COMMON SUBJECTS STUDENT'S STUDY GUIDE

MILITARY JUSTICE

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This Student Study Guide has been prepared to assist you in your preparation for the two hours in Military Justice offered in the USAR School common subjects program. (Branch Officer Basic Course, Branch Officer Advanced Course)

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PREFACE

It is not the purpose of these two hours on Military Justice to go into great detail on how courts-martial are organized, the duties of counsel, or the processing of charges. Rather, it is the purpose of this block to present some of the background, some of the policies, and some of the every-day things you may run into as an officer. For example, the officer as a court member and an officer's responsibilities as a commander in his dealings with Military Justice are considered rather than having a discussion on the types of courts-martial. Should you need further details, it is recommended that you study the Manual for Courts-Martial, enroll in an extension course from The Judge Advocate General's School, or consult your Staff Judge Advocate.

Part I

The History of the Administration of Military Justice

PURPOSE: To familiarize the student with the background of military legal history as it applies in the administration of present-day military justice, showing the origins and sources of our system; the influence of legal considerations on our system and the resulting expansion of military jurisdiction; and lastly a brief survey of the operation of our system in major wars.

REFERENCES: UCMJ; MCM, United States, 1969 (Rev.); and Winthrop's Military Law and Precedents.

1. INTRODUCTION.

Part I of these materials examines the history of our present-day military justice system. It traces its early origins, particularly the British developments. It also surveys the sources of our American system and scans the operation of the military justice system during the country's major wars.

2. EARLY HISTORY TO 1775.

a. ANCIENT TIMES. Military justice, as opposed to civilian jurisprudence, has existed since the earliest organized military forces. Although we still have vestiges of ancient times in our present system, military justice, like the tactics and weapons of war, has changed through the years as much as warfare itself.

Historically, there was no such thing as a "standing army." Disputes between adjacent nobility or nations were settled by personal armies, which were organized for "the duration" and then promptly disbanded. There being no permanent armies, there was no permanent body of "military law." Laws necessary for the governing of troops were the creation of the leader of the army (usually the king) and justice was simply an arm of the commander's discipline. As a result of the particular and limited needs of a system of military law, that law was limited to the proscription of offenses peculiarly military in nature. This remained true until the advent of the permanent military establishments of modern nations.

b. BRITISH CODES. Our own military code can be traced directly to those of the British. The earliest British military code reduced to writing was the ordinance issued by Richard I (The Lion-Hearted) in 1190, when the English forces departed for the Holy Land during the Third Crusade. As a matter of historical interest, the text of the ordinance is set forth below:

Ordinance of Richard I -- A.D. 1190

> Richard, by the grace of God, King of England, Duke of Normandy and Acquitaine, and Earl of Anjou, to all his subjects about to proceed by sea to Jerusalem, greeting. Know ye, that we, with the common consent of fit and proper men, have made the enactments underwritten. Whoever shall slay a man on ship-board, he shall be bound to the dead man and thrown into the sea. If he shall slay him on land he shall be bound to the dead man and buried in the earth. If any one shall be convicted, by means of lawful witnesses, of having drawn out a knife with which to strike another, or shall strike another so as to draw blood, he shall lose his hand. If, also, he shall give a blow with his hand, without shedding blood, he shall be plunged in the sea three times. If any man shall utter disgraceful language or abuse, or shall curse his companion, he shall pay him an ounce of silver for every time he has so abused him. A robber who shall be convicted of theft shall have his head cropped after the manner of a champion, and boiling pitch shall be poured thereon, and then the feathers of a cushion shall be shaken out upon him, so that he may be known, and at the first land at which the ship shall touch, he shall be set on shore. Witness, myself, at Chinon.

Although the penalties set forth in the ordinance may seem unduly harsh, it must be remembered that punishments in civilian life at that period were at least as severe. The penalty for larceny in civilian life, for instance, was hanging.

Since these early codes of military justice remained in effect only during the period for which the troops had been mustered, there was no military law as such during times of peace. Thus, judicial control by the military in peacetime was, as it always has been, repugnant to the ordinary citizen.

With this somewhat abbreviated history, we move now to the development of our own Articles of War.

c. EARLY AMERICAN HISTORY. Several colonies adopted codes of military justice to be observed by their respective colonial troops and militia, the earliest of which was adopted by the Provisional Congress of Massachusetts Bay in April 1775. This code was known as the Massachusetts Articles.

3. UNITED STATES ARTICLES OF WAR FROM 1775.

a. To date there have been only eight basic codes enunciated by the Congress; each successive code evolving from its predecessor and reflecting those changes demanded by the citizen-soldier who had served under the predecessor system and found fault therein. It was clear that permanent armies required

permanent legal systems. The passage of time has seen military law move closer to the system of justice enjoyed by the professional soldier's civilian counterpart, the citizen.

b. ARTICLES OF WAR OF 1775. The first military justice code applicable to all of the colonies was adopted in 1775 by the Second Continental Congress in Philadelphia. The English military tribunal which had been transplanted to this country prior to the Revolution was recognized in these articles. The Articles of War of 1775 was largely copied from the British Code of 1765 and the Massachusetts Articles. The former, according to John Adams, was a literal translation of the Articles of War of the Roman Empire.

c. ARTICLES OF WAR OF 1776. Approximately one year later, in June 1776, the Continental Congress appointed a committee, which included John Adams and Thomas Jefferson, to revise the Articles of War of 1775. New articles were prepared by this committee and were adopted on 20 September 1776 by Congress as the Articles of War of 1776. This code of 1776 was merely an enlargement, with modifications, of the Articles of War of 1775. It continued in force even after adoption of the Constitution, although there were numerous amendments.

Prior to amendments in 1786, a general court-martial was required to have 13 members and a special court-martial five members. Due to the small number of Army personnel, it was often impossible for many detachments to muster enough officers to properly constitute a court-martial. The amendment of 1786 fixed the minimum number of members of general and special courts-martial at five and three, respectively. These minimum figures have persisted even until today. It also should be noted as we approach the period of the Constitution that the Constitution, while expressly naming Congress to provide for the government of the Army and thus to originate courts-martial, also recognized in the fifth amendment the distinctions between civil offenses and those cognizable by a military forum. In view of these provisions, the first Congress did not originally create the court-martial but simply continued it in existence as previously established by adoption in 1789 of the Articles of War of 1776. Thus the court-martial is older than the Constitution and therefore older than any court of the United States instituted or authorized by that instrument. Today, of course, the primary source of authority for courts-martial is the Constitution and legislation based upon the constitutionally granted authority to maintain and regulate the armed forces.

d. ARTICLES OF WAR OF 1806. On 10 April 1806, the Congress enacted the Articles of War of 1806 mainly for the reason that the change from a confederation to a constitutional type of government made desirable a rather complete revision of the Articles of War. These Articles of War remained in effect for nearly 70 years with but few changes until the advent of the Civil War. After the start of the Civil War, changes principally relating to the trial and review of cases were enacted.

e. ARTICLES OF WAR OF 1874. The many amendments and changes to the Articles of War of 1806 made it desirable to reorganize them and make other

changes that experience and the public dictated as a result of the Civil War. On 22 June 1874 the Articles of War were completely revised and re-enacted as the Articles of War of 1874. This code, although it too was amended a number of times, remained in effect until shortly before World War I. Because the Articles of War of 1874 established concepts which we find in the military justice system of today, some of the amendments during this period should be briefly observed. For example, the punishments of flogging, branding, marking and tattooing were first prohibited. Here we also find for the first time a separate statute of limitations on the prosecution of desertion in time of peace. Another milestone in the development of military justice during this period was the authorization by Congress for the President to provide the maximum limits for punishments during time of peace.

f. ARTICLES OF WAR OF 1916. Shortly after the turn of the century, it became apparent that the code of 1874, as amended, was very unscientific in its arrangement of articles and contained many provisions that were either wholly obsolete or not well suited to the conditions existing in the service at that time. On 29 August 1916, the Congress enacted the Articles of War of 1916. The Articles of War of 1916 were a complete revision of the old code of 1874. Some of the more important changes effected are as follows:

(1) General courts-martial could try the capital offenses of murder and rape in time of peace in places outside the United States.

