsement referring charges to an SPCM for trial when the authorized maximum punishment does not include a BCD has been added to this paragraph. The CA may wish to include this instruction in the indorsement when an MJ has not been detailed and his absence is not explained as required by 15b.

33l

Common trial. The last two sentences were deleted as conflicting with the advice in 30g that charges against an accused “ordinarily should be tried at a single trial.”

34b

Investigation of charges—Advising the accused. In the fourth clause after “counsel,” “certified under Article 27(b)” was inserted. *United States v. Tomaszewski*, 8 USCMA 266, 24 CMR 76 (1957). Also, “including the several alternatives available to him as set forth in 34c” was added at the end of this clause. “And his rights under Article 31(b)” was substituted for the last words in this paragraph. It was considered preferable to simply cite Article 31(b) rather than attempting to interpret it here.

34c(3)

Counsel. In the first sentence of the first paragraph, “counsel certified under Article 27(b)” was substituted for “a competent officer,” and “certified counsel” for “such counsel.” *United States v. Tomaszewski, supra.*

Paragraph

The last two sentences were deleted. These sentences suggested that appointment of permanent pretrial counsel might be appropriate to avoid delay, and this type of suggestion can be better covered by means other than an executive order.

The second and third paragraphs were transposed.

The last paragraph is new. It recognizes that the United States may be represented by counsel at the Article 32 investigation when the accused is represented by counsel. *United States v. Weaver*, 13 USCMA 147, 32 CMR 147 (1962); *United States v. Young*, 13 USCMA 134, 32 CMR 134 (1962).

34d

Witnesses. At the end of the second sentence of the first paragraph, "who will determine the availability of the witness" was added. The third sentence of this paragraph is MCM, 1951, was deleted as the issue of the availability of the witness can be raised at trial.

In the first sentence of the second paragraph, "must be examined on oath or affirmation" was substituted for "should be examined on oath or affirmation." See *United States v. Samuels*, 10 USCMA 296, 27 CMR 280 (1959). In the fourth sentence of this paragraph, the suggestion concerning the taking of depositions was limited to witnesses who "are not reasonably available"; and this limitation was removed as depositions should be taken from material witnesses who may not be available at time of trial even if their absence would be unreasonable.

The last sentence of the last paragraph is new.

35a

Action by officer exercising general court-martial jurisdiction in general. The third and fourth sentences were changed to be the same as the amendments to this subparagraph in Exec. Order No. 11081, 28 Fed. Reg. 945, (1963). The primary change was in the fourth sentence where "of which only the power under Article 15 may be delegated (128a)" was substituted for "none of which may be delegated." In the last sentence, "for appropriate disposition" was substituted for "with the instruction that appropriate action by taken by him" to avoid the suggestion that the officer exercising general court-martial jurisdiction may direct the action to be taken by the subordinate commander.

35b

Reference to staff judge advocate or legal officer. The third sentence of the first paragraph is new. It provides that the appropriate Judge Advocate General will act as the staff judge advocate when the Secretary concerned is the convening authority. The next to last sentence of the first paragraph is also new, and provides, in effect, that there will be a new pretrial advice before referral to trial in a case where there was a mistrial. It is contemplated that this advice will discuss whether the mistrial was "manifestly necessary in the interest of justice" relative to determining if further prosecution is permissible. See 56e(1). If there is further prosecution, no review of the proceedings terminated by the mistrial is required. See 56e(3). However, if there is no further prosecution, a review limited to the question of jurisdiction should be prepared. See 56e and 85b.

In the first sentence of the second paragraph, "in such manner and form as the convening authority may direct" was deleted in favor of a cross reference to 35c. See *United States v. Heaney*, 9 USCMA 6, 25 CMR 268 (1958).

Paragraph
35c

Action of the staff judge advocate or legal officer. The second sentence is new, and suggests additional details that should be included in the advice when appropriate.

CHAPTER 8

CONVENING OF COURTS-MARTIAL

Paragraph

36a

Convening orders in general. The second sentence was modified to indicate that it may be inferred from the detail of personnel to court-martial duty that they are on active duty with an armed force. Previously, this sentence indicated that such an appointment was prima facie evidence of this fact. This change is based on numerous cases condemning the use of the term "prima facie." See *e.g.*, *United States v. Simpson*, 10 USCMA 548, 28 CMR 109 (1959).

36b

Form and content of convening orders. The third sentence is a new addition. This sentence sets forth the rule that convening orders should not contain a large number of court members with the intention that only some of them will be present for each trial. The practice eliminated by this sentence has been condemned as reflecting unfavorably on the dignity of the court by giving a casual appearance to the convening of the court. That practice also made it appear that a subordinate of the convening authority was selecting the composition of the court for trial. See *United States v. Allen*, 5 USCMA 626, 18 CMR 250 (1955); CM 363955, *Andress*, 11 CMR 299 (1953).

In addition to the technical changes of replacing "law officer" with "military judge," a new provision was added whereby the convening order shall, unless otherwise provided by secretarial regulations, show that the certified legal personnel have previously taken a prescribed oath as now provided for in Art. 42(a).

36c(2)

This paragraph was amended to state that although the accused may request enlisted members at any time prior to assembly, he should do so at any Art. 39(a) session held prior to assembly. See comments opposite 4b. "Court has been assembled for trial" has replaced "accused has been arraigned" since arraignment may now occur at an Art. 39(a) session held prior to assembly.

37b

Exception to the general rule regarding changes in personnel of the court. The second sentence of the first paragraph was modified to define "good cause." See *United States v. Boysen*, 11 USCMA 331, 336, 29 CMR 147, 152 (1960). Of course, ordinary leave (ACM 12932, *Boshears*, 23 CMR 737 (1956)) and routine duties would not constitute good cause under this definition.

The requirement was added to the first paragraph that the record of trial must detail the basis for the absence or relief of a member. *United States v. Whitley*, 5 USCMA 786, 19 CMR 82 (1955); *United States v. Grow*, 3 USCMA 77, 83, 11 CMR 77, 83 (1953).

Also in the first paragraph, the policy against appointment of additional court members after assembly, except as required by reduction of court membership below a quorum (*United States v. Greenwell*, 12

Paragraph

USCMA 560, 31 CMR 146 (1961)) or for other good cause such as a request of an accused for replacement of a member excused for good cause (*United States v. Grow, supra*). was stated in mandatory language.

If permitted by secretarial regulations, arraignment may be held at an Art. 39(a) session held prior to assembly. The presence of members, however, is not required until "assembly." Therefore, "arraignment" was changed to "assembly" as the critical point with reference to absence of court members. This change conforms with amended Art. 29.

37c(1)

Manner of effecting changes in the composition of the court. The title of this subparagraph has been changed from "*Formal changes*" to "*Changes in composition*" on the basis that the new title is more appropriate.

"If trial proceedings have not begun, any case pending before the old court may be withdrawn subject to the limitations in 56" was substituted for "any unarraigned case which is pending before the old court may be withdrawn from it and referred to the new court." Significant action in the case such as an Art. 39(a) session and request for trial by the MJ alone may occur prior to arraignment. The critical point for having good cause for withdrawing charges is commencement of trial including an Art. 39(a) session rather than arraignment. The standards of 56 serve as sufficient guidance that such action will be scrutinized for arbitrary or unfair withdrawal. 56 also covers the situation where the accused has requested trial by MJ alone, although the trial has not yet commenced.

37c(2)

Manner of effecting excusal of personnel. The title of this subparagraph has been changed from "*Informal changes*" to "*Excusing personnel*" on the basis that the new title is more appropriate.

38

Command relationship with court. The prior first paragraph was deleted and the title of the paragraph, formerly designated as "Instructing Personnel of Court," was changed in order to provide a more appropriate title as required by the deletion.

This paragraph was extensively revised to implement the amendment to Art. 37. The revised paragraph strengthens the existing prohibitions against unlawful influence on members or officials of a court-martial by the convening authority or other commanding officers. General informational lectures on military justice are exempt from the prohibitions. See *United States v. Davis*, 12 USCMA 576, 31 CMR 166 (1961) and *United States v. Danzine* 12 USCMA 350, 30 CMR 350 (1961). The paragraph now provides that performance of a member of a court-martial may not be evaluated in preparing an effectiveness, fitness, or efficiency report on him or in determining his fitness for promotion, transfer, or retention in the service. A counsel may not be given a less favorable rating or evaluation because of his zeal in acting as defense counsel in a court-martial. The convening authority and any member of his staff may not prepare or review any report concerning the effectiveness, fitness, or efficiency of the MJ which relates to his performance of duty as MJ at a GCM, provided the court was not convened by the President or the Secretary concerned (Art. 25 (c)).

As for the SPCM, the prohibition extends only to the convening authority and not to any member of his staff. The provisions dealing with MJ's performance of duty as a SPCM is not an implementation of an

Paragraph

amendment to Art. 37. "The Military Justice Act of 1968," leaves to the services a degree of flexibility in regard to the use of judge advocates as MJ's of SPCM's. This leaves the MJ of a SPCM without some of the isolation provided for the MJ under an independent field judiciary concept. In an effort to balance the desirability of having a system whereby the MJ of a SPCM can be used for other duties but to insure independence in his judicial capacity, this provision has been added to the paragraph without statutory basis.

CHAPTER 9

PERSONNEL OF COURTS-MARTIAL

Paragraph

39b(1)

The MJ presides over each session of the court-martial to which he has been detailed—Art. 26(a). His rulings on matters of law or interlocutory questions other than the factual issue of mental responsibility are final. He may change his rulings at any time during the trial (including during Art. 39(a) sessions)—Art. 51(b). He rules finally on challenges Art. 41. He may permit or forbid the taking of depositions—Art. 49.

39b(2)

Recognizes Art. 39(a) sessions. The term “Article 39(a) session” was devised in lieu of the “pretrial session” referred to in the committee report, because an Art. 39(a) session is part of the trial and may be held at any time, including subsequent to announcement of sentence. The possible confusion engendered by use of the term pretrial with regard to changing rulings, detailing counsel, calling witnesses and accepting a plea of guilty and entering a finding thereon, destroyed the utility of that term for the purposes of the Manual. The text is silent relative to challenges, but see 62*d*.

Provision is made for holding arraignment, receiving pleas, and entering findings at such sessions *if permitted* by regulations of the secretary concerned.

39b(3)

As the presiding officer, the MJ sets the time for assembly. He may no longer assist the court in putting its findings in proper form in closed session. He may, however, give additional guidance in open court. (Art. 26(e).)

39b(5)

Provides for the court composed of the MJ alone. See Arts. 16 and 51(d) and notes opposite 4*a*. The MJ alone determines all questions of law and fact, makes findings, and adjudges sentence. No instructions are given by an MJ but special findings may be requested. See notes opposite 71*f*.

39*c*

Provision for assisting the members in closed session in putting their finding in proper form has been eliminated to conform to Arts. 26 and 39.

39*e*

New Military Judge. Conforms existing paragraph to the Act with regard to replacing MJ who is presiding over a trial with members, and implements new Art. 29(d) with regard to replacing MJ who is trying case alone.

The first sentence was rewritten to permit change of the MJ during the trial only for good cause. Two sentences were added thereafter which define good cause and provide that the facts are to be recorded. *United States v. Boysen*, 11 USCMA 331, 336, 29 CMR 147, 152 (1960).

The fourth sentence was modified so as not to require that the reading of the record to a new MJ be done in the presence of the court members. Reading in the presence of the members is not required by the

Paragraph

code, and there is no good reason for so inconveniencing the members when a long record is involved. Additionally, the members should not hear those portions of the record which relate to hearings previously held out of their presence. Also, in the fourth sentence, the word "evidence" was substituted for the words "testimony of each witness" and the word "introduced" substituted for "examined." This was done to broaden the subject covered. As modified this will now cover evidence such as depositions or stipulations that are read into the record.

40b

The subsections of this paragraph have been revised. Subsection (1) now relates to functions of the president when an MJ is detailed and (2) relates to functions of the president at a SPCM without an MJ. The MJ is now designated as the presiding officer by statute Art. (a). The president is consulted as to the time of assembly, but the MJ sets the time. The president prescribes the uniform at sessions requiring attendance of members. It is unlikely that the president will administer any oaths when an MJ is present, but service regulations may so provide.

40b(2)

Duties of President of Special Court-Martial Without an MJ. The president of the SPCM without an MJ is the presiding officer and he has increased authority to rule under Art. 51(b). See paragraph 57.

Two sentences were added to require the president to instruct on the maximum punishment as limited by the authority of the court and restrictions which apply to rehearings and new or other trials. *United States v. Barnes*, 11 USCMA 671, 29 CMR 487 (1960); *United States v. Larsen*, 11 USCMA 555, 29 CMR 371 (1960); *United States v. Green*, 11 USCMA 478, 29 CMR 294 (1960); *United States v. Erchmann*, 11 USCMA 64, 28 CMR 288 (1959).

40c

Changed to conform with Art. 54 which states that the MJ will generally authenticate the record of trial and added reference to app 9b(3).

41a

A general statement was added to make it clear that paragraph 41 does not apply in those cases wherein the presence of members is not required by the Act.

41b

Duties of court members. Admonitions were added in two sentences against members fraternizing with other parties to the trial (*United States v. Walters*, 4 USCMA 617, 16 CMR 191 (1954)) and discussing the case before it is submitted to them for final decision (*United States v. Payne*, 12 USCMA 455, 31 CMR 41 (1961)).

The last portion of the last sentence was changed from "is" to "may be" a military offense. Because the improper conduct of a court member is an offense depends on the particular facts involved.

41c

Absence of members. Changed "assembly" to "meeting", and "arraignment" to "assembly" to conform with new terminology. "Assembly" now has a technical meaning as defined in 61j. "Arraignment" is no longer a suitable point after which to require the absence of a member to be explained in court since the accused may be arraigned at an Art. 39(a) session wherein members are not required. "Assembly" was substituted for "arraignment" by the new Art. 29(a).

41d(1)

Effect of Absence. Changed to conform challenging procedure with Art. 41. It now relates only to the SPCM without an MJ. When an MJ is detailed, he rules finally on challenges.

Paragraph

- 41d(2) Changed to insure presence of EM's "at all sessions at which members are present after assembly" when EM's are required pursuant to request of accused for EM's on the court.
- 41d(3)&4 Changed "arraignment" to "assembly" to conform with Art. 29. The last sentence was added requiring TC to state the reason for the excusal of a court member by the convening authority. See also 37b. *United States v. Metcalf*, 16 USCMA 153, 36 CMR 309 (1966).
- 41e
&
41f In covering the procedure to be followed with new members of a general or special court-martial, a parenthetical phrase was added to cover the possibility that the new member might have been previously sworn pursuant to secretarial regulations as now authorized by Art. 42(a).
- 41e *New member of general court-martial.* In the first sentence, the word "evidence" was substituted for the words "testimony of each witness" and the word "introduced" substituted for "examined." See the discussion of changes in 39e, *supra*. The words "in open session" are also a new addition to this sentence. They were added because it would be improper to have a new member hear testimony which was previously heard out of the presence of the court members.
- 41f *New member of special court-martial.* In the first sentence the word "evidence" has been substituted for the words "testimony of" and the word "introduced" substituted for the words "examined witnesses." See the discussion of changes in 39e, *supra*.
- 43 *Suspension of counsel.* The scope of the first paragraph was broadened by providing that suspension may also be temporary and that a suspension may be on other reasonable grounds besides professional or personal misconduct. These changes now give the Judge Advocates General authority to suspend for reasons such as security or mental impairment. Temporary suspension contemplates suspension for a particular case or series of cases.
- The second paragraph is a new addition. It provides that suspension by one Judge Advocate General or disbarment or suspension by the Court of Military Appeals will be a basis for suspension as counsel by other Judge Advocates General, without further hearing.
- 44c *Absence of trial counsel.* The MJ was added as an authority permitted to excuse trial counsel from attendance at trials. The authority of the president to excuse was limited to special courts-martial without an MJ.
- 44e *Trial counsel reports of result of trial.* This subparagraph was modified to eliminate the requirement for the trial counsel submitting the report of the status of cases on hand to the convening authority. This report was frequently not submitted in actual practice, and its deletion is consistent with the Presidential directive to reduce reports. The title of the subparagraph was changed to one which will more accurately describe the material now remaining therein.
- 44f(2) *Notification of personnel and witnesses by Trial Counsel.* Provision is made for the TC to include in his notice instructions appropriately emanating from the MJ, as well as the president. For example, the MJ prescribes the uniform at Art. 39(a) session and the president for sessions with members. The MJ may instruct the TC to include in the notice the matters the MJ intends to consider at an Art. 39(a) session.

Paragraph

The latter portion of this subparagraph was restated to avoid the implication that the TC can determine whether witnesses requested by the defense shall be called for the trial.

44f(3) *Trial counsel preparation for trial.* The second sentence was modified and the third sentence added to exclude the question of jurisdiction from those matters as to which a plea of guilty relieves the prosecution of the burden of proof. *United States v. Wheeler*, 10 USCMA 646, 28 CMR 212 (1959). Also see ACM 15760, *Wheeler*, 27 CMR 981 (1959).

44i Added reference to app 9b.

44g(1) *Trial counsel's general duties during the trial.* The third paragraph was modified to provide that the trial counsel should call the court's attention to illegalities throughout the entire trial rather than just when the court is in open session. The new wording therefore covers the out-of-court hearing situation.

44g(2) *Trial counsel's presentation of the case.* The former first paragraph which indicated that the trial counsel should read the Manual to the court was deleted. *United States v. Johnson*, 9 USCMA 178, 25 CMR 440 (1958); *United States v. Fair*, 2 USCMA 521, 10 CMR 19 (1953).

Formerly the third paragraph (present second paragraph) indicated that the trial counsel could cross-examine a witness called by the court if that witness was adverse to the prosecution. This paragraph was modified to permit cross-examination if the witness has not previously testified for the prosecution of defense, or if the witness has so testified, as to any new matter elicited upon recall by the court. The new provision is consistent with 149b(3) and 153b(1) in the former and present Manuals.

45a *Assistant trial counsel of general court-martial.* The latter portion of this subparagraph was modified to implement the principle that no person may practice law before a general court-martial unless he is qualified under Article 27(b) or is otherwise qualified as a lawyer. *United States v. Davis*, 9 USCMA 614, 26 CMR 394 (1958); *United States v. Kraskouskas*, 9 USCMA 607, 26 CMR 387 (1958). Of course, this does not preclude the appointment of personnel without the requisite legal qualification as assistants so long as their assistance is limited to pretrial matters and ministerial functions during the trial. Also see paragraph 6.

46c *Absence of defense counsel.* The MJ was added as an authority permitted to excuse defense counsel from attendance at trials. The authority of the president to excuse was limited to special courts-martial without an MJ.

47 *Assistant defense counsel.* This paragraph was revised to indicate that the assistant defense counsel must meet the qualifications prescribed by Article 27 for defense counsel in general and special courts-martial before he can conduct any portion of the defense before those courts. *United States v. Davis, supra*; *United States v. Kraskouskas, supra*. Here also, this does not preclude the appointment of personnel without the requisite legal qualifications as assistants so long as their assistance is limited to pretrial matter and ministerial functions during the trial. Also see paragraph 6.

48a *Right of accused to counsel of his own choice.* Changed to conform to Art. 38(b) with regard to excusal of detailed counsel by the MJ or president of an SPCM without an MJ.

Paragraph

A new second paragraph provides that only a person qualified under Art. 27(b) or otherwise qualified as a lawyer may act as counsel for the accused before a GCM, unless the accused after proper advice elects to defend himself. *United States v. Davis, supra; United States v. Kraskouskas, supra.*

Since the Act requires defense counsel detailed to BCD SPCM to be lawyers, the manual requires individual counsel also be lawyers. This incorporates the principle of *Kraskouskas* that individual counsel must have the same qualifications as those required for detailed counsel. This position is reinforced by the sentiments expressed by C. J. Quinn in his concurring opinion in *United States v. Culp*, 14 USCMA 199, 218, 33 CMR 411, 430.

Broad language was intentionally used in this paragraph so as to permit foreign lawyers to act as individual counsel before courts-martial. *United States v. Nichols*, 8 USCMA 119, 125, 23 CMR 343, 349 (1957). The last sentence of this new paragraph indicates that the accused is not precluded by these provisions from having a non-lawyer present at the counsel table for the purpose of consulting with him.

48b

Detail of individual military counsel. This subparagraph was completely revised. It now places the responsibility for determining the reasonable availability of requested counsel upon the commanding officer or head of the organization, activity, or agency with which the requested counsel is on duty. The purpose of this revision is that the former subparagraph failed to clarify who was to act on a request for a counsel not under the convening authority's command. The tendency under the former provision was to place the determination at a higher level than necessary although commanders and leaders at lower levels are in a better position to know the status of the requested person and therefore are in a better position to make an intelligent determination. In rewriting this subparagraph, consideration has been given to the fact that today we have many varied and complex activities, agencies, and organizations in the services. Often military officers work under the supervision of civilian departmental heads. The former subparagraph also failed to clarify what next superior authority should act on an appeal from an adverse decision, that is, the superior of the convening authority or the superior of the requested counsel's superior. This problem is now solved by making it clear that it is the superior in the requested counsel's chain of command. The subparagraph as rewritten will make it possible to resolve requests at the operational level where the availability of information is immediately at hand. Although it does away with the right of appeal from an adverse decision if it must be decided at departmental or higher level, it is not believed that the change will jeopardize the rights of the accused since the decision itself is subject to review at the trial and appellate review. *United States v. Cutting*, 14 USCMA 347, 34 CMR 127 (1964). A requirement was also added that all actions pertaining to a request for counsel shall be included in the record of trial. *United States v. Cutting, supra.*

The first sentence of the last paragraph was modified by deleting the prohibition that a person is disqualified for detail as individual counsel simply because he has been named in the convening order as the trial counsel or assistant trial counsel in the case. There is no such limitation in the Code (see Art. 27(a)) nor is there any good reason why the

Paragraph

convening authority could not make such an appointment when there is a request by an accused and the convening authority wants to approve it.

A provision was added in the last paragraph to the effect that a pending appeal from a decision that requested counsel is not available is proper ground for postponement or continuance of a trial. *United States v. Vanderpool*, 4 USCMA 561, 16 CMR 135 (1954).

48e New paragraph which requires DC to advise the accused of his right to request trial by MJ alone pursuant to Art. 16 when an MJ is detailed to the court. The request is transmitted to the MJ through the TC in order to allow TC to request argument. The remaining subparagraphs are relettered. (Present *e* becomes *f*, etc.)

48f Relettered.

48k(3) *Defense counsel advising the accused of appellate rights.* The first sentence of this subparagraph was modified to require detailed advice to the accused as to his appellate rights.

The second sentence was changed to indicate that communications concerning requests for appellate defense counsel are directed to appropriate authority rather than appellate defense counsel since the procedures in the different services vary.

The fourth sentence was modified to allow the accused 10 days after notice of action on his case, rather than after sentence, to request appellate defense counsel. *United States v. Darring*, 9 USCMA 651, 26 CMR 431 (1958).

48k(4) Requires defense counsel to inform the accused of his right to apply for deferment of service of sentence to confinement and to explain to him the legal consequences involved if his request is granted. See discussion opposite 88f. Sub-paragraph 48k(4) is redesignated 48k(5).

49, 50 *Reporter; Interpreter.* These paragraphs were expanded to include employed reporters and interpreters as authorized by Article 28.

49b(1) *Duties of the reporter in general.* The third sentence was rewritten to state the duties of the reporter regarding the record without inferring that it is a duty of the reporter to control "off the record" discussions.

49b(3), 50b *Compensation of reporters and interpreters.* Provisions for regulations covering payment of allowances, expenses, and per diem for reporters and interpreters were added. The prior provision only as to compensation was not sufficiently broad. The specific reference to 114d and *e*, respectively, for the reporter's and interpreter's oaths, were changed to Chapter XXII generally in view of the change to Art. 42(a), and it is spelled out that the secretary concerned will provide regulations concerning oaths for reporters.

50c *Counter-interpreters.* This subparagraph is a new addition which provides for the use of a counter-interpreter by the accused. *United States v. Rayas*, 6 USCMA 479, 20 CMR 195 (1955).

CHAPTER 10
GENERAL PROCEDURAL RULES

Paragraph**53b**

The example given in this paragraph was changed in view of the amendment to Art. 42(a) whereby there is no longer any requirement that prescribed oaths be administered to court-martial personnel in the presence of the accused.

53c

Changed to recognize that each accused has a right to request trial by MJ alone. In a joint trial, when only one accused makes such a request, the MJ may either deny the request or grant a severance.

53d(1)

Provides for the new Art. 39(a) session as a part of the trial. Such a session held before assembly must comply with the time provisions of Art. 35. Subsections (a), (b), (c), and (d) repeat the statute. The language of Art. 39(a) is quite broad and the examples listed in the Manual paragraph are not intended to limit in any way the matters which may be considered in an Art. 39(a) session. For example, see 62d with regard to challenges. The same procedure and authority for obtaining witnesses is available for an Art. 39(a) session as is available for the other parts of the trial. See notes opposite 39b(2).

The statute does not limit the number of such sessions which may be held before and after assembly and this Manual imposes no such limit. The statement in the Senate Committee Report (p10) that "Only one pretrial session would be called in any particular case" is in the nature of a prediction of experience which does not limit the statutory language.

53d(2)

Sets forth the statutory requirements for trial by MJ alone (Art. 16). Such a court has no jurisdiction to try a capital case. (Art. 18). The written request for trial by MJ alone originates with the accused after the case is referred to a panel with MJ and members. The accused must have consulted with counsel and the MJ should make an inquiry to be sure the request was understandingly made.

The procedure described by paragraph 53d(2) is designed to allow the maximum degree of flexibility while safeguarding the rights of the accused.

If the MJ receives a request prior to trial which appears proper on its face, he may approve it immediately and call for assembly for trial by him alone. If the MJ receives a request upon which the TC has requested argument or about which he has doubts, he may call an Art. 39(a) session to examine the request and hear arguments. If the request is made and approved at an Art. 39(a) session, the MJ should announce that the court is assembled. There would be no reason to continue the session under Art. 39(a) since the single officer court has the same facility of proceeding, that is, Art. 16 gives the MJ authority to sit alone and no further recourse to Art. 39(a) is required. See 36c and 67b.

Paragraph

Approval of the withdrawal of a request for trial by the MJ alone is discretionary with the MJ. *Cf. Riadon v. U.S.* 274 F2d 304, *McCranie v. U.S.* 333 F2d 307, 46 ALR 2d 919.

The last subparagraph (53d(2)(e)) is merely a general statement that procedure before the MJ alone shall be the same as before the MJ with members were appropriate.

53d(3)

Art. 39(a) sessions are always open sessions. The former provision covering assisting the court on findings in closed session has been eliminated to conform to Article 26 and 39.

A third paragraph was added limiting the use of legal references by court members to the president of a special court-martial in open session only. *United States v. Rinehart*, 8 USCMA 402, 24 CMR 212 (1957).

53e

Spectators and publicity. This subparagraph was substantially revised to correctly state the law regarding the exclusion of spectators. See *United States v. Henderson*, 11 USCMA 556, 29 CMR 372 (1960); *United States v. Brown*, 7 USCMA 251, 22 CMR 41 (1956), and the cases cited therein; *United Press Association v. Valente*, 308 N.Y. 71, 123 N.E. 2d 777 (1954):

The recording of court proceedings by recording or similar devices for public release or broadcast was added to the prohibitions in the third paragraph. The provision for permitting the prohibitions in this paragraph if approved by the Secretary concerned has been deleted as unnecessary and in order to make the prohibitions absolute.

The fourth paragraph is a new addition.

53h

Explanation of rights of accused. The latter portion of this subparagraph was significantly modified. The statement was eliminated which provided that the meaning and effect of a guilty plea will be explained in open court unless it otherwise appears in the record that the accused is aware of his rights. It has been replaced by a cross reference to 70b where the procedure for guilty pleas is covered in detail. The prior provision was not satisfactory because it did not indicate that the explanation should be out of the presence of the members of a general court-martial (see *United States v. Drake*, 15 USCMA 375, 35 CMR 347 (1965)), and it indicated that it was unnecessary to make the explanation in all guilty plea cases (see *United States v. Richardson*, 15 USCMA 400, 35 CMR 372 (1965)), *United States v. Griffin*, 15 USCMA 135, 35 CMR 107 (1964). The subparagraph also now indicates that an accused who is not represented by legally qualified counsel should be advised of his rights to testify at all appropriate stages of a trial, and that it may be assumed that an accused represented by legally qualified counsel has been properly advised as to these rights. It further provides that the MJ may inquire of the defense counsel if an accused has been advised of his rights as a witness or may explain the rights if he desires to do so, but it must be done out of the hearing of the court members. *United States v. Endsley*, 10 USCMA 255, 27 CMR 329 (1959).

54b

Responsibility of the court regarding the introduction of evidence. The next to the last sentence of this subparagraph is a new addition which cautions the court against departing from its impartial role in obtaining additional evidence. Many cases announce the principle that the

Paragraph

court members may not assume the role of the prosecution. E.g., *United States v. Blankenship*, 7 USCMA 328, 22 CMR 118 (1956).

The last sentence of this subparagraph, prescribing that the right of the members of the court to cause the recall of a witness or to call for additional evidence is subject to an interlocutory ruling by the MJ or president of a special court-martial without an MJ as to the propriety therefor, is also a new addition. There has been some confusion in regard to the former manual provisions in this regard. Compare *United States v. Rogers*, 14 USCMA 570, 34 CMR 350 (1964) with *United States v. Salley*, 7 USCMA 603, 23 CMR 67 (1957) and *United States v. Parker*, 7 USCMA 182, 21 CMR 308 (1956). This sentence thus establishes that courts-martial shall follow the Federal rule in this regard and the one announced in the *Rogers* case.

54d

Introduction of documentary evidence. The first sentence of the first paragraph was changed to require attachment to the record of all documents marked for identification and not admitted in evidence. This change was made because this is the usual practice today, and these documents are often required by appellate agencies when there has not been a request for attachment by counsel.

55

Action when evidence indicates an offense not charged. This paragraph was revised by deleting the procedure for interrupting the trial and referring the matter to the convening authority for direction when the court is of the opinion that an accused may be guilty of an offense other than the one charged. In *United States v. Johnpier*, 12 USCMA 90, 30 CMR 90 (1961), the Court of Military Appeals stated that the procedure formerly provided for in this paragraph was archaic, injudicious, contrary to Article 51, and violative of the spirit of the Code.

56a,b,c

Withdrawal of specifications; general, grounds for, and effect of. These paragraphs were revised to accomplish the following:

(1) To clearly indicate that although the convening authority has an unrestricted right to withdraw a case or specification (this authority has always been inherent in this paragraph), he must exercise it cautiously unless he intends to dismiss as the withdrawal may bar future prosecution of the withdrawn offenses dependent upon the facts involved.

(2) To distinguish between the withdrawal of an entire case and the withdrawal of only some specifications after commencement of a trial. Normally, an entire case may be withdrawn after commencement of the trial only because of urgent and unforeseen military necessity. See *Wade v. Hunter*, 336 U.S. 684 (1949). Although less than all of the specifications can be withdrawn with a view to future prosecution when good reason is shown, it is only in extremely limited situations that the use of this authority will be appropriate. See *United States v. Williams*, 11 USCMA 459, 29 CMR 275 (1960) which well illustrates the problem of withdrawal after trial commences.

(3) To emphasize that the critical time for having good cause for a withdrawal is after the trial commences whether by Art. 39(a) session or assembly rather than after arraignment. *United States v. Williams, supra.*

Paragraph

(4) To require that the reasons for a withdrawal after trial commences be made a matter of record.

These changes were necessitated by the fact that the MJ and the special court-martial have the sole responsibility for the conduct of a trial. *United States v. Walter*, 14 USCMA 142, 33 CMR 354 (1963); *United States v. Johnpier*, 12 USCMA 90, 30 CMR 90 (1961); *United States v. Grant*, 10 USCMA 585, 28 CMR 151 (1959); *United States v. Lynch*, 9 USCMA 523, 26 CMR 303 (1958); *United States v. Ivory*, 9 USCMA 516, 26 CMR 296 (1958); *United States v. Patrick*, 8 USCMA 212, 24 CMR 22 (1957); *United States v. Harris*, 8 USCMA 199, 24 CMR 9 (1957); *United States v. Stringer*, 5 USCMA 122, 17 CMR 122 (1954).

A third unnumbered paragraph has been added to 56b which limits withdrawal of a case after the accused has requested trial by the MJ alone except for good cause. See comment opposite 37c. This provision recognizes that the decision to request trial by MJ alone is a significant event in the processing of a case.

56d *Action of the trial counsel upon a withdrawal of specifications.* Material was added to provide for the proper procedure when a specification is withdrawn after a trial has commenced. Accordingly, the title of the subparagraph was changed to conform with the expanded contents thereof.

56e *Mistrials.* This subparagraph is a new addition which is generally based on the cases cited in the second paragraph of the discussion above as to changes in 56a, b, and c. Also see *United States v. Goffe*, 15 USCMA 112, 35 CMR 84 (1964) regarding a mistrial as to sentence proceedings only.

57a *Interlocutory questions other than challenges in general.* This paragraph has been revised to reflect the changes in Art. 51(b). It has been reorganized to include in a those provisions which are equally applicable to the military judge and to the president of an SPCM without an MJ (i.e., (1) the ruling on the factual issue of mental responsibility is subject to objection by any member and (2) treatment of offered evidence). Provision is made for instructing the court members on the factual issue of mental responsibility of the accused before they indicate whether or not they object to a ruling which was made subject to their objection (*U.S. v. Williams*, 5 USCMA 197, 17 CMR 197 and *U.S. v. Gray*, 6 USCMA 615, 20 CMR 331). In view of the increased authority given the president of the special court-martial without a military judge and the creation of the new special court-martial with a military judge, the "key" used in this paragraph of the MCM (1969) to differentiate rulings on specific issues made by the president finally from rulings made subject to objection has been abandoned in favor of spelling out specifically in each instance by whom the ruling is made and explaining in para 57b and c how finality of a ruling by the president is determined.

57b *Applicability of paragraph on interlocutory questions other than challenges.* Subparagraph has been revised to clarify and illustrate what is meant by interlocutory questions, questions of law, questions of fact, and mixed questions of law and fact. The changes in this paragraph were required by amendments to Art. 51(b). Final rulings are made by an MJ on "any

Paragraph

question of law or any interlocutory question . . .,” whereas a president of an SPCM without an MJ rules finally upon “any question of law.” Interlocutory questions may, of course, be either questions of law or questions of fact. Since a president, unlike an MJ, does not rule finally on all interlocutory questions, the fact/law distinction becomes important. Accordingly, 57b now discusses questions of fact, questions of law, and mixed questions. The general definition of an interlocutory question remains the same.

The example used in the third paragraph was based on *United States v. Orvelas*, 2 USCMA 96, 6 CMR 96 (1952). See also *United States v. Carson*, 15 USCMA 407, 35 CMR 379 (1965) and *United States v. Boehm*, 17 USCMA 530, 38 CMR 328 (1968).

57c *Rulings by the president of a special court-martial without an MJ.* This subparagraph reflects the change in Art. 51(b) concerning the power of the president of an SPCM without an MJ to rule finally on questions of law.

See also *United States v. Bridges*, 12 USCMA 96, 30 CMR 96 (1961).

57d *Rulings by Military Judge.* This subparagraph expands the area in accordance with Art. 51(b), in which the MJ rules finally to include his ruling on a motion for a finding of not guilty.

57e,f
&g(2) Conforming changes were made in *e* on the form of ruling, in *f* on voting on interlocutory questions, and in *g*(2) to indicate out-of-court hearings are necessary only when the MJ is sitting with members.

57g(2) *Inquiry necessary by the law officer into interlocutory questions; preponderance of evidence.* The first portion of the second paragraph was changed to incorporate matters concerning the admissibility of a pretrial statement of an accused and other possible matters which might be prejudicial to an accused as items which the MJ should hear out of the hearings of the court. *United States v. Cates*, 9 USCMA 480, 26 CMR 260 (1958). Also, this subparagraph now requires that all out-of-court hearings be transcribed, recorded, and incorporated in the record of trial. *United States v. Lampkins*, 4 USCMA 31, 15 CMR 31 (1954).

The former last two sentences of the fourth paragraph were deleted and one new sentence added in their place. This new sentence requires incorporation of written arguments in the record of trial. *United States v. Lampkins, supra.*

57g(3) Subparagraph has been modified to state that the president of an SPCM without an MJ may close and consult with other members of the court before making his ruling, only when such ruling is subject to objection by any member.

58 *Postponements and continuances.* “Postponements” were added to the title to more accurately describe the contents of the paragraph.

58a *Postponement of trial.* This subparagraph was modified so that it now covers only postponements rather than postponements and continuances. Also, the convening authority has been added as a proper party from whom to request a postponement before trial. The former last sentence was deleted as unnecessary. The paragraph was further changed to reflect the fact that the MJ sets time for trial.

Paragraph

58b

Continuances in general. This subparagraph was revised to indicate that continuances are in the sole discretion of the MJ or president of a special court-martial without an MJ. The purpose of the changes is to make it clear that the convening authority has no powers in the area of granting delays once a trial begins. *United States v. Knudson*, 4 USCMA 587, 16 CMR 161 (1954).

58c

Grounds for continuance. Two new sentences were added at the end of the second paragraph. They indicate that in computing the number of days from the service of charges until the trial, the date of service and date of trial are excluded, and that Sundays and holidays are not excluded. *United States v. Nichols*, 2 USCMA 27, 6 CMR 27 (1952).

58e

Application for a continuance. This subparagraph was modified so as to deal only with applications for continuances which are requests for delay after a trial begins. A request for a delay before trial is a request for a postponement. Accordingly, the title was changed to conform with the content. Also, the former first paragraph was modified for consistency with the approach in 58b and *Knudson, supra*.

The second paragraph was changed to state that an application for continuance should be made at an Art. 39(a) session held prior to assembly. There is no need to wait until after the arraignment if counsel is aware of any reason for requesting a continuance at the Art. 39(a) session.

58f

Matters in support of application for continuance. This subparagraph has been modified to indicate that the subject matter relates to "matters" and not "evidence" or "facts." Normally, "evidence" is not introduced to support an application for a continuance.

The former last paragraph was deleted on the basis of *United States v. Thornton*, 8 USCMA 446, 24 CMR 256 (1957). That paragraph indicated that an application based on the absence of a witness may be denied when the opposite party is willing to stipulate that the absent witness would testify as stated in the application unless it clearly appears that such denial would be prejudicial.

CHAPTER 11

ORGANIZATION OF THE COURT AND ARRAIGNMENT OF THE ACCUSED

Paragraph

59

Attendance of the Court. This paragraph has been revised to avoid conflict with new use of the term "assembly."

In the second paragraph, the reference to the convening authority was deleted to avoid any implication that he may intrude into the proceedings.

60

Attendance and security of accused. The first sentence of the first paragraph was amended by providing as a responsibility of those persons responsible for the attendance of the accused that they "will determine the nature and degree of any restraint." The next sentence is new, and places responsibility on the MJ or president of a special court-martial without an MJ to determine what physical restraint will be imposed on the accused during open session of the court. Added provision for MJ designating appropriate uniform.

The third paragraph was deleted as being unnecessary and contradictory to the changes in the first paragraph. The substance of this paragraph was that neither the court nor the trial counsel had responsibility for the security or restraint of an accused, they could make recommendations as to these matters, and the court controlled the personal freedom of the accused in its presence.

The reference to 74f(1) was deleted since the MJ may no longer enter closed session.

61a

Informal Inquiry. The caption has been changed from "preconvening procedure" to "informal inquiry" to avoid any confusion with an Art. 39(a) session held prior to "assembly." Also, an added paragraph provides for inquiry into existence of a request for trial by the MJ alone.

61b

Seating of personnel and the accused. The seating of personnel other than court members was changed from "as the president directs" to "as the MJ, or the president of a special court-martial without an MJ may direct."

61c

Announcing Personnel. Changed to reflect that in accounting for parties to the trial, members are not always required to be present; e.g., at a trial by the MJ alone.

61d

Swearing Reporter and Interpreter. Changed to reflect new provisions of Art. 42(a) concerning oaths for reporters and interpreters, including the possibility that they may have been previously sworn pursuant to secretarial regulations.

61f(1)

General rules as to legal qualifications of defense counsel. In subparagraphs (a) and (b) and after "trial counsel," the words "or any assistant trial counsel" were added so that the defense counsel for a special court-

Paragraph

martial would be equally qualified if the assistant trial counsel has legal qualifications. A similar change was made in 6c.

The former last paragraph was deleted as unnecessary in view of the foregoing changes in (a) and (b) and because of the erroneous implication that the defense counsel at a general court doesn't have to be legally qualified. See *United States v. Kraskouskas*, 9 USCMA 607, 26 CMR 387 (1958).

61f(2) *Ascertaining legal qualifications of counsel for the defense.* A reference to 48a was added to emphasize that the defense counsel at a general court-martial and a BCD SPCM must be legally qualified.

61f(3) *Action when defense counsel is not legally qualified.* This paragraph was rewritten to simplify and clarify its provisions. New provisions have been added stating that a non-lawyer may not represent an accused before a GCM or BCD SPCM. See notes to 48a.

61g *Announcement of request for trial by MJ alone.* New paragraph which establishes trial procedure to allow accused to announce request for trial by MJ alone which parallels announcement of similar request for enlisted membership.

61h Conforming changes and has been re-lettered from 61g.

61i The former 61h was changed to reflect the new provisions of Art. 42(a) concerning oaths for court-martial personnel.

61j *Assembly of the court.* Replaces former i which related to "convening of court" with a paragraph which defines "assembly." Since certain rights are terminated by "assembly" (Articles 16, 23(c), and 29(e)), it was necessary to have a clearly definable point of "assembly." The point in the procedure after the jurisdictional prerequisites of the court-martial have been verified on the record was chosen as the best point for "assembly." The practice of allowing the accused one final opportunity to request EM and trial by the MJ alone just prior to terminating the right to so request has been retained in the interest of fairness and orderly procedure.

61k *Applicability to Article 39(a) sessions.* This is a new paragraph to insure that the jurisdictional facts have been verified on the record of any Art. 39(a) session.

62a Conforming changes and added the statutory language of "relevancy."

62b *Disclosing grounds for challenges.* Rewritten to comply with new Art 41. A new third sentence was added to reinforce and emphasize, not change, this paragraph as interpreted by the Court of Military Appeals in *United States v. Richard*, 7 USCMA 46, 21 CMR 172 (1956), which was that only the ultimate ground for challenge need be disclosed.

The example in the third unnumbered paragraph was deleted to avoid possible conflict with *United States v. Witherspoon*, 391 U.S. 510 (1968).

The fourth paragraph is new. It points out the problem resulting from the disclosure of derogatory information, and it recognizes that a member of the court may be examined out of the presence of the court. See *United States v. Talbott*, 12 USCMA 466, 31 CMR 32 (1961). This provision was expanded and strengthened for cases in which an MJ is sitting since the MJ rules finally on challenges.

Paragraph

- 62c Provision was added to encourage early disclosure of possible challenges for cause to insure orderly procedure.
- 62d Conforming changes to new Act recognizing power of MJ to rule on challenges and the possibility of Art. 39(a) sessions. The fourth sentence states that the “military judge or the president of a special court-martial without a military judge should” rather than “may” permit a challenge for cause at any stage of the proceedings as failure to allow the challenge could be reversible error.
- 62f(10) The standard for disqualification of a judge who previously sat on the same or a closely related case is personal bias or prejudice and not prejudgment at the prior hearing which was based on evidence therein adduced. By not automatically disqualifying the MJ on rehearing, it is possible to use him again on a rehearing. This change recognizes the increased authority and judicial stature of the MJ and his capacity to judge issues impartially. *Cf. Craven v. U.S.*, 22 F2d 605; *Gallarelli v. U.S.*, 260 F2d 259. If it is to be presumed that a jury will pay no attention to evidence brought out and ordered stricken or to evidence which the jury is instructed to disregard, it is even more reasonable to trust a judge to ignore non-evidentiary matter. See 57a(2). *Cf. U.S. v. Camino*, 321 F3d 590, 511.
- 62f(13) *Challenges for cause—grounds for.* In the second sentence, “facts which may constitute grounds for challenge” was substituted for “facts constituting grounds for challenge” to avoid any implication that the examples establish grounds for challenge as a matter of law. The first example concerning an MJ of the court which first heard the case was deleted. *United States v. Broy*, 15 USCMA 382, 35 CMR 354 (1965 and 62f(10)). The sixth example, formerly seventh, was limited to where prior participation in a closely related case was as a member or counsel because prior participation as an MJ would not of itself be a ground for challenging the MJ. The eighth example relating to conscientious scruples was deleted for the reason stated in note to 62b.
- 62g *Inquiry as to eligibility of MJ.* The fact that the MJ of a GCM must be designated and assigned in accordance with Art. 26(c) has been added as the 5th ground of eligibility of the MJ.
- The word “qualifications” as used in the penultimate sentence including designation, assignment, and certification as well as status as an attorney.
- 62h This paragraph was revised to recognize the new power of the MJ to determine the relevancy and validity of challenges (Art. 41). The MJ may no longer be questioned under oath with regard to a suspected ground for challenge. Such a requirement would be anomalous in view of the fact that the MJ rules finally on challenges and has already sworn to perform duties of the MJ faithfully.
- 62h(3) *Deliberation and voting on challenges by an SPCM without an MJ.* The second sentence, which provides that a court should be instructed on the applicable law and procedure in deciding challenges, is new. See *United States v. Cleveland*, 15 USCMA 213, 35 CMR 185 (1965). “Should” was used instead of “shall” to insure that a failure to instruct would be tested for specific prejudice instead of general prejudice.

Paragraph

63

Witness for the prosecution. The second paragraph is new, and sets forth how a person may be a witness without testifying in person at the trial. See *United States v. Wilson*, 7 USCMA 656, 23 CMR 120 (1957); *United States v. Moore*, 4 USCMA 675, 16 CMR 249 (1954).

65a

Arraignment. The last sentence of the first paragraph stated, in reference to Article 35, that a valid objection to trial based on the lack of the time between the service of charges and the trial would not prevent arraignment. This sentence was deleted as it suggested a procedure inferior to that of waiting until the accused has no basis under Article 35 for the objection when it is apparent that he would object to trial.

If service regulations permit, arraignment, plea, and entry of findings may be held at an Art. 39(a) session prior to assembly. A new unnumbered 4th paragraph so provides (Art. 45(b)).

65b

Additional charges after arraignment. The change in language of this paragraph was for clarity. There was no intent to change its meaning as interpreted in *United States v. Davis*, 11 USCMA 407, 29 CMR 223 (1960).

CHAPTER 12

PLEAS AND MOTIONS

Paragraph

66a *Pleas.* 66 was divided into two subparagraphs, *a* and *b*. The first sentence of this subparagraph is the same as the second sentence of 66, and the substance of the second sentence was taken from the second paragraph of 66.

66b *Motions.* The first sentence, which defines a motion, is new. Except for the material in 66a and the deletion in the last sentence of words which described the reference of matters before trial to the convening authority as an administrative procedure, this subparagraph incorporated the material in the former 66 and the former first paragraph of 67a. In regard to the deletion, the convening authority is carrying out a judicial function on when he acts on a defense pretrial request for a psychiatric examination. See *United States v. Nix*, 15 USCMA 578, 36 CMR 76 (1965).

Also provides that motions for appropriate relief should be made prior to conclusion of 39(a) session or plea, whichever is earlier. See 67b.

67a *Defenses and objections which may be raised.* The former first paragraph was transposed to 66b. See comment on 66b.

67b Motions for appropriate relief must be raised prior to conclusion of any Art. 39(a) session held prior to assembly or may be considered waived. This parallels Rule 12 of the Federal Rules of Criminal Procedure. Relief from waiver for good cause is unchanged.

67c *Form and content of motion.* The first sentence, which stated that a motion raising a defense or objection should include all defenses and objections, was deleted as it incorrectly implied that all defenses and objections must be raised at one time by a single motion. The second sentence of the first paragraph was transposed so that it is now the last sentence of this subparagraph. These changes resulted in this subparagraph being one paragraph instead of two.

67d *Time of making motions.* All motions should be raised at an Art. 39(a) session held prior to assembly even though failure to so raise would not constitute a waiver except for those motions covered in 67b.

In the first sentence of the second paragraph the references, which made this sentence applicable to motions based on *res judicata* and which gave motions for a finding of not guilty and motions to dismiss based on *res judicata* as examples of "motions predicted upon the evidence," were deleted. See comments on 71. In the last sentence of the second paragraph, "delay" was substituted for "dismiss" as lack of mental capacity at the time of trial should not terminate the case. See *United States v. Williams*, 5 USCMA 197, 17 CMR 197 (1954); *United States v. Lopez-Malave*, 4 USCMA 341, 15 CMR 341 (1954).

Paragraph
67e

Paragraph was changed to incorporate the concept of an MJ at an SPCM. It deletes the requirement of the MJ ruling before the members on a motion for a finding of not guilty since his ruling thereon is no longer subject to objection.

The second sentence is new, and provides that motions should be ruled on before the members deliberate on findings. The fourth sentence is new and recognizes that the MJ may direct hearings outside the presence of the members of the court. The sixth sentence is new and delineates when counsel may and may not refer to facts of other pertinent cases when arguing a motion before the members. See *United States v. Bowie*, 9 USCMA 228 26 CMR 8 (1958).

67f

Effect of ruling on motion. The fourth paragraph was rewritten. The former second sentence of the fourth paragraph, which stated that "as to motions granted by the court which do not amount to a finding of not guilty, the convening authority may, if he disagrees, return the record of trial to the court. . . . (Art. 62(a)," was too broad. It did not recognize that Article 62(a), which is set forth in the new first sentence of the fourth paragraph, addresses itself only to situations where a specification has been dismissed and the ruling does not amount to a finding of not guilty. The former fifth sentence of the fourth paragraph, which was deleted, provided:

If the convening authority finds that the action of the court was proper but that the defect raised by the motion can be cured, he will take appropriate action to remedy the defect and return the record to the court for trial as above indicated.

This was incorrect as to motions to dismiss except when the convening authority can cure a specification which was dismissed because of failure to allege an offense and return it to the same court. There is no "defect" which can be remedied if the dismissal is because of the running of the statute of limitation, former jeopardy, pardon, constructive condonation of desertion, former punishment, promised immunity, speedy trial, or lack of jurisdiction. A new second sentence was added to insure a fair procedure before returning a record to the court. A new fourth sentence was inserted in the fourth paragraph to point out specifically that the convening authority may not direct reconsideration of a ruling to grant appropriate relief or a continuance. See *United States v. Knudson*, 4 USCMA 587, 16 CMR 161 (1954). The sixth sentence of the fourth paragraph is new. In the last sentence of the fourth paragraph, which was part of the former third sentence of this paragraph, the example of a motion in which a disagreement could arise as to a question of fact was changed from one concerning an objection to trial on the ground of lack of mental capacity at time of trial to one concerning condonation of a desertion. This change was made because the necessary prerequisite if a dismissal before the convening authority may direct a reconsideration would not be met in the former example as sustaining the motion based on lack of mental capacity should result in a continuance, not a dismissal.

In the first sentence of the fifth paragraph, which corresponds to the sixth sentence of the fourth paragraph in MCM, 1951, "wherein the action of the court operates as a bar to further prosecution" was deleted as appropriate orders should be published in all cases where the record is not

Paragraph

returned for trial. The removal of this qualification as to when orders should be published made the former last two sentences of this paragraph redundant and they were deleted.

The last paragraph is new, and it provides the procedure to be followed after a motion for appropriate relief is granted.

67g *Inadmissible defenses and objections.* This subparagraph was deleted as unnecessary and possibly misleading, for example it may have implied that a motion to dismiss for lack of speedy trial could not be made before the plea.

68a A reference to paragraph 57 was added.

68b(2) *Motions to dismiss because of lack of jurisdiction.* The last two sentences were transposed from 71b as they belong in this discussion of jurisdiction rather than *res judicata*.

68b(3) *Failure to allege an offense.* The application of the first sentence was broadened by adding the words "triable by court-martial." See *United States v. French*, 10 USCMA 171, 27 CMR 245 (1959), where the court held that a capital offense, the violation of the Espionage Act, cannot be tried as a violation of Article 134 even though it could be considered as service discrediting conduct.

68c *Statute of limitations.* The subject matter of Chapter XXIX, entitled *Matters of Defense*, is new to that chapter; and it contains the discussion of the substantive law relative to the statute of limitations. For this reason much of the substance of the first and third paragraphs and all of the fourth paragraph was transposed to 215d. The second paragraph, which stated that Article 43 would not revive liability to trial of any offense barred by the running of the statute of limitations before 31 May 1951 but that where the offense was not barred the statute of limitations shall be governed by Article 43, was deleted because of its limited application at this time.

The first paragraph is a rewrite of information that formerly was in the first sentence of the first paragraph and the second sentence of the third paragraph. In the first sentence of the second paragraph after "when it appears from the charges," the words "or from the evidence" were inserted so that the direction to advise the accused is applicable in either event. The third sentence of the fifth paragraph, which stated "this action should, as a rule, be taken at the time of arraignment," was deleted as it was too restrictive. Except for these changes, the second paragraph is substantially the same as the former fifth paragraph; the third paragraph is the same as the former sixth paragraph; the fourth and fifth paragraphs are substantially the same as the former seventh except that in the last sentence of the fifth paragraph "should advise" was substituted for "must advise" and, as the failure to follow the procedure set forth does not necessarily result in a waiver, "may constitute" was substituted for "constitutes."

68d *Former jeopardy.* The discussion of the substantive law relative to former jeopardy is now contained in 215b. For changes in the substantive discussion, see the comments on 215b. The first sentence is in the exact language of Article 44(a). The substance of the last two sentences was contained in the former last paragraph.

Paragraph

68g

Former punishment. In the first sentence “and punishment imposed under Article 13 for a minor disciplinary infraction” was inserted so that this, as well as punishment under Article 15, would be a bar to trial. See *United States v. Williams*, 10 USCMA 615, 28 CMR 181 (1959). The discussion of the substantive law relative to former punishment is now in 215c. See the comments on 215c for the changes in this discussion.

68h

Grant or promise of immunity. This subparagraph is new. See *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964); *United States v. Kirsch*, 15 USCMA 84, 35 CMR 56 (1964); ACM 10757, *Guttenplan*, 20 CMR 764 (1955). 68h was formerly only a reference to 148e.

68i

Speedy trial. This subparagraph is new. In regards to the qualifying “may” in the last sentence, see *United States v. Schalek*, 14 USCMA 371, 34 CMR 151 (1964). The substantive law relative to this subject is in Chapter XXIX.

69a

Motions to grant appropriate relief. General. At the end of the second sentence, “and general atmosphere of prejudice at the place of trial (69e)” was added as another example of objections which may be raised. Motions for appropriate relief must be raised before the conclusion of any Art. 39(a) session held prior to assembly. See 67b.

69e

Change of venue. The title and material is new. See *United States v. Gravitt*, 5 USCMA 249, 17 CMR 249 (1954). The former 69e corresponds to 69f.

69f

Miscellaneous motions for relief. This subparagraph corresponds to the former 69e. In the next to last sentence, “ordinarily” was inserted before “will not be granted”; and the last sentence was added to this subparagraph. These changes were because, under appropriate circumstances, the prosecution might be required to elect when charges are multiplicitous. See *United States v. Middleton*, 12 USCMA 54, 30 CMR 54 (1960).

70b

Procedure if plea of guilty is entered. In the first sentence of the first paragraph of subparagraph (2), “should explain” was substituted for “will explain” to avoid any implication that a failure to explain would result in general prejudice; and “unless it otherwise affirmatively appears that the accused understands the meaning and effect thereof” was deleted as the meaning and effect of a plea of guilty should be explained in any event. In subparagraph (2), the elements of the offense were added as one of the things which should be included in the explanation. The last paragraph of subparagraph (2) was deleted. It implied that a guilty plea should be accepted when the accused indicates that he understands its meaning and effect. Subparagraph (3) now gives the standard for accepting a guilty plea. See *United States v. Drake*, 15 USCMA 375, 35 CMR 347 (1965). Subparagraphs (4) and (5) are the same as the former (3) and (4).

Subparagraph (4) was changed to recognize that a verbatim record of trial need not be prepared in every GCM (see Art. 54). The second paragraph which states that the providence of a guilty plea should be inquired into out of the presence of the members, is new. See *United States v. Drake, supra*.

The first two sentences of the next to last paragraph were rewritten, but are in substance the same. The fourth sentence of this paragraph in

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MCM, 1951 was deleted as unnecessary. It read as follows: "Occasion for making this explanation and statement frequently arises in desertion cases when the accused, after pleading guilty testifies or states in effect that throughout his unauthorized absence he had the intention of returning." The fourth, formerly fifth, sentence of this paragraph was changed to make it discretionary for the MJ or president of a special court-martial without an MJ to permit an accused to change his plea of guilty to not guilty instead of this being a change that the accused "should be permitted." However, if the accused was advised that he could make this change, it could be a prejudicial error to refuse him the permission to change his plea. See *United States v. Politana*, 14 USCMA 518, 522, 34 CMR 298, 302 (1964). Because of the nature of the summary court, the accused was given the unqualified right to change a guilty plea before a summary court by the reference in the fifth sentence of this paragraph. The last sentence of this paragraph is new.

The former last paragraph was deleted as unnecessary because of 65a. It stated as follows: "One plea may be entered as applicable to all or to certain specified charges and specifications such as 'Not guilty to all charges and specifications'."

A new final paragraph has been added to provide for immediate entry of a finding of guilty where trial is before an MJ alone or an SCM. Provision is also made for entry of findings without vote where members are present if secretarial regulations permit.

71

Motions for finding of not guilty; res judicata. The title of this paragraph was "*Motions predicated upon the evidence*" but it was changed as it did not properly suggest the inclusion of the material in 71b relative to res judicata. Res judicata is not always raised by a motion and when it is this motion is not predicated on the evidence in the sense that a motion for a finding of not guilty is.

71a

Motion for finding of not guilty. The fourth sentence of the second paragraph was rewritten. It had read, as follows: "If there is any substantial evidence which, together with all proper inferences to be drawn therefrom and all applicable presumptions, reasonably tends to establish every essential element of an offense charged or included in any specification to which the motion is directed, the motion will not be granted." "Substantial" was deleted, and the correct concept of such relevant evidence as a reasonable mind might accept as adequate to support a conclusion is in the sentence as rewritten. As rewritten, this sentence avoids incorrect implications concerning considerations that should be given to the weight of the evidence and the credibility of witnesses. See *Consolidated Edison Company v. National Labor Relations Board*, 305 U.S. 197 (1938); *United States v. Wapnick*, 202 F. Supp. 712 (E.D. N.Y. 1962).

A new last paragraph states that the MJ rules finally on a motion for a finding of not guilty. (See Art. 51(b).)

