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# A Journal For Military Defense Counsel **THE ADVOCATE**

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# THE ADVOCATE

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## TRANSITION

### POLLING, INSTRUCTING, CHALLENGING

When was the last time you tried polling court-martial members? It can't be done, you say? Captain Joe Caldwell disagrees and sets forth his reasons in the first article of this edition of The Advocate. Skeptical? Joe claims he got the idea from some thought-provoking language in a recent opinion of the Court of Military Appeals.

Captain John Ross raises a question mark about the Army's standard reasonable doubt instruction. He compares it to instructions which several federal circuits have found acceptable, and concludes that the military instruction might not adequately state the law.

Completing the articles section is Duane Cantrell, with a summary of the law on challenging the military judge for cause. Captain Cantrell feels that, by familiarizing themselves with the case law, defense counsel should be able to pursue a challenge when the need arises (without getting too bloodied in the process).

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### NEW TRIAL TACTICS EDITOR

We welcome Allan T. Downen, an action attorney in Defense Appellate Division, as our new trial tactics editor. Assuming primary responsibility for the "Side-Bar," Captain Downen would like to share any of your trial tactics and successes with our other readers. If you have raised a unique issue at trial, been successful with a particular tactic, or are entertaining some thoughts on an area of the law which you would like to see developed, please contact him at Autovon 289-1618.

## POLLING THE MILITARY JURY

Captain Joe R. Caldwell, Jr., JAGC\*

The practice of polling the jury following announcement of the verdict is relatively common in civilian court systems. It is recognized as a vital and fundamental right of long-standing in many jurisdictions, particularly in felony and capital cases.<sup>1</sup> In some jurisdictions, the right has been characterized as approaching constitutional magnitude.<sup>2</sup> In others, the matter has been left to the sound discretion of the trial judge.<sup>3</sup> Even those jurisdictions which do not permit polling of individual members generally allow a question of assent to the verdict to be asked by the court and answered by the panel as a whole.<sup>4</sup> However, the practice of polling has never been favored in military justice. Recently, Judge Cook, writing the lead opinion for the Court of Military Appeals in United States v. Hendon, 6 M.J. 171 (CMA 1979),

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1. See generally, "Annotation: Accused's Right to Poll of Jury," 49 ALR 2d 619, Footnotes 7-13. See also Fed. R. Crim. P. 312.

2. In Temple v. Commonwealth, 77 Ky (14 Paush) 769, 29 Am. Rep. 442 (1879) the right to poll the jury was founded upon the constitutional and statutory right to trial by jury. See State v. Boger, 202 N.C. 702, 703, 163 S.E. 877, 878 (1932), where the North Carolina Supreme Court considered the right to be based upon the constitutional guarantee that "no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court." See also State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

3. See "Annotation: Accused's Right to Poll of Jury," supra, at 626-27.

4. Id. at 627-29.

commented that the trial defense counsel failed to request a poll of the court members.<sup>5</sup> He acknowledged the practice in civilian courts without deciding its applicability to courts-martial. Judge Cook's language, although cautious, affords the inference of (or at least avoids foreclosing) the practice of polling court members under controlled and appropriate circumstances in the military justice system.

Jury polling has been described as a procedure whereby the jurors are individually asked their finding after the general verdict has been announced.<sup>6</sup> Such a practice requires each juror to answer personally, thereby creating individual responsibility while eliminating uncertainty as to the verdict announced by the foreman.<sup>7</sup>

Paragraph 74d, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969] provides for "full and free discussion as to the merits of the case," by deliberating members and prohibits the "influence of superiority in rank . . . in any manner in an attempt to control the independence of members in the exercise of their judgment." Due to the obvious disparity in rank of court members, particularly in those cases where the accused has

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5. As the facts in Hendon only peripherally relate to this article, they will not be explored in detail. The court-martial announced a sentence of three years confinement, which was concurred in by three-fourths of the members (where only two-thirds was necessary). A majority of the Court of Military Appeals found that no reasonable likelihood existed that a lesser sentence was agreed upon by a two-thirds' majority but rejected because the court members believed that a three-fourths' concurrence was required.

6. See State v. Cleveland, 6 N.J. 316, 78 A.2d 560, 23 ALR 2d 907 (1951); Commonwealth v. Jackson, 457 Pa. 237, 324 A.2d 350 (1974).

7. Id. See also Wigmore on Evidence, §2355 (1940): "The purpose of the formality of polling is to afford an opportunity for free expression, unhampered by the fears or the errors which may have attended the private proceedings."

requested the presence of enlisted members on the panel, the perception and practice of full and free discussion, absent unlawful influence, may not always prevail. Proper utilization of polling may significantly counter such a perception or practice.<sup>8</sup>

An historical examination of the issue reveals that military appellate courts and opinions have either refused to decide its propriety for the military justice system, or denounced the practice.

Regarding an 1873 court-martial cited in Digest of Opinions of The Judge Advocate General 1912, at 521, The Judge Advocate General of the Army rendered his opinion in the following:

The polling of a court-martial, in the manner of a jury or otherwise, is a proceeding wholly unknown to military law. So, where an officer, acting as the counsel of a soldier on trial by court-martial demanded, on the court ruling adversely upon the admission of a special plea, that it would be polled, [it is] held that his action was wholly irregular as well as disrespectful to the court.

Trial defense counsel may argue that such opinion is clearly distinguishable from contemporary concerns of the polling practice. The subject of the poll, in the opinion above, was the rejection of a plea rather than the more

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8. In Commonwealth v. Martin, 379 Pa. 587, 590, 109 A.2d 325, 328 (1954), the Pennsylvania Court opined:

The polling of the jury is the means for definitely determining before it is too late, whether the jury's verdict reflects the conscience of each of the jurors or whether it was brought about through the coercion or domination of one of them by some of his fellow jurors or resulted from sheer mental or physical exhaustion of a juror.

typical jury verdict. Moreover, the responsibilities of court members have been significantly altered since 1873 by statutory revision which, with the advent of certified military judges for special as well as general courts-martial, substantially confines the scope of court members' duties to those of civilian jurors.<sup>9</sup> As a result, the acceptance of a plea in current practice is the sole responsibility of the trial judge, and would remain equally as "irregular" if today made the subject of a jury poll.

In United States v. Tolbert, 14 CMR 613 (AFBR 1953), the Air Force Board of Review, in dictum, denounced the practice categorically. During the trial, the individual defense counsel, apparently unaware of a court member's prior undisclosed participation in a companion case, requested and was granted the opportunity to poll the court members after their findings of guilty were announced. The Air Force Board of Review stated in passing that "polling a court . . . is unknown to military law."<sup>10</sup> This conclusion was based upon two grounds: (1) the historical view that the members of a court-martial act as a unit without regard to individual opinion, and (2) the prohibition in the court members' oath against disclosure of the vote or opinion of an individual member unless required before a court of justice. As these reasons are oft repeated in military appellate history, each merits individual attention.

The proposition that court members act as a unit was early recorded by the military historian and judge advocate, Colonel William Winthrop, who said it was founded on "the principle that all military action must, as far as practicable,

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9. Uniform Code of Military Justice, Article 42, 10 U.S.C. §842 [hereinafter cited as UCMJ].

10. Id. at 617. See also United States v. Clarke, 21 CMR 913 (AFBR 1956). But Cf. United States v. London, 4 USCMA 90, 97, 15 CMR 90, 97 (1954) where the Court of Military Appeals refused to decide the applicability of polling in courts-martial.

be summary, final and conclusive."<sup>11</sup> Winthrop recognized that civilian tribunals properly permitted dissenting opinions to be expressed and recorded; but he further opined that in "military courts all dissent is merged and lost in the conclusion, whatever it may be, of the court, which thus, to the parties, the public and the readers of its record, appear as an integral and indivisible whole."<sup>12</sup>

On the basis of such precepts of the nineteenth century, court members were not authorized to take any official independent act to "counter the court" or "protest against the ruling or judgment of the court." However, careful scrutiny of these pre-twentieth century concepts suggests that some action far greater than a simple jury poll was contemplated. Clearly the response, "I voted not guilty," falls short of a "protest or an official independent act to counter the court." As Winthrop notes, an individual or joint clemency recommendation was entirely permissible as a personal, and not an official, proceeding of the court.<sup>13</sup>

Here again, defense counsel might argue the functional distinction between current and former court members' roles. Since the nineteenth century court panel ruled not only on findings and sentence, but evidentiary matters as well, unity was necessary if efficiency was to prevail. However, as ruling on questions of law is no longer within the province of the members, the need for free and intelligent dissent obtains. Moreover, it may be that the court unity theory was no more than a legal fiction even at its inception because it

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11. W. Winthrop, Military Law and Precedents, at 173 (2d ed., 1920 reprint) [hereinafter referred to as Military Law and Precedents].

12. Id. Winthrop has offered further argument for secrecy of votes and opinions. Historically, he states, the desire was to protect members from resentment or other prejudice if their individual and personal action became known, thus assisting their independence and the ends of justice. Military Law and Precedents, at 234.

13. Id. at 173.

succumbed by its own language before a court of justice upon evidence of impropriety.<sup>14</sup> This matter will be explored separately, infra.

The oath requirement has in the past represented a more formidable obstacle. Judge Brosman looked askance at the polling practice on that basis in his concurring opinion in United States v. Nash, 5 USCMA 550, 555-6, 18 CMR 174, 179-80 (1955). There he commented (again only hypothetically) that a court member, being sworn to secrecy, is prohibited from revealing even his own vote, whether in open court or within the confines of the deliberation room.

