

**MILITARY  
LAW  
REVIEW**

**A SYMPOSIUM ON  
MILITARY JUSTICE**

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**HEADQUARTERS, DEPARTMENT OF THE ARMY APRIL 1961**

## PREFACE

The *Military Law Review* is designed to provide a medium for those interested in the field of military law to share the product of their experience and research with their fellow lawyers. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

The *Military Law Review* does not purport to promulgate Department of the Army policy or to be in any sense directory. The opinions reflected in each article are those of the author and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.

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This Review may be cited as Mil. L. Rev., April, 1961 (DA Pam 27-100-12, 1 April 61), p. ----.

For sale by the Superintendent of Documents, United States Government Printing Office, Washington 25, D. C. Price: **\$0.45** (single copy). Subscription price : \$1.75 a year ; \$0.50 additional for foreign mailing.

PAMPHLET }  
 No. 27-100-12 }

HEADQUARTERS,  
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 WASHINGTON 26, D. C., 1 April 1961

**MILITARY LAW REVIEW**  
**A SYMPOSIUM ON MILITARY JUSTICE**  
 The Uniform Code of Military Justice, 1951-1961

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**A SYMPOSIUM ON MILITARY JUSTICE**  
**The Uniform Code of Military Justice, 1951–1961**

**FOREWORD**

The Uniform Code of Military Justice, which became effective on 31 May 1951, was designed to provide greater uniformity among the several armed services and to remedy conditions which had been the subject of much adverse criticism—whether well founded or not—during and since World War II. For the first time, Congress provided for an all-civilian Court of Military Appeals. Congress recognized, however, that the Code must be subjected to continual review in the hope that our system of military justice would become the most modern, useful, and enlightened system extant.

The field of military justice is a dynamic one. The interpretations of the Code by the Court of Military Appeals and other Federal courts necessitate the continuing study of appropriate statutory revision. Thus, recently a Department of the Army Committee (consisting of nine general officers) completed a comprehensive study and report on the administration of military justice. The report has been approved by the Secretary of the Army and now represents the Department of the Army position relating to needed improvements to modernize the administration of military justice.

This issue of the *Military Law Review* is devoted to military justice subjects and commemorates the tenth anniversary of the enactment of the Uniform Code of Military Justice. Whether the articles included present the views of the Department of the Army or any other official agency is immaterial to the purpose of this publication. In fact, any opinions expressed represent only the views of the respective authors. What is decisively material is that the process of searching, critical analysis and inquiry is essential to the continuing improvement of any system of law.

**CHARLES L. DECKER**  
Major General, USA  
The Judge Advocate General

# THE FORMAL PRETRIAL INVESTIGATION\*

BY LIEUTENANT COLONEL WILLIAM A. MURPHY\*\*

## I. INTRODUCTION

The statutory requirement of extensive and formalized pretrial investigation of charges and specifications before reference to trial by courts-martial was first incorporated into the Articles of War in 1920.<sup>1</sup> That requirement has been the subject of two substantive legislative changes, the second such change resulting from the enactment of the Uniform Code of Military Justice.<sup>2</sup> A brief study of the two statutory antecedents of Article 32, Uniform Code of Military Justice will be undertaken at a subsequent point in this discussion.<sup>3</sup> The current provisions of the Uniform Code of Military Justice<sup>4</sup> requires a thorough and impartial investigation prior to referral of charges and specifications to trial by general court-martial.

Since 1920, the requirement of formal pretrial investigation has undergone substantial and critical scrutiny by civilian, military, judicial and congressional bodies. During the forty-year period involved, no authoritative voice has been heard to denounce the basic precepts of the requirement. There is no question that it is firmly entrenched as an important and substantive ingredient of military due process, the denial of which in any substantial aspect in a particular case can require the reversal of a conviction.<sup>5</sup>

In November 1954, a paper submitted by Colonel Frederick B. Wiener, Judge Advocate General's Corps, United States Army

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\* This article was adapted from a thesis presented to The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia, while the author was a member of the Eighth Advanced Class, The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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<sup>1</sup> Article of War 70, § 1, ch. 2, 41 Stat. 759, 802 (1920), as amended. See also 62 Stat. 604, 633, 639, 642 (1948).

<sup>2</sup> 10 U.S.C. § 801-934 (1958). The Uniform Code of Military Justice will hereinafter be referred to as the Code and will be cited as UCMJ, art. ----.

<sup>3</sup> See Section 11, *infra*.

<sup>4</sup> UCMJ, art. 32.

<sup>5</sup> United States v. Parker, 6 USCMA 75, 19 CMR 201 (1966); United States v. Schuller, 5 USCMA 101, 17 CMR 101 (1954).

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Reserve, to the Judge Advocates Association, questioned whether the Article 32 pretrial investigation really did any good or served any useful purpose and whether the requirement for such investigation should not be eliminated completely except where the convening authority feels that the pretrial statements do not give a sufficiently clear picture of what actually happened.<sup>6</sup> The Association's Committee on Military Justice, composed of seven individuals prominent in the field of military law, rendered a report on Colonel Wiener's paper after first receiving and considering comments of the three Judge Advocates General thereon. The following language from the report as presented to and adopted by the Association on October 15, 1955, is worthy of consideration since it represents the capsule consensus of a representative group of individuals deeply concerned with military law :

Your committee feels the pretrial investigation serves a useful purpose ; indeed the armed services can point to it with pride as exceeding any comparable protection in civilian life. . . . The Committee deprecates the tendency to formalize pretrial investigations to the point where errors therein could constitute the basis for trial reversals. Pretrial investigations should not be full dress trials in themselves and any further tendency in that direction will lead to a movement for their abolition, which your Committee opposes.'

This article is premised on the author's firm conviction that the basic requirement of a formal pretrial investigation is inherently sound, that it serves a valuable and essential function from the viewpoint of both an accused and the government, and that no substantially different substitute procedure would better lend itself to the satisfactory accomplishment of that function than that required by Article 32. The Article 32 investigation, together with other related statutory rights, is the equivalent, under military law, of the indictment by grand jury guaranteed by the Constitution and the preliminary proceedings thereto provided by statute.\*

The late Judge Brosman summed up the importance of the procedure as follows :

[U]nder the Uniform Code, the filing, investigation and referral of general court-martial charges are parts of no game; neither do they constitute steps in the paternalistic imposition of sanctions for the violation of club rules. Instead these and related procedures constitute the elements of that which is a juristic event of substantial gravity—one demanding the very highest sort of professional responsibility and conduct from all attorneys involved.<sup>9</sup>

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<sup>6</sup> Judge Advocate Journal (Bull. No. 21, December 1955) 22.

<sup>7</sup> *Ibid.*

<sup>8</sup> Compare UCMJ, arts. 30, 32, 33, and 34, with Fed. R. Crim. P. 3-9.

<sup>9</sup> United States v. Green, 5 USCMA 610, 617, 18 CMR 234, 241 (1955).

## PRETRIAL INVESTIGATION

Recent decisions of the United States Court of Military Appeals,<sup>10</sup> interpreting the provisions of Article 32 and the implementing provisions of the Manual for Courts-Martial,<sup>11</sup> have given cause for concern as to how to use the law relating to pretrial investigations correctly.

A study of the numerous reported decisions involving Article 32 investigations indicates that the conduct of such investigations and the effect of deficiencies therein were subjected to a somewhat belated consideration by the Court of Military Appeals. The Code provision which negates the possibility of pretrial investigation errors affecting jurisdiction was probably one factor responsible for the failure of such deficiencies to fall sooner under the court's full scrutiny.<sup>12</sup>

That continuing close scrutiny by the Court of Military Appeals can be anticipated is clearly indicated by the following caveat by a member of the Court in a 1957 case :

One matter which repeatedly sticks its head up in general court-martial records is the belief that, because strict compliance with Article 32 is not jurisdictional, it may be carried on in a haphazard manner or, for all practical purposes, utterly abandoned. Sooner or later the military services must realize that this process is the military counterpart of a civilian preliminary hearing, and it is judicial in nature and scope.<sup>13</sup>

The lot of a formal pretrial investigating officer in a case involving numerous and complex charges is not an enviable one. This is particularly true if, as is frequently the case, the investigating officer is not a lawyer. The Manual provisions to which a pretrial investigating officer must turn are designed in substantial part to cover the "usual" cases.<sup>14</sup> Notoriously absent are detailed instructions designed to guide a formal pretrial investigating officer in the unusual case or in an unusual aspect of an otherwise routine case.

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<sup>10</sup> See UCMJ, art. 67, which establishes a United States Court of Military Appeals, hereinafter referred to as the Court of Military Appeals.

<sup>11</sup> Manual for Courts-Martial, United States, 1951. This Manual was promulgated as Exec. Order No. 10214, February 8, 1951, and will hereinafter be referred to as the Manual and will be cited as Par. ----, MCM, 1951.

<sup>12</sup> UCMJ, art. 32(d), provides that the requirements of Article 32 ". . . shall be binding on all persons administering this Code, but the failure to follow them in any case shall not constitute jurisdictional error."

<sup>13</sup> United States v. Nichols, 8 USCMA 119, 128, 23 CMR 343, 352 (1967) (concurring opinion of Latimer, J.).

<sup>14</sup> Par. 34a, MCM, 1951.

II. LEGISLATIVE BACKGROUND OF ARTICLE 32  
AND ITS ANTECEDENTS

A. BEFORE ARTICLE OF WAR 70

Before the enactment of Article of War 70, the necessity for a definitive system of pretrial investigation in the military court-martial system had been noted. There were numerous instances in which baseless charges were preferred and actually tried, sometimes resulting from jealousies and differences of opinion among high ranking officers, sometimes caused by a failure to properly ascertain the facts.<sup>15</sup>

Prior to 1920, under the Army court-martial system, charges could be preferred only by a commissioned officer, upon his own information or upon complaint of any other person, military or civilian. After preferment the charges were referred to the commander authorized to convene the appropriate court-martial, along with a letter of transmittal explaining the circumstances and recommending trial. The commander examined the charges, usually with the assistance of his staff judge advocate, and decided whether or not the accused should be brought to trial.<sup>16</sup> The act of preferring charges, by implication, included the duty to investigate to the extent of insuring that such charges were supported by prima facie evidence.<sup>17</sup> There was, however, no requirement of swearing witnesses or of perpetuating or forwarding their testimony or statements.

On July 14, 1919, the War Department promulgated a change to the then current Manual for Courts-Martial, requiring a more thorough pretrial investigation of charges.<sup>18</sup> That change required that if the officer exercising immediate summary court-martial jurisdiction concluded that charges should be tried by a special or general court-martial, he must, preliminary to taking further action, either investigate the charges himself or have them investigated by an officer other than the one preferring the charges. It further required the investigating officer to afford the accused

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<sup>15</sup> 1 Winthrop, *Military Law and Precedents* 151 (2d ed. reprint 1920).

<sup>16</sup> *Id.* at 150-55 sets forth in general terms the preliminary procedure of preferring and approving charges prior to 1917. Although there were revisions of the Articles of War in 1916 and 1918, the preliminary procedure was not changed.

<sup>17</sup> *Id.* at 150.

<sup>18</sup> Manual for Courts-Martial, United States Army, 1917 (Change No. 5, 1919).

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an opportunity to make a statement, call witnesses, offer evidence, or present matter in explanation or extenuation for consideration.

All material testimony given by any witness in person **was** required to be reduced to a summarized statement which was to be later read and signed by the witness. There was, however, no requirement that statements be sworn. The investigating officer, in submitting his report to the ordering authority, was required to enclose papers, documents, and signed statements of witnesses and to include any known document or other evidentiary matter which was not enclosed but which might become important or necessary in the case.<sup>19</sup>

### B. REQUIREMENTS UNDER ARTICLE OF WAR 70

During the congressional hearings and investigation on the subject following World War I, the prior instances of preferring baseless and unjustified charges were noted as one of the basic criticisms of the Army court-martial **system**.<sup>20</sup> Congress accordingly incorporated specific requirements for a pretrial investigation into Article of War 70 by the 1920 revisions of the Articles of War.<sup>21</sup>

The original purposes of the formal pretrial investigation were to insure adequate preparation of cases, to guard against hasty, ill-considered charges, to save innocent persons from the stigma of unfounded charges, and to prevent trivial cases from going before general courts-martial.<sup>22</sup>

Subsequent to the enactment of Article of War 70 there followed a prolonged period during which the Army initially took the position that the pretrial investigation required by the article was

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<sup>19</sup> *Ibid.*

<sup>20</sup> See generally *Hearings on S. 64 Before a Subcommittee of the Senate Committee on Military Affairs*, 66th Cong., 1st Sess. (1919).

<sup>21</sup> A.W. 70 provides in pertinent part as follows: “**No** charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charge, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity **shall** be given to the accused to cross examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense **or** mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.”

<sup>22</sup> War Department, *Military Justice During The War* 63 (1919).

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jurisdictional in nature<sup>23</sup> In 1943, after a series of cases established a trend toward a more liberal interpretation of the effect of irregularities in the pretrial investigation, an Army board of review reviewed the previous line of decisions, re-examined the apparent intent of Congress in its requirement of a pretrial investigation, and concluded that the pertinent provisions of Article of War 70 were directory only.<sup>24</sup> This view prevailed within the Army until the enactment of the Uniform Code of Military Justice.

### C. FEDERAL COURT INTERPRETATIONS OF ARTICLE OF WAR 70

During the period from 1921 to 1951, the interpretation of Article of War 70 by federal courts was at times substantially different from the Army's interpretation. The question was raised in 1946 in the case of *Hicks v. Hiatt*.<sup>25</sup> The district court in that case, although finding numerous other errors "of such effect as to deprive Hicks of the substance of a fair trial," indicated that the failure to accord Hicks the benefits of the provisions of Article of War 70 was a denial to him of due process of law.<sup>26</sup>

In the case of *Anthony v. Hunter*,<sup>27</sup> a general court-martial prisoner was ordered released solely on the ground that he had been denied the full benefits of the procedure required by Article of War 70. Judge Melott, in his opinion in that case, discussed the Army decisions interpreting the effect of non-compliance with Article of War 70, but remarked that "little light is shed upon the problem by the conflicting administrative rulings."<sup>28</sup> He concluded that whether the failure to follow the prescribed procedure be construed as a defect precluding jurisdiction attaching to the court-martial or whether it be construed to deprive the accused of due process, the result was the same and required that relief be granted the accused.<sup>29</sup>

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<sup>23</sup> See, e.g., CM 161728, *Clark* (1924), Dig. Ops. JAG 1912-40, p. 292, holding that a court-martial is without jurisdiction to try an accused upon charges referred to it for trial without having been first investigated in substantial compliance with the provisions of A.W. 70 and, in such a case, the court-martial proceedings are void *ab initio*.

<sup>24</sup> CM 229477, *Floyd*, 17 BR 149 (1943).

<sup>25</sup> 64 F.Supp. 238 (M.D. Pa. 1946).

<sup>26</sup> *Id.* at 249.

<sup>27</sup> 71 F.Supp. 823 (D. Kan. 1947).

<sup>28</sup> *Id.* at 830.

<sup>29</sup> *Id.* at 831; but cf. *Henry v. Hodges*, 76 F.Supp. 968 (S.D. N.Y. 1948), in which the court rejected the Army theory that defects in the preliminary investigation are *injuria sine damno* if followed by a full and fair trial and indicated that the failure to accord an accused this right appeared to be jurisdictional rather than procedural. The order of this court that accused

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During the period from 1945 to 1950 other federal courts, however, were equally authoritative in holding that Article of War 70 was not jurisdictional and that lack of compliance therewith did not per se constitute a deprivation of due process.<sup>30</sup> Although the Articles of War were revised in 1948, the jurisdictional issue which had been most consistently troublesome since the enactment of Article of War 70 was not clarified by that revision. The provisions for pretrial investigation contained in Article of War 70 were incorporated verbatim into Article of War 46(b), the only change being the addition of a single sentence providing the accused a right to counsel at such investigation.<sup>31</sup>

### D. PROVISIONS OF ARTICLE 32

In view of the historical background of the requirement of a formal pretrial investigation, little question should remain as to why the most controversial issue involved in the congressional hearings on that requirement, as contained in the proposed Uniform Code of Military Justice, related to whether or not the requirement was jurisdictional. Fortunately for the proponents of the theory that failure to fully comply with the requirement was non-jurisdictional, they had a recent and highly persuasive authority on which to rely in the case of *Humphrey v. Smith*,<sup>32</sup> decided by the United States Supreme Court in 1949. Mr. Justice Black, speaking for the majority of the court in that case said :

We hold that a failure to conduct pretrial investigations as required by Article 70 does not deprive general courts-martial of jurisdiction so as to empower courts in habeas corpus proceedings to invalidate court-martial judgments. . . . This court-martial conviction resulting from a trial fairly conducted cannot be invalidated by a judicial finding that the pretrial investigation was not carried on in the manner prescribed by the 70th Article of War.<sup>33</sup>

Space does not permit a detailed discussion of the congressional hearings which preceded the enactment of the present Code. Suffice it to say that Article 32 of the Code retained all the previous requirements of Article of War 46(b), with only minor modifications, but that two additional substantive features were included. In Article 32(c) language was included to authorize use of an investigation conducted prior to preferment of charges in

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be released was subsequently reversed by the Court of Appeals on the grounds that lack of compliance with Article of War 70 had not been established. See *Henry v. Hodges*, 171 F.2d 401 (2d Cir. 1948).

<sup>30</sup> See, e.g., *Waide v. Overlade*, 164 F.2d 722 (7th Cir. 1947).

<sup>31</sup> 62 Stat. 633 (1948).

<sup>32</sup> 336 U.S. 696 (1949).

<sup>33</sup> Id. at 700-01.

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lieu of the normal Article 32 investigation under certain limited **circumstances**.<sup>34</sup> Article 32(d) was added to prevent the article from being construed as jurisdictional in a habeas corpus proceeding.<sup>35</sup> As noted in the congressional hearings, the provisions of Article 32(a) and (b) were not rendered impotent by the provisions of subdivision (d), because failure to conduct the investigation required by the article would be grounds for reversal by a reviewing authority under the Code and an intentional failure to do so would be an offense under Article 98.<sup>36</sup>

It is noteworthy that until the enactment of the Code no preliminary investigation requirement was incorporated into the Navy or Coast Guard disciplinary statutes. Both the Navy (including the Marine Corps) and the Coast Guard, however, required by regulation or directive that an *ex parte* investigation be conducted into the circumstances of any alleged offense subject to trial by court-martial and that a report of such investigation, along with any statement the accused might desire to make, be forwarded to the officer authorized to convene an appropriate court.<sup>37</sup> There was never any suggestion, however, that these requirements had any jurisdictional significance.

Very minor changes were made in the language of Article 32 of the Code at the time of the recodification of Title 10 of the United States Code in 1956.<sup>38</sup> These modifications were intended merely to make the wording of the article technically correct from a terminology standpoint, and they in no way changed the substantive contents or requirements of Article 32.<sup>39</sup>

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<sup>34</sup> UCMJ, art. 32(c), contains the following language: "If an investigation of the subject matter of an offense has been conducted prior to the time the accused is charged with the offense, and if the accused was present at such investigation and afforded the opportunities for representation, cross examination and presentation prescribed in subdivision (b) of this Article, no further investigation of that charge is necessary under this Article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf."

<sup>35</sup> *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. in *Index Legislative History of Uniform Code of Military Justice* 993 (1949).

<sup>36</sup> *Zbid.* UCMJ, art. 98, provides, in pertinent part, that any person subject to the Code who ". . . knowingly and intentionally fails to enforce or comply with any provision of the Code regulating the proceedings before, during, or after trial of an accused . . . shall be punished as a court-martial may direct."

<sup>37</sup> U.S. Navy Regs., arts. 197, 200, 201 (1920); *Naval Courts and Boards* §§ 342-44 (1937); U.S. Coast Guard Commandants' Circular 13-47 (1947).

<sup>38</sup> 10 U.S.C. § 832 (1958).

<sup>39</sup> See S. Rep. No. 2484, 84th Cong., 2d Sess. 19-21 (1956). Typical of the seven minor modifications affected by the revision are the following. In Art. 32(a) the language "No charge *or* specification shall be referred to a general court-martial until a thorough and impartial investigation of all the matters

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### III. NATURE OF THE ARTICLE 32 INVESTIGATION

A bare reading of the provisions of Article 32 of the Code and its Manual implementation<sup>40</sup> does not fully portray the intended judicial status of the investigation required thereby.

#### A. ANALOGOUS PROCEDURE UNDER FEDERAL RULES

In federal practice, after arrest of a defendant, the individual making the arrest must take the defendant without unnecessary delay before the nearest available commissioner or committing magistrate.<sup>41</sup> At that time the defendant is entitled to be informed of the complaint against him, of his right to retain counsel, and of his right to have a preliminary examination.<sup>42</sup> There is no provision for the defendant to enter a plea at that time, but he may, if he so desires, waive preliminary examination. If he does not waive preliminary examination, the commissioner must hear the evidence within a reasonable time.

At the hearing the defendant is entitled to cross examine witnesses against him and introduce evidence in his behalf. The commissioner either discharges the defendant or holds him to answer in district court, on the finding that there is probable cause to believe that the defendant has committed an offense. The commissioner is also entitled to admit the defendant to bail.<sup>43</sup> This type of preliminary hearing has as its primary purposes the determination whether there is sufficient evidence against an accused to warrant his being held for action by grand jury<sup>44</sup> and to prevent a person from being held in custody without a prompt hearing.<sup>45</sup> These rules do not govern when a commissioner acts as a trial magistrate for the trial of petty offenses committed on Federal reservations.<sup>46</sup>

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set forth therein has been made," was modified by substitution of the word "may" for "shall." In the second sentence of Art. 32(a) the language in parentheses was inserted at the points indicated as follows: "This investigation shall include inquiries as to the truth of the matters set forth in the charges, (consideration of) the form of charges and (a recommendation as to) the disposition which should be made of the case in the interest of justice and discipline."

<sup>40</sup> Par. 34, MCM, 1951.

<sup>41</sup> Fed. R. Crim. P. 5(a).

<sup>42</sup> Fed. R. Crim. P. 5(b).

<sup>43</sup> Fed. R. Crim. P. 5(c).

<sup>44</sup> Barber v. United States, 142 F.2d 805 (9th Cir. 1944). See Orfield, Criminal Procedure from Arrest to Appeal 59 (1942).

<sup>45</sup> United States v. Gray, 87 F.Supp. 436 (D.D.C. 1949).

<sup>46</sup> Fed. R. Crim. P. 1 (Notes of Advisory Committee on Rules, note 3).

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Once the defendant has been held to answer in district court after preliminary proceedings before a commissioner, the next step is consideration of the complaint by a grand jury summoned by the district court, unless the defendant in a non-capital case, waives in open court, prosecution by indictment.<sup>47</sup> The defendant may make a challenge to the array or, by motion to dismiss, object to the array or qualification of any individual juror.<sup>48</sup> However, the defendant has no right to be present at or to be notified of impending grand jury action.<sup>49</sup> The indictment is usually prepared by the district attorney and submitted to the grand jury. If favorably considered, the indictment is endorsed as a true bill by the grand jury and forms the basis for trial in federal district court.

### *B. COMPARISON OF ARTICLE 32 PROCEDURE WITH FEDERAL PROCEDURE*

A procedure roughly analogous to the federal procedure of preliminary examination and grand jury indictment is obtained in the military through the use of a formal pretrial investigation of charges and subsequent consideration of and action thereon by the convening authority. In many material aspects, the Article 32 investigation provides greater safeguards for an accused during the pretrial investigation than the Federal Rules of Criminal Procedure provide for defendants charged under federal law.<sup>50</sup> It should be remembered, however, that the requirements of Article 32 are not founded in the Constitution since cases arising in the land or naval forces are specifically exempted from the grand jury requirement of the Constitution.<sup>51</sup>

Various authorities have equated the Article 32 investigation to the investigation of charges accomplished in civilian life by a grand jury.<sup>52</sup> Others have suggested that it is similar to the committing magistrate's hearing.<sup>53</sup> It appears that the requirements of the Article 32 investigation are actually more similar to those

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<sup>47</sup> Fed. R. Crim. P. 7(a), (b).

<sup>48</sup> Fed. R. Crim. P. 6(b)(1).

<sup>49</sup> Fed. R. Crim. P. 6 (Notes of Advisory Committee on Rules, note to subdivision (b)(1)).

<sup>50</sup> See Kent, *The Jencks Case: The Viewpoint of A Military Lawyer*, 45 A.B.A.J. 819 (1959).

<sup>51</sup> U.S. Const. amend V.

<sup>52</sup> Everett, *Military Justice in the Armed Forces of the United States* 169 (1956).

<sup>53</sup> Index and Legislative History, *Uniform Code of Military Justice* 668, 1000-01; ACM 8408, *Everett*, 16 CMR 676,682 (1954).

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of the preliminary committing magistrate's hearing than to the grand jury proceedings.

There are several major differences between the Article 32 investigation and the grand jury investigation. The grand jury may return an indictment without the accused having any knowledge of its proceedings or having been afforded an opportunity to cross-examine the witnesses against him or to call witnesses in his favor. The prosecutor, who if the case is subsequently referred will represent the government at trial, is frequently the individual who develops the evidence against the accused at the grand jury proceedings. In military procedure, however, the accused is entitled to cross-examine the witnesses who testify against him at the formal pretrial investigation and the Article 32 investigator is disqualified from prosecuting the accused if the charges are later referred for trial.<sup>54</sup>

If a defendant is called before a grand jury he has no right to have a lawyer available to advise him, or to even have an attorney present during the giving of testimony by adverse witnesses. In an Article 32 investigation, however, an accused, if he desires counsel, is entitled to same and may hire a civilian lawyer at his own expense or be furnished military counsel at no expense to himself.<sup>55</sup>

A fourth major difference is that if a grand jury does not indict, the charges against the defendant are dismissed and he is not tried, whereas under military law charges against an accused can be referred to trial by general court-martial even though the Article 32 investigator has recommended otherwise.<sup>56</sup> Another distinction can be made in the fact that a grand jury has the power to subpoena witnesses to testify before it, but the formal pretrial investigating officer cannot compel witnesses who are not subject to military jurisdiction to appear before him or to give testimony.<sup>57</sup>

It is not surprising that the Fifth Amendment specifically excluded military cases from the requirement of indictment by

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<sup>54</sup> UCMJ, art. 27.

<sup>55</sup> Par. 34, MCM, 1951.

<sup>56</sup> *United States v. Zagar*, 5 USCMA 410, 18 CMR 34 (1966). But see UCMJ, art. 34(a), which provides that before directing trial of any charge by general court-martial the convening authority shall refer it to his staff judge advocate or legal officer for consideration and advice and that the convening authority shall not refer a charge to general court-martial unless he has found that the charge alleges an offense under the Code and is warranted by the evidence indicated in the report of investigation. See par. 35, MCM, 1951.

<sup>57</sup> Par. 34d, MCM, 1951.

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grand jury. The framers of the Constitution undoubtedly realized that convening grand juries consisting of 24 members of a military force to investigate serious offenses would unduly interfere with military operations. There is little doubt, however, that the incidents of the military pretrial investigation accord the military accused at least as many safeguards and privileges as his civilian counterpart enjoys.<sup>58</sup>

### C. JUDICIAL NATURE OF THE INVESTIGATION

Since the advent of the Code, the Article 32 investigation has been described as both a quasi-judicial proceeding<sup>59</sup> and a judicial proceeding.<sup>60</sup> In 1957, Chief Judge Quinn used the following language in describing the formal pretrial investigation :

An Article 32 investigation is not a mere formality. Rather, the pretrial hearing is an integral part of the court-martial proceedings. Its judicial character is made manifest by the fact that testimony taken at the hearing can be used at the trial if the witness becomes unavailable.<sup>61</sup>

Further characterization of the Article 32 proceeding can be found in the pronouncements that it is a preliminary proceeding, that it is not a trial on the merits, that it is *ex parte*, in view of the fact that the Government is not formally represented as a party, and that it operates as a discovery proceeding for the accused.<sup>62</sup> Recommendations of an investigating officer are advisory only, and he is not required to decide difficult legal questions or to adhere to the strict rules of evidence.<sup>63</sup>

From the above discussion it is apparent that the Article 32 investigation is a vital part of military due process. The pretrial

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<sup>58</sup> Talbot v. Toth, 215 F.2d 22, 28 (D.C. Cir. 1954), *rev'd*, 350 U.S. 11 (1955). The court in this case, after itemizing the rights of the accused at the Art. 32 investigation and pointing out that a convening authority shall not refer a charge to trial by general court-martial without first securing the consideration and advice of his legal officer and determining that the charge is warranted by the report of the evidence upon investigation, stated that "these provisions of the Uniform Code seem to afford an accused as great protections by way of preliminary inquiry into probable cause as do requirements for grand jury inquiry and indictment." For a discussion of the purpose of the exception from the Fifth Amendment, see generally *Ex parte Quirin*, 317 U.S. 1, 43-44 (1942), and U.S. Legislative Reference Service, Library of Congress, *The Constitution of the United States of America* 838 (Corwin ed., 1952 rev. & ann. ed.) (S. Doc. No. 170, 82d Cong., 2d Sess.).

<sup>59</sup> NCM 276, *Yuille*, 14 CMR 450 (1953).

<sup>60</sup> *United States v. Samuels*, 10 USCMA 206, 212, 27 CMR 280, 286 (1959); *United States v. Tomaszewski*, 8 USCMA 266, 269, 24 CMR 76, 79 (1957); *United States v. Nichols*, 8 USCMA 119, 124, 23 CMR 343, 348 (1957).

<sup>61</sup> *United States v. Nichols*, *supra* note 60, at 124, 23 CMR at 348.

<sup>62</sup> *United States v. Samuels*, 10 USCMA 206, 212, 27 CMR 280, 286 (1959).

<sup>63</sup> *Id.* at 213, 27 CMR 287 (dictum).

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investigation together with the pretrial advice of the staff judge advocate are substantial proceedings which constitute the military equivalent of essential pretrial procedures which are guaranteed to the civilian community.<sup>64</sup>

### IV. RIGHTS OF THE ACCUSED

#### A. CODE AND MANUAL PROVISIONS

Article 32 of the Code provides that the accused shall be advised of the charges against him and of his right to be represented at the formal pretrial investigation by counsel. The article further provides that, upon his own request, the accused shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel be reasonably available, or by counsel appointed by the officer exercising general court-martial jurisdiction over the command. It is specifically required that the accused be given opportunity to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation and that, if charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of testimony taken on both sides, a copy of which shall be given to the accused.

From the standpoint of rights of the accused specifically designated as such, the provisions of paragraph 34 of the Manual add little to the above listing of rights. Paragraph 34, however, does spell out the rights provided by the Code with somewhat more particularity. It requires that the accused be advised at the outset of the investigation of the offense charged ; of the name of the accuser and of the witnesses against him as far as then known by the investigating officer ; of his right to counsel as provided by Article 32 ; of his right to cross examine witnesses against him if they are available ; of his right to present anything he may desire in his own behalf, either in defense, extenuation, or mitigation ; of his right to have the investigating officer examine available witnesses requested by him; and of his right to make a statement in any form regarding the offense being investigated.

It is obvious that, from the standpoint of an accused, the importance of receiving correct and thorough advice as to his rights cannot be overstated. However thoroughly and impartially a formal pretrial investigation may be conducted, its final efficacy in

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<sup>64</sup> United States v. Allen, 5 USCA 626, 640, 18 CMR 250, 264 (1955) (Quinn, C. J., concurring, dictum).

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case of timely attack by the accused, may depend upon whether the accused was properly informed of and reasonably understood his rights in connection therewith. The doctrine of waiver will not normally be invoked with regard to the right of an accused to which he is entitled upon his own affirmative request unless it can be demonstrated that he was aware of the right and consciously waived it.<sup>65</sup>

It is unnecessary to cover in detail each of the rights of an accused at the Article 32 investigation. A study of the reported cases indicates that errors of substantial import have been committed in certain limited areas only. These problem areas concern themselves generally with the right of the accused to counsel; the right of the accused to present evidence in his own behalf, either through the testimony of requested witnesses, cross-examination of witnesses called by the investigating officer, deposition, or introduction of documentary evidence; and the related problem of the right to use the Article 32 investigation as a discovery proceeding.

### B. RIGHT TO COUNSEL

Article of War 70 made no provision for an accused to be represented by counsel at the pretrial investigation.<sup>66</sup> Under the procedure followed in the Army under Article of War 70, the fact that an accused was not afforded counsel at the pretrial investigation was not a jurisdictional defect.<sup>67</sup> The Secretary of War in 1947 made administrative provision for an accused to have counsel at the pretrial investigation.<sup>68</sup> This right was first given statutory recognition in the Articles of War in 1948, with the enactment of the Elston Act.<sup>69</sup> Article 32(b) of the Code makes similar provision for counsel for an accused at the investigation in the following language :

Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel be

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<sup>65</sup> United States v. Tomaszewski, 8 USCMA 266, 269, 24 CMR 76, 79 (1957); United States v. Rhoden, 1 USCMA 193, 196, 2 CMR 99, 102 (1952).

<sup>66</sup> See United States v. Tomaszewski, *supra* note 66, at 272, 24 CMR at 82.

<sup>67</sup> Romero v. Squier, 133 F.2d 528 (10th Cir. 1943), *cert. denied*, 318 U.S. 785 (1943).

<sup>68</sup> War Department, Directive on Administration of Military Justice, 20 August 1947 (War Dep't. File DAD, C 250).

<sup>69</sup> Article of War 46(b). The pertinent language of this article is as follows: "The accused shall be permitted, upon his request, to be represented by counsel of his own selection, civilian counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general court-martial jurisdiction over the command."

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reasonably available, or by counsel appointed by the officer exercising general court-martial jurisdiction over the command.

Additionally, Article 32(b) requires that he shall be advised of his right to be represented at such investigation by counsel.

The implementing provisions of the Manual<sup>70</sup> require the investigating officer to promptly report the request of the accused to be represented by counsel to the appointing authority. The appointing authority must give the accused a reasonable opportunity to obtain civilian counsel at his own expense if he requests civilian counsel. The accused, however, must take appropriate and timely steps to obtain civilian counsel and he may not utilize an expressed intention to obtain civilian counsel to unreasonably impede, delay or hamper the conduct of the investigation.<sup>71</sup> Neither may the accused delay an investigation for an unreasonable period of time to await the convenience and pleasure of his civilian counsel.<sup>72</sup>

If the accused requests individual military counsel of his own selection and the requested counsel is reasonably available the appointing authority is required by paragraph 34c of the Manual to make him available. If the requested counsel is not under the command of the appointing authority, such authority will take prompt action to ascertain his availability and if available, obtain his services without unduly delaying the investigation. The availability of requested counsel is a matter to be determined by proper military authority and not by the requested counsel himself.<sup>73</sup>

Although no specific provision is made for an accused to appeal a determination of non-availability of requested military counsel, it has been held that he may appeal such a determination.<sup>74</sup> Entitlement to a continuance pending a decision on the appeal is a matter within the sound discretion of the adjudicating authority.<sup>75</sup> An accused has no absolute right to military counsel of his own selection and the right is subject to the exigencies and practicalities of whatever situation may prevail at the time.<sup>76</sup>

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<sup>70</sup> Par. 34c, MCM, 1951.

<sup>71</sup> ACM 7395, *Westergren*, 14 CMR 561 (1953).

<sup>72</sup> *Ibid.*

<sup>73</sup> CM 397402, *Bigelow*, 25 CMR 512 (1957).

<sup>74</sup> *United States v. Wright*, 10 USCMA 36, 27 CMR 110 (1968). This case held that denial to accused of right to appeal from a ruling of the convening authority declaring requested counsel to be unavailable for the pretrial investigation was not reversible error where the matter was not raised at trial, the accused pleaded guilty and no specific prejudice was indicated. See also par. 34c, MCM, 1951, which incorporates the provisions of par. 48, MCM, which does provide for an express appeal of this determination.

<sup>75</sup> *United States v. Vanderpool*, 4 USCMA 561, 16 CMR 135 (1954).

<sup>76</sup> *Id.* at 565-66, 16 CMR at 139-40.

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Whether the accused is legally entitled to have both civilian counsel, at his own expense, and requested or appointed military counsel at the pretrial investigation has apparently not been decided in a reported case. Neither do the congressional hearings give an answer to this question. The language of Article 32 lends support to the conclusion that an accused has a statutory right to only one counsel at the pretrial investigation and that if he obtains civilian counsel, he is not also entitled to government counsel.<sup>77</sup>

If the accused obtains military counsel first and later obtains civilian counsel at his own expense, it would be unwise, if not prejudicial, to then deny him the right to the military counsel previously made available or detailed. As a practical matter, and in view of the uncertainty as to how the Court of Military Appeals might rule on this issue, it would appear to be good practice to allow an accused to have military counsel, if requested and available, as well as civilian counsel obtained at his own expense.

It is abundantly clear that an accused is legally entitled to counsel at the Article 32 investigation.<sup>78</sup> It is equally clear, however, that the only qualifications specifically prescribed by these provisions in the event counsel is designated and provided by the officer exercising general court-martial jurisdiction, is that such counsel be "competent." Prior to the enactment of the Code it was the commonly accepted view in the Army that counsel so designated and provided did not have to be a lawyer. This view prevailed during the first several years of operation under the Code.

### 1. ~~Qualifications~~ of Appointed Counsel

The issue of whether accused is entitled to have lawyer counsel was first directly considered by the Court of Military Appeals in the case of *United States v. Tomaszewski*,<sup>79</sup> decided in December, 1957. That case involved an Air Force sergeant with almost

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<sup>77</sup> UCMJ, art. 32, provides that the accused "upon his own request shall be represented by civilian counsel . . . , or military counsel of his own selection . . . , or by counsel appointed by the officer exercising general court-martial jurisdiction over the command." (Emphasis added.) Paragraph 34c of the Manual can be interpreted to provide that the accused may have both civilian counsel *and* military counsel of his own selection, if reasonably available, but that he is entitled to counsel detailed by the officer exercising general court-martial jurisdiction only if he has not obtained civilian counsel or military counsel of his own selection. Compare language of par. 34b, MCM, 1951, which provides that the accused shall be informed of "his right to have counsel represent him at the investigation if he so desires, as provided in Article 32." (Emphasis added.)

<sup>78</sup> ACM 4903, *Nicholson*, 4 CMR 519 (1952).

<sup>79</sup> 8 USCMA 266, 24 CMR 76 (1957).

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nineteen years of military service who, desiring representation by a lawyer, had declined to exercise his right to counsel at the Article 32 investigation after he had been advised by the investigating officer that he could not have a military lawyer for counsel. During the course of the ensuing investigation the accused made an incriminating statement to the investigating officer which was subsequently received into evidence at the accused's trial. During the course of the trial and after the prosecution had introduced evidence, accused's counsel objected to the Article 32 investigation because the accused was deprived of qualified counsel at the investigation.

The Court of Military Appeals, in reversing Tomaszewski's conviction by a **two** to one decision, held that if an accused desires counsel, and selects neither civilian counsel nor particular military counsel, the general court-martial authority must appoint a lawyer qualified in the sense of Article 27(b)<sup>80</sup> of the Code. The majority opinion pointed out that the investigation operates as a discovery proceeding for the accused and that "it would defeat that purpose if a person unskilled in the requirements of proof, or knowledge of legal defenses, represents the accused."<sup>81</sup> It further appears that the majority reversed the conviction in *Tomaszewski* because the accused had not knowingly waived his right to qualified counsel, timely objection was made at the trial and particularly "because the investigating officer was permitted to testify to an incriminating statement made to him by the accused."<sup>82</sup>

Judge Latimer conceded that it is particularly desirable to have a qualified lawyer represent an accused at an Article 32 investigation. He expressed the opinion that reversal was not required, however, in a well documented and persuasive dissent which concluded that neither the Code, the Manual, military custom and practice, nor congressional intent, contemplates or requires the appointment of a legally trained lawyer to assist an accused in the pretrial hearing.<sup>83</sup>

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<sup>80</sup> UCMJ, art. 27(b), provides in pertinent part that an officer appointed to perform certain duties enumerated therein "(1) shall be a judge advocate of the Army or the Air Force, or a law specialist of the Navy or Coast Guard, who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or shall be a person who is a member of the bar of a Federal court or of the highest court of a State; and (2) shall be certified as competent to perform such duties by The Judge Advocate General of the armed force of which he is a member."

<sup>81</sup> *United States v. Tomaszewski*, 8 USCMA 266, 268, 24 CMR 76, 78 (1957).

<sup>82</sup> *Id.* at 270, 24 CMR at 80.

<sup>83</sup> *Id.* at 270-74, 24 CMR at 80-84.

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### 2. *Effect of Denial of Certified Counsel*

The holding in *Tomaszewski* was the signal for numerous appellate decisions based upon an alleged failure to provide certified counsel at the Article 32 investigation. In three decisions involving trials in the Air Force which had been completed prior to the date the Court of Military Appeals handed down its decision in *Tomaszewski*, Air Force boards of review held the failure to appoint counsel certified under Article 27(b) of the Code required reversal where the accused had requested appointed counsel, apparently on the theory of general prejudice and on the theory that the right was not waived by the failure of the defense counsel at trial to raise the matter where trial was held prior to the decisions establishing the existence of such right.<sup>84</sup>

Upon certification of each of these cases to the Court of Military Appeals, that court reversed the decision of the board of review, and held that reversal of the convictions was not required where no objection was made to the appointed officer's qualifications and there was no showing that the failure to provide certified counsel at the pretrial investigation adversely affected the accused's rights at trial where he was represented by certified counsel.<sup>85</sup> The court distinguished these cases from *Tomaszewski* by pointing out that no evidence obtained during the pretrial investigation had been admitted against the accused at the trial. It is noteworthy that in each of these three cases the counsel provided was a law school graduate who had not yet been certified in accordance with the provisions of Article 27(b) of the Code.

The following dicta from one of the cases involved is illuminating :

The law demands that an accused, who is aware of error in preliminary procedures, make timely objection to preserve his rights. From one who is not aware of the error until after trial, we can expect no less than a showing that the pretrial error prejudiced him at the trial.<sup>86</sup>

From the above quoted language it appears that although the doctrine of waiver will not be applied if the accused's failure to make timely objection results from the failure of the investigating officer to properly advise him of his right to counsel, he is entitled to no relief unless he can point to resulting specific prejudice.

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<sup>84</sup> United States v. Mickel, 9 USCMA 324, 26 CMR 104 (1958); ACM 14268, Thompson, 25 CMR 806 (1957), *rev'd*, 9 USCMA 330, 26 CMR 110 (1958); ACM 14144, Reynolds, 25 CMR 761 (1957), *rev'd*, 9 USCMA 328, 26 CMR 108 (1958).

<sup>85</sup> *Ibid*.

<sup>86</sup> United States v. Mickel, 9 USCMA 324, 327, 26 CMR 104, 107 (1958).

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The Court of Military Appeals has also refused to upset a conviction where an accused was represented by a non-lawyer at the pretrial investigation and did not object at trial, but contended upon appellate review that “the possibilities open to a skilled lawyer in developing inconsistencies and new leads were manifold.”<sup>87</sup> Convictions have also been affirmed, in the face of an alleged failure to furnish certified counsel at the investigation, where the accused was represented by a non-lawyer specifically requested by name<sup>88</sup> and where the accused, after requesting a named certified lawyer, was afforded non-lawyer counsel, raised no objection at the investigation or at trial and entered a plea of guilty.<sup>89</sup> In the latter situation, however, Judge Ferguson, who had consistently concurred in prior decisions denying relief where no specific prejudice was apparent or where the accused had waived the defect by failing to object or by pleading guilty at trial,<sup>90</sup> dissented. He based his dissent on the decision in *Tomaszewski* and the fact that “despite accused’s specific request for certified counsel . . . he was furnished an officer without any legal qualifications whatsoever, and whose college education consisted of two years, during which he majored in chemical engineering.”<sup>91</sup> To the extent that this dissent implies that an accused is prejudiced when he, through understanding of his right to certified counsel, or through more fortuity, requests a named certified counsel who is not available, and is thereafter afforded non-certified counsel, whereas an accused who makes no such request and is furnished non-certified counsel is not prejudiced, it does not appear to be based upon sound logic. The doctrine of waiver would be at least as applicable in case of the former accused as that of the latter.

The *Lasseter*, *Gandy* and *Rehorn* decisions do not indicate the specific advice which the investigating officers gave to the accused as to their right to counsel. It may be reasonably inferred from the facts given, however, that they informed the accused generally of their right to counsel but did not specifically advise them that they were entitled to *certified* counsel. In a recent decision in the case of *United States v. McFerrin*, the Court of Military Appeals held that in the absence of a showing that the accused was misled by the investigating officer’s failure to affirmatively state that the word “counsel” meant a certified counsel, the

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<sup>87</sup> *United States v. Lasseter*, 9 USCMA 331, 26 CMR 111 (1958).

<sup>88</sup> *United States v. Gandy*, 9 USCMA 355, 26 CMR 135 (1958).

<sup>89</sup> *United States v. Rehorn*, 9 USCMA 487, 26 CMR 267 (1958).

<sup>90</sup> *United States v. Mickel*, 9 USCMA 324, 328, 26 CMR 104, 108 (1958); *cf. United States v. Johnson*, 9 USCMA 399, 26 CMR 199 (1958); *United States v. Steveson*, 9 USCMA 332, 26 CMR 112 (1958).

<sup>91</sup> *United States v. Rehorn*, 9 USCMA 487, 490, 26 CMR 267, 270 (1958).

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accused was adequately advised of his right to counsel where the advice given was in compliance with the requirement of paragraph 34 of the Manual.<sup>92</sup>

The Court of Military Appeals distinguished *McFerrin* from *Tomaszewski* by pointing out that the accused was given erroneous advice which misled him in the latter case but that no erroneous or misleading advice was given in *McFerrin*.<sup>93</sup>

The current law covering the right of an accused to certified government counsel, as evidenced by the cited decisions, appears to be sound, logical and just. One may sympathize with an accused who, because he is not aware of his right to certified government counsel, obtains civilian counsel to his own financial detriment, or an accused who seeks and obtains a new investigation after misadvice as to his right to such counsel and is thereby required to suffer additional delay in having his case brought to trial. It cannot be logically contended, however, that considerations of such nature should result in a guilty accused escaping unpunished, although they would be worthy of consideration in assessing the sentence.

A Navy board of review has stated that any person charged with administering the Code who refers a case to trial by general court-martial without substantial compliance with the requirements of Article 32 and thereby denies to the accused any one of certain enumerated rights, including the right of appointment of qualified counsel, is thereby precluded from approving a sentence of greater severity than could have been imposed by a special court-martial.<sup>94</sup> This dicta was premised on the conclusion that referral of a case to trial by general court-martial without compliance with Article 32 always presents the probability that the

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<sup>92</sup> *United States v. McFerrin*, 11 USCMA 31, 28 CMR 255 (1959). The court indicated it had some reservations in regard to the appellate defense argument that to persons in the military service the word "counsel" is a word of art and means any officer. The court based its decision upon the fact that it could be fairly inferred from the record that the accused was not misled by use of the word "counsel" and the fact that the accused did not produce any support for his contention that he was misled.

<sup>93</sup> *Id.* at 33, 28 CMR at 257.

<sup>94</sup> NCM 57-00202, *Tolbert*, 26 CMR 747 (1958). In this case the accused was not advised of his right to qualified counsel at the Article 32 investigation. Additionally, he was denied the right to present a statement in his own behalf at the investigation and no record or summarization of testimony of witnesses at the investigation was made or forwarded with the investigative report. The board of review found specific prejudice as to one charge and disapproved the finding on that charge and reduced the sentence to one impossible by special court-martial.

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accused will be materially prejudiced as to his substantial rights with respect to the sentence imposed.<sup>95</sup> The board further concluded that the doctrine of waiver should not be applied unless the record affirmatively disclosed that the accused, with full understanding of his rights, had specifically waived such rights. In *Tolbert* the accused made a motion for appropriate relief at trial in the form of a request for a new pretrial investigation, based upon the denial by the investigating officer of his right to make a statement in his own behalf. The motion was denied by the law officer.<sup>96</sup>

The board of review decision in *Tolbert*, in effect, recognized an alternative method of purging the prejudicial effect resulting from a failure to comply substantially with the provisions of Article 32. However, the decision provided no clear cut test to determine when such an error may be purged by reduction of the sentence or by a rehearing preceded by a full and thorough Article 32 investigation. The decision apparently contemplates, however, that any substantial failure to comply with Article 32 which results in specific prejudice as to the findings will require reversal. It further indicates that a reduction of the sentence will be required for any failure to comply substantially with the provisions of Article 32, apparently on the theory of general prejudice as to the sentence, based upon the possibility that the case would not have been referred to a general court-martial had there been substantial compliance with Article 32.<sup>97</sup>

The Court of Military Appeals has not applied the rationale in *Tolbert* or held that reduction of the sentence may effectively purge Article 32 errors. That court has consistently required reversal where specific prejudice is established but has refused to require any corrective action where no specific prejudice could be demonstrated, even where failure to follow Article 32 was clear.<sup>98</sup> It is submitted that the *Tolbert* decision, insofar as it concludes that the referral of any case to trial by general court-martial without substantial compliance with Article 32 will result in general prejudice requiring at least reduction of the sentence to one impossible by special court-martial, will not be followed by the Court of Military Appeals.

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<sup>95</sup> *Ibid.*

<sup>96</sup> *Id.* at 751.

<sup>97</sup> *Id.* at 756.

<sup>98</sup> See Section V, *infra*, for more detailed coverage of effect of errors at the Article 32 investigation.

C. RIGHT OF DISCOVERY AT ARTICLE 32  
INVESTIGATION

Although the discovery aspects of the Article 32 investigation have not been emphasized in the preceding pages of this article, this is not intended to minimize the importance of the discovery rights of an accused. The Article 32 investigation, although principally a fact finding investigation,<sup>99</sup> offers both the government and the accused an ideal opportunity to ascertain the facts of the case and, within the limits of the Code, to develop their theories.<sup>100</sup>

1. Importance and Scope of Discovery Right

The importance of the right of discovery encompassed within the framework of the pretrial investigation was fully recognized in the congressional hearings which preceded the enactment of the Code.<sup>101</sup> It has also been given express recognition by the Court of Military Appeals.<sup>102</sup> Some authorities, on the other hand, have contended that the Code did not envision discovery by the accused as one of the primary purposes of the formal pretrial investigation.<sup>103</sup>

<sup>99</sup> Legal and Legislative Basis, MCM, 1951, p. 53.

<sup>100</sup> *United States v. Claypool*, 10 USCMA 302, 27 CMR 376 (1959).

<sup>101</sup> *Hearings on H.R. 2498 Before the House Committee on Armed Services*, 81st Cong., 1st Sess. 997 (1949). Mr. Felix Larkin, one of the Code's principal draftsmen, described the Article 32 investigation as ". . . , partially in the nature of a discovery for the accused in that he is able to find out a good deal of the facts and circumstances which are alleged to have been committed, which by and large is more than an accused in a civil case is entitled to." General Franklin Riter, testifying on behalf of the American Legion at the hearings, stated in pertinent part: ". . . [T]hat right of discovery is an important thing. . . . And all evidence discovered should be readily made available. . . . [N]ot only the testimony of witnesses but any documents should be turned over to the defense. We lawyers are insisting that there be frankness in disclosing your evidence before trial." *Hearings on H.R. 2498, supra*, at 669.

<sup>102</sup> *United States v. Allen*, 5 USCMA 626, 632, 18 CMR 250, 256 (1955). Judge Brosman, who authored the court's opinion wrote: "The Article 32 investigation — among other served purposes — provides for the accused a form of discovery." See also *United States v. Tomaszewski*, 8 USCMA 266, 268, 24 CMR 76, 78 (1957) (where the majority opinion of the court expressly recognized the discovery aspect of the investigation); *United States v. Schuller*, 5 USCMA 101, 113, 17 CMR 101, 113 (1954).

<sup>103</sup> See Earle, *The Preliminary Investigation in the Army Court-Martial System — Springboard for Attack by Habeas Corpus*, 18 Geo. Wash. L. Rev. 67, 80-81 (1950); *United States v. Eggers*, 3 USCMA 191, 194, 11 CMR 191, 194 (1953), in which Brosman, J. stated: "Discovery is not a prime object of the pretrial investigation. At most it is a circumstantial by-product and a right unguaranteed to defense counsel."

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The provisions of Article 32 of the Code and paragraph 34 of the Manual leave little doubt that, whether intended as a primary purpose or only a circumstantial by-product, substantial and valuable discovery rights are afforded the accused. Article 32 requires that full opportunity be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf. Those provisions, together with the Manual requirements that the investigating officer ascertain and weigh *all* available facts, that he call and examine, in the presence of the accused, all available witnesses who appear to be reasonably necessary for a thorough and impartial investigation, including those requested by the accused, and that he show or make known to the accused and his counsel the substance of documentary evidence and statements of witnesses who are not available, to the extent required by fairness to the Government and the accused, afford a military accused considerably more pretrial discovery rights than federal rules afford a civilian defendant.<sup>104</sup> It is doubtful that the preliminary hearing provided for under the federal rules of criminal procedure was intended to provide any substantial discovery rights to a defendant.<sup>105</sup>

Assuming, without conceding the validity of the assumption, that pertinent provisions of the Federal Rules of Criminal Procedure<sup>106</sup> are invocable on behalf of an accused at an Article 32 investigation,<sup>107</sup> few practical situations can be visualized in which he would gain any greater benefits by relying on those provisions in lieu of the ones expressly provided by the Code, the Manual and controlling court-martial case law. It is therefore intended that the remainder of this chapter deal with the latter provisions except where the federal rules and federal court inter-

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<sup>104</sup> See Kent, *The Jencks Case: The Viewpoint of a Military Lawyer*, 45 A.B.A.J. 819 (1959), for a general comparative analysis of the military and federal discovery procedures.

<sup>105</sup> See *Barber v. United States*, 142 F.2d 805 (5th Cir. 1944), holding that the only purpose of a preliminary hearing conducted pursuant to Rule 5, Fed. R. Crim. P., is to determine whether there is sufficient evidence against an accused to warrant his being held for action by grand jury.

<sup>106</sup> See Fed. R. Crim. P. 5(c), 6(e), 10, 15, 16(b), and 16(c).

<sup>107</sup> UCMJ, art. 36(a), provides in part as follows: "The procedure, including modes of proof in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulation which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States District Courts, but which shall not be contrary to or inconsistent with this Code." See *United States v. Knudson*, 4 USCMA 587, 590, 16 CMR 161, 164 (1954), wherein Quinn, C. J., speaking for the majority of the court wrote: "We have repeatedly held that Federal practice applies to court-martial procedures if not incompatible with military law or with the special requirements of the military establishment."

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pretations of them have been expressly applied in reported military cases or may otherwise aid in interpreting a Code or Manual provision.

### 2. *Right of Confrontation*

Obviously the best method by which an accused may examine a witness on direct or cross examination during the pretrial investigation is to have the witness present at the investigation for the purpose of testifying. As previously noted, however, this right, assuming the materiality of the witness' testimony can be established, depends upon the availability of the witness. The Court of Military Appeals has shown little inclination to question the determination by proper authority that a military witness, whose presence at the investigation is desired by an accused, is not reasonably available, in the absence of a manifest abuse of discretion.<sup>108</sup> The term "available witness" is used in its general sense of being available for examination. Availability is not dependent solely upon the factor of physical presence, but also may include other factors such as the state of physical or mental health that will permit an individual to undergo examination. The investigating officer's report should fully reflect the absence of any witness which the accused has requested and the reason for the absence.<sup>109</sup> Since there is no legal authority to subpoena a civilian witness to appear and testify at the Article 32 investigation, the availability of a civilian witness must necessarily depend upon whether he will voluntarily appear and testify at the request of the investigating officer or the accused, without payment of witness fees or other remuneration.<sup>110</sup>

Assuming the unavailability or refusal of a civilian witness to appear at the investigation and testify, consideration should be

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<sup>108</sup> ACM 8768, Doyle, 17 CMR 615 (1954), *pet. denied*, 5 USCMA 858, 17 CMR 381 (1955).

<sup>109</sup> *Ibid.*

<sup>110</sup> Legal and Legislative Basis, MCM, 1951, p. 55, contains the following illuminating language: "A difficult problem arising in the pretrial investigation is that of determining whether a witness is 'available.' The testimony before the Subcommittee of the House Committee on Armed Services with respect to the meaning of 'availability' is not helpful. It indicates a failure to understand that the primary and practical restriction on the availability of witnesses arises from these facts: Witnesses may not be paid for attending the investigation; civilians may not be compelled to attend. Thus the availability of a civilian witness is determined by whether he will attend the investigation voluntarily. In complicated cases involving serious offenses, it may be necessary for the investigating officer to travel a considerable distance to interview a witness. In such a case, the witness is considered as 'available' and the pretrial counsel and the accused, if he desires, should be given an opportunity to accompany the investigating officer."

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given to the advisability of the investigating officer, together with the accused and his counsel, traveling to the witness for the purpose of interrogating him. This procedure would, of course, depend upon the approval of the appointing authority and the availability of necessary funds to defray the expenses of travel of the military personnel involved.<sup>111</sup> In such a case the investigation could proceed in the same manner as if the witness had appeared before the investigation at the locality where it was originally ordered.

Authority may also be granted an accused or his counsel, or both, to proceed to the location of a material witness for the purpose of interviewing him. It is to be remembered, however, that a civilian witness, wherever he may be contacted, may not be forced to testify or give a statement for the purposes of a pretrial investigation in the absence of the power to issue and enforce a subpoena. Neither can a military witness be compelled to talk to or submit to an interview by an accused or his counsel, unless within the framework of an officially directed and conducted investigation, deposition or examination at trial.<sup>112</sup> Paragraph 34 of the Manual provides that even where a witness is available, he need not be called if the accused withdraws his request upon being advised that the expected testimony will be regarded as having been actually taken. No logical reason exists why this same rule cannot be applied in the case of defense witnesses, whether available or unavailable, so long as the investigating officer by any means available, protects the interests of the government by reasonably assuring himself of the veracity of the expected testimony.

### 3. *Use of Depositions*

The question of the use of depositions to obtain otherwise unavailable testimony for use at the pretrial investigation deserves consideration. Article 49(a) of the Code provides that any "party" may take oral or written depositions at any time after charges have been signed unless an authority competent to convene a court-martial for the trial of such charges forbids it for good cause. This Code provision appears on its face to authorize the taking of a deposition for use at the Article 32 investigation at the instance of either the government or the accused. Other provisions of the Code, however, cast doubt upon the validity of this inference.

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<sup>111</sup> WC NCM 58 01416, Johnson, 15 April 1959. (Not reported.)

<sup>112</sup> *Ibid.* See also ACM 8768, Doyle, 17 CMR 615 (1954) (dictum).

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The Code provides that process issued in “court-martial cases” to compel the attendance of witnesses and the production of other evidence shall be similar to that possessed by United States courts having criminal jurisdiction,<sup>113</sup> and that the trial counsel, defense counsel and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.<sup>114</sup> The language of Article 47 of the Code adds confusion to the problem by making it an offense for a person not subject to the Code, who has been duly subpoenaed to appear as a witness before any “court-martial, military commission, court of inquiry, or any other court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such court, commission, or board” to wilfully neglect or refuse to appear and testify. It thus appears that unless a deposition is to be read in evidence before a court, commission or board, no provision for issuing or enforcing process, which may be necessary to the taking of the deposition from a civilian witness, is provided by the Code.

To add further confusion, paragraph 34 of the Manual indicates that if material defense or government witnesses are not reasonably available for the investigation and it appears that they may not be available at the time of trial, the investigating officer should initiate action with a view toward obtaining necessary depositions. Apparently this provision does not contemplate the taking of a deposition of a witness who is unavailable for the purposes of the Article 32 investigation if it appears that he will be available at the time of trial. In still another part of the Manual it is provided that a subpoena cannot be used for the purpose of compelling a witness to appear at an examination before trial except as provided by Article 135 of the Code in the case of a court of inquiry.<sup>115</sup>

### 4. *Use of Subpoena*

The Code and Manual provisions set out in the preceding paragraphs do not, of course, affect the taking of an oral or written deposition from a military witness, since such a witness can be ordered by competent military authority to appear and testify at the time and place designated for the taking of the deposition, subject only to the provisions of Article 31 of the Code.<sup>116</sup> They

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<sup>113</sup> UCMJ, art. 46.

<sup>114</sup> *Ibid.*

<sup>115</sup> Par. 115, MCM, 1951.

<sup>116</sup> UCMJ, art. 31, prohibits compulsory self-incrimination and provides further in pertinent part that no person subject to the Code shall compel any

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do, however, create substantial doubt as to whether the deposition of a civilian witness may be taken solely for use in an Article 32 investigation at the request of an accused and, if so, whether a subpoena may lawfully be issued for the purpose. This doubt has been reflected by the conflicting views of at least two authors of books on military law under the Code.<sup>117</sup>

A search of reported cases tried under the Code brings to light only two cases concerning this problem. One Air Force board of review decision involved a case wherein it was held that a deposition taken pursuant to a request on a deposition form which was signed by the Article 32 investigating officer and which stated in the opening paragraph of the form that the deposition was to be considered at the Article 32 investigation, was properly taken since sworn charges were in existence and the taking of the deposition was directed by the convening authority.<sup>118</sup>

Another case, decided by the Court of Military Appeals, involved the question of the right of the investigating officer to consider written but unsworn statements of unavailable witnesses. The majority opinion contained the following language: "While unavailability affects the accused's right to cross-examine, it does not preclude the investigating officer from considering the statements of the witnesses."<sup>119</sup> In footnote amplification of the above quoted language the following statements were included:

This does not mean that the accused cannot question the witness at all. There is still open to him the deposition proceedings provided by Article 49. In this way he may examine the witnesses on direct or cross examination.<sup>120</sup>

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person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

<sup>117</sup> Everett, *Military Justice in the Armed Forces of the United States* 217 (1956). This authority expresses the belief that a civilian cannot "be subpoenaed in connection with a pretrial investigation of charges under Article 32 of the Uniform Code." He further states that it would appear that a civilian can be subpoenaed only after charges have been referred to a court-martial for trial. But see Feld, *A Manual of Courts-Martial Practice and Appeal*, § 41 at 54-55 (1957). This author expresses the view that although a subpoena cannot be used to compel attendance at a pretrial examination except a court of inquiry, one can be used for the purposes of a deposition regarding charges not yet referred for trial if issued by the trial counsel of an existing court-martial at the direction of the convening authority.

<sup>118</sup> A.C.M. 13003, *Tatmon*, 23 CMR 841 (1957). This case holds, however, that an investigating officer is not a "party" within the purview of Article 49(a) of the Code.

<sup>119</sup> *United States v. Samuels*, 10 USCMA 206, 213, 27 CMR 280,287 (1959).

<sup>120</sup> *Ibid.* The value of the quoted language to support the proposition for which cited may be substantially decreased in view of the fact that the unavailable witnesses involved in the case were *military* witnesses rather than *civilian* witnesses.

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The difficulty encountered in arriving at an authoritative conclusion as to the existence of authority for use of a subpoena to enforce the taking of a deposition for use at the investigation is manifested in the preceding paragraphs. It is the belief of this author, however, that although authority does not exist to subpoena a civilian witness to appear at the Article 32 investigation, there is statutory authority to subpoena such a witness for the purpose of taking his oral or written deposition. The use of subpoena would be proper in any investigation where the officer exercising general court-martial jurisdiction over the accused has authorized taking of a deposition after determining that the matter to be covered in the deposition is material and reasonably necessary to a thorough and impartial investigation.

It is further submitted, that if and when the problem is squarely presented to it, the Court of Military Appeals will specifically uphold the authority to obtain and use depositions where reasonably necessary to fulfill the requirements of Article 32. As a practical matter the question of legality of use of a subpoena, if issued in connection with the taking of a deposition for use at the pretrial investigation, would not normally arise unless the party subpoenaed refuses to obey the subpoena or unless competent military or government officials question the payment of fees. The pertinent language of Article 49 of the Code, providing in part that any party may take depositions at any time after charges have been signed, are rendered substantially less meaningful if the power of subpoena is not available for use in connection with the taking of such depositions. Some support for the conclusion may also be found in the Federal Rules of Criminal Procedure.<sup>121</sup>

### 5. Right to Have Statements Sworn

Recent decisions of the Court of Military Appeals have pointed up another right of an accused at the pretrial investigation. In *United States v. Samuels*, decided by the Court of Military Appeals in 1959, it was held that unsworn written statements of unavailable witnesses may not be considered by the investigating officer over objection of the accused.<sup>122</sup> At the investigation which

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<sup>121</sup> Fed. R. Crim. P. 15 contains the following language: "If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition . . . ."

<sup>122</sup> 10 USCMA 206, 27 CMR 280 (1959).

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preceded the trial of that case the investigating officer considered unsworn written statements of fifty-eight witnesses who had been transferred from the area prior to the Article 32 investigation and who were, with one possible exception, located more than one hundred miles from the place of the investigation. The court did not look behind the investigating officer's determination that the witnesses were unavailable and indicated that although failure to follow the strict evidentiary rules applicable at trial was not error, consideration of the unsworn written statements, over objection of the accused, was prejudicial error. The majority premised its holding on the grounds that the requirement for sworn statements can be inferred from Article 32 of the Code which requires an inquiry into the truth of the charges, because an oath or affirmation is reasonably necessary to insure the truth of written statements, and because paragraph 34d of the Manual expressly provides that witnesses "who give evidence during the investigation should be examined on oath or affirmation."<sup>123</sup> Judge Latimer dissented on the grounds that the requirement might place an unnecessary burden on the government and that neither the Code, the Manual nor congressional intent requires that written statements of witnesses be sworn in order to be legally considered by the investigating officer.<sup>124</sup>

The *Samuels* decision was given express recognition in another recent case but the Court of Military Appeals refused to apply the rule in that case on the grounds that defense counsel, although he moved that all witnesses which the government proposed to use at trial be produced for examination, failed to expressly object either at the investigation or at trial, to the investigating officer's consideration of unsworn statements of certain of the requested witnesses who were unavailable.<sup>125</sup> Although Judge Ferguson dissented in *Lassiter* on the theory that waiver should not apply where the accused, by objecting to the absence of the witnesses whose written statements were in issue, impliedly objected to the utilization of the unsworn statements,<sup>126</sup> it appears from the majority opinion that specific objection must be made at the investigation or at trial to the erroneous use of unsworn statements or waiver will be invoked against the accused.

### 6. Right to Learn Identity of Informers

Before entering into a discussion of the discovery rights of an accused at the pretrial investigation insofar as they relate to his

<sup>123</sup> *Id.* at 213, 27 CMR at 287.

<sup>124</sup> *Id.* at 215-20, 27 CMR at 289-94.

<sup>125</sup> *United States v. Lassiter*, 11 USCMA 89, 28 CMR 313 (1959).

<sup>126</sup> *Id.* at 91-92, 28 CMR at 315-16.

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right to obtain or inspect documents and pre-existing statements or reports, it is well to look briefly to his right to learn the identity of informers. As a general rule, communications by informants to public officers engaged in the discovery of crime are privileged and an accused is not entitled to disclosure of the identity of one who has acted as an informer against him unless that privilege has been waived by the government officials entitled to its benefit.<sup>127</sup> This privilege does not prevail in the event the informing individual exceeds the bounds of an informer only, however, and where knowledge of the identity of the informer and the right to cross-examine him are reasonably necessary and material to the defense of the accused, he is entitled to know the identity of the informer and to question or cross-examine him at the pretrial investigation.<sup>128</sup>

### *7. Right to Discovery of Written Matter*

The pretrial discovery rights of an accused, insofar as they involve the right to learn the contents of or inspect documents, written statements and existing reports at the pretrial investigation, should not create a substantial problem for either the government, the investigating officer or the accused. In the case of documents, statements or records not within the possession or control of the federal government, it is logical that the same considerations which prevail in the case of the testimony of civilian witnesses requested by the accused would control. If the accused can obtain such matter through his own efforts, he is entitled to offer them and have them considered by the investigating officer and appended to the investigative report. If, on the other hand, the accused meets the burden of establishing the probable existence and materiality of documents not otherwise known to the investigating officer, he is entitled to the assistance of the investigating officer, and the appointing authority in obtaining them, depending upon their availability.

### *8. Documentary Evidence and Statements*

A study of the reported cases indicates that it is the statements, documents and records which are prepared by governmental agen-

<sup>127</sup> Par. 151b, MCM, 1951; *Scher v. United States*, 305 U.S. 251 (1938); ACM 14661, **French**, 25 CMR 851 (1958), *aff'd in part, rev'd in part*, 10 USCMA 171, 27 CMR 245 (1959).

<sup>128</sup> *United States v. Hawkins*, 6 USCMA 135, 19 CMR 261 (1955). In this case the informer, using money made available by government investigators, requested that the accused buy narcotics for him. Narcotics were purchased by the accused with money given him by the informer. The Court of Military Appeals held that denial to the accused of the right to ascertain the instructions given to the informer and the right to examine the informer was prejudicial error where the accused relied on the defense of entrapment and the informer could furnish material testimony relating to that issue.

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cies or are in the hands or files of the government which most frequently become the subject of judicial controversy.<sup>129</sup> Paragraph **34d** of the Manual requires that documentary evidence and statements of witnesses who are not available will be shown, or the substance thereof will be made known, to the accused and his counsel to the extent required by fairness to the government and the accused.<sup>130</sup> This provision may be logically interpreted to require that statements and documents which accompany the charges at the time they are delivered to the investigating officer, as well as those which are obtained by the investigating officer during the investigation, should be fully disclosed to the accused and his counsel.

The Manual further provides that if documents which are to be introduced in evidence are in the custody and control of military authorities, the trial counsel, the court, or the convening authority will, upon proper request, take necessary action to effect the production of such documents without the necessity of further legal process.<sup>131</sup> Certainly any documents which would be admissible in behalf of an accused at trial should be equally admissible at the pretrial investigation and the accused is entitled to obtain such documents for use at the investigation.

Consideration of some of the reported cases give considerable insight into the extent to which an accused is entitled to inspect existing statements and documents at the pretrial investigation. As a practical matter, it can be fairly stated that a military accused is usually granted pretrial access, not only to the formal pretrial file but to the investigative file as well.<sup>132</sup> It is difficult to visualize how any unfairness to the government could result from such full and frank disclosure in the absence of a government con-

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<sup>129</sup> CM **391879**, *Craig*, **22 CMR 466** (1956), *aff'd*, **8 USCMA 218**, **24 CMR 28** (1957); CM **377832**, *Batchelor*, **19 CMR 452** (1955), *aff'd*, **7 USCMA 354**, **22 CMR 144** (1956). These two cases exemplify the type of controversy which may arise when government officials deny an accused the right to obtain or use documents, statements, etc. which are in the custody and control of the government.

<sup>130</sup> Legal and Legislative Basis, MCM, **1951**, p. **55**, states that this provision of the Manual was inserted to give the investigating officer the right to withhold from the accused and pretrial counsel matters of a confidential or security nature which are in the file but which are not material to the inquiry.

<sup>131</sup> Par. **115c**, MCM, **1951**.

<sup>132</sup> CM **374659**, *Dickinson*, **17 CMR 438, 444** (1954), *aff'd*, **6 USCMA 438**, **20 CMR 154** (1955). In this case the accused was furnished at his pretrial investigation with copies of all ninety-five statements made by fellow prisoners of war who had so much as mentioned his name in any way. See ACM **11080**, *Bohannon*, **20 CMR 870** (1956). This was a case in which the accused was furnished the entire investigative file for use at the Article **32** investigation.

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tion of privilege or necessity for protecting security classification in connection with documents, statements or files in issue.

The *Batchelor* decision<sup>133</sup> is an excellent source of general legal pronouncements covering the pretrial discovery rights of an accused. In that case defense counsel made innumerable requests at the pretrial investigation and at subsequent times prior to trial for the production by the government of complete government files on all repatriated prisoners of war and on eighty-six named individuals, all government files relating to the possible communist influence on prisoners of war, all statements made by the accused to Army authorities, all memoranda, newspaper clippings, etc., respecting statements made by the accused to any persons whatsoever, complete text of communist zone newspaper and periodical articles, broadcasts and speeches by accused and other named persons and a full investigation of the accused's character background to include results of the interrogation of 126 named persons.

Defense counsel based his pretrial requests in *Bachelor* on the necessity of the documents for the purpose of developing "defensive theories" and preparing for trial. The board of review in its decision in *Batchelor* found no prejudicial error in the denial of many of the accused's pretrial requests for information and documents where such requests were unreasonable and the materiality of the requested material had not been satisfactorily demonstrated.<sup>134</sup> The opinion noted that no evidence favorable to the accused had been actually suppressed and that the pretrial discovery rights of the accused do not entitle him to engage in a pure "fishing expedition" by rumaging through government files in hope of obtaining something of value.<sup>135</sup>

### 9. Effect of Governmental Privileges

Statements, reports and investigative files have, on occasion, been denied to an accused at the pretrial investigation on the

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<sup>133</sup> **CM 877832, *Batchelor*, 19 CMR 462 (1955), *aff'd*, 7 USCMA 354, 22 CMR 144 (1966).**

<sup>134</sup> *Id.* at 513-17. The board in its opinion noted that rules 16 and 17 of the Federal Rules of Criminal Procedure provide that a defendant may upon his motion at any time after filing of indictment or information be permitted, in the discretion of the court, to inspect and copy a photograph, designated books, papers, documents, or tangible objects obtained from or belonging to defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of the defense and that the request is reasonable, and that a subpoena may be issued to enforce this right.

<sup>135</sup> *Id.* at 609-25, contains an excellent dissertation on the broad aspects of an accused's pretrial and trial discovery rights.

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grounds that their disclosure to the accused and his counsel would violate security measures or governmental privilege.<sup>136</sup> Assuming that there is an area of military and diplomatic secrets where the national interest must prevail over the discovery rights of an accused<sup>137</sup> what then are the effects of such a determination in a given case? The decided cases make it clear that in any case where such evidence is furnished to the investigating officer for his use during the investigation, the accused and his counsel are likewise entitled to the evidence without regard to administrative classification of such evidence.<sup>138</sup> It appears also that where a witness has made a statement prior to the Article 32 investigation, and the accused desires the statement for use during trial to cross-examine one of the witnesses who testified at the investigation, he is entitled to it upon demand without a preliminary showing that the witness is testifying untruthfully or in a manner inconsistent with his prior statement.<sup>139</sup> The right to inspection arises as soon as the existence of a prior statement on a matter material to the defense at the Article 32 investigation is discovered.<sup>140</sup>

The military services, as a matter of practical necessity, have issued detailed regulations covering the classification, safeguard-

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<sup>136</sup> See par. 151, MCM, 1951, for examples of matter protected by governmental privilege, including communications made by informants, diplomatic correspondence, written official communications, Inspectors General reports, the disclosure of which would be detrimental to the public interest.

<sup>137</sup> *Bank Line v. United States*, 76 F.Supp. 801 (S.D.N.Y.1948). This case contained dictum to the effect that there is perhaps an area of military and diplomatic secrets where the national interest must prevail even at the expense of private justice. See *Jencks v. United States*, 353 U.S. 657 (1957).

<sup>138</sup> *United States v. Nichols*, 8 USCMA 119, 23 CMR 343 (1957); CM 391879, *Craig*, 22 CMR 466 (1956), *aff'd*, 8 USCMA 218, 24 CMR 28 (1957). In each of these cases the accused or his counsel was denied access to "confidential" investigative files which were available to and utilized by the investigating officer at the Article 32 investigation. The decision in each case makes it clear that where such matter is utilized by the investigating officer, the executive privilege is waived, and the accused and his counsel are likewise entitled to the material. See par. 44h, MCM, 1951.

<sup>139</sup> See *United States v. Heinel*, 9 USCMA 259, 26 CMR 39 (1958). This case held that the defense was entitled to a transcript of the prior testimony of prospective prosecution witnesses at an Inspector General's investigation as soon as it appeared that they had previously testified and without first establishing that they were testifying untruthfully or had made an inconsistent statement. *Cf.* *United States v. Gandy*, 9 USCMA 355, 26 CMR 135 (1956). In this case the accused objected to the use at trial for impeachment purposes of statements made by him before trial on the basis that he had never been given a copy of the statements. The court found no error where there was no claim that defense counsel had requested prior inspection of the statements and been refused and stated that under the circumstances there was "no duty on the part of the Government to open its files to an accused without some prior request on his behalf."

<sup>140</sup> *Ibid.*

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ing and release of information and records from their files.<sup>141</sup> The denial of access to information or records requested by an accused which are material and reasonably necessary to his defense cannot be legally justified, however, solely on the basis that such material is classified or safeguarded. Pertinent regulations may prohibit local authorities granting access in certain situations. In such cases authority to grant access to the accused should be sought from The Judge Advocate General or other competent authority.<sup>142</sup>

Paragraph 151 of the Manual gives coverage to the general subject of privileged communication and recognizes the existence of a governmental privilege running to "state secrets and police secrets" and "confidential and secret evidence." A careful reading of that paragraph indicates, however, that the drafters of the Manual realized that the governmental privileges discussed therein could not be invoked to deny an accused access to information necessary to his defense. The Manual authorizes an officer exercising general court-martial jurisdiction to dismiss charges in the event he determines that the security considerations involved are paramount to trial.<sup>143</sup>

The current status of the accused's right to inspect statements, documents or records which are material to his defense at the pretrial investigation can be summed up by the following language :

. . . [S]ince the government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.<sup>144</sup>

There is little reason to doubt that the Court of Military Appeals will follow the general precept expressed in the language quoted above. It can be reasonably anticipated that action on the part of military authorities which interposes any obstacle to the disclosure of facts or information tending to exculpate the accused at the pretrial investigation will afford basis for appropriate corrective action by that court.

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. . . [S]ince the government which prosecutes an accused also has the *Army Files*, as one example of the many existing service regulations on this general subject.

<sup>142</sup> *Id.* at par. 12 specifically directs that questions of legal interpretations with regard to release of information and records from Army files will be referred to The Judge Advocate General of the Army.

<sup>143</sup> Par. 33, MCM, 1951.

<sup>144</sup> *United States v. Reynolds*, 345 U.S.1, 12 (1945).

10. *Other Considerations*

Before leaving the discussion of rights of the accused at the pretrial investigation it should be pointed out that there is no requirement that the testimony of witnesses who testify at such investigation be recorded verbatim. The report of such investigation is sufficient if accompanied by a statement of the *substance* of the testimony taken on both sides.<sup>145</sup> Accordingly, if it appears that a prospective prosecution witness is testifying at the pretrial investigation in a manner inconsistent with prior statements or testimony given by him, the accused should give consideration to requesting, as a matter of tactics, that his testimony be recorded verbatim.

Another point should be kept in mind by the accused at the pretrial investigation. It has been held that the verbatim testimony of a prospective prosecution witness at a pretrial investigation is admissible at subsequent trial as “reported or former testimony” if subjected to cross-examination at the investigation.<sup>146</sup> In the event the accused anticipates that a defense witness who is available to testify or the Article 32 investigation will not be available at trial for any of the reasons specified in Article 49 of the Code he should request that the testimony be recorded verbatim and he should move that counsel be appointed to represent the government for the purpose of cross-examining that witness’ testimony. Based upon the rationale in *Eggers*, it is clear that defense testimony taken at the investigation would not be admissible at subsequent trial as “reported or former testimony” if not subjected to cross-examination, or at least the opportunity for cross-examination, by adversary counsel for the government.<sup>147</sup>

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<sup>145</sup> *United States v. Allen*, 5 USCMA 626, 18 CMR 250 (1955). This case held that an impartial condensation of the information, obtained from witnesses during the pretrial investigation, is all that is required by Article 32. See Par. 34e, MCM, 1951.

<sup>146</sup> *United States v. Eggers*, 3 USCMA 191, 192-94, 11 CMR 191, 192-94 (1953). The Court of Military Appeals recognized in its decision that the tactical objectives of a cross-examining defense counsel at the pretrial investigation might be primarily those of discovery and that these objectives might differ substantially from those of the same counsel at trial. The court nonetheless held that verbatim testimony of a material prosecution witness which had been subjected to searching cross-examination at that time was admissible at trial as “reported testimony” where the witness had died before trial. The unanimous opinion of the court contained the following language: “. . . [W]e prudently leave for future consideration questions involving pre-trial testimony less thoroughly sifted than that involved there (sic)—or wholly uncross-examined, although an opportunity for such testing had been afforded. On these and related matters we express no opinion.” See UCMJ, art. 50, and par. 145b, MCM, 1961, for limitations on the use of “reported testimony.”

