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WAR DEPARTMENT TECHNICAL MANUAL

MILITARY JUSTICE PROCEDURE

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For explanation of symbols, see FM 21–6.

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FOREWORD

This manual is a practical guide to court-martial and military justice procedure. It is not a substitute for the Manual for Courts-Martial but is intended as an aid in using that book. The Manual for Courts-Martial is a legal work, covering comprehensively, but concisely, the basic law and procedure of military justice. However, officers need to know not merely the legal principles but how to apply them practically in a given situation, what to insert in the blanks on the first page of a charge sheet, for example, or how to state to an accused the effect of his plea of guilty, or how to draft a court-martial order where several accused have been tried jointly. It is to answer such questions as these that this manual is designed. Accordingly, it contains numerous appendices, containing a "step by step" outline of trial procedure, a specimen record of trial by general, special, and summary courts martial and examples of all other papers and forms commonly encountered in court-martial procedure.

The possible duties which an officer may be required to perform in connection with the administration of military justice are numerous and varied, as for instance, imposition of punishment under AW 104, serving as trial judge advocate or as summary court, or even as reviewing authority. Doubtless no one officer will have to perform all these tasks. Since any officer, however, may from time to time be called on to serve in several different capacities, this manual touches on most of the phases of military justice procedure from the initial question "Is any punishment required?" to the final action to be taken on a completed case. Some of the material is necessarily legal and technical in nature, such as the discussion of the rules of evidence or the powers of reviewing authority. Although all officers other than members of the JAGD will not have to deal with such matters, some must have knowledge of these and other technical aspects of the court-martial system. These subjects are covered as simply as possible and practical examples and forms are furnished.

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CHAPTER I

GENERAL

1. MILITARY JUSTICE AND THE ARTICLES OF WAR. a. In general. Military Justice is the system for enforcing discipline and administering criminal law in the Army. If an Army is to be anything but an uncontrolled mob, discipline is required and must be enforced. In civilian life, every citizen is subject to many laws ranging from local ordinances to federal statutes. If he breaks those laws, he may be tried in the criminal courts and punished. So also in the Army, there are rules governing the conduct of military personnel and providing a method by which persons who break those rules may be punished. They are contained in the Articles of War, statutes enacted by Congress in the exercise of the power which the Constitution gives it "to make rules for the government of the land and naval forces."

b. History of the Articles of War. The present Articles of War were enacted by Congress in 1920, and amended in a few particulars since that date. In all armies, it has been necessary to have similar rules and some system of enforcing those rules through military authorities. In this country, regulations for the government of the Army have been continuously in force since the time of the Revolution, existing even before the colonists declared their independence and long before the Constitution itself was adopted. On June 4, 1775, the Second Continental Congress appointed a committee, of which George Washington was chairman, to "prepare rules and regulations for the government of the Army," and the first Articles were adopted on June 30, 1775, 3 days before George Washington took command of the Continental Army. Those Articles were patterned largely on the British Articles then in force, which in turn were derived from earlier Articles traceable back through the seventeenth century to the middle ages. The system of military justice is, therefore, the product of centuries of experience in many countries. While retaining the substance which history has proved sound, nevertheless our Articles of War are not mere relics of the past. Congress has periodically reconsidered and revised them in the light of new experience. The original Articles adopted in 1775 were completely revised in 1776, 1786, 1806, 1874, 1916, and finally in 1920, and there have been many minor changes at other times.

c. **Nature of the Articles of War.** The present Articles of War consist of a series of articles numbered from 1 to 121, each being referred to in this manual as AW. Forty-three of these (AW 54 through 96) describe various crimes and offenses and how they shall be punished. These are known as the "punitive articles." Most of the remaining articles deal with the procedure by which the punitive articles are to be enforced. They provide for a system of courts-martial and establish the procedure of such courts in general. There are also miscellaneous provisions not dealing with military justice but with other aspects of military service, such as courts of inquiry, separation from the service, rank and precedence, and deceased persons.

2. CRIMES AND OFFENSES. The crimes and offenses made punishable by the punitive articles (AW 54 through 96) may be divided into three general groups. First, the crimes with which every one is familiar, such as murder and rape (AW 92), arson, burglary, larceny, and sodomy (AW 93) and frauds against the United States (AW 94). Second, the offenses which are strictly military in nature, arising out of military duties and having no counterpart in civilian life, of which desertion (AW 58), willful disobedience of lawful orders of superior officers and noncommissioned officers (AW 64, 65), misbehavior before the enemy (AW 75) and sleeping on post (AW 86) are examples. Third, there are two articles (AW 95 and 96) which do not specify particular acts of misconduct, but cover a variety of transgressions in broad and general terms. AW 95, which applies only to commissioned officers and to cadets at the United States Military Academy, makes punishable any "conduct unbecoming an officer and a gentleman"—i. e., any acts which are morally unfitting and unworthy of a man of honor. Examples of offenses under this Article are making false official reports, breaches of trust, fraudulently passing bad checks, and drunkenness of a gross and disgraceful nature. AW 96 applies to all persons subject to military law. It makes punishable (1) disorders and neglects which are directly prejudicial to good order and the maintenance of military discipline; (2) conduct tending to bring discredit on the military service; and (3) the commission of crimes or offenses not capital denounced in federal laws other than the Articles of War. The purpose of this general article is to cover offenses not expressly made punishable in the more specific Articles and thus to prevent the possibility of a failure of justice. In practice, perhaps, a greater number of charges are based upon this Article than upon any other. A detailed discussion of the punitive articles would be out of place in this manual which is intended to cover only the procedure of military justice. Such a discussion, together with the facts which must be proved to establish the various offenses, will be found in chapter XXVI, MCM. In every case before attempting to decide whether a particular offense has been committed, the pertinent paragraph in that chapter dealing with the offense in question should first be carefully studied.

3. AGENCIES THROUGH WHICH CRIMES AND OFFENSES PUNISHED. a. In general. Having defined the various offenses and authorized punishment for them (AW 54 through 96), Congress provided the means whereby that punishment could be imposed. It established the system of courts-martial to try offenders, and conferred upon commanding officers a disciplinary power to impose limited punishment for minor offenses without trial. The exercise of such disciplinary power by commanding officers is considered fully in chapter 3, *infra.*

b. Nature of courts-martial. A court-martial is a court composed of one or more commissioned officers (the number depending upon the class of court), the function of which is to decide whether a person subject to military law has committed a violation of the Articles of War and, if it finds him guilty, to adjudge punishment for the offense. It is an instrumentality through which military authorities enforce discipline and punish offenders. Unlike the criminal courts of a state or the United States, it is not a permanent judicial body. It comes into existence only when ordered by competent military authority, its members are selected by the officer who appoints it; and its sentences are carried out only when the authority who appointed it, or in some cases like or higher authority, so orders. It is, however, a court of law and justice, determining each case only after hearing witnesses and receiving evidence. Similarly it is bound by certain rules of evidence and the fundamental principles of criminal law, and is empowered to adjudge only such sentences as the Articles of War permit.

c. Classes of courts-martial. There are three classes of courts-martial: (1) The highest court, known as a general court-martial, consisting of at least five officers as members (one of whom is designated as law member), together with a trial judge advocate (the prosecuting attorney), an assistant trial judge advocate, a defense counsel, and an assistant defense counsel. It has power to try any person subject to military law for violation of any Article of War. It may impose any authorized punishment from a mere reprimand to dishonorable discharge, dismissal, life imprisonment, or even death itself. (2) An intermediate court known as a special court-martial, consisting of at least three officers as members, together with a trial judge advocate and defense counsel. It may try any person subject to military law from a warrant officer down to a private. It is more limited as to the offenses it can try and the punishment it can impose than a general court. (3) The lowest court, known as a summary court-martial, consisting of but one officer who performs the functions of court, trial judge advocate and defense counsel. It is narrowly limited as to the persons it can try and as to the punishments it can impose. Only relatively minor offenses are referred to it. The jurisdiction of general, special, and summary courts-martial with respect to persons, offenses and punishments is discussed in chapter 8, *infra.*

4. MANUAL FOR COURTS-MARTIAL. Congress itself in the Articles of War defined the crimes and offenses which are punishable and the general system for imposing punishment. No statute, however, can provide for all the numerous details encountered in the operation of any judicial or administrative system. The laws establishing the procedure of civil courts, for example, are often supplemented by detailed rules of court. In providing for the court-martial system, Congress accordingly authorized the President to prescribe the detailed procedure to be followed before military tribunals and the manner of proof and rules of evidence (AW 38), and also to establish maximum limits of punishment for most offenses (AW 45). The President issued these regulations in the Manual for Courts-Martial, U. S. Army, 1928. The Manual for Courts-Martial covers the operation of the entire court-martial system, from the initial steps to be taken before trial through the completion of the case. It deals fully with the various crimes and offenses, the evidence which can be used to prove them and the sentences which can be imposed. It is the bible of military justice. Being an order of the President issued by direction of Congress, it has all the force of law. From time to time since 1928 changes were made in the Manual for Courts-Martial by executive order of the President. These changes are included in the present edition of the Manual for Courts-Martial corrected to April 20, 1943. All references to the Manual for Courts-Martial herein are to this edition. It will be cited as MCM.

CHAPTER 2

PREVENTIVE AND CORRECTIVE MEASURES

5. IN GENERAL. Some individuals are by nature rebellious or are habitual offenders who cannot be kept from wrongdoing. Punishment may be the only possible method of dealing with them. Such cases, however, are in the minority. Punishment is a last resort and should be used only if other measures have proved ineffective. In many cases, where the offender is not an incorrigible wrongdoer, proper preventive measures would have kept him out of trouble. The foremost preventive is, of course, good leadership, with all that the term implies. The better the leadership, the better the morale and discipline in an organization and the fewer the occasions requiring use of punitive measures. For good leadership there is no effective substitute.

6. DISCIPLINARY INSTRUCTION. a. In general. The importance of adequately instructing men in the meaning of their military status, in their duties and responsibilities toward one another, their superiors and the Government, in the advantages to be gained from being good soldiers and in the disadvantages of a bad record, cannot be too greatly stressed. Many men coming into the Army are unfamiliar with the concepts and necessity of military discipline. Unless they know what is expected of them, they cannot be expected to do their job. It is for this reason that Army Regulations provide:

> "* * * Officers will impress upon the young enlisted men lessons of patriotism and loyalty, will instill or develop in them the concept of democracy as a form of government ideally suited to the American way of life, and will teach and impress upon them the necessity for obedience and military discipline in the service. These lessons will be repeated again and again. The difference between the status of an enlisted man and that of a civilian will be carefully explained. The Articles of War will not only be read to the enlisted men but will be explained and their purpose laid before the young enlisted man in such a way as to make him understand that in becoming an enlisted man he has subjected himself to a new control and has assumed obligations of service that did not rest upon him as a civilian." (See par. 3, AR 600–10, 8 July 44.)

It must be remembered that in the Army many officers are inexperienced in matters pertaining to military justice. All officers should fully acquaint

themselves with the provisions of the Articles of War and of Army Regulations relating to matters of discipline so they can properly instruct their men and also carry out the disciplinary policies of the Army themselves.

b. Explanation of Articles of War. Congress felt it so important to acquaint enlisted men with their military obligations that it required certain of the Articles of War to be read and explained to every soldier at the time of his enlistment and once every 6 months thereafter (AW 110). The articles to be read include all the punitive articles (AW 54 through 96), together with certain miscellaneous provisions (AW 1, 2, 29, and 104 through 109). In addition to these articles specified in AW 110, AW 28 (defining desertion) is to be similarly read and explained. (See par. 27, TM 12–230.) Moreover, specific explanation of the offenses of wartime desertion (AW 28, 58, 59) misbehavior of sentinels (AW 86) and the serious consequences resulting therefrom is an important part of training, and it is the duty of a commanding officer to insure that it is properly done. A perfunctory, hurried reading of the articles by an officer who himself does not clearly understand what they mean and is anxious only to get through with a necessary chore, defeats the purpose of the requirement. Soldiers should understand the law so that they will not break it. Adequate time and preparation must be devoted to the task if that object is to be attained. As a supplement to (but *not* a substitute for) this required reading and explanation, use of the following sound training films will prove helpful: TF 11–235, Articles of War; TF 15–992, Administration of Military Justice and Courts-Martial; TF 19–2034, AWOL and Desertion. The fact that the Articles of War have never been read to a soldier does not excuse him if he commits an offense, but, although not serving as a defense, it can be regarded by the court as an extenuating circumstance. (See par. 126*a*, MCM.)

7. DISCHARGE PROCEEDINGS. An individual who, for mental or physical reasons, cannot be adjusted to military service impairs the efficiency and morale of his organization. He may not only get into trouble himself but may corrupt others. If he has no potential value to the service he should be eliminated before his continued presence causes disciplinary problems. Under the provisions of AR 615–368, 20 July 1944 and AR 615–369, 20 July 1944, an enlisted man may be administratively discharged from the service if he gives evidence of habits or traits of character which serve to render his retention in the service undesirable, or is disqualified for service, physically or in character, through his own misconduct or if he is inapt, does not possess the required degree of adaptability to military service, or is disqualified because of enuresis. Such administrative discharge *should not* be used in place of punishment for a crime or offense. It should never be regarded as a substitute for appropriate disciplinary action where such action is called for. However, the elimination in proper

cases of undesirables who have no potential military value may prevent the necessity of disciplinary action later. The policy with respect to administrative discharge of homosexuals is set out in War Department Circular 3, 1944, and of marihuana addicts in Memo W 615–13–43, January 29 (Monthly Digest of War Department Directives, January, 1943, p. 13, AR 615–368, 20 July 1944).

8. NONCOMMISSIONED OFFICERS. A thoroughly competent group of noncommissioned officers is of vital importance in developing and maintaining discipline in any organization. (See WD Cir. 70, 1944.) Careful initial selection of noncommissioned officer material is required. Equally important is the removal of those who do not attain or live up to the standard expected of them. Proper use should be made of administrative proceedings to transfer or reduce inefficient noncommissioned officers. (See pars. 13*c* and 15, AR 615–5, 30 June 1943.) Such administrative reduction is not punishment and should not be used as such.

9. USE OF NONPUNITIVE CORRECTIONAL MEASURES. Many delinquencies occur which indicate, not that the offender is essentially a wrongdoer, but that he needs further instruction or training. For such delinquencies correction, not punishment, is required. If the offense is trivial, Army Regulations provide that no punishment, either under AW 104 or by court-martial, be imposed until less drastic measures have been tried without success. (See par. 2*b*, AR 600–10, 8 July 1944.) A commanding officer is expected and authorized to use appropriate correctional measures to remedy deficiencies in discipline (par. 105, MCM). He may, for instance, warn, criticize, or rebuke the offender or require him to undergo further training. A recruit, for example, who is late for formation, appears in improper uniform or has unclean equipment may be censured, required to clean his equipment, or to take special training. Such action is in the nature of instruction, not punishment.

CHAPTER 3

DISCIPLINARY PUNISHMENT UNDER ARTICLE OF WAR 104

10. FUNCTION AND USE OF ARTICLE OF WAR 104. Many minor infractions of the rules may occur from time to time in any command which require some punishment but which are not sufficiently serious to warrant trial by court martial. To provide a prompt and efficient method of disposing of such offenses, Congress in AW 104 authorized commanding officers themselves to impose limited forms of disciplinary punishment directly upon persons of their command without the intervention of a court-martial. Such disciplinary punishment is commonly known as "company," "battery," or "squadron" punishment. The policy as to use of this disciplinary power is clear:

> "A commanding officer should resort to his power under A. W. 104 in every case where punishment is deemed necessary and where that article applies, unless it is clear that punishment under that article would not meet the ends of justice and discipline. Superior commanders should restrain any tendency of a subordinate commander to resort unnecessarily to court-martial jurisdiction for the punishment of offenders" (par. 105, MCM).

A commanding officer must not disregard the provisions of AW 104. He must decide in each case whether they are applicable, and if so, whether use of them will adequately serve the ends of justice and discipline. AW 104 does not give commanding officers authority to impose any punishment they see fit in any manner they choose. The forms of authorized punishment are limited and the procedure for imposing them clearly prescribed. It is necessary to consider, therefore, what offenses can be dealt with under this Article, who may exercise the power, the persons subject to it, and the nature of the punishment that can be imposed.

11. OFFENSES PUNISHABLE. Only "minor" offenses may be disposed of by use of a commanding officer's disciplinary powers. If a serious offense is to be punished, charges must be preferred and tried by court-martial. Whether an offense is minor or serious is often a question of judgment which cannot be settled by rule of thumb. Everyone easily recognizes some offenses as being very serious. The Manual refers to three such classes which are never minor (par. 105, MCM): (1) those for which the Articles of War provide a mandatory punishment, such as conduct

unbecoming an officer and a gentleman (AW 95) or an officer's being found drunk on duty in time of war (AW 85) for which dismissal from the service is required punishment; (2) those for which the death penalty is authorized, such as wartime desertion (AW 58) or sleeping on post in time of war (AW 86); and (3) those for which confinement in a penitentiary is authorized, of which felonies such as arson, burglary or assault with intent to do bodily harm with a dangerous weapon (AW 93) are examples. Whether an offense not falling within one of the above classes is "minor" depends upon its nature, the time and place of its commission, and the person committing it. "Generally speaking, the term includes derelictions not involving moral turpitude or any greater degree of criminality or seriousness than is involved in the average offense tried by summary court-martial" (par. 105, MCM). In other words, the nature of the offense and the customary punishment for it must be taken into consideration. Offenses such as larceny, an attempt to commit sodomy, or fraudulently passing a bad check involve moral turpitude and so are not properly to be treated as minor. Escape from confinement, willful disobedience of noncommissioned officers, threatening or assaulting a sentinel are offenses which, while not involving moral turpitude, are more serious than the average offense tried by summary court. These should not be regarded as minor. On the other hand, unaggravated absence without leave for a short period or drunkenness in station are offenses usually tried by summary court and properly may be punished under AW 104. Of course, an offense which on its face seems minor may be considered a serious one in the light of the circumstances of the particular case and the person committing it. Drunkenness on the part of a soldier who constantly overindulges and who has not changed his ways despite repeated attempts at correction and the use of disciplinary punishment, may cease to be a minor dereliction. The question is one on which the commanding officer must use his best judgment taking into account the nature of the offense, its effect upon the organization as a whole, the manner in which such offenses are customarily punished in the Army, the circumstances of the particular case, and the record of the offender. Unless his discretion is abused, his decision will be final and conclusive.

12. WHO MAY PUNISH. **a.** The commanding officer of a detachment or a company has power to impose disciplinary punishment upon all persons of his command. Higher authority (for example, a regimental, post, division, or army commander) also possesses such power. In the case of enlisted men, the offender's unit commander usually takes disciplinary action. If higher authority believes that disciplinary action under AW 104 is appropriate in such cases, he will normally refer the matter to the unit commander for such action rather than impose punishment himself. In the case of officers, the unit commander, although having

the power to impose punishment himself, will usually refer the case to higher authority such as the regimental or post commander. If forfeiture of pay is believed an appropriate punishment in the case of a commissioned officer who may be so punished (par. 14a, *infra*), the matter must be referred to the commanding general, since only a commanding officer of the rank of brigadier general or higher has authority to forfeit an officer's pay under this Article.

b. The disciplinary power of a commanding officer cannot be delegated to a subordinate (par. 105, MCM). A company commander cannot, therefore, authorize his first sergeant to dispose of offenses under AW 104. He must handle the matter himself. Of course, an officer who is temporarily in command of an organization has full authority to impose disciplinary punishments, since that is one of the command powers to which he has succeeded.

13. PERSONS PUNISHABLE. Any person under the command of the commanding officer is subject to disciplinary punishment. This includes not only enlisted men but also warrant officers, flight officers, and commissioned officers. There is often more occasion for utilizing AW 104 in the case of officers than in the case of enlisted men. A commissioned officer can be tried only by general court-martial. Unless his misconduct is such as to warrant or require dismissal from the service, disciplinary punishment is usually sufficient and preferable to trial.

14. WHAT PUNISHMENT MAY BE IMPOSED. a. Authorized punishments. The types of disciplinary punishments which may be imposed are set out in AW 104 and in paragraph 106, MCM. These include admonition (i. e., a warning or reproof), reprimand, withholding of privileges for not exceeding 1 week, extra fatigue for not exceeding 1 week, restriction to limits for not exceeding 1 week, and hard labor without confinement for not exceeding 1 week. The term "extra fatigue" includes kitchen police. Hard labor may not be imposed on any person above the rank of private first class and no punishment which would tend to degrade the rank of the person punished is permitted (par. 106, MCM). In the light of these limitations, the punishments which are applicable to noncommissioned officers and officers are somewhat restricted. In their case, admonition and reprimand, restriction to limits, and withholding of privileges may be utilized. An additional punishment available in time of war in the case of commissioned officers *below the rank of major*—i. e., only captains and lieutenants—is forfeiture of half of 1 month's pay. The pay subject to forfeiture is base pay, which includes the increase for foreign service plus longevity pay. Flying pay is not included. (See WD Cir. 420, 1942.) Only *commissioned* officers are subject to such forfeiture.

Warrant officers or flight officers are not commissioned officers, nor are aviation cadets. (See WD Cir. 420, 1942.) Their pay cannot be forfeited under AW 104.

b. Time limit and apportionment. The Article limits withholdings of privileges, extra fatigue, restriction and hard labor *without* confinement to a period *not exceeding 1 week.* A week means *7 consecutive* calendar days. Restriction to the limits for two or more weekends or kitchen police for 7 Sundays, for example, are illegal forms of punishment. Furthermore, any combination of the punishments referred to above cannot exceed a total of 1 week. Thus, a soldier may not be restricted to the limits for 1 week and in addition be required to perform extra fatigue or hard labor. If it is desired to impose a combination of two or more punishments for a single offense, they must be apportioned so that the total will not exceed 1 week. Thus, 4 days' restriction plus 3 days' hard labor is authorized since the combined punishment falls within the 1 week limitation. This rule as to apportionment does not, however, prevent adding also a reprimand or admonition (or, in the case of a captain or lieutenant, forfeiture of pay), even if other authorized punishment in the full amount of 1 week is imposed.

c. Prohibited punishments. Confinement under guard and forfeiture of pay (except the forfeiture of pay of captains and lieutenants) are expressly prohibited (AW 104; par. 106 MCM). Detention of pay (par. 106 MCM) or any forced contributions or deductions are likewise illegal. Reduction of noncommissioned officers or privates first class is not authorized as punishment under AW 104, but may be accomplished administratively in accordance with paragraphs 13*c* and 15, AR 615–5, 30 June 1943. Punishments not sanctioned by the customs of the service, such as carrying a loaded knapsack (par. 102 MCM) or "double-timing" may not be imposed. Strictly military duties, such as guard duty, drills, practice hikes, and marches, are not to be degraded by use as punishments (par. 102 MCM), and it is illegal to impose them under AW 104.

15. PROCEDURE FOR IMPOSING PUNISHMENT. a. On enlisted men. The procedure to be followed in exercising disciplinary powers under AW 104 is provided for in paragraphs 107 and 108, MCM.

(1) The first step taken by the commanding officer is to satisfy himself that the person to be punished has committed the offense in question and that it is a minor offense which can be disposed of under AW 104. No particular form of investigation is required, but the commanding officer should fully acquaint himself with the facts before he takes action. To do this he will usually interview informally persons having knowledge of the offense. It is desirable to give the accused an opportunity to explain his side of the case, and he may be permitted to be present when other witnesses are interviewed if this seems desirable. It must be re-

membered that no person can be required to admit his guilt or to make any statement which will incriminate him (AW 24). In talking with the accused, therefore, the commanding officer must be careful not to indicate that he has to make any statement. On the contrary, he should explain to the accused that he is perfectly free to remain silent if he chooses but that if he does say anything, it may be considered against him.

(2) Having satisfied himself that an offense was committed and that disciplinary action under AW 104 is appropriate, the commanding officer will call in the accused, notify him briefly and clearly of the nature of the offense, and inform him that he proposes to impose punishment under AW 104 unless trial by court-martial is demanded. *The accused must have an opportunity to demand trial by court-martial before punishment is imposed.* Failure to afford him this opportunity nullifies the order of punishment and renders it illegal. He should, therefore, be given a reasonable time in which to make up his mind whether to demand trial. He is not entitled to be informed as to the punishment he will receive if he selects disciplinary punishment in place of trial. If the accused demands trial, disciplinary action under AW 104 cannot be taken. In such case, if trial is advisable, charges should be promptly preferred and the fact that a demand for trial was made should be noted on a memorandum attached to the charges (par. 27, MCM) or opposite the specification on the charge sheet itself (par. 33, MCM). A demand for trial does not require the preferring of charges (par. 109, MCM), but if any punishment is to be imposed, it must be by way of trial.

(3) If no demand for trial is made, the commanding officer determines the appropriate punishment for the offense and informs the accused of the punishment. At the same time the accused must be notified of his right to appeal to the "next superior authority" if he believes the punishment unjust or out of proportion to the offense.: Such superior authority has the power to modify or set aside the punishment if justice requires, but he may not increase it or impose a different kind of punishment (par. 108, MCM). Failure to notify him of his rights renders the punishment illegal. An appeal must be in writing, signed, and include a statement of reasons for regarding the punishment as unjust or excessive (par. 108, MCM). If the accused expresses a desire to appeal, the commanding officer should assist him in preparing the appeal, have him sign it and forward it (through channels) to next superior authority. Having imposed punishment, the commanding officer is charged with the responsibility of having it executed. Punishment should be strictly enforced. Failure in this respect may well have a worse effect on discipline than imposing no punishment at all. The fact that the accused has appealed does not prevent his being required to undergo the punishment in the meantime, but the officer imposing the punishment may suspend it until action by higher authority is taken.

b. In the case of officers. If the commanding officer decides to impose punishment under AW 104 upon an officer of his command, notification of the offense and of his intention to impose punishment therefor must be by written communication to the officer through proper channels. The accused will be directed to acknowledge receipt by indorsement through channels and to include in the indorsement any demand for trial. Notification of the punishment imposed (and of any reprimand or admonition included therein) will be by indorsement on the original communication and the accused will be directed to acknowledge receipt by similar indorsement and to include the date of receipt and any appeal (par. 107, MCM). A form for imposition of company punishment upon an officer is attached. (See app. 5.) Such disciplinary power is an attribute of command and may not be delegated to any subordinate. For this reason the commanding officer authorized to impose punishment under AW 104 must discharge the duty personally and cannot authorize any other officer to impose the punishment.

16. RECORDS OF DISCIPLINARY PUNISHMENT. In every case in which punishment is imposed under AW 104, the immediate commanding officer of the person punished must make a record of such punishment (par. 109, MCM) noting the offense with date and place of commission, the punishment which was imposed, the authority who imposed it, the date the accused received notice of the imposition of punishment, the decision of higher authority (in case there was an appeal), any mitigation or remission of punishment and any additional information desired. No form for this record is prescribed. It is commonly kept in a punishment book. A suggested form for such a book is set out in appendix 6. No entry of such punishment will be made in the service record (par. 47, TM 12–230) nor will any transcript of the record be furnished or forwarded in the event of enlisted men's transfer. In the case of officers, a copy of the communication imposing the punishment with its indorsements is usually placed in the officer's 201 file.

17. EFFECT OF DISCIPLINARY PUNISHMENT. a. In general. The fact that punishment under AW 104 has been imposed upon a soldier or officer may be taken into account by his commanding officer in connection with other matters affecting him in the future. It is a factor in considering his fitness for promotion. The fact that the offender has been punished under AW 104 in the past may be an important consideration in deciding whether trial by court-martial should be had for a subsequent offense. The authority acting upon a sentence may well take into account such prior punishment in determining whether the sentence should be remitted or mitigated.

b. As a bar to trial. No person under military law may without his consent be tried twice for the same offense (AW 40). Punishment under AW 104 is *not* technically a "trial" within the meaning of this provision.

However, the same fundamental principle of fairness which precludes "double jeopardy" is the basis for the rule set forth in the Manual for Courts-Martial that punishment under AW 104 will bar a subsequent trial for the *same* offense (par. 69*c*, MCM). Thus, a soldier who has been properly punished under AW 104 for failure to appear at drill cannot later be tried by court-martial for the same act. As has been stated above, only "minor" offenses can properly be punished under AW 104. There is no power to dispose of a "serious" offense under that article. If, therefore, disciplinary punishment was in fact imposed for a serious offense, such punishment would not prevent trial by court-martial for that offense. Thus, if a soldier were punished under AW 104 for sleeping on post in violation of AW 86 (a capital offense, which cannot be considered minor), he could nevertheless be tried by court-martial for that offense, since his commanding officer had no power at all to dispose of so serious a transgression by such limited punishment. The offenses which are minor and properly punishable under AW 104 are described in paragraph 11, *supra*. Although the imposition of disciplinary punishment for a minor offense will bar a later trial by court-martial for the *same offense*, it will not bar trial for another crime or offense growing out of the act which was punished (AW 104; par. 69*c*, MCM). For example, if a soldier were punished under AW 104 for reckless driving, that punishment would not preclude trying him later for manslaughter if his reckless driving had caused a death (par. 69*c*, MCM); or if a soldier while drunk struck a noncommissioned officer, punishment under AW 104 for drunkenness would not mean that he could not be tried for the assault. If he were so tried, however, he would be entitled to show at the trial the punishment he had already received so that the court could consider that fact in determining its sentence (par. 79*e*, MCM).

c. As a previous conviction. As noted above, disciplinary action under AW 104 is not a trial, and an accused who has been so punished has not been "convicted" of any offense. Records of disciplinary punishment, therefore, are *not* previous convictions and may *not* be introduced in evidence by the trial judge advocate nor considered by the court against the accused under the provisions of paragraph 79*c*, MCM.

CHAPTER 4

ARREST AND CONFINEMENT

18. ARREST OR CONFINEMENT BEFORE TRIAL. a. In general. The law with respect to arrest and confinement pending trial is set out in AW 69, paragraphs 18 through 23, MCM, and AR 600–355, 17 July 1942. An outline of the procedural steps to be taken on arrest or confinement is contained in section XVI, TM 12–255.

b. Necessity and purpose of restraint. If an offense has been committed for which trial by court-martial is required, the question of imposing some form of restraint on the accused pending trial must be considered. The purpose of such restraint is to insure the presence of the accused at the trial and to prevent him from committing other offenses in the meantime. AW 69 provides that when "charged with crime or with a serious offense" the accused "shall be placed in confinement or arrest as circumstances may require" but "shall not ordinarily be placed in confinement" when charged with a minor offense. It is *not* mandatory that the accused be restrained at all pending trial (par. 19, MCM). The necessity for any restraint must be determined in the light of the offense charged and the character of the offender. If some restraint is deemed necessary, only the minimum required under the circumstances should be imposed (par. 19, MCM).

c. Types of restraint. (1) A person in arrest is restrained within certain limits, not by physical force, but by his moral and legal obligation to obey the order or arrest (par. 139*a*, MCM). When placed in arrest he is required to remain within his barracks, quarters, or tent unless larger bounds, such as the company area, are specified (AW 69).

(2) By *confinement* the accused is physically restrained (par. 139a, MCM) either by being imprisoned in a guardhouse or being put under the control of a guard.

d. Degree of restraint to be imposed. No greater degree of restraint should be imposed than is required by the circumstances of the particular case. Unless physical restraint is necessary, an accused should not be placed in confinement pending trial. Confinement results in loss of manpower. Not only is the person confined unavailable for duty during his confinement, but the more soldiers there are in the guardhouse, the greater the number of guards who must be taken from other duties to control

them. For minor offenses restraint in any form may be unnecessary. For example, there is usually no need to restrain a soldier who voluntarily returns after a few days' absence without leave. The fact that he has returned on his own accord is a good indication of his intention to stay with his organization. His availability for trial a few days later can safely be assumed. Arrest or restriction would in any event be futile if he should decide to run off again. On the other hand, a soldier who breaks restriction and remains absent without leave until apprehended, probably requires confinement since his past conduct indicates that only physical restraint will hold him with his organization. Even a person who commits a serious military offense, such as a sentinel who sleeps on post, is not necessarily to be confined unless there is some basis for believing that otherwise he will flee before trial. The question to be decided in each case is: what restraint, if any, is necessary to insure the presence of the accused at the trial and to prevent his doing harm to persons or property in the meantime.

19. WHO MAY ARREST AND CONFINE. a. Enlisted men. (1) Any commissioned officer has the power to order an enlisted man into arrest or confinement (par. 20, MCM). A warrant officer does not have the authority of a commissioned officer to arrest or confine enlisted men, except when he is assigned and serving as *commander* of a station or unit.

(2) The commanding officer of any company or detachment may delegate to his noncommissioned officers the power to arrest or confine enlisted men belonging to his own company or detachment, or enlisted men of other organizations temporarily in the company's jurisdiction, if such restraint is necessary (par. 20, MCM). Thus, for example, the first sergeant of a company, or any other noncommissioned officer, may be authorized by the company commander to arrest or confine any enlisted man requiring such restraint who commits offenses in the company area.

b. Officers and warrant officers. A commissioned officer or warrant officer may be placed in arrest or confinement only by order of a "commanding officer" (par. 20, MCM). The term "commanding officer" means the officer commanding a complete or separate organization or command, such as a post or regiment, or any lower unit which is "detached." In other words, a "commanding officer" is an officer who, under AW 10, has power to appoint a summary court-martial. (See par. 52a, *infra*.) For example, a captain commanding a company would have no power to place in arrest a lieutenant in the company if the company was serving with and as part of a regiment. If, however, the company were "detached," that is, acting alone and not subject to the immediate disciplinary control of a superior of the same branch of the service (par. 5*b*, MCM), such power would exist. Of course, any authority superior to a "commanding officer" has similar power to arrest or confine. Thus, a post commander may arrest, and so may the commanding general of the service command in

which the post is located; a regimental commander may arrest, and so may his superiors, e. g., the division, corps, and Army commanders. A commanding officer may not delegate to others his power to arrest and confine officers (par. 20, MCM). The order placing a commissioned officer or warrant officer in arrest or confinement must be the order of the commanding officer himself. That does not mean that he personally must communicate his order to the person arrested. Like any order of a commander, it may be issued through other officers or be communicated to the person arrested either in writing or orally (par. 20, MCM).

20. PROCEDURE FOR ARRESTING OR CONFINING. a. Preliminary inquiry into offense. No person should be placed in arrest or confinement unless the authority so ordering either has personal knowledge of the offense or has made inquiry into it (par. 19, MCM). The purpose of this requirement is to prevent a person being deprived of his liberty on mere suspicion. A full and exhaustive investigation is, of course, not required. But such investigation should be sufficient to furnish reasonable grounds for believing that an offense has been committed by the person to be restrained.

b. Procedural steps to arrest. An arrest is imposed by notifying the person to be arrested that he is under arrest and informing him of the limits of his arrest. The order of arrest may be oral or in writing. No particular formality is required. It is desirable to explain to him the meaning of arrest and the penalty which may be imposed if he breaks his arrest.

c. Procedural steps to place person in confinement. A person to be confined is placed under guard and taken to the guardhouse or other place of confinement. The authority ordering confinement will deliver to the commander of the guard or prison officer a written statement of the name, grade, and organization of the prisoner and the Articles of War which he has violated. (See par. 6*a*, AR 600–355, 17 July 1942.) Unless such a written statement is delivered with the prisoner, the commander of the guard may refuse to receive the prisoner (AW 71).

d. Statements and reports required. When a person is placed in arrest or confinement, reports must be made of that fact so that proper authorities will be sufficiently informed to take proper action.

(1). The immediate commanding officer of the person restrained (i. e., his company or unit commander) must at once be notified (par. 6*c* and *d*, AR 600–355, 17 July 1942), so that he may take disciplinary action, if necessary, and make proper entries in the morning report. If the arrest or confinement was ordered by a person *other than an officer*, that person must at once report the fact to his *own* unit commander who will without delay notify the unit commander of the person restrained. Thus, a noncommissioned officer who has placed a soldier from some other organization in arrest or confinement would at once inform his own company com-

mander, who would without delay notify that soldier's unit commander. If arrest or confinement was ordered by an *officer*, he will himself notify directly the unit commander of the person restrained. Thus, a lieutenant who placed a soldier in confinement would himself report such confinement to the soldier's unit commander.

(2) If an *officer* is placed in arrest or confinement without, at the same time, charges being preferred against him, a written report must be made to the officer having general court-martial jurisdiction. (See par. 6*b*, AR 600–355, 17 July 1942.) Thus, a regimental commander who placed one of his officers in arrest without preferring charges would be required to make a written report to the commanding general of the division; a post commander would make such report to the commanding general of the service command.

(3) If a person is placed in *confinement*, the commander of the guard (i. e., the officer of the day or other officer in direct control of the guardhouse) within 24 hours after such confinement, or as soon as he is relieved from his guard, must report to the commanding officer the name of the prisoner, the offense charged against him, and the name of the officer who ordered the confinement (AW 72; par. 14*a*, AR 600–375, 17 May 1943). Thus, if a company commander caused an accused to be confined in the post guardhouse, the prisoner officer (or the officer of the day) would be obliged to make the report to the *post commander* within 24 hours after confinement. The post commander must then see that proper steps are taken to have the prisoner promptly tried or released. (See AW 70.)

21. STATUS OF PERSON IN ARREST OR CONFINEMENT. a. Status of arrest. A person in arrest is restricted to his barracks, quarters, or tent or such larger limits as may have been specified in the order of arrest (AW 69). A change of status from duty to arrest having occurred, an entry to that effect will be made in the morning report. (See par. 20, AR 345–400, 3 January 1945.) He cannot, if he is to remain in that status, be required to perform his full military duty, since placing him on duty terminates his arrest. This, however, does not prevent his being required to do ordinary cleaning or policing up about his quarters. He is furthermore subject to the restrictions provided in paragraph 7, AR 600–355, 17 July 1942, such as inability to bear arms or to exercise command of any kind. If he breaks his arrest by going beyond the prescribed limits, he is subject to trial (AW 69) and, if he is a commissioned officer, may suffer the penalty of dismissal for such offense.

b. Status of confinement prior to trial. A person who is confined pending trial is a "garrison prisoner" and subject to the provisions of AR 600–375, 17 May 1943, with respect to treatment, discipline, and employment. If he is a private or private first class, he will perform such hard labor and military duties as are prescribed in paragraph 20*b*, AR 600–375, 17 May 1943. If he is of higher rank, he will not be required to perform

military duties or hard labor while detained, except necessary policing of quarters and employment in the mess appropriate to his grade. (See par. 20(*d*) (2), AR 600–375, 17 May 1943.)

22. DURATION AND TERMINATION OF ARREST AND CONFINEMENT. When a person is placed in arrest or confinement, immediate steps must be taken either to bring him to trial or to release him (AW 70; par. 26, MCM). The law, however, does not prescribe any definite time limit within which he must be released if charges are not preferred. Normally charges can and should be preferred promptly, within at least 48 hours after the accused is restrained. The accused is not automatically released from restraint, however, because of delay in preferring the charges. He must remain in arrest or confinement until released by proper authority. The proper authority to release the accused from *arrest* is normally the officer who imposed the arrest. Thus, a commissioned officer or warrant officer would be released from arrest by order of the commanding officer who had arrested him. An enlisted man will usually be released from arrest by his own unit commander. The proper authority to order release from *confinement* is the commanding officer to whose command the guardhouse or prison is subject. Thus, a prisoner confined in a post guardhouse would be ordered released by the post commander; a prisoner in a regimental guardhouse by the regimental commander. Once the prisoner is turned over to the guard, he passes beyond the control of the officer who initially ordered him confined—unless such officer is the "commanding officer" described above—and such officer is not a proper authority to order his release (par. 140*a*, MCM). The release of a prisoner without proper authority is a punishable offense (AW 73).

CHAPTER 5

PREFERRING CHARGES

23. CHARGES IN GENERAL. a. Definitions. If, because of the seriousness of the offense, trial by court-martial is required, charges must be preferred—i. e., there must be a formal accusation, just as in state and federal courts a defendant is brought to trial on an indictment or complaint. The charges consist of two parts, the technical "charge" which is a statement of the Article of War violated, and the "specification" which is a statement of facts and circumstances constituting that violation (par. 24, MCM). Charges are "preferred" by preparing a charge sheet (WD, AGO Form 115) and submitting it to the officer exercising court-martial jurisdiction. See appendices 2, 3, and 4, for forms of completed charge sheets.

b. By whom charges preferred. Ordinarily, the immediate commanding officer of the accused (i. e., the company or unit commander) will himself prefer charges or cause them to be preferred. Charges, however, may be preferred by others. Any person subject to military law—another officer, an enlisted man, or even a prisoner—has the legal right to prefer charges (par. 25, MCM). It is ordinarily preferable, however, for one who claims that an offense has been committed to inform the immediate commanding officer of the accused of the alleged offense and let him take such action as he deems necessary. Charges cannot be preferred by any one who is not subject to military law, although such a person may bring to the attention of military authorities a supposed offense. The person who prefers charges is known as the "accuser." (par. 60, MCM).

c. Necessity for inquiry before preferring charges. In the absence of his own personal knowledge, the accuser must make some inquiry into the alleged offenses in order to avoid the preferring of charges on the basis of mere frivolous or malicious accusations, or inaccurate information. Some investigation frequently is necessary to determine just what offense. The person who prefers charges is known as the "accuser" that a report of an assault and battery was not accurate, and that the offender should be charged instead with being drunk and disorderly. The accuser should be sure that there is evidence of all elements of the offense, and should know from what witnesses or other sources such evidence

can be obtained. This does not mean that in each case he must make an exhaustive investigation or even interview all possible witnesses. The extent of the inquiry will depend upon the seriousness of the offense, the existence of unusual circumstances, the extent of the accuser's personal knowledge of the facts, or the credibility of the original complaint he receives. In preferring charges the accuser must take an oath that he either has personal knowledge of, or has investigated, the matters stated in the specifications (par. 31, MCM; also Affidavit, WD, AGO Form 115). To avoid swearing falsely, he must at least have made sufficient inquiry into the offense to justify a reasonable belief that the accused committed it.

d. Promptness in preferring charges. Undue delay in preferring charges not only is an injustice to the accused, but has an adverse effect upon the discipline of the command. Although no definite time limit for preferring charges is set by law or regulation, in the ordinary case they should be preferred within 48 hours after the offense is discovered. Promptness is particularly necessary if the accused is in arrest or confinement, since AW 70 requires that "immediate steps" be taken either to try or to release a person who is thus restrained. The accumulation of charges, that is, allowing various unrelated offenses to pass without taking any disciplinary action and then preferring charges for such past offenses if the accused is later guilty of further misconduct, is an improper practice. If an offense warrants punishment at all, punishment should be imposed at once. Punishment long after an offense has occurred hurts rather than helps the discipline of the command.

e. Additional charges. After charges originally are preferred, but before the accused is brought to trial, other offenses by the accused may be brought to light. Such offenses may have occurred before the preparation of the charge sheet, but were not known at that time to the accuser, or, as is more frequently the case, they may be committed after the original charges were preferred, as, for example, a breach of arrest or escape from confinement while the accused was awaiting trial. Charges for such offenses should be tried at the same time as the original charges. They are known as "additional charges." They should be preferred separately on a charge sheet designated "additional charges," and forwarded for disposition in conjunction with the original charges. If they are added to the original charge sheet, the affidavit should be amended to show the accuser's knowledge or investigation of the additional charges and specifications. Since the additional charges also must be sworn to by the accuser, the date of the affidavit should be changed, if necessary, so that it will not be prior to the date of the offense alleged in the additional charges.

24. SELECTION OF CHARGE. a. General. The first step in preferring charges is to determine the offense or offenses with which the accused

should be charged. That requires an analysis of the facts and a study of the pertinent paragraphs of the Manual for Courts-Martial dealing with the elements of proof of various offenses (ch. XXVI, MCM). In the case of Private Lennie O. Bark (app. 2), for example, Lieutenant Loganby, his company commander, before starting to prepare the charge sheet, first considered what offense Bark committed by deliberately refusing to obey his order to go out to drill. Turning to the Index of the Manual for Courts-Martial under the heading "Disobedience of Orders," he found that the offense of willful disobedience in violation of AW 64 was dealt with in paragraph 134*b*. From the discussion in that paragraph he realized that to constitute willful disobedience there must be an intentional defiance of authority, not mere heedless failure to obey, or nonperformance of a mere routine duty. Checking the elements of proof, he concluded that in this case the offense was committed. Accordingly, he decided to charge willful disobedience in violation of AW 64. Had the facts been different and Bark's disobedience been due to mere neglect, or had the order been a standing order, then he would have decided to charge the offense of failure to obey in violation of AW 96. In the Bark case the selection of the appropriate offense was not difficult. Often there is more doubt as to what offense the accused has committed. For example, wrongful taking and use of property must be distinguished from larceny. To be guilty of larceny, the taker must have an intention permanently to deprive the owner of his rights in the property taken. One who takes a vehicle for a short "joy ride" without permission from the owner has not committed larceny if the taking is not accompanied with the intent to permanently deprive the owner thereof. Such cases should be charged as wrongful taking and using either under AW 96 if a civilian vehicle, or under AW 94 if a Government vehicle, rather than as larceny under AW 93. If, after careful study of the facts and the Manual for Courts-Martial, uncertainty still remains, it is well to consult the staff judge advocate, if possible, before drafting charges.

b. Multiplication of charges. When an offender has committed several violations of the Articles of War, either by a single act or by acts connected with one incident, there may be a temptation to "throw the book at him"—that is, to charge him with every violation, serious or petty, of which he is technically guilty. Such a practice of multiplication of charges is to be avoided (par. 27, MCM). Numerous charges and specifications increase the difficulty of investigation, trial and action on the record. Moreover, the amount of punishment is not increased by charging several different offenses arising out of a single act, since punishment may be imposed with respect to the act in its most serious aspect only. (See par. 80*a*, MCM.)

c. Combining charges of serious and minor offenses. If a serious offense is charged, charges of minor offenses should not generally be added. (See par. 27, MCM.) Thus, to a charge of burglary, there should not be joined a charge of being drunk in quarters; to the charge of sleeping on post,

there should not be added a charge of failure to repair for reveille. The possible additional punishment for the minor offense is inconsequential, and the additional charge is a nuisance at the trial and detracts from the important charge. However, if the minor offense serves to explain the circumstances of the greater offense, it is proper to charge both. For example, if the accused stole $50 from the footlocker of another soldier after having lost heavily in a poker game, the charge of gambling in camp in violation of orders could properly be added to the more serious offense of larceny, since the former explains the motive for the larceny.

d. Joint charges. A joint offense is one committed by two or more persons acting together in pursuance of a common intent. If, for example, soldiers *A* and *B* plan to rob a service station, and pursuant to that plan *A* holds up the proprietor with a gun while *B* removes money from the till, a joint offense of robbery has been committed. Anyone who aids, abets, or assists another in the commission of an offense is as much a principal as the chief offender, e. g., the driver of a getaway car as well as those removing the money at the point of a gun, would be guilty of robbery. Joint offenders may be charged either separately or jointly—that is, a single charge may be made against all (par. 27, MCM). The advantage of a joint charge is that all the accused will be tried together at one trial, thus saving time, labor and expense. This must be weighed against possible unfairness to the accused which may result if their defenses are inconsistent or if evidence against one would seriously prejudice another. As to some offenses which can be committed only by two or more acting together, such as mutiny, riot, or conspiracy, the charges should almost always be joint. As to others, such as robbery or assault committed by two or more, the question is one of the most convenient method of trial. There are offenses which can never be joint, such as absence without leave, desertion, or drunkenness (par. 27, MCM). Such offenses cannot be jointly charged.

25. DRAFTING CHARGES AND SPECIFICATIONS. a. The charge. The offense or offenses to be charged having been determined, the next step is to draft the charges and specifications. The charge is simply a statement of the Article of War which was violated (par. 28, MCM). In deciding what offense to charge, the accuser necessarily will have concluded what the proper Article of War is. No matter how many offenses an accused commits, if they are all violations of a single Article of War, there will be only one charge. For example, AW 93 covers, among other things, the offenses of arson, burglary, perjury, forgery and assault with intent to do bodily harm. If an accused committed each one of those offenses, he would have violated only one Article of War. Accordingly, in charging him with those five offenses there would be one charge—violation of AW 93—and five specifications, each setting out a separate offense. On the other hand, if the accused committed the offense of

larceny and also deserted the service, he would have violated two Articles of War, i. e., AW 93 by larceny and AW 58 by deserting. In charging him, therefore, there would be two charges with one specification under each. Designation of the wrong Article of War in a charge is not fatal, provided that the specification sets out an offense (par. 28, MCM).

b. Specifications, in general. In drafting the specification, the accuser should see appendix 4, Manual for Courts-Martial, for the appropriate form. There he will find 167 forms for specifications covering almost every offense. The specification for willful disobedience in violation of AW 64, for example, is covered in Form 28. If there is a specification for the offense he wants to charge, as there will be in ninety-nine cases out of one hundred, he should copy that specification *exactly*. Any attempts to improve on the form or add new flourishes may result in failure to charge any offense. In the rare case where there is no form exactly covering the offense he wants to charge, the form for the offense which seems most like it should be followed as a guide. For example, there is no form for a specification charging involuntary manslaughter—i. e., the unintentional killing of a human being through culpable negligence. To allege that offense, the specification for voluntary manslaughter (Form 88) should be adapted by omitting the words "willfully, feloniously, and." In some cases there may be no form which even seems close to the offense to be charged. Then the accuser must make up his own. He should state clearly and concisely just what the accused did. In drawing up a new specification, care must be taken to show that the acts done by the accused were unlawful by stating that he did the acts "unlawfully" or "wrongfully," otherwise no offense may be stated. For example, an allegation that the accused "took and carried away" the property of another person does not set out an offense since he may have had permission to take it or have done so under orders from a superior. If, however, it is stated that he took it "wrongfully" or "unlawfully," it is clear that an offense was committed. Forms of specifications for wrongful taking and conversion of property of another are set out in appendix 7. Before drafting the specification, the Instructions, appendix 4, pp. 236–238, Manual for Courts-Martial, should be studied. They contain detailed information as to the method for completing the forms. Other particular matters to be observed in drafting specifications are discussed below.

c. Abbreviations. Abbreviations should not be used in specifications. Grades, organizations and months should be written out in full. However, the numerical designation of the organization should be set out in figures instead of words—e. g., "341st Field Artillery Battalion" or "IX Armored Corps"—except where the official designation of the organization is always written out as in the case of an Army, an Air Force, or a Service Command—e. g., "Third Army," "First Air Force," "Fourth Service Command." (See par. 6, AR 220–5, 16 December 1944.)

d. Serial numbers. The serial number of the accused should *not* appear in specifications (par. *a*, app. 4, MCM).

e. Description of persons. The accused should be described by name, rank and organization only. If a civilian, appropriate descriptive words showing jurisdiction should be added after his name, such as "a person accompanying the armies of the United States in the field" (par. *c*, app. 4, MCM). Other persons mentioned in the specification may be identified by name and rank only, if military personnel, and by name only, if civilians.

f. Dates. Dates should be alleged as "on or about" a certain date. The hour of the day at which the offense is alleged to have occurred should not usually be stated. In charging absence without leave for a brief period during one calendar day, however, the hours of departure and return may be stated, if known.

g. Details. Although a specification must describe the offense charged so that it reasonably refers to that specific offense and no other, it should not allege details unnecessary for that purpose. Since details alleged must be proved, elaborate specifications unduly increase difficulties of proof. It is not ordinarily proper to allege the street address where the offense occurred, or to recite the occupation, residence, or station of persons, or detailed descriptions of articles. For example, a specification alleging that the accused did "at Cheyenne, Wyoming, on or about 15 November 1943, feloniously take, steal and carry away a Chevrolet automobile, value about $375, the property of George R. Crowe" would be sufficient.

h. Value. In order to be the subject of a larceny, the thing stolen must be of some value. The articles alleged to have been stolen and the value of each should be stated. For example, an allegation that the accused stole "clothing and equipment of a total value of $_____" is improper; it should be stated as "one shirt, value $_____, one pair of shoes, value $_____, and one blanket, value $_____, of a total value of $_____." Value of articles should be stated as "value $2.08" (when known exactly, e. g., per Government price list), or "value about $5" (the usual form). If money itself is involved (e. g., when money is alleged to have been stolen), it should be described as "about $3.50, lawful money of the United States."

i. Several larcenies. When several articles appear to have been stolen at about the same time and place, from either one or several persons, as when a thief enters a barracks at night and steals articles from several foot lockers, the larceny of all of them should be alleged in a single specification (pars. 27, 149*g*, MCM). If, however, there were several unrelated larcenies committed at different times, each should be set out in a separate specification.

j. Examples of correct and incorrect drafting. The following example illustrates the errors most commonly made in the drafting of specifications:

> Specification: In that Pvt. Arthur N. Beadle, 38432987, Co. C, 118th Inf., Ft. Sam Houston, Tex., did, at Ft. Sam Houston, Tex., on or about March 20th, 1943, take, steal, and carry away one billfold, black leather, value two dollars ($2.00), containing three dollars and fifty cents ($3.50) in currency, and personal papers, all the property of Pvt. Lester P. Wake, Co. B, 118th Inf., Ft. Sam Houston, Tex.

Under the rules set out above, the foregoing specification should read as follows:

> Specification: In that Private Arthur N. Beadle, Company C, 118th Infantry, did, at Fort Sam Houston, Texas, on or about 20 March 1943, feloniously take, steal and carry away one billfold, value about $2, and about $3.50, lawful money of the United States, of a total value of $5.50, the property of Private Lester P. Wake.

k. Numbering charges and specifications. When there is but a single charge—that is, when a violation of only one Article of War is alleged—the charge is not numbered. When there is more than one, however, the charges are to be numbered with Roman numerals—i. e., Charge I, Charge II, etc. Similarly, if there is but one specification under a particular charge, it should not be numbered. But if more than one specification is alleged under one Charge, they are designated by Arabic numerals—i. e., Specification 1, Specification 2 (app. 4*b*, MCM). Additional charges (par. 23c, *supra*) are numbered in the same manner as the original charge; a single added charge is designated simply "Additional Charge," but if more than one, they are numbered Additional Charge I, Additional Charge II, etc. Specifications under additional charges are designated in the same way as ordinary specifications. The term "Additional" is not used in connection with the specifications.

26. PREPARATION OF CHARGE SHEET. a. General. Having drafted the charges and specifications, the accuser must then prepare the charge sheet in triplicate. The first page consists largely of personal data regarding the accused and a list of witnesses and of records or other articles to be used as evidence. The instructions on the charge sheet (WD AGO Form 115) should be carefully followed. Attention should be given to the matters noted below.

b. Name, etc., of accused. The instructions on page 1 as to the name of the accused state "Give last name, first name, and middle initial in that order followed by serial number, grade, company, regiment, arm or service, or by other appropriate description of accused." It will be noted that the method of stating the name is the reverse of that used in the specification. It will be noted also that the serial number must be stated, whereas it is *never* set out in the specification. Great care must

be taken to set out this data correctly since an error may cause the wrong person to be charged. If the accused is not a member of a military organization or of any arm or service, such as a civilian accompanying the Army, the "appropriate description" following his name would be words indicating what he was and that he was subject to military law.

c. Age of accused. It is preferable to state the age of the accused in years and months as of the date of preferring charges (e. g., 25 8/12). The word "present" should be inserted over the age.

d. Pay of accused. Pay of the accused will be base pay only. "Base pay" includes the increase for longevity and for foreign service. (See par. 124d, *infra.*) The amount of any compulsory deduction from an enlisted man's pay under the Servicemen's Dependents Allowance Act should be entered in the space "Allotments to Dependents" and indicated as "Class F." (See par. 39, AR 35–5540, 5 January 1944.) This space is also used for entering the amount of any voluntary allotment for the benefit of dependents. Deductions for National Service Life Insurance are to be entered in the space designated "Government Insurance Deduction." Other allotments should not be entered on the charge sheet.

e. Service of accused. Prior service should be shown under this heading with the inclusive dates of such service, organizations from which discharged, and the total length of such service in years, months, and days. If the accused had no prior service, the statement "no prior service" should be made. After such entry, current service should be shown. In the case of enlisted men, this should include a statement as to the place and date of enlistment or induction and of the term of enlistment, which now is "for the duration of the war and 6 months." In the case of officers, this should include a statement of the date of original commission and dates of entry upon present active duty.

f. Data as to witnesses, etc. In this space should be listed the names and addresses of witnesses under the headings "Against the Accused" and "For the Accused." If there are no witnesses for the accused, the word "None" should be entered under the latter heading. If the witnesses are in military service, their grade, organization, and station should be shown—e. g., "Corporal Arthur T. Bickle, Battery B, 741st Coast Artillery Battalion, Fort Dawes, Maine." Under the heading "Documentary and Other Evidence" there should be listed any papers, documents, or other articles or things—e. g., a knife, currency, etc.—which may be introduced in evidence. If there is no such evidence, the word "None" should be entered under that heading. The record of previous convictions (par. 29, *infra*) should not be referred to on the charge sheet.

g. Data as to restraint of the accused. The type, place and date of any restraint imposed should be stated. If the accused was initially placed in arrest or confinement elsewhere by military or civil authorities, the date and place of such initial restraint should also be shown. If no restraint was imposed, this fact should be indicated.

27. PREPARING JOINT CHARGES. In preparing joint charges, page 1 of the charge sheet should be filled in as to one accused in the ordinary way. (See par. 26, *supra.*) The personal data as to the other accused should be filled in on page 1 of another charge sheet—the page cut off immediately above "Data as to witnesses, etc." It is usually unnecessary to fill out the entire first page as to the other accused since the data as to witnesses and restraint will nearly always be the same for all. Securely fasten the cut page to the top of page 1 of the first charge sheet. Forms for specifications for joint offenses may be found in Appendix 4*f*, p. 237, MCM. In using these forms it must be noted that an allegation "that Private *A* and Private *B*, acting jointly and in pursuance of a common intent, did, in conjunction with Private *C*" do a certain act, does not state an offense against Private *C*, but does charge a joint offense against *A* and *B*.

28. SIGNING AND SWEARING TO CHARGES. After he has prepared the charge sheet, the accuser will sign the same on the original on page 3 and swear to it before a person authorized to administer oaths. Ordinarily the copies need not be signed. The charges may be sworn to before any of the officers authorized by AW 114 to administer oaths. The notes in fine print appearing at the end of the affidavit should be strictly followed. It must appear that the accuser either has personal knowledge of, or has investigated, each matter made the subject of charges. The inapplicable words should be stricken from the affidavit. If the accuser has personal knowledge of certain specifications and charges and has investigated others, nothing need be stricken. Care should be taken to insure that the affidavit on the charge sheet shows the date of its execution and the name, rank, branch and capacity (i. e., Adjutant, Summary Court, etc.) of the officer administering the oath. Unless it appears that the officer was one who could administer oaths, it may be contended that the charges were not sworn to. If the accuser believes the accused is innocent, but feels that he should be tried for his own protection—that is, in order to have judicial determination of his innocence—he need not swear to the charges. Such a case would be one in which, for example, a sentinel in the performance of his duty killed an intruder and it was desired to try him for homicide so that the lawfulness of the killing might be established. An accused, however, may not be tried upon unsworn charges if he objects par. 31, MCM).