Not until the case of United States v. Connors, 23 CMR 636 (ABR 1957) was the issue squarely raised and addressed by the military appellate system. In the course of the trial of Sergeant Connors, the court closed to deliberate on findings. During deliberation, the court called the law officer into closed session<sup>15</sup> and indicated that the final sentence had become a consideration to them in reaching their findings. The law officer then reopened the court and instructed the members that only the issue of guilt or innocence was before them at that time. The court again closed, reached a finding, and in due course, a sentence. After the sentence was announced, the defense counsel requested a closed hearing wherein he asked that the portion of the record pertaining to the law officer's closed session conversation with the court be read. After hearing it, he moved for permission to voir dire the court members to ascertain what role consideration of the sentence played in their findings, and later, the sentence. Defense counsel sought to prove that certain members of the court had urged an excessive sentence to allow latitude to the convening authority in reducing it. The law officer denied counsel the opportunity to "interrogate" the court members, either in a polling procedure or in laying a foundation for a challenge for cause.

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14. United States v. Tolbert, supra, at 617. See also United States v. Connors, 23 CMR 636 (ABR 1957).

15. The practice of calling the law officer into the court members' closed session was discontinued by Articles 26(e) and 39(b), UCMJ, and paragraphs 39b(2), 74d(1) and 74e, MCM, 1969.

In upholding the law officer's decision, the Army Board of Review stated the following:

[I]t is our opinion that polling, as authorized in the Federal courts under Rule 31a (Federal Rules of Criminal Procedure) is not applicable in a court-martial. Basically, the reason is that in the latter, voting is by secret ballot (Article 51(a)). And the members take an oath that they will not disclose the vote or opinion of any particular member of the court upon a challenge or the findings or sentence, unless required to do so before a court of justice in due course of law (paragraph 114, MCM, 1951 and App. 8a).<sup>16</sup>

It is significant to note that the request made by defense counsel in the foregoing case sought more than is generally requested or received in the traditional jury poll where the court clerk asks each individual juror, "How do you find?"<sup>17</sup> Here, defense counsel sought to voir dire, or "interrogate" the court members to prove that an excessive sentence was urged by some of them to afford the convening authority latitude in reducing it. Hence, the Board of Review concluded that such an interrogation would exceed the court members' oath requirement of paragraph 114, Manual for Courts-Martial, United States, 1951 [hereinafter referred to as MCM, 1951] not to "disclose or discover the vote or opinion of any particular member."<sup>18</sup>

16. United States v. Connors, supra, at 639.

17. State v. Cleveland, supra.

18. Paragraph 114b, MCM, 1951, read, in pertinent part, as follows:

"You, AB, CD \* \* \* and YZ, do swear (or affirm) that you will faithfully perform all the duties incumbent upon you as a member of this court; that you will faithfully and impartially try, according to the evidence, your conscience, and the

However, the Board of Review in Connors did not view the language of paragraph 114 as an absolute prohibition against polling court members. Although it approached the practice with a great deal of caution, it acknowledged that polling, to a limited extent, may not exceed the parameters of the oath requirement, stating:

It might be possible to question the court as to whether or not the required number of members voted in favor of each finding as announced by the president, without disclosing the vote or opinion of any individual member.<sup>19</sup>

Defense counsel may argue from a fair reading of Connors that a member could lawfully register a negative response in a poll, despite the fact that the requisite number was achieved, if, in the opinion of the member, that number was obtained by coercion, domination or any other means indicative of a lack of free will.

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18. Continued.

laws and regulations provided for trials by courts-martial, the case of (the) (each) accused now before this court; and that if any doubt should arise not explained by the laws and regulations, then according to the best of your understanding and the custom of war in like cases; and that you will not divulge the findings and sentence in any case until they shall have been duly announced by the court; and that you will not disclose or discover the vote or opinion of any particular member of the court upon a challenge or upon the findings or sentence unless required to do so before a court of justice in due course of law. So help you God."

19. United States v. Connors, supra, at 640.

Arguably, the Board of Review's pronouncement devolved from a fair reading of the comparatively restrictive language of paragraph 114, MCM, 1951. Fortunately for the advocate seeking to poll the court, the corresponding provisions of the 1969 Manual afford far broader interpretation. In pertinent part, paragraph 114b, MCM, 1969, currently provides that court members "will not disclose or discover the vote or opinion of any particular member of the court (upon a challenge or) upon the findings or sentence unless required to do so in due course of law." As pertains to this article, the revised language deleted the prohibition against divulging the findings and sentence until duly announced by the court. Concluding that the deleted language of the 1951 version was "unnecessary and misleading," the joint-service authors of the 1969 edition stated the following:

The purpose of a juror's oath is to impress him with the importance of his duty and the only essentials of the oath are that he swears to well and truly try the case and render a true verdict according to the law and evidence. 5 Wharton, Criminal Law and Procedure §2003 (12th ed. 1957).<sup>20</sup>

Perhaps more significant to the polling practice is the 1969 Manual's deletion of the language prohibiting disclosure unless "before a court of justice." That language was apparently derived from the oath of the British Articles of War, which prohibited disclosure "unless before a court of justice, or a court-martial."<sup>21</sup> Thus, disclosure was permissible in the British court-martial system. However, the American military system did not include the phrase "or a court-martial" in its Articles of War.<sup>22</sup> Accordingly, Winthrop concluded:

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20. Department of Army Pamphlet 27-2, Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised edition, paragraph 114 [hereinafter referred to as Analysis of Contents, MCM, 1969].

21. See Footnote 20, Military Law and Precedents at 235, n.20.

22. See American Articles, 1786, Article 6, reprinted in Military Law and Precedents at 973.

"By the term 'court of justice' was evidently intended a civil or criminal court of the United States or of a State: a court-martial could scarcely have been contemplated."<sup>23</sup> Although specifically denouncing disclosure of individual votes,<sup>24</sup> the example he cited was the 1782 court-martial conviction of a general officer for relating publicly what had transpired at a Council of War, and the opinions expressed there by another general officer.<sup>25</sup>

Regardless of the merits of the foregoing as an argument against polling court members, the issue was at least intended to be resolved by the authors of the new Manual, who, when referring to paragraph 114, MCM, 1969, stated:

Also in subparagraph b, "before a court of justice" was deleted after "required to do so" in the latter portion of the court member's oath. This provision was considered too restrictive since such a disclosure may be required other than before a court, for example, at a pre-trial investigation involving misconduct of a court member in connection with a trial. Although it was not changed, it was recognized that the court members' oath might go too far as it prohibits the disclosure of the vote or opinion of a particular member except as provided therein. Probably there is no objection to a court member disclosing his own vote or opinion at any time. See Harnsberger, Amend Canon 23 or Revise Opinion 109, 51 A.B.A.J., 157 (1965). [Emphasis in original].<sup>26</sup>

23. Military Law and Precedents at 235.

24. Id.

25. Id. at n.19.

26. Paragraph 114, Analysis of Contents, MCM, 1969.

It therefore appears that the authors, by this action, intended, and in fact succeeded, in removing all vestiges of the statutory and historical obstacles to the military polling practice. It should be noted that the long-standing tradition of non-disclosure of another court member's vote remains inviolate. However, disclosure of one's own vote has, per the 1969 Manual, become permissible. Absent evidence of impropriety, the latter is all that is sought by polling.

### Conclusion

The polling practice may be an effective tool for defense counsel to ensure that "full and free discussion as to the merits of the case" occurred without improper influence. Proper use may aid the practice, as well as the perception of unhampered expression to those both within and without the deliberation room.

The historical prohibition is no longer applicable due to procedural and substantive changes in military law. A fair reading of current provisions no longer reveals statutory obstacles to employment of the practice. A more conservative reading at least supports the proposition that court members upon polling might lawfully reveal whether the requisite number of votes was obtained. Even the most restrictive interpretation of current provisions should permit polling to discover coercion or voting impropriety.

In light of the Court of Military Appeals' recent comment in Hendon, regarding trial defense counsel's "failure" to poll the court, defense counsel might be well advised in an appropriate case to avoid such a "failure" by requesting a poll of individual court members following announcement of findings or sentence.

# REEVALUATING THE STANDARD REASONABLE DOUBT INSTRUCTION

Captain John L. Ross, JAGC\*

## Introduction

While it is the responsibility of the military judge to instruct the court on the law applicable to the case in a trial by court-martial, complete and effective representation of the accused dictates that defense counsel also give full attention to instructions in his trial preparation.<sup>1</sup> Thorough legal research, including submission of proposed instructions, will not only insure an accurate submission of the defense theory to the court, but will also assist counsel by clarifying the issues involved and providing the basis for properly phrased voir dire questions.<sup>2</sup> Too often, the defense attorney is satisfied with acceding to the military judge's reliance upon pattern instructions taken from the Military Judges' Guide.<sup>3</sup> The purpose of this article is to suggest to the defense practitioner, by way of one specific example, that pattern instructions are not necessarily without error, and that defense-tailored instructions can provide the defense counsel with notable opportunities to forward the cause of his client.

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1. Fletcher, Instructions - An Under-Utilized Opportunity for Advocacy, 10 The Advocate 7 (1978); Keeton, Trial Tactics and Methods, §6.1 et. seq. (2d ed. 1973).
2. See Holdaway, Voir Dire - A Neglected Tool of Advocacy, 40 Mil. L. Rev. 1 (1968).
3. Department of Army Pamphlet 27-9, Military Judges' Guide (19 May 1969).