<sup>147</sup> *Zbid.*

V. EFFECT OF FAILURE TO COMPLY WITH ARTICLE 32

A. GENERAL CONSIDERATIONS

Little need be said relative to the now well settled proposition that errors committed during the pretrial investigation are non-judicial. Article 32(d)<sup>148</sup> was included in the Code for the express congressional purpose of precluding the requirements of Article 32 from being treated as judicial in a habeas corpus proceeding.<sup>149</sup> No military or federal court decision has been found which construes an Article 32 error to be judicial since the effective date of the Code. As specifically noted in the congressional hearings which preceded the enactment of the Code, however, the failure to conduct an Article 32 investigation or to substantially comply with the requirements of Article 32, although not a judicial defect, might be grounds for reversal or other corrective action upon review.<sup>150</sup>

Paragraph 34a of the Manual provides that failure to comply substantially with Article 32 resulting in prejudice to the substantial rights of the accused may result in a miscarriage of justice and may require a delay in disposition of the case or disapproval of the proceedings. It is further provided that a substantial failure to comply with the requirements of Article 32 of the Code and paragraph 34 of the Manual may be brought to the attention of the court by a motion for appropriate relief and that such motion should be sustained only if the accused shows that the defect has actually prevented him from preparing for trial or otherwise injuriously affected his substantial rights.<sup>151</sup>

If the motion is granted, the court may grant a continuance to enable the accused to further prepare his defense or it may adjourn the proceedings to permit compliance with the pertinent requirements.<sup>152</sup> In the latter event, the matter should be referred to the

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<sup>148</sup> UCMJ, art. 32(d), provides that failure to follow the requirements of Art. 32 shall not constitute judicial error.

<sup>149</sup> *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess., in *Index and Legislative History of Uniform Code of Military Justice* 993 (1949).

<sup>150</sup> S. Rep. No. 486, 81st Cong., 1st Sess. 16-17 (1949); H.R. Rep. No. 491, 81st Cong., 1st Sess. 20 (1949).

<sup>151</sup> Par. 69c, MCM, 1951. See par. 67b, MCM, 1951, indicating that failure to make objection to pretrial error prior to plea constitutes a waiver, but that the court for good cause shown may grant relief from the waiver.

<sup>152</sup> *Ibid.*

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convening authority for curative action since it is doubtful that the law officer has the power to direct that a new or supplemental Article 32 investigation be had.<sup>153</sup> Further, a misstatement of the relief sought does not justify a denial of such relief, if it is otherwise indicated, and the accused's pretrial motion or objection should be decided according to its substance.<sup>154</sup>

Even though error has been committed in connection with the Article 32 investigation, the findings and sentence of any subsequent general court-martial are not necessarily adversely affected by the error. The Code itself specifically provides that a finding or sentence of a court-martial shall not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.<sup>155</sup> It is clear, then, that the effect of an error or irregularity in the pretrial investigation must depend upon all the pertinent facts and circumstances involved in the particular case.<sup>156</sup>

Before an error in the Article 32 investigation becomes the subject of consideration by the Court of Military Appeals, the report of the investigation will normally, after submission by the investigating officer, have undergone the pretrial consideration of the staff legal officer,<sup>157</sup> the convening authority,<sup>158</sup> the trial counsel,<sup>159</sup> and possibly that of the law officer,<sup>160</sup> the staff judge advocate's post trial review,<sup>161</sup> the convening authority's action on the record of trial<sup>162</sup> and review by a board of review if the sentence, as approved, involves death, dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.<sup>163</sup> An alleged error will not normally be considered by the Court of Military Appeals unless

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<sup>153</sup>United States v. Allen, 5 USCMA 626, 635, 18 CMR 250, 259 (1955); CGCM 9805, Sampson, 15 CMR 579 (1954); but see United States v. Nichols, 8 USCMA 119, 124, 123 CMR 343, 348 (1957), wherein the Court of Military Appeals' majority opinion utilized the following language in commenting on the fact that accused's civilian counsel was prohibited from representing him at the pretrial investigation: "Under normal circumstances this action would require the law officer to grant the accused's motion to the extent of ordering a new investigation."

<sup>154</sup>United States v. Nichols, *supra* note 153, at 124, 123 CMR at 348.

<sup>155</sup>UCMJ, art. 59 (a).

<sup>156</sup>NCM 57-00202, Tolbert, 26 CMR 747 (1958); CM 397652, Bell, 25 CMR 519, 521 (1957).

<sup>157</sup>UCMJ, art. 34; par. 35, MCM, 1951.

<sup>158</sup>*Zbid.*

<sup>159</sup>Par. 44f(5), MCM, 1951.

<sup>160</sup>UCMJ, art. 51(b).

<sup>161</sup>UCMJ, art. 61.

<sup>162</sup>UCMJ, art. 60.

<sup>163</sup>UCMJ, art. 66.

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it was previously raised or unless if previously raised, the relief sought was not granted. An exception to the validity of the preceding statement would arise in case a board of review takes corrective action as a result of an alleged Article 32 error and the cognizant judge advocate general certifies the question of correctness of such action to the Court of Military Appeals.<sup>164</sup>

One might question how alleged pretrial investigation errors could go uncorrected through the involved pretrial and appellate screening processes provided by the Code to the extent that occasion for review by the Court of Military Appeals would ever arise. The answer lies partially in the fact that many of the alleged errors urged as a basis for relief are considered by that court but are found to require no corrective action, partially because the court has given certain Code and Manual provisions interpretations materially different from the interpretations previously applied by the services and partially because these new interpretations of the law gave rise to the possibility that error had been committed in cases which were in appellate channels at the time the new interpretations were handed down. Analysis of the types of corrective action required by the Court of Military Appeals and the general areas of errors requiring the action will give further insight into the question.

### B. ERRORS REQUIRING REVERSAL OR OTHER CORRECTIVE ACTION

The Court of Military Appeals has consistently refused to grant relief in the absence of specific prejudice in cases where defects in the formal pretrial investigation are urged as a basis for appellate relief and the accused did not make a motion for appropriate relief or otherwise object to the error at trial.<sup>165</sup> The court has, in such cases, required a showing of specific prejudice as a prerequisite to granting relief, even where the denial of a fundamental pretrial right is involved. The court's dicta in *Mickel* clearly indicates that the doctrine of general prejudice will not be

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<sup>164</sup> UCMJ, art. 67(b) (2). See *United States v. Mickel*, 9 USCMA 324, 26 CMR 104 (1958), for an example of such certification by The Judge Advocate General of the Air Force.

<sup>165</sup> *United States v. Mickel*, *supra* note 164, where accused was tried prior to time Court of Military Appeals rendered decision establishing right to certified counsel at Article 32 investigation, and was represented by non-certified counsel at the investigation but did not object at trial, he is not entitled to relief on appeal in the absence of showing that failure to provide certified counsel adversely affected his rights at trial.

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utilized as a basis for affording relief from pretrial investigation errors.<sup>166</sup>

### *1. Inconsistent Participation in Same Case*

Any subsequent participation in the same case, in an inconsistent capacity, by the pretrial investigating officer or pretrial defense counsel constitutes prejudicial error and requires reversal or other corrective action. It should be noted, however, that such an error is not actually one committed at the Article 32 investigation since error results only upon participation in the same case *after* the investigation is completed.

The Code provides that no person who has acted as defense counsel, assistant defense counsel, or investigating officer shall subsequently act as staff judge advocate or legal officer to any reviewing authority in the same case.<sup>167</sup> It further provides that no person shall be eligible to sit as a member of a general or special court-martial<sup>168</sup> or as law officer<sup>169</sup> when he has acted as counsel or investigating officer in the same case. No person who has acted as investigating officer shall subsequently act as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant defense counsel in the same case.<sup>170</sup>

The Code does not define the term “investigating officer.” The Manual provides, however, that the term, as applied to a particular offense, shall be understood to include a person who, under the provisions of Article 32 of the Code and paragraph 34 of the Manual, has investigated that offense or a closely related offense alleged to have been committed by the accused.<sup>171</sup> The Manual further provides that the term includes any person who has conducted a personal investigation of a general matter involving the particular offense.<sup>172</sup> The term does not include a person who, in the performance of his duties as counsel, has conducted an investigation of an offense with a view to prosecuting or defending it before a court-martial.<sup>173</sup>

It is clear, however, that prejudicial error results when a pretrial investigating officer or defense counsel subsequently acts in the

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<sup>166</sup> *Id.* at 326–28, 26 CMR at 106–08.

<sup>167</sup> UCMJ, art. 6(c).

<sup>168</sup> UCMJ, art. 25(d)(2).

<sup>169</sup> UCMJ, art. 26(a).

<sup>170</sup> UCMJ, art. 27(a).

<sup>171</sup> Par. 64, MCM, 1951.

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

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same case in violation of the Code and that a waiver will not be invoked where such an error is involved.<sup>174</sup>

### 2. *Where Error Not Raised at Trial*

In only two cases<sup>175</sup> decided by the Court of Military Appeals has that court reversed convictions where errors at the pretrial investigation were involved **and** where the error was not raised in some manner at trial. Both of these cases came to the Court of Military Appeals for mandatory review because they involved approved sentences to **death**,<sup>176</sup> both cases arose in the same command, and both cases involved not only errors at the pretrial investigation but errors at trial as well, to the extent that specific error, justifying reversal, could be found in dismaying abundance.

In each of these cases the court, although expressing great reluctance to apply the doctrine of waiver in a case in which the death sentence had been affirmed, failed to indicate that it would apply the doctrine of general prejudice to errors involving the Article 32 investigation.

Although the Court of Military Appeals has indicated in dicta that it will not apply the doctrine of waiver to pretrial investigation errors if it will result in a miscarriage of justice and that an appellate court will not presume acquiescence in the loss of pretrial rights if the accused does not know of those **rights**,<sup>177</sup> the *Parker* and *McMahon* cases are the only ones in which that court has found specific prejudice where the errors complained of were not raised at trial. In both *Parker* and *McMahon* the majority of the court reversed the convictions and directed rehearings, but did not require a new Article 32 investigation prior to rehearing.

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<sup>174</sup> See, e.g., *United States v. Green*, 5 USCMA 610, 18 CMR 234 (1955), where pretrial defense counsel prepared memorandum of prosecution evidence which was used by trial counsel in preparing for trial in same case, reversal was required on grounds of general prejudice; *United States v. Bound*, 1 USCMA 224, 2 CMR 130 (1952), officer who performed investigation of offense as security watch disqualified to sit as member of special court-martial in same case. Dicta indicates Article 32 investigator would be clearly disqualified; CM 375794, *Tillery*, 17 CMR 421 (1955), where pretrial defense counsel prepared staff judge advocate review of trial in same case, general prejudice requiring new review resulted; CM 350672, *Heinernan*, 2 CMR 517 (1952), where accused's pretrial counsel sat as member of court-martial in same case, the court was improperly constituted and proceedings were null and void.

<sup>175</sup> *United States v. McMahon*, 6 USCMA 709, 21 CMR 31 (1956); *United States v. Parker*, 6 USCMA 75, 19 CMR 201 (1955).

<sup>176</sup> UCMJ, art. 67(b)(1), requires that the record of trial in any case in which the sentence, as **affirmed by** a board of review, extends to death be reviewed by the Court of Military Appeals.

<sup>177</sup> *United States v. Mickel*, 9 USCMA 324, 326, 26 CMR 104 (1958).

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In only two reported cases have boards of review taken corrective action based upon errors at the pretrial investigation where no objection was raised at trial. In one of these cases the board of review refused to apply the doctrine of waiver, where the accused was not advised of his right to certified counsel, and reversed the conviction without a finding of specific prejudice. The Court of Military Appeals later reversed this decision, upon certification by The Judge Advocate General, and held that the accused was not entitled to relief in the absence of showing of any prejudice at trial.<sup>178</sup>

In the other board of review decision, the accused requested named individual counsel and was told by the investigating officer, at the instance of the requested counsel, that the counsel would represent him at the trial provided he did not request the counsel at the pretrial investigation and made no statement at the investigation.<sup>179</sup> The board of review found specific prejudice in the misinformation given the accused, refused to apply waiver from the accused's failure to object at trial and approved the findings, but purged the prejudicial effect of the error by disapproval of a substantial part of the sentence, including that part providing for bad conduct discharge.<sup>180</sup>

### 3. *Where Error Raised at Trial*

It is with regard to the pretrial error which was raised at trial that the Court of Military Appeals' decisions have made their greatest impact on the rights of the accused at the pretrial investigation. Only four cases decided by that court fall into this group.<sup>181</sup> Since each of the four cases involved not only objection to pretrial error at trial, but also specific prejudice, it is arguable that corrective action would have been required whether such errors were raised at trial or not.

In *Nichols* the Court of Military Appeals found specific error in the exclusion of accused's civilian counsel from the Article 32 investigation because of his lack of security clearance. In *Tomaszewski* specific error was found in the advice to the accused at the pretrial investigation that he was not entitled to lawyer

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<sup>178</sup> United States v. Thompson, 9 USCMA 330, 26 CMR 110 (1958), reversing ACM 14268, *Thompson*, 25 CMR 806 (1957).

<sup>179</sup> CM 397402, *Bigelow*, 25 CMR 512 (1957).

<sup>180</sup> *Id.* at 515.

<sup>181</sup> United States v. Samuels, 10 USCMA 206, 27 CMR 280 (1959); United States v. DeLauder, 8 USCMA 666, 25 CMR 160 (1958); United States v. Tomaszewski, 8 USCMA 266, 24 CMR 76 (1957); United States v. Nichols, 8 USCMA 119, 23 CMR 343 (1957).

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counsel, where he then refused non-lawyer counsel and made an incriminating statement which was received into evidence at trial. In *DeLauder*, a unanimous court found specific prejudice in the denial of the accused's right to representation by counsel where the counsel was not provided with a copy of the charges, was not told of the time and place of the hearing and was directed not to communicate with the victims of the offense charged, although they were the principal prosecution witnesses. Finally, in *Samuels*, the majority of the court held that consideration by the investigating officer of unsworn statements of witnesses, where the accused had requested the presence of the witnesses, had objected to the use of their statements obtained "by goodness knows what means," and had raised the matter at trial, constituted specific prejudice.

It is worthy of note that in each of the cases mentioned in the preceding paragraph the majority opinion of the court provided for reversal of the findings and referral of the case back to the convening authority for dismissal of the charges or the ordering of a new Article 32 investigation, and a rehearing, if justified as a result of the reinvestigation. It is also interesting that in each of those cases, except *DeLauder*, Judge Latimer dissented, either on the basis that the accused was not entitled under the law to the right he claimed to have been denied him or on the ground of waiver.

In *Tolbert*,<sup>182</sup> a board of review, acting on a record of trial by general court-martial in which the accused was not advised of his right to certified counsel at the investigation, was denied the right to present a statement in his own behalf at the investigation and in which the investigating officer did not cause the testimony of witnesses at the investigation to be recorded or forward a copy of their summarized testimony to the convening authority, found that the errors resulted in prejudice as to one of the charges and as to the sentence. The board purged the error in that case by dismissing one of the charges and reducing the sentence to one impossible by a Navy special court-martial.<sup>183</sup>

In *Tolbert*, the board of review recognized that failure to comply substantially with the requirements of Article 32 does not deprive a general court-martial of jurisdiction and that reversal of a

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<sup>182</sup> NCM 57-00202, *Tolbert*, 26 CMR 747 (1968).

<sup>183</sup> *Id.* at 756. The board of review also found specific prejudice as to the finding of guilt of one of the two offenses charged because of the failure of the investigating officer to maintain a record or summarization of the testimony taken at the investigation. It is thus clear that some reduction in the sentence would have been required on that basis alone.

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conviction is required only where such failure results in specific prejudice as to the findings. Dicta in the decision indicates, however, that even where no prejudicial effect as to the findings is found, the referral of charges to trial by general court-martial without substantial compliance with Article 32 will result in prejudice as to the sentence if it exceeds bad conduct discharge, confinement at hard labor for six months or forfeiture of two-thirds pay per month for six months.<sup>184</sup> The board's opinion is apparently based on the theory that referral of a case to trial by general court-martial without substantial compliance with Article 32 necessarily results in the possibility of prejudice with respect to the sentence imposed.

The opinion overlooks the fact that if a bad conduct discharge is included in the sentence finally approved, as was the case in *Tolbert*, the stigma of a bad conduct discharge awarded by general court-martial is worse than if such discharge is awarded by special court-martial.<sup>185</sup> It is therefore doubtful whether the prejudice as to the sentence, resulting from denial of a substantial pretrial right, can be purged by reduction of the sentence, if a bad conduct discharge is approved. In view of the fact that the Court of Military Appeals has not made any distinction between prejudice as to the findings and as to the sentence in cases involving errors in the pretrial investigation, it is doubtful that it will follow the rationale in *Tolbert*.

An Air Force board of review has held that the offer at trial of a continuance for the purpose of allowing the defense to become properly acquainted with the events of the investigation, prevented any prejudice where a statement was apparently added to the pretrial investigative report some eleven days after the investigation was completed. In that case the board denied further relief and affirmed the findings and sentence.<sup>186</sup>

### C. ERRORS FOR WHICH RELIEF DENIED

Of the numerous cases in which Article 32 investigation errors have been considered by the Court of Military Appeals and boards

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<sup>184</sup> *Id.* at 753-56.

<sup>185</sup> See Everett, *Military Justice in the Armed Forces of the United States* 245-46 (1956), where it is stated that a bad conduct discharge, if awarded by a special court-martial, will have about the same effect on future benefits as an undesirable discharge. A bad conduct discharge imposed by a general court-martial, however, has the same effect as a dishonorable discharge and military benefits and rights "under any laws administered by the Veterans' Administration" are cut off.

<sup>186</sup> ACM 10045, *Estrada*, 18 CMR 872 (1955).

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of review, relief has been denied in most because the error was not raised at trial, or if raised at trial, because it resulted in no specific prejudice. As compared with the six cases in which the Court of Military Appeals has granted relief, based totally or partially upon errors or denial of accused's rights at the pretrial investigation, relief has been specifically denied by that court in at least seventeen cases. The proportion of reported cases in which relief has been denied by boards of review to those in which relief has been granted is approximately the same.

No attempt will be made to analyze in detail the numerous cases in which relief has been denied. A brief consideration of several of the more illuminating decisions denying relief may serve a useful purpose, however.

After the decision in *Tomaszewski*,<sup>187</sup> a number of cases were considered by the Court of Military Appeals in which the question of denial of the accused's right to certified counsel at the Article 32 investigation was directly in issue. The decision of that court in the case of *United States v. Mickel*<sup>188</sup> formed the basis for the disposition of most of those cases.

In *Mickel* the court reaffirmed the decision in *Tomaszewski* that an accused is entitled to certified counsel at the pretrial investigation, but indicated that denial of such right does not, in and of itself, constitute denial of due process requiring reversal. The court indicated that acquiescence of an accused in loss of his rights would not be presumed if he did not know of such rights and further stated that “. . . if an accused is deprived of a substantial pretrial right on timely objection, he is entitled to judicial enforcement of his right, without regard to whether such enforcement will benefit him at the trial.”<sup>189</sup> The court affirmed the accused's conviction on the ground that the failure to provide certified counsel, even though accused was not aware of his right thereto, did not require reversal in the absence of a showing of specific prejudice.

The *Mickel* decision was cited in support of a number of other decisions involving the right to certified counsel where, in short opinions, the court either denied relief or reversed boards of review decisions which had found general prejudice resulting from a denial of military due process.<sup>190</sup>

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<sup>187</sup> *United States v. Tomaszewski*, 8 USCMA 266, 24 CMR 76 (1957).

<sup>188</sup> 9 USCMA 324, 26 CMR 104 (1958).

<sup>189</sup> *Id.* at 327, 26 CMR at 107.

<sup>190</sup> *United States v. Lassiter*, 9 USCMA 331, 26 CMR 111 (1958); *United States v. Thompson*, 9 USCMA 330, 26 CMR 110 (1958); *United States v. Reynolds*, 9 USCMA 328, 26 CMR 108 (1958).

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In *United States v. Allen*,<sup>191</sup> the Court of Military Appeals held that an accused is not entitled to relief on appeal where his signed summarized statement obtained at the pretrial investigation did not contain every detail of his oral statement, and where the law officer at trial denied the use of the statement to the prosecution for the purpose of impeaching the accused's testimony, since he had waived any deficiencies by signing the statement.

In *United States v. Rogan*<sup>192</sup> the court held that the possibility of prejudice resulting from misadvice as to the right to counsel at the pretrial investigation, given before the investigation commenced, was cured by the correct advice given by the investigating officer just prior to the investigation. In *United States v. Gandy*,<sup>193</sup> the court held that where the accused was afforded an officer not a certified lawyer, whom he specifically requested to represent him at the pretrial investigation, and did not raise any objection at trial, no corrective action was required at the appellate level, even though accused was not informed of his right to certified counsel at the investigation. Relief was also denied where the accused was denied the right to appeal the ruling declaring requested counsel at the Article 32 investigation unavailable and where the accused made no motion for appropriate relief at trial but pleaded guilty and no specific prejudice was apparent from the record.<sup>194</sup>

The cases of *United States v. Farrison*<sup>195</sup> and *United States v. Lassiter*<sup>196</sup> both involved situations where the physical presence of witnesses was requested at the pretrial investigation but the witnesses were not made available and their unsworn statements were considered instead. The court distinguished *Farrison* and *Lassiter* from *Samuels*<sup>197</sup> and held that no corrective action was required on appellate review because no specific prejudice was apparent and the alleged errors had not been raised at trial by specific objection to the use of the unsworn statements.

Boards of review have closely followed the lead set by the Court of Military Appeals in denying relief in the absence of specific prejudice or appropriate motion at trial. It must not be overlooked that even where appropriate objection is made at trial, no

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<sup>191</sup> 5 USCMA 626, 18 CMR 250 (1955).

<sup>192</sup> 8 USCMA 739, 25 CMR 243 (1958).

<sup>193</sup> 9 USCMA 355, 26 CMR 135 (1958). See *United States v. McFerrin*, 11 USCMA 31, 28 CMR 265 (1959), holding that in the absence of a showing that accused was misled, failure to advise accused that word "counsel" meant a certified lawyer, where advice was otherwise complete, was not error.

<sup>194</sup> *United States v. Wright*, 10 USCMA 36, 27 CMR 110 (1958).

<sup>195</sup> 10 USCMA 220, 27 CMR 294 (1959).

<sup>196</sup> 11 USCMA 89, 28 CMR 313 (1959).

<sup>197</sup> *United States v. Samuels*, 10 USCMA 206, 27 CMR 280 (1958).

relief will be granted if the record shows that the accused was well defended at trial and that no specific prejudice resulted.<sup>198</sup> The result is that if an accused's motion for appropriate relief is denied and the record shows that he was well prepared to defend and hence suffered no actual prejudice at trial, the pretrial error will be lost to him as an effective basis for appeal.

## VI. CONCLUSIONS

It is the sincere hope of the author that this article has pointed up, admittedly to a limited extent, some of the troublesome areas in the existing pretrial investigation procedure. It is also his sincere hope that the overall utility of the present system as a just, practicable, and workable one has been demonstrated.

One may question decisions of the Court of Military Appeals which require appointment of certified counsel to represent an accused at the Article 32 investigation and which require that written statements of absent witnesses be sworn, on the basis that they read into the law rights of an accused and place burdens on the government which deviate from the congressional intent behind Article 32. Assuming that these decisions require more than Congress intended to require as minimum compliance with Article 32 of the Code, it can hardly be argued that they place a disproportionate burden upon the government or that they do not assist in a better attainment of the ultimate ends of justice.

It is apparent that the Court of Military Appeals has fully considered the requirements of inherent justice and reasonableness in its treatment of the effect of errors committed in the Article 32 investigation. No fault can be found with the requirement that specific prejudice resulting from errors in the pretrial investigation be subjected to appropriate corrective action. Equally laudable is the refusal of that court to require corrective action where the accused cannot point to a specific detriment to his rights as a result of pretrial investigative error.

Judge Latimer has called attention to one essential requirement which is deserving of serious consideration as a practical

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<sup>198</sup> See, e.g., ACM 8408, *Everett*, 16 CMR 676 (1954), where accused made a motion to quash the charge of rape at trial because he was not allowed to cross-examine prosecutrix at pretrial investigation, no transcript or summary of testimony of prosecutrix was included in the investigating officer's report or made available to accused, and he was not allowed to make a statement at the investigation. See also ACM 14581, *Kirkland*, 25 CMR 797 (1957), where investigating officer failed to call character witnesses requested by the accused at the investigation; ACM 13470, *Harris*, 24 CMR 698 (1957), *aff'd*, 9 USCMA 493, 26 CMR 273 (1958).

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basis for refusal to further extend the scope of the Article 32 investigation. That requirement is that military law must work in time of war as well as in periods of peace.<sup>199</sup> An army is organized to win victory in war, Pretrial and trial procedures which result in duplication of effort or which deter personnel from their primary mission of training for and fighting wars, where necessary, should be avoided to the maximum extent consistent with justice and discipline.

In the final analysis, any judicial system is only as good as the individuals who conduct the proceedings prescribed by the system. The surest way of avoiding errors in the pretrial investigation is to ensure, by all reasonably available means, that competent officers, fully familiar with their duties, are appointed to conduct such investigations. Minimization of errors can also be assured by the concentrated efforts of staff judge advocates directed toward a thorough and complete study of the report of pretrial investigation in conjunction with their duty to render the pretrial advice required by the Manual.<sup>200</sup> The adverse effects of most errors may be initially corrected or purged by returning the investigation report to an investigating officer for additional investigation or by obtaining a signed waiver from the accused if, after consultation with counsel, he does not desire further investigation prior to referral of charges to trial.

The final opportunity to preclude an Article 32 investigation error from having any prejudicial effect on the findings or sentence is available at the trial itself. Care on the part of the law officer in properly acting on motions or objections of the accused relative to pretrial errors will minimize the possibility of prejudice and the necessity for subsequent reversal or other corrective action.

It is hoped that any future revision of the Manual for Courts-Martial will include a corrected coverage of the requirements of an Article 32 investigation to include those requirements imposed by decisions of the Court of Military Appeals since the enactment of the Code. The existing legal requirements for the Article 32 investigation, if carefully followed, fully serve the purposes for which such investigation is intended. The compilation of these necessary requirements of an Article 32 investigation into appropriate coverage in the Manual would be of substantial assistance to those persons charged with carrying out the requirements and will lessen the possibility of their being overlooked.

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<sup>199</sup> *United States v. Samuels*, 10 USCMA 206, 216, 27 CMR 280, 290 (1959).  
<sup>200</sup> Par. 35b and c, MCM, 1951.



# PRETRIAL HEARINGS FOR COURTS-MARTIAL\*

BY CAPTAIN PHILIP G. MEENGs\*\*

## I. INTRODUCTION

Anyone with much court-martial experience is aware of the impatient foot-shuffling of court members while counsel at an out-of-court hearing display their legal brilliance before an audience limited to the law officer, a slightly bored court reporter, and a thoroughly confused accused. Many defense counsel have undoubtedly wondered about the effect on the outcome of their case when, at long last, the members return to the court room scowling at their watches and at counsel.

Is there a solution—is there a better way? As is obvious from the title and scope of this article the writer believes that there is. Through the use of a pretrial procedure somewhat similar to, but broader than, that employed by the federal district courts under Rule 12b of the Federal Rules of Criminal Procedure, it would be possible to dispose of many, if not most, interlocutory questions prior to the assembling of the full court-martial.

In the following sections we will look briefly at the need and justification for such a procedure, the legality of such a procedure and the method for effectuating it, the scope of such procedure—when it should be used and what should be accomplished therein, and the status of a pretrial hearing.

## II. NEED

This article naturally assumes the need and justification for a procedure such as was suggested in the introduction. However, it appears proper at this point to examine in a bit more detail the justification for such a procedure.

It will be noted that this entire article is directed towards pre-trial procedures for general courts-martial. It is recognized that

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\* This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Eighth Advanced Class. The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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some sort of pretrial procedure might also be useful in certain special courts-martial. However, the present structure of special courts-martial does not lend itself to pretrial procedures. Since any ruling by the president on an interlocutory matter is subject to objection by a member,<sup>1</sup> little would be gained by obtaining preliminary rulings prior to trial. Certain proposals discussed from time to time concerning the amendment of the special court-martial structure, if adopted, might change this conclusion, but for the present this matter will not be pursued any further.

In only one reported military case<sup>2</sup> has a full-blown pretrial procedure of the type contemplated by this article been employed. A Marine named Al Mullican was tried by general court-martial on 4 October 1955 on a charge of desertion. Five days prior to the trial a pretrial hearing was conducted by the law officer, during which evidence and arguments were received concerning the admissibility, *inter alia*, of records of three previous convictions of the accused on AWOL charges, and the admissibility thereof was finally determined.

The law officer in *Mullican* stated rather clearly the usefulness of a pretrial procedure. At the commencement of the proceedings, he said, in part :

This hearing is conducted for several reasons. . . , I definitely feel that such a hearing is to the benefit of the accused in a case when it is known ahead of time that certain evidence which the Government plans to introduce will be objected to by the accused. Such a hearing as this guards the rights of the accused in that it does not prejudice the court members who may or may not know of the purposes for such an out-of-court hearing. Next, I feel that it further protects the interests of the Government, and finally such a procedure will expedite the trial of general courts-martial cases, and further does not unnecessarily harass the court members who must clear the courtroom for out-of-court hearings and stand idly around while the issues are being decided in the out-of-court hearings.<sup>3</sup>

The above statement points up two of the distinct advantages inherent in the use of a pretrial hearing procedure. The first is protection of the accused from the possibly prejudicial effects of having to raise motions and objections in open court. The Court

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<sup>1</sup> U.S. Dep't of Defense, Manual for Courts-Martial, United States, par. 57c (1951), prescribed by Executive Order 10214, 8 February 1951 and hereinafter referred to as the Manual and cited as par. ----, MCM, 1951.

<sup>2</sup> United States v. Mullican, 7 USMA 208, 21 CMR 334 (1956). The Navy board of review opinions, discussed later, were not reported. Unless otherwise indicated, all subsequent citations of *Mullican* refer to the Court of Military Appeals opinion, not the board of review.

<sup>3</sup> Appellate Exhibit 1, Record of Trial, United States v. Mullican, *supra* note 2.

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of Military Appeals<sup>4</sup> has recognized the possibility of prejudice arising from the determination of contested issues in open court and therefore has given the accused the right to have certain matters decided in out-of-court hearings.<sup>5</sup> Nevertheless, it is obvious that in certain situations the mere raising of an issue in open court may prejudice the accused, even though the determination of the issue is outside the court members' presence. Particularly is this true in view of the increased sophistication of the average court member now, as compared with the early days of the Code.<sup>6</sup> Although it may be argued that objections can also be **raised** at an out-of-court hearing, this would not only require a high degree of foresight by the defense counsel in anticipating trial counsel's actions, but would still not eliminate the speculation of court members. If the pretrial procedure had not been employed in *Mullican* and defense counsel had been forced to contest the admissibility of the prior convictions in open court, a ruling favorable to the accused, followed by the most carefully-worded instruction, would not have expunged from the minds of the court members the thought that Al Mullican had been in trouble before.

The second justification pointed out by the *Mullican* law officer is the expedition of trials. Hardly separable from this is the unnecessary harassment of the court members. Trials by general court-martial are expensive to the services in terms of time, money and manpower. Any procedure which may cut down on this expense is worthy of consideration. The expeditious handling of trials will also result in better working relationships within commands, a greater respect for the system of military justice, and a more just result of trials from the standpoint of both the Government and the accused.

In addition to the saving of court members' time, consideration should be given to unnecessary demands on the time and effort of counsel. A determination of disputed interlocutory questions prior to the time of trial could permit counsel to more adequately prepare for the trial with less wasted effort. For example, a

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<sup>4</sup> Hereinafter generally referred to as the Court. The Uniform Code of Military Justice, the Act of 5 May 1950, 10 U.S.C. §§ 801-940 (1956), is hereinafter referred to as the Code and cited as UCMJ, art. \_\_\_\_\_. Citations of Articles of the Code can be converted to sections of Title 10 U.S.C. by adding 800 to the number of the Article.

<sup>5</sup> For example, in *United States v. Cates*, 9 USCMA 480, 26 CMR 260 (1958), the Court held that, upon request of the defense, it is mandatory for the law officer to hold an out-of-court hearing on the admissibility of the accused's pretrial confession.

<sup>6</sup> For example, a lengthy out-of-court hearing following a plea of guilty immediately indicates to some experienced court members that the accused has "made a deal."

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determination in favor of the prosecution on the admissibility of certain evidence might preclude the necessity of calling one or more witnesses. This would not only save the counsel preparation time otherwise used in interviewing the witnesses, but would also save the Government the cost of witness fees. Conversely, a pre-trial determination in favor of the accused on a jurisdictional question could not only preclude the necessity of assembling the court members, but would spare counsel countless hours of preparation on the merits of the case.

It is interesting to note the results of a questionnaire employed by the Defense Appellate Division of the Army Judge Advocate General's Office. This questionnaire was sent recently to 50 Judge Advocate officers known to have had experience as defense counsel. One of the questions was as follows :

Do you think the administration of justice in the military would be enhanced by pretrial proceedings to dispose of interlocutory questions that presently are heard in out-of-court proceedings and to facilitate presentation of uncontested evidence?

- a. Should the Code be amended to *require* such proceedings?
- b. As an alternative, would it be better to *merely authorize* pretrial proceedings?<sup>7</sup>

The answers to these questions, as summarized by the Chief of the Defense Appellate Division :

Almost all (92%—46) agreed that such pretrial proceedings would be a good idea.

70% (35) felt that it would be better to *merely authorize* pretrial proceedings and 26% (13) felt that the *Code* should be amended to *require* such proceedings.<sup>8</sup>

In addition, in answer to the question, "If you could make only one change in the UCMJ or its application, what would it be?", three of the officers answering considered authorization of pretrial of sufficient importance to list it as their choice.<sup>9</sup>

The preceding comments point out many of the advantages which could result from a pretrial hearing procedure. Experienced counsel can undoubtedly conceive of more. It should be noted at this point that paragraph 67*a* of the Manual permits reference to the convening authority prior to convening a court of defenses and objections capable of determination without trial. However, such determinations are not final and can be renewed at trial, so such procedure hardly eliminates the need discussed in this chapter for a pretrial hearing procedure.

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<sup>7</sup> "Report on Questionnaire Answered by a Group of JAGC Officers Selected for Their Experience as Defense Counsel," Chief, Defense Appellate Division, Office of The Judge Advocate General, U.S. Army, pp. 8-9 (undated).

<sup>8</sup> *Id.* at p. 9.

<sup>9</sup> *Id.* at pp. 12, 15.

In addition, Department of the Army Pamphlet 27-9, *The Law Officer*, suggests:

If he [the law officer] wishes to confer with counsel in advance of trial with respect to a question of law that is likely to arise at the trial, the law officer should afford counsel for both sides an opportunity to be present.<sup>10</sup>

Although this suggested device could be useful to the law officer as a means of preparation, it does not afford the opportunity for *disposing* of interlocutory matters such as is contemplated through the use of pretrial hearings.

### 111. LEGALITY AND METHOD OF ACCOMPLISHMENT

In the *Mullican* case discussed *supra*, the law officer at the pretrial hearing determined that certain documents offered by the prosecution were admissible in evidence. At the time of trial these documents (or, more technically, their contents, since they were read by the trial counsel) were admitted into evidence without further discussion as to their admissibility. It was noted in the record of trial that the documents had been determined to be admissible during a pretrial hearing. Although the mechanics employed by counsel might be described as somewhat inartful<sup>11</sup> it is nevertheless apparent that the procedure constituted a bona fide, and a proper use of a pretrial hearing.

The procedure employed in *Mullican* seems to be without precedent in the military. Naturally, prior to the Code, because the law officer as an individual separate and distinct from the members of the court did not exist, *Mullican's* forum in effect did not exist. Winthrop suggested that certain objections could be raised by the defense prior to arraignment and before the court was sworn.<sup>12</sup> These objections were of a type that attacked the legal existence of the court or its authority to proceed further with the case (as concerned the particular accused, but not the particular offenses). The court then would decide the issues raised, even though it was not yet sworn and the accused not yet arraigned. Winthrop described these objections as being of a "radical

<sup>10</sup> U.S. Dep't of Army, Pamphlet No. 27-9, Military Justice Handbook—The Law Officer 10 (1958).

<sup>11</sup> At trial, the documents were never formally offered or received in evidence. Trial counsel was sworn and simply read to the court the documents "which have previously been admitted into evidence." The Court noted this defect but held that "under the circumstances their contents were properly before the court. . . . Moreover, what took place at the pretrial conference is part of the record." *United States v. Mullican*, *supra* note 2, at 211, 21 CMR at 337.

<sup>12</sup> Winthrop, *Military Law and Precedents* 163 (2d ed. 1920 reprint).

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character”;<sup>13</sup> by hindsight they appear most closely to resemble the type of objections which, pursuant to Rule 12b(2) of the Federal Rules of Criminal Procedure<sup>14</sup> *must* be raised prior to trial and, pursuant to paragraph 67b of the Manual, must be raised before plea is entered.<sup>15</sup> However, no case law supporting or amplifying Winthrop’s views on this point has been found. The drafters of the Manual did indicate that paragraph 67b was intended to adopt Rule 12b to the military.<sup>16</sup>

As noted above, Rule 12b provides for disposition of certain interlocutory matters prior to trial. Generally speaking, “any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.” The rule goes on to list certain defenses and objections which must be raised prior to trial on the risk of waiver (generally attacks on the composition and actions of the grand jury) and provides for trial by jury only where a fact issue is present which requires a jury trial under the Constitution or an act of Congress. In addition, Rule 41e permits a pretrial determination of motions to suppress evidence or return property obtained through an improper search and/or seizure.<sup>17</sup>

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<sup>13</sup> *Ibid.*

<sup>14</sup> Rule 12b, Fed. R. Civ. P., provides as follows: “Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

<sup>15</sup> Paragraph 67b of the Manual requires that defenses and objectives “based on defects in the preferring of charges, reference for trial, form of the charges and specifications, investigation, or other pretrial proceedings other than objections going to the jurisdiction of the court or the failure of the charges to allege an offense” must be raised before plea is entered or risk waiver.

<sup>16</sup> Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, p. 83.

<sup>17</sup> No such motion is available in military law. Par. 152, MCM, 1951; ACM 5796, *Toreson*, 8 CMR 676,690 (1953).

Pretrial practice under the Federal Rules of Civil Procedure is much broader in scope than under the Criminal Rules. Rule 16 of the Civil Rules does not depend on the defense to begin proceedings, but permits the court in its discretion to direct the attorneys to appear before it for conferences in order to simplify issues, dispose of amendments and supplemental pleadings, obtain admissions of fact and settle admissibility of documents, and generally for any other action which may expedite the trial.<sup>18</sup>

Prior to *Mullican* no attempt had been made to utilize the pretrial procedures set forth above in the military. There was nothing in the Code or Manual which specifically authorized it, and apparently nothing in military legal literature or case law to suggest its use. This dearth of authority proved to be too much for the Navy board of review which, in an unpublished opinion,<sup>19</sup> reversed Mullican's conviction. The board distinguished criminal from civil procedure, and found that Rule 12 had already been incorporated into military criminal law in Appendix 8 of the Manual where the trial counsel advised the accused concerning motions to be made prior to pleas. The board felt that the law officer was not justified in using the procedure he employed to supplement that found in Appendix 8, and rested their reversal on the doctrine of general prejudice and lack of military due process.<sup>20</sup> The Court of Military Appeals held that "we do not find it necessary to put our stamp of approval or disapproval on the pretrial proceedings in issue,"<sup>21</sup> and reversed the board. It is difficult to single out the specific reason for this reversal. The Court held that, although the procedure employed was "unorthodox" and "not specifically permitted by either the Code or the Manual," it did not, under the attendant circumstances, result in a deprivation of military due process. In citing the circumstances which negated such deprivation, the Court impliedly suggested that such a procedure under altered circumstances might be lacking in military due process. The Court noted that what took place at the pretrial had been made part of the record, and accordingly the accused had not been deprived of his right to appellate review of the law officer's determinations. And finally,

<sup>18</sup> Fed. R. Civ. P. 16.

<sup>19</sup> NCM 5505995, *Mullican* (16 February 1956).

<sup>20</sup> "While we cannot say that the substantial rights of the accused in this case have been materially prejudiced we do feel that there is a possibility of specific prejudice in some other case. We find no authority for this procedure and fearful of what might follow, we conclude there is general prejudice on the ground of non-compliance with established procedure and hence lack of military due process. . . . We cannot put our stamp of approval on the procedure followed in the instant case." *Id.* at pp. 5-6.

<sup>21</sup> United States v. Mullican, *supra* note 2, at 211, 21 CMR at 337.

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the Court noted that defense counsel not only consented to the procedure employed, but expressly indorsed it.<sup>22</sup> "This," held the Court, "goes even further than the ordinary doctrine of waiver. An accused cannot consciously elect a particular mode of procedure and thereafter maintain on appeal that this procedure prejudiced his rights, unless the matter is jurisdictional. . . . But the procedure here was not jurisdictional."<sup>23</sup>

The assertion by the Court that the procedure employed in *Mullican* was "not jurisdictional" is far more significant than a cursory reading of the decision would initially indicate. It is at least a starting point on the way to setting up an orderly and worthwhile pretrial procedure. Read in connection with the rest of the case, the statement that the procedure is not jurisdictional seems to indicate that a properly conducted pretrial hearing, with the expressed consent and endorsement of the accused, is legally permissible.<sup>24</sup> How then should such a procedure be established? Is any further guidance and authority beyond *Mullican* necessary or desirable?

It is arguable that the services should go ahead and use a pretrial hearing whenever desirable and consented to by the accused, based solely on the authority of *Mullican*. It is known that such has been done in at least two cases.<sup>25</sup> However, these pretrial hearings did not approach the scope desirable in a true pretrial procedure. Both cases involved guilty pleas, and the primary purpose of the pretrial was merely to assure the law officer of the providence and understanding of the pleas. No issue was raised on appeal as to the propriety of the procedure, which was not commented upon in either board of review decision. It is not intended to suggest that such matters are not the proper subject for a pretrial hearing, quite the contrary;<sup>26</sup> however, it is believed that the two decisions are of doubtful authority because of the pleas.

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<sup>22</sup> Defense counsel's words, in answer to the law officer's inquiry as to whether he had any objection to the pretrial: "In answering for the accused, the defense counsel states that he has no objection whatever to conducting this pretrial hearing and expressly approves it because of the possible prejudice to the accused if offer of such evidence is made before the members of the court." *Id.* at 210, 21 CMR at 336.

<sup>23</sup> *Id.* at 211, 21 CMR at 337.

<sup>24</sup> This is not intended to suggest that only a jurisdictional defect will result in reversal of a conviction, but the jurisdictional language does indicate that pretrial is not doomed from the start.

<sup>25</sup> CM 402572, *Legree* (8 September 1959); CM 402815, *DeWall* (28 September 1959).

<sup>26</sup> See note 6 *supra*. A pretrial disposition of this matter would remove all basis for speculation.

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Of course if the one-time swearing of the court in the presence of many accused were the answer, then sufficient authority apparently exists without any help from *Mullican* and further action is unnecessary.<sup>27</sup> It is certainly true that some of the advantages of a pretrial procedure could be attained through such one-time swearing of the court in the presence of many accused. Under this procedure, the court could either recess following the convening or trial could proceed in a relatively simple case, and out-of-court hearings held for the cases involving complex interlocutory questions. This system would be particularly appropriate in jurisdictions having a heavy case load. However, on closer examination, the beneficial use of such a procedure is seen to be seriously limited. In many jurisdictions the case load is too small to make such a procedure practicable. Where cases come up one at a time, it would necessitate calling the court together solely for the convening procedure, thus largely eliminating the benefits sought through pretrial. The drafters of the Manual themselves discouraged the use of the procedure, primarily because of the possibility of changes in personnel (members and counsel) between convening and trial.<sup>28</sup> An examination of Appendix 8a of the Manual pertaining to court-martial procedure through the administration of oaths suggests many instances where the system would be clumsy or improper (e.g., where one accused wanted enlisted men on the court and another did not; or where one accused had individual counsel). The one-time swearing procedure was further discouraged by a memorandum of the Special Assistant on Military Justice to the Assistant Judge Advocate General of the Army, as presenting too great a risk of a defective record of trial.<sup>29</sup>

It is the writer's contention that *Mullican*, standing alone, does not provide sufficient ammunition for an organized and large scale invasion into the area of pretrial. Perhaps the answer would be different were it not for the *caveat*, coupled with a bit of advice, with which the Court concluded the *Mullican* decision:

In view of our holding we do not find it necessary to put our stamp of approval or disapproval on the pretrial proceedings in issue. Suffice it to note that such procedure has not been provided for in criminal practice in general nor by the Code or Manual in particular. If, on the other hand, the services decide that some such proceedings—as distinct from those now provided—are desirable, they should be set up in an orderly

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<sup>27</sup> Such a procedure is authorized by paragraphs 53b and 112c, and Appendix Pa, of the Manual.

<sup>28</sup> Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, p. 61.

<sup>29</sup> Paragraph 2, Memorandum for Maj. Gen. Franklin P. Shaw, The Assistant Judge Advocate General, Subject: "Matters for Discussion with Staff Judge Advocates," 12 October 1951.

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fashion under the provisions of Article 36(a), Uniform Code of Military Justice, 50 USC § 611, or by way of amendment to the Code.<sup>80</sup>

From the tenor of the above excerpt, and the use by the Court of such language as “such procedure is generally not authorized for or used in criminal trials,” “unorthodox procedure,” and “such procedure has not been provided for,” it is a fair assumption that a broad use of pretrial in contested cases, without a procedure therefor being “set up in an orderly fashion,” will be subjected to close scrutiny by the Court and will be employed only at the constant risk of reversal. Indeed, appellate defense counsel in the *Mullican* case used this precise language in arguing to the board of review that “disposition not inconsistent with” the Court’s *Mullican* opinion could still include reversal of the conviction because of the pretrial hearing.<sup>81</sup> In any event, to ignore the rather clear-cut warning and advice of the Court would be simply asking for trouble.

There appear, then, to be two alternative methods available for setting up, “in an orderly fashion,” a procedure for pretrial hearings in the military justice system: (1) an amendment to the Code by legislation, or (2) amendment to the Manual through an Executive Order of the President. Although a consideration of the mechanics of promulgating a pretrial procedure (e.g., coordination among the services, liaison with Department of Defense and Congress, etc.) is generally outside the scope of this article, it cannot be overlooked in this particular area.

Certainly an amendment to the Code specifically authorizing a pretrial procedure would be the most legally-unassailable method of effectuation. However, an amendment to the Code would undoubtedly require further corresponding amendments to the Manual. In addition, past experience indicates that it is exceedingly difficult to interest Congress in amending the Code. Therefore, it appears that simple amendment to the Manual would be the most expeditious means of setting up a pretrial procedure “in an orderly fashion,” and the means most likely of fulfillment.

In order to properly consider an amendment to the Manual in the procedural area, it is necessary to examine Article 36(a) of the Code, to which the Court referred in its *Mullican* advice, in some detail. This Article provides :

The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may

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<sup>80</sup> United States v. Mullican, *supra* note 2, at 211, 21 CMR at 337.

<sup>81</sup> The argument was not successful, but it is interesting to note that the board, without being so requested, reduced the findings to AWOL. NCM 5505995, *Mullican* (10 September 1956).

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be prescribed by the President by regulations which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which shall not be contrary to or inconsistent with this Code.

It is in part from this Article that the President derived his authority to promulgate Executive Order 10214 prescribing the Manual, and thus also the authority to amend the Manual as concerns matters of evidence and procedure.

Article 36 (a) has been a little publicized but amazingly fertile source of confusion to boards of review and the Court. Perhaps some of this confusion arises unconsciously from the use of the words “may” and “shall”: “. . . procedures, including modes of proof . . . may be prescribed by the President by regulations which shall . . . apply the principles of law . . . recognized . . . in the United States district courts. . .” (Emphasis added.) A reading of cases discloses a varying interpretation of the Article, particularly as regards emphasis on the application of the federal district court rules. An Air Force board of review stated: “It may be said generally, too, that the procedural rules applicable in the Federal courts are specifically recognized by the Congress as being, in substantial part, impracticable and unworkable in Courts-Martial trials, the President being directed to prescribe such rules, including modes of proof, *only* ‘so far as he deems [them] practicable’ ”<sup>32</sup> (Emphasis added.) The tenor of the decision seems to seriously limit the applicability of the federal rules to courts-martial, and to emphasize the “only” idea cited. Yet 16 months later another Air Force board of review held: “Article 36, UCMJ, provides that the principles of law and the rules of evidence generally recognized in the United States district courts *will* apply in cases before courts-martial unless the President shall provide *otherwise*.”<sup>33</sup> (Emphasis added.) And a few months later an Army board of review stated: “Since Congress, in enacting the Code, has specifically charged the President, in formulating the rules of procedure in the Manual, to conform, in so far as he deems practicable, with principles of law generally recognized in the Federal courts. . . .”<sup>34</sup> In addition to the confusion on the emphasis intended by Congress, the above and many other decisions in this area leave unanswered the very pertinent question: If the Manual and the Code are silent on a particular

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<sup>32</sup> ACM 4702, *Norman*, 5 CMR 675, 684 (1952).

<sup>33</sup> ACM S-7392, *Dutey*, 13 CMR 884, 888 (1953).

<sup>34</sup> CM 369472, *Clark*, 15 CMR 439, 442-3 (1954), *pet. denied*, 4 USCMA 731, 16 CMR 292 (1954).

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matter, are the Federal rules applicable? Note that Article 36 (a) relates the Federal rules *only* to the regulations prescribed by the President, not to court-martial procedures and rules of evidence in general. The Court suggested an answer to this question (at least as to rules of evidence, and no reasonable grounds appear to justify drawing a distinction between rules of evidence and rules of procedure) in its dictum in *United States v. Dial*,<sup>85</sup> wherein it stated: "The Uniform Code of Military Justice expressly provides that, where not otherwise prescribed, the rules of evidence generally recognized in the United States District Courts shall be applied by courts-martial. Article 36 (a), Uniform Code of Military Justice, 10 USC § 836; see also paragraph 137, Manual for Courts-Martial, United States, 1951."<sup>86</sup> This is *not* what Article 36 (a) "expressly provides"; rather it gives the President authority to prescribe regulations, *which* regulations shall conform to the Federal rules if not inconsistent with the Code and if the President deems such rules practicable. The Court does correctly quote the Manual<sup>87</sup> on this matter.<sup>88</sup>

A search for the Congressional intent behind Article 36 is a rather frustrating exercise. The Senate hearings indicate very little discussion of the Article. The House subcommittee, on the other hand, took a rather careful look at the Article and its anticipated effects. Initially their concern was with the fact that the regulations promulgated pursuant to Article 36 might not be uniform for all the services, and the subcommittee is responsible for that portion of Article 36 (b) requiring uniformity

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<sup>85</sup> 9 USCMA 700, 26 CMR 480 (1958).

<sup>86</sup> *Id.* at 703, 26 CMR at 483.

<sup>87</sup> Paragraph 137, MCM, 1951, provides in part: ". . . So far as not otherwise prescribed in this Manual, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts or, when not inconsistent with such rules, at common law will be applied by courts-martial."

<sup>88</sup> The drafters of the Manual interpreted Article 36 (a) to mean that "the rules of evidence ordinarily are to follow the rules generally recognized in the trial of criminal cases in the United States district courts, but that the President need not adopt any particular rule followed by those courts if he does not deem it practicable to do so." Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, p. 210. They went on to set forth the order of priority in searching for a particular rule of evidence to be applied, namely the Manual, the federal rules if the Manual were silent, and the common law if both of the others were silent. They do not indicate any differentiation between rules of evidence which apply to courts-martial because the Manual says so, and rules that apply because the Manual says nothing and they apply in federal district courts or at common law. Are these situations equal exercises of Presidential discretion under Article 36 (a), particularly when the Manual specifically adopts a rule applicable in federal district courts? The 1949 Manual contains language in paragraph 124 almost identical to the present paragraph 137.

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insofar as practicable.<sup>39</sup> Of even greater concern was the amount of discretion to be vested in the President; some of the subcommittee members feared that the language “so far as he deems practicable” would permit the President to disregard entirely the federal rules.<sup>40</sup> However, after it was demonstrated that certain leeway to depart from the federal rules was required,<sup>41</sup> these fears appeared to have been allayed.

Mr. Felix Larkin, then Assistant General Counsel for the Secretary of Defense and executive secretary to the committee on the Code, anticipated a problem arising from the rigid adherence to the federal rules when he stated :

I think you may face this problem if you require that the regulations and principles of law and rules of evidence be followed that are generally recognized in the United States district courts. Every time a Federal court reconstrues a rule of evidence, construes in a different way, you will have the necessity of changing them for the court martial.<sup>42</sup>

(It could well be argued that as a result of paragraph 137 of the Manual the rules *automatically* change with the Occurrence of the situation hypothesized by Mr. Larkin.) In spite of this warning, however, the subcommittee apparently viewed with favor paragraph 124 of the 1949 Manual,<sup>43</sup> which is substantially the same as that portion of paragraph 137 of the present Manual previously cited. This apparent approval of the paragraph 124 interpretation of the pre-Code equivalent to Article 36 (Article of War 38) was, however, based mainly on the ground of keeping the President *generally* within the bounds of the federal rules, and can hardly be interpreted as an intent to have the federal rules applied *in toto*. Indeed, the ultimate approval of the controversial phrase “so far as he deems practicable” indicates the contrary.<sup>44</sup>

If, as suggested parenthetically above, there is no sound reason for distinguishing between rules of evidence and procedure in the narrow area now under examination,<sup>45</sup> then it should follow

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<sup>39</sup> *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 1015 (1949).

<sup>40</sup> *Id.* at 1016-1019, 1061-1064.

<sup>41</sup> *Id.* at 1062-1063.

<sup>42</sup> *Id.* at 1017.

<sup>43</sup> *Id.* at 1018.

<sup>44</sup> It should be noted that the subcommittee, in considering the “principles of law and rules of evidence generally recognized in . . . United States district courts” did not refer only to the Federal Rules of Criminal Procedure, but to the “federal common law” as well, a much broader concept which would include federal court decisions.

<sup>45</sup> Note that the Court has used language similar to that of *Dial* as to the applicability of the Federal Rules to courts-martial in the procedural area. *United States v. Knudson*, 4 USCMA 587, 16 CMR 161 (1954).

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from the *Dial* language previously quoted that, where not otherwise prescribed, and not inconsistent with the Code or military practice in general, rules of procedure generally recognized in the United States district courts should be applicable to courts-martial. But if this is a fair conclusion to be drawn from *Dial*, then *Mullican* indicates that this principle will be strictly applied, *i.e.*, that federal rules of procedure will be applied to, *but not broadened or expanded for*, trials by court-martial. Thus, although the federal rules permit pretrial hearings, such will not satisfy the Court where the pretrial employed in a court-martial exceeds in scope or form that used in a federal court. Such is consistent with the Court's pointing out in *Mullican* that the broad pretrial authorized by the Federal Rules of Civil Procedure is generally not authorized for pretrial in criminal trials, which **do** not encompass hearing evidence or determining its admissibility. It is consistent also with the Court's language that the pretrial used in *Mullican* "has not been provided for *in criminal practice in general* nor by the Code or Manual in particular."<sup>46</sup> (Emphasis added.) We discover, then, that adoption of a federal rule for court-martial practice requires some specific authorization where it is desirable, as it is in our situation, to broaden **as** well as adopt the rule.

One of the commissioners of the Court of Military Appeals<sup>47</sup> has found it surprising that Congress did not grant to the Court the supervisory and rule-making power which the Supreme Court possesses.<sup>48</sup> He states: "Perhaps in time, in conformity with the civilian precedent, Congress may give the authority to promulgate rules of practice for courts-martial to the CMA. For the present, the President has prescribed the rules in the MCM, US, 1951."<sup>49</sup> The cynic might be inclined to think that the Commissioner is guided solely by statutory law and ignoring some case law. In *United States v. Bryson*,<sup>50</sup> the Court was asked to apply the law of Pennsylvania regarding authentication of the signature of a state official. In refusing to do so, the Court looked to Rule 26 which does not sanction recourse to state statutes for rules of evidence, and stated: "We think the above rule is sound and should apply in trials under the Uniform Code of Military Justice. Article 36, Uniform Code of Military Justice. . . . On that basis,

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<sup>46</sup> *United States v. Mullican*, *supra* note 2, at 211, 21 CMR at 337.

<sup>47</sup> Feld, *Courts-Martial Practice: Some Phases of Pretrial Procedure*, 23 *Brooklyn L. Rev.* 25 (1956).

<sup>48</sup> See 18 U.S.C. §§ 3771-2 (1958).

<sup>49</sup> Feld, *supra* note 47, at 26.

<sup>50</sup> 3 USCMA 329, 12 CMR 85 (1953).

we hold . . . [that it does **apply**].”<sup>51</sup> Although it may be argued that the Court was simply applying Rule 26 in accordance with paragraph 137 of the Manual, the language certainly indicates a conscious *choice* to apply it, and is not such a choice rule-making? In *United States v. White*,<sup>52</sup> the Court had occasion to examine paragraph 143a (2) of the Manual concerning authentication of fingerprints, which differed from the Federal rule.<sup>53</sup> It stated: “The provisions of paragraph 143a of the Manual, do not conflict with the Code. Accordingly, we can not declare these provisions inoperative or illegal in an absence of a clear showing that the discretionary powers vested in the President by Article 36 were exceeded. There is no such abuse of discretion here.”<sup>54</sup> The only strict limitation on the President found in Article 36(a) is that he cannot prescribe regulations contrary to or inconsistent with the Code; the rest is left to his discretion. The above citation immediately disposes of this limitation. Where then does the Court derive the authority to search for abuse of discretion in this matter other than pursuant to some sort of rule-making power? Finally, in *United States v. Kraskouskas*,<sup>55</sup> a majority of the Court held that non-lawyers could not actively participate in general courts-martial. Judge Latimer in his dissent strongly suggests that the majority has usurped the rule-making power of the President. After citing Article 36 as containing this power, he concludes: “. . . [w]hile it might be preferable for this Court to have the rule-making power for all military courts, Congress has decreed **otherwise**.”<sup>56</sup>

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<sup>51</sup> *Id.* at 335, 12 CMR at 91. The Manual (par. 143) contains no solution to this precise problem, although paragraph 147a does permit judicial notice of the signatures of state officials *on official records*. The document in question, a Pennsylvania bonus check, was held not to be an official record.

<sup>52</sup> 3 USCMA 666, 14 CMR 84 (1954).

<sup>53</sup> It is interesting to note that the drafters of the Manual made no reference to this difference. Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, pp. 223–4.

<sup>54</sup> *United States v. White*, *supra* note 62, at 670, 14 CMR at 88.

<sup>55</sup> 9 USCMA 607, 26 CMR 387 (1968).

<sup>56</sup> *Id.* at 612, 26 CMR at 392. While the majority purported to base its decision on an interpretation of Article 38 of the Code and the Congressional intent behind it, their *own* language belies this, and smacks of rule-making and the exercise of supervisory powers. They found merit in appellate defense counsel’s argument on basic policy reasons, they believed “that the day in which the nonlawyer may practice law before a general court-martial **must draw to an end**” (*Id.* at 609, 26 CMR at 389, emphasis added), and they concluded on a definitely supervisory tone: “Accordingly, *we direct* that the practice of permitting nonlawyers to represent persons on trial before general courts-martial **be completely discontinued** (*Id.* at 610, 26 CMR at 390, emphasis added). Even in his dissent Judge Latimer seems to find, seemingly inconsistently, some supervisory or rule-making power in the Court when he stated: “Therefore, I hope to show that the Court’s opinion is no more than

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Many more cases could be added to the few examples discussed above. On the basis of these cases, it is submitted that, though never admitted, some degree of rule-making power has been exercised by the Court. Had it been so inclined, it might easily have exercised it in the *Mullican* situation, which certainly did not present facts shocking to the Court, and employed what was obviously a desirable and expeditious procedure. The fact that the Court refused to sanction the procedure under these circumstances is an additional reason for taking affirmative action by way of amendment to the Manual.

In one of the first cases decided under the Code,<sup>57</sup> the Court held that where the Manual did not conflict with the Code, "the Act of Congress (the Code) and the act of the Executive (the Manual) are on the same level and that the ordinary rules of statutory construction apply. . . . Silence on the part of Congress does not necessarily require like silence on the part of the Executive when, as here, the President has been expressly authorized to prescribe rules of procedure for courts-martial (UCMJ, Article 36)."<sup>58</sup> The *Lucas* case has been cited many times by boards of review and the Court itself as standing for the general proposition that, where not contrary to or in conflict with the Code, the Manual has the force of law, and that the Manual and the Code are on the same level. This proposition is now sufficiently well entrenched in military law as to require no further discussion. However, in a case decided only two weeks after *Lucas*,<sup>59</sup> the Court amplified the rationale of *Lucas* in a clear and concise manner that warrants citation :

. . . Congress saw fit to delegate to the President the right to set up the procedure in military courts and tribunals. It must have been realized that implementing acts would be necessary to fill in the interstices and that it would be undesirable for Congress to deal with the many details. For it to have done so would have rendered the system *rigid and inflexible*. If Congress was not to complete the structure, then it was incumbent that the authority to do so be delegated to and centralized in the President or some Federal agency. This was accomplished by Congress designating the former and authorizing him to finish the task within the framework of the Act. . . . [W]e conclude that *Congress intended that the President should be fettered only to the extent* that his orders must be consistent with and not contrary to the Act.<sup>60</sup> (Emphasis added.)

It is clear from the above that the procedural system of military justice was intended to be flexible, and that the proper method

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a piece of judicial legislation *which should have been given prospective application* and not used as a basis for a reversal of this conviction." *Id.* at 611, 26 CMR at 391. (Emphasis added.)

<sup>57</sup> *United States v. Lucas*, 1 USCMA 19, 1 CMR 19 (1951).

<sup>58</sup> *Id.* at 22, 1 CMR at 22.

<sup>59</sup> *United States v. Merritt*, 1 USCMA 56, 1 CMR 56 (1951).

<sup>60</sup> *Id.* at 61, 1 CMR at 61.

for exercising this flexibility is through amendment to the Manual, the only restriction thereto being that the Manual must always be consistent with and not contrary to the Code. A clearer argument for the propriety and legality of a Manual amendment authorizing pretrial hearings can hardly be conceived.

As additional justification for the contemplated amendment to the Manual, consideration might be given to a long line of Court decisions beginning generally with *United States v. Berry*,<sup>61</sup> holding that Congress intended the law officer to occupy a position as nearly equivalent as possible to that of a civilian judge. The Court has done all in its power to effectuate this Congressional intent. A clear indication of this position by the Court is found in *United States v. Keith*,<sup>62</sup> wherein the Court stated:

No one who has read the legislative history of the Code can doubt the strength of the Congressional resolve to break away completely from the old procedure and insure, as far as legislatively possible, that the law officer perform in the image of a civilian judge. This policy is so clear and so fundamental to the proper functioning of the procedural reforms brought about by the Uniform Code of Military Justice that it must be strictly enforced.<sup>63</sup>

Certainly the institution of an orderly pretrial hearing procedure would be another step in the direction of having the law officer perform in the image of a civilian judge, and thus likely to be viewed with favor by the Court.

On the basis of what has been discussed in this section, it is concluded that a pretrial procedure set up in an orderly fashion for courts-martial would be legally unassailable. It is further concluded that amendment to the Manual would be the most practicable, and at the same time legally appropriate, manner for effectuating such a procedure. Accordingly, a proposed draft amendment is included as an Appendix to this article.

#### IV. THE SCOPE OF PRETRIAL — WHEN, WHAT, AND HOW

In examining into the scope of the proposed pretrial procedure, it is appropriate to look for precedents and guides from civilian criminal cases and procedures. However, such an examination proves to be largely unproductive. It is true that Rule 12b makes

<sup>61</sup> 1 USCMA 235, 2 CMR 141 (1952).

<sup>62</sup> 1 USCMA 493, 4 CMR 85 (1952).

<sup>63</sup> *Id.* at 496, 4 CMR at 88. For an interesting discussion which questions this conclusion concerning Congressional intent, see Miller, *Who Made the Law Officer A Federal Judge*, Mil. L. Rev., April, 1959, p. 39.

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provision for determination of certain motions and objections prior to trial. However, nearly all of the reported cases dealing with Rule *12b* are concerned with the merits of the judge's ruling on the motion or objection, not with the mechanics of the procedure. The rule itself delineates the scope of the procedure, and the mechanics are apparently within the discretion of the judge involved.

At the time the advisory committee was formulating the Federal Rules of Criminal Procedure, consideration was given to inclusion of a rule similar to Rule 16 of the Federal Rules of Civil Procedure. However, it was not adopted. In discussing this matter, Judge Irving R. Kaufman of the United States District Court for the Southern District of New York has stated:

But notwithstanding the absence of a specific criminal pre-trial rule the court by virtue of its inherent authority alone can avail itself of pre-trial procedures in a criminal case if and when necessary. . . . Indeed, we find in the advisory committee's notes the observation that 'the fundamental powers of a court are considered not to be enlarged by pre-trial rules but merely to be specified for use.'<sup>64</sup>

Judge Kaufman goes on to point out that, relying on this inherent authority, he has conducted pretrial hearings in many criminal cases, primarily with a view towards expediting the trial itself. As for guidance to the military from such use, however, his conclusion is pertinent but disappointing:

In view of the limitations on our knowledge and experience, generalizations, as to the form and manner in which criminal pre-trials are to be conducted, have been difficult to formulate. These difficulties may be attributed in part to the fact that up to this point excursions into criminal pre-trial have been sporadic and individualized and those employing the procedure have not been able to build on the experience of **others**. However, in view of the promise suggested by these limited excursions we should now extend our efforts toward the wider application and study of a systematic criminal pre-trial procedure.<sup>65</sup>

Judge Kaufman not only suggests to us in the military that we can gain little from civilian precedent in the field of pretrial, but another factor which must be borne in mind in our consideration of this subject. If a pretrial procedure for courts-martial is established, it will not burst full blown from an Executive Order, but will evolve and grow from use, experimentation and appellate decision, and only time will tell its true dimensions. What follows must be tempered by this consideration.

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<sup>64</sup> Kaufman, *Pre-Trial in Criminal Cases*, 42 J. Am. Jud. Soc'y 150-151 (1969). In spite of the Court's attempts to create the law officer in the image of a civilian judge, it is highly unlikely that they would clothe him with such "inherent authority" or "fundamental powers."

<sup>65</sup> *Id.* at 173.

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One of the initial questions in this area involves timing — when should the pretrial procedure be used and how should it be initiated? The logical time would appear to be after charges have been referred for trial to a general court-martial but prior to assembling the full court. Until such time as the charges have been referred for trial, there is, of course, no specific law officer for the case. Indeed, technically speaking there is no case. Although it is conceivable that a law officer might be assigned solely for purposes of the pretrial, if he were not going to be sitting on the case at trial, little would be accomplished, for in the spirit of paragraph 67a of the **Manual**,<sup>66</sup> the matter could be redetermined at trial. And it is common knowledge that, given the same circumstances, two law officers could come to opposite conclusions. Additionally, until charges are referred, there are no counsel assigned for the case. Finally, there appears no sound reason why waiting with the pretrial until after referral would defeat or impair any of the advantages to be obtained from the use of the procedure. In short, after referral is soon enough, while after assembling the full court is meaningless and not true pretrial.

The question of how such a procedure will be initiated is not quite so easily answered. The *Mullican* record of trial does not indicate who “got the ball rolling,” whether the pretrial was requested by counsel, directed by the law officer, or otherwise. All that is shown is that all parties involved had no objection to the procedure and warmly indorsed it. It is believed that considerable latitude is desirable in this area. Pretrial should be available upon request by either counsel as well as by direction of the law officer, subject only to the discretion of the law officer.<sup>67</sup> It

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<sup>66</sup> This section provides in part that action on motions made to the convening authority before trial “shall be without prejudice to the renewal of the assertion by motion to the court,”

<sup>67</sup> It is recognized that in order to intelligently exercise this discretion the law officer must have some knowledge of the case. Pretrial itself will also of necessity reveal some facts about the case. It is doubted, however, that such knowledge will be considered disqualifying within the letter or spirit of paragraph 62f of the Manual. It is noted that ACM 4221, *Patrick*, 3 CMR 555 (1952), approved, and in fact indorsed, a procedure whereby the law officer, prior to trial, was furnished a memorandum of law, including citations of authority and assumed facts, concerning points of law likely to arise during the trial. But in *United States v. Fry*, 7 USCMA 682, 23 CMR 46 (1957), a majority of the Court held that while such practice was not specifically prohibited by law, “it was not good practice for the law officer to review the investigating officer’s report and the testimony of the witnesses,” as being too close to the spirit of the Code and Manual on disqualification. 7 USCMA at 686, 23 CMR at 50. Pretrial, on the other hand, would reveal primarily matters pertaining to questions of law and would not involve a complete and detailed disclosure of facts of a case. See also CM 359916, *Linerode*, 11 CMR 262 (1953), wherein the *discretionary* power of the law officer to direct out-of-court hearings was affirmed.

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is anticipated that the law officer would reject a request for pre-trial only when it was manifestly impracticable, unnecessary, or, with justification, opposed by the party not requesting it.

One thorny problem remains: Should pretrial be permitted when the accused is opposed to or does not consent to such procedure? Naturally the exercise of discretion by the law officer will eliminate this problem where the accused has sound grounds for opposing the pretrial, but suppose he “just doesn’t like the idea” or refuses to state any grounds for not consenting thereto. It is believed that in such a situation the pretrial could proceed without his consent. After all, if pretrial is to become a recognized procedure, its status should be, as nearly as possible, equated to a trial before a properly convened court-martial, which does not require the consent of the accused. However, as indicated earlier, pretrial as a recognized procedure must be an evolutionary product, and the matter discussed in this paragraph should prudently be avoided during the early days of evolution. In other words, the law officer should assure himself of the accused’s consent to pretrial until such time as the procedure becomes a well-recognized and accepted part of the court-martial system; at that latter time in an appropriate case pretrial might be held without the accused’s consent or even in the face of his active opposition.<sup>68</sup> For the sake of emphasis however, it is reiterated that this procedure is recommended only where no sound basis is advanced for the accused’s opposition; either party to the trial may have good reasons for not desiring pretrial, which reasons should be respected by the law officer.

The mechanics of pretrial procedure are covered substantially by the proposed Executive Order in the Appendix. It is worthy of mention that the proposed pretrial guide provides for administering oaths to counsel and the law officer. This is included more out of caution than a sense of necessity. The Code and the Man-

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<sup>68</sup> For an interesting example of evolution at work, trace the Court’s treatment of the law officer’s improper participation in closed sessions of the court. In *United States v. Keith*, 1 USCMA 493, 4 CMR 85 (1952), the Court held that it was necessary to enforce the change (from the law member idea) by applying general prejudice, conceding that “once the tradition of non-participation is well established in the service, it may be possible to assess the occasional lapses in terms of specific prejudice.” 1 USCMA at 496, 4 CMR at 88. The Court held strictly to this view for some time, relaxed it slightly (without so admitting) in *United States v. Miskinis*, 2 USCMA 273, 8 CMR 73 (1953), and finally decided in *United States v. Allbee*, 5 USCMA 488, 18 CMR 72 (1955), that the prophesied time had arrived: “We are convinced that this is the case today—for we do not now perceive recalcitrance, even reluctance, in complying with the Uniform Code’s clear mandate that the law officer shall sit apart.” 5 USCMA at 491, 18 CMR at 75.

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ual<sup>69</sup> require such oaths only at trial, In *United States v. Parrish*,<sup>70</sup> it was contended on appeal that the accused was prejudiced by virtue of the fact that written interrogatories forming the basis of a deposition admitted into evidence were prepared by unsworn counsel. In rejecting this contention, the Court found “no such requirement in military law,”<sup>71</sup> and that although counsel appearing during the actual trial are sworn, “no provision in the Code or the Manual makes it incumbent upon counsel appearing in pretrial proceedings to take an oath.”<sup>72</sup> After citing Article 42, the Court added :

It is crystal clear that this section [Article 42] is limited to the actual trial stage of general and special court-martial cases, It is not unusual for counsel to appear in other proceedings without being sworn, for they participate in pretrial hearings [Article 32 investigations?] and arguments before the boards of review and this Court, without being required to take an oath in each case. . . . Had Congress intended the requirement of being sworn to be applicable in other instances, it would have been a relatively easy matter to have so provided.<sup>73</sup>

The *Parrish* case could certainly be cited as authority for not requiring oaths at pretrial; however, the oaths have been included out of caution and in an effort to give the pretrial a status as nearly as possible approximately that of a trial. Indeed, if pretrial does acquire this status, Article 42 would probably require that the participants be sworn. It appears to be relatively unimportant as to who administers the oaths;<sup>74</sup> obviously the president of the court cannot do so, as is indicated in the procedural guide in Appendix 8a of the Manual. Nor have any cases been found to suggest that Article 42 requires *simultaneous* swearing of all the trial participants. And finally, it is suggested that the law officer and counsel who participated in the pretrial be again sworn as per Appendix 8a during the trial itself. To fail to do so might be held violative of Article 42 and paragraph 112b, particularly if the pretrial is not equated to the trial, status-wise.

An important consideration is the scope and limitations of a pretrial hearing, Unfortunately *Mullican* is precedentially weak here, since the pretrial there concerned itself only with the ad-

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<sup>69</sup> UCMJ, art. 42; par. 112b, MCM, 1951.

<sup>70</sup> 7 USCMA 337, 22 CMR 127 (1956).

<sup>71</sup> Id. at 343, 22 CMR at 133.

<sup>72</sup> Ibid.

<sup>73</sup> Id. at 344, 22 CMR at 134.

<sup>74</sup> In ACM 4019, *Emery*, 1 CMR 643 (1951), the procedure whereby a “de facto” president of the court-martial administered the oaths was approved. In that case the second senior member of the court had erroneously assumed the position of president. The board pointed out that in the absence of *any* oaths the proceedings would have been null and void. Cf. *United States v. Pulliam*, 3 USCMA 95, 11 CMR 95 (1953).

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missibility of certain documentary evidence, whereas the primary use of pretrial would probably come to be disposition of **defense** motions. In the usual case, determination of admissibility of **evidence** (even when contested) is not so time-consuming as to warrant pretrial merely to alleviate the situation posed in the introductory chapter. However, admissibility of evidence should nevertheless be included within the permissible scope of pretrial, primarily **as** an expedient to counsel in preparation for trial. **It** **is** not too difficult to imagine **a** situation where knowledge of the admissibility of certain evidence could save counsel hours in the preparation of his case and save the expense of bringing unnecessary witnesses to the place of trial. In addition, some knotty and time-consuming problems of admissibility occasionally arise (*e.g.*, use of depositions or evidence obtained as a result of a questionable search and seizure). **As** noted earlier, examination into the providence of a guilty plea in a pretrial hearing would be appropriate.<sup>75</sup> Closely allied to this would be an examination into the contents of, consent to, and understanding of stipulations contemplated for use in the trial.

Pretrial would be **a** useful tactical tool to defense counsel in situations where merely raising an issue in open **court** might have some prejudicial effect on the defense case. The Court has held that upon request of defense counsel, the admissibility of a pretrial confession must be determined out of court, including the testimony of witnesses on the **matter**.<sup>76</sup> It is not unreasonable to extend this idea (not as a mandatory rule but simply as a permissible one) to the raising of the issue, and allow defense counsel to keep all of this from the ears of the court **members**.<sup>77</sup> As mentioned above, the legality of a search and seizure as it affected the admissibility of evidence obtained thereby would also be appropriate for pretrial determination. Although Article **36**(a) does not prevent the President from prescribing rules not consistent with federal rules, precedent can be found if desired for permitting determination of evidentiary problems at pretrial in Rule **41e**. Technically this Rule authorizes a pretrial determination of a motion for the return of property and suppression **of** evidence obtained through an allegedly improper search and seizure. The opinion in *Mullican* took cognizance of this rule but

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<sup>75</sup> It is hoped that sometime in the future the law officer will be permitted to enter a verdict of guilty pursuant to a provident and well-understood plea thereof, thus eliminating the need for pretrial on this point.

<sup>76</sup> United States v. Cates, *supra* note 5.

<sup>77</sup> Particularly is this **a** valuable protection in the not too uncommon case of a witness who, through inadvertence or design, **says** too much **too fast** before an objection can stop him.

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apparently did not accord it precedential value beyond its strict confines.

As indicated above, determination of motions by defense counsel will probably generate the largest volume of pretrial business. Thus, in such situations it would normally be the defense counsel who would request the pretrial hearing. But even here, there is no reason why the law officer should not direct the hearing if he learns that certain motions appropriate for pretrial will be raised.<sup>78</sup> There would appear to be no limit on the type of motion which could be disposed of at pretrial upon request of defense counsel (except as indicated below), and thus no purpose would be served by delineating the various motions available. Of course an obvious limitation is a motion on which the law officer is not permitted to rule finally, such as a motion for a finding of not guilty.

In addition to the matters mentioned above, pretrial would be appropriate for at least initial discussions and arguments on instructions. Briefing the law officer on unusual questions of law which might arise in the trial, and indicating legal authorities thereon, would also be proper at pretrial. In certain instances, requests for continuances could be disposed of at this time.

The above is probably not an all-inclusive recitation of the uses to which pretrial hearings can be put. Experienced counsel can undoubtedly conceive of more. The author firmly believes that the widest possible scope should be given to pretrial uses, in order to expedite trials by court-martial. Two qualifications, however, must be noted. Paragraph **57g** of the Manual, in speaking of out-of-court hearings, states in part that :

. . . [I]f preliminary evidence adduced at such a hearing goes to the weight of the evidence admitted by the ruling of the law officer, both sides will be given an opportunity to present for the consideration of the members of the court any competent evidence affecting the weight to be given to the evidence so admitted.

Obviously, the same rule should apply to evidence adduced at pretrial, which must not be perverted into a device for keeping from the court members matters properly for their consideration. The primary application of this rule would be in the field of confes-

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<sup>78</sup> The *Law Officer* pamphlet suggests the following: "To give the law officer an opportunity to conduct his own legal research into any complicated legal problem likely to arise at the trial, it is customary for the staff judge advocate or counsel to advise the law officer of such a problem in advance of trial." U.S. Dep't of Army, Pamphlet No. 27-9, Military Justice Handbook — The Law Officer 9-10 (1958). The propriety of this action is discussed in note 67 *supra*.

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sions, where the testimony of the witness who obtained the confession is often pertinent in determining the weight to be given it.

The second qualification on the scope of pretrial is in the area of motions and objections involving disputed questions of fact. In *United States v. Ornelas*,<sup>79</sup> the Court held that a motion to dismiss for lack of jurisdiction actually resolved itself into the factual question of whether the accused had taken the oath of induction, and that such factual question should have been submitted to the members of the court, either at the time the motion was made or at the conclusion of the trial. Many cases since *Ornelas* have grappled with this problem without particularly clarifying the matter. Suffice it to say that for our purposes, a pretrial hearing cannot finally dispose of a matter involving a factual issue properly for the determination of the court members.<sup>80</sup> Of course certain portions of such objections and motions could be handled in pretrial, but where a question for the court is involved such a procedure would probably involve duplication and repetition and thereby eliminate many of the advantages sought through pretrial.

It is appropriate at this juncture to examine briefly the roles the various individuals connected with courts-martial will play in the pretrial procedure. Beginning with the convening authority, it appears that pretrial will in a sense be a derogation of his authority. As mentioned earlier, paragraph 67a of the Manual provides that defenses or objections "capable of determination without trial of the issue raised by a plea of not guilty may be raised before trial by reference to the convening authority. . . ." If the pretrial forum were also available before trial, it is doubtful that many such matters would be referred to the convening authority. However, on the basis of experience, this derogation is more apparent than real. It is believed that the provision permitting reference of these matters to the convening authority is used only infrequently. Particularly is this so since an adverse ruling by the convening authority is not final but can be re-opened at trial. Furthermore, most defense counsel would probably feel it futile to refer such matters to the convening authority since in the vast majority of cases the matter was considered when the case was referred for trial, and the referral itself indicates a decision adverse to the accused. It is believed that few convening authorities would resist this "derogation," since it would simply

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<sup>79</sup> 2 USCMA 96, 6 CMR 96 (1952).

<sup>80</sup> As noted by the Court in *Ornelas*, provision is made in Rule 12b for submitting certain factual matters concerning motions to the jury.

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relieve them of a responsibility and, therefore, afford them more time for other duties.

Since the granting of a pretrial hearing is a matter solely for the sound discretion of the law officer, the convening authority would play no part in that determination. It is believed that even were the procedure set up otherwise, a convening authority would have little interest in whether the request for pretrial were granted or not, and would defer to the decision of the law officer. In brief then, the convening authority's role in pretrial would be practically non-existent. However, in certain cases he will have some control over the results thereof pursuant to Article 62(a) of the Code, which will be discussed later.

