

The Judge Advocate

JOURNAL



Published By

JUDGE ADVOCATES ASSOCIATION

An affiliated organization of the American Bar Association, composed of
lawyers of all components of the Army, Navy, and Air Force

JUDGE ADVOCATES ASSOCIATION

OFFICERS for 1952-1953

OLIVER P. BENNETT, Iowa.....	President
JOSEPH F. O'CONNELL, Jr., Mass.....	1st Vice President
PAUL W. BROSMAN, La.....	2nd Vice President
THOMAS H. KING, D. C.....	Secretary
EDWARD B. BEALE, Md.....	Treasurer
JOHN RITCHIE, III, Mo.....	Delegate to A. B. A.

DIRECTORS

Louis F. Alyea, Ill.; Leslie L. Anderson, Minn.; Joseph A. Avery, Va.; George Bains, Ala.; Ralph G. Boyd, Mass.; E. M. Brannon, D. C.; Robert G. Burke, N. Y.; Francis X. Daly, D. C.; Reginald Field, Va.; Edward F. Gallagher, D. C.; Reginald C. Harmon, Ill.; Edward F. Huber, N. Y.; William J. Hughes, Jr., D. C.; Albert G. Kulp, Okla.; Arthur Levitt, N. Y.; Ira H. Nunn, D. C.; Gordon W. Rice, Nev.; Franklin Riter, Utah; Gordon Simpson, Texas; Frederick B. Wiener, D. C.; S. B. D. Wood, Hawaii.

Alexander Pirnie, George Hafer ----- Past Presidents

Executive Secretary and Editor

RICHARD H. LOVE
Washington, D. C.

BULLETIN No. 14

JUNE, 1953

Publication Notice

The views expressed in articles printed herein are not to be regarded as those of the Judge Advocates Association or its officers and directors or of the editor unless expressly so stated.

TABLE OF CONTENTS

	PAGE
Report of The Nominating Committee—1953.....	1
Announcement of 1953 Annual Meeting.....	4
Legal Sufficiency of Specifications Under The Uniform Code of Military Justice.....	5
Statement of Policy.....	14
Col. Menter Recieves Legion of Merit.....	14
Finality of the Law Officer's Rulings.....	15
The Fifth Army Judge Advocate School.....	23
Gen. Hull Addresses JAG School Class.....	26
Notes on Recent Decisions—CMA.....	30
What The Members Are Doing.....	39
Book Announcement.....	41
Reservation Form for 1953 Annual Meeting.....	43

Published by the Judge Advocates Association, an affiliated organization of the American Bar Association, composed of lawyers of all components of the Army, Navy, and Air Force.

Report of

The Nominating Committee --- 1953

In accordance with the provisions of Section 1, Article IX of the By-laws of the Association, the following members in good standing were appointed to serve upon the 1953 Nominating Committee:

Maj. Samuel F. Beach, JAGC-USAR, Washington, D. C., Chairman
Col. John F. Richter, JAGC-USAR, Chevy Chase, Maryland
Col. Clel E. Georgetta, JAGC-USAR, Reno, Nevada
Col. Leon Jaworski, JAGC-USAR, Houston, Texas
Col. Frank A. Verga, JAGC-USAR, Jersey City, New Jersey
Lt. Cmdr. J. Kenton Chapman, USNR, Washington. D. C .
Capt. Sherman S. Cohen, USAFR, Washington, D. C.

The By-laws provide that the Board of Directors shall be composed of twenty members, all subject to annual election. It is provided that there be a minimum representation on the Board of Directors of three members for each of the Armed Forces: Navy, Army, and Air Force. Accordingly, the slate of nominees for membership on the Board of Directors is divided into three sections; and, the three nominees from each section with the highest plurality of vote within the section shall be considered elected upon the annual election as the representation on the Board of that Armed Force; the remaining eleven positions on the board will be filled from the nominees receiving the highest number of votes irrespective of their arm of service.

Members of the Board not subject to annual election are The Judge Advocates General of each of the Armed Forces and the three most recent past Presidents of the Association.

The Nominating Committee has conferred and has submitted the following report which has been filed with the Secretary of the Association as provided in Section 2, Article VI of the By-laws.

SLATE OF NOMINEES FOR OFFICES OF THE ASSOCIATION

Col. Joseph F. O'Connell, JAGC-USAR, Boston, Massachusetts - President (1)
Col. Gordon Simpson, JAGC-USAR, Dallas, Texas - 1st Vice President (2)

- Capt. Robert E. Quinn, USNR, West Warwick, Rhode Island - 2nd Vice President (3)
 Col. Thomas H. King, USAFR, Chevy Chase, Maryland - Secretary (4)
 Col. Edward B. Beale, JAGC-USAR, Rockville, Maryland - Treasurer (4)
 Col. John Ritchie, III, JAGC-USAR, Madison, Wisconsin - Delegate to House of Delegates, A. B. A. (4)

- Note: (1) Presently serving as 1st Vice President.
 (2) Presently a member of the Board of Directors.
 (3) Chief Judge of the United States Court of Military Appeals which sits in Washington, D. C.
 (4) Incumbent. Col. Ritchie was President of the Association during the year 1951-52.

SLATE OF NOMINEES FOR THE TWENTY POSITIONS ON THE BOARD OF DIRECTORS

Navy nominees:

- Capt. George W. Bains, USN, Alabama (1)
 Capt. Robert G. Burke, USNR, New York (1)
 Col. John E. Curry, USMC, Pennsylvania
 Lt. George E. George, USNR, District of Columbia
 Lt. Col. James Fielding Jones, USMCR, Texas
 Lt. Cmdr. Milton S. Kronheim, Jr., USNR, District of Columbia
 Capt. William C. Mott, USN, Rhode Island
 Lt. Cmdr. Theodore E. Provost, USNR, New Jersey
 Capt. S. B. D. Wood, USN, Hawaii (1)

Note: (1) Incumbents.

Capt. Bains, Wood, and Col. Curry are on active duty in Washington, D. C. Capt. Mott is Commandant of the Naval Justice School in Newport, Rhode Island.

Army nominees:

- Col. Joseph A. Avery, USAR, Virginia (1)
 Brig. Gen. Ralph G. Boyd, USAR, Massachusetts (1)
 Lt. Col. James P. Brice, USAR, California
 Col. Charles L. Decker, USA, Virginia
 Maj. O. Bowie Duckett, USAR, Maryland
 Lt. Col. Reginald Field, USAR, Virginia (1)
 Col. Osmer C. Fitts, USAR, Vermont
 Lt. Col. Edwards F. Gallagher, USAR, District of Columbia (1)
 Lt. Col. James K. Gaynor, USA, Indiana
 Col. James Arthur Gleason, USAR, Ohio
 Col. George H. Hafer, USAR, Pennsylvania (1)

Col. J. Alton Hosch, USAR, Georgia
Capt. Edward F. Huber, USAR, New York (1)
Col. William J. Hughes, USAR, District of Columbia (1)
Col. Donald M. Keith, USAR, California
Col. Mason Ladd, USAR, Iowa
Lt. Col. Boyd Laughlin, USAR Texas
Col. Arthur Levitt, USAR, New York (1)
Col. Trueman E. O'Quinn, USAR, Texas
Lt. Col. Percy J. Power, USAR, Michigan
Col. Victor A. Sachse, USAR, Louisiana
Maj. Robert L. Strong, USAR, Ohio
Lt. Col. R. C. Van Kirk, USNG, Kansas
Col. Frederick Bernays Wiener, USAR, District of Columbia (1)
Note: (1) Incumbent.

Air Force nominees:

Capt. William H. Agnor, USAFR, Georgia
Maj. Nicholas E. Allen, USAFR, Maryland
Lt. Col. Louis F. Alyea, USAF, Illinois (2)
Maj. Marion T. Bennett, USAFR, Maryland
Col. Andrew B. Beveridge, USAFR, Maryland
Col. Paul W. Brosman, USAFR, Louisiana (1)
Lt. Col. Frank E. Moss, USAFR, Utah
Col. Allen W. Rigsby, USAF, Nebraska
Col. Francis W. Schweikhardt, USAF, New York
Capt. Hugo Sonnenschein, Jr., USAFR, Illinois
Col. Fred Wade, USAFR, Tennessee
Lt. Col. Gerritt W. Wesselink, USAFR, Virginia
Maj. Milton Zacharias, USAFR, Kansas

Note: (1) Presently serving as 2nd Vice President. Col. Brosman is Associate Judge of the United States Court of Military Appeals on duty in Washington, D. C.
(2) Incumbent.

Under provisions of Section 2, Article VI of the By-laws, regular members other than those proposed by the Nominating Committee shall be eligible for election and will have their names included on the printed ballot to be distributed by mail to the membership on or about August 1, 1953, provided they are nominated on written endorsement of twenty-five, or more, members of the Association in good standing; provided, further, that such nomination be filed with the Secretary at the offices of the Association on or before July 15, 1953.

Balloting will be by mail upon official printed ballots. Ballots will be counted through August 24, 1953. Only ballots submitted by members in good standing as of August 24, 1953, will be counted.

ANNOUNCEMENT OF 1953 ANNUAL MEETING

Coincident with the Diamond Jubilee Meeting of the American Bar Association, the Judge Advocates Association will hold its 7th Annual Meeting in Boston, Massachusetts, on August 25 - 26, 1953. All functions of the Association will be held in the First Corps Armory located directly across the street from the Hotel Statler, which will be A. B. A. headquarters.

The First Corps Armory was built about sixty years ago by three organizations: The Military Order of the Loyal Legion, The Massachusetts Military Historical Society, and the First Corps Cadets. The buildings house the museum of the Massachusetts Military Historical Society, a fine Civil War trophy room, and library. It is located conveniently close to the locale of A. B. A. activities, the principle hotels, and night clubs.

The annual banquet of the Association will be held Tuesday evening, August 25, 1953, beginning with a reception at 6:00 p.m. in the main ballroom of the Armory. Dress will be informal and members are urged to bring their ladies and guests. The committee on arrangements, headed by Col. Joseph F. O'Connell, has arranged for a typical New England menu. The cost of the banquet will be \$8.00 a place. The toastmaster for the occasion will be our own member, Warren Farr, a member of the Boston law firm of Ropes, Gray, Best, Coolidge and Rugg. The committee assures that the principal speaker will be a nationally prominent figure.

The annual business meeting will be held on Wednesday, August 26, beginning at 4:00 p.m. in the Military Historical Society's quarters of the Armory. The Judge Advocates General and the Judges of the United States Court of Military Appeals will be present at this meeting.

The annual banquet and meeting will serve as an excellent opportunity for members of the Association to renew Service acquaintances and to also be brought current on developments affecting military law. Reservations for the banquet may be made directly with Col. Joseph F. O'Connell, 31 Milk Street, Boston, Massachusetts, or by application to the national headquarters of the Association, 1010 Vermont Avenue, Washington 5, D. C. It is anticipated that the attendance at this annual banquet and meeting will be the greatest in the history of the Association, and you are urged to make your reservations as early as possible.

NOTE: For your convenience, a form for making reservations is attached at page 43. Use it today.

Legal Sufficiency of Specifications Under The Uniform Code of Military Justice

By

FIRST LIEUTENANT URIEL E. DUTTON, JAGC*

FIRST LIEUTENANT FRANK J. HUCEK, JAGC*

The United States Court of Military Appeals has spoken on the question of sufficiency of specifications on several occasions, and its opinions thereon, properly interpreted, are adequate precedent for the proper determination of most, if not all, questions which may arise in this field. Unfortunately, there are indications that these decisions have not always been considered or properly interpreted, because other military justice appellate agencies occasionally arrive at conclusions that seem to be at variance with underlying principles laid down by the United States Court of Military Appeals.

In the early decision of *United States v. Marker* (No. 281), 3 CMR 127, decided 19 May 1952, the Court of Military Appeals approved and adopted the test for sufficiency found in paragraph 87a(2), Manual for Courts-Martial, 1951, which states:

"The test of the sufficiency of a specification is not whether it could have been made more definite and

certain, but whether the facts alleged therein and reasonably implied therefrom set forth the offense sought to be charged with sufficient particularity to apprise the accused of what he must defend against, and whether the record is sufficient to enable him to avoid a second prosecution for the same offense."