29. EVIDENCE OF PREVIOUS CONVICTIONS. a. General. When forwarded, the charges should be accompanied by evidence of previous convictions. (par. 34, MCM). This may be considered in deciding what disposition to make of the charges, but is primarily for use by the court (if the case is referred for trial) in determining the amount of the sentence (par. 80*a*, MCM). The evidence is usually in the form of an

extract copy of the pertinent entries in the accused's service record (app. 2, par. 216 *infra*) showing the date and nature of the offense, the sentence imposed, and the fact of approval. The extract must be authenticated by the official custodian of the service record, who ordinarily is the unit personnel officer.

b. Convictions which should be included. The evidence of previous convictions should be in such form that it can be introduced at the trial. Therefore, only convictions which can be considered by the court should be included. Disciplinary punishment under the 104th Article of War is not a conviction, and no reference thereto should be made. The convictions must be convictions by courts-martial. Such previous convictions may be considered by the court only if they meet two conditions: (1) they must be for offenses which were committed during the accused's current enlistment (if an enlisted man) or current appointment (if an officer); and (2) they must be for offenses which were committed within 1 year of the offense being charged (if an enlisted man) or within 3 years of the offense being charged (if an officer). Thus, if a soldier is tried on 7 July 1944 for an offense committed on 1 July 1944, only convictions for offenses committed within 1 year before 1 July 1944 would be admissible—i. e., offenses committed on or after 1 July 1943. Therefore, a conviction for an offense committed on 29 June 1943 would not be admissible and should not be included in the certificate of previous convictions. In computing the 1 year, periods of absence without leave for which the accused was convicted should be excluded (par. 79*c*, MCM). Thus, in the example given above, if the accused had been convicted of absence without leave from 1 September 1943 to 1 October 1943, that period of 30 days would not be counted in computing back 1 year from 1 July 1944. One year from 1 July 1944 (excluding that 30-day period) would be 1 *June* 1943. Therefore, any offense committed on or after 1 June 1943 would be admissible, and the conviction for the offense committed on 29 June 1943 should be included in the certificate in such case. Periods of absence without leave are excluded only if the accused was convicted of such absence. Disciplinary punishment under AW 104 for such absence is not a conviction. Thus, if, in the example last given, the accused had in fact been absent without leave from 1 September 1943 to 1 October 1943 but had not been convicted of such absence, the 30-day period would *not* be excluded. Nor are periods during which the accused was not in a duty status during the one year for other reasons (as, for example, periods in confinement or in a hospital for treatment for venereal disease) to be excluded. The only periods which may be discounted are periods of unauthorized absences for which the accused was *convicted*.

c. Where no admissible previous convictions. If the accused has no admissible previous convictions, a certificate that there are no admissible convictions should be forwarded. Although, if no evidence of convictions is forwarded with the record, it may properly be assumed that

there are none which can be considered, it is better to have an express certificate of that fact. Then there can be no question of merely forgetting to forward evidence of convictions if there are any.

30. STATEMENT OF EVIDENCE UPON WHICH CHARGES BASED. Unless the accuser believes that the charges will be disposed of under AW 104 or by reference to a summary court, he should prepare a summary of the evidence upon which the charges are based. This summary is intended to give the commanding officer sufficient information about the case so that he can decide how to dispose of it, and to guide the investigating officer if the charges are later formally investigated. The summary may be in any convenient form. (See app. 2, pp. 180–185 *infra.*) The signatures of witnesses to the summaries of their respective testimony should be obtained when practicable and when no undue delay will result (par. 32, MCM). If, for any reason, it is desirable to make a more complete statement of the testimony of any witness (for example, if it may be difficult for the investigating officer to interview him later, or if the accused will probably not desire to cross-examine him, or if there is a possibility that he may be tampered with before the investigation), the substance of his testimony, stated in the first person, should be signed and sworn to by him. Each such sworn statement should be entered on a separate sheet of plain paper for possible attachment to the investigating officer's report.

31. LETTER OF TRANSMITTAL. Charges not disposed of under the provisions of AW 104 should be forwarded by letter of transmittal unless the accuser believes that they should be referred to a summary court-martial. The letter may be very brief, and a mimeographed form may be used. (See app. 2, p. 175 *infra.*) It should contain a specific recommendation as to disposition of the charges. An explanation of any unusual features of the case or a statement as to the character of service of the accused may be included. Any documentary evidence that may be used in proof of the offense should be listed in the body of the letter and should normally be forwarded with the charges. (Par. 32, MCM.) Any articles which may be introduced in evidence should be referred to with a statement as to where they may be found. Other papers submitted with the charges (such as prior correspondence) should be listed separately as inclosures. If it is believed that trial should be had by summary court-martial, charges may be submitted without a letter of transmittal or any accompanying papers other than the certificate of previous convictions. Such forwarding will be considered a recommendation for trial by summary court.

32. SUBMISSION OF CHARGES TO IMMEDIATE COMMANDER OF ACCUSED. If a person other than the immediate commander of the accused prefers charges, he ordinarily should submit them to such commander for action.

(Par. 30, MCM.) That officer is the one primarily concerned with the discipline of the accused and is in the best position to know of any personal elements that should be considered in determining what disposition to make of the charges. The accuser, moreover, may not have available the personal data regarding the accused which must be shown in the charge sheet, and the immediate commanding officer can supply the necessary information. Upon receipt of the charges, the immediate commander will take action in accordance with paragraph 33, MCM. If any of the offenses alleged may properly be punished by action under AW 104, he should so dispose of them, and line out and initial the specifications and charges thus disposed of. Charges not so disposed of should be carefully examined to insure that they are complete and correct in form and properly signed and sworn to by a person subject to military law, and that the accuser's summary of evidence is sufficient. Any missing personal data on the first page of the charge sheet should be inserted and any errors corrected. No corrections or changes may be made in the charges or specifications themselves.

33. FORWARDING CHARGES. — Charges which the immediate commanding officer of the accused has preferred himself, and charges submitted to him by others which he has not disposed of under AW 104, will be forwarded by him directly to the officer who has authority to appoint summary court-martial for the command (par. 30*a*, MCM), e. g., the regimental or post commander. (See par. 52, *infra*, for a discussion of the commanders having such authority.) The charges will be forwarded by letter of transmittal (except where trial by summary court-martial is recommended), inclosing the summary of evidence, certificate of previous convictions, and any other pertinent memoranda discussed in the preceding paragraphs.

CHAPTER 6

ACTION UPON CHARGES

34. IN GENERAL. The charges and allied papers are forwarded to the officer exercising summary court-martial jurisdiction over the organization—for example, the regimental or post commander—who will be referred to in this chapter as the "commanding officer." It is his task to see than the charges are properly disposed of. The various types of action he can take are discussed in the following paragraphs.

35. DISMISSAL OF CHARGES AND ACTION UNDER AW 104. a. Dismissal. Upon examination of the charges, he may decide that all or some of them do not warrant further action because they are trivial, do not constitute any offense or because there are sound reasons for not punishing the accused for such offenses. If so, he may dismiss all or part of the charges. If he wishes to dismiss all of the charges, he normally will return the charge sheet and allied papers to the accuser by indorsement on the letter of transmittal (if any) or by separate communication, stating that no action appears warranted. If he wishes to dismiss only some of the specifications or charges, he will draw lines through such specifications or charges and initial them.

b. Action under AW 104. He has the same obligation and authority as the immediate commanding officer of the accused to make use of disciplinary punishment under AW 104 if such punishment is appropriate. If, therefore, any of the offenses charged are "minor" offenses which can be adequately punished under that article, he will, unless trial is demanded, line out the specification or charge alleging that offense and have appropriate disciplinary punishment imposed. Although he may himself impose the punishment, normally the matter should be referred back to the immediate commanding officer of the accused for action. The procedure to be followed in imposing disciplinary punishment under AW 104 is discussed in chapter 3, *supra*. Of course, if the accused demands trial, disciplinary punishment cannot be imposed. In such case the charge must be either dismissed or tried.

c. Renumbering of charges and specifications. Where some charges and specifications are dismissed or disposed of under AW 104, the remaining charges and specifications may require renumbering. Thus, if there

were two charges, with one specification under Charge I and three specifications under Charge II, and the commanding officer struck out Charge I and its specification and also Specification 1 of Charge II, all that would be left would be a single charge with two specifications under it. Therefore, the numeral II should be stricken out after the Charge and the specifications should be renumbered 1 and 2. In such case it would be necessary to change the numerical designations of the charge and specifications appearing in the affidavit on the charge sheet to correspond to this renumbering.

36. MAKING CHANGES AND CORRECTIONS IN CHARGES. If the commanding officer decides that trial by court-martial is necessary on all or some of the charges, he should, before referring them to trial, have the charges carefully examined to determine that they are properly signed and sworn to, free from defects of form or substance, and that they properly set out an offense under the Article of War alleged. If any errors or omissions are discovered in the charge sheet or allied papers, relating to formal matters, such as data as to service, previous convictions, etc., corrections should be made or the missing data supplied. If the charges and specifications themselves contain obvious errors, corrections may be made, or the charges and specifications may be redrafted without sending the charges back to the accuser, provided that the correction or redraft does not involve any substantial change or include matters not already fairly included. Where corrections or changes are made, they must be initialed by the officer making them. If a specification sets out all the elements of the offense, but is carelessly drawn, its wording can be changed to conform to the appropriate form in appendix 4, MCM. Or if, for example, a specification and charge allege larceny in violation of AW 93, the specification can be redrafted to allege wrongful taking, and the charge changed to allege a violation of AW 96, since that offense is fairly included in the original charge. This change can be made by striking out the necessary words and figures and substituting new ones, or by retyping the entire specification and charge. However, the specification could not be redrafted over the accuser's signature to allege larceny of different or additional property, or to charge embezzlement rather than larceny. Such redrafting would result in charging new matters to which the accuser has never sworn. If such a change is necessary, new charges must be prepared and signed and sworn to either by the original accuser or some other authorized person.

37. REFERENCE TO TRIAL BY INFERIOR COURT. a. Policy. Having determined that trial by court martial is warranted, the commanding officer must decide to what type of court-martial the charges should be referred. The Manual for Courts-Martial provides that "charges, if tried at all, should be tried by the lowest court that has power to adjudge an appropriate and adequate punishment" (par. 34, MCM). The first question

to be determined then is whether a summary court has jurisdiction to try the accused and the offense in question, and if so, whether the punishment it has power to impose is adequate and appropriate for the offense. If the case cannot adequately be disposed of by summary court, then consideration must be given to referring it to a special court-martial. In this connection, the jurisdictional limits of summary and special courts-martial, discussed, in chapter 8, *infra*, should be considered. Trial by general court-martial should be the exception, not the rule. Charges against an enlisted man should not be referred to general court-martial unless the offense is so serious that only a general court-martial has power to adjudge an adequate sentence or unless the accused should be dishonorably separated from the service because he is unsuitable to associate with other enlisted men.

b. Procedure. If the charges are to be referred to a summary or special court-martial the 1st indorsement on page 3 of the charge sheet should be completed and signed by the adjutant on each of the three copies. The charge sheets, together with the allied papers, will then be transmitted to the summary court officer or trial judge advocate of the special court-martial as the case may be.

38. FORWARDING CHARGES TO AUTHORITY HAVING GENERAL COURT-MARTIAL JURISDICTION. a. Reference to investigating officer. If the commanding officer decides that trial by general court-martial is required, the charges must be formally investigated in compliance with AW 70 before being forwarded to superior authority (par. 30*c*, MCM). A formal investigation under AW 70 is not required before charges are referred to inferior courts-martial for trial (AW 70; par. 30*c*, MCM), although the commanding officer may have any charges investigated before deciding how to dispose of them. Such action would be proper if he were doubtful as to the nature of the offense, the appropriateness of the charges or the type of inferior court to which they should be referred. However, he should not unduly delay trial by requiring investigations in the usual case of minor offenses. The purpose and procedure of an investigation under AW 70 is discussed in chapter 7, *infra*.

b. Action after investigation. On the basis of the investigating officer's report, the commanding officer may conclude that his initial decision to recommend trial by general court-martial was not sound and that it would be better to dismiss the charges, dispose of them under AW 104 or refer them to an inferior court. He would accordingly take such of those actions as was indicated. If, however, he still believes that trial by general court-martial is warranted, he will forward the charges, allied papers and the investigating officer's report to the authority having general court-martial jurisdiction over the command. Unless he has been otherwise directed, all three copies of the charge sheet and other papers will be forwarded. Usually he will forward the charges by indorsement on the letter of transmittal. He must include in the indorse-

ment, or other communication, his recommendation as to trial. The indorsement or letter should be personally signed by the commanding officer and not by his adjutant. (See app. 2, p. 179 *infra.*)

c. Forwarding charges where general court-martial not recommended. The commanding officer may believe that trial by an inferior court is adequate, but he may have no power to refer the charges to such a court. For example, he is without authority to refer a capital case to a special court-martial (par. 58b, *infra*), or to refer charges against a noncommissioned officer to a summary court over his objection. (See par. 59a, *infra.*) In such cases trial by the inferior court in question can be authorized only by the authority having general court-martial jurisdiction. The commanding officer, therefore, would forward the charges to the authority having general court-martial jurisdiction, recommending trial by special or summary court, as the case may be.

d. Action by officer exercising general court-marital jurisdiction. AW 70 and paragraph 35*b*, MCM, require the authority having general court-martial jurisdiction to consider the advice of his staff judge advocate, based on all the information relating to the case which is reasonably available, before he orders trial by general court-martial. This requirement for examination of the charges by a trained military lawyer safeguards the substantial rights of the accused and protects him against trial on unfounded or relatively minor offenses by a general court-martial and insures adequate preparation and investigation of each case. The staff judge advocate rechecks the charges and accompanying papers to ascertain that all necessary data appear on their face, that they have been properly investigated and that there is sufficient evidence to warrant trial. Just as the "commanding officer" may correct errors and redraft charges and specifications over the signature of the accuser, provided no substantial change is made and no matter not fairly included in the original charges is added (par. 36, *supra*), so the staff judge advocate may make similar corrections and changes. If the investigation has been inadequate or is incomplete, he may recommend that the charges be sent back for further investigation. He must make a written report to the officer exercising general court-martial jurisdiction as to the kind of trial, if any, which should be had, taking into account the nature of the offenses charged, the circumstances surrounding them, the age, character, length of service, and former convictions of the accused, and policies as to trial by inferior court. (See app. 2, p. 178 *infra* for an example of such a report.) In addition to reference to a general court-martial for trial, he may recommend, and the appointing authority may take, any of the actions which the commanding officer could have taken—e. g. dismissal of any charge or specification, disposition under AW 104, or reference to an inferior court. Normally if disposition under AW 104 or trial by an inferior court is deemed proper, the charges will be returned to the commanding officer who forwarded them, with directions to take such action. If trial by general court-martial is decided upon, the charges

will be referred to the trial judge advocate of that court by completion of the first indorsement on the charge sheet.

39. SUSPECTED INSANITY. If there is reason to believe that the accused is mentally defective or was so at the time the offense was committed, steps should be taken to settle the question before charges are referred to trial. The matter should be referred to a board of one or more medical officers for its opinion on three questions: (1) whether both at the present time and at the time the offense was committed the accused knew the difference between right and wrong, (2) whether he had the capacity to keep from doing wrong, and (3) whether at the present time he has the mental ability to understand the nature of the proceedings against him and to do what is necessary to present his defense. To determine these questions the board should place the accused under observation, examine him and conduct such further investigation as it thinks necessary. Its report, in as nontechnical language as possible, should state its opinion specifically on these questions. On the basis of this report, further action on the charges may be suspended or the charges dismissed, proceedings may be taken to discharge the accused from the service on the ground of mental disability, or the charges may be referred to trial. Both the commanding officer who first received charges and higher authority to whom the charges are forwarded have authority to have the accused examined by a board of medical officers.

40. SUGGESTED TIME STANDARD FOR DISPOSITION OF CHARGES. There is no prescribed period of time within which charges must be preferred and the various steps in the trial of a case taken and completed. Normally, however, the following time periods can be observed without any sacrifice of thoroughness or fairness. In most cases it should be possible to prefer charges within 48 hours after an offense is known to have been committed. If such charges are to be tried by a summary court, the case should be tried and completed within 3 days after the charges are preferred. In special court-martial cases, the charges should be referred for trial, the trial had and the record completed within 7 days after the charges are preferred. In general court-martial cases, the charges should be investigated within 48 hours after they are preferred, should be sent to the officer exercising general court-martial jurisdiction within 24 hours after completion of the investigation and should be referred for trial within 48 hours after receipt by the officer exercising general court-martial jurisdiction. After being so referred they should promptly be served on the accused, but, except where military necessity demands it, the accused should *not* be brought to trial on those charges before a general court-martial within 5 days after such service unless he consents thereto. There will, of course, be many cases in which for good reasons compliance with this suggested standard will not be possible. However, this standard should be the rule, and departure from it the exception.

CHAPTER 7

INVESTIGATION OF CHARGES

41. PURPOSE AND SCOPE OF INVESTIGATION UNDER AW 70. The purpose of the formal investigation required by AW 70 is to inquire into the truth of the matter set forth in the charges, the form of the charges, and what disposition should be made of the case (par. 35*a*, MCM). It is not the investigator's function to build up a case against the accused, but to ascertain and impartially weigh *all* facts in arriving at his final conclusions. He is required to conduct "a thorough and impartial investigation" (AW 70). All available evidence should be exhausted. The investigating officer is not limited to examination of the witnesses and documentary evidence indicated on the charge sheet; he should extend his investigation as far as may be necessary to make it thorough. Failure of investigating officers to perform their duties in a careful and conscientious manner will sometimes cause injustice to be done and will often require return of the charges for further investigation, thus delaying the proceedings.

42. PRELIMINARY PROCEDURE UPON RECEIPT OF CHARGES. Before starting the investigation proper, the charge sheet and accompanying papers should be examined with particular attention to the witnesses and evidence relied upon by the accuser to substantiate the charges. The investigating officer should familiarize himself with the essential elements of each offense charged so that he will be able to determine whether the evidence received in the investigation supports the offense charged. Paragraphs 129 through 152, MCM, contain a discussion of the more common offenses under the Articles of War, and give in detail the necessary elements of proof in each case. Each specification should be compared with the corresponding form in appendix 4, MCM. Any minor corrections necessary to put it in proper form may be made and authenticated by initials. Changes of substance may not be made.

43. INVESTIGATION PROPER. a. Since, in the absence of a satisfactory reason, the report of investigation should be completed within 48 hours, immediate steps must be taken to arrange a time and place for the investigation at which the accused and all available witnesses will be present.

b. At the outset, the accused should be advised that an impartial investigation of the charges is to be conducted. The nature of the charges, the name of the accuser, and the names and substance of the testimony of all witnesses should be made known to him. He should be shown the charge sheet and accompanying papers. He should then be advised that he has the right to cross-examine all witnesses against him if available, to call any available additional witnesses in his own behalf, to introduce any other evidence, and to make any statement bearing on the case subject to the risk of having it used against him. He must be specifically warned that it is not necessary for him to make any statement. He should be made to understand that the investigating officer is seeking the truth, not playing the role of prosecutor.

c. After the accused has been fully advised of his rights, all available witnesses should be called and examined in his presence. In examining witnesses the investigating officer should encourage them to talk freely, being alert to discover any evidence not disclosed by the papers. If witnesses are not available, their expected testimony should be read to the accused and he should be asked if he desires to have them questioned further. If he does not, the witnesses need not be called, even if they become available. If the accused does wish to question them, the investigating officer should ascertain whether they will be available within a reasonably short time and, if so, whether the officer referring the charges for investigation will consent to a delay for the purpose of questioning such witnesses. The investigating officer may ascertain the substance of the testimony which the accused expects from any witness, and inform the accused that such testimony will be regarded as having been taken; and if accused then withdraws his request to have the witness questioned, such witness need not be called even if he is available. The decision of the officer having immediate summary court-martial jurisdiction over the witness (e. g. the regimental commander) as to the availability of the witness is final (par. 35*a*, MCM). The accused has no right to counsel, although in exceptional cases the commanding officer of the accused may, in his discretion, permit counsel.

44. PREPARATION OF SUMMARIES OF EXPECTED TESTIMONY. a. Witnesses. After each witness has been examined and cross-examined his material testimony should be reduced to writing and recorded on a separate sheet of paper headed by the name of the witness, a notation as to whether he was sworn, and any other appropriate explanatory comment, e. g., "Johns, Walter E., Pvt., Co. B, 111th Infantry, Fort Meade, Maryland (Sworn)," "Werner, Irwin A., grocer, 112—13th St., N. W., Washington, D. C. (by telephone)." The summary should be in the first person and should be reasonably brief without sacrificing important details. Matter which is obviously hearsay or which could serve no useful purpose at the trial should be excluded. Although witnesses need not sign or swear to

their statements, it is advisable to secure signed and sworn statements if practicable. If the witness is sworn, the following jurat: "Subscribed and sworn to before me this _____ day of _____, 19____," should be added after his signature. The jurat will be signed by the investigating officer, who has authority to administer oaths for all purposes of the investigation. (See AW 114, and app. 2, pp. 180–185 *infra*, for examples of summaries of expected testimony.)

b. Statement of accused. Any statement made by the accused will likewise be reduced to writing, will be read over to him, and he will be given the opportunity to sign it, if he so desires. But he will not be required or induced to sign it and will be advised that it is not necessary for him to do so.

45. SUFFICIENCY OF EVIDENCE TO SUSTAIN CHARGES. a. General. After the investigating officer has heard all the witnesses and examined all documents and other relevant matters, he will check the essential elements of the offense with the evidence to determine whether the charges can be sustained. It often will be impossible to find *direct* evidence of every element of the offense charged, but the element may be established by reasonable inference from other facts (par. 112*b*, MCM). Thus, for example, all the essential elements of a larceny may be proved by showing (1) the disappearance of the article from the possession of its owner without his consent (from which it is inferred that it was taken and carried away by trespass), and (2) the unexplained possession by the accused of this same article shortly thereafter (from which it is inferred that it was the accused who committed the trespass and carried the article away) and (3) the fact that the accused had made no report of having the property of another in his possession, well knowing the incriminating nature of such possession, plus, perhaps, the fact that he used the property as his own, or asserted ownership of it through pawning it or otherwise (from which it is inferred that he had the intention to deprive the owner permanently of his property). Wherever the intention of the accused is an essential element, as for example, in desertion, larceny, burglary, murder, it almost always must be inferred from the circumstances.

b. Lesser included and related offenses. If the evidence is not sufficient to establish the offense charged, it may tend to establish a lesser included offense—i. e., an offense which must be proved in establishing the principal offense, but which lacks some of the additional elements of the principal offense. For example, absence without leave must be proved to establish desertion, but does not contain the element of intent to remain away permanently or to avoid hazardous duty or shirk important service required for desertion; wrongful taking without the consent of the owner must be shown to establish larceny, but lacks the element of intent to deprive the owner permanently of his property required for larceny. (See app. 8 *infra* for a list of some of the more common lesser included offenses.)

If the evidence tends to establish only the lesser included offense, the investigating officer may recommend that the lesser offense be substituted on the charge sheet for the greater offense originally charged, or, in case of doubt, that the accused be tried on the original charge since the court can always find him guilty of the lesser included offense. (See par. 106, *infra.*) The evidence may, however, show a different offense, not included in the offense charged. For example, if under a charge of larceny the evidence showed that the accused did not wrongfully take the property but that it was entrusted to him, the offense of embezzlement should have been charged. In such case, the investigating officer may recommend that the original charge be withdrawn and the accused tried on a substituted charge. The investigating officer should draft the substituted charge on a separate charge sheet, have it sworn to (or swear to it himself if to the best of his knowledge and belief the facts it contains are true) and forward it with his report of investigation.

46. RECOMMENDATION AS TO DISPOSITION OF CASE. If the investigating officer decides that the evidence will not support a finding of guilty of the original charge, or of some lesser included or other offense, he will so report, recommending dismissal of the charges. If he is in doubt as to whether the charges can be sustained, he can properly recommend trial, particularly if the offense is of a serious nature, so that the doubtful issue of fact can be determined by a court. If he is convinced that the charges can be sustained, he will then recommend the type of court to which they should be referred. In this connection he will be guided by the policy with respect to trial by inferior courts discussed in chapter 6, *supra.*

47. REPORT OF INVESTIGATING OFFICER. a. Contents. If he determines that the charges should be dismissed, disposed of under AW 104, or tried by inferior court, the investigating officer may make an informal report to that effect to the commanding officer, either orally or in writing. If the commanding officer then decides not to forward the charges, the investigating officer may be required to make ony a very abbreviated formal report or none at all (par. 35*a*, MCM). He must make a complete formal report, however, when required to do so, or when he himself recommends trial by general court-martial. The printed form of Pretrial Investigating Officer's Report (WD AGO Form 120, see app. 2, p. 177 *infra*) may properly be used, but its use is not required, and other forms may be provided locally for this purpose. The report will include a recommendation as to the disposition of the case, a statement of the investigating officer's opinion as to whether the accused is or was mentally defective, deranged, or abnormal; and a statement of the substance of the testimony taken on both sides (par. 35*a*, MCM). The report, together with a summary of the expected testimony of witnesses, and any statement by the accused, will be prepared in triplicate.

b. Documents and other evidence. A list of all documents and other evidence (such as a pistol, knife, or shoes) and any other matters which have been considered, with such comment as may be necessary to identify them, should be made in the space provided on the form. Where practicable to do so, documents should be attached to the report, fastened to legal size paper to permit ready incorporation into the file. Official records and bulky documents or evidence will not be attached, but a statement will be made as to where they may be found. Articles to be used as evidence, which have been placed for safekeeping in the possession of a responsible person (for example, a billfold, believed to have been stolen, which has been found in the accused's locker and delivered to the company commander) should be left in his custody, if practicable, until they are produced at the trial. The reason is, of course, that in order to identify the article when introducing it in evidence, it may be necessary to present the testimony of each person who has had it in his possession since it was found in the accused's locker, and this procedure becomes unduly complicated if the article has passed through several hands.

c. Explanatory remarks. A statement of any explanatory or extenuating circumstances should be made in the report whether they are offered by the accused in his own behalf or are developed by the independent inquiry of the investigating officer. These circumstances, which perhaps have no direct bearing on the question of accused's guilt, may be very important in determining the type of court to try the case. Comments as to appearance and apparent credibility of the accused or other witnesses may be included. In short, all matters which were given weight by the investigating officer in making his recommendation should appear in his report.

48. INVESTIGATION OF THE CASE OF PRIVATE BARK. **a.** Examples of the forms and procedure used in investigating charges appear in the case of Private Lennie O. Bark (app. 2 *infra*). By first indorsement on the letter of transmittal (app. 2, p. 176 *infra*) the regimental commander referred the charges to Lieutenant Neeland, investigating officer. Lieutenant Neeland first studied the charges and the accuser's summary of evidence, and noted that the offenses alleged were willful disobedience of a superior officer, escape from confinement, and desertion; and that the specifications followed the appropriate forms in appendix 4, MCM. He then examined the paragraphs in the Manual for Courts-Martial dealing with the elements of proof of these three offenses (pars. 134*b*, 139*b*, and 130*a*, respectively, MCM). It appeared that the witnesses whose testimony was outlined in the accuser's summary of evidence should be able to testify to all of these necessary elements. Accordingly, he promptly arranged for the witnesses to come to his office at regimental headquarters and for the accused to be brought there under guard. This was a fairly simple matter, since all were members of the same command. If

some witnesses had been in other organizations or were civilians, the investigating officer might have had to go to them; or, if it had not been practicable for the accused to be brought from his place of confinement, it might have been necessary to interview him and the witnesses at the guardhouse.

b. After advising Private Bark in the manner outlined in paragraph 43b, *supra*, Lieutenant Neeland interviewed each witness separately in Bark's presence, with the exception of Lieutenant John Smith, giving Bark an opportunity to cross-examine each and to make a statement himself. Lieutenant Smith was interviewed by telephone after the accused had been shown the summary of his expected testimony and stated that he did not wish to cross-examine him. After the hearing he prepared, in triplicate, a summary of each witness' testimony which was signed and sworn to by each, except Lieutenant Smith. (See app. 2, pp. 180–184 *infra*.) The accused elected to remain silent rather than make a statement. Concluding that the statements of the witnesses were sufficient to support the charge, Lieutenant Neeland prepared his report in triplicate (app. 2, pp. 177–178 *infra*) recommending trial by general court-martial, attached the statements as exhibits, and returned all three copies, with the charges and accompanying papers, to the regimental commander.

CHAPTER 8

APPOINTMENT AND JURISDICTION OF COURTS-MARTIAL

49. APPOINTMENT IN GENERAL. There are three classes of courts-martial: general, special, and summary (AW 3). Certain commanding officers are authorized by the Articles of War to appoint one or more of these classes of courts. The officer who has this power is called the "appointing authority." The power is not dependent upon rank, but upon command. An officer who is not so authorized under the Articles of War cannot appoint courts, whether he be a general officer or a second lieutenant. Officers authorized to appoint are enumerated in AW 8, 9, and 10, dealing, respectively, with general, special, and summary courts-martial.

50. WHO MAY APPOINT GENERAL COURTS-MARTIAL. A general court-martial can be appointed only by relatively few persons. AW 8 authorizes the President of the United States, the Superintendent of the Military Academy, the commanding officer of a territorial department or territorial division (e. g., the Department of Hawaii, the Department of Alaska) and the commanding officers of certain large tactical units—i. e., an army, a corps, a division, and a separate brigade—to appoint a general court-martial. It will be seen that this list does not include the commanding officers of many other organizations or installations, such as service commands, air forces, defense commands, ports of embarkation, etc. However, AW 8 permits the President to empower the commanding officer of any district or any force or body of troops to appoint a general court. Through General Orders, or other directives, of the War Department, the President has given that power to commanding officers of many such large organizations and installations. A commanding officer who has power to appoint a general court-martial is known as an "authority exercising general court-martial jurisdiction."

51. WHO MAY APPOINT SPECIAL COURTS-MARTIAL. a. Post, station, and regimental commanders. Any authority who can appoint a general court-martial can also appoint a special court-martial. In addition, the commanding officers enumerated in AW 9 have power to appoint such courts—i. e., "the commanding officer of a district, garrison, fort, camp, or other place where troops are on duty"—in short, any post or station

commander—and the commanding officer of a "brigade, regiment, detached battalion, or other detached command." Post and regimental commanders are typical examples of officers who have power to appoint a special court-martial.

b. Other commanding officers. Many types of organizations, it will be noted, are not expressly referred to in AW 9. No reference, for example, is made to squadrons, groups, and wings in the Air Force. Such units, however, correspond to battalions, regiments, and brigades, respectively, and so have the same power to appoint inferior courts. (See par. 2*c*, AR 95–10, 27 July 1942.) Nor is there any express reference to the many varying special types of units which are not part of any division or regimental organization, such as antiaircraft battalions, supply, repair and replacement depots, service schools, etc. Most of these, however, are covered by the term "detached battalion or other detached command." If a unit is not subject to the immediate disciplinary control of a superior of the same branch of the service and its commanding officer is primarily responsible for the administration of discipline over the enlisted men in it, it is "detached." For example, independent units such as a quartermaster port battalion or a service school are "detached." So is an engineer battalion in an infantry division, since there is no intermediate command of the same branch of the service between it and division headquarters, and its commanding officer is directly responsible for discipline in the command. On the other hand, a battalion in an infantry regiment, while serving as a part of the regiment, is not "detached" since it is merely a tactical unit subject for disciplinary purposes to the control of the regimental commander, a superior of the same branch of the service.

c. Reservation by superior authority of power to appoint. A commanding officer who has power under AW 9 to appoint special courts-martial is known as an "authority exercising special court-martial jurisdiction." His power to appoint such courts cannot, however, be exercised if "a competent superior deems it 'desirable' to reserve that power to himself and so notifies the subordinate" (par. 5*b*, MCM). By "superior" is meant higher authority in the same chain of command. For example, the commanding general of a division might reserve to himself the power to appoint special courts martial for all or any units in the division, and if he so notified the commander of each regiment or detached command in the division, they could not appoint special courts.

52. WHO MAY APPOINT SUMMARY COURTS-MARTIAL. a. General. Summary courts may be appointed by any officer who has power to appoint a general or special court-martial. Post and regimental commanders are typical examples of an authority exercising summary court-martial jurisdiction. The commanding officer of any "detached company, or other detachment" is also specifically authorized to appoint summary courts (AW 10). The term "detached" or "detachment" has the same meaning

as in AW 9—i. e., a body of troops separated from others and made an independent unit for disciplinary purposes. (See par. 51b, *supra.*) So that a small detachment may have the means of enforcing discipline through summary courts, AW 10 provides that "when but one officer is present with a command he shall be the summary court officer." In such case, he automatically assumes his duties as summary court officer without any order of appointment (par. 5*c*, MCM). Where more than one officer is present with a command, however, a subordinate officer must be appointed summary court-martial (par. 5*c*, MCM).

b. Reservation by superior authority of power to appoint. As in the case of special courts-martial, a "competent superior" may reserve to himself the power to appoint summary courts. (See par. 51c, *supra.*)

53. COURTS APPOINTED BY "ACCUSER" OR "PROSECUTOR." a. General and special courts-martial. An accused may not be tried by a general or special court-martial appointed by the "accuser," that is, the one who originates, adopts, or becomes responsible for the charge, or the "prosecutor," that is, the one who proposes or undertakes to have the charges tried, in the case. (See AW 8, 9) An officer who has himself signed and sworn to the charges is always an accuser (par. 60, MCM) and any officer who, because of his personal feeling or interest in charges preferred by another, adopts them as his own or undertakes to have them tried is an accuser or prosecutor (pars. 5, 60, MCM). The mere forwarding of charges with a formal recommendation as to their disposition does not make the forwarding officer either an accuser or prosecutor. Every officer exercising court-martial jurisdiction must make a recommendation as to the disposition of charges submitted to him before they are referred for trial. Mere fulfillment of this official duty does not disqualify him from acting as an appointing authority. If the officer who appointed a general or special court is the accuser or prosecutor in a particular case, the case cannot be tried by his court. For example, if a division commander had preferred charges, the accused could not be tried by a general or special court-martial appointed by him. The charges would have to be tried by a special or general court appointed by superior authority—e. g., the corps commander. The fact that an appointing authority is an accuser or prosecutor as to charges in one case does not, of course, mean that a general or special court appointed by him cannot try other cases in which he is not the accuser or prosecutor.

b. Summary courts-martial. There is no prohibition against trying an accused before a summary court-martial appointed by the accuser or prosecutor in the case. It is generally desirable, however, where the officer who appointed the summary court is the accuser or prosecutor, to forward the charges to higher authority for reference to another summary court.

54. COMPOSITION OF COURTS-MARTIAL. a. Who may serve as members. Only officers are competent to serve on courts-martial. By "officers" is meant "commissioned officers" (AW 1). Warrant officers and flight officers are not "officers" within this definition and may not be detailed as members, trial judge advocate, defense counsel, or as summary court officers. An officer who is the "accuser" in a particular case or who is "witness for the prosecution," i. e., one called as a witness by the prosecution at any stage of the proceedings (pars. 4, 5, 59, MCM; AW 9, 10), is ineligible to sit as a member in the trial of that case. If, therefore, a member of the court is called as a witness for the prosecution, he must, before qualifying as a witness, be excused from further duty as a member of the court in the case (par. 59, MCM). This disqualification does not apply to summary court officers. The summary court officer may be the accuser and chief witness for the prosecution but, in such a case, the charges should, as a matter of policy, be referred to another summary court officer for trial, if possible.

b. Number of members. Every general court-martial must have at least five members (AW 5) and every special court-martial at least three (AW 6). If less than the required number is present, a trial cannot proceed (par. 38*c*, MCM). Therefore, enough members over the bare minimum should be detailed in the order appointing the court so that if some members are absent or challenged, the court will not be reduced below the necessary quorum and become unable to function. Usually from seven to ten members are detailed on a general court and from five to eight on a special. One of the members of a general court-martial must be expressly designated as law member (AW 8). Failure to designate a law member renders the entire general court-martial illegal. A trial judge advocate and a defense counsel must be appointed for both general and special courts-martial (AW 11). In addition a general court-martial may also have one or more assistant trial judge advocates and assistant defense counsel when necessary (AW 11). The detail of assistant trial judge advocates or assistant defense counsel on special courts-martial is permissible, but is neither required nor customary. If so detailed, however, there should be as many assistant defense counsel as trial judge advocates. Defense counsel should be of at least equal rank with the trial judge advocate. The duties of the trial judge advocate, defense counsel, and members are discussed in chapters 10, 11, and 12, *infra*, respectively. A summary court consists of only one officer who combines the functions of member, trial judge advocate and defense counsel. His duties are discussed in chapter 9, *infra*.

c. Experience and qualifications of members. The proper functioning of the court-martial system is dependent upon the selection of qualified officers for detail to courts. For that reason, it is especially important that each general and special court have detailed one or more members with a background of military law. A summary court officer should

possess a like qualification and should be selected from field officers whenever practicable. (See par. 3*v*, AR 235–5, 15 May 1942.) Where possible, officers who are lawyers should be utilized for the three key positions of president, trial judge advocate, and defense counsel on general and special courts martial, and for the additional key position of law member on general courts martial. A general or special court to which charges against a member of the Women's Army Corps is referred will include one or more commissioned officers of the Women's Army Corps, when available. (See WD Cir. 462, 1944.)

55. ORDERS APPOINTING COURTS. a. Preparation. After final selection of personnel for a court-martial has been made and approved by the commanding officer, the formal order must be prepared, mimeographed and published. Orders appointing general courts-martial are usually prepared under the supervision of the staff judge advocate, whereas orders appointing special and summary courts-martial are usually prepared by the adjutant of the organization appointing the court, e. g., regiment, detached battalion, etc. Forms for orders appointing general, special, and summary courts are set out in appendix 2, MCM. Examples of orders appointing special and summary courts-martial are contained in appendices 3 and 9 *infra* respectively. The order appointing the court is a special order and subject to the provisions of paragraph 4, AR 310–50, 1 December 1944, as to form, contents, and abbreviations.

b. Detail of members. The orders appointing general and special courts will name the members in order of rank, personnel of the prosecution, and the defense being named after the members of the court. The grade, name, serial number, and organization or arm of service, of each officer detailed should be stated, e. g., "MAJ WILFRED E KESSELRING, 0322618, 21st Inf." The appointing order should not designate a president, since the ranking member present at any particular sitting is automatically the president.

c. Amending orders. When it becomes necessary to relieve members or to add new ones, the appointing order may be amended. This should *not* be done by deleting certain names and inserting others—e. g., "par. 8, SO 31, this Hq, 31 Jan 1944, is amended by deleting the name of MAJ WILFRED E KESSELRING, 0322618, 21st Inf, and inserting the name of CAPT RUDOLPH O MILSTEIN, 0847996, 21st Inf, in place thereof"—but by formally relieving the member and appointing his successor, viz, "CAPT RUDOLPH O MILSTEIN, 0847996, 21st Inf, is detailed as a member of the SCM aptd by par. 8, SO 31, this Hq, 31 Jan 1944, vice MAJ WILFRED E KESSELRING, 0322618, 21st Inf reld." Amending orders should be kept at a minimum. Frequently it is no more difficult to prepare an entire new detail than to prepare an amending order changing an existing detail. In any event, no more than two amending

orders should be issued. If it is necessary to make further changes, a new court should be appointed.

d. Dissolving court. In appointing a court, the old court should not be dissolved nor the order appointing the old court rescinded or revoked. Such action would prevent the reconvening of the old court for purposes of revision proceedings if that became necessary. A court-martial is dissolved only as a method of censure.

e. Withdrawing cases from old court. When a new court is appointed, care should be exercised to include in the appointing order a provision withdrawing from the old court charges previously referred to it and referring them to the new court—e. g.:

> "All unarraigned cases in the hands of the trial judge advocate of the SCM aptd by par. 8, SO 31, this Hq, 31 Jan 1944, are withdrawn from that court and are referred for trial to the trial judge advocate and the SCM herein aptd."

56. JURISDICTION IN GENERAL. In directing trial by inferior courts, consideration must be given to the jurisdictional limits of such courts with respect to persons, offenses, and punishments. A failure to recognize these limits may lead commanding officers to refer cases for trial by inferior courts-martial which the court is without power to try. In such cases the result is a void sentence which cannot be enforced.

57. JURISDICTION OF GENERAL COURTS-MARTIAL. General courts-martial have power to try any person subject to military law for any crime or offense made punishable by the Articles of War (AW 12) and upon conviction may, within certain limitations, punish such person at its discretion (par. 13, MCM). As to limitations on a court's discretion in imposing a sentence, see paragraphs 117 through 120, *infra*, and paragraphs 102 through 104, MCM.

58. JURISDICTION OF SPECIAL COURTS-MARTIAL. a. As to persons. Special courts-martial have power to try all persons subject to military law except "commissioned officers and persons of equivalent, relative or assimilated rank" (par. 14, MCM). Warrant officers, flight officers, and aviation cadets are, therefore, triable by special courts-martial. Both special and summary courts-martial have jurisdiction over civilians subject to military law, but that authority should not be exercised in this country without consent of the War Department.

b. As to offenses. Any offenses not capital may be tried by special court-martial. A capital offense is any offense which the Articles of War expressly provide may be punished by death (AW 43). Thus, a sentinel who sleeps on his post in time of war in violation of AW 86, commits a capital offense because that Article provides that he shall "suffer death or such other punishment as the court-martial may direct." Since the offense is one which is expressly made punishable by death

by the Article of War defining it, the offense is capital. The following offenses are capital: desertion in time of war (AW 58); advising or aiding another to desert in time of war (AW 59); assaulting or willfully disobeying a superior officer (AW 64); mutiny or sedition (AW 66, 67); misbehavior before the enemy (AW 75) and other war offenses (AW 76–78, 81–82); misbehavior of a sentinel in time of war (AW 86), including sleeping on post, drunk on post, or leaving post before regularly relieved; and murder or rape (AW 92). These capital offenses, except murder, rape, and spying (par. 14, MCM), may be tried by special court-martial if, but only if, *prior* to trial the officer exercising *general* court-martial directs the particular case to be so tried (AW 12, 13). For example, the commanding officer of a regiment cannot refer charges of sleeping on post in time of war (AW 86) to a special court-martial without express authority from the officer exercising general court-martial jurisdiction, i. e., the division commander. If he believes the case should be tried by a special court-martial, he must forward the charges to division headquarters. In such case, the division commander could in his discretion either refer the case for trial to a general or special court-martial appointed by himself, or return the charges to the regimental commander with authorization to try them by special court-martial. In event of trial of a capital case by special court-martial, the punishment that may be imposed is limited by AW 13 (par. 14, MCM). No capital case therefore, should be referred to such a court for trial unless it is clear that the punishment it has jurisdiction to impose is adequate under the circumstances. Nor does the power to try a capital case give it jurisdiction over persons otherwise not subject to trial by special court-martial, e. g., officers (AW 12, par. 14, MCM).

c. As to punishments. Special courts-martial have power to adjudge confinement of not more than 6 months, and forfeiture of two-thirds pay per month for not more than 6 months (AW 13). They may adjudge restriction to the limits, detention of pay, and hard labor without confinement, for not more than 3 months. They may also adjudge a reprimand, admonition, and reduction of a noncommissioned officer or private first class. They cannot adjudge death, dishonorable discharge of an enlisted man, or dismissal of an officer (par. 15, MCM).

59. JURISDICTION OF SUMMARY COURTS-MARTIAL. a. As to persons. Summary courts do *not* have jurisdiction over commissioned officers, warrant or flight officers, aviation cadets, master sergeants, first sergeants, or technical sergeants under any circumstances. They have jurisdiction over privates, privates first class, and noncommissioned officers *below* the grade of technical sergeant. Such noncommissioned officers, however, cannot be tried by summary court if they object, unless the trial is authorized by the officer exercising general court-martial jurisdiction over them (par. 16, MCM). For example, a regimental commander

could not refer charges against a corporal in his command to a summary court-martial over the corporal's objection. In such a situation the division commander (who exercises general court-martial jurisdiction) might authorize trial by summary court-martial, after which the regimental commander could refer the charges to such court. It should be noted that technicians are noncommissioned officers. Privates and privates first class can be tried by summary courts regardless of their objection.

b. As to offenses. Summary courts-martial have jurisdiction to try any offense not capital. They have *no* power to try a capital offense under any circumstances. For a discussion of capital offenses, see paragraph 58b, *supra.*

c. As to punishments. Summary courts-martial have power to adjudge confinement of not more than 1 month, restriction to limits for not more than 3 months, and forfeiture or detention of two-thirds of 1 month's pay (AW 14). The maximum amount of confinement and forfeiture (or of confinement and detention) may be imposed together in one sentence. Since confinement and restriction to the limits are both forms of deprivation of liberty, only one of these may be imposed in the maximum amount in any one sentence (par. 17, MCM). Summary courts have power also to impose a reprimand or admonition and to adjudge reduction of noncommissioned officers or privates first class (par. 103*d* and *e*, MCM). They cannot adjudge death, dishonorable discharge of an enlisted man or dismissal of an officer (par. 103*b*, MCM).

CHAPTER 9

SUMMARY COURT OFFICERS

60. NATURE AND FUNCTIONS OF SUMMARY COURT. The function of a summary court is to dispense justice promptly for relatively minor offenses under a simple form of procedure. A summary court-martial consists of a single officer, called the "summary court officer," who performs the functions not only of a court, but of the trial judge advocate and defense counsel as well. The summary court must investigate both sides of the matter thoroughly and impartially and see that the interests of both the Government and the accused are fully conserved (par. 82, MCM). A summary court proceeding is a true "trial," its procedure following that prescribed for general courts-martial as far as practicable. Its very name indicates, however, that its proceedings will be taken promptly and speedily completed.

61. SELECTION OF SUMMARY COURT OFFICERS. Since far more soldiers are tried by summary courts than by all other types of military tribunals combined, the fairness and efficiency of the entire court-martial system may be judged by the manner in which such proceedings are conducted. It is, therefore, of utmost importance that each summary court officer not only possess qualities of leadership, fairness and dignity, but that he be so well grounded in rules of summary court procedure as to enable him to maintain a judicial atmosphere in his proceedings at all times. The appointment of inexperienced junior officers with little or no background in military law or the handling of men defeats the very purpose of a summary court trial. The duty of acting as summary court officer is not one, therefore, that can be rotated indiscriminately among officer personnel of a command. As the summary court must act impartially, any close personal knowledge of the soldier or the offense is a handicap. It is, therefore, inadvisable to refer to a summary court officer charges against personnel of his own immediate command with whom he has had close personal contact. Although there is no legal prohibition against the accuser or prosecutor serving as summary court officer, a fairer trial will result if such cases are referred for trial to someone having no knowledge of the persons or offenses involved. Of course, in small detachments, with a single officer or with a very limited number of officers present, if

the maintenance of discipline requires immediate trial and punishment, the charges may have to be tried by an officer familiar with the case, even the accuser himself. That the law provides for. (See pars. 53 and 54a, *supra.*) Where possible, however, such a result should be avoided.

62. DUTIES OF SUMMARY COURT OFFICER BEFORE TRIAL. **a.** The first knowledge that a summary court officer ordinarily will have of a case will be upon his actual receipt of the charges referred to him for trial. Since usually neither a letter of transmittal nor a report of investigation will accompany the charges, his only information of the case may be the contents of the charge sheet itself. This he will carefully examine, both to determine the offenses to be tried and the evidence, witness and documentary, that may be adduced to prove them. Although he should correct and initial slight errors or obvious mistakes in the charges, he has no authority to make any substantial change therein. As soon as the charges and accompanying papers, if any, have been examined and a knowledge obtained as to the proof necessary to sustain the charges, immediate arrangements should be made for trial. That is of especial importance if the accused is in arrest or confinement. It should be possible in the normal case to arrange for the trial to take place within 24 hours after receipt of the charges. The summary court officer then notifies all witnesses and the accused of the time and place set for trial. The organization commanders of military witnesses, including the accused, should be requested (informally, by telephone or otherwise) to have them present. If the accused is in confinement, arrangements for his attendance may be made with the appropriate prison officer. Civilian witnesses may be notified, by letter or telephone, of the time of the trial. The summary court officer has the same power as the trial judge advocate of a general or special court to compel the attendance of civilian witnesses by subpoena and to take depositions in proper cases. (See par. 68c and e, *infra.*)

b. The case of Private Merton T. Johnson (app. 4 *infra*) may be considered to illustrate the procedure followed by a summary court officer. On 13 October 1943, Major Charles B. Foster, 181st Infantry, Summary Court, received the original and two copies of a charge sheet, together with a certificate of previous convictions extracted from the service record of accused showing a prior conviction. He then studied the charge sheet from which he learned that the accused had been in confinement since 11 October 1943, and that he was charged with two offenses: being drunk in camp and breach of restriction, both in violation of the 96th Article of War. He noted the names of three witnesses listed on page 1 of the charge sheet: Captain Arthur M. Stern, Company C, 181st Infantry, Corporal Zachary T. Kellogg, Company K, 181st Infantry, and Private Thomas D. Graves, 26th Military Police Company. He first called Captain Stern, then the commanding officers of the two enlisted witnesses

and arranged for them to be present in his office at 0900 the next morning. He next called the prison officer at the post guardhouse and arranged for the presence of accused at the same time.

63. CONDUCT OF TRIAL. a. Explanation of accused's rights. At the appointed hour, when all witnesses and the accused have arrived, the court will proceed with the trial. Witnesses should be excluded from the proceedings of the court until called to testify. The accused should be called in and advised of the following matters: the nature of the proceeding; who appointed the court; the name of the accuser; the names of the witnesses to be called so far as is known; the right of accused to cross-examine them or have the court ask any questions desired; the right of accused to call any witnesses or produce any evidence in his own behalf, with assurance that the court will assist him in every way possible to do so; and his right to testify, to remain silent, or to make an unsworn statement at the proper time. If accused desires to produce additional witnesses or other evidence, the court should recess briefly at this point to arrange for having the witnesses summoned or the evidence produced.

b. Arraignment and pleas. After making sure that accused understands his rights and is as much at ease as possible under the circumstances, the summary court should read or show the charges and specifications to him. He should be asked if he understands the nature of the charges. If he indicates that he does not, additional explanation should be made. He should then be asked how he pleads to each specification of each charge and to each charge. If he pleads guilty to any specification or charge, the meaning and effect of his plea should be explained to him, including the maximum sentence the court could impose if the plea is allowed to stand. (For form of explanation of effect of plea of guilty, see app. 1, p. 149 *infra.*) The court should change the plea of "guilty" to "not guilty" if the accused requests it or if there is any doubt as to his understanding and desire to plead guilty, or if at any time during the trial he makes a statement, sworn or unsworn, inconsistent with the plea. If the guilty plea is changed, the court will proceed in the same way as if a plea of "not guilty" had been originally entered. If a plea of guilty to all specifications and charges is allowed to stand, the court may proceed at once to find the accused guilty and to impose an appropriate sentence. Despite the plea of guilty, however, the court, if it so desires, may summon witnesses to clear up any doubtful matters or to testify to any mitigating or extenuating circumstances in connection with the commission of the offense. If after hearing this evidence the court should believe the plea of guilty to have been improvidently entered it may allow a withdrawal of the guilty plea.

c. Conduct of trial proper. If the accused enters a "not guilty" plea to any offense charged, witnesses must be called or evidence produced to

establish every element of every offense to which he has so pleaded. Witnesses for the prosecution will first be called. They will be sworn and interrogated by the prosecution as to all matters relevant to the offense charged, after which the accused will be extended the right to cross-examine them. The accused may question them himself, or suggest questions to be asked by the court, or decline to exercise his right. The court will carefully follow the testimony but will not attempt to record it. After all prosecution evidence has been offered, evidence for the defense, including any testimony or statement by the accused will be received. The rights of the accused as a witness should be fully explained to him. (For a form of such explanation, see app. 1, pp. 152–153 *infra.*) The accused may testify or make an unsworn statement at any stage of the presentation of his defense. If the accused elects to make an unsworn statement, the court may not cross-examine or question him on the statement par. 76, (MCM).

d. Findings and sentence. At the conclusion of all evidence on both sides, the court, after considering the evidence, should arrive at findings of guilty or not guilty as to each offense charged. A summary court, like members of a general or special court, must be satisfied beyond a reasonable doubt before it can find an accused guilty. (See par. 104, *infra.*) If the accused is found not guilty of all offenses charged, the court will advise the accused that he has been acquitted of all charges and specifications. If, however, the court has convicted the accused of any offense charged, or of an offense included in any offense charged, it will not announce any of its findings at that time. It will rather determine the sentence to be imposed, taking into consideration any evidence of previous convictions and the personal data as to the accused appearing on the first page of the charge sheet. The evidence should be shown or read to the accused who will be asked whether it is correct. If he claims it is not correct, the court will take action as indicated in paragraph 79*b*, MCM. A discussion of findings and sentences will be found in chapters 15 and 16. After deciding upon its sentence, the court should announce both its findings and sentence immediately, i. e., before the accused leaves, unless otherwise directed by the appointing authority. In the case of Private Merton T. Johnson (app. 4 *infra*) the court would have announced its findings and sentence as follows: "Private Johnson, the court finds you: Of all the Specifications and the Charge: Guilty, and sentences you to perform hard labor for fifteen days and to forfeit eighteen dollars of your pay."

64. DUTIES OF SUMMARY COURT OFFICER AFTER TRIAL. The duties of the summary court are not over at the conclusion of the trial. So much of the proceedings as relate to pleas, findings, and sentence or acquittal must be recorded in the appropriate place on page 4 of the charge sheet (par. 86 and app. 8, MCM). All three copies of the charge sheet will be completed. For the completed record of trial in the case of Private John-

son, see appendix 4 *infra*. If any previous convictions were considered by the court, as in the Johnson case, a notation of that fact and the number considered will follow the sentence in the column headed "Sentence or acquittal and remarks" on page 4 of the charge sheet. If the accused were a noncommissioned officer and objected to trial by summary court, a notation that trial was authorized by an authority competent to bring the accused to trial before a general court-martial should be made in the same column. A statement that the meaning and effect of the accused's plea of guilty (if any) and his right to testify were explained to him is not required (see note, app. 8, MCM), but is desirable, and may be placed in the same column, e. g., "MCM, par. 82 complied with," or "Meaning and effect of plea of guilty explained to accused." The summary court will then sign the record in triplicate and will forward all three copies, and accompanying papers, without letter of transmittal to the reviewing authority, i. e., the authority who referred the case for trial or his successor (par. 86, MCM). If the summary court officer is the only officer present with the command, he will so state in signing the record and instead of forwarding the record, will hold it as transmitted to himself as reviewing authority (par. 86, MCM). The action to be taken by the reviewing authority and the disposition to be made of the record are discussed in chapter 18, *infra*.

CHAPTER 10

TRIAL JUDGE ADVOCATE

65. FUNCTIONS AND DUTIES IN GENERAL. **a.** A trial judge advocate must be appointed for every general and special court martial (AW 11). He is the prosecuting attorney who represents the United States in the trial of cases and, under the direction of the court, prepares the record of trial. It is his duty to bring charges to trial promptly, to make a full, systematic, and fair presentation of the case, to execute all orders of the court, to advise the court in matters of procedure and to see that the record of its proceedings is accurate and in proper form. Upon him rests a distinct responsibility for a fair and complete trial, free from prejudicial error, ending in a just result. Unless he is capable, familiar with all his duties, and thoroughly prepared, the proper trial of any case is jeopardized. Although his primary duty is to prosecute, proper prosecution does not mean just obtaining convictions. It means presenting the facts to the court fully so that the truth may be ascertained. Any act inconsistent with a genuine desire to have the whole truth revealed is prohibited (par. 41*d*, MCM). The trial judge advocate must at all times be fair and free from bias, prejudice, or hostility. (par. 41*a*, MCM). He must conduct himself as the representative of the United States, not simply as an attorney determined to win a case. If, for any reason, he cannot properly perform his duties in this manner, he should promptly report that fact to the appointing authority.

b. In addition to a trial judge advocate, one or more assistant trial judge advocates may be appointed for every general court-martial when necessary (AW 11). The appointment of an assistant trial judge advocate for a special court-martial is neither required nor customary. An assistant trial judge advocate performs such duties as the trial judge advocate may designate. Appropriate duties include taking care of details in arranging for trial and in securing the attendance of witnesses, assisting in the preparation of cases, and conducting the trial of particular phases of a case (app. 5, MCM). He is, however, competent to perform any of the duties of the trial judge advocate and may conduct the entire trial of a case if the trial judge advocate so directs. Ultimate responsibility, however, always rests upon the trial judge advocate.

c. A trial judge advocate's first task is to know what his duties are. They are described in detail in the Manual for Courts-Martial, particu-

larly in paragraphs 41, 42, and appendix 5. He should fully acquaint himself with those provisions and with other passages in the Manual for Courts-Martial referred to in those paragraphs. The discussion in this chapter, and in later chapters in this manual dealing with trial procedure and evidence, furnishes explanatory and supplementary material as to some of the principal functions of the trial judge advocate. There is, however, no adequate substitute for a study of the Manual for Courts-Martial. If he has any doubt or difficulty as to his duties in general, or as to a problem in a particular case, he should never hesitate to ask the staff judge advocate of the command for advice. It is far easier to avoid errors by obtaining instructions before trial than to try to correct them after the proceedings are completed.

66. PRELIMINARY DUTIES BEFORE TRIAL. a. Examination and checking of charges and accompanying papers. Suggestions as to the steps a trial judge advocate should take prior to the assembling of the court for trial are set out in appendix 5, MCM. When a case is referred for trial, there will be forwarded to the trial judge advocate the charges and accompanying papers. These papers should include the investigating officer's report (if any), with its summary of the expected testimony of witnesses, the record of previous convictions of the accused, in some cases documentary evidence listed on the charge sheet, such as an extract copy of a morning report, and, in general court-martial cases, the staff judge advocate's recommendation for trial by general court-martial. These papers should be in duplicate. The trial judge advocate should examine all papers received to see that none appear to be missing. He should then check the order appointing the court and the 1st indorsement on the charge sheet to determine that the charges were referred to him for trial. Next he should examine the charges and specifications to see if they are in proper form, comparing them with the appropriate form or forms in appendix 4, MCM. If he finds any obvious error in form or slight mistake in names, dates, amounts, or spelling, for example, he should correct and initial such defect. He cannot, however, make any substantial change in the charges or specifications. If he discovers any serious irregularity in the order appointing the court or in the charges themselves, he should promptly report that fact to the appointing authority. After determining that the charges and allied papers are complete and in correct form, he should separate the duplicate copy of the charge sheet and of each of the allied papers to make up a set for service on the accused. He should not include in the papers to be served any memorandum or letter containing instructions for the trial of the case which may have been sent to him by the staff judge advocate.

b. Service on accused. Immediately after the papers have been received and checked, the trial judge advocate should serve the accused. This consists in delivering personally to the accused a copy of the charge

sheet. Copies of the allied papers may be either delivered to the accused himself with the charge sheet or to defense counsel. At the time of service, he may inquire of the accused whether the data appearing on the first page of the charge sheet are correct. If incorrect, he should check with the custodian of the service record of the accused and have the statement corrected. After delivering a copy of the charges to the accused, he should complete and sign the certificate of service appearing on page 4 of the charge sheet, both on the original charge sheet and on the copy delivered to the accused. He should at once notify the defense counsel that the accused has been served. Service on the accused should not be delayed. In a general court-martial case, the accused should *not* ordinarily be brought to trial within 5 days after service of charges upon him without his express consent. Any delay in serving charges, therefore, delays the beginning of trial. Similarly in a special court-martial case, although there is no definite limit as to the time within which trial may be begun after service, the accused is entitled to a reasonable time after service within which to prepare his defense.