71b

Res judicata. This subparagraph was revised to a large extent. Only the most significant changes are discussed herein. The primary change is that res judicata has been expanded by providing that it is also applicable as a rule of evidence. Previously the Manual treated it solely as a complete "defense" to the offense in question, that is, as a bar to trial. Consistent with this modification, it was provided that the doctrine may be invoked

Paragraph

by objecting to the admissibility of certain evidence. The doctrine should be raised by a motion, of course, only when the issue to be precluded relates to an element of the offense and thus would operate in effect as a complete bar. However, there may be cases when it is impossible to make this determination before evidence is presented on the merits. In such a case, the doctrine could be asserted by objecting to the admission of the evidence in question. Then, if the objection is sustained and the prosecution's evidence is insufficient to establish a prima facie case, motion for a finding of not guilty may properly be granted. For examples of when the accused is entitled to invoke res judicata even when it does not amount to a complete defense in bar of trial, see *United States v. Carlisi*, 32 F. Supp. 479 (E.D.N.Y. 1940) ; and *United States v. Smith*, 4 USMCA 369, 15 CMR 369 (1954).

It should be noted that the first sentence of the first paragraph provides that the doctrine of res judicata is applicable even though "the determination [of the matter] was based upon an erroneous view or application of the law." See *United States v. Smith, supra*. In this connection, however, the second sentence was added to make it clear that res judicata applies only to the "matters" determined and not to any abstract principle of law which may have been the basis for the determination of the "matter" in a particular case. For example, in a rehearing of a murder case, the accused may not successfully object to the content of a self-defense instruction on the ground that a more favorable instruction had been given at the original hearing. In this situation, there was no matter decided in favor of the accused but only a principle of law announced by the MJ.

Also consistent with the broadened concept of this subparagraph, the third sentence of the first paragraph makes it clear that the invoking of the doctrine is not contingent upon there having been an acquittal at the previous trial.

The next to last sentence of the first paragraph now indicates that the prosecution *may not* assert the doctrine of res judicata. The former Manual stated that this was "generally" true but that there was an exception when a question of jurisdiction is raised at a second trial that follows a final conviction of fraudulent separation in violation of Article 83(2). Article 3(b) requires that as a precedent to prosecuting for an offense committed before a fraudulent discharge, the prosecution must establish that the accused has been convicted of violating Article 83(2). The accused in the second trial cannot attack the fact of that conviction by showing that his discharge was not fraudulent. This is not really an exception to the rule that the prosecution may not invoke res judicata. Although it does concern res judicata in a very narrow sense, it really stands for the proposition that a judgment is not subject to collateral attack. Accordingly, this subject is now covered as a matter of jurisdiction in 68b(2).

Consideration was given to *United States v. Doughty*, 14 USCMA 540, 34 CMR 320 (1964) in which the Court held that the phrase "same parties" as used in 71b of the 1951 Manual is not limited to the particular accused and the Government and that when the crime involved is impossible of sole commission but requires concurrence of intent or action between two or more parties, adjudication of issues in a trial of one of these essential parties may be raised by another who was not joined in the first

Paragraph

proceeding. As the legal ramifications of this decision are far from settled, no attempt has been made to cover the point in this paragraph. See the dissenting opinion of Judge Kilday in *Doughty*.

The example contained in the first sentence of the second paragraph, except for editorial modifications, was contained in the former Manual. The example in the second sentence of the paragraph is new. It was taken from *United States v. Smith, supra*.

See, generally, O'Donnell, *Public Policy and Private Peace—The Finality of a Judicial Determination*, 22 Mil. L. Rev. 57 (1963).

CHAPTER 13

MATTERS RELATED TO FINDINGS AND SENTENCE

Paragraph

72b

Content of arguments. A prohibition was added at the end of the first paragraph against the citation of legal authorities and facts of other cases in arguments on the findings and sentence. *United States v. Bowie*, 9 USCMA 228, 26 CMR 8 (1958). Counsel are allowed to cite such authorities to the MJ trying a case alone.

A sentence was added at the end of the third paragraph indicating that the trial counsel should refrain from commenting on the exercise by the accused of his rights under Article 31 (b) (*United States v. Hickman*, 10 USCMA 568, 28 CMR 134 (1959)), the conduct of the defense at the Article 32 investigation (ACM 17545, *Jackson*, 31 CMR 654 (1961)), and the probable effect of the court's findings on community relations (*United States v. Cook*, 11 USCMA 99, 28 CMR 323 (1959)).

The first sentence of the last paragraph was qualified by the addition of a sentence containing two cross references. This was added to point out that there are restrictions on drawing inferences in some situations.

73a

Instructions to a court-martial with members. General. The MJ sitting alone is not required to instruct himself in open court. Art. 51(d) states that Art. 51 (c) relating to instructions on findings does not apply to a court-martial composed of an MJ alone.

This subparagraph was completely rewritten to set forth the general requirements for instructing on the issues as established in cases too numerous to permit full citation. However, the significant cases considered in redrafting the subparagraph are discussed hereafter. *United States v. Smith*, 13 USCMA 471, 33 CMR 3 (1963) and *United States v. Bethas*, 11 USCMA 389, 29 CMR 205 (1960) announce the requirements for instruction on elements of principal and included offenses and affirmative defenses. *United States v. Jones*, 13 USCMA 635, 33 CMR 167 (1963); *United States v. Smith, supra*; and *United States v. Acfalle*, 12 USCMA 465, 31 CMR 51 (1961) are illustrative of the fact that instructions must be tailored to the facts and theories in an individual case. *United States v. Clark*, 1 USCMA 201, 2 CMR 107 (1952) deals with instructions on included offenses in issue. *United States v. Ginn*, 1 USCMA 453, 4 CMR 45 (1952) concerns instructions on affirmative defenses in issue. Of course, sua sponte instructions are not required on all affirmative defenses in issue. For example, a special alibi instruction is only required on request. See *United States v. Moore*, 15 USCMA 345, 35 CMR 317 (1965); *United States v. Bigger*, 2 USCMA 297, 8 CMR 97 (1953). *United States v. McDonald*, 6 USCMA 575, 20 CMR 291 (1955) requires definition of terms which have special legal connotation. The requirement for limiting instructions when evidence is admitted for only a limited purpose is set forth in *United States v. Lewis*, 14 USCMA 79, 33 CMR 291 (1963); *United States v. Back*, 13 USCMA 568, 33 CMR 100 (1963); and *United States v. Hoy*, 12 USCMA 554, 31 CMR 140 (1961).

Paragraph

Of special significance is the third sentence of the first paragraph which indicates that the elements of the offense, for instructional purposes, are those factual issues which must be determined by the members of the court on the question of the guilt or innocence of the accused. This definition was added so as to make it clear that no instruction is given when an element involves a strictly legal issue. For example, in the prosecution of a violation of Article 92 for disobedience of an order, the question of the legality of the order, if no factual dispute concerning legality is involved is entirely a question of law for determination by the MJ or president of a special court-martial without an MJ. However, if the legality of the order depends upon the resolution of conflicting facts, then this question of fact should be presented to the court-martial for determination on the general issue. *United States v. Carson*, 15 USCMA 407, 35 CMR 379 (1965). For a discussion of other offenses to which the *Carson* holding probably applies, see Taylor and Barrett, *A Supplement to the Survey of Military Justice*, 32 Mil. L. Rev. 81 n. 48 (1966).

The third and fourth paragraphs were transposed from the former 73c because the matter contained in these paragraphs is more closely related to the other matter covered in 73a than it is to 73c as modified. The third paragraph was changed to provide for the possibility that findings might be entered on a plea of guilty without a vote in accordance with Article 45(b).

73b

Charging the court. The initial language of this subparagraph was modified to conform with the increased scope of 73a and to indicate that the Article 51(c) charge is only required in cases where there is a not guilty plea. *United States v. Lucas*, 1 USCMA 19, 1 CMR 19 (1951). The language "when appropriate, in cases in which a plea of guilty to all charges and specifications has been entered" was used because the practice in the Air Force is to prove the case and give Article 51(c) instructions even though there be no pleas of not guilty.

The last sentence, which formerly indicated that the Article 51(c) charge need not be explained, was deleted as unnecessary, and misleading. For instance, it has been held that "reasonable doubt" must be explained upon a request by counsel. *United States v. Offley*, 3 USCMA 276, 12 CMR 32 (1953).

73c

Military Judge's summarizing and commenting upon the evidence. This subparagraph has been revised to limit its scope to the subject of summarizing and commenting upon the evidence. Accordingly, the former title "*Additional instructions by the law officer*" has been changed to one more descriptive of the new scope. The material contained herein, except for modifications discussed below, was formerly in subparagraph "(1) *General*" of 73c which is no longer subparagraphed. Some material in the former subparagraph (1) was moved to 73a. See the last paragraph of the discussion of changes in 73a concerning the matter that was moved. Additionally, the former first and fourth sentences of the first paragraph were deleted. They indicated, respectively, that the MJ was only required to give the instructions specified in Article 51(c) and that instructions on included offenses in issue were optional. These deletions were necessary to conform with changes in 73a and b and the changes in the concept of the obligation to instruct which have developed since the 1951 Manual was published.

Paragraph

The words "simple and" were deleted before the word "orderly" in the second (former third) sentence of the first paragraph. Also, the words "on each side of those" have been substituted for "that tends to support or deny" in this sentence. See *United States v. Nickoson*, 15 USCMA 340, 344, 35 CMR 312, 316 (1965).

The prohibition in the former last sentence of the third paragraph of 73c(1) against counsel or the accused interrupting the MJ while instructing the court was not retained. This rule was not always followed in all instances nor was it always desirable that it be followed. Interruption as to obvious mistakes in instructions are often beneficial to the MJ. Also, MJ's have the inherent power to handle the problem, and it should be left entirely to their discretion.

The overall effect of changing the scope of this subparagraph coupled with some of the changes mentioned above was to remove the prior indication that there were different standards for the MJ and president of a special court-martial without an MJ in instructing the court.

73d

Preparing instructions. Subparagraph *d* is new, but with modifications it contains that matter which was formerly in 73c(2). The scope of the subparagraph has been enlarged so as to apply to the president of a special court-martial and to pertain to all instructions rather than to just what was previously referred to as "additional instructions."

The second and third sentences of the first paragraph are new additions. See *United States v. Sellers*, 12 USCMA 262, 30 CMR 262 (1961); *United States v. Walker*, 7 USCMA 669, 23 CMR 133 (1957), and the cases cited therein. The last portion of the first paragraph was modified by adding an admonition that the source of a requested instruction should not be identified (*United States v. Wynn*, 11 USCMA 195, 199, 29 CMR 11, 15 (1960); *United States v. Shaughnessy*, 8 USCMA 16, 421, 24 CMR 226, 231 (1957)), and by requiring that arguments by counsel on proposed instructions be recorded and incorporated in the record (*United States v. Lampkins*, 4 USCMA 31, 15 CMR 31 (1954)). The statement that members of a GCM would be excluded during argument on a proposed instruction was expanded to require that members would be excluded if an MJ was present whether at a GCM or SPCM.

The second paragraph is a new addition which requires that any written instructions taken into closed session must be appended to the record of trial as an appellate exhibit. *United States v. Caldwell*, 11 USCMA 257, 29 CMR 73 (1960).

74a(3)

Reasonable doubt. The last sentence of the first paragraph, which admonished a court that acquits because an accused may be innocent, was deleted as neither necessary nor desirable.

The discussion of prima facie proof, formerly contained in the fourth and fifth sentences of the second paragraph, was deleted. *United States v. Simpson*, 10 USCMA 543, 28 CMR 109 (1959).

The fourth paragraph was completely revised so as to no longer infer that strong evidence is required in a case proved by circumstantial evidence than in one proved by direct evidence. The Supreme Court has held that an instruction that circumstantial evidence must exclude every reasonable hypothesis of innocence is confusing and incorrect when a jury is properly instructed on the standards of reasonable doubt. *Holland v.*

Paragraph

United States, 348 U.S. 121, 139-140 (1954). See also *United States v. Mason*, 8 USCMA 329, 332, 24 CMR 139, 142 (1957).

74d

This paragraph was modified to conform with the amendments to Art. 45 and Art. 52. The title was changed to exclude those cases tried by the MJ alone.

74d(3)

This subparagraph was modified to conform with the amendments of Art. 45 and Art. 52 concerning entering findings without vote and the number of votes required to reconsider.

74e

Requesting additional instructions on findings. The first sentence of the second paragraph modified so as to no longer indicate that the trial counsel of a special court-martial without an MJ obtains additional information on the law *from the convening authority*.

74f(1)

Court-Martial with an MJ and members. This paragraph was revised to delete provision permitting the MJ to enter closed session to assist court-martial in putting its findings in proper form (Art. 39) and expanded to cover all courts to which an MJ has been detailed. The paragraph provides a careful procedure for an MJ to assist the members in open court with the findings.

74f(3)

A paragraph for the MJ alone was added for completeness.

74f(4)

Reason for findings. This subparagraph, which formerly provided that a court could advise the convening authority of the reasons for its findings, now provides simply that no finding should include any indication of the reasons for making it. The procedure formerly provided is archaic and analogous to a special verdict which is not the practice in the federal courts. See 23A C.J.S. *Criminal Law*, § 1399 n. 13 (1961). Additionally, the former subparagraph inferred command influence as it could lead a court member to believe that he must justify his action to the convening authority. See *United States v. Schultz*, 8 USCMA 129, 23 CMR 353 (1957) (concurring opinion). The paragraph applies only to findings by a court with members. The MJ alone may set out the reasons for his decision by means of special findings or a memorandum of decision.

74g

Announcing the findings. Material was added at the end of the first paragraph to explain how an error made in announcing the findings may be remedied before conclusion of a trial. *United States v. Downs*, 4 USCMA 8, 15 CMR 8 (1954).

A new paragraph providing for the MJ alone announcing his findings in open session was added.

74h

Statute of limitations. This subparagraph was modified so it no longer indicates that the invoking of the statute of limitations by an accused after findings of guilty acts as a *bar of punishment*. It was inconsistent to indicate that it was invoked in bar of punishment and determined as a motion to dismiss. NCM-01668, *Brand*, 29 CMR 668 (1959), is a well reasoned opinion as to why a conviction in this event cannot stand. A provision has been added to the second sentence of the first paragraph as to the action to be taken by the MJ, or the president of a special court-martial without an MJ in this situation.

74i

This is a new subparagraph which deals with findings by the MJ who is trying a case alone. He decides the guilt or innocence of the accused and, in addition, makes special findings on request. Special findings are required

Paragraph

only if requested but they may be made without request. *United States v. Devenere* 332 F2d 160; *Sullivan v. United States*, 348 U.S. 170. Superfluous findings are not required when findings of facts in issue are made. *Cesario v. United States*, 200 F2d 232. Special findings are appropriate not only on findings on the elements of the offense but also on factual questions placed in issue, such as mental responsibility and special defenses. In order to insure orderly procedure, requests for special findings must be submitted prior to the announcement of general findings and must be specific as to the issue which is sought to be answered. The MJ may require that a request for special findings be submitted in writing in any case in which he deems it desirable in order to insure clear understanding of the request. A party is entitled to only one set of special findings. Special findings are made after the making of general findings and they may not be required in the course of a trial prior to that time. *Benchwick v. United States* 297 F2d 330.

The delayed entry of special findings after general findings have been made is permissible. Cf. *United States v. Ginzburg* 338 F2d 12.

The comment following Section 4623, *Federal Practice and Procedure* by Barron and Holzoff observes that "In criminal cases requests for special findings of fact are made only by the defendant, to save the question of sufficiency of evidence for review on appeal. If a defendant is acquitted, the judge is not obliged to make special findings."

75a

Amended to take account of the MJ sitting alone and to conform to 74i.

75b(2)

Presentation of evidence of previous convictions during the presentencing procedure. In the third sentence of the first paragraph, the limitation has been removed which required that evidence of previous convictions must relate to offenses committed "during a current enlistment, voluntary extension of enlistment, appointment, or other engagement or obligation for service of the accused." Also, the limitation that the offenses be committed within three years has been raised to six years. Thus, the only remaining limitation is that the previous convictions relate to offenses committed during the six years next preceding the commission of any offense of which the accused is convicted at the trial where they are introduced. The former current enlistment limitation was removed because it was felt that the new rule is more equitable from the standpoint that there is no good reason why an accused who has recently had the benefit of reenlistment should be in a more favorable position than an accused who has not had the opportunity of such a benefit. In making the change, its effect, on the additional punishment provisions of the second paragraph of section B of 127c, be broadening the admissibility of previous convictions was fully recognized and that paragraph has been modified accordingly. Here also, it was felt that a more equitable result was produced by removal of the current enlistment limitations.

Consistent with the change discussed in the above paragraph the former fourth sentence of the first paragraph and the sentence formerly comprising the second paragraph were deleted. They were no longer applicable as they prescribed rules which related only to the limitation that was deleted from the third sentence of the first paragraph.

The second sentence was added to the present second (former third) paragraph to make it clear that a previous conviction is not admissible until the review of the case has been fully completed. See *United States v.*

Paragraph

Pope, 5 USCMA, 29, 17 CMR 29 (1954); *United States v. Engle*, 3 USCMA 41, 11 CMR 41 (1953). This sentence was added to explain the rule contained in the first sentence of the paragraph and makes no change in the current practice. The added sentence was taken from the back of DD Form 493 (1962), Extract of Military Records of Previous Convictions. It should be noted that the regulations of the various services differ as to requiring an entry in personnel records to show the completion of review of court-martial cases. When such an entry is required by regulation or other legal authority on a document and the document or extract thereof which is introduced does not show the entry, it is inadmissible, unless other evidence of the final review is introduced, because under the presumption of regularity it must be presumed that the required review has not been accomplished. *United States v. Engle, supra*. However, if an entry as to final review is not required by regulation or other legal authority, it may be presumed after a reasonable time that the required review has been accomplished and the accused then has the burden of contesting the finality of the previous conviction. *United States v. Larney*, 2 USCMA 563, 10 CMR 61 (1953).

The last sentence of the second paragraph was added to remove the argument that a pending request for the Judge Advocate General to exercise his new authority under Art. 69 might prevent the admission of a conviction which is otherwise final. See 110A.

The last paragraph was substantially modified. The first three sentences cover the subject matter previously contained in the first two sentences. However, these sentences were modified and rearranged. In the present first sentence, "record of previous convictions" was added because this is the document which is usually used in proving previous convictions. Also, in this sentence, "service record" was changed to "personnel records" to conform with the same change in 32f(4)(c). For the reason for this change, see the discussion as to that subparagraph of chapter VII.

The former next to last sentence was deleted as it was legally incorrect in indicating that "in the absence of objection, an offense may be regarded as having been committed during the prescribed three-year period unless the contrary appears. *United States v. Marshall*, 15 USCMA 475, 35 CMR 447 (1965).

The present last sentence is a new addition based on *United States v. Kiger*, 13 USCMA 522, 33 CMR 54 (1963).

75d

This is a new paragraph which broadens the information to be considered by the sentencing agency in a court-martial. It places upon the Military Judge the burden of determining the relevance of items presented to him and gives him broad discretion in determining relevance and in ruling on objections to items presented. The procedure contemplated by this change is similar to that under Federal Rule of Criminal Procedure 32, dealing with presentencing reports, but it limits items which may be considered to items contained in official records and accordingly puts the accused on notice of what may be considered against him.

75e

Argument on the sentence. This new subparagraph was added for the purpose of providing for argument on the sentence. It has been held that this argument is permitted. *United States v. Olsen*, 7 USCMA 242, 22 CMR 32 (1956). It is indicated that improper argument on the sentence includes raising an inference that counsel speaks for the convening or a higher

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authority and referring to the views of these authorities (*United States v. Carpenter*, 11 USCMA 418, 29 CMR 234 (1960); *United States v. Lackey*, 8 USCMA 718, 25 MCR 222 (1958)), referring to policy directives on punishment (*United States v. Davis*, 8 USCMA 425, 24 CMR 235 (1957); *United States v. Estrada*, 7 USCMA 635, 23 CMR 99 (1957); *United States v. Fowle*, 7 USCMA 349, 22 CMR 139 (1956)), and referring to any quantum of punishment authorized for offenses in excess of that which can be lawfully imposed by the court which is trying a case (*United States v. Crutcher*, 11 USCMA 483, 29 CMR 299 (1960); *United States v. Eschmann*, 11 USCMA 64, 28 CMR 288 (1959)).

The matter as to whether the prosecution or defense has opening and closing argument has been left to the discretion of the MJ, or the president of a special court-martial without an MJ. On this subject, see CM 412244, *Wilson*, 35 CMR 576 (1965); ACM 9406, *Weller*, 18 CMR 473, 483 (1954).

76a

Basis for determining the sentence. This subparagraph was substantially revised. The former subparagraph (3), which concerned the effect of previous convictions on determining the proper measure of punishment, was deleted as inconsistent with the theory that the matter of an appropriate sentence is solely for the discretion of the court. See *United States v. Slack*, 12 USCMA 244, 30 CMR 244 (1961). The former subparagraph (4), which indicated that sentences should be relatively uniform and that more severe sentences may be necessary to meet the needs of local conditions, and the former subparagraph (5), which indicated that inadequate sentences tend to bring the armed forces into disrepute, were deleted for the same reason as subparagraph (3). See also *United States v. Cook*, 11 USCMA 99 28 CMR 323 (1959); *United States v. Mamaluy*, 10 USCMA 102, 27 CMR 176 (1959). The subsequent portions of this subparagraph were renumbered to compensate for these deletions.

The second sentence of subparagraph (2), which indicated that the maximum sentence should be reserved for an offense aggravated by the circumstances or where there is evidence of previous convictions of similar or greater gravity, was deleted. The court does not know the facts and circumstances surrounding previous convictions, and this sentence was inconsistent with the theory that the matter of an appropriate sentence is entirely discretionary with the court. See *United States v. Slack, supra*. To compensate for this deletion a new clause was added after the word "therein" in the first sentence.

The present second, third, and fourth sentences of subparagraph (2) are new additions. They provide new rules as to what matters may be considered by the court members in determining an appropriate sentence. The rule that the court may consider evidence of other offenses or acts of misconduct *properly* introduced at any stage of the trial even if it does not meet the requirement of 75b(2) and even if it was introduced for a limited purpose on the merits was apparently the law before the decision in *United States v. Turner*, 16 USCMA 80, 36 CMR 236 (1966). See *United States v. Plante*, 13 USCMA 266, 273-274, 32 CMR 266, 273-274 (1962); *United States v. Statham*, 9 USCMA 200, 203, 25 CMR 462, 465 (1958); *United States v. Blau*, 5 USCMA 232, 243-244, 17 CMR 232, 243-244 (1954). It is fully recognized that the Court in *Turner* stated:

"We hold, therefore, as our precedents require, that, even assuming admissibility of the stipulated fact . . ., it was the duty of the law

Paragraph

officer, *sua sponte*, to instruct the court that such evidence of other misconduct could not be considered by it on the sentence or for any purpose other than that for which it was received.”

This quotation is followed by citations to *United States v. Conrad*, 15 USCMA 439, 35 CMR 411 (1965); *United States v. Gewin*, 14 USCMA 224, 34 CMR 4 (1963); *United States v. Back*, 13 USCMA 568, 33 CMR 100 (1963); *United States v. Bryant*, 12 USCMA 111, 30 CMR 111 (1961). However, study of the cited cases indicates that they did not necessarily require the result in *Turner*. In *Conrad*, the error went to findings because the law officer's limiting instructions, under the particular facts of the case, were not sufficiently specific. *Gewin* stands for the proposition that when other offenses are *improperly* admitted they should not be considered on the sentence. In *Back*, the error went to the findings as no limiting instruction was given in a situation where there should have been one. *Bryant* stands for the principle that when evidence is admitted for a limited purpose, a request for instruction is not required and that a limiting instruction must be given *sua sponte*. Regardless, however, *Turner* and the cases that followed were based on the 1951 Manual provisions, particularly paragraph 75b(2). See *United States v. Rodriguez*, 17 USCMA 54, 37 CMR 318 (1967); *United States v. Kirby*, 16 USCMA 517, 37 CMR 137 (1967). The President is authorized under Article 36(a) to prescribe the rule as to consideration of other offenses and acts of misconduct, and even with the changes in the first paragraph of 75b(2), the military procedure will be more lenient than that followed in the Federal system. For a more detailed discussion of these matters, see the first paragraph of the discussion of changes in 75b(2), *supra*. The added rule is both practical and logical. The primary purpose of limiting instructions is to foreclose the possibility of convicting the accused on the basis that he is a “bad man” with criminal dispositions or propensities rather than on the evidence relevant to the offense charged. *United States v. Hoy*, 12 USCMA 554, 556, 31 CMR 140, 142 (1961). The same consideration does not exist as to sentence. The fact that the accused is a “bad man” is the very type of thing that should be considered in determining an appropriate sentence. Also, it is highly unlikely that court members can ever erase other acts and offenses from their minds once they are heard. As a matter of fact, a limiting instruction tends to overemphasize the importance of prior misconduct.

Additions were made in what is now the fifth sentence of subparagraph (2) which provide that a court in determining an appropriate sentence may consider a guilty plea as a mitigating factor (see *United States v. Rake*, 11 USCMA 159, 28 CMR 383 (1960)), evidence of mental impairment or deficiency as provided in 123, and any evidence in mitigation.

The subject matter now contained in subparagraph (5) was formerly in subparagraph (8). However, the subparagraph was substantially revised. The example in the first paragraph was expanded by showing that if the accused, in the example, was convicted of absence without leave instead of desertion, the unauthorized absence and the escape would not be separate for punishment purposes. *United States v. Welch*, 9 USCMA 255, 26 CMR 35 (1958).

What was formerly the last sentence of the one paragraph comprising (8) was deleted as it erroneously indicated that an included offense could not contain an element not contained in the principal offense. Although this is a general rule, it is not always legally correct. See *United States v.*

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Malone, 4 USCMA 471, 16 CMR 45 (1954); *United States v. Duggan*, 4 USCMA 396, 15 CMR 396 (1954); *United States v. Craig*, 2 USCMA 650, 10 CMR 148 (1953); *United States v. Davis*, 2 USCMA 505, 10 CMR 3 (1953).

The second paragraph contained in subparagraph (5) is a new addition which shows that there are other rules which must be considered besides the general rule before it is finally determined whether or not offenses are separate. These rules were announced respectively in *United States v. Redenius*, 4 USCMA 161, 15 CMR 161, (1954); *United States v. Kleinhans*, 14 USCMA 496, 34 CMR 276 (1964); *United States v. Beene*, 4 USCMA 177, 15 CMR 177 (1954); and *United States v. Soukup*, 2 USCMA 141, 7 CMR 17 (1953).

The third paragraph of subparagraph (5) is also a new addition. It states how the maximum punishment is determined when an accused is convicted of offenses which are not separate.

76b

The titles were changed to indicate that the procedure described applies only to court members and not to the MJ sitting alone.

76b(1)

Instructions on punishment. The first sentence was modified to require instructions on the maximum punishment. *United States v. Turner*, 9 USCMA 124, 25 CMR 386 (1958).

The second sentence is new and requires the MJ to tailor his instructions on the sentence to the law and the evidence in the case. *United States v. Wheeler*, 17 USCMA 274, 38 CMR 72 (1967).

The third and fourth sentences are new additions. They indicate that the court will not be advised of the maximum punishment that would be authorized except for limitations on the sentence because of the jurisdiction of the court or because the case is a rehearing or new or other trial. It is further provided that the court will not be advised of the reason for any sentence limitation. *United States v. Green*, 11 USCMA 478, 29 CMR 294 (1960); *United States v. Eschmann*, 11 USCMA 64, 28 CMR 288 (1959); *United States v. Jones*, 10 USCMA 532, 28 CMR 98 (1959).

The fifth sentence is new and it requires that the court be advised of the reason when additional punishment is authorized because of the provisions of 127c, Section B. *United States v. Rake*, 11 USCMA 159, 28 CMR 383 (1960); *United States v. Hutton*, 14 USCMA 336, 34 CMR 146 (1964); *United States v. Yokom*, 17 USCMA 270, 38 CMR 68 (1967).

The next to the last sentence was revised to remove the former inference that the president of a special court-martial without an MJ does not rule finally on the question of instructions. Art. 51. See *United States v. Bridges*, 12 USCMA 96, 30 CMR 96 (1961).

76b(2)

Deliberation and voting on the sentence. Two sentences were added at the end of the third paragraph to provide for action to be taken when the required portion of the court members cannot agree on a sentence. *United States v. Goffe*, 15 USCMA 112, 35 CMR 84 (1964); *United States v. Jones*, 14 USCMA 177, 33 CMR 389 (1963).

76b(4)

Form of sentence. The former last sentence was deleted. That sentence authorized the court to make a brief statement of the reasons for a sentence for inclusion in the record. This deletion was made for the same reasons given for a similar change in 74f(3).

Paragraph

Three sentences were added at the end of the subparagraph which prescribe that the MJ may not enter a closed session of the court during sentence deliberations and how the court should properly obtain additional instructions on the sentence when required. *United States v. Keith*, 1 USCMA 493, 4 CMR 85 (1952). See *United States v. Linder*, 6 USCMA 669, 20 CMR 385 (1956).

76c

Announcing sentence. Four sentences were added before the last sentence of the first paragraph to prescribe the method of correcting an incorrectly announced sentence before a court disperses. *United States v. Liberator*, 14 USCMA 499, 34 CMR 279 (1964); *United States v. Robinson*, 4 USCMA 12, 15 CMR 12 (1954). See *United States v. Nicholson*, 10 USCMA 186, 27 CMR 260 (1959); *United States v. Long*, 4 USCMA 101, 15 CMR 101 (1954).

76d

Procedure for reconsideration of the sentence. This is a new subparagraph reflecting the new Article 52(c).

When reconsidering a sentence which is not mandatory but which is legal in part and illegal in part, the maximum sentence that may be adjudged is the legal portion of the original sentence. See *United States v. Nicholson, supra*; *United States v. Lang, supra*.

76e

Provides for announcement of sentence in open session by MJ alone.

77a

Conforming changes which recognize that the MJ may adjudge the sentence.

77c

New subparagraph which recognizes the right of an accused whose sentence includes confinement at hard labor to apply for deferment of the service of confinement.

CHAPTER 14
PROCEDURE OF INFERIOR COURTS-MARTIAL

- Paragraph
78 Revised to recognize that an MJ may be detailed to an SPCM.
- 79a *Function of the summary court-martial.* The former second sentence, which stated that in the trial of the case “the summary court represents both the Government and the accused,” was deleted. The sentence was considered unnecessary as the matter is adequately covered in the present second sentence. The present second (former third) sentence was modified so as to make it applicable in guilty plea cases. An accused is entitled to the protection provided by this sentence whether or not there is a guilty plea.
- 79d(1) This incorporates the right, now provided by Art. 20, of a person to object to trial by SCM even after he has refused non-judicial punishment.
- 79d(2) *Arraignment and pleas before a summary court-martial.* The former first paragraph was divided into two paragraphs, and the first paragraph is the same as the first three sentences of the former first paragraph. The remainder of the first, now second, paragraph, which gave the explanation to be made to the accused when he pleads guilty, was changed to conform to that for general and special courts-martial. See the comments on 70b(2).
- The third paragraph, which gives the standard to be used in determining whether to accept a guilty plea, is new. This standard conforms to that for general and special courts-martial. See the comment on 70b(3).
- 79d(3) *Presentation of evidence at the summary court-martial.* In the first sentence, “in the interest of justice” was deleted before the word “following” on the basis that it was an improper limitation on presenting evidence in guilty plea cases. At the end of the third sentence, “whether on the merits or in extenuation or mitigation,” was deleted as the procedure for presenting matters in extenuation and mitigation is covered in 79d(4).
- 79d(4) This subparagraph has been amended to include the requirement that the summary court, if the sentence imposed includes confinement at hard labor, advise the accused of his right to apply for deferment of confinement. See Art. 57(d) and 88f.
- 79e *Record of the summary court-martial.* The first sentence is a new addition which was added to provide flexibility. See the discussion of changes made in subparagraphs 90e and 91c of Chapter XVII. The former first sentence, which was a reference to “appendix 11 for form of record of trial by summary court,” was deleted. The former second sentence was deleted.

CHAPTER 15

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

Paragraph

80b

Revision. In connection with a new MJ or new member of the prosecution or defense being "sworn," a parenthetical phrase was added to cover the possibility that they had been previously sworn.

It further provides that proceedings in revision in a trial conducted by MJ alone may be held only by the MJ who was present at the conclusion of the case.

80c

Revision procedures. The second sentence of the first paragraph is a new addition which indicates that the MJ, or president of a special court-martial without an MJ should give the necessary instructions to accomplish the revision action. It was added to remove the inference that the MJ instructs at a revision proceeding only on request.

Also in the first paragraph, the words "If necessary" were added to the sixth sentence and the words "open and" were deleted between "will" and "announce" in the seventh sentence. This was done because it may not always be necessary to close to accomplish the revision, for example, to correct "a slip of the lip" on a sentence announcement.

81b

Procedure for rehearings and new and other trials. This subparagraph was completely revised. It now distinguishes between rehearings in full, rehearings on the sentence, and combined rehearings, and it sets forth the procedure to be followed at each type of rehearing. The new material was necessary primarily because rehearings on the sentence have been frequent since the publication of the former Manual in 1951, and they were not provided for in that Manual. See, e.g., *United States v. Kepperling*, 11 USCMA 280, 29 CMR 96 (1960); *United States v. Field*, 5 USCMA 379, 18 CMR 3 (1955). Some additions which are particularly worthy of note are discussed below.

81b(2)

Procedure for rehearings on sentence only. The purpose of the fifth sentence is to emphasize that the former testimony exception to the hearsay rule is not applicable in this situation. This is because the Government does not again have to prove its case as to the guilty findings and because the court must have some information concerning the offenses in order to properly adjudge a sentence.

In regard to the last sentence, if the plea is established as being improvident and the rehearing has been ordered by a Court of Military Review or the Court of Military Appeals, referral should be through the appropriate Judge Advocate General rather than directly to Court.

81b(3)

Procedure for combined rehearings. The second sentence provides for additional challenges for cause during the sentencing procedure in a com-

Paragraph

bined rehearing. The reason for this is that the members of the court are not advised of the offenses which are being reheard for sentencing only until after announcement of the findings on the specifications being reheard on the merits. The additional challenges for cause are permitted because it would be improper to *voir dire* the member at the usual time as to the specifications which are not being reheard on the merits. Also, the members of the court would not be aware themselves of any disqualifications as to these specifications until after findings.

81c

Examination of record of former proceedings at a rehearing or new or other trial. A cross reference to 81b(2) was added as a second sentence in order to clearly indicate that an exception to the general rule, as expressed in the first sentence of the subparagraph, exists in the case of a rehearing on the sentence. See the fifth sentence of 81b(2). On rehearing, permits MJ to read prior record in its entirety.

81d

Sentence rules for rehearings and new and other trials. This subparagraph was substantially changed. The title was changed from "Sentence" to "Rules relating to sentence" on the basis that the new title is more appropriate for the matter contained in this subparagraph. Also, it was subdivided into subparagraphs (1) and (2). The significant features of these subparagraphs are discussed below.

81d(1)

Sentence rules for rehearings and new trials. The major innovations herein are the provisions for sentence rules for the three types of rehearings.

The first paragraph makes it mandatory to advise the court of the maximum sentence which is imposable in accordance with the same change made in 76b(1). Formerly, the first sentence of 81d erroneously indicated that the court should be advised of the sentence adjudged at the original trial. This was corrected, and, in the third paragraph, an admonition against doing this has been added. *United States v. Eschmann*, 11 USCMA 64, 28 CMR 288 (1959).

The first sentence of the second paragraph prescribes that the maximum sentence authorized at a rehearing or new trial is limited by the legal sentence adjudged upon a previous trial or hearing as ultimately reduced by the convening or other proper authority when any such action has been taken. Should the Court of Military Appeals reverse a Court of Military Review by holding that the court erred in affirming only a portion of the findings and sentence as approved by the convening authority, there would not be an "ultimate" (valid) reduction which would limit the maximum sentence at a subsequent trial for the same offenses. In this instance, the maximum permissible sentence at a subsequent trial would be that which was approved by the convening authority. See *United States v. Russo*, 11 USCMA 252, 355, 29 CMR 168, 171 (1960); *United States v. Jones*, 10 USCMA 532, 28 CMR 98 (1959); *United States v. Dean*, 7 USCMA 721, 23 CMR 185 (1957). The word "legal" was included in the sentence to indicate another exception to the rule expressed therein, that is where a court fails to return a mandatory punishment. Such a failure results in an illegal sentence. The significance of the use of "by the convening or other proper authority" is that any sentence reduction under Article 74 would be applicable to rehearings and new trials. Frequently these reductions take place prior to the completion of appellate review, and this conforms with the language used by the Court in *United States v.*

Paragraph

Jones, 10 USCMA 532, 533, 28 CMR 98, 99 (1959). Also see *United States v. Russo, supra*.

The third sentence of the second paragraph explains that in adjudging a less severe sentence at a rehearing or new trial, the court is not limited to adjudging the same or a lesser form or amount of the same type of punishment originally adjudged. *United States v. Smith*, 12 USCMA 595, 31 CMR 181 (1961); *United States v. Kelley*, 5 USCMA 259, 17 CMR 259 (1954).

The last sentence of the second paragraph is based on NCM 364, *Kincaid*, 17 CMR 523 (1954).

As to the sentence comprising the third paragraph, it should not be interpreted as prohibiting the breaking down of the maximum punishment when a rehearing is combined with a trial on additional offenses. In that instance, the court should be advised of what portion of the overall maximum sentence pertains to the reheard specifications, and that no punishment in excess of this may be considered for these offenses. See *Kincaid, supra*. This is really no different than breaking down the overall maximum punishment for the court when more than one offense is involved in an original trial. Of course, the court should not be told the reason for the sentence limitations on the reheard offenses.

81d(2)

Sentence rules for other trials. This subparagraph defines "other trials" and makes the sentence rules applicable to rehearings also applicable to other trials except as provided in the second sentence. This change was made for fundamental fairness to the accused who should not suffer by being subject to a more severe sentence at the next trial because of mistakes by the Government which were not his fault. It was felt that the Court of Military Appeals has found the lack of such a sentence limitation to be cumbersome and as a result has avoided declarations of jurisdictional error to insure that the accused will have the sentence protections of a rehearing at a subsequent trial. This might lead to bad law. See *United States v. Law*, 10 USCMA 573, 578, 28 CMR 139, 144 (1959) (dissenting opinion); *United States v. Ferguson*, 5 USCMA 68, 17 CMR 68 (1954); *United States v. Padilla*, 1 USCMA 603, 5 CMR 31 (1952). It was also noted that in *United States v. Roberts*, 7 USCMA 322, 22 CMR 112 (1956), despite a holding of jurisdictional error, the Court ordered a rehearing.

CHAPTER 16
RECORDS OF TRIAL

Paragraph
82a

General courts-martial—Responsibility for preparation of the record.
The second paragraph was rewritten to provide that the notes and recordings from which the record of trial was prepared should be retained for a period that is prescribed by regulations instead of “for at least 30 days after delivery of a copy of the record to the accused or 60 days after the record of trial is forwarded to the convening authority, whichever period expires first.” Administrative matters such as this are handled better by regulations than by an executive order. In rewriting this paragraph, the reference to recording devices was deleted as unnecessary and the paragraph is now addressed only to the retention of the notes and recordings.

82b

Contents of the record of trial. In the third sentence of (1), “hearings held out of the presence of the members” was inserted as a matter to be included in the “verbatim transcript.” Subparagraph (1) was further modified to implement the amendment of Article 54 by providing for summarized records of trial in certain designated cases.

When the accused has been acquitted of all charges and specifications, it is sufficient for his protection if the record reflects that he had been tried for an offense, and found innocent by a court which had jurisdiction.

The provision that records of trial in cases terminated with prejudice to the Government prior to findings need only contain sufficient information to establish jurisdiction over the accused was added as being within the intent of Art. 54. Such a termination of the case has the same effect as an acquittal and for all practical purposes it is an acquittal of all charges and specifications. The similarity between such action and an acquittal is even greater in cases dismissed on a motion for a finding of not guilty.

A summarized record is required for those cases in which the sentence adjudged does not include a discharge and is not in excess of that which could otherwise have been adjudged by a special court-martial. In such cases, the accused has been convicted and appellate authorities require a record upon which to review the conviction. The time and effort required to produce a verbatim record is not justified. The Manual for Court-Martial, United States, 1951 required only a summarized record for a special court-martial which did not adjudge a bad-conduct discharge. The summarized record has been found to be completely adequate for these cases, and this paragraph extends the practice to GCM's in which a similar sentence is adjudged.

This paragraph sets forth the minimum requirements for summarized records of trial but, in view of the many courses of action available, it is made clear that each Secretary may prescribe additional requirements for his department.

Paragraph

The former sixth sentence of (1) was deleted as being erroneous. It read as follows: "The record will set forth material conclusions arrived at by the members of the court in closed session." In the second paragraph of (5), "proceedings held outside of the presence of members of a general court-martial," was deleted because the common practice today is to incorporate them into the record at the point where they occur. See 57g(2) for the procedure for these hearings.

82f This subparagraph was changed to implement the amendment of Article 45.

82g(1) *Delivery to accused a copy of the record of trial of general court-martial.* In the first sentence of the first paragraph, "the trial counsel will arrange for the accused to be furnished with a copy of the record" was substituted for "the trial counsel will give the accused a copy of the record" to make it clear that the trial counsel does not have to personally hand the accused a copy.

82g(2) *Forwarding the record of trial to convening authority.* In the first sentence, "including a properly executed Court-Martial Data Sheet" was deleted as this type of detail is more appropriately handled by regulations. For the same reason, "the necessary copies of the record" was substituted for "all copies of the record not delivered to the accused."

82h *Loss of record of trial of a general court-martial.* In the second sentence, consideration was given to deleting "substantially" before the words, "accurate record of the case." But, the use of "substantially" was retained as it correctly reflects the standard applied by the Court of Military Appeals. See the comment on 15b for citations of authority.

82i *Loss of notes or recordings of the proceedings.* The former title, "Loss of notes or devices containing original record of proceedings" was changed and the reference to the devices from which the proceedings were recorded was deleted. It is the loss of notes or recordings, not the devices which made them, that creates the problem.

83 *Inferior courts-martial.* The material contained in 83b (1), (3), and (4), 83c, and 83d of the 1951 Manual was deleted in favor of leaving the matters formerly covered therein to regulations. The deleted material contained details as to preparation, authentication, and disposition of special court-martial records of trial.

83a Conforming changes were made to take account of presence of the MJ at BCD SPCM.

83b *Special court-martial records not involving bad-conduct discharge.* Numerical subparagraphing was no longer necessary in view of the deletions discussed under 83, above. This subparagraph now contains the material formerly contained in 83b(2). However, it was changed as indicated below.

The words "as indicated in appendix 10" were deleted at the end of the first sentence to remove the possible implication that the format prescribed in appendix 10 was not subject to modification.

The third sentence was inserted to allow further summarization in the event of acquittal. See comments opposite 82b.

Paragraph

The phrase "unless otherwise provided by regulations of the Secretary concerned" was added at the end of the fourth sentence. Cogent reasons may arise for providing for the retention of notes and recordings of these proceedings.

The last sentence was added to make it clear that details as to preparation, authentication, and disposition of records of trial are appropriate matters for regulations.

83c

Summary courts-martial. This subparagraph was formerly 83e. Its redesignation was necessitated by the deletions which are discussed under 83, above.

CHAPTER 17

INITIAL REVIEW OF AND ACTION ON RECORDS OF TRIAL

Paragraph

- 84a *Who may take initial action. General.* In the second sentence, “the term ‘convening authority’ includes the person who” was substituted for “the term ‘convening authority’ shall be understood to include the officer who” in recognition that a Secretary can be a convening authority.
- 84b *Normal convening authority.* In the first sentence, “person” was substituted for “officer” for the same reason as 84a.
- 84c *Officer exercising general court-martial jurisdiction.* In the first sentence “person” was substituted for “officer” for the same reason as in 84a. The third sentence was revised by adding the grant of immunity to a witness for the prosecution situation. See *United States v. White*, 10 USCMA 63, 27 CMR 137 (1958). A similar disqualification results when a prosecution witness testifies at a trial of another pursuant to his own negotiated plea of guilty agreement. See *United States v. Gilliland*, 10 USCMA 343, 27 CMR 417 (1959).
- 84d *Action when a bad-conduct discharge is adjudged by a special court-martial.* In the second sentence, “and has not been authorized to forward such a record directly to the appropriate Judge Advocate General for action” was deleted and “ordinarily” was inserted. The reference to 94a(3) was transposed from the second sentence to the third, and the change in this subparagraph conforms to the change in 94a(3). Added reference to 88b.
- 85b *Form and content of review.* In the first paragraph, all after the third sentence is new. In regard to statements in the fourth sentence of this paragraph, that matters outside the record may be considered relative to disapproval of all or part of the findings, see *United States v. Massey*, 5 USCMA 514, 18 CMR 138 (1955); but not to support finding of guilty, see *United States v. Duffy*, 3 USCMA 20, 11 CMR 20 (1953). In regard to the statement in the fifth sentence of this paragraph that matter outside the record may be considered relative to sentence, see *United States v. Lanford*, 6 USCMA 371, 20 CMR 87 (1955). In regard to the statement in the sixth sentence of this paragraph as to the opportunity to rebut or explain adverse matter, see *United States v. Griffin*, 8 USCMA 206, 24 CMR 16 (1957); and in regard to the two exceptions, “unless he supplied the information himself or may be charged with knowledge that the information might be used against him,” see *United States v. Harris*, 9 USCMA 493, 26 CMR 273 (1958) and *United States v. Owens*, 11 USCMA 240, 29 CMR 56 (1960), respectively. The former last sentence of the first paragraph, which stated that the convening authority may direct his staff judge advocate or legal officer to make a more comprehensive review, was deleted as unnecessary.
- The last sentence of the last paragraph is new, and states that the review should be limited to questions of jurisdiction when proceedings

Paragraph

were terminated without findings and no further action is contemplated. The term "concerned" was deleted as obsolete in this context.

85d

Disposition of review. This subparagraph formerly stated that two signed copies of the review will be attached to the original record, that copies of the review customarily are made available to the trial counsel and MJ, and in a case involving a bad-conduct discharge adjudged by a special court-martial a copy is ordinarily transmitted to the convening authority. As rewritten, it simply states that the original of the review will be attached to the original record of trial, and the number of copies of the review and their distribution will be as prescribed in regulations.

86b(2)

Finding of not guilty or ruling amounting to finding of not guilty as considered on review. The former last two sentences of the first paragraph read as follows: "Such a record may also show that administrative action is appropriate. For example, if the court acquitted the accused of all charges and specifications because of his lack of mental responsibility at the time of the offense (120b), the disposition of the accused will be in accordance with pertinent departmental regulations." They were deleted as an inappropriate reference to an administrative matter.

86c

Correction of record. The ninth and tenth sentences are new. They require service on the accused of a copy of the certificate of correction of the record of a summary court and the attaching of the receipt of this service to the record of trial if regulations require that a copy of the record be furnished to the accused.

86d

Revision proceedings. The first example in the former third sentence, "if a previous conviction was erroneously considered by the court, and it is believed that the consideration of such conviction influenced the court in adjudging the sentence," was deleted as this type of error could best be cured by a rehearing on the sentence or by the convening authority's reduction of the sentence.

87a(1)

Findings as to a specification on examination of a finding of guilty. The first sentence of (1) is new. It reads as follows: "The convening authority must make a specific and independent determination with respect to each finding of guilty."

87c

Effects of errors on the findings. This subparagraph formerly consisted of five paragraphs instead of the present two. In the rewrite, certain language was eliminated as surplusage. The former introductory words of the first sentence of the first paragraph, "although the competent evidence of record may be sufficient to establish the guilt of the accused as to a particular offense," were deleted; and in this sentence, "an error affecting that finding" was substituted for "an error concerning the admission of incompetent evidence prejudicial to the accused or the rejection of competent evidence favorable to the accused, or any matter of procedure affecting a finding of guilty of an offense." The second sentence of the first paragraph is the same as the former second sentence of the first paragraph. The third sentence of the first paragraph was substituted for the former second paragraph and the first sentence of the third paragraph of the first paragraph was substituted for the former second paragraph and the first sentence of the third paragraph of MCM, 1951.

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The substance of the fourth sentence of the first paragraph is the same as was in the former second sentence of the third paragraph. The fifth sentence of the first paragraph is the same in substance as the former third sentence of the third paragraph, but surplus language was eliminated by substituting "rather, the test is whether the competent evidence. . . ." The last sentence of the first paragraph is substantially the same as the fourth paragraph of MCM, 1951. However, the example of a flagrant violation of a fundamental right "when the disloyalty of defense counsel directly aids the prosecution," was deleted as unnecessary.

The last paragraph is the same as the fifth paragraph of MCM, 1951.

The former third sentence in the first paragraph gave, as an example of material prejudice to the accused, the failure to advise him relative to the statute of limitations. This sentence was deleted as unnecessary.

88a

Powers of the convening authority with respect to the sentence in general. The first sentence of the first paragraph is a new addition which generally defines the power of the convening authority as to disapproving or reducing a legal sentence. This statement was considered necessary to provide additional clarity when read in conjunction with 88b and c.

The fourth sentence of the first paragraph, formerly the third sentence was modified and reference to "divisible" sentences was deleted. The word "divisible" was considered to be unnecessarily confusing. In modifying this sentence, it has been changed to reflect what was meant by the word "divisible" in the former Manual. See *Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, 125.*

In the last sentence of the second paragraph, "mitigated" was changed to "reduced." The powers of the convening authority on sentence cannot be distinguished separately on individual theories of mitigation and commutation. See the discussion of this in the first paragraph of the discussion of changes in 88c, *infra.*

88b

The convening authority's determination of what sentence should be approved. The word "severe" was deleted before the word "sentences" in the next to last sentence of the first paragraph because the factors discussed in this sentence should be considered in all cases rather than just in those involving severe sentences.

The third paragraph is a new addition. The first sentence was added to compensate for the deletion of the former provision in the second paragraph of 127b of the 1951 Manual that forfeitures of pay may not exceed two-thirds per month for 6 months without a punitive discharge. The language adopted here is similar to that formerly appearing in the last paragraph of 127b, however the forfeiture limitation was linked to cases where there is no confinement rather than to those with no punitive discharge. The last paragraph of 127b was deleted as it related to a matter which should be considered by the convening authority in taking his action and its content thus was more closely related to the subject matter in this chapter. Logically, the forfeiture limitation should be linked to cases where there is no confinement rather than where there is no punitive discharge. A person who is confined has no great need for money, whereas a person pending punitive discharge, who is not confined, does have. The provision is also consistent with the Congressional intent expressed in Article 57(a) that a person in confinement should not be allowed

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to draw full pay. It also expresses what has long been a custom of the service. See CM 361331, *Bomblosky*, 9 CMR 342 (1953). This policy is generally practice in the service today and the example in the last paragraph of 88e(1) has always inferred that the policy is applicable. A clear pronouncement of the policy was needed in the Manual in order to avoid confusion. Additionally, the provision takes into account the guidance in *United States v. Jobe*, 10 USCMA 276, 27 CMR 350 (1959), which indicates that it might be cruel and unusual punishment to have a person who is not confined under excessive forfeitures.

The second sentence of the new third paragraph is a cross reference which indicates appropriate action when a problem arises as to overlapping forfeitures resulting from more than one sentence. See 88d(3) and the discussion of its provisions herein as to how the power of the convening authority has been expanded in the deferral of forfeitures.

88c

Approval of part of a sentence by the convening authority. This subparagraph was almost completely rewritten to reflect the holding in *United States v. Russo*, 11 USCMA 352, 29 CMR 168 (1960), and subsequent cases (see, e.g., *United States v. Johnson*, 12 USCMA 640, 31 CMR 226 (1962); *United States v. Christensen*, 12 USCMA 393, 30 CMR 393 (1961)), that the convening authority may not only reduce a sentence in quality and quantity but also may change the punishment adjudged to one of a different nature, so long as its severity is not increased. Although the word "commute" is used in *Christensen*, it has not been used in this subparagraph as it was considered best to avoid the use of words having special legal connotation and to avoid the possibility of any appearance of inconsistency with Article 71(a) and (b). No attempt has been made to set forth examples of sentences which may properly be approved by the convening authority. Each case will have to turn on its particular facts and circumstances in accordance with the general rules set forth in this and other paragraphs.

It should be noted that the first sentence of the first paragraph does not refer to the convening authority approving a *part* of a sentence as was formerly done in the second sentence of this paragraph. In testing the legality of the convening authority's action, the test is not whether he approves a *part* of an adjudged sentence which is no more severe than a *part* adjudged. The test is whether the *overall* sentence approved by the convening authority is no more severe than that adjudged. See, e.g., *United States v. Christensen*, *supra*.

Of course, the second sentence of the present first paragraph does not foreclose a convening authority from taking actions such as changing an improperly adjudged dismissal of a noncommissioned warrant officer to a dishonorable discharge. This type of action is obviously sanctioned by the decisions in *United States v. Alley*, 8 USCMA 559, 25 CMR 63 (1958) and *United States v. Bell*, 8 USCMA 193, 24 CMR 3 (1958).

88d

Execution of sentence. This subparagraph was substantially revised by expanding and subparagraphing it. Subparagraph (1) has been entitled "*Authority to order*" since this is the subject matter contained therein. This matter is basically the same as that which formerly comprised all of 88d. Subparagraphs (2) and (3) contain matter which is new to 88d, and they are entitled "*To confinement*" and "*To forfeitures of pay or allowances*," respectively. It is felt essential in the interest of clarity to

Paragraph

give these subjects separate treatment as they are exceptions to the general rule that sentences are effective on the date ordered executed as prescribed in Article 57(c). Since they are afforded separate treatment in Article 57(a) and (b), it was considered appropriate to do the same in 88d. Significant features of the individual subparagraphs are discussed below.

88d(2)

Execution of sentence to confinement. This subparagraph consists of cross references to 88f, 97c, and 126j. The basis of this addition was that the convening authority should consider the provisions of these subparagraphs prior to taking his action. It was considered more appropriate to leave the material contained in these subparagraphs in their present locations rather than incorporating it here because these provisions normally operate automatically without affirmative action by the convening authority.

88d(3)

Execution of sentence to forfeiture of pay or allowances. This subparagraph discusses the effective date of forfeitures. The subject was formerly discussed in detail in 88e(3)(c), and a partial discussion still remains in 126h(5). Because of its close connection with Article 71, it was considered more appropriate to include the detailed discussion of this matter in this subparagraph rather than in 88e(2)(c). It was felt that the relocation might be helpful in eliminating the problem of forfeitures being prematurely ordered applied or executed in some cases.

A new second paragraph was added to comply with the change to Article 57(a). This paragraph is designed to eliminate any ambiguity in actions or orders affecting the application of forfeitures where a deferred sentence to confinement is involved. The officer empowered to defer the service of confinement has several options with respect to forfeitures in the event he subsequently rescinds a deferment of confinement. He may continue the deferment of the forfeitures; he may order forfeitures to apply effective the date of the rescission; or he may direct that forfeitures be applied at some future date.

The third paragraph of this subparagraph concerns the specific actions to be taken by the convening authority when he is authorized to order forfeitures applied or executed. It was formerly indicated in 88e(2)(c) that the power of the convening authority to defer was limited to deferral of the *application* of forfeitures until the sentence is ordered executed at the completion of appellate review. It is indicated in 42 Comp. Gen. 279 (1962) that the power to defer is not this limited. Accordingly, the limitation was removed. The present treatment permits the convening authority to defer the *execution* of forfeitures when authorized (see Article 71) and appropriate, for example, to obtain full collection of forfeitures when two sentences to partial forfeitures would otherwise overlap. Also, deferral of *application* is permitted without limitation as to time. For example, a convening authority may decide to defer the application of total forfeitures for whatever time is necessary to obtain transportation for dependents from an oversea command and the time element would probably be something short of the time required to complete appellate review. Of course, each service is free to impose by policy regulations those limitations on these powers which are considered necessary.

The sentence comprising the third paragraph indicates that the convening authority should make an affirmative statement in his action as to the execution, suspension, application, or deferral of forfeitures. The purpose of the sentence is to encourage good administration. It was not in-

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tended to conflict with the automatic application of forfeitures provision in the next to last sentence of the first paragraph of this subparagraph. In this regard, although the second paragraph contains rewording, there is no change in substance from the material contained in the second paragraph of 88e(2)(c) of the 1951 Manual. Although there might appear to be some conflict concerning the mandatory language of the Manual (see also 126h(5)) and the permissive language of Article 57(a) as to the application of forfeitures, the Court of Military Appeals has upheld the mandatory language of the Manual which serves to implement automatic application. *United States v. Lock*, 15 USCMA 574, 577, 36 CMR 72, 75 (1965).

88e(1)

Suspension of the execution of the sentence in general. The words "for a stated period of time" were added to the first sentence of the second paragraph to indicate that a suspension cannot be indefinite.

The word "Ordinarily" was deleted from the beginning of the second sentence of the second paragraph because there are no valid exceptions to the stated purpose of suspending sentences. The sentence was further reworded to avoid the inference that the purpose of a suspended sentence is to permit an accused to show by affirmative acts of good conduct that a suspension should be remitted. Actually, all that is required is that he not get in trouble which would justify vacation. See, e.g., *United States v. Cecil*, 10 USCMA 371, 27 CMR 445 (1959); *United States v. May*, 10 USCMA 258, 27 CMR 432 (1959).

The third and fourth sentences of the second paragraph are new additions which contain information transposed from 97a. It was felt more appropriate to include this information here as it should be considered by the convening authority when he takes suspension action.

The former next to last paragraph has been deleted because it furnished little or no guidance and could be considered as a limitation on the powers of the convening authority under the Code and as command influence.

88e(2)(a)

Types of suspensions in general. The first sentence was revised so as to convey more definite instructions for specifying the period of time for which a suspension is to last. The terms "definite" and "indefinite" formerly used to describe this period of time were subject to several interpretations. As rewritten, the sentence makes it clear that the period of suspension may not be so indefinite as to depend on a contingency that may never occur.

The second sentence was modified to indicate that the convening authority should provide for remission of all types of suspended sentences rather than just when the suspension is for a specific term. See *United States v. Cecil, supra*; *United States v. May, supra*.

The next to last sentence as rewritten incorporates the idea formerly expressed in the next to last sentence as well as the former provisions in the last paragraph of 88e(2)(b). This material was moved from 88e(2)(b) as it expresses general rules which are applicable to suspensions other than the suspension of punitive discharges. It should be noted that the former provision in this sentence as to suspending for an additional period has been removed as such an action would be an illegal increase in the punishment.

88e(2)(b)

Suspending dishonorable or bad-conduct discharge when sentence also includes confinement. The former third through sixth sentences were

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deleted. These sentences sanctioned the practice of administrative suspension of punitive discharges until the completion of appellate review at which time the discharges were executed without a hearing as required by Article 72(a) and (b). This practice was forbidden in the *Cecil* and *May* cases, *supra*.

The former last sentence was modified and incorporated in the next to last sentence of 88e(2)(a). See the last paragraph of the discussion of changes in 88e(2)(a), above, for the reason for this change.

88e(2)(c)

Suspending the execution of forfeiture. This subparagraph now consists of only a cross reference to 88d(3) where the matters formerly appearing herein now appear in modified form. See the discussion of changes in 88d(3), *supra*, for the details.

