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# THE ADVOCATE

A Journal For  
Military Defense Counsel

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Vol. 9 No.1

Jan-Feb 1977

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## EDITOR'S NOTE

By now, all field defense counsel should be aware of the Interim Change to AR 600-50, dated 15 January 1977, superceding paragraph 4-2a(7) of that regulation. The effect of the change is to mandate the charging of marijuana and narcotic drug offenses under Article 134 of the Uniform Code of Military Justice and the charging of all other dangerous drug offenses (e.g., amphetamines, barbiturates, LSD, mescaline, etc.) under Article 92 of the Code. See 21 U.S.C. §801 et seq. for definitions of "narcotic" and "dangerous drug". Clearly, the purpose of the Interim Change is to cure the Constitutional defect inherent in the 92/134 charging decision as discussed in United States v. Courtney, 24 USCMA 280, 51 CMR 796 (1976). Whether or not this Army-wide policy change does eliminate the equal protection problem is open to question since this issue is once again before the United States Court of Military Appeals in the case of United States v. Jackson, \_\_\_ CMR \_\_\_ (ACMR, 24 September 1976), petition granted, 3 November 1976, and the final outcome is uncertain.

Until the matter is finally resolved, field defense counsel are urged to continue to level challenges against the charging decisions in drug cases. Two possible modes of attack are available. First, counsel might argue that, despite the Army-wide charging policy, the government must still demonstrate some rational basis for the manner in which they have categorized the various controlled substances. This is particularly relevant when the offense is marijuana. During a time when most civilian jurisdictions are reducing the penalties for marijuana offenses, the Army has opted for a charging policy which chooses the more severe of the available punishments and without any apparent rational basis for punishing marijuana more severely than, say LSD. Make the objection and put the Government to its proof. A second, and possibly more effective approach, is to renew the equal protection argument, basing it not on disparate treatment within the Army, but on differences currently existing from service to service. The Air Force has already acted in changing its regulations to provide for uniform charging of drug offenses. See Air Force Regulation 30-2, with Change dated 8 November 1976. However, the Navy has taken no action to date to make its charging policy uniform. See Navy Regulation 1973, Article 1151. As long as one service continues to allow the charging of drug offenses without a definite standard, the equal protection argument survives for all. The Uniform Code of Military Justice requires uniform application of the law.

The Advocate will continue to monitor the progress of United States v. Jackson, supra, and will report other methods of challenge available to the trial defense counsel in this area.

## LITIGATING THE INSANITY DEFENSE

A current area of controversy and uncertainty, in both military and civilian law, is the question of how to define a standard of "criminal insanity," or more precisely, criminal mental responsibility. While the military system has continued, since at least 1920, to cling to the traditional test of mental responsibility (a combination of the M'Naghten rules and the "irrepressible impulse" doctrine, both originating at least as early as the 1840's), many states and every federal circuit but one have abandoned this standard for more modern definitions of responsibility. By far the most popular of these modern definitions is that proposed by the American Law Institute in 1956 in Section 4.01 of its Model Penal Code (the ALI test).

In the military particularly, the law's state of flux is underlined by the fact that the Court of Military Appeals has granted for review and has heard oral arguments in two cases which specifically challenge the propriety of the traditional test for mental responsibility of Paragraph 120b of the Manual for Courts-Martial, United States, 1969, (Revised edition). United States v. Smith, Docket No. 32,428, petition granted 9 July 1976 (oral argument 15 November 1976); United States v. Frederick, Docket No. 32,159 (oral argument 15 November 1976). Regardless of the outcome of these cases, it is clear that the Court of Military Appeals is undertaking a thorough re-examination of the entire subject of criminal mental responsibility.

The current state of uncertainty thus presents certain problems as well as opportunities for the trial defense counsel confronted with a sanity issue. The problems arise from his inability to rely firmly on any one legal standard, the multitude of alternative tests, and the need to protect his client both at trial and on appeal. The opportunities arise from the fact that a modification of the traditional military test of responsibility may significantly increase his client's chances of acquittal or reversal.