The opinion in the *Marker* case and in other cases since then leaves little doubt as to what the proper approach to the question should be. See *United States v. Snyder* (No. 409), 4 CMR 15; *United States v. Gohagen* (No. 858), decided 6 February 1953; *United States v. Smith* (No. 887), decided 13 February 1953; and *United States v. Steele* (No. 943), decided 14 April 1953. Yet, many board of review opinions indicate some confusion as to the proper approach to the problem of legal sufficiency of specifications; the boards of review seem to have applied much stricter tests than would be required by the United States Court of Military Appeals.

In ACM 5107, *McCourt*, 5 CMR 513, an Air Force board held insufficient in law a specification which alleged that at a certain time and place, the accused did "unlawfully enter air-

* Of the Judge Advocate General's School.

craft number 9364, with intent to commit a criminal offense, to wit: larceny therein," stating that "the employment of the word 'unlawfully' adds nothing to the specification in this respect and does not supply the deficiency" (claimed by the board to exist because the *ownership* of the aircraft was not alleged). Similarly in ACM 5167, *Wheat*, 5 CMR 494, a board of review held a specification alleging that at a certain time and place the accused did "unlawfully enter Warehouse Number 2, with intent to commit a criminal offense, to wit: larceny, therein" insufficient to allege the offense of housebreaking, because "it contains no averment that the warehouse allegedly entered was the property of another" and the mere addition of words importing criminality "will not in itself convert the statement of fact into an offense unless the acts charged are made an offense by statute, regulation or custom having the effect of law." Both the *McCourt* and *Wheat* decisions relied upon the language of paragraph 28a(3), Manual for Courts-Martial, 1951, to the effect that "if the alleged act of the accused would not under any circumstances be an offense, the mere addition to the specification of words importing criminality will not in itself convert the act into an offense." It appears that the boards of review misinterpreted the true significance of the quoted portion of paragraph 28a(3). The addition of words importing criminality cannot make a crime of an otherwise lawful act to which a specification refers, but such words may be all important in determining the *legal sufficiency* of the specification. In other words, the

fact that a pleader chooses to describe a particular act as "unlawful" or "wrongful" cannot make that act a crime unless the act itself was criminal, but the use of these terms in a specification describing a criminal act may be essential to the legal sufficiency of the specification. For, as paragraph 28a(3) states, when an alleged act of an accused is not in itself an offense but is made an offense by applicable statute, regulations, or custom having the effect of law, words importing criminality should be used in a specification charging such acts. An example of a case in which the use of words of criminality is essential to the legal sufficiency of a specification is ACM S-2860, *Priester*, 4 CMR 830, 831. In that case a specification alleged, in substance, that the accused did, at a certain time and place, strike Corporal O in the face with his fist. The board of review held that, "*in the absence of words or circumstances 'importing criminality' such as 'assault' or 'unlawfully' strike,*" the specification did not state an offense within the purview of the Uniform Code of Military Justice.

The United States Court of Military Appeals on at least one occasion has recognized the vitality of such words of criminality as "wrongfully" and "unlawfully." In the *Gohagen* case, *supra*, accused was convicted of a violation of a lawful general order under a specification which alleged that he "wrongfully" possessed a hypodermic syringe and needle. The specification did not contain an allegation that the accused had not possessed those instruments "for household use or the treatment of disease," the only exceptions to the proscription of

the allegedly violated. In affirming the conviction and holding the specification legally sufficient, the Court stated:

"* * * accused was squarely put on notice that his possession was not deemed to fall within the language of the exceptions, because the specification alleged that he possessed the instruments proscribed 'wrongfully.'"

In the early decision of CM 307079, *Mellinger*, 60 BR 199, 214, an Army board of review correctly stated the law pertaining to words of criminality used in a specification. In that case the accused was charged with having "wrongfully and unlawfully" engaged in business in the European Theater of Operations in violation of Article of War 96. The prosecution relied on orders of the theater headquarters prohibiting such conduct, but such orders were not alleged in the specification. On appeal it was contended that, as the acts alleged were not *per se* wrongful, the specification must set forth the particular statute or order which the alleged acts were claimed to have violated, and, as that was not done, the specification failed to allege an offense. The board held that, although it would have been better to allege the particular orders prohibiting the conduct involved, "failure to include a reference to such orders did not prejudice the substantial rights of the accused, since the specification fairly apprised the accused of the offense charged." The use of the word "wrongful" in the specification was sufficient to put the accused on notice "that his acts were alleged to have been effected under such improper circumstances as to be prejudicial to good order and military

discipline or to constitute conduct of a nature to bring discredit upon the military service * * *.

The word 'wrongfully' may reasonably be construed to mean under improper circumstances in the light of the general situation with regard to the existing military situation. European economic and currency conditions, accused's position as an officer, and the place where the transactions were made."

Under the above decisions, it appears that the boards of review in the *McCourt* and *Wheat* cases should not have refused to give effect to the use of words such as "wrongfully" or "unlawfully" in a specification, and that in those cases, the use of such terms should have been held sufficient to supply or cure any other omissions in the specifications involved, for, as will be seen, a specification need not specifically allege every element of the offense charged. See *United States v. Snyder* (No. 409), 4 CMR 15.

Of course, the use of words such as "unlawfully" and "wrongfully" cannot supply every essential of a specification. They should be held sufficient to apprise an accused that a criminal or unlawful act is being charged, but the specification must go further and, as a minimum, must apprise the accused of *what* offense is charged against him with sufficient particularity to enable him to prepare his defense. This requirement is clearly shown in *United States v. Marker, supra*, wherein the court held a specification legally sufficient where it alleged that an accused did "wrongfully and unlawfully accept a gift" under certain circumstances as alleged (which would not ordinarily con-

stitute a crime). The terms "wrongfully and unlawfully" were sufficient to allege that a crime had been committed, and the facts recited in the specification were sufficient to inform the accused of the allegations he must be prepared to meet. In this connection, the Court stated:

"Fortunately we are no longer bound by the ancient rigor of pleading at common law. It is the modern rule that formal defects in indictments, not prejudicial, will be disregarded. 'The true test of the sufficiency of an indictment is not whether it could have been more definite and certain, but whether it contains the elements of the offenses intended to be charged.' *Hagner v. United States*, 285 U. S. 427, 431. If the indictment informs the accused of what he must be prepared to meet, and is sufficiently definite to eliminate the danger of future jeopardy, it will be held sufficient. *Martin et al v. United States*, 299 Fed. 287 (C.A. 4th Cir.); *Roberts v. United States*, 137 F. 2d 412 (C.A. 4th Cir.); *Nye v. United States*, 137 F. 2d 73 (C.A. 4th Cir.)."

The foregoing cases clearly demonstrate that, in so far as the *legal sufficiency* of a specification is concerned, an allegation of "wrongfulness" or "unlawfulness" is sufficient to supply the element of *criminality* required in a specification. This conclusion is fortified by the decision in *United States v. Gohagen, supra*, and is supported by the holding in *United States v. Snyder, supra*, that a specification need not, in every case, specifically allege every element of an offense. In the *Snyder* case, the Court held that *knowledge* of a regulation allegedly violated need not be alleged in a specification and stated:

"Indeed there is nothing inconsistent

with a requirement that a certain element of an offense be established by proof, even though the element need not be alleged specifically in the specification. Examples of this phenomenon are found in murder (malice aforethought); rape (against the will of the victim); larceny (intent permanently to deprive the owner of the property); and willful disobedience of an officer's order (knowledge that person is officer)."

The rationale of the *Snyder* decision is in apparent conflict with the provisions in paragraph 28a(3) of the Manual to the effect that "The facts so stated will include all the elements of the offense sought to be charged. A specification must exclude every reasonable hypothesis of innocence." It is clear that literal application cannot be given these provisions and they must be considered, not as mandatory requirements, but as statements of what *should* be contained in an ideal specification. Thus, the fact that the particular language of a specification may, by ingenious reasoning, be susceptible to a construction which would permit the conduct alleged to be lawful is not enough to render the specification bad. That is not the test. It is not whether the specification could have been made more definite and certain but whether the offense sought to be charged is set forth with "sufficient particularity to apprise the accused of what he must defend against, and whether the record is sufficient to enable him to avoid a second prosecution for the same offense" (par. 87a(2), MCM, 1951). Thus in CM 358808, *Haney*, decided 5 March 1953, an Army board sustained a specification which stated, substantially, that the accused, "hav-

ing knowledge of a lawful order which it was his duty to obey, did transfer, during the period 14 July 1952 to about 4 September 1952, Military Payment Certificates to a Korean National, a person not authorized to receive them" (charged as a violation of Article 92, UCMJ. The board held that although an allegation that the accused "failed to obey" the order was not set forth, sufficient evidentiary facts were set forth from which such conclusion could be deduced, and it further stated:

"* * * it is our opinion that this specification was inartfully drawn but that it was sufficient to state the offense. Since no objection was made at the trial and it clearly appears that the accused was not misled, we find no material prejudice to the substantial rights of the accused (MCM, 1951, subpar. 67b, p. 96, subpar. 69b-2), p. 105)."

To the same effect is the opinion in *United States v. Smith* (No. 887), decided 13 February 1953, involving a conviction of misbehavior before the enemy in violation of Article 99, UCMJ. The specification was assailed on appeal by the defense, on the ground that, as a matter of law, it did not state an offense because it omitted an allegation that the act of cowardice occurred before or in the presence of the enemy. After conceding that this was a necessary element of the offense charged, the Court stated:

"However, as will be spelled out in more detail later, it is our opinion that the evidence adequately established this element of the offense. Further, the element was expressly submitted by the law officer to the

court in his pre-finding instructions and is thus necessarily embodied in the court's findings."

Of course, the fact that all the elements of an offense need not be stated in a specification does not alter the fact that all such elements must be established by the evidence. Thus in the *Haney* case, *supra*, the board stated:

"In order to establish the alleged offense it was necessary for the prosecution to prove that there was a general order or regulation of which the accused had knowledge and that he violated or failed to obey the order or regulation (MCM, 1951, subpar. 171a; *United States v. Snyder* (No. 409), *supra*)."

However, although the evidence must establish every essential element of the offense, some boards of review, in dealing with cases in which the record does not support a finding of a particular essential element, have erroneously assigned the "sufficiency of the specification" as a reason for their disapproval of the conviction. Thus, in *ACM S-4399, Hunter*, decided 5 March 1953, the accused was found guilty of a specification alleging that he did have "wrongful possession of official letter orders of another with intent to deceive then well knowing the same to be unauthorized" in violation of Article 134, UCMJ. The officer exercising general court-martial jurisdiction approved only a finding of guilty of "wrongful possession of official letter orders of another as alleged then well knowing the same to be unauthorized" (presumably because the record did not support a finding of the "intent to deceive"). On review, the board held that the

approved findings "did not set forth an offense," stating that "* * * mere possession of the valid orders of another, even with the knowledge that such possession is unauthorized, without illegal intent, is not an offense. * * * It is the intent to deceive or defraud which is the essential ingredient * * *." (Emphasis supplied). The board, however, went on to say that "the findings of guilty as approved do not contain allegations excluding every reasonable hypothesis of innocence" (emphasis supplied), citing paragraphs 28a(3) and 87a(2) of the Manual for Courts-Martial, 1951. In other words, the reason assigned by the board for its decision was not that, under the record, the acts of which accused had been found guilty were not an offense (hence, not "wrongful") but that the specification as approved was not legally sufficient to allege an offense. It is submitted that under the test for sufficiency set forth in paragraph 87a(2) of the Manual and as applied by the United States Court of Military Appeals in the *Marker, Snyder, and Smith* cases, and others, an allegation that the accused was in "wrongful possession of official letter orders of another then well knowing the same to be unauthorized should be held *legally sufficient* to allege an offense. Such facts as are alleged and those which are reasonably implied therefrom "set forth the offense sought to be charged with sufficient particularity to apprise the accused of what he must defend against," in satisfaction of the first aspect of the test, and such allegations, together with the record, would be "sufficient to enable him to

avoid a second prosecution for the same offense" in satisfaction of the second aspect of the test. It would appear that the board confused the question of sufficiency of the evidence with the question of sufficiency of a specification. It is clear that if the evidence established only that the accused was in possession of someone else's orders, there would then be no proof that such possession was "wrongful," and a conviction should be reversed, not because the specification or finding failed to set forth an offense, but because of lack of sufficient evidence. But where the evidence adduced shows that accused's possession of the orders was in fact "wrongful," that is, in violation of one or more clauses of Article 134, it would seem clear that his conviction should be sustained. The correct approach to the problem was demonstrated in *United States v. Norris* (No. 1756), decided 27 February 1953, wherein the United States Court of Military Appeals disapproved the action of a board of review which had reduced a finding of guilty of wrongful appropriation to a finding of guilty of "wrongful taking" under Article 134 (based upon the board's determination that the LO's failure to instruct on the effect of voluntary intoxication required disapproval of any finding of specific intent in the case). The Court based its holding, not on the ground that the specification, as approved by the board of review, failed "to allege an offense," but on the ground that by expressly eliminating all findings of a specific intent in the case, the board of review had found accused guilty of acts which did not constitute an offense

under the UCMJ. In other words, the Court did not hold that a specification alleging that an accused "wrongfully took" certain articles does not allege an offense; it held only that this particular accused had not been convicted of an offense because every element of "wrongfulness" had been removed by the action of the board of review.

