

# MILITARY LAW REVIEW Vol. 32

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HEADQUARTERS, DEPARTMENT OF THE ARMY  
APRIL 1966



## PREFACE

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

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

Articles, comments, and notes should be submitted in duplicate, triple spaced, to the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. Footnotes should be triple spaced, set out on pages separate from the text and follow the manner of citation in the *Harvard Blue Book*.

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## IN MEMORIAM

**Edwin Wilhite Patterson**  
1889-1965

Professor Edwin Wilhite Patterson, teacher, counselor, and friend to students at The Judge Advocate General's School, was born in Kansas City, Missouri, on 1 January 1889, and died 23 December 1965 at Charlottesville, Virginia. He received his A.B. in 1909 as a Phi Beta Kappa from the University of Missouri and graduated from the University of Missouri Law School as a member of the Order of the Coif in 1911.

Following graduation, Professor Patterson entered private practice in Kansas City, Missouri. He then entered Harvard where in 1920 he received his S.J.D.

In a distinguished career spanning 47 years, Professor Patterson held professorial chairs in eight colleges of law; was the Vice Chairman, Section of Insurance Law, American Bar Association; was a Carnegie Fellow in International Law at Harvard; held membership in The Academia Colombiana de Jurisprudencia at Columbia University; and was Scholar in Residence at the University of Virginia Law School.

From 1961 to 1965 Professor Patterson rendered outstanding and distinguished service to The Judge Advocate General's School as instructor of jurisprudence.

In 1965 shortly after his retirement, Professor Patterson received the Outstanding Civilian Service Award. The citation of that award states that:

. . . His gifted counsel, his brilliant instruction, and his untiring efforts, while an instructor at The Judge Advocate General's School, have been responsible for the consistently outstanding curriculum of jurisprudence. Professor Patterson has given generously of his knowledge, understanding, and time to students and faculty alike. His excellent lectures and superb course materials have produced stimulating instruction, and they have resulted in exceptionally well-trained officers.

Professor Patterson has transmitted his enthusiasm and reverence for the law to both student officers and faculty. His efforts have immeasurably elevated the level of scholarship and education at The Judge Advocate General's School. His achievements have brought great credit upon the Corps, upon the United States Army, and upon his country.



## MAJOR GENERAL ENOCH H. CROWDER

Judge Advocate General

1911-1923

Enoch H. Crowder was born in a log house near Edinburg, Missouri, 11 April 1859. Following education in the local schools, he tried his hand at farming and rural school teaching. In 1877, he entered the United States Military Academy.

Graduating in 1881, Lieutenant Crowder was assigned to the 8th Cavalry, then stationed near Brownsville, Texas. During this tour he studied law, and in 1884 gained admission to the Texas bar. The same year, Crowder obtained a long-sought transfer to Jefferson Barracks, Missouri, and after a brief period of study there, was admitted to the Missouri bar.

The next year, Lieutenant Crowder was given an assignment he sought—Professor of Military Science at the University of Missouri. Here he instructed two companies of cadets and a company of one hundred coeds which he organized, working meanwhile toward a law degree which he obtained in 1886.

Soon after obtaining his law degree, Crowder was promoted to First Lieutenant and ordered to rejoin his regiment as a troop commander in the Geronimo campaign. Following the end of that campaign in September 1886 he returned to the University of Missouri where he instructed in law and military science for the next three years. Upon completion of this detail, Lieutenant Crowder returned to the 8th Cavalry at Fort Yates, Dakota Territory, where he participated in the final campaign against Sitting Bull. During this same period he defended the *cause celebre* of Lieutenant Steele—an officer who, in a rash moment, maintained his authority over a defiant trooper with his fists, and whose case had been prominently featured in the yellow journalism of that period.

In 1891, Crowder was transferred to the Judge Advocate General's Department, promoted to Captain and given the post of Acting Judge Advocate for the Omaha headquarters of the Department of the Platte. In January of 1895, this temporary

branch transfer became final and Crowder was promoted to Major.

The beginning of the Spanish-American War marked his promotion to Lieutenant Colonel, following which he served on the commission which arranged the Spanish surrender of the Philippines. During his service in the Philippines, he filled many important posts in the military government of the Islands. In 1899, he headed the Board of Claims, served on the Philippine Supreme Court, and drafted the new Philippine criminal code. Impressed with the ability Crowder had demonstrated in the Philippines, Judge Advocate General Davis in 1901 called him to Washington to serve as Deputy Judge Advocate General.

In this capacity, Crowder assisted in the prosecution of the then noteworthy *Deming* case (186 U.S. 49 (1902)), became a member of the General Staff, and attained the rank of Colonel. In the Russo-Japanese War of 1904-1905 he was senior American observer with the Japanese Army.

During the period 1906-1909, Colonel Crowder served as chief legal adviser to the U.S.-sponsored Provisional Government of Cuba, and Supervisor of its Departments of State and Justice. Simultaneously he headed the Cuban Advisory Law Commission and Central Election Board.

In 1910, he represented the United States at the Fourth Pan American Conference in Buenos Aires and in that capacity made official visits to Chile, Peru, Ecuador, Colombia, and Panama. After studying the military justice and penal systems of France and England on a European tour, he returned to Washington to assume the duties as Judge Advocate General of the Army on 11 February 1911.

As Judge Advocate General, General Crowder initiated a number of innovations including the regular publication of Judge Advocate General opinions; the issuance of a new digest (published in 1912) of all JAG opinions issued since 1862; and a program for the legal education of line officers at government expense. He additionally supervised the revision of the Articles of War for the first time since 1874, revised the Manual for Courts-Martial and took an active part in prison reform in the Army.

With the advent of World War I, General Crowder was appointed Provost Marshal General in addition to his duties as Judge Advocate General. As Provost Marshal General he pre-



pared the Selective Service Act of 1917 and supervised the registration, classification and induction of over 2,800,000 men into the armed services.

As Judge Advocate General, he supervised the administration of military justice in the Army during the period when the number of general courts-martial rose from 6,200 in 1917 to over 20,000 in 1918.

The officers who served under General Crowder during this period are legion. Among these are the following: Major Hugh S. Johnson, Major Cassius Dowell, Lieutenant Colonel A. W. Gullion, Major John H. Wigmore, Major Charles B. Warren, Captain M. C. Cramer, and Lieutenant Colonel E. A. Kreger. Although offered a promotion to the rank of Lieutenant General in 1918, General Crowder, mindful of public and Congressional opposition to "swivel chair" generals, refused the promotion, seeking instead a field command.

After the war, General Crowder found himself, along with the entire military justice system, the center of a storm of controversy, stemming from charges that the military justice system was "un-American." Crowder, a perceptive critic of the system who had already commenced work on needed reform, now accelerated his efforts. The specific recommendations he submitted to Congress, most of which were subsequently adopted, included greater safeguards for the accused, changes in the composition and powers of special courts-martial, and the addition of an authority in the President to reverse or alter any court-martial sentence found to have been adjudged erroneously.

In 1920 a bill authorizing the President to retire General Crowder with the rank and pay of a Lieutenant General was introduced in Congress but was never formally brought to the floor of the House for action.

On 14 February 1923, after forty-six years of service, General Crowder retired from the Army, but his days of service to his country were not finished. On the same day he was appointed the first Ambassador from the United States to Cuba, a post which he held until 1927.

From 1927 until his death in 1932, General Crowder was engaged in the private practice of law in Chicago. Among his honors and decorations were the Distinguished Service Medal, the Cuban Order of Carlos Manuel de Cespedes, the Japanese Order of the Rising Sun, Knight Commander of the British Order

of St. Michael and St. George, Commander of the French Legion of Honor, and Commander of the Italian Order of the Crown.

His name has been suitably memorialized in his home state of Missouri through the naming of a state park in his honor and through the designation of the World War II training center at Neosho, Missouri, as Camp Crowder.

Perhaps the most apt description of the service to his country by Enoch H. Crowder is contained in the words of the late Henry L. Stimson, Secretary of State in the cabinet of President Hoover and Secretary of War in the cabinets of Presidents Taft and Franklin D. Roosevelt, who said of General Crowder:

His record as Judge Advocate General and his later record as Provost Marshal General have constituted a page in the history of our Army upon which we can all look with deep satisfaction and admiration.<sup>1</sup>

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<sup>1</sup> Letter from the Hon. Henry L. Stimson to Mr. David A. Lockmiller, 28 March 1944, printed in LOCKMILLER, ENOCH H. CROWDER — SOLDIER LAWYER STATESMAN 261 (1955).

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## APPELLATE CONSIDERATION OF MATTERS OUTSIDE THE RECORD OF TRIAL\*

By Captain Edward S. Adamkewicz, Jr.\*\*

*This article analyzes the principles governing the consideration of matters outside the record of trial during review of the findings and sentence of a court-martial by the convening authority, boards of review, and Court of Military Appeals under the Uniform Code of Military Justice. In addition, related procedural problems are also examined.*

### I. INTRODUCTION

Under the *Uniform Code of Military Justice*,<sup>1</sup> after every trial by court-martial, a record of trial is prepared and forwarded to the convening authority for initial review and action.<sup>2</sup> Thereafter, records of general court-martial and special court-martial in which a bad conduct discharge was approved, are forwarded for further review to the Judge Advocate General of the armed force of which the accused is a member.<sup>3</sup> The Judge Advocate General then refers the record of trial in certain cases to a board of review.<sup>4</sup> Finally, after a board of review has acted, three types of cases may be further reviewed by the Court of Military Appeals.<sup>5</sup>

It is the purpose of this article generally to discuss the principles governing the consideration of matters outside the record

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

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<sup>1</sup> Hereinafter referred to as the Code or UCMJ and cited as UCMJ art. ....

<sup>2</sup> UCMJ art. 60.

<sup>3</sup> UCMJ art. 65(a), (b).

<sup>4</sup> See UCMJ art. 66. See also Part IV. A., *infra*, for a discussion of the types of cases reviewed by a board of review.

<sup>5</sup> See UCMJ art. 67. See also Part IV. B., *infra*, for a discussion of the three types of cases reviewed by the Court of Military Appeals.

of trial in review of courts-martial by the convening authority, boards of review, and Court of Military Appeals under the *Uniform Code of Military Justice*,<sup>6</sup> and the procedural problems arising in connection therewith, a process one judge has called a "muddled appellate procedure,"<sup>7</sup> often resulting in a "battle of affidavits."<sup>8</sup> Emphasis will be placed on the evolution of the treatment of matters outside the record in appellate review with respect to a question of jurisdiction, sanity of the accused, judicial notice, petition for a new trial and such other matters as are authorized in the military judicial system, with a comparison of judicial treatment in each of these areas. No effort will be made toward an analysis of the substantive law in these areas nor of the scope of appellate review in general. Congressional grant of power over certain sentences to the President and Department Secretaries is not in issue, and hence will not be considered.<sup>9</sup>

## II. THE RECORD OF TRIAL

### A. GENERAL

Before beginning a discussion of the matters outside the record which may be considered on review, it is appropriate to consider what constitutes the record of trial, how the record may be corrected, and when matters not appearing in the trial transcript may be determined to be part of the "proceedings" subject to review.

The *Uniform Code of Military Justice* requires that each general and special court-martial keep a separate record of the proceedings of each case tried before it.<sup>10</sup> The general court-martial record must contain a verbatim transcript of all proceedings in open session and any consultation between the court and law officer in closed session with respect to the form of the findings.<sup>11</sup> A special court-martial may not adjudge a bad-conduct discharge

<sup>6</sup> For the historical background of courts-martial review prior to the Code, see Fratcher, *Appellate Review in American Military Law*, 14 Mo. L. Rev. 15 (1949).

<sup>7</sup> Latimer, J., dissenting in *United States v. Johnson*, 8 U.S.C.M.A. 173, 178, 23 C.M.R. 347, 402 (1957).

<sup>8</sup> E.g., *United States v. Strahan*, 14 U.S.C.M.A. 41, 42, 33 C.M.R. 253, 254 (1963); *United States v. Walters*, 4 U.S.C.M.A. 617, 626, 16 C.M.R. 191, 200 (1954).

<sup>9</sup> See UCMJ arts. 71, 74.

<sup>10</sup> See UCMJ art. 54(a), (b).

<sup>11</sup> UCMJ art. 39; *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, para. 82b(1) [hereinafter referred to as the Manual or MCM, 1951, and cited as MCM, 1951, para. ----].

## MATTERS OUTSIDE TRIAL RECORD

unless a "complete record" of the proceedings and testimony has been made.<sup>12</sup> Minimal standards will be met when ". . . the transcript is sufficiently complete to present all material evidence bearing on all issues. . . ." <sup>13</sup> The allied papers required to accompany the trial transcript are described in the Manual.<sup>14</sup>

A properly authenticated record of trial imports absolute verity on appeal and may not be challenged except on the ground of fraud.<sup>15</sup> However, if the record is deficient in not containing essential trial proceedings<sup>16</sup> or indicates that an unauthorized private communication between court-martial personnel has taken place,<sup>17</sup> the doctrine of presumptive prejudice is applied and the burden is on the Government to overcome that presumption by clear and convincing evidence.<sup>18</sup> This is so because the accused is being deprived of the right to have reviewing authorities pass on the legal correctness of the unrecorded matter considered by the court-martial. In the absence of some reliable showing concerning what occurred at the unauthorized private discussion, the prejudice presumed to arise therefrom will result in reversible error.<sup>19</sup>

When an unauthorized communication or conference takes place, the proper corrective action at the trial level is to make a full and complete disclosure in open court so that the matter will be

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<sup>12</sup> UCMJ art. 19. MCM, 1951, para. 83a, interprets this to mean a "verbatim transcript" of the proceedings. This more stringent requirement was upheld in *United States v. Whitman*, 3 U.S.C.M.A. 179, 11 C.M.R. 179 (1953). Army regulations have effectively precluded the imposition of a bad conduct discharge by special courts-martial by limiting the appointment of reporters to those cases in which the Secretary of the Army has authorized such action in advance. Army Reg. No. 27-12, para 1c (15 Oct. 1965).

<sup>13</sup> *United States v. Nelson*, 3 U.S.C.M.A. 482, 486, 13 C.M.R. 38, 42 (1953).

<sup>14</sup> See MCM, 1951, para. 82b(5), app. 9e. Documents should not be included in a record of trial unless they are competent and relevant to the issues involved. *United States v. Shotter*, 12 U.S.C.M.A. 283, 30 C.M.R. 283 (1961).

<sup>15</sup> *United States v. Albright*, 9 U.S.C.M.A. 628, 26 C.M.R. 408 (1958); *United States v. Galloway*, 2 U.S.C.M.A. 433, 9 C.M.R. 63 (1953). The burden of proof to overcome this presumption is on the challenger. *United States v. Tobita*, 3 U.S.C.M.A. 267, 12 C.M.R. 23 (1953).

<sup>16</sup> *United States v. Lowry*, 4 U.S.C.M.A. 448, 16 C.M.R. 22 (1954).

<sup>17</sup> *United States v. Adamiak*, 4 U.S.C.M.A. 412, 15 C.M.R. 412 (1954). Unrecorded communications between court-martial personnel are a part of the "proceedings" although not reflected in the transcript. *United States v. Walters*, 4 U.S.C.M.A. 617, 16 C.M.R. 191 (1954).

<sup>18</sup> *United States v. Adamiak*, *supra* note 17; *cf.* *United States v. Caldwell*, 11 U.S.C.M.A. 257, 29 C.M.R. 78 (1960).

<sup>19</sup> *United States v. Smith*, 12 U.S.C.M.A. 127, 30 C.M.R. 127 (1961).

come a part of the record and may be reviewed for prejudice.<sup>20</sup> If the issue is raised promptly after trial, a certificate of correction, proceedings in revision, or an appropriate form of investigation should be used by the convening authority to determine what took place and its prejudicial effect, if any. The real problem presented is how such a deficiency in the record, unknown until after the record has left the control of the convening authority, can be corrected and preserved for consideration on appellate review.