## Reasonable Doubt About Reasonable Doubt

Upon reviewing a number of federal cases, one trial defense counsel recently arrived at the conclusion that the definition of "reasonable doubt," set forth in the Military Judges' Guide,<sup>4</sup> is inaccurate, misleading, and not in accordance with developing criminal jurisprudence. Therefore, at his next trial by court-martial, he requested the military judge to provide the court members with the following instruction:

You are instructed that in the case being considered, if there is reasonable doubt as to the guilt of the accused, the doubt shall be resolved in favor of the accused and you must acquit him. A "reasonable doubt" is what the words

### 4. Id. paragraph 2-4:

By 'reasonable doubt' is intended not a fanciful or ingenious doubt or conjecture, but substantial, honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest, substantial misgiving generated by insufficiency of proof of guilt. Proof beyond reasonable doubt means proof to a moral certainty although not necessarily an absolute or mathematical certainty. If you have an abiding conviction of the accused's guilt such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt. The rule as to reasonable doubt extends to every element of the offense although each particular fact advanced by the prosecution which does not constitute an element, need not be established beyond reasonable doubt. However, if, on the whole evidence, the court is satisfied beyond reasonable doubt of the truth of each and every element, the court should find the accused guilty.

imply, a doubt founded in reason arising from the evidence, or from a lack of it, after consideration of all the evidence. A "reasonable doubt" is not a flimsy, fanciful, imaginative, or fictitious doubt, since such doubts can be raised about anything and everything in the human experience. Rarely, if ever, can anything be proved to an absolute or mathematical certainty, and such a burden is not required of the Government here. Rather, a "reasonable doubt" is a doubt which would cause a reasonably prudent person to hesitate to act in the more important and weighty of his own personal affairs. In considering the evidence in this case, before you may vote for a finding of guilty, you must be convinced to a moral certainty of the accused's guilt and you must be satisfied that the evidence is such as to exclude every fair and rational hypothesis or theory of innocence. If you are not so convinced and satisfied, then it is your duty to find the accused not guilty.

To counsel's surprise, the trial judge agreed to the request, and gave the above instruction, with one modification. Instead of employing the "hesitate to act" phrase, the judge advised that a reasonable doubt was one which would cause a person "not to act in the more important and weighty of his own personal affairs."

The instruction requested (as opposed to both the standard instruction and the instruction as modified) incorporates several concepts which have been gaining greater acceptance

in the federal courts.<sup>5</sup> Using recent federal cases as a backdrop, this article will seek to explore the differences between the instruction addressed above and the standard one set forth

5. Instructions such as the following have been cited with approval by appellate tribunals:

It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

So if the jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that a defendant is guilty of the charge, it must acquit. If the jury views the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—the jury should of course adopt the conclusion of innocence.

Dewitt and Blackmar, Federal Jury Practice and Instruction, §11.14 (3d ed. 1977).

in the Military Judges' Guide, and then will discuss an important difference between the standard instruction and the Manual<sup>6</sup> definition of reasonable doubt.

### "Reasonable Doubt" Versus "Substantial Doubt"

It is axiomatic that an accused's guilt must be proved beyond a reasonable doubt under our system of justice.<sup>7</sup> The reasonable doubt standard is an important device in reducing the risk of convictions based on factual error.<sup>8</sup> Any lesser standard fails to pass constitutional muster under the due process clause.<sup>9</sup>

Congress has mandated that in the military the trial judge must instruct members of a court-martial that "the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt."<sup>10</sup> However, the standard instruction in the Military Judges' Guide risks lessening this degree of proof because it allows the members to convict where the Government has only proved guilt beyond "substantial" doubt. Many courts which have addressed the two terms have stressed that "substantial" is not a synonym of "reasonable." For example in United States v. Atkins, 477 F.2d 257, 260 (8th Cir. 1973), the Court explained:

The objection made on appeal is that 'substantial' doubt is not the equivalent of 'reasonable' doubt. We agree. Proof of guilt beyond a reasonable doubt would

6. Paragraph 74a(3), Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter MCM, 1969].

7. See, e.g., United States v. Verdi, 5 M.J. 330 (CMA 1978). See also Article 51(c), Uniform Code of Military Justice, 10 U.S.C. §851(c) [hereinafter UCMJ].

8. United States v. Pinkney, 551 F.2d 1241 (D.C. Cir. 1976).

9. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

10. Article 51(c), supra.

seem to require a greater evidentiary showing by the Government than proof of guilt beyond a substantial doubt. For this reason, we do not approve of the alternative statement that reasonable doubt means a substantial doubt.<sup>11</sup>

As recently as last term, the United States Supreme Court indicated that equating reasonable doubt with substantial doubt in instructing the jury was at least misleading and confusing, if not reversible error.<sup>12</sup>

Is there really a significant difference between the words "reasonable" and "substantial?" The position of the Supreme Court of Missouri on this question is clear:

'Reasonable' and 'substantial' are not synonymous as can be seen by referring to any of the standard dictionaries. The point was well put by counsel in argument recently where he pointed out that if one had to undergo a serious operation and were querying the doctor as to the prospects for a successful outcome, how differently the person would feel if the doctor told him there was only a reasonable chance of success as opposed to being told that there was a substantial chance of success.<sup>13</sup>

11. Accord, United States v. Gratton, 525 F.2d 1161 (7th Cir. 1975); United States v. Bridges, 499 F.2d 179, 185-86 (7th Cir. 1974); United States v. Fallen, 498 F.2d 172, 176-77 (8th Cir. 1974). See also United States v. Loman, 551 F.2d 164 (7th Cir. 1976); United States v. Muckenstrum, 515 F.2d 568, 571 (5th Cir. 1975); United States v. Alvero, 470 F.2d 981 (5th Cir. 1972); United States v. Christy, 444 F.2d 448, 450 (6th Cir. 1971).

12. Taylor v. Kentucky, \_\_\_ U.S. \_\_\_, 98 S.Ct. 1930, 1936, \_\_\_ L.Ed.2d \_\_\_ (1978).

13. State v. Davis, 482 S.W.2d 486, 490 (Mo. 1972) (Seiler, J., concurring), cited with approval by the 8th Circuit in United States v. Atkins, supra, at 260, n.2.

It is noteworthy that the pattern Army instruction uses the word "substantial" not once, but twice. Thus, if it is misleading to instruct on substantial doubt, it is substantially misleading to so instruct twice. The gravamen of repetition of the error is that the incorrect standard is reinforced and the possibility that the members will resort to an unconstitutional standard of proof is enhanced.<sup>14</sup> Finally, it is noteworthy that none of the cases cited as authority for the instruction in the Military Judges' Guide uses the word "substantial" in defining reasonable doubt.<sup>15</sup>

#### Hesitancy to Act Versus Willingness to Act

The definition which is cited most often with approval by the federal courts describes reasonable doubt as that doubt which would cause an individual to hesitate to act in matters of importance.<sup>16</sup> The widespread use of this definition is based primarily on the case of United States v. Holland, supra, wherein the Supreme Court recommended "hesitation to act" language in jury instructions. Several circuits have stressed that the Holland definition is not the preferred definition but is the approved definition, and must be given when requested by the defense.<sup>17</sup>

14. See United States v. Fallen, supra, at 176-177.

15. See United States v. Holland, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954); Bishop v. United States, 107 F.2d 297, 303 (D.C. Cir. 1939).

16. Wright, Federal Practice and Procedure: Criminal §500. See e.g., United States v. Williams, 505 F.2d 947 (8th Cir. 1974).

17. The defendant is correct when he argues that the approved language for explaining reasonable doubt is not "willingness to act." This Court has previously stated that reasonable doubt is better explained as the kind of doubt that would make a reasonable person hesitate to act. United States v. Richardson, 504 F.2d 357 (5th Cir. 1974). The defendant, however, failed to object to the charge as given,

It is puzzling that the pattern instruction defines reasonable doubt in terms of the degree of certainty upon which court members would act, since the very cases cited in the Military Judges' Guide as authorities supporting it (such as Holland itself)<sup>18</sup> aver that the better definition is one which employs the hesitation to act language. Several circuit courts have indicated that an instruction similar to the pattern one fails to comply with the law.<sup>19</sup> In fact, an instruction nearly identical to the standard one was specifically disapproved in James v. United States, 338 F.2d 553, 555 (D.C. Cir. 1964). Finally, although the discrepancy between willingness and hesitation to act has not been specifically addressed in any military cases, at least one military tribunal has acknowledged the Supreme Court's preference for an instruction framed in the latter terms.<sup>20</sup>

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17. Continued.

and, therefore, error must be "plain" to be reversible. In Richardson, supra, we specifically held that the use of "willingness to act" does not constitute plain error.

United States v. Patman, 557 F.2d 1181, 1182 (5th Cir. 1977).

[W]e think it appropriate to call once again to the attention of the trial courts in this circuit that "the definition of reasonable doubt should be phrased in terms of hesitation to act [ . ]" United States v. Dunmore, supra, 446 F.2d at 1222.

United States v. Williams, supra, at 948.

18. See also Wilson v. United States, 232 U.S. 563, 34 S.Ct. 347, 58 L.Ed. 728 (1914).

19. United States v. Cole, 453 F.2d 902, 906 (8th Cir. 1972); United States v. Dunmore, 446 F.2d 1214, 1221-22 (8th Cir. 1971); Scurry v. United States, 347 F.2d 468, 469-70 (D.C. Cir. 1965).