### The Various Tests

Most defense counsel are familiar with applying the current standards, which are addressed toward a person's ability "to distinguish right from wrong and to adhere to the right." This test is accompanied by the doctrine that an accused, to show lack of responsibility, must have been completely unable to "distinguish" or to "adhere". The courts, legislatures and

scholars rejecting this approach have turned in a variety of directions. The famous case of Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), overruled in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972), advocated the acquittal of persons whose criminal acts were "the product of mental disease or defect". This doctrine was unsuccessfully urged upon the military in the twin cases of United States v. Smith, 5 USCMA 314, 17 CMR 314 (1954) and United States v. Kunak, 5 USCMA 346, 17 CMR 346 (1954). The British Royal Commission on Capital Punishment has urged that the question be directly placed to the jury as to whether the accused could be found "justly responsible" for his acts. The clear legal consensus over the past ten years, however, has been to adapt rather than abandon the "distinguish-adhere" formula, and the ALI test does just that.

The ALI test's reforms, however, are significant. It avoids much of the medically obsolete language of the old test; terms such as "irresistible impulse" which are distinctly unfavorable to an accused. (Note that the Manual's explanation of the military test, in Paragraph 120b, specifically uses this term) and most importantly the requirement of "complete inability" is abandoned in favor of one which would acquit a person who lacks "substantial" mental capacity. This principle opens new doors to a defense counsel to present his client's mental problems in a realistic, pragmatic fashion, instead of being forced to prove an almost unprovable state of complete mental breakdown. A proper application of the ALI standard ought to prevent the prosecution from invoking such magic phrases as "no psychosis" or "character/behavior disorder" which currently are tantamount to conviction. In other words, the ALI test gives an accused a realistic, fighting chance, if the issue is properly litigated.

### Playing Two Games At The Same Time

Until such time as the Court of Military Appeals decides what, if any, single test of mental responsibility is appropriate, the litigation of this issue will be, in many ways, a schizophrenic affair. A defense counsel is well advised to make as extensive use of the ALI test as the military judge will permit, since it can benefit his client greatly; yet reluctance on the part of most trial judges to adopt the new test can be expected to continue. Therefore, the trial itself will involve the application of the old test. The defense counsel should prepare his case with both tests in mind, and with an eye toward relief either at trial or on appeal.

The first step, then, for a defense counsel confronted with a potential "insanity" issue is to determine what test of responsibility is most favorable to his client and to strive to adopt that test for his case. As noted above, the ALI test is not the only alternative to M'Naghten, but it is the most popular with legal scholars and appellate courts, and if any alternative is to be accepted, it probably has the best chance of success. If M'Naghten is ultimately rejected, it is also possible that no single test will be mandated. The Fourth Circuit in United States v. Chandler, 393 F.2d 920 (4th Cir. 1968), left the issue of mental responsibility, with general guidelines, to a case-by-case application. This would place the burden even more squarely on the shoulders of the opposing counsel and trial judge.

### Inertia And The Military Judge

Once a decision is made, long before trial, regarding an appropriate test, there is no reason why the military judge should not be urged to adopt this test. This proposal might be made at a pretrial hearing or in requested jury instructions. There is no reason to postpone such tactics until after the Court of Military Appeals has decided its pending cases on the issue. The traditional excuse for not confronting the issue at trial is that the test for insanity can only be "changed" by Congress or the Court. See e.g., United States v. Eason, 49 CMR 844 at 854 (NCOMR 1974). There is strong precedent, however, to argue that no real change is necessary; that there is no legally binding military standard; and that a court may quite properly phrase a standard to best suit a particular case.