While a specification may contain allegations sufficient to apprise the accused of the offense of which he is charged, it may at the same time be defective in some matters of form as, for example, that it is "inartfully drawn, indefinite, redundant, or that it misnames the accused, or is laid under the wrong article, or does not contain sufficient allegations as to time and place" (par. 69b, MCM, 1951). Such defects do not, in general, prevent a specification from meeting the test of paragraph 87a(2) and, if not brought to the court's attention by a timely motion for appropriate relief, are deemed to be waived (par. 69a, MCM, 1951). However, this is not true in every case, for, as was pointed out in the discussion of the effect of terms such as "unlawful" or "wrongful", a specification subject to objection for one of the foregoing reasons, while setting forth the offense sought to be charged, may not set it forth with *sufficient particularity* to apprise the accused of what he must defend against and thus may be objectionable under paragraph 87a(2). The Court of Military Appeals has held a specification alleging that, at a certain time and place, the accused did "* * * commit an assault upon an *unknown* Korean male, by striking

him on the body with a dangerous weapon to wit: a .30 calibre carbine" (emphasis supplied) to be legally sufficient in the sense of paragraph 87a(2). *United States v. Hopf* (No. 372), 5 CMR 12. It seems clear, however, that a specification alleging merely that at a certain time and place the accused "did steal" does not meet the test. That a line must be drawn somewhere between the two foregoing examples is obvious, but precisely where it should be drawn is not quite so clear. Each case must rest upon its own particular facts, but the liberal rules expressed in the *Hopf* decision should not be unduly limited, and courts should take a practical viewpoint in determining whether an accused was in fact sufficiently apprised of the offense with which he was charged to enable him to prepare his defense. In this connection, it is to be noted that the second aspect of the test in paragraph 87a(2) concerns the question of double jeopardy. Here again, boards of review have indicated a tendency to confuse the problem of the sufficiency of an allegation with the problem of the sufficiency of the evidence. Consequently, many boards of review have asserted that a specification, lacking definiteness, was insufficient because it would not enable the accused to defeat a subsequent prosecution for the same offense by pleading the present proceeding as former jeopardy. These boards, however, frequently lose sight of the fact that it is not solely the specification to which they should look in determining whether the second aspect of the test is met. Paragraph 87a(2) expressly provides that the *entire re-*

cord can be looked to for a determination of this question.

In CM 354119, *Huffman*, decided 4 August 1952, an Army board held void proceedings under a specification which alleged larceny of "goods of a value of \$19.60." The board held that the specification was too indefinite as to the nature and character of the property allegedly taken. A contrary result was reached in ACM 5128, *Maxwell*, decided 8 December 1952, wherein an Air Force board held sufficient a specification alleging the larceny of "merchandise and lawful money * * *." Both cases were alike in that neither accused made a motion for appropriate relief and that in both cases the evidence adduced established precisely the items of property taken. In the latter case, the board, after reviewing the Federal civilian cases on the subject, stated:

"In the final analysis, then, it is clear that the specification herein states all the elements of the offense of stealing in violation of Article 121. It is equally clear that the accused is protected from again being tried for the same offense. Under such circumstances we think the test contained in paragraph 87a(2) of the Manual dictates the validity of this specification. We cannot say that 'it appears from the record that the accused was in fact misled . . . or that his substantial rights were in fact otherwise materially prejudiced' In specifications similar to this we have no doubt that an accused whose defense depends upon greater particularity of description will make his predicament known and that a motion to make the specification more definite will be made if for any reason the accused is unable to obtain the necessary information prior to trial. In those cases, as previously stated, a

denial of such a motion would present a different question on appellate review and might constitute prejudicial error."

In proceedings predicated upon written instruments, such as prosecutions for forgery and for counterfeiting, the specifications therein are frequently assailed, and almost as frequently held fatally defective, on the ground that the written instrument involved is not set out in *haec verba*. See ACM S-4150, *Black*, decided 5 November 1952, and ACM 5732, *League*, decided 13 November 1952. The theory upon which such cases are based is that the specification, by not setting out the written instrument involved, does not protect accused against a subsequent prosecution for the same offense. That theory indicates that the full import of paragraph 87a(2) has not been fully grasped. It is not the specification alone which is considered in determining whether the second aspect of the test has been met, but, rather, the record as a whole. It is submitted that the reasoning in the *Maxwell* case, *supra*, should suffice to sustain the specifications in these cases, as they involve the same fundamental principle, that is, whether, in the one case, the property allegedly stolen has been sufficiently described and, in the other, whether the written instrument allegedly forged or counterfeited has been sufficiently described.

It is apparent, therefore, that the old rules of common law pleading are not applicable to the drafting of specifications under the UCMJ. The sufficiency of a specification is to be determined under the liberal and non-

technical test set forth in paragraph 87a(2) of the Manual and followed by the United States Court of Military Appeals. Under that test, the specification need not contain every element of the offense; and if the facts alleged therein and those reasonably implied therefrom set forth the offense sought to be charged—

that is, inform the accused of the offense with which he is charged—, and if that is done with “sufficient particularity to apprise the accused of what he must defend against,” and if the specification *together with the record* is “sufficient to enable him to avoid a second prosecution for the same offense,” the specification is legally sufficient.



THE JUDGE ADVOCATES ASSOCIATION

The Judge Advocates Association is a national legal society and an affiliated organization of the American Bar Association. Members of the legal profession who are serving, or, who have honorably served in any component of the Armed Forces are eligible for membership. Annual dues are \$5.00 per year, payable January 1st, and prorated quarterly for new applicants. Applications for membership may be directed to the Association at its national headquarters, 312 Denrike Building, Washington 5, D. C.

Use the Directory of Members when you wish local counsel in other jurisdictions. The use of the Directory in this way helps the Association perform one of its functions to its membership and will help you. You can be sure of getting reputable and capable counsel when you use the Directory of Members.

STATEMENT OF POLICY

The Judge Advocates Association, an affiliated organization of the American Bar Association, is composed of lawyers of all components of the Army, Navy, and Air Force. Membership is not restricted to those who are or have been serving as judge advocates or law specialists.

The Judge Advocates Association is neither a spokesman for the services nor for particular groups or proposals. It does not advocate any specific dogma or point of view. It is a group which seeks to explain to the organized bar the disciplinary needs of the armed forces, recalling, as the Supreme Court has said, that "An Army is not a deliberative body," and at the same time seeks to explain to the non-lawyers in the armed forces that the American tradition requires, for the citizen in uniform not less than for the citizen out of uniform, at least those minimal guarantees of fairness which go to make up the attainable ideal of "Equal justice under law."

If you are now a lawyer, if you have had service in the Army, Navy or Air Force or are now connected with them in any capacity, active, inactive, or retired, and if you are interested in the aims herein set forth, the Judge Advocates Association solicits your membership.

COL. MENTER RECEIVES LEGION OF MERIT

Col. Martin Menter of Syracuse, New York, on April 28, 1953, was awarded the Legion of Merit for his work as Staff Judge Advocate, Headquarters, Far East Air Forces in Tokyo. The high quality of Col. Menter's judicial and professional work was not only recognized by the military but likewise by the civilian legal profession in Japan. On April 22nd, prominent members of the Japanese legal profession, including Chuzo Iwata, president of the Federation of Japan's Bar Associations; Chusaburo Arima, president of the Japan Lawyer's Association; and Kotaro Tanaka, Chief Justice of the Subreme Court of Japan, feted Col. Menter at a banquet in the Supreme Court Building in Tokyo. Brig. Gen. and Mrs. Bert E. Johnson attended the affair. Gen. Johnson succeeds Col. Menter as Far East Air Forces SJA.

Finalty of the Law Officer's Rulings

By

LIEUTENANT COLONEL KENNETH J. HODSON, JAGC¹

Military lawyers viewed with intense interest the series of opinions of the United States Court of Military Appeals which liberally interpreted the instructional requirements of Article 51c of the Uniform Code of Military Justice² to mean not only that the law officer (president of a special court-martial) must instruct the court as to the "elements of the offense" but also that he must instruct on the elements of each lesser offense in

Based on a "Case Note" that first appeared in the JAG Chronicle, a weekly training publication of The Judge Advocate General's School, Charlottesville, Virginia. According to an editor's note in the Chronicle, the opinions expressed in the "Case Note" were "those of individual judge advocates; they do not necessarily represent views of The Judge Advocate General or doctrine of The Judge Advocate General's School."

¹Chief, Research, Planning, and Publications Division, The Judge Advocate General's School.

²"* * * the law officer of a general court-martial and the president of a special court-martial shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense * * *"

³*United States v. Clark* (No. 190), 2 CMR 107.

⁴*United States v. Ginn* (No. 263), 4 CMR 45.

⁵*United States v. Jones* (No. 426), 3 CMR 10.

⁶*United States v. Soukup* (No. 533), 23 Jan 53.

⁷*United States v. Cline* (No. 769), 17 Apr 53.

issue under the evidence,³ must advise the court of the law concerning any affirmative defense in issue,⁴ and must define any term having special legal connotation which was employed by him in giving his instructions.⁵ The Court continued this liberal approach to the judge-jury instructional concept to the point where it set aside convictions because members of 2d Infantry Division courts-martial were not advised by the law officer of the meaning of "cowardice"⁶ and "absence without leave,"⁷ even though the law officer had referred the members specifically to the correct definitions of those terms in the Manual for Courts-Martial; nor would the Court presume that the members of

a Marine court-martial knew that absence without leave was a lesser included offense of desertion.⁸

Additional concern was created among military lawyers when a majority of the Court of Military Appeals rejected the harmless error rule⁹ in favor of the concept of "general prejudice."¹⁰ Perhaps, however, the one opinion that initiated the most numerous and uncertain arguments was that handed down by the Court in the *Ornelas* case.¹¹ The opinion in that case dealt with an accused who was charged with desertion from 9 January 1944 to 9 August 1951 in violation of Article of War 58. At the trial the defense moved to dismiss on the ground that the court lacked jurisdiction because the accused, a draftee, had never become a member of the armed forces, having failed to take the oath of allegiance. This motion was denied by the law officer. Following the

⁸*United States v. Lowery* (No. 683), 13 Mar. 53.

⁹Article 59a, UCMJ.

¹⁰For an example of the application of this doctrine, see *United States v. Woods and Duffer* (No. 1023), 19 Feb. 53, wherein Judge Brosman, the creator of the general prejudice concept in military law, stated, "It is difficult to deal effectively with a position (the general prejudice concept) the origins of which sound almost wholly in psychology, rather than in logic, in history, in analysis, or in function." (Emphasis supplied.)