The staff judge advocate will also be a silent partner in pretrial, formally speaking. Informally, however, he can play a vital role, particularly during the early period of pretrial. He will undoubtedly be called upon to explain the procedure to the convening authority, or, if not, should seek the opportunity to do so. In his role of supervision of the military justice system of the command, he can do much to encourage and improve the use of pretrial. By so acting, he can not only reduce the cost of administering military justice, but improve the quality thereof.

The primary participant in pretrial will of course be the law officer, and largely on his shoulders will rest the success or failure of the program. Pretrial will be a large step towards making the law officer like a civilian judge, and will require judicial conduct and discretion of the highest order. Initially this discretion must be exercised in determining whether a pretrial hearing is appropriate. A request for pretrial should be denied only for compelling reasons. The hearing must be conducted in such a manner as to avoid the appellate labels of "summary," "unorthodox," "unjudicial" and the like. The law officer should rule with finality wherever possible, but should not fear reserving a ruling where the circumstances so require. He should become as much involved in the case as is possible without crossing the fine line which would render him disqualified for further participation in the trial in chief. He must bear in mind that the primary purpose of pretrial is to expedite the trial, and should do all possible to accomplish this end, while at the same time judiciously protecting the fundamental rights of the accused and the people.

Counsel of course will also play an important part in pretrial. Their initial responsibility will be in recognizing situations which are appropriate for pretrial. They must protect the rights and interests of their clients in pretrial no less vigorously than in the

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trial itself. Adequate preparation cannot be overemphasized. Counsel must not fall into the snare of feeling that pretrial is unimportant and concentrate solely on the trial. Military counsel must realize what his civilian brother readily recognizes—that many cases are won or lost on “motion day.”

### V. THE STATUS OF PRETRIAL

The Code and Manual speak often of “trials by court-martial,” actions taking place “before a court-martial,” cases tried by “courts-martial” and the like. Will a pretrial hearing actually be considered a “court-martial?”<sup>81</sup> Obviously an all-inclusive answer to this question is impossible; however, it is appropriate to consider generally the status of pretrial.

A common apprehension expressed on pretrial is that, until the court is convened, it has no power to act. If such would be true, the limitation would probably apply to the law officer individually as well as the court as a whole. This problem was recognized by government appellate counsel in *Mullican* when the case was initially presented to the board of review. After citing the Manual provisions permitting the law officer to examine evidence before ruling on its admissibility and to conduct out-of-court hearings on such admissibility, *inter alia*, the government’s brief added :

The only conceivably missing element then is the technical convening of the court prior to commencement of this hearing. However, it is submitted that absolutely nothing would have been added by the accomplishment of the fact of convening of the court, since by definition the court is excluded from any participation in an ‘out of court hearing.’ The action taken in the convening procedure amounts to merely the disclosure of identity and qualifications of the counsel and administering oaths to court members, law officer and counsel.<sup>82</sup>

The board of review never specifically answered this argument, but, as earlier indicated, rested its decision on the grounds of general prejudice and lack of military due process.

Article 16 of the Code defines a general court-martial as consisting of “a law officer and any number of members not less than five.” Going by the strict words of this definition, a pretrial hearing is not a general court-martial. Does this mean it (*Le.*, the law officer in our case) is powerless to act until the terms of this definition have been satisfied? Since pretrial as herein recom-

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<sup>81</sup> Note that paragraph 67a of the Manual provides in part that defenses and objections capable of determination without trial on the merits may be raised “before trial by reference to the convening authority, or by motion to the court before a plea is entered.” (Emphasis added.)

<sup>82</sup> NCM 55 05995, *Mullican* (16 February 1966).

mended was apparently not considered when the Code was enacted or the Manual drafted, no definite answer is to be found in the history of either. As mentioned earlier, paragraph 67 of the Manual was intended to adopt Rule 12 and make its procedures applicable after arraignment and before pleas. The *Mullican* board of review recognized this when it stated:

The Board finds no justification in establishing such procedure to supplement the trial guide set forth in Appendix 8, MCM, 1951. Under this guide, Rule 12 is followed when the trial counsel advises the accused after the court is convened but before his pleas that **any** motion to dismiss any charge or to grant other relief should be made at that time.<sup>83</sup>

Keep in mind, however, that the board was dealing with the Manual as it now stands; the problem in this article is, in part at least, to move the motion time back prior to convening, and the vehicle for this move is the proposed amendment to the Manual.

It is interesting and of some precedential value to trace the preliminary, pretrial procedures up to the actual trial on the merits of a general court-martial case as outlined by Winthrop. It was earlier indicated<sup>84</sup> that Winthrop outlined certain actions which could be taken by the court prior to being sworn.

Winthrop states that, "When five or more [court members] have arrived, they may proceed to business. . . ." <sup>85</sup> "Five members having assembled, a *court* is constituted—not a court 'empowered to proceed to trial, because the members have not as yet qualified for this purpose by taking the oath prescribed by Article 84, but a court competent to proceed with the *preliminary* business."<sup>86</sup> This preliminary business was of two kinds: settlement of questions of precedence among members, and noticing and reporting obvious defects in the specifications to the convening **commander**,<sup>87</sup> which could be done in the absence of the accused; and entertaining objections of a radical nature and entertaining challenges, which took place **after** the introduction of the accused but **before** the court was sworn. These objections related to the existence of the court; since arraignment had not been completed, any objection to the form of the charges or the jurisdiction to try them would here have been premature.

<sup>83</sup> *Zbid.*

<sup>84</sup> See text accompanying notes 12 and 13 *supra*.

<sup>85</sup> Winthrop, *Military Law and Precedents* 161 (2d ed. 1920 reprint).

<sup>86</sup> *Id.* at 162.

<sup>87</sup> *Id.* at 163. It was noted that the court at this stage had no authority of its own to make or direct any modifications in the charges. Moreover, it is clear that the court did not have any **rule-making** powers at this stage. To this extent, there is a certain difference between these actions and modern pretrial procedure.

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“The regular and appropriate occasion for the interposing of challenges is when the accused, by the reading of the order or orders detailing the court, is informed as to the members present, and before the court is sworn.”<sup>88</sup> The procedure on challenges included examination of the challenged member and, when appropriate, other witnesses, but neither could be sworn, the court lacking the authority to administer an oath prior to its organization.<sup>89</sup> After challenging had been completed, “the members . . . proceed to complete their organization as the court, for the trial, by formally qualifying themselves as prescribed in Article 84 [oath for members].”<sup>90</sup> “The court must be qualified separately for every case precisely as if this were the only case to be adjudicated ; such qualifying being an essential preliminary to its being authorized to ‘try and determine’ the same.”<sup>91</sup>

The administration of oaths completed the organization of the court. “The court being now duly qualified and organized for the trial, and the accused being before it and ready to plead, the next proceeding is the formal arraignment.”<sup>92</sup> The arraignment consisted of calling the accused to the bar and reading the charges, the latter being waivable. The answer to the arraignment was not a part of it.<sup>93</sup> The answer could be either a plea of guilty or not guilty, or a special plea or other motions.<sup>94</sup> After preliminary objections, motions, and special pleas had been disposed of and a regular plea entered, “all is now prepared for the Trial on the merits. . . .”<sup>95</sup> Winthrop did not use the word “convening,” but apparently his “duly qualified and organized” is its equivalent, and followed the taking of the prescribed oaths. It is seen from the above that certain actions (*e.g.*, disposition of questions of precedence, the legal existence of the court, and challenges) properly preceded the “qualification and organization” of the court.

The 1949 Manual<sup>96</sup> apparently did not use “convening” as a term of art either. As in the present Manual, it permitted motions to be submitted to the convening authority (appointing authority) prior to trial if capable of determination without trial, or by motion to the court before a plea was entered.<sup>97</sup> And, as in the

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<sup>88</sup> *Id.* at 207.

<sup>89</sup> *Id.* at 210–211.

<sup>90</sup> *Id.* at 231.

<sup>91</sup> *Id.* at 232.

<sup>92</sup> *Id.* at 236.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Id.* at 249.

<sup>95</sup> *Id.* at 281.

<sup>96</sup> Manual for Courts-Martial, United States Army, 1949.

<sup>97</sup> *Id.* par. 64.

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procedure outlined by Winthrop, under the 1949 Manual challenges preceded the administration of oaths, Paragraph 61 provided :

After the proceedings as to challenges are concluded the members of the court, the trial judge advocate, and each assistant trial judge advocate are sworn. . . . The organization of the court is then complete and it may proceed with the trial of the charges in the case then before the court.

The procedure on challenges, unlike Winthrop's, did permit examination of the challenged member *under oath*.<sup>98</sup> It is reasonable to assume that "organization" as used in the above quote is the equivalent of "convening" as presently used.

The procedure under the present Manual changed the order so that challenges *follow* the administration of oaths. No explanation is offered for this change in order, the drafters of the Manual simply stating that "grounds for challenge are initially discovered after the court has convened. . . ." <sup>99</sup> Paragraph 61*h* of the Manual provides for the administration of oaths and paragraph 61*i* concludes : "After the oaths have been administered, the convening of the court is complete."

From the above we have seen that, from the time of Winthrop through the 1949 Manual, certain official actions could be taken by the court prior to convening (organization). The Code and present Manual, and their histories, do not indicate a specific distaste for this procedure or any reasons for changing it. The question arises then : is an expansion of pre-convening activities, traditionally permitted to greater or lesser degrees prior to 1951, prohibited by the Code in the absence of a specific prohibition? Or was it simply not provided for by the drafters of the Code and Manual for reasons best known to them, or simply because it was not considered? If the answers to these questions are, respectively, in the negative and the affirmative, then there appears to be no legal objection to the proposed pretrial procedure. It should be noted that the present Manual, in at least two instances, apparently accords to the law officer authority to act officially prior to convening. Paragraph 44*e*(1) requires the trial counsel to submit a weekly report on cases on hand for over two weeks, *inter alia*, to the convening authority "through the law officer of a general court-martial." Although this is obviously a simple administrative function, it nevertheless suggests some status in the law officer prior to convening, and accords with the idea that a general court-martial comes into being upon publication of the appointing orders. Of similar significance is that portion of para-

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<sup>98</sup> *Id.* par. 58*f*.

<sup>99</sup> Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, p. 62.

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graph 59 which provides for the president of the court to confer with the law officer as to the time for the court to meet. The scope of the court's authority under this idea is then largely a procedural matter which can properly be spelled out by the President pursuant to Article 36 of the Code. This conclusion, at least as to pretrial, seems to be consistent with the Court's finding in *Mullican* that the procedure employed therein was not jurisdictional. Although this conclusion does not answer the question as to whether pretrial will be considered a court-martial for all purposes, it does suggest that, sensibly administered, it will satisfy that definition where such is necessary to uphold actions taken therein. However, because this area is one of uncertainty, the suggestion made earlier is repeated: until the status of pretrial is clarified and, it is hoped, fortified by appellate decisions, it should be employed only with the expressed consent of the accused.

Having come to some sort of conclusion, albeit perhaps tenuous and oversimplified, as to the general legal status of pretrial, let us examine three specific problem areas. Article 46 of the Code assures equal opportunity for all parties to obtain witnesses and adds that "process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence . . . , shall run to any part of the United States, its Territories, and possessions." Article 47 of the Code makes punishable by a United States District Court the refusal to appear or qualify as a witness of any person "duly subpoenaed to appear as a witness before any court-martial, military commission, court of inquiry, or any other military court or board." Will Articles 46 and 47 apply to pretrial hearings, *i.e.*, will there be enforceable compulsory attendance of witnesses for such hearings? The "equal opportunity to obtain witnesses" does not present a problem since it implies equality within the capabilities of the services, and certainly defense counsel can be given such opportunity. Whether such opportunity would exist through use of compulsory process need not be determined on the equality issue, since the determination would affect prosecution and defense alike. But what of compulsory process?

Paragraph 115a of the Manual provides in part that "such process [subpoena] cannot be used for the purpose of compelling a witness to appear at an examination before trial." This language is generally interpreted to apply to pretrial investigations pursuant to Article 32 of the Code, but it hardly answers the question concerning pretrial hearings, the controlling issue being whether

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such pretrial hearings will be considered to be part of the trial, a “court-martial” itself.<sup>100</sup>

The writer is aware of no cases where the subpoena authority of Article 46 has been questioned and litigated. ‘Since the Article equates the authority to that of United States courts of criminal jurisdiction, the Federal rules might be looked to for guidance. However, Rule 17 and its civil counterpart, Rule 45 of the Federal Rules of Civil Procedure, do not answer the question, other than **by** implication from the broad language describing when subpoenas may be issued. In practice, pretrial in federal cases, both criminal and civil, is conducted solely between the judge and counsel, so the problem has probably never arisen. The enforcement of the subpoena authority of Article 46 of the Code rests with the local United States District Attorney; it is doubtful that he **could** be persuaded to bring an action under Article 47 for refusal to honor **a** subpoena issued for a pretrial appearance, when such practice is alien to his own bar. To this extent, at least, there would be no effective compulsory attendance of non-military witnesses before a pretrial hearing. The solution to this deficiency is obvious—if a matter otherwise appropriate for pretrial requires a witness who will appear only upon issuance of an enforceable subpoena, the matter should be saved for the trial itself, where the attendance can be compelled.

Article 48 of the Code provides in part that a court-martial “may punish for contempt any person who uses any menacing words, signs, or gestures *in its presence*, or who disturbs *its proceedings* by any riot or disorder.” (Emphasis added.) Could an individual be punished for contempt for his conduct at a pretrial hearing? The underscored portions of the Article suggest a negative answer. This appears even more certain from the language of paragraph 118 of the Manual, which holds the Article to apply only to direct contempts, and specifically excludes from its purview “those [contempts] not committed in the presence or immediate proximity of the court *while it is in session*.” (Emphasis added.) Paragraph 118b goes on to state that the preliminary question of whether an individual is to be held in contempt is disposed of in the same manner as a motion for a finding of not guilty, with the ruling of the law officer made subject to the objection of any member of the court. If there is a preliminary determination that an individual should be held in contempt, the

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<sup>100</sup> Perhaps this language of paragraph 115a is in itself an argument for calling the proposed procedure something other than “pretrial.” However, it seems unlikely that questions such as this would be resolved solely on the basis of labels.

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court must close to vote on the matter by secret ballot. Since the members of the court will not be present at the pretrial hearing, they could hardly object to the law officer's ruling or make a final finding, nor could they intelligently do so upon convening, not having witnessed the allegedly contemptuous conduct. Thus the conclusion is inescapable that conduct during pretrial could not be made the subject of contempt proceedings. It is believed that this will work no hardship, since contempt, rare in trials by court-martial, would be even rarer in pretrial, where there is no motivation for "grandstanding" and the nature of the proceedings themselves makes them easier to control.

What about the use of depositions at a pretrial hearing? Article 49(d) of the Code provides in part that "a duly authenticated deposition . . . may be read in evidence *before any military court* . . ." (Emphasis added.) Will the pretrial hearing qualify as "any military court"? Certainly the hearing would be sufficiently tied in with the trial to preclude the use of depositions without the accused's consent at the pretrial hearing on a capital case,<sup>101</sup> but what about non-capital cases? The lengthy discussions on depositions found in the Manual<sup>102</sup> shed no light on this question, nor do the reported cases. However, some assistance is available, by way of analogy, from paragraph 137 of the Manual, which provides in part:

On interlocutory matters relating to the propriety of proceeding with the trial, as when a continuance is requested, or to the availability of witnesses (see 145b; Art. 49d), the court may in its discretion relax the rules of evidence to the extent of receiving affidavits, certificates of military and civil officers, and other writing of similar apparent authenticity and reliability. . . .

In most cases, the desired use of a deposition at pretrial would be in relation to an interlocutory matter. Although the two examples of interlocutory matters cited in the quoted portion of the Manual would not often be pertinent in pretrial, it could be argued by analogy that the spirit of paragraph 137 should permit relaxation of the rules in other interlocutory areas. Such a spirit of relaxation could be applied to permit the use of depositions at pretrial, assuming *arguendo* that the language of Article 49(d) would otherwise preclude their use.

Of course if the deposition testimony pertained to the issue of guilt or innocence and were to be used at trial, the unavailability of the witness *at time of trial* would be a prerequisite to its use. If the use were limited to pretrial, perhaps unavailability of the

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<sup>101</sup> UCMJ, art. 49(d).

<sup>102</sup> Pars. 117 and 145a, MCM, 1951.

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witness at time of pretrial would be enough, although it could be argued that if the witness would be available at time of trial, the matter involving his testimony should be deferred until that time.<sup>103</sup>

Undoubtedly there are more problem areas similar to those posed above arising from the question of what is the status of a pretrial hearing. Like those discussed above, these problems are probably not susceptible of definitive answers, but must await appellate action for clarification. It is believed that if the pretrial program is administered with a good strong dose of common sense many of the problems will disappear or never arise.

One other area deserves attention in this chapter—an area that might be loosely termed “after-action.” Assuming that a pretrial hearing has been conducted and is now concluded, what results flow therefrom and what remains to be done pertaining thereto?

Article 62 (a) of the Code provides :

If a specification before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action. (Emphasis added.)

The emphasized portion of the Article suggests that it might have been considered in our previous discussion of the status of pretrial, *i.e.*, is a specification being considered at pretrial a specification “before a court-martial”? However, it appears to be logically sound that if a convening authority can direct reconsideration of dismissal of a specification effected during trial, he would certainly have the same authority when the dismissal occurs at pretrial. We will thus proceed to consider just how Article 62(a) will affect pretrial.<sup>104</sup>

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<sup>103</sup> Discussions of availability of witnesses in this area must be tempered by our previous discussion of compulsory process at pretrial. On the basis of our tentative conclusion in that discussion it appears that it would be easier to make out a case of unavailability at pretrial than at trial. Recall too, that the Court in *Mullican* noted that the Federal Rules of Criminal Procedure did not authorize considering evidence at pretrial. However, the recommended procedure would be broader than that utilized pursuant to the Federal Rules.

<sup>104</sup> Paragraph 67f of the Manual attempts to supplement and clarify Article 62(a). It provides in part: “. . . As to motions granted by the court which do not amount to a finding of not guilty, the convening authority may, if he disagrees, return the record of trial to the court with a statement of his reasons for disagreeing and with instructions to reconvene and reconsider its ruling with respect to the matters as to which he is not in accord with the court (Art. 62a). To the extent that the court and the convening authority differ as to a question which is solely one of law, . . . the court will accede to the views of the convening authority; but if the matters as to which the

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The language of the Manual appears to be much broader than that of the Code, which is limited to situations in which a specification has been dismissed on motion. Perhaps the quoted language of the Manual is intended to be qualified by the phrase, "when the trial cannot proceed further as a result of the action of the court on a motion raising a defense or objection, the court will adjourn and submit the record of its proceedings so far as had to the convening authority," which appears in the preceding paragraph of the Manual. This would seem to be more within the limitations of Article 62(a). But then it is somewhat shocking to read that the court must accede to the views of the convening authority on questions solely of law. Does this mean that if a law officer determines on motion that a specification does not allege an offense, that such determination must be set aside if the convening authority disagrees? The drafters of the Manual do little to clarify this matter, simply citing similar language in the 1949 Manual.<sup>105</sup> In *United States v. Knudson*,<sup>106</sup> the Court held that the authority of the convening authority under Article 62(a) did not include reversing a law officer's decision on a request for a continuance, primarily because such decision lacked the requisite finality to make it appealable. This decision, though not too enlightening, seems at least to suggest a restrictive interpretation of the Manual language.

In *United States ex rel Froelich v. Forrestel*,<sup>107</sup> the District Court did not appear to be troubled with the authority thus placed in the hands of the convening authority. In that case, the law officer of a general court-martial had granted a motion to dismiss based on the accused's assertion that the statute of limitations barred his trial. The convening authority returned the record to the court for reconsideration pursuant to Article 62(a). At this stage the accused sought habeas corpus in the District Court on the grounds that the law officer's determination was one of fact and therefore his action amounted to a finding of not guilty. The District Court disagreed, holding :

The law officer's decision was a contested question of law and not of fact, and a ruling on this issue subjected the law officer to reversal much

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convening authority disagrees are issues of fact, . . . the court will exercise its sound discretion in reconsidering the motion. . . . If he [the convening authority] does not wish to return the record for trial, he will take appropriate action to conclude the case by the publication of appropriate orders in cases wherein the action of the court operates as a bar to further prosecution . . . ."

<sup>105</sup> Par. 64f, MCM, 1949.

<sup>106</sup> 4 USCMA 587, 16 CMR 161 (1964).

<sup>107</sup> 137 F. Supp. 580 (N.D. Ill. 1956).

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the same as any trial court's ruling on a legal issue would be amenable to reversal on appeal.<sup>108</sup>

Such action of course is proper under 18 U.S.C. § 3731 (1958), which authorizes appeal by the government from adverse decisions of law by the district court. The question the Court did not decide (possibly because it did not recognize it, or perhaps it was not raised by the accused) was whether the convening authority is really an intermediate appellate tribunal whose decisions on questions of law are binding on the court-martial, a status suggested by the Manual language but not by the Code.<sup>109</sup>

Whatever the authority of the convening authority under Article 62(a) (and its limits are certainly not clear), it is at least sufficient to require that he be informed of any action at pretrial which results in dismissal of a specification. Thus where this occurs, the convening authority should be notified and furnished with a record of the proceedings so that he may take appropriate action.

How do the determinations reached at pretrial affect the trial proceedings? In the case of motions, objections and other similar interlocutory matters, it simply means that these questions will not be raised at the trial, except in those relatively rare situations where the law officer has reserved his ruling or where fact questions have been raised which must be settled by the court-martial as a whole. Where a pretrial determination of admissibility of certain evidence has been made, the *Mullican modus operandi* should be avoided. If the pretrial determination is against admissibility that would, of course, conclude the matter. But if the determination is for admissibility, the evidence should be formally introduced and received at the trial, with a simple statement that its admissibility has been determined at a pretrial hearing and that any objections raised at that time will be preserved for appeal without repetition in open court.

The Court in *Mullican* pointed out that "what took place at the pretrial conference is part of the record. The accused was not deprived of his right of review by the board of review and this Court on the law officer's ruling on the evidence."<sup>110</sup> The importance of this language should not be minimized. Article 54 of the

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<sup>108</sup> *Id.* at 582.

<sup>109</sup> The *Froelich* decision must be regarded as questionable authority on the interpretation of Article 62(a), since the Court held that the convening authority had determined correctly that the law officer's action did not amount to a finding of not guilty, but did not decide whether, in fact, the convening authority had the power to act at all. And, the Court added, even assuming he did not have such power, the accused had to first exhaust his military judicial remedies before seeking relief in the federal courts.

<sup>110</sup> United States v. Mullican, *supra* note 2, at 211, 21 at CMR 337.

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Code requires each general court-martial to “keep a separate record of the proceedings of the trial of each case brought before it.” Paragraph 53b of the Manual states that “In each case the proceedings and the record thereof must be completed without reference to any other case.” It appears that the appropriate method of complying with these requirements is to make a verbatim record of the pretrial hearing and attach it to the record of trial as an appellate exhibit, the procedure followed in *Mullican*. Scrupulous compliance with this procedure would preclude what appears to be one of the more objectionable aspects of the *Mortensen* case:<sup>111</sup>

... [A] law officer is not authorized to carry out any judicial functions which affect the rights of the accused to a fair trial except that they be in the court room *and on the record*. . . . Regardless of the method employed to effectuate the amendment, the paragraph [paragraph 69 of the Manual concerning amending specifications] envisions that the matter will be before the court and *not handled in an ex parte, off the record transaction*.<sup>112</sup> (Emphasis added.)

Perhaps a word about the finality of pretrial determinations would be appropriate before concluding this section. Once the law officer has made a determination at pretrial, can the matter again be raised at trial?<sup>113</sup> If there is a change in law officers so that the one who held the pretrial is not sitting on the case, the law officer actually sitting on the case should not be bound by his predecessor's decision.<sup>114</sup> But if the law officer who conducted the pretrial is sitting on the case his prior decisions should be subject to reconsideration only under unusual circumstances. Because of the variable delay between pretrial and trial, during which new

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<sup>111</sup> United States v. Mortensen, 8 USCMA 233, 24 CMR 43 (1957).

<sup>112</sup> *Id.* at 235, 24 CMR at 45. Lest the reader get the impression that the quoted language strikes at the heart of pretrial in general, some facts should be recited. The law officer in *Mortensen* had examined the specifications prior to trial and come to the conclusion that one of them was faulty. Based on this conclusion the law officer so informed an officer in the staff judge advocate's office and later directed trial counsel, prior to trial, to amend the specification to cure the supposed defect. Such was ultimately done. It was these actions by the law officer which “got the Court's back up.” At trial the law officer made a full disclosure of his actions and defense counsel declined to challenge him. The court, by exceptions and substitutions, found the accused guilty as originally charged. The Court affirmed the conviction on the basis of waiver of the law officer's disqualification and curing of the error through the findings. Judge Ferguson dissented.

<sup>113</sup> Recall that Article 62(a) of the Code, previously discussed, precludes certain of the law officer's rulings from being binding on the convening authority.

<sup>114</sup> Of course if the change were made far enough ahead of trial, the new law officer could conduct his own pretrial, or could decide from reading the pretrial record whether or not he wished to go along with his predecessor's determinations.

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evidence might be discovered, the proposed amendment to the Manual permits this as a basis for reconsideration of a pretrial determination. Since other presently unpredictable reasons might justify reconsideration, "other compelling reasons within the sound discretion of the law officer" has also been added as a basis. And finally, the law officer on his own initiative, pursuant to Article 51(b) of the Code, should be permitted to change his ruling at any time during the trial. As a practical matter, it is felt that reconsideration of a pretrial determination will be relatively rare, since only under unusual circumstances would it result in a different ruling.

## VI. CONCLUSION

The increasing complexities of trials by court-martial over the past decade or two has resulted in many more strictly legal issues being raised than was previously the case. The creation of the law officer, "in the image of a civilian judge," under the Code apparently recognized this trend. Not only has there been an increase in the number of decisions in which the court members take no part, but also a simultaneous increase in the issues of which they should properly have no knowledge. There is no doubt but what this trend has all but reduced the court-martial members to a status equivalent to that of a civilian jury, with the president acting as foreman. While there are a substantial number of "old-timers" who do not take kindly to this loss of status, there are an even greater number of court members who feel, with justification, that their time is being wasted while the law officer exercises the powers that once were theirs. And military lawyers in general feel that if the civilian system of criminal law is going to invade the military, it should bring with it its advantages as well as its disadvantages.

The author believes that the above trends and dissatisfactions present a strong justification for the pretrial procedure proposed in this article. Such a procedure can be legally established through the amendment to the Manual contained in the Appendix, and thoughtful consideration should be given to it. With the creation of the Field Judiciary system in the Army<sup>115</sup> and the resultant stable corps of military judges, the time for such change appears propitious.

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<sup>115</sup> See Mummy and Meagher, *Judges in Uniform: A n Independent Judiciary for the Army*, 44 J. Am. Jud. Soc'y 46 (1960).

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Pretrial of course is not the whole answer to the problems presently confronting the administration of military justice. It concentrates on only one small problem area. However, it would give to the courts-martial system a degree of flexibility lacking today, which might be even more essential and beneficial tomorrow. Military law, as is true with all systems of law, was never intended to be rigid and unchanging. Its aim in part should be to furnish a predictable guide to conduct while ever seeking means for improving. Pretrial hearings in courts-martial is one such means of improvement which demands consideration.

### VII. APPENDIX

There is no compelling logic as to placement of the proposed amendment within the Manual. However, since the pretrial hearing comes within the scope of general procedural rules, it seemed appropriate to place it in Chapter X. Lacking further logical guidance, the amendment has been labelled paragraph 53*j*, which will in effect be an addition to the Manual paragraph on miscellaneous matters. Since a procedural guide for pretrial is also desirable, it is included in the proposed Executive Order as Appendix 8*d* to the Manual (also an addition). In addition, the law officer should note for the record during the trial itself that a pretrial hearing has been held, and the results thereof, when appropriate.

#### EXECUTIVE ORDER -----

By virtue of the authority vested in me by Article 36 of the Uniform Code of Military Justice (10 U.S.C. § 801 *et. seq.*), and as President of the United States, it is ordered that the Manual for Courts-Martial, United States, 1951 (prescribed by Executive Order No. 10214 of February 8, 1951), be, and it is hereby, amended as follows:

I. Subparagraph "j" is added to paragraph 53, as follows:

"j. **Pretrial hearings.** Notwithstanding any other provision of this Manual, at any time subsequent to referral of charges to a general court-martial and prior to the convening of the court, a pretrial hearing may be held at the direction of the law officer of the court to which the charges are referred or, within his sound discretion, at the request of trial or defense counsel. Such hearing shall be attended by the law officer, counsel for both sides, the accused and a reporter. The proceedings of this hearing shall be recorded verbatim and attached to the record of trial as an appellate exhibit.

Any interlocutory matters which do not require submission to, or whose determinations are not subject to objection by, the members of the court may be finally determined by the law officer at such hearing. Except in the event of newly discovered evidence or other compelling reasons within the sound discretion of the law officer, such determinations shall be final and binding on all parties to the trial. However, the law officer may change any ruling at any time during the trial (Art. 51*b*). In appropriate cases the law officer may reserve his ruling on a matter in controversy. Witnesses may be called and evidence presented in the same manner as before the full court-martial.

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Any action by the law officer at a pretrial hearing which results in dismissal of a specification which has been referred for trial shall be reported to the convening authority for appropriate action (Art. 62a.).”

2. Subparagraph “d” is added to Appendix 8, as follows:

“d. Pretrial Procedure.

**Pre-convening procedure**

Note.—Prior to calling the pretrial hearing to order, the law officer will assure that the trial counsel, defense counsel, the accused and the reporter are present and prepared to proceed.

**Hearing called to order**

LO: The pretrial hearing will come to order. Let the record show that present at this pretrial hearing are the law officer, the trial counsel and the defense counsel appointed by \_\_\_\_\_, (as amended by \_\_\_\_\_) to serve as such in the trial of the United States against \_\_\_\_\_, who is also present.

**Appointing orders**

**Presence of accused**

**Reporter sworn**

\_\_\_\_\_ has been appointed reporter for this pretrial hearing and will now be sworn.

Note.—The reporter rises and stands with right hand raised; the TC, right hand raised, faces the reporter and administers the oath.

TC: You swear (or affirm) that you will faithfully perform the duties of reporter for this pretrial hearing. So help you God.

REPORTER: I do.

TC: The personnel of the pretrial hearing will now be sworn.

Note.—All persons present at the pretrial hearing will rise while the personnel are being sworn. The individual being sworn will raise his right hand and face the person administering the oath, who will also raise his right hand.

**LO sworn**

TC: You, Colonel \_\_\_\_\_, do swear (or affirm) that you will faithfully and impartially perform, according to your conscience and the laws and regulations provided for trials by courts-martial, all the duties incumbent upon you as law officer for this pretrial hearing; 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, So help you God.

**Prosecution sworn**

LO: I do.

LO: You, Captain \_\_\_\_\_ and Lieutenant \_\_\_\_\_, do swear (or affirm) that you will faithfully perform the duties of trial counsel for this pretrial hearing. So help you God.

**Defense sworn**

TC (and ASST TC): I do.

LO: You, Captain \_\_\_\_\_ and Lieutenant \_\_\_\_\_, do swear (or affirm) that you will faithfully perform the duties of defense (and individual) counsel for this pretrial hearing. So help you God.

**Challenge of LO**

DC (and ASST DC): I do.

LO: This pretrial hearing is called (at the direction of the law officer) (at the request of the (trial) (defense) counsel) for the purpose of (hearing certain motions by the defense) (determining the admissibility of certain documents) ( \_\_\_\_\_ ) and such other matters as may properly be disposed of. Does (any of) the accused desire to challenge the law officer for cause?

DC: No (The accused challenges the law officer for cause on the ground \_\_\_\_\_.)

Note.—If the accused challenges the law officer for cause, evidence may be received on the matter during the pretrial hearing. However, unless the law officer's disqualification is apparent, the matter will not be finally disposed of until the court is convened and the members sworn, at which time the evidence (either previously received and read from the record, or received after convening) will be presented to the court members for voting upon proper instructions (see 62h). The law officer, in his dis-

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cretion, may suspend the pretrial proceedings or continue them to completion following a challenge for cause.

Note.— Ordinarily the party requesting the pretrial hearing will present his reasons therefor, and make any appropriate motions or objections. He will be given the opportunity to present evidence, call witnesses, and present legal authority. The opposing party will be given an equal opportunity. Any witnesses called will be sworn in the same manner as for a court-martial. The law officer may in his discretion relax the rules of evidence as to matters which will form the basis for his ruling on interlocutory matters. The parties will be given an opportunity to argue on the matters on which the law officer will rule. At the conclusion of all evidence and argument the law officer will rule on the matters in question; however, he may, in his discretion, reserve his rulings.

LO: Does the proecution have anything further to offer?

TC: It does (not).

LO: Does the defense have anything further to offer?

DC: It does (not).

LO: This pretrial hearing is now concluded. The proceedings will be transcribed (and attached to the record of trial).”

# THE FAST-CHANGING LAW OF MILITARY EVIDENCE\*

BY ROBINSON O. EVERETT\*\*

Many fields of law can today be described as fluid and fast-changing. Military law, however, would seem to hold a paramount title to such a description. For instance, before one's eyes military jurisdiction can appear and then disappear in the same case as fundamental principles are judicially altered.<sup>1</sup> Insofar as matters of evidence are concerned, this fluidity is especially discernible—as will be obvious from an examination of some opinions rendered by the Court of Military Appeals during the past decade.

## I. DEPOSITIONS

Courts-martial, unlike civilian courts in criminal cases, have long been accustomed to receiving as evidence depositions offered by either the prosecution or the defense; and Article 49 of the Uniform Code of Military Justice specifically authorized this practice.<sup>2</sup> In *United States v. Sutton*,<sup>3</sup> the Court of Military Appeals ruled in a split decision that even a deposition taken solely on written interrogatories could be used by the prosecution despite defense objections. The majority based this result on certain "necessities of the service"<sup>4</sup>—such as the transient nature of military personnel and the importance of avoiding interference with combat operations that might result from bringing witnesses into court.

Chief Judge Quinn, dissenting, insisted that service personnel "are entitled to the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by

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\* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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<sup>1</sup> See *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956); and *Reid v. Covert*, 354 U.S. 1 (1957). Everett, *Military Jurisdiction Over Civilians*, 1960 Duke L. J. 366.

<sup>2</sup> 10 U.S.C. § 849 (1958).

<sup>3</sup> 3 USCMA 220, 11 CMR 220 (1953).

<sup>4</sup> *Id.* at 225-6, 11 CMR at 225-6.

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necessary implication, by the provisions of the Constitution itself,"<sup>5</sup> that among these is the right of confrontation in accord with the Sixth Amendment, and that the use of written interrogatories over an accused's objection deprived him of this right. As was noted previously, it was not made clear in his *Sutton* dissent whether Chief Judge Quinn would consider the presence of the accused himself at the taking of a deposition to be a prerequisite for effective cross-examination<sup>6</sup>

After the death of Judge Brosman and his replacement by Judge Ferguson, another attack was launched against prosecution use of depositions taken on written interrogatories, but in *United States v. Parrish*,<sup>7</sup> the previous rule was adhered to. However, some of the subsequent opinions of the Court of Military Appeals led to the observation a year ago that, "In the long run there may occur a substantial diminution, or even the virtual abolition of the written deposition in courts-martial—the very result so fervently advocated by Chief Judge Quinn in the *Sutton* case."<sup>8</sup>

This "virtual abolition" of the deposition taken on written interrogatories came more swiftly—and more directly—than had been anticipated. In *United States v. Jacoby*,<sup>9</sup> the Government had notified defense counsel of its intent to take certain depositions upon written interrogatories. Defense counsel objected and urged that, in order to preserve the accused's right to confrontation, the witnesses should either be produced at the trial or their oral depositions should be taken. This defense pretrial request having been denied, objections were unsuccessfully interposed at the trial; and, on appeal, it was contended that the previous interpretation of Article 49 by the Court of Military Appeals had produced a conflict with the Sixth Amendment. Judge Ferguson, writing for the majority, accepted the position of the *Sutton* dissent that servicemen are entitled to the protections of the Bill of Rights, except those which are expressly or by necessary implication inapplicable. In order to conform to the requirements of the Sixth Amendment, he re-interpreted Article 49 of the Code as demanding that the accused be present for the taking of any deposition from a prosecution witness and that he have the opportunity,

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<sup>5</sup> *Id.* at 228, 11 CMR at 228.

<sup>6</sup> Everett, *The Role of the Deposition in Military Justice*, Mil. L. Rev., January, 1960, p. 131 at 133.

<sup>7</sup> 7 USCMA 337, 22 CMR 127 (1956).

<sup>8</sup> Everett, *supra* note 6, at 135. See also *United States v. Daniels*, 11 USCMA 52, 28 CMR 276 (1959).

<sup>9</sup> 11 USCMA 428, 29 CMR 244 (1960) ..

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through counsel, to cross-examine the witness. However, the majority did conclude that, by reason of “the exigencies of the military service” and in light of the history of military depositions, the Sixth Amendment should be construed as allowing courts-martial to receive in evidence oral depositions which had been taken with the accused present.<sup>10</sup>

In criminal trials in federal civilian courts, there is no statutory authority for the prosecution to offer either written or oral depositions in evidence against the accused.<sup>11</sup> Thus, in any event, the use of depositions by the Government before a court-martial will differ from the civilian practice—this difference being justified in Judge Ferguson’s opinion by reason of the “exigencies” involved. Some would argue, as did the majority in *Sutton*, that these same “exigencies” justify a further departure from the usual federal practice contemplated under the Sixth Amendment. Such further divergence from the civilian norm could consist in allowing the use of depositions on written interrogatories or else in requiring only that defense counsel be present and not that the accused be there. Perhaps, though, it is just as well to preclude the taking of a written deposition by the Government in all cases where the accused objects,<sup>12</sup> instead of having a case-to-case attrition of the written interrogatory as had been expected by this writer a year ago.

Under the new rule there will be considerable difficulties for the prosecution. Sometimes it will be difficult and expensive to arrange for accused and his counsel to go to some distant spot to take the deposition of an absent witness, and especially will this be so if the accused is in pretrial confinement.<sup>13</sup> Occasionally it

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<sup>10</sup> The Court discussed especially *Mattox v. United States*, 156 U.S. 237 (1895), and *Motes v. United States*, 178 U.S. 458 (1900). The former case held admissible testimony which witnesses, later deceased, had given at a previous trial. The latter refused to admit evidence given at a preliminary hearing before a United States Commissioner by a witness who had later disappeared. Compare *United States v. Eggers*, 3 USCMA 191, 11 CMR 191 (1953). See also *Everett*, *Military Justice in the Armed Forces of the United States* 205-6 (1956).

<sup>11</sup> See dissenting opinion of Judge Latimer in *United States v. Jacoby*, *supra* note 9.

<sup>12</sup> In capital cases an accused must consent—not merely fail to object—to introduction of a deposition by the Government. See *United States v. Young*, 2 USCMA 470, 9 CMR 100 (1953). Apparently an accused must object in order to obtain the benefit of the *Jacoby* rule. *United States v. Howell*, 11 USCMA 712, 29 CMR 528 (1960).

<sup>13</sup> Fortunately the Armed Services have made many efforts to reduce the use of pretrial confinement of an accused, and so this is not so likely to be a problem as might have been the case at one time. There is, however, no provision in military law for releasing an accused on bail from pretrial confinement.

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may be difficult to arrange for the presence of an experienced reporter or stenographer to transcribe the oral deposition ; on the other hand, under the previous practice the answers to written interrogatories could be easily written or typed in on the form provided. Frequently it will be easier and cheaper to transport the witness to the scene of trial, rather than transport the accused and other necessary individuals to the witness's residence, although obviously this choice is not available with respect to a recalcitrant foreign witness. Some objectives can still be accomplished by the prosecution through the use of depositions. For instance, it often will be desirable to take the depositions of personnel who are in ill health, scheduled for transfer, or awaiting discharge from the armed services.<sup>14</sup>

In a previous article, this writer discussed the extent to which the defense could compel the prosecution to subpoena a defense witness to give personal testimony before a court-martial, instead of accepting the presentation of his testimony by a deposition.<sup>15</sup> If, however, a defense deposition is to be taken, must the accused be allowed to be present at the time to suggest questions to his counsel? The Court of Military Appeals in *Jacoby* interprets Article 49 of the Code as requiring that an accused be present for the taking of a deposition, and, although the opinion is concerned with depositions taken at the request of the prosecution, it should be noted that, with one exception not here **material**,<sup>16</sup> this Article of the Code does not differentiate between depositions of prosecution and defense witnesses. On this basis, it might be reasoned that, even if the defense has initiated the request for a deposition, the accused is entitled to be present to **ask** questions. However, the rationale of the *Jacoby* opinion is that the previous construction of Article 49 presents a conflict with the Sixth Amendment. Since that Amendment requires that an accused "be confronted with witnesses *against* him," it might be argued that it has no relevance to evidence which the accused is trying to obtain for his cause. Under this view, Article 49 could be interpreted as requiring oral depositions with the accused present only when the prosecution has requested the deposition. The question

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<sup>14</sup> The use of depositions are especially important in cases where the contemplated discharge and consequent loss of jurisdiction will occur prior to trial.

<sup>15</sup> Everett, *supra* note 6, at 136-141.

<sup>16</sup> Under Article 49 (f) of the Uniform Code a deposition can be used by the defense in a capital case, but it cannot be used by the prosecution in such a case without express consent of the accused.

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then would center on whether, in the particular case, the means provided the accused for obtaining and presenting his evidence were sufficient to comply with his right "to have compulsory process for obtaining witnesses in his favor."<sup>17</sup> Unless some limitation is placed on the extent to which the accused can be present for obtaining depositions, there is a danger that the Government will be harassed by defense counsel demanding confrontation of even the most routine witness who may happen to be on another continent.<sup>18</sup>

### 11. DOCUMENTARY EVIDENCE

#### A. OFFICIAL RECORDS

Just as the taking of prosecution depositions has been one distinguishing feature of trials before courts-martial, the heavy reliance on official records has been another. For instance, traditionally absence without leave, the most prevalent military offense, has been proved almost exclusively by the use of official records, usually the morning reports of the unit from which the accused was absent.<sup>19</sup> The importance of official records in trials by court-martial is probably itself a reflection of the fact that in military life many types of activity are subject to official regulation and especially that extensive record-keeping is usually required by the armed services.

In one of its earliest cases the Court of Military Appeals recognized that official records are admissible as an exception to the hearsay rule if the officer who keeps the records, or under whose supervision they are kept, "has an official duty to perform and he is required to know or to ascertain through customary and trustworthy channels of information the truth of the facts or

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<sup>17</sup> See *United States v. Thornton*, 8 USCMA 446, 24 CMR 256 (1957), and *United States v. Harvey*, 8 USCMA 538, 25 CMR 42 (1957). See also Everett, *supra* note 6, at 136-141.

<sup>18</sup> The action taken by the defense in *United States v. DeAngelis*, 3 USCMA 298, 12 CMR 54 (1953), would seem to sustain the inference that some defense counsel are willing to utilize any possible opportunities for harassing the Government.

<sup>19</sup> See, *e.g.*, *United States v. Masusock*, 1 USCMA 32, 1 CMR 32 (1951). In the Navy the entries in an accused's service record are used to show his unauthorized absence. The morning reports may also be used to show apprehension, escape from confinement, and circumstances of return to military. See, *e.g.*, *United States v. Simone*, 6 USCMA 146, 19 CMR 272 (1955); *United States v. Wilson*, 4 USCMA 3, 15 CMR 3 (1954).

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events recorded.”<sup>20</sup> Accordingly, it often becomes necessary to examine in detail the terms of some applicable military directive to determine whether the recording of certain information is part of the official duty of the person who prepared the record. For instance, in several cases it was necessary for the court to determine whether “apprehension” of an absentee was among the “circumstances of return” which the governing regulation required be recorded.<sup>21</sup> More recently, the Court commented that Naval directives requiring the notation in a sailor’s service record of the “circumstances of return” from an unauthorized absence did not create a duty to record everything that happened to the accused during his absence and that, therefore, a service record entry about a conviction for vagrancy during the unauthorized absence was inadmissible under the hearsay rule.<sup>22</sup> Under the official record exception to the hearsay doctrine, the armed services have considerable opportunity to alter the scope of the evidence admissible in a court-martial; by changes in the directives for record-keeping, they can enlarge or contract the official duty to record certain information, and this duty will govern admissibility.<sup>23</sup> Of course, there are several limitations on this power to enlarge the area of admissibility. For instance, the Government cannot make a case against an accused by simply requiring in a directive that all misconduct be recorded in some official record; under the Manual for Courts-Martial, official records are not admissible if “made principally with a view to prosecution, or other disciplinary or legal action.”<sup>24</sup> Moreover, even if an entry in an official record surmounts the hearsay obstacle, it can still be challenged for materiality, competency, and relevancy.<sup>25</sup> Accordingly, it was prejudicial error to receive in evidence that portion of a morning report entry which indicated that, during his unauthorized absence, the accused had been arrested for

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<sup>20</sup> United States v. Masusock, 1 USCMA 32, 35, 1 CMR 32, 35 (1951). See also par. 144b, MCM, 1951. A record made long after the event can still be admissible if the official duty includes making delayed entries. See United States v. Takafuji, 8 USCMA 623, 25 CMR 127 (1958); United States v. Wilson, 4 USCMA 3, 15 CMR 3 (1954). In the *Wilson* case an entry made many months after the event was deemed sufficient to show that the accused had become absent without leave on that date.

<sup>21</sup> United States v. Simone, 6 USCMA 146, 19 CMR 272 (1956); United States v. Kitchen, 5 USCMA 541, 18 CMR 165 (1955); United States v. Bennett, 4 USCMA 309, 15 CMR 309 (1954); United States v. Coates, 2 USCMA 625, 10 CMR 123 (1953).

<sup>22</sup> United States v. Hall, 10 USCMA 136, 27 CMR 210 (1959).

<sup>23</sup> See United States v. Bennett and United States v. Simone, *supra* note 21.

<sup>24</sup> Par. 144d, MCM, 1961, at p. 268; United States v. Takafuji, *supra* note 20.

<sup>25</sup> United States v. Schaible, 11 USCMA 107, 28 CMR 331 (1960). See also United States v. Hall, *supra* note 22.

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burglary and convicted of petty theft, misconduct which had no relevancy to the charges before the court-martial.<sup>26</sup>

On the basis of a detailed investigation of the relevant directives, defense counsel may be able to show that the official record was not prepared in accord with any official duty. Moreover, the type of information used in preparing the report may be questionable for some reason, and may bring into play some other rule of law. For instance, if all the information used as a basis for the questioned entry comes from the accused himself, it may be possible to raise objections—either because of a failure to warn the accused of his rights under Article 31(b) or because of the corpus delicti rule.<sup>27</sup> In some instances information contained in the official record would be inadmissible, even if a witness were available to testify personally to the same facts, perhaps because of its remote and prejudicial nature<sup>28</sup> or because it constitutes opinion testimony.

The defense counsel may wish to request a hearing outside the presence of the court-martial members in order to present evidence bearing on the admissibility of an official record.<sup>29</sup> However, the Court of Military Appeals has emphasized that the matter of admissibility is entirely different from that of credibility;<sup>30</sup> and so, if the official record is admitted in evidence, counsel may wish to lessen its weight by presenting to the court-martial evidence about the circumstances of its preparation.

There is greater likelihood in military than in civilian life that an official record will be made of some event which may later be pertinent in adjudicating an accused's guilt or innocence; thus, the availability of official records is greater in the armed services than in the civilian context. Moreover, the "exigencies" of the armed forces, exigencies which have already been discussed in connection with depositions, often make it necessary for the Government to rely on documentary evidence rather than produce a witness to testify personally. The Court of Military Appeals appears to have been consistently aware of these exigencies, and it has admitted official records quite freely. The limitations imposed on official records have been very reasonable, and so the

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<sup>26</sup> United States v. Schaible, *supra* note 25.

<sup>27</sup> *CF.* United States v. Takafuji, *supra* note 20.

<sup>28</sup> United States v. Schaible, *supra* note 25.

<sup>29</sup> *CF.* United States v. Roland, 9 USCMA 401, 26 CMR 181 (1958); pars. 122c, 144d, MCM, 1951.

<sup>30</sup> United States v. Takafuji and United States v. Wilson, *supra* note 20.

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official records exception has provided the armed forces with an easy route to *prima facie* proof of some prevalent military offenses.

### B. BUSINESS ENTRIES

Since so much of the record-keeping in the armed forces is done pursuant to specific directives and on official government forms, rather than merely in "the regular course" of business, it is often unnecessary to resort to the business entries exception to the hearsay rule. However, where the record-keeping is not done pursuant to any specific regulation, this exception may be useful. Of course, many limitations on admissibility are common to business entries and to official documents;<sup>31</sup> thus, a business entry cannot be used in evidence if it constitutes an "opinion," if it has been prepared for purposes of a criminal prosecution, or if it is irrelevant, immaterial, or otherwise incompetent.

The liberality of the Court of Military Appeals towards business entries is vividly displayed in *United States v. Villasenor*,<sup>32</sup> where the Government offered in evidence an envelope on which the accused had marked the amount of money that he had placed inside. This money had been collected by him for an Air Force activity to which he was assigned and had then been put in a safe, but when the safe was opened on the following day, the accused was absent, and the envelope contained substantially less money than had been indicated by his notation thereon. According to the Court, the writing on the envelope qualified as a memorandum of an act done by the accused, and, having been "made in the regular course of his 'business' " to collect the funds of the Air Force activity, the memorandum was admissible as a business entry.<sup>33</sup> Moreover, even though prepared by the accused, this entry constituted part of the corroboration required for admission of the accused's confession to larceny of the money.

In *United States v. Grosso*<sup>34</sup> a witness testified that he had searched the records of the Navy Exchange and had found no

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<sup>31</sup> Par. 144*d*, MCM, 1951. Cf. *United States v. Takafuji*, *supra* note 20; par. 122*c*, MCM, 1951.

<sup>32</sup> 6 USCMA 3, 19 CMR 129 (1955).

<sup>33</sup> The Court also rejected contentions that the memorandum was too fragmentary to be admissible as a business entry. Consider also the dictum in *United States v. Salley*, 7 USCMA 603, 605, 23 CMR 67, 69 (1957), indicating that some hospital data might be admissible under the business entry exception to the hearsay rule.

<sup>34</sup> 9 USCMA 579, 26 CMR 359 (1958). This case concerns the manner of proving that certain entries do not exist in designated business records. The

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record that defendant had purchased certain items he was charged with stealing. The Court of Military Appeals found reception of this evidence to be proper as an exception to the hearsay rule and held that it did not violate the best evidence rule. One passage in the opinion might be taken to indicate that a business entry was not admissible if the maker thereof had lacked personal knowledge of the transaction involved.<sup>35</sup> However, it seems doubtful that the Court intended to repudiate the contrary implication of the Manual for Courts-Martial on this point.<sup>36</sup>

### C. FINGERPRINT CERTIFICATES

The Manual for Courts-Martial authorizes the introduction in evidence of a certificate of fingerprint comparison, which states that a duly qualified fingerprint expert has examined the fingerprints attached to the certificate—usually those of the accused—and has found that they are those of a named person whose fingerprints are on file in Washington.<sup>37</sup> In this way the accused's identity can be established, which may be important in determining whether he is subject to military jurisdiction or whether he has committed some such offense as fraudulent enlistment. The author is not aware of any civilian jurisdiction where, in a criminal case, a court would consider a similar certificate over defense objection. Clearly a court that received this certificate in evidence has admitted an expert's opinion in evidence without opportunity for confrontation of the witness or for questioning as to his qualifications. Because of the repeated emphasis by the Court of Military Appeals on assimilating military justice to civilian practice as much as possible, it might have been antici-

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Manual contains a provision for a certificate showing that designated official records do not contain certain information. Pars. 143a(2), 143b(2) (f). Like the fingerprint certificates discussed later in this article, these certificates that no record exists might be subject to attack, but would probably be upheld by a majority of the Court.

<sup>35</sup> "Two related rules of evidence are actually involved in the accused's claim of error. One concerns entries made in the regular course of business as an exception to the hearsay rule which excludes evidence not based on the witness's personal knowledge or observation. The other is that the best evidence of the contents of a writing is the writing itself. Neither rule applies, however, when the facts sought to be proved are independent of the writing and *are based upon the witness's own knowledge and conduct.*" 9 USCMA at 580-81, 26 CMR at 360-61. (Emphasis supplied.)

<sup>36</sup>Par. 143c of the Manual states: "All other circumstances of making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

<sup>37</sup> Par. 143a(2), MCM, 1961, at p. 259.

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pated that the use of these certificates would have been severely questioned. However, when this was first considered by the Court, all three Judges agreed that the Manual authorization for their use was valid.<sup>38</sup>

The Court's position on this appears to be supportable. Although comparison of fingerprints will involve some expertise, the likelihood of divergence of opinion among qualified experts as to whether two sets of prints are the same would appear to be very small, and the comparison would seem to be a routine observation.<sup>39</sup> Probably the amount of "opinion" involved would be considerably less than, for example, that involved in some of the information from hospital records which might be admissible under the business entries exception to hearsay. Since even the *Jacoby* case<sup>40</sup> makes a bow to military "exigencies," authorization of the fingerprint certificate appears a reasonable means to avoid the delay and expense involved in producing experts to testify on relatively incontrovertible and indisputable matters.

### III. JUDICIAL NOTICE AND PRESUMPTIONS

No evidence need be produced as to matters judicially noticed by a court-martial;<sup>41</sup> therefore, the burden of producing evidence may be greatly affected by the scope of judicial notice. From the very outset, the Court of Military Appeals has allowed a wide

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<sup>38</sup> United States v. Taylor, 4 USCMA 232, 15 CMR 232 (1954); United States v. White, 3 USCMA 666, 14 CMR 84 (1954).

<sup>39</sup> At least this would seem true assuming that, as is generally true when fingerprint comparisons are used before courts-martial, the examiner has two complete, clear sets of fingerprints for comparison, and is not called on to give his opinion whether a fragmentary print corresponds to a set of fingerprints on file in Washington. An accused might wish to take a deposition from the fingerprint examiner in order to attack the weight of the certificate, and presumably he would be entitled to do so—as well as to call another expert.

<sup>40</sup> See text accompanying note 9 *supra*.

<sup>41</sup> In his concurring opinion in United States v. Lovett, 7 USCMA 704, 23 CMR 168 (1957), Judge Latimer speaks of the rule of judicial notice in these words: "The point of importance is that the rule is founded on the principle that the matter noticed is taken as true without the offering of evidence by the party who should do so because the agency considering the question assumes that the matter is so notorious it will not be disputed. In the light of that concept, my point is this: When evidence which may be qualified, explained, or denied is judicially noted, it should not be accepted as true until the party against whom it is to be used has been afforded an opportunity to come forward with his denial, explanation, or qualification. It is entirely possible that unless both parties are offered their day in court, the conclusion reached in reliance on judicially noticed testimony might be erroneous. That result is a distant possibility in this case." 7 USCMA at 711, 23 CMR at 176. For other comments on judicial notice see Morgan, *Judicial Notice*, 57 Harv. L. Rev. 269 (1944); 9 Wigmore, Evidence, §§ 2666 *et. seq.* (3d ed. 1940).

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scope for such notice. For instance, in *United States v. McCrary*,<sup>42</sup> Judge Brosman concurred in upholding a conviction of desertion because of facts which he considered subject to judicial notice, such as the fact that accused's absence commenced at a staging area for overseas shipment to Korea during the Korean War. Other matters that have been judicially noticed include these: that the purpose of a "pipeline" company from which accused absented himself was to process replacements for duty in Korea;<sup>43</sup> that medical men are always attached to units such as machine gun platoons when those units are going into combat;<sup>44</sup> that the Army maintained a rotation program for its troops in Korea and that the average tour of duty there varied at different periods during hostilities and with the type and location of the service rendered;<sup>45</sup> and that "cold war" conditions presently exist between the United States and Russia.<sup>46</sup>

On several occasions Chief Judge Quinn indicated his unwillingness for the court-martial to take judicial notice of certain facts,<sup>47</sup> which Judges Latimer and Brosman thought could be noticed. One suspects that Judge Ferguson sides more with the Chief Judge.<sup>48</sup> Where, however, a defense counsel is urging that judicial notice should be taken of certain defects in the court-martial's proceeding which are not directly apparent from the record of trial, the Court, as now constituted, appears quite willing to apply judicial notice.<sup>49</sup>

Insofar as judicial notice is used to broaden appellate review of claims that an accused's rights have been violated, one can easily perceive that the results accord with the Court's general policy to strike at injustice in courts-martial irrespective of

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<sup>42</sup> 1 USCMA 1, 1 CMR 1 (1951).

<sup>43</sup> *United States v. Uchihara*, 1 USCMA 123, 2 CMR 29 (1952). According to Judge Brosman's opinion, concurred in by Judge Latimer, it is not necessary that the fact judicially noticed be "generally notorious; it is enough if it is notorious in the military service." 1 USCMA at 127, 2 CMR at 33.

<sup>44</sup> *United States v. Cook*, 2 USCMA 223, 8 CMR 23 (1953).

<sup>45</sup> *United States v. Jester*, 4 USCMA 660, 16 CMR 234 (1954).

<sup>46</sup> *United States v. French*, 10 USCMA 171, 27 CMR 245 (1959).

<sup>47</sup> See *United States v. Uchihara*, *supra* note 43; *United States v. Williams*, 6 USCMA 243, 19 CMR 369 (1955). *Cf.* *United States v. McCrary*, *supra* note 42.

<sup>48</sup> Compare *United States v. Smith*, 5 USCMA 314, 338, 17 CMR 314, 338 (1954), with *United States v. Schick*, 7 USCMA 419, 22 CMR 209 (1956), and *United States v. Gray*, 9 USCMA 208, 25 CMR 470 (1958). However, these cases, which concerned judicial notice of official publications, present special problems of command control.

<sup>49</sup> *United States v. Moore*, 9 USCMA 284, 26 CMR 64 (1958); *United States v. Lovett*, 7 USCMA 704, 23 CMR 168 (1957); *cf.* *United States v. Shepherd*, 9 USCMA 90, 25 CMR 352 (1958).

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procedural niceties.<sup>50</sup> Since many accused are represented by appointed counsel, it is probably appropriate, and in accord with congressional intent, for the Court to be somewhat paternalistic in this regard. The wide expansion of judicial notice at the trial level accords with the "exigencies" of the military services, which make it especially undesirable to view trial by court-martial as merely a game, and which call for eliminating the expense and waste of time involved in proving obvious matters that cannot be disputed.<sup>51</sup>

To the extent that a material fact may be presumed, the need for evidence thereof is reduced or eliminated. The word "presumption" is often used by judges and lawyers in three different senses:<sup>52</sup> (1) a conclusive presumption, which is really a rule of substantive law; (2) a rebuttable presumption, a fact which the trier of fact *must* find unless evidence to the contrary is produced; and (3) an inference, which the jury is free to draw or not draw. Professor Thayer and many other scholars have urged that "presumption" should be used only in the second sense,<sup>53</sup> but the Manual for Courts-Martial uses the term primarily to refer to a permissible inference.<sup>54</sup> A number of cases considered by the Court of Military Appeals have involved contentions that, by using the word "presumption" in an instruction to the court-martial, the law officer had misled court members into an erroneous belief that they were under a *duty* to reach certain conclusions, unless the accused presented evidence to the contrary.<sup>55</sup> Among the permissible inferences which may be especially important, and which the Court of Military Appeals has allowed, are these: larceny inferred from unexplained exclusive possession

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<sup>50</sup> United States v. Ferguson, 5 USCMA 68, 17 CMR 68 (1954), is a good example. For examples of the Court's relatively liberal view concerning waiver see Tedrow, Digest—Annotated and Digested Opinions, U.S. Court of Military Appeals 184-86 (1959).

<sup>51</sup> It is not unusual for the trial counsel representing the Government to be young, inexperienced, and overworked; and so he may by oversight fail to prove an obvious fact. Occasionally judicial notice can salvage the situation.

<sup>52</sup> See United States v. Biesak, 3 USCMA 714, 719, 14 CMR 132, 137 (1954).

<sup>53</sup> See 3 USCMA at 720, 14 CMR at 138.

<sup>54</sup> Par. 138a, MCM, 1951. However, the Manual makes it clear that the "presumption of sanity" is a rebuttable presumption.

<sup>55</sup> See, e.g., United States v. Jones, 10 USCMA 122, 27 CMR 196 (1959) (intending natural and probable consequences); United States v. Miller, 8 USCMA 33, 23 CMR 257 (1957) (intending natural and probable consequences); United States v. Crowell, 9 USCMA 43, 25 CMR 305 (1958) (failure to account); United States v. Ball, 8 USCMA 25, 23 CMR 249 (1957) (exclusive possession of recently stolen property); United States v. Biesak, 3 USCMA 714, 14 CMR 132 (1954) (sanity). See also United States v. Simpson, 10 USCMA 543, 28 CMR 109 (1959) (disapproving reference in the law officer's instructions to *prima facie* proof).

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of recently stolen property ;<sup>56</sup> embezzlement inferred from failure of custodian to account for or deliver entrusted property; <sup>57</sup> that one intends the natural and probable consequences of an act intentionally committed by him ;<sup>58</sup> that anyone is sane ;<sup>59</sup> and that official duties are regularly performed.<sup>60</sup>

Paragraph 164a of the Manual for Courts-Martial provides that, if an unauthorized absence “is much prolonged and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain absent permanently.” In some of its early cases the Court seemed to subscribe to this principle.<sup>61</sup> Later, however, in *United States v. Cothorn*<sup>62</sup> it held that this Manual provision was invalid by reason of conflict with the Uniform Code, since, as viewed by the Court and when incorporated in a law officer’s instructions, it tended to equate any prolonged absence to an absence with intent to remain away permanently. An instruction, that a prolonged period of absence may be a circumstance, among others, from which intent to remain away permanently may be inferred, is permissible.<sup>63</sup>

In *Cothorn*, which involved a seventeen day unauthorized absence, there was no basis for the law officer’s instructing the court members that “much prolonged absence” without explanation could justify an inference of desertion, and the reversal of the conviction there may have been justifiable. However, the majority’s general repudiation of the apparently well entrenched inference from lengthy, unexplained absence does not seem necessary. Instances can certainly be imagined where the length of the absence would justify any reasonable man in finding beyond all reasonable doubt that the accused had intended to remain away permanently.

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<sup>56</sup> *United States v. Ball*, *supra* note 55; *United States v. Hairston*, 9 USCMA 554, 26 CMR 334 (1958) ; *but cf.* *United States v. Boultinghouse*, 11 USCMA 721, 29 CMR 537 (1960) (dealing with inability to explain because of amnesia).

<sup>57</sup> *United States v. Crowell*, *supra* note 55.

<sup>58</sup> *United States v. Miller and United States v. Jones*, *supra* note 55.

<sup>59</sup> This is initially a rebuttable presumption; but after rebutting evidence has been produced, there remains an inference of sanity. *United States v. Biesak*, *supra* note 52; *United States v. Johnson*, 3 USCMA 725, 14 CMR 143 (1954).

<sup>60</sup> *United States v. Bennett*, 4 USCMA 309, 15 CMR 309 (1954).

<sup>61</sup> See the concurring opinion of Judge Latimer in *United States v. Cothorn*, 8 USCMA 158, 23 CMR 382 (1957).

<sup>62</sup> 8 USCMA 158, 23 CMR 382 (1957). See also *United States v. Socio*, 8 USCMA 477, 24 CMR 287 (1957), which also involved some other interesting problems.

<sup>63</sup> *United States v. Farris*, 9 USCMA 499, 26 CMR 279 (1958).

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Fortunately there are some helpful by-products of the Court's position in *Cothorn*. For one thing there will be no need for case-by-case determination of the length of time before an absence becomes "much prolonged." Moreover, trial counsel will now have added incentive to search for available evidence in connection with desertion charges where a lengthy absence is involved.<sup>64</sup>

One of the most important "presumptions" is that of the regularity of performance of official duties ; indeed, this "presumption" is a foundation for admitting official records in evidence as an exception to the hearsay rule.<sup>65</sup> According to the Manual for Courts-Martial, there is only a "justifiable inference" that official duties are properly performed.<sup>66</sup> Yet, as early as *United States v. Masusock*, Judge Latimer, discussing the "legal presumption of regularity in the conduct of governmental affairs," wrote for a unanimous Court :

In the absence of a showing to the contrary, this court *must* presume that the Army and its officials carry out their administrative affairs in accordance with regulations and that morning reports reach the level of other official documents.<sup>67</sup>

In *United States v. Taylor*,<sup>68</sup> a similar remark is made about "a rebuttable presumption" of regularity, and *Masusock* is cited approvingly. Then, in *United States v. Bennett*,<sup>69</sup> both of these cases, along with the Manual, are cited for the proposition that, "In light of the presumption of regularity, we believe the court-martial could reasonably have inferred that on November 12, 1952, an effort was made to distribute to the accused a copy of special orders . . . ." As matters stand, it is unclear whether the "presumption" of regularity is only a permissible inference. Moreover, if the presumption of regularity is more than an inference, does it vanish completely when rebutting evidence is

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<sup>64</sup> In this connection consider the criticism by the Court of trial counsel's preparation in *United States v. Wilson*, 4 USCMA 3, 15 CMR 3 (1954). Cf. *United States v. Kitchen*, 5 USCMA 541, 18 CMR 166 (1955). The trial counsel is also given added incentive to prepare his case by the Court's rejection of a proposed presumption that an accused's unauthorized absence—once shown to have begun—will be presumed to have continued through the date alleged for the termination of the absence. *United States v. Lovell*, 7 USCMA 445, 22 CMR 235 (1956). This decision could hardly be considered an undue burden since, as a practical matter, it will require only that trial counsel introduce in evidence two morning report extracts, instead of only one.

<sup>65</sup> Cf. *United States v. Masusock*, 1 USCMA 32, 1 CMR 32 (1951).

<sup>66</sup> Par. 138a, MCM, 1951.

<sup>67</sup> 1 USCMA 32, 36, 1 CMR 32, 36 (1961). (Emphasis supplied.)

<sup>68</sup> 2 USCMA 389, 392, 9 CMR 19, 22 (1953).

<sup>69</sup> 4 USCMA 309, 313, 15 CMR 309, 313 (1954). (Emphasis supplied.)

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offered, or in that event does it still retain some weight as the basis for an inference?<sup>70</sup>

The presumptions which the Court of Military Appeals have upheld have been a major convenience to the Government in the proof of its cases before courts-martial. However, this is no ground for criticism since there is ample authority that the relative convenience to the parties, along with other factors, can be considered in creating presumptions or allocating the burden of producing evidence.<sup>71</sup> Indeed, under our adversary system, and with an accused protected by the privilege against self-incrimination, the failure to give suitable latitude for a court under certain circumstances to draw adverse inferences from an accused's failure to produce evidence might place an overwhelming burden on the prosecution. For the most part, the results reached by the Court of Military Appeals in connection with presumptions have represented a satisfactory balancing of the Government's interests and those of the accused.

### IV. EVIDENCE OBTAINED FROM AN ACCUSED PERSON

#### A. ARTICLE 31

The privilege against self-incrimination, granted in the Fifth Amendment to the United States Constitution and in similar provisions of most state constitutions, is not so universally acclaimed as some Americans may believe. In many foreign countries this privilege is not recognized at all, and some of our own jurists have conceded that fair trials can be accorded without assuring the accused a right to remain silent.<sup>72</sup> Even in this country a few dissenters have recently suggested that the privilege against self-incrimination might merit overhauling.<sup>73</sup>

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<sup>70</sup> In *United States v. Biesak*, *supra* note 52, it was held that, although the presumption of sanity is a rebuttable presumption and not merely a justifiable inference, after rebutting evidence is introduced it still has weight as a justifiable inference and the court members may be instructed by the law officer that they are free to consider this inference of sanity.

<sup>71</sup> See, *e.g.*, *Morrison v. California*, 291 U.S. 82 (1934), quoted by the Court in *United States v. Gohagen*, 2 USCMA 176, 7 CMR 51 (1953), and *United States v. Blau*, 5 USCMA 232, 17 CMR 232 (1954), and by Judge Latimer's dissent in *United States v. Lovell*, 7 USCMA 445, 22 CMR 235 (1956).

<sup>72</sup> *Cf.* *Twining v. New Jersey*, 211 U.S. 78 (1908), *Palko v. Connecticut*, 302 U.S. 319 (1937), and *Adamson v. California*, 332 U.S. 46 (1947). Apparently the privilege against self-incrimination is not one of the safeguards which was obtained for American service personnel under the NATO Status of Forces Treaty. See Everett, *Military Justice in the Armed Forces of the United States* 43 (1956).

<sup>73</sup> Mayers, *Shall We Amend the Fifth Amendment?* (1959).

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However, Congress, in enacting the Uniform Code of Military Justice, and the Court of Military Appeals, in applying and interpreting it, have for the most part appeared determined to expand, rather than contract, the privilege against self-incrimination. Article 31 of the Code,<sup>74</sup> in addition to prohibiting self-incrimination, dictates that :

No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Any "statement" obtained in violation of the warning requirement or by coercion is inadmissible in evidence.<sup>75</sup> The purpose of this warning requirement is to counteract any coercion to confess that might be implicit in military life.<sup>76</sup>

As the Court of Military Appeals has noted, Article 31 has a broader scope than does the Fifth Amendment,<sup>77</sup> and it embraces more than a right to decline to make any incriminating statement.<sup>78</sup> Of course, where there is a duty to speak or furnish evidence, Article 31 is not applicable.<sup>79</sup>

### B. WHO MUST WARN A SUSPECT UNDER ARTICLE 31?

Article 31(b), as quoted above, appears to require a warning only when a suspect is interrogated by a "person subject to" the Uniform Code.<sup>80</sup> However, the Court of Military Appeals interpreted the provisions of the Manual for Courts-Martial to cover persons not subject to the Code who were interrogating or requesting a statement in furtherance of any official military investigation.<sup>81</sup> Moreover, if anyone subject to the Code utilizes the services of another person not subject thereto "as an instru-

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<sup>74</sup> 10 U.S.C. § 831 (1958).

<sup>75</sup> UCMJ, art. 31(d), 10 U.S.C. § 831(d) (1958).

<sup>76</sup> *United States v. Aronson*, 8 USCMA 525, 25 CMR 29 (1957). See Everett, *Military Justice in the Armed Forces of the United States* 75-81 (1956).

<sup>77</sup> *United States v. Musgire*, 9 USCMA 67, 25 CMR 329 (1958).

<sup>78</sup> *United States v. Heaney*, 9 USCMA 6, 25 CMR 268 (1958) ; *United States v. Williams*, 2 USCMA 430, 9 CMR 60 (1953).

<sup>79</sup> *Cf. United States v. Haskins*, 11 USCMA 365, 29 CMR 181 (1960) ; *United States v. Howard*, 5 USCMA 186, 17 CMR 186 (1954).

<sup>80</sup> This category of persons has been recently narrowed by the Supreme Court, as is discussed extensively in Everett, *Military Jurisdiction Over Civilians*, 1960 *Duke L. J.* 366.

<sup>81</sup> *United States v. Grisham*, 4 USCMA 694, 16 CMR 268 (1954).

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ment for eliciting disclosures without warning," the Court has indicated that Article 31 would nonetheless be applicable.<sup>82</sup>

What is an official military investigation wherein any interrogator must give the Article 31(b) warning? In an airman's trial by court-martial for robbery, a Texas civilian policeman who had arrested the accused on the complaint of his victim testified about statements made to him by the accused. The Court of Military Appeals ruled that this policeman had not been acting for the military; and therefore he was under no duty to give any warning.<sup>83</sup> In *United States v. Holder*<sup>84</sup> the accused's statement had been made to an FBI agent, who had apprehended him as a deserter. Noting that a number of civil officials have authority to apprehend deserters,<sup>85</sup> the Court, over Judge Ferguson's dissent, ruled that the accused's statements were admissible in evidence despite the absence of an Article 31 warning "unless prior to the arrest, the Army interjected itself into the apprehension or in some way assumed direction and control of this agent outside the normal passing of information to the Bureau." Since the basic purpose of Article 31 was to counteract any subtle pressures to confess that might be inherent in the military life, and since the FBI agent was not aided by such pressures, the *Holder* case did not present the evil that led to the passage of Article 31. Accordingly, the Court was justified in adopting an interpretation of the Code and Manual that would not necessitate the giving of an Article 31 warning under these circumstances.

In *United States v. Gibson*,<sup>87</sup> the Court passed on the admissibility of an incriminating statement made by the accused to an undercover agent who had been cooperating with military investigators but was the accused's fellow prisoner. For obvious reasons the obtaining of the accused's verbal confession had not been preceded by any warning of his right to silence, but it is equally obvious that there was no subtle or implicit coercion to confess, as there might be in the case of a serviceman being interrogated by his superior officer or by a military investigator.

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<sup>82</sup> *Id.* at 696, 16 CMR at 270.

<sup>83</sup> *United States v. Dial*, 9 USCMA 700, 26 CMR 480 (1958). Texas is the only American civilian jurisdiction which requires that an accused be warned before he is interrogated. The Court of Military Appeals considered that chaos would result if it attempted to take the varying state rules of evidence into account in ruling on admissibility in courts-martial.

<sup>84</sup> 10 USCMA 448, 28 CMR 14 (1959).

<sup>85</sup> See UCMJ, art. 8, 10 U.S.C. § 808 (1958).

<sup>86</sup> 10 USCMA at 451, 28 CMR at 17.

<sup>87</sup> 3 USCMA 746, 14 CMR 164 (1954). The opinions in this case provide some excellent background for interpreting Article 31.

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Indeed, a more voluntary statement by an accused could hardly be conceived than the one that had been made to this undercover operative. Chief Judge Quinn and Judge Brosman took the position that, in light of the intent of Article 31(b), no statutory warning was required here; Judge Latimer criticized their interpretation as “judicial legislation.” Whether this criticism is correct, it is apparent that Judge Latimer’s interpretation would have handcuffed the use of undercover agents and informers, one of the most effective means of detection.

A much more recent case is *United States v. Souder*,<sup>88</sup> which concerned an accused who had attempted to sell a stolen accordion in a local music store. By chance, the store was being operated by a naval officer in civilian attire, whose military status apparently was not known to the accused and who asked several questions designed to elicit incriminating admissions. Judge Ferguson, writing the opinion of the Court but without any citation of the *Gibson* case, concluded that Article 31(b) did apply and that a warning was required. Chief Judge Quinn concurred, although he cited *Gibson* for the proposition that, “There are some situations to which Article 31 does not apply, even though the participants are persons subject to the Uniform Code.”<sup>89</sup> Judge Latimer also accepted the applicability of the warning requirement.<sup>90</sup>

Apparently the Court did not intend to overrule the *Gibson* case, but it is hard to reconcile the results in the two cases. Moreover, there seems little basis for including *Souder* within the protection of Article 31(b) since there was no pressure of any sort for him to confess, no influence of military rank; instead he apparently thought that he was dealing with a civilian businessman. Is not the purpose of Article 31 best served by considering **how** the situation appeared to the accused at the time of his statement?

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<sup>88</sup> 11 USCMA 59, 28 CMR 283 (1959).

<sup>89</sup> *Id.* at 61, 28 CMR at 285. The Chief Judge also cited *United States v. Dandaneau*, 5 USCMA 462, 18 CMR 86 (1955), for this same proposition. There the accused’s statements to his squadron commander were deemed not subject to the warning requirement of Article 31(b); yet the chance of subtle pressures to confess appears to have been **much** greater than was the case in *Souder*.

<sup>90</sup> He distinguished cases like *United States v. Johnson*, 5 USCMA 795, 19 CMR 91 (1955), which held that the requirements of Article 31 did not apply where an interrogator—there the victim of the crime—was acting in a personal, rather than an “official,” role. A similar doctrine is applied in search and seizure cases where the search is performed by one who is acting as a private individual and not in an official capacity. See, *e.g.*, *United States v. Volante*, 4 USCMA 689, 16 CMR 263 (1954), where it was quite unclear in what capacity the person making the search had acted.

C. *WHO IS ENTITLED TO A WARNING?*

In *United States v. Wilson*<sup>91</sup> a military police sergeant went to an area where a shooting had reportedly occurred, and, approaching a group of soldiers standing around there, asked who had done the shooting. Two men responded that they had “shot at the man.” When these admissions were offered at their trial for premeditated murder, they objected to the admissibility of their statements under Article 31 because they were not preceded by a warning of the right to remain silent. Judge Brosman and Chief Judge Quinn concluded that, although these men had not been (“accused” and under previous law would not have had any right to a warning, they should be considered ((suspects)) under Article 31(b) of the Uniform Code.

In *United States v. Haskins*,<sup>92</sup> the Court of Military Appeals considered the case of an airman convicted of twenty specifications of larceny, who had been in charge of the Air Force Aid Society office at his base in Georgia, but had been removed from this post and placed in confinement because of suspicions that he had misappropriated certain funds from the base theater, where he worked in off-duty hours. A lieutenant, who was in charge of the Air Force Aid Society Fund, had the accused brought from the stockade for an interview about certain missing ledger cards. The interview was not prefaced by an Article 31 warning, and, in the course thereof, the accused at the officer’s request produced the missing cards. The majority opinion concedes that under the circumstances “some doubt” might arise as to whether accused had misappropriated funds from the Air Society Fund, but adds:

But that is not the sort of suspicion which Congress had in mind when it enacted Article 31, for it provides that the interrogator must inform one suspected of an offense of the nature of the accusation. The suspicion must have crystallized to such an extent that a general accusation of some recognizable crime can be framed. Here it had not, and, therefore, it was impossible to apprise the accused of the nature of the charge.<sup>93</sup>

On this point Judge Ferguson’s dissent seems to have the better of the argument, for most persons, upon learning that an accused had been confined on suspicion of stealing certain funds to which he had access and that certain vital documents concerning a different fund over which he had custody were inexplicably miss-

<sup>91</sup> 2 USCMA 248, 8 CMR 48 (1953).

<sup>92</sup> 11 USCMA 365, 29 CMR 181 (1960).

<sup>93</sup> *Id.* at 369, 29 CMR at 185.

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ing, would strongly have suspected that he had embezzled some of the funds with which he was entrusted. At the least, the emphasis here seems different from that of the *Wilson* case, and the Court may be moving closer to the English practice, under which a policeman is required to "caution" a suspect only after his suspicions have definitely crystallized and he is ready to prefer charges against the suspect.<sup>94</sup>

In *Haskins* the majority is on safer ground when it states that the accused was under a duty to produce the missing ledger cards belonging to the Government of which he was custodian. Thus he was not entitled to a warning that he could permissibly decline to do what, in fact, he could have been lawfully ordered to do.<sup>95</sup> Judge Ferguson argued that any duty to produce the records had been terminated when the accused was relieved of his duties as custodian; he reasoned that the duty to account for documents ends when possession ends, and that possession of the ledger cards ended when the accused's responsibility was terminated. In this regard, perhaps it could be contended that possession of the ledger cards was still in *Haskins*, as he was the only one who knew where they were hidden.<sup>96</sup>

In *United States v. Vail*<sup>97</sup> the accused had been apprehended in the course of committing larceny of certain government property. At the time the provost marshal, who was participating in the apprehension, asked the accused to show him where he had put certain stolen property. When the evidence obtained by means of the accused's answer was offered in evidence, his counsel objected on the grounds that it had been obtained without any warning in violation of Article 31(b). Where the statement

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<sup>94</sup> With reference to the English practice, see Judge Brosman's concurring opinion in *United States v. Gibson*, 3 USCMA 746, 754, 14 CMR 164, 172 (1954). The present writer discussed the English practice with some ranking English police officials and concluded that it bears considerable resemblance to the requirement under former Article of War 24 that an "accused" be warned, in that suspicions must have crystallized to a considerable extent. Cf. *United States v. Wilson*, 2 USCMA 248, 8 CMR 48 (1953), for a discussion of the expansion of the warning requirement effected by Article 31. The English police officials to whom this writer explained the warning requirement under Article 31 appeared somewhat surprised by its broad scope.

<sup>95</sup> The Court relied especially on *Wilson v. United States*, 221 U.S. 361 (1911), and *Davis v. United States*, 328 U.S. 582 (1946), both of which involved custodians of documents.

<sup>96</sup> Here one must consider a variety of doctrines about constructive possession, abandonment, and the like. One might ask what is the basis of an inference of embezzlement from a failure to account if, as Judge Ferguson argues, there is no duty to account once the accused has been relieved of his duties as custodian.

<sup>97</sup> 11 USCMA 134, 28 CMR 358 (1960).