(2) Reviewing authorities were allowed to approve lesser included offenses.

(3) Conviction of offenses carrying the death penalty was raised from a bare majority to a two-thirds majority vote.

g. ARTICLES OF WAR OF 1920. After cessation of hostilities in 1918 and the "return to normalcy" the hue and cry of the "citizen soldiers" who had fought World War I were heard and heeded by Congress. A bill incorporating many changes was enacted as the Articles of War of 1920. These articles retained the expanded jurisdiction over "civilian type offenses" which had first been included in the 1916 articles. Some of the salient features of the Articles of War of 1920 were as follows:

(1) It became mandatory for the officer convening a general court-martial, the convening authority, to refer charges to his staff judge advocate for a pretrial advice, and to obtain a post-trial review prior to his final action and the findings and sentence. Additionally, decisions of the convening authority could be reviewed at departmental level by boards of review.

(2) Nonjudicial punishment rather than trial by court-martial was encouraged and the appointment of a defense counsel in the same manner as a trial counsel was made mandatory.

(3) A legally qualified member was provided for every general court-martial.

(4) Reconsideration by a court of an acquittal or a finding of not guilty of any specification was prohibited, nor was it permissible to increase a sentence once announced.

(5) Courts-martial were required to vote unanimously for a death sentence, reach a three-fourths vote to sentence to life or imprisonment of more than 10 years, or a two-thirds vote for any other sentence.

(6) A peremptory challenge for each side was authorized.

These articles and the principal implementing executive order, the 1928 Manual for Courts-Martial, were used throughout World War II.

h. THE ARTICLES OF WAR OF 1948. As a result of World War II when extremely large numbers of civilians were drafted into the armed forces, especially into the Army, the largest public clamor ever heard after a major war was made for a review of the system of military justice which existed during World War II. By and large the objections were aimed at eliminating command influence and so-called "drum head" justice. As a result, the Elston Bill, enacted by both houses of Congress, substantially modified the existing Articles of War of 1920 and created the Articles of War of 1948. In 1949 a new Manual for Courts-Martial was promulgated to implement these articles. Some of the principal changes effected by the Elston Act were as follows:

(1) For the first time, warrant officers and enlisted men were authorized to serve as members of general and special courts-martial; the law member was required to be a judge advocate; the bad conduct discharge was created as a lesser form of punitive discharge; the constitutional protection against self-incrimination was incorporated by statute into military law; a higher appellate body, the Judicial Council consisting of three judge advocates of general officer rank, was created with the authority and responsibility to review the decisions of Boards of Review.

(2) Convening authorities and commanding officers were, for the first time, specifically forbidden to censure, reprimand, or admonish a court-martial or any of its members with respect to the findings or sentence or any other judicial act.

i. THE UNIFORM CODE OF MILITARY JUSTICE. Despite the major changes made by the Elston Act, which applied only to the Army, many people were of the opinion that there should be but one system of military justice for all the services. Added impetus was given this philosophy by the creation of the Department of Air Force. Extended congressional hearings, similar to those that preceded the Elston Act, were held. The predominant theme of the "legislative history" of the UCMJ was (1) uniformity for all services, and (2) protection of the rights of the accused. The Code as we know it was

enacted in 1950 and it, along with the Manual for Courts-Martial, 1951, became effective on 31 May 1951.

(1) Uniform provisions. Among the provisions included in the Uniform Code of Military Justice to attain uniformity are the following:

(a) Offenses made punishable by the Code are identical for all the armed forces;

(b) One system of courts with the same limits of jurisdiction of each court is established for all the armed forces;

(c) The procedure for general courts-martial is identical for all the armed forces as to institution of charges, pretrial investigation, action by the convening authority, review by the Board of Review, and review by the Court of Military Appeals;

(d) The rules of procedure at the trial, including modes of proof, are equally applicable to all the armed forces;

(e) The Judge Advocates General are required to make uniform rules of procedure for Boards of Review;

(f) The required qualifications for members of the court, law officer, and counsel are identical for all of the armed forces;

(g) The Court of Military Appeals, which finally decides questions of law, is the court of last resort for each of the armed forces and also acts with The Judge Advocates General as an advisory body to the Congress with a view to securing uniformity in policy and in sentences and in discovering and remedying defects in the system and its administration.

(2) Protection of the rights of the accused. Among the provisions designed to protect the rights of the accused, and thus to insure a fair trial, are the following:

(a) The military judge, a legally qualified officer, is made the "non-voting" judge of courts-martial. His rulings on nearly all matters are final. He is the presiding officer at the trial; thus, the president of the court-martial has assumed the position of his civilian counterpart, the foreman of the jury.

(b) A pretrial investigation is provided, at which the accused is entitled to be present with counsel to cross-examine available witnesses against him and to present evidence in his own behalf.

(c) Referring any charge for trial which does not state an offense, is not shown to be supported by sufficient evidence, or is not warranted by the facts and circumstances is prohibited.

(d) It is mandatory that there be competent, legally trained counsel at general courts-martial for both the prosecution and the defense.

(e) A prohibition against compulsory self-incrimination is provided. In addition to being informed as to the offense or offenses of which he is suspected or accused, that he need not make any statement whatever and that anything he says may be used against him in a trial by court-martial (Art. 31, UCMJ), the accused must also be informed that he has the right to consult with legally qualified counsel, either civilian (at his own expense) or a judge advocate officer, that such counsel may be present with him during the interrogation. Additionally, if the accused requests counsel, the interrogation must cease until counsel is present. However, if the accused affirmatively and in clear and convincing manner indicates that, understanding his rights as to counsel, he nevertheless waives that right and desires to proceed, the interrogation may proceed in the absence of counsel. If, notwithstanding the waiver of counsel, the accused indicates he does not desire to make a statement, the interrogation likewise must cease.

(f) Legal process is given to the accused, as well as the prosecution, for obtaining witnesses and depositions.

(g) Only the accused may use depositions in a capital case.

(h) An accused enlisted man has the privilege of having enlisted men as members of the court trying his case.

(i) All voting on findings and sentences is by secret ballot by members of the court.

(j) The law officer must instruct the court concerning the elements of the offense, presumption of innocence, and the burden of proof. These instructions must be made in open court and be made a matter of record.

(k) An automatic review of all records of trial is provided for errors of law and fact and in most general courts-martial cases the record of trial additionally is reviewed for errors of law and fact by a Board of Review with the right of the accused to be represented by legally competent counsel.

(l) Acceptance of pleas of guilty in capital cases is prohibited.