¹¹*United States v. Ornelas* (No. 446), 6 CMR 96.

¹²A ceremony then prescribed by regulations and held essential to induction in *Billings v. Truesdale*, 321 U.S. 542.

accused's plea of not guilty, the prosecution introduced extract copies of morning reports to show the unauthorized absence for the period alleged and rested its case. The accused then testified through an interpreter that he was born in Arizona and was an American citizen; that at the age of six he moved to Juarez, Mexico, where he lived continuously thereafter; that, after making inquiries in El Paso, Texas, in 1943, about enlisting in the Army, he received a notice to report to Fort Bliss, Texas, for induction; that he reported to Fort Bliss and passed a physical examination; that he was never administered an oath and was never asked to stand with a group of men or to raise his right hand; that he received no uniform; that he did not spend the night at Fort Bliss or any other camp; that he was told he was free to return to Juarez but had to report back within 15 days; and that he was unsuccessful in three attempts to re-enter the United States. The defense then renewed the motion to dismiss, and it was again denied. The defense also requested that the issue of jurisdiction be submitted to the court under appropriate instructions, but this request was refused. Thereafter the accused was found guilty as charged and was sentenced. The Army board of review affirmed without opinion. The Court of Military Appeals reversed the board and ordered a rehearing, holding that as the evidence in support of the motion to dismiss raised an issue of fact as to whether the accused was actually inducted through the administration of the oath,¹² the law officer erred in making his decision on the issue of

jurisdiction final by refusing to submit this issue to the court under appropriate instructions.

The effect of this opinion was uncertain because of the use of some rather broad language by the Court and because of the fact that the result in the case seemed to be directly contrary to the provisions of Article 51b of the Uniform Code. That article provides unequivocally that the rulings of the law officer on interlocutory questions are to be final (except on questions of the accused's sanity and on motions for findings of not guilty). It had generally been assumed, by some Army lawyers at least, that, except for the two excluded items, Article 51b meant that the law officer's rulings were to be final even though they might involve the determination of disputed questions of fact.

Recognizing the existence of Art-

¹³It is contended by some, for example, that the opinion in the *Ornelas* case would require the law officer to submit to the court-martial the question of admissibility of evidence obtained as a result of a search the legality of which is in dispute. The rule that the law officer's ruling admitting a confession or admission in evidence is not conclusive of the voluntary nature of the confession or admission (par 140a, MCM) is not involved in the *Ornelas* question. The confession-admission rule stems from the fact that the law officer's ruling, although conclusive as to admissibility, is not conclusive as to the weight to be given to the confession; the rule does not mean that the court is allowed to second-guess the law officer on the question of the *admissibility* of the confession or admission.

icle 51b of the Uniform Code, the Court in reaching its decision experienced difficulty with the provision of paragraph 67e of the Manual for Courts-Martial that a decision on a motion raising a defense or objection is an interlocutory matter. The Court neither mentioned nor attempted to explain paragraph 57b of the Manual, which unequivocally defines interlocutory questions as "all questions other than the findings and sentence." In arriving at its decision, the Court started with the premise that the accused could not be guilty of desertion unless he had been lawfully inducted. To hurdle the obstacles that were apparently created by Article 51b and paragraph 67e, the Court used the following language:

"There is nothing in the legislative history of the Uniform Code of Military Justice which assists in dealing with this problem. However, the Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, page 82, discloses that paragraph 67 of the Manual was patterned on Rule 12(b), Federal Rules of Criminal Procedure. This rule states clearly that issues of fact arising in connection with defenses and objections 'shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress.' This suggests forcibly that the Manual draftsmen did not intend to vest in law officers final authority to decide issues of fact arising in connection with a defense or objection raised by an accused." (Emphasis supplied.)

This language raises several questions: (1) Is Rule 12 of the Federal Rules of Criminal Procedure to be followed in court-martial practice? (2) If not, must all interlocutory questions involving disputed ques-

tions of fact submitted to the court for determination?¹³ Although the Court mentioned Rule 12(b) of the Federal Rules of Criminal Procedure rather favorably, it does not seem likely that the Court intended to graft that rule to Article 51b. It is obvious that Rule 12(b), as such, is not applicable to court-martial practice, as Article 36 of the Code empowers the President to prescribe the procedure in cases before courts-martial and there is no indication in the Manual of an intention to follow Rule 12 or Federal precedent blindly in disposing of interlocutory matters. The drafters of the Manual stated only that it was intended to adopt Rule 12 of the Federal Rules of Criminal Procedure "insofar as practicable for court-martial practice."¹⁴ In essence, Rule 12(b)(4) contemplates that matters respecting motions ordinarily will be determined by the trial judge and permits him to determine contested issues of fact in connection therewith in any manner he sees fit unless a jury trial of a particular issue is required by the Constitution or by statute.¹⁵ No issue before a court-martial is required by the Constitution to be determined by the "jury" (members of the court);

¹⁴Legal and Legislative Basis, MCM, 1951, p. 81.

¹⁵Notes of Advisory Committee, Federal Rules of Criminal Procedure, Rule 12(b)(4), 18 U.S.C.A.

¹⁶Articles 41, 51, 52, UCMJ.

¹⁷For example, what civilian precedent is one likely to find for the disposition of a motion to dismiss resulting in a disputed fact question of whether the convening authority is the accuser?

statutes applicable to courts-martial require only that challenges, the accused's sanity, guilt or innocence, and the sentence be resolved by the members of the court.¹⁶ An additional statute, Article 51b, provides that interlocutory questions, with certain exceptions, are to be decided by the law officer. The Congressional intent seems clear. It appears difficult to reconcile the holding of the Court in the *Ornelas* case with the Congressional intent.

If Rule 12(b) of the Federal Rules of Criminal Procedure is not applicable (except perhaps by rather far-fetched and unreliable analogy¹⁷) and the provisions of Article 51b of the Uniform Code do not govern the final disposition of interlocutory questions which involve disputed fact questions, what rule is the law officer to follow? The concluding language of the Court in the *Ornelas* case sheds some light on this question:

"We conclude that where an accused raises a defense or objection *which should properly be considered by the court in its determination of guilt or innocence*, and which resolves itself into a question of fact, that issue must be presented to the court pursuant to appropriate instructions. But where the issue is *purely interlocutory or raises solely a question of law*, it is within the sole cognizance of the law officer. * * * We should add that it matters not, in our opinion, whether the issue is submitted at the time the motion is made or at the conclusion of the case when the court is required to deliberate on the evidence." (Emphasis supplied.)

This conclusion appears to be in accord with the not unreasonable view that no provision of the Uniform Code can be interpreted so as to de-

tract from the power of the court to determine the guilt or innocence of the accused. It seems clear that as the court-martial has the sole power of determining guilt or innocence,¹⁸ it cannot be precluded from exercising that power by an interlocutory ruling of the law officer which determines the existence or nonexistence of one of the elements of an offense. This conclusion is fortified by the fact that, except when he is ruling on a question of sanity, the law officer is not guided by the rule of reasonable doubt that must be followed by the court when it determines the existence or nonexistence of an element. As Ornelas could not properly have been found guilty of desertion unless the court was convinced beyond a reasonable doubt that he was a "person subject to military law" at the inception of the period of unauthorized absence,¹⁹ there can be no quarrel with this principle and its application in the *Ornelas* case.

Under this interpretation of the *Ornelas* case, it would be proper for the law officer to rule finally on a motion raising a defense or objection, even though this would entail resolving an issue of fact, if the fact issue is not one which the court would have to resolve in favor of the prose-

cution beyond a reasonable doubt in reaching a finding of guilty. It is believed that this is the type of fact issue that the Court would characterize as "purely interlocutory" and "within the sole cognizance of the law officer." In resolving such an issue of fact, the law officer would be guided by the general rule that the burden rests upon the accused to support by a preponderance of the evidence a motion raising a defense or objection.²⁰

A discussion of the application of the principle evolved in the *Ornelas* case to motions to dismiss, asserting some of the more familiar defenses and objections, may be helpful. Ordinarily the fact issue, if any, raised under a motion asserting former punishment, promised immunity, former jeopardy, pardon, or constructive condonation of desertion will not be an issue which should properly be considered by the court in determining guilt or innocence, for such an issue would relate to events occurring after the commission of the offense. Such events could logically have no bearing on the accused's guilt or innocence. In fact, if the law officer does not rule finally on such a motion but instead submits it to the court under appropriate instructions, he may well be prejudicing the substantial rights of the accused by abdicating his functions as law officer.²¹ Similarly, the law officer should rule finally on a motion attacking the jurisdiction of the court when the issue raised thereunder is whether the convening authority is in fact an accuser in the case, for this issue has no bearing on the general issue of guilt or innocence. For the same reason the

¹⁸Article 52, UCMJ.

¹⁹Under Article of War 58, "any person subject to military law" could be guilty of desertion. Under Article 86 of the Uniform Code, only a "member of the armed forces" may desert.

²⁰Par. 67e, MCM.

²¹*United States v. Berry* (No. 69), 2 CMR 141.

law officer should rule finally on a jurisdictional motion which resolves itself into an issue of fact as to whether the status of the accused at the time of *trial* is such as to bring him under the jurisdiction of the court. That is, the law officer determines finally whether the court has a right to try the accused and determine his guilt.

On the other hand, the issue of mental responsibility raised by a motion asserting lack of mental responsibility would be an issue that the court must resolve in determining the accused's guilt or innocence. In the same category would fall one of the issues of fact involved in the *Ornelas* case, that is, whether the accused *at the time of the offense* had a status which made him amenable to punishment for a violation of the punitive article under which the specification is laid. In these instances, unless the issue is resolved finally in favor of the accused under a motion for a finding of not guilty, the law officer must submit the issue to the court for determination under appropriate instructions. Ordinarily such an issue should be submitted to the court at the conclusion of the case, but, as indicated in the *Ornelas* case, the issue could be submitted at any time during the trial. In any event, it appears that the law officer should request the court to state the reasons for its findings if it finds the accused not guilty of the offense because of the defense or objection. Such action would be appropriate, for example, if the evidence reasonably raises the issue of the accused's mental responsibility at the time of the offense or the issue of whether, on the date of

the alleged offense, the accused was in that category of persons who could commit the offense.

As this discussion indicates, it appears that not every jurisdictional motion resulting in a fact issue should be submitted to the court for determination. The reason for this may be made apparent by example. Assume that two accused are tried at separate trials for deserting the Army. The first accused concedes that he was a member of the Army at the time of his alleged desertion, but by a jurisdictional motion he contends that *at the time of trial* he is not a person subject to the Uniform Code. Such a motion, even though it may resolve itself into an issue of fact, should be within the sole cognizance of the law officer, for it does not bear on guilt or innocence; it affects only the right of the court to determine guilt or innocence. The second accused concedes that at the time of trial he is subject to the Uniform Code, but he moves to dismiss the charges on the jurisdictional ground that he was not a member of the Army *at the time of the alleged desertion* and adduces evidence to support his contention. Unless this contention is resolved finally in favor of the accused under a motion for a finding of not guilty, the law officer should submit to the court under appropriate instructions the issue of fact raised by the accused; for if the latter was not a member of the Army, he could not be guilty of desertion.

If this analysis of the holding and effect of the *Ornelas* case is correct, little change has been made in the previously existing state of military law, for the Court of Military Appeals,

earlier indicated that defensive issues which go to guilt or innocence and which are reasonably raised by the evidence must be submitted to the court-martial under appropriate instructions.²² The Court has also held that the touchstone for determining whether an issue of fact is to be determined by the law officer or submitted to the court-martial "is whether the motion to dismiss involved an interlocutory question or whether it raised solely a matter of defense under a plea of not guilty."²³

If, however, the Court by its opinion in the *Ornelas* case intended to indicate that fact issues resulting from motions raising such matters as former punishment, promised immunity, former jeopardy, pardon, and constructive condonation of desertion must be submitted to the court members for determination as matters bearing on guilt or innocence, many complex questions are raised. Which party has the burden of proof under such a motion, and what is his burden? Should the law officer make any ruling at all on such a motion when his ruling would have no finality and would thus amount only to an expression of his opinion on a fact issue that is within the province of the court? What sort of an instruction should the law officer give to the court? If the law officer is to give special issue instructions, by

what provision of the Code or Manual is this authorized? What proportion of the vote of the court members is controlling on such an issue? Should the president in announcing the court's decision state that the motion is denied or granted or that the accused is guilty or not guilty?