The argument for urging a military judge to modify the M'Naghten-Manual instructions runs generally along the following lines: (1) the provisions of the Manual are binding only when they deal with procedure and modes of proof. This fact is made clear by an examination of Article 36 of the UCMJ and the leading case on this question, United States v. Smith, 13 USCMA 105, 32 CMR 105 (1962). The Smith decision discussed at length the legal authority of the Manual and held that in non-procedural areas the Manual serves simply as a reference book for military attorneys. While distinguishing procedure from substance may sometimes be a difficult task, it is clear that the test of mental responsibility is a substantive question. Paragraph 120, therefore, is not mandatory, and military courts may

look elsewhere to determine mental responsibility; (2) the federal courts which have examined the subject in the past fifteen years have often noted that this is a particularly appropriate matter for judicial determination. See e.g., Wion v. United States, 325 F.2d 420 (10th Cir. 1963); United States v. Freeman, 357 F.2d 606 (2d Cir. 1966). Traditionally, the rules of mental responsibility have been rules of judicial decision, based on common law concepts, and they need not be decided solely by Congress or the Supreme Court; (3) COMA decisions have never flatly required the use of Paragraph 120b's test in all military cases. The only case in which COMA has directly ruled on the issue, the twin 1954 decisions of Smith and Kunak, supra, simply rejected the Durham test and otherwise left the issue open. In fact, the Court in Kunak expressly invited renewed consideration of the issue as times changed. 17 CMR at 356. Such language confirms the notion of the federal circuits that a rule of mental responsibility is one of judicial decision and subject to judicial change at anytime; (4) finally, the military judge is instructed to draft his own individualized instructions tailored to particular cases. See Chapter 1 of the Military Judges' Guide, DA Pamphlet 27-9. He therefore should be urged to accept this responsibility and formulate instructions in light of the recent trends in the law of insanity and in light of the facts of the accused's specific case.

### Building A Record

If this tactic fails, as it most often will until a new test is mandated from above, at least the record of trial has been prepared for appeal. But much more can be done at trial to smooth the appellate path. Defense counsel should, as often as possible throughout the trial, make reference to the concept of "substantial impairment." The obvious purpose of this is to show, as fully as possible, that if a person need only be substantially deprived of his mental abilities to be irresponsible, rather than completely deprived, the accused would be acquitted.

### Utilizing The Sanity Board

One way of showing this may be in proposing a special set of questions for the psychiatric inquiry board to answer. Normally, the board simply answers three questions: Was the

accused, at the time of the offense, able to distinguish between right and wrong? Was he able to adhere to the right? And is he currently competent to participate in his defense? Since the board bases its answers on the requirement of complete inability, it could also be asked to give a second set of answers based on the concept of substantial inability. Specifically, was the accused's ability to distinguish between right and wrong substantially impaired at the time of the offense? Was his ability to adhere to the right substantially impaired? If the board responds in the affirmative to both the M'Naghten questions and the ALI questions, then it is essentially saying that the accused was substantially, but not completely impaired mentally, and a clear legal issue is framed for trial and appeal. If this "substantial impairment" is clarified before trial, it is even conceivable that a convening authority might decline to refer charges and pursue administrative remedies instead.

### Special Findings

Similarly, a military judge might be asked to make special findings on the issue of mental responsibility, utilizing both the Manual's test and the ALI or other test. While this may not alter his verdict, it will place the factual and legal issues squarely before him and the appellate courts. .

### Guiding The Expert Witness

If the above techniques do not succeed in framing the issues, the necessary information can be effectively elicited simply through direct and cross-examination of psychiatrists. The best preparation for such questioning is thorough pretrial interviewing of the various expert witnesses. Some psychiatrists may be quite sympathetic to the newer standards of mental responsibility. While they may feel legally bound to express their medical conclusions in terms of the M'Naghten test and its requirement of complete deprivation, there is a widespread recognition in the medical profession that this concept has little scientific validity. See e.g., Gibbs, "The Role of the Psychiatrist In Military Justice," 7 Mil. L. Rev. 51 (1966). Therefore, a military psychiatrist may feel compelled to testify in court: "Since Private X wasn't totally unable to distinguish right from wrong or adhere to the right, I concluded he was sane." However, he may also be quite willing to state, "Private X's ability to conform his

conduct to societal norms was minimal. To a substantial degree, his ability to do so was destroyed." While this testimony would likely result in conviction under the present military standard, it would probably lead to acquittal in any other federal court and may pave the way to reversal on appeal.