20. United States v. Lasseter, 24 CMR 372, 374 (ABR 1957).

## Hypothesis of Guilt Versus Hypotehsis of Innocence

The final matter to be addressed in this article pertains to certain material which is found in the Manual definition of reasonable doubt, but is not incorporated into the standard instruction. The provision in question is that "the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis of guilt."<sup>21</sup> The law in the military is clear that, in order to sustain a conviction, the evidence must not only be consistent with guilt, but must also exclude all rational hypotheses of innocence.<sup>22</sup> Indeed, the denial of a request for such an instruction has been held to constitute reversible error.<sup>23</sup> In order to be complete and underscore the heavy burden which the Government assumes in trial by court-martial, any definition of reasonable doubt should include a remark regarding the exclusion of all rational hypotheses of innocence.

### Conclusion

In light of current judicial thought, the requested instruction discussed in the beginning of this article correctly states the law on "reasonable doubt." While this article addresses only one pattern instruction, hopefully it will stimulate defense counsel to critically examine others. The possibilities for creativity on the part of defense counsel are readily apparent,<sup>24</sup> and should be taken advantage of in appropriate cases in order to insure the complete and effective assistance of counsel.

21. Paragraph 74a(3), MCM, 1969.

22. *United States v. Verdi*, 5 M.J. 330 (CMA 1978); *United States v. McCoy*, 18 CMR 923 (AFBR 1955); *United States v. Green*, 7 CMR 208 (ABR 1952).

23. *United States v. Hamill*, 21 CMR 873 (AFBR 1956).

24. For example, nowhere in the Military Judges' Guide is the presumption of innocence defined. Yet, failure to give a requested clarifying instruction on the presumption of innocence has been held a denial of due process. *Taylor v. Kentucky*, supra.

## CHALLENGING THE MILITARY JUDGE FOR CAUSE

Captain J. Duane Cantrell, JAGC\*

### Introduction

The opportunity to challenge the military judge for cause must be afforded the accused during a pretrial Article 39(a)<sup>1</sup> session of a court-martial.<sup>2</sup> In the majority of cases a dialogue similar to the following occurs:

TC: If the military judge is aware of any matters which may be grounds for challenge by either side against him, he should now state such matters.

(None stated)

TC: Does the accused desire to challenge the military judge for cause?

DC: No.

Although a causal challenge of the military judge may be made infrequently, it is necessary for trial defense counsel to be well versed in its use, as it could arise any time during the course of trial. Furthermore, the failure to present the challenge in a timely fashion may result in waiver. It is the purpose of this article to compile a ready reference for trial defense counsel on the subject of challenging the military judge for cause. This article will assist trial defense counsel in recognizing and asserting potential challenges

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1. Article 39(a), Uniform Code of Military Justice, 10 U.S.C. §839(a) [hereinafter cited as UCMJ].

2. Article 41(a), UCMJ.

of the trial judge and will present counsel with the basic framework from which to begin research on the issue.<sup>3</sup>

### The Mechanism of A Causal Challenge

A challenge for cause against the military judge should be lodged during the initial Article 39(a) session or as soon as practicable after discovery of matters upon which to base the challenge.<sup>4</sup> It is important to note that a challenge, once denied, may be reasserted.<sup>5</sup> The failure to assert a challenge for cause generally constitutes a waiver.<sup>6</sup>

The military judge is obligated to disclose every ground for challenge he believes exists.<sup>7</sup> Furthermore, the defense has a right to inquire of the military judge whether facts exist to support a causal challenge.<sup>8</sup> If there exists an undisputed ground for causal challenge as enumerated in clauses (1) through (8) of paragraph 62f, MCM, 1969, excusal is mandated.<sup>9</sup> For other cases, the military judge's ruling concerning the challenge will be upheld except for an abuse

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3. Each trial defense counsel should be familiar with the following: Articles 16, 26, and 41, UCMJ; paragraphs 4a, 4e, 39, 62, 63, 64, and 65, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter MCM, 1969]. Case references are presented for the general principles stated. It is beyond the scope of this article to draw detailed distinctions.

4. United States v. Wolff, 5 M.J. 923 (NCMR 1978); paragraph 62d, MCM, 1969.

5. Paragraph 62d, MCM, 1969.

6. United States v. Weishaar, 5 M.J. 889 (NCMR 1978).

7. Article 41, UCMJ; paragraph 62b, MCM, 1969.

8. Paragraph 62b, MCM, 1969.

9. Paragraph 62c, MCM, 1969.

of discretion.<sup>10</sup> The burden of establishing the challenge rests with the party asserting it, but the application of a liberal standard in granting causal challenges is encouraged.<sup>11</sup>

A challenge for cause is generally lodged in one of two ways. First, as explained above, the challenger may orally assert it at the Article 39(a) session or whenever the grounds for challenge arise.<sup>12</sup> Second, he may present affidavits that the military judge has a personal bias against him or in favor of the other party.<sup>13</sup> Whichever manner is used to present a challenge, every step must be taken by the proponent to ensure that it is thoroughly preserved on the record so that appellate counsel is able to pursue the issue on appeal.

### Orders

The starting point in determining whether a challenge for cause may exist against the military judge is the convening order and amendments thereto. Jurisdictional error exists if the judge is not properly designated by the convening authority.<sup>14</sup> Good cause must be shown by the Government if the military judge originally named in the convening order is

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10. United States v. Kauffman, 3 M.J. 794 (ACMR 1977); United States v. Reed, 2 M.J. 972 (ACMR 1976); paragraph 62h(2), MCM, 1969.

11. United States v. Grance, 2 M.J. 846 (ACMR 1976); United States v. Wright, 47 CMR 637 (AFCMR 1973); paragraph 62h(2), MCM, 1969; see also United States v. Reed, supra.

12. Wolff, supra at n.8.

13. 28 U.S.C. §144, made applicable by military case law. United States v. Howe, 17 USCMA 165, 37 CMR 429 (1967); United States v. Hurt, 9 USCMA 732, 27 CMR 3 (1958); United States v. Grance, supra.

14. United States v. Newcomb, 5 M.J. 4 (CMA 1978); United States v. Febus-Santini, 23 USCMA 226, 49 CMR 145 (1974).

replaced by another order after arraignment.<sup>15</sup> However, United States v. Smith<sup>16</sup> tends to indicate that commencement of trial on the merits is more controlling than the mere conclusion of arraignment in determining whether good cause must be shown. Without a showing of replacement for good cause, the defense could properly challenge a newly appointed judge for cause. If the military judge is substituted by vocal order, a subsequent written amendment must reference the vocal order.<sup>17</sup> Again, failure to object to improper changes can constitute a waiver of the error.<sup>18</sup>

#### The Military Judge As A Witness

A military judge is prohibited from presiding at a court-martial if he is to be a witness for the prosecution.<sup>19</sup> The clearest example of this rule is United States v. Cardwell,<sup>20</sup> where the military judge, acting as magistrate before trial, issued a search warrant which was introduced at trial. The military judge denied a causal challenge entered against him and testified at trial regarding the issuance of the warrant. It was held that the judge should have excused himself. Other cases involving the military judge as a witness are United States v. Conley,<sup>21</sup> United States v. Airhart,<sup>22</sup>

15. United States v. Weishaar, supra; United States v. Bumgarner, 49 CMR 770 (ACMR 1974); United States v. Hamlin, 49 CMR 18 (ACMR 1974); Article 29(d), UCMJ; paragraph 39e, MCM, 1969.

16. 3 M.J. 490 (CMA 1975).

17. United States v. Broadus, 2 M.J. 438 (ACMR 1975); paragraph 37d, MCM, 1969.

18. United States v. Bumgarner, supra.

19. Article 26(d), UCMJ; paragraphs 62f(4) and 63, MCM, 1969. Cf. paragraph 62f(13), MCM, 1969 (a causal challenge lies if the military judge becomes a witness for the defense).

20. 46 CMR 1301 (ACMR 1973).

21. 4 M.J. 327 (CMA 1978).

22. 23 USCMA 124, 48 CMR 685 (1974) (error waived by failure to challenge).

and United States v. Griffin.<sup>23</sup> In Conley, a military judge who was a certified documents examiner was considered to be a witness for the prosecution and disqualified to continue in the trial after conceding he could utilize such expertise in evaluating the authenticity of documentary evidence involved at trial. In Airhart, a military judge's authentication of a prosecution transcript of testimony in a related trial transformed him into a prosecution witness. In Griffin, a military judge who announced to court members that a defense witness was testifying under a grant of immunity was considered to have become a witness for the prosecution and, therefore, ineligible to further serve in that case. On the other hand, the military judge's actions in United States v. Aragon<sup>24</sup> were deemed not to have made him a prosecution witness. In that case, the military judge's notation of his docketing schedule and an explanation of the reasons for his unavailability to resume trial following a defense motion to dismiss for lack of speedy trial was determined to be a mere statement of neutral facts not tending to favor either the Government or the defense.

#### Military Judge's Trial Conduct

It has long been settled that the military judge is not merely a referee in a court-martial contest between the Government and the accused, but may clear up evidentiary uncertainties and further develop facts.<sup>25</sup> He may call witnesses, ask questions to clear up uncertainties in the evidence, or ask for additional evidence.<sup>26</sup> However, he may not forsake his essential impartiality and become an advocate. Military judges have intruded into some cases and thereby affected the fairness of trial in the following ways: remarking that

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23. 1 M.J. 784 (AFCMR 1976). The Court stated that a defense objection, as opposed to a causal challenge, would also have preserved the error.

24. 1 M.J. 662 (NCOMR 1975).