88e(3)

Termination of suspensions by remission. This subparagraph is a new addition. The first and last sentences contain information formerly contained in 97a. These are matters which should be considered by the convening authority in taking his action and, therefore, properly belong in this chapter rather than in Chapter XIX which deals primarily with subsequent actions at higher levels. The second sentence, providing that the unauthorized absence of an accused interrupts the running of a period of suspension, is an entirely new addition. See JAGJ, CM 347759, 3 Oct. 1952, 2 Dig. Ops. 841(1952 - 1953). In regard to the third sentence, it condenses the material contained in the last two sentences of the third paragraph of 97a of the 1951 Manual into one sentence. This was accomplished by dropping the word "honorable" before "discharge" and adding "which terminates status as a person subject to the code." The added words are necessary because it is common procedure to execute punitive discharges after the completion of appellate review and before the confinement portion of sentences has been completely served. In some instances this occurs in cases where a substantial portion of a sentence to confinement has been suspended. Without the recommended addition, such a suspension could not be vacated for misconduct occurring after the punitive discharge is executed and during the time that the remaining unsuspended confinement is being served.

88f

This new paragraph implements amended Art. 57(d). It explains what deferment of the service of a sentence to confinement is and distinguishes it from clemency. Inasmuch as the authority to defer is a discretionary matter for the officer empowered to do so, no attempt was made to establish guidelines for the exercise of this discretion, other than the cautionary recommendations against granting deferments when the accused would be a danger to the community, may repeat the offense, or may flee to avoid service of sentence. The nature of this authority is emphasized by characterizing it as sole and plenary. This was done in order to assure the greatest possible freedom of action on the part of the officer possessing this authority. See Senate Report, P 13.

The accused may apply for deferment to the officer exercising general court-martial jurisdiction only where the accused is no longer under the jurisdiction of the convening authority. In some instances, such as when the accused is sent to a retraining organization, the officer exercising GCM jurisdiction over the accused may not be the supervisory authority over the case within the meaning of paragraph 94. In order to eliminate any question as to which officer should be requested to grant deferment in an appropriate case, it is clearly stated that the officer exercising jurisdic-

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tion over the command to which the accused is assigned is the proper person, regardless of whether he is the supervisory authority of the case.

Although the statute is clear that the power to defer lies in the convening authority or in appropriate case, the officer exercising general court-martial jurisdiction, the fact that a court-martial was not empowered to do so, was stated in 88f in order to keep the question from being raised.

For the sake of orderliness and the maintenance of a well documented record of trial, applications for deferment of confinement and grants and denials of the applications are to be in writing. This correspondence will be made a part of the record of trial.

Although it may be necessary in certain instances, particularly where there is a considerable distance between the place of trial and the location of the convening authority, to obtain a grant of deferment telephonically, the requirements of this provision are adequately met if the request and grant are reduced to writing and later incorporated into the record of trial.

The fact of a deferment and the dates between which it is in effect will be set forth in the convening authority's action in those cases where the granting of the request occurs prior to or concurrently with the taking of the action. In all other cases this information will be promulgated in supplementary orders which will be included in the record of trial. All deferments together with their inclusive dates under this system will ultimately be reflected in either court-martial orders or supplementary orders, thus providing an authoritative and definitive basis for computing the length of time to be served, and the date upon which the service is to begin, as well as ready, concise account of the accused's status with respect to confinement.

Restriction or any other form of deprivation of liberty is prohibited from being used as a substitute for deferred confinement. Providing or permitting otherwise would serve to increase the punishment which an accused would undergo and might well discourage the exercise of this right completely. Allowance is made for imposing restrictions upon the accused's movements for independent reasons which would be justified under other provisions of the manual.

Once the sentence is ordered into execution, the deferment is terminated (Art. 57(d)). The confinement may be approved and suspended but it may not be further deferred. Deferment of confinement and suspension of the same period of confinement cannot exist concurrently as they involve two basically different concepts.

88g

This paragraph provides for the rescission of deferment of the service of confinement.

The convening authority, and when the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is then assigned, are empowered to rescind a deferment of confinement at any time. The authority to do so is characterized as being sole and plenary in order to give these officers the widest possible discretion in exercising this prerogative.

Rescissions of deferments, together with the dates on which they occur, are required to be set forth in the initial action in the case or in

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supplementary orders depending on when they take place. Ultimately all rescissions and the dates on which they are effected will be reflected in either the court-martial order or supplementary orders which will be included in the record of trial. These requirements insure orderliness in procedure and a complete record of trial, as well as a convenient, authoritative, and definitive document from which to compute the amount of time which remains to be served.

89c(4)

Action concerning execution and suspension of the sentence. The second paragraph which formerly consisted of one sentence was deleted. That sentence dealt with recommendations of the convening authority when he was not empowered to commute a sentence. This provision was no longer proper in view of the changes in 88c giving the convening authority unrestricted power to commute. See the first paragraph of the discussion concerning reasons for changes in 88c, *supra*.

89c(6)

Action concerning custody or confinement while awaiting result of appellate review. The title of this subparagraph was changed. The former title was "Temporary custody." Additionally, the words "or confinement" were added to the latter portion of the first sentence. These changes were made to avoid a possible interpretation that confinement pending appellate review is always classified as temporary custody.

The former next to last sentence was deleted. It announced the policy that an accused in confinement should, when practicable, be retained in the command of the officer exercising general court-martial jurisdiction over him until final disposition of the case upon appellate review. This was not consistent with the practice in all of the services and such a policy is more appropriate for inclusion in regulations if desired.

89c(7)

This is a new paragraph which provides for action on deferment of service of the sentence to confinement.

89c(8)

Action on rehearing or new or other trial. The title and content of this subparagraph was expanded by adding new or other trials to its scope and it was re-numbered. The expansion was accomplished in order to give the convening authority added guidance when required to take action in these situations. Accordingly, this subparagraph was subdivided into two subparagraphs and the substantive changes discussed below were made.

89c(8)(a)

Action on rehearing or other trial. This subparagraph as modified includes all of the material formerly in 89c(7). The first paragraph of the subparagraph is a new addition. The first sentence of the first paragraph provides that the convening authority is subject to the same sentence limitations as those prescribed for the court at a rehearing. The last sentence of the first paragraph provides for the action to be taken in certain cases when a portion of the original sentence was suspended. See *United States v. Smith*, 11 USCMA 149, 28 CMR 373 (1960).

A provision was added to the second sentence of the present second paragraph to require crediting of any executed portion of the original sentence in computing the term or amount of punishment to be served or executed pursuant to a new sentence only when a particular type of executed punishment is also included in the new sentence. This change was necessary to remove the inference that there will be a crediting in all situations where a portion of an original sentence has been executed. For

Paragraph

example, it is now clear that crediting is not required if an accused served a term of confinement on an original sentence, and the sentence at the rehearing only includes a punitive discharge. Also see the discussion of changes in 110f (Chapter XXI), *infra*, where the same change was made in regard to sentences adjudged at a new trial.

89c(8)(b)

Action on a new trial. The content of this subparagraph is a new addition which provides that the action of the convening authority on a new trial will conform to the rules set forth in 89c(7)(a) for rehearings, insofar as authorized and practicable. The purpose of this addition is to furnish needed guidance on new trials. The cross references in the second sentence to various subparagraphs of 110 pinpoint provisions in 89c(7)(a) which are not applicable in new trials.

90a

Orders and related matters in general. The first paragraph is a new addition. It was added to provide needed flexibility. This addition authorizes each service to establish its own procedures in the interest of greater efficiency should any service desire to do so.

90b(2)

Orders issued subsequent to initial action of the convening authority. This subparagraph was revised to make it clear that the authorities mentioned herein do not have the power to take all of the actions indicated by the cross references. The fact that this subparagraph was misleading is well illustrated in the recent case of *United States v. Lock*, 15 USCMA 574, 577, 36 CMR 72, 75 (1966) where the Court cited 90b(2) for the proposition that "Subsequent actions on the same record may be taken by any officer actually exercising general court-martial jurisdiction over the accused." Of course, this is not factually correct. For example, after the initial action of the convening authority, subsequent clemency actions may be taken by the general court-martial authority only when the Secretary concerned has delegated his power under Article 74(a). The last sentence was changed to include the requirement of promulgating orders in certain instances involving deferments and rescissions thereof.

90e

Summary court-martial orders and related matters. All reference to "three" copies of the summary court-martial record of trial was deleted, and the first sentence of the first paragraph was reworded to state that a summary court promulgating order "need not be" rather than "is not" issued. The requirements in the last sentence of the first paragraph regarding copies of the record of trial were made inapplicable when a promulgating order is used.

The former second paragraph of this subparagraph was deleted. This paragraph dealt with the numbering of summary court records which is a subject more appropriate for regulations. Also, numbering is unnecessary if a promulgating order is used.

91a

Disposition of general court-martial records and related matters. The words "two signed copies of" were deleted before the words "the review" in the latter portion of the first sentence of the second paragraph. This is consistent with a similar change in 85d and provides greater flexibility in that the services vary as to requirements for number of copies and distribution of reviews.

91b

Disposition of special court-martial records and related matters. This subparagraph was completely revised in the interest of clarity. The former subparagraph simultaneously discussed those cases that included a bad-conduct discharge and those that did not. This provided a confused

Paragraph

treatment of the subject. It should be noted that, as revised, subparagraph (1) makes no mention of forwarding a case to the Judge Advocate General under 94a(3). The reason for this is that this portion of 94a(3) was not used in the services and regulations provide for the processing of these cases when the general court-martial convening authority has no judge advocate or legal specialist. Accordingly, 94a(3) was revised to leave this matter to regulations.

The clause concerning regulations of the Secretary of a Department was included in the next to last sentence of subparagraph (2) to provide additional flexibility as discussed as to 90a, above.

91c

Disposition of summary court-martial records and related matters. The sentence comprising the first paragraph was added to relieve the mandatory aspects of the remainder of the paragraph.

CHAPTER 18

ACTION

Paragraph

92

Ordering rehearing or other trial. The title of this paragraph was changed as the former title, "Ordering Rehearing," was not as descriptive of its contents. This paragraph was divided into subparagraphs *a* and *b* to facilitate reference.

92a

Rehearing. In the second paragraph, the reference to who may order a rehearing was revised to include an officer having supervisory authority and an officer authorized to convene general courts-martial. See *United States v. Frisbee*, 2 USCMA 293, 8 CMR 93 (1953).

The fourth and fifth paragraphs are new. They were inserted to conform to the changes made in 81, to clarify the types of rehearings which may be ordered, and to prescribe the action which may be taken in each type of rehearing. See *United States v. Field*, 5 USCMA 379, 18 CMR 3 (1955). The seventh paragraph conforms to new 62f(10) in allowing the MJ to sit at the rehearing of a case in which he originally sat it further provided that the accused may request rehearing by MJ alone in all cases regardless of whether such a request was filed at the first hearing. An approved request at the initial hearing does not rule out a hearing with members the second go around.

In the last sentence of the seventh paragraph (formerly the fifth paragraph of 92), "the sentence shall be limited as provided in 81d(1)" was substituted for "no sentence in excess of or more severe than the original sentence shall be imposed unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings or unless the sentence prescribed for the offense is mandatory (Art. 63(b))." The deleted material was incomplete and incorrect. The sentence at the prior trial is not controlling when there has been a valid reduction therein before the rehearing. See 81d(1) and the discussion of the changes in that subparagraph of chapter XV.

The new tenth paragraph is based upon *United States v. Martinez*, 11 USCMA 224, 29 CMR 40 (1960). Although *Martinez* involved a situation where the original trial was before a general court-martial and the rehearing on sentence was before a special court-martial, the objection to a different type of courts-martial would be equally meritorious in a similar situation involving a special and summary court-martial. This paragraph would allow rehearing of the sentence adjudged by a special court-martial with an MJ by a special court-martial without an MJ.

92b

Other trial. This subparagraph contains material formerly in the ninth paragraph of 92. However, it was revised to make the procedure sentence limitations prescribed for rehearings applicable to other trials. See the comment on 81d(2) contained in the discussion of changes in chapter XV. Material similar to that provided in the seventh paragraph of 92a has also been inserted here.

**Paragraph
93**

Paragraph is amended by adding a statement to the first paragraph to the effect that the place of confinement will be designated in the action or order rescinding a previously granted deferment of confinement.

CHAPTER 19

ACTION AFTER PROMULGATION

Paragraph

94a(1)

Review of sentences and filing of records of special and summary courts-martial in general. A new sentence was added to provide that, except as provided in 94, the manner of exercising supervisory powers shall be as prescribed in regulations of the Secretary concerned. This permits flexibility among the services in the exercise of supervisory powers over special and summary courts-martial.

94a(2)

Review of records of trial pursuant to Article 65 (c). In the last portion of the first paragraph, "also reduce (see 88a), change the nature of (see 88a)" was substituted for "mitigate" to conform with the changes made in 88a and c regarding the power of commutation.

In the last paragraph, after "when, upon review pursuant to this paragraph," the words, "and any further review and procedures which may be provided in regulations of the Secretary concerned," were inserted. This permits the Secretary concerned to control the time of finality. Article 76 prescribes finality only with respect to review provided or required "by this chapter," i.e., the Code. The Code contemplates that the review of summary courts-martial and special courts-martial not including a bad-conduct discharge will be as prescribed by regulations, subject only to a requirement that the review be conducted by a judge advocate law specialist or lawyer of the Coast Guard or Department of Transportation. Therefore, the regulations may provide for further review of these cases at departmental level.

94a(3)

Review of special court-martial records pursuant to Article 65(b). The new second sentence states that regulations may provide for forwarding the record to any officer exercising general court-martial jurisdiction, who shall be considered "the officer exercising general court-martial jurisdiction" within the meaning of Article 65(b). The insertion of this sentence made it possible to delete the former third and fourth sentences.

96

Reports in certain cases. In the first paragraph, "which involves suspension from rank and command, restriction, or any other material change in the status of the officer" was changed to "which involves any material change in the status of the officer" as suspension from rank and command is no longer an authorized punishment and the particular designation of "restriction" as a "material change" is unnecessary.

97a

Remission and suspension. In the first paragraph, "reduce, change the nature of, or suspend" was substituted for "mitigate." See first paragraph of the comment on 94a(2).

At the end of the first sentence of the second paragraph, "except as provided in 105b" was added. The President, in the last paragraph of 105b, has authorized the Secretary concerned to act under Article 74(a) after the President commutes a death sentence. The last sentence of this paragraph is new. It provides that "suspension actions

Paragraph

taken under the authority of this paragraph (7) and Article 74(a) are subject to the rules set forth in 88e." This sentence was necessary because all rules concerning suspensions were consolidated in 88e. Accordingly, the third paragraph which dealt with suspensions was deleted and much of the material moved to 88e.

97b

Vacation of suspension. The second paragraph was rewritten to eliminate excess verbiage. Also, in the second sentence, the words "or includes, unsuspended" were added to conform with Articles 71(c) and (d). For example, if a portion of a sentence less than dishonorable or bad-conduct discharge or confinement for one year is vacated, it may be ordered into execution even when the sentence contains dishonorable or bad-conduct discharge or confinement for one year or more so long as any of those ingredients of the sentence continue to be suspended.

The fourth paragraph is a new addition which was added to preclude confusion that has existed in the past concerning the rules stated therein.

97c

Interruptions of execution of a sentence. In the first paragraph, "suspension from rank, command, or duty" was deleted as these are no longer authorized punishments.

The exception contained in the second indented paragraph is a new addition which is based on *United States v. Bryant*, 12 USCMA 133, 30 CMR 133 (1961).

The fourth indented paragraph provides that deferment interrupts the running of the sentence as does suspension.

97f

New subparagraph reflects change to Article 69 which expands the power of the TJAG's to vacate or modify sentences which have been finally reviewed.

CHAPTER 20

APPELLATE REVIEW—EXECUTION OF SENTENCES

Paragraph
100a

A new paragraph has been inserted at the beginning of 100a to make it conform to the new requirements set forth in Art. 66. It requires each TJAG to establish a Court of Military Review and refers to the provisions of Art. 66 for information pertaining to the composition of the courts, qualifications of the judges, and certain restrictions upon the official relationship of members of the court to other members.

The fourth sentence of the first paragraph is new material which provides that the Court of Military Review generally has the same power to modify a sentence as does the convening authority except for suspension. *United States v. Prow*, 13 USCMA 63, 32 CMR 63 (1962); *United States v. Russo*, 11 USCMA 352, 29 CMR 168 (1960); *United States v. Estill*, 9 USCMA 458, 26 CMR 238 (1958). The fifth sentence is also new. It provides that the Court of Military Review may reduce the period of a suspension prescribed by a convening authority. *United States v. Estill*, *supra*.

The sixth sentence is new and it states that the Court of Military Review does not have the authority to defer the service of a sentence to confinement.

Action by the Court of Military Review when sentence is set aside. The first sentence of subparagraph (1) was modified so as to include the authority of the Court of Military Review to reassess sentences in those cases in which all guilty findings are not set aside. The second sentence was modified by the addition of the word "all." The former subparagraph simply quoted Article 66(d). The changes were made because a literal reading of Article 66(d) by itself tends to indicate that a court is authorized only to take the actions described therein. But, the Court of Military Appeals has indicated that Article 66(d) must be read alone with Article 59(a). The modifications in these two sentences are based upon the decisions in *United States v. Miller*, 10 USCMA 296, 299, 27 CMR 370, 373 (1959) and *United States v. Field*, 5 USCMA 379, 18 CMR 3 (1955). This subparagraph, as well as the third paragraph of 101 where similar changes are also made, is not intended to express limitations on the authority of the Court of Military Review or on the Court of Military Appeals in a general sense. They are simply intended to cover their actions in the most common situations. It was felt unnecessary to cover the more unusual actions of these appellate bodies which are clearly authorized under case law, for example, returning a case for a new staff judge advocate review (*United States v. Papciak*, 7 USCMA 412, 22 CMR 202 (1956)); returning a case for a special hearing, such as upon a speedy trial issue (*United States v. Schalck*, 14 USCMA 371, 34 CMR 151 (1964)); setting aside only some guilty findings with silence as to sentence in order to permit the convening authority to decide whether to reassess the sentence or order an appropriate rehearing (see *United*

Paragraph

States v. Best, 4 USCMA 581, 16 CMR 155 (1954)); and dismissal of charges for other than a failure of the evidence, such as when the accused has already suffered sufficient harassment without further rehearing (*United States v. Conrad*, 15 USCMA 439, 35 CMR 411 (1965); *United States v. Lyon*, 15 USCMA 307, 35 CMR 279 (1965)).

Subparagraph (3) was modified throughout by replacing "the convening authority" with "an appropriate convening authority." These changes were made to dispel any possible inference that the original convening authority was intended and to conform with the actual practice. See 84 and Article 60.

100c(1)

Action on sentences not requiring Presidential approval when sentence is affirmed in whole or in part. The next to last sentence of the first paragraph of subparagraph (a) has been modified to indicate that the Clerk of the Court of Military Appeals will be provided with a copy of the receipt for or certificate of service of the Court of Military Review decision on an accused *only* when required by the Court. Current experience indicates that the Court of Military Appeals is interested in these documents only on those cases on which it takes action. Should the Court change its policy, the sentence as modified would accommodate a change of procedure.

The second sentence of the second paragraph of subparagraph (a) is a new addition. It prescribes that the placing of a petition for review in the proper channels confers jurisdiction on the Court of Military Appeals. *United States v. Jackson*, 2 USCMA 179, 7 CMR 55 (1953).

100c(2)

Action on sentences requiring Presidential approval when sentence is affirmed in whole or in part. The words "with his recommendations" were deleted between the words "review" and "directly" in the first sentence. It is considered inappropriate for the Judge Advocate General to make recommendations to the Court of Military Appeals at this stage of the review. In this regard, Rules 26 and 42, USCMA Rules of Practice and Procedure, permit both the defense and the Government to file briefs in Article 67(b)(1) cases, and the Government is entitled to file a brief whether or not one is filed by the defense. Also see *United States v. Martinez*, 11 USCMA 224, 227, 29 CMR 40, 43 (1960) and *United States v. Sparks*, 5 USCMA 453, 458-459, 18 CMR 77, 82-83 (1955) for discussions of the role of the Judge Advocate General in the appellate review of cases.

101

Review by the Court of Military Appeals. The former second paragraph which quoted Article 67(c) was deleted as it was repetitious with material contained in 100c(1)(a).

Changes similar to those made in 100b(1) were made in the present third paragraph for the same reasons discussed above as to 100b(1).

103

Review in the Office of the Judge Advocate General. The one sentence formerly contained in the second paragraph was replaced by three sentences. The content of the paragraph was changed by indicating in the first sentence that the Judge Advocate General shall also advise the appellate defense counsel of reference to a Court of Military Review in those cases when Government counsel are appointed (Art. 70(c)(2)). This change was made in the interest of completeness. The last sentence as modified indicates that the accused shall be advised of his right to representation

Paragraph

before the court if he has not been previously advised of this right and made a selection in this regard. The latter change was made to afford more clarity and to conform with paragraph 48j(3) which provides for conditional requests for appellate counsel in Article 69 cases.

104

This paragraph conforms with amended Art. 68 authorizing the Secretary concerned, instead of the President, to establish branch offices with *any* command.

105a

Commutation. A cross reference to 88c was added at the end of this paragraph to indicate that convening and reviewing authorities may also commute sentences. See the cases titled in the above discussion as to 100a.

105b

Remission and suspension. A second paragraph was added which incorporates the content of Exec. Order No. 10498, 18 Fed. Reg. 7003 (1953).

108

The additional exception added in the second sentence is to recognize the new expanded authority of the JAG under Art. 69. See 110A.

CHAPTER 21

NEW TRIAL AND RELATED MATTERS

Paragraph

109, 110

The petition for new trial. Conduct of new trial and subsequent action. The former 110, "World War II Offenses," was deleted. The reason for the deletion is that, at this date, it is extremely unlikely that there will be any further case to which it will be applicable. However, in the event that there should be, there is a savings clause in the Executive Order implementing this Manual which preserves the provisions of the former 110. This was necessary because 50 U.S.C. § 740 (1964) required the provision of rules by the President. The material formerly contained in 109 was subdivided and is now contained in 109 and 110. Accordingly, 110 was given a new title. The former title of 109 which was "Offenses Committed after 30 May 1951" was also changed to conform with the revision. Changes made in the material formerly contained in 109 are discussed below in connection with the particular subparagraph in which they were made.

109a

The first paragraph was changed to conform to amended Art. 73 deleting the requirement that court-martial sentence extend to a punitive discharge, dismissal or confinement for one year or more in order for the accused to petition for a new trial and extending the time for petitioning from one year to two years after approval.

109f

Action upon petition. The first sentence of the first paragraph was modified to remove the incorrect indication that the Judge Advocates General of each armed force provide separate rules for their Court of Military Review. See Article 66(f).

The former second sentence of the second paragraph was deleted. It read as follows: "Any hearing held by the Judge Advocate General or by a board of review will be conducted under rules prescribed by the Judge Advocate General." It was deleted so as to eliminate the implied mandatory requirement that each Judge Advocate General must prescribe rules of procedure for hearings held by them, and because the situation as to hearings before a Court of Military Review is adequately covered in the first sentence of the first paragraph.

The addition in the third paragraph of "take action under that article when authorized or" was made in the interest of completeness and correctness as the Judge Advocate General might take action under Article 74(a), but he can only recommend to the Secretary concerned that action be taken under Article 74(b).

The last sentence of the third paragraph is new. The grounds for relief under the new authority in Article 69 are broader than those for which a new trial may be granted, and granting of relief is not dependent on an application by accused. Therefore, if an accused petitions for a new trial, but a vacation or modification of the findings or sentence is more appropriate, such can be accomplished. In the reverse situation when the

Paragraph

request is under Article 69, it may be permissible if the grounds are those authorized under Article 73, other requirements are met, and the interests of justice would be best served, to grant a new trial rather than to vacate the findings and sentence. See 110A.

110a(2)

Conduct of new trial. This was formerly 109g(2). The second sentence provides that the same military judge may preside at a new trial. See notes opposite 62f(10) and 92a. The last sentence was modified to conform with language previously adopted in the first sentence of the second paragraph of 81d(1). As to the significance of "legal sentence," "ultimately reduced," and "convening or other proper authority," see the third paragraph of the discussion of changes in 81d(1) of chapter XV, *supra*.

110f

Action by persons charged with execution of sentence adjudged at a new trial. This was formerly 109l. The words "included within the new sentence" were added to the first sentence. With this modification the sentence now requires the crediting of any executed portion of the original sentence in computing the term or amount of punishment to be executed pursuant to a new sentence only when a particular type of executed punishment is also included in the new sentence. This change was necessary to remove the inference that there will be a crediting in all situations where a portion of an original sentence has been executed. For example, it is now clear that crediting is not required if an accused served a term of confinement on an original sentence, and the sentence at a new trial only includes a punitive discharge. This change is consistent with the same change in the second sentence of the second paragraph of 89e(7)(a).

110A

Powers of The Judge Advocate General after Final Review. This is a new paragraph to implement the added authority of TJAG under Art. 69. The Senate Committee report on this provision stated that "It has been the experience of all the services . . . particularly with respect to summary court-martial and those SPCM and GCM cases not reviewable by a board of review, that some provision should be made for removing the fact of conviction, as well as granting other relief in appropriate cases. Since the decision to remove the fact of conviction is a judicial determination based on the traditional legal grounds . . ." the TJAG was empowered to give maximum flexibility. Each Judge Advocate General is required to establish rules to assure consideration of applications for relief under this paragraph. It is emphasized that an application under this paragraph is not a part of the appellate review as the authority to the JAG under this paragraph can be exercised only in those cases which have been *finally* reviewed. Thus, if a request under this paragraph is under consideration by JAG, this fact does not in any way affect the finality of the conviction or its admissibility as a previous conviction. See 75b(2). It should be recognized, however, that if the findings or sentence are in fact vacated or modified, such action may affect, in varying degrees, its admissibility as a previous conviction at future trials of the accused. See also comments opposite 109f.

111

Right of dismissed officer to trial by court-martial. The entire paragraph was replaced by two sentences which indicate that the President has authority to dismiss a commissioned officer in time of war and that the details regarding the right of an officer so dismissed to trial by court-martial are found in Article 4. The former material simply repeated information found in Article 4 which was considered unnecessary.

CHAPTER 22

OATHS

Paragraph

General comment. The words “or affirmation” were deleted throughout this chapter where “oath or affirmation” was formerly used. This was done because “oath” is defined as including affirmation in 112a and in 1 U.S.C. § 1 (1964). This is also consistent with changes in the UCMJ as codified.

112b

There was no basic change in the persons required to be sworn. There being no expressed legislative intent to include individual defense counsel within the purview of Art. 42(a), and based on interpretations of the 1950 Act, a specific manual provision was inserted to require individual counsel to be sworn.

112c

This paragraph replaces the former 112c and spells out the firm requirement under Art. 42(a) for specific Secretarial regulations covering the enumerated areas as to oaths. Permissive language was inserted to allow such Secretarial regulations to prescribe similar provisions for oaths to be taken by individual counsel. Thus, if deemed desirable, these regulations could provide a procedure whereby individual counsel could take a prescribed oath which would be effective for more than one particular case.

Specific provision is made pursuant to Art. 42(a) for the administration of a one-time oath to certified legal personnel. While pointing out that Art. 42(a) no longer requires oaths to be administered in the presence of the accused, the door is left open for such a procedure should any service determine that it is desirable to continue the practice.

112d

Procedure for administering oaths. The words “As long as the prescribed oath is duly administered” were deleted from the beginning of the second sentence of the first paragraph to avoid the suggestion of a mandatory form for any oath. The remainder of the sentence was modified to indicate that some persons swear to perform their duties properly rather than to truthfully testify. See 5 Wharton, Criminal Law and Procedure § 2003 (12th ed. 1957).

In the third sentence of the first paragraph, the words “to military personnel” were deleted after the first “oath” as we use the same form administering oaths for civilians.

In the last sentence of the first paragraph, the words “and believers in other than the Christian religion” were deleted after “obligatory” because some religions other than the Christian, such as the Jewish, believe in God.

The last sentence of the second paragraph uses restrictive language with respect to trial counsel testifying as a witness with intent to discourage this practice. Testimony by counsel has been repeatedly condemned by

Paragraph

the Court of Military Appeals. See *United States v. Stone*, 13 USCMA 52, 56, 32 CMR 52, 56 (1962), and the cases cited therein.

113 Reference to the enlistment oath in app. 3b was deleted as not being relevant to the types of oaths being discussed in chapter XXII.

114 *Form of Oaths.* Although the forms of oaths for court-martial personnel (114a through e) are left by Art. 42(a) to regulations of the Secretary concerned—including who shall administer such oaths—it was deemed desirable to provide sample forms for oaths to such personnel in the Manual which would be available for use in the absence of appropriate secretarial regulations.

There was no change in the prescribed forms of oaths for other specialized situations (114f through k) as these oaths were unaffected by the change in Art. 42(a). The oaths in paragraphs a, b and c were modified to conform to the changed Article.

This paragraph was reorganized from the MCM, 1951 by subparagraphing it.

Subparagraphs a, b, and d no longer make any reference as to when these oaths are given.

The oaths for the MJ and court members in subparagraphs a and b were each modified by deleting that portion of those oaths which indicated that in the event of doubt not explained by the laws and regulations they were to apply their understanding and the custom of war in like cases and that part which indicated that the findings and sentence will not be divulged until duly announced by the court. The deleted provisions were considered unnecessary and misleading. The purpose of a juror's oath is to impress him with the importance of his duty and the only essentials of the oath are that he swears to well and truly try the case and render a true verdict according to the law and evidence. 5 Wharton, Criminal Law and Procedure § 2003 (12th ed. 1957). Of course, the members do divulge their findings to the MJ prior to announcing them when he assists the court in putting them in proper form. Additionally, it is not prejudicial error for the MJ to examine the sentence worksheet prior to announcement of the sentence. See *United States v. Linder*, 6 USCMA 669, 20 CMR 385 (1956). In this event, he must allow counsel to examine the worksheet prior to giving the court any instructions regarding it or his instructions are considered as a private communication. *United States v. Linder, supra.*

Also in subparagraph b, "before a court of justice" was deleted after "required to do so" in the latter portion of the court members' oath. This provision was considered too restrictive since such a disclosure may be required other than before a court, for example, at a pretrial investigation involving misconduct of a court member in connection with a trial. Although it was not changed, it was recognized that the court members' oath might not be literally correct in all situations in so far as it prohibits the disclosure of the vote or opinion of a *particular* member except as provide therein. Probably there is no objection to a court member disclosing his *own* vote or opinion at any time. See Harnsberger, *Amend Canon 23 or Revise Opinion 109*, 51 A.B.A.J. 157 (1965).

The oath of counsel contained in subparagraph c was modified by deletion of the phrase "and will not divulge the findings and sentence to

Paragraph

any but the proper authority until they shall be duly disclosed." This phrase was considered unnecessary since it will be only in a very rare situation that counsel will know the findings and sentence until they are announced. Additionally, this matter can better be disposed of by regulations pertaining to the conduct of counsel.

The interpreter's oath in subparagraph *e* was changed to require true interpretation rather than faithful performance of duties because an interpreter is a witness. See *United States v. Rayas*, 6 USCMA 479, 20 CMR 195 (1955).

The introduction to the oath for witnesses in subparagraph *f* was modified so as to indicate that a witness need be sworn only before he testifies for the first time in a case.

A reference to 62*b* was added in subparagraph *g* to indicate that an oath is given to a challenged member prior to his being examined only when the oath is desired by the questioning party.

CHAPTER 23

INCIDENTAL MATTERS

Paragraph
115a

Attendance of witnesses in general. The second sentence of the second paragraph was modified to indicate that, as an exception, a witness may be subpoenaed for a pretrial examination for the taking of a deposition (Art. 47(a)(1)).

The former third sentence of the fourth paragraph was deleted because the cross reference to Article 49(d) was not complete because that article does not cover all conditions that are required for the admissibility of a deposition. Depositions are treated in detail in 117. It was decided to delete the cross reference entirely rather than correct it because it is considered undesirable to emphasize the use of depositions in view of the development of the law since 1951. Additionally, it is the exception rather than the rule to use depositions in trials today. Therefore, the Manual should not infer that their use is normal.

Two sentences were added at the end of the fourth paragraph based on *United States v. Sweeney*, 14 USCMA 599, 34 CMR 379 (1964) and *United States v. Thornton*, 8 USCMA 446, 24 CMR 256 (1957).

115c

Use and examination of documentary and other evidence in control of military authorities. The former title, "*Production of documents in control of military authorities*," was changed. The change in title was made because the new title is more appropriate in view of several changes that were made in the material contained herein.

The requirements of this subparagraph have been broadened by adding a provision for the *use* of documentary or other evidence in the control of military authorities. The reason for this is that it is appropriate, in some circumstances and upon reasonable request, to allow the defense the *use* of various items of documentary or other evidence which were not provided to him as papers accompanying the charges under 44h. This subparagraph has been broadened in order to make it clear that the defense is entitled to the equal opportunity to prepare his case which is implicit in Article 46. See *United States v. Enloe*, 15 USCMA 256, 35 CMR 228 (1965) for a general discussion of the concept of "equal opportunity." The question of how far the government must go in providing or making these materials available is still an open question. The test as announced by the Court of Military Appeals is relevance and reasonableness of the request which is determined upon the facts and circumstances of each case. *United States v. Franchia*, 13 USCMA 315, 32 CMR 315 (1962). For this reason it is difficult to state a general rule in this subparagraph which will be applicable to all situations. It is contemplated that "relevancy and reasonableness" shall continue to be the test even though this subparagraph has broadened the former rule of discovery in order to provide the defense with equal opportunity to prepare. It is not intended that these changes shall open the door for unreasonable requests

Paragraph

which are no more than "fishing expeditions" nor entitle the defense to materials which are the "work product" of the prosecutor. See *Hickman v. Taylor*, 329 U.S. 495 (1947) and *Saunders v. United States*, 316 F. 2d 346 (D.C. Cir. 1963) for discussions concerning materials which qualify as being the "work product" of an attorney and thus immune from discovery.

115d(1)

Issuing, serving, and returning of civilian witness subpoenas. The first sentence of the last paragraph is a new addition. It was added in the interest of completeness and to remove the inference that the commander does not have full subpoena powers in occupied friendly territory in some instances. He does have these powers in occupied friendly territory if the local courts are not capable of functioning. See U.S. Department of the Army Field Manual No. 27-10, *The Law of Land Warfare*, paragraphs 354 and 362 (1956) [hereafter cited as FM 27-10]. The paragraph should not be interpreted as inferring that the functions of local government are not restored to local officials as soon as possible even in occupied enemy territory. See Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, 12 August 1949, Arts. 54 and 64; FM 27-10, paragraphs 370 and 373. Additionally, the former paragraph was not broad enough to cover the situation when our forces are located in a foreign nation by consent of that nation and must abide by any agreements relative to witnesses. For example, see North Atlantic Treaty Organization Status of Forces Agreement, 19 June 1951, T.I.A.S. No. 2846, Art. VII 6 (a).

115d(3)

Warrant of attachment for a civilian witness. The second paragraph was modified to indicate that this process should be effected through a civil officer of the United States when practicable. This procedure is considered more satisfactory than having a military officer become involved in this manner with civilians, and it conforms with the procedure prescribed in Article 47 for the prosecution of civilians in a United States district court for failure to obey a subpoena. Also see 28 U.S.C. § 547(b) as to the duty of U.S. Marshals in this regard.

116

Employment of experts. The first sentence is a new addition which was added to provide flexibility.

Consideration was given to deletion of the last sentence, but it was retained to warn counsel that they must obtain a previous authorization in order to have expert witness fees paid; also, publication of the Manual in the Federal Register puts any expert on notice that this previous authorization is required. The basic rule that expert witness fees cannot be paid upon a retroactive authorization was laid down in Ms. Comp. Gen., B-49109, 25 June 1945.

117

Depositions. This paragraph was substantially modified. This was necessary in order to provide a coherent and well organized treatment of the subject. A study of the former paragraph indicated that there was unnecessary repetition, for example, in the former second sentence of the second paragraph of subparagraph *g* and the former second sentence of the first paragraph of subparagraph *b*. It was also found that some provisions which should have been made applicable to both types of depositions were only made applicable to one, for example the provisions as to civilian witness fees in the former last sentence of the first paragraph of subparagraph *d*. In revising the paragraph it was felt necessary to have one subparagraph which stated the rules applicable to both types of depositions. Also, it was felt that a subparagraph was needed for each type of

Paragraph

deposition in order to set out the rules which apply only to each type. Substantive changes in this paragraph are discussed below. However, there is generally no discussion of information that has always been in this paragraph and which was simply moved to a new location in the interest of clarity.

- 117a *Definitions regarding depositions.* This subparagraph now consists solely of information that was contained in the first paragraph.
- 117b *General rules and procedures applicable to depositions.* As rewritten this subparagraph consists of eleven subparagraphs which provide general rules and procedures applicable to depositions.
- 117b(2) *Rights of the accused regarding depositions.* The rule contained in the first sentence is taken from the decisions in *United States v. Donati*, 14 USCMA 235, 34 CMR 15 (1963) and *United States v. Drain*, 4 USCMA 646, 16 CMR 220 (1954).
- The rule announced in the second sentence is taken from *United States v. Jacoby*, 11 USCMA 428, 29 CMR 244 (1960) and *United States v. Miller*, 7 USCMA 23, 21 CMR 149 (1956).
- 117b(3) *Action on a request to take a deposition.* The authority given the MJ and president of a special court-martial without an MJ by the last sentence is based on the decision in *United States v. Murph*, 13 USCMA 629, 33 CMR 161 (1963). In drafting this subparagraph there was no intent to require mandatory approval of the taking of all depositions by an appropriate authority. It is simply intended to prescribe a procedure that will normally be followed. See *United States v. Ciarletta*, 7 USCMA 606, 611, 23 CMR 70, 75 (1957), which held that this approval was not mandatory, although the 1951 Manual inferred that it would be done in the first paragraph, 117b, and the first and second paragraphs of 117g.
- 117b(7) *Taking the deposition.* The last two sentences confer new authority on the officer taking a deposition for the proper maintenance of the proceeding. This provides protections similar to those provided by the Federal rules. See Fed. R. Crim. P. 15(d); Fed. R. Civ. P. 30(b) and (d).
- 117d *Oral deposition.* The second sentence makes it clear that the deponent need not sign an oral deposition as it is taken verbatim. Since witnesses at a trial do not sign their testimony, there is no need for a deponent to sign this type of deposition. Usually oral depositions are taken because a witness is to be discharged soon and is departing the area where a trial will be held. If it is a long deposition, it is frequently impossible to have it typed for signature before the deponent's departure.
- 118b *Procedure when a person is charged with contempt.* The first sentence of the first paragraph was modified because it is not decided that certain conduct constitutes contempt until after the contempt proceedings are held.

A new second paragraph has been added to provide a procedure for the MJ who is trying a case alone.

The third paragraph has been modified for consistency with the last sentence of the fifth paragraph which is a new addition.

The fourth paragraph has been changed to provide that the MJ must instruct the court members prior to inquiring whether or not they object to the preliminary ruling.

Paragraph

The last sentence in the fifth paragraph is a new addition which provides that a tie vote by the court members on a preliminary contempt ruling is a determination in favor of the person who is being proceeded against. Formerly, appendix 8b indicated the contrary which conflicts with Article 52(c). This change is also a practical solution since a two-thirds vote by the court members is required to hold a person in contempt.

The former last sentence of the last paragraph was deleted.

CHAPTER 24

INSANITY

Paragraph

120b

General consideration of general lack of mental responsibility. The title of this subparagraph was changed by the addition of the word "general." The purpose of this change is to clearly distinguish between the subject matter contained herein and that contained in the new subparagraph 120c which is entitled "*Partial mental responsibility.*"

The general lack of mental responsibility test has not been changed, and this is so even though the word "completely" was deleted before the word "deprived" in the fourth sentence. "Completely" was deleted as an unnecessary adverb on the basis of being redundant. Either the accused is or is not deprived of the ability to distinguish right from wrong or to adhere to the right, and the word therefore added nothing to the sentence.

120c

Partial mental responsibility in general. This subparagraph is new to the Manual and was added on the basis of the decisions of the Court of Military Appeals in *United States v. Storey*, 9 USCMA 162, 25 CMR 424 (1958); *United States v. Dunnahoe*, 6 USCMA 745, 21 CMR 67 (1956); *United States v. Carver*, 6 USCMA 258, 19 CMR 384 (1955); *United States v. Kunak*, 5 USCMA 346, 17 CMR 346 (1954); *United States v. Edwards*, 4 USCMA 299, 15 CMR 299 (1954); and *United States v. Higgins*, 4 USCMA 143, 15 CMR 143 (1954).

121

Inquiry before trial. In the second sentence of the first paragraph, "a reasonable" was substituted for "substantial" before the word "basis." See *United States v. Nix*, 15 USCMA 578, 582-583, 36 CMR 76, 80-81 (1965).

122

Inquiry and determination by the court. The title of this paragraph was changed by the addition of the words "and determination." The new title was considered to be more descriptive of the content of this paragraph.

122a

Presumption of sanity; reasonable doubt, burden of proof. There was substantial revision in this subparagraph. As revised the subparagraph indicates that "some evidence which could reasonably tend to show" rather than "substantial evidence tending to prove" that the accused is insane raises insanity as an issue before the trial court. The "some evidence" test has been applicable to affirmative defense since as far back as *United States v. Ginn*, 1 USCMA 453, 4 CMR 45 (1952), and the Court of Military Appeals has recently in *United States v. Lewis*, 14 USCMA 79, 82, 33 CMR 291, 294 (1963), reaffirmed that the test is applicable to the defense of insanity.

The former last two sentences of the subparagraph have been moved up for the purpose of better continuity and now appear as the fourth and fifth sentences of the subparagraph. However, the second of these (present fifth sentence) was modified because it inferred that it was incum-

Paragraph

bent on the prosecution to introduce evidence to prove the sanity of the accused when the question of sanity becomes an issue in a case. This inference has been removed by rewording as it was not legally correct. An issue of insanity may be raised, the prosecution may present no rebuttal evidence, and the court may justifiably convict on the basis of no reasonable doubt as to the sanity of an accused because the court properly gave little or no weight to the evidence tending to indicate insanity. *United States v. Carey*, 11 USCMA 443, 29 CMR 259 (1960). See also *McDonald v. United States*, 312 F. 2d 847, 850 (D.C. Cir. 1962); *United States v. Johnson*, 3 USCMA 725, 14 CMR 143 (1954).

Modification was also made in this subparagraph (sixth sentence) to indicate that if, in the light of all the evidence, including the "inference" rather than the "presumption" of sanity, there is a reasonable doubt as to the mental responsibility of the accused at the time of the offense, the court must find the accused not guilty. This change was dictated by the decisions in *United States v. Walters*, 3 USCMA 732, 14 CMR 150 (1954); *United States v. Johnson, supra*; and *United States v. Biesak*, 3 USCMA 714, 14 CMR 132 (1954). In mentioning the inference of sanity in this regard, a cross reference to 138a(2) was added. The material referenced discusses inferences in general and the inference of sanity specifically.

The present next to the last sentence in this subparagraph is a new addition which covers proper findings when there is a reasonable doubt in regard to the ability of an accused to entertain the requisite actual knowledge, specific intent, or premeditated design to kill because of a partial mental impairment. This addition was necessary because of the new material contained in 120c.

122b

Procedure for inquiry and determination of sanity by the court. This subparagraph was completely revised for the purpose of presenting a more explicit and orderly presentation of the information contained therein. Although not specifically mentioned in this subparagraph, it should be remembered that the defense may request additional time to obtain evidence of the mental condition of an accused by moving for a continuance. Such a motion is disposed of in the same manner as prescribed in 58e for delays requested for other reasons. In this regard, see *United States v. Borsella*, 11 USCMA 80, 28 CMR 304 (1959), and *United States v. Frye*, 8 USCMA 137, 23 CMR 361 (1957).

Subparagraphs (2), (3), and (4) have been revised to reflect the changes in Art. 51(b) making the ruling of the MJ final on all interlocutory questions other than the factual issue of mental responsibility, as distinguished from the former law under which his ruling was not final on any question of the accused's sanity. Thus, the ruling of the MJ on the mental capacity of the accused and on whether to inquire into his mental capacity or mental responsibility is final. If a factual question is present in determining capacity or inquiry, it would not be the "factual issue of mental responsibility."

The ruling by the president of a SPCM without MJ still is subject to objective by any member on the factual issues of mental responsibility and mental capacity. The finality of the president's ruling on the question of whether an inquiry should be made into either of those issues depends on the nature of the issue. In most situations the issue is a legal one, on which he rules finally. If the issue is one of fact, however, his ruling is

Paragraph

subject to objection. Provision has been made for instructing the court members before they indicate whether or not they object to a ruling which is made subject to their objection *U.S. v. Williams*, 5 USCMA 197, and *U.S. v. Gray*, 6 USCMA 615, 20 CMR 331).

122c

Evidence relating to sanity. The last sentence of the third paragraph formerly indicated that the members of the court could see medical reports on the issue of conducting further inquiry into the sanity of the accused only if there was an objection to the ruling of the MJ or president of a special court-martial without an MJ. That portion of the sentence was deleted and a new next to last sentence added thereafter to indicate that the court members should be made aware of applicable portions of those documents before a ruling is made. This change was necessitated by the fact that a court member cannot intelligently object to a ruling unless he knows the facts upon which it is based. See *United States v. Gray*, 6 USCMA 615, 619, 20 CMR 331, 335 (1956); *United States v. Williams*, 5 USCMA 197, 204, 17 CMR 197, 204 (1954). The last sentence was added to this paragraph to cover the instructions that should be given when this situation arises.

123

Effect of mental impairment or deficiency upon sentence. The first sentence of this paragraph previously indicated that a court could consider evidence of mental condition of an accused in adjudging a sentence only if the issue of insanity is raised on the merits and the accused is subsequently determined to be sane. This sentence was modified to indicate that the court may consider any evidence with respect to mental condition of the accused which falls short of creating a reasonable doubt as to his sanity. The former restriction is of doubtful validity, conflicts with the concept of the presentation of matters in extenuation and mitigation (75c), and unduly restricts the MJ's discretion in the matter. See *United States v. Cook*, 11 USCMA 579, 29 CMR 395 (1960).

124

Action by convening or higher authority. This paragraph has been expanded from one to two paragraphs.

The second sentence of the first paragraph is a new addition that indicates that when a reasonable doubt exists on review as to mental capacity at the time of trial a rehearing may be directed when the incapacity no longer exists. The purpose of the sentence is to dispel any doubt on the question and to provide consistency with the provisions of 122b(3). Although not specifically mentioned in the text, it should be recognized that a rehearing may also be directed when it appears that evidence tending to indicate insanity was not sufficiently developed at the trial to permit the conduct of a fair review. This is a proper procedure when the record does not raise a reasonable doubt as to sanity and when there is an indication that there is additional information relating to the sanity of the accused which should have been submitted to the members of the court. See *United States v. Dunnahoe*, 6 USCMA 745, 21 CMR 67 (1956).

The second sentence of the second paragraph is new, and it provides that when further inquiry on review results in a determination of a lack of mental capacity to understand the review proceedings, a conviction may not be approved or affirmed by a reviewing authority pursuant to authority under Articles 64, 65, or 66 until the accused regains the requisite mental capacity. This restriction is qualified by the next sentence which indicates that a lack of mental capacity will not justify a delay in setting aside a conviction which is not legally sufficient. The rules an-

Paragraph

nounced in these two sentences were developed from an analysis of a number of decisions by the Court of Military Appeals relating to the question of mental incapacity of an accused during appellate review. In *United States v. Washington*, 6 USCMA 114, 118, 19 CMR 240, 244 (1955) the Court of Military Appeals held that it was not deprived of jurisdiction because of insanity arising during the appellate process. A part of the reasoning in this decision appears to be based on the fact that the Court of Military Appeals decides only legal rather than factual issues (Art. 67(d)) and that communication between attorney and client is therefore not essential at their level of appeal (6 USCMA at 119-120, 19 CMR at 245-246). No subsequent case has been found where the Court has reversed this position, and the reasoning is considered logically correct. In *United States v. Bell*, 6 USCMA 392, 20 CMR 108 (1955) the Court upheld its decision in *Washington*, and further held that neither the convening authority nor the board of review is deterred in acting on a case because of insanity arising after trial. However, in *United States v. Korzeniewski*, 7 USCMA 314, 22 CMR 104 (1956) the Court reversed so much of *Bell* that related to action by a board of review in this instance by holding that a board of review cannot proceed with the review of a case of an insane accused. Since then even this position has been qualified by decisions that a board of review should resolve an issue of incapacity at the time of trial. (*United States v. Jacks*, 8 USMA 574, 25 CMR 78 (1958)) and an issue of mental responsibility at the time of the offense (*United States v. Thomas*, 13 USCMA 163, 32 CMR 163 (1962)) irrespective of the fact that an accused is mentally incapacitated at the time of review. In these cases the Court clearly indicates that a mental incapacity after trial should only work to the advantage of an accused and not to his disadvantage. These decisions can only be interpreted to mean that a conviction may not be affirmed or approved while an accused is mentally incapacitated but should be reversed when good reason exists therefor. The Court has not specifically announced that this rule is also applicable to other reviewing authorities, but it is considered sound to apply the rule to all other reviewing authorities who have fact finding powers (Arts. 64, 65(b) and (c), 66(c)) since consultation between attorney and client are important when a case is before any authority having fact finding powers. The accused does not forfeit any right of a factual review by allowing the completion of reviews under Articles 67 and 69 when a mental incapacity exists during those reviews since the time limitation for petitioning for a new trial (Art. 73) is tolled while the incapacity exists. *United States v. Bell*, 6 USCMA 392,396, 20 CMR 108, 112 (1955).

The last sentence of the second paragraph provides new material. It provides that when new information concerning mental responsibility at the time of an offense is obtained after trial, reviewing authorities may dismiss the affected charges and specification and take appropriate action on the sentence, or direct a new trial or rehearing, as may be appropriate under the circumstances of the case. New information of this type is usually received by reviewing authorities in documentary materials. If there is no question that the infirmity exists, there is no practical reason for litigating the issue. However, the Court has indicated that since mental responsibility is an issue directly going to the guilt or innocence of an accused, if the parties cannot agree on the importance of new information before a Court of Military Review, the issue should be litigated or relitigated, as the case may be, at a proceeding where the rules of evidence for trial by court-martial apply. *United States v. Thomas*, 13 USCMA 163,

Paragraph

168-169, 32 CMR 163, 168-169 (1962). See also CM 406421, *Thomas*, 32 CMR 569 (1962). It is not considered appropriate that litigation of this type be conducted before a Court of Military Review and the Court has indicated on several occasions that de novo trials are not contemplated before the Court of Military Review. *United States v. Thomas, supra*; *United States v. Burns*, 2 USCMA 400, 405, 9 CMR 30, 35 (1953). This rule is not made applicable to situations where post-trial information relates to an issue of incapacity since incapacity is an interlocutory question which does not extend to the guilt or innocence of an accused. See *United States v. Jacks*, 8 USCMA 574, 576, 25 CMR 78, 80 (1958). It is also provided that a new trial or rehearing may be directed, because although a rehearing will most frequently be resorted to, a new trial would be appropriate when sufficient grounds exist as prescribed in 109d.

CHAPTER 25

PUNISHMENTS

Paragraph
125

General limitations on punishments. The word "will" in the first sentence of the first paragraph was changed to "should" since it is not mandatory for a court-martial to reach agreement on a sentence. *United States v. Jones*, 14 USCMA 177, 33 CMR 389 (1963).

The last sentence in the fourth paragraph, was deleted. That sentence indicated that certain formal military duties would not be imposed as punishments. This sentence was deleted earlier by Exec. Order No. 11081, 28 Fed. Reg. 945 (1963).

The former fifth paragraph which indicated that neither confinement on bread and water nor diminished rations would be adjudged against Army and Air Force personnel was deleted. Accordingly, the present last paragraph, which relates to the subject matter formerly contained in the sixth paragraph, now indicates that this punishment may be given to all enlisted members attached to or embarked on a vessel. However, this paragraph was revised to provide that this punishment may not be adjudged in excess of three days rather than thirty as previously provided. In *United States v. Wappler*, 2 USCMA 393, 396, 9 CMR 23, 26 (1953) the Court of Military Appeals held that three days was the maximum period for which this punishment could be adjudged by courts-martial, and also that it could be adjudged against personnel of any service when attached to or embarked on a vessel. Since confinement on bread and water or diminished rations can only be adjudged for three days there is no longer any valid reason to limit this punishment to any particular service. Army and Air Force personnel are subject to this punishment under Article 15 when aboard ship, and the revision of this paragraph provides consistency with that article. See also 131c(5).

A second sentence was added to the present last paragraph authorizing the limitation by regulations of the categories of enlisted personnel upon whom this type of punishment may be imposed. This is also consistent with a similar provision regarding the punishment under Article 15. See 131c(5).

All material was deleted throughout 125 which previously indicated that solitary confinement was an authorized punishment, and the third sentence of the last paragraph now specifically states that it is not authorized. *United States v. Stiles*, 9 USCMA 384, 26 CMR 164 (1958), held that solitary confinement could not be adjudged by courts-martial.

The certificate in the last paragraph has been modified by the addition of the following words: "to confinement no (bread and water) (diminished rations)." This was done to make the certificate more specific.

126a

General comments on miscellaneous limitations on punishments. This matter formerly covered in the second and third sentences of the first

Paragraph

paragraph was revised in the interest of clarity. As formerly written it did not tie together the effect of the Table of Maximum Punishments and provisions for punishment in the Punitive Articles.

The last sentence of the first paragraph formerly indicated that when life imprisonment is adjudged, the court shall also adjudge dishonorable discharge and total forfeitures. This sentence was deleted as being the type of sentence policy statement that has been condemned by the Court of Military Appeals. It is true that the Court has never declared this particular provision illegal and as a matter of fact has sidestepped declaring it illegal by holding that an instruction of this type to a court was not prejudicial error under the facts of one case. *United States v. Jones*, 10 USCMA 122, 27 CMR 196 (1959). However, there is little doubt that this instruction would be held to be prejudicial error in other circumstances. It is also inconsistent with the present theory that all types of punishment are separate. Since instructions to courts-martial on similar policy statements in the Manual have been held to be error, this statement was not retained. See *United States v. Jobe*, 10 USCMA 276, 27 CMR 350 (1959); *United States v. Smith*, 10 USCMA 152, 27 CMR 227 (1959); *United States v. Varnadore*, 9 USCMA 471, 26 CMR 251 (1958); *United States v. Dunn*, 9 USCMA 388, 26 CMR 168 (1958). Since the Court should not be instructed on this policy, there was no valid reason to retain the sentence in the Manual. To retain it would only increase the possibility that court members will be disqualified for courts-martial because of pretrial instruction on this policy. See the language in *United States v. Johnson*, 14 USCMA 548, 34 CMR 328 (1964), which strongly criticizes the exertion of command influence on sentences by pretrial lectures and also the many cases cited in *Johnson* which deal with unlawful command influence.

A cross reference to 145 has been added at the end of the second paragraph, and the former third paragraph which simply repeated material contained in 145 was deleted. That paragraph was incomplete in that it dealt only with use of proceedings of a court inquiry. The use of depositions and former testimony have a similar effect on the maximum punishment.

The second sentence of the third paragraph was formerly the next to last sentence of the first paragraph.

The first sentence of the last paragraph is new and provides that a court-martial may adjudge no separation other than a dishonorable or bad-conduct discharge or a dismissal as appropriate according to the status of the accused. In *United States v. Phipps*, 12 USCMA 14, 30 CMR 14 (1960), it was held that a court-martial may not adjudge an administrative discharge.

126b

A sentence was added to refer to the jurisdictional limitation of a GCM composed of an MJ alone.

126c(1)

Limitations on punishments by special courts-martial. Details formerly contained in this subparagraph were deleted, and it now contains only a cross reference to 15b and Article 19 which contain the deleted information. Also, the previous treatment could be confusing as it did not clearly indicate that the listed limitations were purely jurisdictional. For example, 126g limits the punishment of restriction to two months by any type of court.

Paragraph
126c(2)

Limitations on punishments by summary courts-martial. Details formerly contained in this subparagraph were deleted, and it now contains only a cross reference to 16b and Article 20 which contain the deleted information.

126d

Limitations on punishing commissioned and warrant officers. This subparagraph was reorganized so that all matters pertaining to reduction are discussed in the first paragraph, those regarding separation are covered in the second paragraph, and those dealing with deprivation of liberty are dealt with in the third paragraph. This reorganization was necessary in the interest of clarity as the prior treatment failed to provide needed continuity.

It is now made clear that commissioned officers and commissioned and warrant officers are punitively separated by dismissals whereas warrant officers who receive their warrants from a service secretary are punitively separated by dishonorable discharge. See *United States v. Bristoe*, 13 USCMA 510, 33 CMR 42 (1963).

This subparagraph no longer indicates that an officer or warrant officer shall not be sentenced to confinement or total forfeitures unless the sentence also contains a punitive separation. The reasons for this deletion are the same as those given for deletions in 126a. See the second paragraph of the discussion of changes as to 126a, *supra*. Additionally, in *United States v. Smith*, 10 USCMA 152, 27 CMR 227 (1959), it was specifically held to be error to instruct a court that an officer cannot be sentenced to confinement unless also sentenced to a dismissal. This holding has more recently been reaffirmed in *United States v. Madison*, 14 USCMA 655, 658-659, 34 CMR 435, 438-439 (1964).

A provision was added in the first sentence of the third paragraph to indicate that only a general court can sentence a commissioned or warrant officer to confinement. This was done to compensate for the removal of this limitation with the deletion of the restriction that an officer would not be sentenced to confinement without a dismissal. The added provision was inherent in this deleted material since a special court-martial cannot adjudge a dismissal.

126e

Limitations on punishing enlisted persons; prisoners sentenced to punitive discharge. The provisions of Article 58a were incorporated into the first paragraph.

126h(1)

Limitations on forfeiture, fine, and detention of pay in general. The first sentence of the first paragraph was modified to indicate that forfeitures, fines, and detentions of pay will be expressed in even dollars rather than dollars and cents. This agrees with the provisions of the Manual relative to these forms of punishment under Article 15. See 131c(8). It was felt that rules concerning these forms of punishment should be in accord whether the punishment is adjudged by courts-martial or imposed under Article 15. The change will serve to prevent confusion, and there appeared to be no good reason to have differing rules on this subject.

126h(2)

Limitations on forfeitures. The limitation formerly contained in the third sentence of the first paragraph that forfeiture of all pay and allowances may be adjudged only when the accused is sentenced to a punitive discharge was deleted. Similarly, the limitation that a general court-martial may not adjudge a forfeiture in excess of two-thirds pay per month

Paragraph

for 6 months against an enlisted man unless it also adjudges a punitive discharge was deleted from the next to last sentence of the first paragraph. The reasons for these deletions are the same as those given for deletions in 126a. See the second paragraph of the discussion of changes as to 126a, *supra*, and *United States v. Jobe*, 10 USCMA 276, 27 CMR 350 (1959) which specifically condemns these limitations.