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follows so closely upon the offense and apprehension, the Court, with Judge Ferguson dissenting, reasoned that there is no requirement to warn the accused under Article 31(b). Chief Judge Quinn correctly points out that, under such circumstances, an accused will be aware of what offense he is suspected, as well as that whatever he says may be used as evidence against him. However, the Chief Judge does not discuss whether the accused will know that he has a right to remain silent. And, so far as can be inferred from the wording of Article 31, an accused's right to remain silent is just as applicable when he is caught in the perpetration of the crime and questioned immediately as at any other time. Perhaps the reference in Article 31(b) to interrogation or requesting a statement was designed to suggest a formal sort of interrogation, but any such interpretation can hardly be reconciled with the *Wilson* case.

### D. WHAT IS A STATEMENT?

The Court of Military Appeals quickly recognized that, under some circumstances, an accused's actions can speak louder, and **be** more incriminating, than his words. Accordingly, the Court applied the Uniform Code's warning requirement to various types of non-verbal admissions and included these admissions within the term "statement," as it appears in Article 31(b). For instance, in *United States v. Taylor*,<sup>98</sup> it was held that a suspect should not, without receipt of warning, have been asked to point out his clothing to investigators who were inquiring into his possible possession of marijuana. In *United States v. Nowling*,<sup>99</sup> it was ruled a violation of Article 31(b) for an air policeman to require an airman to produce his pass when he strongly suspected that the airman's own pass had been "pulled," and that any pass in the airman's possession was unauthorized. In that case, however, the Court did emphasize that it did not hold "that every routine or administrative check by an air policeman of a serviceman's pass or identification card must first be preceded by an Article 31 warning."<sup>100</sup>

As the Manual for Courts-Martial recognizes, silence in the face of an accusation may sometimes be construed as an admission of

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98 5 USCMA 178, 17 CMR 178 (1954); *accord*, *United States v. Williams*, 10 USCMA 578, 28 CMR 144 (1959); *United States v. Holmes*, 6 USCMA 151, 19 CMR 277 (1955). But *see* *United States v. Morse*, 9 USCMA 799, 27 CMR 67 (1958).

<sup>99</sup> 9 USCMA 100, 25 CMR 362 (1958).

<sup>100</sup> *Id.* at 103, 25 CMR at 365.

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guilt.<sup>101</sup> However, if military investigators could use in evidence the silence of an accused who, in the exercise of his right under Article 31(b), has chosen not to give a statement, his rights under Article 31(b) could be undercut. Accordingly, the Government is not allowed to present evidence that an accused, pursuant to Article 31, had refused to answer questions.<sup>102</sup> Quite frequently evidence—for example, evidence of prior misconduct—can be brought out by cross-examination of an accused when it could not have been independently offered by the prosecution. If an accused takes the stand, can he be cross-examined about his failure to make a statement before trial as a means of showing that his trial testimony is a recent fabrication? There is considerable authority to the affirmative,<sup>103</sup> but the Supreme Court's decision in *Grunewald v. United States*<sup>104</sup> probably sounds the death-knell for such cross-examination in either federal civilian courts or in courts-martial.<sup>105</sup>

When a suspect is asked to consent to a search and seizure, does the warning requirement of Article 31(b) have any applicability? In *United States v. Insani*,<sup>106</sup> the Court recognized that, "Consent to a search is by itself in no way incriminating. It relates only to the preliminary question of the lawfulness of the search."<sup>107</sup> It would be a distortion of Article 31(b) to apply it to a request for consent to search since such consent could hardly be deemed a "statement regarding" the offense. However relevant it may be to admissibility of evidence, the granting of consent to search cannot in any way be used by the court members, the triers of fact, to aid in inferring guilt. Indeed, the granting of a consent to search, if it could be deemed to have any relevance to guilt or innocence, would seem to imply a confidence of the suspect in his innocence and so would be the opposite of incriminatory. Although Article 31(b) gives a protection that extends beyond

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<sup>101</sup> Par. 140a, MCM, 1951, at p. 251. See also *United States v. Armstrong*, 4 USCMA 248, 15 CMR 248 (1954).

<sup>102</sup> *United States v. Kowert*, 7 USCMA 678, 23 CMR 142 (1957).

<sup>103</sup> See *United States v. Sims*, 5 USCMA 115, 17 CMR 115 (1954), and cases cited therein. See also Everett, *Military Justice in the Armed Forces of the United States* 86 (1956).

<sup>104</sup> 353 U.S. 391 (1957).

<sup>105</sup> The Court of Military Appeals does not invariably consider itself bound by the Supreme Court's opinions on evidence. See, e.g., *United States v. Mims*, 8 USCMA 316, 24 CMR 126 (1957). It seems clear, however, that, as there is no specific authority in the Manual or elsewhere for allowing such cross-examination of an accused, Chief Judge Quinn and Judge Ferguson would adopt the Supreme Court's view.

<sup>106</sup> 10 USCMA 519, 28 CMR 85 (1959).

<sup>107</sup> *Id.* at 521, 28 CMR at 87.

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the scope of the privilege against **self-incrimination**,<sup>108</sup> its purpose does not require an interpretation that requests for consent to search must be preceded by a warning to an accused of his right to remain silent.

### *E. HANDWRITING AND VOICE EXEMPLARS*

The Manual for Courts-Martial states that a suspect may be required "to make a sample of his handwriting" or "to utter words for the purpose of voice **identification**."<sup>109</sup> This provision is based upon the doctrine of "testimonial compulsion" enunciated by the Supreme Court in *Holt v. United States*.<sup>110</sup> However, the Court of Military Appeals reasoned that to order an accused to perform "an affirmative conscious act," such as writing an exemplar for handwriting identification or reciting some words for voice identification, infringes on the prohibition against compulsory self-incrimination in Article 31 (a) of the Uniform Code.<sup>111</sup>

Having ruled that handwriting and voice samples are subject to the privilege against self-incrimination, the Court of Military Appeals was called upon to consider whether such samples could be deemed "statements" within the meaning of Article 31(b). At first the Court refused to apply the warning requirement to these samples.<sup>112</sup> After Judge Ferguson joined the Court, the previous decisions on this point were overruled and a warning requirement was **imposed**;<sup>113</sup> it was maintained that "a liberal and enlightened, rather than a narrow and grudging, application of Article 31 . . . is best calculated to insure to the military the preservation of our traditional concepts of justice and fair **play**."<sup>114</sup> On balance, it is believed that the Court of Military

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<sup>108</sup> *United States v. Williams*, 2 USCMA 430, 9 CMR 60 (1953); *but cf.* *United States v. Heaney*, 9 USCMA 6, 25 CMR 268 (1958).

<sup>109</sup> Par. 150b, MCM, 1951, at p. 284.

<sup>110</sup> 218 U.S. 245 (1910).

<sup>111</sup> *United States v. Greer*, 3 USCMA 576, 13 CMR 132 (1953); *United States v. Eggers*, 3 USCMA 191, 11 CMR 191 (1953) (with extensive citation of authority); *United States v. Rosato*, 3 USCMA 143, 147, 11 CMR 143, 147 (1953).

<sup>112</sup> *United States v. McGriff*, 6 USCMA 143, 19 CMR 269 (1955); *United States v. Ball*, 6 USCMA 100, 19 CMR 226 (1955).

<sup>113</sup> *United States v. Minnifield*, 9 USCMA 373, 26 CMR 163 (1958).

<sup>114</sup> *Id.*, at 379, 26 CMR at 159. Analysing these decisions, the author has previously commented: "Certainly the handwriting or voice evidence that the investigator is seeking does not depend for its reliability on anything within the conscious control of the accused. . . . Yet it is clear that the conscious mind does play some role in producing either a verbal or written utterance, and that some characteristics of either writing or speech can be altered—even if not enough to deceive the qualified expert. Therefore, consciously or un-

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Appeals was right in its conclusion that handwriting and voice samples are within the scope of Article 31(a), which prohibits compulsory self-incrimination. However, handwriting and voice samples do not involve some of the dangers and abuses present where an accused is compelled to testify;<sup>115</sup> therefore, Congress could reasonably have concluded that the protection of an Article 31(b) warning was not required in such instances. Since this requirement of warning is purely statutory and since the word "statement" does not readily suggest a handwriting or voice exemplar, the original interpretation of the Court of Military Appeals, whereunder no warning to the suspect was necessary, is, at least, supportable, and perhaps, in deference to *stare decisis*, that interpretation should not have been overruled.

### F. BODY FLUIDS

The extraction of certain body fluids from a suspect can be a very useful adjunct to an investigation. For instance, blood tests are useful in detecting intoxication and have been authorized for that purpose by statutes in many jurisdictions, and examinations of urine specimens can indicate whether narcotics have been used.<sup>116</sup> When these methods of scientific investigation are used without the consent of the suspect, the admissibility of the results may be attacked along three different lines: (a) compulsory self-incrimination in violation of Article 31; (b) unreasonable search and seizure; and (c) deprivation of "due process." For the most part the decisions of the Court of Military Appeals have centered on "due process" and self-incrimination.

The "due process" objection depends particularly on the Supreme Court's decision in *Rochin v. California*,<sup>117</sup> where the stomach-pumping of a narcotics suspect, who, when apprehended, had swallowed the drug, was deemed to be "conduct that shocks the conscience" and thus a violation of "due process." The Court

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consciously, the suspect may be impelled to seek to disguise his writing or speech when an identification is attempted thereby. It is possible that any such disguise may itself be treated by the finder of fact as an admission of guilt—in which case, the suspect *has* testified against himself. More important, the placing of the suspect in the position where he must choose between seeking to deceive the investigator and increasing the chance that he will be convicted is probably one of the very things against which the privilege against self-incrimination is directed." Everett, *New Procedures of Scientific Investigation and the Protection of the Accused's Rights*, 1959 Duke L. J. 32 at 54-55. Some of the opposing considerations are also presented.

<sup>115</sup> *Zbid.*

<sup>116</sup> Everett, *supra* note 114 at 36-44.

<sup>117</sup> 342 U.S. 166 (1952).

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emphasized that the trustworthiness of the evidence obtained from Rochin's stomach did not vitiate the "due process" objection, just as an involuntary confession remains inadmissible even if independently corroborated.

Later, in *Breithaupt v. Abram*,<sup>118</sup> the Supreme Court determined that bloodtesting is a far cry from stomach pumping. Breithaupt had been involved in an automobile accident in New Mexico, after which, while he lay unconscious in a hospital emergency room, a sample of about twenty cubic centimeters of blood was withdrawn by an attending physician by use of a hypodermic needle. On the basis of subsequent laboratory analysis of this sample, an expert witness testified that Breithaupt was intoxicated at the time of the collision, and this in turn led to his conviction for manslaughter. Justice Clark, writing for the majority, emphasized that, with the blood test procedure so routine in our everyday life, there is nothing "brutal" or "offensive" in the taking of a sample of blood when done under the protective eye of a physician. Of course, the Supreme Court was concerned here only with a "due process" attack under the Fourteenth Amendment and not with a determination whether similar conduct by federal investigators concerned with a federal crime would have violated the Fifth Amendment privilege against self-incrimination.<sup>119</sup>

The Court of Military Appeals first encountered the problem of body fluids in *United States v. Williamson*.<sup>120</sup> The accused soldier, after drinking heavily, had received I hypodermic injection in a Japanese house and, almost immediately thereafter had lapsed into a coma. Taken in an ambulance to a hospital, he was examined by an Army medical officer, and, while he was still unconscious, a specimen of urine was extracted from his bladder by means of a catheter. The results of the analysis, testified to before the court-martial, help demonstrate Williamson's guilt of a narcotics offense.

Judge Latimer reasoned that the privilege against self-incrimination was inapplicable to the extraction of body fluids and that the facts revealed no deprivation of due process. Judge Brosman, concurring with Judge Latimer, stated his view that compulsory catheterization of a conscious accused over his protest would

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<sup>118</sup> 352 U.S. 432 (1957).

<sup>119</sup> See *United States v. Musguire*, 9 USCMA 67, 68, 25 CMR 329, 330 (1958).

<sup>120</sup> 4 USCMA 320, 15 CMR 320 (1954); see also *United States v. Jones*, 5 USCMA 537, 18 CMR 161 (1965).

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transgress due process, but that the catheterization of Williamson, who at the time had already been rendered unconscious by the narcotic and who was in the hands of a qualified physician, did not infringe the accused's rights. Insofar as Judge Brosman was concerned, no privilege against self-incrimination applied to body fluids, nor was the furnishing of a urine specimen to be considered a "statement" under Article 31 (b) .

Chief Judge Quinn wrote a forceful dissent wherein he invoked not only the Uniform Code of Military Justice, but also "the safeguards of the Bill of Rights" and "the protections of both natural and divine law." He noted that in the handwriting cases the Court had gone beyond the doctrine of testimonial compulsion, and to him the use of a catheter seemed analogous to the stomach-pumping in the *Rochin* case. Of course, as Chief Judge Quinn noted in another case decided at the same time, the accused could not object to a court-martial's consideration of a urinalysis if the urine specimen had been "obtained with his consent" and if "there was no interrogation of any kind."<sup>121</sup>

The Court of Military Appeals, as initially constituted, also ruled that the warning requirements of Article 31(b) were inapplicable to requests that an accused furnish a urine specimen.<sup>122</sup> According to Judges Latimer and Brosman, that provision was "limited by its terms to testimonial utterances of an accused, either oral or written." The Chief Judge, on the other hand, seems to have considered that "statement" would include urine specimens, just as it would include handwriting samples.<sup>123</sup> In *United States v. Barnaby*,<sup>124</sup> Judges Latimer and Brosman were apparently agreed that a suspect could, in some form, be ordered to provide a urine specimen for investigators, Chief Judge Quinn considered that the use of an order to require the accused to furnish evidence, even evidence in the form of a body fluid for analysis and irrespective of the form of the order, would invade

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<sup>121</sup> *United States v. Booker*, 4 USCMA 335, 338, 15 CMR 335, 338 (1954) (concurring in result).

<sup>122</sup> *United States v. Booker*, *supra* note 121.

<sup>123</sup> Chief Judge Quinn only concurred in result in *United States v. Booker*, *supra*. Later in *United States v. Ball*, 6 USCMA 100, 19 CMR 226 (1955), he explained that, in dealing with handwriting samples, he considered that, when read as a whole, Article 31 required a broad interpretation of "interrogate" and "statement" as they are used in connection with the warning requirement.

<sup>124</sup> 5 USCMA 63, 17 CMR 63 (1954). To avoid a defense of physical inability in any prosecution for failure to obey, an order designed to have the accused furnish a urine specimen should be in the form of an order that he not urinate except in a designated receptacle. See Everett, *Military Justice in the Armed Forces of the United States* 83 (1956).

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the area protected by the privilege against compulsory self-incrimination.

With the arrival of Judge Ferguson on the Court, the approach to the problem of body fluids changed. The first case of this type in which he participated was *United States v. Jordan*<sup>125</sup> where, relying on previous statements of the Court, a squadron commander had ordered the accused that “the next time he urinated he was to give the OSI a specimen of his **urine.**”<sup>126</sup> According to Chief Judge Quinn, reversing the conviction, “to compel a person against his will to produce his urine for the purpose of using it, or an analysis of it, as evidence against him in a court-martial proceeding, violates Article 31 of the Uniform Code.”<sup>127</sup> Judge Ferguson, refraining from overruling the *Barnaby* decision, centered his attention on whether the order was a lawful command under Article 90 of the Uniform Code.<sup>128</sup> According to him, it was not, since it violated Article 31(a)’s prohibition of compulsory self-incrimination—which Judge Ferguson would not limit to testimonial utterances. Judge Latimer, of course, dissented.<sup>129</sup>

In *United States v. Musquire*,<sup>130</sup> the accused, who apparently was suspected of drunkenness, had been ordered “to remove his shirt and submit to a blood alcohol test,” and, upon his refusal to comply, he was tried for willful disobedience. Chief Judge Quinn, writing for himself and Judge Ferguson, concluded that this order was not a lawful one because:

Article 31 of the *Code* provides that no person subject to the *Code* is required to make a statement regarding an offense of which he is accused or suspected, and cannot be compelled to do so. The word ‘statement’ includes both verbal utterances and actions. *United States v. Holmes*, 6 USCMA 151, 19 CMR 277. Article 31 is wider in scope than the Fifth Amendment. As we pointed out recently in *United States v. Aronson*, 8 USCMA 525, 25 CMR 29, Article 31 is ‘intended to protect persons accused or suspected of crime who might otherwise be at a disadvantage because of the military rule of obedience to proper authority.’<sup>131</sup>

In connection with this conclusion, it should be pointed out that the *Holmes* case, which is cited by the Chief Judge, does hold that conduct can be included within the word “statement,” but it in-

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<sup>125</sup> 7 USCMA 452, 22 CMR 242 (1957).

<sup>126</sup> See Everett, *supra* note 124.

<sup>127</sup> 7 USCMA at 454, 22 CMR at 244.

<sup>128</sup> 10 U.S.C. § 890 (1958).

<sup>129</sup> See also his dissent in *United States v. McCann*, 8 USCMA 675, 25 CMR 179 (1958).

<sup>130</sup> 9 USCMA 67, 25 CMR 329 (1958).

<sup>131</sup> *Id.* at 68, 25 CMR at 330.

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volves a different kind of conduct. Holmes, without being warned of his right to remain silent, had identified certain clothing as his own, and, because this clothing smelled of gasoline, he was linked to an attempted larceny of Government gasoline. The accused's action in pointing out his clothing was the "equivalent" of language and, when taken with other evidence, was itself incriminatory. On the other hand, submission to a blood test is in no way incriminatory, and it is impossible to conceive how a willingness to submit to such a test would be relevant to a court-martial's determination of guilt or innocence. In this respect it is like consent to a search and seizure,<sup>132</sup> which necessarily has no tendency to show guilt. In short, the only case cited in *Musquire* to support the reinterpretation of the term "statement" in Article 31 does not appear applicable to the situation there before the Court.

In *United States v. Forslund*<sup>133</sup> results of a urinalysis were ruled inadmissible because they were the product of compulsion, in the form of an order to the accused to provide urine specimens. In a later case the urine specimens were also held to have been furnished involuntarily since, although the accused had apparently furnished the specimens voluntarily, the evidence showed that he was in no condition to make a rational choice.<sup>134</sup>

The most recent case involving body fluids is *United States v. Hill*,<sup>135</sup> where the Court of Military Appeals apparently considered that an order to provide a sample of blood for clinical purposes is valid, although admissibility of the blood test results was also predicated on a conclusion that the accused had consented to the blood test. This case purports to be applying the view of a previous case<sup>136</sup> that, in light of its purposes, Article 31(b) does not apply to a medical officer obtaining information regularly required in the performance of his duties in treating patients.

Perhaps this medical purpose doctrine will give military investigators some desired leeway. For instance, where an accused is unconscious, as was the case in *United States v. Williamson*<sup>137</sup> and in *Breithaupt v. Abrams*,<sup>138</sup> it is quite probable that a qualified

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<sup>132</sup> See *United States v. Insani*, 10 USCMA 519, 28 CMR 85 (1959), which has been discussed *supra*.

<sup>133</sup> 10 USCMA 8, 27 CMR 82 (1958).

<sup>134</sup> *United States v. McClung*, 11 USCMA 754, 29 CMR 570 (1960).

<sup>135</sup> 12 USCMA 9, 30 CMR 9 (1960).

<sup>136</sup> *United States v. Baker*, 11 USCMA 313, 29 CMR 129 (1960). There Judge Ferguson's dissent suggests convincingly that Baker was not being examined in the regular course of treatment. Incidentally, military law does not recognize the patient-physician privilege.

<sup>137</sup> 4 USCMA 320, 15 CMR 320 (1954).

<sup>138</sup> 352 U.S. 432 (1957).

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physician called in to “treat” the accused would need to know the cause of the unconsciousness, and in performing the usual scientific investigations to discover the cause, he may obtain incriminating evidence.

So far as Article 31(b) and its warning requirements are concerned, Chief Judge Quinn and Judge Ferguson would apparently include body fluids within the term “statement” and thus require some form of warning to the accused before he is asked to provide a blood or urine specimen. The arguments for and against this result are parallel to those discussed in connection with the Court’s current position that handwriting and voice samples fall within Article 31(b).<sup>139</sup> Since handwriting samples require the affirmative action of the accused and are products of his will, they are more susceptible to being viewed as “statements” than are an accused’s blood and urine, but, if one shares the Court’s premise that blood and urine specimens involve self-incrimination, then he may conclude that the purposes of Article 31 require a very broad interpretation of its warning requirements.

In *Musguire* the Court of Military Appeals emphasized that it was considering solely the lawfulness of the order given to the accused and was not deciding whether evidence of a blood test obtained without the accused’s consent is admissible.<sup>140</sup> Thus, a determination of whether body fluids are subject to the privilege against self-incrimination was deemed unnecessary. However, the *Forstlund* case would seem to imply that the results of either urine or blood tests are inadmissible under Article 31 if the accused has not freely consented to provide the specimens that were tested.

Why should such protection be granted to an accused? Apparently the Fifth Amendment does not require it. A half century ago in *Holt v. United States*, Justice Holmes wrote for a unanimous Supreme Court :

But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort *communications* from him, not an exclusion of his body as evidence when it may be material.<sup>141</sup>

The processes by which body tissue, blood, and urine are formed are involuntary and do not concern the will; in no way can they be construed as “communications.” Blood and urine specimens

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<sup>139</sup> See the discussion of *United States v. Minnifield*, 9 USCMA 373, 26 CMR 163 (1958) *supra*. See also Everett, *New Procedures of Scientific Investigation and The Protection of the Accused’s Rights*, 1959 Duke L. J. 32-77.

<sup>140</sup> 9 USCMA at 68, 25 CMR at 330.

<sup>141</sup> 218 U.S. 245,252-53 (1910). (Emphasis supplied.)

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can be obtained without the moral discomfort to which a suspect is subjected when called upon to make the choice between falsifying to protect himself and telling the truth; instead he has no choice because there is no chance for disguise or concealment. Of course, since concealment is impossible, a suspect cannot incriminate himself by seeking unsuccessfully to conceal evidence.<sup>142</sup> Insofar as extraction of the body fluid involves pain for an accused, as with stomach-pumping or catheterization, problems of “due process” may be involved, but not self-incrimination. Even if Article 31 of the Uniform Code was intended to go further than the Fifth Amendment,<sup>143</sup> that Article seems primarily concerned with self-incrimination, and there seems little reason to apply it to urine or blood specimens if they fall outside the Fifth Amendment concept of self-incrimination.

What does this analysis indicate with respect to the lawfulness of orders to submit to blood tests or provide urine specimens? In this connection one might consider a situation where, although the investigators do not wish to obtain body fluids, an accused’s person is involved. An example might be the obtaining of the accused’s fingerprints for comparison,<sup>144</sup> or, as in *Holt v. United States*,<sup>145</sup> having an accused try on certain garments to see if they fit. If the accused is a serviceman and refuses to be fingerprinted, or declines to try on the garment, what remedy is available to the investigator? Can an order be given the accused that he submit to fingerprinting or permit the garment to be tried on him? If such an order is given, is it an order requiring the accused to furnish evidence, and, therefore, unlawful under the rationale that the Court of Military Appeals has used for urine and blood specimens? If such an order is not to be used, shall the investigators proceed by force to hold the accused in place while he is fingerprinted or fitted with the garment? In that event, problems of “due process” might be created. More important, it seems undesirable to require that the investigators use physical, instead of moral, force as a means of performing their investigation.

It appears far better to hold from the outset that lawful orders can be given for a suspect to submit to certain scientific tests such

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<sup>142</sup> In this respect the situation is different from that of the handwriting samples where there is some possibility of disguising the writing—and this effort to disguise may itself be incriminating.

<sup>143</sup> This was stated in *United States v. Musquire*, 9 USCMA 67 at 68, 26 CMR 329 at 330.

<sup>144</sup> Everett, *supra* note 139 at 45–53.

<sup>145</sup> 218 U.S. 245 (1910).

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as blood tests. On one side of the dividing line, and therefore lawful, would be those orders whose subject matter does not provide the suspect with a possible choice between attempts at disguise, on the one hand, and incrimination, on the other hand—orders whose manner of performance would, like the granting of a consent to search, be insusceptible of rational use as evidence of guilt. On the other side of the line would be those orders that require an act which might involve a choice between disguise and incrimination, and whose manner of performance might itself tend to support an inference of guilt. The position originally taken by a majority on the Court of Military Appeals seems a sound one; the Court's present position, based on a novel concept of self-incrimination, gives too little heed to the interest of the public in the detection of offenders.

### G. TRUTH DRUGS AND LIE DETECTORS

In the popular press, among the more publicized instrumentalities in the detection of criminals are the so-called "truth serum" drugs such as scopolamine, sodium amytal, and sodium pentothal, and the "lie detector," or polygraph, which attempt to discover deception by means of graphs which record physical response associated with answering questions about a crime.<sup>146</sup> In courts-martial the Government cannot compel a suspect to submit to these methods of detection, and the evidence obtained by such tests is inadmissible.<sup>147</sup> On the other hand, the prior use of these techniques with an accused's consent does not render inadmissible his subsequent voluntary confession,<sup>148</sup> and a reference to possible use of these measures can occasionally be useful in obtaining an admissible, voluntary confession.<sup>149</sup>

The most interesting cases before the Court of Military Appeals have concerned the efforts of accused persons to use in evidence the favorable results of such tests. Despite the accused's requests, apparently neither truth serum nor lie detector results will be received in evidence by a court-martial.<sup>150</sup> However, either may permissibly be considered by a convening authority in his review of the case,<sup>151</sup> and, of course, a defense counsel will want to make

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<sup>146</sup> Everett, *supra* note 139 at 56-71.

<sup>147</sup> United States v. Ledlow, 11 USCMA 659, 29 CMR 475 (1960).

<sup>148</sup> Everett, *supra* note 139 at 63.

<sup>149</sup> United States v. McKay, 9 USCMA 527, 26 CMR 307 (1958).

<sup>150</sup> United States v. Massey, 5 USCMA 614, 18 CMR 138 (1956) ; United States v. Bouchier, 5 USCMA 15, 17 CMR 15 (1954).

<sup>151</sup> United States v. Massey, *supra* note 150.

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sure that favorable results are brought to the convening authority's attention.

### H. WHO RULES ON THE ADMISSIBILITY OF ACCUSED'S STATEMENT?

Article 51(b)<sup>152</sup> of the Uniform Code provides that the ruling of the law officer is "final" as to any "interlocutory question" except a motion for a finding of not guilty or sanity. In *United States v. Dykes*,<sup>153</sup> Judge Brosman, writing the opinion of the Court in which Chief Judge Quinn concurred, reasoned that under this provision of the Code the ruling of the law officer admitting an accused's confession in evidence was "final" and could not be reversed by the members of the court-martial. Under this view the Code prevailed over a provision of the Manual for Courts-Martial which seemed somewhat in conflict therewith.<sup>154</sup> Under the rule of the *Dykes* case—a rule for which Judge Brosman marshalled impressive precedent—the members of the court-martial would be instructed that the law officer's ruling would be final as to whether the accused's statement could be considered as evidence, but any evidence of involuntariness or failure to give the warning required by Article 31(b) could be considered by them in determining what weight to give the statement.<sup>155</sup>

After Judge Ferguson joined the Court, this allocation of functions was swiftly repudiated in *United States v. Jones*.<sup>156</sup> In his view courts-martial should instead follow what he deemed "the prevailing Federal rule" whereunder a jury, the trier of fact, is not free to consider a confession if that confession is deemed involuntary. It is not clear that this is the "prevailing" Federal rule.<sup>157</sup> Certainly the principle advocated by Judge Ferguson in *Jones*, an opinion concurred in outright by Chief Judge Quinn, who had also concurred outright with Judge Brosman in *Dykes*, had gained no new vogue in the Federal courts between the dates of these two cases. And why should the Federal rule, whatever it might be, make any difference, since the *Dykes* result rested on the wishes of Congress as expressed in Article 51(b) of the Uniform Code?

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<sup>152</sup> 10 U.S.C. § 851(b) (1958).

<sup>153</sup> 5 USCMA 735, 19 CMR 31 (1955).

<sup>154</sup> Par. 140a, MCM, 1951, at p. 250-51.

<sup>155</sup> *Accord*, *United States v. Higgins*, 6 USCMA 308, 20 CMR 24 (1955).

<sup>156</sup> 7 USCMA 623, 23 CMR 87 (1957).

<sup>157</sup> *Schaffer v. United States*, 221 F.2d 17 n. 3 (5th Cir. 1955); *Horne v. United States*, 246 F.2d 83 (5th Cir. 1957); *Annot.*, 170 A.L.R. 567 at 599 (1947).

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As was mentioned in the Dykes opinion, the result reached there was the one advocated by Professor Wigmore and Professor Morgan, the latter probably the chief draftsman of the Uniform Code. Moreover, the overruling of Dykes, in disregard of stare decisis, produced a number of reversals in cases where the law officer had instructed the court-martial in reliance on the earlier case.<sup>158</sup>

One would think, then, that some very important purpose must have been served by the reallocation of functions espoused in Jones. The contrary, however, appears to be the case. For one thing, Dykes, by placing ultimate responsibility on the law officer, tended to build up his stature, a by-product very much in accord with some of the Court's other decisions.<sup>159</sup> Secondly, the allocation of functions in Dykes lent itself to simplicity and to instructions which the court members can readily understand; the present rule places on the members, who are laymen, the difficult **task** of applying the concept of admissibility and thereby paves the way for committing instructional error when the law officer seeks to explain to them their task.<sup>160</sup> Thirdly, the rule adopted probably lessens an accused's protection. When the law officer realizes that the ultimate responsibility of determining whether a confession is to be considered by the members belongs solely to him, he may well lean over backward to protect the accused's rights. On the other hand, if the court members are empowered to pass again on the same matter, he may well decide to give his decision less careful consideration and to resolve all questions in favor of the Government, on the assumption that the court members can correct any injustice to the accused. All in all, the Court's reversal of position as to determining voluntariness and compliance with Article 31 does not seem to be a happy move.

### I. RIGHT TO COUNSEL

In *United States v. Moore*<sup>161</sup> the accused attacked the admissibility of his confession on the ground that he had been confined

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<sup>158</sup> See, e.g., *United States v. Schwed*, 8 USCMA 305, 24 CMR 115 (1957); *United States v. Morris*, 9 USCMA 37, 25 CMR 299 (1958).

<sup>159</sup> See Wiener, *The Army's Field Judiciary System*, 46 A.B.A.J. 1178 (1960); Miller, *Who Made the Law Officer a Federal Judge?*, Mil. L. Rev., April, 1959, p. 39.

<sup>160</sup> See *United States v. Rice*, 11 USCMA 524, 29 CMR 340 (1960), which holds that each court member must make his individual determination of voluntariness and accept or reject the accused's statement accordingly.

<sup>161</sup> 4 USCMA 482, 16 CMR 56 (1954). See also *United States v. Manuel*, 3 USCMA 739, 14 CMR 157 (1954).

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prior to making the statement and had not been granted the aid of counsel. After first rejecting an effort to invoke the “McNabb rule,” which it held inapplicable to the military, the Court of Military Appeals noted :

As a second basis for assault on the voluntariness of these confessions, defense counsel argue that the accused was not furnished with counsel during the interrogations. While it is worthy of note that he is not known to have made any request therefor, the complete answer to this contention is that no right exists to be provided with appointed military counsel prior to the filing of charges.<sup>162</sup>

However, the Court soon made it clear in *United States v. Gunnels*,<sup>163</sup> that, although there was no requirement that counsel be furnished to an accused, he could not be precluded from consulting with counsel. There it was held prejudicial error for the Staff Judge Advocate to inform the accused Air Force officer that he could not consult with counsel in connection with an interrogation by enforcement agents. In fact, while a military accused “has no right to appointed military counsel, he does have a right to obtain legal advice and a right to have his counsel present with him during an interrogation by a law enforcement agent.”<sup>164</sup> Several later cases have involved defense contentions that an accused’s pretrial statement was inadmissible because during his interrogation he had been denied, or misadvised concerning, his right to counsel.<sup>165</sup>

### J. CORPUS DELICTI

Like Federal civilian courts, courts-martial are committed to the corpus delicti requirement in ruling on the admissibility of confessions. This requirement, as stated in the Manual for Courts-Martial, is more rigorous than that applied by the Federal courts generally, and the corroborating evidence must go to “each element of the crime alleged, save only the identity of the perpetrator.”<sup>166</sup>

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<sup>162</sup> *Id.* at 486, 16 CMR at 60. The “McNabb rule,” which the Court rejected, arose out of the Supreme Court’s holding in *McNabb v. United States*, 318 U.S. 332 (1943), that a confession is inadmissible when obtained while a defendant is illegally detained without the prompt hearing now required by Federal Rule of Criminal Procedure 5.

<sup>163</sup> 8 USCMA 130, 23 CMR 354 (1957).

<sup>164</sup> *Id.* at 135, 23 CMR at 359.

<sup>165</sup> See, e.g., *United States v. Kantner*, 11 USCMA 201, 29 CMR 17 (1960); *United States v. Wheaton*, 9 USCMA 257, 26 CMR 37 (1958).

<sup>166</sup> Compare par. 140a, MCM, 1951, at pp. 251–52, with *Opper v. United States*, 348 U.S. 84 (1954). See also *United States v. Fioco*, 10 USCMA 198, 27 CMR 272 (1959); *United States v. Mims*, 8 USCMA 316, 24 CMR 126 (1957); *United States v. Villasenor*, 6 USCMA 3, 19 CMR 129 (1966).

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In accord with his purpose of assimilating military justice as much **as** possible to that applied in Federal civilian courts, Chief Judge Quinn has insisted that the civilian rule of *corpus delicti* should govern in courts-martial as well. According to him, "The Manual is not binding on us when it conflicts with the **law**."<sup>167</sup> Interestingly enough, Judge Ferguson considered that the more rigorous Manual rule should be applied to courts-martial because it **was** a "better rule for the military than that laid down" by the Supreme Court.<sup>168</sup> He makes it clear that he does not consider the Manual provision in any way to be binding on the Court of Military Appeals.<sup>169</sup> Judge Ferguson's unwillingness to follow the Federal rule, as authoritatively established by the Supreme Court, hardly accords with his subordination of the Uniform Code in *United States v. Jones*<sup>170</sup> to what he concluded was the "prevailing Federal rule."

In some instances where problems of *corpus delicti* are involved, the **Court** has been willing to follow Supreme Court precedents. For instance, in *United States v. Stribling*,<sup>171</sup> the Government had established through an audit that **\$2400** was missing from **a** fund of which the accused was custodian. His confession was the sole evidence that this money had been taken in two installments—one of **\$200** and the other of **\$2200**. Following the doctrine of several recent Supreme Court decisions involving analogous problems of **severability**,<sup>172</sup> the Court concluded that the confession was, in itself, sufficient to authorize punishment for two larcenies, rather than for only one.

### K. FALSE OFFICIAL STATEMENTS

In some instances a statement given by a suspect to military investigators has been made a basis of prosecution for a false official statement. The Court of Military Appeals placed a considerable damper on such prosecutions by holding that a suspect is not under a duty to make statements during the course of **a** routine criminal investigation not involving some responsibility

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<sup>167</sup> 6 USCMA at 13, 19 CMR at 139 (concurring in result).

<sup>168</sup> *United States v. Mims*, 8 USCMA 316, 319, 24 CMR 126, 129 (1967) (concurring in result).

<sup>169</sup> *Ibid.*

<sup>170</sup> *United States v. Jones*, 7 USCMA 623, 23 CMR 87 (1957), discussed *supra*.

<sup>171</sup> 5 USCMA 531, 18 CMR 166 (1955).

<sup>172</sup> *Holland v. United States*, 348 U.S. 121 (1964); *Smith v. United States*, 348 U.S. 147 (1964); *Cslderon v. United States*, 348 U.S. 160 (1964).

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with which he has been entrusted.<sup>173</sup> Where, however, the information furnished by the accused does pertain to a responsibility to which he is subject—such as a duty to account for funds with which he has been entrusted—he can be prosecuted under Article 107<sup>174</sup> for making false official statements.<sup>175</sup>

These interpretations have some relevance to other problems. For example, the concept that an accused has no “official” duty to provide evidence for military investigators forms a foundation for holding that: (a) he cannot be given a lawful command to provide such evidence in the form of body fluids,<sup>176</sup> and (b) he cannot be prosecuted for furnishing false evidence. Similarly, where there is an official duty involved, such as a duty to account for funds or documents, the accused cannot claim his privilege against self-incrimination when ordered to furnish evidence<sup>177</sup> and can be prosecuted under Article 107 if he makes a false statement in connection therewith.

So far as the military investigator is concerned, the importance of the concept of “officiality” was significantly reduced in *United States v. Claypool*.<sup>178</sup> There it was held that a false statement by a suspect under oath to an investigator constitutes false swearing, conviction of which authorizes up to three years confinement and a dishonorable discharge.<sup>179</sup> Since there is a broad authority to administer oaths,<sup>180</sup> the investigator will have every incentive to request that witnesses swear to their statements.<sup>181</sup>

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<sup>173</sup> *United States v. Thomas*, 10 USCMA 54, 27 CMR 128 (1968); *United States v. Geib*, 9 USCMA 392, 26 CMR 172 (1958). See also *United States v. Aronson*, 8 USCMA 525, 25 CMR 29 (1957).

<sup>174</sup> 10 U.S.C. § 907 (1958).

<sup>175</sup> *United States v. Aronson*, *supra* note 173; *United States v. Nicholson*, 10 USCMA 186, 27 CMR 260 (1959).

<sup>176</sup> See *United States v. Musguire*, 9 USCMA 67, 25 CMR 329 (1968); *United States v. Forslund*, 10 USCMA 8, 27 CMR 82 (1958), both discussed *supra*.

<sup>177</sup> *United States v. Haskins*, 11 USCMA 365, 29 CMR 181 (1960).

<sup>178</sup> 10 USCMA 302, 27 CMR 376 (1959).

<sup>179</sup> See Table of Maximum Punishments, par. 127c, Sec. A, MCM, 1961, at p. 226. In connection with punishment of certain types of falsity, see also *United States v. Middleton*, 12 USCMA 54, 30 CMR 54 (1960).

<sup>180</sup> See UCMJ, art. 136, 10 U.S.C. § 936 (1968). In the *Claypool* case, *supra* note 178, Judge Ferguson disagreed with the majority as to whether the investigator was authorized under Article 136(b) to administer the oath to the accused. Would he question the authority of a person in one of the categories listed in Article 136(a) to administer the oath to an accused who was making a statement in connection with a routine criminal investigation?

<sup>181</sup> In recent years military law has placed special emphasis on sworn statements. See *United States v. Samuels*, 10 USCMA 206, 27 CMR 280 (1959). Whether sworn or unsworn, a false statement by the accused may be evidence of his consciousness of guilt. *United States v. Hurt*, 9 USCMA 735, 27 CMR 3 (1958).

## V. SEARCH AND SEIZURE

Since the most significant problems of military search and seizure have been reviewed *elsewhere*,<sup>182</sup> the treatment here can be rather brief. With respect to the items subject to seizure, the Court of Military Appeals has followed the federal rule that only fruits and instruments of crime can be seized, but the Court has taken a broad view of what constitutes “instruments.”<sup>183</sup> If a search has been performed, the accused must object at the trial to introduction of its results in evidence, or else he will have waived his rights,<sup>184</sup> Moreover, he cannot complain of a search to which he consented, although mere acquiescence will not be treated as consent.<sup>185</sup> An investigator is not required to give an Article 31 (b) warning prior to requesting consent to a search.<sup>186</sup>

Certain military officials have authority to order searches of persons and property under their command, and this authority can be delegated.<sup>187</sup> However, in any event the authority to search must be exercised on the basis of probable cause.<sup>188</sup> Requiring probable cause for such a search when directed by a commanding officer with respect to persons or property under his control may mark something of an innovation by the Court of Military Appeals.<sup>189</sup> Apparently the Court would dispense with the requirement of probable cause where the search is in the form of a routine “shakedown inspection,” performed for general admini-

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<sup>182</sup> See Comment, *Restrictive Developments in the Law of Military Search and Seizure*, 1960 Duke L. J. 275.

<sup>183</sup> United States v. Webb, 10 USCMA 422, 27 CMR 496 (1959); United States v. Higgins, 6 USCMA 308, 20 CMR 24 (1955); United States v. Marrelli, 4 USCMA 276, 15 CMR 276 (1954); United States v. Rhodes, 3 USCMA 73, 11 CMR 73 (1953).

<sup>184</sup> United States v. Hooper, 9 USCMA 637, 26 CMR 417 (1958); United States v. Dupree, 1 USCMA 665, 5 CMR 93 (1952). The person objecting to the evidence must have some standing to do so; he must have been, in some way, a victim of the illegal search and seizure. See, *e.g.*, United States v. Higgins, 6 USCMA 308, 20 CMR 24 (1955).

<sup>185</sup> See, *e.g.*, United States v. Brown, 10 USCMA 482, 28 CMR 48 (1959); United States v. Berry, 6 USCMA 609, 20 CMR 325 (1956); United States v. Wilcher, 4 USCMA 215, 15 CMR 215 (1954).

<sup>186</sup> United States v. Insani, 10 USCMA 519, 26 CMR 85 (1959) (Judge Ferguson dissenting).

<sup>187</sup> See, *e.g.*, United States v. Weaver, 9 USCMA 13, 25 CMR 275 (1958); United States v. Doyle, 1 USCMA 545, 4 CMR 137 (1952); par. 152, MCM, 1951, at pp. 288-89.

<sup>188</sup> United States v. Gebhart, 10 USCMA 606, 28 CMR 172 (1969); United States v. Brown, *supra* note 185.

<sup>189</sup> See Comment, *supra* note 182; Everett, Military Justice in the Armed Forces of the United States 102 (1956).

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strative purposes rather than to aid investigation of a specific crime.<sup>190</sup> There is some parallel for this in the Supreme Court's willingness to uphold certain searches without a warrant when not made for investigative purposes<sup>191</sup> and in the ruling by the Court of Military Appeals that the Article 31(b) warning requirement does not apply to routine inspection of passes.<sup>192</sup>

If there is probable cause for an arrest of the accused, then he can be searched by the person making the arrest.<sup>193</sup> Moreover, so long as probable cause exists, a search and seizure may be justified on the ground that it was necessary to avoid destruction of the evidence, although, of course, there may be disagreement about the necessity<sup>194</sup> in particular cases.

An especially interesting case is *United States v. DeLeo*,<sup>195</sup> which involved the legality of the search of the accused's apartment in Bordeaux, France. This search, authorized by judicial process from a French court, was undertaken by French police, but, since the suspect was a soldier, they had requested a military investigator to accompany them and during the search the American discovered some very incriminating evidence. Judge Brosman's opinion, concurred in by Chief Judge Quinn, reasoned that, in light of special problems and needs applicable overseas, the search should be treated as if it had been performed by the French alone and the evidence then had been turned over to the military investigators. On this basis, the majority was able to apply "a well-recognized rule of Federal law that the Government may use evidence obtained through an illegal search effected by American state or by foreign police—unless Federal agents participated to some recognizable extent therein."<sup>196</sup> Although the federal decisions cited by Judge Brosman would fully have supported his position at the time, a recent Supreme Court decision overturns the "silver platter" doctrine and holds that a federal district court cannot consider evidence which was obtained by a

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<sup>190</sup> *United States v. Brown*, 10 USCMA 482, 489, 28 CMR 48, 55 (1959); *United States v. Gebhart*, 10 USCMA 606 n. 2, 28 CMR 172 n. 2 (1969).

<sup>191</sup> See *Frank v. Maryland*, 369 U.S. 360 (1959). Cf. *Abel v. United States*, 362 U.S. 217 (1960).

<sup>192</sup> *United States v. Nowling*, 9 USCMA 100, 103, 26 CMR 362, 366 (1968).

<sup>193</sup> *United States v. Brown*, 10 USCMA 482, 28 CMR 48 (1969); *United States v. Florence*, 1 USCMA 620, 6 CMR 48 (1962); see also *United States v. Nowling*, *supra* note 192.

<sup>194</sup> *United States v. Swanson*, 3 USCMA 671, 14 CMR 89 (1954); *United States v. Brown*, *supra* note 193; *United States v. Davis*, 4 USCMA 577, 16 CMR 161 (1954).

<sup>195</sup> 5 USCMA 148, 17 CMR 148 (1964).

<sup>196</sup> *Id.* at 155, 17 CMR at 166.

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search on the part of state officers which, if conducted by federal officers, would have violated the Fourth Amendment.<sup>197</sup>

Undoubtedly the Court of Military Appeals, which so often attempts to approximate federal rules of evidence, will conclude that a court-martial cannot admit any evidence which state officers obtained by unreasonable search and seizure. However, it is still quite possible, consistent with the reasoning of the Supreme Court, to analogize the situation present when evidence is received from foreign police to that which exists when evidence is received from an absolute stranger to law enforcement.<sup>198</sup> The Supreme Court decided that evidence turned over to federal officials on a “silver platter” by state officials who had unreasonably searched should not be received because those officials had violated the Fourteenth Amendment of the *Federal* Constitution.<sup>199</sup>

In recent decisions the Supreme Court has evolved new concepts of extraterritoriality in its interpretation and application of the Constitution—concepts which this writer has criticised in detail in another article.<sup>200</sup> Nonetheless, it is hard to conceive how searches by foreign police could possibly violate the Fourteenth Amendment—which has always been thought to require “state action”—and presumably that of an American state. Thus, upon proper analysis, the “silver platter” doctrine, approved in *United States v. DeLeo*, should remain applicable to the facts of that case, involving a search by foreign police. However, in the law of evidence the Court of Military Appeals has sometimes been reluctant to draw fine distinctions, even when those distinctions were well-justified by previous precedent.

### VI. THE “POISONOUS TREE” DOCTRINE

In a case concerning an illegal wire tap, the Supreme Court ruled that information obtained through wire tap leads was the “fruit of the poisonous tree” and so could not be used as evidence.<sup>201</sup> Earlier the Court had held that knowledge obtained from an illegal search and seizure could not be made the basis for later efforts to seek evidence through court process.<sup>202</sup> In this context the Manual for Courts-Martial has adopted the “fruit of

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<sup>197</sup> *Elkins v. United States*, 364 U.S. 206 (1960); *Rios v. United States*, 364 U.S. 253 (1960).

<sup>198</sup> *United States v. Volante*, 4 USCMA 689, 16 CMR 263 (1954).

<sup>199</sup> *Elkins v. United States*, *supra* note 197.

<sup>200</sup> Everett, *Military Jurisdiction Over Civilians*, 1960 Duke L. J. 366–415.

<sup>201</sup> *Nardone v. United States*, 308 U.S. 338, 341 (1939).

<sup>202</sup> *Silverthorne Lumber Co. v. United States*, 261 U.S. 386, 392 (1920). See also *Counselman v. Hitchcock*, 142 U.S. 647 (1892).

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the poisonous tree” doctrine by specifying that all evidence obtained through information supplied by wire tapping or illegal searches and seizures is inadmissible.<sup>203</sup>

Judge Latimer early espoused the view that an accused’s confession, offered by the Government in evidence, could be deemed the “fruit of the poisonous tree” if it grew out of information obtained by illegal search or wire tap, information with which the accused had been confronted.<sup>204</sup> Apparently a majority of the Court has been willing to apply this doctrine to confessions under some circumstances.<sup>205</sup> But, in some instances the Court seemed somewhat reluctant in using the “poisonous tree” doctrine.<sup>206</sup>

The Manual for Courts-Martial provides that, “Although a confession or admission may be inadmissible because it was not voluntarily made, nevertheless the circumstance that it furnished information which led to the discovery of pertinent facts will not be a reason for excluding evidence of such pertinent facts.”<sup>207</sup> In an early case the Court of Military Appeals, in an opinion by Chief Judge Quinn, appeared to accept this provision of the Manual.<sup>208</sup> However, several years ago the author suggested that this rule might not withstand application of the “poisonous tree” doctrine,<sup>209</sup> and later events soon verified this doubt.

In *United States v. Haynes*<sup>210</sup> it appeared that the accused had made certain statements by reason of a promise of confidentiality and that this statement had led, in turn, to other evidence, which was offered at accused’s trial. Judge Ferguson, writing the opinion of the Court, applied the “poisonous tree” doctrine and held this other evidence to be inadmissible.<sup>211</sup> Chief Judge Quinn concurred only in the result, and without opinion; therefore, it is not certain

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<sup>203</sup> Par. 152, MCM, 1951. For a general discussion of this doctrine, see Everett, *Military Justice in the Armed Forces of the United States* 112-14 (1956).

<sup>204</sup> Dissenting opinion in *United States v. DeLeo*, 5 USCMA at 173, 17 CMR at 173, and in *United States v. Noce*, 5 USCMA at 730, 19 CMR at 26. Cf. dissent by Judge Brosman in *United States v. Dandaneau*, 5 USCMA 462, 18 CMR 86 (1955).

<sup>205</sup> *Zbid.*

<sup>206</sup> See, e.g., *United States v. Dandaneau*, *supra* note 204; *United States v. Monge*, 1 USCMA 95, 2 CMR 1 (1952).

<sup>207</sup> Par. 140a, MCM, 1951, at p. 251.

<sup>208</sup> *United States v. Fair*, 2 USCMA 521, 529, 10 CMR 19, 27 (1953).

<sup>209</sup> Everett, *Military Justice in the Armed Forces of the United States* 113 (1956).

<sup>210</sup> 9 USCMA 792, 27 CMR 60 (1958).

<sup>211</sup> Judge Ferguson characterized the approval in *United States v. Fair*, *supra* note 208, of the Manual provision that evidence learned of through an inadmissible confession is itself nonetheless admissible as dictum.

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whether he would apply the Manual rule. Ironically, Judge Lati-mer, who initially had been the Court's most vigorous proponent of the "poison tree" doctrine, wrote a vigorous dissent, rejecting the application of that doctrine to information obtained by means of an inadmissible confession.

It would seem that, the Manual to the contrary notwithstanding, the "poisonous tree" doctrine should sometimes be applied to evidence obtained by means of inadmissible confessions. Exclusion of wire tap evidence rests only on the Federal Communications Act.<sup>212</sup> Exclusion of evidence resulting from an illegal search and seizure is not required as an element of "due process."<sup>213</sup> Yet for the "fruit" garnered by these illegal investigative tactics, the law decrees inadmissibility. The use in evidence of a coerced confession is clearly a violation of "due process." But the transgression of a more fundamental norm than that is involved in wire tapping or illegal search.<sup>214</sup> The exclusion from evidence of any "fruit" of such a confession would seem demanded as an *a fortiori* case, and the contrary provision of the Manual would seem invalid, as the Court of Military Appeals apparently held in *Haynes*<sup>215</sup> Perhaps one of the chief difficulties in accepting the result there is the expectation that, taken together with the Court's very broad interpretation of Article 31, application of the "poisonous tree" doctrine to information obtained from an inadmissible statement by the accused would grant a criminal an unwarranted windfall of immunity and would involve extensive, time-consuming inquiries about the paths by which the Government found its evidence.

### VII. CONCLUSION'

During the past decade the Court of Military Appeals has made

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<sup>212</sup> Compare *Olmstead v. United States*, 277 U.S. 438 (1928), with *Nardone v. United States*, 302 U.S. 379 (1937).

<sup>213</sup> *Wolf v. Colorado*, 338 U.S. 25 (1949).

<sup>214</sup> *Leyra v. Denno*, 347 U.S. 556 (1954); *Malinski v. New York*, 324 U.S. 401 (1945); *Lisenba v. California*, 314 U.S. 219 (1941); *Brown v. Mississippi*, 297 U.S. 278 (1936).

<sup>215</sup> Of course, in that case the incriminatory statements made by the accused had not been coerced, but instead were allegedly the products of promises to the accused that his statements would be kept in confidence. Thus, the abuse at which the Court was striking in this particular instance would seem of a lesser magnitude than that presented by use of the "third degree" to obtain a confession. However, the Manual for Courts-Martial provision, which the Court invalidated, would apparently authorize admission of evidence to which an accused's confession furnished the "lead," irrespective of the tactics by which the confession was secured. For an instance in which the privilege against self-incrimination was deemed by the Supreme Court to apply not only to one's statements but also to the "fruit" of such statements, see *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

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numerous changes in the rules of military evidence to be applied in courts-martial. Some of these changes were influenced by a desire to accord to the serviceman the same rights enjoyed by his civilian counterpart. With this objective in mind, the Court gave close attention to the rules of evidence applied in federal courts. The scope of this attention was always being enlarged by an ever-increasing willingness, in a reaction against command control, to disregard the provisions of the Manual for Courts-Martial, which at the beginning of the decade was almost the "Bible" of the military lawyer.

Unfortunately not every change has been for the better. And perhaps the deference paid to the federal rules of evidence has sometimes caused the Court to pass up opportunities to pioneer. Moreover, the failure to adhere to the doctrine of *stare decisis* has led to an undue number of reversed convictions and to an ensuing disappointment on the part of many military lawyers. This disappointment has been heightened by the belief that in several instances the changes accomplished by the Court have placed an undue burden on the Government and given an unexpected wind-fall to the guilty.

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# THE COURT OF MILITARY APPEALS AND THE DEFENSE COUNSEL\*

BY CABELL F. COBBS\*\*

## I. INTRODUCTION

On May 5, 1950, President Harry S. Truman approved the Uniform Code of Military Justice,<sup>1</sup> thereby introducing for the first time in the history of American military law the concept of general courts-martial fully staffed by legally trained counsel and presided over by the military counterpart of a United States Judge.<sup>2</sup> Prior to the enactment of the Code, Army and Air Force accused were entitled to representation by attorneys only on the basis of availability or when the Government was so represented.<sup>3</sup> The Articles for the Government of the Navy made no provision for an attorney for the defense.<sup>4</sup> Only the Army and Air Force provided a law member for their general courts-martial, and this functionary combined the tasks of judge and juror.<sup>5</sup>

It is with the role of the newly furnished lawyer for the defense that this study is concerned—more particularly with the manner with which the United States Court of Military Appeals has reacted to his performance of duty. Unfortunately, as a result of the very nature of the appellate process, the Court's views must be generally found in cases which deal with those officer-attorneys who have failed to measure up to a prescribed standard. The vast majority of defense counsel apparently meet the tests laid down by the Court thus far, but proof of their devotion to the cause of their clients is lost both in acquittals and, more frequently,

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\* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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<sup>1</sup> 10 U.S.C. §§ 801-936 (1968).

<sup>2</sup> For an excellent discussion of the law officer and the part played by the Court of Military Appeals in strengthening his role in the military justice process, see Miller, Who Made The *Law Officer A Federal Judge?*, *MIL. L. Rev.*, March, 1959, p. 39.

<sup>3</sup> Article of War 11, as amended, 62 Stat. 629 (1948).

<sup>4</sup> Articles for the Government of the Navy, Article 39, Rev. Stat. § 1624 (1875); Naval Courts and Boards § 384 (1937).

<sup>5</sup> Article of War 8, 62 Stat. 629 (1948).

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in the denial of **appeals**.<sup>6</sup> Nevertheless, it is suggested that the increasingly liberal approach of the Court to the problem of adequate representation demonstrates a marked dissatisfaction with the behavior of counsel in general.

### 11. THE DEVELOPMENT OF THE JUDICIAL CONCEPT OF ADEQUACY

#### A. THE RULE OF UNITED STATES V. HUNTER

It is always extremely difficult for any appellate body to set down a standard by which an answer to the question whether an attorney has adequately represented his client may be properly reached. Most courts tend to speak on the subject in generalities, and, in its initial consideration of the problem, the Court did little more than adopt the measure applied in the Federal appellate system. Thus, in *United States v. Hunter*,<sup>7</sup> it declared:

... Undoubtedly, it would be desirable to furnish every accused with a mature and experienced trial lawyer but that is presently an impossibility. The best that can be done is to assure appointment of officers who are reasonably well qualified to protect their substantial rights.

“After appointment of counsel, as required by the Code, an accused, if he contends his rights have not been fully protected, *must reasonably show that the proceedings by which he was convicted were so erroneous as to constitute a ridiculous and empty gesture, or were so tainted with negligence or wrongful motives on the part of his counsel as to manifest a complete absence of judicial character.* . . .<sup>8</sup> [Emphasis supplied.]

In the *Hunter* case, the accused made a very generalized complaint concerning the quality of the representation afforded him by his appointed defense counsel and the individual nonlawyer

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<sup>6</sup> For example, during the period 1951–1959, the Court of Military Appeals reviewed only 13,428 cases and issued opinions in only 1513 of this number. During the same period, the armed services tried approximately 92,297 general courts-martial. See the various Annual Reports of the United States Court of Military Appeals and The Judge Advocates General of the Armed Forces.

<sup>7</sup> 2 USCMA 37, 6 CMR 37 (1952). The opinion was by Judge Latimer, Chief Judge Quinn and Judge Brosman concurring.

<sup>8</sup> *Id.* at 41, 6 CMR at 41. Compare the Court’s language with the similar declaration in *Diggs v. Welch*, 148 F.2d 667 (D.C. Cir. 1945). The Court had earlier pointed out the duty of all court-martial officials “. . . to protect zealously the right of the accused to counsel.” *United States v. Evans*, 1 USCMA 541, 544, 4 CMR 133, 136 (1952). It had also warned that use of palpably inexperienced counsel might result in refusal to apply the doctrine of waiver. *United States v. Dupree*, 1 USCMA 665, 5 CMR 93 (1952).

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whom he had selected to aid him.<sup>9</sup> He did not point out any course of conduct alternative to that followed by his representatives at the trial, nor could he demonstrate the manner in which he was prejudiced by the tactics applied on his behalf. The Court rejected the contention that the case should be tried *de novo* on appeal and that inadequacy of representation might be established simply by the argument that other things should have been done. Of this proposition, Judge Latimer cogently remarked :

... It is all too easy for a losing litigant to complain on appeal of too few conferences, failure to call witnesses, lack of cross-examination and other items too numerous to mention. But usually, as in this case, they fail to suggest how or in what way they have been prejudiced. It hardly need be said that if there are no facts or theories to develop, conferences are of little help; if there are no witnesses favorable to the accused, counsel cannot be criticized for failure to call [them]; and too much cross-examination is often more damaging than too little.<sup>10</sup>

The measure set forth by the Court in *United States v. Hunter* was applied without modification for a number of years. It did not, however, result in the rejection in every case of accused's attack upon his counsel. During the period 1952–1957, the Court granted review and published opinions in seven cases involving the proposition that counsel was ineffective.<sup>11</sup> Four of these were reversed for denial of effective assistance of counsel, while three were affirmed. Essentially, however, the *Hunter* rule was followed, and the opinions are chiefly important for the circumstances found to establish the allegation of incompetency in the particular trial.

Thus, in *United States v. Soukoup*,<sup>12</sup> the negative argument that defense counsel could have taken many more steps on behalf of his client was rejected on the basis that there were too many factors at a trial, which were not contained in the written transcript, to permit an appellate body to retry the case at its level. And in *United States v. Bigger*,<sup>13</sup> it was pointed out that the failure of the defense counsel to consult on more than one occasion

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<sup>9</sup> Representation of accused persons before general courts-martial is now limited to attorneys. *United States v. Kraskouskas*, 9 USCMA 607, 26 CMR 387 (1958).

<sup>10</sup> 2 USCMA 37, 42, 6 CMR 37, 42.

<sup>11</sup> The count does not include those causes involving counsel's occupation of inconsistent positions in the same or related cases. See *United States v. Lovett*, 7 USCMA 704, 23 CMR 168 (1957); *United States v. Miller*, 7 USCMA 23, 21 CMR 149 (1956); *United States v. McCloskey*, 6 USCMA 545, 20 CMR 261 (1955); and *United States v. Green*, 5 USCMA 610, 18 CMR 234 (1965). In one case, the Court gratuitously commended the defense counsel for his highly competent, albeit unsuccessful, performance. *United States v. Bennett*, 7 USCMA 97, 21 CMR 223 (1956).

<sup>12</sup> 2 USCMA 141, 7 CMR 17 (1953).

<sup>13</sup> 2 USCMA 297, 8 CMR 97 (1953).

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with his client; his stipulation of an expert's testimony; failure to call witnesses to corroborate accused; and allegedly inept trial technique was not significant when the record demonstrated that the counsel participated intelligently; followed a definite strategy; raised a proper defense; exploited inconsistencies in the Government's case; and furnished proof on behalf of his client.<sup>14</sup>

In *United States v. Wilson*,<sup>15</sup> a single ten-minute consultation with an accused was found not inadequate in a murder case when that period sufficed to furnish the defense counsel with the whole story. For the benefit of appellate defense practitioners, the Court sagely advised that the major portion of *nisi prius* preparation did not involve the accused but the tiring search for evidence elsewhere to support his version.<sup>16</sup>

Having firmly established the principle that it would not declare a defending attorney incompetent as long as the record demonstrated reasonably adequate activity on his part, the Court found such efforts to be lacking in a number of cases. In *United States v. Parker*,<sup>17</sup> counsel was found to have performed inadequately. There, the accused was charged with two specifications of rape and assault with intent to commit rape. A majority of the judges determined that the defense counsel had not interviewed the witnesses before the trial; did not move for a continuance, although he had at most only three days in which to prepare; conducted no *voir dire* examination of what appeared to be a specially selected panel; did not assert any challenges; made only two objections; submitted no instructions; and offered no evidence either on the merits or in tenuousness and mitigation, although it subsequently appeared that some was available. In evaluating counsel's behavior, the Court adverted to the *Hunter* rule, but expressed the belief that no counsel could have done less for his client.<sup>18</sup>

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<sup>14</sup> The Court again noted in this case that it would not substitute its judgment for that of the defense counsel or condemn him ". . . merely because they lost or because they might have adopted what may, at this level, appear to have been a better strategic approach." *United States v. Bigger*, 2 USCMA 297, 302, 8 CMR 97, 102. r

<sup>15</sup> 2 USCMA 248, 8 CMR 48 (1953).

<sup>16</sup> The weakness of accused's position was demonstrated by the reversal of the conviction because of an Article 31 violation shown in the record by the very representative whom they condemned.

<sup>17</sup> 6 USCMA 75, 19 CMR 201 (1955).

<sup>18</sup> ". . . When we fairly evaluate counsel's efforts from the four corners of the record, we wonder how any counsel could do less for his client." *United States v. Parker*, *supra* note 17, at 86, 19 CMR at 212. The opinion was written by Judge Latimer, with whom Judge Brosman concurred. Chief Judge Quinn, dissenting, expressed the view that the finding of incompetency

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If the *Parker* case represented the Court's considered belief that the accused's trial had been rendered farcical by his lawyer's inactivity, it spoke out even more strongly for a vigorously conducted defense in *United States v. McMahan*.<sup>19</sup> McMahan was convicted of premeditated murder and sentenced to death. Once more, the record depicted a hasty trial without time for defense preparation and no move made by counsel to support the interests of the accused. Judge Latimer said :

... Suffice it to say that American standards of justice do not permit defending lawyers to waive to the gallows the person they have been chosen to protect. Even though an accused's story may not ring true, it is his counsel's solemn duty to present it in the best possible manner ..<sup>20</sup>

The foregoing decisions made it clear beyond cavil that the Court considered defense counsel's nonfeasance to fall within the Hunter rule, and when the record revealed inaction on his part for which no reasonable grounds could be discovered, reversal would quickly follow. It is worthy of note, however, that the failure of counsel in each of the cases discussed extended throughout the trial and was contradicted by the existence of matter which should have been brought before the court-martial.<sup>21</sup>

Having dealt with the fatal inactivity of defense counsel, the Court condemned just as quickly positive measures on their part which conflicted with their responsibility to their client. In *United States v. Walker*,<sup>22</sup> the record disclosed that accused's individual counsel had urged the court-martial to acquit him on the basis of the insufficiency of the proof. Following trial counsel's argument in rebuttal, the appointed defense counsel, with the permission of the law officer, made an additional statement in which he effectively conceded accused's guilt and sought only clemency. Char-

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was based upon the majority's "speculations" and thought good reasons might have existed for the failure to produce evidence in extenuation and mitigation. 6 USCMA at 91, 19 CMR at 217. It is important to note, however, that all three Judges attributed significance for the first time to the failure of counsel to adduce any matters during the presentencing proceedings.

<sup>19</sup> 6 USCMA 709, 21 CMR 31 (1956). Judge Latimer again spoke for the Court, with Chief Judge Quinn expressing the view that the record so overwhelmingly established guilt of a lesser offense that there should be a partial affirmation.

<sup>20</sup> 6 USCMA 709, 722, 21 CMR 31, 44.

<sup>21</sup> Thus, in *United States v. McMahan*, *supra* note 19, the allied papers reflected accused's superior military service and the fact that he suffered from psychiatric disorders at the time of his offense. In *United States v. Parker*, *supra* note 17, a number of accused's fellow citizens in his home town petitioned for clemency after the trial, averring his good reputation. In neither case was any effort made to uncover this proof and bring it to the attention of the court members.

<sup>22</sup> 3 USCMA 355, 12 CMR 111 (1957).

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acterizing the concession of counsel as, at the very least, so grossly negligent that it came within the scope of *United States v. Hunter, supra*, the Court did not hesitate to order a reversal, and indicated its shock at the appointed counsel's casual destruction of the vigorous contentions by individual counsel.<sup>23</sup>

In *United States v. McFarlane*,<sup>24</sup> less reprehensible, but no less surprising, conduct drew an equally swift order for a rehearing. There, the defense counsel purposely informed the court-martial in a capital case that, but for the provisions of the Uniform Code of Military Justice, Article 45,<sup>25</sup> the accused would have pleaded guilty. Following this declaration, he permitted the Government to present its case with little or no interruption, waived closing arguments, and presented only inconsequential items in mitigation and extenuation. In reversing, Judge Latimer's majority opinion once more commented on the unseemly haste with which the armed forces uniformly seemed to try capital cases. Conceding counsel's good intentions in attempting by these means to save the accused from a death sentence, it was concluded that his conduct was designed to signify to the court-martial a default on the merits in a hope for clemency, a position which was totally unjustified in light of the meagre showing made in mitigation and extenuation. Once more, the Court pointed out the necessity for exploring the defendant's civilian background fully and the duty to seek out proof and matters in mitigation and extenuation wherever they might be found. The combination of affirmatively conceding guilt in defiance of Article 45 and the desultory action thereafter taken was held to require another hearing with new counsel. The Chief Judge, concurring, was more scathing in his characterization of the luckless judge advocate.<sup>26</sup>

The cited cases, decided solely upon the generalized concept that accused's defense must have been so poor that the trial amounted to no more than "a ridiculous and empty gesture,"<sup>27</sup>

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<sup>23</sup> "We know of no case quite like this. Of course, the obvious and simple explanation is that when an accused pleads not guilty and his chief counsel presents a vigorous defense, associate defense counsel in a closing argument which he is not expected to make, should not destroy his efforts by a confession of guilt. Such conduct is almost incomprehensible, but it happened here. . . ." *United States v. Walker, supra* note 22, at 359, 12 CMR at 115.

<sup>24</sup> 48 USCMA 96, 23 CMR 320 (1957).

<sup>25</sup> 10 U.S.C. § 845 (1958). The Article provides, *inter alia*, that ". . . A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged."

<sup>26</sup> ". . . [D]efense counsel here conceded everything, explored nothing, was unprepared on every issue, and made the least of what he had." *United States v. McFarlane, supra* note 24, at 100, 23 CMR at 324.

<sup>27</sup> *United States v. Hunter, supra* note 7, at 41, 6 CMR at 41.

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emphasized that the Court of Military Appeals intended to require fully professional performance from military defense counsel. Silent acquiescence in the trial counsel's efforts or misguided tactics, if no reasonable basis therefor could be found, would entitle the accused to another trial with more competent representation. The emphasis, however, placed in later cases upon the failure of defense counsel to present matter in mitigation and extenuation constituted auguries of things yet to come, and it is suggested that much of the rationale of *United States v. McFarlane*, *supra*, may be found in the Court's recent, more liberal approach to the accused's complaints concerning his representative's professional competence.

### B. THE LIBERALIZATION OF HUNTER— *UNITED STATES V. ALLEN*

Following the *McFarlane* decision, another factor appeared to complicate the application of the standard first set forth in *Hunter*. In 1953, The Judge Advocate General of the Army suggested that convening authorities and defense counsel would do well to negotiate pleas of guilty in hopeless cases in return for approval of a specified maximum punishment.<sup>28</sup> The procedure intended was no more than that commonly followed in civilian criminal courts, except that a binding provision for reduction of sentence was added whereas in the normal civil case the *quid pro quo* is nothing more than a recommendation of an agreed penalty by the sentencing court.

In *United States v. Allen*,<sup>29</sup> the Court of Military Appeals for the first time explored the possibility that counsel might conclude that his duties ended with the negotiation of the guilty plea agreement and do nothing further toward lessening of the accused's penalty.<sup>30</sup> In that case, Allen contended that he had made his

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<sup>28</sup> Letter from Major General Franklin P. Shaw, Acting The Judge Advocate General, U.S. Army, to all Army Staff Judge Advocates, 23 April 1953. By 1960, the number of negotiated guilty pleas had risen to 60% of all Army general courts-martial. 60 Judge Advocate Legal Service 68/17 (1960) (Report by Major General George W. Hickman, Jr., of the Achievements of the Judge Advocate General's Corps During the Period 1966-1960).

<sup>29</sup> 8 USCMA 504, 25 CMR 8 (1967).

<sup>30</sup> With the adoption of the guilty plea program, there was a tendency on the part of some staff judge advocates to attempt to insure that accused did not receive a sentence below that agreed upon by entering into no arrangement unless counsel was willing to forego the right to present evidence in mitigation and extenuation. See 63 Chron 37 (1963). This position was speedily condemned by the Board of Review. CM 390869, *Callahan*, 22 CMR 443 (1966). Doubtless, it is such tactics as these which have caused two of

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trial defense counsel aware of many factors tending to extenuate the desertion to which he pleaded guilty. Following the findings of guilty, counsel said nothing on behalf of the accused. Before the Court, the defense counsel filed an affidavit countering accused's allegations and stated that his investigation of the latter's background disclosed that reference to it would work either to his client's disadvantage or amount to a fraud upon the court-martial. Faced with conflicting statements, the Court ordered the record returned to the board of review as the tribunal best equipped to resolve the question of accused's veracity *vis a vis* that of his lawyer. In so acting, however, it paused to comment that the guilty plea agreement always left in issue the vital question of sentence :

The sentence proceeding is an integral part of the court-martial trial. *United States v. Strand*, 6 USCMA 297, 306, 20 CMR 13. Plainly, therefore, counsel's duty to represent the accused does not end with the findings. Remaining for determination is the question of accused's liberty, property, social standing—in fact, his whole future. And his lawyer is charged with the substantial responsibility of appealing on his behalf to the conscience of the court.<sup>81</sup>

Certainly, one cannot disagree with the conclusion that it is counsel's duty to seek from the trial court the least possible penalty for his client without regard to the pretrial agreement with the convening authority. The startling innovation in *Allen*, considering the prior case law, was the Court's intimation that, in the absence of controversy over the facts, it would assume that counsel had failed in his duty to present extenuating matter if such was available and was not offered to the court-martial.<sup>82</sup> This view was quickly strengthened in *United States v. Friborg*.<sup>83</sup> Although the Court affirmed accused's conviction, it made it clear that the action was taken upon their scrutiny of the record and allied papers, from which they found that “. . . the accused and his counsel decided advisedly to make no statement and to take a

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the Judges to express reservations about the desirability of negotiated pleas. See *United States v. Watkins*, 11 USCMA 611, 29 CMR 427 (1960), and *United States v. Welker*, 8 USCMA 647, 25 CMR 151 (1958).

<sup>81</sup> 8 USCMA 504, 507, 25 CMR 8, 11.

<sup>82</sup> “. . . If these recitals were undisputed we would be compelled to ‘wonder how any counsel could . . . [have done] less for his client.’” *United States v. Allen*, *supra* note 29, at 508, 25 CMR at 12. In his dissenting opinion, Judge Latimer pointed out that the Court was departing from the *Hunter* rule and warned that the Court was judging counsel for using permissible tactics without really knowing in what manner the circumstances affected the choice not to open the question of accused's background. For identical action by the Court, see *United States v. Armell*, 8 USCMA 513, 25 CMR 17 (1957).

<sup>83</sup> 8 USCMA 515, 25 CMR 19 (1957).

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chance on the sentence.”<sup>34</sup> And in *United States v. Welker*,<sup>35</sup> unfavorable mention was made of the “tendency on part of defense counsel to present no evidence, and to make no argument, in mitigation when there is an agreement with the convening authority on the plea and the sentence.”<sup>36</sup>

The development of the *Allen* line of decisions made it clear that the Court had come a long way since its decision in *United States v. Hunter*.<sup>37</sup> From an outright declination of the invitation to re-examine counsel’s trial behavior at an appellate level unless it appeared that no representation was really afforded the defendant, it had determined to meet the accused’s varying complaints head on and re-examine his lawyer’s tactics in order to determine whether there were reasonable grounds for his nonfeasance. It has been suggested that the initial basis for this shift in position is found in the negotiated guilty plea program.<sup>38</sup> In this connection, it is worthy of note that every case involving counsel deficiency in which there is a departure from *Hunter* involved a negotiated plea, and the principal complaint was the apparent tendency of defense counsel to relax his efforts after the pretrial agreement was concluded.

As it further developed the concept of examining the reasonableness of counsel’s efforts, the Court suggested the existence of a limitation on the application of the *Hunter* rule. In *United States v. Horne*,<sup>39</sup> affidavits filed by the accused alleged that he had discussed entrapment with his counsel but that the latter had informed him that he had agreed with the trial counsel not to raise the defense in return for the Government’s exclusion from its case of the defendant’s pretrial statement. In a counter-affidavit, defense counsel denied any such discussion with the accused and averred that he had not raised entrapment as that defense did not exist and its mention would have been frivolous. In reversing, the Court found that the evidence placed entrapment in issue. It also pointed out that counsel had made no challenges, indulged only in perfunctory cross-examination of Government witnesses, made no opening statement and did not present a closing argu-

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<sup>34</sup> Id. at 516, 25 CMR at 20. Compare *United States v. Williams*, 8 USCMA 652, 25 CMR 56 (1957), wherein the Court found that defense counsel had “good and valid reasons for choosing the tactics he employed” in a guilty plea case, and *United States v. Sarlouis*, 9 USCMA 148, 25 CMR 410 (1958), to the same effect.

<sup>35</sup> 8 USCMA 647, 25 CMR 151 (1958).

<sup>36</sup> Id. at 649, 25 CMR at 153.

<sup>37</sup> See note 7 *supra*.

<sup>38</sup> *United States v. Welker*, *supra* nn. 35, 36. See also note 30 *supra*.

<sup>39</sup> 9 USCMA 601, 26 CMR 381 (1958).

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ment. The Court then recast the *Hunter* doctrine in a manner which had not theretofore been mentioned :

...By that broad language we did not intend to be understood as saying that the highest degree of professional competency is, not to be expected of *an appointed defense counsel*. In *Hendrickson v Overlade*, 131 F Supp 661 (ND Ind) (1955), the court drew a distinction between representation of *court appointed counsel* and employed counsel of a defendant's own choice where the question of due process was concerned. . . .<sup>40</sup> [Emphasis supplied.]

Regardless of the validity of the distinction, it is reasonable to infer from the Court's statement some dissatisfaction on its part with the performance of appointed legal representatives and reluctance to impose the high requirements of *United States v. Hunter* upon an accused who had had no choice in the selection of his counsel. Although not stated in the opinion, it is also arguable that the new rule concerning counsel's behavior stems at least in part from realization of the fact that defense counsel is a subordinate of the staff judge advocate and must look to that officer for his efficiency ratings, leaves, passes, and other prerequisites.<sup>41</sup> Aside from the theoretical basis for the departure from the *Hunter* decision, it is clear that the Court now intended to review the performance of at least the appointed defense counsel on appeal and to do so solely by the standard of the reasonableness of his trial tactics or abstention from affirmative efforts on behalf of his client.<sup>42</sup>

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<sup>40</sup> *Id.* at 604, 26 CMR at 384. Judge Latimer, dissenting, characterized the Court's reversal as a substitution of its judgment of trial tactics for those of defense counsel. Compare the concurring opinion of Judge Ferguson in *United States v. Smith*, 10 USCMA 31, 27 CMR 105 (1958).

<sup>41</sup> Compare the rationale of *United States v. Deain*, 5 USCMA 44, 17 CMR 44 (1954), wherein the president of a permanent court-martial had the duty of reporting on members' efficiency, with the superior-subordinate relationship of the staff judge advocate and the defense counsel. And see CM 400008, *Olivas*, 26 CMR 686 (1958), wherein the board of review reversed the first of a series of cases for command influence when the staff judge advocate and convening authority interfered with the military justice process by making a speech on inadequate sentences and by transferring zealous lawyers—defense counsel to line duties in order to impress upon them the importance of the military service. See also CM 399967, *Daniels*, 27 CMR 527 (1968).

<sup>42</sup> No case establishes this principle clearer than *United States v. Huff*, 11 USCMA 397, 29 CMR 213 (1960). There, counsel negotiated an advantageous pretrial agreement in return for a guilty plea to desertion. In mitigation, he omitted to state the motivation for accused's offense but argued that he should not be punished heavily, as he had a civilian job awaiting him and was a noncommissioned officer at the time of his departure. The Court held that such tactics were clearly unreasonable as "it would be impossible to conjure up an argument less attractive for presentation to men whose lives are devoted to 'Duty, Honor, Country.'" *United States v. Huff*, *supra* at 401, 29 CMR at 217. While the opinion may be criticized on the basis that the defense counsel may have had adequate reasons for withholding information

### III. THE PROBLEM CREATED BY THE ALLEN RULE AND ITS SOLUTION

The problem created by the approach of the United States Court of Military Appeals to the adequacy of representation by counsel is also the most valid criticism of the rule which it applies. As has been frequently noted by Judge Latimer,<sup>43</sup> measurement on the appellate level of counsel's performance at the trial must be made on the basis of the record, allied papers, and conflicting affidavits. It is not unusual to find accused who become dissatisfied with their attorneys when a substantial sentence is imposed, and they have nothing to lose by fabrication of claimed deficiencies on the part of their counsel.<sup>44</sup> Additionally, there are many reasons which do not ever appear in written form for failure to adopt aggressive tactics at the trial level, and it is usually difficult to explain these some months later. An experienced defense counsel is, or should be, aware of the foibles and idiosyncrasies of each court member and his judgment in the presentation or withholding of evidence must to some extent be governed by that knowledge. In short, it is frequently impossible adequately to measure the judgment of counsel from affidavits and the written record. Without such measurement, it is improbable that an accurate determination can be made of the reasonableness of his conduct.<sup>45</sup>

On the other hand, it can also be argued that the difficulties involved are no more than those found in appellate resolution of other factual issues in closely contested cases, wherein equally grave questions of judgment are involved. Surely, they are not so insurmountable that the Court should not run the risk of error on its part in order to enforce its demand that the accused be afforded the highest degree of professional assistance. That he

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concerning the motivation for accused's desertion, one can hardly disagree with its conclusion that his status as a noncommissioned officer and his haste to return to a position obtained during his unauthorized absence ". . . were [factors] calculated to assure imposition of the severest of penalties." 11 USCMA at 401, 29 CMR at 217.

<sup>43</sup> United States v. Allen, *supra* note 29; United States v. Horne, *supra* note 39; and United States v. Huff, *supra* note 42.

<sup>44</sup> Indeed, in United States v. Huff, *supra* note 42, it was conceded on oral argument that accused *had not* complained of the tactics employed by his defense counsel. In any event, it is suggested that there is an element of fantasy in any rule requiring an unlettered accused to determine whether his lawyer performed adequately.

<sup>45</sup> This problem doubtless explains the dichotomy in viewpoint regarding the adequacy of counsel's representation in United States v. Watkins, 11 USCMA 611, 29 CMR 427 (1960).

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has not always received that degree of aid appears to be particularly well established by the *Allen* line of decisions in which little or nothing was attempted beyond negotiation of a pretrial agreement.

Similarly, it is suggested that a solution to the problem inherent in the appellate re-examination of defense counsel's performance lies neither in reversion to the broader and less rigid concept espoused in *Hunter* nor in oversensitive reaction to criticism of judge advocate officers, but in acceptance of the well-founded principle that every accused is entitled to advocacy of the highest professional quality and the implementation of measures designed to insure that he receives it, not in the great majority of cases, but in all cases.

The question of mitigation and extenuation alone offers a ready example, and it is undoubtedly the area which has received the most attention by the Court.<sup>46</sup> As a unanimous Court has indicated, the records of trial should always reflect any attempt to obtain information concerning the accused's civilian background and reputation in his home community. Such is always important to both the trial court and appellate agencies.<sup>47</sup> Nevertheless, it seems that counsel are frequently satisfied to make no inquiry that extends beyond their own immediate military area or the accused's records.