67. PREPARATION OF CASE. a. Analyzing case. After the foregoing preliminary matters have been taken care of, the trial judge advocate begins the preparation of the case for trial. Complete and painstaking preparation before trial is the surest method of success. The first step is to know what has to be proved to establish each of the specifications and charges. That requires a study of the paragraphs in the Manual for Courts-Martial (ch. XXVI) discussing the offenses in question. Take, for example, the case of Private Lennie O. Bark, the record of which case appears in appendix 2 *infra*. Three charges are involved: willful disobedience of a superior officer in violation of AW 64, escape from confinement in violation of AW 69, and desertion in violation of AW 58. The trial judge advocate would first read the paragraphs of the Manual for Courts-Martial dealing with those three offenses (pars. 134*b*, 139*b*, and 130*a*, respectively) and note, under the heading *Proof* in those paragraphs, what he must prove to establish each offense. He might write down the following:

Charge I. Willful disobedience (par. 134*b*, MCM).
a. The accused received a command from Lieutenant Loganby.
b. Lieutenant Loganby was the accused's superior officer.
c. The accused willfully disobeyed the command.
Charge II. Escape from confinement (par. 139*b*, MCM).
a. The accused was duly placed in confinement.
b. He freed himself from confinement before being released by proper authority.
Charge III. Desertion (par. 130*a*, MCM).
a. The accused absented himself without leave from his place of service.
b. He intended at the time of absence to remain away permanently from such place.

c. He was absent from 4 October 1943 until he was apprehended at Charleston, S. C., on 26 November 1943.

Having thus learned what he must prove, he would carefully study the statements of the witnesses attached to the investigating officer's report, observing how these bits of testimony will establish each of the required elements of proof.

b. Interviewing witnesses. With the case fully in mind, he should then interview personally every witness who is expected to testify to anything other than purely routine matters. Calling a witness to testify without first knowing what he is prepared to say is a dangerous procedure. From a personal interview before trial, the trial judge advocate is able to make a study of each witness, test the accuracy of his story, check inconsistencies, and observe his ability to express himself and to answer questions. He may also obtain new bits of information about the case or clues to other evidence not disclosed by the investigating officer's report. It is his duty to learn all that he can about the facts involved and he should never fail to investigate any evidence or to interview a witness simply because that evidence or witness is not listed on the charge sheet or referred to by the investigating officer.

c. Arrangement of evidence. His next task is to decide just how he is going to present his case through the testimony of these witnesses. The general method of presenting a case is to prove each offense in the order charged and to prove the events relating to each offense chronologically in the order in which they occurred. In other words, the case should be presented to the court in the manner in which a story would be told, beginning with the first event. In the *Bark* case, the chronological order of events was as follows: the accused disobeyed a command of Lieutenant Loganby, as a result of which he was placed in confinement, from which he escaped and deserted the service. The trial judge advocate would plan to present his evidence to establish the events in that order. Turning to the outline which he has made of the elements of the offenses (par. 67a, *supra*), he will observe that to prove the first charge he must establish that Bark received an order from Lieutenant Loganby, his superior officer, and willfully disobeyed this order. Obviously, Lieutenant Loganby will be the key witness on this charge. He will testify that he ordered the accused to go out on the drill field, that he is the company commander and the superior officer of the accused, and that the accused disobeyed his order. The willful nature of the accused's disobedience is shown by his flat refusal to obey and the character of his remarks at the time. Lieutenant Loganby's testimony is corroborated by Lieutenant Grant, Sergeant Pitch and Sergeant Kelley. It will be desirable to call at least one of these to testify, but in view of the complete unequivocal statements of Lieutenant Loganby it is hardly necessary to take up the time of the court having the same story told four times. Normally Lieutenant Grant would be the corroborating witness whom

the trial judge advocate would select, since he is an officer and was present throughout the entire occurrence. However, on interviewing him the trial judge advocate learned that he will probably not be present at the time of trial because he has been ordered to school. Since the two sergeants also can testify to the entire event, it will be sufficient to call one of them. Sergeant Pitch's story as to the remarks made by the accused is a little more complete than Sergeant Kelley's and after interviewing both, the trial judge advocate observed that Sergeant Pitch appeared to remember the events more clearly and could express himself better. He decides, therefore, to use Sergeant Pitch. As to the second charge, escape from confinement, he has learned from defense counsel that the accused intends to plead guilty. In the course of the preparation of his case, he properly inquired from defense counsel how the accused expected to plead so that he might know in advance, if possible, whether all the issues in the case were going to be contested. He did not, of course, ask the accused himself, nor did he attempt in any way to induce a plea of guilty (par. 41*e*, MCM). Despite the expected plea of guilty, he prepares to offer some evidence on the issue of escape, since the accused may change his mind and since, in any event, at least a prima facie case should be proved in every case where there is a plea of guilty as a guide to the reviewing authority and for subsequent consideration of the case for clemency. The fact of confinement can be established by the entry of duty to confinement in the morning report of Company B, the organization to which the accused was assigned, and by an extract copy of the guard report of the 128th Infantry. The fact that the accused escaped is shown by the same evidence—i. e., the entry in the morning report of confinement to absence without leave, and the entry in the guard report of such escape. The third charge, desertion, requires establishing that the accused absented himself without leave on 4 October 1943, that he intended not to return to the service and that his absence continued until terminated by apprehension on 26 November 1943. The accused intends to plead guilty to absence without leave, although denying desertion, so that element is admitted. It will have been proved in any event by the entry on the morning report used to prove escape from confinement. The termination of that absence by apprehension will be proved by the testimony of Sergeant Sellins, the military policeman who arrested him in Charleston, S. C., on 26 November 1943. His intention not to return will be proved from various facts and circumstances. In most cases, direct evidence of an intention not to return is not available. The court must draw an inference as to intention from the accused's acts, the duration of his absence, the manner in which it was terminated, and other circumstances. In this case, the court-martial would be justified in concluding that Bark did not intend to return to the service on the basis of his statements to Lieutenant Loganby that he did not like the Army and would not do any more work, his escape from confinement

while awaiting trial on a capital charge, his absence for 6 weeks and failure to surrender, although he was not far from his own station, and the termination of his absence by apprehension. In addition to this circumstantial evidence, however, there is in this case also direct evidence of the intention not to return, i. e., the statement made by the accused to Sergeant Sellins that he wasn't going back to the Army. The testimony of Sergeant Sellins on this point, if admitted in evidence, will leave no possible question as to desertion. The trial judge advocate recognizes that the defense counsel will probably object to this damaging evidence on the ground that such a statement made to a military policeman is an involuntary confession. He is prepared to meet that argument by bringing out the fact that the sergeant did not urge the accused to make the statement or threaten him or promise any reward or favor. However, he knows that there is some question whether this evidence will be admitted. In any event, there is enough circumstantial evidence of intention not to return so that the case will not fail even if the sergeant's testimony is excluded.

d. Preparation of questions and opening statement. Having thus outlined the method by which he will prove the case, and the order in which he will call his witnesses, he notes down the principal questions he will ask each witness. An inexperienced trial judge advocate will often find that unless he has clearly in mind just how each witness is to be questioned, he may either forget to bring out some important fact or be unable to phrase his questions properly to elicit the desired information. As he acquires more experience it may become unnecessary to make any notes in advance, but for his first cases it may be desirable to go to the extent of writing out each question in full. It is also good practice to write out an opening statement, that is, a brief statement of the issues to be tried and what he expects to prove, which will be made at the trial immediately before evidence is introduced. An opening statement is not required, but it is desirable in any case involving numerous issues or complicated facts. It enables the court to grasp at the outset the theory of the case and to relate to the whole picture each piece of testimony as it is introduced. By thus preparing a simple and concise statement of what he intends to prove, and the facts that will be shown by the evidence to establish that proof, he makes sure that he has his case well in hand.

68. ATTENDANCE OF WITNESSES; STIPULATION; DEPOSITIONS. a. In general. Before the date for trial, the trial judge advocate must arrange to have witnesses who are to testify in person present at the trial. Before deciding that the presence of a witness is necessary, he should first consider whether the evidence which that witness is expected to give can as well be covered by a stipulation or deposition.

b. Stipulations. A stipulation is an agreement between the parties either as to facts, i. e., that a certain fact is true, or as to testimony, i. e.,

that if a certain witness were present in court he would testify as follows: (then set forth the stipulated testimony) (par. 126*b*, MCM). For example, the parties might agree that the value of an automobile which the accused was alleged to have stolen was $350, or that the officer who authenticated an extract copy of a morning report was the legal custodian of that record, or that the accused had previously been convicted of certain offenses. Such an agreement would be a stipulation as to facts. (See app. 11, *infra*). Or, for example, the defense, while not admitting as a fact that the accused was in civilian clothes when apprehended, might be willing to agree that the policeman who arrested the accused would testify that the accused was dressed in civilian clothes when arrested. Such an agreement would be a stipulation as to testimony. (See app. 12, *infra.*) It is the duty of the trial judge advocate and the defense counsel to save the time and expense of having a witness brought to the trial by stipulating as to unimportant matters or undisputed facts (pars. 41*b*, 45*b*, MCM). Thus, if both the prosecution and the defense are satisfied that the value of an automobile alleged to have been stolen is $350 and that such value could easily be proved by calling as witnesses certain automobile dealers, there is no point in incurring the expense of having such witnesses brought to the trial and taking up the time of the court in hearing their testimony. A stipulation either that the automobile was of that value or that a certain named witness would so testify would be appropriate. Stipulations, however, should not be made as to vital matters amounting either to a complete defense or substantially admitting the accused's guilt (par. 126*b*, MCM). For example, if the accused pleaded not guilty to a charge of desertion it would not be proper to stipulate that he intended to desert the service, since such a stipulation would be entirely inconsistent with his claim that he was not guilty and would practically amount to a confession. Similarly a stipulation that the accused was 50 miles away from the scene of the crime at the time it was committed should not be entered into by the prosecution since in effect it constitutes a complete defense.

c. Depositions. If a witness cannot personally appear at the trial for any reasonable cause, such as sickness, age, or imprisonment, or if he lives or is about to go outside the state where the trial is to be held or more than 100 miles away, his deposition may be taken to be used in evidence (AW 25). That is, questions by both sides, either written or oral, will be submitted to him at his home or other place where he is found and his answers will be written down and sworn to before some person who has power to administer oaths, such as notary public or an officer mentioned in AW 114. These written answers constitute his deposition and may be introduced in evidence in lieu of his testimony in person. A deposition may be introduced in *any* case by the defense. The prosecution may introduce it in any case that is *not* capital, but may not introduce it in a capital case unless the defense expressly consents in open court to its use. Before arranging to have a witness appear in person, the trial judge

advocate should consider whether a deposition will answer the purpose without involving equal or greater inconvenience or expense (par. 97*a*, MCM). Thus, if a civilian witness in a larceny case lived outside the state or more than 100 miles away from the place of trial, it would be possible for the trial judge advocate to use his deposition instead of having him testify in person. Of course, the testimony of a witness before the court often creates a stronger impression than the reading of his written testimony. The trial judge advocate must balance the advantage to be derived from his testimony in person against the inconvenience, possible delay in trial, and expense to the Government involved in summoning him as a witness. The procedure for taking depositions is fully described in paragraph 98, MCM. A completed deposition is set out in appendix 13, *infra*.

d. Attendance of military witnesses (par. 97*c* MCM). If the witness is in the military service and stationed near the place of trial, the trial judge advocate will informally notify him to attend, either orally or in writing. In the case of an enlisted man, such notice should be given to his commanding officer so that he can arrange for the presence of the witness. Ordinarily a witness should be notified at least 24 hours before the time when he will be required to start for the trial.

e. Attendance of civilian witnesses (par. 97*b* MCM). A civilian witness is usually willing to attend voluntarily if arrangements are made with him in advance and he is informed that he will obtain his fees and mileage going to and returning from the place of trial. Unless the trial judge advocate believes that the witness will not come unless formally served, he will simply mail to the witness a subpoena (WD AGO Form 117) in duplicate and a return addressed envelope, with the request that the witness sign the acceptance of service on one copy of the subpoena and return the copy. If, however, the trial judge advocate believes that the witness will not attend unless required to do so, he will arrange to have the subpoena formally served on the witness. While such service may be made by any person, it should normally be made by an officer. It the witness is a considerable distance from the station of the trial judge advocate, the subpoena may be sent to the commanding officer of a station near the witness with the request that he arrange to have it served. A completed subpoena, with a certificate of service, appears in appendix 14, *infra*. Subpoenas should be issued to a civilian witness so that he will have 24 hours notice before starting to the trial.

f. Attendance of witnesses for the defense. Upon request by defense counsel, the trial judge advocate should make arrangements to procure the attendance of witnesses desired by the defense. Defense counsel may withdraw his request for the attendance of a witness if the trial judge advocate enters into stipulations as to facts or testimony which are undisputed or unimportant. If the testimony of a witness requested by the defense seems to be unnecessary, or it appears that a deposition of that witness will fully answer the purpose, the trial judge advocate may take

the matter up with the appointing authority or the court if during trial, before incurring the expense and inconvenience of summoning the witness. Unless the request by defense counsel is unreasonable, however, any witness requested by him should be summoned.

69. ARRANGING FOR TRIAL. a. Notifying members, witnesses, and the accused. He should arrange with the president of the court as to the time of the trial, and give adequate notice to the members of the court and all others concerned, such as witnesses, of the hour, date, and exact place of meeting. This notice can take any form, even that of an oral communication. All that is required is that those concerned have sufficient advance information so that they will be present at the trial. (See appendix 10, *infra*, for suggested form of written notice to members of the court.) He must also make arrangements to insure the presence of the accused at the trial. This will require notice to the prison officer if the accused is in confinement. Unless the accused is a general prisoner, he should be dressed in a service uniform, not in fatigue or prison attire.

b. Preparation of courtroom, etc. The trial judge advocate is responsible for obtaining a suitable room for the trial and having it supplied with the necessary tables, chairs, stationery, etc. He should have prepared for each member of the court a typewritten copy of the charges and specifications in the case. The court is not entitled to examine the charge sheet itself or any data appearing on the first page of the charge sheet. Unless, therefore, each member has before him a copy of the charges and specifications, it may be difficult for him to follow the case, particularly if the specifications are numerous or complicated.

70. DUTIES DURING TRIAL. At the trial, it is the duty of the trial judge advocate to present the case against the accused. He should be familiar with the provisions of the Manual for Courts-Martial dealing with trial procedure, contained in paragraphs 49 through 84. A few of the important matters which may arise are discussed in chapter 13, *infra*. Appendix 1, *infra*, contains an outline of the procedural steps to be taken in any case. Appendix 2, *infra*, sets out the complete transcript of the proceedings in the trial of Private Bark before a general court-martial showing how that case was presented by the trial judge advocate. Use throughout the trial of the procedural outline in appendix 1 will enable any trial judge advocate to cover all the formal procedure and guide him in the presentation of his case. In addition to trial procedure, a trial judge advocate must have some knowledge of the rules of evidence. Chapter XXV, Manual for Courts-Martial (pars. 110 through 126) compresses into some 30 pages a complete treatise on those rules. A trial judge advocate should consider such portions of that chapter as bear upon problems raised in his particular case. A few of the more common problems of evidence which arise are discussed in chapter 14, *infra*.

71. DUTIES AFTER TRIAL. a. Report of result of trial. Immediately after final adjournment of the court in any case, the trial judge advocate must notify the commanding officer of the accused as to the result of the trial (par. 41*b*, MCM). He must make this report even if the court did not announce the result of the trial in open court. The "commanding officer" to be notified is the post, regimental, or similar commanding officer of the accused, even though the court was appointed by higher authority. It is, however, desirable to send a copy of the notice also to the authority appointing the court in such case. The purpose of the requirement is to permit the commanding officer to take prompt and appropriate action as to the restraint of the accused (par. 19, MCM), such as releasing him if he is in confinement and has been acquitted, or imposing some appropriate restraint on him if he has not theretofore been restrained and has been sentenced to confinement. A form for a report of the result of trial is set out in appendix 15, *infra*.

b. Preparation of Record. It is the responsibility of the trial judge advocate to prepare, or cause to be prepared, the record of trial (par. 41*b*, 85*a*, MCM) and to make proper disposition of it. The preparation and disposition of records of trial are discussed in chapter 17, *infra*.

c. Preparation of vouchers. The trial judge advocate should also complete the voucher for fees and mileage of a civilian witness and, if possible, deliver the vouchers to the witness before he leaves the place of trial so that he may promptly submit the voucher to the proper disbursing officer for payment (app. 5, MCM). A completed voucher for fees and mileage of a civilian witness is set out in appendix 16, *infra*. A similar duty exists as to the preparation of the voucher for the reporter, if any. The compensation to which a reporter is entitled is discussed in chapter 17, and a completed voucher for compensation of a reporter is set out in appendix 2, p. 190, *infra*.

72. WEEKLY REPORTS. Unless the appointing authority directs otherwise, the trial judge advocate is required to submit a weekly report to him, through the president of the court, of the status of cases which have been referred for trial. This report must in any event state the reasons for the delay in disposing of cases that have been on hand for over 2 weeks (par. 41*b*, MCM), but the appointing authority may require an explanation for a shorter delay. A form for such a weekly report is set out in appendix 17, *infra*.

CHAPTER 11

DEFENSE COUNSEL

73. RIGHT OF ACCUSED TO COUNSEL. A defense counsel must be appointed for every general and special court-martial (AW 11). In addition, one or more assistant defense counsel are usually appointed on every general court-martial, the number being equal to the number of assistant trial judge advocates. Every accused tried before a general or special court-martial is, therefore, assured of having counsel to represent him and to protect his rights. He is not, however, required to use the services of the regularly appointed defense counsel, since he may have civilian or military counsel of his own selection if he chooses (AW 17). Civilian counsel must be provided at the accused's own expense (par. 45*a*, MCM). Military counsel, other than the regularly appointed defense counsel, may be detailed, upon request made on behalf of the accused through proper channels, if such person is reasonably available (AW 17; par. 45*a*, MCM). A trial, of course, will not be delayed unreasonably until the particular counsel desired by accused is available to serve. In a trial overseas, for example, the accused would not be entitled to a continuance, for the purpose of obtaining civilian counsel of his own choice, until he was transferred back to this country. The regularly appointed defense counsel will immediately advise the accused of his right to select individual counsel (par. 43*b*, MCM) and should assist in securing such counsel if the accused desires. If the accused does select individual counsel, the regularly appointed defense counsel will assist throughout the trial, performing such duties as individual counsel designates (par. 45*b*, MCM). Though there is no legal objection to enlisted men serving as individual counsel, the practice is not desirable and should not be encouraged. An accused does not have a right to be represented by counsel before a summary court-martial since the summary court officer performs such functions of a defense counsel as are necessary to safeguard his substantial rights.

74. DUTIES OF DEFENSE COUNSEL IN GENERAL. The duties of a defense counsel, whether he be the regularly appointed counsel or one selected by the accused, are similar to those of a counsel for a defendant in a criminal case before the civil courts, i. e., to represent him at the trial and to present his side of the case. Regardless of his personal opinion

as to the guilt of the accused, he must guard his interests by all legitimate and honorable means and present any proper ground of defense or extenuation (par. 45*b*, MCM). While he must never resort to any fraud or trickery, he has the duty of presenting to the court everything favorable to the accused. He should disclose promptly to the accused any personal interest or prejudice he may have, however slight; and, of course, if such prejudice, bias, or personal interest is so strong as to prevent him from representing the accused conscientiously and fairly, he should ask to be relieved before undertaking the defense. He should not ask, however, to be relieved merely because he may believe that the accused is guilty. An accused who admits his guilt is nevertheless entitled to be represented by counsel and to a fair and impartial trial. It is the function of the court, not of defense counsel, to determine the question of guilt or innocence.

75. DUTIES BEFORE TRIAL. a. In general. The first task of a defense counsel is to learn what his duties are. They are described in detail in pars. 43, 44, and 45, MCM. These sections, as well as pertinent cross-references referred to in them, must be thoroughly understood before preparation of any particular case is undertaken. The defense counsel should feel free to call upon the staff judge advocate of his command either to discuss his general duties or to present a problem encountered in preparing the defense of a particular case. There can be no substitute for painstaking preparation.

b. Receipt and examination of charges and accompanying papers. The defense counsel will probably first learn of a particular case when he is notified by the trial judge advocate. Usually the accused himself will have been personally served with a copy of the charges. Defense counsel should first carefully examine both the charges and the allied papers, preferably before he interviews the accused. Unless he has some knowledge of the offenses charged, the elements comprising them (ch. XXVI, MCM), the substance of testimony of all witnesses, and possible theories of defense, he cannot intelligently discuss the case with the accused. No accused can be successfully represented without obtaining his full confidence, and this can never be gained unless he feels that his counsel is energetically putting forth his best efforts.

c. Interview with accused. As soon as he is acquainted with the case, he should at once arrange to interview the accused. Even if the accused is in confinement, he will be allowed to have such interviews with his counsel as may be required. The defense counsel should first tell the accused that he has been detailed to represent him, what his general duties are, and that the accused has the right to select individual counsel, civilian or military, of his own choice. The selection of individual counsel should neither be encouraged nor discouraged. The accused should be told that everything he discloses is confidential, and that the defense

cannot properly be planned unless he tells the whole truth, even though it amounts to a confession of guilt. Counsel should ascertain whether the accused knows of any other witnesses or evidence not disclosed by the papers forwarded. A close questioning frequently reveals details or lines of defense that may not at first be apparent. Even if there is no defense to the charge, there may be reliable testimony as to accused's good character and record of service, or as to circumstances tending to lessen the seriousness of the offense, which should be presented.

d. Advising accused as to pleas. In a proper case the defense counsel will explain to accused his right to plead the statute of limitations in bar of trial (par. 45*b*, MCM). Thus, if it appears from the charges that they are barred by the statute of limitations, for example, that more than 2 years have elapsed in a case involving absence without leave, the defense counsel should explain to the accused his right to enter such a plea. Other special pleas that may be made are discussed in paragraphs 64 through 69, MCM, and in paragraph 86b, *infra*. A decision as to whether the accused will plead "guilty" or "not guilty," should always be reached before trial. After a full discussion of the facts of the case with the accused, he should be asked how he desires to plead to each offense. If he indicates that he desires to plead guilty to one or more offenses, the defense counsel should advise him of the meaning and effect of such plea (app. 1, p. 149, *infra*) and of the maximum punishment he can receive for the offense. He should be told that he has a perfect legal and moral right to enter a plea of not guilty even if he knows he is guilty (par. 64*a*, MCM), and that, if there is any doubt in his mind, he should enter such a plea. He should not be encouraged to plead guilty to an offense in the hope that by so doing he may receive a lighter sentence. If he desires to plead guilty, little can be done but to offer mitigating or extenuating evidence or, in a proper case, to submit a clemency recommendation at the conclusion of the trial. (See par. 77a, *infra*).

e. Preparation of case. By way of preparation, the defense counsel will follow substantially the same procedure as the trial judge advocate in studying the charges and allied papers, analyzing the case and interviewing witnesses. (See par. 66, *supra*.) It is well to interview not only witnesses for the defense but also those for the prosecution, to prepare to cross-examine them, in the light of the expected testimony for the defense. He should make timely request of the trial judge advocate to secure the attendance of defense witnesses if he is doubtful that they will otherwise be present, and should collaborate with the trial judge advocate in the preparation of depositions and stipulations in proper cases. (See par. 68, *supra*.)

76. DUTIES DURING TRIAL. a. In general. It is his duty to present the case for the defense, just as the trial judge advocate presents the case for the prosecution. Like the trial judge advocate, he must be familiar with

court-martial procedure and should be acquainted with the provisions of the Manual for Courts-Martial dealing with such matters (pars. 49 through 84, MCM). Some of the common problems arising in a trial, such as challenges, the examination of witnesses, and arguments, are discussed in chapter 13, *infra*. That discussion applies equally to the trial judge advocate and defense counsel. The outline of procedure (app. 1, *infra*) should be used by defense counsel as well as trial judge advocates. Defense counsel must also have some knowledge of the rules of evidence, dealt with in chapter XXV, MCM, some of which are also discussed in chapter 14, this manual.

b. Calling accused as witness. Often the most important question which must be decided in the course of a trial is whether or not the accused shall testify. The defense counsel must make certain that the accused fully understands the courses of action which are open to him, i. e., to remain silent, to testify as a witness, and to make an unsworn statement, and the possible consequences of following each of these courses. A form for explanation of these rights will be found in appendix 1, p. 152, *infra*. If the accused testifies under oath, he is not only subject to cross-examination like any other witness, but a greater latitude may be allowed in cross-examining him (pars. 120*d*, 121*b*, MCM). It is, therefore, well to consider the possibility that in testifying as a witness the accused may make admissions, either on direct or cross-examination, as to matters essential to the prosecution's case, thus establishing facts which the prosecution might otherwise be unable to prove. No inference of guilt can be drawn from the failure of the accused to testify (par. 120*d*, MCM), and no comment can be made by the prosecution on his silence (par. 77, MCM). If he is on trial for a number of offenses, he has the right to testify about only a part of them and remain silent as to the others (par. 121*b*, MCM). Unless the accused can testify fully and frankly to facts which constitute defense to one or more of the specifications, or which show extenuating or mitigating circumstances, it is usually best that he remain silent. The defense counsel should dissuade him from testifying to an unsubstantiated story which appears incredible and which cannot stand up under cross-examination. The third possible choice, the unsworn statement, should also be carefully explained to the accused, and he should be particularly warned that any admission during the course of the statement may be treated as evidence against him (par. 76, MCM).

77. DUTIES AFTER TRIAL. a. Clemency. If the accused is convicted and it is believed that the sentence of the court is too severe, under the circumstances, the defense counsel may prepare a request for clemency in letter form addressed to the reviewing authority. Such a request may be signed by one or more members of the court as well as by the defense counsel (par. 81, MCM). The defense counsel should not mechanically

prepare a clemency request in every case but only in the event that a good reason exists therefor.

b. Examination of record. Before the record of trial is authenticated, the defense counsel will examine and sign or initial it after making certain that it accurately reflects the proceedings of the court. (See par. 128d, *infra.*)

CHAPTER 12

MEMBERS OF GENERAL AND SPECIAL COURTS-MARTIAL

78. IN GENERAL. Members of courts-martial perform the functions of judge and jury. They hear, discuss, and weigh the evidence, determine the guilt or innocence of the accused and, if the accused is found guilty, adjudge a proper sentence. They are sworn to "administer justice, without partiality, favor or affection." (AW 19). The liberty, or even life, of an accused may depend upon the correctness of their decisions. Service as a member of a court-martial is, therefore, a most important duty which must be conscientiously performed. All members, irrespective of rank, have an equal vote and an equal responsibility in deciding the question of guilt or innocence and in determining the sentence. Neither the president nor the law member has any greater power than any other member in this respect. They do, however, have some special functions to perform which are discussed in the paragraphs below.

79. PRESIDENT. a. Definition. The ranking member present at the trial is the president (par. 39, MCM) and thus no member is ever specially detailed as such. If the senior officer named in the detail for the court is not present at any session, or if the ranking member is excused during trial, the next in rank automatically becomes the president. If the law member of a general court-martial is or becomes the ranking member present, he exercises the functions of both president and law member.

b. Assembling the court. The president, after being consulted by the trial judge advocate, sets the date, hour, and place of the trial, prescribes the uniform to be worn, and directs the trial judge advocate to notify the other members (including counsel) of these matters. If counsel for either side is unprepared to proceed to trial at the time set, or if other good reason for delaying the trial exists, the president may postpone the assembling of the court (par. 52*b*, MCM) thereby in effect granting a continuance. This power should not be exercised unless good cause is shown.

c. Excusing members. The president does not have the power to excuse members from attendance at the trial. Like the performance of any other military duty, a detail to serve on a court martial cannot be revoked by authority inferior to that directing it. Requests to be excused from sitting on the court must be directed to the appointing

authority (par. 38*a*, MCM), not to the president of the court. For a proper reason (e. g., preparation of another case), the president may in advance of trial excuse from attendance during a trial such of the personnel of the prosecution (par. 41*a*, MCM), and, with the consent of the accused, such of the personnel of the defense (par. 43*a*, MCM), as will not be required.

d. Duties during trial in general. While the trial is in progress, the president speaks for the court, maintaining order, directing the conduct of the proceedings, excusing witnesses, declaring recesses and adjournments, preventing any undue delay, and controlling and announcing the results of the court's deliberation in closed session. The president must be thoroughly familiar with court-martial procedure. Appendix 1, this manual, and paragraphs 38, 39, and 49 through 81, MCM, should be carefully studied. (See also ch. 13, this manual for a discussion of some of the common matters arising in a trial.)

e. Rulings on interlocutory questions. In all special court-martial cases and in general court-martial cases if the law member is not present, the president of the court must rule on all interlocutory questions, except challenges. An "interlocutory question" is one which does not finally dispose of the case, an intermediate question arising during the course of the trial. A motion for continuance, a plea to the jurisdiction of the court, the admissibility of a stipulation, whether certain evidence should be received, the propriety of statements or arguments by the trial judge advocate or defense counsel are examples of interlocutory questions. In short, any question except the decision on findings and on the sentence is an interlocutory question. Although a challenge of a member is an interlocutory question, it is disposed of differently. (See AW 31; pars. 57 and 58, MCM, and the discussion in par. 84, *infra*.) On all other interlocutory questions the president must make a ruling. This ruling is always to be made "subject to the objection of any member." Thus, if the defense should move for a continuance, the president would dispose of the question by ruling: "Subject to the objection of any member the motion is granted (or denied)." If no member objects, the ruling will stand. If, however, any member does object, the court will close to vote on the question (AW 31). The vote will be oral, beginning with the junior member and continuing in inverse order of rank. The president will ask each member how he votes and tally the results. A majority vote decides the question, and in case of a tie vote, the objection, motion, etc., is overruled (par. 51*f*, MCM). The members vote on the principal question, and not upon the ruling. If, for example, the defense made a motion for a finding of not guilty; the president ruled, subject to objection by any member, to grant the motion; a member objected; and the court was closed; the question to be put to a vote is whether the motion should be granted or denied, not whether the ruling should be sustained. Therefore, if there were a tie vote, the motion would be overruled. After the vote is taken the court will reopen

and the president will announce the decision, i. e., "Motion denied (or granted)," but not the numerical vote of the court.

f. Concluding incidents of trial. The duties of the president during the deliberation of the court upon its findings and sentence are discussed in chapters 15 and 16, *infra.* In announcing the findings and sentence he must be sure to state the findings and sentence voted by the court accurately, both as to form and substance. The president will conclude the trial by stating either that the court will adjourn to meet at his call, or that it will proceed to other business.

g. Authentication of record. The president, together with the trial judge advocate, authenticates the record of trial. (See par. 128e, *infra.*)

80. LAW MEMBER. a. Definition. A law member must be detailed for every general court-martial (AW 8). He is the member of the court who is specially skilled in questions of military law and procedure and is the legal adviser of the court. It is his function not only to make rulings on questions raised throughout the trial, but to guide the court in matters of procedure and to clarify points of law which may arise in discussion in closed session. He has the powers of other members and votes equally with them on all questions on which a vote is required.

b. Presence at trial. The appointing authority may expressly direct that he be present at all trials or at a particular trial. If there is such a directive, the trial cannot proceed if for any reason the law member is absent (par. 38c, MCM.) If there is no such directive, the absence of the law member does not affect the validity of the proceedings. Thus, if the law member is challenged for cause and the challenge is sustained, the trial may proceed after the law member is excused. In such case, the president will rule on interlocutory questions. (See par. 79e, *supra.*) Every effort, however, should be made to have the law member participate in all trials unless he is excused on a challenge for cause. He cannot be challenged peremptorily.

c. Rulings on interlocutory questions. When present, he, instead of the president, must rule on all interlocutory questions except challenges. (See par. 79e, *supra,* as to what constitutes an interlocutory question.) His rulings differ from the president's in one important respect, namely, his ruling is *final* on objections to the admissibility of evidence. When the president rules (as he does in a special court-martial always, and in a general court-martial in the absence of the law member) *all* his rulings are subject to objection of any member. When the law member rules, all his rulings are subject to the objection of any member *except rulings concerning the admissibility of evidence.* On such questions his ruling is binding on all members of the court and cannot be overturned by them. The reason is clear. Objections to the admissibility of evidence generally concern technical matters of law as to which the law member has more knowledge than any other member of the court. Thus, if an objection

were made to the admission in evidence of an extract copy of a morning report on the ground that it was not duly authenticated or to a question asked a witness on the ground that it called for hearsay, the law member would rule "The objection is overruled (sustained)." AW 31 lists certain matters, such as questions of recalling witnesses, the sanity of the accused, or competency of a witness, which are not to be considered objections to the admissibility of evidence. As to these and all other questions not involving evidence, the law member rules in the same manner as the president, i. e., "subject to objection of any member." (See par. 79e, *supra*, as to procedure if a member objects.) If a member objects in such a case and the court is closed to vote on the question, the law member has the same right as any other member to vote.

d. Other duties during trial. In addition to his functions as a judge in ruling on interlocutory questions and as a member in voting on the findings and sentence, he is the general legal adviser of the court. Though he should not interfere with the orderly procedure of the court, he may call attention to and correct errors that occur even though no objection is made. If, for example, the prosecution offers incompetent or otherwise prejudicial testimony the law member may exclude it despite a failure of the defense to object. He should likewise curtail an unwarranted cross-examination of the accused or any other witness by another member of the court, especially since counsel are more reluctant to object to improper questioning by members of the court than by opposing counsel. If requested by the president, he should explain to accused at the proper time the effect of a plea of guilty and his rights as a witness. (See app. 1, p. 152, *infra*.)

e. Duties in closed session. He must be prepared to answer all questions of law arising in closed session. This may include an explanation of the elements necessary to establish the offenses charged, what lesser offenses, if any, are included in the offenses charged, and the possible findings the court may make by way of exceptions and substitutions. He should be prepared to advise the court as to the maximum punishment for each offense with which accused is charged. It may be desirable for him to write out in proper form the findings and sentence upon which the court has determined so that they will be correctly and accurately announced by the president.

81. JUNIOR MEMBER. The junior member has the same right and duty to participate in discussions in closed session and to vote as has any other member. Since he has an equal responsibility in determining the fate of the accused, he should decide in accordance with his own judgment and not be influenced by the higher rank of other members. To avoid such influence, AW 31 provides that, whenever the vote is oral (as it is on interlocutory questions except challenges), the junior member shall vote first. When the vote is by secret written ballot (as it is on challenges, findings and sentences) the junior member distributes the ballots, collects

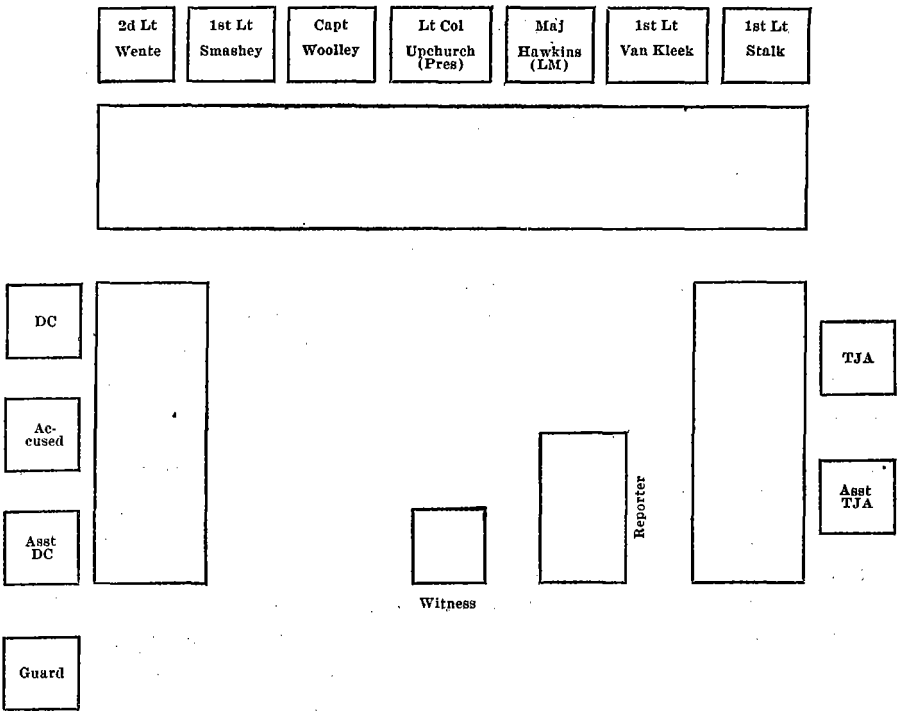
them, opens and counts them before the president who checks and tabulates the vote. The junior member customarily acts as messenger for the court. When the court is prepared to open after having been in closed session, he summons the prosecution and the defense and other persons who have been excluded.

CHAPTER 13

TRIAL PROCEDURE

82. GENERAL. The purpose of a trial is to present evidence to the court so that it may decide whether the accused did what he is charged with doing and, if it is found that he did, adjudge a proper sentence. The first stage of the trial consists of the assembling, organization and swearing of the court, reading the charges and determining how the accused pleads to them. The second stage consists in the presentation of evidence against the accused by the prosecution, of evidence in his behalf by the defense and of arguments, if any, by both sides. The third stage consists in the deliberation and voting by the court on the findings and sentence, and the announcement by the court of such findings and sentence. The entire procedure of a trial is covered in detail in paragraphs 49 through 84, MCM. A step-by-step outline of the procedure for trials before general courts martial is contained in appendix 1 of this manual. The present chapter does not discuss the entire course of procedure, but explains some of the more common incidents of a trial which are sometimes sources of difficulty or error. Most of the procedure discussed has reference to a trial by general or special court-martial. The procedure for trials by summary courts is dealt with in chapter 9, *supra.*

83. PRELIMINARY MATTERS. At the date and hour set for trial, the members of the court assemble, together with the trial judge advocate, the defense counsel, and assistant trial judge advocate and defense counsel, if any. Unless a quorum of the court (i. e., five members of a general court-martial, three of a special) and the accused are present, the trial cannot proceed. The members are seated, with the president in the center, the law member on his immediate left, and other members alternately to the right and left according to rank. The figure below illustrates the proper seating of a general court-martial and the arrangement of the courtroom (the figure being based on the court assembled for the trial of Private Bark, app. 2, *infra.*)



When the court has been properly seated and called to order, the name of the accused is announced and defense counsel introduced. The reporter (if any) is sworn and the trial judge advocate announces the names of the members of the court present, stating the names and reasons for the absence of any who are not present. The court is then ready to consider and dispose of challenges to any of the members.

84. CHALLENGES. a. In general. A challenge is an objection to the right of a member to participate in the trial. There are two classes of challenges: (1) challenges for cause, and (2) peremptory challenges. A challenge for cause is an objection to a member on the ground that he is disqualified to participate for reasons stated to the court. Nine grounds for such disqualification are listed in paragraph 58*c*, MCM. A peremptory challenge is an arbitrary objection to a member without giving any ground or reason. Both the prosecution and defense may make any number of challenges for cause. Each side, however, has only one peremptory challenge. Only members of general and special courts-martial may be challenged (par. 58*b*, MCM). Such objections may not be made to trial judge advocates, defense counsel, or summary court officers.

b. Disclosing grounds of challenge. After announcing the names of the members present, the trial judge advocate must state any ground for

challenge which he believes exists and will call upon every member to make similar disclosure with respect to any grounds of challenge against the member himself or any other member (par. 57*a*, MCM). The purpose of this disclosure is to insure that all possible grounds for disqualification will be known so that proper action can be taken to excuse or challenge any disqualified member. If it appears from the facts thus disclosed that a member falls within the first five classes enumerated in paragraph 58*e*, MCM, for example, that he is not a commissioned officer, or was not appointed on the court, or is the accuser, or will be a witness for the prosecution, his continued presence on the court will make the entire proceedings void. If, therefore, there is no dispute as to those facts, he must be excused at once by the president without requiring a challenge. If any other of the nine grounds for disqualification are revealed, for example, that a member was the investigating officer in the case, or had formed a definite opinion that the accused was guilty, or was a brother of the accused, no action will be taken until that member is challenged.

c. Presenting challenges. After disclosure of all possible disqualifying facts, the trial judge advocate will proceed to state any challenges for cause that he has. Although there is no limit to the number of challenges for cause he may make, only one may be presented at a time. When all his challenges have been presented and disposed of by the court, including his one peremptory challenge, if made (f, *infra*), the defense will be afforded an opportunity to present its challenges (par. 58*f*, MCM). In challenging a member for cause, the reason for the challenge must be stated. Thus, "The prosecution challenges Captain Ritter on the ground that he is decidedly friendly to the accused," or "The defense challenges Major Sikes on the ground that he has expressed a positive opinion as to the guilt of the accused," would be a proper statement of a challenge.

d. Disposition of challenges for cause. When a challenge has been made, it becomes the duty of the court to determine whether it should be sustained or not sustained. The party making the assertion that a member is disqualified has the burden of proving it in case the facts are disputed (par. 58*f*, MCM). When a member is challenged for cause, the president usually asks him what he has to say about the matter and the member may make a statement without being sworn. The challenging side may then withdraw its challenge if the explanation is satisfactory, or it may be willing to submit the matter on the basis of the member's statement. If no satisfactory statement is made, it may offer evidence to support the challenge and may even examine the challenged member under oath. (For form of oath, see par. 95, MCM, and app. 1, p. 146, *infra*). The accused and other witnesses, including members of the court, may testify on that issue. The opposing side may also introduce evidence and both sides may offer argument, creating literally a "trial within a trial."

After all matters to be considered on the issues have been presented to the court, it must proceed to determine whether the challenge should be sustained. Although challenges for cause are interlocutory questions (par. 79e, *supra*), they are not ruled upon by the president or law member, as are other such questions, but by the court itself in closed session and by secret written ballot (AW 31; par. 58*f*, MCM). If, however, there is no doubt that all members of the court would vote unanimously to sustain the challenge were the matter submitted to them it is unnecessary to go through the formality of voting. In such case, the president may excuse the challenged member, unless some objection is raised by the court or counsel (par. 58*f*, MCM). If, for example, a member who was challenged on the ground that he was decidedly hostile to the accused stated that he was convinced that the accused was a worthless soldier and that the service would be much better off without him, there would be no necessity of putting the challenge to a vote since it would doubtless be unanimously sustained. Except in such cases, the court must be closed and vote on the challenge.

e. Voting. When the court is closed to deliberate on the challenge, the challenged member must withdraw. Deliberation in closed session may properly include full and free discussion, after which the junior member will distribute and collect the ballots. The vote should be "sustained" or "not sustained." The junior member will count the votes and the president will check them and announce the numerical result to the court (AW 31). A challenge is not sustained unless a majority of the members present vote to sustain it. The court will reopen, the challenged member will resume his seat and the president will announce whether the challenge is sustained or not sustained. If sustained, the challenged member will be excused and withdraw.

f. Peremptory challenges. Normally each side exercises its peremptory challenge, if it desires to use it, after its challenges for cause have been disposed of, although it may challenge peremptorily before it challenges for cause, or during challenges for cause. Such a challenge cannot be made after the accused has been arraigned, except as to a new member detailed after the beginning of the trial. Any member of the court may be challenged peremptorily except the law member (AW 18; par. 58*d*, MCM). No ground or reason for such a challenge need exist. It is simply an arbitrary right to remove a member from the court. When peremptorily challenged, the member must be excused at once by the president. Only one peremptory challenge may be exercised by each side, i. e., the prosecution and the defense (AW 18). Two or more joint defendants have only one such challenge between them (par. 58*d*, MCM). However, *each* defendant in a common trial may exercise one peremptory challenge.

g. Action after challenges. After all challenges have been disposed of, the court will be rearranged, if that has become necessary because one or

more members were excused upon challenge. The court will then be sworn (AW 19; par. 61, MCM), and is then ready to proceed with the charges.

85. ARRAIGNMENT AND CONTINUANCES. The trial judge advocate will read the charges and specifications, including the signature of the accuser, and then ask the accused how he pleads to each specification and charge (par. 62, MCM). The accused is thereby arraigned. The proper time for making motions and special pleas is after arraignment. Thus, if a motion for a continuance is made at the start of the case, the court should normally defer action on the motion until after the accused has been arraigned (par. 52*c*, MCM). The right to prepare his defense is a fundamental right to which every accused is entitled. If reasonable cause is shown, an application to have the proceedings continued should be granted after arraignment (par. 52*a*, MCM). The grounds for continuance are set forth in paragraph 52*b*, MCM. Whether the request for a continuance is reasonable is a question of judgment depending on the facts and circumstances in each particular case. Occasion for granting a continuance may also arise later in the course of trial as, for example, where a specification is later amended, or where an expected witness is suddenly unable to appear.

86. PLEAS. a. General. After arraignment the accused will plead, i. e., make his answer to the charges, usually through the defense counsel, rather than by stating them himself. The order usually followed in case of several charges and specifications, is to plead to the first, second, etc., specification to the first charge, then to the first charge, and so on with the rest. (See apps. 1, pp. 148–149, and 2, p. 203, *infra*.) He may at once plead "guilty" or "not guilty" or, he may, by way of special plea or motion, raise objections to being tried at all, on all or some of the specifications and charges, or he may remain silent. He may make special pleas to some specifications and charges and plead "guilty" or "not guilty" to the others.

b. Special pleas. A special plea is an objection to trial before the court on all or some of the charges or specifications on the ground, for example, that the court has no jurisdiction, or that the specification or charge is defective, or that trial is completely barred by the statute of limitations or by former trial for the same offense. Special pleas are discussed in paragraphs 64 through 69, MCM. Where the accused has made a special plea to a particular specification or charge, that plea must be disposed of before the accused is required to plead to the merits of the case. Thus, if there were a single specification and charge alleging absence without leave and the accused pleaded the statute of limitations in bar of trial, i. e., contended that he could not be tried for that offense because it was committed more than 2 years before he was arraigned (AW 39), the court could not proceed to the trial until the plea was disposed of. If the plea were overruled, then the accused would be required to plead

further. If the plea were sustained, the trial could not proceed. The court would adjourn and the record of trial up to that point would be prepared and forwarded to the reviewing authority. If, however, there were two or more offenses and a special plea was sustained to one, the trial would proceed as to the charge or charges remaining, and at the conclusion of the trial the entire record would be forwarded to the reviewing authority. The sustaining of a special plea does not, of course, mean that the accused has been found not guilty. If the reviewing authority disagrees with the court's ruling, he may return the record of trial to the court by indorsement or letter with directions to reconvene, overrule the plea, and proceed with the trial on the merits. A ruling on a special plea is an interlocutory question which the law member or president rules on subject to the objection of any member. (See pars. 79e and 80c, *supra.*)

c. Pleas to the merits. If the accused has no special pleas, or if any special pleas he makes are overruled, he must answer to the specification and charge by pleading "guilty" or "not guilty," or guilty in part but not guilty of the rest (as, for example, in a trial on charges of desertion, by pleading guilty of absence without leave but not guilty of desertion). If he remains silent or refuses to plead, the court will proceed as if he had pleaded not guilty (par. 70, MCM). Although the defense counsel is under a duty to explain to the accused the meaning and effect of a plea of guilty (par. 45*b*, MCM), the court should, nevertheless, satisfy itself, when such a plea is made, that the accused does understand the consequences of pleading guilty. In case of doubt the law member or president should make an appropriate explanation or statement to the accused. A form for such statement may be found in appendix 1, p. 149, *infra.* The same duty as to explanation exists if an accused pleads guilty to an offense lesser than, but included in the offense charged, such as a plea of guilty to absence without leave on a charge of desertion. If any question arises as to whether accused intends to plead guilty or not guilty, or if he pleads guilty and then at any stage of the proceedings makes a statement, sworn or unsworn, inconsistent with his plea, the court should enter a plea of not guilty. Thus, if accused pleads guilty to larceny, but claims that he was so drunk at the time he didn't know what he was doing, his statement is inconsistent with his having had a specific intention to steal the property which is necessary to establish larceny. Consequently the case should be treated as though a plea of not guilty had been entered.

87. OPENING STATEMENTS. After all preliminary objections, motions and special pleas have been disposed of, and the accused has pleaded "guilty" or "not guilty" to all or some of the charges, the trial proper is ready to proceed. Before calling any witnesses, the trial judge advocate may make an opening statement, that is, a brief and clear statement of the issues in the case and of the testimony which is to be offered to prove

the charges (par. 75*b*, MCM). Such a statement is not required, and in a minor case or one where the issues are few and not complex, probably serves little purpose. In all cases of difficulty or importance, however, a simple concise statement renders the issues intelligible at the outset and enables the court to follow the testimony more readily. The statement must be factual, omitting all argument and any reference to matter which will not be properly proved. For example, in the case of Private Bark (app. 2, *infra*) the trial judge advocate might state: "The prosecution will show that on the morning of 28 September, the accused refused to go out on the drill field and drill when ordered to do so by his commanding officer, Lieutenant Loganby, saying that he was sick of the Army and would not do any more work; that he was at once placed in confinement in the post stockade by order of Lieutenant Loganby; that on the afternoon of that day, he escaped from confinement. The prosecution will further show that he remained absent without leave until the 26th of November when he was arrested in Charleston, South Carolina, by Sergeant Sellins, a military policeman. Through the testimony of Sergeant Sellins, we shall show that the accused stated at the time he was arrested that he wasn't going back to the Army." The defense counsel may also make an opening statement, usually after the prosecution has concluded its case and before any defense witnesses are called (par. 75*c*, MCM).

88. INTRODUCTION OF EVIDENCE AND EXAMINATION OF WITNESSES.

a. In general. After his opening statement, if any, the trial judge advocate will proceed to call and examine his witnesses. If the accused pleads guilty, he can be convicted on the basis of his plea without any evidence being presented. However, even where there is a plea of guilty, the trial judge advocate should present some evidence to the court on all the elements of the offense, although, of course, since there is no dispute, he need not prove the case in the same detail and with the same completeness as if the accused had pleaded not guilty.

b. Calling and qualifying of witnesses. Although court-martial proceedings are usually open to the public (par. 49*e*, MCM), witnesses should be excluded from the court room until called to testify (par. 121, MCM). The assistant trial judge advocate will ordinarily summon into the court room witnesses for both prosecution and defense. If the witness is in the military service he will proceed to the witness chair, salute the president, and raise his right hand while the trial judge advocate, or his assistant, administers the oath (AW 19), after which he is seated. The trial judge advocate asks all witnesses, for the defense as well as for the prosecution, the preliminary question as to their identity and as to whether they know the accused and who he is. (See app. 1, p. 150, *infra*.) If the witness is a prosecution witness, the trial judge advocate will proceed to examine him; if a witness for the defense, the defense counsel will assume the direct examinations. At the conclusion of his testimony,

the witness will be excused by the president, whom he again salutes before leaving. If the accused testifies, the prosecution will ask him his name, grade, organization and station, and whether he is the accused, after which the defense assumes the direct examination.

c. Order of testimony. The trial judge advocate should be allowed to introduce his evidence in such order as he thinks fit (par. 41*b*, MCM), although he should endeavor to present the case in a logical fashion. The order of examining a witness is direct examination by the party calling him, cross-examination by the other side, redirect examination, recross-examination, and then questions by the court (par. 121*a*, MCM).

d. Direct examination. The object of the direct examination is to present to the court by witnesses a word picture of facts proving or tending to prove the contentions of the side calling them. Leading questions, i. e., questions which suggest the answer, are not ordinarily permitted on direct examination (par. 121*c*, MCM). Careful preparation will enable counsel to know what questions to ask and how to ask them to avoid objections. It may be well for the beginner to write out all questions he proposes to ask on direct examination, and even counsel with experience should make a summary of the evidence to prove by each witness.

e. Cross-examination. For a discussion of the rules of cross-examination, see paragraph 121*b*, MCM. Cross-examination should not be undertaken at all unless it is believed that some advantage can be gained thereby. If an adverse witness tells a straightforward, consistent story on direct examination and no reason appears to doubt his credibility, nothing can be gained by cross-examination. Repetition will only serve to strengthen the witness in the eyes of the court, and matter overlooked on direct examination and adverse to the cross-examiner may often be brought out. If, however, the witness contradicts himself or other witnesses, appears uncertain in his knowledge, or may be impeached by a prior inconsistent statement or a bad general reputation for truth and veracity, then cross-examination is indicated. Leading questions are, of course, proper on cross-examination.

f. Examination by court. After examination by counsel for both sides has been completed, the trial judge advocate will ask if there are any questions by the court (par. 121*b*, MCM). The law member, or president, if there be none, should not hesitate to stop improper inquiry even without objection by counsel as the parties are often disinclined to object to questions asked by members of the court (par. 75*a*, MCM, and app. 2, this manual).

g. Objections. Counsel should make timely objections to the admission of any incompetent or otherwise improper evidence that might be injurious to their side of the case. An objection should be specific, stating the particular ground upon which it is made. Both defense counsel and trial judge advocate have a duty to assist the court in keeping the trial free from error. They should not, however, interrupt the proceedings with frequent objections, even though technically sound, on trivial points

not damaging to their side, as this only serves to delay the trial and may antagonize the court.

89. MOTION FOR FINDINGS OF NOT GUILTY. After the prosecution has presented all its evidence and rested, the defense may make a motion for findings of not guilty as to any offense charged. This motion is in effect a request to the court to acquit the accused because the prosecution has failed to prove all the necessary elements of the offense. After the motion has been made and both sides have been afforded the opportunity to argue, the court must determine whether there is some substantial evidence of every element of the offense. So long as there is *some* evidence of each element, even though contradicted by stronger evidence, the motion should be denied. Moreover, even though the evidence is insufficient to establish the offense charged, if it proves any lesser included offense, the motion should be denied. If, for example, in a trial for desertion the prosecution established absence without leave but failed to offer any evidence of an intent to desert, a motion for findings of not guilty of desertion should not be granted because the lesser included offense of absence without leave has been established. A motion for findings of not guilty is an interlocutory question ruled on initially by the law member or president subject to objection by any other member. (See pars. 79e, 80c, *supra.*) If the motion is granted, the court at once announces that the accused is acquitted and the trial is concluded. Although the motion should be made when it appears that there is no available evidence to prove the prosecution's case, it often serves only to call attention to the prosecution's neglect to present evidence which can be obtained, in which event the court may properly permit or require the trial judge advocate to reopen the case and produce such available evidence (par. 71*d*, MCM).

90. ARGUMENTS. Both the prosecution and the defense may make arguments to the court. After all evidence is in and both sides have rested, the prosecution has the right to open and, if argument for the defense is made, to close (par. 77, MCM). If, however, the prosecution waives opening argument, the defense too may waive argument, in which event the prosecution will be precluded from arguing. A well presented closing argument will aid the court in its deliberations, particularly if the charges are numerous or complex, or the evidence has been difficult to follow. A closing argument should be a clear summation of the testimony indicating in what respects it favors that side. Oratory, strong protestations of the guilt or innocence of accused, and tricks of showmanship are generally ineffective before courts-martial and should be avoided. As in all phases of presenting the case, both the trial judge advocate and defense counsel should conduct themselves with the courtesy, dignity, and forthrightness necessary to the proper performance of their important military duties. After argu-

ments are concluded, the court will be closed to deliberate on its findings. (See ch. 15, *infra.*)

91. JOINT AND COMMON TRIALS. a. Joint trials. Where two or more persons join in the commission of a crime or offense, they may be charged jointly. (See par. 24d, *supra.*) Persons so charged are jointly tried, that is, there is only one trial and one record of the proceedings. After the arraignment one or more of the joint accused may make a motion to sever, that is, to be tried separately. Among the principal grounds for such a motion are the fact that the defenses of the various accused are antagonistic to one another, or that one of the accused desires to call another of the accused as a witness. If the court grants the motion, it will decide which of the accused will first be tried and amend the specification so as to eliminate the reference to the party who is not to be tried at that time (par. 71*b*, MCM). If the motion is not granted or if all accused do not move to sever, the trial proceeds as a joint trial. Each of the accused must in general be accorded every right and privilege he would have had if he had been tried separately (par. 49*c*, MCM). However, the defense has only one peremptory challenge, no matter how many joint accused there may be. Both court and counsel must be careful to note evidence which is admissible against only one or some joint accused, and consider it only as against such of the accused as it applies to. If, for example, a written confession obtained from one accused is offered in evidence, the trial judge advocate should state that it is offered against that accused only, and the court should be cautioned against considering it against any coaccused. So, too, out-of-court statements of one coconspirator after the common design has terminated (par. 114*c*, MCM) and unsworn statements at the trial, which are not evidence (par. 76, MCM), are only admissible against the accused who made them. However, one joint accused may always *testify* at the trial against another (par. 114*c*, MCM). If the defense counsel finds that the defenses of joint accused whom he has been detailed to defend are inconsistent, e. g., if each attempts to cast the blame on the other, he should make application to the reviewing authority to have each represented by separate defense counsel. Separate findings and sentences must be made as to each accused. (See pars. 108, 115, *infra.*)

b. Common trials. Two or more accused may be jointly tried only if they are charged jointly. They can be so charged only if the offense is one which more than one person can commit. (See par. 24d, *supra.*) Two or more persons may each commit an offense which cannot be considered joint, but, if committed at the same time and place, the evidence and witnesses may be the same as to each. In such circumstances, the separate charges against the several accused may be tried together at a common trial. This may be done, however, only if the appointing authority so directs and no one of the accused objects. The

object of having a common trial is one of convenience, to avoid having the same evidence presented at several trials and the preparation of several separate records. Since the charges are separate, each accused is entitled to all the rights he would have had if the charges had not been combined, including the right to a peremptory challenge, the situation differing in this respect from that of a joint trial. Separate findings and sentences must, of course, be made as to each accused. Although a single record of trial is prepared, separate court-martial orders are issued as to each of the accused. (See par. 144n, *infra.*)

CHAPTER 14

EVIDENCE

92. NATURE AND PURPOSE OF RULES OF EVIDENCE. Like civil courts, courts-martial are required to determine the cases before them "according to the evidence" (AW 19), that is, solely on the basis of matters introduced before them at the trial and facts of which the court may take judicial notice. Every bit of this evidence must be presented in open court. If courts were allowed to decide on information they obtained from other sources, their decisions might be based on mere rumor, opinion or something equally untrustworthy. The information which can be introduced before a court upon which to base its decision and the method of presenting it are governed by the rules of evidence. These rules are based on common sense and long experience, and furnish a safe and efficient method of ascertaining the truth. The rules of evidence which must be followed by courts-martial are contained in chapter XXV, MCM. A decision of a court-martial based on facts not established by proper evidence cannot be upheld. Some knowledge of the rules of evidence must, therefore, be possessed by every trial judge advocate, defense counsel and summary court officer. While those untrained in law are not expected to master all the rules, they should know the fundamental principles which apply to the particular case being tried. Full instruction in the substantive law and rules of evidence is not within the scope of this manual. This chapter deals with only some of the rules more commonly encountered in trials. Because of this limitation reference must be had to the Manual for Courts-Martial for further study of other rules of evidence.