The defense counsel will need to ponder in advance the tactical problem of whether to reveal his strategy to the psychiatrist before trial or to disguise the strategy until the last possible moment. A hostile witness who is well-versed in the controversy over the M'Naghten test may resist using phrases like "substantial impairment" if he knows the defense counsel is looking for such words. On the other hand, a defense counsel who never lets his hair down to a witness may not realize that the government doctor he is cross-examining is ready, willing and able to provide helpful testimony. If either of these men is not carefully interviewed before trial, testimony at trial will consist simply of a parrot-like repetition of the Manual's rules, and the accused may be convicted with no factual basis for appeal.

If a witness gives signs of willingness to apply alternative tests of insanity, then he should be given free reign to expound at trial. The following scenario might be followed in such a case:

Direct examination by the trial counsel:

Q: Could Private X distinguish right from wrong on 10 January 1976? ...Could he adhere to the right?

A: Affirmative replies to both questions.

At this point, the prosecution likely will conclude his questions with a flourish of triumph.

Cross-examination:

Q: Isn't it true, doctor, that the medical conclusions you just stated are based on certain legal rules?

A: Yes.

Q: Isn't it also true that one such legal rule is the rule that a person must be completely unable to distinguish right from wrong, or completely unable to adhere to the right, for you to diagnose him as legally insane?

A: Yes.

Q: Do you base all your diagnoses in criminal cases on this rule?

A: Yes.

Q: Is this rule of "complete inability" an accurate measure of insanity?

A: No. In my experiences, many truly psychotic individuals retain at least some ability to understand the wrongfulness of their acts and to control their behavior.

Q: Although you say Private X was not completely unable to do these things, wouldn't you say his mental faculties were substantially impaired?

A: Yes; substantially so, but not completely.

Details can then be supplied to illustrate this conclusion.

With a hostile witness, a more close-to-the-vest approach may produce some favorable testimony. For example, most military doctors have become so used to testifying in terms of the "complete inability" doctrine that they will gladly concede an accused is less-than-completely deprived of his mental abilities. By pointing out to this doctor a few examples of the accused's peculiar or deviant behavior, the defense counsel may receive the following reply: "Oh, Private X definitely is not normal. His mental faculties are substantially impaired, but not completely." The doctor may think his testimony has hurt the accused, but on appeal it may be enough to cause reversal.

#### Post-Trial Remedies

When all other means of relief have failed, post-trial remedies should not be ignored. The military gives the issue of mental responsibility a preferred status, and it may be raised at any time, even subsequent to trial. See Paragraphs 121, 122, 124, Manual; United States v. Triplett, 21 USCMA 497, 45 CMR 271 (1972). Thus new sanity board inquiries may be an effective means of exploring an accused's "substantial" mental impairment, and if such inquiries are requested immediately, they may expedite appellate review at a later time.

## Conclusion

Some final words of caution are necessary, regardless of the standards adopted to define mental responsibility. One prominent attorney has described the litigation of a typical insanity defense as "trial by label." Arens, The Insanity Defense (1974). He notes that both prosecution and defense attorneys content themselves by engaging in a contest of name-calling: phrases such as "psychotic" and "schizophrenic" are pitted against "neurotic" and "character disorder," with no real effort made to describe in specific and functional terms the workings of the accused's mind. The M'Naghten military test of responsibility, cast in obsolete language, is partially to blame for this problem. The all-or-nothing nature of the "complete impairment" concept especially encourages extremes in testimony which defy factual description. But no new test is guaranteed to prevent attorneys from giving in to the temptation of asking simplistic questions. This is in the hands of the attorneys themselves.