Another area of defense failure includes the failure to object to questionable matter during the trial, leading inevitably to the argument of waiver at the appellate level, regardless of the damage to accused's interests. One need only scan the reported opinions of the Court to see the confusion wrought by its attempt to do justice where harmful error was not properly preserved for appellate scrutiny.<sup>48</sup>

These examples are but two of a host of illustrations which could be drawn to demonstrate the room for improvement in counsel's performance. While it is true that the cases reversed for inadequate representation constitute a minority of those heard by the Court and even a smaller fraction of those tried, these few occurrences inevitably erode judicial confidence in the ability of

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<sup>46</sup> See *United States v. Allen*, *supra* note 29; and *United States v. Huff*, *supra* note 42.

<sup>47</sup> *United States v. McFarlane*, 8 USCMA 96, 99, 23 CMR 320, 323-24 (1957).

<sup>48</sup> In *United States v. Cary*, 9 USCMA 348, 26 CMR 128 (1958), the Chief Judge, concurring, specifically interrelated the problem of inadequate representation and waiver. And see *United States v. Dupree*, *supra* note 8.

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the group to which the defaulters belong and, indeed, each such failure of counsel does reflect discredibly upon the administration of a fairly conceived system. It therefore behooves all charged with military justice duties to institute measures whereby the training and development of counsel is such that each case reviewed by military appellate bodies will reflect that degree of legal representation to which the accused is entitled under the Code and which the Court of Military Appeals has demanded that he receive.

### IV. CONCLUSION

The development by the Court of Military Appeals of the concept of adequate representation by defense counsel from its earliest exposition in *United States v. Hunter*,<sup>49</sup> as a broad standard of due process, to that of a reasoned advocacy in *United States v. Allen*,<sup>50</sup> and subsequent cases has imposed a challenging standard upon judge advocate officers. The era of paternalism in military law is dead. It has been supplemented by that of single minded advocacy for the accused's interests and those of the Government. The measure of performance is high, but it must be met if public confidence is to be maintained in a system so different from civil courts, yet involved so deeply in the trial of civil-type offenses committed by members of a largely draftee army.

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<sup>49</sup> See note 7 *supra*.

<sup>50</sup> See note 29 *supra*.



# REHEARINGS TODAY IN MILITARY LAW\*

BY CAPTAIN HUGH J. CLAUSEN\*\*

The word 'rehearing' in military law, is a word of art and refers to a second trial which is ordered, usually, because of some error occurring during the trial which prejudiced the accused.<sup>1</sup>

## I. INTRODUCTION

When the Uniform Code of Military Justice<sup>2</sup> became effective on 31 May 1951,<sup>3</sup> a single system of criminal law for all of our armed forces<sup>4</sup> came into being for the first time. As a result, some of our armed forces also had a statutory basis for rehearings for the first time.<sup>5</sup>

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\* The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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<sup>1</sup> Latimer, *A Comparative Analysis of Federal and Military Procedure*, 29 Temp. L.Q. 1, 22 (1950).

<sup>2</sup> Sec. 1, act of 5 May 1950, as amended. The Uniform Code of Military Justice (referred to hereinafter as "the Code" or the "UCMJ") was codified as 10 U.S.C. §§ 801-934 (1958) by the act of 10 Aug 1956, 70A Stat. 1, 36. Although some changes in language were made in the Code during the codification, the legislative intent was to restate existing law without substantive change. See S. Rep. No. 2484, 84th Cong., 2d Sess. 19 (1956).

<sup>3</sup> Sec. 5, act of 5 May 1950, 64 Stat. 108, 145. The codification mentioned in note 2 *supra*, became effective 1 Jan 1957 concurrently with the repeal of the Code. Act of 10 Aug 1956, 70A Stat. 1, 640.

<sup>4</sup> The individual armed forces, as defined by 10 U.S.C. § 101(4) (1958), are the Army, Navy, Air Force, Marine Corps, and Coast Guard. Under the Code, however, the Navy and Marine Corps (and the Coast Guard when operating with the Navy) are considered as one armed force. See 10 U.S.C. § 801(2) (1958).

<sup>5</sup> The Articles for the Government of the Navy, R.S. § 1624 (1875), as amended; § 2, act of 22 Jun 1874, 18 Stat. 192; act of 3 Mar 1893, 27 Stat. 716; act of 25 Jan 1895, 28 Stat. 639, as amended; §§ 1-12, 16-17, act of 16 Feb 1909, 35 Stat. 623; act of 29 Aug 1916, 39 Stat. 586; act of 6 Oct 1917, 40 Stat. 393, as amended; act of 2 Apr 1918, 40 Stat. 501, the pre-Code system of criminal law applicable to Navy and Marine personnel, had no statutory provision for rehearings. See H.R. Rep. No. 491, 81st Cong., 1st Sess. 30 (1949); S. Rep. No. 486, 81st Cong., 1st Sess. 26 (1949). The Navy did, by executive regulation, § 477, Naval Courts and Boards (1937), have a non-statutory procedure similar in some respects to a rehearing. The Disciplinary

Prior to 1920 the concept known today as a rehearing did not exist in any of the services. Before this time, Colonel Winthrop records, a second trial could be ordered with the accused's consent.<sup>6</sup> There was a theory, however, advanced by some, that The Judge Advocate General of the Army did have the authority to order something in the nature of a rehearing.<sup>7</sup> This thesis was premised on an old statute which appeared to say The Judge Advocate General could "revise" the proceedings of courts-martial.<sup>8</sup> The validity of this proposition was never directly decided. In any event, the then Judge Advocate General<sup>9</sup> did not believe he possessed such authority and apparently never attempted to use it.<sup>10</sup> His position was very likely influenced by an early case which, in dicta, indicated the mentioned statute conferred no judicial functions, but rather recited a list of clerical duties.<sup>11</sup>

## II. HISTORICAL DEVELOPMENT

### A. THE ARTICLES OF WAR OF 1920

The Articles of War of 1920,<sup>12</sup> enacted for the government of the Army, became effective on 4 February 1921.<sup>13</sup> Article of War 501½<sup>14</sup> was the first statutory provision for rehearings, and was

Laws for the Coast Guard, §§ 2-7, act of 26 May 1906, 34 Stat. 200; act of 5 Jun 1920, 41 Stat. 880, contained no statutory authority for rehearings. The Coast Guard also had a non-statutory procedure which included most aspects of a rehearing. See Art. 145, Manual for Courts-Martial of the United States Coast Guard, CG-221, 22 Nov 1949. The pre-Code system of the Army, ch. 11, § 1, act of 4 June 1920, 41 Stat. 787, as amended, made applicable to the Air Force when created, Title 11, act of 26 July 1947, 61 Stat. 499, did provide for rehearings by statute.

<sup>6</sup> Winthrop, *Military Law and Precedents* 453 (2d ed. 1920 Reprint). See also Dig. Ops. JAG 1912, Articles of War par. CII A (Mar. 1909).

<sup>7</sup> See 59 Cong. Rec. 5843-5844 (1920). See also Morgan, *The Background of the Uniform Code of Military Justice*, 6 Vand. L. Rev. 169, 171 (1953).

<sup>8</sup> R.S. § 1199 (1875) provided: "The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army."

<sup>9</sup> Major General Enoch B. Crowder was The Judge Advocate General of the Army from 15 Feb 1911 to 14 Feb 1923. See 1 CMR at vii (1952).

<sup>10</sup> See 59 Cong. Rec. 5843-5844 (1920). See also Morgan, *op. cit. supra* note 7, at 171.

<sup>11</sup> *Ex parte* Mason, 256 Fed. 384 (C.C.N.D.N.Y. 1882).

<sup>12</sup> Ch. II, § 1, act of 4 Jun 1920, 41 Stat. 787.

<sup>13</sup> See ch. 11, § 2, act of 4 Jun 1920, 41 Stat. 787, 812.

<sup>14</sup> Ch. II, § 1, act of 4 Jun 1920, 41 Stat. 787, 799.

considered by some to be the most radical change<sup>15</sup> from the Articles of War of 1916.<sup>16</sup> Articles of War 47 and 49 of the Articles of War of 1916, declaring, respectively, the powers incident to the power to approve and confirm, only authorized approval or disapproval of the findings and sentence in whole or in part.<sup>17</sup> These same articles under the Articles of War of 1920 were identical except for the following addition: “(c) The power to remand a case for rehearing, under the provisions of Article 50½.”<sup>18</sup> Thus, the convening authority of any type court could order a rehearing.<sup>19</sup> The Board of Review, whose review was required in certain general court-martial cases, could order a rehearing—but only with the concurrence of The Judge Advocate General.<sup>20</sup> The President, whose confirmation was required in some cases, was empowered to order a rehearing in such cases.<sup>21</sup> In time of war, the commanding general of an Army in the field could, because of his authority to confirm certain death sentences, order a rehearing.<sup>22</sup>

Although an officer exercising general court-martial jurisdiction had supervisory authority over all special and summary courts-martial tried within his command,<sup>23</sup> he did not possess authority to order a rehearing when reviewing such cases.<sup>24</sup> His authority, as supervisory authority, was limited to remission, mitigation, or suspension.<sup>26</sup>

Article of War 50½ of 1920 remained unchanged until 1937, when it was amended to provide that the functions of the President thereunder could be preformed by the Secretary or Acting Secretary of War.<sup>26</sup> It was further amended in 1942 to provide, when a branch office of The Judge Advocate General was established in a distant command, that the commanding general of such distant command could exercise the same functions as the President in ordering rehearings—provided such officer was not the

<sup>15</sup> See 59 Cong. Rec. 5844 (1920).

<sup>16</sup> Sec. 3, act of 29 Aug 1916, 39 Stat. 650.

<sup>17</sup> See § 3, act of 29 Aug 1916, 39 Stat. 650, 657–658.

<sup>18</sup> See ch. II, § 1, act of 4 Jun 1920, 41 Stat. 787,796–797.

<sup>19</sup> Ch. II, § 1, act of 4 Jun 1920, 41 Stat. 787, 796.

<sup>20</sup> Ch. II, § 1, act of 4 Jun 1920, 41 Stat. 787,797–799.

<sup>21</sup> See AW's 48, 49, and 50% of 1920. Ch. II, § 1, act of 4 Jun 1920, 41 Stat. 787, 796–799.

<sup>22</sup> *Ibid.*

<sup>23</sup> Manual for Courts-Martial, U.S. Army, 1928, par. 91a.

<sup>24</sup> Dig. Ops. JAG 1912–1940 § 403(5) (Aug. 30, 1932).

<sup>25</sup> *Ibid.*

<sup>26</sup> Sec. 1, act of 20 Aug 1937, 50 Stat. 724.

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appointing or confirming authority.<sup>27</sup> No further statutory amendments to the Articles of War affecting rehearings were made until after World War II.

By executive order, however, President Roosevelt delegated (along with other powers) his authority to order rehearings to the Undersecretary and Assistant Secretary of War, and, at the same time, provided that The Assistant Judge Advocate General for Military Justice could exercise all the functions, duties, **and** powers of The Judge Advocate General conferred upon the latter by Article of War 50½.<sup>28</sup> Similarly, President Truman delegated all his functions, duties, and powers under Article of War 50½ to the Secretary and Undersecretary of War.<sup>29</sup>

### B. THE ELSTON ACT

The next statutory development in the law of rehearings occurred with the passage of the so-called Elston Act.<sup>30</sup> Although this act effected considerable changes in language and the numbering of the articles, there was practically no change in substance in the law of rehearings.

Article of War 50½ of 1920 was rescinded and, in the main, rehearings were provided for in Article of War 52<sup>31</sup> while appellate review was provided for in Article of War 50.<sup>32</sup> The latter article did, however, contain some provisions which implemented the rehearing article. Article of War 52 provided, in part, that when “. . . any reviewing or confirming authority disapproves a

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<sup>27</sup> Act of 1 Aug 1942, 56 Stat. 732.

<sup>28</sup> Exec. Order No. 9363, 23 Jul 1943.

<sup>29</sup> Exec. Order No. 9556, 26 May 1945.

<sup>30</sup> Title 11, act of 24 Jun 1948, 62 Stat. 627. Earlier, the National Security Act of 1947, Title 11, act of 26 Jul 1947, 61 Stat. 499, created the Air Force as a separate entity and transferred all personnel, functions, and duties of the former Army Air Corps thereto. The Air Force, however, was not mentioned in the Elston Act and the applicability of these amendments to the Air Force was somewhat questionable. In any event, the day after the Elston Act was passed, and before its effective date, another bill was enacted specifically providing that the Articles of War were applicable to the Air Force. Sec. 2, act of 25 Jun 1948, 62 Stat. 1014. It was felt that this bill would “legalize beyond doubt” the administration of military justice in the Air Force. See 94 Cong. Rec. 8491 (1948). For a good discussion of the applicability of the Articles of War to the Air Force and the attendant constitutional implications see ACM 2361, *Ingle*, 3 CMR(AF) 353 (1950).

<sup>31</sup> Ch. 11, § 1, act of 4 Jun 1920, 41 Stat. 787, 797, as amended by the act of 15 Dec 1942, 56 Stat. 1051, as further amended by Title 11, § 229, act of 24 Jun 1948, 62 Stat. 627, 638.

<sup>32</sup> Ch. 11, § 1, act of 4 Jun 1920, 41 Stat. 787, 797, as amended by Title II, § 226, act of 24 Jun 1948, 62 Stat. 627, 635.

sentence or when any sentence is vacated by action of the Board of Review or Judicial Council and The Judge Advocate General, the reviewing or confirming authority or The Judge Advocate General may authorize or direct a rehearing.” Here again, as under the 1920 act, the convening authority could order a rehearing, his “power to approve” remaining unchanged.<sup>33</sup> Similarly, the President, as confirming authority, could still order a rehearing in those cases where his confirmation was required; although his confirmation was not required in as many instances as was previously the case.<sup>34</sup> The newly established Judicial Council with the concurrence of The Judge Advocate General, the Judicial Council alone, and the Secretary of the Army, were confirming authorities in certain instances, and as such could order a **rehearing**.<sup>35</sup> Further, a board of review, with the concurrence of The Judge Advocate General, could order a rehearing when acting on certain cases.<sup>36</sup>

In addition, the approval of the officer exercising general court-martial authority over the command was required before a special court-martial sentence which included a bad conduct discharge could be executed, and such general court-martial authority could order a rehearing in such cases.<sup>37</sup>

### C. THE UCMJ

Probably because the concept developed in the Army, Congress patterned the rehearing provisions of the Code after the pre-Code practice of the Army.<sup>38</sup> In fact, the term “rehearing” itself was adopted from Army usage.<sup>39</sup> With this historical and legislative background as a general frame of reference, the remainder of this article will be devoted to an analysis of the law of rehearings under the Uniform Code of Military Justice—as interpreted by the United States Court of Military Appeals.

<sup>33</sup> See Article of War 47, ch. II, § 1, act of 4 Jun 1920, 41 Stat. 787, 796, as amended by Title II, § 223, act of 24 Jun 1948, 62 Stat. 627, 634.

<sup>34</sup> See Articles of War 48 and 49, ch. II, § 1, act of 4 Jun 1920, 41 Stat. 787, 796–797, as amended by Title II, §§ 224–225, act of 24 Jun 1948, 62 Stat. 627, 634–635.

<sup>35</sup> *Ibid.*

<sup>36</sup> Article of War 50, ch. II, § 1, act of 4 Jun 1920, 62 Stat. 627, 635.

<sup>37</sup> Article of War 47, ch. II, § 1, act of 4 Jun 1920, 62 Stat. 627, 634. This was a power not possessed by the general court-martial supervisory authority under prior practice. See nn. 23–25 *supra* and accompanying text.

<sup>38</sup> See H.R. Rep. No. 491, 81st Cong., 1st Sess. 30 (1949); S. Rep. No. 486, 81st Cong., 1st Sess. 26 (1949).

<sup>39</sup> *Ibid.*

111. THE AUTHORITY TO ORDER REHEARINGS TODAY

A. THE CONVENING AUTHORITY

The officer who convenes any type court-martial, *i.e.*, the convening authority, has the power to order a rehearing.<sup>40</sup> There are, however, at least two instances where someone other than the officer who convened the court may be the “convening authority” for a particular case. First, where a rehearing is ordered on appellate review, and the accused has been transferred to another command, the officer in this command who has the authority to convene the type court-martial that tried accused may order a rehearing—provided the officer who originally convened the court has ordered a rehearing.<sup>41</sup> If the original convening authority does not order a rehearing, but dismisses the charges after determining that a rehearing is not practicable, this determination is binding on the convening authority of the command into which the accused has been transferred.<sup>42</sup> Secondly, a board of review, or the Court of Military Appeals, may determine that the officer who convened the court-martial was incapable of acting thereon after the completion of the trial, and order that the case be referred to another officer who exercises the same type jurisdiction for a new post-trial review.<sup>43</sup> This latter officer would, necessarily, under Article 63(a),<sup>44</sup> have the authority to order a rehearing.

One further situation concerning the convening authority’s power should be considered. After evidence on the merits has been received the convening authority may, because of urgent, and unforeseen military necessity, or the admission of highly prejudicial inadmissible evidence, withdraw a case from the court and refer it to another.<sup>45</sup> If this is done before the findings the ques-

<sup>40</sup> UCMJ, art. 63(a), 10 U.S.C. § 863(a) (1958). Convening authorities in the Army have possessed this same power by statute since 1920. See note 19 *supra* and accompanying text.

<sup>41</sup> JAGM CM 353869 (Apr. 8, 1953), in Manual for Courts-Martial, United States, par. 92 (1951, Army Supp. 1959).

<sup>42</sup> *Zbid.* Thus, the “order” of a rehearing by the original convening authority amounts to nothing more than an authorization which is not binding upon the subsequent convening authority. *Cf.* Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, p. 133.

<sup>43</sup> See, *e.g.*, United States v. Papciak, 7 USCMA 412, 22 CMR 202 (1956); United States v. McClenny, 5 USCMA 507, 18 CMR 131 (1955); CM 387683, Layne, 21 CMR 384 (1956) (dissent by Col. Searles). *Cf.* United States v. Taylor, 5 USCMA 523, 18 CMR 147 (1955).

<sup>44</sup> 10 U.S.C. § 863(a) (1958).

<sup>45</sup> Manual for Courts-Martial, United States, 1951, par. 56b. [Hereinafter cited as “MCM, 1951.”]

tion is one of jeopardy.<sup>46</sup> In *United States v. Stringer*<sup>47</sup> the convening authority withdrew the case before findings because he determined some remarks made by the president of the court-martial to be highly prejudicial to both the Government and the accused. After holding this procedure to be authorized, and not a bar to further prosecution, the court stated that the convening authority could have ordered a rehearing after the findings and sentence because of the improper remarks, and there was no valid reason why he should be required to wait. In *United States v. Ivory*<sup>48</sup> the accused stood convicted, but unsentenced, when the president of the court noticed a variance between the pleading and proof. The convening authority withdrew the case from the court and the accused pleaded jeopardy at the second trial. The Court of Military Appeals held that jeopardy had not attached and stated: “. . . If an accused is initially found guilty, he can never be convicted of a degree of an offense greater than that returned by the original court-martial.” This language is apparently based on the court’s holding in the *Padilla*<sup>49</sup> case. There, the convening authority erroneously determined that the court-martial that had tried the accused lacked jurisdiction and ordered “another trial.”<sup>50</sup> Although the court found that the first court-martial did possess jurisdiction, and hence the second trial was unnecessary, it likened the second trial to a rehearing with respect to the limitations imposed by Article 63(b).<sup>51</sup> Considering these cases as a whole, it is plain that the Court of Military Appeals likened the Ivory situation to a rehearing and would limit the degree of the findings at the second trial to the findings made at the first trial. Similarly, should a convening authority properly withdraw a case after sentence was adjudged, a logical extension of *Ivory* would require that the maximum sentence imposable at the second trial be limited to that imposed in the first instance.

## B. THE GENERAL COURT-MARTIAL SUPERVISORY AUTHORITY

The officer exercising general court-martial jurisdiction over a command has supervisory authority over all special and summary

<sup>46</sup> UCMJ, art. 44, 10 U.S.C. § 844 (1958). See MCM, 1951, pars. 56b and 68d, 47 5 USCMA 122, 17 CMR 122 (1954).

<sup>47</sup> 9 USCMA 516, 26 CMR 296 (1958).

<sup>49</sup> *United States v. Padilla*, 1 USCMA 603, 5 CMR 31 (1952).

<sup>50</sup> The procedure known as “another trial” is always premised on a lack of jurisdiction. See generally, MCM, 1951, ch. IV and pars. 68b and 92.

<sup>51</sup> 10 U.S.C. § 863(b) (1958), which provides generally that, on a rehearing, the accused may not be tried for any offense of which he was found not guilty at the first trial nor receive a sentence more severe than that first imposed.

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courts-martial tried in such command.<sup>52</sup> Although there was some doubt about it at one time,<sup>53</sup> it is now clear, since the *Frisbee*<sup>54</sup> case, that the general court-martial supervisory authority may order a rehearing when reviewing special courts-martial under Article 65(b)<sup>55</sup> where the sentence, as approved by the convening authority, includes a bad conduct discharge.

Does the general court-martial supervisory authority also have the power to order a rehearing when reviewing special courts-martial where the sentence does not include a bad conduct discharge, and summary courts-martial, under Article 65(c)?<sup>56</sup> The Court of Military Appeals, by dictum, in *Frisbee* answered in the affirmative; although the late Justice Brosman, concurring in the result, thought an answer to the above question should be withheld until raised on review. Since a special court-martial not involving a bad conduct discharge, or a summary court-martial, is final upon review as provided by Article 65(c), the Court of Military Appeals will never be confronted with the problem. For this reason, the dictum of the majority in *Frisbee* assumes additional importance. Their reasoning is, simply, that since the general court-martial supervisory authority may set aside the findings or sentence in whole or in part,<sup>57</sup> he clearly should be able to condition such action on ordering a rehearing—in short, the power to set aside includes the power to direct a rehearing.

### C. BOARDS OF REVIEW

Boards of review may order a rehearing in a case which they review.<sup>58</sup> If a board of review orders a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.<sup>59</sup> It is, therefore, apparent that the “order” of a

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<sup>52</sup> MCM, 1951, par. 94a(1).

<sup>53</sup> See, e.g., NCM 228, *Conway*, 11 CMR 625 (1953).

<sup>54</sup> *United States v. Frisbee*, 2 USCMA 293, 8 CMR 93 (1953). *Accord*, *United States v. Freeman*, 3 USCMA 71, 11 CMR 71 (1953); *United States v. Wyatt*, 2 USCMA 647, 10 CMR 145 (1953).

<sup>55</sup> 10 U.S.C. § 865(b) (1958).

<sup>56</sup> 10 U.S.C. § 865(e) (1958).

<sup>57</sup> MCM, 1951, par. 94a(2).

<sup>58</sup> UCMJ, art. 66(a), 10 U.S.C. § 866(d) (1958). All cases affecting a general or flag officer or where the approved sentence extends to death, dismissal, dishonorable or bad conduct discharges, or confinement for one year or more must be reviewed by a board of review. See UCMJ, art. 66(b), 10 U.S.C. § 866(b) (1958).

<sup>59</sup> UCMJ, art. 66(e), 10 U.S.C. § 866(e) (1968).

board of review of a rehearing is nothing more than an authorization.<sup>60</sup>

In *Best*<sup>61</sup> it was held that the authorization of a rehearing by a board of review was a non-appealable interlocutory order unless the board takes final action on the sentence. Later, however, in *Papciak*<sup>62</sup> it was held that *any* action by a board, which finally disposes of the matter before it, is appealable. Moreover, in *Papciak*, Judge Latimer was of the opinion that, even though the board does not act finally on the matter before it, if a right of any party is determined in such a manner *as* to leave no adequate remedy, except by recourse to an appeal, then such matter would be appealable under the “extraordinary proceedings” exception mentioned in *Best*. In any event, one problem raised by *Best* namely must an accused await a rehearing before he may raise the issue that such rehearing was improperly authorized because based on insufficient evidence—seems to be resolved. Clearly, if a board of review disapproves the findings and sentence and orders a rehearing, such action constitutes acting with finality on the matter before it within the meaning of *Papciak*. Thus, where a board orders a rehearing, the accused may properly petition the Court of Military Appeals to review his case prior to the rehearing if some right of his has been determined in a manner where an appeal is his only adequate remedy. The attack on the board decision when the case is reviewed as a whole by the Court of Military Appeals is, of course, not precluded. A board of review will, however, generally be held not to abuse its discretion in ordering a rehearing as opposed to other lawful corrective action.<sup>63</sup>

#### D. THE COURT OF MILITARY APPEALS

The Court of Military Appeals is authorized by Article 67(e)<sup>64</sup> to order rehearings in cases reviewed by such court, *i.e.*, all cases affirmed by a board of review that affect a general or flag officer or extend to death; all cases reviewed by a board of review which a Judge Advocate General certifies for review; and, upon petition by the accused, any case reviewed by a board of review if the

<sup>60</sup> Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, p. 133.

<sup>61</sup> *United States v. Best*, 6 USCMA 39, 19 CMR 165 (1955).

<sup>62</sup> *United States v. Papciak*, 7 USCMA 224, 22 CMR 14 (1966).

<sup>63</sup> See, *e.g.*, *United States v. April*, 7 USCMA 594, 23 CMR 58 (1957).

<sup>64</sup> 10 U.S.C. § 867(e) (1958).

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petition of the accused shows good cause.<sup>65</sup> However, “. . . if the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.”<sup>66</sup> Thus the “order” of the Court of Military Appeals, like the “order” of a board of review, is nothing more than an authorization.<sup>67</sup>

### E. *THE JUDGE ADVOCATES GENERAL*

The Judge Advocates General of the Army, Navy, and Air Force and the General Counsel of the Treasury Department have no present authority to order rehearings, even when examining records of trial under Article 69.<sup>68</sup> This deficiency was recognized by the Code Committee<sup>69</sup> in their second report<sup>70</sup> and they recommended that The Judge Advocates General and the General Counsel of the Treasury Department be given legislative authority to take corrective action on Article 69 cases to the same extent that boards of review may act on other cases under Article 66<sup>71</sup>—which would include the power to authorize rehearings. This recommendation has been reaffirmed in each subsequent yearly report, but Congress has not yet acted.<sup>72</sup>

### F. *THE PRESIDENT AND THE SECRETARIES*

The President and the Secretaries of the Armed Forces have no authority, as such, to order rehearings. Since all may convene all types of courts-martial,<sup>73</sup> however, they may, as convening authorities, order a rehearing when acting in a particular case.

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<sup>65</sup> 10 U.S.C. § 867(b) (1958); *but see* 10 U.S.C. § 869 (1958).

<sup>66</sup> 10 U.S.C. § 867(f) (1958).

<sup>67</sup> Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, p. 133.

<sup>68</sup> 10 U.S.C. § 869 (1958).

<sup>69</sup> The Court of Military Appeals and the Judge Advocates General (which includes the General Counsel of the Treasury Department) when reporting on the operations of the UCMJ are usually referred to as the Code Committee. See 10 U.S.C. § 867(g) (1958).

<sup>70</sup> 1953 USCMA and the Judge Advocates General of the Armed Forces and General Counsel of the Dep't of Treasury Ann. Rep. 8.

<sup>71</sup> 10 U.S.C. § 866 (1958). The Code Committee recommended that the Judge Advocates General and the General Counsel of the Treasury Department be given the authority to dismiss any case where a board of review or the Court of Military Appeals authorizes a rehearing if to hold a rehearing would be impracticable.

<sup>72</sup> See H.R. 3387, 86th Cong., 1st Sess., the so-called-Omnibus Bill.

<sup>73</sup> UCMJ, arts. 22, 23, 24; 10 U.S.C. §§ 822, 823, 824 (1958).

G. THE LAW OFFICER (PRESIDENT OF A SPECIAL COURT-MARTIAL)

Does the law officer (or president of a special court-martial) have the power to order a rehearing?<sup>74</sup> It must be conceded at the outset that he is not granted such authority in so many words. The exercise of his authority to order a mistrial appears, nevertheless, tantamount to such power.

During the early years of operation under the Code it seems to have been the belief that a law officer had no authority to order a **mistrial**.<sup>75</sup> In the *Stringer*<sup>76</sup> case, the Court of Military Appeals decided, though perhaps with some misgiving, that the law officer does possess the power to declare a **mistrial**.<sup>77</sup> "This device [*i.e.*, a mistrial] is designed to cure errors which are manifestly prejudicial, and the effect of which cannot be obliterated by cautionary instructions . . . ." <sup>78</sup> Moreover, ". . . it is the duty of the trial judge to maintain the integrity of trials by jury, and if it appears . . . that misconduct of any juror or other person has tainted the panel with any sort of corruption, or intimidation, or coercion, the trial should be stopped and a mistrial granted . . . ." <sup>79</sup> It is clear, however, that while both the law officer and a civilian judge may grant a mistrial, the latter may at the same time order a rehearing (or new trial) but the former possesses no such authority. This distinction was recognized in *Stringer*. This means, 'in the military system, there will be no rehearing unless the officer who exercises the proper type of jurisdiction over the accused so orders. As pointed out above, this is also true where the Court of Military Appeals or a board of review authorizes a rehearing. Thus, the order of a mistrial by a law officer in effect authorizes the convening authority to order a rehearing. Applying and extending the rule in *Ivory*,<sup>80</sup> the accused would be entitled to the complete protection of Article 63(b).<sup>81</sup>

<sup>74</sup> It has been suggested that the law officer be specifically authorized to order a rehearing upon his own motion or upon motion of either counsel. See Report of the Working Group Appointed by the Members of the Code Committee to Study and Report on Suggested Amendments to the Uniform Code of Military Justice, pp. 9-10 (1959).

<sup>75</sup> See, *e.g.*, NCM 228, *Conway*, 11 CMR 625 (1953).

<sup>76</sup> *United States v. Stringer*, 5 USCMA 122, 17 CMR 122 (1954).

<sup>77</sup> See also *United States v. Carver*, 6 USCMA 258, 19 CMR 384 (1955).

<sup>78</sup> *United States v. Richards*, 7 USCMA 46, 51, 21 CMR 172, 176 (1956).

<sup>79</sup> *Klose v. United States*, 49 F.2d 177, 181 (8th Cir. 1931), cited with approval in *United States v. Lynch*, 9 USCMA 523, 26 CMR 303 (1958).

<sup>80</sup> *United States v. Ivory*, 9 USCMA 516, 26 CMR 296 (1958).

<sup>81</sup> 10 U.S.C. § 863(b) (1958).

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Because the president of a special court-martial performs the same duties as the law officer (although subject to objection in certain instances), it follows logically that a mistrial properly granted by the former has the same effect as a mistrial granted by the law officer.

### IV. TYPES OF REHEARING

#### A. GENERAL

The various types of rehearings have not been named and defined with any degree of consistency. It is done here to provide a convenient short-hand frame of reference—and in the hope that the adoption of these terms by others will result in better understanding of the rehearing phenomenon.

#### B. THE STRAIGHT REHEARING

A straight rehearing is one at which there is a re-trial of all the offenses of which the accused was originally convicted, except those dismissed on review, and a redetermination of an appropriate sentence.<sup>82</sup>

#### C. THE SENTENCE REHEARING

A true sentence rehearing may only occur if all or some of the offenses of which the accused was convicted were approved on review. The sentence rehearing, of course, is the subsequent trial where the only issue is the redetermination of an appropriate sentence for the convictions approved on review. The existence of the sentence rehearing was first suggested in *United States v. Fields*.<sup>83</sup> Relying on *Fields*, many sentence rehearings were held.<sup>84</sup> Then, some two years later, the United States Supreme Court, in deciding *Jackson v. Taylor*,<sup>85</sup> cast some doubt on the validity of the sentence rehearing concept. In the *Jackson* case the five to four majority, speaking through Mr. Justice Clark, stated:

Finally the petitioner suggests that the case should be remanded for a rehearing before the court-martial on the question of the sentence. We find no authority in the Uniform Code for such a procedure and the peti-

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<sup>82</sup> See UCMJ, art. 63(b), 10 U.S.C. § 863(b) (1958).

<sup>83</sup> 5 USCMA 379, 18 CMR 3 (1966).

<sup>84</sup> See, CM 399682, *Miller & Kline*, 26 CMR 673, 680 (1968).

<sup>85</sup> 363 U.S. 669 (1957), *reh. denied*, 364 U.S. 944 (1967); see also the companion case of *Fowler v. Wilkerson*, 363 U.S. 583 (1957), *reh. denied*, 354 U.S. 944 (1967).

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tioner points to none. The reason is, of course, that the Congress intended that a board of review should exercise this power. This is true because the nature of a court-martial proceeding makes it impractical and unfeasible to remand for the purpose of sentencing alone.<sup>86</sup>

Approximately one year later, an Army Board of Review concluded it had the power to order a sentence rehearing despite the Supreme Court's language in *Jackson*.<sup>87</sup> In so holding, the board stated that the word "and" in the text of Article 66(d) should be read "or" when "such an interpretation is required to arrive at a construction of the statute which will be in consonance with the legislative intent and overall purpose of the act."<sup>88</sup> To dispel the uncertainty in this area The Judge Advocate General certified the case to the Court of Military Appeals.<sup>89</sup>

The court unanimously adopted the board's rationale of substituting "or" for "and" in Article 66(d) and pointed out that "it has long been the law that findings and sentence are completely separate and distinct portions of military justice procedure."<sup>90</sup> Moreover, the court declared, "the express authority to grant the more extensive relief—a complete rehearing—impliedly authorizes a grant of a separate and divisible part thereof—a rehearing on sentence only."<sup>91</sup>

### D. SPLIT REHEARING

A split rehearing occurs when some of the findings are approved, some of the findings and the sentence are set aside and a rehearing is ordered at which accused's guilt or innocence of the disapproved findings is redetermined and an appropriate sentence awarded.

## V. LIMITATIONS AND RESTRICTIONS

### A. GENERAL

The power to authorize rehearing is not, as one might expect, unconditionally granted and this section is devoted to a considera-

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<sup>86</sup> 353 U.S. at 679 (1967). (Footnote omitted.)

<sup>87</sup> CM 399682, *Miller & Kline*, *supra* note 84.

<sup>88</sup> *Ibid.* Although not cited by the board, CMA recognized this same principle as early as 1962. See *United States v. Prescott*, 2 USCMA 122, 6 CMR 122 (1952), wherein it was stated that ". . . it is a well established principle that the word 'and' may be interpreted to mean 'or' to carry out the intention of the lawmakers" (construing TMP, Sec. B, par. 127c, MCM, 1961).

<sup>89</sup> 26 CMR 681 (1968).

<sup>90</sup> *United States v. Miller*, 10 USCMA 296, 299, 27 CMR 370,373 (1969).

<sup>91</sup> *Zbid.*

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tion of these limitations and restrictions on the power to order or authorize a rehearing.

### B. LACK OF SUFFICIENT EVIDENCE

A rehearing may never be ordered where there is a lack of sufficient evidence in the record to support the findings.<sup>92</sup> Specific reference to this principle in three of the four articles of the Uniform Code of Military Justice dealing with rehearings evidences the importance attached thereto by Congress.<sup>93</sup> While the existence of this principle has always been recognized, its application has been fraught with some difficulty, principally because of a misunderstanding whether the term "evidence in the record" would allow a consideration of evidence held inadmissible on review in determining sufficiency. This term was intended to convey that a rehearing would be authorized ". . . where the prosecution has made its case on evidence which is improperly admitted at the trial, evidence for which there *may* well be an admissible substitute."<sup>94</sup> The emphasized language was relied on in *Butcher*, an early board of review case, in holding that a rehearing was authorized where a deposition was held inadmissible because an admissible substitute may be available.<sup>95</sup> The Court of Military Appeals specifically approved this interpretation in *United States v. Eggers*.<sup>96</sup> In *Eggers* the board of review held that some handwriting specimens were obtained from the accused illegally and, because without the handwriting specimen there was insufficient evidence in the record to support the findings, dismissed the charges. The court, in reversing the board held that the criterion was improperly applied and stated that the test ". . . is whether there exists an available substitute for the evidence held inadmissible." Impliedly, the admissible evidence plus the inadmissible evidence, for which there exists an available substitute, must together be sufficient to support the findings.<sup>97</sup> What has been said then gives rise to a two element rule. First, a rehearing may not be ordered unless the "evidence in the record," whether properly

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<sup>92</sup> See ACM 5686, *Metcalf*, 6 CMR 682 (1952). *Accord*, ACM S-10805, *Kelley*, 19 CMR 855 (1955); ACM 4715R, *Burns*, 16 CMR 922 (1954), *aff'd*, 5 USCMA 707, 19 CMR 3 (1955).

<sup>93</sup> 10 U.S.C. §§ 863(a), 866(d), 867(e) (1958). 10 U.S.C. § 865(b), incorporates this provision by implied cross-reference to 10 U.S.C. § 863, *supra*.

<sup>94</sup> Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, p. 132. (Emphasis added.)

<sup>95</sup> ACM 5161, *Butcher*, 5 CMR 634 (1952).

<sup>96</sup> 3 USCMA 191, 11 CMR 191 (1953).

<sup>97</sup> *Cf.* *United States v. Wilson*, 2 USCMA 248, 8 CMR 48 (1953).

or improperly admitted, supports the findings. Second, if the “evidence in the record” supports the findings there must be, nevertheless, an admissible substitute available for any evidence improperly admitted. However, “evidence in the record” does not include evidence admitted in support of motions although incidentally relevant to the merits,<sup>98</sup> evidence ordered stricken from the record,<sup>99</sup> or evidence in extenuation and mitigation.<sup>100</sup> But a presumption or justifiable inference may be relied upon in determining if the “evidence in the record” supports the findings.<sup>101</sup> There are two exceptions<sup>102</sup> to the first element of the rule just stated—evidence outside the record of trial relating to sanity and jurisdiction may be considered.<sup>103</sup> Relying on *Eggers*, it has been held, where a confession was determined inadmissible, that if an available substitute may be secured<sup>104</sup> or if other evidence of guilt is apparently available<sup>105</sup> a rehearing may be ordered. These two cases pose the question of whether, in fact, a substitute for the inadmissible evidence must exist at the time the rehearing is ordered or may be created thereafter. If a confession is held inadmissible on review, substitute evidence possibly would not exist at that time although such substitute evidence may thereafter be obtained. This, of course, would especially be true if the only possibility of substitute evidence were another confession. If the court’s language in *Eggers* “. . . whether there exists an available substitute for the evidence held inadmissible” is to be accorded any weight it must be concluded that the substitute must exist in fact at the time the rehearing is ordered. At first blush this may seem unjustifiable. It is, however, nothing more than a different method of stating the principle that there must be sufficient evidence in the record to support the findings. If there

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<sup>98</sup> *United States v. Swanson*, 9 USCMA 711, 26 CMR 491 (1958). (Evidence submitted in support of a motion to dismiss.)

<sup>99</sup> ACM S-10805, *Kelley*, 19 CMR 855 (1955).

<sup>100</sup> MCM, 1951, par. 75a.

<sup>101</sup> *United States v. Porter*, 9 USCMA 656, 26 CMR 436 (1958) (continuance of marriage); ACM 4715R, *Bums*, 16 CMR 922 (1954), *aff’d*, 5 USCMA 707, 19 CMR 3 (1954), without comment on this point (sanity).

<sup>102</sup> A third possible exception is a certificate of correction. However, since a certificate of correction alludes only to matters omitted from the record of trial through mistake or inadvertence it is not considered to be matter outside the record of trial as that phrase is used herein. See *United States v. Roberts*, 7 USCMA 322, 22 CMR 112 (1956).

<sup>103</sup> *United States v. Dickenson*, 6 USCMA 438, 20 CMR 154 (1955) (jurisdiction); *United States v. Bell*, 6 USCMA 392, 20 CMR 108 (1955) (sanity). See generally *United States v. King*, 8 USCMA 392, 24 CMR 202 (1957); *United States v. Johnson*, 8 USCMA 173, 23 CMR 397 (1957); *United States v. Roberts*, 7 USCMA 322, 22 CMR 112 (1956).

<sup>104</sup> CM 365105, *Cash*, 12 CMR 215 (1953).

<sup>105</sup> CM 376162, *Reid*, 18 CMR 341 (1954).

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is no substitute *in esse* there is in fact no evidence. Obviously this interpretation would not be applicable where the record, independent of the inadmissible evidence, supports the findings. This interpretation will be of very limited effect in practice for, save where a confession is held inadmissible, it is difficult to imagine a situation where there will not be an admissible substitute available for the inadmissible evidence or where the other evidence of record would not of itself support the findings. Furthermore, the application of this interpretation would not place any limitation on the prosecution in a rehearing. For example, if a confession is held inadmissible, but the other evidence would support the findings and a rehearing is ordered, the admissibility of a confession obtained after the rehearing was ordered would not thereby be affected. This conclusion is based upon the principle that the prosecution is not limited on a rehearing to the evidence admitted at the original trial. In any event, where a finding must be set aside because of the introduction of inadmissible evidence for which there is no available substitute, a rehearing may be authorized as to any lesser included offense which does not depend upon the inadmissible evidence.<sup>106</sup>

It should be observed, in determining whether a substitute is available, that the substitute need not be in the same form as the evidence admitted at the original trial. For example, in *United States v. Porter*,<sup>107</sup> although it was determined that the accused's wife was not competent to testify against him over his objection concerning their marriage, it was proper to conclude that that was a substitute available for the wife's testimony regarding the marriage in the form of documentary evidence.

As pointed out earlier, the convening authority may, in certain instances, withdraw a case from one court and refer it to another. If this is done before the findings there is no problem of whether there is sufficient evidence in the record to support the findings—for there would be no findings. However, if the case is withdrawn after findings the question whether there must be sufficient evidence in the record to support the findings to permit referral to another court arises. This second trial before a different court would not technically be a rehearing, although it would be treated as one for the purpose of limiting the findings. This is the rationale of the *Ivory*<sup>108</sup> case as influenced by the *Padilla*<sup>109</sup> decision

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<sup>106</sup> *United States v. Wilson*, 2 USCMA 248, 8 CMR 48 (1953); ACM 7732, *Hawley*, 14 CMR 297 (1954).

<sup>107</sup> 9 USCMA 656, 26 CMR 436 (1958).

<sup>108</sup> *United States v. Ivory*, 9 USCMA 516, 26 CMR 296 (1968).

<sup>109</sup> *United States v. Padilla*, 1 USCMA 603, 5 CMR 31 (1962).

wherein the Court of Military Appeals applied the prohibitions of Article 63(b)<sup>110</sup> to a situation it likened to a rehearing. It seems only logical to predict that where a case is properly withdrawn<sup>111</sup> by the convening authority from one court after the findings to be referred to another court the Court of Military Appeals, in likening this situation to a rehearing, will also apply the restriction of Article 63(a)<sup>112</sup> that there must be sufficient evidence in the record to support the findings.

One further matter must be discussed for a better understanding of the term "evidence in the record." How verbatim must a verbatim record of trial be? It now seems clear that slight omissions in the transcription of the record are not prejudicial to the accused. The record must, however, be sufficiently clear to permit the reviewing authority to determine with reasonable certainty the essence of all questions raised during the trial.<sup>113</sup> If the omission is of such a degree to render the reviewing authority unable to review, because of an inability to understand the evidence, reversal must follow, although if the evidence otherwise appears to sustain the findings a rehearing may be ordered.<sup>114</sup>

### C. CONVZCTION OF A LESSER OFFENSE

When an accused is convicted of a lesser included offense at the original trial, a rehearing may not be ordered on the principal offense.<sup>115</sup> This rule apparently springs from the general rule that a rehearing may not be ordered when there has been an acquittal;<sup>116</sup> a conviction of a lesser offense being comparable to an acquittal of the principal offense. However, when a board of review sets aside findings and orders them dismissed, and the determina-

<sup>110</sup> 10 U.S.C. § 863(b) (1958).

<sup>111</sup> That is, pursuant to MCM, 1951, par. 56b.

<sup>112</sup> 10 U.S.C. § 863(a) (1958).

<sup>113</sup> United States v. Nelson, 3 USCMA 482, 13 CMR 38 (1953). Conversely, in the absence of fraud, testimony and events reflected in the record of trial are presumed to have been accurately recorded. See United States v. Albright, 9 USCMA 628, 26 CMR 408 (1958).

<sup>114</sup> CM 386785, *Broaden*, 21 CMR 347 (1956).

<sup>115</sup> See United States v. Dean, 7 USCMA 721, 23 CMR 185 (1957). See generally 10 U.S.C. § 863(b) (1958). *Cf.* United States v. King, 5 USCMA 3, 17 CMR 3 (1954). The longstanding federal rule in existence when the UCMJ was adopted was that an accused who appeals his conviction and obtains a reversal and rehearing was subject to trial and punishment as though the first trial had not taken place. *Trono v. United States*, 199 U.S. 521 (1905). *Trono* was apparently overruled by *Green v. United States*, 355 U.S. 184 (1957). *But see* vigorous dissent by Justice Frankfurter in which Justices Burton, Clark, and Harlan joined.

<sup>116</sup> 10 U.S.C. § 863(b) (1958). See ACM S-4483, *Brown*, 7 CMR 770 (1953).

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tion is based on a matter of law, the decision of the board does not amount to an acquittal on review and the Court of Military Appeals can reverse the board and in effect reinstate the conviction.<sup>117</sup> Similarly, and logically, where a board reduces a finding of guilty of a principal offense to a finding of guilty of a lesser offense, and the decision is a question of law, the Court of Military Appeals could reverse the board and order a rehearing on the principal offense.

Where the convening authority reduces a finding of guilty of a principal offense to a finding of guilty of a lesser offense and a rehearing is thereafter ordered, the rehearing may only be had on the lesser offense approved by the convening authority.<sup>118</sup>

### D. APPROVAL OF SENTENCE

A rehearing may not be ordered if the person purporting to so order at the same time approves the sentence or any part thereof.<sup>119</sup> If a rehearing is ordered after the sentence or any part thereof has been ordered executed the order of execution must be vacated at the time the rehearing is ordered.<sup>120</sup>

### E. LACK OF JURISDICTION

A rehearing may not be ordered when the court that first tried the accused lacked jurisdiction. This follows from the fact that a rehearing is a continuation of the first trial,<sup>121</sup> and where there is a lack of jurisdiction the entire proceedings are void; the legal fiction being that there was no first trial.<sup>122</sup> Nor may a rehearing be ordered where there is a fatal variance between the pleading and the proof,<sup>123</sup> although "another trial" might be properly ordered. However, if "another trial," *i.e.*, a second trial ordered because of a lack of jurisdiction, is erroneously ordered where there was in fact no lack of jurisdiction, the second trial must be treated as a rehearing, at least insofar as applying the limitations on the findings and sentence pursuant to Article

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<sup>117</sup> United States v. Zimmerman, 2 USCMA 12, 6 CMR 12 (1952). Accord, United States v. Messenger, 2 USCMA 26, 6 CMR 26 (1952).

<sup>118</sup> See United States v. Dean, 7 USCMA 721, 23 CMR 185 (1957). See generally 10 U.S.C. §§ 866(c) and 867(d) (1958).

<sup>119</sup> MCM, 1951, par. 92.

<sup>120</sup> *Ibid.*

<sup>121</sup> United States v. Padilla, 1 USCMA 603, 5 CMR 31 (1952).

<sup>122</sup> United States v. Bancroft, 3 USCMA 3, 11 CMR 3 (1953).

<sup>123</sup> CM 394139, *Meighan*, 23 CMR 506 (1957); ACM S-4483, *Brown*, 7 CMR 770 (1952).

63(b).<sup>124</sup> It is interesting to note here that although a denial of effective assistance of counsel does not create a lack of jurisdiction,<sup>125</sup> the denial of any counsel or improper denial of individual counsel apparently does.<sup>126</sup>

### F. STATEMENT OF REASONS

The Code provides that if a convening authority orders a rehearing he will include his reasons therefor in his action on the record of trial.<sup>127</sup> While a literal application of the provision would impose a limitation on the power of the convening authority to order a rehearing, a more logical interpretation would be that this provision is advisory rather than mandatory. Otherwise, the mere form of stating the reasons for the rehearing would take precedence over the substantive reasons which give rise to need for a rehearing. Even so, however, the better practice would be, when ordering a rehearing, for the convening authority to state his reasons therefor in his action.

### G. FINALITY OF REVIEW

A rehearing may not be ordered when the proceedings of the case under consideration have become final after completion of the degree of review required by the case.<sup>128</sup>

### H. FACTUAL DETERMINATION

One further matter remains for discussion which effects a limitation on the power of the Court of Military Appeals to order

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<sup>124</sup> *United States v. Padilla*, 1 USCMA 603, 5 CMR 31 (1952); CGCM 9777, *Miller*, 6 CMR 493 (1952). *Contra*, 3 Dig. Ops. JAG, Rehearing § 1 (Aug. 11, 1953), which seems to hold that an erroneous order of a convening authority of "another trial" is binding on the court-martial at the second trial but not binding upon the reviewing authority.

<sup>125</sup> ACM 6152, *Vanderpool*, 15 CMR 609 (1954) (originally reported as ACM 6152, *Vanderpool*, 10 CMR 664 (1953)). This case was certified to USCMA (15 CMR 621 (1954)) and later reported as *United States v. Vanderpool*, 4 USCMA 561, 16 CMR 135 (1954), wherein USCMA sustained the BR on this point. See also the *Best* case which was reported three different times as follows: CM 363087, *Self, Best, and Leffew*, 13 CMR 227 (1953); *United States v. Best*, 4 USCMA 581, 16 CMR 155 (1954); *United States v. Best*, 6 USCMA 39, 19 CMR 165 (1956).

<sup>126</sup> ACM 6062, *Hanson*, 8 CMR 671 (1952).

<sup>127</sup> 10 U.S.C. § 863(a) (1958). See also MCM, 1951, par. 89c(2); Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, p. 128.

<sup>128</sup> 6 Dig. Ops. JAG, Rehearing § 1.11 (Jun. 18, 1956). See also 10 U.S.C. § 876 (1958).

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rehearings. Because a factual determination of a board of review is binding on the Court of Military Appeals<sup>129</sup> it is possible that even though the court could review a case it would be powerless to order a rehearing due to a dispositive determination of fact by the board. For example, if the sole question raised was the accused's mental responsibility, and the board, in a purely factual determination, concluded the accused to be sane, the board's decision would be binding on the court.<sup>130</sup> However, the board's determination of fact must be supported by substantial evidence<sup>131</sup> and the board must not exercise its fact finding powers in an arbitrary and capricious manner, or in a manner no reasonable man would take.<sup>132</sup> Additionally, review and determination of an issue by the court may not be defeated because the board labels a question of law a question of fact, and, moreover, an issue of mixed law and fact is reviewable by the court.<sup>133</sup>

## VI. PROCEDURE

### A. GENERAL

"The procedure in rehearings . . . in general is the **same as** in other trials."<sup>134</sup> For this reason, a detailed study of all the procedural aspects of a rehearing is beyond the scope of this article. Therefore, this section will be devoted to a consideration only of those areas where the procedure in a rehearing differs from that of the ordinary trial by court-martial.

### B. USE OF ORIGINAL CHARGE SHEET

It has been said that the original charge sheet *may* properly be used at a rehearing.<sup>135</sup> While this is certainly true, there **may** be a situation where the original charge sheet **must** be used at the rehearing. In *United States v. Rodgers*<sup>136</sup> it was held that when the statute of limitations has run on a offense, a redrafting

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<sup>129</sup> *United States v. Wille*, 9 USCMA 623, 26 CMR 403 (1958).

<sup>130</sup> *Cf. United States v. Roland*, 9 USCMA 401, 26 CMR 181 (1958).

<sup>131</sup> *United States v. Hernandez*, 4 USCMA 465, 16 CMR 39 (1954).

<sup>132</sup> *United States v. Hendon*, 7 USCMA 429, 22 CMR 219 (1966).

<sup>133</sup> *Ibid.*

<sup>134</sup> MCM, 1951, par. 81b.

<sup>135</sup> JAGJ 1953/5761 (July 31, 1953).

<sup>136</sup> 8 USCMA 226, 24 CMR 36 (1957), distinguishing *United States v. Brown*, 4 USCMA 683, 16 CMR 257 (1954); *Contra*, ACM 7211, *Detion*, 13 CMR 846 (1953).

of that offense on a new charge sheet renders the redrafted offense subject to a motion to dismiss—even though the exact offense was originally charged prior to the running of the statute. This is apparently true even though the original charge sheet is introduced in evidence.<sup>137</sup> Applying this reasoning to a rehearing situation, where the rehearing is to take place after the running of the statute of limitations on the offense charged, it would appear mandatory to use the original charge sheet at the rehearing rather than to redraft the offense on a new charge sheet. This reasoning, however, ignores the fact that a rehearing is but a continuation of the original proceedings,<sup>138</sup> and may be distinguished from *Rodgers* and *French*. It is concluded, therefore, that the use of the original charge sheet would not be necessary at a rehearing even when the statute of limitations has run. Notwithstanding the soundness of this theoretical conclusion, the original charge sheet should always be used, where possible, since there is no real advantage to be gained by redrafting the offense on a new charge sheet. If redrafting the offense becomes necessary, it can be done on the original charge sheet.<sup>139</sup>

### C. REFERRAL

“Additional charges . . . may be referred for trial together with charges as to which a rehearing has been directed.”<sup>140</sup> The additional charges must, of course, be referred to trial in the usual manner. Must charges properly referred at the first trial be again referred for the rehearing according to customary usage, *i.e.*, an indorsement on the third page of the charge sheet? There is **some** authority for the position that a formal referral is unnecessary.<sup>141</sup> Since the convening authority orders a rehearing by issuing a supplementary court-martial order,<sup>142</sup> a “formal” referral to hold a rehearing before *some* court exists. There is not, however, a referral to a specific court-martial.<sup>143</sup> A referral,

<sup>137</sup> *United States v. French*, 9 USCMA 57, 25 CMR 319 (1958).

<sup>138</sup> *United States v. Padilla*, 1 USCMA 603, 5 CMR 31 (1953).

<sup>139</sup> *Cf.* MCM, 1961, pars. 33e, 44f(1); *United States v. Brown*, 4 USCMA 683, 16 CMR 257 (1954).

<sup>140</sup> MCM, 1951, par. 92.

<sup>141</sup> NCM 60 00181, *Smrz* (March 8, 1960).

<sup>142</sup> Where a rehearing has been ordered on appellate review, an appropriate supplementary CMO must be issued either dismissing the charges or ordering a rehearing. JAGJ 1952/2227 (Mar. 5, 1952), in MCM, 1951, pars. 89b, 97a, app. 15b (Army Supp. 1969). See also last form set out in MCM, 1961, app. 15b.

<sup>143</sup> *Cf.* *United States v. Greenwalt*, 6 USCMA 669, 20 CMR 286 (1955), to the effect that a convening authority cannot delegate the authority to refer cases to trial.

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either to trial generally or to a specific court-martial, may, of course, be oral.<sup>144</sup> In the absence of a showing to the contrary, application of the presumption of regularity would seemingly preclude an objection on appellate review that the trial counsel improperly referred the case to a particular court. Practical minded judge advocates, however, undoubtedly avoid the possibility of error in this area simply by obtaining the usual referral.

### D. USE OF FORMER RECORD

The Manual provides that "when a rehearing is ordered . . . there will be referred to the trial counsel . . . the record of the former proceedings and all pertinent accompanying papers, together with a copy of any decision of the board of review or the Court of Military Appeals . . ." <sup>145</sup> It further provides that no member of the court at the rehearing should be permitted to examine any of these papers, other than the charges, except when properly received as evidence.<sup>146</sup> Necessarily, however, the law officer (or president of a special court-martial) may examine such portion of the former proceedings as will enable him to decide upon the admissibility of evidence or other questions of law. Similarly, parts of the former record may be read to court when necessary for it to pass upon a ruling subject to their objection pursuant to Article 51(b).<sup>147</sup> This latter use of the former record of trial raises the issue of whether the record may simply be read to the court or must be first introduced into evidence. Technically perhaps, the former record of trial is not used as evidence; nonetheless, since it is being placed before the court for consideration on a question of fact, or at the least a question of mixed law and fact, there is no existing rule which would allow such matters merely to be read to the court. It is, therefore, concluded that the former proceedings must be placed before the members of the court-martial only in accordance with the rules relating to former testimony.<sup>148</sup>

### E. FORMER TESTIMONY

While a general consideration of the rules relating to former testimony is not desirable, there are two matters of enough special

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<sup>144</sup> See MCM, 1951, par. 33j.

<sup>145</sup> *Ibid.*

<sup>146</sup> MCM, 1951, par. 81c.

<sup>147</sup> *Ibid.*

<sup>148</sup> See MCM, 1951, par. 145b.

significance to warrant mention. Although a denial of effective assistance of counsel does not deprive a court-martial of jurisdiction, and a rehearing may be ordered in such case,<sup>149</sup> the testimony of the witness at the former trial may not be used as former testimony over the accused's objection.<sup>150</sup> The plain result here is that, as a practical matter, where a rehearing is ordered because of ineffective assistance of counsel at the first trial, the testimony of all witnesses at the first trial will never be available as former testimony—even though an essential witness may have in the interim died or otherwise become unavailable.

Another matter to be considered is the possible use of the accused's testimony in mitigation and extenuation at the first trial on the merits at the rehearing. Although such testimony actually derives its admissibility from other rules of evidence, *e.g.*, it is a confession, admission, or inconsistent statement,<sup>151</sup> it so closely approximates former testimony as to be appropriately discussed at this point. In the *Riggs*<sup>152</sup> case, the accused's testimony in mitigation and extenuation at the first trial was used to impeach him on the merits at the rehearing. The board of review accorded great weight to the Manual provision that "matter which is presented to the court after findings of guilty have been announced may not be considered as evidence against the accused in determining the legal sufficiency of such findings of guilty upon review. . . ."<sup>153</sup> The board reasoned that since a rehearing is a continuation of the former proceedings,<sup>154</sup> the use of evidence given in mitigation and extenuation at the former trial was not permissible. It is submitted that the board misconstrued the plain meaning of the provision above quoted, which does no more than provide that evidence given in mitigation and extenuation may not be used against the accused in determining legal sufficiency. This is considerably different from *Riggs* where, first of all, it was not evidence given in mitigation and extenuation at the first trial that was used but rather evidence introduced on the merits at the second trial. Moreover, and secondly, this evidence was apparently admitted for impeachment purposes and hence could not be used to establish the truth of the matter asserted.<sup>155</sup> Aside

<sup>149</sup> *United States v. Best*, 6 USCMA 39, 19 CMR 165 (1955).

<sup>150</sup> *United States v. Vanderpool*, 4 USCMA 561, 16 CMR 135 (1954). For a discussion of an accused's right to object to former testimony at a rehearing, see *United States v. Johnson*, 11 USCMA 384, 29 CMR 200 (1960).

<sup>151</sup> See MCM, 1951, par. 145b.

<sup>152</sup> CM 389689, *Riggs*, 22 CMR 698 (1956).

<sup>153</sup> MCM, 1951, par. 75a.

<sup>154</sup> *United States v. Padilla*, 1 USCMA 603, 5 CMR 31 (1963).

<sup>155</sup> See MCM, 1951, par. 153b (2)(c).

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from the second reason advanced, which alone is deemed to control in *Riggs*, the first reason is sufficient to conclude that evidence given by an accused in mitigation and extenuation at one trial may properly be used on the merits at a second trial—provided it is admissible under any rule of evidence and is properly introduced. To hold otherwise would provide the accused with an unjustifiable opportunity to give false testimony in the first instance which would later inure to his benefit.

### F. DEPOSITIONS

Where there is a rehearing of a capital case, *i.e.*, where a death sentence is possible or mandatory, the usual rules concerning the use of depositions will of course prevail. However, “. . . upon a rehearing . . . a case is not capital if the authorized sentence adjudged at a prior hearing or trial was other than death . . . .”<sup>156</sup> A rehearing ordered on a charge of spying in time of war, where the sentence adjudged at the first trial was other than death, would nonetheless be a capital case because the mandatory sentence is death.<sup>157</sup> What has been said about depositions in a capital case rehearing applies with equal force to the use of former testimony.<sup>158</sup>

### G. RES JUDICATA

The doctrine of *res judicata* is, of course, applicable to rehearings to the same extent as other courts-martial. May this doctrine be properly invoked at a rehearing by the accused where an item of evidence that was excluded at the first trial is offered by the prosecution? For example, if a confession is excluded by the law officer at the first trial as involuntarily given, may the prosecution be allowed to again place the voluntariness of the confession in issue at the rehearing? Initially, it must be recognized that *res judicata* does not apply to an unmixed question of law.<sup>159</sup> Since the admissibility of a confession has been held to be an application of the facts to the law,<sup>160</sup> it would seem that a ruling made at the first trial in favor of the accused on a mixed

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<sup>156</sup> MCM, 1951, par. 15a(3).

<sup>157</sup> 10 U.S.C. § 906 (1958). See also 10 U.S.C. § 863 (1958). Cf. MCM, 1951, par. 145a. Spying during time of war is the only mandatory death sentence offense under the UCMJ.

<sup>158</sup> MCM, 1951, par. 145b.

<sup>159</sup> *United States v. Smith*, 4 USCMA 369, 15 CMR 369 (1954).

<sup>160</sup> *Ibid.*

question of law and fact could be properly invoked at the rehearing where the same issue is again sought to be raised. The Manual provides . . . that any issue of fact or law put in issue *and finally determined* by a court of competent jurisdiction cannot be disputed between the same parties in a subsequent trial . . .”<sup>161</sup> Because a rehearing is a continuation of the original proceedings,<sup>162</sup> it could hardly be labeled “a subsequent trial,” and, similarly, no issue raised at the first trial, save an acquittal of some charge, has been “finally determined.” Thus, unless there is an acquittal of an offense, no issue has been finally determined until the completion of appellate review in the case. Moreover, it is only after the completion of appellate review that there can be a subsequent trial.<sup>163</sup>

## H. PERSONNEL

Turning next to the personnel who may participate in a rehearing we find several disabilities. A mere reading of Article 63 (b) discloses that the rehearing must take place before members other than those who sat at the first trial.<sup>164</sup> It also appears that a challenge for cause would be appropriate against the law officer at the first trial.<sup>165</sup> While there is no statutory or Manual authority precluding the original trial counsel from acting at the rehearing, it has been said that a trial counsel, who in the course of his duties at the original trial, receives information beneficial to the government’s case as a result of a breach of the attorney-client relationship by a third party is disqualified to act as trial counsel at the rehearing.<sup>166</sup> This disqualification of the trial counsel, while not presently required by law, should certainly be applied and strictly enforced because of the obvious risk of unfairness and partiality. The defense counsel at the first trial may, of course, always act as defense counsel at the rehearing. There is perhaps a caveat in this area — the participation of the defense counsel at the first trial as defense counsel at the rehearing without the express request of the accused, where the rehearing was ordered because of ineffective assistance of counsel,

<sup>161</sup> MCM, 1951, par. 71b. (Emphasis added.)

<sup>162</sup> *United States v. Padilla*, 1 USCMA 603, 5 CMR 31 (1953).

<sup>163</sup> The so-called “law of the case” doctrine does not compel a different conclusion. See *United States v. Bell*, 7 USCMA 744, 23 CMR 208 (1957), and authorities cited therein.

<sup>164</sup> *But see* CGCM 9857, *Rinehart*, 26 CMR 815 (1958).

<sup>165</sup> MCM, 1951, par. 62f(13). See also CM 370527, *Grosel*, 17 CMR 394 (1954). *But see* *United States v. Richmond*, 11 USCMA 142, 28 CMR 366 (1960).

<sup>166</sup> ACM 13978, *Powell*, 24 CMR 835 (1957) (dicta).

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may well result in prejudicial error. While the defense counsel at the first trial may never act as trial counsel at the rehearing,<sup>167</sup> the dual participation of the trial counsel at the first trial as defense counsel at the rehearing, if the accused expressly so requests, is harmless error.<sup>168</sup>

### I. INSTRUCTIONS

Turning next to the instructions, again we find the procedure at a rehearing is generally the same as for other courts-martial. This is particularly true concerning the findings for there are no troublesome areas peculiar to the rehearing. It is necessary to bear in mind, however, that the accused may not be convicted of any offense or of any greater degree of an offense of which he was not convicted at the first trial.<sup>169</sup>

The rule concerning instructions on the sentence is laid down by Article 63(b)—namely that “. . . no sentence in excess of or more severe than the original sentence may be imposed, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory . . .”<sup>170</sup>

The application of this rule has presented some difficulties. On a “straight rehearing,” the maximum sentence would appear to be the sentence adjudged at the first trial, unless such sentence was less than the mandatory sentence. The same rule would also appear to apply to a “split rehearing” or a “sentence rehearing,” although some compensation should, perhaps, be made if, for example, one of several offenses is dismissed on review. But, in view of the single gross sentence adjudged by courts-martial, how is one to determine the maximum sentence imposable at a rehearing if there was a multiple offense first trial and one offense is dismissed or reduced to a lesser offense on review? Who is to make this compensation?

Article 63(b) actually contains two prohibitions. The sentence at a rehearing must not be “in excess of” or “more severe than” the sentence imposed at the first trial. This first prohibition apparently contemplates what is literally stated. The law officer at a rehearing should instruct the court that the maximum sentence

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<sup>167</sup> 10 U.S.C. § 827(a) (1958). ACM 5329, *Mace*, 5 CMR 610 (1952).

<sup>168</sup> Cf. ACM 11107, *Bell*, 20 CMR 804 (1955). But see 10 U.S.C. § 827(a) (1958).

<sup>169</sup> 10 U.S.C. § 863(b) (1958). An exception, of course, would apply if additional charges were referred for trial at the rehearing.

<sup>170</sup> *Ibid.*

that may be imposed is the sentence imposed at the first trial even though one or more of the offenses of which the accused was convicted at the first trial has been dismissed or reduced on review.<sup>171</sup> There are three exceptions. First, if the sentence imposed at the first trial was less than the mandatory sentence then the mandatory sentence is the maximum sentence at the rehearing. Second, if no mandatory sentence is involved, the maximum sentence at the rehearing may not exceed that shown in the Table of Maximum Punishments for the offense or offenses of which the accused stands convicted at the rehearing. This second exception, while not specifically set out in the Code, is necessarily implied; otherwise an accused at a rehearing would be subject, in some cases, to a punishment at a rehearing for an offense of which he is convicted in excess of that authorized by the Table of Maximum Punishments. For example, assume that at the original trial an accused is convicted of two larcenies, each of more than \$50.00, and sentenced, *inter alia*, to confinement for eight years, and one of the larcenies is dismissed on review and a rehearing ordered as to the other. Applying the general rule, without regard to the second exception mentioned above, the maximum punishment would be eight years for the one larceny—whereas the maximum therefor under the Table of Maximum Punishments is, as to confinement only, five years. A similar result would obtain in applying this principle where, for example, a rehearing was ordered as to both of the larcenies above mentioned and the accused was acquitted of one. Third, the sentence imposed at the rehearing may in no event exceed that approved by the convening authority, board of review, or any other authorized person unless the reduction is based solely on an erroneous conclusion of law. Despite the language of Article 63(b), which appears to place only two limitations on the sentence imposed at the rehearing, the Court of Military Appeals has interpreted the Code to embrace these other limitations.<sup>172</sup>

In instructing on the maximum punishment at a rehearing it is error for the law officer to inform the court of the maximum sentence that was imposed at the original trial and then advise that the maximum at the rehearing is less because of the imposition of a lesser sentence at the first trial or a reduction of the original sentence by the convening authority, a board of review

<sup>171</sup> *CF. ACM 4081, Findley*, 1 CMR 731 (1951), wherein the board considered a similar problem in construing AW 52.

<sup>172</sup> *United States v. Eschmann*, 11 USCMA 64, 28 CMR 288 (1959); *United States v. Skelton*, 10 USCMA 622, 28 CMR 188 (1959); *United States v. Jones*, 10 USCMA 532, 28 CMR 98 (1959); *United States v. Dean*, 7 USCMA 721, 23 CMR 185 (1957).

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or other authorized person.<sup>173</sup> Similarly, it is improper for the trial counsel at a rehearing to inform the court in argument that the maximum sentence imposable or imposed at the original trial was greater than the maximum imposable at the rehearing.<sup>174</sup>

What has been said so far relates only to the quantity of any given type of punishment, leaving for consideration the meaning in Article 63(b) of the words "more severe than." This term refers to quality as opposed to quantity. Thus, if a dismissal only is adjudged at the first trial, it is quality or severity which controls the imposition of the sentence at the rehearing since there is no lesser quantity of dismissal. Therefore, when an unseverable sentence is adjudged at the first trial the maximum sentence which may be imposed at the rehearing is controlled by the same rules applicable to the "in excess of" prohibition. This may well present an additional problem if the second exception to the general rule must be employed when an unseverable sentence is adjudged at the first trial. For example, what type of sentence is not "more severe than" a dismissal or a dishonorable discharge or a bad conduct discharge? It has been held that a sentence to reduction, reprimand, admonition or restriction is obviously less severe than a bad conduct discharge.<sup>175</sup> This list is not inclusive, however, and it is suggested that any sentence which by custom of the service is usually so considered would meet the requirement of being less severe. Naturally the court may compensate for the factors mentioned above at their discretion by returning a sentence less than that authorized. Moreover it is desirable, perhaps even mandatory, that the law officer so instruct the court prior to their deliberations on the sentence.<sup>176</sup>

### J. WITHDRAWAL OF GUILTY PLEA

May an accused at a sentence rehearing withdraw his plea of guilty made at the former trial? In *Yelverton*<sup>177</sup> the accused had pleaded guilty but the Court of Military Appeals found prejudicial error as to the sentence and issued a mandate to The Judge Advocate General (in part) to ". . . cause the convening authority to order a rehearing on the sentence, if such rehearing is practicable . . . ." The convening authority ordered a sentence rehear-

<sup>173</sup> *Cf.* United States v. Green, 11 USCMA 478, 29 CMR 294 (1960).

<sup>174</sup> United States v. Nix, 11 USCMA 691, 29 CMR 507 (1960). *Cf.* United States v. Crutcher, 11 USCMA 483, 29 CMR 299 (1960).

<sup>175</sup> United States v. Kelly, 5 USCMA 259, 17 CMR 259 (1954).

<sup>176</sup> *Cf.* NCM 364, *Kincaid*, 17 CMR 523 (1954).

<sup>177</sup> United States v. Yelverton, 8 USCMA 424, 24 CMR 234 (1957).

ing at which the accused, in mitigation and extenuation, gave testimony which, in the law officer's view, was inconsistent with his guilty plea. The law officer instructed the court that while normally he would in such case enter a plea of not guilty for the accused, here the accused's guilt or innocence was not in issue because the findings of guilty at the former trial had been affirmed by the Court of Military Appeals. Thereafter the accused's motion to change his plea was denied. The board of review in reviewing the rehearing proceedings affirmed, stating that the law officer in such a situation had no discretion to change the accused's plea and that the accused had no absolute right to change his plea.<sup>178</sup> This result was reached upon the reasoning that the mandate of the Court of Military Appeals conferred jurisdiction to act on the sentence **only**.<sup>179</sup> In any event, as the board noted, the accused was not completely without remedy because he could still petition for a new trial under Article 73 on the basis of newly discovered evidence or fraud on the court.<sup>180</sup> This same reasoning would seem to apply to a sentence rehearing ordered by a board of review or the convening authority when taking his initial action.

#### K. TYPE OF COURT

Must every type of rehearing of a general court-martial case also be by general court-martial? In *Martinez*,<sup>181</sup> although the issue was not raised by the accused or briefed or argued by either side, the Court stated that a "sentence rehearing" of a general court-martial may not be held by special court-martial. Several state court cases were cited by the court, but the result was apparently reached because "there is no provision in the Code sanctioning such a procedure."<sup>182</sup> Because of the inherent differences of the court structure in the military system, the soundness of applying the rationale of the cited state court cases to courts-martial is ques-

<sup>178</sup> CM 395163, *Yelverton*, 26 CMR 586 (1958), *petition for review by CMA withdrawn*, 26 CMR 516 (1958).

<sup>179</sup> This reasoning was later indorsed by USCMA. See *United States v. Kepperling*, 11 USCMA 280, 29 CMR 96 (1960).

<sup>180</sup> One board of review has suggested, in dicta, that the proper course of action in such a situation would be for the law officer to halt the proceedings, advise the convening authority in the premises, and that the latter should return the case, with the record of the rehearing completed to the point of adjournment, to the board of review for its further consideration. CM 397509, *Collier*, 26 CMR 529 (1958). CMA has also indicated this may be the course of action that should be taken "in a proper case where an accused makes a clear showing of circumstances entitling him to relief." See *United States v. Kepperling*, *supra* note 179.

<sup>181</sup> *United States v. Martinez*, 11 USCMA 224, 29 CMR 40 (1960).

<sup>182</sup> *Id.* at 228, 29 CMR at 44. The majority also pointed out that the accused may be deprived of certified counsel before a special court-martial.

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tionable. Furthermore, as Judge Latimer pointed out in his dissent, "it would be absurd to hold that a rehearing on both findings and sentence can be taken from a general court-martial and referred to a new special court, but a separate and divisible part thereof cannot."<sup>183</sup>

This "absurd" situation envisioned as a possibility by Judge Latimer became the status of the law one year later. In *Cox*<sup>184</sup> it was held that a "straight rehearing" of a general court-martial case could properly be held before a special court-martial. The majority distinguished *Martinez* on the basis that any action that could have been taken before the original trial may be taken as a part of the rehearing procedure.<sup>185</sup> This attempted distinction is weakened by the fact that neither the procedure employed in *Martinez* nor the one used in *Cox* is either authorized or proscribed by the Code or the Manual. Indeed, what is true for the more extensive relief—a "straight rehearing"—should also be true for a separate and divisible part thereof.<sup>186</sup>

### VII. THE CONVENING AUTHORITY'S ACTION

In general the convening authority may act on a rehearing to the same extent as on other trials by courts-martial; hence the problem need not be explored in detail here. There are, however, a few areas concerning his power to act and publish court-martial promulgating orders that, because of the nature of a rehearing, are affected.

The convening authority may approve a sentence adjudged upon a rehearing without regard to whether any portion or amount of the punishment adjudged at the former trial has been served or executed."<sup>187</sup> This places the burden upon those persons charged with administratively enforcing the sentence to so credit the accused.'@ To insure this is done, ". . . the convening authority shall, if he approves any part of a sentence adjudged upon a rehearing, direct in his action that any portion or amount of the former sentence served or executed . . . be credited to the accused."<sup>189</sup> While this provision is mandatory rather than permissive,<sup>190</sup> the failure of the convening authority to provide in his action on a rehearing for this credit does not require a reduction of the sentence upon

<sup>183</sup> *Id.* at 234, 29 CMR at 50 (dissenting opinion of Judge Latimer).

<sup>184</sup> United States v. Cox, 12 USCMA 168, 30 CMR 168 (1961).

<sup>185</sup> *Id.* at 169, 30 CMR at 169.

<sup>186</sup> *Cf.* United States v. Miller, 10 USCMA 296, 27 CMR 370 (1959).

<sup>187</sup> MCM, 1951, par. 89c (7).

<sup>188</sup> ACM 4081, *Findley*, 1 CMR 731 (1961).

<sup>189</sup> MCM, 1951, par. 89c (7).

<sup>190</sup> NCM 336, *Butler*, 16 CMR 419 (1954).

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appellate review to compensate for the omission.<sup>191</sup> The proper procedure would be for the appellate agency to direct the convening authority to take a new action and include the provision for credit therein.<sup>192</sup> Moreover, even if the appellate agency did reduce the sentence to compensate for the convening authority's failure to provide for such credit, the persons charged with enforcing the sentence would, nevertheless, have to administratively credit the accused.<sup>193</sup> Similarly, should the convening authority reduce the sentence when taking his action on a rehearing by an amount equal to the credit which the accused is entitled, without specifying the reason for such reduction, and omit any provision in his action for administrative credit, the person charged with enforcing the sentence would, in addition, have to administratively credit the accused.<sup>194</sup>

If the court at a rehearing acquits the accused of all offenses which were tried at the former trial the convening authority must restore all rights, privileges, and property affected by an executed portion of the sentence adjudged at the former trial.<sup>195</sup> Similarly, if after a rehearing the convening authority disapproves the findings of guilty of all offenses tried at the former trial he must make complete restoration.<sup>196</sup>

The court-martial orders published by a convening authority as a result of any type of rehearing are the same as for other trials, with the exception that the arraignment section of the initial promulgating order must show that such order is concerned with a rehearing, and, in addition, set forth the citation of the initial promulgating order of the former trial.<sup>197</sup>

## VIII. SUMMARY

The present-day statute providing for rehearings in the military system varies but slightly from the wording of its antecedent enacted some forty years ago. This similarity is significant when one considers that, although the case law pertaining to the findings has remained about the same, the rehearing concept as it applies to the sentence has been expanded radically in recent years by judicial decision.

Despite some misgivings by the United States Supreme Court about the validity of the sentence rehearing, the Court of Military

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<sup>191</sup> ACM 4081, *Findley*, 1 CMR 731 (1961).

<sup>192</sup> See MCM, 1951, par. 89b.

<sup>193</sup> 1 Dig. Ops. JAG, Rehearing § 7.6 (Sept. 12, 1962).

<sup>194</sup> Cf. NCM 336, *Butler*, 16 CMR 419 (1964).

<sup>195</sup> MCM, 1951, par. 89c(7).

<sup>196</sup> *Ibid.*

<sup>197</sup> See MCM, 1951, app. 15a.

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Appeals deliberately, in a carefully worded opinion, reaffirmed its belief in the implied statutory authorization for the new procedure. In any event, the utility of the sentence rehearing has become widely accepted, as well as being considered generally desirable.

Other features of the sentence rehearing procedure, unfortunately, are perhaps less than desirable. For example, the Court of Military Appeals has limited the court-martial at a sentence rehearing, to a sentence which may not exceed that considered appropriate at any stage of appellate review. This holding, while generally a well reasoned opinion, flies directly in the face of statutory language. Moreover, this opinion in conjunction with later decisions to the effect that the court-martial at the rehearing may not be informed of the sentence imposed at the first trial has the undesirable effect of according the accused an unjustifiable opportunity for clemency because the court-martial at the rehearing is not supplied with information it should have.

The court's latest judicial enactment — that a sentence rehearing of a general court cannot be held before a special court — must be condemned as impulsive. As the dissenting judge pointed out, the issue was not raised, briefed or argued; therefore, neither side was accorded the opportunity to either support or contest the issue.

In any event, the uncertainty which has surrounded the rehearing field for several years is now slowly diminishing. An exception to this general trend is, of course, the holding that a "straight rehearing" of a general court-martial case can be held before a special court-martial. It is to be hoped that the court, by exercising greater judicial restraint, will not further confuse the now fairly well settled rehearing principals with more innovations.

# DEVELOPMENT OF THE REVIEW AND SURVEY POWERS OF THE UNITED STATES COURT OF MILITARY APPEALS\*

BY BENJAMIN FELD\*\*

## I. INTRODUCTION

The Uniform Code of Military Justice has governed the armed forces for almost a decade. Sufficient courts-martial proceedings have been held under its provisions to provide material for some positive conclusions as to its influence on military discipline and morale. Addressing a conference of Army lawyers at the Army Judge Advocate General's School, General L. L. Lemnitzer, Chief of Staff of the Army, said :

I believe that the Army and the American people can take pride in the positive strides that have been made in the administration and application of military law under the Uniform Code of Military Justice. The Army today has achieved the highest state of discipline and *good* order in its history.<sup>1</sup>

A different conclusion as to the state of discipline in the armed forces was reached by Frederick Bernays Wiener, a long-time student of military justice. Referring to courts-martial experience under the Uniform Code, he said:

It is difficult to resist the conclusion that we would have better disciplined services if they removed the administration of military justice from the cops and the lawyers, and returned to the traditional process of self-administered discipline, with simplified procedure and with only sufficient legal participation to eliminate patently inadmissible evidence and to insure the observance of basic standards of decency and fair play.<sup>2</sup>

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\* This article was adapted from a thesis entitled "The United States Court of Military Appeals: A Study of the Origin and Early Development of the First Civilian Tribunal for Direct Review of Courts-Martial (1951-1959)" presented for a Doctor of Philosophy degree while the author was a student in The Graduate School, Georgetown University, and it is published with the permission of The Graduate School of Georgetown University. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School nor any other governmental agency.

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<sup>1</sup> Lemnitzer, *The Expanding Role of the Army Lawyer*, 60 Judge Advocate Legal Service 18/1, 3 (1960) (DA Pam. 27-101-18, 7 October 1959).

<sup>2</sup> Wiener, *Soldiers Versus Lawyers*, Army, (vol. 11, No. 4, November, 1958) 58, 64.