93. DIRECT AND CIRCUMSTANTIAL EVIDENCE. Facts other than those of which the court may take judicial notice may be proved either by direct evidence or by circumstantial evidence. Statements of fact within the personal knowledge of the witness, or contained in a document which is admissible in evidence constitute direct evidence. Thus testimony of a witness that he saw the accused take property from the foot locker of another soldier would be direct evidence of the taking. The taking might, however, be proved not by direct evidence of a witness who saw the taking, but by indirect or circumstantial evidence. Thus, if a witness testified

that the stolen property was found in the accused's locker after the accused denied it was there, the court might infer, from the accused's possession and concealment of the property, the fact that he had taken it. Where the offense in question requires proof of a specific intention or knowledge or understanding on the part of the accused, it is almost always necessary to establish such intention, knowledge, or understanding, by indirect evidence. On a charge of desertion, for example, it is necessary to prove that the accused intended to remain away permanently or to avoid hazardous duty or shirk important service. Such intent is not a fact to which a witness, other than the accused, can testify, and testimony of such intent would be merely an opinion or conclusion of the witness, which he is not permitted to give. (See par. 112*b*, MCM.) The intention could be proved only by evidence of things the accused did or said from which the court could infer his intention. That his unexplained absence continued for several months or more, or that he was apprehended while dressed in civilian clothes, or that he had traveled a great distance from his station before being returned to military control, or that he had stolen articles from his barracks mates shortly before leaving, though not directly proving his intention, constitute circumstances from which the court may in the light of other evidence and on the basis of its own general experience and observation, infer the existence of an intent not to return to his organization. The same principle applies to proof of knowledge or understanding, as for example in cases of willful disobedience of lawful orders of commissioned or noncommissioned officers (AW 64, 65), where it must be shown that the accused knew that the order was given by a superior. (See par. 134*b*, MCM.) No witness can testify that the accused understood the order, or knew it was given by a superior, or that his disobedience was "willful." Those are conclusions which the court itself may draw from evidence as to the circumstances under which the order was given and what the accused said and did thereafter.

94. HEARSAY RULE. a. Definition. Any witness other than an expert witness is allowed to testify only to what he himself did or what he observed with his own senses. He can testify, for example, that he ordered the accused placed in confinement, that he saw the accused climb out a window, that he heard shots being fired. He cannot testify to what someone else told him, as, for example, that the sergeant of the guard told him that the accused was placed in confinement, that the accused climbed out the window and that shots were fired at him. Such a testimony would be "hearsay." The "hearsay" rule means simply that a fact cannot be proved by having a witness testify as to statements made by someone else or by introducing in evidence a book, document, report, or other paper in which statements are made. Thus, if a soldier were being tried for larceny of property from a footlocker, testimony

of a witness that the accused's barracks mate said that he saw the accused take the property from the footlocker is no evidence that the accused took it. In such case the witness would not be testifying to facts within his own knowledge, but merely as to what someone had told him. The fact that the statement was in writing would not change the result. If the accused's barracks mate had told an investigating officer during the course of an official investigation that the accused took the property, and the statement was typed, signed and sworn to, the written statement could not be admitted. The best method of proving the fact would be to call as a witness the person who made the statement and let him testify in court from his own knowledge that he saw the accused take the property. Hearsay is literally no evidence at all. Even though hearsay evidence is admitted without objection, it cannot be considered by the court, and if the only evidence to support a finding is hearsay, the finding cannot be upheld. The hearsay rule does not mean a witness can never testify as to what he heard others say. Often one of the issues in a case is whether a statement was made, not whether the facts stated are true. If a soldier is charged with willful disobedience of the lawful order of a superior officer, for example, anyone who heard the order given by the officer can testify to what he heard the officer say. The issue to be decided is whether or not the order was given, and anyone who heard it given would be testifying as to a fact of which he had personal knowledge. Thus there would be no question of hearsay. Similarly, if a soldier were being tried for disrespect toward an officer by calling him incompetent, anyone within hearing at the time the remark was made could testify that he heard accused call the officer incompetent. The purpose of such testimony would not be to prove that the officer was incompetent, but only to show that the accused did in fact make that disrespectful statement. Such testimony is not, therefore, hearsay.

b. Exceptions to the hearsay rule. The hearsay rule is subject to a number of well-recognized exceptions. These are discussed in paragraphs 114 through 119, MCM. A few of the more important exceptions are considered in the paragraphs below.

95. ADMISSIONS AND CONFESSIONS—IN GENERAL. As stated above, the hearsay rule prohibits proof of a fact by having a witness testify to what someone else told him or by producing a written statement made by someone not in court. One of the principal exceptions to the rule is that which permits evidence as to admissions or confessions made prior to the trial by the accused himself. A witness may testify as to what the accused said, or a written statement made by the accused may be introduced in evidence. An admission is a statement made by the accused which connects him with the offense but falls short of a full acknowledgment of guilt. A confession is a full acknowledgment of

guilt or of substantially all the elements of the offense. Thus, a statement by a soldier that he "held up A and took his wallet" or that he "went over the hill to get out of the Army" are, respectively, confessions of robbery (AW 93) and desertion (AW 58), as they both acknowledge all elements of each offense. On the other hand statements that he "stuck a gun in his ribs but ran away when he saw the cops coming" or that he "took off to see his girl but was coming back in a week" are only admissions since they do not acknowledge all elements of the offenses of robbery and desertion, the first not admitting the actual taking, a necessary element of robbery, and the second expressly denying an intent to remain away permanently, a necessary element of desertion. The different rules as to the admissibility in evidence of admissions and of confessions are discussed below. It must be remembered that these rules apply only to admissions or confessions made by an accused *outside* of court. An accused may completely acknowledge his guilt in court by pleading guilty, or in his testimony as a witness, or in an unsworn statement. Or his testimony or unsworn statement may contain damaging admissions. In such circumstances there is no question of hearsay at all. The rules limiting the admissibility of evidence as to confessions by an accused have nothing to do with his statements made before the court.

96. PROOF OF CONFESSIONS AND ADMISSIONS. a. A confession must be voluntary. Before a confession can be admitted it must be shown that it was entirely *voluntary* on the part of the accused. A confession is not voluntary if the accused was induced to make it, or materially influenced, by hope of obtaining some benefit, or by fear of punishment or injury, inspired by some person who had the authority, or whom the accused reasonably believed had authority, to do what he promised or threatened. Thus, if an accused made a confession because of a promise that if he confessed he would be released from confinement at once, or because of a threat that he would be beaten if he did not confess, the confession is not voluntary if the promise or threat were made by a person whom the accused reasonably believed could carry it out. In every case, therefore, before offering evidence of the confession the trial judge advocate should show all surrounding circumstances, including what was said by the person to whom the accused confessed. If the circumstances under which the confession was made raise any doubt as to its voluntary nature, the court should inquire further into the facts, permitting the defense to offer any evidence it may have on the point, before admitting the confession. The circumstances under which a confession was made may not suggest the need for any further inquiry, as for example, if a private confessed to a fellow private. In such cases the confession may be regarded as voluntary. Where, however, a confession is made to a military superior, it should be subjected to close scrutiny

and should not be admitted unless clearly shown to be voluntary, especially when the soldier confessing is ignorant or inexperienced and is being held in confinement. The fact that the accused was advised by his superior before making the confession that he need not make any statement at all, but that if he did it might be used against him, tends to show that the confession was voluntary, but is not conclusive on the point. Even a slight assurance of benefit held out by a military superior to an accused under charges is ground for rejecting the confession. Thus, if a company commander secures a confession from an enlisted man of his organization by stating that "matters would be easier for him" or "as easy as possible" if he confessed, such confession should not be regarded as voluntary. A similar result might follow as to confessions made by soldiers, upon assurances held out, or intimidation resorted to, by noncommissioned officers depending upon the circumstances. In view of the peculiar conditions under which accused persons are often placed when making confessions, and of the probability of error or exaggeration on the part of the witnesses who relate them, when oral, evidence of confessions is in general to be received with caution. Where, however, a confession is explicit and deliberate as well as voluntary, and is proved by a witness by whom it has not been misunderstood and is not misrepresented, it is one of the strongest forms of proof (par. 114*a*, MCM).

b. There must be other evidence of the offense. An accused cannot be convicted solely upon evidence of a confession made by him outside of court. The prosecution is required to furnish evidence, wholly apart from the confession, that the crime charged was probably committed by someone, so that there will be some corroboration of the confession. This is known as evidence of the *corpus delicti*, i. e., body of the crime. Thus, in a trial for murder, it would be necessary to establish that the particular person whom the accused was charged with murdering had died under circumstances indicating that he was unlawfully killed, for example, that he was found dead from poisoning or a bullet wound. If that were shown, a confession by the accused that he had committed the murder could be considered. Ordinarily the prosecution should be required to prove the *corpus delicti* before it offers evidence of a confession. The court may, however, permit the confession to be offered first on the assurance of the trial judge advocate that he will prove the *corpus delicti* later. If he does not, the confession must be stricken out and disregarded by the court. This independent evidence need not be sufficient in itself to satisfy the court beyond a reasonable doubt that the accused committed the crime, nor even cover every element of the offense. All that is required is *some* evidence that the crime in question was probably committed by someone. Thus in a case of larceny, evidence that property was missing under circumstances indicating that it was stolen, e. g., that a soldier's wall locker was pried open and that clothing was taken therefrom, would be sufficient. Or, in a case of desertion,

evidence that accused had absented himself without leave, e. g., a duly authenticated extract copy of his company morning report, would establish the *corpus delicti.*

c. Procedure. After evidence of the *corpus delicti* has been introduced, the prosecution will then be ready to offer evidence of the confession itself. The confession may have been oral or in writing.

(1) *Written confessions.* A witness who was present at the time the alleged confession was signed or written should be called to the stand. The trial judge advocate should produce the confession and have it marked as "Prosecution's Exhibit 1 [or the next number in order] for Identification." It should be shown to counsel for accused and then handed to the witness. The witness should be asked if he can identify the statement, including when and where it was taken, who was present at the time, how it was prepared, e. g., taken down in shorthand and transcribed or written out in longhand, and whether or not he saw the accused sign it, write it in his own hand or otherwise adopt it as his statement. The witness will be asked what, if any, warning was given to the accused before he made or signed the statement. At this point the defense, if it so desires, may cross-examine the witness and introduce any evidence of its own on the issue of whether the confession was voluntarily made. The trial judge advocate should then formally offer the confession into evidence. The entire confession must be offered, as the prosecution has no right to withhold any portion. If the court is satisfied that it is voluntary, the confession will be admitted and marked as an exhibit. The entire confession should then be read to the court by the trial judge advocate, and will ultimately be attached to the record as an exhibit. (See app. 3, p. 233, *infra.*)

(2) *Oral confessions.* The person to whom the confession was made, or someone present at the time, will be called and sworn as a witness. The trial judge advocate will ask the witness if he had, or was present at, a conversation with the accused concerning the particular offense or offenses, and if so where and when it took place and who was present at the time. In view of the discussion in paragraph 96a it is advisable that the witness be asked what, if any, warning was given to accused before he made the statement, after which the defense will be permitted to cross-examine or introduce its own evidence on the question of whether the confession was voluntary. The witness will then be asked to relate what the accused said.

d. Admissions against interest. Admissions or declarations against interest (par. 95, *supra*), unlike confessions, are admissible in evidence without any affirmative showing that they were voluntarily made. For example, if a military police officer arrested an enlisted man on suspicion that the latter had participated in a bank robbery, a statement by the soldier that he had been in the vicinity of the bank at about the time in question would constitute an admission against interest and could

be introduced in evidence despite the failure of the officer to warn him of his rights. Should it appear, however, that the admission was procured by means which may have been of such character as to have caused the accused to make a false statement, such as, for example, the use of "third degree" measures, the court should exclude or disregard all evidence of the statement.

97. OFFICIAL WRITINGS. a. Admissibility in general. As already indicated (par. 94, *supra*), a written statement is ordinarily not admissible as proof of the facts stated in it since it is a statement made by someone outside of court, i. e., hearsay. This is true even if the statement is an official report. Thus, the written report of an investigating officer as to what a witness said at the investigation, or a written statement or affidavit by a military policeman that the accused was apprehended, would be inadmissible. The witness at the investigation or the military policeman must be called to testify in person. An important exception to this rule, however, is that which permits the use in evidence of official statements in writing made by an officer or other person *who had the duty to know and to record* the fact or event stated (par. 117*a*, MCM). The most common illustration of this rule is the admission of entries in a morning report. The company or other similar unit commander is charged by law with the duty to know and to make a permanent record in his company morning report of certain facts and events taking place within his organization. (See AR 345–400, 3 January 1945.) Since he must know and record the status of all men in his organization, an entry in a morning report of "Dy to AWOL," for example, is evidence of absence without leave. It is unnecessary to call the company commander himself to testify as a witness. The entry in the morning report is enough. This exception, it must be remembered, applies only to the original record of facts which the person making the record had a duty to know and to record. An investigating officer does not have a duty to *know* the facts to which a witness at an investigation testifies, whereas a company commander does have a duty to know the status of enlisted men in the company. The report of the investigation is, therefore, inadmissible, whereas the morning report is admissible. Other unit records in which facts must be originally recorded, such as the record of individual clothing and equipment, a payroll, or a guard report, are admissible on the same principle. For instance, entries in a guard report relating to confinement or escape from confinement would be admissible to establish those facts, without calling as a witness the prison officer or other person making the entries. (See app. 2, p. 215, *infra*.)

b. Entries obviously not based on personal knowledge. One qualification must be observed as to official records of facts which the recording officer has a duty to know and to record. If it appears from the record that the officer making the entry obviously did not have personal

knowledge of the fact recorded, the entry is treated as hearsay. Thus, a company commander is required to enter in the morning report facts affecting the status of men in the organization, but it may be obvious that he cannot have personal knowledge of those facts. For example, suppose a soldier stationed at Camp A was ordered to proceed on detached service to Camp B a considerable distance away. While en route to Camp B he absented himself without leave and failed to arrive at Camp B at the designated time. At his trial for absence without leave the trial judge advocate offered into evidence an extract of the company morning report made at Camp A reciting absence without leave of accused while en route to Camp B. It is obvious that the entry in question was not based on the personal knowledge of the company commander at Camp A, as the alleged unauthorized absence did not originate at the station of his organization and the entry must have been based on information obtained from outside sources. A proper method of proving absence without leave in such case would be to offer into evidence a duly authenticated extract of the morning report of the company at Camp A reciting the transfer from Camp A to detached service at Camp B, an authenticated copy of the orders transferring accused from Camp A to Camp B, and a duly authenticated extract copy of the morning report of the organization to which accused was assigned at Camp B, showing his absence without leave by failing to arrive at the point of destination at the required time. The latter entry, i. e., that accused failed to report at the organization at the time ordered, would be within the personal knowledge of that organization commander. Another common unauthorized use of a hearsay entry in a morning report is the attempt to prove termination of absence without leave or desertion at a place or post other than that where the particular unit is stationed. If a company is located at Camp A, an entry in its morning report that an absentee of that company surrendered to or was apprehended by either the civil authorities or the military authorities at a location other than at Camp A would obviously not be within the personal knowledge of the absentee's company commander at Camp A and would be no evidence at all of the termination of the absence. This does not mean that termination of absence cannot, in a proper case, be shown by morning report entries. If the absentee surrenders to his own organization and is restored to duty, or is apprehended and returned to it under guard, respective entries in his organization morning report of "AWOL to duty" or "AWOL to confinement, Post Guardhouse," would be based on personal knowledge and admissible to show return to military control. (See, for example, app. 2, p. 214, *infra.*)

c. Service records. The principles applicable to unit records discussed in paragraph 97a, *supra*, do not apply in general to service records. Entries made in these records are not ordinarily made as to facts which the recording officer himself has a duty to know, but are copies from other

original records. Although, for example, all furloughs taken by a soldier are recorded in this service record, the entries therein are copies from the original furlough certificate and are thus *secondary* evidence, not the original evidence of the fact of the furlough. The entry in the service record could not be introduced into evidence, therefore, to establish that a soldier had taken a furlough, if proper objection was made that the entry was copied from other original sources (par. 117*a*, MCM). There are, however, two types of entries in service records which may properly be introduced into evidence at a trial. The first of these, an extract copy of a service record duly authenticated by the unit personnel officer and relating to evidence of previous convictions of accused, is both admissible and the usual method of proving previous convictions (par. 117*a*, MCM, and app. 2, this manual). And, secondly, the final indorsement on the service record is an original entry and commonly used to establish the character of the discharge of an accused, i. e., honorable or dishonorable. (See par. 117*a*, MCM.)

d. Proof of official writings. The discussion in the subparagraphs above has dealt with the question whether the contents of a document can be considered as evidence of the facts stated therein. Before that question arises, however, the document itself must be properly proved. The method of proving writings is considered in paragraph 98.

98. METHOD OF PROVING WRITINGS. a. In general. There are two general rules for proving the contents of a document or other writing: (1) the original document or writing must be produced and (2) there must be evidence to prove that the document or writing is what it purports to be. There are exceptions to these rules in the case of public documents or other official records. The general principles will first be discussed and then the exceptions will be dealt with.

b. Original writing must be produced. Generally when the contents of any written instrument are to be proved at a trial, the instrument itself must be introduced. This is known as the "best evidence" rule. It forbids proof of the contents of any writing by oral testimony or by a copy of the writing. If, for example, it is desired to prove admissions made by an accused in a post card mailed to another soldier, the latter is not permitted to testify as to what was contained in the card. The card itself must be introduced as the best evidence of what it contains. Likewise the recipient of the card would not be permitted to make a copy of it and bring that to court as evidence, even though he would testify that the copy produced was an exact copy of the original. If, however, the original writing has been lost or destroyed or is otherwise not available, its contents may be proved by a copy or by the testimony of witnesses who have seen the writing (par. 116*a*, MCM). Whenever the contents of a document become material, such as a check in a forgery case, a pay voucher, or a written or signed confession of an accused, the original writing must

be produced in court, and introduced into evidence, unless there is a satisfactory showing that it cannot be produced.

c. Writing must be authenticated. No document can be received in evidence until the party offering it has established its genuineness, i. e., that it is what it purports to be, by testimony of one or more witnesses. If, for example, the prosecution seeks to introduce into evidence a letter written by the accused, it must do more than merely bring the letter into court and offer it into evidence. There must be some proof that the piece of paper in question was written by the accused. The prosecution should have the person who received the letter testify that he received it and identify it. Then the signature should be shown to be that of the accused by the testimony of that witness or other witnesses. The genuineness of the letter is thus established and the letter may be received in evidence. The fact that the writing is an official document, such as a judgment of a court or a company morning report, does not dispense with the necessity of its authentication. If a company morning report, for example, is offered in evidence, it must be authenticated by proof that it is in fact the morning report of the particular unit. This may be shown by testimony of the company commander, the first sergeant, or anyone else who knows that fact of his own knowledge. The exception which permits the introduction of authenticated copies of such documents is discussed in d below.

d. Exceptions in the case of official records. An important exception to the two general rules stated above, i. e., that the original writing must be produced and that its genuineness must be proved by witnesses, exists in the case of public records required to be preserved on file in a public office, including records in the War Department and in any command or unit in the Army. In the case of such records, a copy which has been duly authenticated by the legal custodian of the original may be admitted in evidence in place of the original without first proving that the original has been lost or destroyed, or is otherwise unavailable. This exception is made necessary by the inconvenience to the public business and the impairment of the record system of the War Department and Army units that would result if the original records were removed from their files. A common illustration of the use of this exception is in the case of company morning reports. A morning report may, of course, be proved by producing the original and having a witness testify in court as to its genuineness, as stated in c above. But since it is in official writing, an extract copy duly authenticated by its legal custodian may be introduced into evidence without production of either the original report or a witness to authenticate it. There are three "legal custodians" of the morning report, any one of whom may prepare an extract copy. They are the company or other unit commander preparing the report, The Adjutant General, and the unit personnel officer, all of whom receive duplicate originals of the morning report (AR 345–400, 3 Jan

1945) and are charged with their custody. As only three legal custodians exist, it follows that no one else is empowered to authenticate an extract of the morning report. For example, neither the regimental commander, the regimental adjutant, nor any company officer other than its commander may exercise this function, and an extract purportedly authenticated by any of them would be excluded on objection that it was not properly authenticated. Though a failure to object to its introduction on the part of the defense would waive a proper authentication, a trial judge advocate should never anticipate a failure to object on proper grounds, and should make certain that the extract is properly authenticated before it is offered into evidence. In the ordinary case involving absence without leave the company commander will prepare and authenticate an extract from his morning report containing pertinent entries that concern the accused on WD AGO Form 44. This will be attached to the charges and other allied papers at the time they are forwarded and will be introduced into evidence at the trial by the prosecution. The advantages of using a duly authenticated copy in lieu of the original are manifest. Aside from saving the time consumed by a witness in attending a trial, it is often impracticable or even impossible to produce both the original morning report and a witness to authenticate it. If, for example, a soldier deserts his organization at a port of embarkation and is not returned to military control until after it has departed, neither the original company record nor any one who could identify it as such would remain. If, however, the company commander had properly prepared and authenticated an extract copy of this report and attached it to the charges or delivered it to the port authorities, this difficulty would not arise. For a specimen form of a duly authenticated extract copy of a morning report, see appendix 2, p. 214, *infra.*

e. Mechanics of introducing documentary evidence. In the usual case requiring documentary proof, where the original writing is to be introduced, a witness who can testify as to its genuineness will be called. The document should be marked for identification by the reporter, or, if none, by the trial judge advocate, after which the document will be referred to by the number given, e. g., "Prosecution's Exhibit 1 for Identification." It will be shown to opposing counsel and then to the witness who will be asked to identify it as to what it purports to be. If opposing counsel desires to cross-examine the witness on the question of admissibility before the document is received in evidence, such a request should be granted. The document will then be offered in evidence, and if admitted will be shown or read to the court. It is of utmost importance that the document actually be received in evidence, and the mere marking of it for identification does not serve this purpose. If a duly authenticated extract copy of a morning report or other official record is offered in evidence, no witness need be called. The document is merely marked for identification, shown to opposing counsel, and offered in evidence.

All documents received in evidence will be attached to the record of trial when it is prepared. If, however, an original record or other document which should be returned to its source is received in evidence, the party introducing the record should request permission of the court to withdraw it and substitute a suitable copy certified as such by the trial judge advocate, so as to permit the return of the original (par. 75*a*, MCM).

99. IMPEACHMENT OF WITNESS. a. In general. A fundamental principle of evidence is that the reputation of a witness as to truth and veracity cannot be shown unless it has been attacked. For example, after a witness testifies, his own side cannot "bolster" his testimony by offering evidence that his general reputation for truth and veracity in his community, organization or station is good. The accused occupies no exceptional status as a witness in this respect and his testimony cannot be enhanced by evidence of his reputation for truth and veracity any more than that of any other witness. Once a witness testifies, however, the opposing side may attack his credibility. The methods of doing so are discussed in the subparagraphs below.

b. Methods of impeaching witnesses. The various methods of diminishing the credibility of a witness are discussed in paragraph 124*b*, MCM. There are four methods of impeaching a witness: (1) By showing that the reputation of a witness for truth and veracity in his community is bad. His "community" includes his organization, station, or post. Such evidence must be limited to his reputation in the community, and the personal opinion of a witness as to his character or veracity may not be shown. (2) By showing that the witness has been convicted of a crime which involves moral turpitude or which effects his credibility, as, for example, sodomy (involving moral turpitude) or making a false official statement (affecting credibility). Convictions for other offenses as, for example, a purely military offense such as desertion (AW 58) or willful disobedience (AW 64) are not admissible. Before a conviction may be proved, the witness must first be questioned with reference to it and given an opportunity of denying, admitting, or explaining it. (3) By showing that the witness has previously made a statement inconsistent with his testimony in court. The inconsistent statement must relate to one of the issues in the case, not to a collateral or subordinate matter. For example, if a witness testified in a trial for robbery that he was in a drugstore drinking a lemonade when the accused came in with a gun in his hand and held up the store, he could not be impeached by showing that before the trial he had stated that he was drinking an ice cream soda at the time the accused entered. He could be impeached, however, by showing that he had earlier stated that at no time did he see the accused with a gun. (4) By showing that the witness was prejudiced or biased for or against the accused, or was a friend or an enemy or related to the accused, etc. Such facts with respect to his personal interest tend to diminish his credibility.

c. Evidence of reputation for truth and veracity where witness has been impeached. When the credibility of a witness has been assailed, the side which called the witness may meet the attack by evidence that his general reputation for truth and veracity was good. If, for example, the defense offers evidence to impeach the credibility of a prosecution witness by proof that his general reputation for truth and veracity in his organization was bad, or that he had made prior inconsistent statements, the prosecution may in rebuttal show that his general reputation for truth and veracity in his organization is good (par. 124*b*, MCM). But such rebuttal evidence is inadmissible unless his credibility as a witness, rather than the truth or accuracy of his particular testimony, is assailed. Although statements made by a witness are flatly contradicted by other witnesses, his reputation for truth cannot be shown until his credibility has been assailed by some recognized method of impeachment discussed in paragraph 99b, *supra*. If, in every case where witnesses are in direct conflict, proof of their general character could be introduced, the true disputed issues of fact would be lost sight of in a mass of testimony sustaining or impeaching the various witnesses in the case. If, to prove a charge of drunkenness a prosecution witness, A, testifies that accused was staggering and had the odor of alcohol on his breath, and the defense thereafter calls a witness, B, who testifies that accused neither staggered nor smelled of liquor, the prosecution may not show that the general reputation of A for truth and veracity in his organization was good. The attack made by B was upon A's particular testimony, not upon his character or reliability as a witness generally. But if the defense called witness C, who testified that A's general reputation for truth and veracity was bad, the proposed prosecution testimony would be admissible.

d. Character of accused. It is a fundamental rule that the prosecution may not introduce evidence of the accused's bad moral character or formal misdeeds in proof of the charges on which he is being tried (par. 112*b*, MCM), since there would be a tendency to find him guilty simply because of his bad record. If, however, the accused testifies under oath as a witness, his credibility is subject to being attacked like that of any other witness. If it is attacked, the defense may show that his reputation for truth and veracity is good, as it may in the case of other witnesses. If the prosecution does not attempt to impeach him, then the defense may not bolster his story by evidence of his reputation for truth. It must be remembered that the prosecution may not impeach his credibility unless he testifies as a witness. If, for example, he remained silent or made an unsworn statement only, his credibility would not be an issue and the prosecution could not attack it. Although the defense may not introduce evidence of the reputation of the accused for truth in order to enhance his credibility as a witness unless the prosecution attempts to impeach him, it may always offer evidence of his general good character and military record to show the probability that he was innocent. Whereas his

reputation for truth and veracity would be material only if he testified as a witness, evidence of his good character, such as that he is a good soldier, that he has had a prior honorable discharge, would all indicate the unlikelihood that he had committed the offense charged. If the defense introduces such evidence, the prosecution has the right to introduce evidence in rebuttal. It could, for example, show by another of his former commanders that he was not a good soldier, or that he had at one time received a discharge other than honorable. It must be remembered that only the defense may offer evidence of the accused's general good character originally, and that the prosecution may introduce evidence on the point only by way of rebuttal.

100. PROOF OF VALUE OF PROPERTY. a. In general. In cases involving an offense against property, such as larceny, embezzlement, misappropriation, damage, loss, or wrongful disposition, it is necessary to prove that the property had some value in order to establish the offense. Moreover, in such cases the seriousness of the offense and the amount of punishment that can be imposed are determined by the value of the property in question. For example, larceny of a watch valued at less than $20 carries a maximum confinement of 6 months in a guardhouse, whereas if the watch is shown to be of a value in excess of $50, confinement for 5 years in a penitentiary is authorized. The trial judge advocate must, therefore, offer affirmative and competent evidence of the value of each item of property included in the charges.

b. Civilian property. The value to be proved is the "market value" of the property, that is what it is worth in the open market at the time of the offense. The court cannot determine the specific market value of any property unless evidence is introduced to prove it, or unless there is a stipulation by both sides as to that value. (See par. 68b, *supra*, as to stipulations as to value.) Proper evidence of market value is the testimony of someone who, by virtue of his knowledge and experience, knows what that value is. If, for example, the article involved is a second hand watch, a dealer in second hand watches may testify as to his opinion of its value. When called as a witness, the dealer or other expert should first be questioned as to his experience in dealing in articles of the kind involved so that he may qualify as an expert on the subject of their value, after which he will be shown the property, be permitted to examine it if he has not already done so, and then asked to give his opinion of its value at the time the alleged offense was committed. The owner of the property may not testify as to its value unless he can also qualify as an expert witness, nor may the owner be permitted to testify as to any special or peculiar value the property may have for him. Neither the original cost of a second hand article, nor what it will cost to replace it is sufficient to prove its market value. Thus, if a soldier

were being tried for stealing a suit of clothes worth $30, the testimony of the owner that he paid $40 for the suit 2 years ago, and that it is still worth that much to him as he could not replace it for $50, is not evidence of the "market value" of the suit. If, however, someone who dealt in second hand clothing and was familiar with its market value testified that the suit was worth $25 at the time of the offense, the court could find that the suit had a value of $25.

c. Inference of some value from nature of property. Although a court-martial cannot find the specific value of property unless evidence of such value is produced, nevertheless where the character of the property clearly appears in evidence, for instance, if it is exhibited in court, the court, from its own experience, may infer that the property has some value (par. 149*g*, MCM). Where the prosecution, for example, fails to prove the specific value of a suit of clothes, the court could, despite lack of direct proof, infer that the clothes were of some value. The value inferred in such cases is nearly always "some value less than $20."

d. Value of government issue property. When Government articles issued or used in the military service are involved, as, for example, an Army issue overcoat in serviceable condition, their value is established by reference to a published Government price list (e. g., AR 30–3000, 16 Oct. 1944). The proper procedure is to identify the property as of a type mentioned in a published Army price list, offer evidence of its serviceable condition, then show the price set out in the list. The court may take judicial notice of the published price (par. 125, MCM), that is, it may recognize the existence of the price without formal proof of it. The court should be asked to take judicial notice of the price and the published list should be called to its attention or submitted to it.

CHAPTER 15

FINDINGS

101. CLOSING OF COURT AND DELIBERATION. After all the evidence has been received and the arguments and statements have been made, the court closes to determine its findings. Before voting, the members of the court may desire to discuss the evidence and the merits of the case. So that no member's opinion will be influenced by superiority in rank, the members should express their views in inverse order of rank, beginning with the junior member. Discussion should be frank and informal, but it should not take the form of members stating how they intend to vote. The requirement for voting by secret written ballot (AW 31) is to prevent any member being unduly affected by the decision of other members.

102. VOTING PROCEDURE. After the discussion is completed, the junior member of the court distributes a ballot to each member. The court will vote first on the specification, or specifications, and then on the charge. If there are two or more charges, the court will vote first on the specifications to Charge I, then on Charge I, next on the specifications to Charge II, then on Charge II, etc. The necessity of voting on the specification before voting on the charge is clear. It cannot very well be decided that the accused has violated the Article of War set out in the charge until it has first been determined whether he did the acts alleged in the specification. After each vote, the junior officer collects the ballots and counts them in the presence of the president, who verifies his count and announces the result to the court.

103. NUMBER OF VOTES REQUIRED. To find an accused guilty of any charge or specification, a two-thirds vote of the members present at the time the vote is taken is sufficient in every case except for a conviction of spying in violation of AW 82. For that offense a unanimous vote is necessary for conviction. AW 43 requires unanimity for conviction of "an offense for which the death penalty is made mandatory by law" and violation of AW 82 is the only such offense. All other convictions, even for offenses for which the death penalty *may* be imposed, such as wartime desertion, mutiny, sleeping on post, or murder or rape, require only a two-thirds vote. In determining how many votes are needed to

make the required two-thirds, a fraction is counted as one. Thus, assuming that eight members are present at the time of voting, six votes would be necessary to convict. Two-thirds of 8 is 5⅓, but since the ⅓ counts as a whole vote, the requirement for two-thirds is not met unless six members concur. Unless two-thirds of the members (or in the case of spying all the members) vote to find the accused guilty of a specification or charge, the accused is acquitted of that specification or charge. The court may, however, take as many ballots on any specification or charge as it sees fit, the final result not being conclusively determined by the first ballot. For example, if on the first ballot only five of nine members present voted to find the accused guilty of a specification, the court could, if it saw fit, vote again on the same specification and if 6 members then voted to find the accused guilty, the accused would be convicted. Conversely, if the required two-thirds voted to find the accused guilty, it would be possible to take another vote upon which less than two-thirds might be obtained. In short, the court may reconsider its findings, vote again, and come to a different result at any time until it has announced its findings or has received evidence of previous convictions (par. 78*d*, MCM).

104. DUTIES OF MEMBERS IN VOTING. Every member must vote on each specification and charge. A refusal or failure to vote would be a neglect of duty and thus a military offense. Each member of the court has sworn to determine the case "accordng to the evidence" and "without partiality, favor or affection" (AW 19). In deciding on the guilt of the accused, he must not consider any matter which has not properly been placed before the court, nor may he take into account any previous knowledge or opinion he may have had as to the accused. Every accused is presumed to be innocent until his guilt is proved beyond a reasonable doubt (par. 112*a*, MCM). As to each offense charged, therefore, the prosecution must establish beyond a reasonable doubt each element of the offense and that the accused was the person who committed it (par. 78*a*, MCM). Thus, if on a trial for willful disobedience in violation of AW 64 a reasonable doubt existed as to any of the facts which must be established, i. e., that the accused received the command in question, or that the officer giving it was his superior officer, or that the accused disobeyed it, or that his disobedience was willful, the court could not find the accused guilty. The requirement for proof beyond a reasonable doubt, however, does not mean that the prosecution must prove with absolute mathematical certainty that the accused is guilty. No matter how clear the testimony, there is almost always some possibility that the accused may be innocent. The question each member must ask himself is whether in view of all the evidence, he, as a reasonable man, has any substantial, sensible and conscientious doubt as to the guilt of the accused.

105. TYPES OF FINDINGS ON SPECIFICATIONS. a. In general. The most common findings on a specification are "Guilty" or "Not Guilty." The court, however, may also find the accused guilty with exceptions, or guilty with exceptions and substitutions.

b. Findings with exceptions. The evidence may establish that the accused is guilty of a part of a specification but not of the balance, or guilty of the substance of a specification but not of certain details alleged. In such a case, the court may find the accused guilty of the specification with the exception of the part not proved. For example, if a specification for larceny alleged that the accused stole "one billfold, value about $2, and one fountain pen, value about $4.50, property of Private Walter Buntz," and the evidence proved merely that the accused stole Private Buntz's billfold, the court should convict him of stealing the billfold but not the fountain pen. It would do this by finding him guilty of the specification with the exception of the words in the specification relating to the fountain pen, as follows:

> Of the specification: Guilty, except the words "one fountain pen, value about $4.50," of the excepted words, not guilty.

c. Findings with exceptions and substitutions. The court is not limited, however, merely to finding the accused guilty with exceptions. Where certain allegations in a specification are not exactly established, the court may not only except such allegations but substitute the true details shown by the evidence. If, therefore, the names of persons, dates, or places, descriptions of articles, sums of money, etc., which are set out in a specification are shown by the evidence to be incorrect, the court in its findings on the specification should except such statement, substitute the correct facts shown by the evidence, and find the accused not guilty of the excepted words but guilty of the substituted words. For example, if a specification alleged that the accused stole "one gold watch, value about $85," and the evidence established that, although he stole the gold watch, its value was only $13, the court in its finding on the specification would except the figures "$85" and substitute the figures "$13," as follows:

> Of the specification: Guilty, except the figures "$85," substituting therefor the figures "$13"; of the excepted figures, not guilty, and of the substituted figures, guilty.

The power to make exceptions and substitutions does not authorize the court, however, to find the accused guilty of a different or greater offense than was charged. For example, if the specification alleged that the accused stole a watch and the evidence showed that he stole a fountain pen, the court could not by exceptions and substitutions find him guilty of stealing the latter article since that is a different offense. Similarly, if the specification alleged that he stole a watch of a value of $15 (for which a sentence of 6 months confinement can be imposed), he could not

by exceptions and substitutions be found guilty of stealing a watch of a value of $55 (for which a sentence of 5 years' confinement might be imposed), since the latter is a greater offense.

106. LESSER INCLUDED OFFENSES. The evidence in a case may fall short of proving all the elements of the offense charged but may prove that the accused committed a less serious offense which is necessarily included in the offense charged. For example, to prove desertion it is necessary to establish (1) that the accused absented himself without leave and (2) that he had the intent to desert. The offense of absence without leave is, therefore, necessarily included in desertion. To prove robbery it is necessary to establish (1) that the accused stole certain property and (2) that he did so by force and violence or by putting the owner in fear. Larceny (the stealing of the property) is, therefore, necessarily included in robbery. Where the offense described in the specification is not fully proved, but it is shown that the accused committed a lesser included offense, the court by exceptions and substitutions should find the accused not guilty of the offense set out in the specification, but guilty of the less serious offense established by the evidence. If the court's finding on the specification is simply "not guilty," the accused will be acquitted, not merely of the major offense, but of all minor offenses necessarily included in it. A finding of not guilty on a specification alleging desertion, for example, will bar any subsequent trial for absence without leave (par. 68, MCM). Before finding an accused not guilty, the court shall consider whether the commission of any lesser included offense has been proved. Some of the more common examples of lesser included offenses are listed in appendix, *infra*. The method of finding an accused guilty of a lesser offense is to except from the specification the inappropriate words and substitute the necessary appropriate words. For example, if an accused were tried under a specification alleging larceny in the usual form (app. 4, Form 94, MCM), and the court desired to find him guilty only of the lesser included offense of wrongfully taking the property, it would be necessary to except the words indicating that the accused stole the property and substitute words showing simply a wrongful taking. This would be done as follows:

> Of the specification: Guilty, except the words "feloniously take, steal, and carry away," substituting therefor the words "wrongfully take and carry away," of the excepted words not guilty, of the substituted words guilty.

Although the court by exceptions and substitutions may always convict of a lesser included offense, it has no power to find a greater offense nor an offense of a different nature than that charged, since no one can be convicted of an offense of which he has not been notified and which he has had no opportunity to defend. Thus, if charged with absence without leave, he cannot be found guilty of the greater offense of desertion; if charged with larceny, he cannot be convicted of the greater

offense, robbery. Similarly, a finding of a different offense, as, for example, embezzlement on a charge of larceny, or wrongful pledging of property on a charge of wrongful sale, may not be made.

107. FINDINGS AS TO CHARGES. After arriving at its findings on the specification or specifications under a charge, the court must then make a finding on the charge itself. A finding on the charge is essential. Where the accused has been found not guilty of the specification under a particular charge, or of all specifications if there are more than one, the only possible finding on the charge itself is "not guilty." Since the accused was not guilty of doing the acts alleged in the specification, he did not violate the Article of War set out in the charge. If, however, the accused is found guilty of the specification or specifications, the finding on the charge should be "Guilty." Thus, if the accused is tried on a charge of violating the 58th Article of War and on a specification alleging that he deserted the service of the United States, and he is found guilty of the specification, he must be found guilty of the charge—i. e., of violating the 58th Article of War. Since that article denounces desertion, one who deserts necessarily violates it. To find an accused guilty of a charge, it is necessary only that he be found guilty of *one* specification which describes an offense under the Article of War referred to in the charge. Thus, if the accused were charged with violating the 93d Article of War and there were three specifications under that charge each alleging a different larceny, he must be found guilty of the charge if he is found guilty of *one* specification, even if he is found not guilty of the other two specifications. Larceny is a violation of AW 93, and an accused who has committed one larceny is as guilty of violating that Article as if he had committed three, fifteen, or one hundred. Similarly, if under a charge of violating AW 93 there were three specifications, the first alleging robbery, the second alleging mayhem and the third alleging arson, and the accused were found guilty of the third specification only, the finding on the charge must be guilty because arson is an offense denounced by AW 93. In such a case, the findings would read as follows:

Of Specification 1 of the Charge: Not Guilty
Of Specification 2 of the Charge: Not Guilty
Of Specification 3 of the Charge: Guilty
Of the Charge: Guilty

By making exceptions and substitutions in its finding on a specification, the court may have caused the specification to allege an offense which is not covered by the Article of War referred to in the Charge. In such a case, the court must find him not guilty of the Article of War referred to in the Charge, but guilty of the Article of War which covers the new offense of which he has been found guilty. For example, assume a charge of violating the 58th Article of War, and a specification alleging that the accused deserted the service. If on the specification the court by excep-

tions and substitutions found the accused guilty only of the lesser included offense of absence without leave, it could not find him guilty of the Charge. Absence without leave is not a violation of AW 58, but of AW 61. The court's finding on the charge in such case should read as follows:

Of the Charge: Not guilty, but guilty of a violation of the 61st Article of War.

108. FINDINGS AS TO JOINT ACCUSED. If two or more accused are charged jointly, separate findings on each specification and charge must be made as to each accused. Thus, if Privates Timothy Binz and Roderick Random were jointly charged with robbery and were found guilty of the specifications and the charge, the findings should be made in this form:

As to Private Roderick Random—
Of the Specification of the Charge: Guilty
Of the Charge: Guilty.

As to Private Timothy Binz—
Of the Specification of the Charge: Guilty.
Of the Charge: Guilty.

If one or more of joint accused is acquitted and one or more convicted, the findings should by proper exceptions eliminate the words showing that the person acquitted jointly participated in the offense. Thus, if in the trial of Privates Binz and Random, the former was found not guilty and the latter guilty, it would be necessary in making the finding as to Random to except the reference to Binz and the words indicating that the offense was joint. The finding in such case would be in the following form:

As to Private Timothy Binz—
Of the Specification of the Charge: Not Guilty.
Of the Charge: Not Guilty.
As to Private Roderick Random—
Of the Specification of the Charge: Guilty, except the words "Private Timothy Binz, Company C, 143d Infantry," and "acting jointly and in pursuance of a common intent," of the excepted words, not guilty.
Of the Charge: Guilty.

109. PROCEDURE AFTER VOTING ON FINDINGS. After the findings have finally been determined, the court will be opened. If the accused has been found not guilty of *all* specifications and charges, the president will at once announce that he has been acquitted (AW 29). If, however, he has been found guilty of *any* offense, the court will make no announcement of its findings, but will call on the trial judge advocate to read the data as to the age, pay, and service of the accused shown on the first page of the charge sheet and to offer any evidence of previous convictions (par. 79*a*, MCM, and app. 1, this manual). This information is to be considered by the court in fixing the appropriate sentence in much the same way a judge in a criminal court may take into account a defendant's previous

criminal record and other factors disclosed by the probation officer before imposing sentence. After reading the data from the charge sheet the trial judge advocate should ask the accused if the statement is correct. As already indicated, this data should have been carefully checked before trial, so there should be no inaccuracy or lack of completeness. In the very rare case in which defects may be pointed out, the correct data may be stipulated to or may be proved by taking evidence on the point (par. 79*b*, MCM). The trial judge advocate will then read to the court any evidence of previous convictions by courts-martial and introduce in evidence as an exhibit the extract copy of the service record of the accused or other proof (such as the court-martial order or record of trial itself) of the convictions. The convictions which may be considered for this purpose are discussed in paragraph 29, *supra*. At this stage the accused may introduce evidence of the character given him on any former discharges from the military service.

CHAPTER 16

SENTENCES AND PUNISHMENTS

Section I. PROCEDURE

110. CLOSING OF COURT AND DELIBERATION. After the data and evidence described in paragraph 109, *supra*, have been received, the court will again be closed, so that it may determine the sentence. As in the case of findings, the voting may be preceded by a full and free discussion among the members, the junior member being permitted to express himself first to avoid any influence based on superiority of rank. It is proper for the law member of a general court-martial or the president, if the law member is not present or the trial is before a special court-martial, to state at the very outset of the discussion the punishment which is authorized upon the basis of the findings, provided he does not at that stage indicate his views as to what punishment *ought* to be imposed. A clear statement by him of the permissible punishments will prevent useless discussion or consideration of unauthorized sentences. The matters to be considered in determining the proper punishment are discussed in paragraphs 117 through 120, *infra*.

111. DUTIES OF MEMBERS. Every member of the court is required to to vote for a proper sentence regardless of his opinion or vote as to the guilt of the accused. Although he personally may have believed the accused not guilty and may have so voted when the court was considering its findings, the question of guilt has been settled by the court and he must accept that conclusion. The only matter he can now consider is what is an adequate and proper punishment for the offense. If the Article of War which the accused has violated prescribes a mandatory punishment (par. 118, *infra*), then it is the duty of each member to vote for that sentence. If the Article leaves the punishment to the discretion of the court, then he must vote for an appropriate sentence, exercising his own judgment and voting according to his own conscience. He should, however, give due weight to the opinions of others, and if the court becomes sharply divided, he should carefully re-examine his own views to determine the justness of his decision in the light of conflicting opinions.

112. METHOD OF VOTING. When the discussion is completed, any member who desires to propose a sentence will write it out on a slip of paper. The junior member will collect these proposed sentences and submit them to the president who will arrange them in order of severity and read them to the court. The court will then vote on the proposed sentences beginning with the lightest. As in the case of findings, the voting will be by secret written ballot, the junior member collecting and counting the ballots in the presence of the president who verifies the count and announces the result of the court. If the first sentence voted on is not adopted, a ballot will then be taken upon the next heavier sentence proposed, and so on until a sentence has received the required number of votes. If none of the sentences proposed are adopted, a new set of proposals may be made and voted upon.

113. NUMBER OF VOTES REQUIRED. AW 43 prescribes the number of votes which are required to impose a sentence. For a sentence of death, all members present at the time of voting must concur; for a sentence to confinement for more than 10 years (including, of course, life imprisonment) concurrence of three-quarters of those present at the voting is required; for all other sentences concurrence of two-thirds of those present at the voting is required. Thus, an accused may be convicted of wartime desertion by a two-thirds vote, but to sentence him to death a unanimous vote would be necessary, to sentence him to confinement in excess of 10 years a three-quarters vote, and to impose any other sentence a two-thirds vote.

114. FORM OF SENTENCE. a. General. After the court has arrived at a sentence, it should be written out in proper form by the president or law member. The forms for sentences set forth in appendix 9, MCM, should be strictly adhered to. Failure to express the sentence in proper form may result in an illegal or ineffective sentence or one which does not express the result which the court desires.

b. Sentence must be single. Regardless of the number of offenses of which the accused has been convicted, the court will impose a single sentence. The sentence will not be so phrased as to indicate that part of the punishment is imposed for one offense and part for another offense.

115. SENTENCES FOR JOINT ACCUSED. If two or more accused are jointly tried and convicted, a separate sentence must be adjudged as to each precisely as if they had been separately tried. A different punishment may be imposed on each if there are extenuating circumstances as to some not existing as to others or if the degree of guilt is different. Even if precisely the same punishment is imposed on all, however, the sentence as to each must be separately stated. Thus, if Privates Binz and Random were jointly convicted of robbery and the court desired to

impose confinement for 5 years on both, the sentence would be phrased as follows:

> As to Private Timothy Binz:
> To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 5 years.
> As to Private Roderick Random:
> To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 5 years.

116. ANNOUNCEMENT OF SENTENCES; CLEMENCY; ADJOURNMENT. When ready to disclose its sentence, the court should be opened, the accused brought before the table where the court sits, and the president should then announce the findings and sentence of the court. The form for this announcement is set out in appendix 1, pp. 156–157, *infra.* In announcing the findings and sentence, the president should state only the proportion of members voting for the finding or the sentence which is required by AW 43. Thus, if an accused were found guilty of any offense, except spying in violation of AW 82, the announcement of the findings should be "two-thirds of the members present at the time the vote was taken concurring in each finding of guilty," even if there was actually a unanimous vote or a proportion greater than two-thirds. If the accused were sentenced to 10 years' confinement or less, the announcement should refer to the concurrence of "two-thirds" of the members; if sentenced to more than 10 years to "three-fourths" of the members; and if to death to "all the members." If there is good reason for not disclosing them, the president will state that the court has directed that the findings and sentence be not announced. It is only in a rare case that there are sufficient reasons of policy for not announcing the findings and sentence in open court. Even if not announced, the findings and sentence must be revealed to the trial judge advocate who must record them (app. 6, pp. 268–269, MCM) and notify the commanding officer of the accused of the result of trial (par. 41*b*, MCM). After the announcement of findings and sentence (or statement that they are not to be announced), the defense counsel may submit any documents or other matters relating to clemency which he desires the court to consider. (See ch. 11, *supra.*) When all clemency considerations have been disposed of, the court will adjourn unless the trial judge advocate has other cases to present at that time. In the latter case, the court will take up the next case.

Section II. PUNISHMENTS—GENERAL LIMITATIONS

117. CONSIDERATIONS IN DETERMINING PUNISHMENT. a. Sentence should be adequate and appropriate. So far as the sentence is discre-

tionary, the court should impose a punishment which is adequate for the offense and appropriate for the offender, avoiding on the one hand undue leniency and on the other excessive harshness. Any extenuating or aggravating circumstances involved in the commission of the offense, together with the character and record of the accused, as shown by previous convictions and previous service, should be taken into account. A court which automatically imposes the maximum sentence in every case is not performing its proper function. On the other hand, inadequate sentences may have even more serious consequences. The reviewing authority has power to reduce an excessively severe sentence, but he cannot add to the punishment no matter how inadequate it may be. Undue leniency completely ties the reviewing authority's hands and, where the offense is of a civil nature which would be punished severely by the civil courts, may bring the entire system of military justice into disrepute.

b. Limitations on court's discretion. The court does not in any case have a completely uncontrolled discretion. First, it must consider what punishment is authorized for the particular offense, since punishment for that offense may be mandatory—i. e., specifically prescribed by the Article of War, or it may be limited by the Table of Maximum Punishments. Second, if the case is tried by an inferior court, it must consider whether it has jurisdiction to impose the kind and amount of punishment which is authorized for that offense. Third, it must consider the status and rank of the accused, since all types of punishment are not applicable or appropriate to all types of accused. Fourth, it must select an authorized kind of punishment and consider the possible limitations on the amount of that punishment and the circumstances under which it can be adjudged.

118. MANDATORY SENTENCES. Some offenses carry a mandatory punishment, that is, the Article of War denouncing that offense provides the specific punishment which *must* be imposed upon conviction. For spying in violation of AW 82, the death penalty must be imposed; for conduct unbecoming an officer and a gentleman in violation of AW 95, dismissal from the service is mandatory. As to these offenses the court has absolutely no discretion in determining the sentence, its only function being to adjudge the sentence which the statute requires. It cannot add anything to the prescribed punishment, nor give anything less. For murder or rape in violation of AW 92, death or life imprisonment are the only possible punishments, the court having simply the power to choose one or the other. For other offenses (AW 56, 57, 85, and 87) the punishment is partly mandatory and partly discretionary, that is, those articles require dismissal, but permit the court to adjudge such additional punishment as it sees fit. An officer convicted of being drunk on duty in time of war (AW 85), for example, must be sentenced to dismissal, but, unlike the case of a conviction for conduct unbecoming an officer and a gentle-

man (AW 95), the court may add a further punishment if it chooses. Where the sentence is mandatory or partly mandatory, failure of the court to adjudge the punishment which the statute requires makes its sentence illegal and of no effect.

119. TABLE OF MAXIMUM PUNISHMENTS. a. Definition. The punishment of offenses other than those referred to in paragraph 118 is left by the Articles of War to the discretion of the court, the Articles generally providing that the offense should be punished "as a court-martial may direct." However, by AW 45, the President was authorized to establish limits of punishment for such offenses. By the Table of Maximum Punishments set out in paragraph 104*c*, MCM, the President established such limits for many offenses. The punishment provided in that table for any offense is simply the *maximum* that may be imposed. It is not a required punishment, and the court may adjudge less than that set out in the table in any case.

b. To whom applicable. The limitations provided in the table are applicable only to offenses committed by *enlisted* men, including prisoners under a *suspended* sentence of dishonorable discharge. As to offenses committed by other persons triable by courts-martial, commissioned officers, warrant and flight officers, aviation cadets, prisoners whose dishonorable discharge has been executed, and civilians, there is no legal maximum other than that provided in the Articles of War. However, the maximum established in the table may be used as a standard for determining the appropriate amount of punishment for such persons. In the case of civilians, adherence to that maximum should be the rule (see WD Cir. 175, 1943).

c. Offenses covered by table. The maximum provided in the table as to a particular offense is also applicable to any included offense not listed or to any closely related offense which is not listed. For example, the table does not provide any punishment for wrongful taking of property in violation of AW 96. That does not mean that there is no limit to the punishment for wrongful taking, however, since wrongful taking is included in the offense of larceny. Therefore, it cannot be punished any more severely than can larceny of the same amount of property. Similarly, there is no punishment provided for the offense of knowingly receiving stolen goods in violation of AW 96. That offense is not included in any offense listed, but it is closely related to the offense of larceny. It is, therefore, governed by the maximum applicable to larceny.

d. Offenses to which limitation in table no longer applies. The limitation on punishment of some offenses listed in the table is no longer in effect. The maximum established for the offense of willful disobedience of a superior officer in violation of AW 64 is not applicable "in time of war or grave public emergency." There is now, therefore, no limitation upon the punishment for that offense. (It will be noted that the table

contains no maximum at all as to the offense of assaulting a superior officer in violation of AW 64.) The limitation on punishments for violation of AW 58 (desertion), AW 59 (advising or persuading another to desert) and AW 86 (misbehavior of sentinel) were suspended by order of the President as to offenses committed after 3 February 1942 (Executive Order 9048, 3 February 1942; Sec. IV, Bull. 6, WD, 1942; see Note, p. 97, par. 104*c*, MCM). Violations of those Articles committed *after* that date are punishable by death or such other punishment as the court-martial may direct. However, for such offenses committed on or before 3 February 1942 the maximum is still in effect. Thus, an accused who is tried today for having deserted on 1 February 1942 cannot be punished more severely than the table allows. The limitation upon punishment for absence without leave from command, guard, quarters, station, or camp in violation of AW 61 was suspended by order of the President as to such offenses committed *after* 1 December 1942 (Executive Order 9267, 9 November 1942; Sec. I, Bull. 57, WD, 1942; see Note, p. 97, par. 104*c*, MCM). Absence without leave on or before 1 December 1942 is punishable only to the extent provided in the table. It will be noted that in addition to absence without leave from command, guard, quarters, station, or camp, AW 61 also makes it an offense to fail to repair at the fixed time to the properly appointed place of duty or to go from the same without proper leave. The President's order did not suspend the maximum as to these two latter offenses. If, therefore, a soldier today failed to repair for KP in violation of AW 61 he could be punished only to the extent permitted by the table—i. e., by forfeiture of 3 days' pay.

120. SUBSTITUTED PUNISHMENTS. The Table of Maximum Punishments state the maximum punishment in terms of confinement or forfeiture or both. It contains no reference to such other forms of punishment as hard labor without confinement, restriction to the limits, or detention of pay. For many minor offenses these latter forms of punishment would be more appropriate. Unless a dishonorable discharge is imposed, the court has discretion to substitute other punishments for those stated in the table. The basis for such substitution is set out in a table on page 96, MCM. From that table it will be seen that the following punishments are equivalents: forfeiture of 1 day's pay, confinement at hard labor for 1 day, detention of 1½ day's pay, hard labor without confinement for 1½ days, and restriction to the limits for 3 days. If an enlisted man were convicted of being drunk on duty in violation of AW 85, for example, for which the maximum punishment is forfeiture of 20 days' pay, the court could substitute other punishments for all or part of the 20 days' forfeiture at the rates just referred to. Since 1 day's forfeiture is equivalent to 1 day's confinement, it could substitute 20 days' confinement; since 1 day's forfeiture is equivalent to 1½ day's hard labor without confinement, it could substitute 30 days' hard labor

without confinement; since 1 day's forfeiture is equivalent to 3 days' restriction to the limits, it could substitute 60 days' restriction to the limits. Or it could substitute other punishments for *part* of the authorized forfeiture. Thus, it could impose forfeiture of 10 days' pay and for the remaining 10 days' forfeiture authorized substitute 10 days' confinement of 15 days' hard labor without confinement or 30 days' restriction. Substitutions *cannot* be made if a *dishonorable discharge is imposed.* They are of importance chiefly in cases of minor offenses. By substituting additional forfeitures, or hard labor without confinement, or restriction, for the authorized confinement in such cases, the accused will be adequately punished but will not be kept from his regular duties as he would be if the sentence included confinement. In making substitutions the court must keep in mind the limits on its own jurisdiction and on particular types of punishment. Thus, if the authorized punishment for an offense were confinement at hard labor for 1 month and forfeiture of two-thirds of 1 month's pay, a *summary* court-martial could not impose additional forfeitures in place of all or any part of the confinement, since it has no jurisdiction to forfeit more than two-thirds of 1 month's pay. Similarly if the authorized punishment for an offense were 2 months' confinement and forfeiture of two-thirds pay per month for 2 months, *no* court could substitute restrictions for *all* the confinement (that is, 3×60, or 180 days) since in no event may restriction be imposed in excess of 3 months (i. e., 90 days). It is to be especially noted that the Table of Maximum Punishments and the Table of Substitutions are to be used *by the court* in cases involving enlisted personnel *only*, excluding aviation cadets, warrant officers, and flight officers and including general prisoners not dishonorably discharged (par. 104*a*, MCM). In no case may the reviewing or higher authority make use of the Table of Substitutions in taking his action. (Par. 104c, MCM.)