When the insanity defense is simply a "trial by label," with witnesses merely stating their conclusions by repeating the words of the applicable test, the defendant bears the brunt of the damage. In practical terms, it is the defendant who has the continued burden of proof throughout an insanity defense. Conceivably, the government can override a claim of insanity entirely through lay testimony. See United States v. Carey, 11 USCMA 443, 29 CMR 259 (1960). But once the prosecution produces even a single doctor to testify to the accused's sanity, it becomes extremely difficult for the accused to override this testimony. If the only testimony in the accused's favor is another doctor's bare conclusion that the accused was insane, the defense is sure to fail. Only by laying out, in explicit detail, a mass of factual evidence showing the accused's irrational thinking and behavior, can the defense hope to succeed. Thus the defense attorney must probe deeply into his client's mind and behavior, and the depth of this inquiry must be reflected in the record of trial.

If the defense fails in this effort, it will not matter which legal test of insanity is used: in a battle of labels, the government is bound to win. But the ALI test helps by encouraging specificity on the part of all witnesses. Additionally, it is simply a better, more accurate test. Properly applied by counsel, it can result in a more effective trial process and a more accurate measurement of an accused's mental responsibility.

SELECTION OF COURT MEMBERS:  
THE GOVERNMENT CAN'T HAVE IT BOTH WAYS

Military defense counsel and commentators on military justice have long expressed dissatisfaction with the method by which court-martial members are selected. A system in which the "jury" is personally selected by the convening authority seems, at least in theory, to be unfair to the accused. Thus, one writer has commented, not atypically:

In a court-martial...the serviceman is tried by a panel of court members arbitrarily selected by a convening authority, usually the base commander, who is also responsible for convening the trial. The result is undeniably a hand-picked jury.

\* \* \*

[A]s long as the power to arbitrarily appoint court members rests with one individual, the convening authority, an accused in the court-martial system has very little chance of getting a fair trial. (Rudloff, "Stacked Juries: A Problem of Military Injustice", 11 Santa Clara Lawyer, 362, 375 (1971)).

Although most military lawyers would probably agree that the foregoing presents much too bleak a picture, most would probably also agree that there is now a widespread perception of unfairness.

The United States Court of Military Appeals has also recently expressed displeasure with the present system:

This case provides no occasion for reviewing whether the military jury system as embodied in Article 25, Uniform Code of Military Justice, 10 U.S.C. §825, offends the Sixth Amendment, whether the Sixth Amendment right to trial by jury applies to the military, and whether constitutionally military juries must reflect a representative cross-section of the military

community. Suffice it to say that court members, hand-picked by the convening authority and of which only four of a required five ordinarily must vote to convict for a valid conviction to result, are a far cry from the jury scheme which the Supreme Court has found constitutionally mandated in criminal trials in both federal and state court systems. See Taylor v. Louisiana, 419 U.S. 522 (1975). Compare Apodaca v. Oregon, 406 U.S. 404 (1972) and Johnson v. Louisiana, 406 U.S. 356 (1972), with Andres v. United States, 333 U.S. 740, 748 (1948). See also, Williams v. Florida, 399 U.S. 78 (1970). Constitutional questions aside, the perceived fairness of the military justice system would be enhanced immeasurably by congressional reexamination of the presently utilized jury selection process. United States v. McCarthy, 25 USCMA 30, 54 CMR 30 (1976), at n. 3.

Two things seem evident from the foregoing language: (1) The Court seems willing, in an appropriately framed case, to consider the question of the constitutionality of the present method of court member selection; and (2) If legislation is required to change the present system, the Court is strongly recommending that such legislation be undertaken.

It is not conceded that the present selection method can pass constitutional muster, and trial defense counsel are encouraged to litigate the constitutional issue. However, to limit the scope of this article, it will be assumed that legislation will be required to effect a change in the present system.

There now seems to exist a widespread practice of paying only lip service to the strict standards of the present Code provision. Perhaps this laxness in administration is because actual compliance would be difficult and time consuming. However, as the Government created the system, they can certainly be forced to apply it. The basic premise upon which this article is based, then, is that trial defense counsel should require strict compliance with both the letter and the spirit of the standards which Congress and the courts have set for administering the present system.

## Code And Manual Requirements

The criteria for the selection of court-martial members are set forth in Article 25 of the Uniform Code of Military Justice and Paragraph 4, Manual for Courts-Martial, United States, 1969 (Revised edition). The crucial provisions for the purposes of this article are Article 25(d)(2), Code, and Paragraph 4d, Manual.