### B. CORRECTION OF THE RECORD

#### 1. *Pre-authentication Correction.*

After transcription of the record, the trial counsel makes and initials whatever changes are necessary to make the record show the true proceedings.<sup>21</sup> Trial counsel then permits defense counsel to examine the record and a notation to this effect is made on the page bearing the authentication of the record.<sup>22</sup> If the trial counsel and defense counsel do not concur in any change, the matter should be brought to the attention of the persons who authenticate the record of trial.<sup>23</sup> The latter may change and initial the record to make it show the true proceedings at any time before the record is forwarded to the convening authority.<sup>24</sup> The use of this informal type of correction procedure is not limited to minor error or changes in the record. When the initial transcript omits a part of the proceedings, the presumption of regularity which attends proper authentication will support the insertion of additional pages in the record of trial to correct the defect.<sup>25</sup>

<sup>20</sup> *United States v. Liberator*, 14 U.S.C.M.A. 499, 34 C.M.R. 279 (1964); *United States v. Payne*, 12 U.S.C.M.A. 455, 31 C.M.R. 41 (1961); *United States v. Ferry*, 2 U.S.C.M.A. 326, 8 C.M.R. 126 (1958). Merely noting for the record that a private discussion has taken place without relating the substance of the discussion is insufficient. *United States v. Bruce*, 12 U.S.C.M.A. 410, 30 C.M.R. 410 (1961). *But see United States v. Erb*, 12 U.S.C.M.A. 524, 31 C.M.R. 110 (1961).

<sup>21</sup> MCM, 1951, para. 82e.

<sup>22</sup> *Ibid.* See also MCM, 1951, app. 9c.

<sup>23</sup> MCM, 1951, para. 82e. The defense counsel may also note his objections to the record in an appellate brief (UCMJ art. 38(c)), or seek a formal certificate of correction (NCM 383, Daily, 18 C.M.R. 428 (1955)).

<sup>24</sup> MCM, 1951, para. 82e. A general court-martial record is authenticated by the signatures of the president and law officer. UCMJ art. 54(a). A special court-martial record is authenticated by the signatures of the president and the trial counsel. MCM, 1951, para. 83c.

<sup>25</sup> *United States v. Payne*, 12 U.S.C.M.A. 455, 31 C.M.R. 41 (1961).



## MATTERS OUTSIDE TRIAL RECORD

### 2. *Certificate of Correction.*

When a record of trial upon review is found to be incomplete or defective in some material respect, the record may be returned to the president of the court for a certificate of correction to make the record correspond to what actually occurred at the trial.<sup>26</sup> A certificate of correction may be filed at any time before appellate review is completed.<sup>27</sup> Such certificate is normally used to show an event or occurrence that took place at the trial but which is not properly reflected in the transcript of the proceedings, or to delete something from the transcript because the matter is erroneously included. It cannot be used to change what actually occurred at the trial,<sup>28</sup> or to change what was said at the trial into something that should have been but was not said.<sup>29</sup> Nor can ex parte affidavits, the substance of which is not verified or conceded by the other party, be used in place of a certificate of correction.<sup>30</sup>

While an unrecorded communication between court-martial personnel may be a part of the "proceedings" subject to review,<sup>31</sup> since there usually will be no untranscribed reporter's notes in existence from which the omitted matters could be supplied, the use of a certificate of correction or any other form of corrective action would amount to no more than a reconstruction of the occurrence.<sup>32</sup> The problem becomes more acute with the passage of time, especially when those charged with authenticating a certificate of correction may not have been present at the unauthorized discussion. Under these conditions, the defense should be given an opportunity to dispute the truthfulness of content of any form of corrective action taken by the Government.<sup>33</sup>

<sup>26</sup> MCM, 1951, para. 86c. There is no provision in the Code for such a procedure. The certificate is authenticated in the same manner as the record of trial. MCM, 1951, para. 86c.

<sup>27</sup> See *United States v. Snook*, 12 U.S.C.M.A. 613, 31 C.M.R. 199 (1962).

<sup>28</sup> *United States v. Nicholson*, 10 U.S.C.M.A. 186, 27 C.M.R. 26 (1959).

<sup>29</sup> *United States v. Hollis*, 11 U.S.C.M.A. 235, 29 C.M.R. 51 (1960). In *Hollis*, the president by a "slip of the tongue" omitted the word "confinement" from his statement of the sentence adjudged. The Court noted that revision proceedings under UCMJ art. 62(b) could be used to correct the mistake.

<sup>30</sup> *United States v. Strahan*, 14 U.S.C.M.A. 41, 33 C.M.R. 253 (1963).

<sup>31</sup> See *United States v. Walters*, 4 U.S.C.M.A. 617, 16 C.M.R. 191 (1954).

<sup>32</sup> The same type of situation arises when the reporter's recording machine breaks down during the trial and portions of the proceedings are unrecorded. See *United States v. Schilling*, 7 U.S.C.M.A. 492, 22 C.M.R. 272 (1957); *CM 404435*, Bond, 30 C.M.R. 503 (1960).

<sup>33</sup> *But cf.* *United States v. Galloway*, 2 U.S.C.M.A. 433, 9 C.M.R. 63 (1953) (defense counsel's refusal to approve a certificate of correction does not affect the validity of the certificate).

3. *Proceedings in Revision.*

Revision proceedings are another way in which mistakes in the record may be corrected. When there is an apparent error or omission in the record, or when the record indicates improper or inconsistent action by a court-martial with respect to a finding or sentence which can be rectified without material prejudice to the substantial rights of an accused, the convening authority may return the record to the court for proceedings in the revision.<sup>34</sup> The record is ordinarily transmitted to the trial counsel by a written communication pointing out the apparent defect in the record and directing the reconvening of the court for the purpose of reconsideration and revision of its proceedings.<sup>35</sup> Such proceedings may take place only before the members of the court who participated in the findings and sentence.<sup>36</sup> As the action which may be taken is entirely corrective, the proceedings cannot be used to reopen the case to receive new evidence.<sup>37</sup> While revision proceedings may be used for the correction of clerical errors in the record of trial (a function performed by a certificate of correction), because of its many limitations and complicated procedure it is useful chiefly to correct inconsistencies in the findings or sentence.<sup>38</sup> Of special interest is the fact that revision proceedings have been used to overcome the presumption of prejudice arising from the presence of an unauthorized person in the closed session deliberation of a court-martial,<sup>39</sup> and its use has been authorized to correct a misannouncement of the sentence actually adjudged.<sup>40</sup>

4. *Affidavits and Certificates.*

The Court of Military Appeals has recognized that there are other methods of correcting a record of trial. A supplementary or additional designation of record may be admitted on appellate review when

. . . it involves some procedure or occurrence which ordinarily would be included in the record of trial and other proceedings . . . but which is missing therefrom by way of mistake, inadvertence, or otherwise. . . . [T]he only question involved is whether such occurrence in fact took

<sup>34</sup> UCMJ art. 62(b); MCM, 1951, para. 86d.

<sup>35</sup> MCM, 1951, para. 86d.

<sup>36</sup> MCM, 1951, para. 80b.

<sup>37</sup> MCM, 1951, para. 80c.

<sup>38</sup> See LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, at 123.

<sup>39</sup> See *United States v. Self*, 3 U.S.C.M.A. 568, 13 C.M.R. 124 (1953) (noting that a certificate of correction could also have been used).

<sup>40</sup> See *United States v. Hollis*, 11 U.S.C.M.A. 235, 29 C.M.R. 51 (1960).

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place. If so, and if pertinent, it is entitled to be made part of the record of the proceedings. . . .<sup>41</sup>

Post-trial affidavits of the parties which are in substantial agreement may be used to fill lacunae<sup>42</sup> or to clear up an ambiguity in the trial transcript.<sup>43</sup> Such procedures amount to no more than the standard civilian practice of having the parties by written stipulation amend the record or agree upon a statement of the facts material to the controversy.

*Correcting the record* by post-trial affidavits should be distinguished from *raising an issue*, by affidavits or appellate briefs, of omissions in the record or of extra-record error in the proceedings. For example, where the transcript of trial itself discloses an unreported communication between the law officer and court members, since an authenticated record imports verity, affidavits offered by the Government to fill the void in the transcript may not be considered on review when the defense does not concede the existence of the facts to which they pertain. The Court of Military Appeals has indicated that in this situation, absent a concession by the defense, only a properly authenticated certificate of correction reporting verbatim the discussion will be considered.<sup>44</sup> But where the trial transcript does not indicate an unauthorized communication took place, the issue may be raised by post-trial affidavits or an article 38(c), UCMJ, brief, offered by the defense as a supplement to the record, and Government affidavits may be filed controverting the factual allegations of the defense affidavits, or showing that the off-the-record communication was innocuous. The affidavits of both parties then may properly be considered and the controversy determined by the board of review or by the convening authority.<sup>45</sup> A delay in filing the affidavits and any discrepancies in the versions of the affiants are matters that may be taken into consideration on the weight to be accorded the affidavits.

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<sup>41</sup> *United States v. Roberts*, 7 U.S.C.M.A. 322, 325, 22 C.M.R. 112, 115, (1956). *Accord*, *United States v. King*, 8 U.S.C.M.A. 392, 24 C.M.R. 202 (1957). Post-trial certificates concerning the pretrial advice (*United States v. Schuller*, 5 U.S.C.M.A. 101, 17 C.M.R. 101 (1954)), and the post-trial review (*United States v. Hardy*, 11 U.S.C.M.A. 521, 29 C.M.R. 337 (1960)), may also be considered on appellate review.

<sup>42</sup> *United States v. Walters*, 4 U.S.C.M.A. 617, 16 C.M.R. 191 (1954).

<sup>43</sup> *United States v. McDonald*, 11 U.S.C.M.A. 506, 29 C.M.R. 322 (1960).

<sup>44</sup> See *United States v. Solak*, 10 U.S.C.M.A. 440, 28 C.M.R. 6 (1959); *cf.* *United States v. Snook*, 12 U.S.C.M.A. 613, 31 C.M.R. 199 (1962).

<sup>45</sup> See *United States v. Strahan*, 14 U.S.C.M.A. 41, 33 C.M.R. 253 (1963).

Civilian courts provide the necessary means to insure that a complete and correct record is before the appellate court. When any difference arises whether the record reflects the actual trial proceedings, the dispute may be submitted to, and settled by, the trial court and the record made to conform to the truth.<sup>45</sup> The use of this simple and expeditious civilian procedure for correcting a record of trial is unavailable in the military system. A law officer cannot act as a trial judge does on remand in civilian jurisdiction because he is limited to acting in a particular court-martial.<sup>46</sup> In the military, attempts to correct the record during post-trial review have often resulted in a battle of affidavits and counter-affidavits. A possible solution to this problem will be offered in Part VI, *infra*.

### III. INITIAL REVIEW—THE CONVENING AUTHORITY

#### A. GENERAL

After the record of trial has been prepared and authenticated, it is forwarded to the convening authority for initial review and action on the record.<sup>47</sup> The convening authority is normally the same officer who convened the court-martial, a commissioned officer temporarily in command, a successor in command, or any officer exercising general court-martial jurisdiction when it is impracticable for the regular convening authority to accomplish the initial review and action.<sup>48</sup> Prior to taking his action upon a record of trial of a general court-martial, or upon a record of trial of a special court-martial which involves a sentence of bad conduct discharge, a convening authority who exercises general court-martial jurisdiction will refer the record to his staff judge advocate or legal officer for review and written advice.<sup>49</sup> If he does not exercise general court-martial jurisdiction, the convening authority will forward the special court-martial record and his action to the officer exercising general court-martial jurisdiction over his command, who will review and take action upon the record in the same manner as a record of trial by general court-martial, or he may send it directly to the appropriate Judge Advo-

<sup>45</sup> See, e.g., FED. R. CIV. P. 75(h); FED. R. CRIM. P. 39.

<sup>47</sup> *United States v. Allen*, 8 U.S.C.M.A. 504, 25 C.M.R. 8 (1957); *cf. United States v. Robinson*, 13 U.S.C.M.A. 674, 33 C.M.R. 206 (1963).

<sup>48</sup> UCMJ art. 60.

<sup>49</sup> *Ibid.*; MCM, 1951, para. 84b, c.

<sup>50</sup> UCMJ arts. 61, 65(b); MCM, 1951, para. 85e.

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cate General to be reviewed by a board of review.<sup>51</sup> Ordinarily the convening authority will accept the opinion of his staff judge advocate as to the effect of any irregularity or error respecting the proceedings, as to the adequacy of the evidence, and as to what sentence can be approved legally. However, the convening authority has the independent power and responsibility to weigh the evidence, judge the credibility of the witnesses, decide controverted questions of fact, and determine what legal sentence should be approved.<sup>52</sup> In the military system, ". . . the post-trial review and the action of the convening authority together represent an integral first step in an accused's climb up the appellate ladder."<sup>53</sup>

### B. CONSIDERATION OF MATTERS OUTSIDE THE RECORD ON REVIEW OF THE FINDINGS

#### 1. For Purpose of Approval.

In acting on the findings of a court-martial, the convening authority may approve only such findings of guilty as he finds correct in law and fact and as he in his discretion determines should be approved.<sup>54</sup> If the final action of the court has resulted in an acquittal of all charges and specifications, no action is required by the convening authority. However, the record of trial is examined to determine whether the court was properly constituted and had jurisdiction over the accused and the offenses tried.<sup>55</sup>

The extent to which the convening authority may consider information from outside the record of trial on review of the findings was decided initially by the Court of Military Appeals in the case of *United States v. Duffy*.<sup>56</sup> The conviction rested upon circumstantial evidence and the findings and sentence were approved by the convening authority despite the advice of his staff judge advocate that the evidence of record was insufficient to sustain the findings of guilty. The convening authority transmitted the record of trial and his action to The Judge Advocate General of the Army with a letter explaining the reasons for his action.<sup>57</sup> In the letter he stated that the accused had previously confessed to the commission of the crime but because of a technical failure to

<sup>51</sup> See UCMJ art. 65(b); MCM, 1951, para 84d.

<sup>52</sup> MCM, 1951, para. 85c.

<sup>53</sup> *United States v. Wilson*, 9 U.S.C.M.A. 223, 226, 28 C.M.R. 3, 6 (1958).

<sup>54</sup> UCMJ art. 64.

<sup>55</sup> UCMJ art. 61; MCM, 1951, para. 86b(2).

<sup>56</sup> 3 U.S.C.M.A. 20, 11 C.M.R. 20 (1953).

<sup>57</sup> This procedure is in accordance with MCM, 1951, para 85c.

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fully comply with the warning requirements of article 31 of the Code, the confession was not admissible in evidence.

The Court of Military Appeals, in reversing the conviction for insufficiency of the evidence and dismissing the charges, stated:

By his utilization of "evidence" outside the record in affirming the conviction of the accused, the convening authority unwarrantedly deprived the accused of the review guaranteed him by the Code and Manual . . . Without hesitation, we say that the right of an accused to a review confined to the record of trial adduced at his trial is safely within the guarantee of military due process of law . . . We cannot conceive of a concept more repugnant to elementary justice than one which would permit appellate reviewing authorities to cast beyond the limits of the record for "evidence" with which to sustain a conviction.<sup>58</sup>

While the information from outside the record of trial to approve the conviction in the *Duffy* case was considered by the convening authority on his own initiative, normally such a matter comes from the staff judge advocate's review.<sup>59</sup> In either case, it is now settled that the authority of the convening authority to approve findings of guilty is limited "to the record adduced at [the] trial."