25. United States v. Jordan, 45 CMR 719 (ACMR 1972).

26. United States v. Boling, 46 CMR 594 (ACMR 1972).

defense counsel was knowingly eliciting false testimony,<sup>27</sup> conveying his disbelief of the accused to the court members,<sup>28</sup> and aiding the Government too much in presenting its case.<sup>29</sup> Although each case involved denial of due process because of the conduct of military judge, the general proposition is that the injudicious conduct of the judge should not be ignored. While a motion for mistrial might be appropriate when the minds of the members are imprinted with such comments, counsel should be vigilant and consider lodging a challenge in less flagrant situations before irreparable damage is done.

Because the law does require strict impartiality on the part of the military judge, it cannot be stressed enough that trial defense counsel place his objections and challenges on the record. Too often in this area trial defense counsel does not object at all. Perhaps he is unsure of whether a challenge is in order or he is worried that to do so will alienate the judge or court members, if any. It is suggested that if trial defense counsel is in doubt he should assert the challenge for the record. Failure to object will usually result in a waiver of the issue. An objection may lay the foundation for appellate relief or provide the ground work for new law. If new law is made, trial defense counsel has not only aggressively represented his client, but has advanced the cause of others who may later be similarly situated. He has been an advocate.

Although it is wise not to alienate other court-martial participants, that desire is secondary to effective representation of the accused. If there are court members, it is suggested that the military judge be challenged at an out of court hearing or at a side bar conference. If the military judge will not allow either such session, then the trial defense counsel must "bite the bullet" and lodge the challenge. In this event, counsel should seize the opportunity clearly to convey to the court members his objections. If counsel can get them thinking his way on this point, the

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27. United States v. Holmes, 23 USCMA 497, 50 CMR 577 (1975).

28. United States v. Shackelford, 2 M.J. 17 (CMA 1976).

29. United States v. Wilson, 2 M.J. 548 (ACMR 1976).

challenge may eventually inure to the benefit of the defense, even if it is denied. More importantly, it will be on the record and, thus, may bear fruit on appeal.

Military Judge's Prior Relation To The Case:  
Exposure And Bias

There is more guidance in this area of causal challenge against the military judge than any other. In this regard, counsel should systematically assert a challenge if the military judge acted in or occupies any position delineated in the provisions of clauses (3) (accuser), (5) (investigating officer), (6) (counsel for the prosecution), (7) (member of previous court), (9) (forwarded the charges), (10) (formed or expressed a positive opinion), (11) (acted in same case as convening authority), (12) (act in same case as reviewing authority), or (13) (any other facts) of paragraph 62f, MCM, 1969.<sup>30</sup>

To successfully maintain a challenge, personal bias, as opposed to judicial bias, on the part of the military judge, is required. Mere exposure to the facts of the case without bias is not sufficient.<sup>31</sup> The primary tool of the defense counsel here is voir dire of the military judge.

Defense counsel were unsuccessful in challenging the military judge on the basis of prejudice against counsel in United States v. Pergande<sup>32</sup> and United States v. Kama.<sup>33</sup> In both cases, the military judge questioned the defense attorneys' ethics or conduct, but ultimately found them correct. Without a showing of bias, appellate courts have not granted relief where a military judge had merely been exposed to facts about a case or the accused, e.g., reading the Article

30. See United States v. Paulin, 6 M.J. 38 (CMA 1978); United States v. Wright, 47 CMR 637 (AFCMR 1973).

31. United States v. Reed, supra; United States v. Grance, supra.

32. 49 CMR 28 (ACMR 1974).

33. 47 CMR 838 (NCOMR 1973).

32 Investigation prior to trial;<sup>34</sup> giving initial advice to a criminal investigator;<sup>35</sup> prosecuting an accused in a prior court-martial for events not related to the pending charges;<sup>36</sup> remarking at sentencing that he was setting punishment for the accused, specifically recalling that he had, in a previous court-martial, of the same accused for different events, been lenient;<sup>37</sup> reading the pretrial advice;<sup>38</sup> ex parte acceptance of a case authority list from government counsel;<sup>39</sup> and knowledge that the defense was negotiating a plea with the convening authority.<sup>40</sup> On the other hand, military judges have been disqualified where they drafted the charges,<sup>41</sup> advised the responsible staff judge advocate,<sup>42</sup> acted as a magistrate in issuing a pretrial search warrant where his statements evinced prior disposition deciding the existence of probable cause,<sup>43</sup> and directed trial counsel to draft charges against an accused for offenses admitted during his testimony.<sup>44</sup>

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34. *United States v. Hodges*, 14 USCMA 23, 33 CMR 235 (1963).

35. *United States v. Goodman*, 3 M.J. 1 (CMA 1977).

36. *United States v. Head*, 2 M.J. 131 (CMA 1977); *United States v. Richmond*, 11 USCMA 142, 28 CMR 366 (1960).

37. *United States v. White*, 46 CMR 1235 (NCOMR 1973).

38. *United States v. Gardner*, 46 CMR 1025 (ACMR 1972).

39. *Id.*

40. *United States v. Hodges*, 22 USCMA 506, 47 CMR 923 (1973). The court opined, however, that it would be better if the military judge had excused himself.

41. *United States v. Renton*, 8 USCMA 697, 25 CMR 201 (1958).

42. *United States v. Jones*, 44 CMR 819 (ACMR 1969).

43. *United States v. Cardwell*, supra.

44. *United States v. Morgan*, 44 CMR 699 (ACMR 1971).

The fact that the military judge has presided in a closely related case, without a showing of bias, is not a disqualification.<sup>45</sup> Nor is it disqualifying that he, while sitting as judge alone, rejects a guilty plea for improvidency.<sup>46</sup> However, the Court in United States v. Cockerell<sup>47</sup> suggested that the military judge should, if he rejects a guilty plea for improvidency after approving a request for trial by military judge alone, either excuse himself or offer the accused the option of withdrawing his request for trial before military judge alone. Cockerell has been criticized and a military judge may in his sound discretion decide not to follow its suggestions.<sup>48</sup>

A problem similar to the improvident guilty plea arises where the same military judge is requested to sit alone in separate trials of co-accused.<sup>49</sup> What happens if, during the 39(a) session of the second co-accused to be tried, inquiry of the military judge reveals that he has developed a favorable opinion of the credibility of prosecution witnesses or some other opinion which induces the defense to conclude that they do not desire him to continue the case as military judge alone? First, it is clear that the election to be tried by military judge alone is made only after knowing the identity of the military judge.<sup>50</sup> In this regard, it may be

45. United States v. Lewis, 6 M.J. 43 (CMA 1978); United States v. Stewart, 2 M.J. 423 (ACMR 1975); United States v. Wright, supra.

46. United States v. Jophlin, 3 M.J. 858 (ACMR 1977); United States v. Kauffman, supra; United States v. Melton, 1 M.J. 528 (AFCMR 1975).

47. 49 CMR 567 (ACMR 1974).

48. United States v. Jophlin, supra; United States v. Kauffman, supra.

49. United States v. Jarvis, 22 USCMA 260, 46 CMR 260 (1973). (military judge was, unlike situation in most cases, subject to challenge because trial defense counsel had previously represented Jarvis' co-accused before the same military judge and presented theory of case inconsistent with Jarvis').

50. United States v. Scaife, 48 CMR 290 (ACMR 1974); Article 16, UCMJ.

said that an accused has a right to trial by military judge alone before a particular military judge as opposed to a military judge. Therefore, if the military judge states that such an opinion exists, may he simply refuse to hear the case alone, thereby forcing the accused to be tried by a court with members? The answer is probably yes; but defense counsel should object upon the grounds that this creates an appearance of evil.<sup>51</sup> A solid argument in support of this objection is that merely making the military judge the "law giver" does not cure the dilemma. At any time he may be called upon to rule on interlocutory matters which might require that he alone decide factual issues.

Finally, in this area of challenging the military judge for cause, is it objectionable that the military judge who is to preside at trial, with or without members, also acted as military magistrate in reviewing pretrial confinement? Case law has yet to answer this question, but, by regulation, one person is allowed to perform both functions.<sup>52</sup> This is an area where, under the right circumstances, trial defense counsel might successfully challenge the military judge for cause.

The military judge may not be an investigating officer.<sup>53</sup> An investigating officer is a "person who, as . . . an investigating officer or otherwise, has conducted a personal investigation of a general matter involving the particular offense."<sup>54</sup> Trial defense counsel should make close inquiry of the military judge on this point to include querying his impressions of the accused and any beliefs he may have

51. Paragraph 62f(13), MCM, 1969; Canon 3c(1), Code of Judicial Conduct of the American Bar Association; paragraph 1.7, American Bar Association Standards Relating to the Function of the Trial Judge.

52. Army Regulation 27-10, Chapters 9 and 16 (hereinafter AR 27-10).

53. Paragraph 62f(5), MCM, 1969.

54. Paragraph 64, MCM, 1969 (Emphasis added).

formed. Also, counsel should request to see any notes or records made by the magistrate in performing his duties.<sup>55</sup> It is not argued that a person is prohibited from acting as both military magistrate and military judge regarding the same accused; rather it is suggested that this is a possible area from which trial defense counsel may develop a causal challenge. For instance, if illegal pretrial confinement is made the basis of a pretrial motion for appropriate relief, would not the military judge be required to review his own work as military magistrate?

### Conclusion

Although infrequently asserted, challenges for cause against the military judge have significant potential for the trial defense counsel. How often it has been said, "With any other judge, I'd have won that case." If there is a legal basis for the impression, pursue a challenge, never forgetting the responsibility of counsel to make a record for the client. If an inadequate record regarding a causal challenge is made, the chances for appellate victory are greatly diminished.

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55. AR 27-10, Chapter 16.