The complexity of these questions, as well as the fact that no ready, logical, and consistent solution to them is to be found in the Uniform Code, the Manual for Courts-Martial, or civil or military precedent, lends weight to the theory advanced in this discussion that all the Court intended to say in the *Ornelas* case was that the law officer may not, through his power to rule on interlocutory questions, determine the guilt or innocence of the accused. In other words, except to the extent that the burden may be relieved by a plea of guilty, the prosecution has the burden of establishing the guilt of the accused beyond a reasonable doubt, this burden cannot be lightened by an interlocutory ruling of the law officer on a disputed question of fact that directly affects guilt or innocence.

In two opinions involving motions to dismiss desertion charges because the accused had not been lawfully inducted,²⁴ the Court clarified the question of when a disputed fact issue exists and laid down the rule as to the treatment that is to be accorded such an issue if there is no dispute as to the facts. Each case involved the question of whether the accused was subject to military law at the time of the offense. The evidence on the question of induction, although legally complicated, was not disputed in either case. The Court

²²*United States v. Ginn*, supra.

²³*United States v. Richardson* (No. 429), 4 CMR 150.

²⁴*United States v. Rodriguez* (No. 365), 31 Dec 52; *United States v. McNeill* (No. 1048), 14 Apr. 53.

held that it was not error for the law officer to rule finally on the motions to dismiss for lack of jurisdiction, concluding that there was no "factual dispute concerning jurisdiction which would have an effect on the ultimate guilt or innocence of the accused."²⁵ Thus the Court considered that the legal eligibility of the accused to commit the offense was not an element of the offense of desertion but was, instead, to be treated as being in the nature of an affirmative defense.²⁶ However, if, as the Court said in the *Ornelas* case, an accused cannot be convicted of deser-

tion by a court-martial if he "was never inducted, never became subject to military law," it is arguable that the legal eligibility of the accused to commit the offense of desertion is an element of the offense. If it is an element, however, it would be legal error for the law officer to fail to submit the issue of legal eligibility to the court-martial for its determination in connection with its determination of the findings, even though there was no dispute as to the facts. Under the element theory, the *Rodriguez* and *McNeill* opinions could be justified by the harmless error rule; that is, although the law officer erred in not submitting the question of jurisdiction to the court for its determination, the error did not materially prejudice the substantial rights of the accused because of the compelling (undisputed) nature of the evidence showing that the accused was legally eligible to commit desertion.²⁷ However, as was pointed out in the *Simmons* case,²⁸ if the evidence raises an issue that must be determined by the court-martial—be it element or affirmative defense—the issue must be presented to the court with proper instructions. The Court of Military Appeals has taken the less technical approach and has treated the matter of legal eligibility to commit desertion under Article of War 58 as being in the nature of an affirmative defense; that is, the law officer need not instruct the court that it must find beyond a reasonable doubt that such legal eligibility existed unless that legal eligibility is

²⁵*United States v. McNeill*, supra.

²⁶Legal eligibility to commit the particular offense may be an element of numerous offenses defined by the Uniform Code. For example, only an officer can violate Article 88 (contempt toward officials), only a sentinel or lookout can violate Article 113 (misbehavior of sentinel), only a warrant officer or enlisted person can violate Article 91 (insubordinate conduct toward noncommissioned officer), and only a member of the armed forces can violate Article 85 (desertion) or Article 86 (absence without leave). Certain offenses can be committed only by persons subject to the Code (Articles 118-131, civil type offenses); others can be committed by anyone who violates the prohibitions of the article (Article 104, aiding the enemy; Article 106, spying).

²⁷Article 59a, UCMJ; par 87c, MCM. This reasoning was applied and the same result achieved in a case in which the court-martial was deprived of an opportunity to vote on the guilt of the accused after he had pleaded guilty. *United States v. Lucas* (No. 7), 1 CMR 19.

²⁸*United States v. Simmons* (No. 505), 5 CMR 119.

reasonably in issue under the evidence.

The full effect of the *Ornelas*

²⁹Under the 1948 Articles of War, for example, it would have been difficult to raise the question considered in *Ornelas*, as the law member instructed the court in an unrecorded closed session and also participated in deliberating and voting on the findings.

opinion has not yet been felt. Many dimly-lit passageways remain to be discovered, explored, and described by the Court of Military Appeals. One thing only is certain: The *Ornelas* opinion is but one further illustration of the problems that were bound to be the product of the wedding of the judge-jury concept to the court-martial concept.²⁹

THE FIFTH ARMY JUDGE ADVOCATE SCHOOL

By

LT. COL. MORTON JOHN BARNARD, JAGC-USAR*

Plans are now under way for the third annual Fifth Army Judge Advocate School to be held at Northwestern University Law School during July and August, 1953. Three classes of 15 days each will commence 5 and 19 July and 2 August, respectively.

This year's course will be devoted primarily to a study of the duties of the law officer in a general court-martial, with particular attention to the recent rulings of the U. S. Court of Military Appeals.

Any Army, Navy, Air Force, Marine, or Coast Guard reserve officer who is a lawyer and who is within the Fifth Army Area or comparable unit of one of the other branches is

*Of the Chicago Bar.

invited to apply for 15 days active duty training at the Fifth Army Judge Advocate School through his own Military, Naval, or other district or command. Since the capacity of the school is limited, it is advisable to make application as early as possible and to indicate 1st, 2d, and 3rd choices of classes.

The staff and faculty comprise reserve officers assigned to the Illinois Mobilization Designation Detachment #5, the JAGC School reserve unit in Chicago. The personnel of this unit plan, prepare and execute the entire course. Lectures on special subjects are sometimes given by officers assigned to the JA Section, Headquarters Fifth Army.

Last year more than 125 reserve officers of the Army, Navy, and Air

Force, including one Spar were in attendance. Though primarily for members of the JAGC-reserve, lawyers holding commissions in other branches were invited to and did participate.

Prior to 1951, JAGC-reserve schools for the Fifth Army were held at Ft. Sheridan, Illinois, under the instruction of regular Army JAG officers. During the winter of 1950-51, Lt. Col. Avern B. Scholnik, CO of the Illinois Mob. Des. Det. #5, convinced the Fifth Army Judge Advocate, under whose direction such schools had been conducted in the past, that the place for a JAG School was in an established law school and that the instruction should be under qualified JAG reservists.

The school will again be held at Northwestern University Law School. Located on the near north side of Chicago, its class rooms, library, and offices are ideally suited for such a school, without interfering with the law school's summer curriculum. Abbott Hall, the dormitory a short block away, has excellent facilities at reasonable rates for housing and feeding the students who do not live in town and who do not bring their families with them, while those whose wives insist on coming along can find accommodations at nearby hotels.

The enactment of the Uniform Code of Military Justice and publication of the new MCM 1951, made it mandatory that most of the time, of the first year's course in 1951, be devoted to a study of their provisions and that the lecture and conference method be employed in the main. Despite its general acceptance, students and faculty alike were con-

vinced that future courses should, so far as possible, minimize the lectures and utilize other teaching methods wherever feasible.

When it was determined that the school would again be in operation during the summer of 1952, serious consideration was given to substituting student participation for the lectures wherever possible. After exploring various suggestions, it was finally decided to base the course on a moot general court-martial case, which would be followed from its inception to its ultimate disposition in the Court of Military Appeals.

Mimeographed copies of the essential data, statements of witnesses, and the confession were distributed to the students. They were assigned duties as personnel in the various proceedings that were to follow and were called upon to demonstrate the activities of each.

Forms of charge sheets were distributed and each student then prepared his own charges and specifications.

In like manner, each additional step was carried out: action by the officer exercising summary court-martial jurisdiction, investigation, forwarding of charges, preparation of SJA's advice, reference for trial, trial of the case, preparation of review, and proceedings before the Board of Review and Court of Military Appeals. Each phase was conducted entirely by the students under the direction of the faculty. The review of the staff judge advocate, prepared in detail by each student, was marked by the faculty and served in lieu of an examination.

Prior to the trial, the duties of the

trial and defense counsel and the law officer were discussed by the instructors. Particular emphasis was laid upon the treatment by the law officer of a confession, the admisibility of which is objected to by the accused on the ground that it was improperly obtained, and instructions by the LO as to the elements of the offense and lesser included offenses, in the light of recent USCMA decisions.

The students were given a mimeographed record of the trial, except for the testimony of the witnesses, in advance of the trial. The original statements served in lieu of verbatim questions and answers. By this means the various aspects of the procedure were covered, without depriving the participating students of the opportunity of exercising some latitude and judgment .

The "school solution" for each written document required to be prepared by the students, was distributed after completion of the exercise. At the conclusion of the course, each student had a complete record which would serve as a model for future use.

The class also had the opportunity of observing an actual general court-martial trial and comparing with the classroom work.

In addition to the work in military

justice which was the backbone of the course, military affairs, claims, legal assistance, and the Geneva Convention were included in the curriculum.

At the conclusion of the course, students were requested to turn in their critiques, signed or unsigned as they preferred. Not a single adverse comment was received. The vast majority were enthusiastic and expressed the hope of attending future classes similarly conducted.

Many of the students stated that this was the best course they had ever attended in their military careers. This attitude is particularly significant when one considers that the classes comprised judges, law professors, and lawyers from all walks of life, and included all grades from lieutenant to full colonel, many of whom had had years of military service and had had considerable experience in military law.

When one considers that most of the material was developed by reserve officers on their own time, and that the task was complicated by the fact that it had to be designed to appeal to lawyers whose military background varied from extensive experience with military justice to complete lack thereof, the result may be considered as highly satisfactory.

Please advise the headquarters of the Association of any changes in your address so that the records of the Association may be kept in order and so that you will receive all distributions promptly.

GEN. HULL ADDRESSES JAG SCHOOL CLASS

On April 24, 1953, at the graduating exercises of the 13th Class of The Judge Advocate General's School, Charlottesville, Virginia, General John E. Hull, Vice Chief of Staff, U. S. Army, addressed the 58 graduates, their guests, the advanced class of student officers, and the staff and faculty. Col. Charles L. Decker, Commandant of the School, presided at the ceremonies which were attended by Maj. Gen. Franklin P. Shaw, Assistant TJAG of the Army, and Dr. Colgate W. Darden, Jr., President of the University of Virginia.

General Hull's remarks on this occasion are set forth:

It is a real pleasure to appear today as a voluntary witness testifying to your successful completion of the Judge Advocate General's School. I can assure you that General Brannon did not have to subpoena me for this ceremony. On the contrary, I am delighted that circumstances did not prevent me—as they prevented General Collins last January 30th—from attending the graduating exercises.

The training you have just completed was designed to supplement the basic legal knowledge which you acquired in law school. Your knowledge and experience have been directed into military channels these past twelve weeks. You have been schooled for assignments as advisers and representatives of Army commanders in the specialized field of military law.

I know that the instructors and staff officers of the school have presented you with a detailed brief of your future functions and responsibilities. During the next few min-

utes I would like to discuss some of the problems, some of the programs of this client—the United States Army—whom you will serve.

The Army is the product of two principal forces—men and materiel. Military justice, claims, procurement, contracts and other legal actions involve men and materiel. Your approach to these forces will differ from that of the Quartermaster, Ordnance, Engineer or Signal Corps officer. Ultimately, however, you have the same objective—to make the individual soldier more efficient and useful, and to give the Army the best possible equipment and facilities at the least possible cost.

No problem has a greater impact on the plans and operations of the Army than that of personnel. None of us can deny or underestimate the costliness or complexity entailed in waging a war with a force which has been compelled to mobilize, fight and demobilize at one and the same time.