(m) Review of certain records for errors of law by the Court of Military Appeals is provided. This review is automatic in cases where the sentence is death or involves a general or flag rank officer. Such review may be requested by the accused in those other cases which are reviewed by a Board of Review, also with representation by legal counsel.

j. THE KOREAN WAR. Following the Korean War, unlike most other major wars involving the United States, there was no significant public demand for

substantial changes in the military justice system. This is undoubtedly due to the significant changes made by, or resulting from, the Uniform Code of Military Justice, including the expansion of Judge Advocate General's Corps activities at the trial level, the elimination of command influence, the expanded protection of the accused's rights, and the appellate system, supervised by three eminent civilian jurists -- the Court of Military Appeals.

k. UCMJ AMENDMENTS. Since the enactment of the Uniform Code of Military Justice in 1950, there have been four amendments enacted by Congress, all at the request of the military departments:

(1) Article 58a, enacted July 1960, provided that an approved court-martial sentence of an enlisted man in pay grade above E-1 that includes a DD or BCD, confinement, or hard labor without confinement automatically reduces the man to E-1. The Manual for Courts-Martial had contained such a provision for years, and this statute gave it the force of law.

(2) Article 123a, enacted October 1961 (and effective March 1962), provided a new bad check statute for the military. It was modeled after the laws in force in many states and, along with the accompanying amendments to the MCM, make the proof of bad check offenses much easier, especially where the check was written on a bank in another state or country.

(3) Amendments to Article 15, enacted September 1962 (effective February 1963), expanded the limits of punishments that could be imposed by commanding officers in the administering of nonjudicial punishment upon men of their commands in lieu of resort to courts-martial.

(4) The Military Justice Act of 1968, which increased substantially the right to counsel at special courts and also provides for military judges. Certain procedural reforms were made as well.

4. PRESENT TRENDS.

a. CONTINUED CONGRESSIONAL INTEREST. Today we have the largest peacetime Army in history and it appears that this trend will continue. Since 1951 a large proportion of young men in the United States have served, are serving, or will serve in the armed forces. We can expect a continuing and lively interest by the Congress in our military justice system. Extensive hearings have been held by a subcommittee of the Senate Committee on Constitutional Rights. The Subcommittee looked long and searchingly at many aspects of military justice and at the services' system of elimination by administrative boards. This is a permanent subcommittee and will undoubtedly continue to hold hearings.

b. THE MILITARY JUSTICE SYSTEM TODAY. Until this century, the concept of the court-martial was that of an agency through which the convening authority asserted his will. Although a fair trial was contemplated and desired, the commanding officer by and large was the sole judge of what constituted a fair trial. If he was dissatisfied with a finding of a sentence of the court he could return the case to that court repeatedly with directions for the members to reconsider. The only really effective restraints on his absolute power to mold the proceedings according to his will

were the jurisdictional limitations of courts-martial which were always subject to review in the federal courts by writ of habeas corpus and the requirement that certain death sentences and sentences affecting general officers be confirmed by the President. Gradually, however, this concept disappeared. No longer are serious sentences self-executing upon approval by the convening authority. They must now be confirmed by some higher authority. No longer may the convening authority require a court to reconsider its findings or its sentence. The accused is given the right to counsel, the right to testify in his own behalf, and limitations on punishments have been imposed. Independent judicial agencies not in the chain of command now enter the appellate review picture. In the aggregate these changes have operated to substitute for the commander's personal standards of justice and fairness, objective standards of military due process designed to be applied uniformly throughout the armed forces.

5. SUMMARY.

The foregoing account has covered briefly the history of our present military justice system showing its development to the full and complete system of jurisprudence we know today. It touched on the origins and sources of our system and has covered, in some detail, the progressive changes of our system after each major war. The present Code has been amended only four times since its passage, thus attesting to the soundness and fundamental fairness of our present military justice system. In view of the fact that Congress has had, and continues to have, a "paternal" interest in the military justice system, its continued careful scrutiny of the system will undoubtedly expose any attempted abuses.

Part II

Commander's Role in the Administration of Military Justice and the Role of the Officer as a Court Member

PURPOSE: To give student officers insight into their position, duties, and responsibilities as commanders exercising court-martial jurisdiction in the Military Justice system and to emphasize the role of the officer as a court member.

REFERENCES: UCMJ, Arts, 6, 24, 25, 26, 29, 33, 37, 40-42, 50-92; MCM, paras. 4, 5, 20(c), 26(b), 30(f), 30(h), 36, 39-41, 57, 58 62, 73, 79; App. 8, and Chap. XVIII; ARs 310-10, 633-10, 635-206; DA Pams 27-7, 27-9, and 27-10.

1. INTRODUCTION.

The Commander has a key role in the administration of Military Justice, and you, as officers of the Army, must be prepared to carry out these responsibilities. In addition, you may someday be called upon to serve as a member of a courts-martial. This, too, is a great responsibility, for you will decide the future of the accused who appear before you. It is the purpose of this reading assignment to introduce you to some of the tools you will need and some of the concepts you must employ.

2. THE COMMANDER'S RESPONSIBILITY.

a. PURPOSE OF MILITARY JUSTICE.

(1) The principal function of any army is to fight and win wars. Experience has proven that only disciplined troops can successfully carry out this task. The stern necessities of military discipline demand not only the sacrifice of personal comforts and privileges but also those of personal liberties and life itself.

(2) One purpose of military justice is to aid the commander in the maintenance of good order and discipline by providing sanctions for violations of military law and to implement the policies designed to prevent breaches of discipline. These sanctions and policies are set forth in the Uniform Code of Military Justice; the Manual for Courts-Martial, 1969 (Rev.); Army Regulations; and various command publications.

b. Within the framework of the laws and policies furnished him, it is the commander's responsibility to insure that his organization attains that state of discipline necessary to make it the finest possible military instrument, with the will and capability to fight and win war.

3. WHAT ARE SOME OF THESE LAWS, REGULATIONS AND POLICIES WHICH GOVERN MILITARY JUSTICE?

a. THE UNIFORM CODE OF MILITARY JUSTICE. The Uniform Code of Military Justice, as enacted by the Congress of the United States, is found in Title 10, Chapter 8, United States Code, and in the Manual for Courts-Martial, United States, 1969 (Rev.). It is the basic act of Congress governing the administration of military justice. It is the supreme source of military legal authority and should any provision of the Manual or regulations (acts of the executive branch of the government) prove inconsistent with it, the act of Congress will prevail. The following provisions of the Code are of particular importance to the commander:

(1) "Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice." (UCMJ, Art. 6b). While this statute relates in the Army chiefly to the relationship between a general court-martial convening authority and his legal officer, it is included here as many special court-martial jurisdictions now have judge advocate personnel assigned to the staff of the commanding officer.

(2) "No authority convening a general, special, or summary court-martial nor any other commanding officer, may censure, reprimand, or admonish the court or any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings. No person subject to military law may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening authority, approving authority, or reviewing authority with respect to his judicial acts." (Art. 37, UCMJ). This article prohibits "command influence," believed by Congress to be one of the greatest evils which beset military justice before and during World War II. Although it is phrased in terms of convening authorities and commanding officers, its proscriptions apply equally to staff officers as the reproving and disciplinary powers of the latter must be exercised through the commander on whose staff they serve.

(3) Complaints of wrongs. "Any member of the armed forces who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to any superior officer who shall forward the complaint to the officer exercising general courts-martial jurisdiction over the officer against whom it is made. That officer shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department concerned a true statement of such complaint, with the proceedings had thereon." (Art. 138, UCMJ).

Note that this article provides a congressionally enacted procedure whereby any member of the armed forces who believes himself wronged by a commander may complain to the officer exercising general court-martial authority over the commander. This officer must, by congressional mandate, examine the complaint and take any corrective action necessary.

b. THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev.).