The last sentence of the second paragraph formerly indicated that unless a dishonorable or bad-conduct discharge is adjudged, the monthly contribution of an enlisted person to family allowance or basic allowance for quarters would be deducted prior to computing the net amount of pay subject to forfeiture. The sentence was deleted because it improperly inferred that a general court-martial could not adjudge total forfeitures when an accused was making one of these contributions unless a punitive discharge was also adjudged (see *United States v. Jobe, supra*), it undesirably inferred that a special court-martial adjudging a bad-conduct discharge did not have to consider the contribution in determining the maximum allowable forfeiture, and it was no longer up to date with the statutes dealing with basic allowances for quarters. The third and fourth sentences of this paragraph are new additions which compensate for deletion of this former provision and the changes in the law relating to the subject. See Dependent's Assistance Act of 1950, Ch. 922, 64 Stat. 794 (amended by § 4, 76 Stat. 152 (1962)) (now 50 App. U.S.C. §§ 2201-2216). Also, this is consistent with the provision contained in *Manual for Courts-Martial, 1951*, para 126h (Addendum, 1963).

126h(3)

Limitations on fines. The following was deleted from the end of the second sentence of the first paragraph: "in all cases in which the applicable article authorizes punishment as a court-martial may direct." The deletion was accomplished for the purpose of removing excess verbiage which no longer has any significance. The deleted material first appeared in the MCM of 1949 at paragraph 116g. The drafters of the MCM of 1949, in *Seminars Concerning the Manual for Courts-Martial, 1949*, at page 95, did not clarify the reason for this inclusion. However, study of the context in which the words were used in the MCM, 1949, leads to the conclusion that they were used to distinguish a problem concerning fines that was peculiar to the Articles of War of 1920, as amended, which were applicable at that time. See MCM, 1949, appendix 1. Apparently the words were used to describe those other Articles of War for which a fine was an authorized punishment in addition to A.W. 80 and A.W. 94 which expressly authorized fines for the offenses of dealing in captured or abandoned property and fraud against the government, respectively. These words were also significant because A.W. 88, unlawfully influencing the action of a court, made no reference to punishment that may be adjudged. In the Code, A.W. 80 was incorporated into Article 103 and A.W. 94 into Article 132 which do not expressly authorize fines for these offenses. A.W. 88 was replaced by Article 37 of the Code where it is no longer included among the punitive articles. However, a violation of Article 37 is punishable under Article 98 which provides for punishment as a court-martial may direct. With these changes in the Code, there is no longer any punitive article which fails to provide for punishment or which expressly provides for a fine. Accordingly, the deleted portion of this sentence was also excess verbiage in the 1951 Manual as the need for these descriptive words disappeared with the enactment of the Code.

Paragraph

The former third sentence which stated that a fine would not be adjudged against an enlisted person unless the case falls within Section B, 127c, was deleted. This deletion was necessitated by deletion of the referenced material which was contained in the first sentence of the former third paragraph, Section B, 127c, and which indicated that a fine may be adjudged against any enlisted person, in lieu of forfeitures, provided a punitive discharge is also adjudged. These deletions are based on the holding in *United States v. Landry*, 14 USCMA 553, 34 CMR 333 (1964).

This subparagraph and the fourth paragraph of section B, 127c, as now written, make a fine when adjudged by a general court-martial a truly additional punishment.

The fourth sentence of the first paragraph is a new addition which simply makes cross reference to Section B, 127c, for information concerning authority of a general court-martial to adjudge a fine as an additional punishment. In regard to fines, Section B, 127c, now simply provides in the fourth paragraph that a general court-martial may adjudge a fine as an additional punishment in an appropriate case. Of course, as pointed out in the next to last sentence of the first paragraph of 126h(3), an appropriate case is when an unjust enrichment is involved. Section B, 127c, now gives a general court-martial authority to fine both officers and enlisted members in addition to adjudging total forfeitures. There appears to be no sound reason to distinguish between officers and enlisted members in this regard. It was noted that the Court of Military Appeals has interpreted the former Manual provisions to mean that a fine could be adjudged against an enlisted member only in lieu of forfeitures. *United States v. Hounshell*, 7 USCMA 3, 21 CMR 129 (1956). Under this interpretation a fine would not be an additional punishment in a strict sense.

The second sentence of the first paragraph has always indicated that fines could be adjudged as a punishment which was substituted for forfeitures. Therefore the statement now made in the newly added fifth sentence of the first paragraph has always been the law, although it was not so clearly stated. The sentence also has for a basis the decision in ACM S-19148, *Papenhagen*, 29 CMR 890 (1960). In view of this sentence, the statement that a fine may be adjudged against any enlisted person in lieu of forfeitures was deleted from Section B, 127c. If it is "in lieu of," it is truly not an additional punishment and should be covered here rather than there. There appeared to be no valid reason to distinguish between the maximum amount that a special court-martial may fine enlisted members and officers.

The next to last sentence of the first paragraph is new. It indicates that a fine should normally be adjudged against a member of an armed force only when the accused was unjustly enriched as a result of the offense of which he was convicted. The last sentence of this paragraph is also new. It points out that a fine may always be adjudged for contempt. Both of these sentences contain information which was transferred to this paragraph from the third paragraph, section B, 127c for the reason that it is more appropriate to include this information with limitations rather than additional punishments.

126h(4)

Limitations on detention of pay. This subparagraph was substantially modified as it was felt essential to prescribe some basic rules for this punishment. The provision that detention of pay may only be adjudged by a court-martial against enlisted persons was deleted. There

Paragraph

appeared to be no good reason to distinguish between officers and enlisted members, and the prohibition was inconsistent with Article 15(b) (1) (B) (iv) which permits detention of an officer's pay. The subparagraph now provides that the detention period may not exceed one year from the date the sentence is ordered executed, whereas there was formerly no limitation. The limitation is consistent with the limitation prescribed in Article 15(b) as to detention of pay under that article. It was felt that there should be some limitation on how long pay may be detained, and one year was considered reasonable. If a more severe monetary punishment is desired, forfeiture of pay is the appropriate punishment. The limitations as to the amount that may be detained, now contained in the fourth sentence, were moved from the former third paragraph of 127b. It was felt that the entire subject should be covered in one place. A new provision in this paragraph further provides that the maximum amount of pay that may be detained is determined by the rules used in determining maximum partial forfeitures. It is further provided that detained pay will be returned to the accused at the expiration of the period of detention or when his term of service expires, whichever is earlier. This is consistent with a similar provision in Article 15(b). See, also 131c(9). A detention of pay until separated from the service, as previously indicated as the only time it is returned, would be too severe in many cases.

126i

Suspension from rank, command, or duty; loss of rank, promotion, numbers, or seniority. The former first three paragraphs were deleted and the sentence now comprising the first paragraph was modified to indicate that suspension from rank, command, or duty are not authorized as sentences for anyone. These punishments were not considered useful as punishments in the present day, although it is realized that they served their purpose in former days when because of the restricted size of the military community the resulting dishonor was the important part of the punishment. Today, suspension from rank, command, or duty actually punishes the military services, which are deprived of the full service of the person, rather than punishing the person. The placing of a person in a restricted category of these types is an administrative function rather than a punitive measure, and therefore should be handled similar to other personnel management problems. See *United States v. Phipps*, 12 USCMA 14, 30 CMR 14 (1960), for an example of one administrative measure considered inappropriate as punishment. This change also provides uniformity as they are not presently authorized as punishments against Navy personnel.

The sentence now comprising the second paragraph was modified by adding "except as provided below" at the end thereof because the punishments discussed in the present third paragraph are really a loss of rank. See the definition of "rank" in 10 U.S.C. § 101 (19) (1964).

126j

Limitations on confinement at hard labor. The former second sentence of the first paragraph, indicating that an officer would not be sentenced to a punitive separation, was deleted to conform with the deletion of the same limitation in 126d. See the reasons given for this deletion in the third paragraph of the discussion of changes as to 126d, *supra*.

The third sentence of the first paragraph was also deleted. This sentence had indicated that only under unusual circumstances should an enlisted person be sentenced to confinement without a sentence to forfeiture or fine. The reasons for this deletion are the same as the reasons

Paragraph

given for similar deletions in 126a. See the reasons given for those deletions in the second paragraph of the discussion of the changes as to 126a, *supra*.

In the first sentence of the last paragraph, the word "should" was substituted for the word "will" on the basis of *United States v. Dunn*, 9 USCMA 388, 26 CMR 168 (1958).

127a

The maximum limits of punishments as to persons and offenses. The cross reference to Section B, 127c, formerly in the second sentence, was deleted. That cross reference was made to point out an exception to the rule that the limitations in the Table of Maximum Punishments are not binding on courts-martial sentencing officers, warrant officers, aviation cadets, cadets, midshipmen, and civilians. The cross reference is no longer applicable since the exception was deleted from Section B, 127c, and that section no longer contains any limitations and deals exclusively with additional punishments.

127b

General limitations concerning the maximum limits of punishments. That portion of the first paragraph, which recited the specific limitations on special and summary courts-martial in adjudging sentences, was replaced by a cross reference to 15b and 16b which provide the same information in detail.

All material that was contained in the remaining paragraphs of this subparagraph was deleted. The second paragraph formerly provided that, unless a dishonorable discharge or bad-conduct discharge was adjudged, a court-martial could not adjudge a forfeiture of pay greater than two-thirds pay per month for 6 months or confinement in excess of 6 months. These limitations were condemned in *United States v. Jobe*, 10 USCMA 276, 27 CMR 350 (1959), and *United States v. Varnadore*, 9 USCMA 471, 26 CMR 251 (1958), respectively. Consistent with this deletion, the former last paragraph which provided that an accused could not as a result of one or more sentences which do not include a punitive discharge or other stoppages or deductions forfeit more than two-thirds of his pay in any month was deleted. The reasons given for deletions in the second paragraph of the discussion of changes as to 126a, *supra*, are also applicable to these deletions. However, it was considered appropriate to add a limitation in 88b that a person should not be required to forfeit more than two-thirds pay per month unless serving confinement.

The former third paragraph provided that detention of pay could not exceed two-thirds pay per month for three months. This paragraph was deleted and detention of pay has been covered fully in 126h(4).

127c

Maximum punishments. The subparagraph was further subparagraphed into numerically designated subparagraphs. It was felt that this was necessary in the interests of clarity and ease of reading because of the length of the subparagraph and the many subjects covered.

127c(1)

Applicability and use of Table of Maximum Punishments. The last sentence of the first paragraph now provides that when an offense not listed in the table is closely related to more than one listed offense, the maximum punishment for the most closely related offense shall be used to determine the maximum authorized punishment. This new addition is based on the decision in *United States v. Alexander*, 3 USCMA 346, 349-350, 12 CMR 102, 105-106 (1953).

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The second and third sentences in the second paragraph are also new additions. These additions are based on *United States v. White*, 12 USCMA 599, 31 CMR 185 (1962).

127c(2)

Applicability and use of Table of Equivalent Punishments. That portion of the what is now the second sentence of the first paragraph which previously indicated that the Table of Equivalent Punishments could not be used if a punitive discharge was adjudged was deleted. This deletion is consistent with the deletion of other policy statements in this chapter. See the second paragraph of the discussion of changes in 126a, *supra*. Of course, the statement that the table is only applicable in the case of enlisted members has always been true. See the last sentence of the sixth paragraph of 127c in the 1951 Manual.

The former provision in the Table of Equivalent Punishments limiting confinement on bread and water or diminished rations to Navy and Coast Guard personnel was deleted. This provision has been replaced by a provision that these punishments may not be adjudged in excess of 3 days. See the third paragraph of the discussion of changes in 125, *supra*, for the reasons for these changes.

The first sentence of what is now the second paragraph was modified to delete the repeating of information contained in the Table of Equivalent Punishments. The example of the use of this table as given in the second and third sentences of this paragraph was modified for the reason that the former example improperly inferred that the Table of Maximum Punishments expressed maximum forfeitures in terms of days' pay. The example of use of equivalent punishments when an accused was convicted of usury was deleted as unnecessary to the paragraph as well as because of the decision in *United States v. Day*, 11 USCMA 549, 29 CMR 365 (1960) which held that usury is an offense only when committed in violation of an order or statute prohibiting it. The former last sentence of the sixth paragraph was not included in this paragraph. The portion of that sentence which indicated that the Table of Equivalent Punishments could only be used by the court in cases involving enlisted personnel was included in the first paragraph. The sentence also provided that the table could not be used by the convening or higher authority. This provision was not consistent with the convening authority's power to commute sentences as set forth in 88c, and it is felt that the table could now be a useful guide when this power is exercised.

127c(3)

Computation of period of unauthorized absence. The last two sentences of this subparagraph, giving an example of computing the period of an unauthorized absence, are new additions which were added in the interest of clarity.

127c(5)

Automatic suspension of limitations. Violations of Article 91(1) and (2) were added to the others for which limitations on punishments shall be suspended automatically upon declaration of war. This addition was made because it was felt that in time of war assaults against and willful disobedience towards warrant officers, non-commissioned officers, and petty officers are equally as serious as these offenses committed against commissioned officers. Where the Manual previously provided for automatic suspension of limitations on punishments for all Article 86 offenses upon declaration of war, the automatic suspension is now made applicable only to Article 86(3) offenses as it was felt that the former provision was too stringent. As changed this subparagraph is now consistent with the

Paragraph

action taken by the President in suspending the limitations in the table on certain offenses during the Korean War. See Exec. Order No. 10247, 16 Fed. Reg. 5035 (1951).

The footnote to this subparagraph, which appeared on page 217 of the 1951 Manual was not incorporated in this Manual. That footnote included information regarding the lifting of punishment limitations between 1942 and 1950. It was felt that inclusion of this information in this Manual was not warranted because of its present limited application.

Section A, paragraph 127c

TABLE OF MAXIMUM PUNISHMENTS

General.

The values of \$20 and \$50 upon which many punishments were formerly based have been changed to \$50 and \$100, respectively. Where a dishonorable discharge was formerly authorized for a violation involving a value of \$50 or less, now only a bad-conduct discharge is authorized when the value is \$100 or less. The offenses affected by this change involve captured and abandoned property (Art. 103); loss, damage, destruction, and wrongful disposition of military property (Art. 108); waste, spoiling, and destruction of property other than military property (Art. 109); larceny and wrongful appropriation (Art. 121); certain frauds against the United States (Art. 132); knowingly receiving, buying and concealing stolen property (Art. 134). This treatment is identical with that used in prescribing maximum punishments for offenses in violation of Article 123a in Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962). The reasons for adopting this method of prescribing the maximum punishments as well as the reasons for prescribing the type of discharges authorized under Article 123a are similarly applicable to the same matters under the articles listed above. In implementing Article 123a, the drafters of the change in the table were careful to preserve the felony-misdemeanor distinctions in setting maximum punishments. By limiting dishonorable discharges and confinement for more than a year to only those cases where the value involved exceeds \$100, the modern approach of limiting felony punishments in larceny type cases to thefts of property of a value of over \$100 was followed. See, *e.g.*, 18 U.S.C. §§ 641, 661 (1964). Additionally, such a treatment is realistic and practical in view of the decreased value of the dollar since 1951.

Art. 86

Absence without leave. The provisions of Exec. Order No. 10565, 19 Fed. Reg. 6299 (1954), increasing the maximum punishments, were incorporated in the table.

Art. 87

Missing movement of ship, aircraft or unit. The provisions of Exec. Order No. 10565, 19 Fed. Reg. 6299 (1954), increasing the maximum punishments, were incorporated in the table.

Art. 92

Violating or failing to obey any lawful general order or regulation and knowingly failing to obey any other lawful order. Footnote 5, formerly providing that the maximum punishment for these offenses did not apply in cases wherein the accused is found guilty of an offense which is specifically listed elsewhere in the table even though the offense involved a failure to obey a lawful order, was changed. It now provides that the punishments listed do not apply if in the absence of the violated order, the accused would be subject to conviction for another specific offense for which a lesser punishment is prescribed in the table, or if the violation is a breach of restraint that was imposed as a result of an order.

Paragraph

The revision of footnote 5 was made after consideration of the decisions in *United States v. Porter*, 11 USCMA 170, 28 CMR 394 (1960); *United States v. Dozier*, 9. USCMA 443, 26 CMR 223 (1958); *United States v. Renton*, 8 USCMA 697, 25 CMR 201 (1958); *United States v. Brown*, 8 USCMA 516, 25 CMR 20 (1957); *United States v. Hammock*, 8 USCMA 245, 24 CMR 55 (1957); *United States v. Alberico*, 7 USCMA 757, 23 CMR 221 (1957); *United States v. Lowe*, 4 USCMA 654, 16 CMR 228 (1954); *United States v. Loos*, 4 USCMA 478, 16 CMR 52 (1954); *United States v. Yunque-Burgos*, 3 USCMA 498, 13 CMR 54 (1953); *United States v. Larney*, 2 USCMA 563, 10 CMR 61 (1953); *United States v. McNeely*, 1 USCMA 510, 4 CMR 102 (1952); and *United States v. Buckmiller*, 1 USCMA 504, 4 CMR 96 (1952). Analysis of the above decisions indicates that the Court of Military Appeals was really saying that if an offense exists without an order being given it falls within footnote 5. In other instances, particularly, minor violations of orders, the Court tends to rely on the maximum punishment prescribed for another offense which is closely related to the one set out as an Article 92 violation. A primary evil that footnote 5 is intended to prevent is an increase of punishment for an offense already prescribed by the issuance of an order so as to lay a charge under Article 92. The new footnote 5 unquestionably prevents this evil. It is considered impractical to adopt the closely related offense rule into footnote 5 because of the difficulty of application, for instance, whether a certain offense is more closely related to being a disorder under Article 134 or to being a violation of a lawful order. However, the maximum prescribed for violations of orders under Article 92 is really no different that the maximum prescribed for violations of other articles in that the punishment prescribed acts as a ceiling and is not intended to prescribe an appropriate sentence in individual cases. This determination is left to the discretion of the court based on the facts and circumstances and the type of violation just as with other offenses. See 76a(1). Just as the members of the court would undoubtedly adjudge a lighter sentence for a nonaggravated robbery than for an aggravated one, so also should they adjudge a lighter sentence for nonserious violations of orders under Article 92 than for violations which amount to serious offenses. See 76a(2). In other words, when the new footnote 5 does not apply, the appropriateness of the sentence for the type of violation is left properly to the discretion of the court members.

It was also noted that the recent decision in the *United States v. Showalter*, 15 USCMA 410, 35 CMR 382 (1965) support the conclusions stated in the above paragraph. Although the opinion in that case distinguishes *United States v. Yunque-Burgos*, *supra*, in effect it really overrules that decision which previously could be interpreted as contrary to the above conclusions. However, a study of the cases cited above which followed *Yunque-Burgos* indicated even before the *Showalter* decision that *Yunque-Burgos* was eventually bound to be overruled.

Additionally, it was noted that in the *United States v. Buckmiller*, *supra*, the decision which established the "gravamen test," the offense was incorrectly laid under Article 92 and it should have been laid under Article 90 for willful disobedience. Also, any test stated in terms of the gravamen of an offense is too indefinite for application in the field, particularly for trials by special court-martial.

The limitation for violations of conditions of restraint imposed as a result of an order was added because restraint is always imposed by some

type of order and hence is an exception to the first limitation in that punishments for these violations are prescribed elsewhere in the table.

Art. 108

Loss, damage, destruction, or wrongful disposiiton of military property. In addition to the changes discussed above under "General," where negligence is involved and the amount is more than \$100 a bad-conduct discharge is authorized rather than a dishonorable discharge. This was considered appropriate in a case of neglect and is consistent with providing for a bad-conduct discharge for a negligent homicide conviction under Article 134.

Art. 110

Improper hazarding of a vessel. This portion of the table was revised to indicate clearly that the maximum punishment provided relates to situations involving negligence and that no maximum is provided when the act is willful and wrongful. The method now used in describing the offenses is consistent with the method used for Articles 99, 100, and others where no maximum is prescribed.

Art. 113

Misbehavior of sentinel or lookout. A new maximum punishment was provided for this offense when committed in an area where hostile fire pay is authorized. The same change was made in the 1951 *Manual* by Exec. Order No. 11317, 31 Fed. Reg. 15305 (1966).

Art. 121

Wrongful appropriation of property. The wrongful appropriation of an aircraft or vessel was added to the category of offenses carrying a dishonorable discharge and confinement at hard labor for two years. See *United States v. Webber*, 13 USCMA 536, 33 CMR 68 (1963), which held that since the Table of Maximum Punishments did not specify a maximum punishment for wrongful appropriation of an aircraft, the maximum applicable was that prescribed for other private property. Also see the National Motor Vehicle Theft Act, 18 U.S.C. §§ 2311, 2312 (1964), which prescribes the same maximum punishment for the offense of transporting an aircraft or motor vehicle in interstate or foreign commerce. The wrongful appropriation of a vessel was added because it was felt to be equally as serious as the wrongful appropriation of a motor vehicle or aircraft.

In order to end the anomaly by which larceny of a motor vehicle, aircraft or vessel values at less than \$100 was subject to a lesser maximum punishment than the wrongful appropriation of the same property, a specific punishment was stated for such theft regardless of the value of the stolen vehicle.

Art. 123a

Making, drawing, or uttering check, draft, or order without sufficient funds. The maximum punishment has been incorporated in the table as provided in Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962).

Art. 125

Sodomy. The punishment for sodomy is now broken down into three categories, whereas formerly only one punishment was provided for this offense. The maximum limits are now 10 years confinement and a dishonorable discharge if the sodomy is accomplished by force and without consent, 20 years confinement and a dishonorable discharge if the act is committed with a child under 16 years of age, and confinement for 5 years and a dishonorable discharge in other cases. This was done to avoid the situation in which similar offense laid under Article 134, for example, indecent liberties or assault with intent to commit sodomy, which fall short of a consummated sodomy, were punishable by a greater punishment than the sodomy itself. See *United States v. Williams*, 9 USCMA 55, 25 CMR 317 (1958); *United*

States v. Morgan, 8 USCMA 341, 24 CMR 151 (1957). The determination of an appropriate maximum for the two aggravated forms of sodomy was influenced by the maximum punishment of 10 years imprisonment for any sodomy and 20 years imprisonment for sodomy with a child in the District of Columbia. D. C. Code § 22-3502 (1961). Of course, if both forms of aggravation are alleged in one specification, the most severe punishment would be the authorized maximum.

Art. 126

Arson. The values were changed from \$50 to \$100 for consistency with the changes discussed above in the first paragraph under "General." However, the type of discharge was not changed for a simple arson where the value involved is \$100 or less. This was not changed because values are not the most important consideration in setting a punishment for this offense.

Art. 128

Assault. Punishments for assaults upon commissioned officers, warrant officers, noncommissioned and petty officers, persons executing police type duties, and sentinels and lookouts, and consummated assault upon a child under 16 years of age, were moved under Article 128 from under Article 134. It has been held that assaults of this type, aggravated because of the type of victim, should be charged under Article 128 although punishments formerly listed under Article 134 were held applicable. *United States v. Ragan*, 14 USCMA 119, 123, 33 CMR 331, 335 (1963); *United States v. McCormick*, 12 USCMA 26, 30 CMR 26 (1960) (concurring opinion, Latimer, J.).

Art. 132

Frauds against the United States. The descriptions of the offenses under this article have been modified for the purpose of clarity. All types of offenses contained in Article 132 now can be placed within one of the two categories for which punishments are prescribed without any question. The former descriptions had caused some difficulty in this regard. See *United States v. Smith*, 7 USCMA 102, 21 CMR 228 (1956).

Art. 134

Assault. Punishments for assaults upon commissioned officers, warrant officers, noncommissioned and petty officers, and persons executing police type duties, and consummated assault upon a child under 16 years of age were moved from here and are listed under Article 128. For the reasons for this change see the discussion of changes in punishments under Article 128, *supra*.

Art. 134

Assault with intent to commit housebreaking. The punishment was reduced from ten to 5 years' confinement as this was considered adequate. It was noted that a murder committed while housebreaking is not a felony murder under Article 118 (4).

Art. 134

Burning with intent to defraud. This is a new addition to the table, which was added because of *United States v. Fuller*, 9 USCMA 143, 25 CMR 405 (1958). The punishment provided in D. C. Code § 22-402 (1961) was noted in selecting an appropriate maximum punishment. However, 15 years' confinement was considered too severe, and it was determined that 10 years is appropriate.

Art. 134

Check, worthless making and uttering. The maximum punishment was changed from 4 months' confinement and partial forfeitures to bad-conduct discharge, 6 months' confinement, and total forfeitures for uniformity with the bad debt offense under Article 134 as this offense was considered equally as serious as that one.

Art. 134

Correctional custody, escape from and breach of restraint during. The punishments prescribed in Exec. Order No. 11081, 28 Fed. Reg. 945 (1963) were incorporated into the table.

- Art. 134 *Criminal libel.* This is a new addition which is based on *United States v. Grosso*, 7 USCMA 566, 23 CMR 30 (1957). The punishment prescribed is patterned after D. C. Code § 22-2301 (1961).
- Art. 134 *Debt, dishonorably failing to pay.* The type of discharge authorized was reduced from a dishonorable discharge to bad-conduct discharge. The reason for this change is that a comparison of this offense with a worthless check offense under this article indicates that the former maximum was too severe. The former description of this offense as "Debt, just, failing to pay, under such circumstances as to bring discredit upon the military service" was changed because of the decision in *United States v. Schneiderman*, 12 USCMA 494, 31 CMR 80 (1961).
- Art. 134 *Drugs, habit forming or marihuana, wrongful possession, sale, transfer, use or introduction into a military unit, station, base, post, ship or aircraft.* Based on past decisions it was considered appropriate to add sale (see, e.g., ACM 10261, *Simmons*, 19 CMR 640 (1955)), wrongful introduction into installations (*United States v. Jones*, 2 USCMA 80, 6 CMR 80 (1952)), and transfer (*United States v. Blair*, 10 USCMA 161, 27 CMR 235 (1959)) to the drug and marihuana offenses for which a punishment is prescribed. "Aircraft" was added for completeness.
- Art. 134 *Drunk.* A punishment was added for drunk aboard ship. This is consistent with the punishments prescribed under "disorderly" and "drunk and disorderly" which also specifically prescribe a punishment when the offenses are committed aboard ship.
- Art. 134 *False or unauthorized military pass, permit, discharge certificate, or identification card.* The listing of identification card under this offense is new. In *United States v. Oakley*, 11 USCMA 529, 29 CMR 345 (1960), the Court of Military Appeals held that identification card offenses were not punishable as prescribed by 18 U.S.C. § 499 (1964) and that since no punishment was prescribed in the Manual, the maximum punishment was 6 months' confinement at hard labor under 18 U.S.C. § 701 (1964). The problem should not be eliminated by providing a punishment for identification card offenses in the Table of Maximum Punishments.
- A new breakdown has been provided for these offenses based on the decision in *United States v. Blue*, 3 USCMA 550, 13 CMR 106 (1953) which recognized the existence of the less serious offenses of possessing, using, or disposing of these documents without intent to defraud or deceive. As now written, any wrongful making, altering or selling is punishable by a dishonorable discharge, confinement at hard labor for three years, and total forfeitures, but possessing or using is so punishable only if there is an intent to defraud or deceive. Without this intent, these latter offenses are only punishable as provided for "other cases." Wrongful dispositions other than selling are also punishable under "other cases." Wrongful disposition does not include the same type of aggravated intent to deceive or defraud as in the case with possessing or using and was not considered as serious as making, altering, or selling. However, the former maximum punishment of four months' confinement and partial forfeitures for "other cases" was considered inadequate, and it was changed to bad-conduct discharge, 6 months' confinement, and total forfeitures.
- Art. 134 *False pretenses, obtaining services under.* This is a new addition which was added in view of the decision in the *United States v. Herndon*, 15 USCMA 510, 36 CMR 8 (1965), and because it is a common offense in the military. The maximum punishment prescribed is the same as that for

larceny (Art. 121). It was felt that since the offense is so similar to larceny the same punishment would be appropriate. In arriving at this determination 18 U.S.C. § 1025 (1964) and D. C. Code § 22-1301 (1961) were considered.

Art. 134

Indecent, insulting, or obscene language. A punishment was added for this offense when communicated to any child under 16 years of age. In CM 412158, *Knowles*, 7 January 1965, the accused was charged with two specifications of taking indecent liberties with children by communicating obscene language over the telephone. The victim in one specification was a female child, and the victim in the other specification was a male child. The board held that the specifications did not set out the offense of indecent liberties, that the offense against the female child was punishable by a maximum of confinement for one year and a dishonorable discharge as provided in the table for communicating obscene language to a female, and that the offense against the male child was punishable by a maximum of confinement for 4 months as listed for a disorder. On certification by the Judge Advocate General of the Army, the Court of Military Appeals held that the board was correct in holding that the specifications did not set out the offense of indecent liberties. *United States v. Knowles*, 15 USCMA 404, 35 CMR 376 (1965). However, the Court did not comment, nor was it required to do so, as to the holding of the board in distinguishing between the maximum permissible punishments for the male and female child. In keeping with the public policy protecting children, the same punishment has been prescribed for commission against a child of either sex. The modifications made in this portion of the table were influenced by provisions of the D. C. Code which provide a maximum of one year imprisonment or a fine of \$1,000, or both, for similar offenses against children, male or female. D. C. Code § 22-1112(b) (1961). However, a period of two years' confinement was adopted as the maximum punishment. It was felt that the punishment for this offense when communicated to a female of the age of 16 years or over should not be decreased even though the punishment authorized for this offense in D. C. Code § 22-1112(a) (1961) is considerably less than that provided in the 1951 Manual. The reason is that obscene phone calls are a frequent and serious problem in the military because so many dependents reside on or near military installations. In view of the increased aggravation when the communication is to a child under 16 years of age, it was felt that 2 years was an appropriate maximum.

Footnote 6 was added to make it clear that the communication of this language may be charged as indecent acts or liberties with a child if the communication is in the physical presence of a child.

Art. 134

Loaning money at usurious rates of interest. There is no longer a punishment prescribed for this offense. See *United States v. Day*, 11 USCMA 549, 29 CMR 365 (1960). Pursuant to the *Day* case, this now constitutes an offense only when contrary to an order or regulation or prohibited by statute, and in these instances other maximum punishment provisions will control.

Art. 134

Obstructing justice. This is a new addition to the table (see ACM 17112, *Daminger*, 30 CMR 826 (1960) and the punishment listed is based upon 18 U.S.C. § 1503 (1964).

Art. 134

Refusing, wrongfully, to testify. Refusal to testify before an investigation under Article 32 or before a deposition officer are new additions. These offenses are considered sufficiently prejudicial to good order and

- Art.134 discipline to require listing in the table. It is also felt that the listing will prevent possible confusion in this regard. It was also noted that Article 47 specifically includes wrongful refusal to testify at the taking of a deposition.
- Art. 134 *Sentinel or lookout, offenses against.* Assaults upon sentinels or lookouts have been moved under Article 128 offenses. See the discussion of changes in the table as to Article 128, *supra*.
- Art. 134 *Transporting, unlawfully, a vehicle or aircraft in interstate or foreign commerce.* This new punishment prescribes a punishment for a violation of the Dyer Act, 18 U.S.C. § 2312 (1964) which also provides for a five year period of confinement. See *United States v. McCarthy*, 4 USCMA 385, 15 CMR 385 (1954).
- Art. 134 *Weapon, concealed, carrying.* The maximum punishment for this offense now authorizes a bad-conduct discharge, confinement for one year, and total forfeitures instead of confinement for three months and partial forfeitures for a like period as authorized in the 1951 Manual. The former maximum punishment authorized for this offense was considered inadequate when the serious nature of the offense was considered. See D. C. Code §§ 22-3204, 3215 (1961) which authorize imprisonment for not more than one year or a fine of \$1,000, or both for this offense.
- Art.134 *Wrongful cohabitation.* This is a new addition to the table. See *United States v. Melville*, 8 USCMA 597, 25 CMR 101 (1958); *United States v. Leach*, 7 USCMA 388, 22 CMR 178 (1956).

Section B, paragraph 127c

PERMISSIBLE ADDITIONAL PUNISHMENTS

The first paragraph, containing the provisions of Exec. Order No. 10565, 19 Fed. Reg. 6299 (1954), is a new addition to this section. The words "adjudged by a court" were inserted in the first sentence of this paragraph to clearly indicate that the pertinent date is the date the previous conviction was adjudged rather than the date appellate review is completed. Any other approach is impractical because completion of appellate review often takes more than one year.

The second paragraph contains material formerly contained in the first paragraph. However, the portion of this paragraph, which previously provided that no forfeiture would be imposed for any period in excess of the period of confinement adjudged as a result of additional punishment authorized due to two or more previous convictions was deleted. The reasons for this deletion are the same as those given in the second paragraph of the discussion of changes in 126a, *supra*. Additionally, there appeared to be no good reason for the limitation, particularly since it was not applicable to additional punishments authorized by Exec. Order No. 10565, *supra*.

It should be noted that language was added to the first sentence of the second paragraph which expressly require that the previous convictions authorizing the added punishment be adjudged within the three year period stated in the sentence. A 3 year requirement was inherent in the 1951 Manual when the provision was read in conjunction with the previous conviction rules as then stated in 75b(2). However, it was necessary to add this language in view of the changes in 75b(2) which broadened the scope of admissible previous convictions. See the first paragraph of the discussion of the changes in paragraph 75b(2) of chapter XIII, *supra*.

It was felt that a 3 year requirement for the added punishment was sufficiently severe, and the 6 year rule now provided in 75b(2) was therefore not adopted here. Here, as in the first paragraph, the pertinent date is the date the previous conviction was adjudged by a court-martial.

The material relating to fines was revised to make a fine a truly additional punishment. When a fine is an additional punishment is now provided in the fourth paragraph. For a detailed discussion concerning this change, see the discussion of the changes in 126h(3), *supra*.

CHAPTER 26
NONJUDICIAL PUNISHMENT

Paragraph

General. This chapter was previously amended by Exec. Order No. 11081, 28 Fed. Reg. 945 (1963). The comments that follow are addressed to the changes in this chapter as so amended, and they do not cover the changes that were made by the amendment.

131c(8)

Forfeiture of pay. In the fourth sentence, "whether or not" was substituted for "unsuspended" to conform to the procedure relative to courts-martial cases.

131c(9)

Detention of pay. In the second sentence, "from the date the punishment is imposed" was inserted after "one year" so that the "one year" would be a time certain. In the sixth sentence, "whether or not suspended" was substituted for "unsuspended" to conform to the procedure relative to courts-martial cases.

132

Right to demand trial. The fact that the accused may also refuse trial by summary court-martial was incorporated in this paragraph for completeness.

133b

Procedure for Navy, Marine Corps, and Coast Guard. The last sentence of the last paragraph read as follows: "All such letters of censure addressed to an officer or warrant officer shall be in the form prescribed by pertinent regulations." This sentence was deleted to prevent a requirement of regulations.

CHAPTER 27

RULES OF EVIDENCE

Paragraph
137

General. In the first paragraph, it is stated that the summary court-martial will have the same discretionary power as the MJ concerning the reception of evidence. This is done because the summary court-martial officer will not again be mentioned in the chapter on evidence and reference thereafter will be made only to the role of the MJ, the president of a special court-martial without an MJ and the members of the courts-martial. The terms to be used in signifying these various responsibilities are set forth in paragraph 57a of the Manual. Obviously, the word "court" was too loosely used in the former Manual, and in this revision the word "court" will be used only in its generic sense.

In the second paragraph, the material relating to relaxation of the rules of evidence in connection with interlocutory matters relating to the "propriety of proceeding with the trial" was revised as being too broadly stated in the former Manual. For example, insanity at the time of trial affects the propriety of proceeding with the trial and so do a number of other motions raising defenses and objections, and certainly a relaxation of the ordinary evidentiary rules would be inappropriate with respect to a number of these matters. See paragraph 122c of the Manual. The paragraph was revised with these principles in mind.

The third paragraph is new and the reason for its addition is obvious. See, for example, Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, 3 Aug 1959, [1963] 14 U.S.T. 531, T.I.A.S. No. 5351, Art. 39.

In the fourth paragraph, the distinction between "material" and "relevant" evidence found in the third paragraph of 137 in the former Manual was dropped. This distinction was confusing and served no useful purpose. The words are consistently used interchangeably and any supposed distinction is merely academic. See 1 Wharton, Criminal Evidence, § 148, n. 1 (12th ed. 1955). The last sentence of the third paragraph of 137 in the former Manual was deleted, since it has no place in the present practice of drawing a sharp distinction between the trial on the merits and presentencing matters.

The last paragraph deletes the sentence which indicated that the limitation of merely cumulative testimony had special application to character witnesses. On the contrary, it has a general application.

138a

Presumptions and permissible inferences. This subparagraph was entirely rewritten. In the first place, the new subparagraph (1) presumptions are clearly distinguished from inferences. Presumptions are defined as being solely procedural rules which do not themselves supply evidence of the matter presumed. See *Bray v. United States*, 306 F. 2d 743

Paragraph

D.C. Cir. 1962); *United States v. Biesak*, 3 USCMA 714, 14 CMR 132 (1954); 9 Wigmore, Evidence, § 2490 *et seq.* (3d ed. 1940)*. The presumption of innocence has generally been held as not supplying evidence of innocence (see Wigmore, § 2511), and the *presumption* of sanity does not supply evidence of sanity (see *Biesak, supra*). As in the former Manual, it is stated that the presumption of sanity is not overcome until a reasonable doubt of sanity is raised by the evidence. This does not change the prosecution's burden of proof, but is merely a recognition of the procedural fact that if, after considering all the evidence in the case, a reasonable doubt of sanity is not raised in the minds of the finders of fact they would be theoretically obliged to find the accused to be sane, the policy behind the presumption being to require adherence to applicable legal definitions of insanity and to counteract any tendency to regard the abnormality of crime as being in itself "insanity." *McDonald v. United States*, 312 F. 2d 847, 850 (D.C. Cir. 1962); *United States v. Walters*, USCMA 732, 14 CMR 150 (1954); *United States v. Johnson*, 3 USCMA 725, 731, 14 CMR 143, 149 (1954); *United States v. Biesak, supra*.

In the new subparagraph (2), inferences commonly encountered in criminal trials are plainly labeled as being permissible "inferences" and not "presumptions." *United States v. Gainey*, 380 U.S. 63 (1965); *Bray v. United States, supra*; *United States v. Dipietrantonio*, 16 USCMA 386, 37 CMR 6 (1966).

In the examples of common inferences, the first example concerning the inference of sanity was added to distinguish the inference from the presumption of sanity. *United States v. Biesak, supra*. The fourth example (the third in the former Manual), insofar as it relates to the inference of earlier existence of a condition, was reworded in accordance with *United States v. Consolidated Laundries Corporation*, 291 F. 2d 563 (2d Cir. 1961). Although the example concerning the inferences resulting from possession of recently stolen property has not been expanded because all permissible inferences cannot be included in a text of this type, possession by an accomplice of the accused will support the inference as well as possession by the accused himself. *Weisman v. United States*, 1 F. 2d 696 (8th Cir. 1924); *State v. Stutches*, 163 Iowa 4, 144 N.W. 597 (1913); see also *Agobian v. United States*, 323 F. 2d 693 (9th Cir. 1963), *cert. denied*, 375 U.S. 985 (1964) (joint possession of drugs). Matters relating to the "exclusiveness" and the "consciousness" of the possession, often referred to in the earlier cases, really go to the weight and not necessarily to the existence of the inference. *Rugendorf v. United States*, 376 U.S. 528 (1964). See also *United States v. DeSisto*, 329 F. 2d 929, 935 (2d Cir. 1964), *cert. denied*, 377 U.S. 979 (1964). Also, it should be recognized that recent possession will support an inference of receiving and like offenses, and if an offense of this kind is charged no conflicting inference of larceny is to be considered as arising from the mere fact of possession. *Rugendorf v. United States, supra*. The words "refuses or fails" were substituted for the words "does not or cannot" in the last example (the next to the last in the former Manual). *United States v. Lyons*, 14 USCMA 67, 33 CMR 279 (1963); *United States v. Crowell*, 9 USCMA 43, 25 CMR 305 (1958). The last example in the former Manual concerning "bad check cases" was rescinded by Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962).

* Hereafter cited as Wigmore, § ———. All references are to the 3d edition with the exception of references to §§ 2175-2396, which are to the McNaughton Revision (1961).

Paragraph

The last paragraph of (2) concerning conflicting permissible inferences was adopted to provide a sensible rule for dealing with so-called "conflicting presumptions" when these "presumptions" are in reality merely permissible inferences. No such rule is given for presumptions themselves, in the strict sense in which they are used in this revision, for as true presumptions merely regulate procedure such a rule would be inapplicable. The rule adopted is, generally, that found in Rule 15, Uniform Rules of Evidence, after deleting therefrom the confusion between "presumptions" and "inferences" inherent in Rule 15 and in Rule 14. Certainly, in criminal cases today ordinary common inferences, and probably ordinary factually based "statutory presumptions," should be regarded as nothing more than permissible inferences and should not be given illogical effect based on supposed matters of public policy existing apart from the circumstances supporting the inferences. See *United States v. Romano*, 382 U.S. 136 (1965); *United States v. Gainey*, *supra*; *United States v. Dipietrantonio*, *supra*. And this will hold true also with respect to determining the relative effect of conflicting permissible inferences. The rule concerning these inferences set forth in this revision is in accordance with what the Court of Military Appeals actually held in *United States v. Patrick*, 2 USCMA 189, 7 CMR 65 (1953).

138b

Direct and circumstantial evidence. The principal change made in this subparagraph is the deletion of the former last sentence of the subparagraph which cross referenced 74a(3) as to weighing circumstantial evidence. This deletion was made because paragraph 74a(3) now makes no distinction between the weight of circumstantial and other forms of evidence.

138c

Read evidence. A cross reference to paragraph 54d of the Manual was added.

138d

Testimonial knowledge. The second paragraph is a new addition to this subparagraph. It repeats the last sentence of the first paragraph of 138e. Also, the last sentence of the last paragraph was added to cover testimony as to a person's age and date of birth by witnesses other than the person in question. See generally, Wigmore, § 667.

138e

Opinion testimony. The first paragraph was rephrased principally to add a cross reference concerning opinion evidence as to habit or usage. It is also indicated that what is really involved in these situations is a collective "inference" rather than merely an "impression." Wigmore, §§ 1924, 1926.

The subject matter formerly in the third paragraph now appears in the third and fourth paragraphs. However, the third paragraph was revised to adopt the more modern rule concerning expert testimony which is really based on a joint or common effort calling for a correlation of the work of a number of experts, not all of whom necessarily have the same expertise. This is often found, for example, in the testimony of psychiatrists who may have based their opinion in part on reports obtained from psychologists, social workers, and others working with expert knowledge in the general field. There is no reason why an expert opinion cannot be based on such a collective endeavor. The opposite side has ample opportunity to develop all of the facts by cross-examination of the expert and, if necessary, by calling as witnesses those who have worked with him. This rule may be found applied in *Alexander v. United States*, 318 F. 2d

Paragraph

274 (D.C. Cir. 1963), and *Jenkins v. United States*, 307 F. 2d 637 (D.C. Cir. 1962). It has also been adopted, in effect, by the Court of Military Appeals. See *United States v. Walker*, 12 USCMA 658, 31 CMR 244 (1962); *United States v. Heilman*, 12 USCMA 648, 31 CMR 234 (1962). From the standpoint of *admissibility*, the proponent of the expert testimony need not show the details of the basis of the expert's opinion (Rule 58, Uniform Rules of Evidence; Wigmore, § 686), although trial tactics will, of course, often make it advisable for him to do so.

The next to last sentence of the fourth paragraph concerning hypothetical questions asked on cross-examination is an obvious exception to the ordinary hypothetical question rule. See ACM 5745, *Goodman*, 7 CMR 660 (1952); and authorities there cited.

The next to the last paragraph is new and expresses the rule found in *Riley v. Pinkus*, 338 U.S. 269 (1949). See also *Dolcin Corporation v. Federal Trade Commission*, 219 F. 2d 742 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 981 (1955), and *Stottlemire v. Cawood*, 215 F. Supp. 266 (D.D.C. 1963).

138f(1)

Proof of character. This subparagraph has not been materially revised. However, the cross reference to 146b is explained in a new last paragraph.

138f(2)

Character of the accused. This subparagraph was considerably revised. In the first paragraph, the basic rule concerning the prohibition against raising an inference of guilt from proof of the accused's bad character is more clearly stated. See Wigmore, §§ 57, 58. In the second paragraph, it is pointed out that authenticated copies of efficiency or fitness reports of the accused are admissible on the issue of his good character. *United States v. Barnhill*, 13 USCMA 647, 33 CMR 179 (1963). The remainder of the paragraph has been revised in the interest of clarity.

The third paragraph was inserted to indicate that the prosecution's rebuttal is bound only by the general scope of the character evidence introduced by the accused and not by the particular method the accused has used in presenting his character evidence.

The next to the last paragraph is also new and was inserted to point out that rebutting evidence of good character normally may not extend to evidence of other specific offenses or acts of misconduct of the accused. See *United States v. Haimson*, 5 USCMA 208, 17 CMR 208 (1954). However, if the defense presents evidence that the accused had not committed other specific acts of misconduct, then it opens the door and the prosecution may rebut the defense evidence by proof of specific acts, and that is the reason for this exception to the rule as stated in the revision. *United States v. Kindler*, 14 USCMA 394, 34 CMR 174 (1964); *United States v. Brown*, 6 USCMA 237, 19 CMR 363 (1955). Evidence of other specific acts of the accused may also rebut evidence of his good character, of course, if the evidence of specific acts is admissible under 138g. *United States v. Haimson, supra*. The prohibition against showing other specific acts of the accused in rebuttal of his evidence of good character will not prohibit any incidental showing of specific acts of the accused which may occur under the ordinary rules of cross-examination in cross-examining character witnesses. See *Michelson v. United States*, 335 U.S. 469 (1948).

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However, as pointed out by the Supreme Court in the *Michelson* case, this is a very complicated matter, and the space limitations of the Manual will prevent a detailed discussion of it. It should be noted, too, that the *Michelson* case deals only with cross-examination as to reputation evidence and does not indicate what the rules might be with respect to opinion evidence of character. The general rules pertaining to cross-examination set forth in paragraph 149b of the Manual will have to be resorted to in this respect.

The last paragraph was revised in accordance with the revision of paragraph 153b(2)(a).

138f(3)

Character of persons other than the accused. This subparagraph was revised to indicate in the first sentence of the first paragraph that character evidence concerning persons other than the accused is admissible if it is relevant. See ACM S-11208, *Allen*, 20 CMR 676 (1955). An example of the operation of an exclusionary rule in this connection is given in the new second paragraph. See 1 Wharton, *Criminal Evidence*, § 230 (12th ed. 1955).

In the next to last sentence of the second paragraph it is indicated that specific acts of violence of the victim are admissible in the stated circumstances as well as opinion or reputation evidence of violent character. *United States v. Desroe*, 6 USCMA 681, 21 CMR 3 (1956).

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Evidence of other offenses or acts of misconduct of the accused. Several new examples and groups of examples were added to this subparagraph—all being merely instances of the general principle. As to the third group of examples, the general principle was revised to indicate that other offenses are admissible when they tend to prove knowledge or guilty intent when in issue. The word “element” was deleted since in some offenses these may not be specifically designated as being elements but, nevertheless, may be requirements under the circumstances. See the discussion of 154a(1), *infra*. The first example in the third group, that dealing with receiving stolen goods, was changed to indicate that there need not have been “several” previous occasions when the “similar circumstance” test is used. Wigmore, § 324. The example concerning counterfeiting was deleted as being of doubtful validity. See Wigmore, § 310(2). The single example in the fourth group was taken from *United States v. Harris*, 6 USCMA 736, 21 CMR 58 (1956). In the fifth group of examples (the fourth in the former Manual), the first example was revised to state a more common situation. The sixth group of examples was revised to add rebuttal of entrapment as well as rebuttal of accident or mistake as a reason for admitting evidence of other offenses. An entrapment example is given. See *Sherman v. United States*, 356 U.S. 369 (1958); *Whiting v. United States*, 296 F. 2d 512 (1st Cir. 1961); *Neill v. United States*, 225 F. 2d 174 (8th Cir. 1955); *Carlton v. United States*, 198 F. 2d 795 (9th Cir. 1952). Also, the first example in this group was revised to be more explicit. See Wigmore, § 363. A seventh basis for receiving evidence of other offenses or acts of misconduct of the accused was added to indicate that evidence of this kind is admissible when it tends to rebut any issue raised by the defense, with the exception mentioned in the text, and a rebuttal of self-defense example has been given which was taken from *United States v. Harris*, *supra*. See also *United States v. Hoy*, 12 USCMA 554, 31 CMR 140 (1961). Accordingly, the

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second sentence of the first paragraph was revised to accommodate the examples concerning rebuttal of issues raised by the defense.

The new second paragraph states that the military judge or special court-martial president should instruct the court members concerning any limitations upon the purpose for which evidence of this kind may be considered. See *United States v. Donley*, 15 USCMA 530, 36 CMR 28 (1965); *United States v. Conrad*, 14 USCMA 344, 34 CMR 124 (1964); *United States v. Back*, 13 USCMA 568, 33 CMR 100 (1963).

The last paragraph was rewritten to indicate that evidence of other offenses or acts of misconduct of the accused not amounting to proof of conviction thereof is not admissible merely to impeach his credibility as a witness, but that if evidence of this kind is admissible independently of impeachment it will also be admissible to impeach the accused's credibility, provided it has a tendency to do so. See *United States v. Kindler*, 14 USCMA 394, 34 CMR 174 (1964); *United States v. Robertson*, 14 USCMA 328, 34 CMR 108 (1963). It has also been pointed out in this paragraph that when under certain circumstances evidence that the accused was convicted of crime is admissible only for the purpose of impeaching his credibility as a witness, an instruction to this effect should be given. *United States v. Moore*, 5 USCMA 687, 18 CMR 311 (1955).

138h

Evidence of habit or usage. This subparagraph is new. Generally speaking, it was taken from Rules 49 and 50 of the Uniform Rules of Evidence. See also *Hambrice v. F. W. Woolworth Company*, 290 F. 2d 557 (5th Cir. 1961); *United States v. Vandersee*, 279 F. 2d 176, 180-181 (3d Cir. 1960) *cert. denied*, 364 U.S. 943 (1961); Wigmore, § 92.

139a

Hearsay rule. In the first sentence, the word "hearing" was substituted for the word "trial," for testimony given at a former trial would be admissible in the instant hearing, if at all, under an exception to the hearsay rule. The word "hearing" is also used in the definition of the hearsay rule given in Rule 63 of the Uniform Rules of Evidence, which is the same as the rule in the former Manual and in this revision. In the second sentence, a new definition of the word "statement" was adopted, and this is the definition used in connection with the hearsay rule in Rule 62(1) of the Uniform Rules of Evidence. The last sentence in the statement of the rule was added to make it clear that this revision retains the rule found in the former Manual generally prohibiting the use as substantive evidence of repudiated, or not adopted, inconsistent statements made out of court (see 153b(2)(c) in MCM, 1951, and in this Manual) and that the contrary "exception" to the hearsay rule found in Rule 63(1) of the Uniform Rules of Evidence has *not* been adopted. It is recognized that there is considerable argument concerning this matter. See the discussion in *United States v. DeSisto*, 329 F. 2d 929 (2d Cir. 1964), *cert. denied*, 377 U.S. 979 (1964), and see *Douglas v. Alabama*, 380 U.S. 415 (1965), which deals only with the confrontation clause of the Sixth Amendment as applied to the States. However, it hardly seems proper in criminal cases to allow inconsistent statements of a kind which are not themselves independently within a hearsay exception to come in as substantive evidence. To do so would practically destroy the hearsay rule, and, for example, depositions and former testimony would be admissible against the accused as substantive evidence even when the witness testifies in court, if the witness has repudiated such a former statement in his testimony. The conventional rule is stated in *Community Counselling Service, Inc. v.*

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Reilly, 317 F. 2d 239 (4th Cir. 1963), and in *Consolidated Electric Cooperative v. Panhandle Eastern Pipeline Company*, 189 F. 2d 777, 783 (8th Cir. 1951), and cases there cited. The proposal in Rule 63(1) of the Uniform Rules and the Comment thereto that consistent statements be considered per se an exception to the hearsay rule also has not been adopted. See 75 A.L.R. 2d 922.

139b

Illustrations. In the second illustration, a more apt example is given of an out-of-court statement which is offered merely to prove that the statement was made and not to prove the truth thereof. The former example dealt largely with matters of mitigation, whereas the new one deals with the merits. A new example—the next to the last one—was added to provide an example of the operation of the last sentence of the statement of the hearsay rule in the present subparagraph 139a. This example indicates how dangerous it would be in criminal cases to adopt a rule allowing repudiated or unadopted inconsistent statements to be received as substantive evidence, regardless of their nature.

140a(1)

Confessions and admissions. Definitions. Subparagraph 140a in general was almost completely revised in the light of the many changes in the law of confessions and admissions which have occurred since the 1951 Manual was written. In this Manual, 140a was subdivided for better indexing, referencing, and understanding. In 140a(1) it is pointed out that a statement which proves to be self-incriminating is an admission even if it was intended by its maker to be exculpatory. See *Miranda v. Arizona*, 384 U.S. 436, 477 (1966).

140a(2)

Voluntariness. The first paragraph omits the statement that there are no “hard and fast rules” for determining the “voluntariness” of a confession or admission, since rules of this nature are now provided. The second paragraph contains several changes in the instances of coercion and unlawful acts which can cause a statement to be involuntary. In the first instance, it is no longer indicated that questioning accompanied by deprivation of the necessities of life need also be “prolonged” (see *Miranda, supra*), and the fifth instance no longer requires that a threat or promise be “substantial” to cause a statement to be involuntary in a proper case (*United States v. Rogers*, 14 USCMA 570, 34 CMR 350 (1964)). The last two instances are a result of Article 31(b) of the Code and *Miranda, supra*, which will be subsequently discussed in this connection. It should be mentioned here, however, that statements obtained in violation of the warning requirements of Article 31(b) or other Federal warning requirements are implied or legally assumed to be “involuntary,” the decision in *Johnson v. New Jersey*, 384 U.S. 719 (1966), not to apply the *Miranda* decision retrospectively merely pointing out (at 730) that pre-*Miranda* statements could be attacked on the ground of “substantive” involuntariness.

In the first sentence of the third paragraph, Article 31(b) is separately discussed. See generally *United States v. Reynolds*, 16 USCMA 403, 37 CMR 23 (1966); *United States v. Beck*, 15 USCMA 333, 35 CMR 305 (1965); *United States v. Elliott*, 15 USCMA 181, 35 CMR 153 (1964); *United States v. King*, 14 USCMA 227, 34 CMR 7 (1963) (still of importance with respect to foreign interrogations under similar circumstances); *United States v. Nitschke*, 12 USCMA 489, 31 CMR 75 (1961); *United States v. Davis*, 8 USCMA 196, 24 CMR 6 (1957); *United States v. Grisham*, 4 USCMA 694, 16 CMR 268 (1954). The term “investigation” is

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no longer used in describing the limits of the operation of Article 31(b), although that article will not apply unless there is an "official" interrogation or request. *United States v. Beck, supra*. The second sentence of the third paragraph is derived from the law of *Miranda v. Arizona, supra*, pertaining to the right to remain silent, as that law will apply in a court-martial trial of an accused who has been subjected to custodial interrogation by domestic civilian authorities as an accused or suspect. The third sentence expresses another facet of the *Miranda* case (at 473-474). In this sentence, the words "and that desire remains in effect" are included in recognition of the fact that an accused who has once invoked his right to remain silent may later freely and voluntarily change his mind. Of course, *Miranda* (at 473-474) requires that an interrogation cease once this privilege is invoked except when the accused has counsel present and there is no overbearing (n. 44 at 474). However, there is no indication that this was intended to preclude an accused from changing his mind even if this change of mind was expressed upon subsequent inquiry as to whether there has been a change of mind, so long as there is no improper influence exerted. The exception in footnote 44 of *Miranda* was intentionally omitted for several reasons. It would be unfair and illogical to give the suspect who desires to remain silent and does not desire counsel advantage over the suspect who desires to remain silent but also desires counsel. The former could not be interrogated, but the latter would be subject to interrogation when counsel is present and there is no overbearing. Also, a danger of this exception is that it could lead to the practice of automatically providing an appointed counsel in order to interrogate a suspect who is expected to invoke his right to remain silent.

The fourth paragraph sets forth the rules as to the warning of the right to assistance of counsel. These rules are a result of the decision in *Miranda, supra*, which was followed by the United States Court of Military Appeals in *United States v. Tempia*, 16 USCMA 629, 37 CMR 249(1967). See also *People v. Kelley*, 424 P. 2d 947 (Cal. 1967). As to the necessity for an affirmative showing of the waiver of the right to assistance to counsel and to remain silent when counsel was not present at the interrogation, see *Miranda*, at 475 and *Tempia*, 16 USCMA at 638, 37 CMR at 258.

As to the first sentence of the fifth paragraph, see *Miranda*, at 468, 471. Article 31(d) had already demanded this result as to a violation of the warning requirement of Article 31(b). The last sentence, as it applies to Article 31(b), reflects the decision in *United States v. Howard*, 5 USCMA 186, 17 CMR 186 (1954). Other aspects of that sentence are inherent in certain reservations in *Miranda* (see n. 45 at 476).

The first sentence of the sixth paragraph is taken from the case of *Westover v. United States*, decided with *Miranda*, at 494. The second sentence is a cross reference which supplants the eighth paragraph of the former 140a, which no longer can be considered as stating a correct rule of law. *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

The seventh paragraph is a substitute for the fifth paragraph of 140a in the former Manual, as that paragraph has been affected by *Miranda, supra*. *Miranda* (at 476) prohibits any distinction between confessions and admissions with respect to the order of proof. Also, the material concerning declarations of the accused that his statement was voluntary was omitted, for these declarations normally consist of written statements

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signed in connection with the interrogation and, since they are admissions and there is no longer any distinction between confessions and admissions, they, too, would have to be affirmatively shown to be voluntary.

The eighth paragraph is a restatement of similar material previously appearing in the Manual, but a cross reference to paragraph 57g(2) has been added to indicate that military judges should conduct their preliminary inquiries into these matters out of the presence of the members of the court.

The ninth paragraph is a statement of those principles applying to rulings on the admissibility and consideration of confessions and admissions. The objections of the Court of Military Appeals to the language in the former Manual that the law officer's ruling "is not conclusive" of voluntariness (see *United States v. Cotton*, 13 USCMA 176, 32 CMR 176 (1962)) have been recognized by stating that the ruling "does not establish" voluntariness. The second sentence points out that the ruling of the military judge must be based on an interlocutory finding that the statement was voluntary to indicate the fact that in the military the "Massachusetts" rule is followed and not the "New York" rule which was condemned by the Supreme Court in *Jackson v. Denno*, 378 U.S. 368 (1964). See also *Sims v. Georgia*, 385 U.S. 538 (1967). The rest of the paragraph sets forth the rules pertaining to instructions when evidence raising an issue as to the voluntariness of the statement has been introduced in open session. See *United States v. Williams*, 13 USCMA 208, 32 CMR 208 (1962); *United States v. Gorko*, 12 USCMA 624, 31 CMR 210 (1962); *United States v. Erb*, 12 USCMA 524, 31 CMR 110 (1961); *United States v. Acfalle*, 12 USCMA 465, 31 CMR 51 (1961); *United States v. Rice*, 11 USCMA 524, 29 CMR 340 (1960); *United States v. Jones*, 7 USMCA 623, 23 CMR 87 (1957).