As of last December 31st, the num-

ber of Army personnel returned to the United States from the Far East Command alone since the combat rotation plan was put into effect in May 1951, totaled approximately half-a-million. During the current fiscal year, 1953, some 700,000 soldiers—nearly half of our authorized total strength—will be released to civilian life while we cast about for an equal number of Selective Service recruits for the replacement pool. In addition, at the present time only nine per cent of our officers and men are from the Reserve or National Guard. These components furnished the greatest portion of our strength when the going was roughest only two years ago.

I cite these statistics not to prove that the Army faces a tremendously difficult personnel problem. That is self-evident. Rather, I believe that these figures illustrate a fact that those of us with many year's experience have long recognized. The individual soldier is the Army's most priceless and scarcest asset. He is basically a civilian soldier.

The emphasis given at the Judge Advocate General's School to the Uniform Code of Military Justice affirms this truth.

Military justice is not a set of legal principles to be mastered academically, applied mechanically, and administered autocratically. It is an instrument of the military society delicately constructed to insure necessary discipline while respecting the rights of the individual.

As lawyers you will recognize appropriate provisions of the Uniform Code which can be invoked for infractions of military law. As officers, however, you must first realize that

discipline in the United States Army is the product of intelligent respect for authority rather than fear of punishment.

I would emphasize, therefore, the opportunity which you will have to assist your commander and his staff in explaining to the soldiers of your unit the purpose of discipline, the reason for command authority, and the nature of military law. I have unquestioning confidence in the willingness and ability of the individual soldier to do more than his share in carrying out any mission which he understands and which he is asked to support.

In the field of military justice, your job begins long before charges are preferred and you are appointed Trial Judge Advocate or Defense Counsel. It begins the moment you report for duty on your new assignment, and continues throughout your Army career. And the greatest verdict you will win will not be signified by the words GUILTY or NOT GUILTY. It will be recorded in the absence of a Court-Martial record for the soldier who was told the reason for military law—and knowing—obeyed it.

The United States Army today is big business. For example, the Army's expenditures for hard goods, such as tanks, guns and ammunition, increased from approximately \$300 millions monthly in the summer of 1950 to approximately \$1.6 billions a month by the end of last year. The production of finished ammunition alone for our fighting forces amounted to a rate of four million dollars a month in the early summer of 1950. Today that production has soared to the rate of \$200 million a month and

the figure will go still higher to the rate of well over \$300 million a month by the end of this year.

This production represents a tremendous investment by the American taxpayer. From a military standpoint, it means that our soldiers in Korea are getting the ammunition and equipment they need. From a legal standpoint, it means that you and your fellow officers in the Judge Advocate General's Corps have the difficult but inescapable responsibility of insuring that the Army and the American taxpayer get a dollar's worth of material for each dollar expended.

In this effort there can be only a single standard of integrity and firmness. Your opinions and actions must be lawfully correct and morally honest. Your career must reflect the highest standards of the legal profession and of the United States Army.

The service awaiting you these next few years may well be the most challenging and productive of your entire life. Certainly, few attorneys in civil life share the responsibility which will be yours in protecting an investment of billions of dollars in national security. Few of your associates in the legal profession will have your obligation to prosecute, defend, and judge those with whom you must work in the common cause of defending our nation. None will be required to advise their superiors more frequently on matters affecting the welfare of thousands of their fellow men and the property of all their fellow citizens.

This latter responsibility as the "commander's lawyer," demands that

you possess all the qualities of a good staff officer. It is not enough that you know your own job. You must study and learn the basic missions of each staff and subordinate unit in your command. You must become familiar with their requirements and problems.

It is of no help to tell a commander that a certain course of action cannot be taken, when the mission requires accomplishment of the assigned objective. Your advice must detail the reasons why the suggested action is impractical or improper. It must offer sound, lawful alternative steps, if they exist, which may be taken. In other words, you must keep your commander out of jail while providing him with every possible legal aid to carry out his difficult mission.

As a staff officer, you will often be required to make recommendations to your commander on legal matters. These recommendations must not be based on what you think the commander wants you to say. They must not be an attempt to second guess the commander. Instead, every recommendation you make must be the product of sound judgment, firm conviction, and absolute determination to do only that which will promote the best interests of your unit, the Army, and our Nation.

During your Army career you may occasionally question the necessity of your job. You may wonder, as did the veteran combat officer who had been approached by a young, healthy law school graduate for a military assignment as a legal officer, whether we are fighting the Communists or suing them. I'm sure all of us would be much happier if the fight could be

settled in the court room instead of on the battlefield.

The Army exists for one purpose only—to defend our nation against armed aggression. Today, however, military preparedness requires more than a mere willingness or even a determined desire to bear arms. An adequate posture of defense is the product of technology, science, industry, administration and law.

Our society of which the Army is but a part is founded on the principle of law and order. These norms regulate our commerce, stabilize our economy, and harmonize our relations with our fellow men. They affect the Army in all of its operations.

By training and experience you are qualified and expected to be the interpreters of these principles. Virtually every activity of the Army and its members touches in one way or another some law, regulation, directive, or order. This does not mean that the Army is restricted and hampered by these legal safeguards. It does mean that our policies and programs must reflect an intelligent appreciation and application of these guidances.

The Army is the repository of a priceless investment by the American

people in the cause of freedom—their lives and their fortunes.

We look to you for counsel, for encouragement, for positive guidance and action to enable the Army to accomplish its assigned mission in the shortest possible time, at the least possible cost, and with maximum protection for the rights and institutions of those we are pledged to defend.

I know that you will devote all of your ability and effort to the tasks which confront you. I am confident that you will not fail to measure up to the highest standards of your profession and of the Army.

Integrity, firmness, initiative and ability are the qualities for which you were selected as officers of the Judge Advocate General's Corps. Make them your creed of service. Adopt them as personal standards of performance.

You can then be numbered among those generations of Americans who have served their country and the Army faithfully and well. You can then give testimony to the imperishable truth that the rights and freedom guaranteed by law will live so long as there are Americans willing to die in their defense.

Your professional successes, important cases, new appointments, political successes, office removals, and new partnerships are all matters of interest to the other members of the Association who want to know "What The Members Are Doing." Use the Journal to make your announcements and disseminate news concerning yourself. Send to the Editor any such information that you wish to have published.

NOTES ON RECENT DECISIONS OF THE UNITED STATES COURT OF MILITARY APPEALS

Because of the great volume of decisions emanating from the court, there will be no attempt to discuss the facts or detailed holdings in the cases, but only the identification of the case with the essential principle established by it.

Instructions of the Law Officer

In *U. S. v. Fox* (Case No. 837, decided 8 May 1953) upon a GCM trial for unpremeditated murder, the trial court found the accused guilty of the lesser included offense of involuntary manslaughter while attempting a battery. There was sufficient evidence to sustain this finding, but there was no instruction by the LO upon the included offense. CMA reversed and remanded, holding that the LO failed to carve out instructions tailored for the case and permitted the Court to operate without guidance as to the law.

The LO, in *U. S. v. Smith* (Case No. 486, decided 5 May 1953) on a GCM trial for larceny, adopted in his instructions the defense counsel's reading of portions of the Manual on elements of proof and referred the court to the specific parts of the Manual. Both trial counsel and defense counsel, on the question of the LO, announced that they were satisfied with the instructions. CMA, on the contention of error in failure of the LO to personally and directly instruct on the elements of larceny,

held: where defense clearly and unequivocally assents to minimal instructions, he will not be heard thereafter to claim error in relation to those instructions. However, in *U. S. v. Chaput* (Case No. 687, decided 13 January 1953), CMA held that the only appropriate source of the law applicable to any case is the LO and for the LO to direct the court to previous cases where larceny was involved to obtain information required for its guidance is prejudicial error.

In *U. S. v. Day* (Case No. 703, decided 30 April 1953) in a trial for premeditated murder, the LO failed to define malice aforethought and premeditation in his instructions. The defense counsel did not request definition, but both the trial counsel and defense counsel in their argument defined the terms. There was held to be no prejudicial error. Also in this case, the LO failed to instruct on lesser included offenses, but CMA on the facts, found that the only possible lesser included offense was unpremeditated murder and the LO had advised of it and did instruct the Court upon the effects of intoxication, which, on the evidence, was the only basis for considering that lesser included offense. This was held not to be error.

In *U. S. v. Floyd* (Case No. 745, decided 12 February 1953) on a charge of assault with intent to commit murder, it was held necessary for

the LO to instruct on what constitutes murder as well as on all elements of included offenses. CMA, in *U. S. v. Aldridge* (Case No. 686, decided 24 March 1953), held it immaterial that the President in an SCM trial for larceny instructed upon the elements of the common law offenses of larceny, embezzlement, and taking under false pretenses since UCMJ abolished the distinctions between these crimes and made the means of acquisition of property unimportant, and the court had only to find that the accused acquired possession of specific property of named persons with intent to permanently deprive the owner thereof.

In a trial for involuntary manslaughter arising out of operation of a truck, CMA in *U. S. v. Cobb* (Case No. 1240, decided 24 March 1953) held the LO's instructions giving the elements of involuntary manslaughter without definition of culpable negligence not error on the record, particularly because the defense counsel in his argument had defined the term.

In *U. S. v. Grossman* (Case No. 796, decided 16 April 1953), a case involving homicide through culpable negligence in the use of an automobile, CMA held LO's instructions from the Manual on manslaughter erroneous since it furnished no measuring rod of the degree of homicide.

Instruction of the LO in a case of cowardly conduct in the presence of the enemy which failed to include the element of fear was held erroneous in *U. S. v. King* (Case No. 948, decided 15 April 1953), and *U. S. v. Soukup* (Case No. 533, decided 23 January 1953).

In *U. S. v. Lowery* (Case No. 683,

decided 13 March 1953) the LO's failure to instruct the court on the elements of AWOL in a desertion case where there was some evidence that there was intent not to desert was held prejudicial error, and the failure of the defense counsel to request instruction on AWOL did not relieve the LO of his duty, nor was the error vitiated by the fact that officers generally know that AWOL is a lesser included offense of desertion.

In *U. S. v. Bagueux* (Case No. 699, decided 13 March 1953) on a trial for premeditated murder, the LO instructed the court only upon the elements of premeditated murder and upon the specific request of defense counsel averted to the lesser included offenses referring the court to the MCM. The accused was found guilty of unpremeditated murder. CMA held the instruction was error because the evidence fairly raised the issue of unpremeditated murder and voluntary manslaughter and was not cured by the fact that the court only found the accused guilty of unpremeditated murder.

In *U. S. v. Benavides* (Case No. 876, decided 20 February 1953) on review of the evidence in a premeditated murder case, CMA held the LO's instructions on the elements of premeditated murder and unpremeditated murder were not insufficient because they did not cover the legal effect of intoxication on the element of specific intent to kill or on accidental killing, involuntary manslaughter, and negligent homicide.

In *U. S. v. Backley* (Case No. 1588, decided 12 May 1953) upon a trial for assault in which grievous bodily

harm was intentionally inflicted with a weapon, the LO instructed the court on the elements of the offense charged and lesser included offenses, but failed to instruct upon the legal effect of intoxication. CMA held the evidence fairly raised the question of intoxication and since the offense charged required specific intent, the trial court should have upon proper instructions considered evidence of intoxication as it bore on the element of specific intent. The mere statement of lesser offenses did not suffice.

The LO's instruction must be considered as a whole and will not be declared error merely because parts taken out of context do not completely or accurately state the law, *U. S. v. O'Briski, et al* (Case No. 1082, decided 30 March 1953).

Where defense counsel consciously and affirmatively causes the removal from the court's consideration of the issue of the commission of the offense substantially lesser than the offense charged, he thereby waives his right to have the court instructed thereon, *U. S. v. Mundy* (Case No. 1447, decided 12 May 1953).

In *U. S. v. Clark* (Case No. 1042, decided 1 May 1953), CMA held in trial of accused for rape of a nine year old Korean girl that the LO's instruction that carnal knowledge was not a lesser included offense of rape was not error in view of the uncontradicted evidence indicating force.