(1) The provisions of Article 36, Uniform Code of Military Justice, authorize the President of the United States to establish rules of evidence and procedure for use in trial by courts-martial. Article 56 of the Code authorizes the President to prescribe maximum limitations on punishment which a court-martial may adjudge for violations of those articles which state that certain misconduct shall be punished as a "court-martial may direct." In implementation of these legislative authorizations, the President, by executive order, promulgated the Manual for Courts-Martial, United States, 1969. This original publication and the various supplemental executive orders are the basic repository of military law for the Army officer. A word of caution, many of the provisions of the Manual have been overruled by decisions of the Court of Military Appeals. A check with your local Staff Judge Advocate on any areas where you may have questions is always in order.

(2) Some of the most important policies included in the Manual are:

(a) The accused has the right to object to trial by summary court-martial in all cases and may not be tried by a summary court over his objection.

(b) The accused has the right to certified counsel in special courts-martial.

(c) Military judges will be detailed to special courts whenever possible and must be detailed to special courts before it can adjudge a bad conduct discharge.

(d) The accused may request trial by a military judge alone.

(e) Army regulations provide what military justice courses may be taught. No court member may be evaluated on his performance as a court member; and no defense counsel may be given a lower rating than he otherwise would receive because of his zeal in presenting a defense.

(f) The convening authority shall personally detail as members of courts-martial such persons as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament (MCM, para. 4d). Though he may rely on members of his staff for nomination of court members, he must personally approve and appoint the members who are to serve.

(g) Confinement will not be imposed upon an accused pending trial unless deemed necessary to insure his presence at the trial, because of the seriousness of the offense charged or to protect the accused from others, himself or to protect other persons (MCM, para. 20c).

(h) One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person (MCM, para. 26b). It is normal to charge the offense in the most serious form established by available evidence.

(i) Subject to jurisdictional limitations, charges against an accused, if tried at all, should be tried at a single trial, and generally by the lowest court that has power to adjudge an appropriate and adequate punishment (MCM, para. 30f). Only in the event that administrative or nonjudicial processes are inappropriate should resort to courts-martial be considered at all.

(j) Upon the receipt of charges or of information concerning a suspected offense, the proper authority -- ordinarily the immediate commanding officer of the accused -- shall take prompt action to determine what disposition should be made of them in the interests of justice and discipline (MCM, para. 30h). Action should be taken without waiting for the formal investigation often conducted by criminal investigators, where the completion of such investigation will unduly delay the immediate commander's disposition. This is not to imply that the commander should not seek the assistance of professionally trained police investigators, only that he may not substitute the investigation for his own personal determination as to the disposition of a suspected offense.

(k) In effecting disposition of charges, if it is determined to try an accused by general court-martial, the officer exercising general court-martial jurisdiction must seek the recommendations of an investigating officer who has considered the sufficiency of the charges and specifications, the evidence to support such offenses and the desirability of trial and at what level. The convening authority may not refer charges to trial by general court-martial until such an investigation has been conducted.

c. ARMY REGULATIONS. Other policies concerning the administration of military justice are set forth in Army Regulations. Some of these are:

(1) A bad conduct discharge may not be adjudged unless a complete record of the proceedings and testimony has been made, counsel qualified under Art. 27(b) was detailed to represent the accused and a military judge was detailed to the trial, excepting any case in which a military judge could not be detailed to the trial because of physical conditions or military exigencies.

(2) A person subject to the Uniform Code of Military Justice who has been tried in a state civil court proceeding normally will not be tried by court-martial or punished under Article 15 for the same act or acts over which the civil court has exercised jurisdiction (para. 2, AR 22-12). This policy applies for instance, where a member of the service has been tried by local civilian courts for a traffic offense. Whether he was found guilty or acquitted the regulatory provision would normally bar his trial thereafter for the same offense by military tribunals. This policy applies equally in the case of a state trial for the more serious offenses. Normally, in this latter instance, convictions of a serious offense by a civil jurisdiction gives rise to administrative discharge of the offender under the provisions of AR 635-206. Trial by a federal court, however, bars any further trial for that offense by the military.

d. MILITARY POLICIES. The commander is exposed to the operation of criminal law principally in two areas. One is his obligation to advise any other person subject to the Code of their rights under Article 31 of the Code. Any time an officer suspects a person in the military of an offense and wishes to question the suspect, he must first warn him of his rights against self-incrimination. These rights have been extended beyond those set forth in Article 31b of the Code. In order to meet the tests of the criminal law, the warning must be as complete as that set forth in paragraph 3i(2)(e), Part I of this Study Guide. Anything less will render any statement, regardless of its content, inadmissible in a subsequent trial by court-martial. This burden falls as equally on the commander as on the professionally trained military police criminal investigator. The second great area of impact by the criminal law is in that of searches and seizures for unlawful contraband. Generally speaking the barracks area of a commander's unit

is subject to his control. While it is possible for a commander to delegate his authority to search, such delegation should be clear, in writing and to a particular person or position, such as the executive officer. The delegate should not exercise this delegated power when the commander is present since the power is an attribute of command. When knowledge of an offense possibly involving a member of his command comes to the attention of the commander, he may direct a search for a particular piece of evidence or of particular persons. Since personal privacy is a constitutionally protected privilege, such searches are proper only within very limited grounds. First there must be sufficient information available to the commander to cause him, upon reasonable grounds, to believe that a crime has been committed and that the fruits of the crime are in an area under his control or that the perpetrator of the crime is residing in barracks under his control. Mere conjecture or suspicion is not enough. There must be sufficient information from a reliable source that a crime probably has been committed. Second hand information from an MP or another member of his command would be sufficient if there is enough detail to satisfy the commander that an offense has been committed. Of course, if a crime is committed in the presence of the officer, or if the accused is apprehended upon reasonable grounds that he has committed an offense, the accused may be searched. To make it clear and certain that an apprehension has been effected and that the accused understands that he is no longer free to exercise his rights of locomotion, he should be told in words to the effect that he is apprehended. Likewise, the accused may consent to a search of his person or his property, but the evidence must be clear and convincing that the accused knew he did not have to submit to the search and has voluntarily relinquished his rights to privacy. Lastly, a commander may direct a search if he has reasons to believe upon a reasonable basis, that if he does not act immediately to search an accused or his property, the property being sought may be removed or disposed of thereby defeating the ends of justice. Any search not conducted within these limited areas will be considered as unreasonable and no evidence disclosed thereby will be admissible against the accused in a subsequent court-martial. In order to forestall possible prejudice to the rights of the Government or the accused, where delay will not seriously prejudice any such investigation, the commander should consult the judge advocate before authorizing or conducting a search.

4. THE ROLE OF THE OFFICER AS A COURT MEMBER.

The Uniform Code of Military Justice and the Manual for Courts-Martial spell out the eligibility and duties of members as well as certain restrictions. This part of your student study guide discusses these duties, responsibilities, and restrictions.

a. GENERAL. Since modern day American armed forces are composed in large part of citizen-soldiers, it has become necessary to strike a balance between the interest of the commander to instill and govern discipline in his organization and to restrict his activity in the area of enforcement of discipline, i.e., the court-martial. To the extent that, in the interest of enforcing discipline, the commander attempts to influence the results of courts-martial findings or sentences, he is guilty of unlawful command influence. Short of such unlawful influence, he is allowed to instill that high degree of discipline necessary to effectuate an efficient fighting unit. One important area in which the commander still operates in the court-martial sphere is the selection of court members. Until very recently, courts were always manned exclusively by officers of the command from which the court was appointed, since they were, by virtue of their positions, disciplinarians. Also, officers, by virtue of their training, education, and experience, were more suited to the judicial role. Thus you, as officers, are still the center of our system. This has continued even though after World War II the Elston Act, the 1948 Articles of War, authorized both warrant officers and enlisted men to sit as members of courts-martial. With this brief historical note, we move now to the duties of court-martial personnel.

b. DUTIES OF MEMBERS OF COURTS-MARTIAL.