### 2. For Purposes of Disapproval.

A different situation is presented in the utilization by the convening authority of matter from outside the record for purposes of disapproval of a finding of guilty. An Army Board of Review had occasion to furnish an answer to this problem in CM 370895, *Pratts-Luciano*.<sup>60</sup> The accused had been convicted of two specifications of indecent acts with a child. After the trial, the child's father wrote a letter to the convening authority stating that post-trial questioning of the child by him had brought forth inaccuracies in the child's trial testimony and he requested that the sentence be reduced. The staff judge advocate considered the letter and an investigation of the matter in his post-trial review and concluded that there was no basis to question the correctness of the court's decision. Before the board of review the appellate defense counsel vigorously urged the *Duffy* decision as requiring reversal. In sustaining the conviction the board distinguished the *Duffy* case by holding that:

. . . In the *Duffy* case it positively appeared that evidence outside the record was utilized to affirm the conviction, whereas in this case it

<sup>58</sup> 3 U.S.C.M.A. 20, 23, 11 C.M.R. 20, 23 (1953).

<sup>59</sup> E.g., ACM S-8021, Deel, 14 C.M.R. 700 (1954); CM 392727, Craighead, 22 C.M.R. 523 (1956).

<sup>60</sup> 15 C.M.R. 481 (1954).

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positively appears that evidence outside the record was considered only as a possible basis for disapproval and the conviction was approved solely on the evidence of record. . . .

. . . [W]e believe, that the authority of a convening authority to approve findings and sentence is conditioned by the evidence of record and the law of the case, whereas his authority to disapprove is conditioned only by his discretion. Where, as in this case, there is brought to the attention of a staff judge advocate a matter extraneous to the record that indicates disapproval may be warranted in the interests of justice, it is the staff judge advocate's duty to cause the matter to be investigated and reported to the convening authority with appropriate advice. The fact that his advice with respect to the extraneous matter may be adverse to the accused does not impeach his recommendation and the pursuant action of the convening authority on the record of trial proper. To hold otherwise would . . . induce rather than prevent miscarriages of justice.<sup>61</sup>

The holding of the board in *Pratts-Luciano* was quoted with approval by the Court of Military Appeals when a similar problem reached the Court in *United States v. Massey*.<sup>62</sup> At the trial the law officer excluded proffered evidence as to the results of lie detector examinations of the accused and of several prosecution witnesses which were favorable to the accused. After trial and conviction, the defense counsel submitted the certificate of a neuropsychiatrist as to the results of an examination of the accused under a sodium pentothal or "truth serum" test. In his review, the staff judge advocate advised the convening authority that the results of the lie detector examinations and truth serum tests could not be considered since they were evidence outside the record of trial within the rationale of the *Duffy* case. The Court held that the convening authority has the absolute power to disapprove findings and sentence for any or no reason, legal or otherwise, based on matter in or out of the record. Since the staff judge advocate's review could have created in the mind of the convening authority the impression that he would err in law if he were to go outside the formal record of trial, the case was remanded for a new review and action by a different convening authority.

While it may have been error in *Massey* to misadvise the convening authority that the results of a favorable lie detector test may not be considered to disapprove findings of guilty, a failure to mention the results of a favorable test has been held not to be an abuse of discretion of the reviewer.<sup>63</sup> However, such matter

<sup>61</sup> *Id.* at 483.

<sup>62</sup> 5 U.S.C.M.A. 514, 18 C.M.R. 138 (1955).

<sup>63</sup> See *United States v. Martin*, 9 U.S.C.M.A. 84, 25 C.M.R. 346 (1958).

should be brought to the attention of the convening authority where failure to do so would result in a "miscarriage of justice."<sup>61</sup>

### C. CONSIDERATION OF MATTERS OUTSIDE THE RECORD ON REVIEW OF THE SENTENCE

In acting on the sentence of a court-martial, the convening authority may approve only the sentence or such part or amount of the sentence as he finds correct in law and fact and as he in his discretion determines should be approved.<sup>62</sup> The Manual states that the sentence approved by the convening authority should be that which is warranted by the circumstances of the offense and the previous record of the accused.<sup>63</sup> In exercising his broad powers of review of the sentence, the convening authority may consider any reliable information which will aid him in reaching a decision on whether to approve the sentence adjudged by the court-martial or lessen its rigor. He can solicit and consider the opinions of officers or other persons, military and civilian;<sup>64</sup> he can request and review information of other acts of misconduct or merit by the accused;<sup>65</sup> and he can look to the accused's service record for relevant information, whether it be favorable or adverse to the accused.<sup>66</sup> The scope of inquiry should be as broad as possible to provide the basis for "an informed judgment."<sup>67</sup> In order to provide the basis for an "informed judgment," it is customary for the staff judge advocate to include in his review a section on clemency matters and the appropriateness of the sentence. The accused will normally be personally interviewed by the staff judge advocate or his representative to secure more information about the accused's background, attitude toward the service and rehabilitation potential than is shown in the record of trial.<sup>68</sup> The clemency portion of the review has been compared to the probation report submitted to a sentencing judge in civilian prac-

<sup>61</sup> See *id.* at 87, 25 C.M.R. at 349.

<sup>62</sup> UCMJ art. 64.

<sup>63</sup> See MCM, 1951, para. 88b.

<sup>64</sup> *United States v. Young*, 9 U.S.C.M.A. 452, 26 C.M.R. 292 (1958). In the words of Brosman, J., he can even consult "a guy named Joe." *United States v. Coulter*, 3 U.S.C.M.A. 657, 663, 14 C.M.R. 75, 81 (1954).

<sup>65</sup> *United States v. Jackson*, 9 U.S.C.M.A. 298, 26 C.M.R. 78 (1958); *United States v. Taylor*, 9 U.S.C.M.A. 84, 26 C.M.R. 296 (1958).

<sup>66</sup> *United States v. Lanford*, 6 U.S.C.M.A. 371, 20 C.M.R. 87 (1955).

<sup>67</sup> *Id.* at 379, 20 C.M.R. at 95.

<sup>68</sup> The Court has gone so far as to state that it is an abuse of discretion, requiring a new review and action, for the staff judge advocate to omit significant clemency factors in his review. *United States v. Jernison*, 10 U.S.C.M.A. 472, 28 C.M.R. 38 (1959).



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72 Although most jurisdictions deny a defendant an opportunity to see the probation report or rebut adverse matters contained therein,<sup>73</sup> the Court of Military Appeals has held that an accused is entitled to an opportunity to explain or deny adverse information from outside the record considered by the convening authority or included in the staff judge advocate's review.<sup>74</sup> In *United States v. Vara*,<sup>75</sup> the Court set forth certain guidelines to be followed:

... [W]e suggest that a practice of serving a copy of the review, or those parts which contain matters of fact adverse to an accused, on the accused or his counsel sometime prior to action by the convening authority be adopted. The time of service should be early enough to permit a reply thereto if accused is so disposed. If that procedure is used, an accused will be afforded a fair opportunity to answer new matters which are prejudicial to him and to present information which might be helpful to his cause. Furthermore, the convening authority and higher reviewing authorities who have power to modify sentences may be furnished with a more comprehensive and impartial base for determining the appropriateness of sentence. Finally, this Court will not be required to speculate on accused's familiarity with the facts being used against him.<sup>76</sup>

Failure or refusal to accord an accused an opportunity to explain or rebut adverse matter in the post-trial review is error and may be grounds for higher appellate authorities to set aside the action taken by the convening authority on such advice and to require a new review and action by the same or different convening authority, or require re-evaluation of the sentence by a board of review. However, not every such failure is grounds for reversal or corrective action, as for example where the accused has supplied the information in a post-trial interview,<sup>77</sup> or where he is charged with knowledge that the information may be used, as where it appears in his official service record,<sup>78</sup> or is of such a minor or trif-

<sup>72</sup> See *United States v. Coulter*, 3 U.S.C.M.A. 657, 14 C.M.R. 75 (1954); *Feld, The Court-Martial Sentence: Fair or Foul?*, 39 VA. L. REV. 319, 327 (1953).

<sup>73</sup> See *Williams v. New York*, 337 U.S. 241 (1949); *FED. R. CRIM. P.* 32(c); *Note, Employment of Social Investigation Reports in Criminal and Juvenile Proceedings*, 58 COLUM. L. REV. 702 (1958).

<sup>74</sup> *United States v. Griffin*, 8 U.S.C.M.A. 206, 24 C.M.R. 16 (1957).

<sup>75</sup> 8 U.S.C.M.A. 651, 25 C.M.R. 155 (1958).

<sup>76</sup> *Id.* at 654, 25 C.M.R. at 158; *accord, United States v. Smith*, 9 U.S.C.M.A. 145, 25 C.M.R. 407 (1958). In *JAGJ 1958/1799*, 7 Feb. 1958, The Judge Advocate General of the Army required uniform compliance by all staff judge advocates of the Court's suggestion in *Vara*.

<sup>77</sup> See *United States v. Harris*, 9 U.S.C.M.A. 493, 26 C.M.R. 273 (1958); *United States v. Bugros*, 9 U.S.C.M.A. 276, 26 C.M.R. 56 (1958).

<sup>78</sup> See *United States v. Owens*, 11 U.S.C.M.A. 240, 29 C.M.R. 56 (1960).

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ling nature that it reasonably appears it could have had no influence on the convening authority.<sup>79</sup>

Care must also be exercised by the reviewer when advising the convening authority on extra-record clemency matters so as to preclude possibility that such material may also be considered as a basis for approval of the findings. In *United States v. Wilson*,<sup>80</sup> the staff judge advocate reported the results of his personal interview with the principal prosecution witness in the clemency section of the review. He pointed out how impressed he had been with the truthfulness of this man and stated that there could be no doubt of this man's testimony at the trial. The Court held that notwithstanding the fact that it was the sincere and conscientious desire of the reviewer to obtain information favorable to the accused, the information obtained could be used to support the findings of guilty and may have provided sufficient weight to tip the scales against the accused, so as to bring the case within the holding in *Duffy*. The case was returned for reference to another convening authority for a new review and action.

Similarly, special care must be exercised by the reviewer when referring to policy statements and directives established by the convening authority or higher headquarters, departmental regulations and instructions, and even Manual statements in order not to mislead the convening authority or raise the specter of command influence. Statements in the staff judge advocate's review that it was the command policy not to retain persons sentenced to a punitive discharge;<sup>81</sup> that military custom and necessity required "barracks thieves" be eliminated from the service;<sup>82</sup> and that Department instructions required that homosexuals be eliminated from the service,<sup>83</sup> have all been held contrary to the intent and spirit of the Code and Manual. The test for determining whether a convening authority's disposition of the case was improperly influenced depends not upon whether he knew of the provisions of the policy statements or directives but upon whether he believed they were command mandates to put aside all discre-

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<sup>79</sup> See, e.g., *United States v. Christopher*, 13 U.S.C.M.A. 231, 32 C.M.R. 231 (1962); *United States v. Barrow*, 9 U.S.C.M.A. 343, 26 C.M.R. 123 (1958); *United States v. Williams*, 9 U.S.C.M.A. 36, 25 C.M.R. 298 (1958).

<sup>80</sup> 9 U.S.C.M.A. 223, 26 C.M.R. 3 (1958).

<sup>81</sup> See *United States v. Wise*, 6 U.S.C.M.A. 472, 20 C.M.R. 188 (1955).

<sup>82</sup> See *United States v. Plummer*, 7 U.S.C.M.A. 630, 28 C.M.R. 94 (1957).

<sup>83</sup> See *United States v. Doherty*, 10 U.S.C.M.A. 453, 28 C.M.R. 19 (1959).

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tion and thereby deny an accused an independent evaluation of the case on its own merits.<sup>84</sup>

In order to avoid unnecessary reversals, and at the same time provide reviewing authorities with essential information, it is recommended that a copy of the post-trial review be served on the accused and his defense counsel, not only when the review contains adverse clemency matters, but in *all* cases. The fact that such action was taken should be indicated in the review. A statement signed by the accused and his defense counsel acknowledging receipt of the review, and setting forth any matters by way of rebuttal or otherwise to be considered in behalf of the accused on review, should be obtained and appended to the end of the review.<sup>85</sup>

### IV. APPELLATE REVIEW

#### A. BOARDS OF REVIEW

All records of trial by general courts-martial and records of trial by special courts-martial which include an approved bad conduct discharge are forwarded to the Judge Advocate General of the armed force of which the accused is a member.<sup>86</sup> Pursuant to the Code, the Judge Advocate General of each of the armed forces is required to constitute in his office one or more boards of review consisting of not less than three commissioned officers or civilians, who must be lawyers,<sup>87</sup> and to prescribe uniform rules of procedure for such boards.<sup>88</sup> Boards of review are intermediate appellate bodies in the military system and they have been compared to the courts of appeal in the Federal judiciary system.<sup>89</sup>

The Judge Advocate General must refer to a board of review the record in every case of trial by court-martial in which the sen-

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<sup>84</sup> See *United States v. Rivera*, 12 U.S.C.M.A. 507, 31 C.M.R. 93 (1961); *United States v. Betts*, 12 U.S.C.M.A. 214, 30 C.M.R. 214 (1961).

<sup>85</sup> In *United States v. Fagnan*, 12 U.S.C.M.A. 192, 30 C.M.R. 192 (1961), the Court called attention to the responsibility of defense counsel for presenting such information. See UCMJ art. 38(c). The procedure recommended above would serve to insure compliance with this responsibility.

<sup>86</sup> UCMJ arts. 65(a), (b), 17(b).

<sup>87</sup> UCMJ art. 66(a).

<sup>88</sup> UCMJ art. 66(f). Pursuant to this authority the Judge Advocates General of the armed forces have promulgated rules of procedure: *UNIFORM RULES OF PROCEDURE FOR PROCEEDINGS IN AND BEFORE BOARDS OF REVIEW*. Army Reg. No. 22-25/Navy Publication NAVEXOS P-2319/Air Force Manual No. 110-11 (29 May 1961) [hereinafter referred to and cited as *BR RULE*].

<sup>89</sup> See Latimer, *A Comparative Analysis of Federal and Military Criminal Procedure*, 29 *TEMP. L. Q.* 23 (1955).

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tence, as approved, affects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for one year or more.<sup>62</sup> All other general court-martial records of trial in which there has been a finding of guilty and a sentence are examined in the office of the Judge Advocate General, and if any part of the finding or sentence is found unsupported in law, or if the Judge Advocate General so directs, the record will be further reviewed by a board of review.<sup>63</sup>

In a case referred to it, the board of review may act only with respect to the finding and sentence as approved by the convening authority.<sup>64</sup> It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, *on the basis of the entire record*, should be approved.<sup>65</sup> In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.<sup>66</sup>

In acting on the findings as approved by the convening authority, a board of review, with certain exceptions,<sup>67</sup> has no authority under the Code to consider matters *dehors* the "entire record" whether in favor or against the interest of the accused.<sup>68</sup> While the board of review and the convening authority have fact-finding power, unlike the latter, a board does not have the discretionary power to disapprove findings for any or no reason, whether based on matter in or out of the record.<sup>69</sup>

Similarly, a board of review is restricted in its consideration of information relating to the appropriateness of sentence to matters included in the "entire record", which includes not only the trial transcript and allied papers,<sup>70</sup> but also matters from outside the record considered by the convening authority in taking his action,<sup>71</sup> as well as any appellate brief forwarded pursuant to article 38 of

<sup>60</sup> UCMJ art. 66(b).

<sup>61</sup> UCMJ art. 69.

<sup>62</sup> UCMJ art. 66(c).

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> These exceptions will be discussed in Part V, *infra*.

<sup>66</sup> See *United States v. Whitman*, 3 U.S.C.M.A. 179, 11 C.M.R. 179 (1953).

<sup>67</sup> See *United States v. Massey*, 5 U.S.C.M.A. 514, 18 C.M.R. 138 (1955);

*United States v. Waymire*, 9 U.S.C.M.A. 252, 26 C.M.R. 32 (1958).

<sup>68</sup> See *United States v. Simmons*, 2 U.S.C.M.A. 105, 6 C.M.R. 105 (1952).

<sup>69</sup> *United States v. Lanford*, 6 U.S.C.M.A. 371, 20 C.M.R. 87 (1955).