In *U. S. v. Presley* (Case No. 2113, decided 27 April 1953), the LO erred in refusing to admit evidence of accused's good character on the issue of guilt or innocence but limiting such evidence to mitigation only.

In *U. S. v. Larry* (Case No. 1896,

decided 29 April 1953), CMA held the accumulation of errors, including the failure of instruction on the issue of sanity properly raised, required a reversal of the conviction even though there had been a guilty plea.

CMA adopted the Federal Trial Court practice of impartial advisory comment on the evidence and facts by the LO with proper instructions to the court in *U. S. v. Andis* (Case No. 712, decided 31 March 1953).

In *U. S. v. Haywood* (Case No. 1852, decided 14 April 1953), CMA held the failure of the LO to instruct on the effect of intoxication upon the accused's capacity to commit the offense charged was error, which could not be purged by the board of review affirming a finding of wrongful taking since UCMJ embraces no such offenses without *intent* to deprive the owner of property.

In *U. S. v. Glover* (Case No. 829, decided 6 February 1953), CMA held it not prejudicial error for the LO to fail to instruct on the elements of the offense of wrongful appropriation where the accused pleaded guilty to that offense because all the elements of that offense, except the intent to deprive the owner permanently, were present in the crime of larceny of which the accused was charged and found guilty on proper instructions. See also *U. S. v. Estes* (Case No. 773, decided 6 February 1953).

In *U. S. v. Mitchell* (Case No. 904, decided 13 February 1953), the instruction of the LO was in the alternative on both premeditated and unpremeditated murder. CMA held the instructions permitted the court to

find the accused guilty of the greater crime of premeditated murder upon the standard of proof required for the lesser offense of unpremeditated murder, and that, therefore, the use of alternative instructions constituted prejudicial error. CMA also found there was sufficient evidence of intoxication to raise it as an issue on a separate charge of assault with intent to commit murder and that, therefore, the LO's failure to instruct on the lesser offenses not requiring the element of specific intent was error.

In *U. S. v. Cline* (Case No. 769, decided 17 April 1953), CMA held the LO's instructions in trial for desertion inadequate because the evidence fairly raised the question of intention to desert and the only instruction on AWOL was by reference to the Manual.

The general instruction on Article 134 "that the accused did or failed to do the acts as alleged, and that the circumstances were as specified" was held inadequate in *U. S. v. White* (Case No. 635, decided 1 May 1953).

CMA approved the LO's instruction on larceny and the lesser included offense of wrongful appropriation under the circumstances of the case in *U. S. v. Bryant* (Case No. 1491, decided 14 April 1953).

Confessions

In *U. S. v. Cooper, et al* (Case No. 708, decided 24 March 1953), on a joint trial for robbery, inter alia, one of the accused by counsel insisted that testimony bearing on the voluntariness of his alleged confession be heard by the LO out of hearing of the court. Later the LO admitted the confession over objection and on ap-

peal it was asserted that the LO erred in submitting the question of voluntariness of the confession without it having heard the testimony on that issue. CMA held the accused had the right to have the court hear the testimony on that issue, but the right was waived by the affirmative action of the defense counsel apparently as a matter of trial tactics to have the testimony taken out of hearing of court.

In *U. S. v. Isenberg* (Case No. 579, decided 25 March 1953), CMA held that evidence of a ten day unauthorized absence without evidence of facts or circumstances from which intent not to return could be found or inferred would not support such a finding that the offense of desertion was probably committed as would form the basis for a consideration of accused's confession of the offense of desertion.

In *U. S. v. Hatchett* (Case No. 1137, decided 8 May 1953), the accused took the stand on the issue of voluntariness of his confession and upon cross-examination, was examined upon matters possibly touching on the merits of the case although also relating to the accused's credibility. The accused later took the stand in his own behalf. CMA held that even if incriminatory admissions had been improperly elicited from the accused when he took the stand for limited purpose that any error thus committed was vitiated by the accused's taking the stand on the merits.

The confession of the accused was held improperly received in evidence in *U. S. v. Williams* (Case No. 1212, decided 1 May 1953) because of improper warning as required by Art-

icle 31, UCMJ. CMA held that a warning that the suspect can refuse to answer only those questions which are incriminatory does not meet the requirements of the statute that the accused be informed of the nature of the accusation, that he need not make any statement, and that any statement may be used against him. See also *U. S. v. Wilson, et al* (Case No. 647, decided 27 February 1953; *U. S. v. Pederson* (Case No. 838, decided 2 March 1953).

Validity of Sentences

In *U. S. v. Murgaw* (Case No. 1079, decided 31 March 1953), in a trial for desertion under AW 58, the LO instructed the court that it could not give a sentence in excess of six months without punitive discharge as provided in MCM 1951. CMA held the instruction prejudicial error because the provisions of MCM 1949 governed the case and provided for punitive discharge on sentences of confinement in excess of twelve months. The remission of the BCD by the convening authority was held not to cure the defect since the record would show a BCD legally imposed.

In *U. S. v. Wappler* (Case No. 1457, decided 15 April 1953), CMA held a sentence of diminished rations in a case of AWOL where accused was not on board vessel invalid, but that a concomitant sentence of BCD was valid and subject to remission by the board of review.

On a retrial ordered because of error affecting the sentence only, CMA held the court not limited by the sentence of the earlier trial, *U. S. v. Chapman* (Case No. 1001, decided 19 January 1953).

Power of Supervisory Authority

In *U. S. v. Frisbee* (Case No. 1182, decided 9 March 1953), the supervisory authority disapproved a sentence of an SCM including a BCD in an AWOL case and ordered rehearing. On retrial upon a plea of guilty, the accused was again sentenced to a BCD. The board of review disputed the supervisory authority's power to order rehearing. CMA held that the officer exercising GCM jurisdiction acts as convening authority in review of record of SCM where the sentence involves BCD and has the power to disapprove the sentence and order rehearing as well as to approve or set aside, and that, therefore, the retrial did not constitute double jeopardy.

In *U. S. v. Watkins* (Case No. 834, decided 9 March 1953) upon a plea of guilty and properly considered prior convictions, the accused was sentenced by SCM for a two day AWOL to BCD and forfeiture of \$73.50 for six months. The officer exercising GCM jurisdiction suspended the BCD and ordered into execution the forfeiture of \$36.00 per month. CMA held the supervisory authority's action suspending the BCD and ordering immediate execution of the forfeiture legal, but stated that the punishment set forth in the Table of Maximum Punishments are severable but where, as in this case, no sentence of confinement was made, the forfeiture would have to be limited to two days pay for each day's absence and, therefore, the forfeiture ordered executed was excessive and illegal.

The power of the board of review to commute sentence is discussed in *U. S. v. Bigger* (Case No. 456, de-

cided 9 March 1953). There a conviction of premeditated murder and death sentence was reduced by the board of review to unpremeditated murder and life imprisonment. CMA on review found the record sufficient to sustain the finding and sentence as reduced by the board of review holding that when a board of review finds evidence sufficient to support only an included offense of premeditated murder, it has power to commute the sentence to such a period of confinement as may be legal for the offense affirmed.

The power of a CM to suspend a BCD is discussed in *U. S. v. Marshall* (Case No. 1670, decided 24 March 1953). In that case upon trial for sleeping on post, an SCM sentenced the accused, among other things, to a BCD and then purported to suspend the BCD. The supervisory authority approved the suspended BCD. CMA held that a CM has no power to suspend sentences, but that the supervisory authority has that power and by its action in effect suspended the punitive discharge. The adjudication of the BCD and its suspension by the CM were two separate and severable actions and the invalid attempt at suspension did not effect the legality of the sentence of BCD.

In *U. S. v. Jackson* (Case No. 1052, decided 11 February 1953), a board of review denied a motion for reconsideration simply because a petition to CMA had been filed for review claiming that the board was thereby divested of jurisdiction. CMA affirmed this view and remanded the

case for reconsideration by the board of review.

Certificate of Correction

The original record of GCM trial of an officer for larceny showed no instruction by the LO on the presumption of innocence, reasonable doubt, burden of proof, and lesser included offenses. The president of the court and trial counsel attached to the record a certificate of correction to the effect that such matters actually had been covered, but the defense counsel and the court reporter affirmed that the reporter's notes did not contain those instructions and a belief that the notes were accurate. CMA in *U. S. v. Galloway* (Case No. 1463 decided 1 May 1953) held that the certificate of correction properly described the proceedings of the trial court since UCMJ puts the responsibility for the accuracy of the record upon the authenticating officials and presumes that they discharge their duties properly.

Composition of Court

The Navy method of appointing officers to SCM's by letter orders addressed to the member and naming therein the other members of the Court was considered in *U. S. v. Beard* (Case No. 1778, decided 24 March 1953); *U. S. v. Lawrence* (Case No. 1732, decided 24 March 1953); *U. S. v. Swaim* (Case No. 1779, decided 24 March 1953). CMA held that there was no doubt of a proper appointment of the membership of the court and that the court was properly constituted even though the addressee of the letter order was not

listed as a member of the court. In the construction of orders appointing courts, CMA said substance, not form, should govern.

Jurisdiction over Persons

In *U. S. v. McNeill* (Case No. 1048, decided 14 April 1953) there was a trial for desertion based on ten months' absence. The accused asserted lack of jurisdiction claiming that he was exempt from induction under the Selective Service Act of 1948 because of prior service. At Selective Service registration, the accused had failed to set forth the factual basis of this exemption and had reported for duty and served six weeks before going absent while en route for overseas duty. CMA held the court-martial had jurisdiction over the accused. The burden of establishing his exempt status with the Selective Service Headquarters was on the accused.

In *U. S. v. Solinsky* (Case No. 594, decided 2 February 1953), the sole question concerns jurisdiction of a court-martial of an offense committed during a prior enlistment and not made the subject of a charge until after a discharge at the convenience of the Government and reenlistment. The reenlistment was effective the day following the discharge. CMA held (Quinn dissenting) that there never was a break of military service and a reversion to civilian status and that, therefore, accused remained subject to military law. The court held momentary break in service does not necessarily break court-martial jurisdiction and that even if there were an infinitesimal period of time that ac-

cused became civilian between his enlistments, he nevertheless would have been during that time a person housed, maintained, paid, and otherwise serviced by the Army and, therefore, a person always subject to court-martial jurisdiction, distinguishing *Hirshberg*, 336 U. S. 210.

Admissibility of Deposition Capital Case

In *U. S. v. Young* (Case No. 1015, decided 8 May 1953) and *U. S. v. Horner* (Case No. 1021, decided 8 May 1953), CMA held it error to admit a deposition into evidence in a GCM case alleging desertion not directed by the convening authority as non-capital because the offense charged carried the death sentence. However, the Court found in the light of the other testimony in the case, that the testimony contained in the deposition could have no impact upon the minds of the members of the court and could cause no material prejudice of substantial rights of the accused.

Insanity

In *U. S. v. Burns* (Case No. 847, decided 15 April 1953) CMA held that when the issue of insanity is properly raised by the accused, the prosecution must prove sanity in the same manner and to the same degree as other issues in the prosecution's case, and the LO must instruct the court on the law whether the accused requests such instructions or not.

Improper Consultation

In *U. S. v. Woods, et al* (Case No. 1023, decided 19 February 1953), U.

S. v. Curtis (Case No. 941, decided 17 March 1953), and U. S. v. Holland (Case No. 1754, decided 17 March 1953), the LO's advice to the court in answer to questions concerning sentence in the absence of the accused and counsel were held to be improper.

In U. S. v. Miskinis, et al (Case No. 1535, 1536 and 1579, decided 5 March 1953), CMA held that assistance by the law officer to the court in closed session in putting the sentence in proper form where the court had already decided sentence and all matters transpired were entered upon the record was not participation in the deliberations of the court and that the accused were not prejudiced.

The error in cases involving improper consultation between the law officer and court in absence of accused and defense counsel was held to be cured by subsequent action of the law officer by having the reporter read what transpired in the consultation in U. S. v. Ferry (Case No. 1438, decided 20 March 1953; by repeating in open court what transpired in U. S. v. Freeman (Case No. 1769, decided 20 March 1953); and by referring the court only to pages in the Manual upon request of the court in U. S. v. Reinking (Case No. 2028, decided 26 March 1953).