## CASE NOTES

### SUPREME COURT DECISION

#### RANDOM AUTOMOBILE STOPS

Delaware v. Prouse, No. 77-1571, 24 Crim. L. Rptr. 3079  
(U.S. Sup. Ct. 1979)

Rejecting the State of Delaware's argument that random automobile stops to check for operator's license and registration certificates are justified as a means to improving traffic safety, the Supreme Court, in an 8-1 decision, has ruled that the practice violates the Fourth Amendment's prohibition against unreasonable search and seizure. "The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure - limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable - at the unbridled discretion of law enforcement officials."

The defendant was stopped for a routine license check by a policeman who admittedly "pulled him off" because he "was not answering any complaints" at the time. The policeman smelled marijuana smoke and in the car saw marijuana. All of the Delaware state courts held that the marijuana was inadmissible at trial. The Supreme Court agreed, emphasizing that a stop of a particular vehicle is justified only if there is a factual basis to believe that the motorist is violating the law. The majority opinion sanctioned utilizing roadblocks to check all oncoming traffic; the concurring opinion assumed that other spot checks that did not involve unbridled discretion would be allowed, such as stopping every tenth car.

## FEDERAL DECISIONS

### FEDERAL RULES OF EVIDENCE -- HEARSAY

United States v. Cain, 24 Crim. L. Rptr. 2405 (5th Cir. 1979)

The defendant and a companion escaped from a federal prison and stole a pickup truck. A state trooper, responding to a CBer's call regarding an abandoned pickup, located the vehicle and discovered a khaki shirt and tee shirt inside. In response to the state trooper's request for information, a second CBer reported having seen two shirtless males hitchhiking some six miles from the site of the abandoned truck. The two were arrested as escapees and convicted of transporting a stolen vehicle across state lines.

The only evidence at trial linking the defendant with the truck was the second CBer's call, conceded by the Government to constitute hearsay. The Government argued that the hearsay was admissible as a "present sense impression" under the Federal Rules of Evidence. Fed. R. Evid. §803(1). The Court of Appeals for the Fifth Circuit rejected that contention, holding that the utterance made, while explaining an event, was not sufficiently close in time to the declarant's observations.

The Court also held that the hearsay exception of Rule 803(2) ("excited utterances") was inapplicable because the declarant was not in a state of excitement. Equally inapplicable, the Court held, was Rule 803(24) ("other exceptions" or "the residual hearsay exception provision") since notice of the use of the declarant's statement was not given to the adverse parties nor were there any extraordinary circumstances requiring the rule to be invoked.

### IMMUNITY

United States v. Herman, 24 Crim. L. Rptr. 2263 (3d Cir. 1978)

The Third Circuit Court of Appeals has held that there is no right to compel the Government to grant immunity

to a defense witness, unless the defense can show that the Government's decision not to do so constitutes an unconstitutional abuse. An abuse of discretion could arise when the decision is made as a "deliberate intent to distort the judicial fact finding process."

The Court questioned whether a trial court has the authority to grant statutory immunity to a defense witness, but suggested that a trial court would have the inherent power to fashion an immunity in order to effectuate the defendant's right to compulsory process. Conferring this immunity should be reserved for those cases in which the witness' testimony is "essential to an effective defense."

#### PLAIN VIEW -- "INADVERTANCE"

United States v. Hare, 24 Crim. L. Rptr. 2391 (6th Cir. 1979)

The United States Court of Appeals for the Sixth Circuit recently defined the term, "inadvertance," as used by the United States Supreme Court in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). In Coolidge, the Supreme Court said that one of the requirements for determining whether a seizure can be made under the so-called plain view doctrine is whether the discovery was "inadvertant."

Although the authorities, in the instant case, were armed with a warrant and entered the defendant's premises in order to search for illegal firearms, they also discovered some drugs during the course of the search. The trial court suppressed the drugs, concluding that their discovery was not inadvertant, because the authorities expected to find them. The Sixth Circuit reversed, holding the drugs admissible under the plain view doctrine. The Court explained that "inadvertant" did not mean that the discovery was "unexpected" or "unanticipated," but that it was "unintentional." As long as the police are legitimately within the bounds of a lawful search warrant, any discovered contraband unrelated to the warrant could legally be seized.

In re Motion for Return of Property, 24 Crim. L. Rptr. 2418  
(S.D.N.Y. 1979)

Only five days before the Sixth Circuit offered its definition of "inadvertance," the Federal District Court for Southern New York interpreted the term somewhat differently. An employee of a department store informed a postal inspector, who had been investigating incidents of mail fraud, that he had been mailing packages containing cosmetics to the defendant's home for about one year. The employee specifically recalled the date of mailing and the contents of one of these packages. The postal inspector contacted a federal attorney and was advised that probable cause existed only for that one package. Accordingly, he sought and received a search warrant for that particular container. The postal inspector then advised the officials who were to execute the warrant that, while looking for the package in question, they could seize any other property not properly in the defendant's house.

When the officials conducted the search, they were accompanied by an employee of the department store. The package specified in the warrant was never found, but several other items, identified by the employee as his store's merchandise, were discovered and seized.

Granting the defendant's motion to suppress the seized items, the District Court emphasized the belief of the postal inspector that property other than the container specified in the warrant would be found, the intent of one of the officials "to seize any and all cosmetics he could find," and the deliberate presentation of only limited evidence to the issuing magistrate. Since the discovery of the other items was "not inadvertant but anticipated," the Court refused to apply the plain view doctrine and concluded that the officials engaged in an unconstitutional general search. "To approve such a search warrant, and to validate a general seizure thereunder, would be to find, in practical effect, that the 'plain view' doctrine has reinstated and validated the general warrant." [NOTE: For additional insight into what is properly seizable under the plain view doctrine, see 10 The Advocate 265 (1978)].

## COURTS OF MILITARY REVIEW DECISIONS

### HEARSAY EVIDENCE TO PROVE VALUE

United States v. Abernathy, NCM 78 0318 (NCOMR 28 December 1978)

To prove the value of property taken in a larceny, a witness was allowed to testify that the value of the property was reflected on a government price list which he had previously seen. The witness then stated those prices. The United States Navy Court of Military Review held that the testimony was incompetent hearsay and modified the findings to reflect larceny of property of "some value."

### FAILURE TO INSTRUCT ON ACCUSED'S SILENCE

United States v. Suttles, ACM S24643 (AFCMR 17 January 1979)

The accused made an unsworn statement in extenuation and mitigation. After the completion of the statement, the court members wanted additional information from the accused. Although alternative evidence regarding the information sought was available, neither trial nor defense counsel introduced it. The Air Force Court of Military Review held that the military judge did not err by denying the members' questions of the accused regarding the additional information or by failing to instruct trial counsel to gather the alternative evidence.

The military judge, in reminding the members that they could not question the accused, however, did not fully protect the accused's right to make an unsworn statement. The Court held that he should have instructed that no adverse inferences could be drawn from the accused silence. See United States v. Jackson, 6 M.J. 116 (CMA 1979). Finding that the incomplete instruction denied the appellant military due process, the Court set aside the sentence and ordered a rehearing on sentence.

SENTENCING -- CONSIDERATION OF MATTERS  
ELICITED THROUGH PROVIDENCE INQUIRY

United States v. Richardson, NCM 78 1004 (NCOMR 14 November 1978)

Appellant plead guilty to robbery of an M-16A1 rifle. Prior to announcing sentence, the military judge stated that the punishment was based on the facts that the victim was a recruit, that the property stolen was a weapon, and that the victim had been placed in a Dempster Dumpster with its possible consequences.

The Navy Court of Review decided that consideration of the fact that a rifle was stolen was proper, since that point had been alleged in the specification. However, it was not proper to consider the other factors since they had been taken from the providence inquiry. During this inquiry, the accused should be encouraged to speak freely. If he knows that what he says can be used against him on sentencing, it would inhibit the goal of encouraging free exchange. Finding prejudicial error, the Court reassessed the sentence.

GOODE WAIVER

United States v. Hale, CM 437070 (ACMR 28 July 1978) (unpub.),  
pet. granted on other grounds, 6 M.J. 146 (CMA 1979)  
(ADC: Captain Weise)

The staff judge advocate's post-trial review indicated that the accused had received nonjudicial punishment on three different occasions. There was no record of nonjudicial punishment introduced at trial. The Army Court of Military Review held that any prejudicial effect upon the accused was waived by the trial defense counsel's failure to respond to this matter, pursuant to United States v. Goode, 1 M.J. 53 (CMA 1975).

United States v. Cotton, CM 437381 (ACMR 7 March 1979) (unpub.)  
(ADC: Captain O'Brien)

Finding "no manifest miscarriage of justice or other effect upon the fairness, integrity or public reputation of the judicial proceedings," the Army Court of Review also applied the waiver doctrine in a case where the staff judge advocate advised the convening authority in his review that the maximum imposable confinement was life (for rape, the offense charged) rather than 15 years (for attempted carnal knowledge, the lesser included offense of which appellant was convicted).

#### ELIGIBILITY FOR PAROLE

United States v. Surry, 6 M.J. 800 (ACMR 1978)  
(ADC: Captain Connell)

Paragraph 12-5a, Army Regulation 190-47, provides that:

A military prisoner with an unsuspended discharge, a dismissal, an administrative discharge, or in a retired status, or a civilian prisoner subject to the Uniform Code of Military Justice, confined pursuant to a sentence or aggregate sentence of:

(1) More than 1 year and not more than 3 years who has served one-third of his term of confinement, but in no case less than 6 months, will be eligible for parole consideration.