Article 25(d)(2) provides, in pertinent part:

When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.

Paragraph 4d of the Manual mirrors this language.

Several things seem obvious from the Codal language. First, wide discretion is granted to the convening authority in selecting court members; the criteria listed are far from concrete. For instance, as to "length of service", there is no indication whether long service or shorter service time would constitute a better qualification. Such determinations are left to the discretion of the individual making the selections. Second, this discretion is apparently granted personally to the convening authority: the selections are to be of those individuals who "in his opinion" are best qualified.

Third, the pool of potential members is quite large: all members of the armed forces are eligible. The pool is not restricted to the particular convening authority's command, nor even to the same service. In this regard, Paragraphs 4f and 4g of the Manual have specific provisions for making selections from other commands and other armed forces. Concurrence of the commander of the potential members is required when selections are to be made from another command. Paragraph 4f, Manual. Unless the convening authority is in a joint command or joint task force (Paragraph 4g(2)), when selections are contemplated from a different armed force the convening authority must request authorization from The Judge Advocate General, and the other Judge Advocates General concerned must

give their approval. Paragraph 4g(3), Manual. Detailing of members from other armed forces is contemplated only "under exceptional circumstances." (Id.). At least a majority of the members of the court should be members of the same armed force as the accused. Paragraph 4g(1), Manual.

Finally, it is important to note that certain criteria are not listed as appropriate in selecting court members. Military rank, in and of itself, is not an appropriate consideration. Individuals of all ranks are eligible, subject only to the requirements that no member should be junior in rank or grade to the accused (Article 25d(1), Code, supra), but enlisted members can serve only when they are personally requested in writing by the accused. Article 25(c)(1), Code, supra.

### Analysis Of Cases On Selection Process

A short conspectus of the case decisions dealing with the selection of court members should provide further illumination of what can be and should be required by defense counsel at trial. In addition, counsel should be aware of a number of cases currently pending decision in the United States Court of Military Appeals which will impact on the selection process.

The cases clearly establish that rank per se is not a valid criterion in court member selection. In United States v. Crawford, 15 USCMA 31, 35 CMR 3 (1964), the Court of Military Appeals found no policy of exclusion of lower ranking enlisted personnel from court membership but emphatically stated:

the Uniform Code does not contemplate blanket exclusion of persons below specified rank as being unlikely to possess the statutory qualities.

Judge Ferguson registered a strong dissent in Crawford finding the record there to establish a policy of excluding all but the most senior enlisted ranks from court membership. In United States v. Greene, 20 USCMA 232, 43 CMR 72 (1970), the Court overturned a conviction in a case where rank was used as a selection standard. A similar result obtained in United States v. Boney, 45 CMR 714 (AFCMR 1972).

The argument most often made by the Government in attempting to salvage selection processes in which rank appears to have been used as a standard is typified by United States v.

Henry, 40 CMR 818 (ACMR 1969) and United States v. Yager, 51 CMR 761 (ACMR 1975), petition granted 14 May 1976. In Henry, the Army Court of Military Review held that Article 25(d)(2), Code, supra, was not violated by a selection process which systematically excluded warrant officers and second lieutenants. The Court reasoned that the convening authority, in his discretion, had determined that those ranks would not meet the 25(d)(2) criteria and that such a determination was within his granted authority. In Yager, supra, the Court again upheld a selection process in which E-1's were systematically excluded from the pool of members who were then to be randomly selected for court-martial membership. Although recognizing that exclusion based on rank would violate the Code, the Court found that exclusion of the rank of E-1 was nothing more than a shorthand way of eliminating those who would not qualify under 25(d)(2) criteria.