To similar effect are: U. S. v. Mann (Case No. 924, decided 2 March 1953); U. S. v. Gladden (Case No. 896, decided 2 March 1953); U. S. v. Derosier (Case No. 1801, decided 5 March 1953); U. S. v. Allen (Case No. 1260, decided 5 March 1953); U. S. v. Miller (Case No. 1537, decided 5 March 1953); and U. S. v. Jester

(Case No. 1655, decided 5 March 1953).

Sufficiency of Allegations and Proof

In U. S. v. Gohagen (Case No. 858, decided 6 February 1953), U. S. v. Welborne (Case No. 1341, decided 14 April 1953), U. S. v. Christophe, Jr. (Case No. 1698, decided 14 April 1953), and U. S. v. Berry (Case No. 1495, decided 14 April 1953), it was held that on charges of wrongful possession of hypodermic needles in violation of a general order, the prosecution need not allege and prove possession for other than lawful purposes set forth in the order.

The evidence was held sufficient to sustain conviction of rape and sodomy in U. S. v. Washington (Case No. 815, decided 11 February 1953) where the only question raised was the credibility of witnesses. The evidence was held sufficient to support convictions of desertions in U. S. v. Taylor (Case No. 1454, decided 15 April 1953) and U. S. v. Logas (Case No. 1524, decided 8 May 1953). In U. S. v. Thompson (Case No. 1673, decided 7 May 1953), the evidence was held sufficient to sustain conviction of missing movement of vessel by neglect.

In U. S. v. Riggins, et al (Case No. 1641, decided 5 May 1953) on mandatory review, CMA held the evidence sufficient to support the conviction of premeditated murder even though largely circumstantial and did not give rise to the issue of lesser included offenses necessitating instruction upon them. A pre-challenge closed court session called by the president upon the subject of the seriousness of the charge and to poll the CM

members on the question of conscientious objection to the death penalty followed by an open court examination on their voir dire was held, in the light of the record of the case and absence of objection until on appeal, not to constitute substantial error although not an authorized practice.

The sufficiency of specifications was passed upon in *U. S. v. Steele* (Case No. 943, decided 14 April 1953), false claim; *U. S. v. Simpson* (Case No. 1938, decided 8 May 1953), failure to obey lawful order; *U. S. v. Frantz* (Case No. 1114, decided 6 February 1953), possession of false pass; and *U. S. v. Smith*, (Case No. 887, decided 13 February 1953) misbehavior before the enemy.

In *U. S. v. Squirrell* (Case No. 657, decided 26 January 1953) allegation of desertion was amended to conform to the proof which showed the offense occurred one day earlier than that charged. Such amendment was held not to be prejudicial error. Constructive condonation of the offense of desertion was held to be an affirmative defense which must be raised at the trial and not for the first time on appeal.

Absence of Accused at Trial

In *U. S. v. Houghtaling* (Case No. 573, decided 26 February 1953) CMA held that if the accused voluntarily absents himself from trial after he is arraigned, and the trial is held and

completed in his absence and he is found guilty, the conviction stands even if the offense charged is punishable by death.

Common Trial

In *U. S. v. Bodenheimer* (Case No. 676, decided 19 January 1953) and *U. S. v. Smith* (Case No. 1453, decided 17 March 1953) CMA held where no objection to a common trial is made by accused prior to or during the trial and there is no motion for a severance, any error of misjoinder is waived. Likewise, a plea of double jeopardy is waived by failure to assert it at the trial, *U. S. v. Kreitzer* (Case No. 1039, decided 6 March 1953).

Morning Reports

In *U. S. v. Truss* (Case No. 1332, decided 5 March 1953), where the only evidence of unauthorized absence was an extract copy of morning report, neither signed nor initialed, the conviction of AWOL was reversed.

In *U. S. v. Hagen* (Case No. 1193, decided 20 March 1953), an extract copy of a morning report showing the date of inception of unauthorized absence in a desertion case, even though made 89 days after the absence began and 27 days after apprehension, was held admissible as an "official document" exception to the hearsay rule.



WHAT THE MEMBERS ARE DOING

CALIFORNIA

Benjamin D. Frantz (4th O. C.), Sacramento recently removed his offices for the general practice of law to the Forum Building.

DISTRICT OF COLUMBIA

On the last Monday of each month, September through May, members of the Association in the Washington area have a dinner meeting at the Officer's Club, Naval Gun Factory, for the members and their guests. At the March meeting, the members bade farewell to Gen. Bert Johnson and Gen. Herbert Kidner, both of the Air Force, who were about to depart for overseas assignments. In April, the guest speaker of the evening was Chief Judge Marvin Jones of the U. S. Court of Claims, and at the May meeting, Congressman James E. Van Zandt was presented as speaker of the evening. Capt. Marion Bennett, USAFR, was elected by the members of the local unit as their Chairman for the current year at the March meeting.

Nicholas E. Allen (11th Off.), formerly Deputy Assistant Secretary of Commerce and at one time Associate General Counsel of the Air Force, recently announced the opening of his office for the general practice of law at 1420 New York Avenue, N. W., in association with John Lewis Smith, Jr. (2nd Off.).

Edward B. Crosland (4th Off.), Assistant Vice President and Attorney of American Telephone and Telegraph Company, was recently transferred from the Atlanta, Georgia office of Southern Bell Telephone and Telegraph Company to offices in Washington, D. C.

Oliver Gasch (3rd Off.), was recently named Chief Assistant U. S. Attorney by Leo A. Rover, U. S. Attorney for the District of Columbia. Col. Gasch has been Chief Trial Attorney of the Corporation Counsel's office of the District of Columbia for many years.

Edward B. Beale and George R. Jones under the style Beale and Jones recently announced the removal of their offices for the practice of law specializing in patent, trade-mark and copyright causes to 711 Fourteenth Street, N. W.

Col. John E. Curry, USMC, was recently retired from active duty after 35 years service. Col. Curry was in charge of the Marine Corps' Discipline Division during World War II, and has been more recently Chairman of Review Board No. 1 in the Office of The Judge Advocate General of the Navy. Col. Curry was largely responsible for the work of the Navy in the formulation and implementation of the Uniform Code of Military Justice. Following his retirement, Col. Curry announced the opening of offices for the general

practice of law at 1025 Connecticut Avenue, N. W.

GEORGIA

William H. Agnor (6th O. C.), Professor of Law, Lamar School of Law, Emory University, has recently completed a year's graduate work at the University of Virginia.

MISSOURI

Ray Mabee (7th Off.), recently announced the opening of offices for the general practice of law in the Woodruff Building, Springfield.

NEW JERSEY

William A. Lord, Jr. was recently appointed Executive Secretary of the New Jersey Title Insurance Association. Mr. Lord engages in the general practice of law at Newark and Maplewood.

NEW YORK

Robert Granville Burke, National President of ROA and currently a member of the Board of Directors of the Judge Advocates Association, recently announced the formation of a partnership for the general practice of law under the firm name of Chapman and Burke with offices at 420 Lexington Avenue, New York City.

Norman Roth (4th O. C.), recently announced that William J. Reinhart, Jr. (12th O. C.), has become a member of the firm of Olcott, Roth & Reinhart, for the general practice of law with offices at 70 Pine Street, New York City.

Abraham S. Robinson, having recently completed a tour of active duty in the Office of The Judge Advocate General of the Air Force, has resumed practice of law with the firm of Robinson and Thebner with offices at 51 Chambers Street, New York City.

Morton H. Zucker of White Plains recently announced the opening of offices for the general practice of law at 175 Main Street .

VIRGINIA

On May 19, 1953, officers of the Army's Judge Advocate General Corps held a dinner dance at Woodlawn Hall, Fort Belvoir. Col Burton F. Ellis was Chairman of the committee arranging the affair and was assisted by Col. Robert Bard, Lt. Col. Joseph Haefele, Lt. Col. Franklin Clarke, Maj. Dean E. Dort, Capt. Ira B. Coldren, and Lts. Kenneth A. Howard and Jackson L. Kiser. JAG officers and their ladies from the Department of the Army, The Engineer Center, and Fort Meade attended the affair. Maj. Gen and Mrs. Bran-non attended the affair.

Recent Deaths

The Journal announces with regret that several of our long active members have died in recent months. Judge William Alvah Stewart of Pittsburgh, Pa., died on April 9, 1953. Richard K. Gandy of Santa Monica, California, died March 30, 1953, and Judge William F. Waugh of Chicago, Illinois, passed on in the month of April.

Book Announcement

MILITARY JUSTICE—"A Symposium on Military Justice" makes up the February, 1953, issue of the *Vanderbilt Law Review* (Vol. 6, No. 2; pages 161-440). This issue is devoted to describing and analyzing important military law reforms of the last two years—congressional enactment of the Uniform Code of Military Justice and the setting up of a civilian Court of Military Appeals—in a manner designed to be of value to civilian practitioners, as well as military law specialists. Introductory comments (pages 161-168) are contributed by Chief Judge Quinn and Associate Judges Latimer and Brosmen of the Court of Military Appeals. Professor Edmund M. Morgan of Vanderbilt University, chairman of the committee which drafted the Code, draws on his military law experience dating back to World War I in preparing "The Background of the Uniform Code of Military Justice" (pages 169-185). Eighteen months' field level experience with the Code is the basis of Navy Captain Chester Ward's detailed study, "UCMJ—Does It Work?" (pages 186-227). "The Court of Military Appeals—Its History, Organization and Operation" (pages 228-240) is the work of Daniel Walker and C. George Niebank, both Commissioners of the Court. "The Boards of Review of the Armed Services" (pages 241-250) is written by two officers with a close associa-

tion with the Boards, Major Roger M. Currier and Captain Irvin M. Kent. Colonel Seymour W. Wurfel discusses many Court of Military Appeals cases in asking "Military Due Process: What Is It?" (pages 251-287). "Habeas Corpus and Court-Martial Prisoners" (pages 288 to 304) is written by General James Snedeker, USMC, ret., who is the author of the new treatise, *Military Justice under the Uniform Code*, which is reviewed by Air Force Judge Advocate General Reginald C. Harmon (pages 421-424). Robert S. Pasley, Jr., the Assistant General Counsel of the Navy, notes the similarity of recent developments in England in "A Comparative Study of Military Justice Reforms in Britain and America" (pages 305-332). The first comprehensive military law bibliography, "A Survey of the Literature of Military Law—A Selective Bibliography" (pages 333-369), is prepared by Captain William C. Mott, USN, and Lieutenant Commanders John E. Hartnett, Jr., and Kenneth B. Morton. Stanley D. Rose, of the Civil Division of the Department of Justice, comments on "The National Guard and the Federal Tort Claims Act" (pages 370-374).

(Address: Vanderbilt Law Review, Nashville 5, Tennessee; price for a single copy: \$2.00.)

To assist your Annual Banquet and Meeting Committee in its arrangements, make your reservations early. Complete and mail the attached form today.

Cut here

To: Judge Advocates Association, 312 Denrike Building, Washington 5, D. C.

With reference to the annual banquet and meeting of the Judge Advocates Association to be held at the First Corps Armory, Boston, Massachusetts, August 25-26, 1953, be advised:

I will attend the annual banquet on August 25th and request reservations for me and my guests.

I tentatively plan to attend the banquet. If I attend, I will require reservations for me and my guests.

I plan to attend the annual business meeting on August 26th.

My check for \$..... is enclosed for above reservations.

Name _____

Address _____

The Journal is your magazine. If you have any suggestions for its improvement or for future articles, please bring them to the attention of the Editor. We invite members of the Association to make contributions of articles for publication in the Journal. Publishability of any article submitted will be determined by the Editor with the advice of a committee of the Board of Directors composed of Lt. Col. Reginald Field, Col. William J. Hughes, Jr., Col. Charles L. Decker, USA, Capt. George Bains, USN, and Brig. General Herbert M. Kidner, USAF.