140a(3)

Purported confession or admission of the accused claimed not to have been made by him. This subparagraph contains rules concerning confessions and admissions which are claimed by the accused not to have been made by him at all, as distinguished from those which he claims to be involuntary. This distinction seems not to have been properly noticed in military law (see *United States v. Miller*, 14 USCMA 412, 34 CMR 192 (1964)) but has been applied in the Federal courts. See *Obery v. United States*, 217 F. 2d 860 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 923 (1955); *United States v. Bridges*, 133 F. Supp. 638 (N.D. Cal. 1955). See also 2 Wharton, Criminal Evidence, § 355 (12th ed. 1955).

140a(4)

Admissions by silence. This subparagraph is a revision for the purpose of clarification of the similar material pertaining to tacit admissions appearing in the former Manual. The new material is a better exposition of the rationale behind the rule. See *United States v. Armstrong*, 4 USCMA 248, 15 CMR 248 (1954). The matter concerning corroboration appearing here in the former Manual was omitted since it is obviously covered by the ordinary rules of corroboration stated in 140a(5). As to the last sentence in the subparagraph, see *United States v. Jones*, 16 USCMA 22, 36 CMR 178 (1966).

140a(5)

Corroboration of confessions and admissions. This subparagraph contains the new rule pertaining to corroboration of confessions and admissions adopted by the Supreme Court in *Opper v. United States*, 348 U.S. 84 (1954), and *Smith v. United States*, 348 U.S. 147 (1954). The *Opper* case is authority for the proposition that the corroborating evidence need

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only raise a "jury inference" of the truth of the essential facts admitted, and the *Smith* case is authority for the principle that if the prosecution desires to use the accused's statement as evidence to establish a particular essential fact, that essential fact must be corroborated by independent evidence. Although both cases involved offenses in which there was no tangible corpus delicti, the Court did not, in announcing its new rule, state that the rule applied only to this type of offense—that is, it did not indicate that the old "corpus delicti" rule would continue to be applied to offenses in which there was a "tangible" corpus delicti, if there is, in fact, any real distinction to be drawn. The new rule is entirely different from the corpus delicti rule found in the former Manual. Under the *Opper* and *Smith* rule, all that is required is that there be independent evidence raising a "jury inference" of the truth of the matters stated in the confession or admission, in other words, actual corroboration of the statement; whereas under the so-called "corpus delicti" rule the confession or admission is completely disregarded until such time as it is shown independently that the offense in question has "probably been committed by someone." There are a large number of offenses in which the "corpus delicti" rule will not work at all—those in which there is no tangible corpus delicti (see *United States v. Mims*, 8 USCMA 316, 24 CMR 126 (1957)—and even when there is a tangible corpus delicti the older rule would seem to be illogical and unsound. The main purpose should be to corroborate the confession or admission so that one will be reasonably assured that it is not false, and not to set up an arbitrary requirement for some outside proof of the corpus delicti as such. Under the *Opper* and *Smith* rule, corroboration of a confession would supply evidence not only that the offense was committed by someone but also that it was committed by the accused, which would seem to be a most desirable method of corroboration as to any kind of offense. This corroboration can be supplied by the circumstance of the independent facts dovetailing with the admitted facts, and an example of such a dovetailing was included in this subparagraph. This theory of corroboration was expressly adopted in *United States v. Waller*, 326 F. 2d 314 (4th Cir. 1963), cert. denied, 377 U.S. 946 (1964). Although not specifically mentioned, at the request of the defense, the members of the court should be instructed that they must determine whether the confession or admission has been sufficiently corroborated, and this is so whether or not the corroborative evidence appears to be ambiguous, impeached, or contradicted. See *Weiler v. United States*, 323 U.S. 606 (1945); *Spaeth v. United States*, 218 F. 2d 361 (6th Cir. 1955); cf. CM 410628, *Kisner*, 34 CMR 588 (1964), rev'd on other grounds, *United States v. Kisner*, 15 USCMA 153, 35 CMR 125 (1964). It seems clear that corroboration is, upon request by the defense, a jury question under the *Opper* and *Smith* rule. In *Opper* the Court stated that the independent evidence must raise a "jury" inference of truth, and the Supreme Court has always held that matters of corroboration are for the jury and not for final determination by the judge. *Weiler v. United States*, supra. The last sentence of the subparagraph states that the rule requiring corroboration does not apply to statements which are made prior to or "contemporaneously" with the act, nor does it apply if the statement is admissible under some rule of evidence other than that pertaining to the admissibility of confessions and admissions. See *United States v. Villaseñor*, 6 USCMA 3, 19 CMR 129 (1955).

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140a(6)

Miscellaneous. As to the provision in the first paragraph of this subparagraph that a confession or admission, as such, is admissible only *against* the accused, see *United States v. Harvey*, 8 USCMA 538, 25 CMR 42 (1957). Once the prosecution has introduced a confession or admission, however, the defense may show the whole of the statement, which may consist of a connected series of statements, and this rule is contained in the second paragraph. See also the discussion of the last paragraph of 142d.

The next to the last paragraph of this subparagraph follows *Miranda v. Arizona*, 384 U.S. 436, 476 (1966) and *United States v. Price*, 7 USCMA 590, 23 CMR 54 (1957).

140b

Acts and statements of conspirators and accomplices. In the first sentence of the first paragraph, it is mentioned that statements made by conspirators are admissible against those who became parties to the conspiracy after the statements were made, as well as those who were parties at the time the statements were made. *United States v. Mesarosh*, 223 F. 2d 449 (3d Cir. 1955), and cases there cited, *rev'd on other grounds*, 352 U.S. 1 (1956). In the last sentence of the first paragraph, it has been pointed out that acts or conduct of the conspirators are admissible to show the existence of the conspiracy, even though the act or conduct occurred after the conspiracy had ended. *Lutwak v. United States*, 344 U.S. 604 (1953); *United States v. Salisbury*, 14 USCMA 171, 33 CMR 383 (1963).

The fourth paragraph is a statement of the law pertaining to the admissibility of statements made by coconspirators after the conspiracy has ended. This has been taken from *Grunewald v. United States*, 353 U.S. 391 (1957). See also *United States v. Beverly*, 14 USCMA 468, 34 CMR 248 (1964). The reason for the requirement that the subsidiary agreement relating to concealment of the conspiracy or other avoidance of penal consequences thereof must be shown to be an express agreement is that the existence of an agreement of this nature as part of the agreement constituting the conspiracy cannot be inferred from acts of concealment or avoidance of apprehension committed by the conspirators.

The fifth paragraph conforms the Manual for Courts-Martial to the decisions of the Supreme Court in *Bruton v. United States*, 391 U.S. 123 (1968) and *Roberts v. Russell*, 392 U.S. 293 (1968) which concerned the admissibility of statements of one codefendant against another codefendant when the former is not subject to cross-examination by the latter.

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Statements made through interpreters. This material was generally revised for the purpose of clarity and explanation. In the list of exceptions in the second sentence of the first paragraph, it has been indicated that the interpreter need only be the agent of the person against whom the statement is to be used—or his accomplice—and need not be the agent of the person who made the statement, as indicated in the former Manual. See *United States v. Day*, 2 USCMA 416, 9 CMR 46 (1953); Wigmore, § 1810(2). However, if evidence of a translation of a statement is admissible only on the ground that the translation was made by an agent of a witness whose credibility proof of the statement would tend to impeach, that evidence cannot be considered for any purpose other than impeachment, even when the statement itself would be admissible for a purpose other than impeachment as an exception to the hearsay rule or otherwise.

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This is because the agency theory operates only adversely to the principal, in this case the witness. The last three sentences of the first paragraph were added to draw attention to the fact that the paragraph deals only with methods of proving statements made through interpreters and that the admissibility of the statements will be governed by other rules of evidence.

The second sentence of the second paragraph in the 1951 Manual provided—

If given at another trial, testimony through an interpreter may be proved by the record of the trial or by other evidence of the interpretation only when such evidence is admissible under the above-mentioned agency exception to the general rule or when, in accordance with the provisions of 145b, the testimony is competent as former testimony and the interpreter, as well as the witness at the former trial, is not reasonably available as a witness.

The third sentence of the present second paragraph changes the rule and now permits proof of the testimony of a witness by the record of trial or hearing or by other evidence by showing only that the testimony of the *witness* and not also the *interpretation* is competent as former testimony. This change was made because it was considered the practical thing to do. At the former trial or hearing, the accused will have been afforded the opportunity to challenge the interpreter, and the transcript of the translation will usually be more reliable than the recollection of the interpreter. Also, the same is permitted in this same paragraph in the case of depositions and testimony before a court of inquiry. There is no practical reason for a different rule as to the former testimony situation even though Wigmore, § 1810(1), is authority to the contrary. Under general principles applying to the use of former testimony, of course, a failure to object on the ground that it does not appear that the witness interpreted is unavailable may be regarded as a waiver of that objection. See 145b.

The last paragraph points out that since an interpreter is actually a witness he is subject to the usual tests of credibility and can be contradicted by the testimony of counter-interpreters. See *United States v. Rayas*, 6 USCMA 479, 20 CMR 195 (1955).

142a

Dying declarations. In the first sentence of the first paragraph, the rule was extended to make dying declarations admissible in trials for any offense resulting in the death of the alleged victim. This extension should avoid ridiculous results with respect to murder-rape cases, for example, and lesser offenses included in homicide charges. See Wigmore, § 1432, and Rule 63(5), Uniform Rules of Evidence, although these would go too far in extending this rule. The first paragraph also has been generally rewritten to be in accordance with *Shepard v. United States*, 290 U.S. 96 (1933). See also Wigmore, § 1442.

In the second paragraph, it is stated that evidence of the opportunity of the declarant to observe may be supplied by assertions in the declaration itself, for unlike spontaneous exclamations the "truth test" in dying declarations lies in the victim's personal, dying condition, not in extraneous events, and all his assertions concerning the circumstances of the act are admissible. See Wigmore, §§ 1434, 1445(2). It has also been indicated in the second paragraph that the declaration may be in the form of a conclusion if it is not merely an expression of suspicion or conjecture. *Shepard v. United States, supra; United States v. DeCarlo*, 1 USCMA 91, 1 CMR 90 (1951).

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The last paragraph contains new matter concerning the weight and impeachment of dying declarations. See *Carver v. United States*, 164 U.S. 694 (1897); Wigmore, § 1446. For the rule concerning the handling of written dying declarations, see *United States v. Jakaitis*, 10 USCMA 41, 27 CMR 115 (1958).

142b

Spontaneous exclamations. In the second paragraph, the rule requiring independent evidence of the startling event is included. See *United States v. Gaskin*, 12 USCMA 419, 31 CMR 5 (1961); *United States v. Anderson*, 10 USCMA 200, 27 CMR 274 (1959); *United States v. Mounts*, 1 USCMA 114, 2 CMR 20 (1952). It is also stated that there must be independent evidence of the opportunity of the declarant to observe the startling event. *Potter v. Baker*, 162 Ohio St. 488, 124 N.E. 2d 140 (1955). This requirement is inherent in the very nature of this exception to the hearsay rule, since it is the observation of the startling event which supplies the shock or surprise which is the "truth test" with respect to this exception. It is further pointed out in the second paragraph that the exclamation, as in the case of a dying declaration, may be in the form of a conclusion if it is not merely an expression of suspicion or conjecture. The rationale of *Shepard v. United States*, *supra*, in this connection should apply here also.

In the next to the last paragraph, it is stated that the fact that the utterance was made in response to questioning does not necessarily indicate that it is not admissible as a spontaneous exclamation, but this fact should be considered in determining whether the utterance was impulsive and instinctive rather than the result of deliberation or design. *Beausoliel v. United States*, 107 F. 2d 292 (D.C. Cir. 1939). The last sentence in this paragraph is based on CM 351606, *Riggins*, 8 CMR 496, 508-509 (1952).

As in the drafting of the 1951 Manual (see *Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951*, 219), the "observer's description exception" to the hearsay rule, now found in Rule 63(4)(a) of the Uniform Rules of Evidence, was not adopted, since there would seem to be insufficient justification for its use, particularly in criminal cases. For the same reason, the "exception" found in Rule 63(4)(c) of the Uniform Rules, which is based merely on the circumstance of unavailability, was not adopted. See *Pointer v. Texas*, 380 U.S. 400 (1965).

142c

Fresh complaint and lack of fresh complaint. The Court of Military Appeals consistently pointed out that the rule concerning evidence of fresh complaint, as stated in the former Manual, was broader than the rule applying in civilian jurisdictions. *United States v. Goodman*, 13 USCMA 663, 33 CMR 195 (1963); *United States v. Annal*, 13 USCMA 427, 32 CMR 427 (1963); *United States v. Bennington*, 12 USCMA 565, 31 CMR 151 (1951); *United States v. Mantooth*, 6 USCMA 251, 19 CMR 377 (1955). In this assertion, the Court was certainly correct, and the rule was far too broadly stated. This is not an exception to the hearsay rule but is only a rule of corroboration of the testimony of the alleged victim that the act was done without the victim's consent, although this corroboration of testimony that the act was done without consent is important with respect to the credibility of the alleged victim of a sexual offense even if lack of consent is not an element of the offense. Being, therefore, a mere rule of corroboration of the alleged victim's testimony that the act was done without consent, there is no reason whatsoever why fresh complaint should be admissible when there is no such testimony. The

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statement of the fresh complaint rule in the first paragraph has been changed accordingly. The provision in the first sentence that fresh complaint is admissible to corroborate victims of either sex is based on the decision in *United States v. Goodman, supra*.

In the second paragraph, a rule pertaining to evidence of lack of fresh complaint is included. See *United States v. Goodman, supra*.

The last paragraph, which gives the definition of sexual offenses, was added. See *United States v. Annal, supra*.

142d

Statements of motive, intent, or state of mind or body. In the third paragraph, it is stated that a disclosure of a person's motive, intent, or state of mind or body made in another person's statement is not admissible unless the person whose motive, intent, or state of mind or body is so disclosed has in some manner approved of the statement. This exceptional circumstance was added to take care of the objection to the rule as stated in the former Manual made by the Court of Military Appeals in *United States v. Marymont*, 11 USCMA 745, 29 CMR 561 (1960). The *Marymont* case, pertaining to contents of letters from another found in the party's possession, is in reality nothing but an example of the broader exception mentioned above.

The last paragraph contains added matter concerning statements of the accused tending to show consciousness of guilt or consciousness of innocence. *United States v. Bradshaw*, 15 USCMA 146, 35 CMR 118 (1964); *United States v. Snook*, 12 USCMA 613, 31 CMR 199 (1962); *United States v. Kachougian*, 7 USCMA 150, 21 CMR 276 (1956); Wigmore, § § 293 and 1144. Of course, statements of the accused showing consciousness of guilt must be subject to the limitations pertaining to the admissibility of confessions or admissions. Also, statements of the accused tending to show consciousness of innocence must, as under the rule pertaining to statements of motive, intent, or state of mind or body generally, be made under circumstances not indicative of insincerity. *United States v. Harvey*, 8 USCMA 538, 25 CMR 42 (1957). Of course, the word "statements" as used in this paragraph also includes conduct. See Wigmore, § 293.

142e

"Lie detector" tests and drug-induced or hypnosis-induced interviews. This subparagraph is new. It follows the rulings of the Court of Military Appeals in *United States v. Massey*, 5 USCMA 514, 18 CMR 138 (1955) and *United States v. Bouchier*, 5 USCMA 15, 17 CMR 15 (1954). See also *Townsend v. Sain*, 372 U.S. 293 (1963); Wigmore, § 998. It should be noted that the rule, as stated, deals only with inadmissibility in a trial by court-martial and, consequently, the rule does not disturb the result in the *Massey* case, *supra*, which allows consideration by a convening authority of a favorable lie detector test.

143a(1)

Proving contents of a writing. General rule, the best evidence rule. The material appearing in the single paragraph of subparagraph (1) in the former Manual now appears, in altered form, in the first and fourth paragraphs of the new subparagraph (1). This material has been entirely rewritten so that the terms "best evidence rule" and "secondary evidence" will be more clearly defined and the application of the best evidence rule more easily understood. Two substantive changes have been made, however. The phrase "for use as an original or as one of a number of originals" has been added to the sentence excluding "identical" copies from the

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operation of the best evidence rule so that the principle of equal admissibility of duplicate originals will be limited to its legitimate application. *Ahlstedt v. United States*, 315 F. 2d 62 (5th Cir. 1963); *Mullican v. United States*, 252 F. 2d 398, 401 (5th Cir. 1963); CM 413633, *Cooper*, 36 CMR 594 (1966). In the fourth paragraph, it is pointed out that a waiver of the best evidence rule will not waive authentication of the writing. *United States v. Bryson*, 3 USCMA 329, 336, 12 CMR 85, 92 (1953).

The second paragraph states the obvious principle that the best evidence rule applies to proof of the contents of the particular writing the terms of which are in issue, even though that writing may actually be a "copy." Wigmore, § 1235. The third paragraph contains an explanation of the proper scope of the "best evidence rule" in relation to other principles of law governing the admissibility of evidence, and points out that facts existing *independently* of a writing in which they are recited may be proved by any competent evidence, without regard to the writing. See *United States v. Parker*, 13 USCMA 579, 33 CMR 111 (1963); Wigmore, § § 1335, 1336, 2427, 2450.

143a(2)

Exceptions to the best evidence rule. The new subparagraph (a) makes several changes in the former first paragraph of subparagraph (2). Nonproduction of the original has been based on lack of feasibility to produce it. Wigmore, § 1192. The second sentence, indicating there is no necessity to show a demand for production of an original writing shown to be in the possession of the accused before introducing secondary evidence, is based on the decision in *United States v. DeBell*, 11 USCMA 45, 28 CMR 269 (1959). Further, general rules concerning the matter of testimonial "interpretations" and machine "translations" of machine, electronic, and coded writings are included so that modern methods increasingly used in the world of business and government will be recognized in the law of evidence. See *Transport Indemnity Company v. Seib*, 132 N.W. 2d 871 (Neb. 1965). This matter will be mentioned throughout the revised paragraphs 143 and 144 and will be discussed subsequently herein (see the discussions of 143a(2) (c) and (e) and 143(d)). It should be noted here, however, that the reason for providing for the admissibility of authenticated machine "translations" as well as testimonial interpretations is that with respect to some of the more advanced systems it would be difficult, if not impossible, to interpret the original without the aid of a machine "translator," which is often part of the general process.

The new subparagraph (b) deletes as being too restrictive the requirement formerly found in the second paragraph of 143a(2) that the result of numerous or bulky writings must be ascertainable by "calculation." *Pritchard v. Ligett and Myers Tobacco Co.*, 295 F. 2d 292 (3d Cir. 1961); Wigmore, § 1230. Also, since examinations and summarizations of the type mentioned in the new subparagraph are frequently group activities and it is reasonable and often desirable to call only one member of the group as a witness, the opposite party having ample opportunity to inquire into the whole matter, the revision takes this problem into consideration. See *Jenkins v. United States*, 307 F. 2d 637 (D.C. Cir. 1962) (adopting a similar approach with respect to medical testimony); Wigmore, § 752a. See also *United States v. Walker*, 12 USCMA 658, 31 CMR 244 (1962); *United States v. Heilman*, 12 USCMA 648, 31 CMR 234 (1962). The subparagraph also contains the usual provision for waiver applicable to a showing of witness qualification and permits the examination and summarization to be made by mechanical or electronic means.

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The new subparagraph (c) entirely revises that part of the former third paragraph of 143a(2) which dealt with copies of official records. The revision was made primarily to parallel the language of Rule 44 of the Federal Rules of Civil Procedure, which rule is adopted by Rule 27 of the Federal Rules of Criminal Procedure, and to provide for written "translations" of machine, electronic, or coded official records. Of course, the new subparagraph deals only with that part of Rule 44 which provides for evidencing the official record by a copy or by an official publication, the matter of authentication being covered in considerable detail in 143b(2). The former requirement that the record be kept on file in a "public office," a matter also mentioned in the former Rule 44 but not in the new Rule 44, effective on 1 July 1966 (see U.S.C.A., 1966 Pocket Part), was omitted, for it seems generally agreed that this is not a valid requirement, so long as the record is in fact an official record kept in official custody. Many records are not open to public inspection, and this is certainly true in the military, but these records are nevertheless entitled to the inference of regularity governing official activities. See *Banco de Espana v. Federal Reserve Bank of New York*, 114 F. 2d 438 (2d Cir. 1940); Wigmore, § 1632; Comment, Rule 63(15), Uniform Rules of Evidence. Consequently, the term "public office" has been dropped from use throughout paragraphs 143, 144, and 147.

The fourth sentence of (c) provides a solution to the problems encountered in this age of automation and their effect on the law of evidence in relation to official records, a solution previously provided for business entries relating to public banking activities by amendment of paragraph 143a(2) of the 1951 Manual. See Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962). As in the world of private business, automatic data and record processing systems have been adopted throughout the Armed Services for use in areas including military operations, intelligence, research and development, engineering, and, more importantly for the purposes of the rules of evidence, business and personnel data. The latter category embraces the familiar problems of supply and personnel accounting which are the most common types of records used in courts-martial. Usually these automated official records, as well as the automated banking entries previously mentioned, although normally qualifying as exceptions to the hearsay rule either as official records or business entries, are in their original form unintelligible or even intangible, consisting perhaps of nothing more than electrical impulses. In the latter event, even the second step in the process, the printing out of a card or the conversion to a tape, may still result in a "record" or "entry" that is beyond the understanding of a layman. Consequently, unless "interpreters" of automated official records or of automated banking entries—a type of business entry frequently used in court—were to spend a large share of their time on the witness stand, it was necessary to provide for the admissibility of certified "translations" of these records or entries as an exception to the best evidence rule, just as the law long ago provided for an exception to that rule in the case of certified true copies of official records. Also, although no proposal is made in these changes to make certified copies of writings other than official records and banking entries admissible as an exception to the best evidence rule, even as to these writings, when automated and otherwise admissible, some provision was required for allowing the testimony on the witness stand of an "interpreter" or one who can authenticate a machine "translation" if the court was ever to receive the

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information contained in such a writing. This was done in subparagraph 143a(2)(a). Sometimes, of course, written "translations" of automated entries are themselves made as official records or business entries, and these would be admissible on that basis without reference to the best evidence rule. See 144b and c. Also, it is conceivable that a particular written "translation" might, under certain circumstances, come within one of the general exceptions to the best evidence rule permitting the use of copies.

It is also indicated in (c) that handwritten portions may be copies in type except, of course, when the handwriting is to be evidenced by the copy. This is the most commonly encountered exception to the "exact copy" rule.

The new subparagraph (d) restates the old rule, formerly found in the third paragraph of 143a(2), providing for written summaries of official records when it would be detrimental to the public interest to divulge the text or informational source of the record. Although the point seems not well understood, there is nothing unusual in providing for summaries of official records when there is good reason for doing so. See *United States v. White*, 3 USCMA 666, 14 CMR 84 (1954), and materials there cited. This subparagraph also provides for the admissibility of a written summary of a foreign official record when the foreign jurisdiction will not furnish an exact copy or extract of the record. This rule is based on the custom of some foreign countries to certify only summaries and to refuse to furnish exact copies or extracts. Although the new Rule 44 conditions the admissibility of summaries of foreign official records on reasonable opportunity being given to all parties to investigate the authenticity and accuracy of the documents, this condition seems unnecessary in military procedure, under which, because of the military pretrial practice, such a reasonable opportunity is always given, although (see *Banco de Espana v. Federal Reserve Bank of New York, supra*) it may actually be impossible to inspect the basic record. The last sentence of the subparagraph states that summaries of official records are inadmissible unless otherwise provided by law, and this is generally recognized as being the law on the subject. *United States v. White, supra*; Wigmore, §§ 1269, 2108.

The new subparagraph (e) is a rephrasing of similar material added to paragraph 143a(2) of the 1951 Manual by Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962). This exception to the best evidence rule was approved in *United States v. Gladwin*, 14 USCMA 428, 34 CMR 208 (1964). The material was rephrased to make use of the same format and approach as was used with respect to copies of official records in 143a(2)(c). Provision is made for the admissibility of certified "translations" of machine, electronic, and coded business entries here as well as in the case of official records, and for the same reason. In this regard, the former paragraph 143a(2) as changed stated that these "translations" could be made, "by machine or an 'interpreter'." This was changed to read "by machine or by a person" because it was found that machine translators in some systems are actually called "interpreters."

The new subparagraph (f) enlarges the scope of the former fourth paragraph of 143a(2) to provide for certificates or statements of fingerprint comparison by any custodian of personnel or fingerprint records of the armed forces, or by his deputy or assistant. This change is necessi-

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tated by the increasingly frequent number of organizational changes in the military departments, and in any event it would seem that if the custodian has a fingerprint expert on duty with him this should suffice. Also, the words "by the expert" were added to the first sentence to emphasize that the identification of the fingerprints must have been made by the fingerprint expert. See *United States v. Taylor*, 4 USCMA 232, 15 CMR 232 (1954).

The new subparagraph (g), formerly the fifth paragraph of 143a(2), points out that when the fact to be proved is the absence of an entry in official records any person who searched the records, or who was a qualified member of a group which searched the records (see the discussion of 143a(2)(b)), may testify as to the absence of the entry. ACM 5293, *Downing*, 6 CMR 568 (1952). See also *United States v. Grosso*, 9 USCMA 579, 26 CMR 359 (1958). That part of the text dealing with certificates of the absence of the entry was rephrased so that aside from matters of authentication its language will be in general accordance with the new Rule 44. Provision is also made for machine searches.

The new subparagraph (h) contains matter added to paragraph 143a(2) of the 1951 Manual by Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962), and approved as to banking entries in *United States v. Gladwin*, *supra*. The material was rephrased to use the same format and approach, as far as appropriate, as was used with respect to proof of the nonexistence of official records in the preceding subparagraph. *Testimony* as to the negative result of a search of business entries is admissible notwithstanding objections on the basis of the best evidence rule or of its being hearsay *McDonald v. United States*, 200 F. 2d 502 (5th Cir. 1953) *United States v. Grosso*, *supra*; ACM 7081, *McDonough*, 12 CMR 883 (1953); Rule 63(14), Uniform Rules of Evidence (1953). The general rule is, however, that proof of the nonexistence of a business entry, unlike proof of the nonexistence of an official record, may not be made by certificate. ACM 7081, *McDonough*, *supra*. This subparagraph recognizes this general rule but provides an exception thereto in the case of public banking entries, since these now have been placed on much the same basis as official records. Machine searches are also provided for in this subparagraph.

143b(1)

Authentication of writings. General. The first paragraph of 143b(1) was revised to contain a caveat concerning the effect of authentication by failure to object to lack of proof of authenticity which is similar to the comparable caveat now contained in the fourth paragraph of 143a(1) with respect to the best evidence rule. The reason is obvious—an authenticated inadmissible document is merely authenticated, it is still inadmissible. Also, a new sentence was added to this paragraph to explain the effect of certificates used in authenticating writings when these certificates are admissible for this purpose as an exception to the hearsay rule. See Wigmore, § 2161, 2162, 2168. This matter will be further discussed in connection with 143b(2).

Due to the somewhat confusing state of the law as to what types of copies may and may not be used for proof of radiograms and telegrams (see Wigmore, § 1236), and the fact of the widespread use of telegrams and radiograms in the military services, it seemed desirable in the second paragraph of 143b(1) to provide specifically for an exception to the best evidence rule in these cases, as well as to speak of their authentication. In

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view of the logical inference of accuracy of copies made in the regular course of business, such an exception seemed justified. See Wigmore, § 2154.

The third paragraph was rewritten principally to define the qualification of the lay handwriting witness—that is, the witness who has merely seen another write by hand or has seen handwriting which can reasonably be believed to be the other's handwriting. The old common law rule was that any person who at any time and under any circumstances has seen another's handwriting was qualified to give an opinion or conclusion as to whether that other was the author of the handwriting in question, regardless of circumstances which would militate against his qualifications in fact to express such an opinion or conclusion. The new rule, by use of the phrase "under circumstances which enable him to form a belief as to the character of a person's handwriting," will give the Military Judge or special court-martial President greater discretion and latitude in determining the qualifications of the witness and is in keeping with modern versions of what the law should be in this field. See Wigmore, §§ 694-702.

The fourth paragraph was rephrased in the interest of clarity and accuracy. The fifth paragraph as it appeared in the former Manual was placed in 143c and a new fifth paragraph was inserted to provide specific authorization for the use of unidentified handwriting to test the opinion of handwriting witnesses, both expert and lay. *United States v. McFerren*, 6 USCMA 486, 20 CMR 202 (1955). Although the *McFerren* case dealt only with the use of such a test in connection with expert handwriting testimony, it would be absurd to prohibit the use of this method of testing in the case of lay handwriting witnesses who obviously are more subject to error in this field than experts.

143b(2)

Authentication of official records. The first paragraph of (a) was generally revised in the interest of clarity of expression and of definition of those terms which are to be used throughout the discussion of authentication of official records. The definition of "authenticating certificate" has been changed to state clearly, although this was inherent in the former Manual definition, that the form of the authenticating certificate is sufficient when indicating only that the signature on the attesting certificate is genuine, without vouching for the official position or duties of the signer of the attesting certificate. Both the former and present Rule 44 require in various forms that the authenticating certificate contain an indication as to the official position or duties of the attesting official. However, the report on Italian and American Procedures of International Co-Operation in Litigation prepared by the Columbia University School of Law Project on International Procedure contains the following interesting comment in this regard:

. . . the Italian Government has requested that . . . United States consuls desist from authenticating Italian documents. As a result, according to an American Embassy Circular of October 10, 1961, American consular officers will certify only the genuineness of the signature of the functionary of the Ministry of Foreign Affairs.

Clearly, under present practice, it would be difficult, if not impossible, for the American consul to issue the certification as to genuineness of signature, incumbency, and authority required by rule 44 . . . However, the proposed revisions of those provisions . . . would eliminate virtually all difficulties. Problems could arise only because American consuls are presently willing to certify merely the genuineness of the signature and not the incumbency of the last certifying Italian official. It would undoubtedly be helpful if the Italian government would relinquish its objection to more extensive certification by the

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United States consul. However, it may well be that elimination of the requirement of a certificate of incumbency from the proposed revisions would also be proper. (Smit, *Italian and American Procedures of International Co-Operation in Litigation: A Comparative Analysis*, Columbia University School of Law Project on International Procedure (New York), 14-15 (1962).)

See also the Advisory Committee's Note to the new Rule 44, in which it is intimated that the language of the amendment may provide a solution to the above problem. It does not, however, appear to have that effect. The requirement of certifying to the incumbency of the preceding official in the chain of authentication, whether he is the attesting official or another authenticator, has been deleted throughout these revisions to the Manual not merely because of the difficulties encountered in Italy but because this particular requirement has in fact no legitimate place in the law generally. Once the signature of a purporting attesting or authenticating official is sufficiently shown to be genuine, as when this is done through an admissible authenticating or other certificate in the chain of authentication, his actual incumbency and authority may be inferred. Indeed, as indicated in the first paragraph of 143b(1), an exception to the hearsay rule then becomes available to prove the authenticating facts stated or indicated by him, subject, of course, to rebuttal by evidence which in fact sways the judgment of the decision maker. See Wigmore, §§ 2161, 2162, 2168 and cases discussed therein. This is only as it should be, for rarely can the next authenticator in the chain really know in detail the legal or administrative sources of the position and authority of the person whose certificate he is authenticating. If the signature of the purporting attesting or authenticating official is properly certified, or otherwise shown, to be genuine, this should be sufficient to dispel, initially at least, any suspicion of fraud, misrepresentation, or impersonation. If, however, as stated in the last sentence of the first paragraph of (a), official position is certified, this may be inferred to be also a certification of signature in the ordinary course of official usage, even when signature is not expressly certified. In connection with the above matters, it should be noted that Rule 44 does not attempt to lay down absolute standards, for the rule's saving clause provides that the rule will not prevent the use of other legally authorized methods of proof. See also *Legal and Legislative Basis, Manuals for Courts-Martial, United States, 1951, 225-227*.

The second paragraph of (a) defines a custodian in accordance with the decision of the Court of Military Appeals in *United States v. Stone*, 13 USCMA 52, 32 CMR 52 (1962), although references to the record being kept "on file" in an "office" are omitted for reasons previously mentioned in the discussion of 143a(2)(c). The paragraph sets forth the inference applicable to a properly authenticated attesting certificate in more detail than does the former version, and some clarifying information is given as to the theory underlying the general operation of authentication by certificate, particularly when there is a chain of authenticating certificates.

The material on military records, subparagraph (b), was rewritten to include the National Guard and military agencies or units of an ally of the United States.

Subparagraph (c), United States records, contains substantially the same material, in a rearranged and slightly enlarged form, as did its former counterpart, but refers to "Commonwealth" rather than "Territories" since the United States no longer has any Territories. "Commonwealth," of course, now means the Commonwealth of Puerto Rico. See use of term "Commonwealth" in 10 U.S.C. § 101(3)(1964) and Article 49,

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UCMJ, 10 U.S.C. § 849 (1964). The word "district" is defined (see 28 U.S.C. §§ 81-131 (1964)), and the definition of "possession" was adopted as a matter of convenience to avoid enumeration of trust territories and other places administered by the United States (see the enumeration in the new Rule 44 and see *United States v. Vierra*, 14 USCMA 48, 33 CMR 260 (1963)). A provision for authenticating the records of former territories is also included. The third method of authenticating United States records (found in the fourth method in the former Manual) was rephrased to make it clear that only records of the Federal government may be authenticated by an attesting certificate alone, under the authority set forth in this method. It might be noticed that the methods of authentication provided for in this subparagraph will permit cross-servicing—that is, authentication of records of a Commonwealth, possession, political subdivision of either, or the District of Columbia by certain Federal officials under certain circumstances, and vice versa—which would probably not be so under Rule 44, thus obviating the necessity of any inquiry as to whether the authenticating official, if otherwise qualified under these rules, actually derived his authority from the Federal, as distinguished from the other mentioned governmental units, or vice versa. Also, the words "of record" have been omitted when reference is made to courts in this and other subparagraphs, since an inquiry as to whether a particular court occupies the ancient and sometimes mysterious status of being a "court of record" seems irrelevant in this century.

Subparagraph (d), State records, was only slightly revised. As in subparagraph (c), authenticating courts need no longer be "of record" and in this connection it might be mentioned that many State courts customarily authenticate records which have no relation to litigation, such as records of vital statistics (see for example, CM 408697, *Griffin*, 32 CMR 642 (1963)). Material was added recognizing the frequently used method of authentication by an attesting or authenticating certificate under the seal of a judge or clerk of a court, as distinguished from a seal which purports to be that of the court itself. CM 408697, *Griffin, supra*. This was also done in the preceding subparagraph (c).

Subparagraph (e), Foreign records, was entirely rewritten so that the third and fourth methods of authentication will, in principle, be in accordance with the new Rule 44. However, for reasons pointed out in the discussion of 143b(2)(a), authenticating or other accompanying certificates need only certify as to genuineness of signature and need not extend to a certification of incumbency of office. In the third and fourth methods, final authentication by United States "foreign service officers," was retained, since it may be necessary or desirable in a particular case to obtain a final authentication in the United States from one of these officers. See, in connection with these revisions, the discussion of the *Mole* case in the discussion of the eighth group of examples of judicial notice under 147a.

The second paragraph of (e) was revised to give greater latitude to final authentication of copies of foreign official records by military authorities. The third paragraph provides for the use of seals, instead of signatures, as links in the chain of authentication of copies of foreign official records as is done in the former Manual. The last paragraph provides for attestation of copies of foreign official records by authorized persons other than custodians, as does the new Rule 44, but in addition sets forth appropriate inferences applying to these attestations.

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It should be noted that the new Rule 44 contains a somewhat imprecise provision concerning the admissibility, “for good cause shown” of attested copies of foreign official records, without the prescribed final authentication, if all parties have been given a “reasonable opportunity” to investigate the authenticity and accuracy of the documents. It is assumed that what is intended here is that there may be some form of waiver or some other form of authentication satisfactory to the court. In this Manual, waiver is specifically provided for in the first paragraph of 143b(2)(a) and other methods of authentication, which should cover most contingencies, are set forth in the second paragraph of 143b(2)(f). In any event, any unusual application of Rule 44 would be adopted by the second method of authenticating foreign official records.

The second paragraph of (f) is a restatement of the common law “examined copy” rule. This restatement is based on generally accepted doctrine (*United States v. Stone, supra*), and “dual testimony”—one witness testifying to the correctness of the copy and the other as to the authenticity of the original—is permitted in this connection (Wigmore, § 1280 (3)). The second paragraph also clarifies similar material that appeared in the second paragraph of 143b(2)(f) of the 1951 Manual concerning direct authentication of attesting or authenticating certificates by testimony or otherwise, and an example is given.

The third paragraph of (f) provides for direct authentication of an original by a judicially noticeable signature, seal, or symbol, a provision made desirable because of the inclusion of official records in certificate form in the new official record rule. See 144b. Also, *admissible* facsimiles of these records may be authenticated in this manner. Such a facsimile would be admissible, for example, when it was itself issued as a certificate constituting an official record (the usual motor vehicle operator’s license) or when it is otherwise outside the prohibition of the best evidence rule. See *Ahlstedt v. United States*, 315 F. 2d 62 (5th Cir. 1963); *United States v. Bryson*, 3 USCMA 329, 12 CMR 85 (1953) (document not an official record in this case).

The last paragraph of (f) is a revision of the general material found in the same paragraph in the former Manual, with additions obviously corresponding with new material elsewhere in the new text. As to the last sentence in the paragraph, see the Advisory Committee’s Note to Subdivision (a) (2) of the new Rule 44 of the Rules of Civil Procedure.

143b(3)

Authentication of banking entries. This subparagraph is a revision of similar material added to the 1951 Manual as subparagraph (3) of 143b by Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962), and approved in *United States v. Galdwin, supra*. The revision will cause the certificate or statement of the person in charge of the banking entry, or his assistant, to follow the language of the business entry exception to the hearsay rule (144c) and will supply, if the certificate or statement is properly notarized, an inference as to his status similar to the inference applying to the signer of a properly authenticated certificate attesting a copy of an official record. The admissibility of an authenticated copy of a banking entry is provided for in 143a(2)(e).

143c

Certain procedural matters relating to documentary evidence. The first paragraph of 143c contains matter appearing in the last paragraph of 143b(1) in the 1951 Manual. The second paragraph is new. It states the rule that a writing does not become admissible against a party merely

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because he requested production of the writing or inspected it and expressly repudiates the supposed common law rule to the contrary which was never well-founded. Wigmore, § 2125.

143d

Definition of writing. This subparagraph, defining the term “writing” as it is used in this chapter, is based on Rule 1(13), Uniform Rules of Evidence (1953). An attempt was made by way of examples to spell out all conceivable situations wherein a recording might constitute a writing.

144b

Official records. This subparagraph was completely revised. The former requirement that the official duty to make the record be one imposed “by law, regulation, or custom” was deleted, since that requirement has no legitimate place in the official record exception to the hearsay rule. *Oakes v. United States*, 174 U.S. 778 (1899); *Stasiukevich v. Nicolls*, 168 F. 2d 474 (1st Cir. 1948); *E. K. Hardison Seed Co., v. Jones*, 149 F. 2d 252 (6th Cir. 1945); Wigmore, § 1633; Rule 63(15), Uniform Rules of Evidence. See also *United States v. Masusock*, 1 USCMA 32, 34, 1 CMR 32, 34 (1951). Certificates given to private persons, whether or not a record of the matters stated in the certificate was officially retained, are now included in this exception to the hearsay rule if they meet the general requirements of the exception. See Wigmore, §§ 1632, 1645, 1674; Comment, Rule 63(15), Uniform Rules of Evidence (1953). The “prima facie presumptions” found in this subparagraph as it appeared in the 1951 Manual are now more properly stated to be inferences. Wigmore, § 2534. Indeed, the use of the term “prima facie” has been avoided throughout this Manual as being inexact, confusing, and subject to differing interpretations. The second inference as it appears in this provision adopts generally the principles set forth in *United States v. Moore*, 8 USCMA 116, 118, 23 CMR 340, 342 (1957) and *United States v. Masusock, supra*. See also *Oakes v. United States, supra*, and Rule 63 (17), Uniform Rules of Evidence. In view of the restated second inference, the third “presumption” found in the former Manual became unnecessary. The official record rule, as now stated, combines, in general, the matters covered in Rules 63(15) and 63 (16) of the Uniform Rules of Evidence. The last paragraph deals with the admissibility of testimonial interpretations of machine, electronic, and coded official records and certain machine and other “translations” thereof.

144c

Business entries. The second paragraph of 144c incorporates the entire test of the 1951 amendment to the Federal business entry statute as later amended (28 U.S.C. § 1732(b) (1964)), although the word “regulation” has been added to the restriction on destruction since record retirement is largely governed by regulations in the armed services. See, generally, *Beard v. United States*, 222 F. 2d 84 (4th Cir. 1955). Of course, when it is shown that an *original* memorandum or record was not made within the time prescribed in the first paragraph of 144c, it would not be a business entry. *Missouri Pacific Railroad Company v. Austin*, 292 F. 2d 415 422 (5th Cir. 1961). It follows that a reproduction thereof would not be admissible as a reproduction of a business entry under the second paragraph. Because of the inference stated in the first sentence of the third paragraph, it must be shown that the entry in question was not made within the time prescribed if its exclusion is sought on that ground. The statement in the next to last sentence of the second paragraph that a properly authenticated copy of a reproduction is admissible subject to the same conditions as a properly authenticated copy of the original itself is not found in 28 U.S.C. § 1732(b)(1964) but was inserted

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to take care of those cases in which the original was an official record or banking entry and, consequently, a reproduction made under the terms of the statute would also have that status.

The first sentence of the third paragraph sets forth a method of authenticating a writing as being a business entry by use of an obvious inference arising out of proof of its origin. *Bisno v. United States*, 299 F. 2d 711, 718 (9th Cir. 1962). The example of authentication of a notation of refusal of payment of a check given in this paragraph was added to paragraph 144c of the 1951 Manual by Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962). The example is based on the common law rule of inferred genuineness of replies (see the second paragraph of 143b(1)). Authority for the statement that the notation on the returned check or accompanying it, once authenticated, is a business entry admissible under the Federal business entry statute is supplied by *Kite v. United States*, 216 F. 2d 802 (4th Cir. 1954).

The fourth paragraph of 144c clearly points out that the best evidence rule applies to business entries and that, unless an exception to the rule is applicable, a copy of a business entry is inadmissible. When, however, the copy is itself a business entry or is within an exception to the best evidence rule, the best evidence rule does not apply. Some examples of the operation of these principles are given.

The fifth paragraph provides for the admissibility of testimonial interpretations of machine, electronic, and coded business entries and certain machine and other "translations" of automated business entries are not admissible on the same generous basis as certified "translations" of automated official records.

The last paragraph of 144c in the former Manual was deleted, for entries of the kind mentioned therein would normally be considered to be official records under the official record rule as now stated in 144b.

144d

Limitations as to the admissibility of official records and business entries. Few changes were made in 144d, and only the more important will be mentioned. The second paragraph has been changed to make it clear that the official duty to which this paragraph refers is with respect to the fact or event in question, not the whole matter set forth in the record. The statement in the third paragraph of 144d that the limitation discussed therein does not prohibit the use of records and reports of preliminary judicial hearings, such as an Article 32 investigation, to prove former testimony under the former testimony exception to the hearsay rule is based on *United States v. Burrow*, 16 USCMA 94, 36 CMR 250 (1966) and *United States v. Eggers*, 3 USCMA 191, 11 CMR 191 (1953). It is further provided in this paragraph that in addition to the limitation there mentioned having no application to certain familiar uses of depositions and records or reports of the kind specified it also does not apply to the use of these writings merely as an alternative means of proving *statements* recorded or reported in them—the purpose for which the statements may be received depending on other evidentiary rules (see the last paragraphs of 145a, b, and c)—and that the limitation does not apply to the use of records of conviction or imposition of nonjudicial punishment as proof of the conviction or imposition of punishment when this proof is otherwise admissible. There are a number of instances in which proof of the fact of imposition of nonjudicial punishment might be proper. For example, an accused might desire to show it in defense or mitigation (see

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Art. 15(f)) and the prosecution might desire to show it to contradict assertions by the accused or the defense that the accused "never got in trouble" while in the service. See *United States v. Mackie*, 16 USCMA 14, 36 CMR 170 (1966) (so much of record of nonjudicial punishment as shows fact of proper imposition of correctional custody, but not offense for which it was imposed, admissible in prosecution for breach of restraint while in correctional custody); *United States v. Statham*, 9 USCMA 200, 25 CMR 462 (1958); CM 412523, *Webb*, 35 CMR 593 (1965).

The sentence formerly comprising the last paragraph of 144d was deleted. That sentence indicated that a news account was not admissible under the official record or business entry exceptions to the hearsay rule to prove an incident. It was deleted because the rule was subject to improper application. For example, a news account is admissible for this purpose when the incident in question was a matter of local interest of such a public nature that it would generally be known throughout the community and had happened so long ago that the testimony of an eyewitness would probably be less trustworthy than a contemporary news account of the incident. *Dallas County v. Commercial Union Assurance Co.*, 286 F. 2d 388 (5th Cir. 1961). See also Wigmore, §§ 1421, 1422. In order to avoid a lengthy discussion, the sentence was deleted as there is little danger that anyone will conclude in the average case that a news account is admissible to prove an incident.

144e

Maps, photographs, sketches, charts, and fingerprints. The second paragraph of 144e is new. The new paragraph sets forth the rule that charts showing complicated mathematical computations or compilations and their mathematical results are admissible at the discretion of the court. *Lloyd v. United States*, 226 F. 2d 9 (5th Cir. 1955); see also *Deschenes v. United States*, 224 F. 2d 688 (10th Cir. 1955). These charts should not contain conclusionary captions or statements other than those indicating mathematical results (see the *Lloyd* case, *supra*). Charts of this kind should not be used by members of the court in closed session. See *Steele v. United States*, 222 F. 2d 628 (5th Cir. 1955); *United States v. Jakaitis*, 10 USCMA 41, 27 CMR 115 (1958) (involving a similar principle applied to depositions).

The third paragraph of 144e contains instructions concerning the use of graphic portrayals which are necessary to allow proper review of the case.

144f

Business, professional, or public lists and directories. The exceptions to the hearsay rule set forth in this new subparagraph are recognized in ACM 4234, *O'Connor*, 3 CMR 541 (1952); Wigmore, §§ 1702-1706; and Rule 63(30), Uniform Rules of Evidence. In the *O'Connor* case, the Rand McNally Banker's Directory was held admissible to show the nonexistence of a purported bank upon which the accused had drawn a check. In *People v. Eppinger*, 105 Cal. 36, 38 Pac. 538 (1894), a city directory was held admissible to prove that there was no firm of the name alleged, and in *State ex rel. Keefe v. McInerney*, 63 Wyo. 280, 182 P. 2d 28 (1947), it was held that city directories and telephone directories are admissible to prove that certain persons are residents of the city. A distinction is drawn in the text between business and professional compilations and those intended for the public at large. Although the case law ordinarily supplies only a vague delimitation of this distinction, usually discernible only in a

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comparison of the facts in the case with the result, it exists nevertheless and should be specifically recognized. The distinction is recognized in the *Keefe* case, *supra*.

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Conforming changes have been made in subparagraphs *a*, *b*, and *c* to provide that a document, writing or record is not shown to the members of the court, except for inspection of it by the president of a SPCM without an MJ for the purpose of determining the admissibility of its contents.

145a

Depositions. In the first paragraph, explanations of some of the sections of Article 49 are given in the light of judicial decisions since the enactment of the Code. The explanation of Article 49(d)(2) was taken from *United States v. Mulvey*, 10 USCMA 242, 27 CMR 316 (1959) and *United States v. Stringer*, 5 USCMA 122, 17 CMR 122 (1954). The explanation of Article 49(d)(3) was taken from *United States v. Miller*, 7 USCMA 23, 21 CMR 149 (1956). As to the last sentence, see *United States v. Jacoby*, 11 USCMA 428, 29 CMR 244 (1960).

It is indicated in the second paragraph that it is the legal sentence as it may ultimately have been reduced by proper authority which will control in determining whether the case is still a capital case. See *United States v. Russo*, 11 USCMA 352, 355; 29 CMR 168, 171 (1960); *United States v. Jones*, 10 USCMA 532, 28 CMR 98 (1959); *United States v. Dean*, 7 USCMA 721, 23 CMR 185 (1957). See also the third paragraph of the discussion of 81d(1) (Chapter XV), *supra*, for a detailed discussion of the significance of the terms used in this provision.

In the fourth paragraph, which is the third paragraph in the former Manual, some obviously necessary clarifying matter has been added as to the use by one party of a deposition taken by another party.

In the fifth paragraph, the matter concerning waiver of objections by not making them in connection with the taking of the deposition was rewritten in accordance with the opinion of the Court of Military Appeals in *United States v. Bryson*, 3 USCMA 329, 12 CMR 85 (1953).

It is stated in the seventh paragraph that an objection that the accused was not afforded in connection with the deposition an opportunity to be adequately represented by counsel and to confront and cross-examine the deponent (see *United States v. Jacoby*, *supra*; *United States v. Miller*, *supra*) may be waived by a failure to object on that ground to the introduction of the deposition. See *United States v. Howell*, 11 USCMA 712, 29 CMR 528 (1960); *United States v. Drain*, 4 USCMA 646, 16 CMR 220 (1954) (not waived because former Manual not clear); *United States v. Vanderpool*, 4 USCMA 561, 16 CMR 135 (1954) (waiver applied to former testimony).

The next to the last paragraph is new and contains the caveat that depositions are merely to be read in evidence and are not given to the members of the court for their use in their deliberations. *United States v. Politte*, 10 USCMA 134, 27 CMR 208 (1959); *United States v. Jakaitis*, 10 USCMA 41, 27 CMR 115 (1958).

145b

Former testimony. In the first paragraph, it is indicated that former testimony cannot be used if the court in the former hearing lacked jurisdiction as to the proceedings. See *United States v. Crooks*, 12 USCMA 677, 679, 31 CMR 263, 265 (1962); *United States v. Vanderpool*, 4

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USCMA 561, 566, 16 CMR 135, 140 (1954). Also, it is stated in this paragraph that refusal of a witness to testify is a good ground for receiving his former testimony if it is not inadmissible under some other rule. The word "lawful" has been deleted. "Lawful" refusal to testify is no longer a condition for the admissibility of a former testimony. Simple refusal is enough, assuming that all other requirements have been met. This change conforms military practice to the practice in many civilian jurisdictions. This rule is particularly appropriate in the military where there is no contempt power simply because the witness obdurately but courteously refuses to testify. But see 149a. It is recognized that in *United States v. Barcomb*, 2 USCMA 92, 6 CMR 92 (1952), the Court of Military Appeals held that *depositions* could not be received merely because the deponent refused to testify. This decision was based on the ground that a witness who is present but refuses to testify, at least under the circumstances in the *Barcomb* case, "fits none of the excepted circumstances listed in Article 49(d) of the Code." No such restriction is inherent in the reception of former testimony, nor should it be. When a witness refuses to testify, he is certainly as unavailable, if not more so, than others whose former testimony was accepted under the situations expressed in paragraph 145b of the former Manual. Former testimony is accepted on the ground of refusal to testify in the civilian courts. *United States v. Yates*, 107 F. Supp. 408 (S.D. Cal. 1952), *rev'd on other grounds*, 227 F. 2d 844 (9th Cir. 1955); *Narum v. United States*, 151 Ct. Cl. 312, 287 F. 2d 897 (1960), *cert. denied*, 368 U.S. 848 (1961); *Johnson v. People*, 384 P. 2d 454 (Colo. 1963) (see also cases and materials there cited—refusal need not be based on privilege), *cert. denied*, 376 U.S. 922 (1964); Wigmore, § 1409; Rule 62(7), Uniform Rules of Evidence. The other grounds for admitting former testimony were redrafted so that they are in general accordance with the limitations on similar grounds for the reception of deposition testimony imposed by the Court of Military Appeals in the *Mulvey*, *Miller*, and *Stringer* cases, *supra*. *United States v. Burrow*, 16 USCMA 94, 36 CMR 250 (1966). The "more than one hundred miles" ground of admissibility was deleted from the former testimony exception to the hearsay rule. See *United States v. Obligation*, 17 USCMA 36, 37 CMR 300 (1967). See also reviser's note to Rule 15(e) of the Federal Rules of Criminal Procedure. With respect to the use of former testimony by the prosecution, the requirement that the accused must have been afforded an opportunity to be adequately represented by counsel (*Pointer v. Texas*, 380 U.S. 400 (1965); *United States v. Vanderpool*, *supra*) was added, although, as stated in the second paragraph, an objection that he was not may be waived by a failure to object on that ground to the introduction of the former testimony (*United States v. Vanderpool*, *supra*).

The last sentence of the first paragraph states that former testimony given at a preliminary judicial hearing, such as an Article 32 investigation, is admissible under the same conditions as testimony given at a former trial: *United States v. Burrow*, *supra*; *United States v. Eggers*, 3 USCMA 191, 11 CMR 191 (1953); see also *Pointer v. Texas*, *supra* (here there was a failure to afford the right of cross-examination through counsel).

This paragraph implements the decision of the U.S. Court of Military Appeals in case of *United States v. Bearchild*, 38 CMR 396 (1968) which applied the rule of *Harrison v. United States* 392 U.S. 219 (1968) con-

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(Third un-
numbered
paragraph)

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cerning inadmissible pretrial statements and their relation to in court testimony.

145b

In the first sentence of the fourth paragraph, it is pointed out, as in the former Manual, that no "best" or "preferred" evidence rule applies in proving former testimony. 11 A.L.R. 2d 36; Wigmore, § 1330; see also *Meyers v. United States*, 171 F. 2d 800, 812 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 912 (1949). It is also indicated in this sentence that a witness need only be able to state the substance of all relevant parts of the former testimony. *Ruch v. Rock Island*, 97 U.S. 693 (1887); 11 A.L.R. 2d 42; Wigmore, § 2099, at 492. Since there is no reason for a greater requirement when proof of former testimony is in written form, the second sentence indicates that the contrary dicta in the majority opinion in *United States v. Norris*, 16 USCMA 574, 37 CMR 194 (1967) has not been followed. The last sentence contains the same provision for requiring completeness of presentation as that found in the preceding material on depositions, for as in the case of depositions the defense can sometimes use former testimony when the prosecution cannot. See Fed. R. Crim. P. 15(e).

As provided for depositions, the fifth paragraph of 145b indicates that former testimony which is in written form is merely read in evidence and is not given to the members of the court for their use in their deliberations.

In the last paragraph, which is the next to the last paragraph in 145b of the former Manual, new material was added to indicate that a statement made by an accused at a trial in connection with an inquiry into the providence of his plea of guilty, or in connection with the sentencing proceedings, is not admissible against him on the issue of guilt or innocence in his subsequent trial for the same or any other offense. *United States v. Barben*, 14 USCMA 198, 33 CMR 410 (1963); *United States v. Stivers*, 12 USCMA 315, 30 CMR 315 (1961). Although the cases cited involve subsequent trials for the same offense, the principles expressed would apply to a subsequent trial for any offense.

145c

Records of courts of inquiry. Matters pertaining to the use of records of courts of inquiry are the subject of this new subparagraph. It was thought desirable to include this matter as a separate subject so that it could be more thoroughly discussed. In the first paragraph, the grounds for introducing this type of former testimony have been made to parallel the grounds for introducing former testimony in general.

The last paragraph contains material similar to that set forth in the last paragraphs of 145a and b. See *United States v. Sippel*, 4 USCMA 50, 15 CMR 50 (1954).

146a

Memoranda. In the first paragraph, the rule pertaining to memoranda used to establish past recollection is given a somewhat broader scope in accordance with more modern views on the subject. It is stated that the witness need only be able to state that the memorandum represents his past knowledge possessed at a time when his recollection was reasonably fresh as to the facts. See *United States v. Day*, 2 USCMA 416, 426, 9 CMR 46, 56 (1953). With respect to the material in the first paragraph dealing with memoranda used only to refresh the recollection of the witness, the example with respect to the use of a newspaper account was deleted since, as now pointed out in the second paragraph, a

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newspaper account can be used even to establish past recollection if, for example, the witness read it and found it to be correct when his memory was reasonably fresh as to the facts. See generally Underhill, *Criminal Evidence*, §§ 499-501 (5th ed. 1956); Wigmore § 738.

In the second paragraph, the theory of admissibility of memoranda used to establish past recollection is explained. Such a memorandum need not be of a kind which itself would be admissible to prove the truth of the matters stated therein as an exception to the hearsay rule. See *Papalia v. United States*, 243 F. 2d 437 (5th Cir. 1957); *People v. Hobson*, 369 Mich. 189, 119 N.W. 2d 581 (1963); 20 Am. Jur. *Evidence* § 946 (1939).

In the third paragraph, a rule was inserted as to the admissibility on behalf of the opposite party of a memorandum used to refresh the memory of a witness and the purpose for which the memorandum is admitted or exhibited. Of course, the military judge or president of a special court-martial, as appropriate, may also require its exhibition for the purpose of determining whether it could have refreshed the memory of the witness. See Wigmore, § 763.

146b

Affidavits. The material pertaining to the admissibility of affidavits was entirely rewritten to indicate that in this subparagraph only affidavits and other written statements offered in the pre-findings part of the proceedings are being considered. A cross reference to paragraph 75c refers the reader to the rules applying to affidavits after findings. Affidavits and other written statements as to the character of the accused offered before findings should be limited to the kind of character evidence otherwise admissible. Also, if the defense uses affidavits or other written statements for this purpose by virtue of this subparagraph, the prosecution also will be given the opportunity to use affidavits or other written statements as to character in rebuttal.

147a

Judicial notice. The examples of judicial notice contained in the second paragraph were revised mainly with a view to insuring that judicial notice may be taken of any signature or seal furnishing the last, or final authenticating, link in the chain of authentication of an official record or copy thereof in accordance with any of the methods prescribed for authenticating the particular record or copy under 143b(2). Examples falling within this category and other authenticating examples will not generally be further discussed, since their import is obvious. See also in this connection the discussion of the last paragraph of 147a.

In the first group of examples, the new matter concerning the taking of judicial notice of facts and propositions which are of generalized knowledge, which are of common notoriety in the area of the trial, or which can be readily ascertained is derived from Rule 9 of the Uniform Rules of Evidence (*accord, Weaver v. United States*, 298 F. 2d 496 (5th Cir. 1962)).

In the third group of examples, there are mentioned as appropriate subjects of judicial notice the contents of official information bulletins, manuals, and pamphlets of Federal agencies, and this same category is again repeated in the eighth group of examples with respect to similar informational material of military agencies, the latter inclusion being merely a clarification of similar provisions contained in the former Manual. These provisions are not inconsistent with the opinion of the Court of Military Appeals in *United States v. Jensen*, 14 USCMA 353, 34 CMR 133

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(1964), for a ruling as to taking judicial notice may or may not be binding on the court members, depending upon the nature of the material. When the court members are asked to take judicial notice of a matter than involves a question of fact in determining whether the matter is judicially noticeable, the military judge should rule that the court *may*, or *may not*, take judicial notice of the matter. If the matter involves only a question of law or if it relates to an interlocutory question the military judge should rule that judicial notice *will*, or *will not*, be taken of the matter. ACM 5309, *Slavick*, 5 CMR 616 (1952); Wigmore § 2567. Certainly, official definitions of technical and scientific terms, as prescribed technical procedures, of a nonlegal nature should be judicially noticeable by court members in appropriate cases in any modern armed force. It should be noticed that the rules discussed here are not nearly so broad as that set forth in Rule 63(31) of the Uniform Rules of Evidence (1953), which would allow any learned treatise or textbook to be received in evidence as an exception to the hearsay rule and not, as in the Federal courts (see *Stottlemire v. Cawood*, 215 F. Supp. 266 (D.C.D.C., 1963) and cases there cited), only for the purpose of cross-examining an expert. Further material was added concerning the taking of judicial notice of general maritime law (*Black Diamond S.S. Corp. v. Robert Stewart & Sons*, 336 U.S. 386, 396 (1949)) and of the law of the air.