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As the "Supreme Court" of the military justice system, the Court of Military Appeals is a focal point for much of the condemnation and commendation of the Uniform Code. When the Court of Military Appeals convened on July 25, 1951, in its first public session, it admitted to membership in its Bar, Major General Reginald C. Harmon, The Judge Advocate General of the Air Force. He remarked that he was "glad" to be present on that "historical occasion," and he expressed the "fervent hope and expectation" that the Court would inspire "the greatest of confidence in the hearts of the American people."<sup>3</sup> Five years later, General Harmon publicly proclaimed that he would prefer to see the Court abolished.<sup>4</sup> In his opinion, it had not contributed significantly to the effective and efficient operation of the military justice system.<sup>5</sup> On the other hand, Wiener maintains that, despite his conviction of the need for a return to former practices, certain decisions by the Court of Military Appeals indicate that it is an important safeguard against lapses in essential fairness by military commanders, and that the "country is simply not going back to any system of military justice which lacks that safeguard."<sup>6</sup> The same conclusion was stated concisely in the civilian *Navy Times* in an editorial which commented on one of the Court's decisions. "Thank God," said the editorial, "for the United States Court of Military Appeals."

War may be the final arbiter of the dispute on the need for the Court of Military Appeals in the military justice system. In

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<sup>3</sup> United States Court of Military Appeals (hereinafter referred to as USCMA), Minute Book I (25 July 1951).

<sup>4</sup> Address by General Harmon, Judge Advocate Association in Chicago, 17 August 1954. He urged repeal of the Uniform Code and reenactment of the Elston Act. A necessary consequence of that action would be abolition of the Court and recreation of a separate Judicial Council for each of the services. See Harmon, *Progress Under The Uniform Code*, Judge Advocate Journal (Bull. No. 18, October, 1954) 10.

<sup>5</sup> 1954 USCMA and the Judge Advocates General of the Armed Forces and General Counsel of the Dep't of Treasury Ann. Rep. 51 (hereinafter cited as USCMA and TJAG Ann. Rep.), General Harmon restated the contention that "military justice was administrated more efficiently" under the Elston Act than under the Code. A particular source of complaint was the difficulties of the appellate processes. As an alternative to a return to the Judicial Council, he proposed that appeals to the Court be conditioned upon the grant of a "Certificate of Good Cause" by one of The Judge Advocates General. This proposal was also construed by both the American Legion and the Court as a step toward abolition of the Court. See Report of the Special Committee of the American Legion To Study USCMA and the Uniform Code of Military Justice 30 (1956); *Hearings Before the Subcommittee on Department of Defense Budget for 1956 of the House Committee on Appropriations*, 84th Cong., 1st Sess. 709 (1955).

<sup>6</sup> Wiener, *op. cit. supra* note 2, at 62.

<sup>7</sup> *Reason for The Court*, Editorial in *Navy Times* (March 3, 1956).

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the meantime, it is here; and it is unquestionably a viable and vital institution directly affecting the strength of, and civilian confidence in, our armed forces.

The Court is young and in a state of flux. It is still feeling its way in the confused world of civilian-military relations. Its decisions are subject to constant critical analysis by military and legal commentators.<sup>8</sup> This article examines the Court itself. It considers some of the special problems that faced the Court and the manner in which the Court attempted to solve them. It is hoped that the study will provide a better understanding of one of the newest and most controversial institutions of the Federal Government.

### 11. VOTE REQUIRED TO GRANT A PETITION FOR REVIEW

Under the Uniform Code, courts-martial convictions are reviewable by the Court in one of three instances : (1) If the accused is a general or flag officer or the sentence extends to death, (2) If The Judge Advocate General of the accused's service files a certificate for review, and (3) On "good cause shown" in a petition for grant of review filed by the accused in a case in which the sentence includes a punitive discharge or confinement for a year or more.<sup>9</sup> Before formal organization of the Court, it was expected that the major portion of the case docket would be comprised of petition cases. The figures for the first nine months of operation established the correctness of the prognostication. Less than eight percent of the **484** cases received by the Court came **up** for review by way of certificates of The Judge Advocate General; there was only one mandatory case; and the balance of the docket consisted of petition cases.<sup>10</sup> By the end of 1958, the percentage of certificate cases had declined to little more than two percent of the total of 12,816; mandatory cases comprised less than one percent; thus ninety-seven percent of the caseload **was** made up of petition cases.<sup>11</sup>

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<sup>8</sup> Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U.L. Rev. 861 (1959); *Survey of the Law — Military Justice: The United States Court of Military Appeals, 29 November 1951 to 30 June 1958*, Mil. L. Rev., January, 1959, p. 67; Walker, *An Evaluation of the United States Court of Military Appeals*, 48 Nw. U.L. Rev. 714 (1954); White, *Has the Uniform Code of Military Justice Improved the Courts-Martial System*, 28 St. John's L. Rev. 19 (1953).

<sup>9</sup> Uniform Code of Military Justice, art. 67, 10 U.S.C. § 867 (1958) (hereinafter cited as UCMJ).

<sup>10</sup> Interim Report of USCMA To Congress 2-3 (1952).

<sup>11</sup> 1958 USCMA and TJAG Ann. Rep. 37.

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Two significant decisions pertaining to the petition for review were made by the Court in its organizational stage. One related to the “good cause” requirement of the petition; the other pertained to the vote by the judges that was required to grant review of a petition.

Its organic act empowered the Court to prescribe its own rules of procedure and the number of judges required to constitute a quorum.<sup>12</sup> Except possibly for the procurement of administrative assistants, the first order of business would have been the promulgation of the rules and determination of a quorum. However there was an unexpected delay in the nomination and confirmation of the judges and they did not take office until almost a month after the Uniform Code became effective. The delay gave special urgency to promulgation of the rules of procedure and thereby left very little time for preliminary study. Also, it seems clear that the judges anticipated that experience would show a need for amendment. These circumstances led to initial publication of the rules in mimeograph form,<sup>13</sup> on a wholly temporary basis.

Although temporary in conception, the rules attained the solidity of permanence in practice. From the very beginning, the judges and the staff worked under pressures, which practically ruled out extensive revision of the rules. Three factors contributed to these pressures: First, Article 67 required the Court to act on a petition for review within thirty days of its receipt. Adherence to this requirement was a task of first magnitude. The caseload steadily increased. In less than four months, the Court had a docket of **115** cases; by the end of **1952**, the number had increased to **231**. Later increases were staggering. In **1956**, for example, **1542** cases were docketed.<sup>14</sup>

The second circumstance was the limitation on staff recruitment. Initially, the limitation resulted from the lack of adequate facilities. Thus, in its interim report to Congress in **1952**, the Court noted that “space limitations have prevented the necessary complement of Court personnel and have interfered seriously with

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<sup>12</sup> UCMJ, art. 67.

<sup>13</sup> Letter From Clerk, USCMA, to Law Librarian, Stanford University, December 6, 1951.

<sup>14</sup> Although, at best, comparisons are uncertain, an idea of the magnitude of the workload is suggested by comparing it with that of the Court of Appeals for the District of Columbia Circuit, one of the busiest of the federal courts, and that of the Supreme Court. In fiscal 1959, the Court of Appeals docketed 540 new cases; the Supreme Court averages 1,540 cases. Both have a nine-judge bench. Director of the Administrative Office of the United States Courts, Annual Report 11-12 (1959); Hart, *The Supreme Court, 1958 Term*, 73 Harv. L. Rev. 86 (1959).

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maximum efficiency of those presently employed.”<sup>15</sup> At the time the Court was located in a six-room suite of offices in the Internal Revenue Building on Constitution Avenue in the District of Columbia, with no library and a courtroom “borrowed” from the Court of Customs and Patent Appeals. Later, after the Court moved into the courthouse on Judiciary Square left vacant by the United States Court of Appeals in late 1952, a division of opinion existed among the judges on the essentiality of staff additions recommended by the Court’s Chief Commissioner. This tended to slow down recruitment and to keep constant pressure on the existing staff. The third factor was the conviction of the judges that, as a new tribunal whose activities would be “subject to close public scrutiny,”<sup>16</sup> the Court, as far as was humanly possible, had to be current in its work. The effects of the workload pressures were vividly described by Judge Brosman in a letter to Professor Edmund M. Morgan in March, 1953. He said: “I find it necessary to work seven days a week and most nights.”<sup>17</sup>

It is in the light of this background that formulation of the rules must be considered.

Rule 5 pertains to the number of judges constituting a quorum. In part, it provides as follows:

Rule 5. Quorum. Two of the judges shall constitute a quorum. The concurrence of two judges shall be required for the rendition of a final decision or the allowance or denial of a Petition for Grant of Review.

Within the terms of its statutory authority, at least theoretically, the Court could have provided that a single judge could decide any matter or case presented to the Court. Practically, for all but routine, interlocutory matters, a provision to that effect would have been unacceptable. Majority rule is too firmly fixed as a principle of American life, generally, and as the basis for decision on a multiple-judge bench, in particular, to be easily disregarded. On the surface, therefore, establishment of the rule of two, as the minimum for decisions of a final nature was entirely consistent with general principle and usual, judicial practice.

Preparation of a first draft of the rules was entrusted to Judge Latimer. He had several sets of rules of appellate courts before him, including the United States Supreme Court rules, when he

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<sup>15</sup> Interim Report of USCMA To Congress 5 (1952).

<sup>16</sup> Quinn, *The Court's Responsibility*, 6 Vand. L. Rev. 161 (1953).

<sup>17</sup> Letter From Judge P. W. Brosman to Professor Edmund M. Morgan, March 20, 1953, on file in the Civilian Committee File, USCMA. See also Latimer, *Improvements and Suggested Improvements in the Administration of Military Justice*, Report of Army Judge Advocates Conference 49 (1954).

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began work on the rules. Although he thought of the Court as the "Supreme Court" of the military justice system, he did not adopt the Supreme Court practice in regard to petitions for review.

In a general way, the petition for review in the military is somewhat like the petition for certiorari in the Supreme Court in that in both proceedings grant of review is discretionary with the appellate tribunal.<sup>18</sup> By statute, "any six" of the nine justices of the Supreme Court constitute a quorum.<sup>19</sup> However, in the exercise of its discretion, the Supreme Court has followed the practice of granting certiorari on the vote of any four justices; and on occasions when only two or three of the justices feel "strongly" about a grant, review is also allowed.<sup>20</sup> Thus the decision to review is by a vote less than that of a majority of the nine justices of the Court. Whether this is desirable is debatable, depending upon whether one looks to the circumstances under which petitions are reviewed, or to the result of the decision on the petition. As Judge Latimer noted in regard to a petition before the Court of Military Appeals, the denial of a petition "is a final decision insofar as an accused is concerned, and . . . it affects his life, liberty and property as effectively as does a written decision rendered by the Court. . ." <sup>21</sup> From that standpoint, application of majority rule to the grant or denial of a petition was natural and understandable.

No formal objection to majority rule was interposed by Chief Judge Quinn and Judge Brosman. However, it was noted that there might be occasions when one judge would feel especially strong about an issue presented by the record and desire to have the point briefed and argued before the whole Court. It was, therefore, informally agreed that in such a situation, one or the other of the judges who were inclined to deny a petition would vote to grant.<sup>22</sup> Thus, in practice, the majority rule was subject to the policy of the "courtesy" grant, in special cases. This, as observed above, corresponds to the "strong" vote for a grant by two or three of the justices of the Supreme Court.

Determination of the vote necessary for a decision was only part of the petition problem. Equally important was the scope of review.

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<sup>18</sup> Sup. Ct. Rule 19; Latimer, 'Good Cause' in *Petitions for Review*, 6 Vand. L. Rev. 163 (1953).

<sup>19</sup> 28 U.S.C. § 1 (1958).

<sup>20</sup> Stern and Gressman, *Supreme Court Practice* 145-46 (2d ed. 1954).

<sup>21</sup> Latimer, *op. cit. supra* note 18, at 164.

<sup>22</sup> Everett, *Military Justice in the Armed Forces of the United States* 289 (1956).

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### III. SCOPE OF REVIEW

Review may be narrow or broad. It is narrow when limited to the issues presented by the appellant; it is broad when the entire record of the proceedings below is open to scrutiny, regardless of whether special issues are raised in the petition. Ordinarily, the scope of review is regulated by statute. However, even if narrow review is provided, some appellate courts will range beyond the specific claims of error in the petition of appellant to notice “plain error,” which, if not corrected, would result in a manifest miscarriage of justice.<sup>23</sup> The plain error rule does not, however, convert a narrow review into a general review. Consequently, where review is on a narrow basis, the primary responsibility for finding and evaluating error rests upon appellant’s counsel. If review is open-ended, the appellate tribunal assumes part of that burden. Denial of review in the former instance justifies only the conclusion that appellate counsel has presented no matter worthy of the Court’s consideration; denial of review in the latter case indicates that the record contains no error prejudicial to a substantial right of the accused.

Review of a conviction by a board of review in the accused’s armed force is of the open-end kind.<sup>24</sup> The kind of review Congress intended the Court to make is not too clear from Article 67 or the legislative background. Some language in the Article indicates that review was to be limited to issues specifically noted in the petition of the accused. On the other hand, the background of the demand for civilian review tends to indicate that what was contemplated was a comprehensive review. Whatever the merits of the respective arguments, the issue was settled by a policy decision of the Court.

In drafting the rules of the Court, Judge Latimer tried to define the scope of review. Rule 4 provides as follows :

The Court will act only with respect to the findings and sentence as approved by the convening or reviewing authority, and as affirmed or as set aside as incorrect in law by a board of review. In those cases which The Judge Advocate General forwards to the Court by Certificate For Review, action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, action need be taken only with respect to issues specified by the Court in the grant of review. The Court may, in any case, however, review other matters of law

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<sup>23</sup> *Kotteakos v. United States*, 328 U.S. 750 (1946).

<sup>24</sup> UCMJ, art. 66.

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which materially affect the rights of the parties. The points raised in the Court will involve only errors in law.<sup>25</sup>

Basically, the Rule is a restatement of the provisions of Article 67.<sup>26</sup> The material difference is the addition of the sentence providing for review "in any case" of other matters which "materially affect the rights of the parties." The sentence can be read as expressing no more than the plain error rule, or as calling for open-end review. The course of review in the first few months of operation provided a practical construction of the Rule.

The sixth case presented to the Court by way of petition was unusual. After indicating his desire to appeal to the Court on errors of law, the accused said: "I have been advised by my defense counsel that there are no valid legal grounds for reversal of my case."<sup>27</sup> Appellate defense counsel, assigned by The Judge Advocate General at the accused's request, and as required by the Uniform Code, submitted the case "on the merits," without assignment of error. Chief Commissioner Tedrow reviewed the case and prepared a memorandum which recommended that the petition be denied. In the course of the memorandum, he showed that he interpreted Rule 4 to limit review to issues specified in the accused's petition but he believed it was too soon to enforce the rule strictly. He expressed the view that the Court ought not

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<sup>25</sup> USCMA Rules Prac. & Proc. 4.

<sup>26</sup> Article 67 provides as follows :

(b) The Court of Military Appeals shall review the record in the following cases :

(3) All cases reviewed by a board of review which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted review.

(c) The accused shall have thirty days from the time he is notified of the decision of a board of review to petition the Court of Military Appeals for a grant of review. The court shall act upon such a petition within thirty days of the receipt thereof.

(d) In any case reviewed by it, the Court of Military Appeals shall act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the board of review. In a case which The Judge Advocate General orders forwarded to the Court of Military Appeals, such action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, such action need be taken only with respect to issues specified in the grant of review. The Court of Military Appeals shall take action only with respect to matters of law.

(e) If the Court of Military Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing it shall order that the charges be dismissed.

<sup>27</sup> CM 346638, *Thomas* (unreported), *pet. denied*, 1 USCMA 699 (1961). (See Docket Entries, USCMA, 8 August 1961.)

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to be expected to review cases *de novo* for possible error but he questioned the advisability of such strict procedure at that early stage of operations.

Commissioner Condon, the only other member of the legal staff at that time, agreed with Tedrow's memorandum and the recommendation to make a *de novo* review. The matter was discussed with the judges. Although there was a general disposition to regard Rule 4 as requiring assignment of specific errors, the final "sense" of the conference was that the Court would consider the entire record, and determine whether there was "good cause" for review.<sup>28</sup>

At the time of the decision, there were only about a dozen other cases before the Court, and three of those involved the same issue of whether the Court had jurisdiction to review a case which had been decided by the Judicial Council after the effective date of the Uniform Code.<sup>29</sup> It certainly must have seemed to the Court and the staff that there would be ample time within which to make a comprehensive review of every case. Moreover, both Tedrow and Condon had had the kind of background in courts-martial practice that lent itself to close examination of the proceedings;<sup>30</sup> the amplitude of time made it possible for them to indulge the tendency. But the *Thomas* ruling did not finally fix the Court's policy.

In the last two weeks of August, 1951, the number of cases more than tripled. The thirty-day period for action on the petition, required by Article 67, demanded extraordinary effort by the judges and the commissioners to meet the deadline. As far as it appears, no one suggested abandonment of the principle of open or *de novo* review. It may be that it was generally believed that the decision for complete review was too recent to be reexamined

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<sup>28</sup> Interview With Commissioner David F. Condon, Jr., in Washington, D. C., September 21, 1959.

<sup>29</sup> *United States v. Sherwood*, 1 USCMA 86, 1 CMR 86 (1951); *United States v. McSorley*, 1 USCMA 84, 1 CMR 84 (1951); *United States v. Sonnenschein*, 1 USCMA 64, 1 CMR 64 (1951).

<sup>30</sup> Interviews With Chief Commissioner, Tedrow and Commissioner Condon, in Washington, D. C., September 21, 1969. Chief Commissioner Tedrow had been appellate defense counsel in the Air Force before joining the Court; previous to the outbreak of the Korean Conflict, he had practiced law in the District of Columbia and had considerable experience as a trial attorney in criminal and courts-martial cases and had served during World War II as Assistant Inspector General of the Navy in charge of courts-martial procedures. Commissioner Condon had been Chief prosecutor in the Twelfth Naval District during World War II. In civil life, he was a career Government attorney, with experience as a Hearing Examiner with the National Labor Relations Board.

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at that time. On October 1, 1951, Daniel C. Walker was added to the legal staff. He was briefly indoctrinated into the method of review by Tedrow and Condon; and he simply accepted the *de novo* review as standard procedure.

Adding Walker to the staff did not materially lessen the pressures of the workload. Forty-one new cases had been docketed in September and 100 cases were received in October, 1951. Toward the middle of November, it appeared that a backlog might be created, and that the Court would be faced with the inability to comply with the thirty-day requirement. The situation forced reconsideration of the scope of review.<sup>31</sup>

At a conference sometime in early December, the review procedures and possible staff additions were examined. Note was taken of the fact that a substantial number of issues had not been assigned as error by appellate defense counsel, but had been recommended by the staff as "good cause" for review. Also, Commissioner Tedrow reported that some weeks previous he had had occasion to discuss the scope of the Court's review with Robert Smart, the Professional Staff Member of the Brooks Subcommittee, and Smart had informed him that he believed it was the sense of the Subcommittee that a comprehensive review would be made by the Court. That, in fact, had been the procedure followed by the Judicial Council in the **Army**.<sup>32</sup> Principally, as a result of these circumstances, it was decided to continue with the practice of complete review. But to alleviate the pressure, it was further decided to add an assistant to the staff.

Adding a staff member relieved, but did not remove, the workload pressure. In a memorandum to the judges in August, 1952, Commissioner Tedrow reported as follows :

The preparation of petition memos for the Court has picked up . . . .  
However, I am forced to concede that this is due to some extent to the

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<sup>31</sup> A graphic portrayal of the conditions prevailing at the time is set out in a memorandum by the Chief Commissioner. He said that the Court was current in its work "largely" because of "substantial overtime." He advised the judges that he did not believe he had the "right to expect" the staff to work overtime as a "regular procedure." "Good legal work," he declared, could not be indefinitely achieved "under pressure" of the kind that was being experienced by everyone connected with the Court. Memorandum From Chief Commissioner Tedrow to the Court of Military Appeals, November 28, 1951, on file in USCMA.

<sup>32</sup> Reporting on the work of the Judicial Council, Major General E. M. Brannon, The Judge Advocate General of the Army, said that the Council considered all errors "regardless of whether the error was noted at the trial or assigned as error by counsel upon appellate review." Brannon, **First Year of The Judicial Council**, Judge Advocate Journal (Bull. No. 4, January, 1960) 10.

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fact that . . . there has been no annual leave or military leave . . . . The leave . . . situation concerns me because employees are entitled to military leave as a matter of law, and because further, present legislation requires that if an employee does not take annual leave within the ensuing calendar year, he loses it entirely.<sup>83</sup>

The memorandum suggested revision of some of the intra-mural procedures in the processing of cases, but gave no hint of a desire to narrow the scope of review. In the course of the year, more attorneys were recruited for the legal staff. In addition, there were some transfers from the administrative staff to the legal staff. Those changes enabled the Court to function without danger of overrunning the thirty-day period for action on petitions, and to keep within the policy of speedy disposition of cases in which review had been granted. However, the pressure was constant.

It is possible that the workload might eventually have led to acceptance of the doctrine of limited review. However, the issue became commingled with that of the Court's status in such a way as to make the change impractical.

On April 27, 1955, Judge Latimer testified before a Senate Subcommittee on the Court's budget for fiscal 1956. He reviewed briefly the improvement in the standards of trial by the prosecution and the quality of representation by defense counsel. The part of his testimony that joined *de novo* review to the position of the Court is as follows:

Now I think that we give any who may reach us by petition a very thorough and adequate review. We not only take the counsel's assigned reasons as to why he thinks he is there, but we have records searched by our own personnel to see if there is anything in the record which we believe affects the right of the accused.

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A complete review is made of every case. When we originally started, many of the errors which were argued before us were errors which were taken out of the record by personnel of the Court.<sup>84</sup>

A year later, the review procedure figured prominently in an attempt by the services to limit appeals to the Court. The occasion was the hearing in 1956 on the Defense Department "Omnibus Bill" to amend the Uniform Code. The matter arose as follows:

Mr. Devereux [Congressman, Md.] . . . . I think we want to go into the question of how many appeals do you have. What are your recommendations for taking care of frivolous appeals?

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<sup>83</sup> Memorandum From Chief Commissioner Tedrow to the Court of Military Appeals, August 21, 1952, on file in USCMA.

<sup>84</sup> *Hearings Before the Subcommittee on Department of Defense Budget for 1956 (H.R. 6042) of the Senate Committee on Appropriations*, 84th Cong., 1st Sess. 456, 458 (1955).

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Judge Quinn. We can very easily take care of them under our rules. We are not embarrassed by what might be regarded as frivolous appeals.

Now, it is true that some of those cases coming up to us now are guilty [plea] cases. I think they should be eliminated . . . That [the adoption of joint recommendations of the Court and the services] would take care of some of the volume, *but we have in the course of our examination of the records found that about 33 percent of the errors that we have passed upon, and upon which we have reversed or granted some relief, were errors never found by the services* or by counsel for the Government or the defense, but were picked up by our own secretaries [note: should be assistants] and commissioners. And so that it seems to me the court has nothing to worry about as far as frivolous appeals are concerned. [Emphasis supplied.]<sup>35</sup>

From the very beginning of *de novo* review, the service lawyers were aware of the practice without, however, knowing of the underlying policy. At first, many attributed the grant of review upon issues not raised by counsel, to a desire on the part of the Court to establish precedents, as soon as possible on as many issues as possible.<sup>36</sup> Support for this view was found in an article by Judge Latimer in the *Vanderbilt Law Review* issue of February, 1953.<sup>37</sup> Calling attention to the fact that the Court “look[ed] at the entire record,” Judge Latimer said that sometimes review was granted despite “reservations concerning good cause” in order to select “test cases” to “fix a rule or establish a principle.”

As the Court continued to grant on issues raised *sua sponte*, which did not involve new principles or unsettled rules, some military lawyers began to question the Court’s liberality of review. Especially critical were Government counsel; but some appellate defense counsel were also somewhat perturbed because they considered a grant on issues not presented by them in the petition as a reflection on their professional competency.<sup>38</sup> A few Government appellate counsel doubted the Court’s legal authority to grant review on issues not raised in the petition, but no one challenged the Court’s authority in the early years. However, every service sought to persuade the Court to narrow its review by stressing that such was the practice in the federal courts. Typical of the form of reply to a petition which alleged no errors is that used by the Army. It reads as follows:

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<sup>35</sup> *Hearings on H.R. 6583 Before the House Committee on Armed Services*, 84th Cong., 1st Sess. (1956).

<sup>36</sup> No written documentation is available for the point made, and the discussion that follows. It is predicated upon the author’s experience as Appellate Defense Counsel in the Office of The Judge Advocate General, U. S. Army.

<sup>37</sup> Latimer, *op. cit. supra* note 18, at 163.

<sup>38</sup> These comments are based on oral conversations with military lawyers. The author addressed a meeting of the Military Law Institute in April, 1969, and much of the question period was devoted to questions on this point.

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The petition for grant of review, the record of trial, the action of the convening authority, and the decision of the board of review have been examined by appellate Government counsel. The court-martial, the convening authority, and the board of review, as the triers of fact, have **judged** the credibility of witnesses, weighed the evidence, and resolved the issues of fact against appellant. Good cause for review is not shown as required by UCMJ, Article 67(b)(3), in that no error of law is assigned as required by Rule 18 of the rules of this Court, and no prejudicial error is apparent upon the face of the record. In accordance with the uniform practice of the Federal courts in such cases, the petition should be denied [citing cases].<sup>39</sup>

In July, 1959, the Army decided to, challenge formally the Court's power to grant on issues raised as a result of its own examination of the record of trial. The claim of lack of power was made the basis for a motion to vacate the decision in *United States V. Brown*, decided on June 26, 1959.<sup>40</sup> In that case, the Court had set aside the accused's conviction for wrongful possession of heroin on the ground, among others, that prejudicial error had been committed in the admission in evidence of the results of an illegal search of the accused's person. The accused's petition for review had assigned no errors, but the Court granted review on two issues raised by the staff, one of which was the legality of the search. Point II of the Government's motion read as follows:

SINCE NEITHER THE EXPRESS LANGUAGE OR ARTICLE 67(b)(3), COMPARED WITH ARTICLE 67(c), UNIFORM CODE OF MILITARY JUSTICE, NOR THE LEGISLATIVE HISTORY UNDERLYING ARTICLE 67 OF THE CODE AS A WHOLE, INDICATES THAT THE UNITED STATES COURT OF MILITARY APPEALS HAS JURISDICTION TO DECIDE ISSUES NOT SPECIFIED BY APPELLANT IN HIS PETITION FOR GRANT OF REVIEW THIS HONORABLE COURT WAS WITHOUT JURISDICTION SO TO DO IN THE INSTANT CASE.

The argument developed in support of the point tied together the provisions of Article 67 requiring the Court to act on a provision in thirty days and the difficulty of making a *de novo* review in every case. The core of the argument is in the following passage :

Obviously, thirty days is an insufficient period of time **for** the three Judges of this Honorable Court, even aided as they are by most capable subordinates, to search each and every record of trial **for** legal error. But it is as Congress declared, an amply sufficient period **of** time to review the issues **specified** by the appellant in his Petition for Grant of Review. *Equal justice under law would* seem to exclude a preferential searching of one record of trial and the non-searching of another. The

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<sup>39</sup> CM 399406, *Jones* (unreported), *pet. denied*, 10 USCMA 663 (1968). (See Appellate Papers, on file in the Office of The Judge Advocate General, U.S. Army.)

<sup>40</sup> 10 USCMA 482, 28 CMR 48 (1969).

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Congress logically and fairly intended, therefore, in specifying the speedy completion of action upon a petition that only the grounds specified in the petition or its attached pleading should be reviewed to determine if good cause was shown for grant of review.

It is worth noting that in the course of its argument, the Government departed from its previous position of recognizing the right of the Court to notice "plain error," to contend that the Court did not even possess "the statutory prerogative accorded certain federal courts to notice plain errors or defects." The motion to vacate the decision was denied.<sup>41</sup>

Coming as late as it did, the attack on *de novo* review seemed foredoomed to failure. *De novo* review was no longer a mere convenient practice; it was a symbol of the Court's fulfillment of the purpose of its creation as a check on the operation of the courts-martial system in the individual case. It was unlikely that the Court would curtail the scope of its review on the basis of a lack of power. It might, however, do so, as a matter of policy, in the event of war and an unmanageable increase in its workload.<sup>42</sup>

### IV. THE SURVEY AND REPORT FUNCTION: THE CIVILIAN ADVISORY COMMITTEE

Under subdivision (g) of Article 67 of the Uniform Code, the Court is required to meet annually with The Judge Advocates General "to make a comprehensive survey of the operations" of the Code and to report thereon to Congress and the Secretaries of the military establishments and the Secretary of the Treasury. Three areas of study are specifically marked out in the Article: (1) Determination of the number and status of pending cases; (2) Formulation of recommendations relating to uniformity of sentence policies; and (3) Consideration of amendments to the Uniform Code. To be sure that the enumeration of specific areas would not be construed as exclusive, Congress provided that "any other matters deemed appropriate" could be included in the report.

At least one matter of inquiry was suggested by the Subcommittee of the Committee on Armed Services of the House of Representatives which considered the Uniform Code. The Subcommittee had heard a great deal of testimony on the desirability of establishing a separate Judge Advocate General Corps for the

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<sup>41</sup> *Zbid.* (See Appellate Papers, on file in the Office of The Judge Advocate General, U.S. Army.)

<sup>42</sup> In his testimony on H.R. 6583, *supra* note 35, Chief Judge Quinn spoke of the Court's power to change its rules and apply "the brakes" on "frivolous appeals," in the "event of an all-out war." It would seem that he comprehended in the term "frivolous appeals," petitions alleging no errors.

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Navy and Air Force, similar to that which was in existence in the Army. In its report it said that "since the Court of Military Appeals will have an opportunity to review the comparative results of the Army with its corps as against the Navy and the Air Force without such a corps," it would be better to defer decision until further information could be obtained. It seems clear that the Subcommittee expected the Court to provide the necessary factual **material**.<sup>43</sup> And in fact, the Court later reported that it was prepared to submit information on the **matter**.<sup>44</sup>

The judges first met with The Judge Advocates General and the General Counsel of the Treasury Department on December 12, 1951, to discuss their responsibility for an annual report. At the meeting, the judges proposed that an interim report of operations be filed, but there were objections by some of the Judge Advocates. These were sufficient to preclude a joint report, but the Judges decided to file a preliminary report of the Courts operation "in view of the fact that the members of Congress . . . manifested great interest in the administration of military justice." This was the first of a series of differences which later arose in the Code Committee.

Although they did their "level best to maintain a cooperative attitude with the Judge Advocates General," the judges had "tough moments" of disagreement with the Judge Advocates General on proposals by the services which were designed to effect a return to former **practices**.<sup>46</sup> As a result, about December, 1952, they conceived the idea of appointing a committee of prominent civilian lawyers to assist them in the discharge of their Code Committee responsibilities. The services did not like the idea.<sup>47</sup>

Invitations were extended to a number of prominent attorneys. In due course, acceptances were received and the Committee was formally organized under the chairmanship of Whitney North Seymour, President of the Association of the Bar of the City of New York.<sup>48</sup>

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<sup>43</sup> H.R. Rep. No. 491, 81st Cong., 1st Sess. 8 (1949).

<sup>44</sup> 1955 USCMA and TJAG Ann. Rep. 10.

<sup>45</sup> Interim Report of USCMA To Congress 1 (1952).

<sup>46</sup> Letter from Judge P. W. Brosman to Professor Edmund M. Morgan, *supra* note 17.

<sup>47</sup> *Zbid.*

<sup>48</sup> The Committee also included: Joseph A. McClain, Jr., Dean of Duke University School of Law; Arthur E. Sutherland, Professor of Law, Harvard University Law School and former Chief of Staff to General Mark Clark; and Felix Larkin, Assistant General Counsel to Secretary of Defense Forrestal, who headed the Working Group of the Forrestal Committee which drafted the Uniform Code; and Ralph G. Boyd, George A. Spiegelberg, and Donald L. Deming.

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On January 27, 1953, the Advisory Committee held its first meeting in New York. Subcommittees were appointed to study separate parts of the Code. Other meetings and the scope of the Committee's work are set out at length in the Annual Report of the Code Committee for 1953. What is worth noting is that insofar as the Advisory Committee disagreed with the services, the judges of the Court were in the position to consider the possibility of a "safe and desirable middle ground."<sup>49</sup> And, in fact, they became the synthesizers of the differences between the extremists in the military and civilian communities.

### V. CONCLUSION

When establishment of the Court of Military Appeals was under consideration by Congress, the House of Representatives approved a bill providing for life tenure for the judges. This provision was changed by the Senate; it considered a fixed term of years preferable to life tenure because it wanted to "see how this court (was) going to operate and what kind"<sup>50</sup> of judges were appointed. The Senate view prevailed in the conference to receive differences between the House and Senate versions of the new Uniform Code, and staggered terms of fifteen, ten, and five years were provided for the first judges. In a sense, therefore, the Court may be regarded as an experiment in the administration of military justice. Whether the experiment has proved a success or a failure and whether the time has now come to give permanent status to the Court, and perhaps even to enlarge its jurisdiction and functions, will, of course be decided upon the basis of the Court's actual work as both the "Supreme Court" of the military courts system and part of the committee to advise Congress on the operations of the Uniform Code. Fortunately, the basis for evaluation of the Court's work in both fields is broad and comprehensive. That this is the case is due largely to its policy decisions in regard to the petition for review and the development of an effective organ for timely determination of civilian sentiment about the operations of the courts-martial system.

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<sup>49</sup> 1953 USCMA and TJAG Ann. Rep. 17.

<sup>50</sup> *Hearings on S. 857 and H.R. 4080 Before the Subcommittee on Establishing a Uniform Code of Military Justice of the Senate Committee on Armed Services, 81st Cong., 1st Sess. 312 (1949).*

# JUDICIAL LIMITATIONS UPON A STATUTORY RIGHT: THE POWER OF THE JUDGE ADVOCATE GENERAL TO CERTIFY UNDER ARTICLE 67(b) (2) \*

BY LIEUTENANT COLONEL ROBERT M. MUMMEY \*\*

## I. INTRODUCTION

This article was generated by a conviction that The Judge Advocates General are being denied an appeal, conferred by statute, by which conflicting board of review opinions may be harmonized and potential miscarriages of justice abated. The impact of recent judicial decisions on this right has been emphasized by the unfortunate absence of explicit ratiocination that has characterized these decisions and the correlative unawareness in the profession that such a corrosive process was in action.

Recognizing, as Judge Learned Hand has warned,<sup>1</sup> that “the last acquisition of civilized man is forbearance in judgment and to it is necessary one of the highest efforts of the will,” one must also accept his later precept: “Let [the judges] be severely brought to book, when they go wrong, but by those who will take the trouble to understand.”<sup>2</sup> A comparable license to criticize is found in Justice Frankfurter’s observation :

The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.<sup>3</sup>

Finally, an express invitation to “the bar, individually and through its legal journals” to “tell the public, the services and us, the judges, whether we are performing properly” was extended

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\* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General’s School or any other governmental agency.

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<sup>1</sup> From a tribute to Justice Holmes in the *New York World*, March 8, 1926, reprinted in *The Spirit of Liberty, Papers and Addresses of Learned Hand* 21 (Dilliard ed. 1959).

<sup>2</sup> *The Spirit of Liberty*, *op. cit. supra* note 1, at 85.

<sup>3</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951).

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from chambers as long ago as February, 1953,<sup>4</sup> and from the bench as recently as 1958.<sup>5</sup>

### 11. THE RIGHT TO APPEAL

#### A. THE HISTORICAL DEVELOPMENT PRIOR TO 1951

The right to appeal that concerns us is that conferred on The Judge Advocate General to "certify" cases to the United States Court of Military Appeals. In establishing a single, civilian Court of Military Appeals at the apex of a non-unified system of initial and intermediate appellate review, Congress provided for it a three-part jurisdiction :

The Court of Military Appeals shall review the record in:

- (1) all cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death;
- (2) all cases reviewed by a board of review which The Judge Advocate General orders sent to the Court of Military Appeals for review; and
- (3) all cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.<sup>6</sup>

Witnesses before the Subcommittee of the House Committee on Armed Services complained that these provisions conferred on The Judge Advocate General a power to appeal a decision of the board of review adverse to the government<sup>7</sup> while giving the accused, in all but Article 67(b) (1) cases, only a right to petition the court for a grant of review on good cause shown, i.e., a certiorari type application.<sup>8</sup> Nevertheless, the hearings<sup>9</sup> and the reports<sup>10</sup> clearly indicate that what was intended to be established was an appellate

<sup>4</sup> Quinn, *The Court's Responsibility*, 6 Vand. L. Rev. 161,162 (1953).

<sup>5</sup> *United States v. Sulewski*, 9 USCMA 490, 492 n. 1, 26 CMR 270, 272 n. 1 (1958), where Chief Judge Quinn stated: "The right to criticize the 'correctness of the decisions of Courts and judges has always existed under our form of Government and must continue to exist, not merely as a right possessed by the individual but as a safeguard to our institution.' *United States v. Craig*, 266 Fed 230,231 (SD NY) (1920)."

<sup>6</sup> Art. 67(b), Uniform Code of Military Justice, 10 U.S.C. § 867(b) (1958).

<sup>7</sup> Note that this power may be and has been exercised regardless of the result at the board of review. See, e.g., ACM 13277, *Storey*, 24 CMR 596 (1957), discussed *infra*; ACM 14722, *Dial*, 25 CMR 845 (1958).

<sup>8</sup> *Hearings on H. R. 4080 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 686, 758, 822-23, 841-42 (1949).

<sup>9</sup> *Id.* at 725, 758-59. See also *Hearings on S. 859 and H. R. 4080 Before a Subcommittee of the Senate Committee on Armed Services*, 81st Cong., 1st Sess. 44 (1949).

<sup>10</sup> H. R. Rep. No. 491, 81st Cong., 1st Sess. 32 (1949); S. Rep. No. 486, 81st Cong., 1st Sess. 29 (1949).

## POWER TO CERTIFY CASES

court where cases requiring confirmation by the President receive automatic mandatory review, where “an accused may request review and will receive it where the court finds good cause,” but where “The Judge Advocate General may direct that a case be reviewed by the court.”<sup>11</sup>

Although this variance may seem at first “unfair” to an accused, it should be noted that there are three separate stages in the military prosecution at which the accused may win an acquittal *on the facts* which is *not* reviewable—the court-martial, the convening authority and the board of review—and two stages at which he may win a reversal (or acquittal) *on the law* which is *not* reviewable—the court-martial and the convening authority.<sup>12</sup>

Nor is this type of provision unique in the military. Title 18 of the United States Code provides a direct appeal for the government from certain decisions and judgments in federal criminal cases<sup>13</sup> and *United States v. Heinxe*<sup>14</sup> upheld the constitutionality of an earlier provision.

It may be helpful to some readers to note briefly the genesis and evolution of the board of review.<sup>15</sup> Prior to 1920 no *legal* review of any court-martial case was required although in a limited category of cases confirming action by the President was necessary prior to execution of the sentence. Records of trial were forwarded to the Office of The Judge Advocate General for filing and the custom of examining each record and “advising” the convening authority of the opinion of that office regarding the legal sufficiency of the record to sustain the findings and sentence had been established.

In December 1917, by War Department general order, the affirmative opinion of The Judge Advocate General was made essential to execution of the sentence. In August, 1918, “boards of review” were established in the Office of The Judge Advocate General to perform this function. In July, 1919, the convening authorities were required by an amendment to the Manual for Courts-Martial, 1917, to refer every record of trial by general court-martial to a judge advocate and secure his written legal opinion thereon. On

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<sup>11</sup> *Hearings on S. 859 and H. R. 4080, supra* note 9, at 29.

<sup>12</sup> UCMJ, arts. 60–67.

<sup>13</sup> 18 U.S.C. § 3731 (1958).

<sup>14</sup> 218 U.S. 532 (1910). See also *Kepner v. United States*, 195 U.S. 100 (1904), holding that a state court appeal from a judgment of acquittal is not a denial of due process.

<sup>15</sup> For an excellent detailed history of this development see Fratcher, *Appellate Review in American Military Law*, 14 Mo. L. Rev. 15–75 (1949).

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4 June 1920, the Articles of War were amended to require the written post-trial review by the staff judge advocate and to establish a board of review in the Office of The Judge Advocate General.<sup>16</sup>

This board reviewed all cases requiring confirmation by the President, or from courts convened by the President, and submitted its written opinion to The Judge Advocate General. That officer then transmitted the case with the board's opinion and *his own recommendation* directly to the Secretary of War for the action of the President. By administrative decision when the board and The Judge Advocate General agreed that the record of trial was legally insufficient, the record was not sent to the Secretary of War but was returned to the convening authority for re-hearing or other appropriate action.

The board also reviewed cases (except those in which the accused pleaded guilty) where the sentence extended to death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary. If The Judge Advocate General agreed with the board, review was complete and the sentence could be ordered executed (if affirmed) or was vacated (if not affirmed).<sup>17</sup> If The Judge Advocate General did not agree with the board, the record with the opinion of each, was forwarded to the Secretary of War for transmittal to the President who decided between the conflicting opinions.<sup>18</sup>

In 1937 the Secretary of War was authorized to act in lieu of the President to resolve such differences of opinion<sup>19</sup> and in 1942 the commanding general of an overseas command in which a branch office of The Judge Advocate General was established was authorized to decide between the conflicting views of a board of

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<sup>16</sup> 41 Stat. 787 (1920) (Article of War 46 and 50%).

<sup>17</sup> A. W. 50½, *supra* note 16, provided in part: “[N]o authority shall order the execution of any . . . sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, *with the approval of The Judge Advocate General*, have held the record of trial upon which such sentence is based legally sufficient to support the sentence. . . .” (Emphasis added.)

<sup>18</sup> A. W. 50½, *supra* note 16, provided in part: “In the event that The Judge Advocate General shall not concur in the holding of the board of review, The Judge Advocate General shall forward all the papers in the **case**, including the opinion of the board of review and *his own dissent therefrom*, directly [i.e., not, as formerly, through The Adjutant General and Chief of Staff] to the Secretary of War for the action of the President, . . .” (Emphasis added.)

<sup>19</sup> 60 Stat. 724 (1937).

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review in that office and the Assistant Judge Advocate General in charge of that office.<sup>20</sup>

In 1948 the so-called Elston Act,<sup>21</sup> effective 1 February 1949, substantially amended the Articles of War with respect to appellate review. There was created in the Office of The Judge Advocate General, in addition to the boards of review, a Judicial Council composed of three general officers of the Judge Advocate General's Corps. The only sentences requiring confirmation by the President were those extending to death or involving a general officer. Sentences involving confinement at hard labor for life or dismissal of an officer or cadet required confirmation by the Judicial Council with the concurrence of The Judge Advocate General. In case of disagreement the record was sent to the Secretary of the Army for resolution.<sup>22</sup> In all other cases, if The Judge Advocate General concurred in the board of review decision, no further confirmation was required.<sup>23</sup> If The Judge Advocate General disagreed with the board holding that a record was legally insufficient, confirmation by the Judicial Council was required.<sup>24</sup> In addition, if The Judge Advocate General had so directed or if the opinion of the Judicial Council was divided, concurrence of The Judge Advocate General was required—with disagreement to be resolved by the Secretary of the Army.<sup>25</sup>

### B. THE STATUTORY PROVISIONS (1951) AND THE CONGRESSIONAL INTENT

This is the background of the then well-established right of The Judge Advocate General of the Army to dissent from the opinion of a board of review and forward the case to a higher authority for resolution of the disagreement.<sup>26</sup> The committee hearings show that the drafters of the Uniform Code of Military Justice and the Congress were aware of this background. It was in this context that the law was drafted and enacted to direct the Court of Military Appeals to “review the record in ... all cases re-

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<sup>20</sup> 56 Stat. 732 (1942).

<sup>21</sup> Act of June 24, 1948, ch. 625, §§ 201–249, 62 Stat. 627–644.

<sup>22</sup> See, e.g., CM 334635, *Simpson*, 1 BR-JC 227, 232 (1949).

<sup>23</sup> See, e.g., CM 334837, *Ratlift*, 1 BR-JC 311, 315 (1949).

<sup>24</sup> See, e.g., CM 341782, *Smith*, 12 BR-JC 259 (BR), 278 (JC) (1950).

<sup>25</sup> See, e.g., CM 345745, *Sherword*, 11 BR-JC 239 (BR), 248 (TJAG nonconcurrency), 249 (Reversal by JC), 254 (TJAG concurrence with JC) (1951).

<sup>26</sup> Article of War 50½, 41 Stat. 797 (1920), as amended, 50 Stat. 724 (1937); 56 Stat. 732 (1942); Article of War 50, 41 Stat. 797 (1920), as amended, 62 Stat. 635 (1948).

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viewed by a board of review which The Judge Advocate General orders sent to the Court of Military Appeals for review. . . .”<sup>27</sup>

In discussing this historical development and the provisions of the Uniform Code, Professor Edmund M. Morgan, the Chairman of the Code Committee, observed that :

[The board of review’s] decision . . . is final and the Judge Advocate General must so instruct the convening authority unless the Judge Advocate General disagrees, in which case he may submit the case to the Court of Military Appeals.

\* \* \*

The Court is required to review . . . all cases reviewed by the Board which the Judge Advocate General orders forwarded to the Court for review.<sup>28</sup>

Professor Morgan’s testimony before the subcommittee of the Senate clearly contemplated an automatic review by the Court once The Judge Advocate General had certified the case.<sup>29</sup>

Mr. Felix Larkin, then Assistant General Counsel in the Office of the Secretary of Defense, Executive Secretary of the Code Committee and Chairman of the working group which did the initial studies and drafting, was present at most of the hearings on the bill and spoke for the Code Committee during the section by section presentations and discussions.<sup>30</sup> At one point during the discussion of a provision, subsequently deleted, permitting The Judge Advocate General to refer a case to another board of review when he disagreed with the decision of the first board the following colloquy occurred :

MR. ELSTON. Now, Mr. Chairman, there is one other question that I think was raised by some of the witnesses who testified before us and that was with respect to subsection (e), where the Judge Advocate General is given authority to refer a case for reconsideration to the same or another board of review. The argument was made that there wasn’t any finality about it.

If the Judge Advocate General wasn’t satisfied with the decision of the board of review he could just send it to another board and it would give him too much authority. There ought to be something final about the action of a board of review. . . .

MR. LARKIN. I recall that criticism, Mr. Elston. The idea here substantially was this: The board of review’s judgment is not necessarily final, for two reasons. The first is that the judge advocate [sic] can if he is dissatisfied with its decision send it to the Judicial Council [the name was later changed to United States Court of Military Appeals]—and not on petition—as a matter of right for future [sic] review or the

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<sup>27</sup> UCMJ, art. 67(b) (2).

<sup>28</sup> Morgan, *The Background of the Uniform Code of Military Justice*, 6 Vand. L. Rev. 169,182 (1953).

<sup>29</sup> See, e.g., *Hearings on S. 859 and H. R. 4080*, supra note 9, at 44.

<sup>30</sup> *Hearings on H. R. 4080*, supra note 8, at 846.

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accused himself may petition the Judicial Council for further review on questions of law. \* \* \* \*

If, of course, he were to send a case to the board of review because he disagreed with their findings on the law and you got a different decision from another board of review, I should say that is a perfect case on the law for the Judicial Council. If two boards of review differ on the law, why it certainly needs settling some place. \* \* \* \*

MR. BROOKS. Well, what occurs to my mind is this: Suppose they would hold that actually there was no basis for conviction and the man was innocent. Now, does that then amount to a double jeopardy when you turn that over to another board?

MR. SMART. It is not jeopardy, sir, because this is not trial procedure. This is appellate procedure. \* \* \* \*

MR. DeGRAFFENRIED. Suppose the board of review would say the evidence was insufficient to sustain a verdict of guilty and order him discharged, that would be tantamount to a verdict of not guilty.

Sometimes they send it back for a new trial if there are errors of law.

MR. LARKIN. That is right.

MR. DeGRAFFENRIED. But sometimes the appellate court holds from the record that the evidence is not sufficient, and they don't order it back for a retrial.

MR. LARKIN. But the Judge Advocate General has the right in that case to send it forward to the Judicial Council to determine the question finally and once and for all.

MR. ELSTON. Well, isn't it true, too, in the civil courts that if you get into the court of appeals and the court of appeals decides in favor of the accused and orders a retrial of the case?

MR. LARKIN. Yes.

MR. ELSTON. Or even orders the dismissal of the accused?

MR. LARKIN. Yes.

MR. ELSTON. The State can appeal.

MR. LARKIN. That is right.

MR. ELSTON. From a decision of the court of appeals.

MR. LARKIN. Exactly so.

MR. ELSTON. The Supreme Court may reverse the court of appeals.

MR. LARKIN. That is right.<sup>31</sup>

This discussion should be recalled later when it will be observed that in one case of refusal to review<sup>32</sup> not only had the legal issue certified to the Court been decided contrarily by another Army board of review in another case<sup>33</sup> but the boards of review of the other services were being confronted with the **same issue**.<sup>34</sup>

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<sup>31</sup> *Id.* at 1191, 1193.

<sup>32</sup> *United States v. Bedgood*, 12 USCMA 16, 30 CMR 16 (1960).

<sup>33</sup> CM 403905, *Larraway* (May 24, 1960).

<sup>34</sup> See, *e.g.*, ACM S-19103, *Phipps* (date unknown), *aff'd*, 12 USCMA 14, 30 CMR 14 (1960).

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Clearly, such a situation calls for a “unifying” decision by the Court of Military Appeals.<sup>35</sup>

### C. THE ORIGINAL JUDICIAL CONSTRUCTION

What has the Court itself said previously about the effect of moot questions on its power or duty to review?<sup>36</sup> An early case, *United States v. Engle*<sup>37</sup> appears almost squarely in point and yet it is not mentioned by the Court in the recent cases refusing review. In *Engle*, the accused entered a plea of guilty to a 13½ hour AWOL and disobedience of a superior officer. A record of three previous convictions was received and the accused was sentenced to a bad conduct discharge, confinement at hard labor for four months, and forfeiture of \$60.00 per month for the same period. The convening authority approved and suspended the execution of the discharge until the accused's release from confinement or completion of appellate review, whichever was later. A Navy board of review concluded that the evidence of the prior convictions was inadmissible and its receipt prejudicial to the accused. However, it also concluded that even if the evidence were admissible, the unsuspended punitive discharge was inappropriate as a matter of fact. It continued: “In view of the foregoing the bad conduct discharge is set aside.”<sup>38</sup>

The Judge Advocate General of the Navy certified the question whether the evidence was inadmissible. The appellate defense counsel moved to dismiss the certificate on the ground that the reduction of the sentence by the board was based upon its finding of fact and accordingly the opinion of the Court on the certified question “could not affect the action taken by the board of review.”

Judge Latimer, the author of the principal opinion expressed his own view as follows :

I believe the meaning of that subparagraph [Art. 67b(2)] is clear and unambiguous and that it imposes **upon** the Court an obligation to review the record in all cases forwarded by The Judge Advocate General of the services, regardless of whether our action results in an **affirmance** or

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<sup>35</sup> See *United States v. Prescott*, 2 USCMA 122, 6 CMR 122 (1952), where the Navy board of review differed with the Army and Air Force boards on the interpretation of a paragraph of the Manual. See also Feld, *A Manual of Courts-Martial Practice and Appeal* § 134(c) (1957).

<sup>36</sup> Commissioner Feld has said “the Court will not dismiss a certificate because the issue raised is advisory or moot.” *Id.* § 134(d).

<sup>37</sup> 3 USCMA 41, 11 CMR 41 (1963).

<sup>38</sup> *Id.* at 43, 11 CMR at 43.

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reversal. I find nothing in the act permitting us to refuse to consider any record which has been certified.. . .<sup>39</sup>

**After** examining the legislative history and some defense arguments, he concludes :

... We have . . . , in certain instances, decided questions certified by The Judge Advocate General which did not affect the ultimate outcome of the particular litigation. It is very seldom that a criminal case is moot and certified questions oftentimes set procedural patterns for subsequent trials. Accordingly, I believe we are required to review the record in all cases presented to us under the provisions of Article 67(b)(2), and that we should not attempt to circumvent those provisions by prematurely dismissing cases on the assumption that our opinions will be advisory. Whether we need answer all questions certified is a matter which can be determined by us on review as an answer to one may be dispositive of all, but I do not find in that power inherent authority to dismiss the certificate.<sup>40</sup>

The Chief Judge concurred separately “to point out clearly that the issue raised by the question certified is presented by the record of trial, as acted upon by the board of review. We are not called upon to answer a hypothetical question, nor a problem presented in vacuo.”<sup>41</sup>

Judge Brosman concurred in the result because he did “not believe it necessary in this case to pass definitively on the broad question of whether we are required by law to review every record of trial as to which a question is certified by The Judge Advocate General of one of the Armed Forces.”<sup>42</sup> He noted that (as in the recent cases) the board of review might have relied on either the legal or factual basis “and said nothing of” the other. Yet it did not. He continues:

It has been urged that the question certified by The Judge Advocate General is moot in that no holding of ours concerning it can possibly affect the accused—that is, can touch the ultimate action taken by the board as to him. This latter is perfectly true. It does not follow, however, that we are without power to respond to the certified question—indeed, that we are not under a duty to do so. . . .

If another view were to be taken, it would be possible for a service board effectively to insulate this Court through the simple device of assigning—in addition to other reasons for its decision—one deriving from its power over facts. In doing so, it could make law safely beyond the reach of review by this Court—for its alternative pronouncement would not constitute mere dicta. Indeed, each would amount to a ratio of the case. It must be perfectly clear that Congress intended no such result. . . .<sup>43</sup>

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<sup>39</sup> *Ibid.*

<sup>40</sup> *Id.* at 44, 11 CMR at 44.

<sup>41</sup> *Id.* at 47, 11 CMR at 47.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Id.* at 47-48, 11 CMR at 47-48.

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Some four years later, in *United States v. Papciak*<sup>44</sup> the Court was again confronted with an attempt by an accused to limit the power of The Judge Advocate General to certify a decision of the board of review. In *Papciak* the board of review, without consideration of the merits of the case, entered a "Preliminary" order returning the case to a new convening authority for a new staff judge advocate review and a new action by the convening authority because of certain ambiguous language in the original review which may have mislead the convening authority as to what evidence he could consider and as to his duty to consider the appropriateness of the sentence. The Judge Advocate General of the Army certified the correctness of the board's finding regarding the effect of the review and whether the corrective action ordered was proper. Appellate defense counsel moved to dismiss the certificate on the ground the board of review had not finally acted on the case so as to permit certification.

Judge Latimer, again writing the principal opinion and denying the motion to dismiss, expressed his views as follows :

It is clear that Congress intended The Judge Advocate General to have the right to seek review here of adverse decision by boards of review, Senate Report No. 486, 81st Congress, 1st Session, on H.R. 4080, page 29, and the Court is united on the proposition that the filing of a certificate setting forth questions for review is the proper way of initiating that form of appeal. *United States v. Engle*, 3 USCMA 41, 11 CMR 41. Were I to consider this certificate as premature, on the ground that the board's decision was not final within the meaning of that word as used in our previously decided cases, the right of review would be effectively nullified on many matters of grave importance to the Government. Absent the right to appeal by certificate, an order such as this one would be insulated from attack, for its review could not be obtained until after it had become moot, and then any decision rendered by us would be academic. An interpretation which brought about that result would be in direct conflict with the intent of Congress, . . .<sup>45</sup>

The Chief Judge and Judge Ferguson concurred in the result on the ground that "if a board of review action disposes of the entire case at that level, such action is appealable to this Court either by certificate or petition."<sup>46</sup>

### 111. THE TREND TOWARD LIMITATION

#### A. THE TECHNIQUE

It is suggested that commencing in 1957 a majority of the Court, Judge Latimer dissenting or concurring in the result,

<sup>44</sup> 7 USCMA 224, 22 CMR 14 (1956).

<sup>45</sup> *Id.* at 227, 22 CMR at 17.

<sup>46</sup> *Zbid.*

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has imposed, almost imperceptibly and with a minimum of explanation, gradually increasing limitations upon The Judge Advocate General's right to certify. These limitations have been developed by relying on "controlling precedents"—dictum or unsupported and undiscussed holdings in earlier cases in which the issue was neither briefed nor argued. This approach to the resolution of issues has not been confined to certified cases.

One example from a non-certification case should illustrate the technique which can then be observed in operation in the certification area. In *United States v. Dean*<sup>47</sup> the majority cited *United States v. King*<sup>48</sup> as having "held that the [convening authority's] action . . . fixes the limits of both the findings of guilty and the sentence in all subsequent proceedings in the case."<sup>49</sup>

What, actually, was held in *King*? The case was reversed and a rehearing ordered (by a majority of the Court) because of a failure to instruct on the possible defense of physical incapacity to comply with an order to go to a forward position in Korea, in violation of Article 90. "Mindful of the protracted history of this case [there had already been one rehearing] . . . and believ[ing] that . . . the findings, as modified by the board of review, may fall within the purview of Article 86,<sup>50</sup> . . . to avoid further difficulty with the case, we believe that any retrial which may be held should be based on charges drafted expressly to fall within Article 90. . . . Upon such retrial, the maximum sentence would come to five years' confinement at hard labor—with credit for confinement under previous sentences."<sup>51</sup> There is no explanation of the basis for this observation and no authority is cited to support it. Judge Latimer dissented on three points in *King*: (1) He did not see any reason for precluding a conviction of absence without leave; (2) He questioned the Court's authority under the Code to limit the sentence to an "arbitrary ceiling" of five years; and (3) He disagreed with the Court's reliance on *United States v. Heims*.<sup>52</sup>

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<sup>47</sup> 7 USCMA 721, 23 CMR 185 (1957).

<sup>48</sup> 5 USCMA 3, 17 CMR 3 (1954).

<sup>49</sup> 7 USCMA at 724, 23 CMR at 188.

<sup>50</sup> Note that the Presidential limitation on maximum punishment for this offense found in par. 127c, MCM, 1951, had been removed by Executive Order 10247, 29 May 1951, when the offense was, as here, committed in Korea.

<sup>51</sup> 5 USCMA at 8, 17 CMR at 8.

<sup>52</sup> *Id.* at 9, 17 CMR at 9. Judge Latimer elected to discuss only the third point concerning the holding in *United States v. Heims*, 3 USCMA 418, 12 CMR 174 (1953), which the majority cited as requiring a *sua sponte* instruction on incapacity.

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This is the “holding” relied on in *Dean*. Judge Latimer had a different label for it. In dissenting in *Dean* he notes the majority’s reliance on “the gratuitous advice,” offered by a majority of the Court in *King*. He continues :

. . . The reasons for the restriction were not developed, but I assumed that the limitation was imposed because the convening authority had reduced the original sentence from ten years confinement to five years, with appropriate accessories, and the board of review had concluded that the punishment, as affirmed by the convening authority, was appropriate for the offense committed. At that time I noted my disagreement with the limitation, but did not state my reasons because the question was not properly before us. . . .<sup>53</sup>

### B. *THE “30-DAY” RULE*

Prior to examining the cases in which this technique has been used to refuse to review a certified case on the ground that the issue has become moot, it may be helpful in this regard to note the manner of resolution of a related problem—the validity of Rule 25 of the Rules of Practice and Procedure before the United States Court of Military Appeals, revised 1 January 1959. Rule 25 imposes a 30-day time limitation for the filing of a Certificate for Review by The Judge Advocate General. This parallels the 30-day time limit for the filing of a petition for grant of review by the accused.<sup>54</sup> However, the latter limitation is imposed by the statute, Article 67(b)(3), UCMJ, whereas the statute contains no similar limitation on the power of The Judge Advocate General to certify.

This issue was not raised<sup>55</sup> in a reported case until very recently, when in *United States v. Lowe*,<sup>56</sup> without citation to authority, the Chief Judge, in an opinion in which Judge Ferguson concurred, held that a certificate of The Judge Advocate General

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<sup>53</sup> 7 USCMA at 727, 23 CMR at 191.

<sup>54</sup> USCMA Rules Prac. & Proc. 24.

<sup>55</sup> In *United States v. Sell*, 3 USCMA 202, 11 CMR 202 (1953), a motion by appellate defense counsel to dismiss the certification as untimely was denied because the record disclosed the certification was filed within 30 days of the final decision of the board of review.

<sup>56</sup> 11 USCMA 615, 29 CMR 331 (1960). Two months earlier there was dictum in *United States v. Davis*, 11 USCMA 410, 29 CMR 226 (1960), to the effect that “the Government’s time to seek review by a certificate of review has expired.” Although the Chief Judge cited *United States v. Smith*, 8 USCMA 178, 23 CMR 402 (1957), and *United States v. Wille*, 9 USCMA 623, 26 CMR 403 (1958), to support this conclusion, neither case in its holding or dictum discusses the right of The Judge Advocate General to certify cases under Article 67(b)(2) nor the attempt by the Court’s Rules to limit the period in which this right may be exercised.

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of the Navy had been filed too late where it was filed within 30 days of receipt of the board of review decision in the Office of The Judge Advocate General of the Navy in Washington, D. C., but beyond 30 days of the receipt of the decision in the West Coast office of that official. Judge Latimer concurred in the result only, without reference to this issue, The brief by the government did not attack the validity of the rule; but merely urged that the period be computed from the later date. It is interesting that one of the Court's commissioners thought it "questionable" and "doubtful" that "the Court's rule can legally curtail TJAG's right to review."<sup>57</sup>

### C. THE REFUSAL TO ANSWER CERTIFIED QUESTIONS

#### 1. Why Questions in Certified Cases?

It may be well to note at this point that although, as noted above, Article 67 (b) (2) directs the Court to review:

all cases reviewed by a board of review which the Judge Advocate General orders sent to the Court of Military Appeals for review;

Article 67 (d) provides that :

in a case which the Judge Advocate General orders sent to the Court . . . action need be taken only with respect to the issues raised by him.

Accordingly, the former practice of merely noting the disagreement of The Judge Advocate General and forwarding the case for review by the Judicial Council without specification of issues, could not be continued. The Court established a form for the "Certificate of Review," which reads :

3. It is requested that action be taken with respect to the following issues<sup>58</sup>

#### 2. The Early Signs of Erosion

In 1957 The Judge Advocate General of the Army certified a case, *United States v. Thornton*,<sup>59</sup> with startling results. The accused, a second lieutenant, had been convicted of larceny and five specifications of making false official statements. The findings of guilty were affirmed by the board but a rehearing on the sentence was ordered on the ground that the accused had been prejudiced by the admission of certain evidence of other offenses not charged. The Judge Advocate General certified these two questions :

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<sup>57</sup> Feld, *op. cit. supra* note 35 § 134(e).

<sup>58</sup> USCMA Rules Prac. & Proc. 19.

<sup>59</sup> 8 USCMA 446, 24 CMR 256 (1957).

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(1) Was the board of review correct in holding that evidence of other misconduct was inadmissible on the merits?

(2) If the first certified question is answered in the affirmative was the board of review correct in holding that evidence of other misconduct prejudiced the accused with respect to the sentence?<sup>60</sup>

Although no cross-petition was filed by the accused the Chief Judge, with Judge Ferguson concurring, reversed the board of review's affirmance of the findings of guilty on the ground that the law officer had erred in denying a defense request at the trial that a former officer now residing in New York (the trial was held in Alabama) be subpoenaed to appear personally for the defense.<sup>61</sup> This issue was entirely unrelated to the questions certified by The Judge Advocate General. Nevertheless, the majority concluded :

In view of our conclusion as to the accused's right to the personal testimony of his witness, we need not consider the evidentiary issue raised by the certificate.<sup>62</sup> That question may not arise on a retrial of the case. The decision of the board of review is reversed. The findings of guilty and the sentence are set aside, and the record of trial is returned to The Judge Advocate General of the Army. A rehearing may be ordered.<sup>63</sup>

Judge Latimer began his dissent as follows:

Because I believe the consequences of this decision may be of far-reaching importance and have a substantial impact upon the trial of future cases in military courts, I set forth the views prompting me to dissent. There are two principal areas of disagreement between my associates and myself: First, the law officer, in my opinion, did not abuse his discretion in denying the motion to subpoena a witness. Second, the questions certified should not go unanswered, for although my associates say the question may not arise at a rehearing, I respectfully disagree. A rehearing has been authorized and most certainly if the evidence is material, competent, and relevant, the Government is entitled to have it introduced at the retrial. We should not therefore brush aside the issue only to be faced with it on another appeal.<sup>64</sup>

We are not here concerned with Judge Latimer's well-reasoned explanation of his disagreement on the first point—nor with the substance of his opinion regarding the second issue.<sup>65</sup> I think

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<sup>60</sup> *Id.* at 452, 24 CMR at 262.

<sup>61</sup> Following the denial the accused was offered a continuance in which to secure a deposition from the witness; but counsel declined. Thereupon, counsel and accused agreed to a stipulation of "the testimony that would have been given by the witness."

<sup>62</sup> Note the absence of citation to authority or discussion despite the forceful condemnation in the dissent.

<sup>63</sup> 8 USCMA at 450, 24 CMR at 260.

<sup>64</sup> *Ibid.*

<sup>65</sup> It is interesting, however, that Judge Latimer finds *three* separate bases for admitting the evidence of prior misconduct.

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we must agree with him, however, that considerations of statutory duty aside, in the interests of sound judicial administration, the Government is entitled to have this certified issue decided by the Court prior to the rehearing ordered by the majority on their own ground.

It should be noted that because of the second certified question having been phrased so as to require an answer only if the first question is answered adversely to the government, Judge Latimer correctly observes that his answer to the first question “disposes of any necessity to answer the second question.”<sup>66</sup>

In 1959, The Judge Advocate General of the Air Force certified a case, *United States v. Keeler*,<sup>67</sup> involving the issue whether the commanding officer of the Tachikawa Air Base in Japan could issue a general order within the meaning of Article 92. That this was at that time and had been a troublesome question can hardly be disputed.<sup>68</sup>

Although the result in the case was to affirm the decision of the board of review, the case did not decide, did not even help clarify, the legal issue involved and certified to Court. This occurred because while Judge Ferguson answered the certified question in the affirmative (agreeing with the board of review) and Judge Latimer answered the question in the negative, the Chief Judge refused in the following language to answer the question:

In my opinion, the accused's separation from the service by affirmative action terminated the proceedings. See my dissent in *United States v. Speller*, 8 USCMA 363, 24 CMR 173. Accordingly, I join in affirming the dismissal of the charges.<sup>69</sup>

Judge Latimer begins his dissenting opinion :

Unfortunately the opinion in the case at bar, written in answer to a certified question, instead of resolving any doubts on the issue referred to us, is only determinative of the instant proceeding. In view of the divergent approach of the three opinions, no law at all is established.

In my view, we must answer the certified question. And, since the author Judge reaches the merits, I must assume he is of the same belief. However, to prevent the services from being misled by the Court's tripartite approach, I invite attention to *the clear language* of Article 67(b) (2). . . .<sup>70</sup>

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<sup>66</sup> 8 USCMA at 455, 24 CMR at 265.

<sup>67</sup> 10 USCMA 319, 27 CMR 393 (1959).

<sup>68</sup> See Meagher, *Knowledge in Article 92 Offenses— When Pled, When Proven?*, Mil. L. Rev., July, 1959, p. 119.

<sup>69</sup> 10 USCMA at 321, 27 CMR at 395. Note that the majority of the Court had held in the *Speller* case that administrative separation from the service does not terminate the proceedings.

<sup>70</sup> *Ibid.*

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More recently in *United States v. Wheatley*<sup>71</sup> an Army board of review set aside the conviction of a first lieutenant of violations of Articles 93 and 133 alleging maltreatment or permitting maltreatment of soldiers under his command.<sup>72</sup> The board found as to the first (Additional Charge I) that “we do not consider that the evidence of record establishes maltreatment of Private Hathorne as a matter of fact or of law within the purview of Article 93.”<sup>73</sup> As to the second (Additional Charge 111) it found :

In this instance neither the specification nor the evidence of record furnishes sufficient factual information on which we may base an imputation of criminality to this accused.<sup>74</sup>

One of the three errors assigned by the accused before the board of review was whether the specification of Additional Charge III stated an offense. The board found the approved findings of guilty and the sentence “incorrect in law and fact,” set them aside and dismissed the charges.

The Judge Advocate General of the Army certified three questions :

A. Under the facts which the board found were established beyond a reasonable doubt with respect to Additional Charge I and its specification, was the board of review correct as a matter of law in determining that it could not affirm the findings of guilty thereof?

B. Was the board of review correct in determining that the specification of Additional Charge III does not furnish sufficient factual information on which [to] base an imputation of criminality to the accused?

C. Under the facts which the board found were established beyond a reasonable doubt, was the board of review correct in determining as to Additional Charge III and its specification that as a matter of law it could not affirm a finding of guilty of an offense under the Uniform Code of Military Justice?<sup>75</sup>

In a very short opinion, after a one-paragraph discussion of the holding of the board on the factual issues, the Chief Judge for a unanimous Court disposed of the certified questions as follows :

From the form of the certified questions, it would appear that The Judge Advocate General concluded the board of review dismissed the charges on the ground of legal, rather than factual, insufficiency. As we read the opinion of the board of review, the sufficiency of the evidence to support each charge was decided as a factual matter. On that basis the only question for our consideration is whether the board of review acted arbitrarily and capriciously in reaching its conclusions. Our reading of the record convinces us the board of review did not abuse its discretion. [United States v. Hendon, 7 USCMA 429, 22 CMR 219; United

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<sup>71</sup> 10 USCMA 537, 28 CMR 103 (1959).

<sup>72</sup> CM 401092, *Wheatley*, 28 CMR 461 (1959).

<sup>73</sup> *Id.* at 464.

<sup>74</sup> *Id.* at 465.

<sup>75</sup> 10 USCMA at 538, 28 CMR at 104.

## POWER TO CERTIFY CASES

States v. Moreno, 6 USCMA 388, 20 CMR 104; see also United States v. Judd, 10 USCMA 113, 27 CMR 187.1 Accordingly, to the extent that questions 'A' and 'C' of the certificate ask whether the evidence is sufficient to support the decision of the board of review, we answer them in the affirmative. As a question of law, question 'B' is moot since the board of review expressly held that the 'evidence of record' also did not provide 'sufficient factual information on which . . . [it could] base an imputation of criminality,' as distinguished from careless and thoughtless conduct, on the part of the accused. We need not, therefore, answer the question. [See United States v. Fisher, 7 USCMA 270, 22 CMR 60.]<sup>76</sup>

An examination of the *Moreno* case<sup>77</sup> and the earlier case of *United States v. Bunting*<sup>78</sup> will disclose that in these cases the problem of moot questions is entangled in the disputed power of the Court of Military Appeals to review factual determinations by the board of review and reverse the decision below "when [the members of the board] have acted arbitrarily or capriciously or where reasonable men could reach only one conclusion from the evidence and the board reaches an opposite result."<sup>79</sup>

The *Moreno* case had been returned to the board for clarification as to whether it "had decided the case as a matter of law or on the basis of its fact-finding power." The board in *Moreno*, upon remand, stated: (1) the evidence is insufficient as a matter of law *but* (2) assuming it is not insufficient as a matter of law, it is insufficient as a matter of fact. Re-confronted upon re-certification with the question of the correctness of holding (1), the Chief Judge found the board had "made it unmistakably clear that its original decision to dismiss the charge was based upon an evaluation of the evidence in its capacity as a fact-finding body. There is, therefore, no question of law for review by this Court."<sup>80</sup> Judge Brosman concurred, "although [he] suspect[ed] that [the Chief Judge] has not receded from the heresy to which he subscribed in *United States v Bunting* [i.e., an assertion of a power in the Court of Military Appeals to review factual determinations for 'arbitrariness and capriciousness']".<sup>81</sup> Judge Latimer again dissented. He objected to the board of review's obvious attempt to preclude review of its legal reasoning by the Court. He noted:

The board of review, . . . , furnishes us with an extensive discussion of the law of involuntary manslaughter, interspersed with comments on the facts of this case, Near the end of the opinion there is found a statement that, as a matter of law, the evidence in the record was

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<sup>76</sup> *Id.* at 539, 28 CMR at 105.

<sup>77</sup> United States v. Moreno, 6 USCMA 388, 20 CMR 104 (1955).

<sup>78</sup> 6 USCMA 170, 19 CMR 296 (1954).

<sup>79</sup> 6 USCMA at 391, 20 CMR at 107. (Dissenting opinion of Judge Latimer.)

<sup>80</sup> *Id.* at 389, 20 CMR at 105. In support of this proposition, the opinion cited only Article 67(d) and the *Bunting* case, *supra* note 78.

<sup>81</sup> *Zbid.*

# MILITARY LAW REVIEW

insufficient to sustain the findings of guilt. As a last line of defense, however, and apparently in response to the invitation in our remand, the board stated that even if it were in error on the insufficiency of the evidence to support the finding as a matter of law, its members, as triers of fact, were not convinced beyond a reasonable doubt of the accused's guilt. . . .

The majority conclude the board of review has now made it unmistakably clear that its members reached their conclusion acting in their capacity as triers of fact. If that be so, it is solely because the opinion contains words to that effect. That must be the reason, because the rest of the opinion indicates to the contrary. However, prior to this time we have never considered ourselves bound by the label attached to a holding by a board of review. Thus, in *United States v. Benson* [3 USCMA 351, 12 CMR 107 (1953)] we were faced with an attempt to render untouchable a result by a statement that the matter decided was one of fact. . . . \* \* \* \* \*

We rejected that method of tying our hands by saying:

'Although that statement by the board of review seeks to characterize the ruling as a finding of fact which under Article 67(d), Uniform Code of Military Justice, 50 USC § 654, we would not review, the reasoning upon which it is based shows it to be a matter of law. . . .'

\* \* \* \* \*

Whether a board of review can defeat review of findings of fact by this Court by merely labeling the finding one of fact was recently considered by us in *United States v. Bunting*, *supra*. . . . Furthermore, in that instance we expressed the view that we look to the substance of the holding by a board of review and its rationale to determine whether that appellate agency had expressed a holding in law, fact, or mixed law and fact. In the last analysis, the question becomes one of whether boards of review can deprive us of our right to determine the nature of their ruling. . . .<sup>82</sup>

### 3. *The Bedgood Decision*

In the case of the *United States v. Bedgood*,<sup>83</sup> decided 4 November 1960, the right of The Judge Advocate General to certify a

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<sup>82</sup> *Id.* at 390-92, 20 CMR at 106-08. The broader question of the power of the Court to reverse "unreasonable" fact-finding by the board of review cannot be discussed in detail in this paper; but an insight into the intent of the drafters of the Code and of the Congress may be gained from a perusal of just two discussions in the Committee hearings, *Hearings on H. R. 4080, supra* note 8, at 608-12; *Hearings on S. 859 and H. R. 4080, supra* note 9, at 55. In these Professor Morgan, Mr. Larkin, and the committee members clearly indicate that the Court may reverse a board of review which has acted "unreasonably"—i.e., where the correctness of the factual determination has become a question of law. See also, Feld, *op. cit. supra* note 35, § 134(b) : "[F]indings of fact by the BR must be supported by evidence in the record of trial. . . . [A] BR cannot act arbitrarily or capriciously. If it does, its action can be set aside by the USCMA."

<sup>83</sup> 12 USCMA 16, 30 CMR 16 (1960). CM 403477, *Bedgood* (April 4, 1960), was reconsidered by the board of review on May 17, 1960, and certified June 2, 1960.

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question involving a moot issue was denied. In *Bedgood*, The Judge Advocate General of the Army certified this question to the Court :

Was the board of review correct in holding that a general court-martial can legally adjudge a sentence to an administrative type discharge?

The issue arose when the court-martial imposed upon an enlisted man a sentence “to be dismissed from the service” (a member<sup>84</sup> commenting that the dismissal was to be “with a general discharge”). The convening authority, on advice of his staff judge advocate, “modified” the dismissal to a “dishonorable discharge,” apparently relying on the conclusion in *United States v. Ellman*<sup>85</sup> that a cadet of the United States Military Academy could be separated from the service only by a dismissal, and the approval in *United States v. Alley*<sup>86</sup> and *United States v. Bell*<sup>87</sup> of the convening authority’s substitution in officer cases of a dismissal for an adjudged dishonorable discharge.

The board of review, giving controlling effect to the unsolicited and unexplained comment of the member of the court-martial, held that the court-martial could legally impose “a sentence providing for separation from the service with a general discharge” and that “the substitution of a dishonorable discharge for the legally adjudged general discharge is incorrect and without legal effect.”<sup>88</sup> It continued, “However, on the basis of the entire record, we believe that the accused should be retained in the service.” The board then affirmed a sentence which included only partial forfeitures and reduction to Recruit E-1. The one-sentence conclusion quoted above is the only portion of a ten-page opinion devoted to a consideration of the appropriateness of separation from the service in this case. The remainder is devoted to sustaining the legal conclusions quoted above, the correctness of which was the issue certified by The Judge Advocate General.

In its 17 May 1960 decision upon reconsideration the board acknowledged that its “holding which expressed the view that a general court-martial could legally impose a general discharge” had been reached without the point having been briefed or argued before it. Here again the entire five-page opinion is devoted to a consideration of the legal problem, with not a word about the appropriateness of a separation.

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<sup>84</sup> Other than the President of the court-martial who had announced the sentence.

<sup>85</sup> 9 USCMA 549, 26 CMR 329 (1958).

<sup>86</sup> 8 USCMA 559, 25 CMR 63 (1958).

<sup>87</sup> 8 USCMA 193, 24 CMR 3 (1958).

<sup>88</sup> CM 403477, *Bedgood* (April 4, 1960) at p. 5.

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The Court of Military Appeals, per Judge Ferguson, with the Chief Judge concurring and Judge Latimer concurring in the result, summarily refused to answer the certified question :

In view of the board of review's action on the sentence, it is apparent that the inquiry framed by The Judge Advocate General is moot. *United States v. Fisher*, 7 USCMA 270, 22 CMR 601; *United States v. Storey*, 9 USCMA 162, 25 CMR 424; *United States v. Armbruster*, 11 USCMA 596, 29 CMR 412.

The decision of the board of review is affirmed.<sup>89</sup>

Except for the one-paragraph introductory statement of how the case came before the Court, these two sentences constitute the entire opinion of the Court.

The purpose of this article is to determine how "apparent" it is that this issue is moot and to inquire as to the effect thereof. Do the decisions cited support the implicit holding of the majority, that if an opinion adverse to the board would not affect the result in the case before it, the Court is under no statutory duty to answer a certified question regarding the legal opinions announced by the board?

The question certified and unanswered in *Bedgood* is answered in *United States v. Phipps*<sup>90</sup> decided the same day. Judge Latimer concurred in the result in *Bedgood* on that ground. It may seem

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<sup>89</sup> 12 USCMA at 17, 30 CMR at 17. Compare the majority's action here with the Court's per curiam opinion in *United States v. Goodman*, 12 USCMA 25, 30 CMR 25 (1960), decided 18 Nov 60, answering a similar certified question even though its answer did not affect the result in the case. But for a recent example of action similar to that in *Bedgood*, see *United States v. Woodruff*, 11 USCMA 268, 29 CMR 84 (1960). There an accused, convicted of larceny and violation of a general regulation on switchblade knives, was sentenced to a bad conduct discharge, forfeiture of \$45.00 per month for six months, and confinement at hard labor for six months. The convening authority reduced the forfeiture to \$40.00 per month for six months. The board of review set aside the findings and sentence and dismissed the charges on the ground that certain evidence was obtained as the result of an illegal search and seizure and in violation of Article 31. The Acting Judge Advocate General of the Air Force certified two questions :

(1) Was the board correct in holding Pros. Exhibits 1 and 2 were inadmissible?

(2) Was the board correct in holding Pros. Exhibit 3 was 'tainted' by a prior violation of Article 31?

Judge Ferguson, with the Chief Judge concurring and Judge Latimer concurring in the result, held: "We need not decide, however, whether our opinion required the board of review to determine that [the exhibits] were inadmissible, for we are certain that any error thus committed was overcome by the accused's later judicial declaration." 11 USCMA at 270, 29 CMR at 86. Nevertheless, without explanation of this conclusion or discussion of the legal issues raised by the certified questions, the majority held that the certified questions were to be answered in the negative.

<sup>90</sup> 12 USCMA 14, 30 CMR 14 (1960). The Court held the court-martial may not impose an administrative discharge.

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that the action of the majority of the Court in *Bedgood* had little or no effect on the substantive law in issue there and hardly warrants the space devoted to it here. This view overlooks not only the importance of the principle of procedural law at stake here—the power of Congress to create an appellate tribunal in the military justice system and at the same time prescribe and control its jurisdiction—but also the practical effect (on the action of boards of review) of a precedent that denies this right of appeal to The Judge Advocate General.

This effect is illustrated by another recent case, *United States v. Stivers*.<sup>91</sup> There, Judge Ferguson, citing only the case of *United States v. Wheatley*,<sup>92</sup> asserted that :

If [the board of review's] decision was factual, it may not be reviewed in this Court.<sup>93</sup>

In Judge Latimer's view the majority of the board in *Stivers* had ruled as a matter of law that a confession obtained under oath was "coerced" within the meaning of Article 31. But, in his opinion, even if they had ruled as a factual determination, they erred as a matter of law (i.e., they abused their discretion), because "the record is devoid of any evidence to support" such a finding.