Section III. TYPES OF PUNISHMENTS

121. CONFINEMENT AT HARD LABOR. a. Definition. By this punishment the accused is imprisoned and required to perform hard labor during such imprisonment. Confinement "without hard labor" cannot be imposed (par. 103*i*, MCM), since it is not desirable that a prisoner serve out his term in idleness. Even if the words "at hard labor" are omitted in the sentence, the prison authorities may require performance of hard labor by the prisoner (AW 37) and normally should do so. (See par. 20, AR 600–375, 17 May 1943, and par. 5, AR 600–395, 28 March 1944.)

b. Who subject to. Any person triable by court martial may be sentenced to confinement at hard labor. Such a sentence cannot be adjudged in the case of a commissioned officer, unless he is also sentenced to

dismissal; and in the case of a warrant officer, flight officer, or aviation cadet, unless he is also sentenced to dishonorable discharge.

c. Length of confinement. The amount of confinement which may be imposed is subject, in the case of enlisted men, to the limitations, if any, imposed by the Table of Maximum Punishments for the offense. (See par. 119, *supra.*) Special and summary courts-martial cannot, of course, adjudge confinement in excess of their jurisdictional limits—i. e., 6 months and 1 month respectively. A general court-martial cannot adjudge more than 6 months' confinement in the case of an enlisted man without sentencing him also to a dishonorable discharge (par. 104*b*, MCM).

d. Imposing forfeiture with confinement. It is contrary to the policy of the War Department that a soldier should serve a sentence of confinement without some forfeiture of pay, in the absence of special circumstances. The mere fact that he is in confinement does not automatically result in any forfeiture of pay. The sentence must expressly provide for forfeiture. In every instance in which confinement is authorized in the Table of Maximum Punishments, forfeiture is also authorized. For example, the offense of larceny of property of a value of $20 or less in violation of AW 93 carries 6 months' confinement at hard labor. Although there is no entry in the column headed "Forfeiture" in the table as to that offense, the entry "Yes" in the column headed "Dishonorable discharge and forfeiture of all pay and allowances" shows that total forfeitures are authorized, and, of course, a lesser forfeiture is, therefore, allowable.

e. Form of sentence. (1) The appropriate forms for sentences of confinement at hard labor are set out in app. 9, MCM. (See particularly Forms 6 and 7.) Care should be taken to state that the accused is to be "confined." A sentence to "serve" at hard labor, for example, does not provide for confinement and would result simply in the performance of hard labor without confinement, which would not carry out the intention of the court. The sentence should expressly state that the confinement is to be "at hard labor," although, as pointed out above, the omission of these words will not prevent hard labor being required. It is not the function of the court to designate the place of confinement, and any such designation in the sentence is improper and ineffective (par. 103*i*, MCM). A sentence of a general court-martial should provide for confinement at hard labor "at such place as the reviewing authority may direct" (app. 9, Form 7, MCM), since there are several possible places of confinement of prisoners sentenced to dismissal or dishonorable discharge. (See par. 5, AR 600–375, 17 May 1943.) These words are usually not included in a sentence imposed by a summary or special court-martial (app. 9, Form 7, MCM), since normally there is only one place in which a garrison prisoner is confined—i. e., the guardhouse of the organization for which the inferior court was appointed.

(2) Sentences of confinement at hard labor in excess of 1 month should not be stated in terms of days—e. g., "ninety days"—but in terms of months—e. g., "three months."

122. HARD LABOR WITHOUT CONFINEMENT. a. Definition. A sentence to perform hard labor without confinement requires the accused to perform hard labor in addition to his regular duties for the number of days or months provided in the sentence. In no case can it be imposed for more than 3 months (par. 103*i*, MCM). The accused is not to be excused from his assigned duties so that he may perform the hard labor, the very purpose of the sentence being to exact extra work of a laborious nature from him during such time as may be available after he has completed his other tasks. Since the labor is to be performed in time which he would otherwise have free, 1 day's hard labor cannot be measured in terms of hours. The performance each day of the assigned task after his normal duties are done satisfies the sentence whether the particular task takes 1, 2, or more hours. A sentence to perform hard labor does not subject the accused to any legal restraint. His freedom of action is limited as a practical matter by having to do additional work after his normal duties are performed, but legally he is as free to come and go as any other soldier.

b. Who subject to. Hard labor without confinement is an appropriate punishment for enlisted men only. It may never be imposed on officers, warrant officers, flight officers, Army nurses, or aviation cadets (par. 103*c*, MCM). A noncommissioned officer or private first class who is sentenced to perform hard labor is automatically reduced to the grade of private if the sentence is approved and either ordered executed or suspended (par. 103*d*, MCM; par. 13*a*, AR 615–5, 30 June 43).

c. Execution of sentence. Since the sentence itself simply provides for the performance of hard labor for a certain number of days or months, some one must designate the particular tasks which the accused is to perform. Normally, the immediate commanding officer of the accused will designate the amount and character of the work to be done, although, of course, the reviewing authority may do so.

123. RESTRICTION TO LIMITS. a. Definition. By this punishment the accused is deprived of the privilege of going outside the area fixed in the sentence. He may, for example, be restricted to the limits of the camp, or of his regimental or company area. As in the case of arrest prior to trial, the restraint is moral, not physical. The person restricted will not be exempted from any military duty by reason of his sentence.

b. Who subject to. Restriction to limits is an appropriate form of punishment for all military personnel whatever their rank or status.

c. Length of restriction. Every type of court-martial may impose restriction, but no court-martial may impose it in excess of 3 months (par. 103*f*, MCM).

124. FORFEITURE OF PAY. a. Definition. A sentence of forfeiture deprives the accused of the amount provided in the sentence for the number of months or days stated therein. That amount is collected out of pay only (par. 7, AR 35–2460, 21 May 1942). Allowances are not forfeited except under a sentence "to forfeit all pay and allowances" which, in the case of enlisted men, can be imposed only with a dishonorable discharge. No punishment—whether it be death, dismissal, dishonorable discharge, or imprisonment—automatically results in forfeiture or deprivation of any pay or allowances *due* the accused. If the court intends to forfeit pay, or pay and allowances, it must expressly adjudge the kind and amount of forfeiture in its sentence (par. 103*g*, MCM; par. 2*b*, AR 35–2460, 21 May 1942). A court-martial has no power to assign or appropriate the pay of an accused to reimburse the Government or any agency or person, nor to require the accused to pay any debt or satisfy any obligation (par. 103*g*, MCM).

b. Who subject to forfeiture. A sentence of forfeiture is an appropriate form of punishment for all *military* personnel whatever their rank or status. Civilians who may be tried by court-martial are, however, subject to forfeiture only as to pay due them from the United States Government. If, as in the case of a newspaper correspondent or an employee of a contractor, for example, they are being paid by someone other than the United States, a money penalty can be adjudged only in the form of a fine. (See sec. IV, WD Cir. 175, 1943 and par. 125, *infra.*)

c. Amount of forfeiture. A summary court-martial may forfeit two-thirds of 1 month's pay (AW 14). A special court-martial may forfeit two-thirds pay per month for 6 months or less (AW 13). A general court-martial is not limited as to the amount of forfeiture it may impose, but in the case of an enlisted man it may not forfeit more than two-thirds pay per month for six months, unless it also sentences the accused to a dishonorable discharge (par. 104*b*, MCM). In such a case, it should adjudge total forfeitures—i. e., forfeiture of "all pay and allowances due or to become due."

d. Pay subject to forfeitures. A forfeiture applies to base pay, longevity pay (that is, the 5 percent increase for each 3 years of service) and the increased pay for sea duty or foreign duty (if not in a status of confinement; see WD Cir. 484, 1944). Except in case of a sentence of total forfeitures (imposed only with a dishonorable discharge) no other pay is subject to forfeiture. To illustrate: An enlisted man of the fourth grade (i. e., a sergeant), who has 4 years of service and is overseas, receives base pay of $78 per month (AR 35–2340, 31 August 1942), which is increased by 5 percent—i. e., $3.90, for 3 years service (AR 35–2360, 7 December 1944) and by 20 percent—i. e., $15.60, for foreign service (AR 35–1490, 15 September 1944). The amount of monthly forfeiture a court could impose upon him, therefore, would be two-thirds of $97.50. Additional pay for particular duties such as aviation

pay (AR 35–1480, 10 October 1942) or pay for parachute duty (AR 35–1495, 1 December 1944) is not part of his pay which can be forfeited. Thus, if the sergeant just referred to received $50 additional pay because required to engage in parachute jumping, the basis for determining the amount of monthly forfeiture would still be $97.50.

e. Class F deductions. It is the policy of the War Department that the amount of an enlisted man's monthly contribution to family allowance be excluded in computing the amount of his pay subject to forfeiture. (See par. 38, AR 35–5540, 5 January 1944.) Any Class F deduction is, therefore, to be subtracted from his base pay. Thus, if there were a Class F deduction of $27 from the pay of a private (whose monthly pay is $50), his net pay subject to monthly forfeiture is $23. Hence, the maximum allowable forfeiture (two-thirds of the net pay) would be $15.33. Other allotments or deductions, however, are not excluded in determining the amount of net pay subject to forfeiture.

f. Effect of reduction of noncommissioned officer or private first class. In computing the amount of forfeiture, the court should remember that if a noncommissioned officer or private first class is reduced to the grade of private by the sentence, the forfeiture must be based on the pay of his reduced grade, that is, on a private's pay. Thus, if a sergeant, whose pay is $78, is reduced by sentence of court-martial, the maximum monthly forfeiture would be $33.33—i. e., two-thirds of $50. There are two ways in which a noncommissioned officer or private first class may be reduced by a court-martial sentence. (1) The sentence may expressly provide that he is to be reduced. Thus, a sergeant might be sentenced "to be reduced to the grade of private," either separately or with some other form of punishment, forfeitures, for example. (2) Even if the sentence does not expressly provide for reduction, a noncommissioned officer or private first class is nevertheless automatically reduced if the sentence includes dishonorable discharge, confinement at hard labor, or hard labor without confinement, and such sentence is carried into execution or suspended. For example, if a sergeant were sentenced to be confined at hard labor for 3 months and to forfeit two-thirds pay per month for a like period, and the reviewing authority approved the sentence and had it carried into execution or suspended it, the sergeant would be automatically reduced to a private on the date of the reviewing authority's action. (See par. 16*a*, AR 615–5, 30 June 1943.) When, therefore, a court-martial sentences a noncommissioned officer or private first class either to reduction, to confinement at hard labor, or hard labor without confinement, it should compute any forfeiture it imposes on the basis of a private's pay and not on the pay which the accused is receiving at the time of trial.

g. Forms of sentences. (1) Forfeitures should be expressed in terms of dollars, or dollars and cents, not in fractions of months' or days'

pay—i. e., "To forfeit $33.33," not "To forfeit two-thirds of 1 month's pay" (par. 1, app. 9, MCM, and AR 35–2460, 21 May 1942).

(2) If the forfeiture is for more than 1 month, it must be expressed as forfeiture of a definite sum *per month* (par. 1, AR 35–2460, 21 May 1942). Thus, a sentence "to forfeit $33 for 6 months," omitting the words "per month," means a forfeiture of only $33. So also, a lump sum forfeiture can forfeit no more than two-thirds of the accused's pay for 1 month. For example, in the case of a soldier receiving $50 per month, a forfeiture of an amount equal to two-thirds of his pay for 6 months expressed as a lump sum—i. e., "$199.98" rather than as "$33.33 per month for 6 months"—is interpreted as forfeiting only $33.33. Forfeitures must not only be stated in terms of dollars and cents per month, but it must also clearly appear for how many months the forfeitures are to run. Thus, a sentence to be confined at hard labor for 6 months and "To forfeit $33 per month" is indefinite as to the amount of the forfeiture. The forfeiture should have been expressed as "$33 per month for a like period" (Form 8, app. 9, MCM).

(3) Forfeitures should not be expressed in terms of days, i. e., "$33 per month for 45 days" or "$1.10 per day for 45 days." If it is desired to impose forfeiture of a soldier's pay for 1 or more months and a fractional part of another month, the better method is to compute the total amount to be forfeited in dollars and cents and divide it into even months. Example: A forfeiture of $14 per month for 1 month and 15 days, amounts to $21. This may be stated as "$10.50 per month for 2 months."

125. FINES. a. Definition. Whereas a forfeiture deprives the accused of all or part of his *pay*, a fine makes him pecuniarily liable in general to the United States for the amount of money specified in the sentence. He owes the United States that amount whether or not he gets any pay. The United States may collect that debt in the way in which it collects other debts due to it, by suit if necessary. A fine is expressly authorized as a punishment for violations of AW 80 (dealing in captured property) and of AW 94 (frauds against the Government), the object being to reimburse the United States for amounts thus illegally diverted from the public treasury for private purposes.

b. Who subject to. Fines should *not* be imposed on military personnel, either enlisted men or officers, except perhaps in the case of aggravated embezzlements or other frauds by a disbursing officer, for instance, where a large sum is necessary to make good the defalcation. The proper form of monetary punishment for military personnel is forfeiture of pay. In the case of civilians triable by courts-martial, however, forfeiture of pay cannot be adjudged except as to pay due them from the United States Government. A fine and not a forfeiture is, therefore, the appropriate method of imposing monetary punishment on a civilian. A sentence imposing a fine may at the same time impose confinement in the alternative

upon failure to pay the fine, at the rate of 1 day for so many dollars of the fine remaining unpaid. (See sec. IV, WD Cir. 175, 1943.) Summary and special courts-martial as well as general courts-martial have jurisdiction to impose fines.

126. DETENTION OF PAY. a. Definition. By this form of punishment, the amount specified in the sentence is withheld from the pay of the accused until he is finally separated from the service, when it will be repaid to him on a final statement. (See par. 9, AR 35–2460, 21 May 1942.) It differs from forfeiture in that the amount detained is ultimately returned to the accused when he leaves the service. It is, therefore, a less severe form of punishment.

b. Who subject to. Only enlisted men in the Army are subject to detention of pay (par. 103*g*, MCM).

c. Amount of detention. A summary court may not detain more than two-thirds of 1 month's pay (AW 15). A special or general court-martial may not detain more than two-thirds pay per month for 3 months (par. 104*b*, MCM). Pay which is subject to detention is the same as the pay which is subject to forfeiture. (See par. 124d, *supra.*) No court-martial can combine both forfeitures and detention so as to affect more than two-thirds of any 1 month's pay.

CHAPTER 17

COURT-MARTIAL RECORDS

127. IN GENERAL. Every court-martial, like every court of law, must prepare a record of its proceedings. This record may be so informal as to be wholly contained on the four pages of a charge sheet, as in the case of a summary court record, or it may consist of several volumes of testimony and exhibits as occasionally occurs in a complicated general court-martial trial. The duty of preparing a general or special court-martial record falls on the trial judge advocate, while a summary court officer is responsible for the preparation of records of the trials he conducts. (See ch. 9, *supra.*) While no record of the testimony at a trial by summary court is made, all testimony at a general court-martial is recorded by question and answer, and testimony at a special court-martial is recorded either by question and answer or by a summary of evidence depending on whether a reporter was authorized by the appointing authority and served at the trial.

128. GENERAL COURT-MARTIAL CASES. a. Number of copies of record. An original and one carbon copy must be made of every general court-martial record whether or not the accused requests a copy. A separate carbon copy will be prepared for each additional accused.

b. Reporters. Civilians or enlisted men may serve and be compensated as reporters at general courts-martial trials without any authorization by the appointing authority. (As to their rates of compensation, see par. 2, AR 35–4120, 30 July 1943.) No military personnel except enlisted men (and women) of the Army and retired military personnel may receive extra compensation for acting as reporter. No compensation can be made for extra carbon copies unless authorized by the appointing authority or ordered by the court, and in no event may an enlisted man be paid additional compensation for making extra copies of the record. A copy of the reporter's voucher *must* be attached to the record of trial. For a specimen completed reporter's voucher, see appendix 2, p. 190, *infra.*

c. Form and contents. The use of the printed form for record of trial by general court-martial (WD AGO Form 114), though not mandatory, will result in the avoidance of many procedural and formal errors as well as in reducing the amount of stenographic work required. The

record should be typed on only one side of the paper. The contents of the record are discussed in paragraph 85*b*, MCM. Great care will be taken to follow the forms contained in appendix 6, MCM. A specimen record of trial may be found in appendix 2, this manual.

d. Examination by defense counsel. The defense counsel will examine the record of trial before it is authenticated. A suitable notation that this duty has been accomplished should be included on the page bearing the authentication, as, for example, the word "Examined" followed by the signature or initials of the defense counsel. (See app. 2, p. 212, *infra.*) If because of death, disability, or absence, the defense counsel is unavailable, the assistant defense counsel, if he was present at the trial, will sign or initial the record in lieu of the defense counsel, reciting the reason therefor. If neither the defense counsel nor the assistant defense counsel is available, the word "Examined" will be followed by the signature or initials of the accused and of one member of the court present at the trial, and the reason for the signature or initials of the member rather than of defense counsel (or assistant defense counsel) will be given.

e. Authentication. The record will be authenticated by the president and trial judge advocate. (See AW 33.) Such authentication can be made only by the president and trial judge advocate who were actually present at the trial. It must be noted that they are the persons who actually served in those capacities, that is, if the senior member of the court detailed in the order appointing the court was absent during the trial, the next senior member who sat was the president and should authenticate as president, not as "a member in lieu of the president because of his absence," and if the trial was conducted by the assistant trial judge advocate, he would authenticate as "trial judge advocate." If, *after* trial, the persons who served in those capacities are unable to authenticate because of death, disability, or absence, the record will be signed by another member in lieu of the president and an assistant trial judge advocate in lieu of the trial judge advocate; otherwise by another member of the court. If someone other than the president or trial judge advocate authenticates, the reason must be stated. The form for authentication in such cases is set out in appendix 6, MCM. (See also app. 2, this manual.)

f. Service on accused. The record of trial will affirmatively show the personal receipt of the accused for a copy of the record if such copy was requested by him at the trial. (See app. 2, p. 194, *infra.*) If his personal signature cannot be secured, a certificate of delivery by the officer delivering it (the trial judge advocate) to accused will be forwarded with the record. It is not proper for the defense counsel to sign a receipt on behalf of the accused. If accused did not request a copy of the record, the extra copy will be forwarded with the original to the appointing authority.

g. Correction. Until the record has been authenticated and forwarded to the reviewing authority, it is not complete and the president or trial

judge advocate is at liberty to correct the transcript of proceedings to make it conform to the facts by erasure, interlineation or otherwise, initialing corrections made. Thereafter, however, any change or correction must be made formally, not by interlineations, erasures or other physical change in the original. See in this connection paragraph 137, *infra*, as to revision proceedings and correction of records by certificate.

h. Forwarding. The record and accompanying papers with General Court-Martial Data Sheet (WD AGO Form 116) properly completed and signed (see note on 2d page of GCM Data Sheet as to questions that need not be answered) will be sent by the trial judge advocate by letter of transmittal to the reviewing authority. (See par. 85*c*, MCM.)

129. SPECIAL COURT-MARTIAL CASES. a. Number of copies of record. Only one copy of the record of a special court-martial trial need be made (first note, app. 7, p. 271, MCM). The accused is not entitled to a copy even though he demands it.

b. Reporters. The appointment of a reporter for a special court-martial is authorized only if the appointing authority directs that the testimony be reduced to writing (par. 46*a*, MCM). A provision for directing that the testimony be reduced to writing may be included in the order appointing the court (see app. 2*b*, MCM). Ordinarily a summary of testimony will suffice without appointing or employing a reporter to record the testimony by question and answer as in the case of a general court-martial trial. It should be noted that there is no provision for paying an enlisted man for serving as reporter of a special court-martial. (See par. 2*h*, AR 35–4120, 30 July 1943.)

c. Form and contents. The form and contents of a special court-martial record are set out in appendix 7, MCM, and a specimen record may be found in appendix 3, this manual. Except as otherwise indicated, the requirements of paragraph 85, MCM, as to general court-martial records are applicable.

d. Examination, authentication, and correction. What has been said as to examination by defense counsel, authentication, and correction of general court-martial records (par. 128d, e, and g, *supra*) applies equally to special court-martial records.

e. Forwarding to reviewing authority. After authentication the record will be sent by the trial judge advocate to the reviewing authority of the special court-martial who will take action thereon. (See ch. 18, *infra*.) After taking action, the reviewing authority will publish a special court-martial order promulgating the result of trial and his action thereon (par. 87*d*, MCM; AR 310–50, 1 December 1944; and ch. 19, this manual).

130. SUMMARY COURT-MARTIAL CASES. The record of trial by summary court-martial is the charge sheet itself (WD AGO Form 115), which is prepared in triplicate by the summary court officer. As to preparation

and forwarding of record by summary court officer, see appendix 8, MCM, and paragraph 64, *supra.* For a specimen form of record by summary court-martial, see appendix 4, *infra.* After completion of the record, the summary court officer will forward all three copies to the reviewing authority who will take appropriate action and make proper disposition of them. (See par. 142a, *infra.*)

CHAPTER 18

ACTION ON PROCEEDINGS BY REVIEWING AUTHORITY

131. GENERAL. After a case has been completed and the record prepared, the proceedings must be submitted to the "reviewing authority"—that is, the officer who appointed the court, or if there has been a change in command, his successor. No sentence of court-martial can be carried into effect until the reviewing authority has personally approved it (AW 46). Up to that point, a sentence is simply a recommendation by the court. A finding of not guilty on any specification or charge, however, is final when announced by the court and cannot be changed or disapproved by the reviewing authority. Nevertheless, even in the case of an acquittal, the record of the proceedings must be transmitted to him although he cannot take action by way of approval or disapproval of the result.

132. EXAMINATION OF RECORD. Before action is taken on a sentence the record must be examined to determine that the procedure was legally correct and that the findings and sentence of the court are lawful. Cases tried by *general* courts-martial are reviewed by the staff judge advocate, who must write a formal review of the case and specifically recommend the action to be taken. Normally there is no staff judge advocate in organizations having only special and summary court-martial jurisdiction and the officer who acts as reviewing authority of an inferior court-martial must, therefore, decide whether the record and sentence are legally sufficient and determine upon his action without the advice of a trained military lawyer. The review of a summary court-martial record, which consists only of the charge sheet, is limited to checking whether the pleas, findings, sentence, and necessary remarks are properly recorded and whether the sentence is a lawful one. A special court-martial record, however, contains a summary of the evidence, and it is incumbent on the reviewing authority to determine not merely that the proper procedural steps were taken and recorded, but that the findings of the court are supported by competent proof. In this connection he should consider the elements of proof required to establish the offense as set out in chapter XXVI, MCM, and decide whether those elements have been established by proper evidence. (See ch. XXV, MCM, and ch. 14, of this manual.) He must then determine whether the sentence imposed is a legal one. (See ch. 16, this manual for a discussion of sentences.) A check list of matters

to be considered in reviewing a special court-martial record will be found in appendix 3, this manual. Having carefully examined the record to determine its validity, the reviewing authority must then decide what action he will take upon the sentence. The various courses of action open to him are discussed in the succeeding paragraphs.

133. APPROVAL OF SENTENCE. Unless the whole or part of the sentence is expressly approved, the proceedings of the court have no legal effect. Approval does not indicate that the reviewing authority is satisfied with the sentence. He may regard it as grossly inadequate, but without approval of the sentence the finding of guilty as well as the sentence is without any force or effect. If the proceedings were valid and the sentence legal, the reviewing authority will approve the sentence. If part of the sentence is unlawful, he should approve so much as is lawful and thereby make that portion effective. Thus, if a special court-martial sentenced an accused to be confined at hard labor for 7 months (which exceeds by 1 month the amount of confinement it has jurisdiction to impose), the reviewing authority would approve "only so much of the sentence as provides for confinement at hard labor for 6 months." Similarly, if the sentence exceeded the amount authorized by the Table of Maximum Punishments, so much as was authorized would be approved. (For form of such action, see app. 21, *infra.*)

134. DISAPPROVAL. The disapproval of a sentence makes it completely ineffective and places the accused in the same position as if he had been acquitted by the court. If the proceedings were entirely irregular, or the findings not warranted, or the sentence wholly illegal, the reviewing authority may wipe out the conviction by disapproving the sentence. Since an accused may not be tried twice for the same offense without his consent (AW 40), disapproval of a sentence, unless a rehearing is ordered by the same action, not only relieves the accused of the punishment imposed by the sentence, but renders him immune from ever being punished for that offense. An error in the course of proceedings is not sufficient ground for disapproving the sentence unless from an examination of the entire proceedings it appears that the substantial rights of the accused were injured thereby (AW 37; par. 87*b*, MCM). If the proceedings were regular and the findings warranted but the sentence is excessive, the entire sentence should not be disapproved. So much as is legal should be approved. (See par. 133, *supra.*) It is unnecessary to disapprove the illegal portion expressly. The reviewing authority should merely state that "only so much as" is legal is approved.

135. APPROVAL AND DISAPPROVAL OF FINDINGS. It is only the *sentence* for which the reviewing authority's approval is required. (See AW 46.) He need not take any action on the findings of the court. If the sentence is lawful, he will ordinarily state only that the sentence is approved,

without referring to the findings. If, however, the findings are not fully supported by the evidence, he may expressly disapprove those which are unwarranted. Thus, if an accused were found guilty of two specifications under a charge and the finding as to the first specification was not supported by the evidence, that finding should be expressly disapproved. (See Form 3, app. 10, MCM.) In such case, it would not be necessary to approve expressly the finding of guilty of Specification 2 and of the Charge. Similarly, if the evidence did not support all the facts alleged in the specification of which an accused were found guilty, only as much of the finding as was warranted might be approved. For example, if a finding of guilty were made on a specification which alleged that the accused stole a watch of a value of $100 and the evidence showed that the watch was of a value of $5 only, the reviewing authority might approve only so much of the finding of guilty of the specification as involved a finding that the accused did at the time and place alleged steal a watch of the value of $5. If the court by exceptions and substitutions should have found the accused guilty only of a lesser included offense, but actually found him guilty as charged, the reviewing authority should approve only so much of the finding as involves a finding of guilty of a lesser included offense. (For forms for such an action see Form 4, app. 10, MCM, and app. 21, this manual.) The reviewing authority cannot disapprove a finding of not guilty, even if he deems it unjustified (par. 87*b*, MCM); nor should he approve such a finding.

136. REHEARING. If the reviewing authority determines that the findings were unwarranted or that errors were committed, he cannot approve the sentence. Yet he may be satisfied that the accused can legally be convicted on a new trial and should not go unpunished. In such a case he may disapprove the sentence and order a rehearing before another court. The direction for a rehearing must be taken at the same time as, and be made a part of, his action in disapproving the sentence. (See par. 89 and Form 7, app. 10*a*, MCM.) It cannot be made later. Nor may a rehearing be ordered if any part of the sentence is approved (par. 89, MCM). The rehearing must be before a court composed of members who did not hear the original case (AW 50½). It may be necessary, therefore, to appoint a new court composed entirely of different members to rehear the case unless another court is already in existence. The trial judge advocate and defense counsel who participated in the original hearing, however, are ordinarily retained in those positions on rehearing. The record of the original trial with action of the reviewing authority disapproving the sentence and directing a rehearing are transmitted to the trial judge advocate of the new court, accompanied by a letter of any special instructions. Where, upon a rehearing, it is made to appear to the satisfaction of the court that a witness who has testified in either a Federal or a State court or before a court martial at a former trial

of the same person where the issues were the same as in the case on trial and where the accused was confronted with the witness and afforded the right of cross-examination, is dead, insane, or too old or infirm to attend the trial, or is beyond the reach of process, or more than 100 miles from the place where the trial is had, or cannot be found, his testimony at the former trial, if properly proved, may be received by the court if otherwise admissible, except that such testimony of an absent witness may not be introduced in evidence in a capital case without the consent of the accused unless the witness is dead or beyond the reach of process. A new indorsement referring the charges for a rehearing is pasted or stapled over the indorsement on the original charge sheet. On rehearing the case is fully tried anew, the procedure being the same as on the original hearing. The court may not find the accused guilty of any offense of which he was found not guilty on the first hearing nor impose a more severe sentence than was originally adjudged. Thus, if an accused charged of larceny in violation of AW 93 was originally found guilty only of wrongful taking in violation of AW 96 and sentenced to confinement at hard labor for 3 months and forfeiture of two-thirds of his pay per month for a like period, on rehearing the court could not find him guilty of larceny nor sentence him to a greater punishment than was originally imposed. A rehearing is appropriate if the errors on the original trial were so substantial as to render the sentence illegal and if it is probable that these errors can be avoided at a new trial, or if the prosecution failed to establish all elements of the particular offense by competent proof *and* such proof is available for a rehearing.

137. CORRECTION OF THE RECORD AND REVISION. a. Certificate of correction. The record may be incomplete or defective in some important respect, such as the omission of a finding on a charge, or absence of a statement as to the sentence, or failure to show that the members of the court were sworn or that the required number of members concurred in the vote on the findings and sentence. A sentence based on such a record cannot be approved. Such defects, however, may be due simply to clerical errors or carelessness in preparing the record. The court, in fact, may have been sworn, or arrived at its findings or sentence by the proper vote or made all required findings, but the record may not correctly show the facts. If such is the case, the record must be corrected to speak the truth. Such correction cannot be made by physical changes in the record through alterations, erasures, or interlineations. It must be made formally. In case of such clerical errors or omissions, before the reviewing authority takes action, the record may be returned to the president of the court, or to the summary court officer in cases tried by summary court, for a certificate as to the matters which appear to have been omitted or incorrectly stated (par. 87*b*, MCM). This certificate will be signed by the officers who authenticated the record or, in summary court-martial cases, by the sum-

mary court officer. A form for indorsement returning a record of trial by special court-martial for correction is set out in appendix 18, *infra*, and a form for a certificate of correction is contained in appendix 19, *infra*. In general court-martial cases, if the accused has been furnished a copy of the record, he must be also furnished a copy of the certificate and his receipt therefor or a certificate of delivery should be signed on the face of the original certificate, otherwise the extra copy of the certificate will be forwarded with the unclaimed copy of the record. In special and summary court-martial cases it is not necessary to furnish a copy of the certificate to the accused since he is not entitled to a copy of the record itself. A certificate of correction merely makes the record correspond to what actually happened at the trial. It cannot change the facts. If the court was not sworn, for example, that defect cannot be remedied by a certificate.

b. Revision proceedings. (1) If the record discloses erroneous action by the court in making its findings and sentence *which is capable of being corrected*, the record may be returned so that the court may revise its action before the reviewing authority acts on the sentence. Such revision of the record is not a new trial or rehearing. No new evidence may be taken, nor witnesses called, nor additional matters considered. The court may reconsider its action on the findings or sentence in question, and either revoke its old action and correct it or decline to make a change. For example, if the court considered improper evidence of previous convictions in determining the sentence, the record might be returned so that it could reconsider its sentence disregarding the improper evidence (par. 87*b*, MCM). Or, if the court erroneously failed to impose any sentence at all, or imposed an illegal sentence, it might revise its action by now adjudging a sentence or revoking its old sentence and imposing a new and legal one. AW 40 specifically prohibits reconsideration of an acquittal or of a finding of not guilty on a specification or charge, or any increase in the severity of the sentence, unless the sentence was less than the mandatory sentence required by law. Thus, a court which had found an accused not guilty of desertion, but guilty only of the lesser included offense of absence without leave, could not on revision proceedings change its finding to one of guilty of desertion. Similarly, a court could not by revision increase a sentence of confinement at hard labor for 3 months to a sentence of confinement at hard labor for 3 months and forfeiture of two-thirds pay per month for a like period. A court, however, which had failed to impose the mandatory sentence of dismissal upon an officer convicted of a violation of AW 95, could revoke its original illegal sentence and adjudge the dismissal which the law requires. Errors which occurred in the course of trial, such as failure to swear the court or witnesses, improper rulings on challenges, or admission of improper evidence cannot be corrected by revision proceedings after the trial is completed.

(2) If the case is a proper one for revision of the findings or sentence, the reviewing authority will return the record to the trial judge advocate of the general or special court-martial with directions to have the court reassemble and reconsider the finding or sentence in the particular specified with a view to correcting the defect. This is usually done by an indorsement on the letter by which the record was transmitted to the reviewing authority or, in the case of a special court-martial where the record may not have been transmitted by letter, the directions may be communicated to the trial judge advocate orally or by original letter. (See app. 20, *infra.*) Only members of the court who were present at the trial can participate. If the necessary quorum of those members (i. e., five for a general court-martial; three for a special court-martial) cannot be obtained, no revision is possible. The accused and defense counsel are not present since no new matters can be considered. The trial judge advocate will read the directions of the reviewing authority to the court and the court will then close for deliberation and voting. The proceedings on revision will be formally recorded and forwarded for attachment to the original record. The form for the record of such proceedings is set out in appendix 6, pp. 269, 270, MCM. If there is occasion for revision in a case tried by summary court martial, the record will be returned to the summary court officer with similar directions.

138. REMISSION AND MITIGATION. a. General. Although a sentence may be a legal and proper one for the offense of which the accused has been found guilty, for reasons of policy the reviewing authority may wish the accused to be less severely punished. If, for example, the accused had been confined for an undue length of time before trial, or there were extenuating circumstances, such as his youth, drunkenness at the time of the offense, or ignorance of his duties, or the court recommended clemency, it might be desirable to make the punishment less severe. If the reviewing authority decided on this course of action, he could approve the sentence and then remit or mitigate it—i. e., relieve the accused of all or part of the punishment by reducing it in quantity or quality (par. 87*b*, MCM). Such action by the reviewing authority does not destroy the effect of the conviction as does disapproval of the sentence. The record of the conviction stands, but the accused does not have to undergo that part of the punishment which is remitted or mitigated. It is essential that the reviewing authority expressly approve the sentence and then reduce it. Until approved the sentence has no legal effect and there is nothing to be reduced.

b. Reduction in quantity. In such a case as of a sentence of confinement at hard labor for 6 months and forfeiture of $33 per month for a like period, the reviewing authority might approve the sentence and remit it in its entirety (in which case the accused would undergo no punishment); or he might remit all or part of the confinement (leaving the

entire forfeiture in effect); or he might remit part of both the confinement and forfeiture. For a form for such action, see Form 2, appendix 10, MCM. (See also app. 2, this manual.)

c. Reduction in quality. Instead of cutting down the quantity of the punishment by remitting all or part of it, the reviewing authority may "mitigate" the punishment—i. e., reduce it to a less severe degree of the same general type of punishment (par. 87*b*, MCM.) For example, confinement at hard labor and restriction to the limits are both forms of restraint on liberty, the latter being a less severe type of restraint. A sentence to confinement at hard labor for 1 month, therefore, could be reduced to restriction to the limits *for the same or a shorter period*, since the general nature of the punishment is not thereby changed but there is simply a reduction in the degree of that punishment. Similarly, confinement at hard labor and hard labor without confinement are both forms of hard labor, the latter being less severe. Therefore, a sentence to confinement at hard labor for 1 month could be reduced to hard labor without confinement *for the same or a shorter period* (par. 87*b*, MCM). For an example of such action see appendix 31, this manual. Although the severity of the punishment may be thus mitigated, the reviewing authority may not change its general nature. He could not, for example, change confinement to forfeiture, nor change forfeiture to restriction. Only the President and certain commanding officers authorized by him under AW 50 may "commute" the sentence—i. e., change its general nature.

d. Limitations. The punishment as reduced by the reviewing authority must be included in the sentence actually adjudged by the court. For example, confinement at hard labor for 1 month cannot be reduced to restriction to the limits for 2 months, since the original sentence provides for only 1 month's punishment. The punishment as reduced must also be one which the court itself could have imposed in the first place. Thus, a sentence of confinement at hard labor for 6 months cannot be reduced by the reviewing authority to restriction to the limits for 6 months or to hard labor without confinement for 6 months, since the court itself could not have imposed more than 3 months of restriction (par. 103*f*, MCM) or of hard labor without confinement. (See par. 103*i*, MCM.) Nor, for example, in the case of a sentence of dishonorable discharge, total forfeitures and confinement at hard labor for 1 year, could the reviewing authority remit the dishonorable discharge leaving the total forfeitures and the confinement at hard labor in effect, since the court itself could not have imposed such punishment without also adjudging a dishonorable discharge. (See par. 104*c*, MCM.)

139. EXECUTION AND SUSPENSION. In addition to expressly approving the sentence the reviewing authority must order it "executed"—i. e., put into effect—if the accused is to undergo the punishment imposed. Except

for certain sentences adjudged by general courts martial (i. e., those which require confirmation under AW 48 or examination for legal sufficiency by the Board of Review and The Judge Advocate General under AW 50½) all sentences may be ordered executed by the reviewing authority as soon as he has approved them. In his action on the sentence, therefore, he will usually order execution of the sentence. Instead of ordering the sentence immediately put into effect, he may "suspend" the execution of all or part of it, in much the same way as a judge in a criminal court sentences an offender and then puts him on probation. The accused is thus given an opportunity to redeem himself. If he does so, he may never undergo the punishment. If he does not, the suspension may be "vacated"—i. e., the sentence may be put into effect. (See app. 28, *infra.*) Suspension differs from remission in that a suspended sentence may later be ordered executed, whereas by remission the accused is completely relieved of the punishment for all time.

140. FORM OF REVIEWING AUTHORITY'S ACTION. After the reviewing authority has decided what disposition he intends to make of the case, his action must be written and signed by him. In summary court-martial cases, it is placed on page 4 of the charge sheet. (See app. 4, *infra.*) In general and special court-martial cases it is written on a separate sheet of paper to be attached to the record of trial. (See apps. 2, p. 165, and 3, p. 225, *infra.*) The heading of the action must show the headquarters of the reviewing authority and the place and date of action. In preparing the body of the action itself, the suggested forms set out in appendix 10, MCM, should be carefully followed. They cover almost all situations, and although in a rare case it may be necessary to make some slight modification, adherence to the forms should be the rule. Attempts to devise a new or unusual type of action may result in rendering the entire action illegal or ineffective. It will be noted that the appropriate forms of action in summary court-martial cases (appendix 10*c*, MCM), are brief and concise. The action in general and special court-martial cases should specifically state the grade, name, serial number, and organization of the accused—e. g., "In the foregoing case of Private John M. Rentland, 36126705, Service Battery, 359th Field Artillery Battalion." The action must be signed by the reviewing authority in his own hand. Under his signature must be typed his name, rank, branch of service, and the word "Commanding." The latter word must appear, since it is only the commanding officer of an organization who has authority to act on a sentence.

141. COMPLETION, ARRANGEMENT, AND DISPOSITION OF RECORD. a. In summary court-martial cases. Each case will be numbered serially by the regimental or other unit adjutant on page 4 of the charge sheet (par. 82, MCM). It is customary to begin a new series each year starting with number 1. After the reviewing authority has recorded his action on

page 4, the original and the two copies will be delivered to the regimental or other unit personnel officer, who will, in the case of an approved sentence, enter the essential data on the service record of the accused and indicate that he has made such entry by initialing in the space provided on page 4. The original record will be filed in the office of the regimental or other unit commanding officer (par. 87*c*, MCM). The two copies (referred to as reports of trial) are then forwarded as follows: one copy, completed and certified as a true copy of the original, will be immediately forwarded to The Adjutant General, Washington, D. C., and the remaining copy will be sent to the officer exercising general court-martial jurisdiction. (See par. 47, TM 12–230, and par. 87*c*, MCM.) These provisions with respect to the disposition of reports of trial by summary court apply to trials of civilians by summary court. In civilian cases it is advisable to forward also a copy of the informal investigation, if any. The report of trial forwarded to the officer exercising general court-martial jurisdiction is examined by his staff judge advocate for errors, defects or omissions (par. 91, MCM). If any are found, the report may be returned with directions to take corrective or modifying action.

b. In special court-martial cases. After the reviewing authority has taken and recorded his action, a special court-martial order setting out the result of trial and the action taken on the sentence must be prepared. (The preparation and distribution of such orders are discussed in chapter 19, *infra.*) The record will then be arranged from top to bottom in the following order:

(1) Special court-martial check sheet (if check sheet is used).

(2) Two copies of the special court-martial order.

(3) Any special court-martial orders suspending, remitting, or mitigating the sentence.

(4) Record of trial proper.

(5) Action of the reviewing authority.

(6) Exhibits in the following order:

(*a*) Special order appointing the court and any amendatory order or orders, to be marked Exhibit 1, 1*a*, etc.

(*b*) Charge Sheet to be marked Exhibit 2.

(*c*) Any other exhibits introduced at the trial, properly numbered or lettered, followed by record of previous convictions, if any, properly numbered as an exhibit. Prosecution's exhibits will be numbered. Defense exhibits will be lettered.

(*d*) Report of investigation, if any.

(*e*) Authorization by officer exercising general court-martial jurisdiction for trial of particular case by special court-martial, if any. (See pars. 38c, 58b, 59a, *supra.*) An example of a completed special court-martial record is set out in appendix 3, *infra.* The record and accompanying papers thus arranged will be forwarded to the officer exercising general court-martial jurisdiction over the command (par. 87*c*, MCM). The rec-

ord will there be examined by the staff judge advocate for errors, defects, and omissions (par. 91, MCM). If any are discovered, corrective or modifying action may be taken by the officer exercising general court-martial jurisdiction or he may return the record with directions that such action be taken by the reviewing authority. The record if found satisfactory, or after corrective action, is filed in the staff judge advocate's office.

c. General court-martial records. After the reviewing authority has taken action, his staff judge advocate will have a general court-martial order issued, complete the additional necessary papers (i. e., the chronology sheet and the court-martial data sheet) and forward the record to the office of The Judge Advocate General. A discussion of the types of review of general court-martial records in the office of The Judge Advocate General is beyond the scope of this manual.

142. SUBSEQUENT ACTION ON SENTENCES. a. What action may be taken. Once the reviewing authority has taken final action on a sentence and that action has been published in a court-martial order, or the accused has been notified of it, the action is final and cannot be changed or revoked (par. 87*b*, MCM) unless the original action was void. Thus, if a reviewing authority approved and ordered executed a sentence of forfeiture adjudged by special court-martial and the special court-martial order were published, it would be too late to recall or rescind his approval. The forfeiture has become legally effective and must be collected. Any amount forfeited can be repaid to the accused only by act of Congress. (See par. 10*j*, AR 35–2460, 21 May 1942.) However, so much of a sentence as has not already been carried out may be remitted or mitigated or suspended (AW 50; AW 52). For example, if an accused had served 2 months of a sentence to confinement at hard labor for 3 months, the remaining 1 month of the confinement might be remitted, or mitigated to restriction to the limits or hard labor without confinement, or suspended. (See par. 17*d*, AR 600–375, 17 May 1943.) Similarly, the uncollected portion of a sentence of forfeiture might be remitted or mitigated or suspended. (See par. 10, AR 35–2460, 21 May 1942.) If originally a sentence was not ordered executed but was suspended, the suspension may be "vacated" and the sentence put into effect at any time during the accused's term of enlistment or service (par. 94, MCM).

b. Who may take action. Subsequent action of the type just described may be taken by the officer who has power to appoint a court of the kind which imposed the sentence for the command in which the person under sentence is held (AW 50; AW 52). For example, such action might be taken on a sentence adjudged by summary court by the officer who has summary court-martial jurisdiction over the organization of accused, e. g., the regimental commander, and by any superior military authority. Thus, if the regimental commander of the 430th Infantry

approved a sentence of a special court-martial and ordered it executed, he could remit, mitigate, or suspend the balance of the sentence so long as the accused was in the 430th Infantry, since he would be the officer who had power to appoint a court of the kind which adjudged the sentence (i. e., a special court-martial) for the command in which the accused is held (i. e., the 430th Infantry). However, if the accused were transferred from the 430th Infantry to the 121st Infantry before the sentence had been completed the commanding officer of the latter organization (who has power to appoint special courts-martial) could remit, mitigate, and suspend the balance of that sentence and the commander of the 430th Infantry would no longer have authority to take such action. Garrison prisoners confined in a post guardhouse are still carried on the rolls of their original organization and, although their sentences may be remitted or suspended by the commander of the post, they should not as a matter of policy be remitted or suspended without the express concurrence of the authority who approved the sentence.

c. How accomplished. It is unnecessary for the authority remitting, mitigating, or suspending the balance of a sentence or vacating a suspension to sign personally any action effecting that result. All that is necessary is the publication of an order setting out the action taken. In general and special court-martial cases, any such action will be published in appropriate general and special court-martial orders (par. 94, p. 83, MCM). (See apps. 26 through 28, *infra*, for forms.) Distribution of such orders is covered by paragraphs 3*d* (3) and (4), AR 310–50, 1 December 1944. In *summary* court-martial cases such action will be published in a paragraph of the organization's special orders (apps. 29 and 30, *infra*) not in a *court-martial* order.

d. Restoration of garrison prisoners to duty. *Garrison* prisoners who are members of organizations under orders for oversea assignments should be released to the custody of their organizations in time to accompany them and the commanding officers of such organizations should consider the advisability of remitting (absolutely or conditionally), mitigating, or suspending the unexecuted portion of the sentence being served by such prisoners.

CHAPTER 19

COURT-MARTIAL ORDERS

143. PUBLISHING RESULT OF TRIAL. A court-martial order setting out the result of the trial and the reviewing authority's final action thereon must be published in every case tried by a general or special court-martial (par. 87*d*, MCM; AR 310–50, 1 December 1944). This requirement applies whether the accused has been found guilty or acquitted. The order in cases tried by a general court-martial will be designated a General Court-Martial Order; in cases tried by a special court-martial it will be designated a Special Court-Martial Order. No order is published in cases tried by summary court-martial, as there is no such thing as a "Summary Court-Martial Order."

144. PREPARATION. Since the court-martial order is an official record of the results of the trial and of the punishment that has been imposed, its careful preparation is a matter of great importance. It is the authority under which a prison officer keeps an accused in confinement and a finance officer withholds the amount of a forfeiture from his pay. It is the basis on which entries of convictions are made in his service record. It is proof of his innocence if he was acquitted. Even slight mistakes in it may have injurious effects upon the rights of an accused, so it must be complete and scrupulously accurate. General court-martial orders are normally drafted by the staff judge advocate and for that reason matters peculiar to such orders will not be discussed. The preparation of special court-martial orders, however, is the responsibility of the adjutant of the command. He must know what is to be included. A form for a special court-martial order is set out in appendix 11*a*, p. 278, MCM, and other examples will be found in appendices 26 through 28, this manual. The mistakes which are commonly made in the preparation of such orders are usually due to carelessness and failure to check the record and the order carefully. Attention should be paid to the following matters which are common sources of error in preparing special court-martial orders:

a. Headquarters. The correct designation of the headquarters of the reviewing authority must be shown. This should be copied from the action sheet.

b. Date. The order, no matter when actually published, will bear the date on which the reviewing authority took final action—i. e., the date will correspond with that on the action sheet. Thus, if on 1 May a regimental commander approved and ordered executed a sentence of a special court-martial, but the adjutant of the regiment did not have the order mimeographed until 3 May, the order would nevertheless be dated 1 May.

c. Numbering. Each special court-martial order issued by an organization is numbered consecutively in a separate series for each calendar year. (See AR 310–50, 1 December 1944.) The last order issued in any calendar year should bear a notation that it is the last of the series for that year, and the first of the next calendar year should bear a notation at the top to the effect that "SCMO No. —— is the last of the series of 194—" (the preceding year). If it is necessary to issue a corrected copy, it will be labeled "Corrected Copy" and be given the same number and date as the order it corrects.

d. Orders appointing the court. The paragraph, number, date and issuing headquarters of the special order which appointed the court and of *all amending orders* must be stated.

e. Description of accused. The name, organization and serial number of the accused must be accurately set forth and correspond with those appearing on page 1 of the charge sheet. Particular care should be taken to insure that the serial number is stated correctly.

f. Charges and specifications. The charges and specifications must be copied exactly as they appear on the charge sheet, unless they were amended in the course of the trial. If amended, they must be set out as they read after amendment. If a charge or specification was nolle prossed or withdrawn by the appointing authority, it should not be copied in full, but its number should be given followed by the words "Nolle prosequi by order of the appointing authority" or "Withdrawn by order of the appointing authority." (See app. 22, *infra.*)

g. Pleas. The pleas must be copied exactly from the record. If a plea of guilty was changed to not guilty at any stage of the proceedings, it should be set forth as "Guilty changed to Not Guilty."

h. Findings and sentence. The findings and sentence must be copied exactly as they appear in the record.

i. Previous convictions. If evidence of previous convictions of the accused was considered by the court, that fact must be stated. This statement is set out in parentheses after the statement of the sentence—e. g., "(Two previous convictions considered)." If no evidence of previous convictions was considered, a positive statement to that effect is not required, since if nothing is said it is assumed that there were no such convictions. It is good practice, however, to state specifically "(No previous convictions considered)," if such was the case, because it would

remove any question of the reference to previous convictions having been omitted through inadvertence.

j. Date of sentence or acquittal. The date on which the acquittal was announced or sentence was adjudged must be stated. This date is important since the date on which the sentence was adjudged fixes the time from which the term of confinement begins to run. (See par. 17*b*, AR 600–375, 17 May 1943.)

k. Action. The reviewing authority's action on the sentence, omitting "In the foregoing case of _____," is copied from the action sheet. Any reprimand imposed by the reviewing authority must be set out in full. (See par. 3*a*, AR 310–50, 1 December 1944.)

l. Authentication. The order must be properly authenticated as provided in paragraph 11, AR 310–50, 1 December 1944.

m. Acquittal. A form for a court-martial order in case of an acquittal will be found in appendix 23, *infra.*

n. Joint and common trials. In the case of a *joint* trial, a single order is issued, but the findings and sentence as to each accused are separately stated. (See app. 24, *infra.*) In the case of a *common* trial, separate orders should be issued for each accused.

o. Rehearing. In the case of a rehearing, neither the original proceedings of the court nor the action of the reviewing authority thereon will be published in the court-martial order (par. 87*d*, MCM). The order will promulgate only the proceedings on rehearing with the action of the reviewing authority thereon. However, if some of the original charges and specifications were not referred for rehearing, they should be set out in a separate paragraph in the order together with the action of the court and the reviewing authority thereon (par. 87*d*, MCM). Thus, for example, if an accused were convicted on two charges and acquitted on a third charge, and the reviewing authority referred for rehearing the two charges on which he was convicted, and on rehearing he was again convicted on those two charges, the court-martial order should set out not only the court's findings and sentence upon the rehearing and the reviewing authority's action on those two charges, but also the fact that the accused was acquitted on the third charge.

145. DISTRIBUTION. Army regulations do not prescribe the distribution to be made of special court-martial orders beyond the requirement that three copies for each accused be sent to The Adjutant General, Attention: Enlisted Branch, Washington, D. C.; one copy (in trials on charges of desertion only) to the Fiscal Director; and copies to the prison officer of the place where the accused is confined. In addition, two copies should be attached to the record of trial when it is forwarded to the officer exercising general court-martial jurisdiction. Although no other distribution is required, it is customary to send a copy to the President, trial judge advocate and defense counsel, to the immediate commanding officer of the

accused and to the finance officer of the organization. An example of the distribution which may be made is set out in appendix 25, *infra.*

146. COURT-MARTIAL ORDERS REMITTING OR SUSPENDING SENTENCES, OR VACATING SUSPENSIONS. When in a general or special court-martial case it is desired to remit or suspend the balance of a sentence which has been ordered executed, or to vacate a suspension of a sentence (ch. 18, *supra*), such action is taken by issuing a court-martial order. Forms for such orders in special court-martial cases are set out in appendices 26 through 28, *infra.* If such action is taken in a case tried by summary court-martial, it must be done in the organization's *special* orders, not by court-martial order. Appropriate forms for a paragraph in a special order remitting the balance of a sentence imposed by summary court-martial, setting aside such a sentence or vacating a suspension will be found in appendixes 29 and 30.

LIST OF APPENDICES

APPENDIX 1

PROCEDURE OUTLINE FOR TRIALS BEFORE GENERAL AND SPECIAL COURTS-MARTIAL, U. S. ARMY

The president is seated with the law member (if present) on his immediate left. The remaining members are seated alternately to the right and left of the president in order of seniority. When the court is ready, the trial proceeds substantially as follows:

PRES: The court will come to order.

TJA: *The prosecution is ready to proceed with the trial of the United States against (Name, rank, and organization of accused as read from the charge sheet).*

At this point the accused, assistant TJA, if any, and counsel for the defense rise and remain standing until the choice of the counsel has been announced.

TJA: *The accused is present, together with the regularly appointed defense counsel and assistant defense counsel.*

TJA: *Whom does the accused desire to introduce as counsel?*

DC: The regularly appointed defense counsel.

or

"The accused desires to introduce as individual counsel (state who he is)." In this event, the TJA should ask the accused if he wishes to retain the services of the defense counsel and the assistant defense counsel. The President of the court should excuse counsel not desired by the accused. Reference military and civilian defense counsel, AW 17; MCM, par. 45.

All except the TJA here resume their seats.

*TJA: *The reporter will be sworn.*

The reporter rises and raises his right hand. The TJA raises his own right hand, faces the reporter, and administers the following oath:

*Indicates not applicable to special courts-martial trials whenever used in this outline.

You (name of reporter) swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God.

On affirmation omit last sentence.

*Reporter: I do.

The reporter now sits down and thereafter is not required to rise until the oath is administered to the court and the TJA, after which he resumes his seat and remains seated throughout the trial.

*TJA: (*To accused*) (*Private* _____), do you want *a copy of the record of your trial?*

*DC: He does (not).

TJA: (*The interpreter will be sworn.*)

The interpreter (if any) may either be sworn at this time or just before he is used.

When sworn, he rises; the TJA facing him repeats the following oath:

You (name of interpreter) swear (or affirm) that you will truly interpret in the case now in hearing. So help you God.

On affirmation omit last sentence.

At this point the accused, assistant TJA and counsel for the defense stand and remain standing until the names of the members present and absent are announced.

TJA: *The following members of the court appointed by paragraph* ____, *Special Orders, No.* ____, *Headquarters* _____, *dated* _____ (*As amended by paragraph* ____, *Special Orders* ____, *dated* _____) *are present:*

(— — — — — — — — — — — — —)

The TJA announces by name and rank the members present, including personnel of the prosecution and defense.

At the first meeting of the court the TJA may read the order appointing the court; if the original court order is amended, he may read this amended order to the court at its first meeting after the amendment is published.

TJA: *Absent:*

Announce by name the members absent including personnel of the prosecution and defense, and the reasons for said absence.

A proper way of announcing the name of an absentee and the reason for his absence is as follows: "Absent, Major Jones (sick in hospital), (by verbal authority of the appointing authority), (on leave of absence), (reason unknown)."

All except the TJA now resume their seats.

TJA: *The general nature of the charges in this case is* (1) *———— ————; the charges were preferred by* (2) *————; forwarded by* (3) *————; and were investigated by ————; and no member of the court will be a witness for the prosecution. The records in this case disclose* (*no grounds for challenge*) (*grounds for the challenge of ————*), *for the following reason: he* (*is the accuser, was the investigating officer, forwarded the charges as commanding officer, will be a witness for the prosecution*) (4).

(1) Merely give the common name of the offense or offenses charged, e. g., "desertion and sleeping on post."

(2) The name of the person signing the charge sheet.

(3) The name of the officer who actually forwards the charges to the appointing authority, as for example, a regimental commander or a detachment commander whose organization has several companies or batteries.

(4) If disclosed grounds of challenge are undisputed and are within the first five grounds enumerated in Par. 58*e*, the president will forthwith excuse the member by ruling in substance: "———————— is excused and will withdraw." If there are challenges on grounds other than grounds 1–5, MCM, par. 58*e*, the procedure outlined in MCM, par. 58*f*, will be followed.

The court need not rearrange itself after each member is excused but will do so after all the challenges have been acted upon.

Whether or not he discloses any grounds of challenge, the TJA will state:

TJA: *If any member of the court is aware of any facts which he believes to be a ground for challenge by either side against any member, it is requested that he state such facts.*

TJA: *The prosecution* (*has no*) *challenges* (————————— *for cause on the ground* ————————).

The TJA should challenge for cause any member whom he believes to be ineligible to sit and in doing so the cause must be stated. The challenged member will be given the right to make a statement to this challenge, and if it appears that the member should be excused, the president may excuse him subject to the objection of any member. In case of an objection by any member, or the DC, evidence may be presented to the court in an effort to uphold or overrule the challenge. In the event of a doubtful challenge, the challenged member should withdraw and the court should be closed. Voting should be by secret written ballot and a majority of votes is necessary to sustain the challenge.

Challenges for cause ordinarily should be made before arraignment but may be presented at any stage of the pro-

ceedings, if the challenger has exercised due diligence or the challenge is based upon grounds as enumerated in clauses 1–5, MCM, par. 58*e*. Challenges for cause may again be presented, even though once overruled, if for good cause, such as newly discovered evidence.

The trial judge advocate will administer to a challenged member who is to be examined under oath as to his competency the following oath:

"You swear (or affirm) that you will true answer make to questions touching your competency as a member of the the court in this case. So help you God."

TJA: *The prosecution (has no peremptory challenge) desires to challenge peremptorily (name of member).*

The prosecution is allowed one peremptory challenge which may be exercised against any member of the court at this time, except the law member. The law member can only be challenged for cause.

TJA: *Does the accused desire to challenge any member of the court for cause?*

DC: (No) Yes, the defense challenges (name of member) for cause. (Cause should be stated.)

TJA: *Does the accused wish to exercise his right to one peremptory challenge, against any member except the law member?*

DC: The defense (has no) challenges (Name of member) peremptorily.

The accused exercises his right to challenge for cause and peremptorily in the same manner as the prosecution.

In a joint trial all the accused constitute the "side" of the defense and are entitled to but one peremptory challenge. MCM, par, 58*d*. In a common trial each accused is entitled to a peremptory challenge.

TJA: *Does the accused object to being tried by any member of the Court now present?*

DC: (No) (The defense challenges, etc.)

If the accused has any further objections they must be stated in the form of a challenge and the necessary action taken as previously indicated. The question by the TJA is repeated until the accused is finally able to answer in the negative.

The seating of the court will be rearranged if made necessary as a result of challenges.

TJA: *The court will be sworn.*

All persons in the court room rise and stand until the swearing of the court and of the TJA (and Asst.) is com-

pleted. Each member raises his hand as his name is called by the TJA in administering the following oath:

You, Major ———, *Captain* ———, *1st Lieutenant* ———, *etc. (each member raises his right hand as his name is called) do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority or duly announced by the court, except to the trial judge advocate and assistant trial judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial upon a challenge or upon the findings or sentence, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God.*

Each member of the court: I do.

Members lower their hands but remain standing while the president administers the following oath to the TJA (and assistant TJA):

PRES: You, Captain ———— (and Lieutenant ————) do swear (or affirm) that you will faithfully and impartially perform the duties of a trial judge advocate (and assistant trial judge advocate), and will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed. So help you God.

TJA (and Assistant): *I do.*

All now resume their seats except the TJA, the accused and counsel, who remain standing during the arraignment and pleas to the general issue.

TJA: (*By direction of the appointing authority, the prosecution withdraws the following charges and specifications, and will not pursue the same further at the present trial:* ————)

A nolle prosequi may be entered either before or after arraignment and plea. MCM, par. 72.

TJA: (*Private* ————), *I will now read the charges and specifications under which you are about to be tried. The affidavit and*

1st indorsement referring the case to me for trial are apparently in proper form.

The TJA now reads the charges and specifications together with the name of the accuser. With the consent of the court the accused may waive the reading of the charges and specifications. MCM, par. 62.

TJA: *The charges were served on the accused on* _____ *19*__.

If the accused is being tried by general court-martial and less than five days have elapsed since the date of service of the charges, the TJA should announce that fact and ask the accused if he consents to being brought to trial at this time. Should an objection be entered by the accused, it may be a ground for a continuance except in a case of military necessity.

TJA: (*Private* _____), *how do you plead to each charge and specification?*

This constitutes the arraignment, as the pleas of the accused are no part thereof. MCM, par. 62.

TJA: *Before receiving pleas to the general issue, I advise you that special pleas or motions, if any, should be made at this time.*

If the DC has special pleas or motions to offer, he should so announce them and state to which charges and specifications they apply. Such as, "a plea in bar of trial is entered to the specification under Charge II and to Charge II, said specification alleging desertion in violation of the 58th AW. The statute of limitations exempts the accused from trial for this offense." Reference special pleas, MCM, par. 64.