In the fourth group of examples, provision is made for taking judicial notice of the signatures of the principal officials of the Federal Government of the United States purportedly written in their respective official capacities, whether or not these signatures are for the purpose of authenticating official records. This appears to be the generally accepted limit of the rule when authentication of official records—or of orders, directives, or publications which are independently judicially noticeable—is not involved. See *United States v. Bryson*, 3 USCMA 329, 12 CMR 85 (1953) Wigmore, §§ 2167, 2168. The dicta in *Bryson* concerning the possibility of presuming the genuineness of the signatures of all Federal officials is not supported by the authorities.

The seventh example was inserted to make explicit the exception, which exists with respect to official records, to the general rule that State or foreign law may not be used in court-martial proceedings to determine the sufficiency of an authentication of a writing. *United States v. Bryson*, *supra*.

The eighth group of examples was enlarged to include the National Guard and military agencies or units of allies of the United States. See also the preceding discussion relating to the third group of examples. This change should obviate for the military the difficulties encountered in *Mole v. United States*, 315 F. 2d 156 (5th Cir. 1963), in which a conviction for impersonating a British RAF officer was reversed on appeal because of lack of Rule 44 authentication of an extract copy of British RAF uniform regulations. Also, cases having facts similar to those in *Mole* might be differently decided under the new Rule 44 and the Manual provisions in 143b(2)(e)—see particularly the inference stated in the last paragraph of 143b(2)(e)—for in *Mole* the extract copy of the regulations was attested by an RAF officer in charge of administration of the RAF staff of the British Embassy in Washington and the attestation was authenticated by a certificate of the British Consul-General stationed there.

The last example permits judicial notice to be taken of the actual duties of a person who has signed a writing in a capacity which would

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allow judicial notice to be taken of his signature. Although there is some disagreement as to whether this recognition of duties should be called judicial notice or should be considered as falling within the realm of inference it seems wise to treat the matter under judicial notice as well, thus giving greater scope to the inquiry as to the actual duties of the signer. See Wigmore, §§ 2161, 2162, 2168.

The third paragraph of 147a is a revision of similar material appearing in the same place in the former 147a. Unlike the former Manual, the word "authentic" is not used in describing the source of relevant information which may be used in taking judicial notice, this word not representing a legitimate limitation upon the taking of judicial notice. Rule 10, Uniform Rules of Evidence; Wigmore, § 2568a. It is also pointed out that the court is not legally required to reject a source of relevant information on the ground that a more primary source is or may be available. Rule 10(2), Uniform Rules of Evidence.

The last paragraph is new and states the rule that some judicially noticeable matters are subject to contradiction. Wigmore, §§ 2566, 2567. This paragraph also clearly indicates that the Manual provisions for judicial notice combine, for convenience of reference and to avoid unnecessary distinctions, the principle of judicial notice in its narrow sense with the principle of inferring the genuineness of certain signatures and seals. See Wigmore, § 2161(3).

147b

Determination of foreign law. This subparagraph was entirely revised to delete the former requirement that foreign law be treated and proved as a question of fact. This requirement is now speedily becoming an anachronism, and certainly should be considered as such in the military community with its widespread international responsibilities. The approach adopted here is that found in Rule 26.1 of the Federal Rules of Criminal Procedure, effective 1 July 1966 (see U.S.C.A., 1966 Pocket Part). Although the distinction between taking judicial notice of foreign law and the procedure for determining foreign law set forth in the new 147b may appear to be slight, this procedure places a more positive obligation upon the authority charged with determining the law in the case to inquire into what the foreign law in issue really is, rather than to leave the matter depending upon the will or ingenuity of the parties or to decide it by guesswork or indulgence in presumptions of similarity which, when examined, are usually found to have no basis in fact.

148a-d

Competency of witnesses. Only clarifying changes were made in this material, although in subparagraph a it is indicated that the presumption of competency is not overcome until the incapacity of the witness appears by clear and convincing evidence. See *O'Shea v. Jewel Tea Co.*, 233 F. 2d 530 (7th Cir. 1956).

148e

Interest of bias and competency and privileges of husband and wife, the accused, and accomplices. The second paragraph, which contains the military rules of evidence concerning the privilege against adverse marital testimony, was entirely rewritten. The third and fourth sentences, pertaining to extrajudicial statements, are new. Wigmore, § 2232; see also ACM 7732, *Hawley*, 14 CMR 927 (1954). The exceptions to the general rule—that both spouses have the privilege—have been divided into two segments. First, the privilege does not exist in favor of the accused spouse when the other spouse has been injured by the offense charged, but,

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except as will be mentioned later, the witness-spouse retains the privilege. *United States v. Moore*, 14 USCMA 635, 34 CMR 415 (1964). Except as otherwise provided in the paragraph, this limitation upon the privilege applies only when the offense was committed after the marriage or, if before it, when the offense was unknown to the injured spouse at the time of the marriage. See *United States v. Williams*, 55 F. Supp. 375, 379 (D. Minn., (1944); CM 348276, *Richardson* 4 CMR 415, 419 (1952), *aff'd United States v. Richardson*, 1 USCMA 558, 4 CMR 150 (1952). In the examples of offenses against the witness-spouse, the archaic offense of polygamy was omitted. Added to the offenses found in the former Manual are the offenses of adultery (*United States v. Leach*, 7 USCMA 388, 22 CMR 178 (1956); Wigmore, § 2239 at 249), and mistreatment of a child of the witness-spouse (*State v. Kollenborn*, 304 S.W. 2d 855 (Mo. 1957); Wigmore, § 2239 at 248; and see Rules 23(2) and 28(2), Uniform Rules of Evidence).

Although the Court of Military Appeals, in *United States v. Massey*, 15 USCMA 274, 35 CMR 246 (1965), held that an offense against the child of the witness-spouse was not an injury against her and therefore that she could not even voluntarily testify against her husband over his objection, the effect of this case is not compatible with the needs of the military service, in which, especially overseas, large groups of military personnel and their dependents live in closely knit communities. In these communities and generally in military life, child beating and child molestation by parents cannot be tolerated and certainly should not be facilitated by a rule of evidence prescribed in the Manual. The marital privilege has no constitutional source and is merely a rule of public policy, particular attempted applications of which should succumb to greater public policy operating in the opposite direction. The case of *United States v. Rener*, 17 USCMA 65, 37 CMR 329 (1967), in which it was held that because of the husband's assertion of the privilege the wife should not have been permitted even voluntarily to testify against him in a prosecution for adultery and unlawful cohabitation, also has not been followed, for the wife is injured by these offenses which are obviously directly deleterious to the marital relationship. Wigmore, § 2239, at 249.

The example with respect to forgery was rephrased to indicate that the forgery must constitute an injury to the legal rights of the other spouse. See *United States v. Wooldridge*, 10 USCMA 510, 28 CMR 76 (1959).

In the *second* group of exceptions to the privilege are those in which neither spouse has the privilege and these are set forth in indented form. The first such instance is reflected in *Wyatt v. United States*, 362 U.S. 525 (1960). The second is indicated in the policy of the statute cited therein. See and compare the language as to husband and wife "competency" in the Act of March 3, 1887, chapter 397, § 1, 24 Stat. 635 (repealed by the Act of June 25, 1948, chapter 646, § 39, 62 Stat. 992). The third results from the rationale of the decision in *Lutwak v. United States*, 344 U.S. 604 (1953), and the fourth grows out of the fact that this privilege, unlike the privilege pertaining to confidential communications between husband and wife, does not survive the termination of the marriage. *Pereira v. United States*, 347 U.S. 1 (1954); Wigmore, § 2237.

Material was added to indicate that if the defense, through the testimony of the accused or otherwise, introduces evidence concerning a com-

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munication between the accused and his spouse, the accused may not assert the privilege so as to prevent the use of his spouse as a witness in an attempt to contradict that evidence. *United States v. Trudeau*, 8 USCMA 22, 23 CMR 246 (1957). It is also stated that, except as indicated above, an accused who testifies in his own behalf does not, merely by reason of so testifying, waive the privilege. *United States v. Massey, supra*; *United States v. Trudeau, supra*; and see Wigmore, § 2242. Of course, a valid claim of the privilege cannot be considered as raising an inference that the spousal testimony would be unfavorable to the accused. Wigmore, § 2243, Rule 39, Uniform Rules of Evidence. In this connection, however, it may be that there are certain circumstances in which a failure by the accused to call his spouse when neither spouse has asserted the privilege would be a proper ground of comment by the prosecution in argument. See *Bisno v. United States*, 299 F. 2d 711 (9th Cir.), *cert. denied*, 370 U.S. 952 (1962).

In the last paragraph of 148e, it has been pointed out that a grant, as well as a promise, of immunity does not make a person incompetent as a witness. *United States v. Stoltz*, 14 USCMA 461, 34 CMR 241 (1964).

149a

Examination of witnesses. General. No substantial changes were made in this subparagraph but clarifying matter has been inserted in some of the paragraphs. In the third paragraph, a cross reference to 54b was added since the revision of that paragraph will clarify the role of the court member in calling for witnesses and evidence and in recalling witnesses.

149b(1)

Cross-examination. In the first paragraph, it is stated that cross-examination of a witness need not be restricted merely because it appears to be repetitious of the questioning of the witness on direct examination. Although the Court of Military Appeals has not made a point of this, it has been noted that there have been a number of cases in which it was erroneously thought by counsel that cross-examination could be restricted on this ground.

In the second paragraph, there is an added cross reference to 153b(2)(b) as to limitations applicable to cross-examination concerning acts of misconduct of a witness. This matter is discussed under the discussion of subparagraph 153b(2)(b).

In the last paragraph, there is a new cross reference to subparagraph 138g concerning limitations upon cross-examination of the accused concerning other offenses or acts of misconduct. This matter was previously discussed under that subparagraph and is further mentioned in the discussion of subparagraph 153b(2)(b). Also, the general rule as to the accused's waiver of the privilege against self-incrimination by testifying was included. Wigmore, § 2276(b)(2). The last paragraph has been changed to implement the decision in *U.S. v. Lovig*, 15 USCMA 69, 35 CMR 41 (1964) Restrictive language concerning cross examination after an accused testifies concerning his guilt or innocence of offense has been removed. As pointed out in *Lovig*, it is not the announced intent of an accused to limit his testimony but whether the content of the testimony is so limited which is controlling as to the proper scope of cross-examination. The matter formerly covered in the last sentence was replaced by a reference to 140a, and the word "thereby" (see *United States v. Miller*, 14 USCMA 412, 34 CMR 192 (1964)) was inserted both here and in 140a to indicate that the accused, *merely* by testifying that the inculpatory state-

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ment was made by him involuntarily or was not made by him at all, does not subject himself to cross-examination upon other issues in the case or upon the truth or falsity of the statement.

149b(3)

Examination by the court or a member. In the first paragraph, it is stated that in questioning witnesses the court and its members must be careful not to depart from an impartial role. See *United States v. Smith*, 6 USCMA 521, 20 CMR 237 (1955).

In the second paragraph, it is stated that in questioning a witness concerning the character of the accused, the court and its members must confine themselves to matters which could properly be inquired into by the prosecution. The rules in 138f(2) are thus made applicable to the court members. Also, a cross reference is made to subparagraph 142d, which contains a limitation upon the right of the court's examination of witnesses. In the last paragraph, it is provided that the military judge, or the president of a special court-martial, may require members to submit their questions. The reason for this authority is to prevent cases from being reversed because of over-zealous questioning by court members. See *United States v. Pratt*, 15 USCMA 558, 36 CMR 56 (1965); *United States v. Marshall*, 12 USCMA 117, 30 CMR 117 (1961); *United States v. Blankenship*, 7 USCMA 328, 22 CMR 118 (1956).

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Leading questions—Exceptions. In the second paragraph, it is pointed out that leading questions may always be asked in any situation in which impeachment is possible. In the next to the last paragraph, language difficulties are indicated as another reason for permitting the use of leading questions. CM 347510, *Pawlik & Smith*, 2 CMR 248 (1951), *rev'd on other grounds*, as to *Smith*, *United States v. Smith*, 1 USCMA 531, 4 CMR 123 (1952).

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Compulsory self-incrimination. This subparagraph was completely rewritten in view of the many cases on the question of self-incrimination which have been decided by the United States Supreme Court and the Court of Military Appeals since the 1951 Manual was written. In the second paragraph, it is stated that the witness will not be required to answer over his objection on the ground of self-incrimination unless it appears that no answer the witness might make to the question *could possibly have the effect* of tending to incriminate him. The possibility of a tendency to incriminate is enough under the ruling of the Supreme Court in *Malloy v. Hogan*, 378 U.S. 1 (1964). Of course, the privilege may be invoked with respect to the laws of any jurisdiction, for the Supreme Court, in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), abandoned the old rule that self-incrimination was to be viewed only with respect to the laws of the forum. The second and third sentences of the second paragraph, which in principle are based on the *Murphy* case, set forth some instances in which, because of prior proceedings or events, the answer would not legally be incriminating, although it might otherwise be expected to be of an incriminating nature. It should be noted that in the second sentence the witness is required to answer "if he has been granted immunity" rather than "if because of a grant of immunity . . . he can successfully object to being tried for the offense as to which the privilege is asserted" as was stated formerly in the sentence which comprised the third paragraph of 150b. Under *Murphy*, the former provision was incomplete, and it was considered unnecessary to set out the details of why a witness is required to testify under a grant of immunity. In *Murphy*, the

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Supreme Court laid down a new rule of convenience concerning the relationship between the States and the Federal Government in connection with grants of immunity. Apparently, under the *Murphy* case, read together with *Adams v. Maryland*, 347 U.S. 179 (1954)—see *Murphy, supra*, at 75, 104, it still remains the law that for a grant of immunity to be effective as to offenses within the jurisdiction of the forum the grant must protect its recipient from being tried at all for any such offense as to which his testimony might tend to incriminate him (see also *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1969)), but as to offenses against the laws of other jurisdictions—for example, State jurisdictions when the forum is a Federal court, and vice versa—it is sufficient if the grant prevents the use of the answer and its fruits in connection with a prosecution of the witness by the other jurisdiction, which remains free to prosecute on the basis of information independently obtained. The Supreme Court in *Murphy* expressed its intent to police this area of the law by forbidding the use of the compelled answer and its fruits in the other jurisdiction when it has the power to do so. Consequently, for example, it would seem that a witness who is given a grant of immunity by an officer exercising general court-martial jurisdiction over him may be required to answer in a court-martial case despite his objection of self-incrimination under State law, but the State would not be able to use the compelled testimony or its fruits in connection with prosecution against him. Such a grant would not be effective with respect to possible self-incrimination concerning offenses against the laws of a foreign country under the *Murphy* arrangement, since in this situation the Supreme Court would be without the policing powers previously mentioned. See also *United States v. Kirsch*, 15 USCMA 84, 35 CMR 56 (1964); ACM 10757, *Guttenplan*, 20 CMR 764 (1955). Additionally, an *international* violation of any of the provisions of Article 31 is an offense under Article 98. *Hearings on H.R. 2498 Before a Subcommittee of the Committee on Armed Services House of Representatives*, 81st Cong. 1st Sess. 984 (1949).

The next to the last two sentences in the third paragraph are derived from *Rogers v. United States*, 340 U.S. 367 (1951) insofar as the principle of waiver applied in that case relates to trials. In *Miranda v. Arizona*, 384 U.S. 436, 476 n. 45 (1966), the Supreme Court held that this type of waiver could not be applied in police interrogations. As to the waiver being limited to the trial in which the answer was given, see *In Re Neff*, 206 F. 2d 149 (3d Cir. 1953).

Some new material was added in the fourth paragraph concerning the prohibition against raising certain inferences from an assertion by a witness of the privilege against self-incrimination. *Billeci v. United States*, 184 F. 2d 394 (D.C. Cir. 1950); *United States v. Bolden*, 11 USCMA 182, 28 CMR 406 (1960); Wigmore, § 2272, at 437.

The explanation of the privilege against compulsory self-incrimination adopted in the first two sentences of the next to the last paragraph of this revision of 150b is that adopted by the Supreme Court. *Gilbert v. California*, 388 U.S. 263 (1967) (making handwriting sample not covered by the privilege); *United States v. Wade*, 388 U.S. 218 (1967) (voice identification utterances not covered); *Schmerber v. California*, 384 U.S. 757 (1966) (taking blood sample not covered). It is also pointed out in the last sentence of this paragraph that the privilege is not violated by the use of compulsion in requiring a person to produce for use as evidence or otherwise a record or writing under his control when that record or

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writing is controlled by him in a representative rather than in a personal capacity, and an example is given. This rule is from *McPhaul v. United States*, 364 U.S. 372 (1960). See also *Rogers v. United States, supra*; *Wild v. Brewer*, 329 F.2d 924 (9th Cir.), *cert. denied*, 379 U.S. 914 (1964)—rule applied even to owner of a solely owned corporation; *United States v. Silverstein*, 314 F.2d 789 (2d Cir. 1963); Rule 25(d), Uniform Rules of Evidence. The example of an application of this rule was taken from *United States v. Sellers*, 12 USCMA 262, 30 CMR 262 (1961).

A new paragraph was added with respect to the matter of the application of the fruit of the poisonous tree doctrine to derivative evidence obtained as a result of a statement obtained from the accused by officially compelling him to incriminate himself. The rule as here stated, in the first sentence of the last paragraph of 150b, is that which is now the rule of the Supreme Court as announced in *Murphy v. Waterfront Commission, supra*, at 103, 105. See also *United States v. Carter, supra*, as to the inadmissibility of *statements* obtained from the accused by anyone through compelling the accused to incriminate himself. The last two sentences of the new paragraph are based on *Rochin v. California*, 342 U.S. 165 (1952).

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State secrets and police secrets. This subparagraph was considerably revised principally to furnish a more detailed and accurate discussion of the privilege pertaining to the identity—and the subsidiary privilege pertaining to the communications—of informants. See generally Wigmore, § 2374. It is pointed out that the informant's privilege is no longer applicable once the identity of the informant has been disclosed to those who would have cause to resent his communication. *Roviaro v. United States*, 353 U.S. 53, 60 (1957). Also, the privilege is not applicable with respect to an informant the disclosure of whose identify is necessary to the accused's defense on the issue of guilt or innocence. Whether such a necessity exists will depend upon the particular circumstances of each case, for the Supreme Court has refused to adopt any specific rules in this area. *McCray v. Illinois*, 386 U.S. 300 (1967); *Rugendorf v. United States*, 376 U.S. 528, 534 (1964). See also *United States v. French*, 10 USCMA 171, 181, 27 CMR 245, 255 (1959); *United States v. Hawkins*, 6 USCMA 135, 140, 19 CMR 261, 266 (1955). Considerable material was added in the last four sentences of the second paragraph to provide a military substitute for the difficulties sought to be avoided by the Congress in passing the "Jencks" Act (18 U.S.C. § 3500 (1964)), which was enacted by the Congress on the theory that in *Jencks v. United States*, 353 U.S. 657 (1957), the Supreme Court might have gone too far in requiring the disclosure of statements made to government agents. It should be obvious that the Jencks Act was not intended to have, and could not have, any application to military procedures, since this act prohibits the disclosure of statements of any kind of government witness made to government agencies until such time as the author of the statement testifies *at the trial*. It is axiomatic that the military practice as envisioned by Congress, in Article 32 and elsewhere in the Code, has always been much more lenient than civilian practice in permitting pretrial disclosure of the government's evidence. At least one reason for the difference between the military and civilian practice is that vicious gangs of criminals and organized crime are, for all practical purposes, nonexistent in the tightly controlled and authoritarian military society, whereas the contrary is true in the civilian society. To apply the flat prohibitions of the Jencks Act to

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court-martial procedures would be contrary to the pretrial procedures of both the Code and the Manual and, actually, would be administratively impossible. Therefore, a very liberal approach was taken in 115c to permit use and examination by the defense of documentary and other evidence in control of military authorities. Despite the apparent uncertainty of the Court of Military Appeals as to the applicability of the Jencks Act in military practice indicated in *United States v. Walbert*, 14 USCMA 34, 33 CMR 246 (1963), a later case from that Court indicates that the Court will insist upon pretrial disclosure as it has customarily been practiced in the military. See *United States v. Enloe*, 15 USCMA 256, 35 CMR 228 (1965). The mentioned new material in this paragraph should provide all the protection for the government—principally in security cases—which is reasonably necessary or proper. Although the Jencks Act itself does not apply to military procedures, governmental suppression or bad-faith destruction of statements of government witnesses will have the results indicated in subsection (d) of the Act. See *Augenblick v. United States*, 180 Ct. Cl. 131, 377 F. 2d 586 (1967).

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Communications between husband and wife, client and attorney, and penitent and clergyman. A number of changes were made in this subparagraph. It is pointed out in the first paragraph that the marital privilege concerning communications will not apply when the marital relationship was a sham at the time the communication was made. See *Lutwak v. United States*, 344 U.S. 604 (1953). The general rule concerning the client and attorney privilege was restated to indicate that the communication between client and attorney is privileged if it was made in connection with the relationship of client and attorney. Wigmore, § 2310. That relationship normally exists during negotiations to employ civilian counsel, whether or not that counsel accepts the employment. Wigmore, § 2304. It is also pointed out that communications within the relationship made by an agent of the client are privileged. Wigmore, § 2317(1); Rule 26(3), Uniform Rules of Evidence. Further, it is stated that communications which contemplate the future commission of a fraud, as well as a crime, are not protected by the privilege. Wigmore, §2298, and see the Federal cases cited under note 1 thereto. The revision makes it clear that “counsel” in any military investigation or proceeding are to be considered as attorneys in connection with the client and attorney privilege. This provision seems wise in view of the increased use of counsel in military boards and investigations today. The penitent and chaplain privilege was broadened so that the privilege will be applicable in the military to any penitent, not just one who is, as the former Manual put it, “subject to military law.” No such distinction appears to be justified. See Rule 29, Uniform Rules of Evidence. In the next to the last sentence of the first paragraph, it is indicated that these privileges are not applicable when the spouse, client, or penitent made the communication intending that it be passed on to someone outside the privileged relationship, and that these privileges are also not applicable to a communication between husband and wife, client and attorney, or penitent and clergyman if to the knowledge of the spouse making it or the client or penitent it was made in the presence of someone out the privileged relationship capable of understanding the communication. *Wolfe v. United States*, 291 U.S. 7 (1934); *United States v. Winchester*, 12 USCMA 74, 30 CMR 74 (1961); *United States v. McCluskey*, 6 USCMA 545, 551, 20 CMR 261, 267 (1955); Wigmore, §§ 2311, 2336. In

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the last sentence of the first paragraph, it is stated that a person interpreting the communication as the agent of either party thereto and an agent of the client, attorney, or clergyman is not outside the privileged relationship. Obviously, if an interpreter is needed in making the communication, this should not destroy the privilege. As to agents of the other kinds described, see *United States v. McCluskey, supra*, and Wigmore, § 2311.

In the first sentence of the second paragraph, an example of waiver is given—consent to a disclosure at a previous trial or hearing. See Wigmore, §§ 2340, 2328(1). Since the reason for the termination of the privilege under these circumstances is the publicity which has been given to the communication with the consent of the holder of the privilege, there is no reason why the previous trial or hearing should be another hearing of the same case in order to effect a waiver. The second exception to the general rule preventing disclosure of these privileged communications was modified in accordance with the language and approach used generally in discussing these communications and also to point out that the exception does not apply when the person outside the privileged relationship obtained his knowledge or possession of a privileged communication between client and attorney or penitent and clergyman in a manner not reasonably to be anticipated by the client or penitent. This is the rule made applicable to the client and attorney privilege by Rule 26 of the Uniform Rules of Evidence. It was extended to the penitent-clergyman privilege as well, since in the military community this protection would appear to be desirable as to both privileges. These protections, as distinguished from the “conivance” protection, are not applicable with respect to the husband and wife communication privilege. *Wolfe v. United States, supra*; *United States v. Higgins*, 6 USCMA 308, 20 CMR (1955).

In the third paragraph, it is indicated that an accused who testifies in his own behalf, or a person who testifies under a grant or promise of immunity, does not waive these privileges merely by reason of so testifying. *United States v. Trudeau*, 8 USCMA 22, 23 CMR 246 (1957); *United States v. Fair*, 2 USCMA 521, 10 CMR 19 (1953); Wigmore, § 2327. Of course, a valid assertion of these privileges by the accused or a witness should not be considered as raising an inference that the communication as to which the privilege was asserted would be unfavorable to the accused. Wigmore, § 2322; Rule 39, Uniform Rules of Evidence. It is also pointed out that if the defense introduces evidence concerning a communication between the accused and his spouse, the accused may not assert the privilege pertaining to confidential communications between husband and wife so as to prevent an attempt to contradict that evidence. *United States v. Trudeau, supra*; Wigmore, § 2340. See also Rules 23(2) and 28(2), Uniform Rules of Evidence.

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Confidential and secret evidence. The last sentence of the first paragraph now provides for the release of testimony and exhibits contained in investigations of the Inspectors General when material to a “military course of justice” other than the actual trial by court-martial. This was done because it was found that the former provision was interpreted too literally, for example, as not applying to an Article 32 investigation.

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Communications to medical officers and civilian physicians. There is no generally recognized patient-physician privilege. Wigmore, § 2380a; see also the physician-patient privilege in Rule 27 of the Uniform Rules of

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Evidence which—see subdivision (5) and (6)—with respect to criminal cases amounts to practically no privilege at all. Considerable thought was given to incorporating in this subparagraph, and making applicable to all mental examinations of military accused persons, that portion of 18 U.S.C. § 4244 (1964) which provides that “No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section [a court-ordered examination as to mental *capacity to stand trial*], whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.” The idea of including this material was abandoned, however, in view of the many complications caused by Article 31(b) and the fact that military mental examinations of suspects necessarily and officially encompass mental responsibility for the offense, which would seem to bear upon the “issue of guilt,” as well as mental capacity to stand trial. Even further complications become obvious when considering the possible applications of such a prohibition to the extent of cross-examination of expert witnesses who have conducted an examination into the accused’s mental responsibility for the offense. See generally *Ashton v. United States*, 324 F. 2d 399 (D.C. Cir. 1963); *United States v. Wimberley*, 16 USCMA 3, 11, 36 CMR 159, 167 (1966); *United States v. Malumphy*, 13 USCMA 60, 32 CMR 60 (1962); *United States v. Shaw*, 9 USCMA 267, 26 CMR 47 (1958); *United States v. Bunting*, 6 USCMA 170, 19 CMR 296 (1955).

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Certain illegally obtained evidence. The matter pertaining to search and seizure was completely rewritten due to the many changes effected in this area by the Supreme Court and the Court of Military Appeals. In speaking of the kinds of unlawful searches which would cause the exclusionary rule to come into effect, it is pointed out that an unlawful search conducted, instigated, or participated in by any domestic official, State or Federal, will be within the rule. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Elkins v. United States*, 364 U.S. 206 (1960). As pointed out by the court of Military Appeals and this paragraph, however, the search must be one conducted in a governmental capacity, and not by an official acting in his private capacity or by a mere private citizen, to come within the ban. *United States v. Carter*, 15 USCMA 495, 35 CMR 467 (1965); *United States v. Conlon*, 14 USCMA 84, 87, 33 CMR 296, 299 (1963); *United States v. Seiber*, 12 USCMA 520, 523, 31 CMR 106, 109 (1961). Also, in view of the fact that the reason for the exclusionary rule is to keep out evidence obtained in violation of the 4th and 14th Amendments, the rule would seem to have no application to searches conducted by foreign authorities. See *United States v. DeLeo*, 5 USCMA 148, 17 CMR 148 (1954).

In the second example given in the first paragraph as to when the exclusionary rule will apply, it is pointed out that an unlawful search of another’s premises may be enough if the accused was legitimately present on the premises. *Berger v. New York*, 388 U.S. 41 (1967); *Jones v. United States*, 362 U.S. 257, 265-267 (1967). As further indicated in this example, the exclusionary rule may also come into effect when there has been a seizure or examination of property of the accused, the presence of which was not due to trespass, upon an unlawful search of anyone’s property, whether or not the accused was present. *Jones v. United States*, *supra*, at 261-264; *United States v. Jeffers*, 342 U.S. 48 (1951); see *United States v. Aloyian*, 16 USCMA 333, 36 CMR 489 (1966), concerning the limitation relating to the presence of the accused’s property not

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being due to trespass. As to unlawful seizures during a *lawful* search, see *Zap v. United States*, 328 U.S. 624, 629 (1946); ACM 4163 *Johnson*, 2 CMR 644, 647 (1951); *cf. United States v. Thomas*, 16 USCMA 306, 36 CMR 462 (1966) (involving not merely a seizure but also a search of the contents of the seized bottle found to contain heroin).

The exclusionary rule, of course, applies to derivative evidence obtained as a result of information supplied by the illegal search on the ground that it, too, has been obtained as a result of the illegal acts. However, in *Wong Sun v. United States*, 371 U.S. 471 (1963), the Supreme Court stated that evidence would be considered as having been obtained as a result of the illegal acts only if it has been come at by an exploitation of those acts instead of by means sufficiently distinguishable to be purged of the taint of the illegality. See also *United States v. Wade*, 388 U.S. 218 (1967); *Hoffa v. United States*, 385 U.S. 293, 309 (1966). The Court of Military Appeals has recently adopted this phraseology and its theory in a case in which there was a question as to whether derivative evidence had been obtained in violation of Article 31 (*United States v. Workman*, 15 USCMA 228, 35 CMR 200 (1965)), and even before the *Wong Sun* case the Court had seemingly applied the theory to a search situation. *United States v. Ball*, 8 USCMA 25, 23 CMR 249 (1957).

The third paragraph pertaining to the government's right to use evidence obtained as a result of an unlawful search to rebut testimony introduced by the defense on certain matters was taken from *Walder v. United States*, 347 U.S. 62 (1954). See also *United States v. Grosso*, 358 F. 2d 154, 162 (3d Cir. 1966).

Consideration was given to adding a paragraph after the third paragraph to indicate, in accordance with the so-called "spiked mike" case (*Silverman v. United States*, 365 U.S. 505 (1961)), that a search for property includes any physical intrusion into the property for the purpose of gathering evidence or information. This idea was abandoned on the basis that such a statement could cause confusion in view of the recent Supreme Court decisions in *Hoffa v. United States*, 385 U.S. 293 (1966), and *Lewis v. United States*, 385 U.S. 206 (1966). The act of an undercover government agent in gaining acceptance, through misrepresentation, as a participant in a criminal transaction, such as an illegal sale of narcotics, whereby he gathers evidence or information within the scope of the transaction while in the home of the other party thereto is not a search (*Lewis v. United States, supra*), nor is the act of a paid government informer in requesting and obtaining a conference with an acquaintance whereby the informer is present when the acquaintance, relying on the supposed confidence of the acquaintanceship, makes self-incriminating statements in the acquaintance's hotel room (*Hoffa v. United States, supra*). See also *Lopez v. United States*, 373 U.S. 427 (1963); *cf. Osborn v. United States*, 385 U.S. 323 (1966).

The examples of lawful searches in the fourth paragraph were changed so that they will be in accordance with modern legal views on the subject. As to arrest searches—the second example—see *United States v. Ross*, 13 USCMA 432, 32 CMR 432 (1963). The rules applying to arrest searches when they involve an intrusion into the body were taken from *Schmerber v. California*, 384 U.S. 757 (1966). As to the new third example concerning hot pursuit searches, see *Warden v. Hayden*, 387 U.S. 294

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(1967). A fourth example was added concerning searches of open fields or woodlands, with or without the consent of the owner or tenant. *Hester v. United States*, 265 U.S. 57 (1924); Underhill, *Criminal Evidence*, § 411 (5th ed. 1956), and cases there cited; and see *United States v. Burnside*, 15 USCMA 326, 35 CMR 298 (1965).

The consent search in the sixth example was modified to indicate that the owner is not always the person from whom consent must be obtained in order to have a lawful consent search. See *Stoner v. California*, 376 U.S. 483 (1964); *United States v. Mathis*, 16 USCMA 522, 37 CMR 142 (1967) (consent of one having an equal interest with another is sufficient); *United States v. Garlich*, 15 USCMA 362, 35 CMR 334 (1965). It is not sufficient, for example, for a hotel proprietor to give the police consent to search a hotel room when the search is directed against the occupant of the room and the occupant has not given his consent to the search.

Military searches in the seventh example were rewritten, first for the sake of clarification but more importantly to indicate that the type of military search authorized by a commanding officer must be based upon probable cause. See *United States v. Hartsook*, 15 USCMA 291, 35 CMR 263 (1965). Also, it is indicated that delegations of the authority to order searches, when made, should be made to impartial persons. *United States v. Ness*, 13 USCMA 18, 32 CMR 18 (1962); *United States v. Drew*, 15 USCMA 449, 35 CMR 421 (1965). It is provided that these delegations may be not only to persons of the command but also to persons "made available" to the commanding officer. This was provided as it was envisioned that in areas of high concentration of military personnel it may become desirable to establish a military magistrate for several commands. The commander who authorizes the search need not make the search himself, but he may do so. See *United States v. Hartsook, supra*.

At the end of all the examples of lawful searches, it is indicated that there may be other searches which are "reasonable," and therefore lawful, for the constitutional prohibition is against unreasonable searches. *Cooper v. California*, 386 U.S. 58 (1967); *United States v. Herberg*, 15 USCMA 247, 35 CMR 219 (1965). Although the former Manual spoke of "customary" searches, these, of course, would have to fall within the "reasonable" category if they are to be held lawful.

The fifth paragraph reflects the abandonment by the Supreme Court, in *Warden v. Hayden, supra*, of the supposed former prohibition against searches and seizures to obtain "mere evidence" of crime and contains the rules laid down in the *Hayden* case. The word "dwelling" was added in this paragraph to the 4th Amendment's list of matters protected from the kinds of searches proscribed therein. *Stoner v. California, supra*. It should be noted that in *Go-Bart Importing Company v. United States*, 282 U.S. 344 (1931) and *Goulded v. United States*, 255 U.S. 298 (1921), a person's office was held to be within the protection, apparently having been considered an "effect" in those cases. See also *Hoffa v. United States, supra*, at 301. Although an automobile would be included within "effects," it was added to the list of protected matters in view of the fact that automobiles are frequently involved in military searches. See, e.g., *United States v. Garlich*, 15 USCMA 362, 35 CMR 334 (1965). In connection with the matters protected by the Amendment, see also *Hester v. United States, supra*; Wigmore, § 2184a, para. 1b(vii). The last sentence points out that the restriction in this paragraph does not apply

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to administrative inspections or inventories. As to these inspections and inventories, see *See v. City of Seattle*, 387 U.S. 541 (1967) (civilian inspection); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (civilian inspection); *United States v. Kazmierczak*, 16 USCMA 594, 37 CMR 214 (1967); *United States v. Lange*, 15 USCMA 486, 35 CMR 458 (1965).

In the sixth paragraph, a definition of what constitutes probable cause for ordering a search is given. See the definition developed by the Supreme Court in *Aguilar v. Texas*, 378 U.S. 108 (1964), which was again used by the Supreme Court in *United States v. Ventresca*, 380 U.S. 102 (1965). See also *United States v. Penman*, 16 USCMA 67, 36 CMR 223 (1966); *United States v. Hartsook*, *supra*. It will be noted that this definition refrains from discussing the degree of particularity which is to be used in describing the criminal items which are to be searched for. This is a matter which seems better left to the future decisions of the courts. Compare, for example, *United States v. Schafer*, 13 USCMA 83, 32 CMR 83 (1962), with *United States v. Hartsook*, *supra*. see also *Warden v. Hyden*, *supra*; *Stanford v. Texas*, 379 U.S. 476 (1965).

The seventh paragraph deals with procedural matters concerning the burden of proof on the interlocutory matter of the lawfulness of the search, and the need for showing by clear and positive evidence that there was consent to the search, if consent is advanced as the reason for the search being lawful. *United States v. Herberg*, *supra*; *United States v. Sessions*, 10 USCMA 383, 27 CMR 457 (1959) *United States v. Berry*, 6 USCMA 609, 20 CMR 325 (1956).

The eighth paragraph points out that unlike the Federal district courts (see Fed. R. Crim. P. 41(e)) military courts, because of their limited functions, have no authority to entertain motions for, or to order, the return or suppression of evidence obtained as a result of an unlawful search or seizure, although they may, of course, rule as to whether or not the evidence is admissible against the accused. However, the inflexible provision concerning procedural matters contained in the fifth sentence of the former first paragraph of 152 has not been retained. That sentence indicated that an objection on the basis of illegally obtained evidence was properly made at the time the prosecution attempts to introduce the evidence.

The next to the last paragraph deals with evidence obtained as a result of violations of § 605 of the Communications Act of 1934, 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1964). It is pointed out that this section does not apply to communications over a self-contained military communications system, nor does it apply to communications over an unlicensed, private communications system. *United States v. Gopaulsingh*, 5 USCMA 772, 19 CMR 68 (1955); *United States v. Noce*, 5 USCMA 715, 19 CMR 11 (1955).

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Credibility of witnesses. The first changes in this subparagraph appear in the second paragraph. As to the rule that accomplice testimony "is of questionable integrity and is to be considered with great caution," it is indicated that the rule applies even if the testimony is apparently corroborated (*United States v. Winborn*, 14 USCMA 277, 34 CMR 57 (1963)) and that, due to the history of and reason for the rule (see *United States v. Scoles*, 14 USCMA 14, 33 CMR 226 (1963)), the rule as such applies only to accomplice testimony adverse to the accused. It is also pointed out

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in this paragraph that in proper cases the rules mentioned therein should, upon request by the defense, be made the subject of instructions. Only in exceptional cases will a failure to give unrequested instructions of this kind result in reversal of a conviction. *United States v. Stephen*, 15 USCMA 314, 35 CMR 286 (1965); *United States v. Crooks*, 12 USCMA 677, 31 CMR 263 (1962). Upon such a request, the determination of matters of the kind involved in these rules is ordinarily made by each member of the court in connection with his deliberation upon the findings. For example, if a rule so included in the general instructions involved a determination as to whether certain testimony is self-contradictory, adequately explained, uncorroborated, uncertain, or improbable or whether special standards applying to proof of falsity have been met, the members of the court should also be instructed that such a determination is to be made by each member in connection with his deliberation upon the findings of guilt or innocence. See generally *Weiler v. United States*, 323 U.S. 606 (1945); *Spaeth v. United States*, 218 F. 2d 361 (6th Cir. 1955); *United States v. Weeks*, 15 USCMA 583, 36 CMR 81 (1966); *United States v. White*, 14 USCMA 646, 34 CMR 426 (1964). However, if corroboration of certain testimony is involved and no evidence has been introduced tending to corroborate that testimony the members of the court should be instructed that the testimony is uncorroborated. *United States v. Weeks, supra*. If the evidence is conflicting as to whether a witness who has testified adversely to the accused is in fact an accomplice, an instruction as to the rules concerning accomplice testimony should, upon request by the defense, be given nevertheless, but in such a case the members of the court should further be instructed that each member will apply these rules only if he believes that the witness is in fact an accomplice. *Gardner v. United States*, 283 F. 2d 580 (10th Cir. 1960); ACM 10050, *Graalum*, 19 CMR 667, 693 (1955). This latter instruction should also contain adequate guidance for the members of the court as to what circumstances would cause the witness to be an accomplice, an "accomplice" for this purpose being a person who was culpably involved in the offense charged. *United States v. Wiley*, 16 USCMA 449, 37 CMR 69 (1966). If the witness is shown to be an accomplice by undisputed evidence, the military judge, or the president of a special court-martial, should instruct the members of the court that the witness is an accomplice in giving any instructions on accomplice testimony. *United States v. Weeks, supra*; ACM 10050, *Graalum, supra*. As an exception to the general rule, when it appears that an instruction that the testimony of an accomplice is of questionable integrity and is to be considered with great caution is of vital importance to the accused, it should be given even without a request therefor. *United States v. Lell*, 16 USCMA 161, 36 CMR 317 (1966); *United States v. Stephen, supra*.

The third paragraph concerning corroboration by consistent statements was revised so as to be more generally stated. See *United States v. Sledge*, 6 USCMA 567, 20 CMR 283 (1955).

The fourth paragraph, which relates to corroboration of an identification witness at the trial, was broadened to include identification concerning persons in the courtroom other than the accused, in accordance with *United States v. Tobita*, 3 USCMA 267, 12 CMR 23 (1953). Of course, if the introduction of corroborative evidence of this kind would be merely cumulative, its reception may be forbidden by the military judge or special court-martial as a matter of discretion. There is an obvious

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need for some discretionary limitation upon this rule in these circumstances. See Wigmore, §§ 1124, 1130. As to the material in this paragraph concerning the right to presence of counsel at a lineup, see *Gilbert v. California*, 338 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967). See also *Stovall v. Denno*, U.S. (1967).

The fifth paragraph was added to indicate that when a consistent statement is independently admissible, it does not come within the rule which normally excludes consistent corroborative statements. See, for example, Wigmore, § 1139. As to the definition of "corroborate" in the last paragraph, see *Opper v. United States*, 348 U.S. 84 (1954).

153b(1)

Impeachment of witnesses. General. The rules in the second paragraph concerning the impeachment of one's own witness were changed in some relatively minor but important respects. The exception relating to indispensable witnesses was changed to indicate that it is the testimony of the witness which must be indispensable, *United States v. Reid*, 8 USCMA 4, 23 CMR 228 (1957). It is also indicated that the extent of the impeachment will be limited by the adverse testimony (*Apodaca v. United States*, 200 F. 2d 775 (5th Cir. 1953)) but that the adverse witness may be impeached not only by proof of inconsistent statements but also by proof of prejudice, bias, or other motive to misrepresent with respect to the adverse testimony (see Wigmore, § 901). The word "adverse" replaces the word "hostile" throughout this paragraph because "adverse" is more precise and is really what is meant by "hostile." For example, a witness may be grossly hostile (unfriendly) yet render only favorable testimony. This will not permit one to impeach his own witness, nor would anyone want to do so in this situation. See 3 Wharton, *Criminal Evidence*, § 951 (12th ed. 1955); Wigmore, § 904(3). In the last sentence, it is indicated that the party may not rely upon statements previously made by the witness if he is in possession of information indicating that the witness is likely to testify contrary to those statements. *United States v. Narens*, 7 USCMA 176, 21 CMR 302 (1956).

As to the rule in the last paragraph concerning impeachment of witnesses for the court, see *Litsinger v. United States*, 44 F. 2d 45 (7th Cir. 1930).

153b(2)(a)

Various grounds. General lack of veracity. In the 1951 Manual, proof that a witness had a good character as to truth and veracity could be introduced in rebuttal if that character had first been attacked by opinion or reputation testimony, evidence of a conviction of a crime affecting credibility, or a showing of unchaste character in a proper case. These limitations were removed. Therefore, if the credibility of a witness has been attacked on any ground, proof that he has a good character as to truth and veracity may be introduced. The logic of this proposition seems inescapable. *Rodriguez v. State*, 165 Tex. Cr. 179, 305 S.W. 2d 350 (1957); see Wigmore, §§ 1105-1108.

153b(2)(b)

Conviction of crime. This subparagraph was entirely revised to incorporate the considerable amount of decisional law which has become available since the former Manual was written. It is pointed out in the first paragraph that non-accusatory questions regarding convictions in general of the type which affect credibility may be properly asked in good faith, whether or not the questioner has information concerning a conviction of any such offense. *United States v. Berthiaume*, 5 USCMA 669, 18 CMR 293 (1955).

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It was noted that the Court of Military Appeals in *United States v Yanuski*, 16 USCMA 170, 36 CMR 326 (1966), recognized the authority of the President to prescribe a rule of evidence as to the admissibility of juvenile offenses. Accordingly, a realistic rule was adopted, and evidence of juvenile offenses are not made inadmissible in every situation. In the next to last sentence of the first paragraph, it is provided that a juvenile proceeding, adjudication, or conviction does not qualify as a conviction of the type admissible under that particular paragraph. However, under the sixth paragraph, offenses committed by a witness other than the accused which were subject to the jurisdiction of a juvenile tribunal, whether or not they resulted in a juvenile proceeding, adjudication, or conviction are admissible to impeach that witness if they involve moral turpitude or otherwise affect his credibility. The important consideration here is whether the witness committed an offense that would reflect on his truth and veracity and not whether he was adjudged a juvenile delinquent or otherwise proceeded against or convicted by a juvenile tribunal. As to an accused who testifies as a witness, a conviction by a regular court as discussed in the first portion of the first paragraph of 153b(2)(b) is admissible against him. Other offenses are admissible only in rebuttal of testimony of the accused as provided in the seventh paragraph of 153b(2)(b), and when they so qualify for admission, they are admissible whether or not there was a conviction, adjudication, or proceeding of any type and whether or not they were committed as a juvenile. It was felt that these provisions avoid many legal issues which could be presented in the interpretation of other possible rules on this subject. For instance, the present rules avoid looking behind the results of juvenile proceedings to determine reliability thereof, avoid the necessity of determining if an offense which did not result in a juvenile proceeding could have been treated as a juvenile offense by the jurisdiction involved, and it avoids having inconsistent rules as to the admissibility of various offenses which depend on the laws of the many jurisdictions that would be involved.

The third paragraph contains a number of examples of offenses involving moral turpitude or otherwise affecting credibility. Generally, these examples have been taken from decisions of the Court of Military Appeals or by analogy therefrom. See *United States v. Kelleher*, 14 USCMA 125, 33 CMR 337 (1963); *United States v. Moore*, 5 USCMA 687, 18 CMR 311 (1955). No doubt there are other offenses affecting credibility, particularly when the circumstances of the case being tried are taken into consideration.

The fourth paragraph points out that a conviction which has been disapproved, set aside, or otherwise reversed, or which is undergoing appellate review, or as to which the time for appeal has not expired is not admissible for impeachment purposes. *Beasley v. United States*, 218 F. 2d 366 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 907 (1955); *United States v. Berthiaume*, *supra*. It also provides, however, that a pending request to The Judge Advocate General to vacate or modify the findings or sentence of a court-martial under Article 69 is not a part of appellate review within the meaning of Article 76.

The sixth paragraph contains the rules concerning attempts to impeach an ordinary witness—not the accused (*United States v. Robertson*, 14 USCMA 328, 34 CMR 108 (1963))—by asking him on cross-examination if he has committed an impeaching type of offense, whether or not he

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was convicted of it, when the questioner has possession of facts which support a genuine belief that the witness has committed the offense. See *United States v. Britt*, 10 USCMA 557, 28 CMR 123 (1959). With respect to this method of impeachment, however, an exculpatory answer of the witness cannot be contradicted by extrinsic evidence unless that extrinsic evidence would be admissible without regard to the answer—for example, when it would be per se admissible under some other rule of evidence. *United States v. Lyon*, 15 USCMA 307, 35 CMR 279 (1965).

In the seventh paragraph, it is pointed out that if the defense opens the door by presenting negative evidence concerning the commission of other offenses by the accused, then the prosecution may rebut that negative evidence by proof of other offenses, whether or not the accused has been convicted of them. *Walder v. United States*, 347 U.S. 62 (1954); *United States v. Kindler*, 14 USCMA 394, 34 CMR 174 (1964); *United States v. Brown*, 6 USCMA 237, 19 CMR 363 (1955). The eighth paragraph states an obvious legal result when evidence of other offenses of the accused is admissible under 138g. *United States v. Haimson*, 5 USCMA 208, 230, 17 CMR 208, 230 (1954).

In the last paragraph, grants and promises of immunity or other advantage, or hopes therefor, have been added as permissible subjects of inquiry in connection with impeachment (see *Alford v. United States*, 282 U.S. 687 (1931); *Farkas v. United States*, 2 F. 2d 644 (1924); *United States v. Albright*, 9 USCMA 628, 26 CMR 408 (1958); CM 368839, *Perdelwitz*, 14 CMR 421 (1954)), as has proof that a witness has charges pending against him for the offense concerning which he has testified or one closely related thereto (see *United States v. Hill*, 9 USCMA 659, 663, 26 CMR 439, 443 (1958)).

153b(2)(c)

Inconsistent statements. The major change made in the first paragraph is the abandonment of the rule in the former Manual to the effect that extrinsic evidence of an inconsistent statement is inadmissible if the witness admits making the statement. This rule has been supplanted by the contrary rule adopted by the Supreme Court in *Gordon v. United States*, 344 U.S. 414 (1953). See also *Bentley v. State of Alaska*, 397 P. 2d 976 (Alaska 1965). Also, it should be noted that the rule in this paragraph requiring the laying of a foundation for the introduction of an inconsistent statement of a witness does not apply if due to death or insanity of the witness or other cause there has been no reasonable opportunity, by deposition or otherwise, to lay an admissible foundation. This exception to the general rule is of particular importance with respect to showing an inconsistent statement of an unsworn witness, that is, one who has made another statement which has been received in evidence as an exception to the hearsay rule. See the rule announced in *Mattox v. United States*, 156 U.S. 237 (1895), as modified by *Carver v. United States*, 164 U.S. 694 (1897).

The last paragraph was changed to indicate that when a witness who gives no material testimony properly subject to impeachment testifies that he has no knowledge of a certain fact he, as well as such a witness who testifies that he has no recollection, may not be impeached by proof that at some other time he made a statement as to the fact. *United States v. Narens*, 7 USCMA 176, 21 CMR 302 (1956).

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153b(2) (d)

Prejudice and bias. This subparagraph was revised to add that illicit relations of the witness with the accused are also matters which may properly be considered in connection with showing bias. *United States v. Grady*, 13 USCMA 242, 32 CMR 242 (1962).

154a(1)

Guilty state of mind—General. The phrase “guilty state of mind” was substituted for the word “intent” in the heading of this subparagraph, for intent is simply one example of the various guilty states of mind to be discussed. Furthermore, in subparagraph 154a, the word “requirement” is used in place of the word “element” found in the former Manual. This substitution has been made to take care of those situations in which a certain state of mind must be regarded as a requirement of the offense when an issue with respect thereto is raised, even though that state of mind is not normally considered to be a formal “element” of the offense. Perhaps an excellent example of one of these hidden “elements” is the requirement in larceny that the property not only be wrongfully taken, obtained, or withheld, in the sense of that act being merely without right, but also that this wrongfulness be with knowledge of its wrongfulness. *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. Bridges*, 12 USCMA 96, 30 CMR 96 (1961); *United States v. Sicley*, 6 USCMA 402, 20 CMR 118 (1955). See also *United States v. Goins*, 15 USCMA 175, 35 CMR 147 (1964) *United States v. St. Pierre*, 3 USCMA 33, 11 CMR 33 (1953). In the first paragraph, desertion, generally, is listed as a specific intent offense. *United States v. Huff*, 7 USCMA 247, 22 CMR 37 (1956).

154a(3)

Effect of drunkenness. In the discussion of drunkenness, it is stated that voluntary drunkenness may be shown for the purpose of raising a reasonable doubt as to the existence of actual knowledge when that knowledge is a requirement of the offense, as well as in cases involving specific intent or premeditation. *United States v. Goins, supra*; *United States v. Oisten*, 13 USCMA 656, 33 CMR 188 (1923); *United States v. St. Pierre, supra*. See also *United States v. Mayville*, 15 USCMA 420, 35 CMR 392 (1965). The defense, of course, need only raise a reasonable doubt in order to secure an acquittal, and need not go so far with its evidence of drunkenness as to “show,” “establish,” or otherwise “prove” that the accused did not have the requisite guilty state of mind. Any greater requirement would be to reverse the burden of proof. The paragraph in the former Manual concerning the easy simulation of drunkenness and similar matter was deleted. See *United States v. Richards*, 10 USCMA 475, 28 CMR 41 (1959) (“insanity feigned with ease” instruction condemned).

154a(4)

Effect of ignorance or mistake of fact. This subparagraph was rewritten in view of the many decisions on this subject since the 1951 Manual was written. However, it is still written in very general terms and no attempt was made to provide any hard and fast general rules that would cover all conceivable cases. This approach was taken because it was felt best to leave the details to case law since the effect of ignorance or mistake of fact so frequently depends on the facts involved in a particular case.

To expound on the first two sentences of the subparagraph, it can be said that if, to indicate the existence of a requisite intent or for any other reason, actual knowledge of a certain fact is a requirement of the offense, ignorance or mistake, no matter how unreasonable, as to that fact on the

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part of the accused will be a defense. If, however, the offense requires only constructive knowledge of a certain fact, that is, the type of knowledge considered to exist when the accused should have known of the fact in the exercise of the requisite degree of prudence, then ignorance or mistake as to that fact, to be a defense, must with respect to reasonableness be consistent with the degree of prudence required. For example, if the degree of prudence required is merely to refrain from being grossly negligent as to the fact in question, an ignorance or mistake as to that fact which is not grossly unreasonable will be a defense; but if the standard of prudence is ordinary due care then the ignorance or mistake, to be a defense, must be reasonable in the general sense. In speaking of ignorance or mistake of fact as well as ignorance or mistake of law (154a(5)), the adjective "honest" was not used in this Manual, for in stating these rules the use of that adjective is unnecessary and may even be misleading. See *United States v. Pelletier*, 15 USCMA 654, 36 CMR 152 (1966). A feigned ignorance or mistake is, of course, no ignorance or mistake at all. The question of ignorance or mistake of fact or law should be treated as being really no more than another way of stating that all the requirements of the offense must be established when these requirements are in issue. Thus, the primary inquiry with respect to ignorance or mistake should be as to whether *knowledge* of the matter in question is a requirement of the offense and, if so, what kind of knowledge is involved. The question cannot be properly determined by *in vacuo* references to such terms as "*mens rea*" or by reliance upon deceptively convenient catchalls, such as the phrase "to constitute a defense, the ignorance or mistake must be such that the conduct would have been lawful had the facts been as the accused believed them to be." The quoted phrase would, of course, be most inappropriate for application with respect to a conviction of the offense charged when, because of ignorance or mistake, only a lesser, or an entirely different offense, was proved. In short, there is no arbitrary device available for determining this question, but it must be determined in each case in accordance with the actual nature of the offense at hand. See *United States v. Richardson*, 15 USCMA 400, 403, 35 CMR 372, 375 (1965) ("gross indifference" not the same as "gross negligence"); *United States v. McCluskey*, 6 USCMA 545, 20 CMR 261 (1955); Williams, *Criminal Law—The General Part*, § 71 (2d ed., 1961). See also *United States v. Torres-Diaz*, 15 USCMA 472, 35 CMR 444 (1965).

In regard to the constructive knowledge mentioned above, it does not depend for its existence upon the presence of any inference of actual knowledge that may arise from the circumstances of the case, and constructive knowledge should not be confused with the proof of actual knowledge by circumstantial evidence. For a case distinguishing these two types of knowledge, see ACM S-7959, *Sanders*, 14 CMR 889 (1954).

154a(5)

Effect of ignorance or mistake of law. The same approach was taken here as in the discussion of ignorance or mistake of fact. Whether the ignorance or mistake will be a defense, and the kind of ignorance or mistake which will constitute the defense, must depend upon the nature of the offense in question. See *Lambert v. California*, 355 U.S. 225, *reh. denied*, 355 U.S. 937 (1958); *United States v. Sicley*, 6 USCMA 402, 20 CMR 118 (1955). In regard to the third and fourth sentences of the first paragraph, if the offense is one which requires only constructive knowledge of a certain law or of the legal effect of certain known facts, an ignorance or mistake as to that law or legal effect must be with respect to

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reasonableness be consistent with the degree of prudence required in order to be a defense. See the second paragraph of the discussion of changes in 154a(4), above.

As to the proper publication of regulations, see the requirement for publishing certain Federal regulations in the Federal Register set forth in 5 U.S.C.A. § 552 (Special Pamphlet, 1966) as amended by 80 Stat. 250 (1966) which amended the Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 (1964). See also *United States v. Aarons*, 310 F. 2d 341 (2d Cir. 1962).

Concerning the authority to issue general orders as provided in subparagraph 171a, see the first two paragraphs of the discussion of changes in that subparagraph of chapter 28, *infra*.

154b

Stipulations. Although not mentioned in the text of the Manual, parties entering into stipulations should be aware that, in the absence of special circumstances indicating to the contrary, it may be inferred that the parties to a stipulation intended, at the time it was introduced in evidence, that it would remain effective in all subsequent phases of substantially the same litigation between the parties, as in a rehearing or new or other trial of the case, and when this inference is present the stipulation may be received in evidence at the subsequent proceedings even over the objection of the party against whom the stipulation is to be used. Wigmore, § 2593. However, there are certain situations in which this inference cannot be drawn and the stipulation may not be used in subsequent proceedings, for example, in a rehearing in which the accused has pleaded not guilty, a stipulation entered into by him in connection with his plea of guilty at a previous hearing of the case is not admissible to prove his guilt or to impeach his credibility in regard to his testimony on the issue of guilt or innocence. *United States v. Daniels*, 11 USCMA 52, 28 CMR 276 (1959).

154b(1)

As to facts and the contents of writings. New material was added to point out that a party may withdraw from an agreement to stipulate or from a stipulation at any time before the stipulation is received in evidence. CM 366984, *Herbert*, 13 CMR 353 (1953). See *United States v. Gerlach*, 16 USCMA 383, 37 CMR 3 (1966), as to the prohibition against contradicting stipulations of fact.

154b(2)

As to testimony. As to the new last paragraph of this subparagraph, see ACM 14702 *Schmitt*, 25 CMR 822 (1958).

154b(2)

A conforming change has been made to provide that a stipulation is not shown to the members of the court, except for inspection of it by the president of SPCM without an MJ for the purpose of determining the admissibility of its contents.

154b(3)

Instructions concerning stipulations received in a joint or common trial. When in a joint or common trial a stipulation by only one or some of the accused is received in evidence, the court members should be instructed that it may be considered only with respect to those accused who joined in it. *United States v. Thompson*, 11 USCMA 252, 29 CMR 68 (1960).

154d

Waiver of objections. The second sentence was modified to indicate that there are some principles of law under which a waiver may add

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something to the value of the evidence, for example, when there has been a waiver of the authentication of a purported official record. The last sentence was revised to state that a mere failure to object does not amount to a waiver with respect to the admissibility of evidence except as otherwise stated in the Manual. This change was made to indicate that this subparagraph, being in the evidence chapter, deals only with waiver applying to evidentiary matters and not with waiver of appellate rights, such as the right to have an error considered as being prejudicial on appeal. This latter form of waiver is beyond the scope of this chapter and this Manual. See *United States v. Stephen*, 15 USCMA 314, 35 CMR 286 (1965) *United States v. King*, 12 USCMA 71, 30 CMR 71 (1960).