The Judge Advocate General of the Navy had certified the question whether the law officer had erred in admitting the confession. The Chief Judge and Judge Ferguson refused to answer this question but returned the case to the board to "be clarified." In a second unpublished opinion, two members of the board reported that their earlier holding had been factual.<sup>94</sup>

However, this result did not prevent the *Stivers* case being cited for the very proposition of law certified to the Court—that placing an accused under oath during interrogation amounts to coercion and duress in violation of Article 31.<sup>95</sup> This is the danger of which Judge Latimer and others have spoken.

To return from our consideration of the significance of *Bedgood* as a precedent to an examination of the authorities cited by the majority in *Bedgood*, the *Fisher* case, the earliest of the three cases cited by the Court, involved a certification by The Judge Advocate General of the Navy of two questions: (1) Did the

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<sup>91</sup> 11 USCMA 512, 29 CMR 328 (1960).

<sup>92</sup> 10 USCMA 537, 28 CMR 103 (1959).

<sup>93</sup> 11 USCMA at 512, 29 CMR at 328. This problem of review of factual determinations of the board of review is discussed more fully *supra*.

<sup>94</sup> WC NCM 6901221, *Stivers* (June 16, 1960).

<sup>95</sup> See WC NCM 6001069, *Morgison* (November 7, 1960).

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board of review err in holding certain evidence to have been improperly received? (2) Did the *law officer* err in excluding certain other evidence (an issue the board of review had not ruled upon)? Judge Latimer, for a unanimous Court and without citation to authority,<sup>96</sup> disposed of the second certified question in one paragraph:

While The Judge Advocate General of the Navy has requested that we answer two questions, we believe a discussion of the second concerning the admissibility of Exhibit 3 would place us in a position of merely monitoring a law officer on a decision which is immaterial to the present controversy. The question involves a review of a ruling that evidence of a prior conviction for desertion was inadmissible. Assuming the law officer erred, the error was rendered harmless by the findings, and it was only one among many rulings made by him. We believe it would be an undesirable course for us to render advisory opinions on evidentiary rulings which are rendered during the course of the trial but which became immaterial by verdict. For present purposes, the law officer's ruling on the question certified is the law of the case, and by discussing its propriety we would furnish nothing but an academic discussion of the rules of evidence. Regardless of our views, it would make no difference in the ultimate outcome of this case, and it would not assist law officers in the field for the obvious reason that admissibility depends on a combination of many factors which change in each set of circumstances. We, therefore, have determined to consider only the merits of the first question.<sup>97</sup>

It seems evident that in *Bedgood* we are *not* concerned with a *factual* ruling by a *law officer* which has been rendered harmless by *verdict* but with a deliberate pronouncement of a *conclusion of law* by an *intermediate appellate* body, a ruling on which by the Court "would [clearly] assist law officers in the field."

The *Storey* case, the next of the three cases cited by the Court, arose on certification by The Judge Advocate General of the Air Force of six questions in the area of mental responsibility. Storey was convicted of assaulting an Air Policeman (by pointing a loaded pistol at him), wilfully discharging a firearm, and violating a general regulation against introducing an alcoholic beverage on the base. Storey's "mental capacity to intend" was made the subject of instructions by the law officer. The board of review held that these instructions were erroneous<sup>98</sup> but that the accused was not prejudiced because the evidence did not raise an issue of *incapacity* but merely of an *impaired* capacity. It is significant that only one short paragraph is devoted to the disposition of the

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<sup>96</sup> Note that the editors of the Court-Martial Reports include in the syllabus a citation to 3 Am. Jur. *Appeal and Error* § 823 (1936).

<sup>97</sup> United States v. Fisher, 7 USCMA 270, 273-74, 22 CMR 60, 63-64 (1956).

<sup>98</sup> ACM 13277, *Storey*, 24 CMR 596,601 (1957).

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*legal* issue of the correctness of the instruction whereas the remainder of the decision concerns the *factual* issue of whether the evidence of record raised an issue of insanity so as to require an instruction.

Judge Ferguson, with the Chief Judge concurring, affirmed the decision of the board of review in *Storey* on the ground that “the issue of lack of mental capacity to intend was not raised and accordingly the law officer was under no duty to so instruct.”<sup>99</sup> This conclusion and the discussion which supported it answered the first four certified questions squarely in favor of the holding of the board of review. The remaining two questions were posed in the contingency<sup>100</sup> that the answer to the fourth question overturned the board’s decision—which it did not. After the conclusion stated above, the Court merely noted, without discussion or citation to authority :

In view of our holding on the certified questions noted above, further discussion of the remaining issues is unnecessary.<sup>101</sup>

Judge Latimer, dissenting, concludes that the evidence *did* raise the issue and, accordingly, that an instruction was required. He notes that while the majority may because of their decision on the fourth question “affirm the decision of the board of review without a discussion of all the certified issues,” he may not do so because of his contrary decision on the fourth question.<sup>102</sup> There is no discussion of the procedural problem of concern to us and no citation to authority.

The result in *Storey*, that the last two questions went unanswered, logically furnishes little support for the majority’s conclusion in *Bedgood*. By their terms no answer to the last two questions was requested in *Storey* if the preceding question (to which all but one paragraph of the board’s opinion was devoted) was answered in the affirmative, as it was. Had The Judge Advocate General wanted an answer to these two questions regardless of the result on the first four questions, he could very easily have so posed these questions.

The third and final authority cited by the majority in *Bedgood* is the *Armbruster* case.<sup>103</sup> There an Air Force board of review

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<sup>99</sup> United States v. *Storey*, 9 USCMA 162, 167, 25 CMR 424, 429 (1958).

<sup>100</sup> “If the preceding question is answered in the negative, . . .” *Id.* at 176, 25 CMR at 437.

<sup>101</sup> *Id.* at 167, 25 CMR at 429.

<sup>102</sup> He finds the instruction prejudicially erroneous (question 5) and not waived at the trial (question 6) and would therefore reverse the board’s decision.

<sup>103</sup> United States v. *Armbruster*, 11 USCMA 596, 29 CMR 412 (1960).

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took judicial notice of a decision of the Comptroller General holding, contrary to the decision of the Court of Military Appeals in *United States v. Simpson*,<sup>104</sup> that reduction to the lowest enlisted grade resulted automatically by operation of the Executive Order<sup>105</sup> upon approval by the convening authority of a sentence to a punitive discharge or unsuspended confinement or hard labor without confinement. The board concluded (1) that the sentence to an intermediate reduction and confinement was inconsistent, (2) that it was prejudicial error for the law officer not to give *sua sponte* instructions on the effect of the Comptroller General decision, (3) that the effect of that decision will be to “punish the accused here beyond the adjudged and approved sentence” and (4) that the convening authority erred “in converting the forfeitures adjudged in fractional terms to an amount permissible for the grade to which the accused was expressly reduced, but excessive for the amount of pay actually credited in view of the Comptroller General’s Decision No. B-139988.” The board “to insure that the accused does not lose” as a result of the conflict between the Comptroller General and the Court, affirmed a sentence which did not include confinement.<sup>106</sup> The Judge Advocate General of the Air Force certified these four issues.

The Chief Judge, with Judge Ferguson concurring and Judge Latimer concurring in the result, concluded the Court has “no disposition to interfere with the board of review’s reassessment of the sentence” and “accordingly, it is unnecessary to return the record of trial to it for further proceedings.”<sup>107</sup> In arriving at this conclusion, the Chief Judge observed that the Court had the “responsibility” for “construing provisions of the Manual for compliance and conformity with the Uniform Code” and that its decisions “are binding upon the military [and], subject only to review by the Supreme Court of the United States on constitutional issues, . . . ‘upon all departments, courts, agencies, and officers of the United States.’ ”<sup>108</sup>

The Chief Judge agreed with the dissenting member of the board of review “that the Comptroller General’s opinion ‘should

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<sup>104</sup> 10 USCMA 229, 27 CMR 303 (1959).

<sup>105</sup> Par. 126e, MCM, 1951, as amended by Exec. Order 10652, 10 Jan 56.

<sup>106</sup> 11 USCMA at 597–599, 29 CMR at 413–15. The board of review decision is not reported.

<sup>107</sup> *Id.* at 599, 29 CMR at 415.

<sup>108</sup> *Id.* at 598, 29 CMR at 414. At the date of this decision, the case of *Johnson v. United States* was pending in the Court of Claims. This case was subsequently decided in favor of the Comptroller General’s decision. 280 F.2d 856 (Ct. Cl. 1960). By Public Law 86–633, 12 July 60, 74 Stat. 468, 10 U.S.C. § 58(a), the Code was amended to impose an automatic reduction in the same circumstances as previously provided for in the Executive Order.

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not be injected into ... [the] proceedings so as to read inconsistency into a sentence,' which has been sustained by this Court."<sup>109</sup> He then expressly answers the second certified question in the negative and observes, without discussion or citation to authority: "This answer makes it unnecessary to consider the other questions."<sup>110</sup>

Judge Latimer "part[s] company with [his] associates on the failure to answer the other certified questions."<sup>111</sup> He would expressly answer all the certified questions in the negative. It is unnecessary "that the case be remanded for reconsideration by the board of review" as "such action would not change the result. . . ." <sup>112</sup>

The difference between (1) refusing to perform the futile act of returning a case to the board of review for further consideration where the reconsideration will not affect the result in the particular case (as in *Armbruster*) and (2) refusing to answer as to the correctness of a conclusion of law announced by a board of review when the principle announced is having and will have substantial impact on the administration of justice and may be (and in this case was) erroneous, again, seems rather evident. The failure of the Court in *Armbruster* to answer explicitly the other questions is understandable since they **are** answered indirectly by the majority's opinion and, in addition, they deal with the administrative interpretation of the sentence rather than its legality.

These three decisions are surely slender reeds upon which to rest an assertion that it is apparent that the issue is moot and a refusal to perform a duty imposed by the literal language of the statute.

## IV. CONCLUSION

It is submitted that the statute and its antecedents and legislative history clearly confer upon The Judge Advocate General a right to send any case reviewed by the board of review to the Court of Military Appeals and to require of the Court an answer to any specified question of law raised in the case, regardless of the effect such an answer will have on the result in the case at bar.

This is a wise provision because it promotes clarity in the law. If obeyed, it permits The Judge Advocate General to secure the

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<sup>109</sup> *Id.* at 598, 29 CMR at 414.

<sup>110</sup> *Id.* at 599, 29 CMR at 415.

<sup>111</sup> *Zbid.*

<sup>112</sup> *Zbid.*

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resolution of opposing views of different boards in his own office and in the other services. It would also prevent, or at least inhibit, a board of review establishing legal principles behind a facade of “fact-finding.” The *Bedgood* board of review opinion furnishes an excellent example of what the refusal to obey the statute evokes and sanctions. Fifteen pages of opinion to support an erroneous legal principle are permitted to stand as law because one sentence announces an unsupported and unexplained “factual” determination that coincidentally requires the same result in the case.

It appears, however, that the majority of the Court have chosen to limit this right to appeal in various ways—by imposing a time limit on filing, by refusing to answer certified questions when it can dispose of the case on issues raised by the accused or by the Court itself, by encouraging the boards of review to make “factual” determinations which compel the same result in the case at bar, and by refusing to answer a question which is “moot.” The Chief Judge, in addition, has refused to answer a question where the accused has been administratively separated from the service prior to the Court’s decision.

Judge Latimer, on the other hand, apparently adheres to the following view, expressed in the Foreword to the Military Justice Symposium in the *Vanderbilt Law Review*:

The Uniform Code of Military Justice provides for three classes of cases which, after having been affirmed by a Board of Review, **must** be considered by the United States Court of Military Appeals. These are: (1) cases in which the sentence affects a general or flag officer or extends to death; (2) cases which The Judge Advocates General order forwarded to the Court of Military Appeals for review; and (3) cases which, upon petition of the accused and on good cause shown, the Court of Military Appeals has ordered a hearing. The cases falling within **the first two** categories are made the subject of **mandatory grant** but those in the third category permit the Court some discretion in determining whether to accept an appeal in the particular case because ‘good cause’ for review has been presented.. \* \* \* \* \*

... [I]f The Judge Advocate General of any service considers that a case involves questions which have real merit he can certify the record to the Court setting out the issues he concludes should be settled and the Court **must** then answer the questions certified. ...<sup>118</sup>

The limitations upon the right to certify are indeed unfortunate; but more perplexing, frustrating and unhelpful is the lack of explicit ratiocination which, the reader must have noticed, characterizes all of the decisions in which these encroachments occur.

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<sup>118</sup> Latimer, *Foreword to A Symposium on Military Justice*, 6 *Vand. L. Rev.* 163–64 (1953). (Emphasis added.)

# ASUPPLEMENTTOTHE SURVEY OF MILITARY JUSTICE\*

BY CAPTAIN BRUCE E. DAVIS\*\*

and

FIRST LIEUTENANT JACOB H. STILLMAN\*\*\*

## I. FOREWORD

“The Survey of The Law — Military Justice : The United States Court of Military Appeals 29 November 1951 to 30 June 1958” appears in 3 Military Law Review 67–115, January 1959. This first survey represented the efforts of nine officers of the Government Appellate Division, Office of The Judge Advocate General, Department of the Army, to present a concise summary of the principles which evolved from decisions of the Court of Military Appeals during the titled period. The first supplement to that survey appears in 8 Military Law Review 113–146, April 1960, and constitutes the efforts of two officers then assigned to the Government Appellate Division. While the objective remains unchanged, *i.e.*, to present a concise summary and analysis of the cases decided by the Court of Military Appeals during the past year, several changes in the format of the survey have been made. The most important is the abandonment of the summary of cases on a fiscal year basis in favor of a consideration of the cases on a court term basis. The cases considered by this supplement will cover the published decisions of the Court of Military Appeals from 1 July 1959 (the termination date of the previous supplement) through the end of the October 1959 Term of the Court of Military Appeals (5 August 1960).

## 11. WORK OF THE COURT

The statistics in Table I are the official statistics compiled by the Clerk’s Office, United States Court of Military Appeals, **pur-**

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\* The opinion and conclusions expressed herein are those of the authors and do not necessarily represent the views of The Judge Advocate General’s School or any other governmental agency.

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suant to the provisions of Article 67 (g), Uniform Code of Military Justice. The statistics in Tables II through VI inclusive were compiled in the Opinions Branch, Military Justice Division, Office of The Judge Advocate General, Department of the Army, and are, thus, unofficial.

**Table Z. Status of Cases Docketed**

Total by Services	Total as of Jun 30, 1958	Jul 1, 1968 to Jun 30, 1969	Jul 1, 1959 to Jun 30, 1960	Total as of Jun 30, 1960 <sup>a</sup>
<b>Petitions (Art. 67(b)(3)) :</b>				
Army-----	7,162	595	342	8,099
Navy-----	2,146	289	310	2,745
Air Force-----	2,407	459	330	3,196
Coast Guard-----	34	4	1	39
Total-----	11,749	1,347	983	14,079
<b>Certificates (Art. 67(b)(2)) :</b>				
Army-----	86	19	6	111
Navy-----	140	11	23	174
Air Force-----	32	4	7	43
Coast Guard-----	5	1	0	6
Total-----	263	35	36	334
<b>Mandatory (Art. 67(b)(1)) :</b>				
Army-----	31	0	0	31
Navy-----	1	1	1	3
Air Force-----	1	0	1	2
Coast Guard-----	0	0	0	0
Total-----	33	1	2	36 <sup>b</sup>
Total cases docketed---	12,045	1,383	1,021	14,449 <sup>c</sup>

<sup>b</sup>  
<sup>c</sup>

**Table ZI. Court Action**

	Total as of Jun 30, 1958	Jul 1, 1968 to Jun 30, 1959	Jul 1, 1969 to Jun 30, 1960	Total as of Jun 30, 1960
<b>Petitions (Art. 67(b)(3)) :</b>				
Granted-----	1,170	148	124	1,442
Denied-----	10,087	1,282	843	12,212
Denied by Memorandum Opinion-----	0	1	1	2
Dismissed-----	9	0	0	9
Withdrawn-----	240	39	20	299

# SURVEY OF MILITARY JUSTICE

*Table II.* Court Action—Continued

	Total as of Jun 30, 1968	Jul 1, 1968 to Jun 30, 1969	Jul 1, 1969 to Jun 30, 1960	Total as of Jun 30, 1960
Disposed of on Motion to dismiss:				
With Opinion -----	7	0	0	7
Without opinion ----	32	4	0	36
Disposed of by Order setting aside findings and sentence -----	2	0	1	3
Remanded to Board of Review -----	54	53	8	115
<b>Court</b> action due (30 days) <sup>d</sup> -----	153	67	77	77
Awaiting briefs <sup>d</sup> -----	66	29	19	19
<b>Certificates</b> (Art. 67(b)(2)):				
Opinions rendered -----	251	31	29	311
Opinions pending <sup>d</sup> -----	6	6	10	10
Withdrawn -----	5	0	1	6
Remanded -----	0	0	1	1
Set for hearing <sup>d</sup> -----	0	0	0	0
Ready for hearing <sup>d</sup> -----	1	0	1	1
Awaiting briefs <sup>d</sup> -----	1	6	6	6
<b>Mandatory</b> (Art. 67(b)(1)):				
Opinions rendered -----	31	2	2	35
Opinions pending <sup>d</sup> -----	2	0	1	1
Remanded -----	1	0	0	1
Awaiting briefs <sup>d</sup> -----	0	1	0	0
<b>Opinions rendered:</b>				
Petitions -----	958	157	113	1,228
Motions to Dismiss -----	9	1	0	10
Motion to Stay Proceedings -----	0	1	0	1
Per Curiam grants -----	22	0	0	22
Certificates -----	220	25	27	272
Certificates and Petitions-Mandatory -----	30	5	2	37
Remanded -----	31	2	2	35
Petition for a New Trial -----	1	48	6	55
Petitions for Reconsideration of Petition for New Trial -----	1	0	0	1
Motion to Reopen -----	1	0	0	1
<b>Total</b> -----	1,274	239	150	1,663 <sup>e</sup>

<sup>d</sup> As of June 30, 1958, 1959 and 1960.

<sup>e</sup> 1,663 cases were disposed of by 1,594 published opinions. 87 opinions were rendered in cases involving 52 Army officers, 18 Air Force officers, 14 Navy officers, 2 Coast Guard officers, and 1 West Point Cadet. In addition 19 opinions were rendered in cases involving 20 civilians. The remainder concerned enlisted personnel. The Court remanded 47 cases in Fiscal Year 1959 by Order and 6 cases in Fiscal Year 1960 by Order.

# MILITARY LAW REVIEW

Table II. *Court* Action—Continued

	Total as of Jun 30, 1958	Jul 1, 1968 to Jun 30, 1959	Jul 1, 1959 to Jun 30, 1960	Total as of Jun 30, 1960
<i>Completed cases :</i>				
Petitions denied -----	10,087	1,282	843	12,212
Petitions dismissed -----	9	0	0	9
Petitions withdrawn -----	240	39	20	299
Certificates withdrawn ---	5	0	1	6
Opinions rendered -----	1,267	192	144	1,603
Disposed of on motion to dismiss :				
With opinion -----	7	0	0	7
Without opinion ----	32	4	0	36
Disposed of by Order set- ting aside findings and sentence -----	2	0	1	3
Remanded to Board of Re- view -----	55	61	9	116
<b>Total -----</b>	<b>11,704</b>	<b>1,668</b>	<b>1,018</b>	<b>14,290</b>
Pending completion as of—				
		Jun 30, 1958	Jun 30, 1969	Jun 30, 1960
<i>Pending cases:</i>				
Opinions pending -----		86	30	38
Set for hearing -----		2	0	1
Ready for hearing -----		0	1	0
Petitions granted—await- ing briefs -----		28	15	9
Petitions—Court action due 30 days -----		163	67	77
Petitions—awaiting briefs -----		66	29	19
Certificates—awaiting briefs -----		1	6	6
Mandatory—awaiting briefs -----		0	1	0
<b>Total -----</b>		<b>336</b>	<b>149</b>	<b>160</b>

## SURVEY OF MILITARY JUSTICE

*Table III. Sources of Cases Disposed of by Published Opinions<sup>†</sup>*

	Army		Coast Guard	Total	
Petition-----	49	32	59	0	140
Certification-----	8	21	6	1	36
Petition & Certification---	2	1	0	0	3
Mandatory-----	0	2	1	0	3
<b>Total-----</b>	<b>59</b>	<b>56</b>	<b>66</b>	<b>1</b>	<b>182</b>

<sup>†</sup> Covers the period of the supplement; 1 July 1959 to 5 August 1960; figures cover only published opinions.

*Table IV. Disposition of Cases Through Published Opinions<sup>¶</sup>*

	Affirmed	Aff in Part Rev in Part	Remanded <sup>b</sup>	Reversed	Total
Petition-----	69	2	0	69	140
Certification-----	11	0	6	19	36
Petition & Certification---	3	0	0	0	3
Mandatory-----	2	0	0	1	3
<b>Total-----</b>	<b>85</b>	<b>2</b>	<b>6</b>	<b>89</b>	<b>182</b>

<sup>¶</sup> Period covered: 1 July 1959 to 5 August 1960; figures cover only published opinions.

<sup>b</sup> Cases returned to boards of review for further consideration.

*Table V. Reversals of Special Courts-Martial Cases Versus  
General Court-Martial Cases Considered by Court<sup>‡</sup>*

	Special (%)	General (%)	Total (%)
Army-----	‡	24 (41%)	24 (41%)
Navy-----	13 (50%)	8 (29%)	21 (39%)
Air Force-----	6 (43%)	19 (35%)	25 (37%)
Coast Guard-----	0	-----	-----
<b>Total-----</b>	<b>19 (47.5%)<sup>‡</sup></b>	<b>51 (36.4%)<sup>‡</sup></b>	<b>70 (38.8%)<sup>‡</sup></b>

<sup>‡</sup> Period covered: 1 July 1959—5 August 1960; figures cover only published opinions. The purpose of this chart is to compare special courts-martial cases with general court-martial cases, with respect to the incidence of error found by the Court of Military Appeals to have occurred at the trial level. Accordingly, the figures in this chart do not include cases in which the Court of Military Appeals, although reversing board of review decisions, upheld the convictions.

<sup>‡</sup> Not utilized at present time (AR 22-145).

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Table VI. Action of Individual Judges<sup>k</sup>

	Quinn	Latimer	Ferguson	Total
Write opinion of Court.....	76	58	44	1781
Concur with opinion of Court...	84	32	53	169
Concur with separate opinion..	7	9	6	22
Concur in result.....	7	25	16	48
Concur in part/dissent in part.	1	9	8	18
Dissent.....	3	45	51	99
Total.....	1781	1781	1781	634

<sup>k</sup> Period covered : 1 July 1959—5 August 1960.

<sup>l</sup> Figures do not include 4 per curiam opinions; figures cover only published opinions.

## III. JURISDICTION

### A. JURISDICTION OVER CIVILIANS

The most significant jurisdictional development during the survey period emanated, not from the Court of Military Appeals, but from the United States Supreme Court and is discussed in this survey because it has overturned a long line of Court of Military Appeals decisions<sup>1</sup> and can be expected to have a significant impact upon cases coming before the Court of Military Appeals in the future. The Supreme Court had previously held in the case of *Reid v. Covert*,<sup>2</sup> decided in 1957, that Article 2(11), Uniform Code of Military Justice, which provides for the exercise of court-martial jurisdiction over civilians serving with, employed by, or accompanying the armed forces overseas, is unconstitutional as applied in time of peace to dependents charged with capital offenses. The constitutionality of Article 2(11) was again before the Court in four companion cases decided during the survey period: *Kinsella v. United States ex rel Singleton*,<sup>3</sup> involving a dependent charged with a non-capital offense; *Grisham v. Hagan*,<sup>4</sup> a civilian employee of the Army charged with a capital offense; and *McElroy v. United States ex rel Guagliardo*,<sup>5</sup> and *Wilson v.*

<sup>1</sup> See *Survey of the Law — Military Justice: The United States Court of Military Appeals, 29 November 1951 to 30 June 1958*, Mil. L. Rev., January 1959, pp. 67, 76-78.

<sup>2</sup> 354 U.S. 1 (1957).

<sup>3</sup> 361 U.S. 234 (1960).

<sup>4</sup> 361 U.S. 278 (1960).

<sup>5</sup> 361 U.S. 281 (1960).

## SURVEY OF MILITARY JUSTICE

*Bohlender*,<sup>6</sup> both involving civilian employees of the armed forces charged with non-capital offenses. A divided court held the exercise of court-martial jurisdiction unconstitutional in all four cases. In so far as capital offenses are concerned, the Court could find no constitutional distinction between dependents and employees for purposes of court-martial jurisdiction. "The awesomeness of the death penalty has no less impact when applied to civilian employees."<sup>7</sup> Neither could the Court find any constitutional distinction between capital and non-capital offenses in this setting. ". . . [M]ilitary jurisdiction has always been based on the 'status' of the accused, rather than on the nature of the offense."<sup>8</sup>

Thus, the uncertain constitutional status of Article 2(11) with respect to dependents and employees appears, for the time being at least, to have been settled. They may not be tried by court-martial under Article 2(11) in time of peace. Several questions in this area remain undecided, however. First, are there any categories of persons, other than dependents and employees, who may still be *tied* by court-martial as persons accompanying the armed forces overseas in peacetime? The Court has not foreclosed the possibility that such categories may be found, for the Court, after referring to the old cases involving naval paymasters' clerks, reiterated the statement made in *Covert* that "there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14<sup>9</sup> even though he had not formally been inducted into the military. . . ." <sup>10</sup>

Second, the Court was careful to limit its holding to the *peacetime* exercise of court-martial jurisdiction. Assuming that jurisdiction would still exist in wartime, two questions arise: would hostilities short of actual war be sufficient to invoke the Clause 14 constitutional power, and would the existence of war or other hostilities justify the exercise of jurisdiction in places outside the area of actual fighting?" With respect to the latter issue, it should be noted that in *Kinsella v. Krueger*,<sup>12</sup> the companion case to *Reid v. Covert*, the Supreme Court refused to sustain jurisdiction over a dependent charged with having committed murder in Japan, even though the offense and trial occurred during the Korean conflict. To at least four members of the Court, the fact that Japan

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<sup>6</sup> *Ibid.*

<sup>7</sup> 361 U.S. at 280.

<sup>8</sup> *Id.* at 243.

<sup>9</sup> U.S. Const. art. I, § 8, cl. 14.

<sup>10</sup> 361 U.S. at 285.

<sup>11</sup> These issues may arise under UCMJ. art. 2(10), rather than UCMJ. art. 2(11). Article 2(10) provides for jurisdiction over persons serving with or accompanying an armed force in the field in time of war.

<sup>12</sup> 354 U.S. 1 (1957).

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was not "an area where active hostilities were under way" disposed of the issue.<sup>13</sup> On the other hand, during World Wars I and II, court-martial jurisdiction was exercised over civilians serving with the armed forces *in the United States*.<sup>14</sup> It may be possible to distinguish the latter cases on the ground that although a limited war will not permit the exercise of jurisdiction outside the area of hostilities, global warfare will do so. Furthermore, the emphasis placed by the Court upon the presence of actual hostilities indicates that within an area of hostilities jurisdiction might exist even in the absence of a full-scale war.

In the light of the recent Supreme Court cases, new challenges will undoubtedly be asserted to the exercise of jurisdiction over military prisoners whose discharges have been executed and over retired personnel. Retired persons will argue that even though they may have a military status, the necessity for maintaining jurisdiction is even less in their case than it is in the case of the accompanying civilians. Prisoners will contend, on the other hand, that regardless of any practical necessity for court-martial jurisdiction over them, the absence of a military status is controlling. With respect to the latter argument, it should be noted that although one of the dissenting opinions in the recent Supreme Court cases interprets the majority as holding that "only persons occupying a *military* 'status' are within the scope of the Article I, §8, cl. 14 power,"<sup>15</sup> the majority opinion did not expressly conclude that a military status is a prerequisite. The majority appears to have used the term "status" in order to point out that it is the status of the accused, *whatever that status may be*, rather than the capital or non-capital nature of the offense, that is controlling.<sup>16</sup>

### B. CONSTRUCTIVE ENLISTMENT

During the survey period the Court of Military Appeals was confronted with a number of issues relating to the inception and termination of military jurisdiction. In *United States v. King*,<sup>17</sup> the accused, three days after being separated from the Army with an undesirable discharge, obtained false orders purporting to authorize his shipment to Europe. On the basis of these orders

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<sup>13</sup> *Id.* at 34.

<sup>14</sup> *Hines v. Mikell*, 259 Fed. 28 (4th Cir. 1919); *McCune v. Kilpatrick*, 63 F. Supp. 80 (E.D. Va. 1943).

<sup>15</sup> 361 U.S. at 263. (Emphasis added.)

<sup>16</sup> *Id.* at 243.

<sup>17</sup> 11 USCMA 19, 28 CMR 243 (1959).

he received advance travel pay and partial pay while traveling from Fort Ord to Fort Dix. He was then shipped to Germany and assigned to a unit, receiving pay and allowances until he committed certain offenses about four months subsequent to the date he had departed from the United States. Thereafter he was tried and convicted of several offenses including fraudulent enlistment. Jurisdiction was based on the theory that the accused had constructively enlisted in the Army, the alleged constructive enlistment also being the basis for the fraudulent enlistment charge. The Court, in dismissing the charges, held that a constructive enlistment had not occurred because there had been no agreement or understanding between the accused and the Government that the status of the accused be changed. A contract that changes a person's status cannot be created, even constructively, unless both parties intend that there be a change in status. The Court stated:

One of the cardinal principles of contract law is that to change a status there must be a mutual understanding of the parties, and here there were no actual terms and conditions contemplated or agreed upon by them which remotely suggested a change in relationship. Accordingly, there is no framework from which to start the construction of a contract bringing about that result.<sup>18</sup>

### C. TERMINATION OF JURISDICTION

#### 1. *Effect of Delivery of Discharge Certificate*

In *United States v. Scott*<sup>19</sup> the discharge of the accused for unfitness was ordered, and he was issued a general discharge certificate prior to the expiration of his term of service. The Court held that his discharge became effective at the moment of the delivery of the discharge certificate to him, notwithstanding an Air Force regulation providing that the discharge would not become effective until midnight on the date of delivery. The military services, reasoned the Court, have no authority to delay the effectiveness of a discharge beyond the time of delivery of the discharge certificate, and accordingly, the accused was not subject to trial by court-martial for an offense committed after delivery of the certificate. The Court, making no attempt to limit its holding to administrative discharges issued prior to the expiration of one's term of enlistment, stated that "one's military service, with the concomitant jurisdiction to try him by court-martial, ends with the delivery to him of a valid discharge certificate."<sup>20</sup> Although

<sup>18</sup> *Id.* at 24, 28 CMR at 249.

<sup>19</sup> 11 USCMA 646, 29 CMR 462 (1960).

<sup>20</sup> *Id.* at 648, 29 CMR at 464.

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that language seems to encompass all types of discharges, it is arguable that in the case of a discharge issued on the basis of the expiration of one's term of service a different rule would apply, possibly on a theory that the term of service does not expire until midnight.

### 2. Offenses Committed in Prior Enlistments

The issue of jurisdiction over offenses committed in prior enlistments was the subject of several cases during the survey period. Because of the divergent views of the three judges on the Court and the uncertain status of Article 3(a) of the Code, this area of the law remains a confusing one. A detailed discussion of the factual situations involved and of the reasoning of the Court is essential to an understanding of these cases. In *United States v. Martin*<sup>21</sup> the accused, after completing six years of an indefinite enlistment, applied for a discharge and immediate re-enlistment to fill his own vacancy. Under 10 U.S.C. section 3815 he was entitled, with exceptions not here pertinent, to be discharged within three months after the submission of a resignation. *Martin* was discharged five days after he had submitted his application and the following day he re-enlisted. Subsequently he was tried and convicted of presenting false claims to the Government in violation of Article 132 of the Code. The offenses had been committed during his prior indefinite enlistment. With Judge Ferguson dissenting, the Court held that the accused's discharge did not terminate jurisdiction to try him for these offenses, but Judges Quinn and Latimer each supported jurisdiction upon a different theory. Judge Latimer viewed the accused's discharge and re-enlistment as being similar to the situation in *United States v. Solinsky*,<sup>22</sup> where the accused was discharged prior to the expiration of his term of enlistment for the convenience of the Government in order to accomplish his reenlistment. *Solinsky* had held that under these circumstances there was no hiatus and therefore no termination of jurisdiction for offenses committed prior to discharge. Judge Latimer concluded that in *Martin*, as in *Solinsky*, the accused was discharged prior to the expiration of his term of service. The discharge was not issued for the purpose of terminating the accused's military service. While the accused had a right to submit an unconditional resignation and obtain his discharge, he did not exercise that right but, on the other hand, submitted a conditional resignation for the purpose of continuing his military status. There was therefore no inter-

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<sup>21</sup> 10 USCMA 636, 28 CMR 202 (1959).

<sup>22</sup> 2 USCMA 153, 7 CMR 29 (1953).

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ruption in his status as a soldier, and he came within the Solinsky exception to the general rule that discharge terminates jurisdiction.<sup>23</sup> Judge Ferguson, in his dissent, rejected Judge Latimer's thesis. In Judge Ferguson's view the accused had submitted an unconditional resignation and "stood in the same position as one who had completed his obligation to serve for a time certain."<sup>24</sup> The accused, he stated, was in a situation identical to that which confronted the Supreme Court in *Hirshberg v. Cooke*,<sup>25</sup> the case in which the Supreme Court upheld the general rule that discharge terminates jurisdiction. Hirshberg, in 1946, had received an honorable discharge upon expiration of his term of service and re-enlisted the next day. The Supreme Court held that in the absence of contrary statutory authority jurisdiction did not survive Hirshberg's discharge. Judge Quinn, unlike Judge Ferguson, expressed no opinion as to whether the accused came within the Solinsky exception to the *Hirshberg* rule, since he was able to sustain jurisdiction on another ground. He noted that Congress, in enacting Article 3(a) of the Uniform Code of Military Justice, expressed an intention to expand the jurisdiction of courts-martial "beyond the confines of the *Hirshberg* opinion." To the contention that Article 3(a) provides for jurisdiction only over offenses not triable in Federal or State courts and therefore provides no jurisdiction in *Martin's* case, Judge Quinn responded that the fundamental purpose of Article 3(a) was to enlarge jurisdiction, not to restrict it. "For almost a century before *Hirshberg* . . . a court-martial had statutory authorization to try an accused for fraud against the Government, even though he had received a discharge between commission of the offense and the institution of proceedings against him,"<sup>26</sup> and *Hirshberg* did not strike down that authority and Congress did not intend to change it. It is not clear whether Judge Quinn meant that Congress intended to abolish the *Hirshberg* rule completely or whether he merely believed that the *Hirshberg* rule is inapplicable to frauds against the Government. Under the former position an intervening discharge would not terminate jurisdiction over *any* offenses committed prior to discharge and re-enlistment. The latter view

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<sup>23</sup> Par. 11a, Manual for Courts-Martial, United States, 1951, states: "The general rule is that court-martial jurisdiction over . . . persons subject to the code ceases on discharge from the service or other termination of such status and that jurisdiction as to an offense committed during a period of service or status thus terminated is not revived by re-entry into the military service or return into such status." Par. 11b, MCM, 1951, lists some exceptions to the general rule.

<sup>24</sup> 10 USCMA at 643, 28 CMR at 209.

<sup>25</sup> 336 U.S. 210 (1949).

<sup>26</sup> 10 USCMA at 639, 28 CMR at 205.

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would retain jurisdiction over all cases of fraud against the Government, but for other offenses jurisdiction would, in the absence of some other exception to the *Hirshberg* rule, be limited by Article 3(a) to major offenses not triable in the civil courts. Judge Ferguson expressly rejected Judge Quinn's theory. He believed that Congress did not intend to abolish the *Hirshberg* rule in its entirety, but only with respect to the types of offenses specified in Article 3(a)—major offenses not triable in civil courts. Furthermore, he said, the traditional inapplicability of the *Hirshberg* rule to fraud offenses was predicated upon the express provisions of Article of War 94, which was repealed upon enactment of the Uniform Code of Military Justice, and is therefore unavailable to sustain jurisdiction now. Judge Latimer, who as previously noted sustained jurisdiction on the basis of the *Solinsky* exception to *Hirshberg*, did not reach a conclusion as to the validity of Judge Quinn's argument, but he did state that because of the provisions of Article 3(a), as interpreted by Judge Ferguson, he had reservations concerning Judge Quinn's hypothesis. Thus, Judges Latimer and Quinn each upheld jurisdiction upon a different ground; Judge Ferguson, rejecting both grounds, dissented; Judge Quinn expressed no opinion with respect to Judge Latimer's position; and Judge Latimer had reservations concerning Judge Quinn's rationale.

In a later case, *United States v. Frayer*,<sup>27</sup> the accused had received an honorable discharge upon expiration of his term of enlistment. The next day he re-enlisted to fill his own vacancy and subsequently was tried, *inter alia*, for several offenses which had been committed during his previous enlistment. Since none of those offenses were punishable by confinement for five years or more, they were not covered by the continuing jurisdiction provisions of Article 3(a). With Judge Latimer dissenting, the Court held that the intervening discharge, as in *Hirshberg*, terminated jurisdiction. Thus it appears that Judge Quinn has rejected, at least in part, the position he took in *Martin*, *supra*. Certainly, he does not believe that the *Hirshberg* rule is completely dead, if in fact that ever was his position in *Martin*. In view of his conclusion in *Martin* that an intervening discharge does not terminate jurisdiction in fraud cases, his opinion in *Frayer* is not clear. There is language in *Frayer* indicating that he may no longer adhere to that conclusion, but since *Frayer* did not involve fraud offenses,<sup>28</sup> that language is only dictum. Judge Latimer, in his

<sup>27</sup> 11 USCMA 600, 29 CMR 416 (1960).

<sup>28</sup> An examination of the general court-martial order in *Frayer* discloses that none of the specifications alleged frauds against the Government.

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dissent, stated that since the accused's discharge and re-enlistment occurred in Germany, he remained subject to the Code, as a person accompanying or serving with the armed forces overseas, during the interim between discharge and re-enlistment. Consequently there was no hiatus in military jurisdiction, and the intervening discharge did not terminate jurisdiction over offenses committed in the prior enlistment. Presumably Judge Latimer's view is predicated on the theory that although Article 2(11) is unconstitutional as applied to civilian employees and dependents accompanying the armed forces, it is still valid as applied to a person accompanying the armed forces overseas during the brief interval between discharge and re-enlistment.

In *United States v. Wheeler*,<sup>29</sup> the accused had been released from active duty and transferred to the Air Force Reserve for completion of his statutory military service obligation. Approximately five months later he applied for recall to active duty, stating in his application that he understood that immediately upon recall he would be confronted with court-martial proceedings. He was thereupon recalled to active duty, tried by general court-martial, and convicted of premeditated murder. The offense had been committed while he had been stationed in Germany prior to his release from active duty. Judges Quinn and Ferguson concluded that his return to active duty was voluntary, and, relying on *United States v. Gallagher*,<sup>30</sup> they upheld jurisdiction on the basis of Article 3(a), since the accused was subject to the Code at the time of the offense and at the time of trial and the offense fell within the category of crimes specified in Article 3(a). The five-month interval was of no consequence. Judge Quinn added that since the accused's recall had been voluntary, no issue was presented relative to the legality of a recall solely for purposes of trial by court-martial. Judge Latimer, rather than determining whether or not the accused's recall to active duty had been legal, voted to sustain jurisdiction on the theory that Article 3(a) is constitutional as applied to a person who after release from active duty has been transferred to the reserves, has not been discharged from the service, and has not completed his statutory military service obligation. To Judge Latimer, therefore, jurisdiction was sustainable even if Wheeler was not subject to the Code under Article 2 at the time of trial. Judge Ferguson rejected Judge Latimer's theory, and Judge Quinn expressed no opinion as to its validity.

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<sup>29</sup> 10 USCMA 646, 28 CMR 212 (1959).

<sup>30</sup> 7 USCMA 506, 22 CMR 296 (1957).

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The present confused state of the law, except in so far as constitutional matters are concerned, could be clarified by Congress. Although courts-martial of discharged servicemen who have severed all relationship with the armed forces are unconstitutional,<sup>31</sup> jurisdiction to try persons for offenses committed prior to discharge appears to raise questions only of statutory interpretation in the case of an accused who has re-enlisted or otherwise returned to active duty,<sup>32</sup> at least if the return is voluntary. Clarifying legislation certainly appears to be in order.

### IV. PRETRIAL AND TRIAL PROCEDURES

#### A. CHARGES — INVESTIGATION AND DISPOSITION

##### 1. Article 82 Investigation

In *United States v. McClure*<sup>33</sup> the Court was faced with an Article 32 investigating officer testifying as a rebuttal character witness in behalf of the Government. The Court held that this was an abuse of the investigating officer's judicial position. Moreover, the investigating officer's only knowledge of the accused was obtained through his activities as investigating officer, and his opinion was based solely on information acquired while gathering facts on the alleged crime.

##### 2. Additional Charges

In *United States v. Davis*<sup>34</sup> the Court had its first opportunity to construe paragraph 65b, *Manual for Courts-Martial, United States, 1951*. The accused was arraigned and trial commenced on 22 January 1959. On 6 February 1960, after the prosecution had presented its case on the original charges, the accused was arraigned, over objection, on a new charge. The Court held that paragraph 65b of the Manual prohibits the introduction of new charges in a proceeding after an accused has been arraigned, although such action may be taken prior to arraignment if other requisite preliminary proceedings are had. Nothing in this decision deprives the convening authority of his right to prosecute separately an additional charge, provided that the second trial does not violate the accused's right to a speedy trial.

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<sup>31</sup> *Toth v. Quarles*, 350 U.S. 11 (1955).

<sup>32</sup> See *Hirshberg v. Cooke*, *supra* note 25.

<sup>33</sup> 11 USCMA 552, 29 CMR 368 (1960).

<sup>34</sup> 11 USCMA 407, 29 CMR 223 (1960).

**B. APPOINTMENT AND COMPOSITION OF  
COURTS-MARTIAL**

During the period covered by this article the Court decided six cases dealing with the appointment and composition of courts-martial.

In *United States v. Broud*<sup>85</sup> the Court held that a commissioned officer of the United States Public Health Service on active duty and assigned to duty with the Coast Guard is eligible to serve on a Coast Guard court-martial. In *United States v. Hedges*<sup>36</sup> a court-martial composed of nine members was appointed for the trial of the accused. Of the nine members seven were directly involved in some aspect of crime prevention, detection, or control within the command; e.g., The Provost Marshal of the Marine Corps Air Station. It was held that the composition of this particular court gave such an impression of being hand-picked in favor of the prosecution as to warrant reversal. In *United States v. Olson*<sup>37</sup> it was held that prejudicial error existed where a challenge for cause in a bad check case was not sustained when it appeared that the president of the court had previously lectured on the subject of the command's bad check program and five members of the court had attended the lecture. In *United States v. Law*<sup>38</sup> the law officer advised the accused that he felt he might be subject to challenge because of prior participation in two companion cases. The law officer was not thereby disqualified, the Court ruled, but was merely subject to challenge. When the accused and his counsel made a clear and intelligent waiver of the law officer's ineligibility, the law officer could properly remain. In *United States v. Boysen*<sup>39</sup> the Court held that paragraphs 37 and 39e of the Manual provide that the law officer, like a court member,<sup>40</sup> may be substituted after arraignment for "good cause." The substitution of the law officer after arraignment in this case was made because the original law officer was being rotated back to the United States. In the absence of a showing of why the law officer was being returned to CONUS there was an insufficient showing of

<sup>85</sup> 11 USCMA 192, 29 CMR 8 (1960).

<sup>36</sup> 11 USCMA 642, 29 CMR 458 (1960).

<sup>37</sup> 11 USCMA 286, 29 CMR 102 (1960).

<sup>38</sup> 10 USCMA 573, 28 CMR 139 (1959).

<sup>39</sup> 11 USCMA 331, 29 CMR 147 (1960).

<sup>40</sup> Excusal of court members is controlled by UCMJ, art. 29, which does not apply to law officers.

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good cause.<sup>41</sup> In *United States v. Rogers*<sup>42</sup> it was ruled that there was a fair risk that an accused, who pleaded guilty to absence without leave, was prejudiced as to the sentence where it appeared that the defense counsel, in interposing a challenge for cause, disclosed that the challenged member of the Court was the accused's division officer, was present when the accused was brought up at Captain's Mast, and had characterized the accused as the worst man he had ever had in the division, and no instructions were given to the other court members to disregard these disclosures in their consideration of the case.

### C. PLEAS AND MOTIONS

#### 1. Pleas of Guilty

It was estimated that, prior to April 1953, pleas of guilty were entered in less than ten percent of the cases tried by special and general courts-martial. However, during fiscal year 1950, out of 33,502 defendants convicted in the federal district courts, 31,739, or over ninety-four percent, pleaded guilty.<sup>43</sup> In 1953 Major General Franklin Shaw encouraged the members of the Judge Advocate General's Court to follow the example of the civilian bar in the utilization of guilty pleas when such pleas would be in the *best interest of the accused*.<sup>44</sup> This recommendation was the beginning of the Army's "Negotiated Guilty Plea Program." The program has proven itself to be of great benefit to the Government and the accused alike.

The following are the established and accepted policies and procedures in the area of guilty pleas within the Department of the Army:

(1) Pleas of guilty should originate with the accused and his counsel ;

(2) Unreasonable multiplication of charges which might tend to induce the accused to enter into a negotiated plea of guilty should be avoided ;

(3) If there is a pretrial agreement the agreement should be written and unambiguous, and it must be scrupulously carried out by the Government;

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<sup>41</sup> It is believed that the Court was *not* holding that normal rotation from the command could not be "good cause," but rather the record in the case did not sufficiently establish the justification for such rotation.

<sup>42</sup> 11 USCMA 669, 29 CMR 485 (1960).

<sup>43</sup> Chandler, *Latter-Day Procedures in the Sentencing and Treatment of Offenders in the Federal Courts*, 37 Va. L. Rev. 825-46 (1951).

<sup>44</sup> Letter from Major General Franklin P. Shaw, Acting The Judge Advocate General, U.S. Army, to all Army Staff Judge Advocates, 23 April 1963.

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(4) Such a pretrial agreement must not contain any provision whereby the accused foregoes his right to present to the court-martial matters in extenuation or mitigation of any offense charged ;and

(5) The law officer should, during trial, and in an out-of-court hearing, determine whether the accused understands the meaning of his guilty plea, advise the accused that he may withdraw his plea at any time before sentencing, ascertain his satisfaction with counsel, and determine from the accused personally whether he is pleading guilty because he is guilty. The out-of-court hearing should be recorded and the pretrial agreement, if there be one, should be attached to the record of trial as an exhibit.

A typical example of the operation of the negotiated guilty plea was presented in *United States v. Watkins*.<sup>45</sup> The accused, after conference with his counsel, initiated an offer to plead guilty if the convening authority would agree to a maximum punishment that would be approved upon post trial review. Prior to the acceptance of the plea the law officer thoroughly and properly counseled the accused as to the accused's rights and the effect of his plea. During this out-of-court hearing the accused introduced matters that raised a question as to the propriety of the plea. Upon being satisfied, however, as to the providence of the plea, the law officer accepted the plea. The Court of Military Appeals<sup>46</sup> upheld the ruling of the law officer in accepting the guilty plea after carefully considering the entire record.

The opinions of the judges provide guidelines as to what matters should be considered in determining the providence of a guilty plea, namely, irregularity in the plea, a post-plea showing which brings out matters inconsistent therewith (the critical question is whether the accused and his counsel were aware of the legal effect of any evidence that might be inconsistent with the plea of guilty<sup>47</sup>), improvidence of the plea,<sup>48</sup> and voluntariness.

It is interesting to note the difference in attitudes exhibited by the judges towards the guilty plea program. Judge Latimer

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<sup>45</sup> 11 USCMA 611, 29 CMR 427 (1960).

<sup>46</sup> Opinion written by Judge Latimer with Chief Judge Quinn concurring in the result, and Judge Ferguson vigorously dissenting.

<sup>47</sup> *United States v. Hinton*, 8 USCMA 39, 23 CMR 263 (1957).

<sup>48</sup> *Cf. United States v. Pajak*, 11 USCMA 686, 29 CMR 602 (1960) (failure to advise accused of the possible application of the "Hiss Act," 68 Stat. 1142, as amended, 5 U.S.C. § 2281 *et seq.* (1958), upon his conviction did not render accused's guilty plea improvident. Such a matter is merely collateral and has no bearing upon the providence of the plea).

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finds the program a "salutary procedure for an accused."<sup>49</sup> Chief Judge Quinn notes that he does not believe the program is as salutary as Judge Latimer makes it out to be.<sup>50</sup> Judge Ferguson concurs with Judge Quinn in expressing concern with the program.<sup>51</sup>

In the general principles and policies governing the use of guilty pleas previously outlined, it was indicated that the accused might withdraw his plea of guilty at any time prior to sentencing. This statement was based upon Article 45 (a), Uniform Code of Military Justice, and paragraphs 75a and 70b, *Manual for Courts-Martial, United States, 1951*. In view of the holdings of the Court in *United States v. Brown*<sup>52</sup> and *United States v. Kepperling*<sup>53</sup> this principle must now be modified. In both of these cases the accused attempted unsuccessfully to withdraw his guilty plea; in the *Brown* case while the case was being reviewed by the convening authority upon completion of the trial, and in the *Kepperling* case during a rehearing on the sentence only. From a reading of the two cases it is suggested that the rule of law governing the withdrawal of guilty pleas has been modified as follows :

(1) Prior to announcement of sentence at the initial court-martial, the accused has an *absolute* right to withdraw his plea;

(2) If the findings and sentence resulting from the trial are set aside, the accused may enter a plea of not guilty at the subsequent trial ;

(3) If the rehearing is to *sentence only*, the accused does not have an absolute right to withdraw his plea, but the accused may be permitted to withdraw his plea on a showing of patent inconsistency<sup>54</sup> and at least the probability of some defense available to the accused ; and

(4) If the proceedings have passed beyond the control of the convening authority, the accused may be permitted to withdraw his guilty plea only upon a convincing showing of a deprivation of

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<sup>49</sup> 11 USCMA at 615, 29 CMR at 431.

<sup>50</sup> See Chief Judge Quinn's comments in *United States v. Welker*, 8 USCMA 647, 25 CMR 151 (1958).

<sup>51</sup> See also, as to the requirement of clear and proper advice by defense counsel prior to the accused entering a plea of guilty, *United States v. Fernengel*, 11 USCMA 535, 29 CMR 351 (1960). For a case dealing with providence of a guilty plea before a special court-martial, see *United States v. Downing*, 11 USCMA 650, 29 CMR 466 (1960).

<sup>52</sup> 11 USCMA 207, 29 CMR 23 (1960).

<sup>53</sup> 11 USCMA 280, 29 CMR 96 (1960).

<sup>54</sup> Whether a particular case meets this test would have to be decided on the basis of the entire record. Clearly, a mere *ex parte* unsworn statement (*United States v. Brown, supra*) would not raise a patent inconsistency.

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a legal **right**.<sup>55</sup> Apparently, the test to be satisfied in this situation is the same as must be met if the accused wishes to withdraw his guilty plea during a rehearing on the sentence only.

### 2. Former Punishment

Article 15(e), Uniform Code of Military Justice, and paragraph 68g, *Manual for Courts-Martial, United States, 1951*, generally provide that non-judicial punishment previously imposed for a minor offense may be interposed in bar of trial for the same offense. Despite the provisions of paragraph 128b of the Manual, some difficulty has been experienced in attempting to define what constitutes a "minor offense." In *United States v. Harding*<sup>56</sup> Judge Latimer, writing the opinion of the Court, set out certain factors that may be helpful in defining minor offenses, namely, severity of the maximum sentence imposable;<sup>57</sup> offenses ordinarily tried by summary courts-martial; nature, time, and place of the commission of the offense; and the potential harm to the maintenance of good order and discipline in the service. Despite the cited guide posts, and the opinion of the Court that the line separating those offenses which merit court-martial action, in addition to disciplinary punishment, from those which do not, should not be vague or meandering,<sup>58</sup> it is felt that the question of what is a "minor offense" in the sense of former punishment remains an enigma.

### 3. Speedy Trial

The Court, during the period covered by this article, had occasion to consider in three instances<sup>59</sup> the accused's right to a speedy trial as provided for by the United States Constitution and the Uniform Code of Military Justice.<sup>60</sup> In the *Brown* case the accused moved to dismiss two specifications of desertion on the ground that he had been deprived of a speedy trial on the basis of a showing of one hundred and eight days delay between the date of confinement and the date of trial. The law officer, prior to rul-

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<sup>55</sup> Judge Latimer suggests in the *Brown* case a possible alternative would be to endeavor to avail oneself of the new trial procedure under art. 73, UCMJ.

<sup>56</sup> 11 USCMA 674, 29 CMR 490 (1960).

<sup>57</sup> *Cf.* *United States v. Fretwell*, 11 USCMA 377, 29 CMR 193 (1960) (Court, relying heavily on the maximum sentence imposable, upheld findings of guilty of drunkenness on duty in the case of an officer who had previously received non-judicial punishment for the same offense).

<sup>58</sup> *United States v. Vaughan*, 3 USCMA 121, 11 CMR 121 (1963).

<sup>59</sup> *United States v. Davis*, 11 USCMA 410, 29 CMR 226 (1960); *United States v. Richmond*, 11 USCMA 142, 28 CMR 366 (1960); and *United States v. Brown*, 10 USCMA 498, 28 CMR 64 (1959).

<sup>60</sup> U.S. Const. amend. VI; UCMJ, arts. 10 and 33.

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ing on the motion, asked *the defense counsel if the accused had any* further evidence to substantiate the contention of material prejudice because of the delay. The counsel replied in the negative, and the motion was denied. Thereupon, the accused entered a plea of not guilty to the desertion specifications but pleaded guilty to the lesser offense of AWOL. A majority of the Court, Judge Ferguson, with Chief Judge Quinn concurring, held that whenever it affirmatively appears that officials of the military services have not complied with the requirements of Articles 10 and 33, Uniform Code of Military Justice, and the accused challenges this delict, the prosecution is required to *show the full circumstances of the delay*. The law officer must then decide, from all the circumstances, whether the prosecution has proceeded with reasonable dispatch. The Court, having found no explanation<sup>61</sup> by the prosecution for the delay, held that the action by the law officer, in shifting the burden of proof, or explanation, of the delay to the accused misconstrued the effects of the Uniform Code of Military Justice.

This rule of law as announced in the *Brown* case remained clear and unchallenged for some ten months, and then the Court decided the *Davis* case. The total time between the apprehension of the accused and the date of trial was one hundred and forty-four days. At the trial the accused's counsel moved to dismiss the charges on the basis that the accused had been deprived of a speedy trial. The evidence before the law officer, *presented by the defense counsel*, prior to his ruling on the motion was that some eighty-one days had elapsed from the time the accused was apprehended until the report of the pretrial investigation was received by the general court-martial convening authority. A letter of transmittal accompanied the investigation and stated that the delay was occasioned by "further investigation." Some two months later the charges were referred to trial.<sup>62</sup> The opinion of the Court reduced the period of delay to be considered to two months—the time spent in processing the record at the convening authority level—on the basis that the officer forwarding the charges noted the undue delay resulted from "further investigation." The Court, having thus reduced the issue to whether the accused was denied a speedy trial in that he was not tried within a period of two months, ruled that the law officer did not abuse his discretion in denying the defense motion to dismiss.

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<sup>61</sup> Trial counsel, after conceding that the required pretrial steps had taken "a little longer than desirable," lightly dismissed them with the assertion that he had no knowledge of the circumstances thereof.

<sup>62</sup> In *Brown*, *supra* note 59, the charges were referred to trial some 60 days after accused was apprehended; in the instant case 37 days elapsed between apprehension and referral for trial.

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Judge Ferguson, in his dissent, stated that the *Davis* holding effectively reversed the holding in the *Brown* case and left the law regarding denial of speedy trials in chaotic condition. The holding of the *Brown* case would seem to require that whenever it affirmatively appears that officials of the military services have not complied with the requirements of Articles 10 and 33, Uniform Code of Military Justice, and the accused challenges this delict, the *prosecution* is required to show the full circumstances of the delay. Then the law officer must decide, on the basis of all the circumstances, whether the prosecution has proceeded with "reasonable dispatch." The Court, having found no explanation by the prosecution of the one hundred and eight days delay between apprehension and trial in *Brown*, reversed the ruling of the law officer. In *Davis* although there was an unexplained<sup>63</sup> delay of one hundred and forty-four days from apprehension to trial the Court held there was no oppressive design or lack of reasonable diligence on the Government's part in prosecuting the case. After having sustained the law officer's ruling in dismissing the motion in the *Davis* case the Court made this statement :

Before concluding our opinion, it is appropriate to reiterate what we said in *United States v. Wilson*, 10 **USCMA** 398, 403, 27 **CMR** 472; when the issue of a speedy trial is raised by way of a motion to dismiss, 'the facts necessary to a proper disposition of the question should be incorporated in the record.' *The allied papers in this case show much more clearly than the evidence presented to the law officer, the actual course of events.*<sup>64</sup>

The authors cannot reconcile the *Brown* and *Davis* holdings. It is suggested that if the *trial counsel* is presented with a factual situation such as arose in *Brown* and *Davis*, the safest and wisest procedure would be for the prosecution to present the law officer with the full circumstances surrounding the delay between apprehension and trial.

Two clear rulings of law have been made, nevertheless, by the Court in the right to speedy trial area. A plea of guilty does not bar the right to challenge, *on appeal*, the denial of a motion to dismiss because of deprivation of a speedy trial.<sup>65</sup> An accused's right to speedy trial must be distinguished from the accused's rights on appeal. Neither the military nor the civilian law extends to the accused the same right to speedy trial at the appellate level as they do at the trial level. When an accused contends he is the

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<sup>63</sup> The only explanation as to the delay was presented to the law officer by the defense counsel in his argument on the motion to dismiss; i.e., "further investigation" delayed forwarding of charges.

<sup>64</sup> 11 **USCMA** at 414, 29 **CMR** at 230. (Emphasis added.)

<sup>65</sup> *United States v. Davis*, *United States v. Brown*, *supra* note 69.

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victim of oppressive, vexatious, and unreasonable processes, the granting of extraordinary relief can only be justified in instances where there has been a flagrant disregard of his rights.<sup>66</sup>

### D. CONDUCT OF TRIAL

#### 1. Conduct of Counsel

In *United States v. Cook*<sup>67</sup> the accused was tried before a general court-martial convened in the Philippines and was charged with voluntary manslaughter. The charge arose out of a barroom fight involving the accused and a Philippine national who died a few days after the accused allegedly struck him with a wooden chair. During the trial counsel's closing statement he uttered the following remarks :

This is a tremendously important case. As I told you before, this case is important because we're trying a man who is here accused of killing a Philippine national, at which we're using mostly Filipino witnesses. I think we can show everyone concerned . . . that we can ensure that justice will be done. And that's the important thing.<sup>68</sup>

The Court, having reviewed the record, concluded that the evidence of guilt was neither overwhelming nor compelling. In such a situation, an untoward incident or inflammatory remark in the presence of the court members could substantially influence them in their deliberations.<sup>69</sup> An appeal to a court-martial to predicate its verdict upon the probable effect of its action on relations between the military and civilian community operates as a one-way street against the accused.<sup>70</sup> Such remarks by the trial counsel exceeds the bounds of fair comment and injected improper matter into the case.<sup>71</sup>

#### 2. Use of Documents and Writings

In civilian jurisdictions, in the absence of a statute to the contrary, the judge may allow his written instructions to be

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<sup>66</sup> *United States v. Richmond*, *supra* note 59.

<sup>67</sup> 11 USCMA 99, 28 CMR 323 (1959).

<sup>68</sup> *Id.* at 102, 28 CMR at 326.

<sup>69</sup> *United States v. Beatty*, 10 USCMA 311, 27 CMR 385 (1959); *United States v. Doctor*, 7 USCMA 126, 21 CMR 252 (1956).

<sup>70</sup> *United States v. Mamaluy*, 10 USCMA 102, 27 CMR 176 (1959).

<sup>71</sup> *Accord*, *United States v. Carpenter*, 11 USCMA 418, 29 CMR 234 (1960), argument of the trial counsel in the presentencing proceedings before a special court-martial, conveying the idea that the convening authority had already considered certain clemency factors in determining the type of court to which the charges should be referred, was improper, but no prejudice appears where the court was specifically instructed that each member must decide appropriate punishment.

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used by the jury during their deliberations on the case provided such written instructions are made a part of the record.<sup>72</sup> In *United States v. Caldwell*,<sup>73</sup> the Court was presented with a case where the court members took into closed session a purported copy of the law officer's oral instructions that had been written down by a court member at the direction of the president, but these written instructions were not attached to the record. The Court held that such a procedure should not be used but did not rule against the taking of written instructions *prepared by the law officer* into closed sessions *provided* such instructions are made a part of the record on appeal. It is suggested that if the issues of a particular case are complex and the instructions are to be lengthy and detailed, the law officer would perform a service to both parties if he furnished the court members with a written copy of his instructions.<sup>74</sup>

In *United States v. Rinehart*<sup>75</sup> the Court directed that "the practice of using the Manual by members of a general court-martial . . . during the course of the trial or while deliberating on findings and sentence be *completely* discontinued. . . ."<sup>76</sup> *United States v. Dobbs*<sup>77</sup> indicated that there would be no deviations from this rule, for in *Dobbs* the president of a special court-martial had access to the Manual only for the purpose of utilizing the procedural guide contained therein. The Court, nevertheless, set aside the findings and sentence. Judge Latimer, in his dissent, makes a sound recommendation for avoiding such error: provide the presidents of courts-martial with copies of such portions of the trial procedure guide as are necessary for their use in open court in administering oaths and otherwise properly performing their duties. Such an extract should be marked and attached to the record as an appellate exhibit.

In *United States v. Allen*<sup>78</sup> the Court reiterated its prior ruling<sup>79</sup> that technical manuals promulgated by the armed services<sup>80</sup> play no role in judicial proceedings beyond that accorded ordinary

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<sup>72</sup> *Rumely v. United States*, 293 Fed 632 (2d Cir. 1923), cert. denied, 263 U.S. 713 (1923); *Cooke v. People*, 231 Ill. 9, 82 N.E. 863 (1907); *State v. Lewis*, 69 W.Va. 472, 72 S.E. 475 (1911).

<sup>73</sup> 11 USCMA 257, 29 CMR 73 (1960).

<sup>74</sup> A copy of these should be attached to the record for appellate scrutiny thereof.

<sup>75</sup> 8 USCMA 402, 24 CMR 212 (1957).

<sup>76</sup> *Id.* at 410, 24 CMR at 220. (Emphasis added.)

<sup>77</sup> 11 USCMA 328, 29 CMR 144 (1960).

<sup>78</sup> 11 USCMA 539, 29 CMR 355 (1960).

<sup>79</sup> *United States v. Gray*, 9 USCMA 208, 25 CMR 470 (1958).

<sup>80</sup> In this instance the Technical Manual, "Psychiatry in Military Law" was involved.

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texts.<sup>81</sup> When they are improperly **used** by the Government in an attempt to control considerations by the court-martial of a particular defense advanced by the accused, intimations of command control are introduced and, absent proper curative action by the law officer, reversal will follow,

### V. MILITARY CRIMINAL LAW

#### A. *SUBSTANTIVE OFFENSES*

##### 1. *Fraudulent Enlistment, Article 83*

In *United States v. LaRue*<sup>82</sup> the Court was presented with the question of whether fraudulent enlistment requires a change from a *civilian* to a *military status*, for LaRue was a member of the United States Army at the time of his alleged fraudulent enlistment. The Court held that Article 83 expresses a congressional intent to encompass all persons, civilian and military, who fraudulently induce their enlistment in one of the armed forces. Article 85(a)(3), relating to desertion by enlistment of a serviceman who has not been discharged, does not remove servicemen from the coverage of Article 83, nor does Article 85 pre-empt this field within the ruling of *United States v. Norris*.<sup>83</sup> Thus, a serviceman who absents himself without leave and then enlists again under another name can be convicted of fraudulent enlistment.

##### 2. *Failure to Obey a Lawful General Order, Article 92(1)*

An averment of knowledge is not required in pleading a violation of a general order,<sup>84</sup> but if the order is issued by a commander not authorized to issue general orders then proof of actual knowledge of the order must be pleaded and proven, although the actual knowledge of the order may be established circumstantially.<sup>85</sup> The importance of deciding who may issue general orders is, therefore, apparent. The Court, on numerous occasions, has been faced with the question: what level of commanders may issue general orders within the purview of Article 92(1)? The state of the law in this area is no more settled than is that of what

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<sup>81</sup> Such texts and treatises are most frequently used in connection with testimony of expert witnesses.

<sup>82</sup> 11 USCMA 470, 29 CMR 286 (1960).

<sup>83</sup> 2 USCMA 236, 8 CMR 36 (1953).

<sup>84</sup> *United States v. Tinker*, 10 USCMA 292, 27 CMR 366 (1959) (general order was issued by the commander, U.S. Forces, Azores).

<sup>85</sup> *United States v. Curtin*, 9 USCMA 427, 26 CMR 207 (1958).

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constitutes a “minor offense” in the area of former punishment.<sup>86</sup> The Court decided two cases<sup>87</sup> concerning authority to promulgate general orders during the period covered by this article.

From a reading of the *Ochoa* and *Porter* cases, in conjunction with prior decisions in this area, it is suggested that the following analysis may be helpful in attempting to determine what level of command may issue general orders within the purview of Article 92 (1), Uniform Code of Military Justice :

(1) The Secretaries of the respective services may promulgate such general orders (this covers violations of Army Regulations, for example).<sup>88</sup>

(2) A commander of an overseas theater may promulgate such general orders.<sup>89</sup>

(3) A commander of a Class II installation (AR 10-30) who exercises general court-martial jurisdiction may promulgate such general orders.<sup>90</sup>

(4) A detachment, company, or organic battalion commander may *not* promulgate such general orders.<sup>91</sup>

(5) A commandant of a service school ordinarily may *not* promulgate such general orders.<sup>92</sup>

This leaves unsettled the authority of commanders of Armies, Corps, Divisions, Posts, and Battle Groups (and their respective counterparts in the other services) to issue such general orders. If the particular case involves one of these commanders, case law should be examined before a prosecution under Article 92(1) is undertaken.<sup>93</sup>

### 3. *Unlawful Detention of Another, Article 97*

In *United States v. Hardy*<sup>94</sup> the Court was presented with the question of whether Article 97 applies only to military officials

<sup>86</sup> See section IV (C) (2), *supra*.

<sup>87</sup> *United States v. Porter*, 11 USCMA 170, 28 CMR 394 (1960); *United States v. Ochoa*, 10 USCMA 602, 28 CMR 168 (1959).

<sup>88</sup> Par. 171a, MCM, 1951.

<sup>89</sup> *United States v. Statham*, 9 USCMA 200, 25 CMR 462 (1958) (CINCUSAREUR); *United States v. Stone*, 9 USCMA 191, 25 CMR 453 (1958) (Commander, USAFFE). Stone indicates that CG, CONUS, and CG, MDW, are also so empowered.

<sup>90</sup> *United States v. Porter*, *supra* note 87.

<sup>91</sup> *United States v. Brown*, 8 USCMA 516, 25 CMR 20 (1957); par. 17, AR 310-110A, 18 Jan 1955.

<sup>92</sup> *United States v. Ochoa*, *supra* note 87.

<sup>93</sup> For a detailed analysis of the problems in this area, see Meagher, Knowledge *in* Article 92 Offenses—When Pleaded, When Proven?, *M.L. L. Rev.*, July 1959, p. 119.

<sup>94</sup> 11 USCMA 487, 29 CMR 303 (1960).

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who have some color of authority to apprehend or arrest. The Court held that the Article sweeps within its provisions all persons subject to the Uniform Code of Military Justice whether they act under color of authority or not.<sup>95</sup>

### 4. *Larceny; Wrongful Appropriation, Article 121*

In *United States v. Hayes*<sup>96</sup> the Court held that where the property involved in a charge of larceny is money, the fact that the accused cannot return the *identical* money does not preclude a court from finding that the accused was guilty of wrongful appropriation only. In *United States v. Epperson*<sup>97</sup> the Court extended the *Hayes* rule to encompass an endorsed Government check, which check the Court held was without special or numismatic value apart from the sum of money it represented.

### 5. *Narcotics Violations, Article 134*

In *United States v. Wilmot*<sup>98</sup> the accused was charged with wrongfully possessing specified narcotics, in violation of Article 134, and wrongfully and knowingly bringing narcotics into Yokota Air Base, Japan, which specification was founded on the Narcotic Drugs Import and Export Act (21 U.S.C. §§ 171-185). Section 174 of the Act provides, in pertinent part, that :

. . . [I]f any person fraudulently or knowingly imports or brings any narcotic drug into the *United States or any territory under its control or jurisdiction*, . . . such person shall upon conviction be fined not more than \$5,000 and imprisoned for not more than ten years. (Emphasis added.)

The Court, after consideration of the Administrative Agreements between Japan and the United States, held that the Yokota Air Base was under the “jurisdiction” of the United States within the purview of the Narcotic Drugs Import and Export Act. The accused’s conduct, therefore, was violative of this Federal statute. In this connection it is believed that most of our overseas installations are under the “jurisdiction” of the United States within the purview of the Narcotic Drugs Import and Export Act (see Article VII, 10-(a), NATO Status of Forces Agreement, entered into force August 23, 1953). A fraudulent or knowing importation of any narcotic drug onto one of these installations by a person subject to the Uniform Code of Military Justice may be

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<sup>95</sup> Citing with approval, CM 364634, *Fritts*, 12 CMR 232 (1953), pet. **denied**, 12 CMR 204 (1953). *Accord*, *United States v. Mitchell and Bowers*, 11 USCMA 497, 29 CMR 313 (1960).

<sup>96</sup> 8 USCMA 627, 25 CMR 131 (1958).

<sup>97</sup> 10 USCMA 582, 28 CMR 148 (1959).

<sup>98</sup> 11 USCMA 698, 29 CMR 514 (1960).

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prosecuted as a violation of Article 134, depending on the local treaty agreements.

The Table of Maximum Punishments<sup>99</sup> prescribes a maximum punishment, for unlawful possession of a narcotic, of dishonorable discharge, total forfeitures, and confinement at hard labor not to exceed *five years*. The maximum punishment prescribed for violation of the Narcotic Drugs Import and Export Act, *supra*, is a fine of not more than \$5,000 and imprisonment not to exceed *ten years*. At Wilmot's trial the law officer instructed the court-martial that the unlawful possession specification and the wrongful and knowing transportation of the narcotics into Yokota were not separate for punishment purposes. The Court did not, therefore, consider the validity of that ruling because of the absence of any possible harm to the accused by such a ruling. While the Supreme Court of the United States would probably rule otherwise,<sup>100</sup> it is believed that the Court of Military Appeals, if faced with such an issue, would rule that the unlawful possession was a lesser crime included in the violations of the Narcotic Drugs Import and Export Act violation.<sup>101</sup> In a factual situation comparable to the *Wilmot* case, by prosecuting for violation of the Narcotic Drugs Import and Export Act, *supra*, the maximum punishment can be increased to ten years confinement, instead of the five year maximum for unlawful possession.

### 6. False Swearing, Article 134

In *United States v. McCarthy*<sup>102</sup> the Court held a specification alleging an offense of false swearing to be insufficient. The specification purporting to allege the offense of false swearing was patterned after the "model specification" for false swearing found in Appendix 6c, *Manual for Courts-Martial, United States, 1951*. There is nothing in that specification, nor was there anything in the specification under which the accused was tried, averring that the sworn statement was in fact false, nor was the falsity of the statement implied in the instant case. Therefore, the following "model specification" for false swearing offenses is suggested :

139. In that \_\_\_\_\_ did, (at) (on board) \_\_\_\_\_, on or about \_\_\_\_\_ 19\_\_\_\_, (in an affidavit) (in \_\_\_\_\_) wrongfully and unlawfully (make) (subscribe) under lawful (oath) (affirmation) a fake

<sup>99</sup> Par. 127c, MCM, 1951.

<sup>100</sup> See *Blockburger v. United States*, 284 U.S. 299 (1932) ; *Gavieres v. United States*, 220 U.S. 338 (1911).

<sup>101</sup> See *United States v. McVey*, 4 USCMA 167, 15 CMR 167 (1952) ; but see *United States v. Jones*, 2 USCMA 80, 6 CMR 80 (1954).

<sup>102</sup> 11 USCMA 758, 29 CMR 574 (1960).

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**statement** in substance as follows: -----, which statement he did not then believe to be true. (Emphasis added.)

### 7. *Usury, Article 134*

In *United States v. Day*,<sup>103</sup> the Court, considering usury as a military offense for the first time, held that since military law in general, and Army regulations in particular, provide no legal rate of interest, and since usury is a statutory offense, the exaction of any given rate cannot be described as illegal and usurious and, thus, a specification charging an accused with loaning money at “usurious rates of interest” does not state an offense under Article 134 even though the interest alleged may have been unconscionably high.<sup>104</sup>

Several possible remedies are suggested to fill the void in military criminal law wrought by the *Day* holding. Chief Judge Quinn called attention to the existence of Navy Regulations, Article 1260 (1948), which provide :

No person in the Naval service on active service shall for profit or benefit of any kind lend money to any other person in the armed services, except by permission of his commanding officer; nor, having made a loan to another person in the armed forces shall he take or receive in payment thereof, then or later, directly or indirectly, without the approval of the commanding officer, a sum of money or any other thing of service of a greater amount or value than the sum of money loaned.

A regulation similar to the Navy’s cited regulation may be promulgated by various commands, and violators of the usury regulation could then be prosecuted under Article 92.

Trials by court-martial might be based upon application of the Assimilative Crimes Act<sup>105</sup> provided, however, that the state usury law to be assimilated is *criminal*, and not merely regulatory, in nature. It is realized, in this connection, that the disparity between the various state usury statutes, and the territorial limitations on the applicability of the Assimilative Crimes Act, would have the effect of establishing varying acceptable interest norms depending upon geographic considerations.

### 8. *Conspiring to Commit Espionage, Article 134*

In *United States v. Rhodes*<sup>106</sup> the Court was presented with a thorny conspiracy issue, set amidst the context of international

<sup>103</sup> 11 USCMA 549, 29 CMR 365 (1960).

<sup>104</sup> For a concise discussion of the present state of the law in this area, see Miller, *Usury in the Barracks*, 14 Personal Finance Law Quarterly Report 152 (1960).

<sup>105</sup> 18 U.S.C. § 13 (1958). Prosecution would be under UCMJ, art. 134.

<sup>106</sup> 11 USCMA 735, 29 CMR 551 (1960).

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espionage, Disclosures by a defected Russian agent during the course of investigation into the activities of Soviet "Master Spy" Rudolph Abel led to the filing against the accused of two charges of conspiring to violate Federal statutes relating to the obtaining and transmission to a foreign government of information involving the national defense of the United States.

The facts giving rise to these charges were as follows. From 1951 to 1953 the accused was assigned to the United States Embassy in Moscow. He confessed that during this period he had entered into an agreement with unidentified senior Russian military officers to engage in espionage work for the Soviet government. Prior to leaving the embassy in 1953, he further admitted that he agreed with his Moscow contacts to continue cooperating with them after his return to the United States. Pursuant to this agreement, he furnished them with information concerning his family background and his forthcoming military assignment. In turn, he memorized an involved method of contacting Russian agents in the United States and received a distinctive identifying smoking pipe which he was to keep in his possession to facilitate any subsequent contact. However, from 1953 until 1957, when questioned by Federal authorities, the accused had taken no steps to contact Soviet agents in the United States, nor had he been personally contacted by them.

During the same period, the evidence disclosed that there was operating in the United States, with headquarters in the New York City area, a Soviet espionage conspiracy comprised in part, of Colonel Rudolph Abel and one Reino Hayhanen, a lieutenant colonel in the Soviet Army. These individuals were actively engaged in transmitting to Moscow sensitive information relating to the defense establishment. While these individuals had not personally contacted the accused since his return from Moscow, they had conducted extensive investigations into his current whereabouts and had actually visited his hometown and talked with the accused's family. Moreover, during the course of a search of Hayhanen's home, Federal agents discovered a coded message from Moscow, referring to the accused which contained almost the precise information which the accused had admitted giving to his Moscow conspirators at the time that he was about to leave the Embassy assignment.

On the basis of these facts the Government asserted a generic and unified conspiracy involving the accused and his colleagues in Moscow in 1951-1953 and Abel and Hayhanen in the United States in 1957.

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At trial the accused's principal defense was based on the fact that the evidence was insufficient to establish that **accused's** activities in Moscow in 1953 and those of Hayhanen and Abel in New York in 1957 were one and the same conspiracy. He argued that the requisite singleness of purpose was absent because the accused had never been in direct contact with either Hayhanen or Abel and had never conspired directly with respect to the precise same subject matter. In affirming the conviction, Chief Justice Quinn, writing for a unanimous Court, rejected these contentions, stating:

Knowledge of the identity of co-conspirators and their particular connection with the criminal purpose need not be established. \* \* \*

Unlike the situation involved in *Kotteakos* [Federal case involving multiple conspiracies], on which the accused heavily relies, there is here substantial evidence that the accused's activities in Moscow and those of Abel-Hayhanen in the United States were 'tied together as stages in the formation of a larger all-inclusive combination.' . . .<sup>107</sup>

The Court proceeded to base its decision on the clearly established principles of ordinary conspiracy law; the principles which are uniformly applied by the courts when the subject matter of the offense is a narcotic or gambling ring. By so doing the Court clearly showed that such principles have relevance and vitality even when they must be applied to conspiratorial alliances.

### B. AFFIRMATIVE DEFENSES

#### 1. *Intoxication*

It is a general rule of law that voluntary drunkenness not amounting to legal insanity, whether caused by liquor or drugs, is not an excuse for a crime committed while in that condition; but such drunkenness may be considered as affecting mental capacity to entertain a specific intent, or to premeditate a design to kill, when either matter is a necessary element of the offense.<sup>108</sup> Also, it has been held by the Court of Military Appeals that in offenses requiring knowledge, voluntary drunkenness may be considered in determining whether or not the accused had the requisite knowledge.<sup>109</sup> Voluntary drunkenness is not, however, a defense to those offenses which do not involve premeditation, specific intent, or knowledge.<sup>110</sup>

<sup>107</sup> *Id.* at 742, 29 CMR at 558.

<sup>108</sup> Par. 154a (2), MCM, 1951.

<sup>109</sup> *United States v. Miller*, 2 USCMA 194, 7 CMR 70 (1953).

<sup>110</sup> *United States v. Craig*, 2 USCMA 650, 10 CMR 148 (1953).

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United States v. *Sasser*<sup>111</sup> dealt with a duty to instruct on lesser included offenses where evidence is sufficient to raise the issue of intoxication. The Court ruled that where an accused is charged with a specific intent offense, and the issue of intoxication as a defense is fairly raised by the evidence, the president of a special court-martial, or the law officer, commits prejudicial error if he instructs only on the defense of intoxication without also instructing on any lesser included offenses which do not involve proof of specific intent. Failure by counsel to request such instructions will not constitute waiver.

### 2. *Ignorance or Mistake of Fact*

As a result of a study of military case law on mistake of fact the following general rules have been formulated :

(1) Where the offense requires a specific intent the mistake need only be honest, e.g., larceny;

(2) Where culpability is based upon the accused's actual knowledge of certain facts, an honest mistake, no matter how unreasonable, which shows that the accused did not have actual knowledge of such facts is a **defense**,<sup>112</sup> e.g., unlawful possession of narcotics; and

(3) If the offense requires merely a general intent the mistake must be honest and reasonable.<sup>113</sup>

In United States v. *Walters*<sup>114</sup> the accused was charged with presenting fraudulent claims against the Government. The Court held that the offense is based upon the accused's actual knowledge of the fraudulent nature of his claims against the Government. Under the general rules cited above an honest mistake, no matter how unreasonable, is a defense to the charge of presenting fraudulent claims against the Government. The law officer instructed the Court that an honest mistake was a defense, which instruction was correct. In reliance upon paragraph 211a of the Manual, however, the law officer also instructed the Court that:

... [I]f it appears that a false claim was made under circumstances which *would* cause the false character of the claim to be apparent to an ordinary prudent man, it may be inferred that the claim was made with knowledge of its falsity.

Such an instruction was inconsistent with the correct instruction and constituted prejudicial error.

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<sup>111</sup> 11 USCMA 498, 29 CMR 314 (1960).