(1) SUMMARY COURTS-MARTIAL. There is perhaps no more difficult task than that of judging your fellow man. This task becomes even more difficult when you are called upon to be, as it were, an investigator, judge, jury, prosecutor and defense counsel all at once. As a summary court-martial U.S. officers act as a one-man investigator, judge, jury, prosecutor and defense counsel. Perhaps the name "Summary" is unfortunate in that all too often it connotes the quality of the justice dispensed rather than describing the administrative proceedings involved.

(a) Procedure. A summary court-martial should be conduced in an orderly and judicious manner. In decorum and thoroughness it should emulate what we think of when we think of an impartial court, and it should be one in which you yourselves would not be afraid to appear.

1. Examination of the file. Paragraph 79, MCM, 1951, spells out in detail the procedure that should be followed by a summary court-martial. Upon receiving a file, you as summary court should carefully examine the charges and allied papers to see that charges are in proper form and that the data on the charge sheet and any evidence of previous convictions are complete and free from error in substance and form. If you have any questions on these matters, you should contact the nearest judge advocate. If you discover any errors or substantial irregularity, you should report them to the convening authority. However, if the errors are minor, such as spelling or other obvious mistakes, you may initial the changes and continue with the court.

2. Trial procedure. After determining that the charges and other data are in proper form, you should arrange for the presence of the accused. When he appears before you, before proceeding further with the trial, you must advise him of: (1) the general nature of the charges, (2) the fact that they have been referred to a summary court-martial for trial, (3) who appointed the court, (4) the name of the accuser, (5) the names of the witnesses who will probably be called, (6) the right of the accused to cross-examine them or have the court ask any questions which the accused desires answered, (7) the right of the accused to call any witness or produce any evidence in his own behalf with the assurance that the court will assist him in every possible way to do so, (8) his right to testify on the merits or to remain silent (see paragraph 148e, MCM, 1951; App. 8a, MCM, 1951; Article 31, UCMJ), (9) should any findings of guilty be announced, of his right to make an unsworn statement in mitigation or extenuation of any offense of which he may have been convicted (paragraph 75c and App. 8a, MCM, 1951), and (10) the maximum sentence which the court can adjudge if the accused is found guilty of the offense or offenses charged. If it does not appear that the accused has been permitted, and elected, to refuse punishment under Article 15, for all the offenses charged, you must advise him of his right to object to trial by summary court-martial and ask him whether he consents or objects to such trial. After giving the accused a reasonable time to consider, you should record the accused's response.

If the accused objects to trial you should return the charges and allied papers to the convening authority. However, if the accused consents to trial, you may proceed with the trial. In either event, you should have the accused check the appropriate box on page four of the charge sheet and sign his name to indicate that he has made an election.

3. Arraignment and pleas. After complying with the foregoing provisions and determining that you have jurisdiction over the accused as a summary court, you should read or show the charges and specifications to the accused. Any necessary explanation of the charges may be made. The accused should then be asked how he pleads to each specification and charge. If he pleads guilty to any specification or charge, you should then explain the elements of the offense to which he has pleaded guilty. You should advise him that the court may find him guilty of such offense without considering further proof and you should inform him of the maximum sentence which you can impose for any of the offenses to which he has pleaded guilty.

If the accused desires to change his plea or if you as the summary court-martial are in doubt as to his understanding and desire to plead guilty or if at any time during the trial the accused makes a statement, sworn or unsworn, which is inconsistent with his plea of guilty, you must enter a plea of not guilty for him. 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 adjudge an appropriate sentence. However, the court may, in the interest of justice, proceed with the trial and consider evidence on the merits or in mitigation and extenuation. If after hearing such evidence, you believe the plea of guilty to have been improvidently entered, you should enter a plea of not guilty and proceed as though the accused had pleaded not guilty.

4. Presentation of evidence. If the accused has pleaded not guilty, or, in the interest of justice following a plea of guilty, the court has determined to consider on the merits or in extenuation or mitigation, arrangements should be made for the attendance of necessary witnesses. Witnesses other than the accused should be excluded from the court room until called to testify. Witnesses for the prosecution will be called first and examined under oath as to all matters relevant to the offense charged whether on the merits or in extenuation or mitigation. The accused will be extended the right to cross-examine such witnesses. You as the summary court must aid the accused in cross-examination if he desires and if the accused requests, you should ask those questions suggested by the accused. On behalf of the accused, should he so request, or should it become necessary to establish the truth, or to aid you in adjudging an appropriate sentence, you should obtain the attendance of additional witnesses, administer the oath and examine them and should obtain such other evidence as may tend to disprove or negate guilt of the charges, explain the acts or omissions charged, show extenuating circumstances, or establish grounds for mitigation.

Before determining the findings, you should explain to the accused his right to testify on the merits or to remain silent and you should give the accused full opportunity to exercise his election.

5. Findings and sentence. The principles we have just discussed should be considered by you as a summary court-martial in determining the findings and sentence, respectively. The court will announce the findings to the accused as soon as they have been determined. If the accused has been found guilty of any offense, you should advise him of his right to submit matter in extenuation or mitigation including the making of an unsworn statement. Before determining the sentence the summary court should show or read to the accused any admissible evidence of previous convictions and the personal data appearing on the first page of the charge sheet and you should ask him whether they are correct. If the accused claims they are not correct in any particular, you should determine the issue. The court should then advise the accused of the sentence as soon as it is determined. If the sentence includes confinement, you, as the summary court, should take necessary action as may be prescribed by the convening authority to have the accused delivered to an appropriate place of confinement.

6. Record of trial. You, as a summary court-martial, are responsible to see that the record of trial found on the last page of the charge sheet is completed and returned to the convening authority for his action.

(b) Summary. You will note that the details of your duties, if conscientiously followed and applied, will make your court truly a court in which justice prevails. Remember even though a summary court-martial tries only minor offenses and uses a rather simplified procedure, you are still dealing with complicated human behavior and a conviction by a summary court-martial is a conviction for a criminal offense and is generally treated as such by employers and the United States Government. Hence, assignment to the duty of summary court-martial should not be taken lightly and should be looked upon as a challenging opportunity in which you have a many faceted responsibility and one which truly tests your mettle as an officer.

(2) MILITARY JUDGE AND THE PRESIDENT OF SPECIAL COURTS-MARTIAL. When a court consists of a military judge with members, the military judge will be the presiding officer over all open sessions. As the presiding officer, he will set the time for assembly of the court after consultation with the senior member. The senior member will prescribe the uniform and still be referenced to as the president. The military judge will administer oaths, recess and adjourn the court, determine and rule upon the validity of challenges for cause, decide whether or not a continuance will be granted. Furthermore, the military judge will rule finally on all questions of law and interlocutory questions of fact arising during the trial except on the issue of the mental responsibility of the accused. Prior to a court closing to vote on the findings, the military judge will instruct the court.

The president of a special court-martial without a military judge has a difficult and challenging role. The senior officer present and sitting on a court-martial is designated the president. Upon him rests the responsibility for the decorum and the fair and orderly conduct of proceedings in accordance with law in all cases referred to the court. In addition, the president, in the absence of a military judge, rules on all interlocutory questions, such as rulings on evidentiary matters, competence of witnesses, requests for continuances, and objections by counsel. Paragraph 57 of the Manual and DA Pam 27-15 define those rulings of the president that are final and those that are subject to objection. Before ruling on an interlocutory matter, the president should give opposing counsel full opportunity to argue their respective views on the disputed matter. All challenges for cause of any member, including the president, are voted on and ruled on by the court itself excluding the challenged member.