Special pleas, if any, should be made before pleading to the general issue. They should briefly and clearly set forth the nature and grounds of the objection to be raised. MCM, par. 64.

If there are more than one accused a motion to sever may be made. MCM, par. 71*b*.

Any motion for continuance by either side should be made at this time. MCM, par. 52*c*.

After all the special pleas and motions have been made and the court has disposed of them, or if there are no special pleas or motions to make, the DC continues:

DC: The accused pleads:

To all specifications and charges (Not Guilty) (Guilty).

or

To the Specification of the Charge (Not Guilty) (Guilty). (Guilty, except the words _____ and _____, substituting therefor, respectively, the words _____

and _____, to the excepted words not guilty, to the substituted words guilty.)

To the Charge (Not Guilty) (Guilty) (Not Guilty, but guilty of a violation of the ____ Article of War).

or

To Specification 1, Charge I, etc.
To Specification 2, Charge I, etc.
To Charge I, etc.
To the specification, Charge II, etc.
To Charge II, etc.

If the accused pleads guilty to any specification(s) or charge(s), the DC continues:

DC: (The meaning and effect of the plea of guilty to ____ specification ____ charge ____ and to ____ charge ____ have been explained to the excused.)

If there appears to be any doubt as to the accused's understanding of his plea, the court should satisfy itself by questions addressed directly to the accused, and additional explanation if necessary, that he understands the effect of his plea of guilty and wishes it to stand. If additional explanation is made, the record will so indicate. In such case the explanation itself need not but the response of the accused, if any, must be recorded. The following explanation may be used in such case:

PRES or
LM: (Private _____, you have pleaded guilty to _____ Specification _____ Charge. By so doing you have admitted guilt of the offense(s) of _____, and your plea subjects you to a finding of guilty of such specification(s) and charge(s) by the court, in which event you may be sentenced by the court to the following maximum punishment: _____. Before accepting your plea of guilty the court wishes to advise you that you are legally and morally entitled to plead not guilty and place the burden upon the prosecution of proving your guilt. With this in mind do you still wish to plead guilty?)

Acc: ((Yes Sir) (I desire to change my plea(s) to not guilty))

Upon completion of pleas the accused, assistant TJA, if any, and counsel for the defense are seated.

TJA: *Does the defense or the court desire any parts of the Manual or other authoritative legal precedents read?*

DC: The defense does (not).

PRES: The court does (not).

The court may direct the TJA to read parts of the Manual or parts of other legal authorities. MCM, par. 75*b*. Any extracts from the Manual or from other authorities that are read will be identified by paragraph, page, etc., but need not be copied into the record.

TJA: *The prosecution calls as its first witness:* ————————. *ment.*

The TJA may acquaint the court with the essence of the proof requisite for conviction on each specification. (This proof may be found in the Manual under discussion and proof appropriate to the AW.) The TJA may make a brief opening statement as to what he expects to prove. MCM, par. 75*b*.

TJA: *The prosecution calls as it first witness:* ————————.

Witness presents himself in front of and faces the president of the court, and if in the military or naval service salutes the president of the court, after which, the TJA (standing) administers the following oath to the witness:

You swear (or affirm) that the evidence you shall give in the case now in hearing, shall be the truth the whole truth and nothing but the truth. So help you God.

On affirmation omit last sentence.

TJA: *State your name, grade, organization, and station:*

Should the witness be a civilian, the following should be asked:

State your name, residence, and occupation.

Witness: ————————

TJA: *Do you know the accused? If so, state his name.*

Witness: ————————

TJA: *Is he in the military service of the United States?*

Witness: ————————

TJA: *What is his grade and organization?*

Witness: ————————

The prosecution now proceeds with the direct examination of the witness, at the conclusion of which the prosecution may state:

TJA: *No further questions. Does the defense desire to cross-examine?*

DC: The defense does (not).

If the defense desires, it may cross-examine the witness respecting matters brought out on direct examination or bearing on his credibility. The prosecution may pursue its redirect examination on facts brought out by the cross-

examination and then turn the witness over to the defense for re-cross-examination, etc. The TJA then inquires:

TJA: *Do any members of the court desire to question the witness?*

Any member of the court may ask a witness, other than the accused, any questions that either side might ask subject to objection by either side or any other member of the court. MCM, par. 121*b*.

In questioning the accused, the members of the court are limited to questions which would have been admissible on cross-examination by the prosecution. MCM, par. 121*b*.

Should the court ask any questions which elicit new matter both the prosecution and the defense may cross-examine upon such new matter.

At the conclusion of all questioning

TJA: *Request that the witness be excused.*

PRES: The witness is excused.

Should a witness be recalled, it is not necessary to again administer the oath. The TJA will simply state "You are reminded that you are still under oath." MCM, par. 121*a*.

If either side believes that it may be necessary to recall the witness for further testimony, the court may be requested to instruct the witness to remain available for recall.

The prosecution presents its case by calling all available prosecution witnesses and introducing in evidence the necessary stipulations, depositions, etc., in logical order.

After the prosecution presents its evidence the TJA announces:

TJA: *The prosecution rests.*

The defense may at this time enter a motion for a finding of not guilty by the following appropriate statement: "The defense moves for a finding of not guilty as to (all specifications and charges) or (to Specification (1), (2), (3), etc.), Charge (I), (II), (etc.), on the ground that the prosecution has failed to present sufficient evidence to support a finding of guilty as to these specifications and charges." The court may require specific indication of the alleged insufficiency. MCM, par. 71*d*.

DC: The defense does (not) desire to make an opening statement.

DC: The defense calls as its first witness:_____

The defense presents its case in the same manner as outlined above for the prosecution. The TJA administers the oath to the witnesses and asks the same preliminary questions as are addressed to witnesses for the prosecution. The defense thereafter conducts the direct and redirect examination and the prosecution conducts cross and re-cross-examination.

DC: The rights of the accused as a witness have been explained to him, and he (elects to remain silent), (desires to make an unsworn statement), (wishes to take the stand as a witness).

> The accused can only become a witness at his own request. If he prefers to remain silent, no inference may be drawn from this fact and no comment made upon it. If accused testifies to only one or a few of many specifications, the cross-examination must be limited accordingly. If there appears to be any doubt as to the accused's understanding of his rights as a witness, the court should satisfy itself by questions addressed directly to the accused, and additional explanation, if necessary, that he understands, and have him, after consultation with his counsel, state again what he elects to do. If additional explanation is made, the record will so indicate. In such case the explanation itself need not, but the response of the accused, if any, must be recorded.

PRES or LM: (Private _____, as the accused in this case you have the right to do one of three things:

First, you may be sworn and take the stand as a witness. If you do that, whatever you say will be considered and weighed as evidence by the court just like the testimony of other witnesses, and you can be cross-examined on your testimony by the trial judge advocate and the court. (The following may be used if there are more than one specification.) If your testimony should concern less than all of the offenses charged against you and you should not say anything about the others, then they can question you about the whole subject of those offenses concerning which you testify, but they cannot question you about any offenses concerning which you do not testify.

Second, if you do not want to testify under oath you may, without being sworn, say anything you desire to the court as an unsworn statement, denying, explaining, or excusing any of the acts charged against you here. This statement can be oral or written, and can be made either by yourself, by your counsel, or by both of you. Since such a statement is not given under oath, and since you cannot be cross-examined upon it, it cannot be given the same weight by the court as sworn testimony, but it will be considered by the court and given such weight as it may seem to deserve. However, any admission or confession which you may make in your unsworn statement can be considered by the court as evidence against you. Furthermore, even though you may be sworn as a witness you may also, if you wish, afterwards make a statement of this kind, not under oath.

Third, you may remain silent, that is, say nothing at all. You have a perfect right to do this if you wish, and if you do so the fact that you do not take the witness stand yourself, or make any statement, will not count against you in any way with the court. It will not be considered as any admission that you are guilty, nor can it be commented on in any way by the trial judge advocate in addressing the court.

Knowing these various rights, take time to consult with your counsel and then state to the court which you will do.)

Acc: (I desire to (be sworn as a witness) (make an unsworn statement) (remain silent))

Should the accused elect to take the stand as a witness, the TJA will administer the oath and ask the following preliminary questions, after which the procedure follows that of other defense witnesses:

State your name, grade, organization and station.
Answer _____
Are you the accused in this case?
Answer _____

When the defense has finished its case the DC should state:

DC: The defense rests.

The prosecution now has the privilege of calling or recalling witnesses in rebuttal. After it has done so, or if it does not wish to rebut the evidence of the defense, the TJA may state:

TJA: *The prosecution has nothing further. Does the court wish to have any witnesses called or recalled?*

PRES: It does (not).

If witnesses are called, the TJA will conduct the direct and redirect examination unless the court otherwise directs. MCM, par. 75*b*.

TJA: (*Opening argument.*)

The TJA has the right to make an opening argument, which he may waive, and if any argument is made in behalf of the defense, the TJA may make a closing argument in rebuttal. MCM, par. 77.

DC: (*Argument.*)

The defense has the right to make an argument at this point. MCM, par. 77.

TJA: (*Closing argument.*)

If there are no arguments or upon completion of arguments, the president may inquire:

PRES: Has the prosecution anything further?
TJA: *It has (not).*
PRES: Has the defense anything further?
DC: It has (not).

The question is repeated by the president until both the prosecution and the defense answer in the negative.

Reference order of receiving testimony and reopening case to receive testimony previously omitted. MCM, par. 121*a*.

PRES: The court will be closed.

At this point all persons leave the room except the members of the court. The TJA should not consult the court in closed session without the accused and his counsel being present. AW 30.

When the court has been cleared the members proceed to vote on the findings. The vote shall be by secret written ballot, shall be counted by the junior member and checked by the president, who will forthwith announce the result of the ballot to the members of the court. AW 31.

The vote may be preceded by an explanation of legal principles involved by the law member and free discussion by the members of the court. The vote itself must, however, be secret.

Specifications are voted upon first, and then the charges under which they are laid, otherwise the order of voting will be determined by the president subject to the control of the court. MCM, par. 78. A vote upon a lesser included offense or upon a finding with exceptions and substitutions may properly be taken after a vote on specifications or charges as written. Reference forms for findings with exceptions and substitutions. MCM, par. 78*b* and *c*.

A two-thirds vote of members present is required to convict of any offense except spying (AW 82) which requires a unanimous vote of members present. AW 43. Should the number of votes required for a finding of guilty not be obtained, the finding is automatically not guilty. The president may, however, in the closed session, require reconsideration and repetition of the voting until the court is convinced that the ballots cast represent the considered and final judgment of the court. A finding of guilty in which the requisite number of the court concurs becomes the finding of the court but may be reconsidered by the court at any time before the finding is announced or the court opens to receive evidence of previous convictions. MCM, par. 78*d*.

When the court has reached its findings, the court will be opened. In the presence of the accused, his counsel and the personnel of the prosecution (all of whom remain standing), the president, if the court has acquitted the accused of *all* specifications and charges, announces:

PRES: (————————————, the court acquits you of all specifications and charges.

The court stands adjourned unless there is other business.)

or

If the court has found the accused guilty of any offense, the president will *not* announce its findings but will inquire:

PRES: Has the prosecution any evidence of previous convictions to offer and will the prosecution read the personal data from the charge sheet as concerns the accused?

TJA: *The prosecution has (no) evidence of* ———————— *previous convictions to offer.*

The TJA states (There are no previous convictions), or (the number of previous convictions, 1, 2, 3, etc.) and reads the evidence of previous convictions as they appear on the form accompanying the Charge Sheet (extract from Service Record). MCM, par. 79*c*. At the conclusion of the reading, the TJA asks:

TJA: *Has the accused any objection to the evidence of previous conviction(s) read?*

DC: (No objection.) (The accused objects ————————————.)

The TJA marks the evidence of previous convictions as an exhibit to be forwarded with the record.

Should the accused object to the introduction of any offered evidence of previous convictions, the court follows the procedure as outlined in MCM, par. 79*b*.

TJA: *The prosecution will now read the personal data concerning the accused as shown on page one of the Charge Sheet.*

The TJA reads everything on page 1 of the Charge Sheet, except data as to witnesses. He then asks:

TJA: *Is this statement correct?*

DC: It is correct. (The accused objects to ————————————.)

If the defense objects to any part of the data read, the court proceeds as outlined in MCM, par.

PRES: The court will be closed.

Deliberation on the sentence may include full and free discussion.

It is customary to permit each member to propose a sentence in writing. They are collected by the junior member and given to the president who puts the proposed sentences to vote beginning with the lightest. Voting on the sentence is by secret, written ballot, and it is obligatory on each member, regardless of his vote on the findings, to vote for an appropriate sentence for the offenses of which accused

was found guilty. If the required number of votes are not obtained on any one of the proposed sentences, new sentences may be proposed, and voted on. Reference voting on sentences, MCM, par. 80*b*.

A unanimous vote of members present is required to give the death penalty and three-fourths vote of members present is required to sentence to life imprisonment or confinefinement for more than ten years. All other sentences are determined by two-thirds vote of members present.

As with the findings, the president, subject to control of the court, may require reconsideration of any sentence voted and repetition of the voting until the court is convinced that the ballots cast represent the considered and final judgment of the court.

Where two or more persons have been found guilty on joint or common charges each must be sentenced separately, although the punishment awarded may be the same.

The court shall award a single sentence for all offenses and not a separate sentence for each of them. MCM, par. 80*b*. The sentence may not exceed the maximum limits for the offense or offenses of which accused is convicted. MCM, par. 104.

When the court arrives at a sentence, the court will be opened, and the president will announce the findings and sentence in the presence of the accused, his counsel, and the personnel of the prosecution, who will stand during the announcement. If the court so decides, the findings and sentence need not be announced.

The anouncement may be as follows:

PRES: (Private _____), the court, in closed session and upon secret, written ballot (two-thirds)[1] (all)[1] of the members present at the time the vote was taken concurring in each finding of guilty, finds you:

Of (all) the specifications and charges: Guilty.

or

Of specification 1, charge 1 (guilty) (not guilty), (and continues to enumerate the findings as to each specification and charge).

Of specification (_____), charge (_____) guilty, except the words _____ and _____ substituting therefor, respectively, the words _____ and _____ of the excepted words, not guilty, of the substituted words, guilty.

Of charge (_____): not guilty; but guilty of a violation of the _____ Article of War.

This latter form (exceptions and substitutions) may be appropriate where the court finds the accused guilty of a lesser included offense.

PRES: And again in closed session and upon secret, written ballot (two-thirds)[1] (three-fourths)[1] (all)[1] of the members present at the time the vote was taken concurring, sentences you: (_____).

(Use appropriate form found in Appendix 9, p. 273, MCM.)

[1] Announce only the required fraction, not the actual number who concurred.

Reference recommendations for clemency, Par. 81.

PRES: Has the prosecution any other cases to try at this time?

After the sentence has been announced, if there are no other cases before the court, the TJA may announce:

TJA: *I have nothing further.*

If there are other cases to be tried, the court proceeds with them. Otherwise:

PRES: The court adjourns to meet at my call.

APPENDIX 2

RECORD OF TRIAL BY GENERAL COURT-MARTIAL AND ACCOMPANYING PAPERS

INTRODUCTION

This appendix contains a specimen record of trial by general court-martial and accompanying papers as arranged by the Staff Judge Advocate for transmittal to The Judge Advocate General. (See par. 141c, *supra.*) It will be noted that papers are *not* arranged in chronological sequence in the order in which they are prepared. As a matter of convenience in checking and examining general court-martial records in the Office of The Judge Advocate General, all such records, when transmitted, should be arranged in the following order:

1. Chronology Sheet.
2. General Court-Martial Data Sheet (WD AGO Form No. 116).
3. General Court-Martial Order, 6 copies (plus one copy for each additional accused, if more than one).
4. Review of Staff Judge Advocate, in duplicate.
5. Charge Sheet.
6. Report of investigating officer, required by paragraph 35*a*, Manual for Courts-Martial, followed by any other papers which accompanied the charges when referred for trial, unless otherwise disposed of.
7. Report of Staff Judge Advocate, required by paragraph 35*b*, Manual for Courts Martial.
8. Copy of reporter's voucher.
9. Any copies of the record not otherwise disposed of.
10. Records of former hearing.
11. Record of trial proper in the following order: index sheet; receipt of accused, or certificate of trial judge advocate, covering delivery of copy of record; Special Order appointing the court and amending orders, if any; record of proceedings in court; action of reviewing authority; exhibits; clemency papers. The action of the reviewing authority will be typed on a separate sheet immediately following the sheet bearing the authentication of the record.

(As a rule items 1 to 10 inclusive, should be bound together and suitably marked on front cover, the record proper being bound separately and also suitably marked on front cover; but if the total bulk is small, all items, 1 to 11 inclusive, may be bound together. In the latter case the

point of division between 10 and 11 should be indicated by a separating cover sheet or other means. An exceptionally bulky record may properly be made up in the form of two or more volumes.)

The record of trial and the general court-martial order have been printed in usual book form. An actual record of trial should be prepared on one side of the page only, and a general court-martial order, if it requires more than one page, should be prepared on both sides of the paper so that the reverse side of each page can be read by turning up the bottom of the page.

RECORD OF TRIAL

(and accompanying papers)

of

Bark	Lennie O.	20401234
(Last name)	(First name and middle initial)	(Army serial No.)

Private	Company A, 128th Infantry
(Grade)	(Organization)

Fort Jackson, S. C.
(Station)

By

GENERAL COURT MARTIAL

Appointed by the Commanding Officer

29th Infantry Division

Tried at

Fort Jackson, S. C. 7 Dec. and 10 Dec., 1943

COVER SHEET

(Withdraw this cover sheet from set used to make carbon copy of record for accused and use as backing on original record.)

* W. D., A. G. O. Form No. 114
14 July 1943

*This form supersedes W. D., A. G. O. Form No. 114, 5 January 1943, which may be used until existing stocks are exhausted.

16—86746-1

A CHRONOLOGY OF THE CASE OF:

	Date	No. of days	Explanation
1. Offense committed:	28 Sep 43		
2. Accused confined:			
By civil authorities			
By military authority			
By military authority ordering trial	28 Sept	0	
Reconfined from escape	26 Nov	0	Acc abs in desertion 28 Sept to 26 Nov.
3. Charges preferred: (Date of Jurat)	27 Nov	1	
4. Charges investigated: (Date of Report)	29 Nov	3	
5. Charges forwarded by C. O.:	30 Nov	4	
6. Charges received, J. A.:	30 Nov	4	
7. Charges returned:	---	—	
8. Charges received back:	---	--	
9. Charges—action Staff J. A.:	1 Dec	5	
10. Charges referred for trial:	1 Dec	5	
11. Trial had:			
Total days to trial	10 Dec	11	Trial commenced 7 Dec but continued to 10 Dec on insanity issue.
Less time in hospital	---	—	
Less delay at request of defense	---	--	
Net total	---	11	
12. Record of trial received:	13 Dec	14	
13. Review by Staff J. A.:	14 Dec	15	
14. Action by reviewing authority:	15 Dec	16	
Total to Action by Reviewing Authority	---	16	
15. Mimeo. orders received:	16 Dec	17	
16. Record of trial mailed to J. A. G. O.:	16 Dec	17	
Total	---	17	

Remarks:

Charles E. Taney
CHARLES E TANEY
Lt Col, JAGD
Division *Judge Advocate.*

All delays must be fully explained.

In computing number of days between two dates, disregard the first day and count the last day. All months will *not* be assumed to consist of 30 days.

GENERAL COURT-MARTIAL DATA SHEET

Bark (Last name) Lennie (First name) O (Middle initial) 20401234 (Army serial No.) Pvt (Grade) Co A, 128th Inf (Company, regiment, or arm or service)

J. A. G. O., C. M. No. .....

	Trial J. A.		Staff J. A.		J. A. G. O.	
	Yes	No	Yes	No	Yes	No
1. Was court ordered by proper authority?	✓		✓			
2. Are all orders showing membership of court properly entered in record?	✓		✓			
3. Were there less than five members detailed or present at any meeting?		✓		✓		
4. Was the law member of the court designated by convening order?	✓		✓			
5. If the presence of the law member was specifically required by the convening authority, was he present at each session?	/	/	/	/		
6. Did the court have jurisdiction of person and offense?	✓		✓			
7. Does the record show place, date, and hour court convened?	✓		✓			
8. (a) Are all members of the court, trial judge advocate, assistant trial judge advocate, defense counsel, and assistant defense counsel accounted for as present or absent?	✓		✓			
(b) If absent, is reason for absence given?	✓		✓			
9. Was accused asked whom he desired as counsel?	✓		✓			
10. Was reporter sworn?	✓		✓			
11. Is reporter's voucher attached to record or its absence explained?	✓		✓			
12. Was interpreter sworn?	/	/	/	/		
13. Is copy of record for each accused accounted for?	✓		✓			
14. Was accused extended right of challenge as to each member of the court, and was he instructed as to his right to exercise one peremptory challenge against any member except the law member?	✓		✓			
15. Was action of court upon challenges regular and properly taken?	/	/	✓			
16. Was the court sworn?	✓		✓			
17. Was any officer sitting as a member of the court the accuser, a witness for the prosecution, or, upon a rehearing, one who sat as a member on the former trial?		✓		✓		
18. Was the personnel for the prosecution sworn?	✓	/	✓			
19. Was the accused properly arraigned?	/	/	✓			
20. Are there copied into the record—						
(a) Charges and specifications?	✓		✓			
(b) Name, grade, and organization of the person signing charges?	✓		✓			
(c) Affidavit to the charges and specifications?	✓		✓			
(d) Name of the person who administered the oath verifying the charges, and his official capacity?	✓		✓			
(e) The order of reference for trial?	✓		✓			
21. If pleas of guilty were explained was accused's response, if any, recorded?	/	/	/			
22. Does each specification state an offense under the Articles of War?	/	/	✓			
23. If the accused was advised of his right to plead the statute of limitations, was his response, if any, recorded?	/	/	/			
24. Are pleas of accused regularly entered?	✓		✓			
25. Were the witnesses sworn?	✓		✓			
26. Are the findings properly entered?	✓		✓			

W. D., A. G. O. Form No. 116 (OVER) 16—12942-2
December 15, 1942

	Trial J. A.		Staff J. A.		J. A. G. O.	
	Yes	No	Yes	No	Yes	No
27. Was the vote upon each finding in closed session and by secret written ballot?	✓		✓			
28. Is the evidence, if any, of previous convictions admissible? (Par. 79c, M. C. M.).	✓		✓			
29. Was the vote upon the sentence in closed session and by secret written ballot?	✓		✓			
30. Did at least two-thirds of members present at the time the vote on each finding was taken concur therein?	✓		✓			
31. In each case of finding of guilty where death sentence was mandatory, did all members present concur in each finding?						
32. Did members present concur in sentence, as follows: To death, all members; to life imprisonment or confinement for over ten years, at least three-fourths of members; to any other punishment, at least two-thirds?	✓		✓			
33. Does the evidence sustain the findings of the court?			✓			
34. Are the findings legal?	✓		✓			
35. Is the sentence legal?	✓		✓			
36. Does any ruling of the court on the admission of evidence or other matters injuriously affect the substantial rights of accused?				✓		
37. Did all members who participated in proceedings in revision vote on original findings and sentence?						
38. At proceedings in revision are the trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, the accused, and the individual counsel, if any, accounted for as present or absent?						
39. Is the record properly authenticated?	✓		✓			
40. Does it sufficiently appear that the defense counsel accepts the record as correct?	✓		✓			
41. Is action of reviewing authority properly entered in record and signed?			✓			
42. In case of adjournment or continuance, are each day's proceedings properly signed by trial judge advocate?						
43. After each adjournment during trial, is presence or absence of members of court, trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, accused, his individual counsel, and the reporter properly accounted for?						
44. Does action of reviewing authority:						
(a) Expressly approve the sentence and order its execution or suspension?						
(b) Designate the proper place of confinement?						
(c) Is the action otherwise legal and properly taken?						
45. Is clemency recommended by the court?		✓		✓		

NOTE.—Questions 15, 19, 21, 22, 23, 33, 36, 41, and 44 not to be answered by the trial judge advocate. Question 44 not to be answered by the staff judge advocate.

Howard J. Hitchings

Howard J. Hitchings, Maj. Inf. 13 Dec 43
Trial Judge Advocate. (Date)

Charles E. Taney

CHARLES E. TANEY, Lt Col. JAGD 15 Dec 43
Staff Judge Advocate. (Date)

Officer Reviewing Record. (Action) (Date)

Chief Examiner. (Action) (Date)

16—12943-2

HEADQUARTERS 29TH INFANTRY DIVISION
Fort Jackson, South Carolina

15 December 1943

General Court-Martial)
Orders No. 96)

Before a general court-martial which convened at Fort Jackson, South Carolina, pursuant to paragraph 1, Special Orders No. 261, this headquarters, 18 September 1943, as amended by paragraph 11, Special Orders No. 273, this headquarters, 30 September 1943, was arraigned and tried:

Private LENNIE O. BARK, 20401234, Company A, 128th Infantry.

CHARGE I: Violation of the 64th Article of War.
Specification: In that Private Lennie O. Bark, Company A, 128th Infantry, having received a lawful command from First Lieutenant Joe R. Loganby, his superior officer, to report on the drill field for duty, did at Fort Jackson, South Carolina, on or about 28 September 1943, willfully disobey the same.

CHARGE II: Violation of the 69th Article of War.
Specification: In that Private Lennie O. Bark, Company A, 128th Infantry, having been duly placed in confinement in the 128th Infantry Guardhouse, Fort Jackson, South Carolina, on or about 28 September 1943, did, at Fort Jackson, South Carolina, on or about 28 September 1943, escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 58th Article of War.
Specification: In that Private Lennie O. Bark, Company A, 128th Infantry, did, at Fort Jackson, South Carolina, on or about 28 September 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Charlestown, South Carolina, on or about 26 November 1943.

PLEAS

To the Specification, Charge I: Not Guilty
To Charge I: Not Guilty
To the Specification, Charge II: Guilty
To Charge II: Guilty
To the Specification, Charge III: Guilty, except the words "desert" and "in desertion," substituting therefor, respectively, the words "absent himself without leave from" and "without leave," of the excepted words not guilty, of the substituted words guilty.
To Charge III: Not Guilty, but guilty of violation of the 61st Article of War.

FINDINGS

Of all Specifications and Charges: Guilty

SENTENCE

To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. (One previous conviction considered

The sentence was adjudged on 10 December 1943.

The sentence is approved but five years of the confinement imposed are remitted. As thus modified the sentence will be duly executed, but the execution of that portion thereof adjudging dishonorable discharge is suspended until the soldier's release from confinement. The Fourth Service Command Rehabilitation Center, Fort Jackson, South Carolina, is designated as the place of confinement.

By command of Major General SAMSON:

G. H. SMOTHERS,
Colonel, GSC,
Chief of Staff.

OFFICIAL:

Jeffrey W. Bertoli

JEFFREY W. BERTOLI,
Major, AGD,
Adjutant General.

HEADQUARTERS 29TH INFANTRY DIVISION

Office of the Division Judge Advocate

14 December 1943

STAFF JUDGE ADVOCATE'S REVIEW

U N I T E D S T A T E S

v.

Lennie O. Bark, 20401234, Private, Company A, 128th Infantry

Present Age: 21 5/12

Date of Enlistment: 13 Nov. 1940

Prior Service: None

Previous Convictions: One

Confined: 28 Sept. 1943

Escaped: 28 Sept. 1943

Reconfined: 26 Nov. 1943

Accused Arraigned: 7 Dec. 1943

Place of Trial: Fort Jackson, S. C.

	Charges and Specifications	Plea	Findings
CH I:	Violation 64th AW	NG	G
Sp:	Willful disobedience of command of superior officer to report for drill, Fort Jackson, S. C., 28 Sept. 1943.	NG	G
CH II:	Violation 69th AW	G	G
Sp:	Escape from confinement, Fort Jackson, S. C., 28 Sept. 1943.	G	G
CH III:	Violation 58th AW	NG but G of violation 61st AW	G
Sp:	Desertion, Fort Jackson, S. C., 28 Sept. 1943, terminated by apprehension, Charleston, S. C., 26 Nov. 1943.	NG but G of AWOL	G

Sentence: DD, TF, CHL for ten years.

Maximum Punishment: Death

1. INSANITY OF ACCUSED

On arraignment the defense suggested (R 5), and offered evidence to justify (R 6) an inquiry into the mental condition of accused. A continuance was granted upon motion of the defense for the purpose of reporting the facts to the appointing authority for appropriate action (R 6). When the court reconvened, the medical officer appointed to examine accused testified that accused was, in his opinion, mentally responsible both at the time the alleged offenses were committed

and at the time of trial (R 7, 8), and the court so ruled (R 8).

2. EVIDENCE

a. For the Prosecution. On the morning of 28 September 1943, at about 0830 (R 10), 1st Lt. Joe R. Loganby, company commander of accused, on hearing that accused was not out drilling with the unit, ordered him brought to the orderly room (R 10). When accused was brought up a few minutes later, Lt. Loganby said, "You get out on the drill field right now" (R 10), or words to that effect (R 11). Accused refused and stated he didn't intend to do any more work in the Army (R 10, 12). Lt. Loganby immediately ordered accused placed in confinement in the 128th Infantry Regimental Guardhouse (R 10), from which he escaped on the same day (R 12; Ex 1, 2). Accused was apprehended in uniform by a military police sergeant at Charleston, S. C., a short distance from Fort Jackson, on 26 November 1943 (R 13). Accused at that time stated that "he came into the Army to fight and they wouldn't let him fight so he wasn't going back to the Army and work" (R 13). Accused pleaded guilty to escape from confinement on 28 September 1943 and to absence without leave from 28 September 1943 to 26 November 1943 (R 8).

b. For the Defense. The accused, after being duly warned of his rights by defense counsel and the court, elected to testify under oath, restricting his testimony to Charge I and the specification thereunder (R 14). He testified in substance as follows: On the morning in question he drove a truck into Columbia, S. C., and back, after which he began raking the company street (R 14). He received an order to roll a wheelbarrow full of dirt up and down the company street (R 14). He went into the orderly room and told the company commander he was willing to work in another branch of the service if he could get overseas in a noncombatant branch, although he also stated that he wanted to go overseas and fight (R 14). He didn't think that Lieutenant Loganby told him to go out on the field that day (R 14). The court received a stipulation that a former company commander of accused, if present, would testify that, while accused was in his command for about eight months, his character was

excellent and that he had no trouble with accused (R 15).

3. COMMENT

a. The record is legally sufficient to support the findings and sentence.

(1) the charge of willfully disobeying a superior officer is established by Lt Loganby and Sgt Pitch, both of whom testified that accused refused to report on the drill field after being ordered to do so by his superior officer. The intentional and defiant character of this refusal is fully evidenced by the remarks he made at the time.

(2) In addition to the pleas of guilty, duly authenticated extract copies of the morning report and guard report establish both escape from confinement (Charge II) and absence without leave for the period alleged (Charge III). Although the specific intent not to return, a necessary element of the charge of desertion, is somewhat negatived by return of accused in uniform to military control near his own station, yet the escape from confinement, the fact of apprehension, the length of absence, nearly two months, and the statement to the military policeman that "he wasn't going back to the Army and work" fully justified the court in inferring the requisite intent. Although the statement by accused was in the nature of a confession or admission made to a military superior, it was volunteered without prompting or interrogation of any kind (R13) and so must be held wholly voluntary. The law member's ruling in admitting the statement was therefore correct.

b. The court properly adjourned for further inquiry into the question of sanity of accused. The uncontradicted finding of the medical officer of sanity removed any doubt on that issue.

c. Evidence of one previous conviction for being drunk and disorderly was properly received by the court.

d. There were no errors or irregularities which injuriously affected any substantial right of the accused.

4. RECOMMENDATION

a. Civilian background. Accused is almost 23 and a half years of

age. Prior to enlisting he lived at Charleston, S. C., with his father. His mother has been dead for some years. He has married since his enlistment but he and his wife are separated and she has instituted divorce proceedings. He completed grade school and three years of high school, then quit school and secured a job as an elevator operator for about 15 months, earning $22.50 per week. He has no civilian police record so far as is known.

b. Military Record. After enlisting on 13 November 1940 accused was given basic training at Fort Jackson, S. C., since which time he has been in four different organizations. He has served as a rifleman, company clerk and supply clerk. He has been uniformly rated as "Satisfactory" as a soldier and his character rating has been from "Unsatisfactory" to "Excellent." His AGCT score is 102. He has had three previous court-martial convictions, only one of which has occurred within a year of the present offenses. He was convicted by summary court-martial of disrespect toward a noncommissioned officer in February 1941, by special court-martial of failing to obey a lawful order of a commissioned officer in January 1942, and, as shown at the trial, by summary court-martial for being drunk and disorderly in January 1943. His total sentences to confinement have aggregated four months. Company punishment has been imposed on accused three times within the last year, twice for drunkenness and once for absence without leave.

c. Recommended action. The record of accused, both civilian and military, shows that he is not a good soldier. Junior officer leadership in his organization is good so no justification for defiance of authority may be based on that ground. Nonetheless, he is young, has a fair civilian background, and though he has numerous military derelictions behind him, none has been serious and they have been spread over nearly three years. It is believed that his apparent resentment of military discipline may yet be cured with proper training. The sentence of the court, dishonorable discharge, total forfeitures and confinement for ten years is not excessive, but it is believed that restoration of accused could better be effected if the period of confinement were reduced. It is therefore recommended that the sentence be approved,

but that five years' confinement be remitted and that as thus modified the sentence be executed, withholding execution of the dishonorable discharge until his release from confinement. The Fourth Service Command Rehabilitation Center, Fort Jackson, South Carolina, is the appropriate place of confinement.

d. A form of action designed to carry this recommendation into effect is attached hereto.

Hugo Root, Jr.
HUGO ROOT, JR.,
1st Lt., JAGD,
Assistant Division Judge Advocate.

I concur. I have personally read the record of trial.

Charles E. Taney
CHARLES E. TANEY,
Lt Col, JAGD,
Division Judge Advocate.

(WRITE NOTHING ABOVE THIS LINE)

CHARGE SHEET

Fort Jackson, S. C. (Place), 27 November (Date), 1943

Name, etc., of accused: Bark, Lennie O., 20401234, Pvt, Co A, 128th Inf.
(Give last name, first name, and middle initial in that order followed by serial number, grade, company, regiment, arm or service, or by other appropriate description of accused. Alias names, etc., to follow in same manner)

Present Age 21 5/12 Pay, $ 50.00 (Base pay plus pay for length of service) per month. Allotments to dependents, $22.00 Class F Deduction per month.

Government Insurance deduction, $ None per month.

Data as to service: No prior service. Enlisted at Charleston, S. C., on 13 November 1940 for three years. Service extended by Service Extension Act of 1941.
(As to each terminated enlistment, give including dates of service and organization in which serving at termination. As to current enlistment, give the initial date and the term thereof. Give similar data as to service not under an enlistment)

Data as to witnesses, etc.: Against the Accused:
(Give names, addresses, and note if for accused. List documentary evidence and note where each item thereof may be found)

1st Lt Joe R. Loganby, Co A, 128th Inf, Fort Jackson, S. C.

1st Lt Cass M. Grant, Co A, 128th Inf, Fort Jackson, S. C.

Sgt Lester R. Pitch, Co A, 128th Inf, Fort Jackson, S. C.

Sgt Marion D. Kelley, Jr, 128th Inf, Fort Jackson, S. C.

1st Lt John Smith, 128th Inf, Fort Jackson, S. C.

Sgt Charles Sellins, 1650th S. U., M.P. Det, Charleston, S. C.

For the Accused:

None.

Documentary Evidence and Exhibits

Extract copy of morning report, Co A, 128th Inf, months of September and November, 1943.

Extract copy of guard report, 128th Inf, months of September and November, 1943.

Data as to restraint of accused: Confined 28 September 1943, reconfined 26 November 1943 after escape, 128th Infantry Guardhouse, Fort Jackson, S. C.
(Give date, place, and initial date of any restraint of accused)

W. D., A. G. O. Form No. 115
8 July, 1943

e16—27709-2

(1)

CHARGE : Violation of the 64th Article of War.

Specification : In that Private Lennie O. Bark, Company A, 128th Infantry, having received a lawful command from First Lieutenant Joe R. Loganby, his superior officer, to report on the drill field for duty, did at Fort Jackson, South Carolina, on or about 28 September 1943, willfully disobey the same.

CHARGE II: Violation of the 69th Article of War.

Specification: In that Private Lennie O. Bark, Company A, 128th Infantry, having been duly placed in confinement in the 128th Infantry Guardhouse, Fort Jackson, South Carolina, on or about 28 September 1943, did, at Fort Jackson, South Carolina, on or about 28 September 1943, escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 58th Article of War.

Specification: In that Private Lennie O. Bark, Company A, 128th Infantry, did, at Fort Jackson, South Carolina, on or about 28 September 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Charleston, South Carolina, on or about 26 November 1943.

(Additional sheets, if necessary, for charges and specifications will be attached here. Ordinary 8 by 12½-inch paper will be used for additional sheets)

(2)

(WRITE NOTHING BELOW THIS LINE)

o10—27709-2

(WRITE NOTHING ABOVE THIS LINE)

(Signature of accuser) Joe R. Loganby
JOE R. LOGANBY,
1st Lt, 128th Inf
(Grade, organization, arm, or service)

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 27th day of November, 19 43, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he* has personal knowledge of the matters set forth in specifications of Charge I; and *has investigated the matters set forth in specifications of Charges II and III, and that the same are true in fact, to the best of his knowledge and belief.
(Indicate by specification and charge numbers)

(Signature) Bradley M. McGinty
BRADLEY M. McGINTY (Grade and organization)
Capt, 128th Inf, Adjutant
(Official character, as summary court, notary public, etc.)

NOTES.—At (*) strike out words not applicable.
If the accuser has personal knowledge of the facts stated in one or more specifications or parts thereof, and his knowledge as to other specifications or parts thereof is derived from investigation of the facts, the form of the oath will be varied accordingly. In no case will he be permitted to state alternatively, as to any particular charge or specification, that he either has personal knowledge or has investigated.
If the oath is administered by a civil officer having a seal, his official seal should be affixed.

1st IND.

Headquarters 29th Inf Div, Fort Jackson, S. C., 1 December, 19 43.
(Place) (Date)

Referred for trial to Maj Howard J. Hitchings, Hq 29th Inf Div, Trial JA of general
(Grade, name, and organization of summary court, or trial judge advocate)

(Summary) (Trial judge advocate of special or general) court-martial appointed by paragraph 1, Special Orders No. 261, Headquarters 29th Inf Div, 18 September, 19 43 as amended by par 11, SO No 273, Hq 29th Inf Div, 30 Sept 43.

By command of Major General SAMSON
(Command or order) (Grade and name of commanding officer)

e19—27760-2

Jeffrey W. Bertoli
JEFFREY W. BERTOLI,
Maj, AGD,
Adjutant General

I have served a copy hereof on (each of) the above-named accused, this 1st day of December, 19 43

(Signature) Howard J. Hitchings, *Trial Judge Advocate.*
HOWARD J. HITCHINGS,
Maj. Hq 29th Inf Div
(Grade and organization)

(SPACE FOR USE WHERE TRIAL IS BY SUMMARY COURT)

CASE No. .....

SPECIFICATIONS AND CHARGES	PLEAS	FINDINGS	SENTENCE OR ACQUITTAL AND REMARKS

Place ....., Date ....., 19....

..... Summary Court.
(Signature, grade, and organization)

Headquarters ....., 19....
(Place and date)

.....
(Action of reviewing authority)

....., *Commanding.*
(Signature, grade, and organization)

Entered on service record in cases of conviction .....
(Initials of personnel adjutant)

(4)

(WRITE NOTHING BELOW THIS LINE) 16—21769-2 U. S. GOVERNMENT PRINTING OFFICE

LETTER OF TRANSMITTAL. COURT-MARTIAL CHARGES

Company A, 128th Infantry
(Organization)

Fort Jackson, S. C.
(Place)
27 November 1943
(Date)

Subject: General ~~of Special~~ Court-Martial Charges.

To: Commanding Officer, 128th Infantry, Fort Jackson, S. C.
(Organization) (Place)

1. In compliance with paragraph 23, MCM, there are forwarded herewith court-martial charges against:

Bark	Lennie O.	20401234	Pvt.	Co A, 128th Inf.
(Last name of accused)	(First name and middle initial)	(ASN)	(Grade)	(Organization)

2. Summaries of expected testimony upon which the charges are based are attached.

3. The following documentary evidence and exhibits upon which the charges are based are attached:

a. Extract copy of morning report, Co A, 128th Inf, months of September and November 1943.

b. Extract copy of guard reports, 128th Inf, months of September and November 1943.

4. There is attached evidence of one previous convictions of accused.

5. Civilian offenses, Character, occupation, and other information of the accused before entrance into the Army: See Incl. 5 attached.

6. Character of military service of accused prior to offenses here charged: Satisfactory.

7. In my opinion he should _____ be eliminated from the service.

8. I recommend trial by General Court-Martial.

Joe R. Loganby
(Signature)

JOE R. LOGANBY
(Name typed)

1st Lt, Inf. Comdg.
(Grade and Organization)

5 Incls.
Incl. 1 - Charge sheet (in trip.).
Incl. 2 - Summaries of expected testimony (in trip.).
Incl. 3 - Documents listed in par. 3.
Incl. 4 - Evidence of previous convictions (in trip.).
Incl. 5 - Civilian record of accused.

FORWARDING INDORSEMENTS

201 Bark, Lennie O. (Enl) 1st Ind.
(Name of accused, last name first)

Hq, 128th Inf (Organization) Fort Jackson, S. C. (Place) 28 November (Date) 19 43

To: 1st Lt Leland V. Neeland (Rank) (Full name) Hq 128th Inf (Organization) Fort Jackson, S. C. (Place)

1. You are designated to investigate the inclosed charges against Pvt Lennie O. Bark (Grade and full name of accused) 20401234 (ASN) Co A, 128th Inf (Organization)

Your investigation will be conducted in conformity with paragraph 35a, MCM.

2. The investigation will be completed on W.D., A.G.O. Form No.120 (Pretrial Investigating Officer's Report) and returned within 48 hours. Any delay beyond that period will be explained in your report.

By order of Colonel SWINBURNE:

Bradley M. McGinty
(Signature)

BRADLEY M. McGINTY
(Name typed)

Capt, 128th Inf
(Grade and organization)
Adjutant.

5 Incls.
n/c

PRETRIAL INVESTIGATING OFFICER'S REPORT

.....2nd..... Ind.

Lt. Leland V. Neeland, Hq. 128th Inf., Investigating Officer, 29 November, 19 43

To: Co. 128th Inf., Fort Jackson, S. C.

1. I have investigated the inclosed charges dated 27 November 1943 against Pvt Lennie O. Bark, 20401234, Co A, 128th Inf in accordance with the provisions of Article of War 70 and paragraph 35*a*, Manual for Courts-Martial. At the outset of the investigations, I informed the accused of the nature of the charges alleged against him; of the names of the accuser and witnesses, so far as known to me; of the fact that the charges were about to be investigated; of his right to cross-examine all available witnesses against him and to present anything he may desire in his own behalf, either in defense or mitigation; of his right to have the investigating officer examine available witnesses requested by him; and that it was not necessary for him to make any statement with reference to the charges against him, but that if he did make one it might be used against him.

2. In the presence of the accused, I have examined all available witnesses and documentary evidence and have reduced the material testimony given by each witness, under direct and cross examination, to a statement embodying the substance of the testimony taken on both sides, which said statement is attached hereto as hereinafter indicated:

1st Lt Joe R. Loganby, Co A, 128th Inf, Exhibit A
1st Lt Cass M. Grant, Co A, 128th Inf, Exhibit B
Sgt Lester R. Pitch, Co A, 128th Inf, Exhibit C
Sgt Marion D. Kelley, Jr, Co A, 128th Inf, Exhibit D
Sgt Charles Sellins, 1650th S. U., M. P. Det, Charleston, S. C., Exhibit E

3. The substance of the expected testimony of the following-named witnesses either in oral or written form was made known to the accused who stated he did not desire to cross-examine such witnesses and therefore the same were not called or examined in the presence of the accused.

1st Lt John Smith, 128th Inf, Fort Jackson, S. C., Exhibit F

4. The following documents have been examined, shown to the accused, and are appended:

a. Extract copy of morning report, Co A, 128th Inf, months of September and November, 1943, Exhibit G

b. Extract copy of guard reports, 128th Inf, months of September and November, 1943, Exhibit H

W. D., A. G. O. Form No. 120*
17 July 1944
*This form supersedes W. D., A. G. O. Form No. 120, 5 January 1943, which may be used until existing stocks are exhausted.

(OVER)

16—82880-2

5. The accused, after he had been carefully warned by me as above indicated, *said that he did not desire to make a statement—or—*~~made the statement hereto attached.~~ ~~(Exxxxxxxx)~~

*Strike out words not applicable.

6. Explanatory or extenuating circumstances:

The evidence adduced established a willful disobedience by the accused of the order of his superior officer, Lt Loganby. His unexplained absence of two months commencing with an escape from confinement and terminated by apprehension, coupled with his statements made to the apprehending military policeman justifies the sustaining of the desertion charge. No mitigating or extenuating circumstances appear.

7. There is no reasonable ground for a belief that the accused is now, or was at the time of the commission of the alleged offense(s), mentally defective, deranged, or abnormal.

8. Trial by general court-martial is accordingly recommended.

9. There is attached a record of one previous convictions committed during the current enlistment and within one year preceding the commission of the offense for which the accused is now charged. (Par. 79, MCM.)

10. In arriving at my conclusions, I have considered not only the nature of the offenses and the evidence in this case, but I have likewise considered the age of the accused, his military service, the necessity for preserving the manpower of the Nation in the present emergency, of salvaging all possible military material, and the established policy of the War Department that trial by general court martial will be resorted to only when the charges can be disposed of in no other manner consistent with military discipline.

Leland V. Neeland
(Signature)

5 Incls
n/c

LELAND V. NEELAND
(Name, typed)

1st Lt, 128th Inf
(Grade and organization)

16—32880-3

RECOMMENDATION OF TRIAL BY COURT-MARTIAL

201 Bark, Lennie O. (Enl) 3d Ind.
(Name of accused, last name first)

Hq, 128th Inf (Organization) Fort Jackson, S. C. (Place) 30 November (Date) 19 43

To: CG 29th Inf Div (Organization) Fort Jackson, S. C. (Place)

I recommend trial of the inclosed charges dated 27 November 1943 against Pvt Lennie O. Bark, 20401234, Co A, 128th Inf by general court-martial.

Warner F. Swinburne
(Signature) *

WARNER F. SWINBURNE
(Name, typed)

Col, 128th Inf, Comdg.
(Grade and organization)

5 Incls.
n/c

* This indorsement should be signed personally by the officer exercising court-martial jurisdiction over the accused, and not by an adjutant or other subordinate.

Loganby, Joe R., 1st Lt, Co A, 128th Inf (Sworn):

I am Commanding Officer of Co A, 128th Inf. On the morning of 28 September 1943 at about 0830 and after the company had gone out to drill, I had Pvt Bark brought up to the orderly room. He was not out with the company. When he came in, I told him, "You get out on that drill field right now." He refused and said he didn't intend to work any more while he was in the Army and that he had been there long enough already. When I saw he wasn't going to obey my order, I ordered him placed in confinement.

Joe R. Loganby
JOE R. LOGANBY
1st Lt, Co A, 128th Inf

Subscribed and sworn to before me
this 29th day of November 1943

Leland V. Neeland
LELAND V. NEELAND
1st Lt, 128th Inf
Investigating Officer

EXHIBIT A (Inv. Off. Report)

Grant, Cass M., 1st Lt, Co A, 128th Inf (Sworn):

On the morning of 28 September 1943, after the company had gone out on the field for drill, someone discovered the accused in the latrine. Lt Loganby called the accused to the orderly room and questioned him as to the reason for not being on the field. I was there at the time. The accused said that he did not intend to go on the field and furthermore that he didn't intend to do any more work. Lt Loganby said, "You go out on the drill field right now." The accused said that he would not and that he had been in the Army long enough and that he didn't like the way it was run. He stated that if he stayed here much longer he would commit suicide.

Cass M. Grant
CASS M. GRANT
1st Lt, 128th Inf

Subscribed and sworn to before me
this 29th day of November 1943

Leland V. Neeland
LELAND V. NEELAND
1st Lt, 128th Inf
Investigating Officer

EXHIBIT B (Inv. Off. Report)

Pitch, Lester R., Sgt, Co A, 128th Inf (Sworn):

I was in charge of quarters on 28 September and was in the orderly room at the time Pvt Bark was called in. The accused refused to obey Lt Loganby's command to go out on the drill field and stated he would not do any more work. He also said that he was tired of the Army and would commit suicide if he stayed here much longer.

Lester R. Pitch
LESTER R. PITCH, 38006411,
Sgt, Co A, 128th Inf

Subscribed and sworn to before me
this 29th day of November 1943

Leland V. Neeland
LELAND V. NEELAND
1st Lt, 128th Inf
Investigating Officer

EXHIBIT C (Inv. Off. Report)

Kelley, Marion D., Jr, Sgt, Co A, 128th Inf (Sworn):

I was present on 28 September 1943 when Lt Loganby said to the accused, "Didn't I tell you that I wanted you on the field?" The accused said "yes." Lt Loganby said something to him about work and the accused said that he didn't intend to work any more.

Marion D. Kelley
MARION D. KELLEY, JR, 18003622.
Sgt, Co A, 128th Inf

Subscribed and sworn to before me
this 29th day of November 1943

Leland V. Neeland
LELAND V. NEELAND
1st Lt, 128th Inf
Investigating Officer

EXHIBIT D (Inv. Off. Report)

Sellins, Charles, 1650th S. U., M. P. Det (Sworn):

On 26 November 1943 I was on patrol duty in Charleston, S. C. Accused was walking along a street in a dirty uniform, so I stopped him and asked him for his pass or furlough, which he said he didn't have. He then told me that they wouldn't let him fight in the Army like he wanted to so he wasn't going back to the Army and work any more. That was all that was said. I didn't say anything more than ask him for a pass before he started to talk.

Charles Sellins
CHARLES SELLINS, 14063281
Sgt, 1650th S. U., M. P. Det

Subscribed and sworn to before me
this 29th day of November 1943

Leland V. Neeland
LELAND V. NEELAND
1st Lt, 128th Inf
Investigating Officer

EXHIBIT E (Inv. Off. Report)

Smith, John, 1st Lt, 128th Inf (Unsworn, by telephone):

I am prison officer of the 128th Infantry. The accused, Bark, was confined in the 128th Infantry Guardhouse on 28 September 1943. On that same afternoon he was absent at roll call and couldn't be found. He was not released by competent authority and did not have my permission to leave. On 26 November 1943 he was returned to confinement at the 128th Infantry Guardhouse.

EXHIBIT F (Inv. Off. Report)

App. 2

ACCUSER'S SUMMARY OF EVIDENCE
in the case of

Bark, Lennie O., 20401234, Pvt, Co A, 128th Inf

1st Lt Joe R. Loganby Comdg Co A, 128th Inf, will testify that the accused was brought before him in the company orderly room on 28 September 1943 for failing to report for drill with his organization; that when commanded to go out on the drill field the accused refused, saying that he had been in the Army plenty long already and that he didn't like the way it was run.

1st Lt Cass M. Grant and Sgt Lester R. Pitch, both Co A, 128th Inf, will corroborate Lt Loganby's testimony, both having been present during the entire conversation.

Sgt Marion D. Kelley, Jr. Co A, 128th Inf, was in the orderly room during part of the conversation and heard Lt Loganby say to the accused, "Didn't I tell you that I wanted you on the field?" to which the accused said "Yes." He also heard Lt Loganby say something about work to which the accused replied that he didn't intend to work any more.

1st Lt John Smith, 128th Inf, will testify that accused, after being confined in the 128th Inf Guardhouse on 28 September 1943, escaped without authority on 28 September 1943 and didn't return until reconfined on 26 November 1943.

Sgt Charles Sellins, 1650th S. U., M. P. Det, Charleston, S. C., will testify that he picked accused up in Charleston, S. C., on 26 November 1943 because he didn't have a pass or furlough, and that accused told him he wasn't going back to the Army to do any more work.

Joe R. Loganby
JOE R. LOGANBY
1st Lt, 128th Inf

Incl. 1

CIVILIAN RECORD
OF

Bark, Lennie O. 20401234 Pvt. Co A, 128th Inf.

Chief of Police of Charleston, S. C., in reply to questionnaire, reports that prior to enlisting accused lived at Charleston, S. C., with his father, his mother having been dead for some years; that accused has married since his enlistment, but he and his wife are separated and she has instituted divorce proceedings; that he completed grade school and three years of high school, then quit school and secured a job as an elevator operator for about 15 months, earning $22.50 per week; and that accused has no police record and that his civilian character is fair.

Joe R. Loganby
(Signature)

JOE R. LOGANBY
(Name typed)

1st Lt, Inf.
(Grade and Organization)

Incl. 5

HEADQUARTERS 29TH INFANTRY DIVISION
Office of the Division Judge Advocate

Fort Jackson, S. C.
1 December 1943

JA 201 Bark, Lennie O. (Enl)

Subject: Recommendation as to disposition of court-martial charges.

To : Commanding General, 29th Infantry Division, Fort Jackson, S. C.

1. The attached charges and allied papers in the case of Private Lennie O. Bark, 20401234, Company A, 128th Infantry, charged with willful disobedience of a lawful order of a superior officer, escape from confinement, and desertion, have been examined.

2. The evidence supports all charges. It shows a flagrant violation of the 64th Article of War. Leadership in the organization of accused has been of consistently high quality and no circumstances appear to mitigate this act of willful disobedience. The remaining two charges, equally well established by the evidence, leave no choice but to recommend trial by general court-martial in order that an adequate sentence may be imposed. The prior record of accused presents nothing in his favor and he has one previous conviction. He appears to be mentally competent.

3. I recommend trial by general court-martial.

Charles E. Taney
CHARLES E. TANEY
Lt Col, JAGD
Division Judge Advocate

1 Incl.
Ltr fr Co A, 128th Inf, 28 Sept 43
w/3 inds, and 5 incls.

App. 2

WAR DEPARTMENT
FORM 336 (Revised)
Form prescribed by
Comptroller General, U. S.
August 17, 1942

D. O. Voucher No. .....
Bureau No. .....

WAR DEPARTMENT

PUBLIC VOUCHER—PERSONAL SERVICES

Compensation for Civilian Witness and/or Reporter, Civilian, or Enlisted Man on Detail

PAID BY

(For use of Paying Office)

THE UNITED STATES, *Dr.*,

To James T. McSorley

Address No. 9, New Western Apts., Columbia, S. C.

For travel performed, services rendered, and/or per diem in lieu of subsistence as: * ☐ WITNESS; ☒ REPORTER-CIVILIAN; ☐ REPORTER-ENLISTED MAN on detail, appearing before:

General Court Martial (Title of court) at Fort Jackson, S. C. (Place)

or giving deposition before ..... (Name of officer) at ..... (Place) Date .....

for use in (Title of court) convened at (Place)

Travel via Privately owned Conveyance (Mode of travel to be used must be specified)

Dates of travel 7 December 1943 and 10 December 1943

Dates of attendance 7 December 1943 and 10 December 1943

Discharged from further attendance 1115 (Hour) 10 December 1943 (Date)

(Attach certified copy of order convening the court and of the subpena)

	AMOUNT	
	DOLLARS	CENTS
For travel from Columbia, S. C. to Fort Jackson, S. C. and return.	$	
44 miles traveled at 5¢ (Rate) per mile (Number of round trips 2)	2	20
..... days at $..... while traveling to and returning from place of attendance		
..... days attendance at $ 5.00 per day	10	00
..... days at $..... per diem in lieu of subsistence		
Additional allowances for reporting as itemized on the reverse hereof	11	86
AMOUNT CLAIMED	$ 24	06

I CERTIFY that the above account is true and just in all respects; that payment therefor has not been received; and that ** I am NOT a salaried employee of the Government nor a detained witness.

(SIGN ORIGINAL ONLY) Payee James T. McSorley

Date 13 Dec 1943 Title Reporter

(Payee will NOT use this space)

Differences .....

.....

.....

Account verified; correct for..... $ .....

(Signature or initials) .....

I CERTIFY that the above account is correct; that the claimant actually performed the services claimed which were authorized pursuant to the attached authority, and was necessarily in attendance at the said proceedings as set forth above; **that at the time of the said travel and attendance he was NOT a salaried employee of the Government nor a detained witness; and that where claim is made for per diem in lieu of subsistence the claimant was in attendance at a point so distant from his residence so as to prohibit return thereto from day to day and no Government transportation was furnished unless shown above.

APPROVED FOR $ 24.06 Howard J. Hitchings

Date 13 Dec 1943 Title Major, Inf., Trial Judge Advocate.

ACCOUNTING CLASSIFICATION (For Completion by Administrative Office)

APPROPRIATION, LIMITATION, OR PROJECT SYMBOL	APPROPRIATION TITLE	LIMITATION OR PROJECT AMOUNT	APPROPRIATION AMOUNT
		$	$

ALLOTMENT SYMBOL	AMOUNT	OBLIGATIONS LIQUIDATED	COST ACCOUNT SYMBOL	COST ACCOUNT AMOUNT	OBJECT OF EXPENDITURE SYMBOL	OBJECT OF EXPENDITURE AMOUNT
	$			$		$

Paid by { Check No. ....., dated ....., 19..... for $..... } on Treasurer of the United States in favor of payee named above.

{ Cash, ... on ....., 19..... (SIGN ORIGINAL ONLY) ..... (Signature of payee) }

*Check mark applicable block.
**When used by enlisted personnel for reporters' fees, delete this phrase.

16—42111-1

ITEMIZED SCHEDULE OF ALLOWANCES CLAIMED

DATE	CHARACTER OF SERVICES RENDERED	RATE	AMOUNT	
	Reporting GCM case of Pvt. Lennie O. Bark, Co. A., 128th Inf., Fort Jackson, S. C., GCM aptd by par. 1, S.O. 261, Hq. 29th Inf. Div., 18 Sept. 43.			
7 Dec 1943	1 hour actually spent in court (1930-2015)	50¢		50
10 Dec 1943	2 hours (0900-1115) actually spent in court	50¢	1	00
	For transcribing notes and for making that portion of the original record which is required to be typewritten, 5,180	20¢ per 100 words	10	36
	TOTAL,		11	86

U. S. GOVERNMENT PRINTING OFFICE 16—42111-3

WAR DEPARTMENT
Form 338a (Revised)
Form prescribed by
Comptroller General, U. S.
August 17, 1944

D. O. Voucher No. .....
Bureau No. .....

WAR DEPARTMENT

PUBLIC VOUCHER—PERSONAL SERVICES

Compensation for Civilian Witness and/or Reporter, Civilian, or Enlisted Man on Detail

PAID BY

(For use of Paying Office)

THE UNITED STATES, *Dr.*,

To James T. McSorley

Address No. 9, New Western Apts., Columbia, S. C.