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the Code.<sup>100</sup> Reports on the post-trial behavior of the accused may not be considered by the board in determining the appropriateness of a sentence, since they are not a part of "the entire record" on appeal.<sup>101</sup>

### B. UNITED STATES COURT OF MILITARY APPEALS

The United States Court of Military Appeals, which was created by article 67 of the *Uniform Code of Military Justice*, is the highest appellate body in the military system. The Court consists of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for overlapping terms of fifteen years with each judge being eligible for reappointment.<sup>102</sup> Pursuant to the authority of the Code, the Court has prescribed its own rules of procedure.<sup>103</sup>

The Court of Military Appeals is not a court of original jurisdiction with general, unlimited power in law and equity.<sup>104</sup> Under its organic act, the Court exercises jurisdiction over three types of courts-martial cases. The Court is required to review the record in all cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death.<sup>105</sup> The Judge Advocate General of each armed service may order review of a board of review decision by filing a certificate of review with the Court.<sup>106</sup> Lastly, an accused, upon petition for grant of review and on good cause shown, may obtain review by the Court of a board of review decision.<sup>107</sup>

The scope of review of the Court extends only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the board of review.<sup>108</sup> In a case which the Judge Advocate General orders sent to the Court by certificate of review, action need be taken only with

<sup>100</sup> See *ibid.*; *United States v. Fagnan*, 12 U.S.C.M.A. 192, 30 C.M.R. 192 (1961).

<sup>101</sup> *United States v. Fagnan*, *supra* note 100.

<sup>102</sup> See UCMJ art. 67 (a) (1).

<sup>103</sup> *Ibid.* U.S. CT. OF MILITARY APPEALS, RULES OF PRACTICE AND PROCEDURE (rev. 1 Jan. 1962) [hereinafter referred to and cited as USCMA RULE].

<sup>104</sup> *In re Taylor*, 12 U.S.C.M.A. 427, 31 C.M.R. 13 (1961). The Court does have jurisdiction under the All Writs Act (28 U.S.C. 1651) to grant *coram nobis* relief. *United States v. Frischholz*, No. 14,270, U.S. Ct. M. App., 25 Mar. 1966.

<sup>105</sup> UCMJ art. 67 (b) (1).

<sup>106</sup> UCMJ art. 67 (b) (2).

<sup>107</sup> UCMJ art. 67 (b) (3).

<sup>108</sup> UCMJ art. 67 (d).

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respect to the issues raised by him.<sup>109</sup> In a case reviewed upon petition of the accused, action need be taken only with respect to issues specified in the grant of review.<sup>110</sup> The Court may, in any case, review other matters of law which materially affect the right of the parties.<sup>111</sup> In all cases the Court takes action only with respect to matters of law.<sup>112</sup> The Court will not consider an error raised for the first time on appeal before it unless failure to do so would result in a manifest miscarriage of justice or seriously affect fairness, integrity, or public reputation of proceedings.<sup>113</sup> The scope of review of the Court extends to matters outside the record considered by the convening authority or the board of review.<sup>114</sup>

A factual determination of a board of review is binding on the Court of Military Appeals.<sup>115</sup> However, the board's determination of fact must be supported by substantial evidence<sup>116</sup> and the board must not exercise its fact-finding powers in an arbitrary and capricious manner, or in a manner no reasonable man would take.<sup>117</sup> Review and determination of an issue by the Court may not be circumvented because the board labels a question of law a question of fact. Moreover, an issue of mixed law and fact is reviewable by the Court.<sup>118</sup>

### V. MATTERS OUTSIDE THE RECORD

Before beginning a discussion of the specific matters that may be considered from outside the record of trial, it should be noted that, just as in the case of the initial review by the convening authority, a conviction upon appellate review must stand or fall on the evidence admitted at trial. Recourse cannot be made to

<sup>109</sup> *Ibid.* The Court will decline to review a moot question. *United States v. Gilley*, 14 U.S.C.M.A. 226, 34 C.M.R. 6 (1963). Nor will the Court render advisory opinions. *United States v. Thompson*, 2 U.S.C.M.A. 460, 9 C.M.R. 90 (1953).

<sup>110</sup> UCMJ art. 67(d).

<sup>111</sup> USCMA RULE 4.

<sup>112</sup> UCMJ art. 67(d); USCMA RULE 4. Just as other federal appellate tribunals, the Court itself decides whether a particular point is one of fact or law. *United States v. Benson*, 3 U.S.C.M.A. 351, 12 C.M.R. 107 (1953).

<sup>113</sup> *E.g.*, *United States v. Dupree*, 1 U.S.C.M.A. 665, 5 C.M.R. 93 (1952).

<sup>114</sup> *United States v. Webb*, 8 U.S.C.M.A. 70, 23 C.M.R. 294 (1957); *cf.* *United States v. Williams*, 13 U.S.C.M.A. 65, 35 C.M.R. 37 (1964).

<sup>115</sup> *United States v. Wille*, 9 U.S.C.M.A. 623, 26 C.M.R. 403 (1958).

<sup>116</sup> *United States v. Hernandez*, 4 U.S.C.M.A. 465, 16 C.M.R. 39 (1954).

<sup>117</sup> *United States v. Hendon*, 7 U.S.C.M.A. 429, 22 C.M.R. 219 (1956).

<sup>118</sup> *Ibid.*

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extra-record information to remove a reasonable doubt that may be left by the evidence presented at trial.<sup>119</sup>

### A. JURISDICTION

Court-martial jurisdiction may be exercised over all persons subject to the *Uniform Code of Military Justice* for any offense made punishable by the Code.<sup>120</sup> Since lack of jurisdiction cannot be waived and may be asserted at any time,<sup>121</sup> appellate authorities may consider jurisdictional matter that is not contained in the record on review.<sup>122</sup> The question presented is not whether extra-record jurisdictional matter may be considered but rather what matters are jurisdictional in nature. A few cases will best illustrate this problem.

In *United States v. Ferguson*,<sup>123</sup> the accused were convicted by an Army general court-martial of mutiny occurring at a post stockade. While the record was pending before the board of review, the staff judge advocate forwarded to The Judge Advocate General of the Army a verbatim transcript of a conference held the day before the trial commenced. Present at the conference were the convening authority, the chief of staff, the staff judge advocate, the law officer, and members of the court-martial. The court-martial members were informed of a dissident element within the stockade who were not responsive to discipline; that more trials were pending; and that it was necessary that the case be handled promptly, expeditiously, and firmly.

The board of review determined that it could consider the transcript as a matter pertaining to jurisdiction and declared that the conference was an unlawful exercise of command control over the court-martial rendering the members incompetent to hear and decide the case. The proceedings were held to be null and void for lack of jurisdiction and a new trial before another court-martial was authorized.

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<sup>119</sup> *United States v. Carey*, 11 U.S.C.M.A. 443, 29 C.M.R. 259 (1960).

<sup>120</sup> See UCMJ arts. 17(a), 18. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal. UCMJ art. 17.

<sup>121</sup> MCM, 1951, para. 68b; *United States v. Burney*, 6 U.S.C.M.A. 776, 21 C.M.R. 98 (1956).

<sup>122</sup> *E.g.*, *United States v. Dickenson*, 6 U.S.C.M.A. 488, 20 C.M.R. 154 (1955). *BR rule* 18 states in part: "Matters outside the record of trial will not be presented to or argued before a board of review except with respect to . . . b. A question of jurisdiction."

<sup>123</sup> 5 U.S.C.M.A. 68, 17 C.M.R. 68 (1954).

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Judge Latimer, writing the principal opinion for the Court of Military Appeals, reviewed the military cases which have been the subject of petitions for writs of habeas corpus in the federal courts and found that the line of departure between errors which rise to the dignity of jurisdictional defects and those which do not had been obscured. The concept of jurisdictional error in its historic sense had been expanded to include:

an accumulation of errors of such serious proportion that it can be said an accused was not protected "from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as civilian courts."<sup>124</sup>

He would have permitted the board of review to consider the pretrial transcript only on the question of jurisdiction. He concluded that the matters presented were not of such serious proportion as to warrant a grant of relief by habeas corpus and that therefore the board erred in its determination that the error was a jurisdictional one.

Chief Judge Quinn agreed that the exercise of command control did not deprive the court-martial of jurisdiction to try the accused but that a question of command control could properly be considered as one gravely affecting the military community and therefore could be determined by an appellate court without having been raised in the trial court. In his view the reason for the rule that appellate courts would not consider matter not properly presented in the trial court, *i.e.*, a party might be injured by consideration of matters which he might have been able to rebut had they been properly raised at the trial level, did not pertain here inasmuch as the transcript was uncontested.

Judge Brosman doubted that the question of jurisdiction should be construed in the narrow fashion used in habeas corpus proceedings. He would have the board and the Court consider the material from outside the record because he was convinced that "by the very fact that they and we are appellate tribunals within a judicial system, both boards of review and this Court possesses authority to correct a fundamental error which corrupts an entire proceeding and challenges its integrity. An undisputed and flagrant instance of command control—like that at bar—would certainly amount to such a fundamental error."<sup>125</sup> In his opinion, the

<sup>124</sup> *Id.* at 77, 17 C.M.R. at 77, quoting from *Burns v. Wilson*, 346 U.S. 137 (1953).

<sup>125</sup> *Id.* at 86-87, 17 C.M.R. at 86-87.



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pretrial conference, held the day before trial, was a part of the "proceedings" within the meaning of article 39, UCMJ, which requires that all proceedings shall be made a part of the record, and therefore could be considered apart from the question of jurisdiction.

In *United States v. Haimson*,<sup>126</sup> the defense claimed that detailed instructions to the trial counsel over the command line of the convening authority disqualified the convening authority as an accuser. Appellate Government counsel obtained a sworn statement and appellate defense counsel submitted cross-interrogatories from an assistant staff judge advocate as to the extent of the convening authority's interest in the case. The statement thus obtained was attached to the Government's brief which the board of review considered as a matter pertaining to jurisdiction in upholding the conviction. The Court of Military Appeals held that the contents of the instruction and the record as a whole, including the statement thus obtained, did not indicate a predetermination of the guilt of the accused nor a personal interest in the outcome of the case and affirmed the conviction.

In *United States v. Long*,<sup>127</sup> the accused was represented before a special court-martial by an enlisted man who served as his appointed defense counsel. It was claimed that the appointment deprived the court-martial of jurisdiction.<sup>128</sup> The board, after deciding that the court-martial was not divested of jurisdiction, took notice of a letter signed by the accused and addressed to the Judge Advocate General of the Navy stating that he had enlisted counsel at his own request. Government and defense appellate counsel were permitted to file affidavits on this matter before the Court of Military Appeals. The Court, without regard to the affidavits, found that failure to appoint officer counsel, coupled with accused's representation by enlisted counsel, was reversible, though not jurisdictional, error and ordered a rehearing. The Court declared:

... in view of our disposition of this case, we do not enter the battle concerning these subsequent affidavits except to point out that they would have been unnecessary had the board of review proceeded in an orderly manner. If an appellate agency is going to use any post-trial information as a basis for its decision, on jurisdictional matters or in any other permissible areas, each party should be afforded an oppor-

<sup>126</sup> 5 U.S.C.M.A. 208, 17 C.M.R. 208 (1954).

<sup>127</sup> 5 U.S.C.M.A. 572, 18 C.M.R. 196 (1955).

<sup>128</sup> MCM, 1951, para 6c, requires that appointed counsel be an officer. The Code is silent on this point.

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tunity to present his, or its side of the dispute. . . . Obviously, this case illustrates the necessity for a full and fair hearing on facts which may be used for the purpose of resolving a dispute. Presently the parties are attempting to litigate the controversy at this level, and we are not inclined to become a trial forum.<sup>125</sup>

In *United States v. Roberts*,<sup>126</sup> after the board of review had approved the conviction, the convening authority forwarded a letter stating that he had personally delegated to his staff judge advocate the authority to refer the case to trial and that the staff judge advocate had made the actual referral. The same information was contained in a number of affidavits filed with the Court. The Court, in reversing and ordering a rehearing, considered the question whether the convening authority's referral of the case to trial was jurisdictional, thereby permitting the Court to consider the post-trial information.

### B. INSANITY

There is no statutory basis in the UCMJ for consideration of matters of insanity outside the record of trial on review.<sup>127</sup> A foundation for such action can be found in paragraph 124 of the Manual which provides:

After consideration of the record as a whole, if it appears to the convening authority or higher authority that a reasonable doubt exists as to the sanity of the accused, he should disapprove any findings of guilty of the charges and specifications affected by such doubt and take appropriate action with respect to the sentence. Such authority will take the action prescribed in [paragraph] 121<sup>128</sup> before taking action on the record whenever it appears, from the record of trial or otherwise that further inquiry as to the mental condition of the accused is warranted in the interest of justice, regardless of whether any such question was raised at the trial or how it was determined if raised. [Emphasis added.]

There are three distinct stages when the issue of the sanity of an accused, if reasonably raised, should be the subject of inquiry:

<sup>125</sup> 5 U.S.C.M.A. at 374, 18 C.M.R. at 198.

<sup>126</sup> 7 U.S.C.M.A. 322, 22 C.M.R. 112 (1956).

<sup>127</sup> *USCMA rules* contain no provisions concerning the raising of insanity matters from outside the record before the Court. *BR rule 18* states: "Matters outside the record of trial will not be presented to or argued before a board of review except with respect to . . . c. Matters affecting the sanity of an accused tending to show that further inquiry as to his mental condition is warranted in the interest of justice."

<sup>128</sup> MCM, 1951, para. 121, provides in pertinent part that ". . . the matter will be referred to a board of one or more medical officers for their observation and report with respect to the sanity of the accused. . . . Such additional mental examinations may be directed at any stage of the proceedings as circumstances may require. . . ."

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at the time of the commission of the offense, at the time of trial, and at the time of review.<sup>133</sup> After the trial, the issue of sanity at any one or all three of these stages may be inquired into by the convening authority,<sup>134</sup> the Judge Advocate General,<sup>135</sup> the board of review,<sup>136</sup> or the Court of Military Appeals.<sup>137</sup>

The consideration of insanity matters outside the record of trial first reached the Court of Military Appeals in *United States v. Burns*.<sup>138</sup> The issue of insanity was raised at the trial. After conviction, the convening authority ordered a mental examination of the accused by a board of officers. In the opinion of the sanity board the accused lacked mental responsibility at the time of the offense. Notwithstanding, the convening authority approved the finding of guilty. At the request of the Judge Advocate General of the Air Force, the Surgeon General of the Air Force reviewed the record and concluded that the accused was sane. The board of review, in approving the conviction, refused to consider the opinion and reports submitted after the findings of the trial court because it was of the opinion that its powers were limited to a review of the evidence presented at the trial.<sup>139</sup> The Court stated that under the Code "[a] trial *de novo* before the board of review is not contemplated, and in the ordinary case the holding of the board would be legally correct. However, . . . insanity is given a preferred rating and there is a provision specifically controlling the procedure before the appellate tribunals."<sup>140</sup> The Court then quoted from paragraph 124, MCM, 1951. The Court held that a board of review is a "higher authority" within the meaning of that Manual provision and that it should have weighed the medical reports acquired after the trial along with the other evidence found in the record.<sup>141</sup> While the issue of sanity is given a "preferred rating," this preference is for the benefit of the accused and not the Government. Where the issue has been raised and

<sup>133</sup> See *United States v. Thomas*, 13 U.S.C.M.A. 163, 32 C.M.R. 163 (1962).

<sup>134</sup> See, e.g., *United States v. Niolu*, 2 U.S.C.M.A. 513, 10 C.M.R. 11 (1953).

<sup>135</sup> See, e.g., *United States v. Edwards*, 4 U.S.C.M.A. 299, 15 C.M.R. 299 (1954).

<sup>136</sup> See, e.g., *United States v. Kunak*, 5 U.S.C.M.A. 346, 17 C.M.R. 346 (1954).

<sup>137</sup> See, e.g., *United States v. Schick*, 6 U.S.C.M.A. 493, 20 C.M.R. 209 (1955).

<sup>138</sup> 2 U.S.C.M.A. 400, 9 C.M.R. 30 (1953).

<sup>139</sup> See UCMJ art. 66(c).