The president is the only member of a special court-martial allowed access to the Manual for Courts-Martial during the trial and he may use it only during open sessions of the court. The evidence portion of the manual, Chapter XXVII, and the punitive articles portion, Chapter XXVIII, will be used most frequently. They should be consulted first if any questions arise. In addition, DA Pam 27-15, "Military Justice Handbook -- The Trial Guide for the Special Court-Martial President," should be studied and followed. As the president is required by law to instruct the court as to the elements of each offense charged, the presumption of innocence, reasonable doubt and the burden of proof, DA Pamphlet 27-9, "Military Judges' Guide," will also prove helpful.

During the course of a trial many times questions arise which cannot be answered or resolved. Paragraphs 73 and 74e of the Manual for Courts-Martial permit the president to cause the trial counsel to produce any law available on the matter, including information on the law from the convening authority. As a normal practice, information can also be obtained from the local judge advocate, but in no event should the president communicate directly with the convening authority or the judge advocate. This should always be done through the trial counsel.

(3) PRESIDENT OF GENERAL COURT-MARTIAL. Unlike the president of a special court-martial, the president of a general court-martial does not rule on interlocutory questions. The military judge of the general court-martial rules on all interlocutory questions and, in addition, instructs the court. The military judge, also, is the presiding officer. Nevertheless, the president of a general court-martial has certain important responsibilities. Among them are:

(a) Prior to trial.

1. Prescribes the uniform for the court unless such has been prescribed by higher authority. However, before stating the uniform, he should seek the advice of the trial counsel on such matters as command policy, the possibility that the military judge, the accused or, because of military exigency, witnesses may be limited in the type of uniform available.

2. Sets the time and place for trial after conference with counsel and the military judge.

(b) During trial.

1. Calls the court-martial to order.

2. Administers oaths to the trial counsel and the defense counsel, if required.

3. Announces findings and sentence reached in closed sessions.

4. Adjourns the court.

5. Conducts the proceedings during closed sessions of the court.

6. Represents the court in all consultations with the military judge on the form of findings and sentence and the dates on which the court will be reconvened following continuances.

(c) After trial.

1. Authenticates the record of trial and any certificates of correction in trials without a military judge.

2. Determines the time and place for holding any revision proceedings after a conference with the military judge and counsel.

(4) DUTIES AND RESPONSIBILITIES OF OTHER MEMBERS OF ALL COURTS-MARTIAL. All members of a court-martial are sworn. A brief analysis of this oath should prove helpful to you in understanding your duties and responsibilities. It is as follows:

> **You do swear (or affirm) that you will faithfully perform all the duties incumbent upon you as a member of this court; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws and regulations provided for trials by courts-martial, the case of (the) (each) accused now before this court; and that if any doubt should arise not explained by the laws and regulations, then according to the best of your understanding and the custom of war in like cases; that you will**

not divulge the finding and sentence in any case until they shall have been duly announced by the court; and that you will not disclose or discover the vote or opinion of any particular member of the court upon a challenge or upon the findings or sentence unless required to do so before a court of justice in due course of law. So help you God.

Notice, the oath requires the members "faithfully and impartially to try, according to the evidence, your conscience and the laws and regulations provided," the case of the accused before you. You are in effect jurymen, but you are select jurymen. You are officers bound by your officer's oath and the court-martial member's oath. In short, the trial is to be governed by established law and not by whim or caprice. Significantly, then, you swear to make an independent decision in each case according to the law and the dictates of your own conscience. You are the triers of fact. It is your responsibility alone to listen to the evidence presented and decide what the facts are and then to make your decision accordingly based upon those facts only.

(a) Questions. As a case progresses you may have questions concerning evidence of the conduct of the case. By and large, counsel are well prepared and they have anticipated most questions. They, more than likely, will be answered either by another witness or by real evidence to be introduced later in the trial. However, if you do have questions of a witness after both counsel have finished their examination, feel free to ask them. In asking them, however, remember two important things. First, you must not abandon your impartial position as a member of the court and assume the role of either a prosecutor or defense counsel. Such conduct may be the cause of a new trial on the case. Second, your questions may be legally objectionable for one reason or another. Although considerable latitude is allowed you as members in asking questions, perhaps the military judge or either counsel may object to your questions. If this happens, remember it is not a personal thing but rather that your questions are legally objectionable, and even if asked by counsel or the military judge, would not or should not be allowed. At the close of the case if you feel it necessary to clear up any questions, you may request any witness be recalled or to ask for such additional evidence or witnesses as may be approptiate. Such requests are directed to the military judge or to the president of a special court-martial if a military judge has not been detailed.

(b) Challenge procedure. Prior to hearing a case, both the Government and defense are afforded an opportunity to ask questions of court members on what is called voir dire examination. This examination is not meant to pry into your personal affairs, but rather it gives each side a basis on which to exercise with intelligence the right to challenge. There are two types of challenges. First, challenges for cause; second, pre-emptory challenges.

1. Challenges for cause. There are a number of things that may make persons ineligible to sit as members of courts-martial. For example, a person may be challenged for cause if he is the accuser as to any offense charged or if he will be a witness for the prosecution. Also, he may be challenged if he was the investigating officer as to any offenses charged or if he has acted as counsel for the prosecution or the accused as to any offense charged.

Nearly all such challenges for cause go to something that would disqualify the member because of either real or apparent abandonment of impartiality toward an accused.

It is your duty, as an officer and as a court member, to disclose anything that you feel might disqualify you. However, if it goes to facts of the case, you must be careful of the manner in which you disclose what you feel might disqualify you, as the information you have might, if disclosed in open court, disqualify all members of the court. In such an instance, you may write your information and hand it to the military judge.

2. Peremptory challenges. Each accused is entitled, as is the Government, to one peremptory challenge. Peremptory challenges are challenges for which no reason for the challenge need be stated. No officer or court member should be offended at being challenged. There are many reasons, too numerous to mention, for exercising this important right. However, it is safe to say a good portion of these challenges are exercised to obtain a more favorable voting number on the court or on some other tactical basis.

c. RESTRICTIONS PLACED ON MEMBERS.

(1) REFERENCE MATERIAL. Some of the restrictions placed upon members by the Uniform Code of Military Justice and the Manual for Courts-Martial have already been indicated. However, in addition, and perhaps most importantly, no member may use or have access to anything that is not placed in evidence before the court, including the Manual for Courts-Martial or any other reference material. The only exception to this is that of the president of a special court-martial who may use the Manual for Courts-Martial in open court only.

(2) INFLUENCE. Members of courts-martial should not discuss among themselves (except in closed session) or with anyone else what takes place during the course of a trial, and should anyone approach you as members of a court and try to discuss the case in hearing or influence you in any way, you should report it immediately to the law officer or the convening authority.

(3) PRESUMPTION OF INNOCENCE. Further, you must remember that an accused is presumed to be innocent until he has been proven guilty beyond a reasonable doubt, and that the burden is always on the Government to prove the guilt of the accused to you beyond that reasonable doubt. The accused need not prove his innocence or anything else.