<sup>112</sup> United States v. Lampkins, 4 USCMA 31, 15 CMR 31 (1954).

<sup>113</sup> United States v. Holder, 7 USCMA 213, 22 CMR 3 (1956).

<sup>114</sup> 10 USCMA 598, 28 CMR 164 (1959).

VI. EVIDENCE

A. DEPOSITIONS

In *United States v. Jacoby*,<sup>115</sup> the Court overruled prior cases<sup>116</sup> and interpreted Article 49 to require that the accused be afforded the opportunity to be present with his counsel at the taking of depositions on written interrogatories (hereinafter referred to as written depositions) of prosecution witnesses. The Court said such an interpretation was necessary in order to avoid a statutory interpretation which would conflict with the Sixth Amendment right of an accused to be confronted by the witnesses against him. The Court added that the accused “may choose knowingly to waive” the right to be present at the taking of the deposition.

Compliance with the decision will not, as the Court implied, result in a written deposition taken in the presence of the accused and his counsel, but rather it will result in an oral deposition. As Judge Latimer points out in his dissent, it would be senseless for the defense to use written interrogatories if the accused and his counsel are present at the taking of the deposition. Instead, the defense counsel will cross-examine the witness orally. Of course, written interrogatories could be submitted by the prosecution, but it is unlikely that the government will remain unrepresented if the defense counsel is present. Furthermore, the majority opinion discloses that the Court was concerned, not solely with the opportunity for the defense to be present at the taking of the deposition, but also with the opportunity for the defense to cross-examine the witness orally. As the Court stated :

Cross-examination necessarily depends as much upon the witness' *answers* to the questions put by the prosecution as it does upon the interrogatories. When the deposition is taken in the absence of counsel and the accused, cross-interrogatories must be framed on the basis of the prosecution's inquiries and the unsatisfactory substitute of letters or pretrial affidavits from the witness. Other than the dubious advantage of submitting additional cross-interrogatories, there is no way by which the defense counsel may accurately take advantage of the witness' direct replies and frame his questions to minimize the damaging effect of the Government's evidence. Moreover, in putting his cross-interrogatories blindly, counsel runs the risk of impaling his client upon defense-sought answers. In short, cross-examination is a two-edged sword and he who would serve his client

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<sup>115</sup> 11 USCMA 428, 29 CMR 244 (1960).

<sup>116</sup> *United States v. Parrish*, 7 USCMA 337, 22 CMR 127 (1956) ; *United States v. Sutton*, 3 USCMA 220, 11 CMR 220 (1953).

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must be afforded the opportunity personally to question the witness if this great right is adequately to be preserved.<sup>117</sup>

Thus, it would seem that the purpose and effect of the decision are to give the accused the right, if he chooses, to prevent the government from using depositions taken on written interrogatories. It is not without significance, however, that the express holding of the case is not as broad as its practical effect and apparent purpose. Had the Court purported to hold that the accused has the right to prevent the government from using written depositions, it would have found it difficult, if not impossible, to avoid declaring unconstitutional that part of Article 49 that provides for the admission of written depositions. By interpreting Article 49 as it did, the Court was able to avoid declaring the statute unconstitutional. Accordingly, the Court's conclusion that the Constitution requires that the accused and his counsel be afforded the opportunity to be present is dictum only, albeit rather powerful dictum, and the decision does not foreclose the possibility that the Court would uphold a statutory amendment that expressly authorized the taking of depositions upon written interrogatories without the presence of the accused and his counsel.

Since in *Jacoby* neither the accused nor his counsel was present at the taking of the depositions, the Court could have based its reversal solely on the ground that *counsel* was not present, yet it chose to state that an opportunity must be afforded for both the accused and his counsel to be present. That does not appear to be the position that Judge Quinn had taken earlier when he dissented in the cases that *Jacoby* overruled.<sup>118</sup> In those cases he indicated that there must be an opportunity for the accused *or* his counsel to be present. Since Judge Quinn concurred outright in Judge Ferguson's majority opinion in *Jacoby*, he has apparently modified his earlier view. Insofar as the use of written depositions is concerned, it makes little difference whether it is required that both the accused and his counsel be afforded an opportunity to be present or whether it is required only that counsel be given the opportunity. For the reasons stated previously, the result in either case will be to eliminate the use of written depositions and substitute therefor oral depositions, the taking of which will presumably be governed by whatever rules are held to be applicable to the taking of oral depositions generally. As a practical matter, therefore, it becomes a moot question whether the Court would in fact apply the *Jacoby* rule in the theoretical case wherein counsel, but not accused, is present at the taking of written depositions.

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<sup>117</sup> 11 USCMA at 432, 29 CMR at 248.

<sup>118</sup> See note 116 *supra*.

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tions; but it becomes quite important to determine whether the rule that *Jacoby* announces with respect to written depositions applies also to the taking of oral depositions. Under existing procedures the accused, although not necessarily present personally at the taking of an oral deposition, is represented there by counsel who personally examines the witness on behalf of the accused.<sup>119</sup> While the Court of Military Appeals has not yet considered the question of the applicability of *Jacoby* to oral depositions, some comments concerning that issue can be made on the basis of the Court's opinion in *Jacoby*. The reason for the requirement that counsel be present at the taking of the deposition is stated in the opinion: ". . . [H]e who would serve his client must be afforded the opportunity personally to question the witness if [the] great right [of cross-examination] is adequately to be preserved." It is not so clear, however, why the accused must also be present. The opinion implies that the presence of both the accused and his counsel is necessary for effective cross-examination. There is also a quotation taken from a Supreme Court case<sup>120</sup> which refers to the "advantage" to the accused of "seeing the witness face to face." In addition, the Court discusses the requirement of the early Articles of War (contemporaneous with the adoption of the Constitution) that the accused be present. The tenor of the opinion as a whole, however, leads to the belief that the Court's primary desire in *Jacoby* was to assure an adequate, effective cross-examination by the defense—an objective which the Court believed could be attained only by the opportunity for oral cross-examination. While the presence of the accused at the taking of the deposition can be of material benefit to counsel in cross-examining the witness, it does not follow that effective cross-examination is impossible without the presence of the accused. If the Court is ever faced with a case involving an oral deposition taken outside the presence of the accused and over his objection, it could conceivably distinguish *Jacoby* and hold that although an opportunity must be afforded for accused's counsel to be present at the taking of the deposition, the accused is not entitled to be present personally.

Assuming, however, that the Court chooses not to distinguish *Jacoby*, the Government, in order to comply with the requirements set forth in the decision, must either bring the accused to the witness or bring the witness to the accused. One solution would be to transport the accused (under guard if necessary)

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<sup>119</sup> Par. 117g, MCM, 1951.

<sup>120</sup> *Mattox v. United States*, 156 U.S. 237 (1896).

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and his counsel to the place where the witness is located and to take the deposition there.<sup>121</sup> As an alternative, the trial could be held in a command that is close to the place where the witness is located. Prior to the transfer of the accused to that command, oral depositions of witnesses located at or near the place from which the accused is being transferred would be taken in the presence of the accused. Both of the foregoing methods might be costly and cause inconvenience and delay. A third possibility would be to bring the witness to the distant place of trial to testify in person. That solution could also be costly and burdensome, and when the witness or the trial is outside the United States it may not be possible to secure the attendance of the witness unless he is willing to attend voluntarily.

### B. ARTICLE 31 WARNING REQUIREMENT

In *United States v. Souder*<sup>122</sup> a naval investigator advised the local music stores that two accordions had been stolen from a member of the naval service. He requested that the naval authorities be informed if someone should attempt to sell the stolen instruments to any of the store owners. When the accused entered one of the stores, the proprietor, who was a naval officer on active duty, obtained incriminating admissions from him. The Court held that the officer was under a duty to advise the accused of his rights under Article 31, since the questioning was undertaken for the sole and express purpose of obtaining incriminating admissions. Judge Latimer concurred in the result, apparently basing his decision upon the additional factor that the officer, in obtaining the admissions, was not acting out of any personal interest in the case but rather was acting solely in aid of the investigation that the naval authorities were conducting. Judge Latimer added :

The argument that this officer was in the same category as other operators of music stores and, therefore, his acts were those of a civilian not subject to military law must fail unless it is established that he acted independently of his service obligations. The record shows to the contrary and, I, therefore, conclude he was required to give a warning.<sup>123</sup>

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<sup>121</sup> If the deposition is taken before charges are referred for trial, it may be satisfactory to appoint a defense counsel for the taking of the deposition a qualified officer who is stationed near the place where the deposition is to be taken. See *United States v. Brady*, 8 USCMA 456, 24 CMR 266 (1967). In that event, only the accused need be transported.

<sup>122</sup> 11 USCMA 59, 28 CMR 283 (1959).

<sup>123</sup> *Id.* at 64, 28 CMR at 288.

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In *United States v. Vail*<sup>124</sup> the Court held that an Article 31 warning was not required when the accused, upon being apprehended while in the process of stealing government-owned guns from a warehouse, was immediately asked at gun point to show the apprehending officer where he had placed the stolen property. The accused had removed the weapons from the warehouse a few minutes earlier, placed them in an automobile about seventy-five to one hundred yards away, and had just re-entered the warehouse when the apprehension and questioning occurred. The Court based its holding principally upon the following two factors: First, the officer had a duty to recover the stolen property and was “naturally and logically expected to ask the criminal to turn over the property which he ha[d] just stolen.” Second, Congress did not intend to require an Article 31 warning when an officer is engaged in the dangerous job of apprehending a person in the commission of a crime of “violence.” The circumstances in this case required “action and not carefully thought out words of advice.” Furthermore, an Article 31 warning would be a useless gesture when the apprehending officer is pointing a loaded pistol at the prisoner.<sup>125</sup>

In *United States v. Baker*<sup>126</sup> the accused was apprehended as an absentee. In the course of a routine physical examination required of all prisoners entering confinement, the medical officer noticed some needle marks on the accused’s arms. Two days later the accused reported to the same doctor complaining of being nervous and unable to sleep. During the course of one of those two visits the doctor, without warning the accused of his rights under Article 31, obtained a clinical history from him. The doctor testified that in his opinion, based in part upon the history obtained from the accused, the accused had given himself an injection of a narcotic drug sometime prior to his apprehension. Holding that the doctor’s testimony was admissible, the Court stated that the warning requirement of Article 31 “does not apply to a medical officer when he is obtaining information regularly required in the performance of his duties in treating patients.”<sup>127</sup> The applicability of Article 31 thus depends upon the purpose for which the doctor questions the patient. In *Baker* the majority of the Court concluded that the clinical history was obtained for medical purposes and not for the purpose of perfecting

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<sup>124</sup> 11 USCMA 134, 28 CMR 358 (1960).

<sup>125</sup> Judge Quinn wrote the opinion of the Court, and Judge Latimer concurred in a separate opinion. Their views were essentially the same, and the quoted material in the text is taken from both opinions.

<sup>126</sup> 11 USCMA 313, 29 CMR 129 (1960).

<sup>127</sup> *Id.* at 317, 29 CMR at 132.

a criminal case against the patient. Even assuming that the doctor suspected the accused of wrongful use of narcotics, no warning was necessary, since the doctor had questioned the accused to ascertain information for medical purposes.

A statement made by Chief Judge Quinn in the Court's opinion in *Vail, supra*, appropriately describes the decisions in both *Vail* and *Baker*: "Slight differences in the factual background may bring the case within the operation of Article 31 or effect its **exclusion.**"<sup>128</sup> In *Vail*, for example, as Chief Judge Quinn noted, Article 31 would have applied if the accused had been taken to the police station first and then asked to disclose the whereabouts of the stolen property. With respect to the *Baker* rule a slightly different factual pattern could have led to the conclusion that the doctor interrogated the patient for the purpose of obtaining incriminating admissions. *Baker* and *Vail* both represent an effort by the Court to avoid an interpretation of Article 31 that would unduly restrict or hamper the performance of essential functions. In *Baker* the Court did not want to impair "the efficiency of the medical service," and in *Vail* the Court wished to avoid placing additional burdens upon the already difficult and dangerous task of apprehending persons during the commission of serious offenses. The Court is certain to look with disfavor upon any effort by criminal investigators to distort the purpose behind these decisions by using them as a subterfuge for obtaining incriminating evidence.

The accused in *United States v. Haskins*<sup>129</sup> had been in charge of the Air Force Aid Society office at an air base. About two weeks after he was relieved of his duties with the Society, the personnel then in charge of the office were unable to locate certain ledger cards that were missing from the cabinet where they should have been filed. The accused was brought to the office and, without being advised of his rights under Article 31, was asked to produce the cards. He thereupon located them, apparently in some "not readily detectable" location in the office. The Court held that since a custodian of public or corporate funds is required by law to turn over to his successor the official financial records in his possession, there was no need to warn the accused that under Article 31 he did not have to produce the records. Despite the fact that he was no longer the custodian, he was deemed to be in constructive possession of the records. As the Court stated:

It is part of the duty of a custodian to hand over to his successor the written records of his administration, and he does not account within the

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<sup>128</sup> 11 USCMA at 135, 28 CMR at 359.

<sup>129</sup> 11 USCMA 365, 29 CMR 181 (1960).

meaning of the law until he furnishes a suitable record of those financial transactions he carried on for the corporation. Records hidden from the corporation do not serve that purpose and, at the very least, a custodian is constructively in possession of them until they are made accessible to other officers or agents of the corporation.<sup>130</sup>

### C. PRIVILEGE AGAINST SELF-INCRIMINATION

In *United States v. McClung*<sup>131</sup> the accused, while in a state of semiconsciousness, was asked "if he could" furnish a urine specimen. He agreed to comply with the request and furnished the specimen which was immediately turned over to a criminal investigator. Without deciding whether the accused should have been advised of his rights under Article 31 prior to being asked to provide the specimen, the Court held that the urine sample had been illegally obtained. It is a violation of Article 31 (the Court apparently meant subsection (a) of the Article) to compel someone against his will to furnish urine for use as evidence against him in a court-martial proceeding. The accused's semiconscious state deprived him of the requisite understanding to be able voluntarily to consent to provide the specimen, and accordingly it was error to admit the results of an analysis of the urine in evidence.

### D. SEARCH AND SEIZURE

In *United States v. Insani*<sup>132</sup> and *United States v. Cuthbert*<sup>133</sup> the Court was confronted with what the defense contended was an interrelationship between the Article 31 warning requirement and the law of search and seizure. *Insani* held that an accused need not be warned of his rights under Article 31 prior to a request that he consent to a search. The Court recognized that the fact that an accused has been advised of his rights under Article 31 may be a relevant consideration in deciding whether he voluntarily consented to the search or "merely yielded to the color of authority." It is not a controlling consideration, however, and accordingly a finding that he voluntarily consented is not precluded by the absence of such advice. In *Cuthbert*, the "polite search" case, the accused's commanding officer was conducting a lawful search of the accused's person. Without advising him of

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<sup>130</sup> *Id.* at 371, 29 CMR at 187. Two cases involving the interrelationship between Article 31 and the law of search and seizure are discussed below in the section on search and seizure.

<sup>131</sup> 11 USCMA 754, 29 CMR 570 (1960).

<sup>132</sup> 10 USCMA 519, 28 CMR 85 (1959).

<sup>133</sup> 11 USCMA 272, 29 CMR 88 (1960).

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his rights under Article 31, the officer instructed the accused to empty the pockets of the clothing he was then wearing, although the officer could lawfully have examined the pockets himself. It was held that in extending this courtesy to the accused, the commanding officer did not convert a lawful search into an unlawful interrogation and therefore no Article 31 warning was necessary. Neither Insani nor Cuthbert, it was pointed out, had been requested to identify his property or clothing. In both cases it was emphasized that "there can be an interrogation without a search, and, conversely, a search without interrogation." The principles of law applicable to searches should not be confused with these applicable to interrogations.

### E. HUSBAND-WIFE TESTIMONIAL PRIVILEGE

The accused in *United States v. Wooldridge*<sup>184</sup> was charged with forging his wife's indorsement to class Q allotment checks. With Judge Latimer dissenting, the Court held that the wife's testimony had erroneously been admitted in evidence over the accused's objection inasmuch as these offenses had not injured her so as to invoke an exception to the husband-wife testimonial privilege. Judge Ferguson seemed to take the position that because of the husband's property interest in his wife's allotment check, the indorsement by the husband of his wife's signature on such check can *never* be an injury to her for purposes of the testimonial privilege. Judge Quinn, while also relying on the husband's property interest in the check, apparently did not consider that factor to be controlling, for he based his decision, at least in part, on the fact that the prosecution had failed to show that the accused had used the proceeds of the checks in such a manner (for example, to finance an extramarital relationship) as would injure his wife.

The husband-wife testimonial privilege was again before the Court in the case of *United States v. Wise*,<sup>185</sup> in which the accused was charged with bigamy and with forging his wife's signature to dependency allotment checks. The Court held that bigamy comes within the exception to the testimonial privilege and that the accused's wife had therefore properly been permitted to testify against her husband on that charge. With respect to the forgery specifications, however, it was again held, as in *Wooldridge*, that the wife should not have been permitted to testify over the accused's objection. The majority opinion, written by Judge Quinn and concurred in by Judge Ferguson, referred to the substantial

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<sup>184</sup> 10 USCMA 510, 28 CMR 76 (1959).

<sup>185</sup> 10 USCMA 539, 28 CMR 105 (1959).

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interest which a husband has in his wife's allotment check. The opinion continued that since the wife had refused to live with her husband, had told him that he could do whatever he pleased with the allotment checks, had renounced all interest in one of the checks, and had not expected to receive the other checks, the forgery offenses had therefore not injured her.

The opinions in *Wise* and *Wooldridge* have not settled the question of the applicability of the testimonial privilege to allotment forgeries. The analyses used by the majority in both cases, with the possible exception of Judge Ferguson's opinion in *Wooldridge*, indicate that under certain circumstances the forgery may constitute an injury to the wife, but what those circumstances may be is not clear. However, one thing that does seem clear is that without the wife's testimony it will be difficult for the Government to obtain convictions in cases like *Wise* and *Wooldridge* because unless the prosecution can produce evidence to show that the wife had not authorized her husband to sign her name to the check, even a confession by the accused will be inadmissible for lack of evidence establishing a corpus.<sup>136</sup>

### F. STIPULATIONS

In *United States v. Daniels*<sup>137</sup> the Court held that a stipulation of facts that is introduced into evidence during the sentencing phase of a negotiated guilty plea case cannot be used to impeach an accused who, at a rehearing, pleads not guilty and takes the witness stand. As the stipulation is so closely related to the guilty plea itself, the use of the stipulation must be governed by the same standard that is applicable to the use of the guilty plea. Since evidence of a prior plea of guilty is inadmissible upon a retrial at which the accused pleads not guilty, neither should the stipulation be used. Furthermore, to permit such use of the stipulation would be to enable the prosecution to evade the rule that applies to the use of the guilty plea; for if the stipulation were used at the rehearing, the defense, in order to minimize its effect, would be compelled to show that it had been made for purposes of processing the earlier guilty plea.

### G. USE OF GUILTY PLEA AS EVIDENCE OF OTHER OFFENSES

In *United States v. Caszatt*<sup>138</sup> the accused was charged with two separate offenses, neither of which was lesser included within the

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<sup>136</sup> *United States v. McFerrin*, 11 USCMA 31, 28 CMR 256 (1959).

<sup>137</sup> 11 USCMA 52, 28 CMR 276 (1959).

<sup>138</sup> 11 USCMA 705, 29 CMR 621 (1960).

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other. There was one element of proof, however, that was common to both offenses. The Court held that the accused's plea of guilty to one of the offenses could not be used as evidence of the common element in the other offense.

### H. SCOPE OF CROSS-EXAMINATION OF ACCUSED

In *United States v. Johnson*<sup>139</sup> the accused elected to testify with respect to one of two offenses with which he was charged, but during the course of his direct testimony he made a non-exculpatory statement concerning the other offense. It was held that the prosecution was not entitled to cross-examine the accused with respect to the latter offense, since the statement was intended to be only a part of the accused's testimony on the first offense and was only an incidental and natural reference to the other offense.

Unlike *Johnson*, which involved an asserted right of the prosecution to extend the scope of cross-examination to offenses concerning which the accused elects *not* to testify, the case of *United States v. Marymont*<sup>140</sup> involved a limitation on the right of the prosecution to cross-examine the accused on the offense concerning which he *does* elect to testify. Marymont was charged with the murder of his wife and with adultery. He elected to testify with respect to the murder charge only, and his testimony on direct examination did not pertain to the adultery charge. The adulterous relationship that formed the basis of the adultery charge was relevant to the murder charge as tending to establish a motive for the murder. In view of that relevancy the Court recognized that if the two offenses had not been joined for a single trial, it would have been permissible for the prosecution to cross-examine the accused concerning the adulterous relationship when he elected to testify with respect to the murder charge. It was held, however, that the Government, in choosing to make the motive for the murder the basis of a separate charge, had thereby lost the right to cross-examine the accused concerning the adulterous relationship, despite its relevancy to the offense with respect to which he had elected to testify. To hold otherwise, reasoned the Court, would be to permit the Government to combine separate offenses in such a manner as to hamper the presentation of the defense by requiring, in effect, that the accused admit the commission of the adultery offense in order to testify concerning the murder charge.

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<sup>139</sup> 11 USCMA 113, 28 CMR 337 (1960).

<sup>140</sup> 11 USCMA 745, 29 CMR 661 (1960).

## VII. POST-TRIAL REVIEW

### A. POWER OF COMMUTATION

In *United States v. Russo*<sup>141</sup> the Court, overruling prior cases,<sup>142</sup> held that the convening authority and the board of review have the power to commute a death sentence to dishonorable discharge, forfeitures, and confinement at hard labor. Subsequent to the end of the survey period the Court made it clear that it had intended in *Russo* to uphold the right of the convening authority and the board of review to exercise powers of commutation, not only in the case of a death sentence, but with respect to *all* types of sentences.<sup>143</sup> Since the power to commute means the power to change the nature of the adjudged punishment, the question arises as to what extent the nature of the punishment can be changed by commutation. A very important limitation is that the commuted form of the sentence must be not more severe than the existing sentence.<sup>144</sup> That requirement is likely to be difficult of application, for while it has been decided that confinement is less severe than death, and a reprimand is less severe than a punitive discharge,<sup>145</sup> there are many other kinds of sentences the relative severity of which will be definitively determined only by a series of judicial decisions.

### B. REHEARINGS

When a rehearing is ordered as to sentence only, it may not be held before a special court-martial if the original trial was by general court-martial,<sup>146</sup> although a rehearing as to both findings and sentence may be held before a special court even though the original trial was before a general court.<sup>147</sup>

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<sup>141</sup> 11 USCMA 352, 29 CMR 168 (1960).

<sup>142</sup> *United States v. Goodwin*, 5 USCMA 647, 18 CMR 271 (1955); *United States v. Freeman*, 4 USCMA 76, 15 CMR 76 (1954).

<sup>143</sup> *United States v. Plummer*, 12 USCMA 18, 30 CMR 18 (1960).

<sup>144</sup> Par. 88a, MCM, 1951; *United States v. Russo*, *supra* note 141; *United States v. Plummer*, *supra* note 143.

<sup>145</sup> *United States v. Kelley*, 5 USCMA 259, 17 CMR 259 (1954).

<sup>146</sup> *United States v. Martinez*, 11 USCMA 224, 29 CMR 40 (1960).

<sup>147</sup> *United States v. Cox*, 12 USCMA 168, 30 CMR 168 (1961). This case was decided after the end of the survey period.

# SURVEY OF MILITARY JUSTICE

## VIII. SENTENCE AND PUNISHMENT

### A. INSTRUCTIONS ON MAXIMUM PUNISHMENT

The maximum sentence which may be adjudged on any rehearing is limited to the lowest quantum of punishment approved by a convening authority, board of review, or other authorized reviewing body prior to the second trial, unless the sentence reduction is expressly and solely predicated on an erroneous conclusion of law.<sup>148</sup> In *United States v. Jones*<sup>149</sup> the Court held that the law officer erred by instructing, at a rehearing on sentence only, as to the maximum punishment authorized for the offense under paragraph 127c of the Manual despite the fact that the convening authority had previously approved only a reduced sentence. The law officer should have instructed the court only as to the "adjusted maximum sentence;" i.e., the sentence as previously approved by the convening authority became the maximum sentence imposable upon the rehearing. In *United States v. Eschmann*<sup>150</sup> the law officer erred by instructing, upon a rehearing on sentence only, both as to maximum sentence authorized for the offense under paragraph 127c and the sentence imposed by the original court-martial. The Court held that since the limitations of paragraph 127c were no longer relevant, the rehearing should not have been informed of them. In *United States v. Green*<sup>151</sup> the Court ruled that the president of the special court-martial erred by instructing the Court on the maximum sentence authorized for the offense under paragraph 127c, which punishment was in excess of the statutory limitations on the sentences of special courts-martial.

The rule, therefore, would seem to be that the court-martial should be instructed only as to the *maximum sentence which that particular court-martial may adjudge.*

### B. EXECUTION OF PUNITIVE DISCHARGE PURSUANT TO REQUEST OF ACCUSED PRIOR TO EXPIRATION OF PERIOD FOR PETITION FOR REVIEW

In *United States v. Doherty*<sup>152</sup> the Court held that an accused had a right to have his conviction reviewed by the Court of Mili-

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<sup>148</sup> See *United States v. Dean*, 7 USCMA 721, 23 CMR 185 (1957).

<sup>149</sup> 10 USCMA 532, 28 CMR 98 (1959).

<sup>150</sup> 11 USCMA 64, 28 CMR 288 (1959).

<sup>151</sup> 11 USCMA 478, 29 CMR 294 (1960).

<sup>152</sup> 10 USCMA 453, 28 CMR 19 (1959).

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tary Appeals under the provisions of Article 67(b)(3) of the Uniform Code even though he had requested that final action be taken in his case and, pursuant to this request, he had been dishonorably discharged from the service. In *United States v. Green*<sup>153</sup> the Court, faced with a situation similar to the *Doherty* case, held that the accused's right to have his conviction reviewed by the Court of Military Appeals may or may not be exercised as the accused sees fit. A request for final action<sup>154</sup> does not preclude the accused from petitioning the Court within the statutory period even though he may have been separated from the service in the interim.

The characterization of a discharge so executed remains an unsettled issue. From a reading of the *Green*, *Doherty*, and related cases, as well as pertinent opinions of The Judge Advocate General, the following propositions concerning the state of the law pertaining to the characterization of such discharges are advanced:

(1) Where the accused is sentenced to a punitive discharge, and prior to completion of appellate review he requests the execution of his discharge, if he does not petition the Court, the punitive characterization of his discharge becomes final and conclusive as of the date ordered executed ;

(2) Where the accused decides to petition the Court, and the petition is granted, the characterization of the discharge as punitive is, during the pendency of the appeal, of no legal effect. If this appeal fails and the sentence is affirmed, the previous execution of the punitive discharge is finalized, and the effective date of the punitive discharge is the date the discharge was first ordered executed ;<sup>155</sup> and

(3) Where the accused's petition results in a voiding of the previously ordered punitive discharge, the accused may be restored to duty.

Three interesting possibilities are suggested in this last sentence. Suppose the service concerned does not desire to restore the man to active duty. If the individual does not desire to be

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<sup>153</sup> 10 USCMA 561, 28 CMR 127 (1959).

<sup>154</sup> Par. 100c, MCM, 1951, (Army Supp. 1959).

<sup>155</sup> The effective date of the punitive discharge in such a case is not absolutely clear. Chief Judge Quinn and Judge Latimer indicate in *Green, supra*, that they would agree with this statement. Judge Ferguson, however, would require revocation of the previously ordered discharge, with a new execution required subsequent to the Court's decision affirming the sentence. The authors believe that if an accused, utilizing the theory advanced by Judge Ferguson, attempted to recover pay and allowances accrued during the interim of his appeal to USCMA, he would meet with little success before the Comptroller General or the Court of Claims.

## SURVEY OF MILITARY JUSTICE

restored to active duty, the problem is simplified. The Judge Advocate General has ruled that where a member accepts such a void discharge as a termination of his military status,<sup>156</sup> and the Army acquiesces in the discharge by affirmative action or by inactivity for a substantial period,<sup>157</sup> a constructive discharge is effected. The type discharge issued, however, must be an *administrative type discharge*, the characterization of which is to be determined by the nature of the individual's service.<sup>158</sup>

Suppose, on the other hand, the individual concerned desires to be restored to active duty. May he compel the service concerned to restore him to active service? The Secretary of the Army has plenary power under the Act of 4 June 1920<sup>159</sup> summarily to order the discharge of a member of the Army prior to the normal expiration of his term of service and irrespective of the desire of such member to remain in the military service. The type of discharge to be issued, however, must be an administrative type discharge, the characterization of which is to be determined by the nature of the individual's service.

Finally, suppose the Army desires to restore the individual to duty, but the individual refuses to return, contending his void discharge releases him from his obligation to the service. It is believed the individual may be compelled to fulfill his service obligation. While the Secretary may void the service contract at any time, the individual, himself, does not have this power.<sup>160</sup>

### C. AUTOMATIC REDUCTIONS AND THE SIMPSON TYPE CASE

In *United States v. Simpson*,<sup>161</sup> decided 20 February 1959, the Court of Military Appeals held that the automatic reduction provisions of paragraph 126e of the Manual were judicial in purpose and effect and, therefore, they operated improperly to increase the severity of the sentence adjudged by a court-martial. Thus, a sentence to confinement no longer automatically reduced an accused to the lowest enlisted grade.

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<sup>156</sup> JAGA 1957/2588, 13 Mar 1957; *id.* 1958/1578, 30 Jan 1958; *id.* 1959/4124, date unknown.

<sup>157</sup> JAGA 1948/6616, 14 Oct 1948 (10 months' inactivity was sufficient acquiescence).

<sup>158</sup> JAGA 1959/4124, *supra* note 156.

<sup>159</sup> 41 Stat. 809, as amended, 10 U.S.C. § 1580 (1958).

<sup>160</sup> JAGA 1953/2661, 30 Mar 1953; *id.* 1957/2891, 4 Apr 1957.

<sup>161</sup> 10 USCMA 229, 27 CMR 303 (1959).

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Six months thereafter the Comptroller General disagreed with the *Simpson* holding and expressed the opinion that an enlisted person sentenced to confinement was automatically reduced to the lowest pay grade on an administrative basis.<sup>162</sup> He referred to a case then pending before the Court of Claims, which involved a former master sergeant who was seeking the difference between the pay and allowances of a master sergeant and that of an airman basic, the grade to which he had been reduced pursuant to paragraph 126e. The Comptroller General directed that pending a decision in that case, the service personnel concerned would be paid at the lowest enlisted grade.

Thereupon, the Court of Claims, in the *Johnson case*,<sup>163</sup> expressed the opinion that paragraph 126e of the Manual is administrative in nature and entirely valid. The Court stated that the cited paragraph indicates a decision by the President that those servicemen who are sentenced to a dishonorable or bad conduct discharge and confinement or hard labor shall be automatically reduced to the lowest enlisted grade.

In an effort to remedy the conflict of authorities and advise the various commands how to proceed in this area the Department of the Army, on 8 April 1960, issued Circular No. 624-8 which directed, in effect, that pending resolution of the current conflict in this area, service personnel receiving *Simpson* type sentences would be reduced to the lowest enlisted grade, citing the Comptroller General's opinion and paragraph 126e as authority for the reduction. Unfortunately, the Circular was so worded as to obscure its true purpose. Many commands felt this Circular was merely a flagging-type directive so that once the conflict was resolved the personnel concerned could be readily identified. The true purpose of the Circular, however, was to establish a Department of the Army policy that enlisted personnel receiving *Simpson* type sentences would be reduced to the lowest enlisted grade.<sup>164</sup>

In the meantime Congress enacted legislation to restore to the military the powers previously exercised under paragraph 126e. On 12 July 1960, Public Law 86-633<sup>165</sup> was signed by the President. The bill added a new article, Article 58(a), which provided, in pertinent part, that :

§ 58a. Art. 58a. Sentences: reduction in enlisted grade upon approval.

(a) Unless otherwise provided in regulations to be prescribed by the Secretary concerned, a court-martial sentence of an enlisted member in

<sup>162</sup> Ms. Comp. Gen. B-139988, 19 Aug 1959.

<sup>163</sup> *Johnson v. United States*, 280 F.2d 856 (Ct. Cl. 1960).

<sup>164</sup> That this was the purpose of DA Cir. 624-8, 13 Apr 1960, was clarified by DA Cir. 624-24, 2 Aug 1960.

<sup>165</sup> 74 Stat. 468 (1960).

## SURVEY OF MILITARY JUSTICE

pay grade above **E-1**, as approved by the convening authority, that includes—

- (1) a dishonorable or bad conduct discharge;
  - (2) confinement; or
  - (3) hard labor without confinement; reduces that member to pay grade **E-1**, effective on the date of that approval.
- \* \* \* \*

A summary of the opinions prepared by The Judge Advocate General pertaining to this and related problems follows :

(1) Reductions made pursuant to Article 58(a) are *administrative* as opposed to penal. Therefore, the limitations of the *ex post facto* clause<sup>166</sup> and holding of *United States v. Simpson*<sup>167</sup> are not applicable. The provisions of Article 58(a) apply to offenses committed and courts-martial sentences adjudged both prior to and after 12 July 1960 provided the convening authority's approving action occurs on or after 12 July 1960;<sup>168</sup>

(2) A suspension by the convening authority of that portion of a court-martial sentence requiring automatic reduction pursuant to Article 58(a) is ineffective to prevent the automatic reduction;<sup>169</sup>

(3) Where a court-martial sentence provides for an *intermediate reduction* and confinement or hard labor without confinement, the court-martial sentence is legal and consistent<sup>170</sup> and the convening authority may legally approve such a sentence. In *such* cases, pursuant to Article 58(a), the accused, nevertheless, is reduced administratively to the lowest enlisted grade effective on the date of the convening authority's action;<sup>171</sup> and

(4) It is not prejudicial error for the law officer not to give sua *sponte* instructions on the effect of the Comptroller General's decision in this area.<sup>172</sup> It is submitted that there is, therefore, no requirement that the law officer instruct on the effect of Article 58(a), which is administrative to the same extent as the Comptroller General's decision and should not be injected into court-martial proceedings.<sup>173</sup> Law officers and presidents of special courts-martial should, however, include reduction in grade in

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<sup>166</sup> U.S. Const. art. I, § 9.

<sup>167</sup> *Supra* note 161.

<sup>168</sup> JAGJ 1959/2173, 5 Aug 1960.

<sup>169</sup> JAGJ 1953/5977, 7 Aug 1953; JAGJ 195912173, *supra* note 168.

<sup>170</sup> *Contra*, *United States v. Flood*, 2 USCMA 114, 6 CMR 114 (1952); CM 357430, *Rivera*, 7 CMR 323 (1953).

<sup>171</sup> JAGJ 1960/8544, 6 Sep 1960; see *United States v. Armbruster*, 11 USCMA 596, 29 CMR 412 (1960) (Judge Latimer's opinion); *but cf.* CM 404965, *Goodman*, 14 Dec 60.

<sup>172</sup> *United States v. Armbruster*, *supra* note 171.

<sup>173</sup> *Zbid.*

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their instructions as to the maximum permissible sentence and instruct that each kind of punishment is separate, and not inclusive by implication or otherwise in any other type of punishment.

One other related problem was presented to the **Court** in the *Armbruster* case. The accused, an airman **first class**,<sup>174</sup> was sentenced to be confined at hard labor for one month, to be reduced one grade to airman second class, and to forfeit two-thirds pay per month for six months.<sup>175</sup> The convening authority modified the sentence by converting the forfeitures to a specific amount, ninety-four dollars per month for six months. The accused's basic pay as an airman second class would be one hundred forty-one dollars. The convening authority, therefore, based the two-thirds forfeiture per month on this basic pay rate. The accused, however, by virtue of the Comptroller General's **opinion**,<sup>176</sup> would be paid as a basic airman (**E-1**), with a basic pay rate of one hundred and five dollars per month. The approved forfeiture was, therefore, in excess of two-thirds of the accused's actual pay. The Judge Advocate General of the Air Force certified this problem to the Court in *Armbruster*:

(d) Did the convening authority err in converting the forfeitures adjudged in fractional terms to an amount permissible for the grade to which the accused was expressly reduced, but excessive for the amount of pay actually credited in view of the Comptroller General's Decision **No. B-139 988**?

The Court's disposition of the *Armbruster* case did not require them to answer this question. Nevertheless, Judge Latimer indicated in his opinion that he would rule that the convening authority did not err by approving such a forfeiture.

The Court has held that administrative considerations, such as the Comptroller General's **decision**,<sup>177</sup> or administrative rulings by an agency or officer of the Government relating to the powers of a court-martial, have no place in court-martial proceedings, which proceedings are judicial in **nature**.<sup>178</sup> The convening authority may legally approve forfeitures which are permissible for the grade to which the accused was expressly reduced because such an action is judicial in nature, and the Court has indicated that it will not permit administrative rulings to be injected into

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<sup>174</sup> Army equivalent to Corporal (**E-4**).

<sup>175</sup> The form of the sentence was contrary to the provision of par. **126h(1)**, MCM, **1951**, which states that forfeitures will be expressed in dollars, or dollars and cents. See par. **13-123**, AR **37-104**, **3 Aug 1960**.

<sup>176</sup> Note **162 supra**.

<sup>177</sup> *Ibid*.

<sup>178</sup> *United States v. Armbruster*, *supra* note **171**.

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judicial proceedings so as to read inconsistencies into a sentence that is otherwise legally permissible for a court-martial to adjudge.

However, it is suggested that finance and accounting officers are obligated in such circumstances to collect only two-thirds of the amount of pay actually credited to an accused by virtue of the Comptroller General's decision.<sup>179</sup> This determination reflects an administrative ruling made by the Chief of Finance, which determination is not a part of any court-martial judicial proceedings.

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<sup>179</sup> B-139988, *supra*. See par. 13-124d(2) and 13-126, AR 37-104, 3 Aug 1960.



## COMMENTS

**INTERROGATION OF SUSPECTS BY “SECRET” INVESTIGATION.”** The impact of the recent case of *United States v. Souder*<sup>1</sup> upon the detection and investigation of crime within the Armed Forces far exceeds that indicated by its highly unusual facts. Therein, all members of the Court of Military Appeals agreed that the mere fact that a military person is to all outward appearances a civilian acting entirely as such, does not relieve him of the necessity of complying with Article 31b, Uniform Code of Military Justice,<sup>2</sup> before he interrogates one whom he suspects of having committed a criminal offense. The unanimous affirmation of this principle casts serious doubt upon the present validity of the prior opinion of a majority of the Court in *United States v. Gibsons* that an undercover agent whose investigative purpose is unknown to the suspect with whom he is dealing is not bound by Article 31b.

In order to put the *Souder* case in proper perspective it is necessary to consider the development by the Court of Military Appeals of certain principles concerning the classes of individuals who are bound by Article 31b.<sup>4</sup>

The Article by its terms requires all persons “subject to” the Uniform Code of Military Justice to advise a suspect of his right to remain completely silent before interrogating him. In order to effectuate the intent of Congress in enacting the statute, a similar requirement is imposed upon any individual not subject to the Code who is acting as an agent of the military authorities for the purpose of criminal investigation.<sup>6</sup> To hold otherwise would be to allow military investigators to “evade by subterfuge the duty imposed by this Article.”<sup>6</sup>

However, the duty to give an Article 31b warning does not bind every individual subject to the Code who interrogates a

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\* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School nor any other governmental agency.

<sup>1</sup> 11 USCMA 59, 28 CMR 283 (1959).

<sup>2</sup> 10 U.S.C. § 831(b) (1958).

<sup>3</sup> 3 USCMA 746, 14 CMR 164 (1954).

<sup>4</sup> See Maguire, *The Warning Requirement of Article 31(b): Who Must Do What To Whom and When?*, Mil. L. Rev., September, 1968, p. 1, for an analysis of this provision.

<sup>5</sup> United States v. Holder, 10 USCMA 448, 28 CMR 14 (1959).

<sup>6</sup> United States v. Grisham, 4 USCMA 694, 696, 16 CMR 268, 270 (1954).

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suspect. Over the course of the years, the Court of Military Appeals has developed the additional requirement that the interrogator must be acting in furtherance of an official investigation into a suspected crime before the duty to warn comes into play. It has achieved this result by looking to the purpose of the statute to eliminate any belief on the part of a suspect that he has a military duty to cooperate in a criminal investigation of himself, as well as the possible coercion, which may be inherent in the interrogation of a subordinate by his military superior. It is obvious that neither of these factors exist when the questioner clearly is acting in a purely personal capacity, as, for example, when the victim of a barracks larceny seeks to recover his money from the suspected thief,<sup>7</sup> and in such situations Article 31b does not apply.<sup>8</sup>

When the interrogation is being conducted by an individual who, although acting in an official capacity, is not seeking evidence or information for investigative purposes but rather is merely discharging an official duty unrelated to criminal investigation, there is no duty to give an Article 31b warning. In this situation, the Court finds that to impose the literal requirements of Article 31b would greatly inhibit the necessary administration of the Armed Forces and, therefore, will not impose the warning requirement upon non-investigative officials seeking information which is reasonably necessary to the discharge of their official duties. Thus, a medical officer who questions a patient in order to confirm his suspicion that the latter is a drug addict but does so for the purpose of acquiring information for treatment purposes need not first advise the patient of his Article 31 rights.<sup>9</sup> Although Congress did not intend that doctors "be allowed to ferret out facts for prosecution purposes in true detective style," it "must have intended to permit them to continue to function as doctors and if that is their primary purpose in the acquisition of medical data, then they should be unhampered in their search for the truth."<sup>10</sup> Similarly, an officer having supervisory responsibility for certain funds could question the custodian, in confinement under charges of having embezzled from one fund, concerning the records of another fund without giving him any preliminary warning. The interrogation "was not only consistent with the duties imposed upon the parties, but it was required by their relationship to the fund" and the officer was

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<sup>7</sup> *United States v. Trojanowski*, 5 USCMA 305, 17 CMR 305 (1954).

<sup>8</sup> *United States v. Dandaneau*, 5 USCMA 462, 18 CMR 86 (1955); *United States v. Armstrong*, 4 USCMA 248, 15 CMR 248 (1954).

<sup>9</sup> *United States v. Baker*, 11 USCMA 313, 29 CMR 129 (1960).

<sup>10</sup> *Id.* at 317, 29 CMR at 133.

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not “seeking to obtain incriminating evidence against the accused.”<sup>11</sup>

The warning requirement, then, is binding upon those individuals who are conducting interrogations in furtherance of an official investigation into a known or suspected crime in pursuit of information or evidence to be used for investigative or prosecution purposes. How does this principle apply in the case of an official investigator who has assumed some other “unofficial” guise for the purpose of investigation? Does the fact that his official status is entirely unknown to the suspect, who may believe that he is dealing with but a fellow criminal, permit an exception to be made to the general rule? If not, then investigative undercover agents may not interrogate suspects without possibly committing violations of Article 98, UCMJ,<sup>12</sup> which makes it a criminal offense “knowingly and intentionally” to fail to comply with any provision of the Code. Furthermore evidence of any statements made by the unwarned suspect to the agent would be inadmissible at the suspect’s trial.<sup>13</sup>

This problem was first presented to the Court in *United States v. Gibson*.<sup>14</sup> In that case, the authorities selected a prisoner whom they had correctly assessed as being a potential informer and assigned him as the accused’s cell mate after giving him instructions to report to them any information which he might secure about the accused. The informant asked the accused what “he was in for” and obtained an incriminating reply which was used as prosecution evidence at the accused’s subsequent trial. All members of the Court agreed that the informant had no duty to warn. Chief Judge Quinn, in an opinion in which the late Judge Brosman concurred, held that informers, because of their necessary method of operation, are not bound by Article 31b, on the theory that to hold otherwise would make it impossible to use either informers or undercover agents as a means of criminal investigation, a result surely not contemplated by Congress. The majority believed that “Judicial discretion indicates a necessity for denying its [Article 31b] application to a situation not considered by its framers, and wholly unrelated to the reasons for

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<sup>11</sup> *United States v. Haskins*, 11 USCMA 365, 369, 29 CMR 181,185 (1960).

<sup>12</sup> 10 U.S.C. § 898 (1958).

<sup>13</sup> UCMJ, art. 31d, 10 U.S.C. § 831d (1958). Evidence discovered as a result of such statements *might* also be inadmissible. See *United States v. Haynes*, 9 USCMA 792, 27 CMR 60 (1958), where Judge Ferguson expresses the view that an inadmissible statement can “taint” subsequently discovered evidence. Judge Latimer disagrees with this principle and Chief Judge Quinn expresses no opinion.

<sup>14</sup> 3 USCMA 746, 14 CMR 164 (1954).

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its creation.”<sup>15</sup> Judge Latimer, in a separate opinion, also found Article 31b inapplicable but solely because of the failure of the evidence to show that the informant was acting as an agent of the investigators and had been instructed to interrogate the accused. However, he disagreed with the principle announced by the majority, saying :

I would, however, suggest that a rule which grants an informer the right to violate a statute which controls other members of the armed services is so repugnant to the ordinary concepts of common sense that it ought to be struck down and never revived. While I neither commend nor condemn the use of undercover agents, I see no reason to place them in an exalted position. Their conduct should, at least, be governed by principles controlling others and, because they can deceitfully conceal their identity by changes in apparel, should not be good cause to exempt them from complying with the law. Perhaps the principal misconception in the Court's opinion is that if we interpret the provisions of the Manual to include undercover agents, we thereby preclude their use by the Government. Of course, that is not true. We merely prevent them from obtaining evidence by interrogation. From my limited experience with their operations, I believe they can be used effectively if they listen, observe, and report. It is only when they seek to obtain a confession or admission by questioning an accused that they run afoul of the provisions of Article 31. . . . I believe that had members of Congress intended to free them from the restrictions of Article 31, the Code would have so stated. Congress did not see fit to grant them special privileges and I am unwilling to warp the provisions of the Code for their benefit. Necessity may actuate Congress in legislating for their use, but it should not influence us to rewrite a statute.<sup>16</sup>

This issue then lay dormant for some five years until the Court granted review in the case of *United States v. Souder*,<sup>17</sup> for the purpose of passing upon the admissibility of a statement of the accused made under the following circumstances. Two accordians were stolen from a sailor. The naval investigators furnished all music stores and pawn shops in the town adjoining the base with a description of the stolen property and requested that they be informed if the accordians turned up. Through one of these coincidences that so frequently do make truth stranger than fiction, the accused selected, out of all the music shops in town, one which happened to be owned by a reserve lieutenant (j.g.) on active duty and also selected a time when the owner himself happened to be working in his store. Needless to say, when the accused entered the store with the stolen accordians and offered to sell them, he was completely unaware that he was dealing with a naval officer. The proprietor recognized the ac-

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<sup>15</sup> *Id.* at 752, 14 CMR at 170.

<sup>16</sup> *Id.* at 757, 14 CMR at 175.

<sup>17</sup> 11 USCMA 59, 28 CMR 283 (1959).

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cordians as the ones described in the report which had been sent to his shop by the naval authorities and before notifying the authorities questioned the accused for the admitted purpose of getting him to make a false and incriminating claim of ownership of the property. The interrogation was not, of course, prefaced by an Article 31 warning.

In three separate opinions, all members of the Court agreed that the officer-proprietor had violated Article 31b despite the fact that his naval status was not known to the accused. Judge Ferguson finds that a warning was required because the proprietor "was a 'person subject to this chapter interrogating an individual whom he suspected of an offense' . . . [who] conversed with the accused and his companion for the express purpose of obtaining incriminating admissions from them."<sup>18</sup> Chief Judge Quinn disagrees with Judge Ferguson's implication that the naval status of the proprietor is "the whole of the matter" but would hold that the status of the interrogator together with his purpose in questioning the accused brought Article 31b into play.<sup>19</sup> Judge Latimer agrees with the Chief Judge that the crucial factor is that the interrogator was in fact acting in an official investigative capacity and not merely as a music shop proprietor, saying:

...[T]he testimony convinces me that his activities were solely in aid of the investigation. He was not acting as a 'fence' and carrying on a business transaction with the accused for the purpose of purchasing the stolen goods. He knew an offense had been committed, and he was solely concerned with delaying tactics . . . until such time as he could notify the appropriate naval criminal investigator. His questions sought information to establish either joint or separate possession of the stolen goods, and his purpose. . . was to obtain evidence which would aid in convicting the accused. The officer had no personal interest in the goods which he was trying to protect, he was not the victim of the offense, and he was not seeking to get the details of a crime which was in the process of being committed. From the time he commenced playing in the drama until he ceased being a member of the cast, he was a naval officer acting upon a request of naval authorities to aid in solving a crime which was fully completed before his intervention. . . . The argument that this officer was in the same category as other operators of music stores and, therefore, his acts were those of a civilian not subject to military law must fail unless it is established that he acted independently of his service obligations.<sup>20</sup>

The application of the opinions expressed in the *Souder* case to any interrogation of a suspect by an official investigator acting as an undercover agent appears clear. There can be no doubt that

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<sup>18</sup> *Id.* at 61, 28 CMR at 285.

<sup>19</sup> *Zbid.*

<sup>20</sup> *Id.* at 63, 28 CMR at 287.

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such an agent would be bound by the provisions of Article 31b in like manner as the ostensible civilian in *United States v. Souder*. Whether or not an informer such as was used in the *Gibson* case violates Article 31 would depend upon his status as an official investigator. Close scrutiny of all the facts would be required to determine whether he had been instructed, explicitly or implicitly, to obtain information about a suspected offense or offender, in which case Article 31 clearly would apply, or whether he had been told no more than that the authorities would be interested in any information he might secure about crime in general,<sup>21</sup> in which case it *might* not apply.

It would of course be completely incompatible with the very essence of the status of an undercover agent or informer to give an Article 31 warning. He could not do so and remain "undercover" or expect to continue as an informer. However, this **does** not mean that these standard investigative techniques may not be used. To quote Judge Latimer, "We merely prevent them from obtaining evidence by interrogation." They may still "listen, observe and report."<sup>22</sup>

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<sup>21</sup> This latter interpretation was the one reached by Judge Latimer on the facts in the *Gibson* case, *supra*.

<sup>22</sup> *United States v. Gibson*, 3 USCMA 746, 767, 14 CMR 164, 176 (1954).

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**LIMITATIONS ON POWER OF THE CONVENING AUTHORITY TO WITHDRAW CHARGES.\*** Charges were preferred against a Navy airman for a 79-day AWOL. Together with ten other accused charged with different offenses, he attended the convening of a special court-martial, which was to hear all 11 cases. He was then excused to await his turn for pre-arraignment proceedings and trial. Four days later he was arraigned before a different special court-martial, appointed the day before. The defense counsel thereupon moved to dismiss the charge, on the grounds that the case had been ordered withdrawn from the original court-martial because of the lenient sentences adjudged in the preceding seven trials. After the motion was denied Williams pleaded guilty and received a maximum sentence, the new court-martial having considered his three previous convictions.

The Court of Military Appeals granted review on the question of “whether withdrawal of the case . . . from the original court-martial and reassignment to the present court-martial prejudiced the accused.” With Judge Latimer dissenting, the Court held that the accused was prejudiced on the sentence proceedings,<sup>1</sup> Subparagraph 56b, Manual for Court-Martial, United States, 1951, provides in part, that “a specification will not be withdrawn arbitrarily or unfairly to the accused in any case.” This provision of the Manual was intended to apply to withdrawal of charges before arraignment, as well as after. The Government was not entitled to seek a more favorable forum. “Accordingly, and in view of paragraph 56b . . . we hold that once a court-martial has been convened to try . . . charges, they may not be withdrawn . . . without good cause.”<sup>2</sup>

Since this is the Court of Military Appeals’ first opinion restricting the convening authority’s power to withdraw charges *before* arraignment, understanding of its significance requires knowledge of the Court’s previous interpretation of the Manual rules relating to both the withdrawal of charges and the convening authority’s power to vary the composition of courts-martial.

Pertinent provisions of the Manual make clear the purported circumstances under which charges may be withdrawn from a

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\* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General’s School nor any other governmental agency.

<sup>1</sup> United States v. Williams, 11 USCMA 459, 29 CMR 275 (1960).

<sup>2</sup> *Id.* at 462, 29 CMR at 278.

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court-martial. Only the convening authority may withdraw a case from trial.<sup>3</sup> Subparagraph 56b of the Manual implies that if he withdraws the case *before* arraignment, the convening authority need not justify his action.<sup>4</sup> This interpretation is consonant with the Manual's concept of the convening authority's broad appointive powers set forth in paragraph 37, where the convening authority is authorized to make changes in the composition of the court-martial before arraignment,<sup>5</sup> and even after arraignment, for "good cause."<sup>6</sup> Even more pertinently, it is provided that: "Any unarraigned case which is pending before the old court may be withdrawn from it and referred to the new court."<sup>7</sup> Arraignment—unlike civilian procedure—follows the swearing (or "convening") of the court personnel, and challenging procedures, in that order. It consists solely of the formality of (1) distributing the charges to the court members, (2) reading them to the accused, and (3) calling upon the latter to plead, the plea itself not being part of the arraignment.<sup>8</sup> Only after arraignment and the receipt of evidence on the general issue may the accused avail himself, before the new court, of the defense of former jeopardy,<sup>9</sup> if the charges were withdrawn for any but the most urgent reasons of "military necessity" or because of "manifest necessity in the interest of justice."<sup>10</sup>

Thus, the "arraignment" is the point where the Manual first limits the discretion of the convening authority in varying the composition of the court-martial. Before this event, therefore, without limitation he could vary the composition of the court-martial to militate against the accused's right to a fair trial. For instance, before arraignment the convening authority could appoint all new members in place of those whose answers on *voir dire*

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3 Subpar. 56a, MCM, 1951; see also subpar. 122b, MCM, 1951.

4 "When a specification is withdrawn **after** evidence has been taken on the issue of guilt or innocence, the reasons therefore should be stated in the record of trial." (Emphasis supplied.) Subpar. 56b, MCM, 1951; see also App. 8a, MCM, 1951, to the same effect.

5 Subpar. 37a, MCM, 1951. This includes the authority to change the entire composition of the court. In such a case no logical distinction can be made between the process of "amending" the composition of the entire original court and the device of referring it to another one.

6 Subpar. 37b, MCM, 1951. See also subpar. 39e, MCM, 1951: "The law officer should not be changed during the progress of a trial except for a good reason." "Good reason" has been interpreted to mean the "good cause" required for the relief of members of a court-martial after arraignment. See *United States v. Boysen*, 11 USCMA 331, 29 CMR 147 (1960).

7 Subpar. 37c (1), MCM, 1951.

8 Subpar. 65a, MCM, 1951.

9 *United States v. Wells*, 9 USCMA 509, 26 CMR 289 (1958).

10 Subpars. 56b, 68d, MCM, 1951.

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indicated too much sympathy for the accused, a procedure not unlike that employed in the principal **case**;<sup>11</sup> he could add a new member, after the accused had exercised his sole preemptory challenge.<sup>12</sup>

In post-arraignment procedures affecting the composition of the court-martial, the Court has not hesitated to plug up such chinks in the armor against attempted unlawful command influence; it has done so on a permanent, rather than on a case-by-case basis. Thus, the Court has required the convening authority in all cases to justify his relief of a member during the trial, even though the Manual purports to make the convening authority's decision of what is good cause for the relief a non-reviewable one.<sup>13</sup> The Court has required a showing of "good cause" to be made for the post-arraignment addition of a **member**,<sup>14</sup> despite any express Code restriction and in view of the merely precatory wording of the Manual.<sup>15</sup> These decisions affect Manual rules made by the President pursuant to a Congressional delegation of authority; this same delegation, however, contains the proviso that the President's rules should not "be contrary to or inconsistent with the Code."<sup>16</sup> Article 37 of the Code prohibits the convening authority from influencing the action of a court-martial by an "unauthorized means." The legislative history of the Code reveals the intent of Congress to interpose this Article as a protection against abuse of the broad appointive powers which it allowed the convening authority to retain solely for administrative convenience, rather than for disciplinary reasons.<sup>17</sup> Apparently the Court believes that "unauthorized means" cannot become "authorized" merely because they are set forth by the President in the Manual—at least when there is a reasonable possibility that the spirit of Article 37 could be violated thereby.

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<sup>11</sup> *United States v. Williams*, *supra* note 1. The Court restricted the Government's remedy in such a case to individual challenges of the overly sympathetic members.

<sup>12</sup> The preemptory challenge must be exercised before arraignment, and the accused is not entitled to another one upon the addition of a new member. Subpars. 61*d*, 62*e*, MCM, 1951; ACM S-8175, Graham, 14 CMR 645 (1954); see ACM 7703, *Gastellun*, 14 CMR 637 (1954).

<sup>13</sup> Subpar. 37*b*, MCM, 1951. *United States v. Grow*, 3 USCMA 77, 11 CMR 17 (1953); see *United States v. Boysen*, *supra* note 6.

<sup>14</sup> *United States v. Whitely*, 5 USCMA 786, 19 CMR 82 (1955).

<sup>15</sup> Subpar. 37*b*, MCM, 1951: "Ordinarily he should not appoint additional members to a . . . court-martial after . . . arraignment . . . unless the court is reduced below a quorum."

<sup>16</sup> UCMJ, art. 36.

<sup>17</sup> Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess. 1113-14 (1949).

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It is not surprising, therefore, that the Court should adopt the same attitude toward the pre-arraignment procedures of the Manual as it has had towards the provisions affecting *post*-arraignment powers of the convening authority.<sup>18</sup> That is why that portion of the opinion of the principal case demanding “good cause” for the post-convening withdrawal of charges should not be considered as pure dictum. It is true that the question certified in *Williams* was only whether or not the accused had been prejudiced by referring the case to another court-martial. But “prejudice” presupposes “error,” which Judge Latimer’s dissent found missing because of the express authority of subparagraph 37c (1) of the Manual. The majority, which did not even mention this provision, found their source of “error” elsewhere, in subparagraph 56b. At first blush it might appear that this authority was cited merely as a makeweight, prompted by the Court’s concern that maybe subparagraph 37c (1) actually *was* consonant with the Codal power of the convening authority to vary the court personnel before arraignment.<sup>19</sup> If this were so, then all the opinion would mean is that the convening authority may still withdraw charges, at will, before arraignment, and that the burden would be on the defense to establish an improper attempt to exert command influence. On the other hand the Court may have used subparagraph 56b as an excuse to engraft a permanent qualification onto subparagraph 37c (1). The latter now seems the intendment of the majority, for it characterized the pre-arraignment withdrawal as “an unusual action.” Also, shortly after its decision in *Williams*, the Court ruled that a convening authority may abuse his power under the Code, in handpicking a court-martial so as to raise a reasonable suspicion that he is trying to control its processes, even though he has never communicated with its members.<sup>20</sup> If the Court was not reluctant to review the convening authority’s exercise of discretion in appointment of courts-martial, it is unlikely that it hesitated to do the same regarding his power

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<sup>18</sup> For example, the Manual would allow the trial to proceed before arraignment, despite the unauthorized absence of a member. Subpar. 41d(3), MCM, 1951. The Court, however, interpreted this provision to require suspension of the proceedings where it appears the member was improperly excused, as distinguished from being AWOL. *United States v. Allen*, 5 USCMA 626, 18CMR 250 (1955).

<sup>19</sup> UCMJ, arts. 22, 25, 29.

<sup>20</sup> *United States v. Hedges*, 11 USCMA 642, 29 CMR 458 (1960) : “Obviously that provision [Article 25d(2), UCMJ] gives discretion to the convening authority in his selection of members, but as in every other field of the law that discretion is reviewable if abused.” (Concurring opinion of Judge Latimer.)

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to withdraw charges—an area not so clearly defined by an act of Congress.

What, then, is “good cause” for the pre-arraignment withdrawal of charges? It is something less than the “urgent and unforeseen military necessity” which is required for the withdrawal *after* receipt of evidence.<sup>21</sup> In *Williams* the Court did mention some examples of “good cause,” as cited in subparagraph 56*b*: Use of one of joint accused as a witness; a substantial defect in the pleadings.<sup>22</sup> Such reasons are patently innocent, the withdrawal being granted usually at the request of the accused. At the other end of the pole is the situation where, as in the principal case, the spectre of unlawful command influence is raised. In between is the area where a possibly improper motive of the convening authority may be neutralized by his *duty* to withdraw charges. For example, suppose that just before arraignment he wishes to refer newly discovered charges to trial. He has available the alternatives of joining the new charges to the pending ones, or of withdrawing the pending charges and referring them with the new charges to another court-martial.<sup>23</sup> If he chooses to withdraw the charges the convening authority might need justification, other than the Manual policy encouraging joinder of all known charges at the lowest court able to give an appropriate sentence.<sup>24</sup> Withdrawing a larceny charge from a special court-martial and joining it with a more serious charge of manslaughter at a general court-martial is obviously required by the Manual policy. On the other hand, withdrawing almost half a hundred minor bad check charges from a special court and referring them, with just a few more similar additional charges, to a general court could call for a showing of “good cause”—the additional charges not being sufficient cause in themselves.

A somewhat similar situation occurred in *United States v. Wells*,<sup>25</sup> decided before *Williams*. There, the sentence as approved

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<sup>21</sup> Subpar. 56*b*, MCM, 1951. Note that in *Williams*, Judge Ferguson expressly declined to comment on the validity of that portion of subparagraph 56*b* giving the convening authority power to declare a “mistrial” because of irregularities occurring at the trial. Compare this to Judge Brosman’s opinion in *United States v. Stringer*, 5 USCMA 122, 17 CMR 122 (1954).

<sup>22</sup> See also subpar. 68*b*(3), MCM, 1951.

<sup>23</sup> A third course of action—separate trial of the new charges—is not considered because the Manual requires joinder at a single trial of all known offenses. Subpars. 30*f*, 33*h*, MCM, 1951; further, the Court of Military Appeals allows an accused in pretrial confinement to insist on a speedy trial. *United States v. Brown*, 10 USCMA 498, 28 CMR 64 (1959).

<sup>24</sup> See note 23, *supra*.

<sup>25</sup> 9 USCMA 509, 26 CMR 289 (1958). In *Wells*, the charges were withdrawn just after arraignment, but before the receipt of evidence on the issues.

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by the board of review, amounted only to a bad conduct discharge, six months' confinement and partial forfeitures.<sup>26</sup> Significantly, the Court authorized a rehearing on the sentence or a board of review disapproval of the bad conduct discharge.<sup>27</sup> Here it would seem that the convening authority's duty to join known charges at a single trial did not quite justify the withdrawal of the original charges.

Who at the trial level will determine if "good cause" is established? Since the convening authority's power to withdraw charges is **absolute**,<sup>28</sup> the law officer at the first trial can do more than assure that the record of trial reveals the complete status quo. He can also record the objections, if any, of the accused. Then at the second trial the law officer has a complete record of the prior proceedings on which to base his decision to whatever relief is requested. If the delay between trials was inordinately long, and was caused by the unauthorized withdrawal of charges, then a motion to dismiss might lie for lack of speedy trial. If it were short, but there was a strong appearance of command influence, he might entertain a motion to continue the case pending a transfer of the case to another appointing authority.<sup>29</sup> This should be the result in *Williams*, where the Court authorized a rehearing on the sentence (accused had pleaded guilty), but did not say where it should be held. In deciding the motion, the Court would require the prosecution to establish "good cause," rather than have the defense show the withdrawal was *not* for good cause, for the reason that such a procedure is "unusual" and accords with the requirement "that specifications not be withdrawn 'arbitrarily or unfairly . . . in any case.'"<sup>30</sup>

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Recently the Court has held that after arraignment additional charges may not be referred to the original court, over the accused's objection. *United States v. Davis*, 11 USCMA 407, 29 CMR 273 (1960).

<sup>26</sup> NCM 56-03499, *Wells*, 19 March 1957 (Not reported). The Court of Military Appeals in its opinion did not state the approved sentence.

<sup>27</sup> Ostensibly this action was ordered because the members consulted the Manual during the sentencing procedures, although the case was tried more than a year before the decision in *United States v. Rinehart*, 8 USCMA 402, 24 CMR 212 (1957).

<sup>28</sup> UCMJ, art. 44(c); subpar. 56a, MCM, 1951.

<sup>29</sup> A motion for change in venue is authorized to avoid recurrence of unlawful command influence. *Cf.* *United States v. Hedges*, note 20 *supra*.

<sup>30</sup> *United States v. Williams*, 11 USCMA 459, 462, 29 CMR 275, 278 (1960).

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## COMMUNICATING THREATS — ITS RELATION TO EXTORTION AND PROVOKING SPEECHES AND GESTURES.\*

The Court of Military Appeals, in *United States v. Frayer*,<sup>1</sup> has considered again the relationship between the offenses of communicating threats,<sup>2</sup> extortion,<sup>3</sup> and provoking speeches and gestures.\* The existence of considerable overlap between these three offenses creates difficulty in administration. Clarification of their relative scope is therefore important.

### I. THE PROBLEM

The confusion over the scope of the three offenses results in large part from inadequacies in the draftsmanship of the Uniform Code of Military Justice. It would have been possible, for example, to have limited the extortion article to threats made for the purpose of obtaining something of value, a crime against property, and then face, in a separate article, the issue of what other threats should be made punishable. The offense of provoking speeches or gestures would be left to deal with the relatively less serious situations of threats made in jest but which raise sufficient risk of provoking a breach of the peace to make them of official concern. This would have served to clarify the principle upon which each offense is based and thus make it easier to resolve such ambiguity as might continue to exist. This was not done, however, and as a consequence the Court has found it necessary to deal with some threats under Article 134 with the result that there is now unfortunate confusion as to the precise scope of each of the three offenses.

Despite the fact that careful draftsmanship can and should minimize the areas of overlap between offenses, it is obvious that the problem is one which exists, in greater or less degree, in **all** criminal codes.<sup>6</sup> Reference to this was made by Judge Latimer in the *Frayer* case :

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<sup>1</sup> 11 USCMA 600, 29 CMR 416 (1960).

<sup>2</sup> UCMJ, art. 134.

<sup>3</sup> UCMJ, art. 127.

<sup>4</sup> UCMJ, art. 117.

<sup>5</sup> This is true in the most recently revised State Criminal Code. See Wis. Stat. (1957) 939.65, providing that when an act constitutes a crime under more than one statute, prosecution may be for one or all of such offenses but convictions are limited. See Wis. Stat. (1959) 939.66.

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There seems to be some misapprehension about the power of Congress to make an act a crime under two or more punitive Articles. There is no such proscription. . . . The Government may choose which punitive Article will be used. . . .<sup>6</sup>

Where overlap exists, there is need for sensible exercise of the discretion thus given to those who have responsibility for administering the Code. The first essential is for a clear understanding of the present scope of each of the offenses involved.

### 11. COMMUNICATING THREATS

The threat may be made to the victim of the threat or to a third party.<sup>7</sup> The threat may be of injury to the person, his property or his reputation.<sup>8</sup> The Court has construed the term "injury" broadly, although it has not as yet been called upon to deal with a threat of a very minor nature. In the *Frayer* opinion judgment was reserved on the issue of whether a "threat to injure a person's feelings is included."<sup>9</sup>

In *United States v. Rutherford*, Chief Judge Quinn said:

. . . [T]he purpose of imposing a penalty upon the communication of a threat in the military service is to prevent the ultimate harm which such threats foretell.<sup>10</sup>

So construed, the offense would be a form of attempt and should require the purpose to carry out the threat. However, in *United States v. Frayer*, Chief Judge Quinn said:

. . . [T]hreat to damage wrongfully the reputation of character of a person in the armed forces has substantially the same tendency to stir up conflict and disrupt good order and discipline as a threat to injure physically.<sup>11</sup>

So construed, the offense is a form of disorderly conduct and it should be immaterial whether there was a purpose to carry out the threat.

The declaration of the intent of the accused to do a wrongful act is an element of the offense which must be proved by the prosecution. However, proof of the declaration of intent is different from proof of the intent itself, which is not required to be proved. This was emphasized by the Chief Judge in *United States v. Humphrys*,<sup>12</sup> when he stated that:

<sup>6</sup> 11 USCMA 600,607, 29 CMR 416,423 (1960).

<sup>7</sup> *United States v. Rutherford*, 4 USCMA 461, 16 CMR 35 (1954).

<sup>8</sup> *United States v. Frayer*, 11 USCMA 600, 29 CMR 416 (1960), deals with a threat to reputation. Earlier cases deal with threats of personal violence.

<sup>9</sup> *Zel.* at 604, 29 CMR at 420.

<sup>10</sup> 4 USCMA 461, 462, 16 CMR 35, 36 (1954).

<sup>11</sup> 11 USCMA 600, 604, 29 CMR 416,420 (1960).

<sup>12</sup> 7 USCMA 306, 22 CMR 96 (1956).

## COMMUNICATING THREATS

... [A] specific intent on the part of the accused is not itself an element of the offense.<sup>13</sup>

The threat need not be of immediate injury. It may be made subject to a condition which there is no right to impose<sup>14</sup> or it may be a threat to cause injury in the future.<sup>15</sup> A threat, subject to a condition which the person does have a right to impose would raise the issue of whether the threat was a reasonable exercise of a right to use or threaten to use force. Thus a threat to hit someone unless he returns property which he has stolen would be privileged if a reasonable exercise of the privilege to use force to recapture property which has been stolen. A threat of injury so far in the future as to cast doubt on whether it will ever be carried out would presumably bear on the issue of the defendant's intention to carry out the threat.

Since the maximum punishment for communicating threats is the same as that for extortion and greater than that for provoking speeches or gestures, the communicating threats offense is adequate to deal with any threat of injury which is made with a purpose to carry it out. It is inadequate, however, to deal with a threat made without a purpose to carry it out. In these situations, resort must be to either extortion or provoking speeches or gestures.

### 111. EXTORTION

The offense of extortion requires a purpose "to obtain anything of value or any acquittance, advantage, or immunity of any description."<sup>16</sup> But, there need not be an intention to carry out the threat. For example, a person may threaten another with a purpose to obtain money under circumstances in which it is doubtful whether he intended to carry out the threat if not paid. This constitutes extortion, but not communicating threats.

### IV. PROVOKING SPEECHES OR GESTURES

The offense of provoking speeches or gestures requires that the threat (assuming a threat is involved) be of a kind likely to provoke a breach of the peace.<sup>17</sup> It is not necessary to establish an

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<sup>13</sup> *Id.* at 308, 22 CMR at 98.

<sup>14</sup> *United States v. Holiday*, 4 USCMA 454, 16 CMR 28 (1954).

<sup>15</sup> *United States v. Frayer*, 11 USCMA 600, 29 CMR 416 (1960).

<sup>16</sup> UCMJ, art. 127.

<sup>17</sup> NCM 290, *Hughens*, 14 CMR 509 (1953).

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intention to obtain anything of value or other advantage or an intention to carry out the threat. The offense is in the nature of disorderly conduct, dealing with cases of aggravated "horse-play."<sup>18</sup>

### V. A COMPARISON

The following brief definitions of each of the offenses will serve to highlight the distinctions between them.

*Article 134 Communicating Threats.* Any person subject to this Code who, with intent to eventually carry out the threat, threatens injury to the person, property or reputation of another and communicates such threat to the threatened person or another shall be punished as a court-martial may direct.

*Article 127 Extortion.* Any person subject to this Code, who, with intent to obtain anything of value, acquittance, advantage or immunity, threatens injury to the person, property or reputation of another and communicates such threat to the threatened person or another shall be punished as a court-martial may direct.

*Article 117 Provoking Speeches or Gestures.* Any person subject to this Code who makes any threat under circumstances in which such threat may provoke a breach of the peace, shall be punished as a court-martial may direct.

There are three major differences between the offenses thus defined: (1) communicating a threat requires a purpose to carry out the threat; the other two do not, (2) extortion requires a purpose to gain **advantage**; the other two do not, (3) provoking speeches and gestures require the likelihood of a breach of the peace; the other two do not.

### VI. PRE-EMPTION<sup>19</sup>

The pre-emption doctrine of *United States v. Norris*<sup>20</sup> has been considered on a number of occasions by the Court in relation to these three offenses. In each instance the doctrine has been rejected although not without dissent.

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<sup>18</sup> *United States v. Holiday*, 4 USCMA 28, 16 CMR 28 (1964).

<sup>19</sup> See Meagher, *The Fiction of Legislative Intent: A Rationale of Congressional Pre-emption in Courts-Martial Offenses*, Mil. L. Rev., July, 1960, p. 69.

<sup>20</sup> 2 USCMA 236, 8 CMR 36 (1963).

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The fact that a communication of a threat would also, under the specifications, constitute extortion does not preclude conviction under Article 134.<sup>21</sup> In the *Norris case*,<sup>22</sup> the Court held that Congress in defining larceny and wrongful appropriation in Article 121 had intended to cover the entire field of criminal conversion and, in so doing, expressed a purpose not to subject any other conversion to penalty under the Code. Since the power of defining offenses rests with the Congress the result reached was obviously proper, assuming that this was in fact the Congressional intent.<sup>23</sup> The difficulty lies in determining whether the legislature intended that there be no liability for conduct other than that prescribed by the specific punitive articles.

In the field of threats, the Court has held that the articles on extortion and provoking speeches and gestures were not intended to preclude liability for threats lying outside their scope.<sup>24</sup> Even Judge Ferguson who dissented in the *Frayer* case agreed that some threats may properly be punished under Article 134. He, however, urged a broader view of pre-emption which seems without support in the field of criminal law generally. It is his view that a conviction cannot properly be under Article 134 when the specification would support a conviction under the specific article dealing with extortion.<sup>25</sup> Thus a conviction under Article 134 for communicating a threat where a threat to kill was made in order to obtain "an advantage" would have to be reversed while it would be affirmed if the specifications or proof nowhere indicated a motive for the threat. This would be like urging the reversal of a second degree murder conviction on the ground that, although all the elements of second degree murder are present, an additional element is also present making the offense first degree murder. This kind of appeal has consistently been denied by civilian courts.<sup>26</sup> If the penalty for communicating threats were higher than that

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<sup>21</sup> United States v. Frayer, 11 USCMA 600, 29 CMR 416 (1960).

<sup>22</sup> See note 20 supra.

<sup>23</sup> United States v. Gebardi, 287 U.S. 112 (1932): ". . . [W]e perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished."

<sup>24</sup> There are two significantly different issues: (1) does the enactment of Articles 127 and 117 indicate an affirmative policy to leave unpunished other threats? (2) if not, do threats otherwise fall within Article 134 as being military offenses?

<sup>25</sup> United States v. Frayer, 11 USCMA 600, 610, 29 CMR 416, 425 (1960). The general rule is that a person cannot be convicted for two offenses under such circumstances, but that the specific crime does not preclude conviction for the more general offense. See A.L.I. Model Penal Code § 1.08 (Tent. Draft No. 5, 1966).

<sup>26</sup> See, e.g., *Hogan v. State*, 36 Wis. 226 (1874).

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for extortion it could be argued that there was a Congressional purpose not to subject the conduct falling within the extortion article to the higher penalty. But this is not the case. The maximum for both offenses is the same.

The argument has also been made that the article on provoking speeches and gestures pre-empts the field of threats other than those falling within the scope of the extortion article.<sup>27</sup> This was rejected by a majority of the Court though it presents a more difficult issue than the argument that extortion pre-empts all conduct within its scope. If it is assumed that Congress intended threats which do not constitute extortion to be dealt with as provoking speeches or gestures, then the creation of the Article 134 offense increases the maximum period of confinement from three months to three years.<sup>28</sup> However, if Congress intended that the provoking speeches or gestures article deal with those threats made in jest, then there would be no legislative declaration as to threats made with a purpose to carry out the threat. Under these circumstances, treating such threats as a serious offense under Article 134 is both explainable and defensible.

### VII. CONCLUSION

The current military law relating to threats is, in substance, perfectly defensible and probably more sensible than most civilian codes which deal with the problem of threats sporadically. The current military law is, however, subject to criticism because of the ambiguity of the punitive articles involved, an ambiguity which inevitably makes administration more difficult.

It is obviously important to have a sound criminal law. It is also important to achieve this by means of a code which is clear and capable of effective and consistent administration by persons not expert in the intricacies of substantive law interpretation. Better results are likely to stem from a code which is easily administered in ninety-eight percent of the cases, but which leaves two percent unresolved, than from a code which is so complex in its formulation that administration is difficult in the majority of cases.

Recent state criminal code revisions have demonstrated that it is possible, by careful draftsmanship, to state clearly and pre-

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<sup>27</sup> *United States v. Holiday*, 4 USCMA 454, 16 CMR 28 (1954).

<sup>28</sup> See dissenting opinion of Judge Brosman in *United States v. Holiday*, *supra* note 28, at 34.

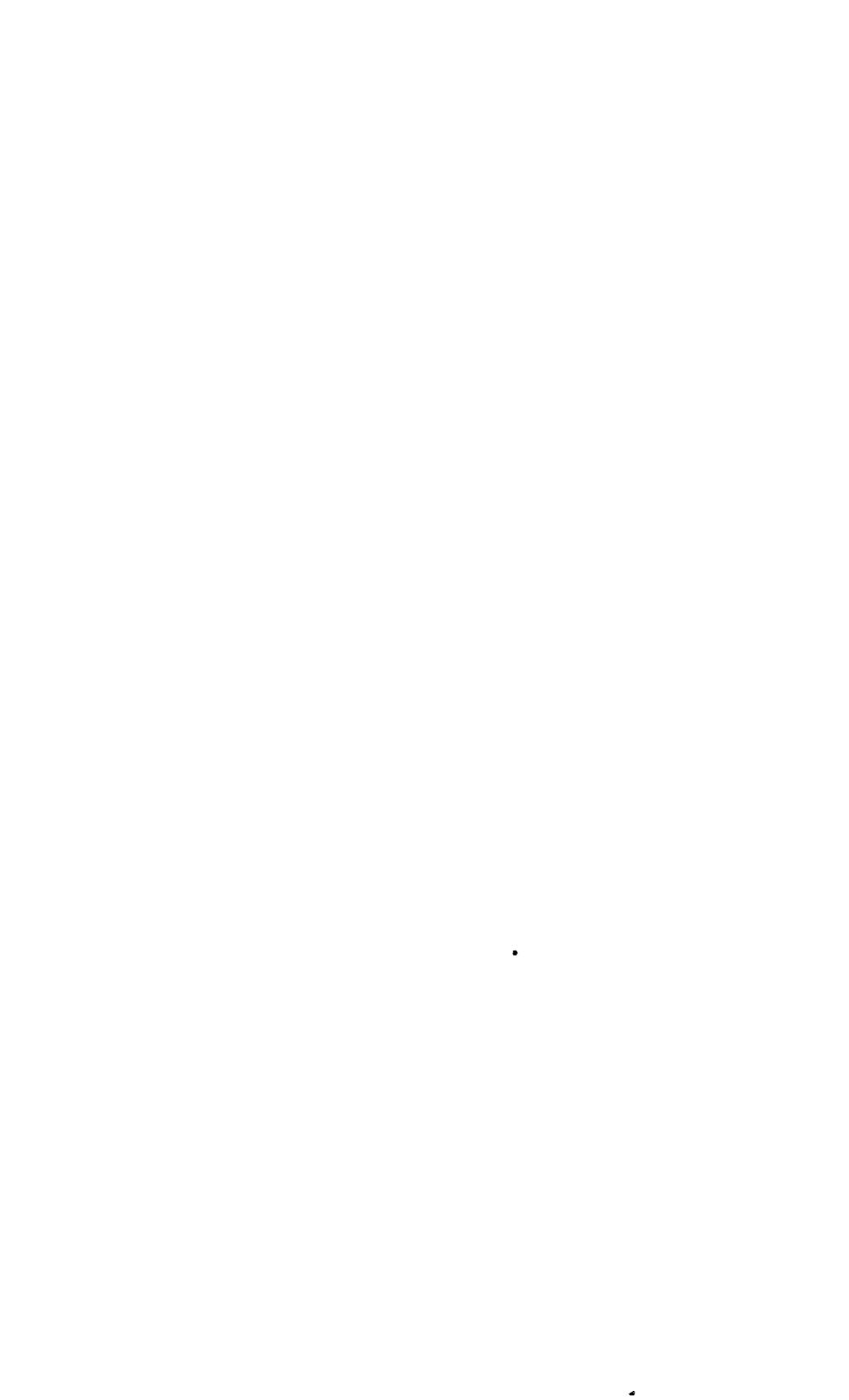
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cisely what a crime is. This is important in civilian criminal law and doubly important in the military, whose law ought to be carefully designed to make possible effective administration under the most adverse of circumstances. To achieve this, in regard to threats, will require legislative revision.

**FRANK J. REMINGTON\***

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BY ORDER OF THE SECRETARY OF THE ARMY:

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**Distribution :**

**Active Army:** To be distributed in accordance with DA Form 12-4 requirements for DA Pamphlets 27-100-Series.

**NG:** None.

**USAR:** Distribution will be accomplished by TJAGSA.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961—520520