For travel performed, services rendered, and/or per diem in lieu of subsistence as: * ☐ WITNESS; ☒ REPORTER-CIVILIAN; ☐ REPORTER-ENLISTED MAN on detail, appearing before:

General Court Martial (Title of court) at Fort Jackson, S. C. (Place)

or giving deposition before ..... (Name of officer) at ..... (Place) Date .....

for use in ..... (Name of court) convened at ..... (Place)

Travel via Privately owned conveyance (Mode of travel and route used must be specified)

Dates of travel 7 December 1943 and 10 December 1943

Dates of attendance 7 December 1943 and 10 December 1943

Discharged from further attendance 1115 (Hour) 10 December 1943 (Date)

(Attach certified copy of order convening the court and of the subpena)

	AMOUNT Dollars	Cents
For travel from Columbia, S. C. to Fort Jackson, S. C. and return.	$.....	
44 miles traveled at 5¢ (Rate) per mile (Number of round trips 2)	2	20
..... days at $..... while traveling to and returning from place of attendance		
..... days attendance at $ 5.00 per day	10	00
..... days at $..... per diem in lieu of subsistence		
Additional allowances for reporting as itemized on the reverse hereof	11	86
AMOUNT CLAIMED	$ 24	06

(Payee will NOT use this space)

Differences .....

Account verified; correct for ..... $.....

(Signature or initials) .....

James T. McSorley
13 Dec 1943 Reporter

24.06
13 Dec 1943

MEMORANDUM

Howard J. Hitchings
Major Inf., Trial Judge Advocate

ACCOUNTING CLASSIFICATION (For Completion by Administrative Office)

APPROPRIATION, LIMITATION, OR PROJECT SYMBOL	APPROPRIATION TITLE	LIMITATION OR PROJECT AMOUNT	APPROPRIATION AMOUNT
		$.....	$.....

ALLOTMENT SYMBOL	AMOUNT	OBLIGATIONS LIQUIDATED	COST ACCOUNT Symbol	COST ACCOUNT Amount	OBJECT OF EXPENDITURE Symbol	OBJECT OF EXPENDITURE Amount
	$.....			$.....		$.....

Paid by { Check No. ....., dated ....., 19..... for $..... } on Treasurer of the United States, in favor of payee named above.

{ Cash, ..., on ....., 19..... } (SIGN ORIGINAL ONLY) .....
(Signature of payee)

*Check mark applicable block.
**When used by enlisted personnel for reporters' fees, delete this phrase.

16—42111-1.

ITEMIZED SCHEDULE OF ALLOWANCES CLAIMED

DATE	CHARACTER OF SERVICES RENDERED	RATE	AMOUNT	
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7 Dec 1943	1 hour actually spent in court (1930-2015)	50¢		50
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	For transcribing notes and for making that portion of the original record which is required to be typewritten, 5,180	20¢ per 100 words	10	36
	TOTAL,		11	86

U. S. GOVERNMENT PRINTING OFFICE 16—42111-1

TRANSMITTAL OF RECORD BY TRIAL JUDGE ADVOCATE
(Leave the space above this line for binding)

Fort Jackson, S. C.
(Place)

13 December 1943

201 Bark, Lennie O (Enl)
(Name of accused, last name first)

Subject: Transmittal of Record of Trial.

To: Commanding General, 29th Infantry Division, Fort Jackson, S. C.

Pursuant to paragraph 85c, MCM, there are transmitted herewith the record of trial and accompanying papers in the case of
Pvt Lennie O. Bark, Co A, 128th Inf.
(Grade, name and organization of accused)

Howard J. Hitchings
(Signature)

HOWARD J. HITCHINGS
(Name typed)

Maj. Inf
(Grade and branch)
Trial Judge Advocate.

1 Incl.
Record of trial and
accompanying papers.

RECORD OF TRIAL

(Proper)

of

Bark (Last name) Lennie O. (First name and middle initial) 20401234 (Army serial No.)

Private (Grade) Company A, 128th Infantry (Organization)

Fort Jackson, S. C. (Station)

By

GENERAL COURT MARTIAL

Appointed by the Commanding Officer

29th Infantry Division

Tried at

Fort Jackson, S. C. 7 Dec and 10 Dec, 19 43

Index	Page
Arraignment	4
Pleas	8
Statement by accused	14
Findings	16
Sentence (or acquittal)	17
Proceedings in revision	

TESTIMONY

Name of Witness	Direct	Cross	Redirect	Recross	Court	Recalled
	Page	Page	Page	Page	Page	Page
Smith, 1st Lt., John	6	-	-	-	-	-
Wiley, Major, Arthur J.	7	-	-	-	-	-
Loganby, 1st Lt., Joe R.	9	10	-	-	-	-
Pitch, Sgt., Lester R.	11	11	-	-	12	-
Sellins, Sgt., Charles	12	13	-	-	-	-

1C—38758-1

EXHIBITS, ETC., APPENDED

Description	Number	Page where introduced
Extract Copy of Morning Report	1	12
Extract Copy of Guard Reports	2	12
Record of Previous Convictions	3	16

RECEIPT FOR COPY OF RECORD

I hereby acknowledge receipt of a carbon copy of the above described record of trial, delivered to me at Fort Jackson, South Carolina

this 13th day of December, 19 43.

Lennie C. Bark
(Signature of accused)

16—36759-1

PROCEEDINGS OF A GENERAL COURT MARTIAL

which convened at Fort Jackson, South Carolina pursuant to the following order:

HEADQUARTERS 29TH INFANTRY DIVISION
Fort Jackson, South Carolina

18 September 1943

Special Orders)
:
No. 261)

EXTRACT

1. A GCM is aptd to meet at Fort Jackson, S. C., at 1900 on 20 Sept 43, or as soon thereafter as practicable, for the trial of such persons as may properly be brought before it:

DETAIL FOR THE COURT

LT COL WALKER E. UPCHURCH, 024163, 116th Inf
MAJ MARK L. HAWKINS, 0311262, 131st Eng Bn, Law Member
CAPT LOWRIE D. CORY, 0301687, 182d QM Co
1ST LT HARTLEY VAN KLEEK JR., 0461238, 116th Inf
1ST LT PHILLIP C. SMASHEY, 0631301, 128th Inf
1ST LT ELIHU B. STALK, 0634812, 230th FA Bn
2D LT GEORGE S. TROUTLINE, 0486201, Hq Co, 29th Inf Div
2D LT PAUL H. WENTE, 0516236, 128th Inf

MAJ HOWARD J. HITCHINGS, 0341266, Hq 29th Inf Div, Trial JA
1ST LT CLEM G. McWAIN, 0496822, 116th Inf, Asst Trial JA

MAJ THOMAS I. TRUEBLOOD, 0201366, 128th Inf, Def Counsel
1ST LT HARRISON PROUDFOOT, 0386998, 193d FA Bn, Asst Def Counsel

All unarraigned cases in the hands of the Trial JA of GCM aptd by par 18, SO 161, this Hq, 10 June 43, will be brought to trial before the court hereby aptd.

* * * * * *

By command of Major General SAMSON:

G. H. SMOTHERS
Col GSC
C of S

OFFICIAL:

Jeffrey W. Bertoli
JEFFREY W. BERTOLI
Maj AGD
Adj Gen.

632260°—45——14

App. 2

HEADQUARTERS 29TH INFANTRY DIVISION
Fort Jackson, South Carolina

30 September 1943

Special Orders
No. 273

EXTRACT

* * * * * * *

11. CAPT ODELL W. WOOLLEY, 0316622, 116th Inf is detailed as a member of the GCM aptd by par 1, SO 261, this Hq, dated 18 Sept 43 vice CAPT LOWRIE D. CORY, 0301687, 182d QM Co reld.

* * * * * * *

By command of Major General SAMSON:

G. H. SMOTHERS
Col GSC
C of S

OFFICIAL:

Jeffery W. Bertoli
JEFFREY W. BERTOLI
Maj AGD
Adj Gen.

Fort Jackson, South Carolina
(Place)

7 December, 1943
(Date)

ORGANIZATION OF THE COURT

The court met pursuant to the foregoing order.... at .....1930..... o'clock ___ M.

PRESENT

Lt Col Walker E. Upchurch, 118th Inf
Maj Mark L. Hawkins, 131st Eng Bn, Law Member
Capt Odell W. Woolley, 116th Inf
1st Lt Hartley Van Kleek, Jr. 116th Inf
1st Lt Phillip C. Smashey, 128th Inf
1st Lt Elihu B. Stalk, 230th FA Bn
2d Lt Paul H. Wente, 128th Inf

Maj Howard J. Hitchings, Hq 29th Inf Div, Trial JA

Maj Thomas I. Trueblood, 128th Inf, Def Counsel
1st Lt Harrison Proudfoot, 193d FA Bn, Asst Def Counsel

ABSENT

2d Lt George S. Troutline, Hq Co, 29th Inf Div (Excused by appointing authority)
1st Lt Clem C. McWain, 116th Inf, Asst Trial JA (Change of station)

The court proceeded to the trial of Private Lennie O. Bark
(Grade) (Name)

20401234 Company A, 128th Infantry
(Army serial number) (Organization)

who, on appearing before the court, was asked by the trial judge advocate whom he desired to introduce as counsel.

The accused stated he desired to be defended by the defense counsel and the assistant defense counsel.

James T. McSorley was sworn as reporter.

PROSECUTION TO ACCUSED: Do you want a copy of the record of your trial?

ACCUSED: I do.

The trial judge advocate then announced the names of the members of the court present and absent.

The trial judge advocate then announced the names of the accuser, the investigating officer, officers who forwarded the charges and any members of the court who would be called as witnesses for the prosecution as follows: The charges were preferred by First Lieutenant Joe P. Loganby, investigated by First Lieutenant Leland V. Neeland, and forwarded by Colonel Warner E. Swinburne, and no member of the court will be a witness for the prosecution.

PROSECUTION: If any member of the court is aware of any facts which he believes to be a ground of challenge by either side against any member, it is requested he state such facts.

PRESIDENT: Apparently there are none.

PROSECUTION: The prosecution has no challenges, for cause but challenges Captain Odell W. Woolley peremptorily.

Captain Woolley was excused and withdrew.

PROSECUTION TO ACCUSED: You now have the right to challenge any member or members of the court for cause, and any one member, other than the law member, peremptorily.

DEFENSE: The defense challenges 1st Lt Phillip C. Smashey for cause on the ground that he has expressed a positive and definite opinion as to the guilt of the accused on the original charge.

1st LT SMASHEY: It is true that I was in Company A, 128th Infantry, during the time of the alleged offense and discussed the charge but I have no clear recollection of the details of the case or of expressing an opinion as to the guilt of the accused. However, it is perfectly possible that I might have expressed such an opinion.

PRESIDENT: The court will be closed.

The challenged member withdrew, the court was closed and voted upon the challenge by secret written ballot, and upon being opened, the president announced that the challenge was sustained and the challenged member thereupon withdrew.

The accused was then asked if he objected to any other member present, to which he replied in the negative.

The members of the court and the personnel of the prosecution were then ... sworn ....

ARRAIGNMENT

The accused was then arraigned upon the following charges and specifications:

CHARGE : Violation of the .....64th..... Article of War.

SPECIFICATION : In that, Private Lennie O. Bark, Company A, 128th Infantry, having received a lawful command from First Lieutenant Joe R. Loganby, his superior officer, to report on the drill field for duty, did, at Fort Jackson, South Carolina, on or about 28 September 1943, willfully disobey the same.

CHARGE II: Violation of the 69th Article of War.

Specification: In that Private Lennie O. Bark, Company A, 128th Infantry, having been duly placed in confinement in the 128th Infantry Guardhouse, Fort Jackson, South Carolina, on or about 28 September 1943, did, at Fort Jackson, South Carolina, on or about 28 September 1943, escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 58th Article of War.

Specification: In that Private Lennie O. Bark, Company A, 128th Infantry, did, at Fort Jackson, South Carolina, on or about 28 September 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Charleston, South Carolina, on or about 26 November 1943.

/s/ Joe R. Loganby
(Signature of accuser (TYPED))
JOE R. LOGANBY
(Name (TYPED))
1st Lt, 128th Inf
(Grade, organization, or arm or service)

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser, this 27th day of November, 19 43, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he *has personal knowledge of the matters set forth in specification/ of Charge I
(Indicate by specification and charge numbers)
; and *has investigated the matters set forth in specifications of Charges II and III
(Indicate by specification and charge numbers)
, and that the same are true in fact, to the best of his knowledge and belief.

/s/ Bradley M. McGinty
(Signature (TYPED))
BRADLEY M. McGINTY
(Name (TYPED))
Capt, 128th Inf
(Grade and organization)
Adjutant
(Official character, as summary court, notary public, etc.)

1st IND.

Headquarters 29th Inf Div, Fort Jackson, S. C. 1 Dec, 1943
(Place) (Date)

Referred for trial to Maj Howard J. Hitchings, Hq 29th Inf Div
(Grade, name, and organization of trial judge advocate)

Trial Judge Advocate of general court-martial appointed by paragraph 1, Special Orders No. 261, Headquarters 29th Inf Div 18 September, 1943 as amended by paragraph 11, Special Orders No. 273, Headquarters 29th Inf Div, 30 September 1943.

By command of Major General SAMSON:
(Grade and name of commanding officer)

/s/ Jeffrey W. Bertoli, *Adjutant.*
JEFFREY W. BERTOLI
Maj, AGD
Adjutant General

~~The accused then pleaded as follows:~~

~~To Specification , Charge .~~

~~To Charge .~~

DEFENSE: The actions and demeanor of the accused during the past few days have raised a doubt in my mind as to his existing mental condition. He has behaved peculiarly and I have been unable to get him to cooperate properly in the preparation of his defense. Whether his conduct is due to an unstable mental condition I have been unable to determine. In the interest of justice I believe that the court should inquire into his mental condition. I now desire to call a witness in support of the statement I have just made and then to move that the court recommend to the appointing authority that the mental condition of accused be inquired into and a report made, and that pending such inquiry the court adjourn to meet again at the call of the president.

LAW MEMBER: Subject to objection by any member the witness may be called.

1st Lieutenant John Smith, 128th Infantry, a witness for the defense was sworn and testified as follows:

*Strike out phrase not applicable.

DIRECT EXAMINATION

Questions by Prosecution:

Q. State your name, grade, organization and station.
A. John Smith, First Lieutenant, 128th Infantry, Fort Jackson, S. C.

Q. Do you know the accused? If so, state his name.
A. I do, Lennie O. Bark.

Q. Is he in the military service of the United States?
A. Yes, sir.

Q. What is his grade and organization?
A. Private, Company A, 128th Infantry.

Questions by Defense:

Q. How long have you known him?
A. Since September 28th 1943.

Q. What has been your relation to the accused since that date?
A. I am the prison officer of the 128th Infantry and the accused was confined in the regimental guardhouse, which is under my jurisdiction.

Q. Have you observed the actions and demeanor of the accused during his confinement?
A. I have.

Q. State what you observed.
A. The actions and demeanor of the accused have been out of the ordinary. He has been sullen and morose, has shown no interest in what goes on about him and has failed to cooperate with his counsel in preparing his case for trial. He has been erratic in his actions and unreliable in his work.

DEFENSE: I renew my motion for an adjournment and a recommendation by the court to the appointing authority for examination of accused by a medical board or officer to inquire into and give a report on the mental condition of the accused.

LAW MEMBER: Subject to objection by any member of the court the motion of the defense counsel is granted.

The court then at 2015 on 4 December 1943, adjourned to meet at the call of the president.

Howard J. Hitchings

HOWARD J. HITCHINGS
Major, Hq. 29th Inf. Div.
Trial Judge Advocate.

Fort Jackson, South Carolina

10 December 1943

The court met, pursuant to adjournment at 0900, all the personnel of the court, prosecution and defense, who were present at the close of the previous session in this case, being present.

The accused and reporter were also present.

PROSECUTION: Second Lieutenant George S. Troutline, who was detailed as a member of the court in the appointing order, is now present. The prosecution does not challenge him. The accused now has an opportunity to exercise his rights as to challenge, for cause or peremptorily, to Lieutenant Troutline.

DEFENSE: The accused does not desire to challenge Lieutenant Troutline, either for cause or peremptorily.

Lieutenant Troutline was sworn as a member of the court.

The record of proceedings of 7 December 1943 in this case was then read to the new member.

PROSECUTION: After the adjournment of the court on 7 December 1943, the appointing authority at the request of the court, appointed Major Arthur J. Wiley, Medical Corps, psychiatrist for 29th Infantry Division, to inquire into and report on the mental condition of the accused. The major is now available as a witness.

PRESIDENT: Major Wiley will be called as a witness.

Major Arthur J. Wiley, Medical Corps, a witness for the court was sworn and testified as follows:

DIRECT EXAMINATION

Questions by prosecution:

Q. State your name, grade, organization and station.
A. Arthur J. Wiley, Major, Medical Corps, 29th Infantry Division, Fort Jackson, South Carolina. I am division psychiatrist.

Q. Do you know the accused? If so, state his name.
A. I do; Lennie O. Bark.

Q. Is he in military service of the United States?
A. He is.

Q. What is his grade and organization?
A. Private, Company A, 128th Infantry.

Q. Directing your attention to the period between 7 December and 9 December 1943 state whether or not you saw the accused during that period.
A. Yes, I saw him several times.

Q. Did you during that period have occasion to examine the accused with reference to his mental condition?
A. Yes, sir.

Q. Mayor, based upon your examination, what is your opinion as to the present mental condition of the accused?
A. The accused is now mentally sound and able to intelligently cooperate in his own defense.

Q. In your opinion at the time of the alleged offenses did the accused know the difference between right and wrong?
A. Yes, sir.

Q. At that time was the accused in your opinion able to adhere to the right?
A. Yes, sir.

The defense declined to cross-examine the witness.

There being no further questions, the witness was excused and withdrew.

DEFENSE: We have no evidence to present on the mental issue.

LAW MEMBER: Subject to objection by any member of the court, it is the ruling of the law member that at the times of the commission of the several offenses charged and at the present time, the accused is not suffering from any mental disease or defect, can distinguish between right and wrong and adhere to the right, and that the trial proceed.

PROSECUTION: Has accused any special pleas to offer?

DEFENSE: No, sir.

PRESIDENT: The accused will plead to the general issue.

The accused pleaded as follows:

To the Specification, Charge I: Not Guilty.
To Charge I: Not Guilty.
To the Specification, Charge II: Guilty.
To Charge II: Guilty.
To the Specification, Charge III: Guilty, except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", of the excepted words not guilty, of the substituted words guilty.

To Charge III: Not guilty, but guilty of violation of the 61st Article of War.

PRESIDENT: The law member will explain to the accused the meaning and effect of his plea of guilty to specification of Charge II and Charge II, and of his plea of guilty to absence without leave and violation of the 61st Article of War under Charge III and its specification.

The law member explained to the accused the effect of his pleas of guilty.

PRESIDENT: Do you still desire to plead guilty to specification of Charge II and Charge II and to absence without leave in violation of the 61st Article of War under Charge III and its specification.

ACCUSED: Yes, sir.

By direction of the court the following matters were read to the court by the trial judge advocate, to wit: None.

The trial judge advocate then made an opening statement to the court.

TESTIMONY FOR THE PROSECUTION

1st Lt Joe R. Loganby, Co A, 128th Inf, a witness for the prosecution, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by prosecution:

Q. State your full name, grade, organization, and station.

A. Joe R. Loganby, 1st Lt, Co A, 128th Inf, Fort Jackson, S. C.

Q. Do you know the accused? If so, state his name.

A. I do; Lennie O. Bark

Q. Is he in the military service of the United States?

A. Yes, Sir

Q. What is his grade and organization?

A. Private, Company A, 128th Infantry

Q. What is your official connection with Company A, 128th Infantry?
A. I am Company Commander.

Q. How long have you been the commanding officer of Company A, 128th Infantry?
A. Since 15 August 1943.

Q. Lieutenant Loganby, did you have occasion to see the accused, Private Bark, on 28 September 1943?
A. Yes, sir.

Q. What were the circumstances?
A. Well sir, on the morning of the 28th at about 0830, the charge of quarters came into the orderly room and said that Bark was down in the latrine. The company was out drilling at the time.

DEFENSE: Objection. What anyone told this witness outside of the presence of the accused is hearsay.

LAW MEMBER: Objection sustained. The answer will be stricken.

Q. Just state what happened.
A. Well, I told the charge of quarters to go down and bring Bark up to the orderly room, and in a few minutes he was brought up.

Q. State what was said if anything by you to the accused when he came to the orderly room.
A. I said, "You get out on the drill field right now."

Q. How far were you from the accused at that time?
A. I would say about five feet. He was just across my desk from me.

Q. In what tone of voice did you speak to him?
A. A little louder than I am speaking now.

Q. What, if anything, did he say or do in reply?
A. He said "No, I won't. I don't intend to work any more while I am in the Army."

Q. What else if anything did he say?
A. He said that he didn't like the way the Army was run.

Q. Tell the court whether the accused obeyed your command.
A. He did not. He just stood there and said what I already told you.

Q. What did you do next?
A. I ordered him placed in confinement in the 128th Infantry guardhouse.

CROSS EXAMINATION

Questions by defense:

Q. Didn't the accused say that he wanted to fight?
A. Yes, sir.

Q. What did he say on the 28th in that connection?

A. He said that he didn't like the way the Army was run: that he joined the Army to fight and had been setting on the post two years, or been here too long; I believe he didn't say years or months, but that he

had been here too long; if he wasn't going to fight, he didn't see why he had to work and he didn't see any good in working, and he wasn't going to work any more.

There being no further questions the witness was excused and withdrew.

Sergeant Lester R. Pitch, Company A, 128th Infantry, Fort Jackson, South Carolina, a witness for the prosecution, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by prosecution:

Q. State your name, grade, organization and station.
A. Lester R. Pitch, Sergeant, Company A, 128th Infantry, Fort Jackson, South Carolina.

Q. Do you know the accused? If so, state his name.
A. Yes, sir. He's Lennie Bark.

Q. Is he in the military service?
A. Yes, sir.

Q. What is his grade and organization?
A. He is a private in our organization, Company A, 128th Infantry.

Q. Were you on duty with Company A, 128th Infantry, on the morning of 28 September 1943?
A. Yes, sir.

Q. Where?
A. In the company orderly room. I was in charge of quarters.

Q. Did you see the accused that morning?
A. Yes, sir.

Q. Were you present when the company commander gave him an order?
A. Yes, sir.

Q. What, if anything, did the company commander say to the accused?
A. He told him to get right out on the drill field.

Q. Did he obey the Lieutenant's order?
A. He did not, sir.

Q. What, if anything, did the accused say to Lieutenant Loganby in response to his command?
A. He said he wasn't going to work and that the Army was all imagination and he didn't like the way it was run.

CROSS EXAMINATION

Questions by defense:

Q. Did the accused make any attempt to or start to carry out the order that you say you heard the commanding officer give him?
A. Well, sir, he hesitated just a moment and then said he refused to do it.

Q. To whom did he make this statement?
A. To Lieutenant Loganby, sir.

Q. Were you present when the accused made statements to Lieutenant Loganby about wanting to fight? What were they?
A. Yes, sir. He said that he joined the Army to fight and that he was willing to fight if he could go across, but he didn't intend to work any more as long as he stayed here; that he was tired of working.

EXAMINATION BY THE COURT

Q. Where were you in the orderly room in reference to Lieutenant Loganby's office?
A. Just outside the door, approximately five feet from Bark.

There being no further questions the witness was excused and withdrew.

PROSECUTION: (After showing document to defense) The prosecution offers into evidence as Prosecution's Exhibit 1 an extract copy of the morning report of Company A, 128th Infantry, duly authenticated by its commander and legal custodian, 1st Lt. Joe R. Loganby, for the months of September and November, 1943, containing entries concerning the accused.

DEFENSE: Objected to as not the best evidence and hearsay. The original should be produced. Also the company commander who testified a few minutes ago could have been examined concerning the entries.

LAW MEMBER: Objection overruled. The document is admitted into evidence and marked Prosecution's Exhibit 1.

PROSECUTION: (After showing document to defense) The prosecution next offers into evidence as Prosecution's Exhibit 2 an extract copy of the guard reports of the 128th Infantry duly authenticated by the regimental adjutant, its legal custodian, for the months of September and November, 1943, containing entries concerning the accused.

DEFENSE: Same objection.

LAW MEMBER: Overruled. The document will be admitted and marked Prosecution's Exhibit 2.

Sergeant Charles Sellins, 1650th Service Unit, Military Police Detachment, a witness for the prosecution, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by prosecution:

Q. State your name, grade, organization and station.
A. Charles Sellins, Sergeant, 1650th Service Unit, M. P. Detachment, Charleston, South Carolina.

Q. Do you know the accused? If so, state his name.
A. I do. Lennie O. Bark, Company A, 128th Infantry.

Q. What is your present duty assignment?
A. On military police duty, Charleston, South Carolina.

Q. Tell the court how you know this accused.
A. On the morning of 26 November 1943, I was on patrol duty in Charleston, South Carolina. I saw the accused walking up the street in a dirty uniform. I stopped him and asked him for his pass. He said he didn't have one. I asked him for a furlough and he said he hadn't one. Then he told me that he came into the Army to fight and they wouldn't let him fight so he wasn't going back to the Army and work.

DEFENSE: I move that the statement made by the accused to Sergeant Sellins be stricken out on the ground that it amounts to a confession; that Sergeant Sellins at the time the statement was made was the superior of the accused, and that no warning of his rights was given to the accused by the Sergeant.

PROSECUTION: Before the law member rules on this motion, I desire to ask the witness some additional questions.

LAW MEMBER: You may proceed.

Q. Did you warn the accused of his rights?
A. No, sir.

Q. Did you threaten him?
A. No, sir.

Q. Did you promise him anything?
A. No, sir.

Q. How was this statement made?
A. He made the statement without any urging of any kind on my part.

Q. Why didn't you warn him?
A. When he told me this I didn't know he was even AWOL. He just made the statement to me right after I asked him for his furlough papers.

LAW MEMBER: The statement made by the accused to the witness was voluntary. The motion to strike is denied.

Q. Sergeant Sellins, then what did you do?
A. I found out he was from Company A of 128th Infantry and took him down to police station.

CROSS EXAMINATION

Q. The accused was dressed in his uniform, wasn't he?
A. Yes, sir.

There being no further questions, the witness was excused and withdrew.

PROSECUTION: The prosecution rests.

DEFENSE: The defense moves for a finding of not guilty of the first charge and its specification on the ground that the evidence before the court is not legally sufficient to support a finding of guilty of such charge and specification. One of the elements of proof of willful disobedience, as given in paragraph 134b, Manual for Courts-Martial, 1928 (corrected April 30, 1943), is that accused willfully disobeyed such command, and this element has not been proven in this case. The evidence does not establish the guilt of the accused.

LAW MEMBER: Subject to objection by any member of the court the defense's motion for a finding of not guilty of the first charge and its specification is denied.

LIEUTENANT WENTE, a member: I object.

PRESIDENT: The court will be closed.

The court was closed and upon being opened, the president announced that the motion of the defense for a finding of not guilty of Charge I and its specification was denied.

DEFENSE: The defense has explained to the accused his rights as a witness, and he desires to take the stand and be sworn as a witness confining his testimony to Charge I and its specification.

The law member at the request of the president again explained to accused his rights and asked accused what he desired to do.

ACCUSED: I desire to be sworn as a witness and testify only to the charge of disobedience of orders.

The accused at his own request was therefore sworn and testified as follows:

DIRECT EXAMINATION

Questions by prosecution:

Q. State your name, grade, organization and station.
A. Lennie O. Bark, Company A, 128th Infantry, Fort Jackson, S.C., Private.

Q. Are you the accused in this case?
A. Yes, sir.

Questions by the defense:

Q. Private Bark, I want you to tell the court exactly what happened on 28 September that concerns this charge before the court.
A. That morning we had the usual routine and I was detailed to drive a truck into Columbia, South Carolina, which isn't very far from Camp.

Q. Then what happened?
A. I drove to Columbia and returned in about half an hour and when I got back, I came and picked up the rake and started raking company street, at the time I was caught on the company street with my rake in my hand. This was reported to Lieutenant Loganby, and he sent a sergeant down and ordered me to roll a wheelbarrow up and down company street full of dirt, and I rolled the wheelbarrow up to the orderly room and got permission to see the company commander. I went and talked to him and told him I was willing to work in another branch of the service if I could get transferred across seas, if I could get that.

Q. Did Lieutenant Loganby tell you to go out on the field?
A. Not that day, sir, I don't think. No, sir, not that day. He gave me orders to roll the wheelbarrow up and down the company street.

Q. What did you tell Lieutenant Loganby about wanting to go overseas and fight?
A. I told him I had been in the company long enough to get a chance to fight.

Q. Do you want to go across seas now and fight?
A. Yes, sir.

CROSS EXAMINATION

Questions by prosecution:

Q. Now you haven't told the court what you told the Lieutenant when you went into the orderly room. Did you tell him you weren't going to work anymore as long as you were in the Army?
A. Not like that.

Q. Well what did you tell him?
A. I was intending to work. I would if I was in a different branch of the service I would like to work.

Q. What branch of the service were you talking about?
A. Noncombatant.

Q. I thought you told the court a few minutes ago you didn't want to work but you wanted to fight.
A. I do, sir.

Q. You don't want to go to noncombatant troops, then?
A. No, sir, not if I can go across seas.

Examination by the court:

Q. What were you doing in Charleston, South Carolina on 26 November 1943?

DEFENSE: The defense objects to that question. The accused has limited his testimony to the first charge and specification and did not give any testimony with reference to Charleston on the 26th of November and it does not have a bearing upon the testimony of the witness on direct examination.

LAW MEMBER: A member of the court may ask the accused only those questions that would have been admissible on cross-examination by the prosecution. This question relates to an offense not testified by accused. Objection sustained.

There being no further questions the witness was excused.

DEFENSE: It is stipulated by and between the prosecution, defense and accused that if Captain William E. Shannahan, Company C, 128th Infantry, were present in court and sworn as a witness, he would testify that he was the company commander of the accused from 23 November 1942 to the 30th of July, 1943, that while the accused was under his command his character was excellent, that he never had any trouble with accused at all.

PROSECUTION: I agree to this stipulation.

LAW MEMBER: Subject to the objection of any member of the court, the stipulation will be accepted.

DEFENSE: The defense rests.

The prosecution announced that it had no further testimony to offer.

The defense had no further testimony to offer.

Oral arguments were then made by the defense and prosecution.

FINDINGS

Neither the prosecution nor the defense having anything further to offer, the court was closed and voted in the manner prescribed in Articles of War 31 and 43. Upon ....secret..... written ballot, ...two-thirds..... of the members present at the time the vote was taken concurring in each finding of guilty, the court finds the accused:

Of all Specifications and Charges: Guilty.

PREVIOUS CONVICTIONS, ETC.

The court was opened and the trial judge advocate stated, in the presence of the accused and his counsel, that he had ....some..... evidence of previous convictions, which
(No or some)
was read to the court and is attached as Exhibit ...3.....
(Cross out if inappropriate)

The trial judge advocate read the data as to age, pay, service, and data as to restraint of accused as shown on the charge sheet as follows:

Age 21 5/12. Pay, $..50.00..... per month. Allotments to
(Base pay plus pay for length of service)
dependents, $Class F $22.00.... per month.

Government insurance deduction, $.....None..... per month.

Data as to service: No prior service. Enlisted Charleston, S. C., on 13 November 1940 for three years. Service extended by Service Extension Act of 1941.

Data as to restraint of accused: Confined 28 September 1943, 128th Infantry Guardhouse, Fort Jackson, S. C. Reconfined 26 November 1943 after escape, 128th Infantry Guardhouse, Fort Jackson, S. C.
Prosecution to accused: Is that data correct?

Accused: Yes, sir.

SENTENCE

The court was closed, and upon secret written ballot ~~two-thirds~~ of the members present at the time the vote was taken concurring, sentences the accused to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for ten years.

The court was opened and the president announced the findings and sentence.

The court then, at 1115 o'clock, M., on 10 December, 19 43 adjourned to meet at the call of the president.

AUTHENTICATION OF RECORD

Mark L. Hawking
MARK L. HAWKING
Maj, CE
—President.

A member in lieu of the president because of his absence.

Howard J. Hitchings
HOWARD J. HITCHINGS
Maj, Inf
Trial Judge Advocate.

I examined the record before it was authenticated.

Thomas I. Trueblood
THOMAS I. TRUEBLOOD
Maj, Inf
Defense Counsel.

HEADQUARTERS 29TH INFANTRY DIVISION

Fort Jackson, South Carolina
15 December 1943

In the foregoing case of Private Lennie O. Bark, 20401234, Company A, 128th Infantry, the sentence is approved but five years of the confinement imposed are remitted. As thus modified the sentence will be duly executed, but the execution of that portion thereof adjudging dishonorable discharge is suspended until the soldier's release from confinement. The Fourth Service Command Rehabilitation Center, Fort Jackson, South Carolina, is designated as the place of confinement.

Lew A. Samson

LEW A. SAMSON,
Major General, U.S. Army,
Commanding.

Bark Lennie O 20401234
(Last name) (First name) (Middle initial) (Army serial number)

Pvt Co A, 128th Inf
(Grade) (Company, regiment, and arm or service)

EXTRACT COPY OF MORNING REPORT OF—

Company A, 128th Infantry
(Company, troop, battery, or detachment) (Regiment or other organization)

28 Sept 43

Bark, Lennie O. 20401234 Pvt
Dy to conf 128th Inf gd house awaiting trial charged with willful disobedience (AW 64)

Bark, Lennie O. 20401234 Pvt
Conf to AWOL 1700

/s/ Joe R. Loganby
1st Lt, Inf
26 Nov 43

Bark, Lennie O. 20401234 Pvt
AWOL to conf 128th Inf gd house 1400 awaiting trial charged with escape fr conf and desertion.

/s/ Joe R. Loganby
1st Lt, Inf.

Co A, 128th Inf. Fort Jackson, S.C. 27 Nov 43
(Complete designation of command) (Station) (Date)

I, Joe R. Loganby, 1st Lt. Inf, certify
(Name, grade, and arm or service)

that I am the commanding officer of Co A, 128th Inf and official custodian of the morning reports
(Complete designation of command)

of said command, and that the foregoing is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report of said command submitted at Fort Jackson, S. C.
(Station)

for the dates indicated in said copy which relates to

Lennie O. Bark, 20401234, Pvt, Co A, 128th Inf
(Full name, Army serial number, grade and organization of person referred to in extract copy)

Joe R. Loganby
(Signature)

1st Lt. Inf
(Grade and arm or service)

(See AR 615-800)
W. D., A. G. O. Form No. 44
10 July 1943

16—36247-1 U. S. GOVERNMENT PRINTING OFFICE

PROSECUTIONS'S EXHIBIT 1

EXTRACT COPY OF GUARD REPORTS OF

128th Infantry

28 Sept 1944

No.	Name	Co	Regt	Confined Authority	Date	Charge
*	*	*	*	*	*	*
	Confined during tour of 27-28 Sept 44.					
12	Bark, Lennie O.	A	128th Inf	CO Co A	28 Sept 44	AW 64

Escaped, Garrison Prisoner Bark, 12, 1700.

26 Nov 44

Reconfined, Garrison Prisoner Bark, 3, 1400.

Headquarters 128th Infantry, Fort Jackson, S. C., 27 November 1943.

I, Capt Bradley M. McGinty, Inf, certify that I am the adjutant of 128th Inf and official custodian of the guard reports of said command, and that the foregoing is a true and complete copy of that part of the guard report of said command submitted at Fort Jackson, S. C., for the dates indicated in said copy which relates to Lennie O. Bark, 20401234, Pvt, Co A, 128th Inf.

Bradley M. McGinty

BRADLEY M. McGINTY
Capt, Inf
Adjutant

PROSECUTION'S EXHIBIT 2

RECORD OF PREVIOUS CONVICTIONS

EXTRACT COPY OF SERVICE RECORD
OF

Bark	Lennie O	20401234	Pvt	Co A, 128th Inf.
(Last name)	(First name and middle initial)	(ASN)	(Grade)	(Organization)

RECORD OF TRIALS BY COURTS-MARTIAL

Sum CM 96th AW 3 January 1943 Drunk and disorderly
(Date of offense) (Synopsis of specifications)

in camp.

Sentence announced and adjudged 6 January 1943.
Sentence as approved CHL for 1 month and forf. $33. Approved 7 January 1943
I certify the above is correct.

/s/ Daniel E. O'Gara 1st Lt. 128th Inf
Name, grade and organization
Personnel Officer

CM AW 1943 .
(No.) (Date of offense) (Synopsis of specifications)

Sentence announced and adjudged 19__.
Sentence as approved . Approved 19__
I certify the above is correct.

Name, grade and organization

128th Infantry	Fort Jackson, S. C.	27 November 1943
(Designation of command)	(Station)	(Date)

I certify that I am the official custodian of the Service Record of the above-named soldier and that the foregoing is a true copy of entries therein relating to previous convictions.

Daniel E. O'Gara
(Signature)

DANIEL E. O'GARA
(Name typed)

1st Lt. 128th Inf
(Grade and Organization)
Personnel Officer

PROSECUTION EXHIBIT 3

APPENDIX 3

RECORD OF TRIAL BY SPECIAL COURT-MARTIAL

INTRODUCTION

This appendix contains a specimen record of trial by special court-martial as it would be forwarded by the reviewing authority to the officer exercising general court-martial jurisdiction over the command. (See par. 141b, *supra.*) Suggested forms for a check sheet and chronology sheet have been included, but it should be noted that the use of these forms is optional and not required.

The record of trial and the special court-martial order have been printed in usual book form. When actually prepared, if the special court-martial order and record of trial by special court-martial are typewritten on both sides of the paper, they should be prepared so that the reverse side of each page can be read by turning up the bottom of the page.

RECORD OF TRIAL
of

Rentland (Last name) John M. (First name and middle initial) 36126705 (Army serial number)

Pvt (Rank) Sv Btry, 359th FA Bn (Organization)

Fort Sill, Okla. (Station)

by

SPECIAL COURT-MARTIAL
Appointed by the Commanding Officer of

359th Field Artillery Battalion

Tried at Fort Sill, Okla.

On 28 November 19 43

Days awaiting trial
(In arrest or confinement): 7

1st Ind.

To: Commanding General, 36th Infantry Division

Fort Sill, Okla. 3 December, 19 43

Forwarded in compliance with paragraph 87c, M.C.M.
For the Commanding Officer:
C. V. Tucker

C. V. TUCKER,
Capt, FA,
(Adjutant)

Received,
Days awaiting the record (after date of trial):
Acting by Commanding General under par. 91, M. C. M.:

Modification of sentence ordered

Letter to appointing authority

Record filed without comment

(Examiner) Division JA

Record of Trial, S.C.M.,--Cover
File Clerk

SPECIAL COURT-MARTIAL CHECK SHEET

RENTLAND, JOHN M.	36126705	Pvt	Sv Btry, 359th FA Bn
(Name)	(ASN)	(Rank)	(Organization)

RECORD	Yes	No
1. Is the chronology sheet properly filled out, including explanations of all excessive delays?	✓	
2. Is the record properly arranged?	✓	
3. Are all orders showing membership of the court appended to the record?	✓	
4. Does the record show place, date and hour the court convened? (App. 7, MCM)	✓	
5. Are absent members listed, or if none are absent, does the record so state? (App. 7, MCM)	✓	
6. Was the accused given an opportunity to challenge members of the court? (Pars. 57 and 58, MCM)	✓	
7. Were the members of the court and personnel of the prosecution sworn?	✓	
8. Were at least three members of the court present at all times throughout the trial?	✓	
9. Are pleas of accused regularly entered? (Pars. 64 and 70, App. 6, MCM)	✓	
10. Were all the witnesses sworn? (App. 6, MCM)	✓	
11. After each recess and adjournment are the personnel of the court, prosecution, defense and accused accounted for? (App. 6, MCM)		
12. Are the findings in proper form?	✓	
13. Does the evidence sustain the findings of the court?	✓	
14. Is the sentence in proper form? (App. 9, MCM)	✓	
15. Is the sentence within the maximum?	✓	
16. Is the hour and date of any adjournment shown? (App. 6, MCM)	✓	
17. Is the record properly authenticated? (App. 6, MCM)	✓	
18. Does the record show that Defense Counsel has examined the record? (Par. 45b, MCM)	✓	
19. Is the action of the reviewing authority in proper form? (Par. 87, MCM)	✓	
20. Are all erasures and interlineations in the record properly initialed? (App. 6, MCM)	✓	
21. Is the date of the SCMO the same as the action of the Reviewing Authority? (Par. 87d, MCM)	✓	
22. Are the orders appointing the court cited in the SCMO? (App. 11, MCM)	✓	
23. Are the accused's name, grade, serial number and organization correctly shown in the SCMO? (App. 11, MCM)	✓	
24. Are all charges and specifications correctly copied into the SCMO?	✓	
25. Are the pleas, findings and sentence correctly copied into the SCMO?	✓	

SPECIAL COURT-MARTIAL ORDER	Yes	No
26. Does the SCMO indicate that previous convictions, if any, were considered? (App. 11, MCM)	✓	
27. Is the date of the adjudging of the sentence, or the announcement of an acquittal, shown? (Par. 87d, MCM)	✓	
28. Is the action of the Reviewing Authority correctly shown on the SCMO?	✓	

C. V. Tucker
C. V. TUCKER
Capt, FA
Adjutant

RECORD OF TRIAL

BY

SPECIAL COURT-MARTIAL

OF

(Last name)	(First name and middle initial)	(ASN)	(Grade)	(Organization)
RENTLAND	John M.	36126705	Pvt	Sv Btry, 359th FA Bn

CHRONOLOGY

		Date	No. of days	Explanation*
1.	Accused arrested or conf	21 Nov 1943		
2.	Charges fwd			
	To Reg or Bn Hq	22 Nov 1943	1	
	Recd, Reg or Bn Hq	22 Nov 1943	1	
	To TJA	24 Nov 1943	3	
	Recd, TJA	24 Nov 1943	3	
3.	Date of trial	28 Nov 1943	7	Personnel of court on CPX, Nov. 26, 27, 1943.
4.	Record fwd to RA	30 Nov 1943	9	
5.	Date of action	1 Dec 1943	10	
6.	Record fwd to SJA	1 Dec 1943	10	
7.	Total		10	

*Explain any delay over six days between arrest or confinement and date of trial; over three days between date of trial and action by RA. Count number of days from arrest or confinement. In computing number of days between two dates, disregard the first day and count the last day. Months will not be assumed to consist of 30 days.

C. V. Tucker
C. V. TUCKER
Capt, FA
Adjutant

HEADQUARTERS 359TH FIELD ARTILLERY BATTALION

Fort Sill, Oklahoma

Special Court-Martial)
: 1 December 1943
Orders No. 127)

Before a special court-martial which convened at Fort Sill, Oklahoma, pursuant to paragraph 32, Special Orders No. 277, this headquarters, 4 October 1943, was arraigned and tried:

Private JOHN M. RENTLAND, 36126705, Service Battery, 359th Field Artillery Battalion.

CHARGE: Violation of the 93d Article of War.

Specification: In that Private John M. Rentland, Service Battery, 359th Field Artillery Battalion, did, at Fort Sill, Oklahoma, on or about November 20, 1943, feloniously take, steal and carry away about $13.00, lawful money of the United States, the property of Private Charles Bozant.

PLEAS

To the Specification and the Charge: Not Guilty

FINDINGS

Of the Specification and the Charge: Guilty

SENTENCE

To be confined at hard labor at such place as the reviewing authority may direct for six months and to forfeit thirty-three dollars per month for a like period. (One previous conviction considered.)

The sentence was adjudged on 28 November 1943.

The sentence is approved and will be duly executed. The Post Stockade, Fort Sill, Oklahoma, is designated as the place of confinement.

By order of Colonel DONOVAN:

C. V. TUCKER,
Capt, FA,
Adjutant.

OFFICIAL: C. V. Tucker

C. V. TUCKER,
Capt, FA,
Adjutant

App. 3

RECORD OF TRIAL

by

SPECIAL COURT-MARTIAL

Private John M. Rentland, 36126705, Service Battery, 359th FA Bn

Proceedings in the trial of Private John M. Rentland, 36126705, Service Battery, 359th Field Artillery Battalion, by the special court-martial appointed by the order of which a copy is appended, marked Prosecution Exhibit 1.

Fort Sill, Oklahoma
28 November 1943

The court met pursuant to the order appointing it at 1940, all the personnel of the court being present except as follows:

First Lieutenant Joseph V. Kingman, 0310513, 359th Field Artillery Battalion.

The accused and regularly appointed defense counsel were present.

The following members of the court were excused and withdrew for the reason stated opposite their names:

Captain Woodman A. Franks, 0369742, 359th Field Artillery Battalion (excused upon challenge for cause);

Second Lieutenant Elwood C. McAttee, 0501326, 359th Field Artillery Battalion (excused upon peremptory challenge).

There was no contest with respect to the excusing of any of the officers named except as follows:

Captain Woodman A. Franks was challenged for cause by the defense upon the ground that he could not impartially try the case having been the accuser at a former trial against the accused and having publicly stated that in his opinion the accused was not a substantial soldier. Captain Franks admitted those facts but stated that he could act impartially in the instant case. Thereupon, Captain Franks withdrew, the court closed and upon secret written ballot voted to sustain the challenge.

The accused having been given full opportunity to exercise his rights as to challenge, the members of the court and the personnel of the prosecution were sworn.

The accused was then arraigned upon the Charge and Specification appended and marked Prosecution Exhibit 2.

The accused then pleaded as follows:

To the Specification and the Charge: Not guilty.

The trial judge advocate made no opening statement.

Private Charles Bozant, Service Battery, 359th Field Artillery Battalion, a witness for the prosecution was sworn and testified in substance as follows:

DIRECT EXAMINATION

I am a private in the Service Battery, 359th Field Artillery Battalion, Fort Sill, Oklahoma. I know the accused who is in the military service of the United States and member of my battery. On November 19, 1943, the accused and I were on guard duty together on the first relief.

When the second relief took over at 9:30 p.m., the accused and I went to the post exchange for something to eat. I had $15 in my billfold. I spent about a dollar and a half at the post exchange and had $13 left in three $1 bills and one $10 bill and some small change. I always keep my bills in a wallet in my left hip pocket. The accused tried to borrow $5 from me, but I wouldn't let him have it. We then went back to the guardhouse and went to sleep. The Corporal of the Guard woke me about one o'clock in the morning. I found my wallet missing. They made a search, but the wallet was not found. The accused helped to make the search and had an electric lantern in his hand. On the following morning the $10 bill and three $1 bills were found in the electric lantern that the accused carried. The lantern was found under the accused's bed.

CROSS EXAMINATION

There were about six lanterns in the guardhouse, and when I reported my money missing, there were about 10 men present in the guardhouse.

QUESTIONS BY THE COURT

When I woke up and could not find my billfold, I told the Sergeant of the Guard at once. The money that was found in the electric lantern was of the same denominations and looked like my money since the corner of the ~~$10~~ $10 bill was torn.

Private Payson T. Wright, Service Battery, 359th Field Artillery Battalion, a witness for the prosecution was sworn and testified in substance as follows:

DIRECT EXAMINATION

I am a private in the Service Battery, 359th Field Artillery Battalion, Fort Sill, Oklahoma. The accused is also a member of that battery. On November 19, 1943, about 9:00 P.M., Private Bozant showed me $15 which he had in his billfold. I was in the guardhouse on the night of November 19th, and sometime during the early part of the morning I was awakened by the accused who told me that someone had taken Bozant's money. The accused, using an electric lantern, joined us in searching for the money. The next morning a $10 bill and three $1 bills were found in the bottom of an electric lantern in the guardhouse.

CROSS EXAMINATION

When Bozant reported that his money was missing, the Corporal of the Guard searched everyone. The money was not found and I went back to sleep. Another search was made in the morning and everyone pulled off his shoes and stockings. After that the Officer of the Day searched the web belts, flashlights and lanterns, and finally found the money in the electric lantern.

First Lieutenant Donald S. Drexel, Headquarters Battery, 359th Field Artillery Battalion, a witness for the prosecution was sworn and testified in substance as follows:

DIRECT EXAMINATION

I know the accused who is in the military service of the United States. On November 19 and 20, 1943, I was Officer of the Day. At about 6:00 A.M. on November 20 I received a report that Private Bozant had lost $13. I then called into the main room of the guardhouse all members of the

guard who were not then on post and had the Sergeant of the Guard search them. I picked up a lantern under the accused's bed in the guardhouse and looked in it. I took off the bottom piece of the lantern and found a $10 bill and three $1 bills folded between the battery and the wall of the lantern.

The witness then identified an electric lantern, a $10 bill and three $1 bills, shown to him by the prosecution, as being the lantern and the bills to which he had just testified.

The prosecution offered in evidence the electric lantern and requested that it might be withdrawn at the conclusion of the trial. The lantern was received in evidence and marked Prosecution Exhibit 3.

The prosecution then offered in evidence the $10 bill and the three $1 bills and requested that they might be withdrawn at the conclusion of the trial. The bills were received in evidence and marked Prosecution Exhibit 4.

The witness then continued his direct testimony:

I immediately took the accused to my office. Before questioning the accused I told him that anything he might say would be held against him and that he could remain silent if he chose to do so. The accused then made a statement as to taking the money. Staff Sergeant William E. Parks, who was present, took down the accused's statement in shorthand and typed it up. The accused read over the typewritten statement and then swore to it before Captain J. L. Cateby, the battalion summary court-martial officer.

The witness then identified a document, shown to him by the prosecution, as being the statement signed and sworn to by the accused.

The prosecution offered the document in evidence. The defense objected to the admission of the document on the ground that the confession was not voluntary. The objection was overruled, the document was received in evidence and marked Prosecution Exhibit 5.

The defense declined to cross-examine the witness.

The prosecution rested.

The defense stated that it had no witnesses to call or evidence to offer.

The accused, after being fully advised of his rights by the court, stated that he desired to remain silent.

The defense rested.

The prosecution announced that it had no further testimony to offer.

The defense had no further testimony to offer.

Oral arguments were then made by counsel for the defense and counsel for the prosecution.

Neither the prosecution nor the defense having anything further to offer, the court was closed, and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds the accused:

Of the Specification and the Charge: Guilty.

The court was opened and the trial judge advocate, in the presence of the accused and his counsel, read the attached evidence of one previous conviction, Prosecution Exhibit 6.

The trial judge advocate read the data as to age, pay and service as shown on the charge sheet, Prosecution Exhibit 2.

The accused stated that he had no objection to offer concerning the data as to age, pay and service.

The court was closed and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, sentences the accused to be confined at hard labor at such place as the reviewing authority may direct for six months and to forfeit thirty-three dollars per month for a like period.

The court was opened and the president announced the findings and sentence.

The court then at 2115 on 28 November 1943, adjourned to meet at the call of the President.

Fletcher S. Smith

FLETCHER S. SMITH
Major, FA
President

Harold C. Connor

HAROLD C. CONNOR
Captain, FA
Trial Judge Advocate

Examined by defense counsel

J. D., Jr.
Initials

HEADQUARTERS 359th FIELD ARTILLERY BATTALION

Fort Sill, Oklahoma

1 December 1943

In the foregoing case of Private John M. Rentland, 36126705, Service Battery, 359th Field Artillery Battalion, the sentence is approved and will be duly executed. The Post Stockade, Fort Sill, Oklahoma, is designated as the place of confinement.

Richard Donovan

RICHARD DONOVAN
Colonel, FA
Commanding

HEADQUARTERS 359TH FIELD ARTILLERY BATTALION

Fort Sill, Oklahoma

Special Orders) 4 Oct 1943
:
No. 277)

E X T R A C T

* * * * *

32. A SCM is aptd to meet at Fort Sill, Okla, at 1930 on 6 Oct 1943, or as soon thereafter as practicable, for the trial of such persons as may properly be brought before it.

DETAIL FOR THE COURT

MAJ FLETCHER S. SMITH, 0412868, 359th FA Bn
CAPT BRIAN W. JOHNSON, 0384057, 359th FA Bn
CAPT WOODMAN A. FRANKS, 0369742, 359th FA Bn
1ST LT JOSEPH V. KINGMAN, 0310513, 359th FA Bn
1ST LT DONALD H. RAYS, 0364363, 359th FA Bn
2D LT ELWOOD C. MC ATTEE, 0501326, 359th FA Bn

CAPT HAROLD C. CONNER, 0350416, 359th FA Bn, Trial JA

CAPT JOSEPH DEERING JR, 0356203, 359th FA Bn,
Def Counsel

All unarraigned cases in the hands of the Trial JA of the SCM aptd by par 12, SO 214, this Hq, 2 August 1943, will be brought to trial before the court hereby aptd.

* * * * *

By order of Colonel DONOVAN:

C. V. TUCKER
Capt, FA
Adjutant

OFFICIAL:

C. V. Tucker

C. V. TUCKER
Capt, FA
Adjutant

PROSECUTION EXHIBIT 1

(WRITE NOTHING ABOVE THIS LINE)

CHARGE SHEET

Fort Sill, Okla. (Place), 22 November (Date), 1943

Name, etc., of accused Bentland, John M., 36126705, Private, Service Battery, 359th Field Artillery Battalion
(Give last name, first name, and middle initial in that order followed by serial number, grade, company, regiment, arm or service, or by other appropriate description of accused. Alias names, etc., to follow in same manner)

Present Age 26 6/12 Pay, $50.00 (Base pay plus pay for length of service) per month. Allotments to dependents, $ None per month.

Government Insurance deduction, $1.36 per month.

Data as to service: No prior service. Inducted at Detroit, Mich., 13 March 1943, for the duration of the war and six months.
(As to each terminated enlistment, give including dates of service and organization in which serving at termination. As to current enlistment, give the initial date and the term thereof. Give similar data as to service not under an enlistment)

Data as to witnesses, etc.: Against the Accused:
(Give names, addresses, and note if for accused. List documentary evidence and note where each item thereof may be found)

First Lieutenant Donald S. Drexel, Headquarters Battery, 359th Field Artillery Battalion, Fort Sill, Okla.

Private Charles Bozant, Service Battery, 359th Field Artillery Battalion, Fort Sill, Okla.

Private Payson T. Wright, Service Battery, 359th Field Artillery Battalion, Fort Sill, Okla.

For the Accused:

None.

Documentary Evidence and Exhibits:

Sworn statement of accused attached hereto.

1 electric hand latern at office, Battalion Headquarters, 359th Field Artillery Battalion, Fort Sill, Okla.

1 $10 bill and 3 $1 bills in safe, Battalion Headquarters, 359th Field Artillery Battalion, Fort Sill, Okla.

Data as to restraint of accused: Confined 21 November 1943, Post Stockade, Fort Sill, Okla.
(Give date, place, and initial date of any restraint of accused)

W. D., A. G. O. Form No. 115
8 July, 1943

016—27709-2

(1)

PROSECUTION EXHIBIT 2

CHARGE : Violation of the 93d Article of War.

Specification : In that Private John M. Rentland, Service Battery, 359th Field Artillery Battalion, did, at Fort Sill, Oklahoma, on or about November 20, 1943, feloniously take, steal and carry away about $13.00, lawful money of the United States, the property of Private Charles Bozant.

(Additional sheets, if necessary, for charges and specifications will be attached here. Ordinary 8 by 12½-inch paper will be used for additional sheets).

(2)

(WRITE NOTHING BELOW THIS LINE)

(WRITE NOTHING ABOVE THIS LINE)

(Signature of accuser) Donald S. Drexel
DONALD S. DREXEL,
1st Lt. 359th FA Bn.
(Grade, organization, arm, or service)

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 22d day of November, 1943, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he* ~~has personal knowledge of the matters set forth in specifications~~ ~~// and~~ has investigated the matters set (Indicate by specification and charge numbers) forth in specifications and the charge, and that the same (Indicate by specification and charge numbers) are true in fact, to the best of his knowledge and belief.

(Signature) J. L. Cateby
J. L. CATEBY (Grade and organization)
Capt. 359th FA Bn. Summary Court
(Official character, as summary court, notary public, etc.)

NOTES.—At (*) strike out words not applicable.
If the accuser has personal knowledge of the facts stated in one or more specifications or parts thereof, and his knowledge as to other specifications or parts thereof is derived from investigation of the facts, the form of the oath will be varied accordingly. In no case will he be permitted to state alternatively, as to any particular charge or specification, that he either has personal knowledge or has investigated.
If the oath is administered by a civil officer having a seal, his official seal should be affixed.

1st IND.

Headquarters 359th FA Bn, Fort Sill, Okla. (Place), 24 November (Date), 1943

Referred for trial to Captain Harold C. Connor, 359th FA Bn, Trial Judge Advocate (Grade, name, and organization of summary court, or trial judge advocate) of the special (Summary) (Trial judge advocate of special or general) court-martial appointed by paragraph 32, Special Orders No. 277, Headquarters 359th FA Bn, 4 October, 1943

By order (Command or order) of Colonel DONOVAN: (Grade and name of commanding officer)

616—27760-2

C V Tucker, *Adjutant.*
C. V. TUCKER
Capt, FA

I have served a copy hereof on ~~(each)(of)~~ the above-named accused, this 25th day of November, 19 43

(Signature) Harold C. Connor, *Trial Judge Advocate.*
HAROLD C. CONNOR,
Capt, 359th FA Bn.
(Grade and organization)

(SPACE FOR USE WHERE TRIAL IS BY SUMMARY COURT)

CASE No. .....

SPECIFICATIONS AND CHARGES	PLEAS	FINDINGS	SENTENCE OR ACQUITTAL AND REMARKS

Place _____, Date _____, 19____.

_____ Summary Court.
(Signature, grade, and organization)

Headquarters _____, 19____
(Place and date)

_____
(Action of reviewing authority)

_____, *Commanding.*
(Signature, grade, and organization)

Entered on service record in cases of conviction _____
(Initials of personnel adjutant)

(4)

(WRITE NOTHING BELOW THIS LINE) c16—27760-2

One electric lantern introduced into evidence and withdrawn at the conclusion of the trial.

PROSECUTION EXHIBIT 3

One $10 bill and three $1 bills introduced into evidence and withdrawn at the conclusion of the trial.

PROSECUTION EXHIBIT 4

Fort Sill, Oklahoma

Personally appeared before me, the undersigned authority for administering oaths in cases of this character, Private John M Rentland, 36126705, Service Battery, 359th Field Artillery Battalion, Fort Sill, Oklahoma, who, having been warned of his rights and having been duly sworn according to law, deposes and says as follows:

On or about 19 November 1943, I was on guard at Fort Sill, Oklahoma. I was relieved from my duties as guard at 9:30 P.M. to resume again at 1:30 A.M., 20 November. Private Charles Bozant, Service Battery, 359th Field Artillery Battalion and myself went down to the PX to get a sandwich. We ate a ham and egg sandwich and drank a milkshake. We went back to the guardhouse and went to sleep. This was about 11:30 P.M. I was sleeping and awakened by a noise. I went to Private Bozant's bed. He was asleep. I took his billfold from his hip pocket, went outside, took $13 from the billfold. I threw the billfold into the bushes and went back to the guardhouse. I went to sleep and was awakened at 1:30 A.M. to go on guard. Before I went on guard I put the $13 in my lantern where it was found by Lieutenant Drexel the next morning.