<sup>140</sup> *United States v. Burns*, 2 U.S.C.M.A. 400, 405, 9 C.M.R. 30, 35 (1953).

<sup>141</sup> Upon remand a rehearing was ordered at which the accused was again convicted. The Court affirmed this conviction. *United States v. Burns*, 5 U.S.C.M.A. 707, 19 C.M.R. 3 (1955).

litigated at the trial, the Government cannot support findings of guilty upon review with evidence that was available before the trial but which was not presented, nor with evidence obtained after the trial.<sup>142</sup>

It should be kept in mind that when the question of insanity or any other factual issue is presented to the Court, the Court, unlike a board of review, does not possess the authority to determine issues of fact. If the sole question raised on review is the accused's mental responsibility, and the board, in a purely factual determination, concluded the accused to be sane, the board's decision would be binding on the Court.<sup>143</sup> In *United States v. Smith*,<sup>144</sup> after conviction for premeditated murder, the accused underwent extensive psychiatric evaluation. These reports were reviewed by the board of review. The Court found that the board had weighed this post-trial evidence with evidence of record and found that premeditation existed. The Court held: "Since this Court lacks power to determine the weight of the evidence, even as to the issue of sanity, we are without authority to disturb the board's determination—regardless of whether we might have reached an opposite conclusion."<sup>145</sup>

Where the issue of insanity has been fully litigated at the trial level, the Court has been unwilling to direct or authorize further investigation at the appellate level.<sup>146</sup> However, where post-trial insanity matters have been accumulated which might bear upon the accused's mental condition at the time of the offense and at the time of trial which had not been considered by a fact-finding body, the Court in the interest of justice, will generally return the record to a board of review for further consideration in light of the new matter.<sup>147</sup>

The Court takes a cautious approach whenever the death penalty is involved.<sup>148</sup> Such circumspection was shown in *United States v. Dunnahoe*,<sup>149</sup> where the accused was convicted of premeditated murder and sentenced to death. Judge Latimer found

<sup>142</sup> See *United States v. Carey*, 11 U.S.C.M.A. 443, 29 C.M.R. 259 (1960).

<sup>143</sup> *United States v. Smith*, 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954); cf. *United States v. Roland*, 9 U.S.C.M.A. 401, 26 C.M.R. 181 (1958).

<sup>144</sup> 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954).

<sup>145</sup> *Id.* at 344, 17 C.M.R. at 344.

<sup>146</sup> See *United States v. Bunting*, 6 U.S.C.M.A. 170, 19 C.M.R. 296 (1955); cf. *United States v. Burns*, 5 U.S.C.M.A. 707, 19 C.M.R. 3 (1953).

<sup>147</sup> See, e.g., *United States v. Washington*, 6 U.S.C.M.A. 114, 19 C.M.R. 240 (1955).

<sup>148</sup> See, e.g., *United States v. Kunak*, 5 U.S.C.M.A. 346, 17 C.M.R. 346 (1954).

<sup>149</sup> 6 U.S.C.M.A. 745, 21 C.M.R. 67 (1956).

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that it was doubtful whether the trial testimony raised an issue requiring instructions on the effect of a character disorder on the capacity of the accused to premeditate. After holding that the evidence of premeditation was ample to support the finding, he stated: "Accordingly, Judge Quinn would affirm the conviction and sentence, and I would join him, if it were not for the fact that the death penalty was imposed. . . . [B]y directing a reconsideration by a board of review. . . we are granting to the accused all, if not more, rights than he is legally entitled to receive."<sup>150</sup> The case was returned to the board of review to affirm a finding of unpremeditated murder and an appropriate sentence, or to order the accused examined as to his mental capacity to premeditate, permitting the accused to furnish evidence on that issue, and then to reconsider the finding, or to grant a rehearing.

Even in a capital case, however, the Court has been careful to point out that its consideration of post-trial examination and extra-record reports is a discretionary matter which practice will not be generally permitted. In *United States v. Schick*,<sup>151</sup> the Court had before it the record of an accused tried in Japan and sentenced to death for the premeditated murder of a young girl. Insanity was the only issue raised at the trial and the only civilian medical experts available to the accused were Japanese. Two civilian Japanese psychiatrists testified that the accused was mentally irresponsible at the time of the offense. Four Army psychiatrists who testified were of the opposite opinion and found the accused sane. After the appeal was assigned for argument in the Court of Military Appeals, the defense obtained a continuance for the purpose of obtaining examination of the accused by civilian psychiatrists. A team of psychiatrists and psychologists from the Menninger Clinic found the accused unable to adhere to right at the time he committed the offense and considered the accused permanently and incurably ill at the time of this examination. In a unanimous decision, the Court ordered, in view of the unusual circumstances, the case remanded to the board of review for reconsideration of the question of the accused's sanity and evaluation of the civilian report in conjunction with any evidence

. . . it may obtain in an investigation of its own if it considers such investigation necessary or desirable. . . . In taking this action we are not holding out to the accused persons the hope that this Court will

<sup>150</sup> *Id.* at 758-759, 21 C.M.R. at 80-81.

<sup>151</sup> 6 U.S.C.M.A. 493, 20 C.M.R. 209 (1955).

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require boards of review to become trial forums. Only when a situation is as unusual as this can we be asked to exercise our discretion.<sup>152</sup>

In *United States v. Roland*,<sup>153</sup> the question of the accused's sanity had not been raised at trial. Appellate defense counsel obtained a psychiatric report by a board of medical officers after the board of review had affirmed the accused's conviction. The report concluded that at the time of the offense the accused was not mentally responsible and that he did not possess sufficient mental capacity to assist in his defense at trial. The defense petitioned the board for reconsideration of its decision on the basis of the post-trial sanity report. In opposing the petition, the Government presented a directly contrary mental report from the Surgeon General. The board of review reconsidered its prior decision in light of these conflicting reports but concluded that the accused's claim of insanity should be rejected and again affirmed the conviction and sentence. The Court held that neither the report of the board of medical officers or the report of the Surgeon General was admissible as evidence as an official record or business entry exception to the hearsay rule since they were statements of opinion and not of fact and the issue of the sanity of the accused is one of fact.<sup>154</sup> However, the Court held that there was no objection to the board of review considering these post-trial reports for the *limited purpose of determining whether the issue of insanity was raised*.<sup>155</sup>

In *United States v. Thomas*,<sup>156</sup> as in the *Roland* case, the issue of mental responsibility had not been raised at the trial and appellate defense counsel's request for a sanity board hearing was granted. The Army sanity board found the accused insane at the time of the offense, trial and examination. The board of review considered the sanity board's report and held that a reasonable doubt existed as to the accused's mental responsibility for the alleged offense and dismissed the charges. It should be noted that, unlike the *Roland* case, the board did not have before it any reports concluding that the accused was sane both at the time of offense and at trial. The Court of Military Appeals held that the board erred in dismissing the charges since the sanity issue had

<sup>152</sup> *Id.* at 494-495, 20 C.M.R. at 210-11. Upon remand and reconsideration, after considering all of the evidence, the board of review affirmed the findings and sentence and the Court affirmed. *United States v. Schick*, 7 U.S.C.M.A. 419, 22 C.M.R. 209 (1956).

<sup>153</sup> 9 U.S.C.M.A. 401, 26 C.M.R. 181 (1958).

<sup>154</sup> See MCM, 1951, para. 144d.

<sup>155</sup> See MCM, 1951, para. 122c.

<sup>156</sup> 13 U.S.C.M.A. 163, 32 C.M.R. 163 (1962).

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not been submitted to the triers of fact, nor subjected to cross-examination. While the board of review has authority to make findings of fact, such findings must be based upon evidence and the sanity board's opinion was not evidence but only hearsay. The *Roland* case can be distinguished on the ground that there the board of review found the accused mentally responsible and affirmed the charges. The Court went on to say that while the Government is entitled to contest the accuracy of the post-trial psychiatric findings, if there was no disagreement concerning the accused's sanity, and if the parties were agreeable, the issue could be submitted to the board of review for determination by "proper means." The decision of the board was reversed and the case returned for action not inconsistent with the opinion.

Upon remand, further inquiry was made by the board of review. The Surgeon General of the Army reported that the accused lacked mental responsibility at the time of the offenses. Appellate Government and defense counsel then stipulated that the Surgeon General's report reflected the mental condition of the accused at the time of the offenses. The issue having been presented by "proper means," the board concluded that there was a reasonable doubt as to the mental responsibility of the accused and dismissed the charges.<sup>157</sup>

### C. JUDICIAL NOTICE

A court is authorized to notice judicially the existence of certain kinds of facts without the formal presentation of evidence.<sup>158</sup> Matters which have been judicially noticed by the trial court become part of the record and are subject to review just as any other evidence of record. The doctrine of judicial notice also has application at the appellate level. Judicial notice may be taken by the convening authority,<sup>159</sup> the boards of review,<sup>160</sup> and the Court of Military Appeals.<sup>161</sup> Some of the more common matters of which judicial notice has been taken at the appellate level in-

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<sup>157</sup> CM 406421, Thomas, 32 C.M.R. 569 (1962).

<sup>158</sup> MCM, 1951, para. 147a, sets forth the principal matters which courts-martial may judicially notice. See, generally, Radosh, *Judicial Notice*, April 1965 (unpublished thesis at The Judge Advocate General's School).

<sup>159</sup> *Cf.* United States v. Rowe, 13 U.S.C.M.A. 302, 32 C.M.R. 302 (1962).

<sup>160</sup> *E.g.*, CM 399327, Heagy, 26 C.M.R. 641 (1958). *BR rule 18* states in part: "Matters outside the record of trial will not be presented to or argued before a board of review except with respect to . . . d. Matters as to which judicial notice may be taken in military law."

<sup>161</sup> *E.g.*, United States v. Owens, 11 U.S.C.M.A. 240, 29 C.M.R. 56 (1960).

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clude matters of common knowledge, records of other cases, and official regulations and publications.

### 1. *Matters of Common Knowledge.*

Included within this category are matters of general and common knowledge and also matters within the peculiar knowledge of the military community from which the membership of the court-martial has been drawn.

In *United States v. Jones*,<sup>162</sup> the accused was tried in Germany for the wrongful introduction of marihuana into a military station. The evidence at the trial revealed that the "military station" was a "Snack Bar" on the German Autobahn. On appeal it was claimed that there was no evidence of record that the snack bar was a military station. In upholding the conviction, the Court of Military Appeals held that the geographic location of familiar military facilities within the command area is a matter which may be judicially noticed and that the members of the court-martial may take judicial notice that such facilities were operated as military installations.<sup>163</sup> The fact judicially noticed need not be "... generally notorious; it is enough if it is notorious in the military service."<sup>164</sup>

In *United States v. Cook*,<sup>165</sup> the Court made it clear that court members need not put aside their general knowledge of military matters in weighing the evidence. The accused, attached for duty as a medical aid with a machine gun platoon then in reserve but scheduled to go into combat, was convicted of desertion with intent to avoid hazardous duty. On appeal defense claimed that the evidence failed to establish that the accused knew with reasonable certainty that he would be required for such hazardous duty. The Court affirmed the conviction and stated that "... it is common knowledge in the Army, of which this Court may take judicial notice, that medical men are always attached to units such as machine gun platoons when these units are going into combat."<sup>166</sup> Likewise, a court-martial sitting in Japan can take judicial notice of the mission of a local military installation and of the specific

<sup>162</sup> 2 U.S.C.M.A. 80, 6 C.M.R. 80 (1952).

<sup>163</sup> *Accord*, *United States v. Rowe*, 18 U.S.C.M.A. 302, 32 C.M.R. 302 (1962) (legal officer may judicially notice existence of Naval hospital near scene of offense).

<sup>164</sup> *United States v. Uchihara*, 1 U.S.C.M.A. 123, 127, 2 C.M.R. 29, 33 (1952).

<sup>165</sup> 2 U.S.C.M.A. 223, 8 C.M.R. 23 (1953).

<sup>166</sup> *Id.* at 87, 6 C.M.R. at 87.



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mission of a certain unit at such installation;<sup>167</sup> and a court-martial sitting in France may take judicial notice that a certain company stationed in France was composed of aliens recruited in Germany for service in the United States.<sup>168</sup> Judicial notice may be taken of the fact that the United States Army maintained a large scale rotation program in Korea with the average tour of duty varying at different periods;<sup>169</sup> that there is a military community at "APO 7."<sup>170</sup> It has been held, however, that judicial notice may not be taken of the *specific* mission of a certain Strategic Air Command aircraft since it was "specialized knowledge not available with the military community generally."<sup>171</sup>

Matters within the common knowledge of mankind in general may also be the subject of judicial notice at the appellate level. For example, judicial notice may be taken of the existence of hostilities in Korea in 1950;<sup>172</sup> that telephone extensions were in general use in 1934 when Congress enacted the Federal Communications Act;<sup>173</sup> that "cold war" conditions exist between the United States and Russia;<sup>174</sup> and that many American prisoners of war in Korea were subjected to severe brutality or to tremendous psychological pressures which made them do and say things which they might otherwise have avoided.<sup>175</sup>

### 2. *Records of Other Cases.*

The Court of Military Appeals will take judicial notice of other cases before it, and of matters appearing in another court-martial record on file in the records of the Court,<sup>176</sup> but not of the record of another case not before it.<sup>177</sup> The board of review, as an appellate court, can also take judicial notice of its own records including its records of another case.<sup>178</sup> In *United States v. Moore*,<sup>179</sup>

<sup>167</sup> *United States v. Uchihara*, 1 U.S.C.M.A. 123, 2 C.M.R. 29 (1952).

<sup>168</sup> *United States v. Weiman*, 3 U.S.C.M.A. 216, 11 C.M.R. 216 (1953).

<sup>169</sup> See *United States v. Jester*, 4 U.S.C.M.A. 660, 16 C.M.R. 234 (1954).

<sup>170</sup> CM 394327, Heagy, 26 C.M.R. 641 (1958).

<sup>171</sup> ACM 17059, Reyes, 30 C.M.R. 776, 788 (1960).

<sup>172</sup> *United States v. McCrary*, 1 U.S.C.M.A. 1, 1 C.M.R. 1 (1951).

<sup>173</sup> *United States v. De Leon*, 5 U.S.C.M.A. 747, 19 C.M.R. 43 (1955).

<sup>174</sup> *United States v. French*, 10 U.S.C.M.A. 171, 27 C.M.R. 245 (1959).

<sup>175</sup> *United States v. Dickenson*, 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1955).

<sup>176</sup> See *United States v. Grady*, 13 U.S.C.M.A. 242, 32 C.M.R. 242 (1962); *United States v. Moore*, 9 U.S.C.M.A. 284, 26 C.M.R. 64 (1958).

<sup>177</sup> See *United States v. Dickenson*, 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1955); *United States v. Forwerck*, 12 U.S.C.M.A. 540, 31 C.M.R. 126 (1961).

<sup>178</sup> See *United States v. Lovett*, 7 U.S.C.M.A. 704, 23 C.M.R. 168 (1957).

<sup>179</sup> 9 U.S.C.M.A. 284, 26 C.M.R. 26 (1958).

the Court found prejudicial error by taking notice of the contents in a record it had previously reviewed.