(4) FREE DISCUSSION. Historically in American law, the deliberations of a jury are considered sacrosanct. So, too, are the deliberations of a court-martial. Although we often hear "RHIP" (Rank Has Its Privileges) in many things in the Army, there is absolutely no room for RHIP in court-martial deliberations. Superiority in rank may not be used to influence the vote or opinion of any other member on any issue. Each member, regardless of rank, has full and equal voice in the proceedings. The only exception is that the president of the court-martial is responsible for the orderly conduct of the discussions and the junior member usually collects and counts the ballots for the president.

d. SENTENCE.

Should findings of guilty be announced, the court then hears the personal data of the accused that are found on the first page of the charge sheet and reviews evidence of any admissible previous convictions. Also the accused may present matters in extenuation and mitigation. The accused may present evidence in many forms for the rules of evidence are relaxed during the presentencing proceedings. If he elects to make an unsworn statement, he may not be cross-examined as to anything he says; however, the Government may seek to rebut it. The Government, if it chooses after matters of extenuation and mitigation have been introduced, may introduce any matters in aggravation. After this procedure has been completed, you, as members of the court, then must adjudge an appropriate sentence. Here again recall the oath that we discussed earlier in this hour. Your duty and responsibility is the same with regard to sentence as it was with the findings. In other words, you must, within the evidence, the law, and your own conscience, assess the sentence you feel appropriate for the offense, to the accused, and to society. The restrictions and other matters previously discussed apply with equal force to the sentencing procedure.

e. POST TRIAL REVIEW.

Should the accused be convicted, his record of trial is prepared and authenticated by the law officer and president of the court to insure it is an accurate transcription. The record is then reviewed for legal sufficiency by the legal officer prior to the action of the commanding general. Upon ascertaining there is no legal error and that the findings and sentence are legally correct, the convening authority has the duty to approve so much of the findings and sentence as he deems appropriate and correct. He has the authority to disapprove the entire proceedings without stating any reason therefor.

f. APPELLATE REVIEW.

Following approval of a valid finding and sentence, all summary and special courts-martial are again reviewed by the legal officer of the officer exercising general court-martial jurisdiction and only legally correct and appropriate findings and sentences are approved. All general courts-martial are forwarded to the Department of the Army for further review by agencies in the Department of the Army. Cases involving minor punishment are reviewed by a legal officer in an agency entitled the Examination Branch. All other general courts are reviewed by a Board of Review. In appropriate cases, the accused may have his case further reviewed by the United States Court of Military Appeals. Each of these reviews calls for examination and, generally, personal representation of the accused's interests by a qualified attorney.

g. REHEARING AND NEW TRIAL.

Should serious legal error occur, or under appropriate circumstances, should it be necessary in the interest of justice, the accused may be granted a rehearing or a new trial. Should this occur, the new findings or sentence may not exceed the findings or sentence first announced.

h. SUSPENSION AND VACATION.

In acting upon the sentence, the convening authority may exercise a form of probation by suspending the execution of part or all of the unexecuted portion of the adjudged sentence. Thereafter should the accused's behavior warrant it, that portion of the sentence suspended will be excused upon expiration of the period of suspension, without ever having been satisfied. Should, however, the accused misbehave further, the suspended sentence can be vacated, whereupon the suspended portion will resume until fully satisfied.

i. SANITY HEARINGS.

Should, at any time prior to, during, or after the trial of the accused, it become apparent that the accused may be insane, the proceedings should be stopped until his sanity is established or has returned. If there is only a question of sanity, this fact must be decided adversely to the accused before a valid finding of guilty can be returned by the court-martial or before the findings of guilt can be approved if the issue of sanity developed after trial.

j. CONCLUSION.

As already indicated, you can expect to be called upon to perform duty as a member of a court-martial. Although to judge your fellow man is difficult at best, you should look upon your selection as a court-martial member as a challenging opportunity and a compliment to

your officer status. It is, by and large, upon your shoulders that the effective administration of military justice rests.

In summary, the role of the officer as a court member can best be expressed by a consideration of the general instruction often given to new members of courts-martial which states:

> It is your duty as members of this court, and your duty alone, to determine the guilt or innocence of the accused as to the charges upon which he will be arraigned and, if the accused is found guilty, to determine an appropriate sentence. Neither the fact that charges have been preferred against the accused nor the fact that such charges have been referred to this court is any evidence of his guilt. With respect to any offense to which there is a plea of not guilty, the determination of the court as to guilt or innocence must be based upon the entire evidence in the case and can only be arrived at after resolving all material issues of fact and applying the rules of law to those facts. Thus, as to any such offense, it is important to keep an open mind until all the evidence and applicable law have been presented.

In short, no member must ever depart from an impartial judicial role.

Part III

Principles and Operation of Nonjudicial Punishment, Article 15, UCMJ

PURPOSE: To give the philosophy of nonjudicial punishment and the evolution of the present Article 15, UCMJ. To show procedures involved in imposing nonjudicial punishment, the types of punishments imposable, the commander's commutation power, and the rights of offenders.

REFERENCES: AR 27-10, Chapter 3; Chapter XXVI, MCM, 1969 (Rev.); Article 15, UCMJ.

1. DEFINITION AND PURPOSE.

a. PURPOSE. The present Uniform Code of Military Justice was passed by Congress in 1950. It provides a comprehensive body of disciplinary and criminal law for the Armed Forces and establishes a court-martial system to try cases arising in the military services. One article of that organized body of disciplinary and criminal law is Article 15. Article 15 provides a means whereby military commanders can deal with minor infractions of discipline without resort to trial by a military criminal court. Under Article 15 the commander, in addition to his authority to admonish or reprimand, can impose specified limited punishments for minor offenses and infractions of discipline without the intervention of a court-martial. This punishment is known as "nonjudicial" punishment.

b. MINOR OFFENSES. As nonjudicial punishment is applicable only to minor offenses, some discussion of what constitutes a minor offense is warranted.

The term "offense" means an act or omission which constitutes a violation of a specific punitive article of the Uniform Code of Military Justice. That is, there is no "offense" unless the act or omission is prohibited by the Code. However reprehensible the conduct, you may not punish an individual under Article 15 for that conduct unless you find that the conduct is forbidden by the Code.

Ordinarily, an offense is not "minor" if, after trial by general court-martial, a conviction for such offense could result in a dishonorable discharge or confinement for more than a year. However, this is not a hard and fast rule, for even in such a case Article 15 punishment might be appropriate under the circumstances. An offense normally triable by a summary court-martial is a "minor" offense.

2. REASONS FOR PRESENT ARTICLE 15.

a. PAST DEFICIENCIES. As a result of twelve years of experience with the operation of Article 15 serious deficiencies warranted a revision of the Article. A revision was made by the Congress effective in 1963, which was intended to correct these deficiencies. For example, under the previous Article 15, a commander had no authority to forfeit or detain an enlisted offender's pay or to impose any form of close custody. While he could impose one of the limited forms of punishment authorized for minor violations, such as restriction or extra duties, these were not always satisfactory as effective disciplinary deterrents. Reducing an offender in grade, practically a continuing punishment, was often too harsh to be appropriate. Trial by court-martial for minor offenses resulted in stigmatizing an offender with a criminal conviction. Moreover, in the case of an officer, trial by court-martial frequently seriously impaired that officer's value to his command. Hence, the thrust of today's Article 15 is to correct, educate, and reform minor offenders who have shown they cannot benefit from less stringent measures.

b. DISCIPLINE. A major concern of the Congressional Committee which revised Article 15 was the state of discipline in the Armed Forces. It recognized that an effective and well-trained armed force is essential to the security of our country, and that to maintain its effectiveness a high state of discipline within the armed forces must be maintained. The use of nonjudicial punishment assists in the enforcement of military discipline by permitting minor disciplinary infractions to be handled promptly and effectively. The Committee recognized that a high state of discipline would be maintained if the commander were given added powers necessary to deal effectively with such infractions. Consequently, the new Article 15 law was drafted and subsequently enacted into law.