Whether the Court of Military Appeals would find this rationale persuasive is doubtful. Indeed, United States v. Yager, supra, is now pending decision by that Court on precisely this issue. Oral arguments in Yager were heard on 19 October 1976. The Court has already shown itself less easily persuaded by the Yager/Henry rationale than was the Army Court. In United States v. Daigle, 23 USCMA 516, 50 CMR 655 (1975), the Court ordered a rehearing on sentence in a guilty plea case. The evidence in that case established that warrant officers and second lieutenants were excluded from selection and that those individuals who were selected were chosen not because they had been individually determined to meet the Code criteria but because they were of a specified rank. The Court stated,

When rank is used as a device for deliberate and systematic exclusion of qualified persons, it becomes an irrelevant and impermissible basis for selection. United States v. Daigle, supra.

In addition to Yager, the Court has granted review on two other cases dealing with the experimental program of random selection of court members which was in effect for a time at Fort Riley, Kansas. Besides E-1's, that system also excluded aliens and individuals of the same rank as the accused from the pool of random selectees. The propriety of these exclusions is at issue in United States v. Perl, Docket No. 32,811, petition granted 1 October 1976 and United States v. Maker, Docket No. 33,137, petition granted 22 November 1976.

The questions of the degree of discretion granted by the Code in court selection and who must exercise that discretion have also been addressed by the military appellate courts. In United States v. Allen, 5 USCMA 626, 18 CMR 250 (1955), the Court of Military Appeals held that the convening authority must personally select the court members. Such a holding clearly follows from the literal language of the Code, but no realist believes that personal selection by the convening authority really occurs. Indeed, fully 50% of the special court-martial convening authorities in a survey conducted for a Military Law Review article in 1972 admitted that they "personally selected" members only in the technical sense that they accepted personal responsibility for selections actually made by staff members. See Brookshire, "Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction", 58 Mil. L. Rev. 71, at 110 (1972).

A general feeling seems to exist that it would be needlessly burdensome to require personal selection by convening authorities. Unfortunately, in the past at least, the Courts seem to have preferred stretching the Codal language to requiring compliance (and thus forcing change). For instance, in United States v. Young, 49 CMR 133 (AFCMR 1974), the Air Force Court found no Code violation where the convening authority had been provided no background whatsoever on the members he appointed to courts-martial. The Court found that the nominating commander who had forwarded the names of the potential selectees had exercised his personal discretion in accordance with the criteria in Article 25(d)(2) and reasoned that the convening authority could properly rely on his subordinate's recommendations. Similarly, in United States v. Kemp, 22 USCMA 152, 46 CMR 152 (1973), the Court of Military Appeals approved a convening authority's reliance on his staff members' selections so long as someone had exercised the Codal criteria in making the selections.

Whether the present Court would approve the same contortion of the statutory language is an open question. In Kemp, supra, the Court expressed displeasure with the present selection system but opined that change must come from Congress. Perhaps the much stronger expression of displeasure in United States v. McCarthy, supra, signals that the present Court would no longer accept such a compromise for administrative convenience. Holding the Government to literal compliance with the statute would certainly be in accord with the previously perceived tendency of the present Court to require precise compliance with the Code. Further, the Court itself is likely to recognize that requiring literal compliance, with the attendant administrative inconvenience, would

be a major spur to legislative change of the current system. Indeed, the Court now has before it several cases dealing with the validity of a convening authority delegating his authority to staff members. See United States v. Ryan, Docket No. 30,971, petition granted 22 October 1975; United States v. Hawkins, Docket No. 31,523, petition granted 13 May 1976; and United States v. Newcomb, Docket No. 31,188, petition granted 21 January 1976.

Although the discretion granted to the convening authority in selecting court members seems to permit the sort of "hand picking" that can lead to serious abuses, that discretion is not unlimited. As shown above, the convening authority can not exclude qualified members solely because of rank. See United States v. Crawford; United States v. Greene; United States v. Daigle, all *supra*. Further, those members who are selected must not be, or give the appearance of being, slanted towards the prosecution. Thus, in United States v. Hedges, 11 USCMA 642, 29 CMR 458 (1960), the Court overturned a conviction by a court on which seven of nine members occupied duty positions directly or indirectly involving law enforcement.