Further the deponent sayeth not.

John M. Rentland

JOHN M. RENTLAND, 36126705
Pvt, Service Btry, 359th FA Bn

Sworn and subscribed to before me this 20th day of November 1943.

J. L. Cateby

J. L. CATEBY
Capt, 359th FA Bn
Summary Court

PROSECUTION EXHIBIT 5

EXTRACT COPY OF SERVICE RECORD
OF

Rentland	John M.	36126705	Pvt	Sv Btry, 359th FA Bn
(Last name)	(First name and middle initial)	(ASN)	(Grade)	(Organization)

RECORD OF TRIALS BY COURTS-MARTIAL

Summary CM 61st AW 3 June 1943 AWOL fr 6/3/43 to 6/6/43
(Date of offense) (Synopsis of specifications)

Sentence announced and adjudged 9 June 19 43
Sentence as approved forf. $10
Approved 10 June 19 43

I certify the above is correct.

/s/ John L. Hynes, 1st Lt, FA
Name, grade and organization
Personnel Officer

359th FA Bn	Fort Sill, Okla.	23 November 1943
(Designation of command)	(Station)	(Date)

I certify that I am the official custodian of the Service Record of the above named soldier and that the foregoing is a true copy of entry therein relating to previous convictions.

John L. Hynes
(Signature)

JOHN L. HYNES
(Name typed)

1st Lt, 359th FA Bn
(Grade and organization)
Personnel Officer.

PROSECUTION EXHIBIT 6

APPENDIX 4

REPORT OF TRIAL BY SUMMARY COURT-MARTIAL

(WRITE NOTHING ABOVE THIS LINE)

CHARGE SHEET

Fort Dix, N.J. (Place), 11 October (Date), 1943

Name, etc., of accused Johnson, Merton T., 33076518, Private, Company C, 181st Infantry
(Give last name, first name, and middle initial in that order followed by serial number, grade, company, regiment, arm or service, or by other appropriate description of accused. Alias names, etc., to follow in same manner)

Present (Class "F")
Age 23 5/12 Pay, $ 50.00 per month. Allotments to dependents, $22.00 per month.
(Base pay plus pay for length of service)

Government Insurance deduction, $ None per month.

Data as to service: No prior service. Inducted at Baltimore, Md., 18 July 1942, for the duration of the war and six months.
(As to each terminated enlistment, give including dates of service and organization in which serving at termination. As to current enlistment, give the initial date and the term thereof. Give similar data as to service not under an enlistment)

Data as to witnesses, etc.: Against the Accused:
(Give names, addresses, and note if for accused. List documentary evidence and note where each item thereof may be found)

Captain Arthur M. Stern, Company C, 181st Infantry, Fort Dix, N. J.

Corporal Zachary T. Kellogg, Company K, 181st Infantry, Fort Dix, N. J.

Private Thomas D. Graves, 26th Military Police Company, Fort Dix, N. J.

For the Accused:

None

Documentary Evidence and Exhibits:

None

Data as to restraint of accused: Confined 11 October 1943, Post Guardhouse, Fort Dix, N.J.
(Give date, place, and initial date of any restraint of accused)

W. D., A. G. O. Form No. 115
8 July, 1943

016—27709-2

CHARGE : Violation of the 96th Article of War.

Specification 1: In that Private Merton T. Johnson, Company C, 181st Infantry, was, at Fort Dix, New Jersey, on or about October 10, 1943, drunk in camp.

Specification 2: In that Private Merton T. Johnson, Company C, 181st Infantry, having been restricted to the limits of Fort Dix, New Jersey, did, at Fort Dix, New Jersey, on or about October 10, 1943, break said restriction by going to New York City, New York.

(Additional sheets, if necessary, for charges and specifications will be attached here. Ordinary 8 by 12½-inch paper will be used for additional sheets)

(2)

(WRITE NOTHING BELOW THIS LINE)

a16—27709-2

App. 4

(WRITE NOTHING ABOVE THIS LINE)

(Signature of accuser) Arthur M. Stern
ARTHUR M. STERN
Capt, 181st Inf.
(Grade, organization, arm, or service)

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 11th day of October, 1943, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he* ~~has personal knowledge of the matters set forth in specifications~~ ~~// and~~ has investigated the matters set
(Indicate by specification and charge numbers)
forth in specifications 1 and 2 of the charge and the charge, and that the same
(Indicate by specification and charge numbers)
are true in fact, to the best of his knowledge and belief.

(Signature) E. M. Rowley
E. M. ROWLEY (Grade and organization)
Capt, 181st Inf. Adjutant
(Official character, as summary court, notary public, etc.)

NOTES.—At (*) strike out words not applicable.

If the accuser has personal knowledge of the facts stated in one or more specifications or parts thereof, and his knowledge as to other specifications or parts thereof is derived from investigation of the facts, the form of the oath will be varied accordingly. In no case will he be permitted to state alternatively, as to any particular charge or specification, that he either has personal knowledge or has investigated.

If the oath is administered by a civil officer having a seal, his official seal should be affixed.

1st IND.

Headquarters 181st Infantry, Fort Dix, N.J., 12 October, 1943
(Place) (Date)

Referred for trial to Major Charles B. Foster, 181st Infantry
(Grade, name, and organization of summary court, or trial judge advocate)
Summary court-martial appointed by paragraph 12, Special Orders
(Summary) (Trial judge advocate of special or general)
No. 244, Headquarters 181st Infantry 1 September, 1943

By order of Colonel RICHARDSON
(Command or order) (Grade and name of commanding officer)

e16—27700-3

E. M. Rowley, Adjutant.
E. M. ROWLEY,
Capt. 181st Inf.

(3)

I have served a copy hereof on (each of) the above-named accused, this _____ day of _____, 19____

(Signature) _____, *Trial Judge Advocate.*

_____
(Grade and organization)

(SPACE FOR USE WHERE TRIAL IS BY SUMMARY COURT)

CASE No. 124

SPECIFICATIONS AND CHARGES	PLEAS	FINDINGS	SENTENCE OR ACQUITTAL AND REMARKS
Sp. 1: Ch: Sp. 2: Ch: Ch:	G NG G	G G G	To perform hard labor for fifteen days and to forfeit eighteen dollars of his pay (one previous conviction considered). Accused received an explanation of the meaning and effect of his plea of guilty to Sp. 1 and to the Ch.

Place Fort Dix, N.J., Date 14 October, 1943.

Charles B. Foster, Major, 181st Infantry, Summary Court.
CHARLES B. FOSTER (Signature, grade, and organization)
Headquarters 181st Inf. Fort Dix, N.J., 15 October, 1943
(Place and date)

Approved and ordered executed.
(Action of reviewing authority)

William H. Richardson, Commanding.
(Signature, grade, and organization)
WILLIAM H. RICHARDSON,
Col. 181st Inf.

Entered on service record in cases of conviction _____
(Initials of personnel adjutant)

A TRUE COPY:
E. W. Rowley
E. M. ROWLEY
Capt. 181st Inf.
Adjutant

(4)

(WRITE NOTHING BELOW THIS LINE) 016—27759-2 U. S. GOVERNMENT PRINTING OFFICE

APPENDIX 5

IMPOSITION OF PUNISHMENT UNDER AW 104 UPON OFFICER

HEADQUARTERS 109TH INFANTRY APB/jj
Office of the Regimental Commander

Fort Wilson, Ohio
1 Feb. 1944

201 - Boyd, Jonathan (Off.).

Subject: Disciplinary Action.

To: 2nd Lt Jonathan Boyd, 109th Inf, Fort Wilson, Ohio.*

1. Investigation has indicated that on or about 27 January 1944, you were disorderly in the Officers' Club, Fort Wilson, Ohio.

2. It is my intention to impose punishment for such offense under AW 104 unless trial by court-martial is demanded. In accordance with MCM, par. 107, you are notified of this intended action. You will acknowledge receipt of this communication by indorsement which will include a statement whether you demand trial in lieu of action under AW 104.

Augustine P. Billesby

AUGUSTINE P. BILLESBY,
Col, Inf,
Commanding.

*Under the provisions of MCM, par. 107, the letter notifying the accused of the intention to impose punishment will be "through proper channels", as will all subsequent indorsements on the communication. Indorsements by intermediate commanders through whom the communication may pass are not shown on this form. Accordingly, none of the indorsements have been numbered.

201 - Boyd, Jonathan (Off.) _____Ind.
Fort Wilson, Ohio, 3 Feb. 1944.

To: CO, 109th Inf, Fort Wilson, Ohio.

Receipt acknowledged. Trial by court-martial is not demanded.

Jonathan Boyd.

JONATHAN BOYD,
2d Lt, 109th Inf.

201 - Boyd, Jonathan (Off.) _____Ind.
Hq, 109th Inf, Fort Wilson, Ohio, 3 Feb. 1944.

To: 2d Lt Jonathan Boyd, 109th Inf, Fort Wilson, Ohio.

1. You are hereby reprimanded for conduct to the prejudice of good order and military discipline. Your actions indicate an instability of character and disregard of the responsibilities of an officer. Every officer is required so to conduct himself as to be an example of decorum to be followed by his associates in the service. In this duty you have failed. Since this is your first offense coming to my notice, and since your military record heretofore has been good, charges were not preferred in order that you might have the opportunity of redeeming yourself and proving you are worthy of holding a commission.

2. This reprimand will become part of your personal record.

3. You are advised of your right to appeal in accordance with MCM, par. 108.

4. Reply by indorsement hereon, including the date of your receipt of this indorsement and any appeal you may desire to make.

Augustine P. Billesby
AUGUSTINE P. BILLESBY,
Col, Inf,
Commanding.

201 - Boyd, Jonathan (Off.) _____Ind.
Fort Wilson, Ohio, 4 Feb. 1944.

To: CO, 109th Inf, Fort Wilson, Ohio

1. Received 4 Feb 1944, and contents noted.

2. No appeal.

Jonathan Boyd.
JONATHAN BOYD,
2d Lt, 109th Inf.

APPENDIX 6

RECORD OF PUNISHMENT UNDER AW 104

COMPANY PUNISHMENT BOOK

Glassborn, Peter E. (Name, Last name first) Pvt. (Rank) Co. A, 109th Infantry (Organization)

OFFENSE	DATE AND PLACE OF COMMISSION	PUNISHMENT	BY WHOM IMPOSED	DATE OF NOTICE TO ACCUSED	DECISION ON APPEAL, IF ANY	MITIGATION OR REMISSION	REMARKS	INITIALS OF IMMEDIATE C.O.
Failure to repair for KP	4 July 1944, Ft. Wilson, Ohio.	6 days restr.	CO Co. A	5 July 1944	No app.	None	None	J.B.S.
Disorderly in barracks.	17 Nov. 1944, Ft. Wilson, Ohio.	7 days HL	CO Co. A	18 Nov. 1944	No app.	None	None	J.B.S.

NOTE: One page is given to each person and an alphabetical index will be found of assistance in consulting the record.

APPENDIX 7

SPECIFICATIONS FOR WRONGFUL TAKING AND CONVERSION UNDER AW 96

For use of property, not owned by the government, without consent of the owner:

In that _____ did, at _____, on or about _____, 19__, without the consent of the owner, wrongfully take and carry away _____, value about _____, the property of _____.

For the use of property, without authority, owned by the United States:

In that _____ did, at _____, on or about _____, 19__, without authority, wrongfully take and carry away _____, value about _____, property of the United States.

Wrongful use of property entrusted to accused:

In that _____ did, at _____, on or about _____, 19__, wrongfully convert to his own use _____, valued at _____, the property of _____, entrusted to him (by _____) (for _____ by _____) by virtue of his (detail) or (assignment) as _____.

In that _____ did, at _____, on or about _____, 19__, wrongfully take and use without consent of the owner, a certain automobile, to wit, a (here give a brief description of the automobile, as: Buick Sedan) property of _____, of a value of more than $50.00.

APPENDIX 8

LESSER INCLUDED OFFENSES

This table lists certain major offenses, some lesser offenses which are included within those major offenses, and some offenses which have been held not to be included offenses. It is not an all inclusive list, nor can it be applied mechanically in every case. There is often a justifiable divergence of opinion, depending on the form of the specification and the facts in the case, as to whether a particular offense is included within the principal offense charged. This table, therefore, is intended as a general guide and must be used in all cases with caution.

Principal offense	Lesser included	Reference	Not included	Reference
Absence without leave (AW 61).	----------	----------	Failure to repair to properly appointed place of duty (AW 61).	Dig. Op. JAG, 1912-40, sec. 419 (3).
Assault with intent to commit murder or manslaughter (AW 93).	Assault with intent to do bodily harm (AW 93).	1921 MCM, par. 377.	----------	
	Lesser degrees of assault (AW 96).	----------	----------	
Assault with intent to commit rape (AW 93).	Assault (AW 96)	Dig. Op. JAG, 1912-40, sec. 451 (4).	Assault and battery (AW 96).	Dig. Op. JAG, 1912-40, sec. 451 (4). But see sec. 451 (59).
	Attempt to commit rape (AW 96).	----------	----------	
Assault with intent to rob (AW 93).	----------	----------	Assault with intent to do bodily harm (AW 93).	Dig. Op. JAG, 1912-40, sec. 451 (59).
Assault with intent to do bodily harm with a dangerous weapon (AW 93).	Assault with a dangerous weapon (AW 96).	Dig. Op. JAG, 1912-40, sec. 451 (8).	Attempting to strike officer or noncommissioned officer (AW 64, 65).	Dig. Op. JAG, 1912-40, Sup. I, sec. 451 (11a).
	Assault (AW 96)	Dig. Op. JAG, 1912-40, sec. 451 (9) and (13).	----------	
Assault with intent to do bodily harm (AW 93).	Assault (AW 96)	----------	----------	

Principal offense	Lesser included	Reference	Not included	Reference
Assaulting commissioned officer (AW 64) or noncommissioned officer (AW 65) in execution of office.	Assault upon officer or noncom, not in execution of his office (AW 96).	Dig. Op. JAG, 1912-40, sec. 423 (2); 1 Bull. JAG, 18.	----------	
Battery (AW 96)----	Assault (AW 96)----	1921 MCM, par. 377.	----------	
Burglary (AW 93)----	Housebreaking (AW 93).	Dig. Op. JAG, 1912-40, sec. 451 (14).	----------	
	Breaking and entering (AW 96).	Dig. Op. JAG, 1912-40, sec. 451 (14).	----------	
	Tresspass (AW 96)--	Dig. Op. JAG, 1912-40, sec. 451 (15).	----------	
	Attempt (AW 96)----	----------	----------	
Conduct unbecoming an officer and a gentleman (AW 95).	Same act under AW 96.	1921 MCM, par. 377; but see 1 Bull. JAG, 215.	----------	
Desertion (AW 58)---	Absence without leave (AW 61).	1 Bull. JAG, 103---	----------	
	Quitting post with intent to report elsewhere (AW 96).	Dig. Op. JAG, 1912-40, sec. 416 (12).	----------	
	Attempt to desert (AW 58).	----------	----------	
Desertion (AW 28) absence without leave with intent to shirk important service or to avoid hazardous duty.	Absence without leave.	----------	Desertion (AW 58) wih intent to remain away permanently.	1 Bull. JAG, 322.
Disobeying order of superior officer (AW 64) or noncommissioned officer (AW 65).	Failure to obey (AW 96).	1 Bull. JAG, 159----	Disobedience of general or standing order (AW 96).	Dig. Op. JAG, 1912-40, sec. 422 (7).
Drunk on duty (AW 85).	Drunkenness (AW 96).	Dig. Op. JAG, 1912-40, sec. 443 (1).	----------	
Drunk on post (AW 86).	Drunkenness (AW 96).	----------	----------	
Embezzlement (AW 93, 94).	Misappropriation (AW 96).	----------	Larceny (AW 93, 94).	Dig. Op. JAG, 1912-40, sec. 451 (43).
	Fraudulent conversion (AW 96).	Dig. Op. JAG, 1912-40, sec. 451 (21).	Losing government property (AW 83, 84).	Dig. Op. JAG, 1912-40, sec. 452 (4).
Escape from confinement (AW 69).	Attempt to escape (AW 96).	Dig. Op. JAG, 1912-40, sec. 427 (4).	Breach of arrest (AW 69).	Dig. Op. JAG, 1912-40, Sup. I, sec. 427 (6a).
			Breach of restraint or parole (AW 96).	Dig. Op. JAG, 1912-40, sec. 427 (6); 1 Bull. JAG, 214.

Principal offense	Lesser included	Reference	Not included	Reference
Larceny (AW 93)	Wrongful taking without consent of owner (AW 96).	Dig. Op. JAG, 1912-40, sec. 451 (40); 1 Bull. JAG, 21.	Embezzlement (AW 93).	
			Wrongful possession (AW 96).	
			Receiving stolen goods (AW 96).	
			Wrongfully disposing of property by sale (AW 83, 84).	Dig. Op. JAG, 1912-40, sec. 451 (16).
			Willfully or negligently losing property (AW 84).	
Manslaughter (AW 93).	Attempt (AW 96)	MCM, par. 149*a*, p. 167.	----------	
	Various forms of assault (AW 93, 96).	----------	----------	
Mayhem (AW 93)	Attempt (AW 96)	MCM, par. 149*b*, p. 167.	----------	
	Various forms of assault (AW 93, 96).			
Misappropriation (AW 93).	----------	----------	Larceny (AW 94)	Dig. Op. JAG, 1912-40, sec. 452 (18).
Murder (AW 92)	Manslaughter (AW 93).	MCM, par. 148*a*, p. 162; Dig. Op. JAG 1912-40, sec. 450 (2).	----------	
	Various forms of assault (AW 93, 96).	----------	----------	
	Attempt (AW 96)	----------	----------	
Perjury (AW 93)	False swearing (AW 96).	Dig. Op. JAG, 1912-40, sec. 451 (52).	----------	
	Giving false testimony (AW 96).	----------	----------	
Rape (AW 92)	Attempt (AW 96)	MCM, par. 148*b*, p. 165.	----------	
	Various degrees of assault (AW 96).	----------	----------	
Robbery (AW 93)	Attempt (AW 96)	MCM, par. 149*f*, p. 171.	Assault with intent to do bodily harm (AW 93).	Dig. Op. JAG, 1912-40, sec. 451 (59); 1 Bull. JAG, 20.
	Assault with intent to rob (AW 93).	----------	----------	
	Assault and battery (AW 96).	Dig. Op. JAG, 1912-40, sec. 451 (59).	----------	
	Larceny (AW 93)	Dig. Op. JAG, 1912-40, sec. 451 (59).	----------	
	Wrongful taking of property (AW 96)	Dig. Op. JAG, 1912-40, Sup. I, sec. 451 (50).	----------	

Principal offense	Lesser included	Reference	Not included	Reference
Sentinel sleeping on post (AW 86).	Watchman sleeping on post (AW 96).	Dig. Op. JAG, 1912–30, Sup. VII, sec. 1548.	Leaving post before being relieved (AW 86). Loitering on post (AW 96) or improperly performing duties as sentinel (AW 96).	Dig. Op. JAG, 1912–40, sec. 444 (2). Dig. Op. JAG, 1912–40, sec. 444 (2).
Sentinel leaving post before being relieved (AW 86).	----------	----------	Improperly performing duties as sentinel (AW 96).	Dig. Op. JAG, 1912–40, sec. 444 (3).
Wrongful disposition of military property (AW 84, 94).	----------	----------	Negligent loss (AW 84). Wrongful abandonment of property (AW 84).	Dig. Op. JAG, 1912–40, sec. 442 (3). 1 Bull. JAG, 275.
Wrongful sale of military property (AW 84, 94).	----------	----------	Wrongful disposition (AW 84, 94). Wrongful pledging or pawning (AW 94).	Dig. Op. JAG, 1912–40, sec. 442 (3). Dig. Op. JAG, 1912–40, sec. 452 (21). 1 Bull. JAG, 20.

APPENDIX 9

SPECIAL ORDER APPOINTING SUMMARY COURT-MARTIAL

HEADQUARTERS
128TH INFANTRY
Camp Polk, Louisiana

1 May 1943.

SPECIAL ORDERS)
NO. 118)

EXTRACT

* *

3. Effective this date Major John P. Stafford, Jr., 02052137, Inf, is detailed Summary Court-Martial.

* *

By Order of Colonel Graves:

R. L. LOWE,
Capt., 128th Inf,
Adjutant

OFFICIAL:

R. L. Lowe.

R. L. LOWE,
Capt., 128th Inf,
Adjutant.

APPENDIX 10

NOTICE TO MEMBERS OF MEETING OF COURTS-MARTIAL

HEADQUARTERS 29TH INFANTRY DIVISION
Office of the Trial Judge Advocate
Fort Jackson, South Carolina.

5 December 1943

SUBJECT: Convening of General Court-Martial.

TO: Second Lieutenant George S. Troutline, Headquarters Company, 29th Infantry Division.

1. By direction of the President thereof, the General Court-Martial appointed by paragraph 1, Special Orders No. 261, Headquarters 29th Infantry Division, dated 18 September 1943, as amended by paragraph 11, Special Orders No. 273, Headquarters 29th Infantry Division, dated 30 September 1943, will meet in Room 4, Division Headquarters Building (T-316), Fort Jackson, South Carolina, at 1930 on Tuesday, 7 December 1943, for the trial of such cases as may be properly brought before the court.

2. Service uniform with coat, service, and trousers, olive drab, without side arms will be worn.

3. Request reply by indorsement.

Howard J. Hitchings

HOWARD J. HITCHINGS,
Major, Inf.,
Trial Judge Advocate.

1st Ind.

Second Lieutenant George S. Troutline, Headquarters Company, 29th Infantry Division, 6 December 1943.

To: Major Howard J. Hitchings, Trial Judge Advocate, Headquarters 29th Infantry Division, Fort Jackson, South Carolina.

1. I will (not) be present.

2. Reason: Excused by VOCG.

George S. Troutline

George S. Troutline
(Name)

Second Lieutenant, Inf.
(Rank) (Arm or Service)

APPENDIX 11

STIPULATION AS TO FACTS

Fort Jackson, S. C.
5 January 1944

STIPULATION

It is hereby stipulated and agreed by and between the prosecution, the defense and the accused as follows:

1. That the value of the gold wrist watch referred to in the Specification of Charge I of this case, at the time alleged therein, was thirty-five dollars ($35.00).

2. That said wrist watch, at the time alleged, was owned by Sgt Joseph A. Turner, Co C, 111th Infantry, Fort Jackson, S. C.

Thomas D. MacFadden
Thomas D. MacFadden
Capt, 130th Inf, Trial Judge Advocate

Cecil T. People
Cecil T. People
Capt, 130th Inf, Defense Counsel

Mat Camicia
Mat Camicia
Pvt, Co C, 130th Inf, Accused

APPENDIX 12

STIPULATION AS TO EXPECTED TESTIMONY

Fort Jackson, S. C.
5 January 1944

STIPULATION

It is hereby stipulated and agreed by and between the prosecution, the defense and the accused that if Michael I. O'Reilly, 4237 2d Ave, New York City, N. Y., were present, he would testify as follows:

I was a member of the New York City Police Department on duty 24 December 1944, when Pvt James R. Scott came to me at the 42d Street Police Station and said that he was absent from his outfit, had no money and wanted to go back. He was dressed in military uniform when he came to the police station.

Thomas D. MacFadden
Thomas D. MacFadden
Capt, 130th Inf, Trial Judge Advocate

Cecil T. People
Cecil T. People
Capt, 130th Inf, Defense Counsel

Mat Camicia
Mat Camicia
Pvt, Co C, 130th Inf, Accused

APPENDIX 13

DEPOSITION OF CIVILIAN WITNESS

(Leave space for binding)

[1] This form to be used where deposition is taken on written interrogatories. It should be modified in case it is to be used for oral depositions so as to conform to the provisions of the Manual for Courts-Martial, 1928 (par. 88, for such cases.
[2] Strike out words not used.

UNITED STATES

vs.[2]

~~[illegible]~~

Pvt John T. Derrick, 35406324, Company A, 113th Infantry

INTERROGATORIES AND DEPOSITION[1]

[3] General (or special or summary) court-martial, or military commission, or court of inquiry, or military board.

Deposition of Lucy Jones Derrick

stationed or residing at 280 East Third St. Newark, N. J.

to be read in evidence before a [3] general court-martial

United States Army, appointed to meet at Fort Wilson, Columbus, Ohio

by paragraph 17, Special Orders, No. 282, Headquarters 50th Infantry Division, 9 October, 19 43.

[4] Insert name or title of person who is requested to cause the deposition to be taken.

Fort Wilson, Ohio, 10 Dec, 19 43 To Second Service Command Governors Island, N. Y.

I request you cause to be taken on the following interrogatories the deposition of the above-named witness.

Daniel C. O'Brien

Daniel C. O'Brien
Capt, 103d FA Bn, Trial JA

[5] To be subscribed by the trial judge advocate or other proper person with his name, grade, organization, and official title, as "judge advocate," "summary court," "recorder," etc.

HEADQUARTERS, Second Service Command, 12 Dec 19 43

To Major Peter M. Milweed, Hqs Second Service Command

who will take or cause to be taken the deposition above requested.[6]

[6] If it is desired to give special instructions, there should be added "special instructions attached."

By command of Major General GLASS

Milton E. Weiss, *Adjutant General*

Milton E. Weiss, Col, AGD

First interrogatory: Are you in the military service of the United States? If so, what is your full name, grade, organization, and station? If not, what is your full name, occupation, and residence?

Answer:[7] My name is Lucy Jones. I live at 280 East Third St., Newark, N. J. I work as a waitress at the Bluebird Restaurant on Clendenny Ave.

Second interrogatory: Do you know the accused? If so, how long have you known him?

Answer: I have known the accused for three years.

Third interrogatory: What is your relationship to the accused?

Answer: I am his wife.

Fourth interrogatory: When were you married?

Answer: About a year ago.

Fifth interrogatory: Does your husband support you?

Answer: He frequently sends me money or brings me money.

Sixth interrogatory: During the period between September 1, 1943, and November 15, 1943, did you see the accused? If so, when?

Answer: Yes, from the middle of September to the end of November.

[7] If the spaces for answers are not sufficient, extra sheets may be inserted by the officer taking the deposition. In such case, he will rewrite the interrogatories, writing the answers immediately below the respective interrogatories.

W. D., A. G. O. Form No. 118
Mar. 19, 1935

3—3309

Seventh interrogatory: Did you write to the accused asking him to come to you because you were sick at that time?

Answer: I wrote to my husband at Fort Wilson and told him I was sick in bed so that a neighbor had to come in and take care of me. I have no relatives nor could I employ a nurse, so I asked my husband to come to me.

Eighth interrogatory: Did the accused come after you wrote to him?

Answer: Yes, he came about the middle of September and told me that he was just taking a few days off and would have to go back soon, but since I did not get any better he stayed down to take care of me.

Ninth interrogatory: How long did he remain with you?

Answer: Until I got well about the middle of November and was able to go back to work.

Tenth interrogatory: Did your husband during that time make a statement to you about returning to Fort Wilson?

Answer: Yes, every couple of days he told me it was about time he got back. About November 24 or 25 he told me one evening that he would have to go back to camp the next day, and he made arrangements that same night to go back.

Eleventh interrogatory: Did your husband leave you to return to Fort Wilson?

Answer: Yes, the next morning he left to catch the train to Ohio, but I did not hear anything from him until he wrote to me from the guardhouse at Fort Wilson.

[1] In case no cross-interrogatories are propounded this fact will be recorded and authenticated by the signature of defense counsel when the deposition is taken by the prosecution, and by the trial judge advocate when the deposition is taken by the defense, in court-martial cases.

First cross-interrogatory[1]: Did you have a doctor examine you when you were ill?

Answer: No, my neighbor and my husband were able to take care of me and I thought it was a silly expense to have the doctor come in.

Second cross-interrogatory: When were you able to work after your illness?

Answer: I was completely well about the middle of November and intended to start work about that time but felt that I should have a little rest after my illness to recuperate, so my husband stayed on.

Third cross-interrogatory: Did you or your husband have any money during this period?

Answer: Yes, my husband had quite a bit of money when he came down to help but used it all up while I was sick.

Fourth cross-interrogatory: Did your husband remain in uniform during this period?

Answer: Yes, he had no other clothes.

(Leave space for binding) 9—3[illegible]

(Leave space for binding)

First interrogatory by the .....*

Answer:

*Insert "court," "commission," or "board," as the case may be.

(*Witness sign here*) Lucy Jones Derrick

Lucy Jones Derrick

I CERTIFY that the above deposition was duly taken by me, and that the above-named witness, having been first duly sworn by me, gave the foregoing answers to the several interrogatories, and that he prescribed the foregoing deposition in my presence at Newark, N. J., this 13th day of December, 19 43

(Name) Peter M. Milweed

Peter M. Milweed

Maj. Hqs Second Service Command

(Grade and organization)

Summary Court

(Official character, as summary court, notary public, etc.)

3—1209

INSTRUCTIONS

1. **Preparation of interrogatories and taking of depositions.**—See paragraph 98, Manual for Courts-martial, 1928.

2. **Suggestions for person taking deposition.**—Before a witness gives his answers to the interrogatories they should be read and, if necessary, explained to him, or he should be permitted to read them over in order that his answers may be clear, full, and to the point. The person taking the deposition should not advise the witness how he should answer, but he should endeavor to see that the witness understands the questions and what is desired to be brought out by them, and that his answers are clear, full, and to the point.

If a military officer takes a deposition, he will ordinarily complete and certify the voucher. When a deposition is taken by a civil officer, he should, if so requested, obtain and furnish with return of the deposition the data necessary for the completion of the witness voucher. (Par. 98*e*, M. C. M., 1928.)

3. **Fees and allowances for witnesses.**—Witnesses, other than persons subject to military law, who are required to appear before a court-martial, court of inquiry, military commission, or retiring board, or before an officer (civil or military) empowered to take depositions, and there to give testimony under oath to be used before a court, are entitled to receive fees and allowances as fixed by law. (See AR 35-4120.)

4. **Tender of fees.**—When ordered by proper authority, the fees of the witness and his mileage at the rates allowed, including fees for one day's actual attendance and mileage for the journey to and from the place where the witness is to appear under the subpœna, will be tendered or paid in advance by the proper finance officer. In order to maintain a prosecution under the 23d Article of War for neglect or refusal to appear, a person must not only be duly subpœnaed but he must be paid or tendered fees as indicated. (See par. 97, M. C. M., 1928.)

5. **Depositions—Before whom taken.**—Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths. (A. W. 26.)

6. **Authority to administer oaths.**—Any judge advocate or acting judge advocate, the president of a general or special court-martial, any summary court-martial, the trial judge advocate or any assistant trial judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and in foreign places where the Army may be serving shall have the general powers of a notary public or of a consul of the United States in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law. (A. W. 114.)

7. **Administration of oaths.**—In all cases in which, under the laws of the United States, oaths are authorized or required to be administered, they may be administered by notaries public duly appointed in any State, District, or Territory of the United States, by clerks and prothonotaries of courts of record of any such State, District, or Territory, by the deputies of such clerks and prothonotaries, and by all magistrates authorized by the laws of or pertaining to any such State, District, or Territory to administer oaths.—*Act July 3, 1926 (44 Stat. Part 2, 830; U. S. Code Annotated. Sec. 93a).*

(Leave space for binding)

U. S. GOVERNMENT PRINTING OFFICE 9—3209

APPENDIX 14

SUBPOENA FOR CIVILIAN WITNESS

SUBPŒNA FOR CIVILIAN WITNESS

The President of the United States to Claude M. Rickaby

GREETING:

You are hereby summoned and required to be and appear in person on the 15th day of December, 1943, at 7:30 o'clock p. m., ~~[illegible]~~ before a [4] general court-martial of the United States, at Fort Wilson, Columbus, Ohio, appointed to meet by paragraph 17 Special Orders, No. 282, Headquarters 50th Infantry Division dated 9 October, 1943, then and there to testify and give evidence as a witness for the defense in the case of [5] Private John T. Derrick, 35406324, Company A, 113th Infantry, Fort Wilson, Ohio

~~[6] and you are hereby required to bring with you, to be used in evidence in said case, the following-described documents, to wit:~~

And have you then and there this precept.

Dated at Fort Wilson, Ohio this 11th day of December, 19 43.

Daniel C. O'Brien
Daniel C. O'Brien, Capt. FA,
(To be subscribed by trial judge advocate, recorder, etc.)
Trial Judge Advocate

The witness is requested to subscribe on one copy of the subpœna the following and to return to the person serving the subpœna the copy thereof so subscribed.

..... , 19.....

[7] I hereby accept service of the above subpœna.

.....
(Signature of witness)

[8] ~~Personally appeared before me the undersigned authority,~~ 2d Lt. Osmer P. Fox who, being first duly sworn according to law, deposes and says that at Marysville, Ohio on 13 December, 1943, he personally delivered to Claude M. Rickaby ..... in person a duplicate of the within subpœna.

Osmer P. Fox
(Signature)

SUBSCRIBED AND SWORN to before me at Fort Wilson, Ohio this 13th day of December, 19 43

Valentine Quade
(Signature)
VALENTINE QUADE
Lt Col, JAGD
(Grade, organization, and official character)

W. D., A. G. O. Form No. 117
Mar. 10, 1928

16—80144-1

[1] Line out when inappropriate "before ——, a ——, designated to take your deposition to be read in evidence."

[2] When used, enter name, grade, and organization, if any.

[3] When used, enter official character, if any, such as trial judge advocate, summary court, notary public, etc.

[4] General (or special or summary) court-martial, etc.

[5] Enter name, etc., of accused or other subject of investigation.

[6] Line out when inappropriate "and you are hereby required to bring with you, to be used in evidence in said case, the following-described documents, to wit."

[7] When service is by mail the witness will be requested to subscribe this acknowledgment of acceptance on one copy and to return same to the officer who issued the subpœna.

[8] This proof of service will be filed out when service is personal, and the copy thus completed be returned to the officer issuing the subpœna.

INSTRUCTIONS

1. **Articles of War.**—(*a*) *Process to obtain witnesses.*—Every trial judge advocate of a general or special court martial and every summary court martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions. (A. W. 22.)

(*b*) *Refusal to appear or testify.*—Every person not subject to military law who, being duly subpœnaed to appear as a witness before any military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may have been legally subpœnaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than $500 or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses: *Provided further*, That every person not subject to military law, who before any court martial, military tribunal, or military board, or in connection with, or in relation to any proceedings or investigation before it or had under any of the provisions of this act, is guilty of any of the acts made punishable as offenses against public justice by any provision of chapter 6 of the act of March 4, 1909, entitled "an act to codify, revise, and amend the penal laws of the United States" (volume 35, United States Statutes at Large, page 1088), or any amendment thereof, shall be punished as therein provided. (A. W. 23.)

2. **Fees and allowances for witnesses.**—Witnesses, other than persons subject to military law, who are required to appear before a court martial, court of inquiry, military commission, or retiring board, or before an officer (civil or military) empowered to take depositions, and there to give testimony under oath to be used before a court, are entitled to receive fees and allowances as fixed by law. (See AR 35-4120.)

3. **Tender of fees.**—When ordered by proper authority the fees of the witness and his mileage at the rates allowed, including fees for one day's actual attendance and mileage for the journey to and from the place where the witness is to appear under the subpœna, will be tendered or paid in advance by the proper finance officer. In order to maintain a prosecution under the 23d Article of War for neglect or refusal to appear, a person must not only be duly subpœnaed but be paid or tendered fees as indicated. (See par. 97, M. C. M., 1928.)

U. S. GOVERNMENT PRINTING OFFICE: 16—30144-1

APPENDIX 15

REPORT OF RESULT OF TRIAL BY TRIAL JUDGE ADVOCATE

Fort Wilson, Ohio
1 July 1944

Subject: Report of Result of Trial.

To: Commanding Officer, 113th Infantry, Fort Wilson, Ohio.

1. The general court-martial appointed by par 3, SO 147, 50th Inf Div, 26 May 1944, tried Private John Derrick, 21406324, Co A, 113th Inf, on 1 July 1944.

2. The court made the following findings:

Sp, Ch I - Not Guilty.

Ch I - Not Guilty.

Sp, Ch II - Guilty.

Ch II - Guilty.

3. The court sentenced the accused as follows:

"To be dishonorably discharged the service, to forfeit all pay and allowance due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for five years."

Elijah T. Noonan

ELIJAH T. NOONAN,
Capt, Inf,
Trial Judge Advocate.

Copy to:
Appointing Authority
Prison Officer
Division JA
CO of Accused

APPENDIX 16

VOUCHER FOR FEES AND MILEAGE OF CIVILIAN WITNESSES

WAR DEPARTMENT
Form 388 (Revised)
Form prescribed by
Comptroller General, U. S.
August 17, 1944

WAR DEPARTMENT

D. O. Voucher No. .....
Bureau No. .....

PUBLIC VOUCHER—PERSONAL SERVICES

Compensation for Civilian Witness and/or Reporter, Civilian, or Enlisted Man on Detail

PAID BY

(For use of Paying Office)

THE UNITED STATES, *Dr.*,

To Claude M. Rickaby

Address 216 Elm Street, Marysville, Ohio

For travel performed, services rendered, and/or per diem in lieu of subsistence as: * ☒ WITNESS; ☐ REPORTER-CIVILIAN; ☐ REPORTER-ENLISTED MAN on detail, appearing before:

General Court Martial (Title of court) at Fort Wilson, Columbus, Ohio (Place)

or giving deposition before ..... (Name of officer) at ..... (Place) Date .....

for use in ..... (Title of court) convened at ..... (Place)

Travel via privately owned conveyance (Mode of travel and route used must be specified)

Dates of travel 15 December 1943

Dates of attendance 15 December 1943

Discharged from further attendance 2130 (Hour) 15 December 1943 (Date)

(Attach certified copy of order convening the court and of the subpena)

	AMOUNT Dollars	Cents
For travel from Marysville, Ohio to Fort Wilson, Columbus, Ohio and return.	$	
28 miles traveled at 5¢ (Rate) per mile (Number of round trips 1)	1	40
days at $ while traveling to and returning from place of attendance		
days attendance at $ 1.50 per day	1	50
days at $ per diem in lieu of subsistence		
Additional allowances for reporting as itemized on the reverse hereof		
AMOUNT CLAIMED	$ 2	90

I CERTIFY that the above account is true and just in all respects; that payment therefor has not been received; and that ** I am NOT a salaried employee of the Government nor a detained witness.

(SIGN ORIGINAL ONLY) Payee Claude M. Rickaby

Date 15 Dec 1943 Title Witness

(Payee will NOT use this space)

Differences.....

Account verified; correct for..... $.....

(Signature or initials).....

I CERTIFY that the above account is correct; that the claimant actually performed the services claimed which were authorized pursuant to the attached authority, and was necessarily in attendance at the said proceedings as set forth above; **that at the time of the said travel and attendance he was NOT a salaried employee of the Government nor a detained witness; and that where claim is made for per diem in lieu of subsistence the claimant was in attendance at a point so distant from his residence so as to prohibit return thereto from day to day and no Government transportation was furnished unless shown above.

APPROVED FOR $ 2.90 Daniel C. O'Brien

Daniel C. O'Brien, Capt., F.A.

Date 15 December 1943 Title Trial Judge Advocate

ACCOUNTING CLASSIFICATION (For Completion by Administrative Office)

APPROPRIATION, LIMITATION, OR PROJECT SYMBOL	APPROPRIATION TITLE	LIMITATION OR PROJECT AMOUNT	APPROPRIATION AMOUNT
		$	$

ALLOTMENT SYMBOL	AMOUNT	OBLIGATIONS LIQUIDATED	COST ACCOUNT SYMBOL	COST ACCOUNT AMOUNT	OBJECT OF EXPENDITURE SYMBOL	OBJECT OF EXPENDITURE AMOUNT
	$			$		$

Paid by { Check No. ....., dated ....., 19..... for $..... } on Treasurer of the United States in favor of payee named above.

Cash, ... on ....., 19..... (SIGN ORIGINAL ONLY) .....

(Signature of payee)

*Check mark applicable block.
**When used by enlisted personnel for reporters' fees, delete this phrase.

16—42111-2

WAR DEPARTMENT
Form 338 a (Revised)
Form prescribed by
Comptroller General, U. S.
August 17, 1944

WAR DEPARTMENT

D. O. Voucher No. .....
Bureau No. .....

PAID BY

(For use of Paying Office)

PUBLIC VOUCHER—PERSONAL SERVICES

Compensation for Civilian Witness and/or Reporter, Civilian, or Enlisted Man on Detail

THE UNITED STATES, *Dr.*,

To Claude M. Rickaby

Address 216 Elm Street, Marysville, Ohio

For travel performed, services rendered, and/or per diem in lieu of subsistence as: * ☒ WITNESS; ☐ REPORTER-CIVILIAN; ☐ REPORTER-ENLISTED MAN on detail, appearing before:

General Court Martial (Title of court) at Fort Wilson, Columbus, Ohio (Place)

or giving deposition before ..... (Name of officer) at ..... (Place) Date .....

for use in ..... (Title of court) convened at ..... (Place)

Travel via privately owned conveyance (Mode of travel and route used must be specified)

Dates of travel 15 December 1943

Dates of attendance 15 December 1943

Discharged from further attendance 2130 (Hour) 15 December 1943 (Date)

(Attach certified copy of order convening the court and of the subpena)

	AMOUNT Dollars	Cents
For travel from Marysville, Ohio to Fort Wilson, Columbus, Ohio and return.	$	
28 miles traveled at 5¢ (Rate) per mile (Number of round trips 1)	1	40
..... days at $..... while traveling to and returning from place of attendance		
..... days attendance at $ 1.50 per day	1	50
..... days at $..... per diem in lieu of subsistence		
Additional allowances for reporting as itemized on the reverse hereof		
AMOUNT CLAIMED	$ 2	90

(Payee will NOT use this space)

Differences .....

Account verified; correct for ..... $ .....

(Signature or initials) .....

Claude M. Rickaby
15 Dec 1943 Witness

MEMORANDUM

2.90
15 December 1943

Daniel C. O'Brien, Capt., F.A.
Trial Judge Advocate

ACCOUNTING CLASSIFICATION (For Completion by Administrative Office)

APPROPRIATION, LIMITATION, OR PROJECT SYMBOL	APPROPRIATION TITLE	LIMITATION OR PROJECT AMOUNT	APPROPRIATION AMOUNT
		$	$

ALLOTMENT SYMBOL	AMOUNT	OBLIGATIONS LIQUIDATED	COST ACCOUNT SYMBOL	COST ACCOUNT AMOUNT	OBJECT OF EXPENDITURE SYMBOL	OBJECT OF EXPENDITURE AMOUNT
	$			$		$

Paid by { Check No. ....., dated ....., 19..... for $..... } on Treasurer of the United States in favor of payee named above.
{ Cash, ... on ....., 19..... (SIGN ORIGINAL ONLY) ..... (Signature of payee) }

*Check mark applicable block.
**When used by enlisted personnel for reporters' fees, delete this phrase.

16—42111-1

APPENDIX 17

WEEKLY REPORT OF TRIAL JUDGE ADVOCATE

Fort Wilson, Ohio
26 May 1944

Subject: Weekly report of trial judge advocate of general court-martial appointed by par 35, SO 106, Hq 50th Inf Div, 15 April 1944.

To: Commanding General, 50th Inf Div, Fort Wilson, Ohio.

Report rendered for week ending Friday, 26 May 1944 by Captain Daniel A. O'Brien, trial judge advocate of the general court-martial for the 50th Infantry Division.

a. Cases awaiting trial:

Accused	Referred	Cause of delay*	Expected Date of Trial
Doll, Pvt John A, Co A, 109th Inf	23 May 44		30 May 44
Peters, Cpl E Frank, Btry C, 407th FA Bn	10 May 44	Awaiting depositions forwarded 11 May	29 May 44

b. Cases being reported:

Accused	Tried	Cause of delay*	Expected Date of Return of Record
James, Pvt Tom D, Co A, 50th Eng Bn.	19 May 44	Reporter in hospital 21-25 May	27 May 44
Potts, Pfc John, 50th QM Co	25 May 44		28 May 44

*Explanation of delay in every case in hands of trial judge advocate not promptly brought to trial after five days from date of service of charges upon accused and not submitted to Division within five days of date of trial. Use additional paragraphs, if necessary, if space provided not adequate.

Daniel A. O'Brien

DANIEL A. O'BRIEN,
Capt, AGD,
Trial Judge Advocate.

APPENDIX 18

INDORSEMENT RETURNING RECORD OF TRIAL FOR CERTIFICATE OF CORRECTION

201 Hartford, John J. (Enl) ____Ind.
Hq, 150th Inf, Fort Wilson, Ohio, 4 August 1944

To: Capt Daniel A. O'Brien, Inf, Trial JA, 150th Inf,
Fort Wilson, Ohio.

1. The record of trial by special court-martial in the case of Pvt John J. Hartford, 32016543, Co A, 109th Inf, returned herewith, fails to disclose that Cpl Timothy B. Maguire, a witness for the prosecution, was sworn.

2. If this witness was in fact sworn, a certificate of correction prepared in accordance with MCM, par. 87b, will be signed by the president of the court and the trial judge advocate, a copy served on the accused and the original sent to this office together with the record of trial.

By order of Colonel MULROONEY:

E. T. Burstein

E. T. BURSTEIN,
Capt, Inf,
Adjutant.

1 Incl.
Record of trial

APPENDIX 19

CERTIFICATE OF CORRECTION

5 August 1944.

U N I T E D S T A T E S

v.

Private John J. Hartford, 32016543,
Company A, 109th Infantry.

The record of trial in the above case, which was tried by Special Court-Martial appointed by par 38, S.O. 197, Hq 150th Infantry, dated 15 July 1944, at Fort Wilson, Ohio, on 1 August 1944, is corrected by the insertion on page three immediately following line 9, of the following:

"Corporal Timothy B. Maguire was sworn as a witness."

This correction is made because the witness was sworn at the time of trial but a statement to that effect was omitted, in error, from the record.

Hollingsworth E. Helnick

HOLLINGSWORTH E. HELNICK,
Lt Col, Inf,
President.

Daniel A. O'Brien

DANIEL A. O'BRIEN,
Capt, Inf,
Trial Judge Advocate.

Copy of this certificate received by me this 5th day of August 1944.

John J. Hartford

JOHN J. HARTFORD, 32016543.

APPENDIX 20

INDORSEMENT RETURNING RECORD OF TRIAL FOR PROCEEDINGS IN REVISION

201 Gabney, Theodore O. (Enl) Ind.
Hq. 150th Inf, Fort Wilson, Ohio, 10 August 1944.

To: 1st Lt. Stanley G. Pettigrew, Trial Judge Advocate, Hq. 150th Inf, Fort Wilson, Ohio.

1. The record of trial by special court-martial in the case of Pvt Theodore O. Gabney, 14117877, Hq Co, 158th Inf, is returned herewith for revision in accordance with MCM, par 83.

2. The record recites that the trial judge advocate read to the court the evidence of previous convictions contained in the certificate attached as Prosecution Exhibit 6.

3. Inasmuch as the second offense contained in the certificate was committed more than one year prior to the offense charged less periods of unauthorized absences as shown by the findings in the case and by the evidence of previous convictions, that offense should not have been considered by the court in deliberating on its sentence (MCM par. 79c).

4. The members of the court present at the original trial should reconvene, vacate their previous sentence, and adjudge an appropriate sentence without regard to the previous conviction mentioned (MCM, par. 87b).

By order of Colonel MULROONEY:

E. T. Burstein

E. T. BURSTEIN,
Capt, Inf,
Adjutant.

APPENDIX 21

ACTION OF REVIEWING AUTHORITY APPROVING PART OF FINDINGS AND SENTENCE

HEADQUARTERS 149TH ARMORED INFANTRY BATTALION

Camp Polk, Louisiana,
19 July 1944.

In the foregoing case of Private Alonso K. Schiedman, 26843214, Company D, 149th Armored Infantry Battalion, Camp Polk, Louisiana, only so much of the findings of guilty of the specification of Charge II and of Charge II as involves findings that the accused did, at the time and place alleged, fail to obey the lawful order of a noncommissioned officer in violation of Article of War 96 is approved. The findings of guilty of the specification of Charge III and of Charge III are disapproved. Only so much of the sentence as provides for confinement at hard labor for three months and forfeiture of $33.00 per month for a like period is approved and will be duly executed. The Post Stockade, Camp Polk, Louisiana, is designated as the place of confinement.

Todd Midquoit

TODD MIDQUOIT,
Lt Col, Inf,
Commanding.

APPENDIX 22

SPECIAL COURT-MARTIAL ORDER

HEADQUARTERS 83D FIELD ARTILLERY BATTALION
Fort Knox, Kentucky

4 September 1944

Special Court-Martial)
Orders No. F)

Before a special court-martial which convened at Fort Knox, Kentucky, pursuant to paragraph 1, Special Orders No. 227, this headquarters, 14 August 1944, was arraigned and tried:

Private JOSEPH K. POPKINS, 31119637, Battery D, 83d Field Artillery Battalion.

CHARGE I: Violation of the 65th Article of War.
Specification: In that Private Joseph K. Popkins, Battery D, 83d Field Artillery Battalion, did, at Louisville, Kentucky, on or about 26 August 1944, wrongfully attempt to strike Corporal James Gutowski, a noncommissioned officer on the face with his fist, while said Corporal James Gutowski was in the execution of his office.

CHARGE II: Nolle prosequi by direction of convening authority.

CHARGE III: Violation of the 85th Article of War.
Specification: In that Private Joseph K. Popkins, Battery D, 83d Field Artillery Battalion, was, at Fort Knox, Kentucky, on or about 27 August 1944, drunk on duty at drill.

PLEAS

To all Specifications and Charges: Not Guilty.

FINDINGS

Of the Specification, Charge I: Guilty, except the words "while said Corporal James Gutowski was in the execution of his office," of the excepted words not guilty.

Of Charge I: Not Guilty but guilty of a violation of the 96th Article of War.

Of the Specification, Charge III, and Charge III: Not Guilty on motion by the defense.

SENTENCE

To be confined at hard labor, at such place as the reviewing authority may direct for three months and to forfeit $33.00 per month for a like period.

The sentence was adjudged on 1 September 1944.

The sentence is approved and will be duly executed. The Post Guardhouse, Fort Knox, Kentucky, is designated as the place of confinement.

By order of Lieutenant Colonel BARRELL:

I. E. WEED,
Capt, FA,
Adjutant.

OFFICIAL:

I. E. Weed

I. E. WEED,
Capt, F. A.,
Adjutant.

APPENDIX 23

SPECIAL COURT-MARTIAL ORDER—ACQUITTAL

HEADQUARTERS 83D FIELD ARTILLERY BATTALION
Fort Knox, Kentucky

20 July 1944

Special Court-Martial)
Orders, No. 76)

Before a Special Court-Martial which convened at Fort Knox, Kentucky, pursuant to paragraph 1, Special Orders Number 164, this headquarters, 12 June 1944, was arraigned and tried:

Private JAMES D. GRUBY, 39476212, Headquarters Battery, 83d Field Artillery Battalion.

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private James D. Gruby, Headquarters Battery 83d Field Artillery Battalion, did, at Fort Knox, Kentucky, on or about 5 July 1944, with intent to do him bodily harm, commit an assault upon Private Robert T. Donn, by striking him on the head with a tent stake.

PLEAS

To the Specification: Not Guilty
To the Charge: Not Guilty

FINDINGS

Of the Specification: Not Guilty
Of the Charge: Not Guilty

The Court thereupon acquitted the accused on 16 July 1944.

By order of Lieutenant Colonel McGuffey:

L. E. JONES,
Capt, FA,
Adjutant.

OFFICIAL:

L. E. Jones

L. E. JONES,
Capt, FA,
Adjutant.

APPENDIX 24

SPECIAL COURT-MARTIAL ORDER—JOINT TRIAL

HEADQUARTERS, ARMORED CENTER, FORT KNOX, KENTUCKY

21 August 1944

Special Court-Martial)
Orders, No. 42)

Before a special court-martial which convened at Fort Knox, Kentucky, pursuant to paragraph 8, Special Orders Number 167, this headquarters, 15 June 1944, as amended by paragraph 2, Special Orders Number 185, this headquarters, 3 July 1944, was arraigned and tried:

Private EDDIE G. ROUNDIE, 37182366, Detachment Medical Department, Fort Knox, Kentucky, and Private JULIUS R. BRUNTON, 18032711, Detachment Medical Department, Fort Knox, Kentucky.

CHARGE: Violation of the 69th Article of War.

Specification: In that Private Eddie G. Roundie and Private Julius R. Brunton, Detachment Medical Department, Fort Knox, Kentucky, having been duly placed in confinement in the Post Guardhouse, Fort Knox, Kentucky, on or about 20 July 1944, acting jointly, and in pursuance of a common intent, did, at Fort Knox, Kentucky, on or about 22 July 1944, escape from said confinement before they were set at liberty by proper authority.

PLEAS

Private Eddie G. Roundie:
To the Specification and the Charge: Not Guilty.

Private Julius R. Brunton:
To the Specification and the Charge: Not Guilty.

FINDINGS

Private Eddie G. Roundie:
Of the Specification and the Charge: Guilty.

Private Julius R. Brunton:
Of the Specification and the Charge: Guilty.

SENTENCE

Private Eddie G. Roundie:
To be confined at hard labor, at such place as the reviewing authority may direct, for six months and to forfeit $33.33 per month for a like period.

Private Julius R. Brunton:
To be confined at hard labor, at such place as the reviewing authority may direct for six months and to forfeit $33.33 per month for a like period. (One previous conviction considered).

The sentences were adjudged on 17 August 1944.

The sentences are approved, but as to Private Eddie G. Roundie, three months of the confinement at hard labor imposed are remitted. As thus modified the sentences will be duly executed. The Post Guardhouse, Fort Knox, Kentucky, is designated as the place of confinement.

By order of Colonel UPDYKE:

T. T. STRUMPLEMEYER,
Maj, Inf,
Adjutant.

OFFICIAL:

T. T. Strumplemeyer

T. T. STRUMPLEMEYER,
Maj, Inf,
Adjutant.

APPENDIX 25

DISTRIBUTION LIST OF SPECIAL COURT-MARTIAL ORDERS

(Prepared for Units in 50th Infantry Division)

No. of Copies	Distribution*
3	The Adjutant General, Attention: Enlisted Branch, War Department, Washington 25, D. C.
1	The Fiscal Director, War Department, Washington D. C. (in desertion cases only)
2	To be forwarded with special court-martial record
1	Commanding General, 50th Infantry Division
2	Finance Officer, 50th Infantry Division
1	Adjutant General, 50th Infantry Division
1	Commanding Officer of accused's organization
1	President of special court-martial
1	Trial Judge Advocate
1	Defense Counsel
1	Individual tried
2	Post Prison Officer

Distribution made: _____, by _____.

* The distribution listed above meets the requirements of par. 3d (3), (4), AR 310-50, 1 December 1944.

APPENDIX 26

SPECIAL COURT-MARTIAL ORDER REMITTING UNEXECUTED PORTION OF SENTENCE

HEADQUARTERS 109TH INFANTRY
Fort Wilson, Ohio

20 October 1944.

Special Court-Martial)
Orders, No 51)

The unexecuted portion of the sentence adjudged against Private Peter Stiles, 37024891, Service Company, 109th Infantry, by special court-martial, promulgated in SCMO No. 45, this headquarters, 12 October 1944, insofar as it relates to confinement at hard labor, is hereby remitted.

By order of Colonel BILLESBY:

V. J . PAKULA,
Capt, Inf,
Adjutant.

OFFICIAL:

V. J. Pakula

V. J. PAKULA,
Capt, Inf,
Adjutant.

APPENDIX 27

SPECIAL COURT-MARTIAL ORDER SUSPENDING UNEXECUTED PORTION OF SENTENCE

HEADQUARTERS 109TH INFANTRY
Fort Wilson, Ohio

27 October 1944.

Special Court-Martial)
Orders, No 53)

The unexecuted portion of the sentence adjudged against Private Keith A. Coward, 31682436, Service Company, 109th Infantry, by special court-martial, promulgated in SCMO No. 46, this headquarters, 12 October 1944, is hereby suspended.

By order of Colonel BILLESBY:

V. J. PAKULA,
Capt, Inf,
Adjutant.

OFFICIAL:

V. J. Pakula

V. J. PAKULA,
Capt, Inf,
Adjutant.

APPENDIX 28

SPECIAL COURT-MARTIAL ORDER VACATING SUSPENSION OF SENTENCE

HEADQUARTERS 109TH INFANTRY
Fort Wilson, Ohio

9 February 1944.

Special Court-Martial)
Orders, No. 15)

So much of the order published in SCMO No. 83, this headquarters, 21 December 1943, as suspends execution of the unexecuted portion of the sentence in the case of Private Haljmar Dynowzki, 34824894, Headquarters Company, 109th Infantry, is vacated and said sentence will be carried into execution.

By order of Colonel BILLESBY:

V. J. PAKULA,
Capt, Inf,
Adjutant.

OFFICIAL: V. J. Pakula
V. J. PAKULA,
Capt, Inf,
Adjutant.

APPENDIX 29

SPECIAL ORDER REMITTING SENTENCE OF SUMMARY COURT-MARTIAL

HEADQUARTERS 109TH INFANTRY
Fort Wilson, Ohio

10 March 1944.

Special Orders)
No. 70)

EXTRACT

* * * *

14. So much of the unexecuted portion of the sentence adjudged by Sum CM, Case No 47, this Hq, 27 Feb 1944, in the case of Pvt Thomas M Trembone, 37182365, Co D , 109th Inf, as pertains to confinement at hard labor only, is remitted.

* * * *

By order of Colonel BILLESBY:

V. J. PAKULA,
Capt, Inf,
Adj.

OFFICIAL:

V. J. Pakula

V. J. PAKULA,
Capt, Inf,
Adj.

APPENDIX 30

SPECIAL ORDER VACATING VOID SENTENCE OF SUMMARY COURT-MARTIAL

HEADQUARTERS 109TH INFANTRY
Fort Wilson, Ohio

17 December 1944

Special Orders)
No. 251)

E X T R A C T

* * * * *

5. Proceedings of Sum CM, Case No. 122, this Hq, 13 Dec. 1944, in the case of Pvt Harold E. Hofhenstein, 37035063, Co M, 109th Inf, being void, the findings and sentence in said case are vacated. All rights, privileges and property of which Pvt Hofhenstein has been deprived by virtue of said sentence will be restored.

By order of Colonel BILLESBY:

V. J. PAKULA,
Capt, Inf,
Adj.

OFFICIAL:

V. J. Pakula

V. J. PAKULA,
Capt, Inf,
Adj.

APPENDIX 31

ACTION OF REVIEWING AUTHORITY MITIGATING SENTENCE

HEADQUARTERS 92D INFANTRY

Camp Polk, Louisiana
23 September 1944

In the foregoing case of Private David L. Belasco, 39786241, Company E, 92d Infantry, the sentence is approved but so much thereof as relates to confinement at hard labor is mitigated to hard labor without confinement for one month and restriction to the limits of Camp Polk, Louisiana, for a like period. As thus modified the sentence will be duly executed.

Roger E. Mulligan

ROGER E. MULLIGAN
Col, Inf,
Commanding.

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