3. TYPES AND AMOUNTS OF PUNISHMENT.

There are nine different types of punishment which can be imposed under Article 15. They are:

a. ADMONITION AND REPRIMAND. An "admonition" is a warning, reminder, or reproof given to deter repetition by the offender of the type of misconduct which resulted in the admonition and to advise him of the consequences that may follow from a recurrence of such misconduct. A "reprimand" is an act of formal censure which rebukes, or reprehends the offender for his conduct. An admonition may be included in a reprimand. These may be imposed on all members of a command by any commander separately or in conjunction with any other authorized punishment.

b. RESTRICTION. Restriction is the mildest form of deprivation of liberty; it involves moral rather than physical restraint and is a restriction to certain specified limits. The offender may be required to report regularly at periodic intervals at a designated place to "sign in" to insure that he is complying with the punishment. Unless otherwise specified by the commander imposing the punishment, a restricted offender may be required to perform any military duty.

When imposed on enlisted personnel, field grade commanders may restrict up to 60 days; other commanders are limited to 14 days. When imposed on officer personnel, a general court-martial convening authority or general officer in command may restrict for 60 days; all other commanders, 30 days.

c. ARREST IN QUARTERS. Arrest in quarters as nonjudicial punishment may be imposed only upon commissioned and warrant officers, and only a general officer in command or an officer exercising general court-martial jurisdiction may impose such punishment. Like restriction, the restraint involved in this punishment is enforced by a moral obligation rather than by physical means. An officer so punished must remain within his quarters during the period of punishment unless the limits of his arrest are otherwise extended by appropriate authority. While in arrest in quarters, an officer may be required to perform military duties, but he may not exercise command. This punishment is limited to 30 days.

d. CORRECTIONAL CUSTODY. Correctional custody is the physical restraint of a person during duty or non-duty hours, imposed as punishment only under Article 15, and may include regular military duty, extra duties, fatigue duties, or hard labor. Wherever practicable, such custody will not be served in immediate association with persons awaiting trial or held in confinement pursuant to trial by court-martial. This punishment may be imposed only on male enlisted personnel at grades E-3 and below as follows: field grade can give up to 30 days; all other commanders can give up to seven days.

e. CONFINEMENT ON BREAD AND WATER OR DIMINISHED RATIONS. Confinement on bread and water or diminished rations involves confinement in a place where the person so confined may communicate only with authorized persons, and may be imposed only upon an enlisted person attached to or embarked on a vessel. When confinement is imposed under Article 15 aboard ship, the food ration given to the offender may not consist solely of bread and water unless specifically directed by the commander. This punishment is imposable only on male enlisted personnel in grades E-3 and lower while embarked on a ship. It is limited to three days by all commanders.

f. EXTRA DUTIES. A most often used punishment is extra duty. It involves the performance of duties in addition to those duties normally assigned to the offender; it may include normal military duties of any type, including fatigue duties. Extra duties may be imposed only on enlisted personnel and must not be duties that are demeaning to their grade. Field grade commanders may impose up to 45 days while other commanders may impose up to 14 days.

g. REDUCTION IN GRADE. Reduction in grade as nonjudicial punishment is one of the most severe forms of punishment and, practically speaking, is a continuing punishment, as the offender is punished not only by losing his rank but also suffers the continuing indignity of reduced status and decreased pay. Consequently, commanders should exercise caution in using this type of punishment.

A commander has the authority to reduce a subordinate from a particular grade if he has the general authority to promote to the grade held by the offender or any higher grade. It is not required that he have the specific authority to promote the particular individual concerned to the grade held by him before his reduction. Field grade commanders may reduce E-4's and below to E-1 or any intermediate grade. They may reduce E-5's and above one grade. Company grade officers may reduce E-4's and below one grade.

h. FORFEITURE OF PAY. Forfeiture of pay involves a permanent loss of entitlement to the pay forfeited. "Pay" means basic pay plus any sea or foreign duty pay. Thus special pay for special qualifications, incentive pay for the performance of hazardous duties, proficiency pay, subsistence and quarters allowances, and similar types of compensation, are excluded from forfeiture or detention under Article 15 because they are not basic pay. If the offender is also reduced in rank, the forfeiture must be based on the grade to which reduced and not on the grade held by the offender before the reduction. Also, if the offender is an enlisted person and has in effect a Class Q allotment to dependents, no portion of his Class Q allotment will be included in the amount subject to forfeiture. No forfeiture may extend to any pay already accrued before the punishment of forfeiture is imposed. When applied to officers, a general court-martial convening authority or general officer in command may impose a forfeiture of one-half of one month's pay per month for two months. When applied to enlisted men, field grade commanders may impose a forfeiture of one-half of one month's pay per month for two months, while other commanders may impose up to seven days' forfeiture of pay.

i. DETENTION OF PAY. A detention of pay involves only a temporary withholding of pay, unlike a forfeiture which involves a permanent loss of entitlement to pay. Pay may not be detained for more than one year or expiration term of service (ETS) whichever is sooner and the period for which the pay is to be detained must be specified at the time the punishment is imposed. The amount detained must be returned to the offender at the expiration of the specified period of detention or at the expiration of the offender's term of service, which ever first occurs.

When applied to officers, a general court-martial convening authority or a general officer in command may detain one-half of one month's pay per month for up to three months. When applied to enlisted men, field grade commanders may detain one-half of one month's pay per month for up to three months. All other commanders may detain up to 14 days' pay.

j. DEMAND FOR TRIAL. Except when embarked upon a vessel, punishment may not be imposed upon any member of the armed forces who has before the imposition of the punishment under that article demanded trial by court-martial in lieu of punishment thereunder. He also has the right, in all cases, to refuse trial by summary court-martial. Thus, a serviceman may refuse both punishment under Article 15 and trial by summary court-martial. He may then be tried, if at all, only by a special or general court-martial.

j. DEMAND FOR TRIAL. An accused person has the right to demand trial by court-martial in lieu of nonjudicial punishment. In such a case, the commander may not impose any portion of the punishments authorized under Article 15.

k. APPEAL. An accused who believes his punishment under Article 15 is illegal or disproportionate to the offense, may appeal through the officer originally imposing the nonjudicial punishment, to the next superior command.

l. POST-PUNISHMENT ACTION. The officer imposing the punishment or any superior commander, or any successor in command, may exercise clemency. Thus punishment may be suspended, mitigated (i.e., changed in quality or quantity such as 15 days hard labor changed to 15 days restriction, or 15 days restriction reduced to 10 days restriction) or set aside. Since the commander may exercise these various types of clemency, he is given wide latitude to punish a wayward member of his command, yet at the same time offer an inducement for improved future behavior by the possibility of partial or total restoration of lost rights and privileges.

4. SUMMARY.

There are three salient features about our present Article 15:

a. Article 15 is aimed at having effective punishment imposed by the commander who is closest to his men and who has an intimate knowledge of the disciplinary and morale requirements of his unit.

b. It is also aimed at the maintenance of effective discipline in a unit without having an offender branded with a court-martial conviction that might hinder and interfere with his future military or civilian career.

c. And lastly, although Article 15 is "nonjudicial" it does provide many traditional safeguards for an offender, including notice of offense, right to appeal, and in certain cases, a review for legal sufficiency by a judge advocate.