(2) More than 3 years who has served not less than 1 year will become eligible for parole consideration at such time as the Army Clemency Board may determine. This time will not be more than one-third of the sentence or aggregate sentences as lawfully adjudged and approved, or not more than 10 years when the sentence is life or in excess of 30 years.

Appellant, who was serving his approved sentence which included one year confinement at hard labor at the United States Disciplinary Barracks, contended that he was deprived of equal protection of the laws. Since his adjudged confinement did not exceed one year, he argued he was ineligible for parole. Pointing to subparagraph 12-5c of the regulation, which allows the Army Clemency Board to waive the eligibility requirements quoted above "where exceptional circumstances exist," the Army Court of Review rejected the contention, concluding "the appellant may apply for parole and . . . the Army Clemency Board may grant it." Accordingly, an inmate, sentenced to less than one year, may be paroled if an "exceptional circumstance" justifies it. [NOTE: In appropriate cases, defense counsel should advise their clients who receive one year or less confinement that, under this opinion, they are eligible for parole and may pursue the same at the USDB].

#### STATE DECISIONS

##### MIRANDA - PROOF OF WAIVER OF RIGHTS

State v. Gullick, 24 Crim. L. Rptr. 2370 (N.H. Sup. Ct. 1978)

An Air Force enlisted man was escorted to the military police station by his commander in order to be interviewed by two civilian policemen regarding an offense committed off-post. The policemen read the Miranda warnings to the servicemember, who refused to sign a waiver form. He was then told that he did not have to sign, as long as he understood his rights and was willing to talk. The accused agreed to make a statement.

At the suppression hearing, the accused said that he felt he had to talk because his commander had escorted him to the police station. At trial, he maintained that he did not sign the waiver form because there was something on it he did not understand, but agreed to talk anyway.

New Hampshire requires that the Government prove beyond a reasonable doubt that a suspect has been warned of his rights, that he waived his rights, and that any statements which he made were voluntary. Under this standard, the State Supreme Court held that the Government failed to prove that

the serviceman had waived his rights. The accused's willingness to give a statement, the Court explained, was not tantamount to a waiver of his rights. The record failed to show that the alleged waiver was voluntarily, knowingly and intelligently made. The Court therefore cautioned that the presiding judge in a suppression hearing must find, as a matter of record, that the waiver was voluntary beyond a reasonable doubt.

#### IMPEACHMENT BY POST-ARREST SILENCE

People v. Bowen, 24 Crim. L. Rptr. 2377 (N.Y.Sup.Ct., App. Div, 1st Dept. 1978)

The defendant, an off-duty policeman, was discovered standing next to an unconscious woman, suggesting suspicious circumstances. As responding policemen approached, the defendant identified himself as a policeman. At trial, he testified that he had come to rescue the woman and had been attacked by an assailant. The prosecution impeached the defendant's testimony by showing that the defendant did not disclose this information at the time the other policemen arrived.

The New York Appellate Court upheld the use of the defendant's post-arrest silence for impeachment, concluding that a policeman, under these circumstances, has a special duty to speak; his silence is inconsistent with his later exculpatory statement. The defendant's unique status as a police officer took this case out of the realm of Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2249, 49 L.Ed.2d 91 (1976), which generally forbids the use of a fully warned suspect's post-arrest silence for impeachment purposes.

#### INSANITY -- DRUG ADDICTION

Commonwealth v. Sheehan, 24 Crim. L. Rptr. 2316 (Mass.Sup. Jud.Ct. 1978)

Under the state's ALI-based insanity test, the Massachusetts Supreme Judicial Court has held that neither drug addiction nor the fact that a mental disease or defect resulted from drug addiction would relieve a defendant from criminal responsibility.

## "SIDE-BAR"

or

### Points to Ponder

1. Conditional guilty pleas. Defense counsel may wish to consider negotiating a pretrial agreement containing a condition that the plea of guilty specifically will not waive one or more issues on appeal which normally would be waived by such a plea. (See 10 The Advocate 197 (1978) for issues which are normally waived.) Conditional guilty plea agreements have been endorsed by the Third Circuit Court of Appeals in United States v. Zudick, 523 F.2d 848 (3d Cir. 1975) (statute of limitations issue) and United States v. Moskow, 25 Crim. L. Rptr. 2277 (3d Cir. 1978) (search and seizure issue preserved).

In deciding the cases, both Courts relied on Lefkowitz v. Newsome, 420 U.S. 283, 95 S.Ct. 886, 43 L.Ed.2d 196 (1974), in which the Supreme Court held that a plea of guilty did not foreclose federal habeas corpus review of specified constitutional issues, where state procedure allowed a defendant to plead guilty without forfeiting his right to a review of those issues. The Supreme Court's rationale in Lefkowitz for allowing this procedure was twofold: (1) in the case of a conditional guilty plea, the prosecution "acquires [no] legitimate expectation of finality in the conviction," and (2) the conditional plea procedure represents a "commendable [effort] to relieve the problem of congested criminal trial calendars in a manner that does not diminish the opportunity for the assertion of rights guaranteed by the Constitution." As the Court concluded in Moskow, if factual guilt is admitted or if the facts are stipulated, there simply is no persuasive reason to require a lengthy trial for the sole purpose of preserving a legal point for appellate review.

It should be noted that the majority of the circuits have refused to allow this type of appeal. The most recent case adhering to the orthodox view that a plea of guilty conclusively admits all factual allegations of the indictment and forecloses all inquiry into alleged antecedent constitutional deprivations was United States v. Benson, 579 F.2d 508 (9th Cir. 1978). There, the Court distinguished Lefkowitz as a case based on a specific state statute which permitted post-

guilty plea review of specific issues. Nevertheless, the defendant was given the opportunity to withdraw his guilty plea and plead anew.

A military case which addressed a similar issue was United States v. Williams, 41 CMR 426 (ACMR 1969) wherein the law officer advised the accused that he might enter a guilty plea without waiving his right to litigate at the appellate level a search and seizure issue. The Court found that the guilty plea was expressly conditioned upon the preservation of his appellate rights and refused to invoke the doctrine of waiver.

Negotiating a conditional guilty plea agreement should be reserved for cases in which there is no true factual issue of guilt to be resolved in the trial. If it appears that litigation of the facts will no doubt result in conviction, the key legal point could still be preserved for appellate review. The only facts which would be litigated are those necessary to create a complete record for the issue on which the case turns. If that point is lost, then nothing would be forfeited by pleading guilty. As with all other pretrial agreements, this one must be entered into with the convening authority, and must provide that the accused's plea of guilty will not preclude appellate review of the issue. Securing an agreement allowing a conditional guilty plea could be difficult in most cases. However, where a case involves only issues of law, and the facts point to the accused's guilt, it may be worthwhile to consider this type of guilty plea agreement.

2. Forcing the government to elect between multiplicitous offenses. Two recent cases, United States v. Stegall, 6 M.J. 176 (CMA 1979) and United States v. Haywood, 6 M.J. 604 (ACMR 1978), underscore the importance of being alert to multiplicity problems.

In Haywood, the appellant was convicted of separate specifications of possession, transfer, and sale of marijuana in violation of Article 134, UCMJ. At a pretrial Article 39(a) session, defense counsel moved to force the Government to elect to prosecute either the transfer or sale allegations, but not both. The motion was denied. Then, after presentation of the Government's evidence, which showed a single sale of

marijuana, counsel renewed his motion. Again, the military judge denied it. The Army Court of Military Review held that the motion should have been granted. The facts of the case showed no necessity to charge both offenses. Once the evidence was before the court, there was no reason for multiplicitous charging under the provisions of paragraph 26b of the Manual for Courts-Martial. The Court dismissed the transfer specification, but warned that failure to object to such multiplicitous charging could constitute a waiver of any error on appeal. See United States v. Falls, 19 USCMA 317, 41 CMR 317 (1970).

In Stegall, the appellant was convicted of assault and battery and striking the same noncommissioned officer while in the execution of his office, in violation of Articles 128 and 91, UCMJ, respectively. At the outset of the trial, appellant's counsel moved to force the Government to elect which of the charges it would prosecute since the charges arose from only one altercation. The military judge denied the motion, but did rule the offenses multiplicitous for sentencing purposes. The Court of Military Appeals held that the offense of assault and battery was included in the greater offense and should have been dismissed. There was no necessity to charge the offenses separately in order to meet the exigencies of proof, or, as the trial judge noted, was more than one punishment imposable under the circumstances. The Court therefore set aside the finding of guilty as to the assault and battery.

In both of these cases the sentence was affirmed on appeal because the trial judge had considered the offenses multiplicitous for sentencing purposes. However, this result should not detract from pursuing the goal of preventing the accused from being found guilty of multiple offenses where only one, in law, has been committed. Because appellate tribunals may not entertain the issue if first raised on appeal, trial defense counsel should remain alert to these multiplicity problems and press for an election by the Government.

3. Is Rakas cause for concern? The recent United States Supreme Court case of Rakas v. Illinois, 24 Crim. L. Rptr. 3009 (1978), purports to restructure the analysis of standing<sup>1</sup> to contest the legality of a search. This case is of interest to all criminal practitioners because it demonstrates the high court's continued trouble in dealing with the practical effect of the exclusionary rule. However, its direct impact on military defendants can be minimized. A review of the opinion indicates that the decision is limited to the facts of the case, and that, under those facts, Rakas would have had standing to object in a trial by court-martial.<sup>2</sup>

Rakas was the passenger in an automobile which was stopped by the police as a suspected getaway car in a robbery. A search of the car revealed a box of rifle shells in the glove compartment and a sawed-off rifle under the front seat. Rakas was arrested and convicted of armed robbery at a trial in which the rifle and shells were admitted as evidence. Rakas moved to suppress the rifle and shells on Fourth Amendment grounds, but the trial court denied the motion on the ground that the defendant lacked standing to object to the lawfulness of the search because he asserted that he did not own the car, the rifle, or the shells. The conviction was affirmed by the Supreme Court.