#### What Defense Counsel Can Do At Trial

What then should a trial defense counsel do if the premise of this article is to be put into practice? Several things seem appropriate when defense counsel feels that members were improperly selected. First, before trial, request all paperwork used in making court member selections. Second, require the presence at trial of all those persons involved in the selection process from the lowliest staff member to the convening authority himself. At trial, defense counsel should move to dismiss charges on the basis that the court is improperly constituted and therefore lacks jurisdiction. See McClaghry v. Deming, 186 U.S. 49 (1902); Runkle v. United States, 122 U.S. 543 (1887); United States v. Singleton, 21 USCMA 432, 45 CMR 206 (1972). Counsel should argue that the selections must have been personally made by the convening authority on the basis of the Article 25(d)(2) standards. Certainly some individual must be shown to have made the selections on the basis of these criteria. Thus, if, for instance, a warrant officer is established to have been told simply to compile a list of a given number of individuals of specified rank (as often seems to be the case), then Article 25(d)(2) has been violated. Similarly, if the basic criterion which the convening authority used to select members is their command experience, then, arguably, the Hedges, *supra*, problem might exist: giving the appearance of hand picked, hanging jury.

Finally, if the motion to dismiss is denied, then the ruling will, of necessity, be that Article 25(d)(2) of the Code has been followed. At that point, then, on the basis of those cases set out in footnote 3 of United States v. McCarthy, supra, counsel should argue that the members have been "hand picked" by the convening authority, and, therefore, the selection process is unconstitutional. The Government certainly can't have it both ways, and the record thus created would provide ample basis for reversal at the appellant level.

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### RECENT OPINIONS OF INTEREST

#### COMA OPINIONS

##### CONFESSIONS - PROMISE OF CONFIDENTIALITY

United States v. Hanna, 25 USCMA 135, 54 CMR 153 (2 December 1976) (INTERIM).

A classic "Mutt and Jeff" interrogation produced a confession, but the interrogator's testimony was equivocal as to whether the accused stated "you have to prove it." Since the statement was previously admitted outside of the member's presence, the question was whether the evidence before the court members was sufficient to require an instruction that before considering the content of the statement, they were required to find, beyond a reasonable doubt, that it was made voluntarily.

Promises of confidentiality or assurances, if relied on by an accused as an inducement to speak, negate prior warnings. The equivocation by the agent left doubt that the accused uttered the words, leaving an issue for the court. The failure to request the instruction did not waive the error.

#### CMR DECISIONS

##### SPEEDY TRIAL

United States v. Kanzler, CM 434439 (ACMR 29 November 1976).

The Government conceded Burton violations on possession of LSD and AWOL offenses but not on the larceny offenses which the Government claimed not to have knowledge of until ten days after the accused's return to military control. The court held the Government accountable from a time well before the accused's return to military control because of three statements which pointed to the appellant as a suspect.

#### PRETRIAL AGREEMENTS

United States v. Feight, CM 434797, (8 December 1976).

A plea bargain which included a waiver of the Article 32 Investigation is contrary to public policy and void. Pretrial agreements must concern themselves solely with bargaining on the charges and sentence. There was no indication who originated this provision; therefore there was doubt as to whether the agreement was "a freely conceived defense product."

#### JURISDICTION - SELECTION OF COURT MEMBERS

United States v. Horton, CM 432079 (6 December 1976).

A case was referred for trial by the convening authority at Fort Leavenworth but tried at Fort Carson. A list of Fort Carson court personnel was sent to Fort Leavenworth, but the convening authority there failed to exercise his personal discretion in their selection. This was held to be jurisdictional error in violation of Article 25(d)(2), Code.

#### COMMAND INFLUENCE

United States v. Hinton, SPCM 11876 (23 December 1976).

The accused's immediate commander was "externally induced" by his superior to recommend trial by general court-martial rather than by the summary court-martial he had originally intended. While the court found that the creation of this type of persuasion is error, description of the error as one of military due process was rejected because the company commander had rejected all non-judicial courses of action and the only question was the level of punishment. The sentence was reassessed to reflect the punishment of a summary court-martial.