CHAPTER 28

PUNITIVE ARTICLES

Paragraph

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Principals. All after the first three sentences of the first paragraph is new. The new material is in recognition of the principle that the perpetrator and the aider and abettor may be guilty of different offenses, depending upon the intent which each entertained. See *United States v. Desroe*, 6 USCMA 681, 21 CMR 3 (1956); *United States v. Jackson*, 6 USCMA 193, 19 CMR 319 (1955).

The second sentence of the third paragraph was deleted. This sentence read as follows: "Thus a sentinel or a guard charged with the duty of preventing the removal of government property who stands passively by while such property is taken in or from his presence by persons known to him to be thieves, is guilty of larceny of such property, for he is duty bound to prevent offenses against the property he is protecting, and his inaction in the presence of the perpetrations constitutes assent to, and concurrence in, the larceny." Inaction cannot be substituted for the required intent, although it may be evidence of that intent. See *United States v. Ford*, 12 USCMA 31, 30 CMR 31 (1960); *United States v. McCarthy*, 11 USCMA 758, 762, 29 CMR 574, 578 (1960); *United States v. Lyons*, 11 USCMA 68, 28 CMR 292 (1959).

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Accessory after the fact. The substance of the former last paragraph was transposed to be the third paragraph so that the *Proof* would be last. However, it was modified to incorporate the holding in *United States v. Marsh*, 13 USCMA 252, 32 CMR 252 (1962), that, as a matter of procedure, the principal need not be apprehended or tried prior to the accessory after the fact and that the acquittal of the principal before or after the trial of the accessory after the fact does not bar his conviction or punishment. The sentence relating to the inadmissibility of evidence of the result of a prior trial of the principal has been expanded to include both conviction and acquittal.

The phrase "actually or constructively" was deleted from (c) of the "Proof." Article 78 requires that the prescribed acts be committed by a person ". . . knowing that an offense punishable by this chapter has been committed . . ." Proof of constructive knowledge does not meet a requirement of actual knowledge. See *United States v. Curtin*, 9 USCMA 427, 26 CMR 207 (1958).

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Lesser included offenses. The second paragraph of the former Manual contained the following erroneous statement: "An offense is not included within an offense charged if it requires proof of any element not required in proving the offense charged . . ." The paragraph was rewritten in accordance with the concept expressed in Judge Brosman's concurring opinion in *United States v. McVey*, 4 USCMA 167, 175, 15 CMR 167, 175 (1954), which was cited with approval in *United States v. Thacker*, 16 USCMA 408, 411, 37 CMR 28, 31 (1966). See also *United States v. Magin-*

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ley, 13 USCMA 445, 32 CMR 445 (1963) *United States v. Duggan*, 4 USCMA 396, 15 CMR 396 (1954). The example in the next to last sentence is based on *United States v. Malone*, 4 USCMA 471, 475, 16 CMR 45, 49 (1954). The examples in the last sentence are based, respectively, on *United States v. Davis*, 2 USCMA 505, 10 CMR 3 (1953); and *United States v. Craig*, 2 USCMA 650, 10 CMR 148 (1953); and *United States v. Duggan, supra*.

The third paragraph is new. Its first sentence provides as follows: "When the offense charged is a compound offense comprising two or more included offenses, an accused may be found guilty of any or all of the offenses included in the offense charged." See *United States v. Calhoun*, 5 USCMA 428, 18 CMR 52 (1955).

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Attempts. The former first and second paragraphs were combined into the first paragraph. However, the first sentence was rewritten by paraphrasing the language of Article 80(a) to avoid conflict with the statutory definition.

The second paragraph (former third paragraph) was rewritten in view of *United States v. Thomas*, 13 USCMA 278, 32 CMR 278 (1962), but the substance of the examples was retained. The former first sentence of this paragraph stated: "It is not an attempt when every act intended by the accused could be completed without committing an offense, even though the accused may at the time believe he is committing an offense." The defense of legal impossibility was limited in *Thomas* to situations where the intended act is not a crime. In *Thomas*, where an attempted rape conviction was sustained although the intended victim was dead before the attempt, the defense of legal impossibility would have been available only if rape had not been a crime.

In (b) of the *Proof*, "under the code" was added to conform with Article 80.

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Conspiracy. In the third paragraph, the first sentence was rewritten and the second sentence is new. These changes expand on the proposition that the overt act must be independent of the agreement and incorporate the proposition that the act may coincide or follow it. See *United States v. Kauffman*, 14 USCMA 283, 34 CMR 63 (1963). The last sentence of the third paragraph is new. In regard to the principle of vicarious liability which it states, see *Pinkerton v. United States*, 328 U.S. 640 (1946).

The sixth paragraph incorporates the substance of its former two sentences, and was expanded to cover the situation where abandonment or withdrawal is after the offense is committed. See *United States v. Miasel*, 8 USCMA 374, 24 CMR 184 (1957). The last sentence of the sixth paragraph was changed to cover the situation where a new party is added to the conspiracy. See *Poliafico v. United States*, 237 F. 2d 97 (6th Cir. 1956).

The ninth paragraph is new. It addresses itself to the problems created as to convicting an accused when all other alleged conspirators are acquitted. See *United States v. Doughty*, 14 USCMA 540, 34 CMR 320 (1964); *United States v. Kidd*, 13 USCMA 184, 32 CMR 184 (1962); *United States v. Nathan*, 12 USCMA 398, 30 CMR 398 (1961).

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Fraudulent enlistment, appointment, or separation. The *Proof* was transposed so that it is now the last paragraph.

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The former last three paragraphs dealt with the proof of identity, particularly by fingerprints, and the proof of the fact that there was no discharge by evidence that there is no record of the discharge. These paragraphs were deleted as these matters are adequately covered in Chapter XXVII, *Evidence*.

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Effecting unlawful enlistment, appointment, or separation. In the first sentence after "must know," the words "or have reasonable cause to believe" were deleted as this offense cannot be committed by negligence. See Article 84. The former second sentence was deleted. It stated that: "The term enlistment includes induction or any other means of entry into the service of an armed force." See *United States v. Jenkins*, 7 USCMA 261, 22 CMR 51 (1956).

164a

Discussion of desertion. In the former first paragraph a statement that a member is guilty of desertion was given in the language of Article 85(a)(3), as follows:

Without being regularly separated from one of the armed forces, enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been so regularly separated, or enters any foreign armed service except when authorized by the United States.

This example was deleted as Article 85(a)(3) establishes a rule of evidence by which the intent to remain away permanently may be proved, not a separate offense. See *United States v. Huff*, 7 USCMA 247, 22 CMR 37 (1956); *United States v. Johnson*, 5 USCMA 297, 17 CMR 297 (1954).

Absence without proper authority with intent to remain away permanently (16a(1)). The last clause in the fourth sentence of the first paragraph read as follows: "and a purpose to return, provided a particular but uncertain event happens in the future, may be considered an intent to remain away permanently." This clause was deleted in view of *United States v. Soccio*, 8 USCMA 477, 24 CMR 287 (1957) and *United States v. Rushlow*, 2 USCMA 641, 10 CMR 139 (1953). The first sentence of the second paragraph is new. See the comment in the previous paragraph, above. The second sentence of this paragraph was the second sentence of 164a(3), MCM, 1951. The last sentence of this paragraph is the same as the last sentence of 164a(1), MCM, 1951.

Quitting unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service (164a(2)). The last five sentences are new. They were added to provide guidance for determining important service within the meaning of Article 85(a)(2). See *United States v. McKenzie*, 14 USCMA 361, 34 CMR 141 (1964); *United States v. Merrow*, 14 USCMA 265, 34 CMR 45 (1963); *United States v. Hyatt*, 8 USCMA 67, 23 CMR 291 (1957); *United States v. Deller*, 3 USCMA 409, 12 CMR 165 (1953).

As Article 85(a)(3) is a rule of evidence, not a separate offense, 164a(3) in the former Manual, entitled "*Enlisting or accepting an appointment in the same or another armed force, or entering a foreign armed service*," was deleted. See the first paragraph of this discussion of 164a.

The former third section under *Proof*, which was entitled "*Desertion by enlisting or accepting appointment in the same or another armed force, or by entering a foreign armed service*," was deleted. See the first paragraph of this discussion of 164a.

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In the paragraph after *Proof*, entitled "*Absence without proper authority (Absence without leave)*," the second sentence is new and reads as follows: "However, entries that administratively refer to an accused as a 'deserter' are not evidence of intent to desert." See ACM 12395, *Graham*, 22 CMR 810 (1956). This sentence was substituted for the former sentence, which read as follows:

But *these entries*, even though they refer to an accused as a "deserter," are not complete evidence of desertion; they are evidence only of the absence without proper authority and attendant facts and circumstances required to be recorded (see 144b), and it is still necessary to prove the other elements of the offense of desertion. (Emphasis added.)

The words, "these entries," were in reference to the entries described in the preceding sentence as "entries in the morning report in case of the Army and Air Force and by entries in the service record or unit personnel diary in the case of the Navy, Marine Corps, and Coast Guard." The length of an absence without authority shown by "these entries" may be of great probative value of the intent to desert as well as of the absence without authority. See *United States v. Cothorn*, 8 USCMA 158, 23 CMR 382 (1957). The substituted sentence was carefully limited to exclude only administrative entries that refer to an accused as a deserter. Other entries may be evidence of an intent to desert as well as of other elements of desertion. The present next to last sentence of this section was rewritten in view of *United States v. Lovell*, 7 USCMA 445, 22 CMR 235 (1956). The former last and next to last sentences of this paragraph were deleted. The first of these provided in effect that anyone who enlisted or accepted an appointment in the same or another armed force, or attempted to do so, without disclosing that he had not been separated, thereby abandoned his status of duty, pass, liberty, or leave and became absent without leave with respect to the former enlistment or appointment. The former last sentence provided similarly that anyone who is absent on a short pass or liberty who is found on board a ship at sea, without authority, bound for a distant port, may be regarded as having abandoned his pass and as being absent without authority. These sentences were deleted to reflect the decision in *United States v. Johnson*, 7 USCMA 488, 22 CMR 278 (1957). The present last sentence of the first paragraph is new and points out that a return may be effected by return to an armed force other than the one of which the accused is a member. See *United States v. Coates*, 2 USCMA 625, 10 CMR 123 (1953). The two sentences which form the second paragraph of this section are new. They cover the termination of absence when the accused is in civilian custody and are based, respectively, upon *United States v. Garner*, 7 USCMA 578, 23 CMR 42 (1957), and ACM 15734, *Webster*, 27 CMR 956 (1958).

The section entitled "*Intent in desertion by absence with intent to remain away permanently*," which was formerly composed of one paragraph. The first two sentences of the first paragraph of this section are new. They now correctly state the law concerning intent to remain away permanently. The former first sentence of this section read as follows: "If the condition of absence without proper authority is much prolonged and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain absent permanently." This sentence was deleted, and the matter of a prolonged absence is included in the second paragraph of this section as one of the circumstances from which an inference that an accused intended to remain absent permanently may be drawn. This change places the circumstance of an absence

Paragraph

for a prolonged duration in proper perspective and is in keeping with the teachings of *United States v. Cothern*, 8 USCMA 158, 161, 23 CMR 382, 385 (1957), where Judge Ferguson wrote:

An absence of seventeen days, or seventeen months, or seventeen years, is only an absence—though its probative value may be great—and it is not a substitute for intent. The court-martial must consider the intent of the accused.

It should be noted that in *Cothern*, and the cases subsequent thereto, the Court never held that prolonged absence was not sufficient to raise an inference of intent to remain absent permanently. What was condemned in *Cothern* was an instruction that appeared almost to require a court-martial to conclude from that fact alone that an accused had the requisite intent, irrespective of the other facts and circumstances of the case. In regard to the deletion of “no satisfactory explanation of it” in reference to the prolonged absence in the former first sentence of this section, see *United States v. Soccio*, 8 USCMA 477, 24 CMR 287 (1957), where error was found because the instruction had the effect of shifting the burden of proof to the accused.

Also, in the second paragraph of this section, the last circumstance listed in the first sentence is new. See the first paragraph of this discussion of 164a.

165

Absence without leave. The former last sentence of the first paragraph was broken into two sentences which were transposed with the former next to the last sentence of this paragraph. In the present last sentence, “knew or had reasonable cause to know” was substituted for “has actual or constructive knowledge.” This was an editorial change, not a recognition of change in the substantive law.

In the first *Proof* paragraph, element (b), “that the accused knew or had reasonable cause to know of that time and place”; was inserted. This offense can be committed through negligence in not knowing of the duty to be at a certain place at a certain time; and it is a general intent offense. See *United States v. Scheunemann*, 14 USCMA 479, 34 CMR 259 (1964); ACM S-14446, *Gilbert*, 23 CMR 914 (1957).

166

Missing movement. No change was made in the first four paragraphs. In regard to the third and fourth paragraphs, see *United States v. Thompson*, 2 USCMA 460, 9 CMR 90 (1953).

The *Proof* section was rewritten. The substance of the former section was incorporated and matter was added in element (b) as follows: “that the accused knew or had reasonable cause to know of the prospective movement of this ship, aircraft, or unit.” This should emphasize that lack of actual knowledge of a movement is no defense when the accused was at fault in not knowing of the movement, for example, when he failed in a duty to check with his orderly room concerning a possible movement and had he done so he would have received actual knowledge of the movement. See *United States v. Scheunemann*, *supra*. Both Article 86(3) and Article 87 use the words “he is required”; and the rationale in *Scheunemann*, that AWOL may be committed by negligence because a mistake of fact must be both honest and reasonable to constitute a defense, should apply to the offense of missing movement. Also see *United States v. Jones*, 1 USCMA 276, 3 CMR 10 (1952).

168

Disrespect toward a superior commissioned officer. The fifth paragraph formerly read as follows: “If the accused did not know that the

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person against whom the acts or words were directed was his superior officer, such lack of knowledge is a defense." The last clause of this sentence was changed to read "he may not be convicted of a violation of this article." This change was made consistent with the decision to treat this knowledge as an element, not the lack thereof as a defense.

In the *Proof*, element (d) was inserted to be consistent with the treatment of knowledge as an element. Element (e) is new and was added for clarity.

169a

Striking or assaulting superior commissioned officer. The first sentence of the first paragraph was deleted. It reads as follows: "By 'superior officer' is meant not only the commanding officer of the accused, whatever may be the relative rank of the two, but any other commissioned officer of rank or command superior to that of the accused." This sentence failed to differentiate between officers of different services, and it was unnecessary because the cross references in this paragraph adequately define "his superior commissioned officer." The phrase in the last sentence of the first paragraph, "he may not be convicted of this offense" was substituted for "is available as a defense" to be consistent with the treatment of this knowledge as an element, not the lack thereof as a defense.

In the *Proof*, element (d), "that the accused at the time knew the officer was his superior commissioned officer," was added to be consistent with the treatment of this knowledge as an element.

169b

Disobeying superior commissioned officer. The second sentence in the first paragraph was modified to emphasize that a failure to comply through neglect is not a violation of Article 90.

The second sentence of the third paragraph, cross referencing 57b for the manner of determining legality of an order, is new. See *United States v. Carson*, 15 USCMA 407, 35 CMR 369 (1965).

In the *Proof*, element (d), "that the accused at the time knew the officer was his superior commissioned officer," was added consistent with the decision to treat this knowledge as an element, not the lack thereof as a defense.

In the former Manual, there was a paragraph after the *Proof*, which read as follows: "A command of a superior officer is presumed to be a lawful command." This was deleted as it was redundant with material in the second clause of the first sentence of the third paragraph.

170a

General discussion of insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer. In the first sentence of the second paragraph, "he may not be convicted of a violation of this article" was substituted for "is a defense to a violation of this article." This is consistent with the decision to treat this knowledge as an element, not the lack thereof as a defense.

170b

Assaulting a warrant officer, noncommissioned officer, or petty officer. In the *Proof*, (c) specifically requires that the victim be the superior of the accused. This is an editorial change rather than one of substance as this is covered by (a) which requires that the status of the victim be proved as alleged. Element (d) is new, and is consistent with the decision to treat this knowledge as an element, not the lack thereof as a defense.

170c

Disobeying a warrant officer, noncommissioned officer, or petty officer. The next to last sentence of the first paragraph was formerly the last paragraph. The new last sentence is a cross reference to 57b for

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the manner of determining the legality of an order. See *United States v. Carson*, 15 USCMA 407, 35 CMR 379 (1965).

In the *Proof*, the same elements were added as in 170b. See the comment on 170b.

170d *Treaty with contempt or being disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer.* In the *Proof*, the same elements were added as in 170b.

171a *Violation or failure to obey a lawful general order or regulation.* The first sentence is a rewrite of the former second sentence, which stated as follows: "A general order or regulation is one which is promulgated by the authority of a Secretary of a Department and which applies generally to an armed force, or one promulgated by a commander which applies generally to his command." General and flag officers in command and all general court-martial convening authorities are now included within the category of commanders empowered to issue lawful general orders or regulations. Present decisions concerning the authority of a commander to issue a general order or regulation are based on determinations utilizing tests which require the presentation of evidence as to whether the commander occupies a "substantial position" in effecting the mission of the service (*United States v. Brown*, 8 USCMA 516, 25 Department of the Army level" (*United States v. Porter*, 11 USCMA 170, 28 CMR 394 (1960)), whether the unit commanded is a "post, ship, or station" (*United States v. Arnovits*, 3 USCMA 538, 13 CMR 94 (1953); (*United States v. Wade*, 1 USCMA 459, 4 CMR 51 (1952); *United States v. Snyder*, 1 USCMA 423, 4 CMR 15 (1952)), whether the commander is a general officer or officer of flag rank, and whether he exercises general court-martial jurisdiction (*United States v. Porter, supra*). The result of these decisions has been to ". . . compound the confusion already rampant" (*United States v. Porter*, 11 USCMA 170, 175, 28 CMR 394, 399 (1960) (dissenting opinion, Ferguson, J.)). See also *United States v. Chunn*, 15 USCMA 550, 36 CMR 48 (1965), where the Court held that the evidence indicated that the United States Naval Base, Subic Bay, Republic of the Phillipines, occupied such a position of substance and importance in effecting the mission of the Naval establishment in the Pacific area as to conclude that its commander possessed authority to issue general orders. Among other things, the commander exercised general court-martial jurisdiction.

Although general or flag rank and the authority to convene general courts-martial have been considered only as indications that the commander is empowered to issue a lawful general order (*United States v. Porter*, 11 USCMA 170, 28 CMR 394 (1960); *United States v. Ochoa*, 10 USCMA 602, 604, 28 CMR 168, 170 (1959)), the determination by the President in this revision, acting within his Constitutional powers as Commander-in-Chief (see U.S.C. §§ 3061, 6011, 8061 (1964)), that any general or flag officer in command and any commander authorized to convene general courts-martial, and authorities superior to them, may issue general orders and regulations obviates the difficulties in applying the present tests and provides a workable criterion. The Court of Military Appeals has never held that a general or flag officer in command or a general court-martial convening authority could not promulgate a general order, although it has indicated that the commander's status is not necessarily controlling. A Presidential declaration that all general and flag

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officers in command and all commanders empowered to convene general courts-martial, and their superiors, may promulgate general orders is also within the President's power to make regulations to spell out the details and implement the statutory provisions of Article 92(1) and is consistent with the Court's opinions. See *Hampton, Jr. and Co. v. United States*, 276 U.S. 394 (1928). In view of the necessity for organizational changes to take advantage of swift technological advances and changing strategic and logistical concepts, the level or authority to issue general orders or regulations should not be solely tied to Secretarial status or the exercise of general court-martial jurisdiction, since a number of commands commanded by general or flag officers, although important and sometimes being unified or joint commands, will not require this jurisdiction but will require the authority to issue general orders or regulations.

The second sentence, which deals with when a general order terminated, is new. The third sentence is substantially the same as the former first sentence; and, because of this sentence, the former last paragraph as deleted was being redundant. It read as follows: "A general order or regulation is presumed to be lawful." The next to last (see *United States v. Carson*, 15 USCMA 407, 35 CMR 379 (1965)) and last sentences are also new.

In (b) of the *Proof*, "that the accused had a duty to obey it" is new. However, this was implied in the former (b), which is now (c); therefore no change of substance was made.

171b

Failure to obey other lawful order. The first paragraph was modified by implementing the holding in *United States v. Curtin*, 9 USCMA 427, 26 CMR 207 (1958), that proof of actual knowledge is required for an Article 92(2) violation.

The second paragraph was transposed with the *Proof* so that the *Proof* is now at the end of the subparagraph.

173a

Mutiny. The first three sentences were substituted for the former first sentence to more clearly delineate the two types of mutiny under Article 94(a) (1). See *United States v. Woolbright*, 12 USCMA 450, 31 CMR 36 (1961); *United States v. Duggan*, 4 USCMA 396, 15 CMR 396 (1954).

174b

Breach of arrest. The former first sentence was deleted. It read as follows: "Arrest officially imposed is presumed to be legal." This sentence actually meant that arrest officially imposed could be *inferred* to be legal. Inferences are to be used by fact finders as an aid in arriving at conclusions and not by the law officer in deciding legal issues. In view of the holding in the *Carson* case, *supra*, that the legality of an act is usually to be decided as a question of law by the law officer, the sentence to this extent has no significance. Even in those cases when there is a factual issue as to the legality to be decided by the members of the court, there would under those circumstances be no inference of legality. The statement therefore is meaningless.

Consideration was given to deleting the word "duly" from the *Proof* section because of the *Carson* case, especially in view of the propensity of presidents of special courts-martial and even law officers to use this section of the Manual to draft instructions. However, it was decided to retain the word because the prosecution *does* have to prove that the restraint

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was "duly" imposed or accomplished. Presidents and law officers, however, should not follow the *Proof* section mechanically in drafting instructions.

- 174c *Escape from confinement.* The former second sentence was deleted. It read as follows: "Confinement officially imposed is presumed to be legal." See the discussion above as to a similar change in 174b.
- 174d *Escape from custody.* The former second sentence was deleted. It read as follows: "Custody officially imposed is presumed to be legal." See the discussion above as to a similar change in 174b.
- 176 *Unlawful detention of another.* The former third sentence of the second paragraph was deleted as it was considered unnecessary to give examples of places where an offense can be committed when it is capable of being committed anywhere. It read as follows: "The restraint may be in a guardhouse or in a brig, in a house, or in a public street."
- 177a *Unnecessary delay in disposing of case.* In (a) of the *Proof* "to his knowledge" was inserted to treat knowledge as an element, not the lack thereof as a defense.
- 178a *Running away before the enemy.* The last two sentences of the first paragraph and (e) of the *Proof* are new. See *United States v. Parker*, 3 USCMA 541, 13 CMR 97 (1953).
- 178e *Cowardly conduct.* In the *Proof*, (c) is new and adds the requirement of fear. *United States v. Soukup*, 2 USCMA 141, 7 CMR 17 (1953).
- 179b *Striking the colors or flag.* The second paragraph was transposed with the *Proof* so that the *Proof* would be the last paragraph.
- 182a *Failing to secure capture enemy property.* The former second paragraph, which set forth the standard of a reasonable prudent man, was deleted as erroneously conflicting with the standard in the first paragraph. If this paragraph were retained, it would be implicit in its retention that a person was not required to do what could reasonably be expected of him. There is no reason to read the article as requiring more or less than can be reasonably expected of a person. A person with extraordinary ability, experience, power, and intelligence must take "steps" which could reasonably be expected of him, not just "steps" that "a reasonably prudent man" acting in the same capacity would take. Accordingly in (b) of the *Proof*, "that the accused failed to do what was reasonable under the circumstances to secure this property for the service of the United States," was substituted for a failure of the accused "to perform the responsibilities of a reasonably prudent man . . ."
- 183b, d *Harboring or protecting the enemy; communicating, corresponding or holding intercourse with the enemy.* The conclusion that a conviction under Article 104(2) may be based on constructive knowledge was eliminated. Article 104(2) requires actual knowledge as it reads "knowingly."
- 185 *Spies.* The former second sentence of the third paragraph read as follows: "This intent will very readily be inferred on proof of a deceptive insinuation of the accused among our forces, but this inference may be overcome by very clear evidence that the person had come within the lines for a comparatively innocent purpose, as to visit his family, or to reach his own lines by assuming a disguise." This sentence was rewritten so as not to shift the burden of proof to the accused.

Paragraph

In (a) of the *Proof* after “a certain place,” the words “as alleged” were substituted for “within our zone of operations” to avoid stating a restriction as to place.

186

False official statements. All of the first paragraph is new except for the first sentence. See *United States v. Geib*, 9 USCMA 392, 26 CMR 172 (1958); *United States v. Washington*, 9 USCMA 131, 25 CMR 393 (1958); *United States v. Aronson*, 8 USCMA 525, 25 CMR 29 (1957).

The last sentence and the last clause of the next to the last sentence are new. See *United States v. Hutchins*, 5 USCMA 422, 18 CMR 46 (1955).

187c

Suffering the loss, damage, destruction, sale, or wrongful disposition of military property. The *Proof* was transposed so that it is now the last paragraph.

188a

Wasting or spoiling property other than military property of the United States. In the last sentence of the first paragraph, “culpable disregard of foreseeable consequences” was substituted for “disregard for the probably destructive results” for consistency with the definition of “reckless” stated in 190.

Under *Proof*, (b) is a new addition which was added on the basis of ACM S-9837, *Rand*, 17 CMR 893 (1954), and ACM 6812, *Smith*, 12 CMR 725 (1953).

188b

Willfully and wrongfully destroying or damaging other than military property of the United States. The last two sentences of the first paragraph, which define “willfully” and “wrongfully” and advise how “willfulness” may be shown, are new; and the last clause of the former first paragraph, which stated “but a reckless disregard of property rights may be of such a high degree as to carry an implication of willfulness,” was deleted. See *United States v. Bernacki*, 13 USCMA 641, 33 CMR 173 (1953).

Under *Proof*, (b) is a new addition which was added on the basis of ACM S-9837, *Rand*, 17 CMR 893 (1954), and ACM 6812, *Smith*, 12 CMR 725 (1953).

190

Drunken or reckless driving. The last two sentences of the second paragraph were substituted for the last sentence of the former second paragraph, which read as follows: “The term ‘vehicle’ is not restricted to motor driven or passenger carrying vehicles nor does it describe only types of land transportation.” See *United States v. Webber*, 13 USCMA 536, 539, 33 CMR 68, 71 (1963).

In the *Proof*, “(c) that the accused thereby caused the vehicle to injure the victim, as alleged,” is new. This was added because alleging and proving an jury as a matter of aggravation authorizes an increase maximum punishment. See *United States v. Grossman*, 2 USCMA 406, 9 CMR 36 (1953).

191

Drunk on duty. In the second clause of the second paragraph, “mental or physical” was substituted for “mental and physical” as impairment of either is drunkenness.

192

Misbehavior of sentinel or lookout. In the *Proof*, (c) is new. When this offense is committed in an area designated as authorizing entitlement

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to special pay for duty subject to hostile fire an increased punishment is authorized by the Table of Maximum Punishments.

194 *Malingering.* The last two sentences of the first paragraph are new. In regard to self-inflicted injuries by non-violent means such as starvation, see CM 413397, *Belton*, 36 CMR 602 (1966).

195a *Riot.* This subparagraph was rewritten to conform with the decision in *United States v. Metcalf*, 16 USCMA 153, 36 CMR 309 (1966). The Court in that decision criticized the discussion of riot in the 1951 Manual particularly for failing to set forth the requirement that the acts of the participants must cause public terror. The Court indicated that it preferred the treatment of riot set forth in the 1949 Manual. Accordingly, the subparagraph is now based in large part on the 1949 Manual. In accordance with *Metcalf* it is provided that it is not necessary to have actual terror in the public at large but only that the conduct be calculated to cause alarm or terror. See also 2 Wharton, Criminal Law and Procedure, § 864 (12th ed. 1957). The last two sentences of the discussion paragraph were taken from the 1951 Manual.

195b *Breach of the peace.* Although this subparagraph was not changed, it should be recognized that a breach of the peace may also be committed in a confinement facility. See *United States v. Hewson*, 13 USCMA 506, 33 CMR 38 (1963).

196 *Provoking speeches or gestures.* Although this paragraph was not changed, it should be recognized that knowledge that the victim was a person subject to the Code may be an issue in some cases. See *United States v. Lacy*, 10 USCMA 164, 27 CMR 238 (1959).

197a *Murder in general.* The second paragraph was formerly the last paragraph after *Proof*. The third paragraph is new. See *United States v. Stokes*, 6 USCMA 65, 19 CMR 191 (1955); *United States v. Craig*, 2 USCMA 650, 10 CMR 148 (1953); *United States v. Roman*, 1 USCMA 244, 2 CMR 150 (1952).

197b *Premeditation.* This subparagraph was formerly 197d. However, the last sentence, which states the general rule, was substituted for the former next to last sentence which gave an illustration of the lack of premeditation and the former last sentence which gave an illustration of premeditation.

A separate *Proof* section was provided for this type of murder. It was adapted from the *Proof* section that previously followed 197g and covered all types of murder.

The material in the former 197b, which was entitled *Justification*, is covered in 216a and d. See comments on 216 a and d in Chapter XXIX.

197c *Intent to kill or inflict great bodily harm.* This subparagraph was formerly 197e. In the third and fourth sentences, "inferred" was substituted for "presumed." See *United States v. Houghton*, 13 USCMA 3, 32 CMR 3 (1962); *United States v. Miller*, 18 USCMA 33, 23 CMR 257 (1957).

A separate *Proof* section was provided for this type of murder. It was adapted from the *Proof* section that previously followed 197g and covered all types of murder.

Paragraph

The material in the former 197c, entitled *Excuse*, is covered in 216b and c of Chapter XXIX, *Matters of Defense*. See comments on 216b and c.

197d

Act inherently dangerous with wanton disregard of human life. This subparagraph was formerly 197f.

A separate *Proof* section was provided for this type of murder. It was adapted from the *Proof* section that previously followed 197g and covered all types of murder.

In *United States v. Davis*, 2 USCMA 505, 510-511, 10 CMR 3, 8-9 (1953), the Court of Military Appeals held that to constitute murder under Article 118(3)—acts “inherently dangerous to others”—the act of the accused must be dangerous to more than one person. *Accord, United States v. Holsey*, 2 USCMA 554, 10 CMR 52 (1953). The holdings in these cases have not been specifically implemented in this subparagraph. Following these decisions, the UCMJ was codified in 1956 as chapter 47 of title 10 of the *United States Code* and made subject to the definitions and provisions of 10 U.S.C. § 101 which provides that the definitions in sections 1-5 of title 1 apply to title 10. 1 U.S.C. § 1 (1964) provides in part that: “In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words importing the plural include the singular” Although doubt may have previously existed as to whether this provision applied to the UCMJ, it now seems that it does apply. Therefore, the holdings in *Davis* and *Holsey* have not been specifically included, as it is felt that the Court of Military Appeals may desire to re-examine those decisions in the light of the subsequent legislative action.

197e

Commission of certain offenses. This subparagraph was formerly 197g. The *Proof*, which formerly covered the *Proof* for all types of murder, was changed to relate only to felony murders. The paragraph that formerly followed this *Proof* was more appropriately placed by transposing it so that it is now the second paragraph of 197a.

198a

Voluntary manslaughter. The second sentence of the first paragraph is new, and was inserted in recognition that heat of passion may be produced by fear. See *United States v. Bellamy*, 15 USCMA 617, 36 CMR 115 (1966).

The *Proof* is new. There was no *Proof* paragraph in the former 198a. See *United States v. Walker*, 7 USCMA 669, 23 CMR 133 (1957).

198b

Involuntary manslaughter. In the *Proof*, (c) was rewritten to be more specific. It formerly read: “. . . facts and circumstances showing that the homicide amounted in law to the degree of manslaughter alleged.” As rewritten it is patterned after the first discussion paragraph of 198b.

199a

Rape. The first sentence of the second paragraph is the same as the former first clause of the third sentence in the first paragraph. The former second clause of this sentence, “but the force involved in the act of penetration will suffice if there is no consent,” was deleted, and the proper application of this statement of the law, where the woman’s resistance is overcome through threats or fright or where she is otherwise incapable of consenting, is covered by the second paragraph which was rewritten largely for clarity. See *United States v. Short*, 4 USCMA 437, 16 CMR 11 (1954).

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- 199b *Carnal knowledge.* In regard to the last sentence of the third paragraph which was retained, see *United States v. Berry*, 6 USCMA 609, 614, 20 CMR 325, 330 (1956).
- 200a(2) *Taking, obtaining, or withholding.* This subparagraph was expanded to clearly indicate the principle that a withholding may arise whether the property was lawfully or unlawfully acquired. See *United States v. Sicley*, 6 USCMA 402, 20 CMR 118 (1955) where the Court stated that a fiduciary relationship is not essential to wrongful withholding; *United States v. O'Hara*, 14 USCMA 167, 33 CMR 379 (1963) holding that a withholding after a wrongful taking not accompanied by an intent to steal would constitute larceny if accompanied by the larcenous intent; and *United States v. Kantner*, 11 USCMA 201, 29 CMR 17 (1960), apparently permitting conviction of a finder of lost property whose intent to steal occurred subsequent to the finding of the property. The revision also includes new material to the effect that a finding of larceny cannot be predicated solely on evidence which shows receipt of stolen property or that the accused was an accessory after the fact. *United States v. Jones*, 13 USCMA 635, 33 CMR 167 (1963); *United States v. McFarland*, 8 USCMA 42, 23 CMR 266 (1957).
- 200a(4) *Wrongfulness of the taking, obtaining, or withholding.* The example in the fifth sentence was added and this subparagraph was changed to set forth with more clarity the discussion concerning the taking, obtaining, or withholding by an owner with intent to charge the person from whom the property is taken, obtained, or withheld with the value of the property. See *Hall v. United States*, 277 Fed. 19 (8th Cir. 1921); 2 Wharton, Criminal Law and Procedure § 497 (12th ed. 1957).
- In regard to this subparagraph, it should be recognized that knowledge of wrongfulness is the *mens rea* of larceny. See *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. Bridges*, 12 USCMA 96, 30 CMR 96 (1961); *United States v. Sicley*, 6 USCMA 402, 20 CMR 118 (1955). The specific intent to steal and the *mens rea* are separate and different. See *United States v. Keleher*, 14 USCMA 125, 129, 33 CMR 337, 341 (1963). If the evidence raises an issue as to whether a taking, obtaining, or withholding which was apparently wrongful in the sense of being without right, was done with knowledge of the wrongfulness, this knowledge then becomes a requirement of proof, and it is probably best to treat it as an element of the offense. This also is so with respect to wrongful appropriation.
- 200a(5) *False pretense.* The former last sentence of the first paragraph was deleted. It read as follows:
- For example, a person makes such a false pretense by uttering a check made by him if at the time of the uttering he did not honestly intend to have sufficient funds in the bank available to meet payment of the check upon its presentment for payment in due course.
- The words, "such as giving a check, without intending that it shall be honored, in purported payment of a debt incurred in a past purchase of property and not thereby obtaining any money, personal property, or article of value," were deleted from the last sentence of the second paragraph. Both of these deletions were previously made in the 1951 Manual by Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962).
- 200a(6) *Intent.* The former first paragraph has been divided into two paragraphs, but the former last two sentences were deleted because of the

Paragraph

decision in *United States v. Griffin*, 9 USCMA 215, 25 CMR 477 (1958). Those sentences read as follows :

Consequently, a person may be guilty of larceny even though he intends to return the property ultimately, if the execution of that intent depends on a future condition or contingency which is not likely to happen within a reasonably limited and definite period of time. Thus one may be found guilty of larceny who conceals the property of another with intent to retain it until a reward is offered for it, or who pawns the property of another without authority, intending to redeem it at an uncertain future date and then return it.

The last sentence of the next to last paragraph was deleted as it dealt with a matter of defense which is covered in general in 154a(4). The sentence read as follows :

Also, a person who takes, obtains, or withholds the property of another, believing honestly and reasonably, although mistakenly, that he or the person for whom he is acting has a legal right to acquire or retain the property, is not guilty of an offense in violation of Article 121.

Also, this sentence was not a correct statement of the law. See, *e.g.*, *United States v. Rowan*, 4 USCMA 430, 16 CMR 4 (1954).

The last sentence of the last paragraph is a new addition based on the decisions in *United States v. Epperson*, 10 USCMA 582, 28 CMR 148 (1959); *United States v. Boudreau*, 9 USCMA 286, 26 CMR 66 (1958); and *United States v. Hayes*, 8 USCMA 627, 25 CMR 131 (1958).

200a(7)

Value. This is a new subtitle. The material herein as modified formerly appeared in the two paragraphs after the *Proof*. The first paragraph is new and replaces a sentence which read as follows: "Items of government issue which were serviceable government property at the time they were stolen are deemed to have values equivalent to the prices therefor as listed in official publications or, if not so listed, as otherwise officially recognized." See *United States v. Thompson*, 10 USCMA 45, 27 CMR 119 (1958); *United States v. Thornton*, 8 USCMA 57, 23 CMR 281 (1957).

Also, the following clause was deleted from the end of what is now the third sentence of the second paragraph: "or by the testimony of a person who has ascertained the price of similar articles by adequate inquiry in the market involved." This has been held to be hearsay evidence. See CM 366778, *Bills*, 13 CMR 407, 412-413 (1953).

200a(8)

Miscellaneous. This subparagraph was formerly designated 200a(7).

201

Robbery. In the fifth paragraph, all after the second sentence is new. See *United States v. King*, 10 USCMA 465, 28 CMR 31 (1959); *United States v. Calhoun*, 5 USCMA 428, 18 CMR 52 (1955); *United States v. Ransom*, 4 USCMA 195, 15 CMR 195 (1954); *United States v. McVey*, 4 USCMA 167, 15 CMR 167 (1954).

202

Forgery. A primary change was in the first sentence of the sixth paragraph. In this sentence the words "or from extrinsic facts" were inserted; and the sentence now reads as follows :

With respect to the apparent legal efficacy of the writing falsely made or altered, the writing must appear either on its face or from extrinsic facts to impose a legal liability on another, or to change a legal right or liability to the prejudice of another.

The essence of the legal efficacy requirement is that the writing must have the capability of use as in instrument to defraud. This capability appears on the face of certain writings such as in the examples in the fifth paragraph. But, where the false writing is a letter of introduc-

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tion or an insurance application that does not give notice on its face by fair implication of how it could be used as an instrument to defraud, this must be alleged for the specification to state an offense. See *United States v. Farley*, 11 USCMA 730, 29 CMR 546 (1960). For this reason, the word "mere" before "letter of introduction" in the third sentence is not surplusage as a letter is not a "mere letter" if extrinsic facts are alleged showing how it was intended to be and could be used as an instrument to defraud.

The last sentence of the seventh paragraph is a new addition based on *United States v. Showalter*, 15 USCMA 410, 35 CMR 382 (1965).

Although not mentioned in the text, it should be noted that in *United States v. Gibbons*, 11 USCMA 246, 29 CMR 62 (1960), forgery and uttering were held to be separate criminal acts and specifications of falsely making a signature on a check and uttering it the same day were not multiplicitous for sentence purposes.

202A

Making, drawing, or uttering check, draft, or order without sufficient funds. This paragraph is the same as that which was added to the 1951 Manual as 202a by Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962), except that the next to last paragraph before the *Prrof* was added. As to this addition, see *United States v. Bowling*, 14 USCMA 166, 33 CMR 373 (1963); *United States v. Margelony*, 14 USCMA 55, 33 CMR 267 (1963).

The capital "A" was used in the designation of this paragraph to avoid the erroneous suggestion that it was a subparagraph of 202.

203

Maiming. The third and fourth sentences of the third paragraph are new. They were inserted in recognition that the requisite intent may be an intent to injure the victim, without specifically intending to commit the resulting disablement or disfigurement. See *United States v. Hicks*, 6 USCMA 621, 20 CMR 337 (1956).

204

Sodomy. In the *Proof*, (b) is a new addition. This addition to the *Proof* was made in view of the change to the Table of Maximum Punishments authorizing increased punishment when this crime is committed by force without consent or with a child under 16. See the discussion of changes in the Table of Maximum Punishments in chapter XXV as to Article 125.

207a

Assault. Throughout this subparagraph, "apprehend" or "apprehension," as appropriate, was substituted for "fear." See *United States v. Norton*, 1 USCMA 411, 414, 4 CMR 3, 6 (1952).

The former last sentence of the last paragraph, dealing with self-defense, was replaced by a cross reference in 216c where self-defense is now covered. The former sentence incorrectly stated the principle as to the amount of force that could be used in self-defense. See the discussion of the content of 216c in chapter XXIX.

207b

Assaults permitting increased punishment based on status of victim. This entire subparagraph is new. In 207b (1) and (2), knowledge of the victim's status is treated as an element instead of the lack thereof as a defense. This is consistent with the treatment of knowledge in regard to offenses under articles 89, 90, and 91.

As to the reason for including these assaults as Article 128 offenses rather than Article 134 offenses, see *United States v. Ragan*, 14 USCMA 119, 123, 33 CMR 331, 335 (1963); *United States v. McCormick*, 12 USCMA 26, 30 CMR 26 (1960) (concurring opinion, Latimer, J.).

Paragraph

207c *Aggravated assault.* This subparagraph was 207b in the former Manual.

207c(1) *Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm.* In the title, the words after “weapon” were added to reflect the statutory language in Article 128(b) (1). The third sentence of the first paragraph was added because of the holding in *United States v. Vigil*, 3 USCMA 474, 13 CMR 30 (1953) that fists may be a means likely to produce grievous bodily harm.

207c(2) *Assault in which grievous bodily harm is intentionally inflicted.* In the last sentence of the second paragraph, “was a foreseeable consequence of the blow with the fist so” was deleted in favor of “occurred under such circumstances” as Article 119(b) (2) does not have a foreseeability requirement.

208 *Burglary.* The first sentence of the first paragraph was modified to exclude Article 123a. This change was made in the 1951 Manual by Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962). The last two sentences of the first paragraph are new. See *United States v. Kluttz*, 9 USCMA 20, 25 CMR 282 (1958).

In the last paragraph before the *Proof*, the second sentence was added on the basis of *United States v. Lovig*, 15 USCMA 69, 35 CMR 41 (1964).

209 *Housebreaking.* The second sentence of the first paragraph was added on the basis of *United States v. Williams*, 4 USCMA 241, 15 CMR 241 (1954).

210 *Perjury.* The first sentence of the second paragraph was modified to stress that the false testimony must be willfully given. See *United States v. McCarthy*, 11 USCMA 758 29 CMR 574 (1960).

In the last clause of the sentence which composes the fourth paragraph, “unless he was forced to answer over a valid claim of privilege” was substituted for “even if he was forced to answer over his claim of privilege.” See *United States v. Price*, 37 USCMA 590, 23 CMR 54 (1957), where it was held that Article 31 is relevant to all pretrial statements in violation of its terms and the fact that the statement or answer requested is an official statement within the meaning of Article 107 does not restrict the protection of Article 31.

The last two sentences of the fifth paragraph are new, and they read as follows: “Whether the allegedly false testimony was with respect to a material matter is a question of law to be determined as an interlocutory question. See 57b.” See *Harrell v. United States*, 220 F. 2d 516 (5th Cir. 1955); *Dolan v. United States*, 218 F. 2d 454 (8th Cir. 1955); CM 393094, *Martin*, 23 CMR 437 (1956).

The first sentence of the seventh paragraph was changed to provide that circumstantial evidence alone may be sufficient to prove the falsity of the allegedly perjured statement with respect to matters which by their nature are not susceptible of direct proof. This is based on *United States v. Walker*, 6 USCMA 158, 19 CMUR 284 (1955). In that case, Chief Judge Quinn, speaking for the Court, traced the history of the common law requirement that the falsity of an oath must be established by the positive testimony of two witnesses or by one witness corroborated by other evidence and that circumstantial evidence is insufficient. He pointed out that the modern

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trend is that perjury may be proved by circumstantial evidence and that the military rule follows this modern trend as evidenced by that portion of paragraph 210 of the Manual, providing that a witness may commit perjury by testifying that he knows a thing to be true when in fact he either knows nothing about it at all or is not sure about it. That is to say, the truth or falsity of testimony that the accused did not see the acts in question is by its very nature not susceptible of direct proof but only by circumstantial evidence. The Court, accordingly, held that the evidence in the case, although only circumstantial as to the falsity of the statement' was sufficient. Although Chief Judge Quinn did not specifically limit the thrust of the case to those matters which are by their nature not susceptible of direct proof, Judge Brosman in a concurring opinion would so limit the decision and would require the Government to go beyond circumstantial evidence with respect to matters which are susceptible of proof by direct evidence. That is the position adopted in the sentence as changed. *United States v. Guerra*, 13 USCMA 463, 32 CMR 463 (1963), is not contrary to this position. Although the Court talks there in terms of the necessity for testimony of at least one witness directly contradictory to the accused's former testimony and states that circumstantial evidence alone would not suffice, it does not appear that the Court intended to overrule *Walker*. Rather it seems to have adopted Judge Brosman's rationale in *Walker* because in *Guerra* the question in issue, whether a larceny had in fact been committed, could be proven directly. Accordingly, the addition to the Manual is consistent with *Guerra*. Other than the exceptional case relating to matter which can be proved only by circumstantial evidence, the testimony of a single witness must not only be corroborated but must "directly contradict the accused's statement," and it is not sufficient if the falsity must be inferred from his testimony. *United States v. Guerra, supra*. This language, therefore, has been included in the first sentence of the seventh paragraph.

The last sentence of the seventh paragraph was deleted as surplusage. It read as follows: "In such a case, it may be inferred that the accused did not believe the allegedly perjured statement to be true."

The eighth paragraph is new. See *United States v. Guerra, supra*.

The *Proof* was transposed to the end of the paragraph and "(f) that the testimony was false" was added thereto. See *United States v. Guerra, supra*; *United States v. McCarthy, supra*.

211a

Making a false or fraudulent claim. The last two sentences of the second paragraph are new. They were added to make clear that the mere writing of a document in the form of a claim is not a violation of Article 132(1)(A) and that something must be done to place the document in official channels. See *United States v. Steele*, 2 USCMA 379, 9 CMR 9 (1953).

The next to the last sentence of the former second paragraph was deleted in view of the holding in *United States v. Walters*, 10 USCMA 598, 28 CMR 164 (1959), that actual knowledge of the falsity of the claim is required. This sentence read as follows:

However, if it appears that a false claim was made under circumstances which would cause the false character of the claim to be apparent to an ordinary prudent man, it may be assumed that the claim was made with knowledge of its falsity.

Paragraph

In (a) of the *Proof*, “or an officer thereof” was inserted after “the United States” to conform with Article 132(1) (A), and (d) in the former Manual, which read “the amount involved as alleged,” was deleted as not relevant to the offense or the punishment provided therefor.

211b

Presenting for approval or payment a false or fraudulent claim. The former third paragraph was deleted because it presented a highly unusual situation. It gave as an example of this offense the presentation by an officer of a second account for payment covering the same period as an account which he previously assigned and which could be collected upon by the assignee.

In the *Proof*, the same changes were made as are discussed in the last paragraph under 211a, above.

211c

Making or using a false writing or other paper in connection with claims. In the *Proof*, the same changes were made as are discussed in the last paragraph under 211a, above, but they were made as to (d) and (e), respectively.

211g

Making or delivering receipt without having full knowledge that it is true. The last clause of the last sentence of the first paragraph was rewritten as an inference to avoid use of the term “prima facie evidence.” This term might be erroneously taken as implying that an accused could be properly convicted on “prima facie evidence” of an intent to defraud without a finding that the element actually existed.

212

Conduct unbecoming an officer and a gentleman. The paragraph immediately before the *Proof* is a new addition, and (b) of the *Proof* was modified to require proof that the act or omission constitutes conduct unbecoming an officer and gentleman. See *United States v. Welch*, 1 USCMA 402, 3 CMR 136 (1952).

213a

General as to the general article. This subparagraph is new. It sets forth the proposition that the first two clauses of Article 134 are not necessarily mutually exclusive, that the specification need not allege which clause the conduct violates, and that conduct which falls short of establishing a crime or offense not capital may still constitute an offense under one of the other clauses. See *United States v. Williams*, 8 USCMA 325, 24 CMR 135 (1957); *United States v. Holt*, 7 USCMA 617, 23 CMR 81 (1957); *United States v. Herndon*, 1 USCMA 461 4, CMR 53 (1952).

213b

Disorders and neglects to the prejudice of good order and discipline in the armed forces. This subparagraph was formerly 213a.

The last paragraph was expanded to include use, and the third sentence was modified by substituting lack of knowledge for accident or mistake as an example of innocent possession or use. See *United States v. Greenwood*, 6 USCMA 209, 19 CMR 335 (1955). The second sentence of this paragraph was restated as an inference rather than a presumption. See the discussion of 138a (chapter XXVII), *supra*. The last sentence of this paragraph is a new addition which is based on *United States v. West*, 15 USCMA 3, 34 CMR 449 (1964). See also the second paragraph of the discussion of 200a(4), *supra*.

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The former *Proof* section was deleted at the end of this subparagraph as the matter of proof is now covered in the new subparagraph *d*.

213c

Conduct of a nature to bring discredit upon the armed service. This subparagraph was formerly 213b, but it was substantially revised. The second sentence is new. Actual injury to the reputation of the armed forces is not required. See *United States v. Hooper*, 9 USCMA 637, 647, 26 CMR 417, 427 (1958); *United States v. Berry*, 6 USCMA 609, 614, 20 CMR 325, 330 (1956); *United States v. Thompson*, 3 USCMA 620, 624, 14 CMR 38, 42 (1954). The last sentence, which gives examples of conduct prescribed by the second clause of Article 134, is new.

The last paragraph of the former 213b was deleted. It addressed itself to the subject of dishonorably failing to pay debts, which is now covered by 213f(7).

The former *Proof* section was deleted at the end of this subparagraph as the matter of proof is now covered in the new subparagraph *d*.

213d

General requirements of proof under Article 134. This subparagraph is new. It was inserted to emphasize that conduct punishable under the first two clauses of Article 134, in all cases, must be prejudicial to good order and discipline or of a nature to bring discredit. See *United States v. Gittens*, 8 USCMA 673, 25 CMR 177 (1958); *United States v. Williams*, 8 USCMA 325, 24 CMR 135 (1957); *United States v. Grosso*, 7 USCMA 566, 23 CMR 30 (1957). Accordingly, this requirement was added to the *Proof* sections in subparagraph 213f (formerly 213d).

213e

Crimes and offenses not capital. This subparagraph was formerly 213c. The last sentence of subparagraph (1) is a new addition.

213f

Various types of offenses under Article 134. This subparagraph was formerly 213d. See the above discussion of 213d concerning an addition to the *Proof* sections.

213f(1)

Assaults involving intent to commit certain offenses of a civil nature. To emphasize that the offenses in the subparagraphs herein require a specific intent, changes have been made throughout to indicate that these assaults must be committed with the appropriate specific intent. The first sentence of subparagraph (a) was changed to provide that there is a specific intent to *kill* for assault with intent to murder. *United States v. Holman*, 3 USCMA 396, 12 CMR 152 (1953). A similar change was made in the first sentence of subparagraph (b) based on *United States v. Pitts*, 12 USCMA 634, 31 CMR 220 (1962). These two changes were also incorporated into (b) of the *Proof* section.

213f(3)

Indecent acts with a child under the age of 16 years. The first sentence of the first paragraph was changed to provide that the required intent is a specific intent. The second and third sentences were added to this paragraph to provide that although the indecent liberties must be taken in the physical presence of the child (*United States v. Knowles*, 15 USCMA 404, 35 CMR 376 (1965)), it is not essential that there be a physical touching of the child (*United States v. Brown*, 3 USCMA 454, 13 CMR 10 (1953)).

213f(4)

False swearing. The first part of the first paragraph was modified in accordance with *United States v. Smith*, 9 USCMA 236, 26 CMR 16

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(1958), which held that the offense of false swearing does not extend to falsehoods stated under oath in a judicial proceeding or course of justice and that false swearing is not a lesser included offense of perjury. Accordingly, this modification was also made in the *Proof*. Additionally, in (e) of the *Proof*, the requirement that the statement be false was added. *United States v. McCarthy*, 11 USCMA 758, 29 CMR 574 (1960).

213f(7)

Dishonorable failure to pay debts. This offense was in 213b, but the discussion herein is almost entirely new. See *United States v. Richardson*, 15 USCMA 400, 35 CMR 372 (1965); *United States v. Schneiderman*, 12 USCMA 494, 31 CMR 80 (1961); *United States v. Cummins*, 9 USCMA 669, 26 CMR 449 (1958); *United States v. Kirksey*, 6 USCMA 556, 20 CMR 272 (1955).

213f(8)

Dishonorable failure to maintain funds for payment of checks. This subparagraph is new. See *United States v. Bowling*, 14 USCMA 166, 33 CMR 378 (1963); *United States v. Margelony*, 14 USCMA 55, 33 CMR 267 (1963); *United States v. Groom*, 12 USCMA 11, 30 CMR 11 (1960); *United States v. Kirksey*, 6 USCMA 556, 20 CMR 272 (1955).

213f(9)

Bigamy. This subparagraph is new. See *United States v. McCluskey*, 6 USCMA 545, 20 CMR 261 (1955).

213f(10)

Communicating a threat. This subparagraph is new. See *United States v. Gilluly*, 13 USCMA 458, 32 CMR 458 (1963); *United States v. Frayer*, 11 USCMA 600, 29 CMR 416 (1960); *United States v. Jenkins*, 9 USCMA 381, 26 CMR 161 (1958); *United States v. Humphrys*, 7 USCMA 306, 22 CMR 96 (1956); *United States v. Holiday*, 4 USCMA 454, 16 CMR 28 (1954).

213f(11)

False and unauthorized passes, permits, discharge certificates, and identification cards. This subparagraph is new. See *United States v. Blue*, 5 USCMA 550, 13 CMR 106 (1953). See also the remarks regarding these offenses in the discussion of changes in the Table of Maximum Punishments (chapter XXV).

213f(12)

Negligent homicide. This subparagraph is new. See *United States v. Greenfeather*, 13 USCMA 151, 32 CMR 151 (1962); *United States v. Russell*, 3 USCMA 696, 14 CMR 114 (1954); *United States v. Kirchner*, 1 USCMA 477, 4 CMR 69 (1952); ACM 17272; *Tomlin*, 30 CMR 933 (1961).

213f(13)

Offenses against correctional custody. This subparagraph is new, but the substance of the first two sentences of the first paragraph was taken from subparagraph 131c(4) of Chapter XXVI as amended by Exec. Order No. 11081, 28 Fed. Reg. 945 (1963). See also *United States v. Carson*, 15 USCMA 407, 35 CMR 379 (1965).

Regarding the inclusion of (a) in each of the *Proof* sections, see the second paragraph of the discussion of 174b herein.

Knowledge was not included in these *Proof* sections as these offenses are similar to Article 95 offenses which have no requirement of knowledge. See 174. However, lack of knowledge may be an affirmative defense.

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213f(14)

Receiving stolen property. This subparagraph is new. See *United States v. Ford*, 12 USCMA 3, 30 CMR 3 (1960); *United States v. Haddon*, 1 USCMA 461, 4 CMR 53 (1952).

CHAPTER 29

MATTERS OF DEFENSE

Paragraph

Redesignation of chapter. This chapter formerly dealt with the subject of habeas corpus. All of the former material was deleted and replaced by material dealing with matters of defense. The subject of habeas corpus was considered inappropriate for the Manual because it dealt with the writ as a civilian court process rather than as a court-martial process. Of course, it is now only in the embryonic stage as a court-martial matter. Also, it was felt that habeas corpus details were more appropriate matters for administrative regulations.

This new chapter was designed to include in one place, with certain exceptions, the substantive rules with respect to various matters of defense which may be raised at a trial by court-martial. A good deal of this material was formerly in chapters XII and XXVIII. Procedural aspects governing motions are still located in chapter XII.

214

General. This paragraph sets forth the general rules with respect to the effect of motions in bar of trial and special defenses. Except in the case of a motion raising the question of the accused's mental responsibility at the time of the alleged offense, motions in bar do not normally go to the issue of the guilt or innocence of the accused. But see 57b and 67e, which provide that when motions to dismiss raise contested issues of fact which properly should be considered by the members of the court in their determination of guilt or innocence, those issues must be decided by the members.

Special or affirmative defenses, on the other hand, go to the guilt or innocence of the accused. A special defense is distinguished from a denial by the accused that he committed the acts in question and from cases in which the accused in essence defends by contending that the prosecution has failed to meet its burden of proving his guilt beyond a reasonable doubt. Of course, if the prosecution fails to introduce sufficient evidence (see 71a), a motion for a finding of not guilty should be granted. Even when the prosecution's evidence is sufficient to withstand a motion for a finding of not guilty, the accused may defend by contending that the prosecution has not established his guilt beyond a reasonable doubt. The accused, of course, may adopt this approach without raising any special defenses. He may also raise a defense which does not amount to a special defense, as alibi or mistaken identity. Here the defense does not contend that an offense was not committed but rather contends that the prosecution has not established beyond a reasonable doubt that the accused committed the offense, either because he was not at the scene of the crime (alibi) or that somebody else committed the offense (mistaken identity). Although alibi is not an affirmative defense, the Court of Military Appeals has held that a special instruction, when requested, must be given if alibi is in issue. See *United States v. Moore*, 15 USCMA 345, 35 CMR 317 (1965).

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In the case of a special defense, on the other hand, the accused does not usually deny that he committed the acts in question but rather contends that the acts under the circumstances of the particular case do not constitute a crime because an essential element, such as intent or knowledge, is negated, or because the acts are justified or excused. The special defenses of drunkenness and mistake of fact or law are discussed in 154a(3), (4), and (5), respectively. The special defense of mental responsibility is discussed in 120b. The remaining special defenses are discussed in 216. When an affirmative defense is in issue, sua sponte instructions thereon are required.

The prosecution has the burden of proving the accused's guilt beyond a reasonable doubt in every case. Even when special defenses are in issue, the burden of proof with respect to the special defenses cannot be shifted to the accused. See *United States v. Lombardi*, 14 USCMA 466, 34 CMR 246 (1964) (self-defense); *United States v. Morphis*, 7 USCMA 748, 23 CMR 212 (1957) (drunkenness); *United States v. Noe*, 7 USCMA 408, 22 CMR 198 (1956) (mistake of fact); *United States v. Rowan*, 4 USCMA 403, 16 CMR 4 (1954) (mistake of fact). The prosecution, however, does not have to present evidence to rebut the evidence of a special defense raised by the accused but may merely argue that the testimony raising the issue should not be believed. See, e.g., *Johnson v. United States*, 317 F. 2d 127 (D.C. Cir. 1963). The prosecution, of course, if it does not introduce evidence to rebut the evidence of a special defense raised by the accused, may run the risk of not persuading the court.

215b

Former jeopardy. A large portion of this subparagraph was adapted from 68d in MCM, 1951.

The first two sentences of the first paragraph are the same as the first two sentences of the first paragraph in 68d, MCM, 1951. The third sentence of the first paragraph in 68d, MCM, 1951 read as follows:

But the disapproval or setting aside of a finding of guilty as to any charge or specification for lack of sufficient evidence in the record to support the findings of guilty is a bar to rehearing upon that charge or specification (Arts. 63a, 66d, 67e).