### 3. *Military Regulations, Publications, and Orders.*

Judicial notice may be taken of official military regulations and publications,<sup>150</sup> but not if they contain the individual beliefs or opinions of the authors.<sup>151</sup> In *United States v. Williams*,<sup>152</sup> a majority of the Court took judicial notice of a general order and a special order which indicated that certain officers held certain official positions within a given theater command. In *United States v. De Maria*,<sup>153</sup> the trial court took judicial notice of a cut-off date established in a Secretary of the Army message which implemented regulations prohibiting certain military payment certificate transactions. On review, the Court of Military Appeals judicially noticed the transaction procedures prescribed by the Secretary and reversed the conviction after concluding that the accused's actions were not prohibited by the message. And an Army board of review has taken judicial notice that the official Army Table of Organization and Equipment for an Engineer Company shows that a five-ton dump truck described in the record of trial was motor-equipped and self-propelled and therefore was a motor vehicle for sentencing purposes.<sup>154</sup>

When a request is made to the trial court to take judicial notice of a certain fact, opposing counsel is given an opportunity to object and present evidence indicating the non existence of the fact which the court is asked to notice. When judicial notice is being taken for the first time on appellate review, the party against whom it is to be used should be given the same opportunity. For instance, if a reviewing authority is going to notice that official publications show that the dump-truck described in the record was a motor vehicle, the accused should be afforded the opportunity to dispute that "fact." The particular dump-truck may not have been self-propelled but rather a towed vehicle and the point may not have been raised at the trial because it was within the common knowledge at that military community. That

<sup>150</sup> See, e.g., *United States v. Addye*, 7 U.S.C.M.A. 643, 23 C.M.R. 107 (1957); *United States v. Taylor*, 2 U.S.C.M.A. 389, 9 C.M.R. 19 (1953).

<sup>151</sup> *United States v. Schick*, 7 U.S.C.M.A. 419, 22 C.M.R. 209 (1956).

<sup>152</sup> 6 U.S.C.M.A. 243, 19 C.M.R. 389 (1955) (Quinn, C.J., concurring, would not hold that judicial notice may be taken of a Department of the Army special order as distinguished from a general order).

<sup>153</sup> 6 U.S.C.M.A. 585, 20 C.M.R. 301 (1955).

<sup>154</sup> CM 408710, *Miner*, 33 C.M.R. 450, *petition for review denied*, 14 U.S.C.M.A. 670, 33 C.M.R. 436 (1963).

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such a chance for rebuttal should be given appears quite clear when one considers that evidence judicially noted upon review may be used to establish a missing element of proof, contrary to the general rule that the Government cannot support findings of guilty upon review with evidence which was not presented at the trial. The same opportunity for rebuttal should be given the Government when the accused is urging on review that judicial notice should be applied to establish reversible error.

### D. PETITION FOR A NEW TRIAL

A petition for a new trial is an extraordinary remedy which Congress has provided in addition to the normal appellate procedures. It is generally designed to reach extra-record matters which affect the guilt of an accused and thereby prevent an injustice.<sup>185</sup> The statutory basis for a petition for a new trial is provided in article 73 of the Code:

At any time within one year after approval by the convening authority of a court-martial sentence which extends to death, dismissal, dishonorable or bad conduct discharge, or confinement for one year or more, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before the board of review or before the Court of Military Appeals, the Judge Advocate General shall refer the petition to the board or court, as the case may be, for action. Otherwise, the Judge Advocate General shall act upon the petition.

As a new trial will be granted only on the grounds of newly discovered evidence or fraud on the court, such grounds, of necessity, must be presented to a large extent by matters gathered from outside the record of trial.<sup>186</sup> The petition must contain an affidavit of fact pertinent to the newly discovered evidence or fraud on the court relied upon and an affidavit of relevant facts from each person whom the accused expects to present as a witness in the event of a new trial.<sup>187</sup> Sufficient grounds for granting a new trial will be deemed to exist only if, within the discretion of the authority considering the petition, all the facts and information, including, but not limited to, the record of trial, the petition, and other matters presented by the accused, affirmatively

<sup>185</sup> See *United States v. Chadd*, 13 U.S.C.M.A. 488, 32 C.M.R. 438 (1963).

<sup>186</sup> The *USCMA rules* and *BR rules* recognize that matters from outside the record will be considered. *USCMA rule* 54 provides that the Court on considering a petition for a new trial may refer the matter to a referee to make further investigation, to take evidence and to make recommendations to the Court. *BR rule* 18b permits matters from outside the record to be presented to a board with respect to a petition for new trial.

<sup>187</sup> *MCM*, 1951, para. 109e.

establish that an injustice has resulted from the findings or the sentence and that a new trial would probably produce a substantially more favorable result for the accused.<sup>188</sup>

Four tests must be met to satisfy the requirements for a new trial on the grounds of newly discovered evidence.<sup>189</sup> (1) the matters presented must indicate that an injustice has resulted from the findings and sentence;<sup>190</sup> (2) the evidence is newly discovered, *i.e.*, discovered after the trial;<sup>191</sup> (3) due diligence to discover the evidence at the time of trial was exercised;<sup>192</sup> and (4) the newly discovered evidence, if presented to a court, would probably produce a result more favorable to the accused.<sup>193</sup> A new trial on the grounds of fraud on the court will not be granted unless the fraud had a substantially contributing effect upon the findings of guilty or upon the sentence adjudged.<sup>194</sup>

In *United States v. Hood*,<sup>195</sup> the accused was found guilty pursuant to his plea. In a petition for review and a petition for new trial he alleged his plea had been improvidently entered. In a supporting affidavit he stated his plea had been entered only because his defense counsel and the law officer threatened him with a long period of confinement if he did not plead guilty. Affidavits of the defense counsel and law officer categorically denied these allegations. "Out of a superabundance of caution," the Court decided to personally hear testimony from each of the affiants in open court. When the accused took the witness stand before the Court he promptly repudiated the material assertions in his affidavit. The Court then had no trouble in affirming the conviction.

### E. OTHER MATTERS

The Court of Military Appeals has recognized that matters outside the record, in areas other than those which have been con-

<sup>188</sup> MCM, 1951, para. 109d(1).

<sup>189</sup> See MCM, 1951, para. 109d(2); *United States v. Childs*, 5 U.S.C.M.A. 270, 17 C.M.R. 270 (1954).

<sup>190</sup> See *United States v. Malumphy*, 13 U.S.C.M.A. 60, 32 C.M.R. 60 (1962).

<sup>191</sup> Cumulative evidence or a "new" expert interpretation of evidence where the issue has been fully litigated at the trial is not newly discovered evidence. *United States v. Hurt*, 9 U.S.C.M.A. 735, 27 C.M.R. 3 (1958); *United States v. Henderson*, 11 U.S.C.M.A. 556, 29 C.M.R. 372 (1960).

<sup>192</sup> See *United States v. Woolbright*, 12 U.S.C.M.A. 450, 31 C.M.R. 36 (1961).

<sup>193</sup> See *United States v. Day*, 14 U.S.C.M.A. 186, 33 C.M.R. 398 (1963).

<sup>194</sup> MCM, 1951, para. 109d(3). Perjured testimony of the chief prosecution witness is a fraud on the court warranting a new trial. CM 404781, *Parkas*, 30 C.M.R. 548 (1961).

<sup>195</sup> 9 U.S.C.M.A. 358, 26 C.M.R. 338 (1958).

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sidered, may be acted upon by the boards of review and the Court to prevent a miscarriage of justice or whenever a fundamental right is involved. One such area has been the providence of a guilty plea.

In many cases it is difficult to distinguish between a claim of improvidence of a plea and a charge of inadequate representation of counsel. An allegation of one will often include an imputation of the other. In either case, certain general principles have been established.

An accused is entitled to adequate representation by his defense counsel regardless of the nature of the charges preferred or the pleas entered.<sup>196</sup> Being a layman in legal matters he is compelled to rely upon the advice of his counsel. Once having accepted the advice and assistance of counsel, the accused is bound by his counsel's knowledge of the law, conduct of the case, and representations, concessions, and stipulations made at trial.<sup>197</sup> Also, a plea of guilty is a complete judicial confession of guilt.<sup>198</sup> Despite these principles, or perhaps because of them,<sup>199</sup> the Court of Military Appeals has permitted the challenge of a guilty plea upon any grounds that suggest improvidence. Normally, such grounds will be disclosed from the record of trial itself. However, the improvidence may appear from post-trial declarations of the accused,<sup>200</sup> in the post-trial review of the staff judge advocate,<sup>201</sup> and may even be raised for the first time on appeal before the board of review,<sup>202</sup> or the Court of Military Appeals.<sup>203</sup> Post-trial statements submitted in connection with the appeal may also be used to defeat a claim of inadequate representation,<sup>204</sup> but any doubt in this area is resolved in favor of the accused, and requires corrective action.<sup>205</sup>

<sup>196</sup> *United States v. Huff*, 11 U.S.C.M.A. 397, 29 C.M.R. 213 (1960).

<sup>197</sup> See, e.g., *United States v. Kraskouskas*, 9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958); *United States v. Ransom*, 4 U.S.C.M.A. 195, 15 C.M.R. 195 (1954); *United States v. Cambridge*, 3 U.S.C.M.A. 377, 12 C.M.R. 133 (1953).

<sup>198</sup> *United States v. Brown*, 11 U.S.C.M.A. 207, 29 C.M.R. 23 (1960).

<sup>199</sup> See Cobbs, "The Court of Military Appeals and the Defense Counsel," 12 *Mil. L. Rev.* 131 (1961), wherein the author suggests that the liberal approach of the Court to this problem "demonstrates a marked dissatisfaction with the behavior of counsel in general."

<sup>200</sup> See *United States v. Lemieux*, 10 U.S.C.M.A. 10, 27 C.M.R. 84 (1958).

<sup>201</sup> See *United States v. Hood*, 8 U.S.C.M.A. 473, 24 C.M.R. 283 (1957).

<sup>202</sup> See *United States v. Williams*, 15 U.S.C.M.A. 65, 35 C.M.R. 37 (1964).

<sup>203</sup> See *United States v. Killgore*, 8 U.S.C.M.A. 633, 25 C.M.R. 187 (1958).

<sup>204</sup> *United States v. Chadwell*, 13 U.S.C.M.A. 361, 32 C.M.R. 361 (1962).

<sup>205</sup> *United States v. Epperson*, 10 U.S.C.M.A. 582, 28 C.M.R. 148 (1959); cf. *United States v. Fernengel*, 11 U.S.C.M.A. 535, 29 C.M.R. 351 (1960).

## 32 MILITARY LAW REVIEW

In *United States v. Allen*,<sup>206</sup> pursuant to a pretrial agreement, the accused pleaded guilty to a charge of desertion. During sentencing procedures, defense counsel presented no evidence in extenuation or mitigation nor did he make any argument or statement in the accused's behalf. Before the Court, the accused contended he was deprived of the effective assistance of counsel, and submitted an affidavit of matters in mitigation which were available and known to trial defense counsel but not submitted to the trial court. These matters in mitigation also appeared in the allied papers and the staff judge advocate's review. The Court held that if the allegations were true, then the accused was not adequately represented and reversal must follow. However, his former defense counsel filed an affidavit with the Court refuting the accused's affidavit. The Court found it impossible to choose between the conflicting allegations. Since a board of review is vested with fact-finding powers, the record was returned to the board for a hearing and the taking of sworn testimony.<sup>207</sup> The Court recognized that in civilian jurisdictions such a hearing would normally be held by the trial judge, but that a law officer, the military counterpart of a civilian trial judge, is limited to acting in the particular court-martial to which he is assigned.<sup>208</sup> Therefore, the law officer would not be in a position to take any action to resolve the issue.

The approach taken by the Court in the *Allen* case would appear to solve the problems encountered in the "battle of affidavits" on appellate review. However, as subsequent cases have revealed, the problem is still as muddled as ever. Also, no matter what procedure is employed, there will continue to be differences of opinion whether the extra-record matters alleged are sufficient to raise an issue requiring further investigation.<sup>209</sup>

The *Allen* approach was used by a board of review in *United States v. Henn*<sup>210</sup> when conflicting post-trial affidavits were pre-

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<sup>206</sup> 8 U.S.C.M.A. 504, 25 C.M.R. 8 (1957).

<sup>207</sup> *Accord*, *United States v. Armell*, 8 U.S.C.M.A. 513, 25 C.M.R. 17 (1958).

<sup>208</sup> See *United States v. Robinson*, 13 U.S.C.M.A. 674, 33 C.M.R. 206 (1963).

<sup>209</sup> In *United States v. Friberg*, 8 U.S.C.M.A. 515, 25 C.M.R. 19 (1957), the issues were the same as in the *Allen* case. After examining the record of trial and the affidavits, the Court stated it found no basis for the accused's allegations and affirmed the conviction. *United States v. Killgore*, 8 U.S.C.M.A. 633, 25 C.M.R. 137 (1958), held that an accused will be denied the type of relief set forth in the *Allen* case where from an examination of the counter-affidavits and a reading of the entire record, he fails to make out a *prima facie* case.

<sup>210</sup> 13 U.S.C.M.A. 124, 32 C.M.R. 124 (1962).

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sented to the board. An investigation ordered by the board tended to corroborate the accused's claim that he had never admitted guilt to his counsel and that he pleaded guilty only on the advice of his non-lawyer counsel which, from the latter's affidavit and testimony, was based on an erroneous impression of the evidence. The Court considered the post-trial information and held that accused's contention of improvidence was supported sufficiently to a warrant a rehearing. However, where the board of review's post-trial investigation has been incomplete or if new extra-record matters are presented to the Court which raise a doubt as to the providency of a plea, the record will be returned to the board for further consideration.<sup>211</sup>

In a recent decision, the Court of Military Appeals has further relaxed the procedural barriers to the consideration of extra-record information by holding that the providence of a guilty plea may be raised for the first time on appeal by unsworn statements.<sup>212</sup> In *United States v. Williams*,<sup>213</sup> appellate defense counsel submitted to the board of review two unsworn letters, one by the trial defense counsel and one by the accused, in support of an assignment of error that the accused's plea was improvidently entered. The Government's contention that the letters could not be considered since they were outside the record was brushed aside by the Court. Instead, the Court held that the case was sufficiently similar to the *Henn* case to warrant an investigation by the board into the providence of the plea.

Consideration of extra-record matters has also been extended to the challenge of the fairness and impartiality of the staff judge advocate's pretrial advice and post-trial review.<sup>214</sup>

In *United States v. Hardy*,<sup>215</sup> defense counsel alleged in affidavits that the post-trial review, though signed by the staff judge advocate, was actually prepared by a certain assistant who was disqualified because he had actively participated in the prosecution of the case. The board of review denied the accused any relief since the disqualification of the reviewer did not appear as a

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<sup>211</sup> *United States v. Forster*, 13 U.S.C.M.A. 162, 32 C.M.R. 162 (1962).

<sup>212</sup> *United States v. Williams*, 15 U.S.C.M.A. 65, 35 C.M.R. 37 (1964).

<sup>213</sup> *Ibid.*

<sup>214</sup> *United States v. Callahan*, 10 U.S.C.M.A. 156, 27 C.M.R. 230 (1959); *United States v. Kema*, 10 U.S.C.M.A. 272, 27 C.M.R. 346 (1959). Such extra-record matter has been treated as a supplementary or additional designation of record. *United States v. King*, 8 U.S.C.M.A. 392, 24 C.M.R. 202 (1957). *But see United States v. Johnson*, 8 U.S.C.M.A. 173, 23 C.M.R. 387 (1957).

<sup>215</sup> 11 U.S.C.M.A. 521, 29 C.M.R. 337 (1960).

matter of record. The Court held that the accused had presented more than a naked charge of unfairness by naming a particular individual and submitting substantiating affidavits. The record was returned to the board for further inquiry into the matter, citing the *Hood* and *Allen* cases. Upon remand, the board of review was unable to obtain a sworn statement from the staff judge advocate, who had since retired, and the affidavit obtained from his assistant was equivocal. On appeal, appellate defense counsel complained that the board's inquiry was insufficient and lacked confrontation. The Court held an undetermined factual issue still existed, and, in the "interests of justice," a new post-trial review was ordered.<sup>216</sup>

An accused has a right to be represented by "military counsel of his own selection if reasonably available."<sup>217</sup> In *United States v. Cutting*,<sup>218</sup> the record of trial failed to reflect whether the denial of the accused's request for an individual military lawyer had been acted upon by the convening authority or the basis for counsel's unavailability. Because of the incomplete record concerning a "fundamental right," the decision of the board affirming the conviction was reversed and a rehearing authorized. The Court believed that:

. . . the matter should be resolved at the primary level at which an appropriate showing may be made by both parties. . . . [T]here are numerous, unanswered factual questions here that should be resolved at a level where testimony can be taken, witnesses examined, and testimony offered in rebuttal. In this manner the rights and interests of the accused and the Government will be preserved. . . .<sup>219</sup>

The right to a speedy trial is another substantial right guaranteed to the accused in the Code.<sup>220</sup> Until recently, it had been assumed that, absent any manifest miscarriage of justice, the right to object to a denial of a speedy trial was waived if not

<sup>216</sup> 12 U.S.C.M.A. 513, 31 C.M.R. 99 (1961).