The five justice majority specifically rejected the so-called "target" theory, whereby any criminal defendant at whom a search was directed would have standing to contest

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1. Although the majority was not sure that the determination of a motion to suppress is materially aided by labeling the inquiry as one of standing rather than "recognizing it as one involving the substantive question of whether or not the proponent of the motion to suppress has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge," they nonetheless continued to label the inquiry as one of standing throughout the opinion. 24 Crim. L. Rptr. (BNA) at 3010,3011.

2. The Army Court of Military Review, without mentioning the Rakas decision, recently found error in a trial judge's ruling that an accused lacked standing to contest the search of an automobile in which he was a passenger. United States v. Cordero, CM 437407 (ACMR 13 March 1979) (unpub.).

the legality of that search. Instead, the Court announced that, since the defendant had not claimed either a property or a possessory interest in the car searched or an interest in the property seized, and had failed to show that he had any legitimate expectation of privacy in the glove compartment or the area under the front seat, he was not entitled to challenge a search of that area. No longer is it enough that one be "legitimately on the premises" to have standing to object to the search, ruled the Court. Now, a defendant must also have a legitimate expectation of privacy in those premises.<sup>3</sup>

This change is probably as broad or as narrow as the interpreting court wishes it to be. The narrow holding of the majority is that passengers do not have a legitimate expectation of privacy in a glove compartment or under a seat in a car in which they are riding. The concurring opinion takes the position that the defendant had no legitimate expectations of privacy because he was merely a guest in an automobile.<sup>4</sup> The expectation of privacy in a car has long been held to be less than that in other areas. See United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977).

The dissent maintained that a guest in a business office, a friend's apartment or a taxicab, or an individual in a telephone booth may still rely upon the protection of the Fourth Amendment, and questioned why a non-paying guest in a car may not. 24 Crim. L. Rev. at 3019. The dissent suggested that the majority was actually attacking the exclusionary rule itself.

Whether the Supreme Court applies a narrow or broad interpretation of "legitimate expectation of privacy" does not affect the concept of standing in the military. Paragraph

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3. The holding left untouched a defendant's standing to contest a search where the same possession necessary to establish standing is an essential element of the offense charged. See Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960).

4. Written by Mr. Justice Powell and joined by the Chief Justice.

152, Manual for Courts-Martial, United States, 1969 (Revised edition), provides that "Evidence is inadmissible against the accused: . . . If it was obtained without the freely given consent of the accused as a result of an unlawful search of another's premises on which the accused was legitimately present." Since this provision falls within the President's statutory power to prescribe rules of trial procedure (Uniform Code of Military Justice, Article 36, 10 U.S.C. §836) and is not otherwise inconsistent with the Code, it has the force and effect of law. United States v. Hawkins, 2 M.J. 23 (CMA 1976). Had Rakas been in the military, he probably would have been allowed to challenge the search. In sum, since the Rakas case only changes the Fourth Amendment consideration from "legitimately on the premises" to a "legitimate expectation of privacy" of one on the premises, it should not change the outcome of standing determinations in military courts.

4. Some thoughts on the opening statement. Perhaps you have heard these tips before. If not, we hope they will be beneficial.

a. The opening statement can be a crucial part of trial. Competently delivered, it not only enhances the courtroom performance of the advocate, but significantly contributes to the chances of ultimate success as well. Too often, counsel have a tendency to forego making an opening statement, assuming that the case at bar is simple and does not require much of an explanation. This assumption could be a mistake. Effectively made, an opening statement generates interest and anticipation and enables the court members and the trial judge to follow the case with greater understanding. Generally, counsel are advised to make an opening statement in every case. Although a danger that the evidence will not develop exactly as anticipated might exist, it is greatly outweighed by the opportunity of counsel to preview their case to the trier of fact.

b. In his opening statement counsel should specify the witnesses who are expected to testify on a particular charge or element and stress the relevancy that that testimony has to the case at bar. Ordinarily, an opening statement should not excessively detail the evidence planned to be presented. Instead, it should serve the same purpose as a preview of a movie. It should outline in an interesting manner what counsel expects to prove. Simplicity and conciseness should be the keynote.

c. Counsel, of course, should not read the opening statement. Word-for-word reading is not only boring, but risks losing the chance of developing a direct, almost personal relationship with the trier of fact, which could be essential to a successful outcome. If counsel does not know his case well enough to discuss it with the trier of fact, he might convey the impression that he is not prepared.

d. Counsel should keep in mind that his opening remarks are not his findings argument. Again, an opening statement is a statement to the court members and the trial judge of what counsel expects the evidence to show and the means by which counsel intends to get such evidence before the court. An opening statement amounting to argument could invite immediate judicial intervention that would diminish the effectiveness of the statement and might have an adverse impact on the members. Likewise, counsel should avoid the tendency to "testify" during this phase of trial.

e. At times it is important for counsel to discuss the elements of the crime as they relate to his case. This tactic is permissible as long as counsel does not invade the province of the court by instructing the court members on the law of the case. As the Supreme Court of Iowa stated in State v. Kendall, 200 Iowa 483, 203 N.W. 806 (1925), "Primarily an opening statement to the jury by the attorney for either side should be devoted to a statement of facts, and conclusions to be drawn from such facts, and not attempt to run a school of instruction as to the law of the case." Any attempt by counsel "to run a school of instruction as to the law" will result in intervention by the military judge. As a general rule, a verbatim recitation of the elements of proof of an offense is not effective. You would do better to concentrate on one or two critical element(s) and explain to the court how you intend to disprove or attack the prosecution's handling of them.

f. The opening statement can be a very effective tool for defense counsel to point out the strengths and weaknesses in his case. For example, counsel might wish to explain that the accused or one of the defense witnesses has a prior conviction in an attempt to ameliorate its effect when introduced by the prosecution. A weakness in the case is usually softened considerably when brought out by the affected side, rather than by the opponent.

g. Counsel should never promise the court more proof than he reasonably believes will be presented. In other words, counsel should not overstate the facts in the opening statement because his credibility with the court members might be jeopardized. If you are not certain as to the way in which the evidence will develop, you should carefully couch your comments in terms such as "the defense believes the evidence will show . . . ."

h. Defense counsel would do well in the opening statement to develop the habit of referring to the soldier on trial by his military rank and name -- or at least as "my client," rather than "the accused." The term "the accused," while legally correct, connotes remoteness or detachment and you should want the court to think of your client as an individual.

i. Ordinarily, the defense counsel should make an opening statement immediately after the trial counsel completes his opening statement. To permit the trial counsel to preview his case and proceed without opposing comment could leave the court members with an indelible impression of guilt. By making his opening statement at the close of trial counsel's, defense counsel has the opportunity at the beginning to cast doubt on the trial counsel's case or let the court know there are two sides to the story. For example, defense counsel may use the opening statement to alert the court as to what type of defense (e.g., alibi, self-defense, insanity, mistake of fact, mistaken identity, etc.) to anticipate, or how the defense will attack the prosecution's case. If the defense has an alibi defense, make the members aware of it. If the defense case will be keyed to attacking the prosecution evidence through cross-examination, inform the court of your plan. While occasions might develop when trial strategy dictates keeping some "secrets" until you actually present the case, it is usually best to alert the court of what is happening, rather than keeping them "in the dark." REMEMBER: what may seem to counsel a most significant matter may be lost to the court members if it is not explained to them. The opening statement gives you an excellent opportunity to do so.

"ON THE RECORD"

or

Quotable Quotes from Actual  
Records of Trial Received in DAD

\* \* \* \* \*

Q: I'm asking whether there could be a compound that would have the same thin-layer chromatogram as LSD.

A: There might be, there probably are several.

(Both defense counsel converse)

Q: Counsel suggests that I ask you what about horse urine, does that give us a similar result as LSD?

A: Not that I know of.

\* \* \* \* \*

TC: Do you know the accused?

W: Yes, I do.

MJ: Let the record reflect that the trial counsel pointed to the accused.

\* \* \* \* \*

W: I reached in my wallet and I pulled out my little GTA card with the procedure for reading a person his rights whenever there's been a disturbance or some law has been broken, and I read verbatim the information on that little card and asked the two questions on the bottom of it, whether or not he wanted to make any statements or not. I asked him did he understand what I had read to him. He didn't answer and I asked him again. He said, "Yeah, you [expletive deleted], I understand it," and from then on I didn't have any more conversation with him. Hell, I just refused to talk to him.

\* \* \* \* \*

MJ: I still feel maybe that, my language and your language are not getting together. Did you intend to roll the guy?

ACC: Yes, sir.

MJ: I want to be sure that you're not just saying that because it seems to be the answer that I'm trying to get. Tell me in your own words, why you reached in his pocket and took the billfold?

ACC: I don't . . . ,

MJ: I'm sorry?

ACC: Something to do, I guess, sir.

\* \* \* \* \*

MJ: Do you understand what "suspend" means?

ACC: Yes, Your Honor.

MJ: What does that mean?

ACC: Set aside for a period of time until I might do something wrong.

MJ: Literally "suspend" means to hang, hang over. If he agreed to suspend any part of your sentence, he has agreed to have it hanging over your head. You would not be required to serve the punishment as long as you are on good behavior. However, if you engaged in certain types of misconduct then what would happen?

ACC: I would be hanged, Your Honor.