This sentence was dropped in favor of the balance of the language used in the first paragraph. This was to emphasize that Article 44(b) permits a convening authority, board of review, and the Court of Military Appeals to order a rehearing, in accordance with Articles 63(a), 66(b), and 67(e), respectively, without placing the accused twice in jeopardy, except when there is a lack of sufficient evidence in the record to support the findings.

The second paragraph is substantially the same as the second paragraph of 68d, MCM, 1951. But see the discussion of changes in 56a, b, and c in chapter X.

The third paragraph of 68d, MCM, 1951, was omitted as its material is covered in 215a. It read as follows: "A person has not been tried in the sense of Article 44 if the proceedings were void for any reason, such as lack of jurisdiction to try the person or the offense."

The third paragraph, which was formerly the fourth paragraph of 68d, contains references to previous trials in foreign courts which are new. See AR 27-10, for the policy of the Department of the Army concerning disciplinary action following a trial in a State of foreign court, and see North Atlantic Treaty Organization Status of Forces Agreement, 19 June 1951, T.I.A.S. No. 2846, Art. VII, para. 8, for an example of a

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treaty limitation applicable to courts-martial following a trial in a foreign court.

The last paragraph was formerly the fifth paragraph of 68*d*.

215*c*

Former punishment. This subparagraph was adapted from 68*g* of the Manual without substantive change. The reference to Article 13 punishment has been included because of the decision in *United States v. Williams*, 10 USCMA 615, 28 CMR 181 (1959). In view of the more liberal and flexible definition of "minor offenses" in 128*b*, no examples of minor offenses are included.

215*d*

Statute of limitations. A major part of the substance of this subparagraph was moved from 68*c*. See the comments on 68*c*.

A discussion of what is "war" within the meaning of Article 43 was intentionally omitted. This can be an operative fact relative to the application of the statute of limitations. The existence, beginning, and ending of a "war" within the meaning of Article 43 is a factual matter which is not dependent on a formal declaration. *United States v. Shell*, 7 USCMA 646, 23 CMR 11 (1957); *United States v. Ayers*, 4 USCMA 220, 15 CMR 220 (1954); *United States v. Bancroft*, 3 USCMA 3, 11 CMR 3 (1953). Attention is called to the dissent by the Chief Judge in the *Ayers* and *Shell* cases on the ground that the Korean War did not produce a time of war within the United States within the meaning of Article 43.

In the second paragraph in regard to the reference of the applicability of the statute of limitations to the crime of conspiracy, see *United States v. Rhodes*, 11 USCMA 735, 29 CMR 551 (1960). The cautionary material in the latter part of the second paragraph, which deals with altering of charges after the period of limitations has run, is new. See *United States v. Spann*, 10 USCMA 410, 27 CMR 484 (1959); *United States v. French*, 9 USCMA 57, 25 CMR 319 (1958); *United States v. Rodgers*, 8 USCMA 226, 24 CMR 36 (1957).

215*e*

Speedy trial. This subparagraph is new. The following cases were considered in drafting it: *United States v. Williams*, 16 USCMA 589, 37 CMR 209 (1967); *United States v. Tibbs*, 15 USCMA 350, 35 CMR 322 (1965); *United States v. Schalck*, 14 USCMA 371, 34 CMR 151 (1964); *United States v. Williams*, 12 USCMA 81, 30 CMR 81 (1961); *United States v. Batson*, 12 USCMA 48, 30 CMR 48 (1960); *United States v. Davis*, 11 USCMA 410, 29 CMR 226 (1960); *United States v. Brown*, 10 USCMA 498, 28 CMR 64 (1959); *United States v. Wilson*, 10 USCMA 398, 27 CMR 472 (1959); *United States v. Callahan*, 10 USCMA 156, 27 CMR 230 (1959); *United States v. Hounshell*, 7 USCMA 321 CMR 129 (1956).

216*a*

Justification as a special defense. This subparagraph was adapted from 197*b* of the former Manual. The scope was enlarged to include "death, injury or other act."

216*b*

Excuse of accident or misadventure. The defense of accident or misadventure generally arises in connection with a case involving a homicide or assault. See, e.g., *United States v. Sandoval*, 4 USCMA 61, 15 CMR 61 (1954); *United States v. Bull*, 3 USCMA 635, 14 CMR 53 (1954); and 197*c* (homicide) and 207*a* (assault) of the former Manual. However, the defense is not limited to crimes which involve death or injury. This was recognized by including the words "other event." The target of a defense of accident or misadventure is to negate the criminality of the act

Paragraph

charged. The defense does not, for example, deny an alleged injury but raises the issue of whether the injury was the unforeseen consequence of a lawful act done in a lawful manner. See *United States v. Torres-Diaz*, 15 USCMA 472, 35 CMR 444 (1965).

216c

Self-defense. The subject matter in this subparagraph was formerly contained in 197c and 207a. However, that material was completely revised in view of the many recent self-defense cases. The provision for a duty to retreat in 197c, MCM, 1951, was omitted in view of *United States v. Green*, 13 USCMA 545, 33 CMR 77 (1963); *United States v. Hayden*, 13 USCMA 497, 33 CMR 29 (1963); and *United States v. Smith*, 13 USCMA 471, 33 CMR 3 (1963). Also, the limitations as to meeting force with a like degree of force in 207a, MCM, 1951, were omitted in view of the *Green* case, the *Smith* case, and *United States v. Acosta-Vargas*, 13 USCMA 388, 32 CMR 388 (1962).

In regards to the rules stated in the first and second paragraphs, see *United States v. Perry*, 16 USCMA 221, 36 CMR 377 (1966); *United States v. Armistead*, 16 USCMA 217, 36 CMR 373 (1966); and *United States v. Jackson*, 15 USCMA 603, 36 CMR 101 (1966).

The first two sentences of the third paragraph are based on *United States v. O'Neal*, 16 USCMA 33, 36 CMR 189 (1966), and the last sentence is based on *Acosta-Vargas*.

The fourth paragraph is based on the *Perry* case.

216d

Obedience to apparently lawful orders. This subparagraph was adapted from 197b, MCM, 1951. For a discussion of the civilian authorities in this area, see ACM 7321, *Kinder*, 14 CMR 742 (1954).

216e

Entrapment. The first sentence is based on the following language in *Sorrells v. United States*, 287 U.S. 435, 442 (1932): "A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce the commission in order that they may prosecute." See also *Sherman v. United States*, 356 U.S. 369, 372 (1958), which cites this language with approval. The definition of "innocent" in the second and third sentences paraphrases language in 21 Am. Jur. 2d *Crim. Law* § 144 at 214 (1965). The fourth sentence is based on *Sorrells* at 441 and the fifth sentence on *Sherman* at 372. The last sentence is a reference to 138g(6), which recognizes that the issue of entrapment places the predisposition of the accused in issue thereby making admissible relevant evidence of previous misconduct by the accused.

216f

Coercion or duress. This subparagraph is based on *United States v. Brookman*, 7 USCMA 729, 23 CMR 193 (1957); and *United States v. Fleming*, 7 USCMA 543, 23 CMR 7 (1957). Regarding the proposition that the defense is inapplicable when the offense in question involves the killing of an innocent person, see 15 Am. Jr. *Crim. Law* § 318 (1938) and 1 Wharton, *Criminal Law* § 384 n.3 (12th ed. 1932).

The dicta in *United States v. Margelony*, 14 USCMA 55, 33 CMR 267 (1963), and *United States v. Brookman*, *supra*, to the effect that coercion may require less than fear of death or serious bodily harm when interposed as a defense to a minor offense, was not incorporated in this subparagraph because of the uncertainties of the law in this area.

Paragraph
216g

Physical or financial inability. The discussion in this subparagraph is based on the decisions in *United States v. Pinkston*, 6 USCMA 700, 21 CMR 22 (1956); *United States v. King*, 5 USCMA 3, 17 CMR 3 (1954); and *United States v. Heims*, 3 USCMA 418, 12 CMR 174 (1953).

GENERAL DISCUSSION OF CHANGES IN APPENDICES

Generally, those appendices for which there is a published Department of Defense Form were modified to agree with the latest edition of those forms.

Former Appendix 18, Interrogatories and Deposition, and former Appendix 19, Warrant of Attachment, were deleted. They were deleted as it was felt that their inclusion in the Manual was not warranted because of their infrequent use. However, it is planned that these forms will remain available through normal publication channels.

APPENDIX 1
CONSTITUTION OF THE UNITED STATES

Amendments XXII, XXIII, XXIV, and XXV were added.

APPENDIX 2

THE UNIFORM CODE OF MILITARY JUSTICE

The Uniform Code of Military Justice as revised, codified, and enacted into law as part of title 10, United States Code, by the act of 10 August 1956, with subsequent amendments designated in the text as explained in the first paragraph of appendix 2, was substituted for the Code which was enacted as part of the act of 5 May 1950 and was set forth in appendix 2, MCM, 1951.

The note after Article 2(10) was retained as containing information of value. The notes after Article 2(11) and Article 3(a) are new.

APPENDIX 3

STATUTES TO WHICH MILITARY PERSONNEL SHOULD HAVE READY ACCESS

The material in this appendix was substituted for the former material which was under the title *Punishment Under Article 15—Nonjudicial Punishment Forms*.

APPENDIX 4

FORMS FOR ORDERS CONVENING COURTS-MARTIAL

Sample convening orders were changed to conform to the new requirements of Art. 26(c) and to recognize the possibility of an MJ being detailed to an SPCM.

APPENDIX 5
CHARGE SHEET

This appendix was modified by substituting, with minor modifications therein, the form currently in use, Department of Defense Form 458, October 1969. Page four of the charge sheet was modified to conform with amended Article 20.

APPENDIX 6

FORMS FOR CHARGES AND SPECIFICATION

Instructions (6a). Paragraphs 13 and 14 were added to furnish guidance as to the proper method of describing property and the acceptable methods of pleading documents. As to the latter, see *United States v. Lawrence*, 3 USCMA 628, 14 CMR 46 (1954); *United States v. Bunch*, 3 USCMA 186, 11 CMR 186 (1953).

Forms for specifications (6b). The word "about" was placed in parentheses throughout when used to describe value or amount. This was done to conform with the instructions in paragraph 11 of 6a that the exact value or amount should be stated in the specification if known. Significant changes in the various specifications are hereafter discussed individually. Specification numbers which are not in parentheses refer to numerical designations in this Manual. Numbers in parentheses indicate the number assigned in the 1951 Manual.

Specification No.:

- 11 *Desertion by reenlistment, etc.* (Art. 85). Deleted in view of the decision in *United States v. Huff*, 7 USCMA 247, 22 CMR 37 (1956).
- 28 *Violating other written order or regulation* (Art. 92(2)). This is a new addition which was added to provide a form for pleading violations of written orders which are not general orders under Article 92(1). Concerning the necessity for this form, see, e.g. *United States v. Keeler*, 10 USCMA 319, 27 CMR 393 (1959); *United States v. Brown*, 8 USCMA 516, 25 CMR (20) (1957); *United States v. Bunch*, 3 USCMA 186, 11 CMR 186 (1953).
- 30 *Derelict in duty* (Art. 93(3)). The word "willfully" was added as this offense can also be committed in this manner. See 171c. Other modifications were made to avoid the literal interpretation in some instances that the failure or neglect was the duty required. See CM 413411, *Wolfson*, 36 CMR 722 (1966).
- 39 *Releasing prisoner without authority; suffering prisoner to escape* (Art. 96). The word "duly" was deleted. This provides consistency with 175a and the rewording of Article 96 when codified. For the reason for the rewording on codification, see the explanatory note to 10 U.S.C. § 896 (1964).
- 47 *Misbehavior before the enemy; cowardly conduct* (Art. 99(5)). The words "as a result of fear" were added for consistency with the same change in 178e. See *United States v. Soukup*, 2 USCMA 141, 7 CMR 17 (1953).
- 63 *Maltreatment of prisoner* (Art. 105(2)). This specification was modified to require a statement that the improper conduct amounts to maltreatment. This conforms to the proof requirements in 184b and the wording of Article 105(2).

Specification No.:

- 64 *Spying* (Art. 106). This form was modified by adding "(in) (about)" and "(control) (jurisdiction)" as selections. These modifications conform with the wording of Article 106 which is stated in the alternative rather than the conjunctive.

- 70 *Hazarding or suffering to be hazarded any vessel, willfully and wrongfully* (Art. 110 (a)). This form is a new addition which was necessitated by the fact that all forms in the 1951 Manual were for *negligently* hazarding a vessel.

- 75 (74) *Drunken or reckless operation of vehicle* (Art. 111). The words "strike and" were placed in parenthesis because the aggravating factor is the injury, and this could occur without striking the victim with the vehicle. See the Table of Maximum Punishments, Section A, 127c, as to Article 111.

- 77 (76) *Misbehavior of sentinel or lookout* (Art. 113). A selection was added for alleging the aggravating factor when the offense is committed in an area where hostile fire pay is authorized. This is consistent with the addition of this aggravating factor in the proof section of 192 and in the Table of Maximum Punishments, Section A, 172c. See also Exec. Order No. 11317, 31 Fed. Reg. 15305 (1966).

- 89 (88) *Rape and carnal knowledge* (Art. 120). This specification was modified to include the proper means of alleging rape when carnal knowledge may be an included offense. See CM 392172, *Mosby*, 23 CMR 425 (1957).

- 92 (91) *Robbery* (Art. 122). Modified by the addition of "(force) (violence)" as selections because Article 122 is worded in the alternative.

- 93 (92)
94 (93) *Forgery* (Art. 123). A selection was added to form 93 for alleging the forgery of an indorsement. Experience has indicated that there has been some confusion in the past as to how such an allegation should be set out.

A selection was added to forms 93 and 94 for situations where a document on its face will not clearly operate to the legal prejudice of another. See *United States v. Wilson*, 13 USCMA 670, 33 CMR 202 (1963); *United States v. Farley*, 11 USCMA 730, 29 CMR 546 (1960).

- 95 (93.1)
96 (93.2) *Check, worthless* (Art. 123a). These new specifications were incorporated from Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962).

- 98 (95) *Sodomy* (Art. 125). Selections have been added for alleging the aggravating factor when offenses are committed against a child under 16 years of age or by force and without the consent of the victim. This conforms with the same additions in the proof section of 204 and in the Table of Maximum Punishments, Section A, 127c.

- 103-105 (121-123)
106 (166)
108 (125) *Assaults aggravated by the status of the victim* (Art. 128(a)). The specifications have been moved under Article 128 from under Article 134. This conforms with the same change made in 207 and the Table of Maximum Punishments, Section A, 127c.

- 112 (104) *Housebreaking* (Art. 130). The words "the property of" were added on the basis of the decision in ACM 5167, *Wheat*, 5 CMR 494 (1952).

- 133 *Burning with intent to defraud* (Art. 134). This is a new addition which was added because of *United States v. Fuller*, 9 USCMA 143, 25 CMR 405 (1958).

Specification No.:

134 (129)

Check, worthless, making and uttering (by dishonorably failing to maintain sufficient funds) (Art. 134). The new form as provided in Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962) was used, but the words "wrongful and" were deleted as excess verbiage as the wrongfulness is the dishonorable failure. See *United States v. Schneiderman*, 12 USCMA 494, 31 CMR 80 (1961). See also 213f(8).

135, 136 (129a)

Correctional custody (Art. 134). These new specifications were incorporated from Exec. Order No. 11081, 28 Fed. Reg. 945 (1963). However, the word "duly" was added to both specifications to conform with the treatment in 213f(13). This also conforms with the manner in which other similar specifications are set out, for example, 36-38, 173, and 175. Cf. *United States v. Carson*, 15 USCMA 407, 35 CMR 379 (1965).

137

Criminal libel (Art. 134). This new specification is based on the decision in *United States v. Grosso*, 7 USCMA 566, 23 CMR 30 (1957). It should be noted that the specification used in *Grosso* was patterned after the wording of a particular state statute which was alleged to be violated.

138 (130)

Debt, dishonorably failing to pay (Art. 134). The words "wrongfully and" were deleted as excess verbiage as the wrongfulness is the dishonorable failure. See *United States v. Schniederman*, 12 USCMA 494, 31 CMR 80 (1961). See also 213f(7).

145 145 (147)

Drugs, habit forming, or marihuana: wrongful use, transfer, or sale (Art. 134). Transfer and sale were added to the possible selections in this form. This is consistent with the same addition in the Table of Maximum Punishments, Section A, 127c. See the discussion of the reasons for these additions in the Table which are discussed as changes in Chapter V.

146

Drugs, habit forming, or marihuana: wrongful introduction into military unit, etc. (Art. 134). This new specification is based on the decision in *United States v. Jones*, 2 USCMA 80, 6 CMR 80 (1952).

147 (138)

False or unauthorized pass offenses (Art. 134). This specification was modified to provide consistency with the treatment of these offenses in 213f(11) and the Table of Maximum Punishments, Section A, 127c. See the discussion of the reasons for modifications in the Table which are discussed as changes in chapter XXV.

148

False pretenses, obtaining services under (Art. 134). This new specification is based on the decision in *United States v. Herndon*, 15 USCMA 510, 36 CMR 8 (1965).

149 (139)

False swearing (Art. 134). The selection "(in his testimony before a _____ court-martial at the trial of _____)" was deleted because of *United States v. Smith*, 9 USCMA 236, 26 CMR 16 (1958). The word "false" was added before "statement" because of *United States v. McCarthy*, 11 USCMA 758, 29 CMR 574 (1960). See also ACM 17112, *Daminger*, 30 CMR 826 (1960).

152 (142)

Fleeing scene of accident (Art. 134). Modified to provide for appropriate allegations when a passenger other than the driver is charged. See *United States v. Petree*, 8 USCMA 9, 23 CMR 233 (1957). Also modified to incidate that the accused was in the vehicle involved in the accident or collision. See *United States v. Fleig*, 16 USCMA 444, 37 CMR 64 (1966).

155 (145)

Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official (Art. 134). The word "willfully" was added

Specification No.:

- because of the decision in *United States v. Demetris*, 9 USCMA 412, 26 CMR 192 (1958).
- (150) *Loaning money at usurious rate* (Art. 134). Deleted because of the decision in *United States v. Day*, 11 USCMA 549, 29 CMR 365 (1960).
- 158 (148) *Indecent, insulting, or obscene language communicated to a female or a child under the age of 16 years* (Art. 134). Modified to conform with the addition of a punishment in the Table of Maximum Punishments, Section A, 127c, when the victim is a child. For the reason for this change, see the discussion of changes made in chapter XXV.
- 160 (151)
161 (152) *Mail, taking, opening, secreting, destroying, or stealing* (Art. 134). Both specifications were modified to incorporate specific allegations that the object involved is "mail matter." See *United States v. Lorenzen*, 6 USCMA 512, 20 CMR 228 (1955).
- 165 *Obstructing justice* (Art. 134). This is a new specification. Its addition was promoted by *United States v. Wysong*, 9 USCMA 249, 26 CMR 29 (1958); ACM 17112 (Reh) *Daminger*, 31 CMR 521 (1961); ACM 17112, *Daminger*, 30 CMR 826 (1960). The language in 18 U.S.C. § 1503 (1964) was used as a guide in drafting the form.
- 169 (159) *Perjury, statutory* (Art. 134). The note which formerly followed this specification was deleted. That note indicated that the offense should be charged as false swearing if the matter falsely stated or subscribed was not material. The deletion is based on *United States v. McCarthy*, 11 USCMA 758, 29 CMR 574 (1960) and *United States v. Smith*, 9 USCMA 236, 26 CMR 16 (1958).
- 172 (162) *Public record, altering, concealing, removing, mutilating, obliterating, or destroying* (Art. 134). Two "(alter)" selections and one "(steal)" selection were added to conform with the description contained in the Table of Maximum Punishments, Section A, 127c.
- 174 (164) *Refusing, wrongfully, to testify* (Art. 134). Selections have been added for changing a wrongful refusal to testify before an Article 32 officer and a deposition officer. See the discussion of the reasons for making the same additions in the Table of Maximum Punishments, Section A, 127c, as discussed under changes in chapter XXV.
- 178 *Soliciting another to commit an offense* (Art. 134). This new specification was added because experience has indicated that solicitations of offenses other than those provided in Article 82 are frequently charged. No maximum punishment for this offense was provided in the Table of Maximum Punishments as the punishment should depend on the seriousness of the offense charged. Therefore, it was felt best to allow the determination of the proper maximum to be made on the basis of the circumstances in each case under the general rules applicable when a maximum is not provided in the Table. These general rules are contained in 127c(1). Compare the maximum authorized punishments in *United States v. Goodnight*, 9 USCMA 542, 26 CMR 322 (1958); *United States v. Haveriland*, 9 USCMA 621, 25 CMR 125 (1958); *United States v. Oakley* 7 USCMA 733, 23 CMR 197 (1957); with that authorized in *United States v. Wysong*, 9 USCMA 249, 26 CMR 29 (1958); *United States v. Brown*, 8 USCMA 255, 24 CMR 65 (1957).
- 182 *Transporting, unlawfully, a vehicle or aircraft in interstate or foreign commerce* (Art. 134). This new specification alleges a violation of the

Specification No.:

Dyer Act, 18 U.S.C. § 2312 (1964). See *United States v. McCarthy*, 4 USCMA 385, 15 CMR 385 (1954), which held that to constitute the offense the aircraft or vehicle must be stolen rather than merely wrongfully appropriated.

188

Wrongful cohabitation (Art. 134). This specification is a new addition. See *United States v. Melville*, 8 USCMA 597, 25 CMR 101 (1958); *United States v. Leach*, 7 USCMA 388, 22 CMR 178 (1956).

APPENDIX 7
INVESTIGATING OFFICER'S REPORT

This appendix was modified by substituting, with minor modifications therein, the form currently in use, Department of Defense Form 457, October 1969.

The only other significant change is the addition of the material contained in the block in item 18 of the form.

APPENDIX 8

**PROCEDURE FOR TRIALS BEFORE GENERAL
COURTS-MARTIAL; CONTEMPT AND REVISION PROCEDURES
FOR GENERAL AND SPECIAL COURTS-MARTIAL**

a. Trial Procedure for Article 39(a) Session. Procedure for an Art. 39(a) session held prior to assembly is provided. It may be adapted for other Art. 39(a) sessions. It is not necessary or desirable to provide a detailed procedure for the Art. 39(a) session. The specific procedure should be left to the discretion of the military judge. This appendix insures, however, that the jurisdictional facts in the case have been verified on the record prior to the taking of any action at the session. The appendix may be used by the military judge at an SPCM by amending the qualifications of counsel section and the duties of the reporter as appropriate. Even if the Secretary concerned does not allow arraignment and/or pleading at an Art. 39(a) session held prior to assembly, the military judge may inquire into the providency of a proposed guilty plea and thus shorten the post assembly procedure.

b. Trial Procedure for General Courts-Martial.

General. Because of the increasing differences as to procedure to be used by general and special courts-martial, it has become impractical to retain a single trial guide which would serve for both. Accordingly, appendix 8b provides the procedure only for trials by general courts-martial. No specific procedure is provided for the special court-martial. However, procedures for special and summary courts-martial may be provided in regulations of the Secretary of a Department and will, so far as practicable, conform to that provided in 8b for general courts-martial. See 78 and 79.

In *b*, appendix 8, language applicable only to special courts has been eliminated, and no comment is made below. Otherwise, the principal changes are discussed individually below.

Informal Inquiry. The third sentence in the note, which indicates that the military judge should verify the qualification of any individual counsel, is a new addition. This precaution could result in saving time at the trial in the event the individual counsel is not qualified.

Interpreter. The last sentence of the note is a new addition which cross references 50 for the purpose of reflecting that three types of interpreters may be used at a trial.

Unqualified IC. This is a new addition which advises the accused of possible courses of action when it is discovered that he has an unqualified individual counsel. This addition is consistent with provisions contained in 48a and 61f(3).

Explanation to accused. Revision was made requiring the military judge rather than the trial counsel, to explain the accused's rights when he is represented by a counsel who has acted in another capacity in the case. This is a more fitting duty for the military judge.

Inquiry into request for military judge alone. This portion of the procedure was added because of the provisions of the Military Justice Act of 1968 providing for trial by the military judge alone.

Request for enlisted membership. This portion of the procedure was revised by the addition of a question by the military judge which requires the defense counsel to state whether the accused has been advised of his rights to have enlisted members on the court. A new note was added which provides for the action to be taken if the accused has not been advised. See *United States v. Parker*, 6 USCMA 75, 85, 19 CMR 201, 211 (1955).

Preliminary instructions. The note contained herein is a new addition. It has been added as it is now common practice for many military judges to give preliminary instructions, and it is believed that they serve to prevent mistrials which might result from a lack of knowledge by court members.

Members sworn. The oath has been changed to agree with changes made in it in 114b.

MJ Sworn. The oath has been changed to agree with changes made in it in 114a.

Prosecution sworn. The oath has been changed to agree with changes made in it in 114c.

Defense sworn. The oath has been changed to agree with changes made in it in 114c.

Disclosing grounds for challenge. The material now contained under this subtitle was formerly contained under "challenges." The title was changed because the subjects of disclosures and challenges are now treated separately. This is consistent with treatment of these subjects in 62.

The second sentence of the note which is opposite this subtitle has been revised to conform with the new procedure provided for the withdrawal of charges and specification in 56d.

The two notes which were formerly contained under the subtitles "grounds disclosed by records" and "grounds disclosed by enlisted members" have been consolidated into one note which is now under the subtitle "grounds disclosed by members." This change was made because the procedures for handling disclosures are the same regardless of how a disclosure is made. Consolidation provides additional clarity.

Grounds disclosed by members. The second sentence of the trial counsel's announcement is a new addition which cautions court members to state only the general nature of a possible ground for challenge.

Challenges. This subtitle has been displaced for the reasons discussed above for the addition of the subtitle "Disclosing grounds for challenge." The note concerning the *procedure* for challenges has been revised in order to be consistent with the provisions of 62.

Withdrawal of charges. This portion has been completely revised. It now only consists of a cross reference to 56. The former provisions were no longer applicable in view of changes in 56.

Arraignment. The language used by the trial counsel has been revised to require the defense counsel to make a clear election on whether he wants the charges read or not. The former language often caused confusion as to who should say what and when it should be said.

Distribution of charges and specifications. This is a new subtitle which incorporates the common practice which was formerly sanctioned

in the trial counsel's statement under "waiver of reading charges." Separate treatment of this matter has been provided for purposes of clarity and because the court members should have a copy of the charges and specification even if the accused does not waive their reading. It should be noted that provision is made for earlier distribution with the consent of defense counsel. Many counsel prefer the distribution to be made before the court members are asked to disclose grounds for challenge since they sometimes refresh members on possible grounds for challenge.

End of arraignment. The military judge now calls for the pleas and gives the advice formerly given by the trial counsel as to making motions.

Motion. A new statement was added for the defense counsel whereby he simply indicates whether he has or does not have motions to be made. A statement was added to the note indicating that motions for appropriate relief are waived if they are not made prior to plea or prior to the conclusion of any Article 39(a) session held prior to assembly, whichever occurs earlier. A new note was added indicating that the military judge may hold a hearing out of the presence of the court members at this time to determine the substance of any motions and the procedures to be followed in disposing of them.

Hearing on motion. The new subtitle has replaced the former subtitle "Rulings by the LO or president on interlocutory questions," and the note contained therein was moved from immediately below to immediately above the subtitle "Ruling on the motions." Additionally, the content of the note was changed to agree with 57b, 57g(2), and 67e.

Request for hearing on guilty plea. This is new material which makes it possible to have the explanation as to a guilty plea prior to having the plea announced in open session. This will eliminate possible prejudice to an accused where the court hears a plea of guilty which is not accepted.

Pleas. The actual pleas of the accused, and consequently this subtitle, have been moved to come after the explanation of any guilty plea. "Explanation of plea of guilty," formerly listed under "Pleas," has been given the status of a separate subtitle and all material dealing with guilty pleas was incorporated under this new subtitle for purposes of clarity and orderly arrangement.

Form of explanation of plea of guilty. This is a new main subtitle. A requirement that the explanation should be conducted out of the presence of the court members was added to the note. See 70.

Consultation with DC. This is new material which is consistent with the requirement in 70.

Advice as to punishment. This material has been moved from behind to before the "general explanation" on the basis that any misunderstanding as to the punishment authorized should be resolved prior to any further explanation. It is now a part of the "form of explanation" and is no longer a main subtitle. Provision has been made to advise the accused of the maximum authorized punishment without a request from him, and the note which formerly indicated that the advice should be given on his request has been deleted. This should almost completely eliminate the withdrawal of guilty pleas which are accepted from accused who are of the opinion that the authorized punishment is other than it really is.

Effect of previous convictions. The material contained herein was formerly under the subtitle "Advice as to punishment." It is felt that the

new designation is appropriate as it makes it easier to follow the guide. Additionally, although it should be separate from the normal advice, it should immediately follow the normal advice in cases in which it is applicable. The note has also been revised to conform with the revisions in Section B, 127c.

Accused's understanding of punishment. This is a new addition which has been added as a precaution against withdrawal of guilty pleas subsequently in the trial when an erroneous understanding of the punishment is brought out.

General explanation. This portion has been modified to conform with the new treatment of this subject in 70b(2) and (3).

Additional explanation. This is a new note which sanctions the current practice.

Acceptance of guilty plea. This announcement by the MJ is new to the guide, but it is common practice. The military judge by advising the defense counsel of his decision as to accepting or rejecting the guilty pleas makes it possible for the defense counsel to present added argument and authority prior to terminating the hearing, if he desires to do so.

Legal authorities. This subtitle and all material relating thereto has been completely deleted. There is no set time at which counsel may present legal authorities, and it is usually done at those times when it is necessary to support specific legal arguments which are usually conducted out of the hearing of the court members. See *United States v. Johnson*, 9 USCMA 178, 25 CMR 440 (1958).

Presentation of prosecution case. That portion of the note has been deleted which previously indicated that the prosecution could make reference to a confession in the opening statement. It has been replaced by a cross reference to 44g(2) on the ground that it is better practice to cite the general rules applicable to opening statements rather than giving a specific illustration.

Oral stipulation. The word "oral" has been added to the subtitle designation since the material contained therein relates to the proper disposition of oral stipulations. Written stipulations are provided for later in the guide.

Examination by the court. The next to last sentence of the second paragraph of the note is a new addition which provides that both sides are permitted cross-examination when new matter is developed through examination by the court. This is in accordance with the provisions of 149b(3).

Argument on objections. A cross reference to 57g(2) has been added for reference to a discussion of when these arguments are conducted before the members of the court or out of their presence.

Admission of evidence for limited purpose. This is a new addition which is based primarily on the provisions of 57a(2).

Contempt procedure. This subtitle and its note were deleted as serving no useful purpose.

Description of article for the record. The second note, which previously provided that an offered exhibit not admitted in evidence is attached to the record on request, has been modified to require attachment of the article or a suitable substitute for all exhibits marked for identification, whether or not admitted. This conforms with the requirement in

54d. The third note, concerning the transcription of exhibits read to the court, is a new addition.

Authenticated official records and banking entries. This has replaced the former subtitle "depositions and authenticated official records." The material opposite this subtitle now relates only to the matters included in the subtitle that no longer deals with depositions. The nature of official records and banking entries dictate that they be discussed jointly (see 143b(2) and (3)), and depositions are properly included in the next subtitle which is discussed immediately below.

Written stipulations and other admissible documentary testimony. This note is a new addition. The proper procedure for handling written stipulations of facts or of the content of a writing is set forth in accordance with 154b. The note also sets out the proper procedure in regard to testimony admissible in documentary form. See 145.

Confessions and admissions. The portion of the first sentence of the note concerning an admission is a new addition based on *Miranda v. Arizona*, 384 U.S. 436, 476-477 (1966). The remainder of the note has been revised to make it discretionary with the military judge as to whether any inquiry or explanation is conducted concerning the accused's right to testify as to a pretrial statement. It is also provided that any inquiry or explanation will be made out of the hearing of the court members. These new provisions are consistent with 53h.

Explanation of accused's right to limit his testimony. The word "circumstances" have been deleted at the end of the subtitle. This was done as the explanation by the military judge has been modified to include the right of the accused to contest that he in fact made the statement in addition to testifying as to the circumstances surrounding the taking of the statement. This is consistent with the provisions of 140a.

Excluding members. This note has been substantially modified to reflect current law and practice and new provisions of the Manual as cited in the note.

In-court conference. The note has been revised to require the military judge to state at the outset of the conference whether it will be recorded and included in the record. The military judge's statement at the conclusion of the in-court hearing has therefore been deleted as no longer necessary.

Out-of-court hearing. This subtitle has been substantially revised. The note has been modified to explain when an in-court conference or out-of-court hearing is the proper procedure. The subtitles "opening of hearing," "conduct and recording of hearing," and "termination of hearing" and appropriate material have been added under this subtitle. These replace the former subtitles "recording out-of-court hearing" and "recording presentation of additional instructions" and the material contained therein which is no longer applicable because of the requirements in 57g(2) for recording and incorporating out-of-court hearings in the record of trial.

Accounting for personnel after adjournment or recess. The last sentence of the note has been modified to require recording of the reason for the absence of the court members as required by 41d(4).

Absence of member. This is a new addition which provides the proper procedure when a member is absent after assembly. See 37b.

Reading of record. The first statement by the military judge has been modified to provide in accordance with 41e that only that part of the record heard previously by the court members will be read to the new member.

Motion for a finding of not guilty. This is a new subtitle. It was considered better practice to discuss this motion at that point in the proceedings where it may first be made rather than immediately after arraignment with the other motions that are normally made at that time.

Accused as a witness. The statement of the defense counsel has been modified so that it is made only when the accused elects to testify rather than then and also when he elects to remain silent. Additionally, the statement makes no mention of the rights of the accused to testify having been explained to him since this is normally assumed at a general court-martial as the accused is represented by legally qualified counsel. See 53*h*. Added to this statement by the defense counsel is a statement indicating whether or not the accused's testimony will be limited to certain specifications or charges.

Explanation of rights of accused to testify (findings). The first note has been completely revised to indicate that it may be assumed that the accused has been correctly advised of these rights, and by deletion of the requirement that an affirmative showing be made on the matter. The new provisions are consistent with 53*h*.

Recall and reopening the case. This is new material which has been added on the basis of provisions in 149*a*.

Witness called by court. The first paragraph of the note has been modified by the deletion of all reference to special court-martial and by rewording in the terms of 54*b*. Also deleted from this note is the former statement that the military judge does not rule finally when the court requests a witness expected to testify in relation to the sanity of the accused. See *United States v. Borsella*, 11 USCMA 80, 28 CMR 304 (1959); *United States v. Frye*, 8 USCMA 137, 23 CMR 361 (1957).

The content of the second paragraph of the note is basically unchanged, but it has been stated in more detail.

Hearing on instructions. This material is a new addition based on 73 and the common practice which is sound.

Arguments by counsel. The fourth sentence of the first note, formerly indicating that the counsel could argue the law of the case on the findings, has been modified to indicate that they may argue the facts as they relate to the law. The provisions of 72*b* bar counsel from citing legal authorities or the facts of other cases in arguing on the findings. The reason for these provisions is that the court receives its instructions on the law only from the military judge. The modification removes the conflict with these provisions. It is common practice, and not objectionable, for the counsel to state that the military judge will instruct what the law is on a certain point and then relate this law to the facts involved in the case.

Charge to court. This portion of the guide has been substantially revised. It is now divided into two notes which separately deal with instructions in guilty and not guilty plea cases. The guilty plea note is derived from 73*a*. The not guilty plea note is based on the requirements expressed generally throughout 73. The changes are necessitated by the great change in the concept of instructions since preparation of the 1951 trial guide. The matter of additional instructions is discussed in broad generalities because of the great variation in instructions required from case to case. However, it is anticipated that the military judge will apply sound discretion in determining what additional instructions are required in light of the circumstances in each case. The verbatim listing of the

charge contained in Article 51(c) has been deleted since it is also quoted verbatim in 73b.

Closed session. The first portion of the note formerly indicated only that the courtroom was cleared for deliberation and voting on the findings. The note has been modified to also indicate that the members of the court may retire to another room for this purpose. This is a common practice which is considered desirable. The examples as to when the court may ask for additional instructions have been deleted. These were formerly contained in the last sentence of the note. They are no longer necessary since the members do not have access to the Manual (53d) and examples are contained in 74e.

Voting on findings. Only the first sentence has been retained from the former note. The remaining material has been replaced by a cross reference to 74. It is no longer necessary to include a detailed discussion of the method of voting, the number of votes required, and the rules applicable to reconsideration since 53d bars the court members from access to the Manual. For the same reason the subtitle "Voting procedure" and the material contained therein has been deleted.

MJ called after findings made. All of the second paragraph of the note after the second sentence, has been revised. A provision has been added for the proper procedure when the military judge decides that additional instructions are required after examination of the findings in this manner. Under this provision he must advise both sides of the circumstances requiring additional instructions. A failure to do so could well constitute a private communication to the court. See *United States v. Linder*, 6 USCMA 669, 20 CMR 385 (1956).

MJ alone. Material related to conviction or acquittal by MJ alone has been added.

Evidence of previous convictions. This material has been revised to require that admissible evidence of previous convictions be marked, offered, and admitted in the same manner prescribed for other documentary evidence. *United States v. Carter*, 1 USCMA 108, 2 CM R14 (1952). Also see 75(2).

Summary of information from personnel records for sentencing purposes. This is a new note to implement the provisions of 75d.

Rights of accused (sentence). The first note has been revised to indicate that it may be assumed that the accused has been correctly advised of his rights on sentence, and by deletion of the requirement that an affirmative showing be made on this matter. These changes are consistent with the provisions of 53h. The second note no longer requires that a written statement of the accused or his counsel on sentence be quoted verbatim in the record. The requirement now is only that it be attached to the record as an exhibit. The former requirement results only in unnecessary work and duplication.

Arguments (sentence). This is a new addition which is based on 75e.

Sentence instructions. This is a new subtitle. The material contained in the note is based on 76b(1). It is patterned after the treatment afforded to instructions on the findings. See "Charge to court," above.

Court closed for sentence. This note has been completely revised. It has been indicated that the court members may conduct their closed session in another room as well as in the cleared courtroom. As previously discussed under "Closed session," above, this is a common and desirable

practice. A provision for additional instructions is provided in the last sentence of the note in accordance with 76b(4).

Voting on sentence. All material previously contained in the note has been deleted in favor of a cross reference to various subparagraphs in 76. It is no longer necessary to include a detailed discussion of the method of voting, the number of votes required, and the rules for sentence reconsideration since 53d bars the members from access to the Manual.

Improper sentence. This is a new addition which is based on 76c.

c. Contempt Procedure.

Voting on preliminary ruling. The last sentence of the note has been changed to indicate that a tie vote is a determination in favor of the person involved rather than against him. This is consistent with 118b.

Closed session. A provision has been added to this note requiring the law officer, or the president of a special court-martial, to give the court any necessary instructions prior to their entry into closed session. See 118b.

d. Revision procedure.

Proceedings in revision. An addition has been made to the trial counsel's statement of persons present which will also indicate any person present in an official capacity who was not present when the court adjourned. This is consistent with 80b which permits a member of the prosecution or defense to be present who was previously absent during the trial. Accordingly, the words "unless they are now present" has been added at the end of the first sentence of the note. The third sentence of the note, based on 80b, is a new addition, which indicates that valid proceedings may be conducted when a quorum is present, if any absent members has been properly excused.

Directed by. The note has been revised to indicate that the military judge, or the president of a special court-martial, gives the court necessary instructions and that the court requests any additional instructions needed from him. Previously the note provided for instructions by both the military judge and trial counsel, but only upon request of the court. The modification is consistent with provisions in 80c.

New findings. This was formerly a portion of the subtitle "New findings and sentence." The new subtitle has been used because it is considered appropriate to divide the former material into two separate subjects. The announcement of the new findings has been changed by dropping the reference to majority vote and substituting material requiring that the vote on the new findings is concurred in by two-thirds or all of the members. This change is necessitated because the former provisions conflicted with the reballoting requirements contained in 74d(3). The note under the announcement, making simply a cross reference to *a*, appendix 8, is a new addition.

New sentence. This subtitle is new. It has been added for the reason indicated above for adding the subtitle "New findings."

Adherence to former action. This is a new subtitle, but the president's announcement remains basically unchanged.

e. Form for Request for Trial Before Military Judge Alone. This form insures that the statutory requirements of knowing the identity of the MJ and consulting with counsel are met. In addition, it insures that an en-

listed accused is aware that he may have enlisted persons included in the membership of the court.

The trial counsel is allowed to request argument if he desires to oppose the request for any reason. This also serves as a convenient means for informing trial counsel of the existence of a request. For form of request for trial by judge used in Federal Courts, see 325 F2d 632.

f. Sample Format for Special and General Findings. See 74i. For form of special findings used in Federal Courts, see *Federal Practice and Procedure*, by Barron and Holzoff, section 4623.

g. Summary. This appendix specifies the authentication format for summaries of personal records admitted for sentencing under 75d.

APPENDIX 9

GUIDE FOR PREPARATION OF RECORD OF TRIAL
BY GENERAL COURT-MARTIAL AND BY SPECIAL COURT-MARTIAL
WHEN A VERBATIM RECORD IS PREPARED

a. Record of Trial.

Index; Witnesses; and Exhibits. The itemized listings under these subtitles were deleted and replaced by a note indicating that these details will be left to other publications. This provides greater flexibility in making changes.

Out-of-court hearings and Article 39(a) sessions. This note is a new addition.

e. Arrangement of Original Record With Allied Papers. The itemized listing of these papers was deleted in favor of leaving this matter to other publications. This also provides greater flexibility for making changes.

APPENDIX 10

**GUIDE FOR PREPARATION OF RECORD OF TRIAL BY
SPECIAL COURT-MARTIAL WHEN A VERBATIM RECORD IS NOT PREPARED**

a. Record of Trial With a Military Judge. This appendix is new and results from the provision of the Military Justice Act of 1968 authorizing the detail of military judges to special court-martial. The appendix indicates how Article 39(a) sessions will be summarized and provides for those situations which are unique to trial with a military judge, such as request for trial by military judge alone. In other respects it is similar to Appendix 10b, below.

b. Record of Trial by Special Court-Martial Without a Military Judge.

Inquiry concerning Article 38(b). This section is new and is a result of the decision of the Court of Military Appeals in *U.S. v. Donahew*, 18 USCMA 149, 39 CMR 149 (1969).

Enlisted membership. The second sentence, pertaining to the defense counsel's announcement as to enlisted membership, is a new addition.

Challenge. The first sentence, regarding the right of each accused to challenge, is a new addition.

Convening authority identified. This is a new addition.

Instructions (findings). This was modified to indicate that besides giving the Article 51(c) charge, the president also gives the other instructions required by paragraph 73 of the Manual.

Data as to service, etc. The portion pertaining to the admission of previous convictions was changed to indicate that they are offered and admitted in the same manner as other documentary evidence. See 75b(2).

Instructions on sentence. This is also a new addition.

Action. This portion is also a new addition.

c. Arrangement of Original Record With Allied Papers. The itemized listing of these papers was deleted in favor of leaving this matter to other publications. This provides greater flexibility in making future changes.

APPENDIX 11

FORM FOR RECORD OF TRIAL BY SUMMARY COURT-MARTIAL

This appendix was changed by modifying the form currently in use, Department of Defense Form 458, October 1969, in accordance with the Military Justice Act.

APPENDIX 12

TABLE OF COMMONLY INCLUDED OFFENSES

In general, appendix 12 follows the format of appendix 12, MCM, 1951. The note at the beginning contains some new material. It sets forth a definition of an included offense and why it is important to determine an included offense. The caution concerning the use of the table, which was in the first paragraph of the note, MCM, 1951, was accomplished in the last paragraph of the note. The limitations of the table stated in the second and third paragraphs of the note in the MCM, 1951 were incorporated in the second paragraph.

In the table, false swearing was deleted as an offense included in perjury. See *United States v. Smith*, 9 USCMA 236, 26 CMR 16 (1958). The former last entry in the table was also deleted. It concerned worthless check offenses. The entry under Article 123a was substituted for the deleted entry. These changes were previously made in the Manual by Exec. Order No. 11009, 27 Fed. Reg. 2585 (1962). Assault and battery was added throughout to those offenses which might include a battery. Additional significant additions to the table are shown in the chart on the following pages.

Article	Offense Charged	Article	Included Offense	Authority
87	Missing movement through design.	86	Absence without authority.	<i>United States v. Bridges</i> , 9 USCMA 121, 25 CMR 383 (1958)
87	Missing movement through neglect.	86	Absence without authority.	<i>United States v. Posnick</i> , 8 USCMA 201, 24 CMR 11 (1957)
89	Disrespect toward superior officer.	117	Using provoking or reproachful speech.	ACM 7678, <i>Nicolas</i> , 14 CMR 683 (1954)
90	Drawing or lifting up a weapon or offering violence to superior officer in execution of his office.	128	Assault, assault with dangerous weapon, assault upon a commissioned officer.	CM 365376, <i>McGuire</i> , 12 CMR 432 (1953)
90	Willfully disobeying lawful order of superior officer.	89	Disrespect to superior officer.	ACM 9632, <i>Luckey</i> , 18 CMR 604 (1954)
91	Striking warrant, noncommissioned, or petty officer in execution of his office.	128	Assault or assault and battery with dangerous weapon.	CM 361544, <i>Rhea</i> , 10 CMR 268 (1953)
91	Assault upon warrant, noncommissioned, or petty officer in the execution of his office.	128	Assault with dangerous weapon.	CM 361544, <i>Rhea</i> , 10 CMR 268 (1953)
91	Treating with contempt or being disrespectful in language or deportment toward warrant, noncommissioned, or petty officer in execution of his office.	117	Using provoking or reproachful speech.	See ACM 7678, <i>Nicolas</i> , 14 CMR 683 (1954)
94	Mutiny—Refusal to obey orders from proper authority in concert with others with intent to override military authority.	90 91	Willful disobedience of commissioned officer. Willful disobedience of warrant, noncommissioned, or petty officer.	CM 365692, <i>Verdone</i> , 13 CMR 468 (1953) <i>United States v. Woolbright</i> , 12 USCMA 450, 31 CMR 36 (1961)

Article	Offense Charged	Article	Included Offense	Authority
94	Mutiny—Creation of violence or disturbance in concert with others, with intent to override military authority.	116 134	Riot. Disorderly conduct.	<i>United States v. Duggan</i> , 4 USCMA 396, 15 CMR 396 (1954) See NCM 312, <i>Red Bird</i> , 15 CMR 569 (1954) and the included offense as to Article 116
94	Sedition.	134	Disorderly conduct.	See the included offense as to Article 116
99	Cowardly conduct.	86(3) 99	Absence without authority. Running away before the enemy.	<i>United States v. Hallett</i> , 4 USCMA 378, 15 CMR 378 (1954) <i>United States v. Parker</i> , 3 USCMA 541, 13 CMR 97 (1953)
120	Rape.	120 134	Carnal knowledge. Taking indecent, lewd, and lascivious liberties with a female.	See <i>United States v. McVey</i> , 4 USCMA 167, 15 CMR 167 (1954); cf. CM 392172, <i>Mosby</i> , 23 CMR 425 (1957) <i>United States v. Headspeth</i> , 2 USCMA 635, 10 CMR 133 (1953)
120	Carnal knowledge.	134	Indecent acts or liberties with a female under 16.	ACM 7576 <i>Wilson</i> , 14 CMR 557 (1953)
122	Robbery.	128 128	Assault with a dangerous weapon. Assault intentionally inflicting grievous bodily harm.	<i>United States v. Craig</i> , 2 USCMA 650, 10 CMR 148 (1953) <i>United States v. King</i> , 10 USCMA 465, 28 CMR 31 (1959)
125	Sodomy.	134 134	Indecent, lewd, and lascivious acts with another. Assault with intent to commit sodomy.	CM 368036, <i>Jones</i> , 13 CMR 420 (1953) <i>United States v. Morgan</i> , 8 USCMA 341, 24 CMR 151 (1957)
127	Extortion.	134	Communicating a threat.	See <i>Jeffers, The Military Offense of Communicating a Threat</i> , 15 Mil. L. Rev., 23, 41 (1962)
128	Assault upon a commissioned, warrant, noncommissioned, or petty officer of the Air Force, Army, Coast Guard, Navy, or a friendly foreign power, not in the execution of his office.	128	Assault; assault and battery.	CM 365376, <i>McGuire</i> , 12 CMR 432 (1953)
128	Assault upon any person who, in the execution of his office is performing air police, military police, shore patrol, or civil law enforcement duties.	128	Assault; assault and battery.	CM 394588, <i>Whitehead</i> , 23 CMR 555 (1957)
134	Assault, indecent.	128	Assault; assault and battery.	<i>United States v. Kluttz</i> , 9 USCMA 20, 23, 25 CMR 282, 285 (1958)
134	Assault with intent to commit voluntary manslaughter.	128 128	Assault with a dangerous weapon. Assault intentionally inflicting grievous bodily harm.	<i>United States v. Berry</i> , 6 USCMA 638, 20 CMR 354 (1956) <i>United States v. Malone</i> , 4 USCMA 471, 16 CMR 45 (1954)
134	Assault with intent to murder.	134	Willful or careless discharge of a firearm.	<i>United States v. Mundy</i> , 2 USCMA 500, 9 CMR 130 (1953)

Article	Offense Charged	Article	Included Offense	Authority
134	False or unauthorized military or official pass, permit, discharge certificate, or identification card, possessing with intent to deceive.	134	False or unauthorized military or official pass, permit, discharge certificate, or identification card, possessing without intent to deceive.	<i>United States v. Burton</i> , 13 USCMA 645, 33 CMR 177 (1963)
134	Impersonating an officer, warrant officer, noncommissioned or petty officer, or agent of superior authority with intent to defraud.	134	Impersonating an officer, warrant officer, noncommissioned or petty officer, or agent of superior authority without intent to defraud:	<i>United States v. Collymore</i> , 11 USCMA 66, 29 CMR 482 (1960)
134	Mails, taking, opening, abstracting, secreting, destroying, stealing, or obstructing.	121	Larceny; wrongful appropriation.	See <i>United States v. Dicarrio</i> , 8 USCMA 353, 24 CMR 163 (1957)
134	Communicating a threat.	117	Using provoking speeches.	<i>United States v. Hazard</i> , 8 USCMA 530, 25 CMR 34 (1957)

APPENDIX 13

FORMS FOR SENTENCES

General. This appendix has been modified substantially. It is now divided into three main paragraphs. The major changes are that the appendix has been modified so as to more closely follow the pattern of forms currently used in trials, to provide a form that is more easily adaptable to use as a sentence work sheet, and to do away with the use of forms which combine punishments.

Paragraph *a* opens with the introductory remarks of the president in announcing the sentence. It is common practice to include this on the sentence work sheets actually used by the court. Thereafter, in this paragraph, there is an explanation of the use of the forms in paragraph *c* to include the modification of those forms and their use in combination which was previously covered in the first introductory sentence of the former appendix 13. *Examples* of the proper method of announcing sentences containing combined punishments are then given. This approach, coupled with only setting out single punishment *forms* in paragraph *c*, eliminates several objections in regard to the forms contained in the appendix in the 1951 MCM. For instance, the use of *examples* for combined punishments eliminates the inference contained in the prior appendix that certain punishments should be combined, such as that other punishments should be included with punitive separation. Also, there is no longer an inference that only the combined punishments set out in the appendix are permissible. Of course, almost any combination may be made as explained in paragraph *a*. Because of the many combinations possible, it would be impracticable to attempt to set them all out in this appendix.

As to the examples of combined punishments in paragraph *a*, the first was adapted from the prior form 9 but the reduction provision is a new addition thereto; the second was adapted from the prior form 10*a*; the third was adapted from the prior form 20; and the fourth is a new innovation. The combined punishments formerly designated as forms 7, 10*b*, 23 have not been used in this appendix on the basis that they are unnecessary in the approach taken in the modification. Accordingly, the former footnote 8 to the prior form 10*b* which cross referenced 127*c* and Articles 18 and 19 was deleted as no longer applicable.

The forms for suspension from duty, command, or rank, previously designated as forms 15, 16, and 17, have not been used as these are no longer authorized punishments. See 126*i*. Accordingly, the former footnote 11 to these forms was not used as it therefore became no longer applicable.

b, appendix 13, provides a new section which provides forms of sentencing for use by the MJ sitting alone.

EXPLANATION OF CONTENTS OF PARAGRAPH *c*, SINGLE PUNISHMENT FORMS. This paragraph has been organized by group-

ing single punishment forms under five main categories to provide for easier use. The contents of each category are discussed individually below.

For punitive separation. Forms 1, 2, and 3 are new in that they were not previously listed as single punishment forms. However, they were included in the combined punishment forms previously designated as forms 9, 10a, 10b, 20, and 23. Footnotes 1 and 2 are new additions which were added for the convenience of the user. Footnote 3 was formerly 14, but the words "and commissioned warrant officers" were added in the interest of clarity.

Pertaining to deprivation of liberty or death penalty. The note in the body was formerly the last sentence of the introductory remarks to this appendix.

Form 4 was previously Form 14 and footnote 4 was previously footnote 10.

Form 5 is unchanged in number or content, but footnote 5 thereto was previously footnote 3.

Form 6 is unchanged except that "[the length of your natural life]" has been added. The addition was previously contained in the combined form designated as form 23. Footnote 6 is a new addition which was added for the user's convenience. The former footnote 4 which pertained to confinement at hard labor has been deleted on the basis of *United States v. Varnadore*, 9 USCMA 471, 26 CMR 251 (1958). That footnote indicated that a sentence to confinement could not exceed 6 months unless a dishonorable or bad-conduct discharge was also adjudged.

Form 7 was adapted from the prior form 8. However, all reference to solitary confinement has been deleted on the basis of *United States v. Stiles*, 9 USCMA 384, 26 CMR 164 (1958). Also, this form has been changed so that the diminished rations selection no longer includes "to wit: two full meals per day." This was deleted because the last paragraph of 125 now indicates that the ration to be furnished under this punishment is to be specified by the authority who administers the punishment. Footnote 7 was previously footnote 5, but it has been corrected to reflect changes in the text which provide that these punishments may not be imposed in excess of 3 days and may only be imposed on enlisted members attached to or embarked in a vessel and which removed the limitation prohibiting imposition on Army and Air Force personnel.

Form 8 was previously form 24 and the content is unchanged.

Pertaining to financial penalty. The subject matter of the note in the body was formerly covered in the second sentence of the introductory remarks to this appendix. However, it has been changed, to indicate that financial penalties should be expressed in even dollars. This is consistent with changes in 126h(1). Accordingly, the forms herein have been changed so as to no longer provide a space for expressing these punishments in cents.

Prior forms 1 and 3 have not been used because it is desirable to have detentions and forfeitures expressed in number of months even if it be for just one month. These forms have led to improperly announced sentences in a number of cases by causing courts to announce other than the sentence intended and arrived at.

Form 9 was previously form 2 but it has been modified to require an announcement of how long the money shall be detained. See 126h(4). Footnote 8 was formerly footnote 1, but it has been corrected to be

consistent with changes in the text. Accordingly, the provision that detention of pay is only authorized in the case of enlisted persons has been deleted (126h(4)). Also, the cross reference to 127b was deleted because deletions therein made it no longer applicable.

Form 10 was previously form 4, but it has been changed by the addition of "(all pay and allowances)" which was formerly contained in the combined forms of punishment in forms 9, 10b, 20, and 23. Footnote 9 combines the information formerly contained in footnotes 2, 6, and 7, but it has been corrected to compensate for changes in the text by deletion of the cross reference to 127b which was formerly contained in footnote 2.

Form 11 combines the provisions of the prior forms 21 and 22 into one form. Footnote 10 was previously footnote 15.

For reduction in grade or loss of numbers, lineal position, or seniority. Forms 12, 13 and 14 were previously designated as forms 11, 18, and 19 respectively. Footnote 11 was formerly footnote 9, but the former cross reference to 126c(2) has been changed to 16b to compensate for changes in 126c(2). Footnotes 12 and 13 remain unchanged in number and content.

Admonition and reprimand. Forms 15 and 16 were previously forms 12 and 13. Footnote 14 is a new addition which was added for the user's convenience.

APPENDIX 14

FORMS FOR ACTION BY CONVENING AUTHORITY

Editorial changes were made throughout, and the forms were renumbered as necessitated by substantive changes discussed below.

Forms 3, 4, 29, 30, 35, 36, 48, 49 are new and deal with deferral of services of confinement and rescission of such deferral. See 88*g* and *f*.

Form 6 in the former Manual read as follows: "Approved and suspended." This form was deleted as indefinite suspensions are no longer authorized. See 88*e*(1) and 88*e*(2)(*a*). Similarly, the forms now designated as 18, 19, 30, and 41 were modified by removing indefinite suspensions as possible selections.

Form 26 is new. It provides for approval of findings when there is a rehearing as to sentence only.

Form 28 is new. It provides commutation of a punitive discharge to confinement.

The last example of the note under the form now designated as form 32 has been modified so as to no longer indicate that the power to defer forfeitures is limited to deferral until the sentence is ordered executed. The same change was made in the note under form 41 and in form now designated as form 41. See the second paragraph of the discussion of changes made in 88*d*(3) of chapter XVII.

The forms now designated as 33 and 46 were modified by deleting the entries which permitted the selection of administrative suspension of a punitive discharge until release from confinement or completion of appellate review, which ever was later. *United States v. Cecil*, 10 USCMA 371, 27 CMR 445 (1959); *United States v. May*, 10 USCMA 358, 27 CMR 432 (1959).

Form 44 (formerly 37) was changed to provide for commutation of a punitive discharge to additional confinement. The form formerly included a recommendation for commutation, which was deleted because the convening authority is empowered to commute. See 88*a* and *c*.

The material in *d* is substantially the same as that which appears in *Manual for Courts-Martial, United States, 1951*, app 14 (Addendum, 1963).

APPENDIX 15

FORMS FOR COURT-MARTIAL ORDERS

The second sentence of the first note under section *b* was changed to be consistent with 107 by substituting "an appropriate convening authority" for "the convening authority." Also, in the last sentence of this note, the words, "and there has been no modification of the findings," were inserted in order to require a supplementary order when a board of review modifies the findings but affirms the sentence without change.

In all forms in section *b*, the words "Commandant _____ Naval District" were substituted for "U.S.S." because commanding officers of commissioned vessels of the Navy do not issue court-martial orders in Articles 66 and 67 type cases.

In the one form contained in section *c*, "(suspended)" was deleted as an example of an appropriate choice as indefinite suspensions are no longer authorized. See 88e(1) and 88e(2)(a).

In the next to the last sentence of the note under section *e*, "an appropriate convening authority" was substituted for "the officer who took action" to be consistent with Article 72(e).

The words "Commandant _____ Naval District" were added to the last form in section *e* for consistency with changes made in section *b*.

Forms have been provided for deferral of service to confinement and rescission thereof.

APPENDIX 16
RECORD OF PROCEEDINGS TO VACATE SUSPENSION

The previous form was replaced by the form currently in use, Department of Defense Form 455, October 1969.

APPENDIX 17
SUBPOENA FOR CIVILIAN WITNESS

This appendix was modified to no longer infer that it is the general practice to conduct general courts-martial trials aboard ship. No other significant substantive changes were made.

Pam 27-2

By Order of the Secretary of the Army:

Official:

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Major General, United States Army,
The Adjutant General.

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General, United States Army,
Chief of Staff.

Distribution:

In accordance with special list.