<sup>217</sup> UCMJ art. 38(b). The initial determination of availability, subject to appeal and review, is made by the convening authority. MCM, 1951, para. 48b. See *United States v. Vanderpool*, 4 U.S.C.M.A. 561, 16 C.M.R. 135 (1954).

<sup>218</sup> 14 U.S.C.M.A. 347, 34 C.M.R. 127 (1964).

<sup>219</sup> *Id.* at 352, 34 C.M.R. at 132. In a recent case the accused requested counsel. The request was denied, and other qualified counsel was appointed. The Article 32 investigating officer indicated on the appropriate form that requested counsel was not reasonably available, but he did not explain the reason for nonavailability. The Court of Military Appeals held that, since there was no objection made at the article 32 hearing or trial of the non-availability of requested counsel, the objection was waived. *United States v. Mitchell*, 15 U.S.C.M.A. 516, 36 C.M.R. 14 (1965).

<sup>220</sup> See UCMJ arts. 10, 33, 98.



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raised at the trial.<sup>221</sup> However, in *United States v. Schalck*,<sup>222</sup> after pleading guilty at the trial, the accused for the first time asserted before the board of review that he was denied military due process by reason of the fact he was confined for ninety-six days without being informed of the charges against him. Because the record lacked any explanation for the delay, the board agreed with the accused and dismissed the charges. Upon certification, the Court reversed, holding that while the delay in preferring charges was not waived by a failure to raise the issue at trial, the board erred in dismissing the charges since the Government was never accorded a hearing upon the question. The Court, just as in the *Cutting* case, found that there were "numerous, unanswered factual questions here that should be resolved at a level where testimony can be taken, witnesses examined, and testimony offered in rebuttal"<sup>223</sup> in order to preserve the rights and interests of the parties. However, unlike the *Cutting* case, a rehearing was not ordered and no other guidelines were given as to the type and nature of the proceedings contemplated.

Upon remand, the board of review neatly side-stepped this problem by returning the case to the convening authority for "further proceedings" not inconsistent with the mandate of the Court! At the lower level, the initial review and action were withdrawn and a new review and action substituted. Trial counsel and defense counsel were appointed to represent the respective parties and affidavits they obtained were made a part of the new review. Before the board for the third time, the case was once again returned to the convening authority because the "further proceedings" did not conform to the original mandate. The board rejected the Government's contention that the single issue raised could be resolved by a new court-martial convened for that purpose.<sup>224</sup> The board indicated that since it was bound by the Court's action reinstating the conviction, only the convening authority could legally order a rehearing. The record was again remanded for compliance with the appellate mandate. The convening au-

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<sup>221</sup> *United States v. Wilson*, 10 U.S.C.M.A. 398, 27 C.M.R. 472 (1959); *United States v. Hounshell*, 7 U.S.C.M.A. 3, 21 C.M.R. 129 (1956).

<sup>222</sup> 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964).

<sup>223</sup> *Id.* at 374, 34 C.M.R. at 154.

<sup>224</sup> Citing *Miller v. United States*, 173 F.2d 922 (6th Cir. 1949), which held that there is no authority for a partial new trial in a criminal case and that a defendant is entitled to retrial upon all relevant issues present. *But see United States v. Steidley*, 14 U.S.C.M.A. 108, 33 C.M.R. 320 (1963), where the Court ordered a rehearing on the sentence of three specifications, and a jurisdictional issue of a fourth specification was to be determined by the taking of evidence.

thority could disapprove the findings and sentence and dismiss the charges, or order a rehearing if practicable.<sup>225</sup>

It is submitted that the board of review was in error. If the board could not order a rehearing, then neither could the convening authority. Both are bound by the mandate of a higher appellate authority. When the Court of Military Appeals returns a case, its orders must be complied with without modification or alteration by those below.<sup>226</sup> Granted, the mandate was obscure and ill-conceived, but ". . . the appropriate place to seek relief from an oppressive order is with the tribunal which issued it."<sup>227</sup> What then of the mandate of the Court? The Court was simply returning the case for a fact-finding hearing upon a single collateral issue and not for a full rehearing as in the *Cutting* case where the factual question raised went to the guilt or innocence of the accused. The problem recognized by the board was that there was no adequate procedure in the military system for a full-scale post-conviction hearing "where testimony can be taken, witnesses examined, and testimony offered in rebuttal." A possible solution to this major deficiency in the Code will be discussed in the next part.

## VI. CONCLUSIONS AND RECOMMENDATIONS

The traditional concept of an appellate review based solely on the record of trial has undergone drastic changes as a result of decisions by the United States Court of Military Appeals. The traditional restrictions against the consideration of matters *dehors* the record has virtually been discarded. The liberal approach taken by the Court in this area has extended to all phases of pretrial, trial, and post-trial proceedings. Whenever a "fundamental right" is involved or the "interests of justice" so require, the Court will inquire into any alleged injustice even though it may become necessary to look behind and beyond the record and irrespective of any procedural niceties. The Chief Commissioner, United States Court of Military Appeals, has noted that the Court ". . . sua sponte has repeatedly directed parties to file additional information, affidavits, exhibits, etc., to develop ques-

<sup>225</sup> CM 408904, Schalck, 2 Sept. 1964.

<sup>226</sup> See *United States v. Stevens*, 10 U.S.C.M.A. 417, 27 C.M.R. 491 (1959).

<sup>227</sup> *United States v. Kepperling*, 11 U.S.C.M.A. 280, 285, 29 C.M.R. 96, 101 (1960).

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tionable or incomplete items." <sup>228</sup> The Judge Advocates General of the armed forces took cognizance of this new form of review when, in 1961, the *BR* rules were amended to authorize a board of review to consider "[s]uch other matters [outside the record of trial] as a board of review may determine to be proper under substantive law." <sup>229</sup>

Notwithstanding the fact that the framers of the Code believed that the appellate review provided in the Code was so substantially improved over past military practices as to insure a complete and thorough review on all issues, <sup>230</sup> actual practice has proven otherwise. The approach taken by the Court of Military Appeals has been necessitated by the absence of any military judicial device for a post-trial collateral attack or a post-trial conviction hearing. <sup>231</sup> The civilian criminal system, and the federal system in particular, provide for such post-trial attacks. <sup>232</sup>

Upon collateral review or in a post-conviction hearing, the scope of review is not limited to the record of the trial court and the record itself is subject to impeachment or contradiction. A searching judicial inquiry into the truth and substance of the application for relief is made in order to preserve and safeguard the rights of the defendant though it may become necessary to look outside the record for that purpose. <sup>233</sup> The taking of evidence orally, by deposition, and even by affidavit is permitted. Evidence *dehors* the record is admissible to overcome the presumption of regularity which the record of trial imports. <sup>234</sup>

The cases in which the Court of Military Appeals has enlarged the scope of review to include extra-record attack closely parallel the development and expansion of the scope of the writ of habeas corpus as affected by decisions of the United States Supreme

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<sup>228</sup> TEDROW, *DIGEST-ANNOTATED AND DIGESTED OPINIONS, U.S. COURT OF MILITARY APPEALS* 71 (Cumulative Supp., 1 Feb. 1963). He goes on to comment that one-third of the Court's opinions have involved issues raised at that level in the Court's *de novo* review.

<sup>229</sup> *BR* RULE 18e. This change only acknowledges the inherent authority of an appellate tribunal to apply substantive rules of law.

<sup>230</sup> See *Hearings before Subcommittee of the House Armed Services Committee on H.R. 2498*, 81st Cong., 1st Sess. 1210-17 (1949).

<sup>231</sup> The post-trial relief provided by a petition for a new trial under UCMJ art. 73 is woefully inadequate. See Part V. D., *supra*.

<sup>232</sup> See, e.g., 28 U.S.C. §§ 2241, 2255 (1958). See generally SOXOL, *FEDERAL HABEAS CORPUS* (1965).

<sup>233</sup> *Frank v. Mangum*, 237 U.S. 309 (1915).

<sup>234</sup> *Walker v. Johnston*, 312 U.S. 275 (1941).

Court.<sup>235</sup> It is expected that the Court of Military Appeals will continue to consider matters outside the record of trial whenever required in the interests of justice. Under the expanded scope of federal inquiry upon habeas corpus by a military prisoner, any retreat by the Court from its present liberal position on the treatment of extra-record matter would result in a deluge of applications for habeas corpus on the ground that the ". . . military decision has [not] dealt fully and fairly with an allegation raised in that application . . ." <sup>236</sup> by not affording an accused the opportunity to tender the issue.<sup>237</sup>

Assuming then that military reviewing authorities will continue to examine matters outside the record of trial, the problem next presented is the procedural aspects involved in the disposition of issues raised therefrom. Allegations of error or prejudice based on extra-record information which are patently without merit, or raise no genuine issue, may be disposed of in the same manner as similar allegations raised from the record of trial.<sup>238</sup> Where a prima facie case for relief is alleged, the Court of Military Appeals has used various approaches in disposing of the issue.

If the extra-record matters submitted by the parties are not in material dispute, reviewing authorities may determine the issue and, where necessary, take appropriate corrective action, just as if the matters were a part of the record of trial.<sup>239</sup> Where the issues are in material dispute, the Court has returned the record to the board of review for disposition with an appropriate man-

<sup>235</sup> *E.g.*, compare *Moore v. Demsey*, 261 U.S. 86 (1923) (mob control), with *United States v. Ferguson*, 5 U.S.C.M.A. 68, 17 C.M.R. 68 (1954) (command control); compare *Waley v. Johnston*, 316 U.S. 101 (1942) (coerced guilty plea), with *United States v. Hood*, 9 U.S.C.M.A. 558, 26 C.M.R. 338 (1958) (coerced guilty plea); compare *Walker v. Johnston*, 312 U.S. 275 (1941), and *Johnson v. Zerbst*, 304 U.S. 458 (1938) (denial of counsel), with *United States v. Cutting*, 14 U.S.C.M.A. 347, 34 C.M.R. 127 (1964) (denial of counsel).

<sup>236</sup> *Burns v. Wilson*, 346 U.S. 139, 142 (1953).

<sup>237</sup> *Whichel v. McDonald*, 340 U.S. 122 (1950); *cf.* *Fay v. Noia*, 372 U.S. 391 (1963); *Case v. Nebraska*, 381 U.S. 336 (1965).

<sup>238</sup> See, *e.g.*, *United States v. Killgore*, 8 U.S.C.M.A. 683, 25 C.M.R. 137 (1958); *cf.* *United States v. Chadwell*, 13 U.S.C.M.A. 361, 32 C.M.R. 361 (1962).

<sup>239</sup> See, *e.g.*, *United States v. Henn*, 13 U.S.C.M.A. 124, 32 C.M.R. 124 (1962). *United States v. Roberts*, 7 U.S.C.M.A. 322, 22 C.M.R. 112 (1956); *United States v. Ferguson*, 5 U.S.C.M.A. 68, 17 C.M.R. 68 (1954); *United States v. Walters*, 4 U.S.C.M.A. 617, 16 C.M.R. 191 (1954); *cf.* *United States v. Solak*, 10 U.S.C.M.A. 440, 28 C.M.R. 6 (1959).

## MATTERS OUTSIDE TRIAL RECORD

date.<sup>240</sup> Where there are unanswered factual issues which cannot be adequately resolved at the appellate level by proper means, the Court has authorized return of the record to the primary level for a rehearing,<sup>241</sup> or a new post-trial review,<sup>242</sup> as appropriate.

The attempts of the Court of Military Appeals to do justice where apparent prejudicial error or a violation of a fundamental right has been urged in connection with matters outside the record of trial has wrought disorder and confusion in military appellate procedures. It is suggested that this "muddled appellate process," which has often degenerated into a "battle of affidavits," demonstrates the need for an amendment to the Code authorizing a post-trial hearing. Such a hearing could also be used for reformation of the record of trial. The rights and interests of the accused as well as those of the Government require that such action be taken. The civil criminal system has long since recognized the need for such a procedure. The need is just as great within the military. The Court's current practice of using the board of review as a fact-finding "referee",<sup>243</sup> has proven to be impractical and ineffectual in actual operation. Unless one of the parties to the dispute is willing to retreat from its position and submit the issue to the board by "proper means," the board, lacking subpoena power and otherwise ill-equipped to conduct a full-scale hearing, is generally reduced to making feeble attempts to obtain more extra-record information by way of affidavits, which only serve to compound the problem. An appellate tribunal is not the proper forum for a total or partial trial *de novo*.

When a court-martial conviction is undergoing appellate review and matters from outside the record present ". . . numerous, un-

<sup>240</sup> See *United States v. Williams*, 15 U.S.C.M.A. 65, 35 C.M.R. 37 (1964) (for investigation); *United States v. Strahan*, 14 U.S.C.M.A. 41, 33 C.M.R. 253 (1963) (for determination by the board of review or the convening authority); *United States v. Thomas*, 13 U.S.C.M.A. 163, 32 C.M.R. 163 (1962) (for disposition by proper means or a rehearing); *United States v. Forster*, 13 U.S.C.M.A. 162, 32 C.M.R. 162 (1962) (for consideration of the new matter presented); *United States v. Hardy*, 11 U.S.C.M.A. 521, 29 C.M.R. 337 (1960) (for further inquiry); *United States v. Allen*, 8 U.S.C.M.A. 504, 25 C.M.R. 8 (1957) (for a board hearing and determination of the dispute); *cf. United States v. Schalck*, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964) (for a hearing).

<sup>241</sup> *E.g.*, *United States v. Cutting*, 14 U.S.C.M.A. 347, 34 C.M.R. 127 (1964); *United States v. Thomas*, 13 U.S.C.M.A. 163, 32 C.M.R. 163 (1962); *cf. United States v. Steidley*, 14 U.S.C.M.A. 108, 33 C.M.R. 320 (1963) (sentence rehearing combined with a hearing on jurisdictional issue over one specification).

<sup>242</sup> *E.g.*, *United States v. Hardy*, 12 U.S.C.M.A. 513, 31 C.M.R. 99 (1961).

<sup>243</sup> See note 240 *supra* and accompanying text.

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answered factual questions . . . that should be resolved at a level where testimony can be taken, witnesses examined, and testimony offered in rebuttal,"<sup>244</sup> it is submitted that such a showing may only be adequately made by a judicial inquiry at the trial level.<sup>245</sup> Because of the inadequacies in the present military system, very often a complete rehearing must be held even where the issue in dispute does not go to guilt or innocence but only extends to a possible plea in bar of trial. A review by way of a post-trial hearing<sup>246</sup> would be best suited to solve the problems discussed in this study. Administrative difficulties which would be created by use of a post-conviction hearing of the type recommended would be no greater than those encountered in ordering a complete rehearing on the findings and sentence nor greater than those experienced in civilian jurisdictions which provide for such a post-trial remedy.<sup>247</sup>

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<sup>244</sup> *United States v. Schalck*, 14 U.S.C.M.A. 371, 374, 34 C.M.R. 151, 154 (1964).

<sup>245</sup> See *Townsend v. Sain*, 372 U.S. 298 (1963), holding that post conviction procedures should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable reviewing courts to determine the sufficiency of those hearings.

<sup>246</sup> The possible use of a hearing by a board of officers under Army Reg. No. 15-6 (3 Nov. 1960), or by a court of inquiry under UCMJ art. 135, has been considered. Such hearings are too administrative in nature to be incorporated within a criminal judicial system.

<sup>247</sup> The exigency for a military post-trial remedy has been intensified in the recognition by the Court of Military Appeals that it has the power to grant relief encompassed within the writ of *coram nobis*. *United States v. Frischholz*, No. 14,270, U.S. Ct. M. App., 25 Mar. 1966. Such relief must be supported by affidavits or other appropriate showing as to matters not of record. See generally 49 C.J.S. *Judgments* §§ 811-18 (1947).

## MILITARY LAW IN AFRICA: AN INTRODUCTION TO SELECTED MILITARY CODES\*

By Major Albert P. Blaustein \* \*

*As a means of providing readily available material in the comparative law field, the Military Law Review periodically publishes articles on the military legal systems of other nations. This article continues that practice in presenting an introduction to the military justice codes of three African nations: Nigeria, Ghana, and the Sudan.*

### I. INTRODUCTION

Similarities rather than differences highlight most studies in comparative law. And the study of comparative military law constitutes no exception. This is to be expected. Armed forces throughout the world face the same problems. They must of necessity make provision for such universal crimes as homicide and theft; they must of necessity make provision for such common and peculiarly military offenses as desertion. And there are only so many legal responses which can be developed to meet these problems.

Further, most codes of military justice are based upon—and in substantial measure copied from—other older codes. America's first Articles of War differed little from the Articles of War which governed the troops of England's George III. As is to be expected, the emerging nations of Africa have likewise modeled their mili-

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tary law on patterns developed for the armed forces of the former colonial powers.

Of course there are differences. Punishment for the "possession of or smoking hashish or bango" is provided for in section 35 of the Armed Forces Act of the Sudan. And section 78(2) of the Armed Forces Act of Ghana sets forth special punishments for "boys"—a "boy" being defined in section 98 as "a male person over the age of thirteen years enrolled in the Army and below the prescribed maximum age." Yet the similarities are far more significant.

But before analyzing any of the characteristics of African military law, it is essential to outline the essentially limited scope of this study. Only three African nations are discussed in this study: Nigeria, Ghana and the Sudan. Such discussion further involves consideration of the military laws of Great Britain and Canada. In addition, the *Uniform Code of Military Justice* of the United States will be cited and referred to for comparative purposes.

Why Nigeria, Ghana and the Sudan? To understand the nature and importance of these countries in the totality of African law, it is necessary to provide some introductory comments on the nature of Africa and its legal background.

## II. THE MANY AFRICAS

With an area of 11,500,000 square miles—nearly four times as great as the continental United States—Africa possesses many different and varied cultures. There is no one Africa. From the legal point of view there are at least five Africas. Only one of these will be considered in this study.

Most interest today centers on "emerging" or "developing" Africa—meaning the new nations South of the Sahara. That eliminates any consideration of the United Arab Republic (generally classified as a Middle Eastern country) and the other primarily Arabic nations bordering on the Mediterranean. "South of the Sahara," in the parlance of Africanists, also implies "North of the Lampopo," since that river divides developing Africa from the South African Republic. And South Africa is a nation which differs greatly from the rest of the continent in almost everything, including the possession of a legal system based on Roman-Dutch law which is itself unique. A third Africa which is outside the compass of emerging Africa consists of the still-existing Spanish and Portuguese territories, none of which is close to independence,



"New" Africa is usually characterized as either Francophonic<sup>1</sup> or Anglophonic. The distinction is essentially valid: in terms of ties with former colonial powers, in terms of language, in terms of economies and, certainly, in terms of law. In Francophonic Africa are the nations which once comprised French West Africa, French Equatorial Africa and Madagascar, plus the three nations which were formerly Belgian colonies: Republic of the Congo (Leopoldville), Rwanda and Burundi. Since Belgian law is French law with minimal exceptions, all of these countries have essentially the same legal heritage and are developing their own legal systems on this foundation.

The fifth Africa—the one of most importance in the beginnings of this military law study—is Anglophonic Africa. It is usually broken down as follows:

West Africa: Nigeria, Ghana, Sierra Leone and Gambia

East Africa: Kenya, Tanzania, Uganda, Sudan and, for the most part, the Somali Republic

Central Africa: Rhodesia, Zambia and Malawi

High Commission Territories: Bechuanaland, Basutoland and Swaziland

This includes all of Africa except for the long-independent states of Liberia and Ethiopia. The former has a legal system based almost entirely on American law, and thus must also be considered as Anglophonic.

Ethiopia is a special exception in all discussions about the African continent. It has a civil code based on the French pattern<sup>2</sup> and a criminal code drafted by a Swiss scholar.<sup>3</sup> Yet its military law, with notable exceptions, retains an English orientation, and Ethiopia must be classified as Anglophonic for the purposes of a study on African military law.

It is the military law of three selected countries in Anglophonic Africa which will be considered here.

Nigeria is by far the most important country in Africa. One out of every five Africans lives within the borders of this Federa-

<sup>1</sup> Francophonic Africa refers to that part of Africa where the European language used is French; Anglophonic Africa refers to that part where the English is the European language used.

<sup>2</sup> See ETHIOPIAN CIVIL CODE OF 1960, *Negarit Gazeta*, Extraordinary Issue No. 2, 1960 (drafted by Professor René David).

<sup>3</sup> See ETHIOPIAN PENAL CODE OF 1957, *Negarit Gazeta*, Extraordinary Issue No. 1, 1957; ETHIOPIAN CRIMINAL PROCEDURE CODE OF 1961, *Negarit Gazeta*, Extraordinary Issue No. 1, 1961 (drafted by Dean Jean Graven, Faculty of Law, University of Geneva).

tion. Its 55,000,000-plus population makes it more than twice as large as any other nation on the continent. It is likewise of prime importance in Africa's economic developments. Thus the study of every phase of African law must (or at least should) begin with a study of the law of Nigeria.

Ghana is also of prime importance in the study of African law. This was the first of the "new" nations to gain its independence. And while independence only dates back to 1957, Ghana is still the "new" country with the most experience with the law and (with the possible exception of Nigeria) the one with the most literature on its legal system. The special relationship between the military law of Canada and Ghana also makes this an important country to be considered.

There are several reasons why the military law of the Sudan is likewise considered in this study. To begin with, the Sudan is the most populous nation of Anglophonic East and Central Africa. But that is not the most important reason. What makes the Sudanese law of special interest is its amalgam of English, Indian and Islamic legal principles. It is also important because it has provided the model for the penal code of Northern Nigeria, which is different from the penal law of the rest of Nigeria.

Before considering specific provisions of the military laws of these three countries, a preliminary word is necessary on the *general* influence of English law—particularly English penal law—on Anglophonic Africa.

### III. INFLUENCE OF ENGLISH LAW

There is no one generalization which can be made concerning the influence of English law on African nations. As a leading African legal authority, Antony Allott, has pointed out:

The mode of introduction of English law into newly acquired territories under the Crown, whether colonies, protectorates, protected states or trust territories, varies (partly as a consequence of the way in which the particular territory was acquired). First of all, a distinction is usually made between *settled*, and *conquered or ceded* colonies.\* [Emphasis in original.]

Further, the modes of reception of English law vary considerably. These are classified by Professor Allott under five headings:

(a) Introduction by English settlers.

(b) Introduction by the imperial government by Order in Council or Act of the imperial parliament.

\* ALLOTT, *ESSAYS IN AFRICAN LAW* 3 (1960).

(c) General reception of all English law, or of all English law on a particular topic (e.g. the law of crime, the law of real property by local ordinance).

(d) Adoption of specific English enactments.

(e) Adaptation and re-enactment of English law, in local ordinances (e.g. company law or adoption law).<sup>5</sup>

And, of course, much English law came to the former African colonies second-hand, through the adoption of Indian laws based on English precepts.

On the influence of English penal law in particular, Ghana Justice N. M. Ollennu makes this statement regarding the four Commonwealth West African countries (Gambia, Sierra Leone, Ghana and Nigeria) :

As to criminal law, it must be pointed out that, apart from Northern Nigeria, which because of predominant Islamic influence adopted the Sudan Penal Code (based upon the Indian Penal Code), the criminal law and procedure in each of the territories save Sierra Leone is almost entirely governed by Criminal Codes and Criminal Procedure Codes, passed by the various legislatures and based upon the English criminal law. As far as Sierra Leone is concerned the criminal law is the common law as to crime.<sup>6</sup>

The present penal codes of both the Sudan and Northern Nigeria go back to the Indian Penal Code of 1860. However, this was not always the situation in Northern Nigeria. The Nigerian Criminal Code

itself first arrived on the African continent in Northern Nigeria in 1904, and was closely based upon the famous Queensland Criminal Code of 1899. From Northern Nigeria it was extended to the whole of Nigeria in 1916 upon the amalgamation of the Nigerian dependencies, and it is still in force throughout Nigeria except for the Northern Region, where . . . it was replaced by a new code, based upon that of the Sudan, in 1959.<sup>7</sup>

The origin of Ghana's Criminal Code, extensively revised in 1960, is found in the St. Lucia Code of 1889 which, in turn, was derived from a code drafted for Jamaica which never went into effect.<sup>8</sup>

While Ethiopian military law will not be considered in this preliminary study, a few words on its origin will indicate the com-

<sup>5</sup> *Id.* at 5-6. Footnotes omitted.

<sup>6</sup> Ollennu, *The Influence of English Law on West Africa*, 5 J. AFRICAN L. 21, 25 (1961).

<sup>7</sup> Read, *Criminal Law In the Africa of Today and Tomorrow*, 7 J. AFRICAN L. 5, 6 (1963). Footnotes omitted.

<sup>8</sup> See *id.* at 5.

plexity of its underlying structure, plus a surprising Anglo-American influence in an area of the world which has remained in relative isolation.

Ethiopia's Penal Code and Criminal Procedure Code (which include Ethiopian military law) were drafted by Swiss jurist Jean Graven, president of the Court of Cassation of Geneva and doyen (dean) of the faculty of law of the University of Geneva.

Certainly the primary base is the Swiss Federal Criminal Code of December 21, 1927. Next in importance is the Yugoslav Criminal Code, which came into force on July 1, 1951. It was this code which provided models, or at least guidelines, for the provisions on economic crimes and military offenses set forth in the Ethiopian codes. And of lesser importance are the penal codes of Greece and Brazil. Another non-Ethiopian source are various international conventions resulting in a special title on "Offences Against the Law of Nations." There is also some American influence—in the sense that several provisions of the Ethiopian Constitution of 1955 were modeled on the United States Constitution, and these, in turn, have been implemented by provisions of the Penal Code.<sup>9</sup>

The military law of Ethiopia is further influenced by the Imperial Army Proclamation of 1944,<sup>10</sup> which was promulgated during the British occupation in World War II. This proclamation was, in part, based upon Ethiopian custom, but it was influenced even more by British needs and British military habit—the habit of officers nurtured on the King's Regulations.

#### IV. NIGERIAN MILITARY LAW

There are three separate military codes for Nigeria; but the fact that there are three has nothing to do with the differences between the criminal law of Northern Nigeria and the criminal law of the rest of the country. Differences are substantial. They have led to the publication of one book, entitled *The Criminal Law and Procedure of Lagos, Eastern Nigeria and Western Nigeria*,<sup>11</sup> and another, entitled *The Penal Codes of Northern Nigeria and the Sudan*.<sup>12</sup> But the "differences" pointed out in these volumes have no relationship to the differences among the three sets of Nigerian military laws.

<sup>9</sup> Blaustein, *Ethiopia's Criminal Law*, June 1964, pp. 5-6 (unpublished manuscript at The Judge Advocate General's School).

<sup>10</sup> Proclamation No. 68 of 1944, *Negarit Gazeta*, 28 July 1944, p. 132.

<sup>11</sup> BRETT & McLEAN (1963).

<sup>12</sup> GLEDHILL (1968).

All three Nigerian codes are based upon—and, for the most part, copied from—the British Army Act of 1955. Then, why three? The reason may be simply a matter of pride. Enacted in 1960 was the Royal Nigerian Military Forces Ordinance. Its title reads: "An Ordinance to consolidate and amend the Law as to the Establishment, Government and Discipline of the Royal Nigerian Military Forces and Its Reserves and to provide for Appeals from Courts-Martial and purposes connected therewith and incidental thereto." It was an ordinance bearing the "L.S." of the governor-general, "Assented to in Her Majesty's name. . . ." The short title was later changed retrospectively to the Royal Nigerian Army Act, and certain amendments were made in 1963. It was this Ordinance-Act which governed all of the nation's armed forces until 1964.

In that year, the Nigerian Parliament passed both an Air Force Act (No. 11)<sup>13</sup> and a Navy Act (No. 21),<sup>14</sup> containing special provisions applicable to special conditions in those branches of the service. And there were other differences as well. First, however, a consideration of similarities.

On the last two pages of the 1960 Nigerian Army Act is a "Comparative Table."<sup>15</sup> This lists the 208 section numbers of the Nigerian enactment. And next to each, as applicable, are the "Corresponding U.K. Provisions." The Army Act of 1955 is cited 146 times, the Courts-Martial (Appeals) Act of 1951 of the United Kingdom is cited eight times, and one provision is copied from the Visiting Forces (British Commonwealth) Act of 1933.

As noted, the Army Act has 208 sections. The Air Force Act has 209 sections and the Navy Act has 215. The British Act has 226 sections, with several devoted to such matters as "Application to Channel Islands and Isle of Man." So they are all approximately the same size. And in military law matters they are much the same.

#### A. DESERTION AND AWOL

Of prime importance in any military code are the provisions dealing with desertion and absence without leave. Reproduced

<sup>13</sup> Nigerian Air Force Act, No. 11, p. A67 (1964) [hereafter cited as Nigerian AF § ----].

<sup>14</sup> Nigerian Navy Act, No. 21, p. A189 (1964) [hereafter cited as Nigerian Navy § ----].

<sup>15</sup> Royal Nigerian Military Forces Ordinance (1960), Supplement to 47 Official Gazette Extraordinary No. 61, Part A, 29 Sept. 1960, pp. A203-04, as amended by the Army Act, No. 8, p. A639 (1963) [hereafter cited as Nigerian Army § ----].

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below are the applicable sections on these offenses from the United Kingdom Act, followed by notes on the differences found in the three Nigerian Acts. The applicable provisions of the *Uniform Code of Military Justice* are likewise set forth for comparative purposes. First, the article or section on desertion:

### UNITED STATES

#### ART. 85. Desertion.

(a) Any member of the armed forces of the United States who—

(1) without proper authority goes or remains absent from his place of service, organization, or place of duty with intent to remain away therefrom permanently; or

(2) quits his unit or organization or place of duty with intent to avoid hazardous duty or to shirk important service; or

(3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact he has not been so regularly separated, or enters any foreign armed service except when authorized by the United States;

is guilty of desertion.

(b) Any officer of the armed forces who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to remain away therefrom permanently is guilty of desertion.

(c) Any person found guilty of desertion or attempted desertion shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the desertion or attempted desertion occurs at any other time, by such punishment, other than death, as a court-martial may direct.<sup>16</sup>

### UNITED KINGDOM

Desertion, absence without leave, etc.

37. (1) Any person subject to military law who—

(a) deserts, or

(b) persuades or procures any person subject to military law to desert,

shall, on conviction by court-martial be liable to imprisonment or any less punishment provided by this Act:

Provided that a person shall not be liable to be imprisoned for more than two years unless—

(i) if the offence was against paragraph (a) of this subsection if he was on active service or under orders for active service at the time when it was committed,

<sup>16</sup> UNIFORM CODE OF MILITARY JUSTICE art. 85 [hereafter cited as *UCMJ* art. ----].

- (ii) if the offence was an offence against paragraph (b) of this subsection, the person in relation to whom it was committed was on active service or under orders for active service at that time.
- (2) For the purpose of this Act a person deserts who—
- (a) leaves Her Majesty's service or, when it is his duty to do so, fails to join or rejoin Her Majesty's service, with (in either case) the intention, subsisting at the time of the leaving or failure or formed thereafter, of remaining permanently absent from his duty, or
  - (b) being an officer enlists in or enters any of Her Majesty's forces without having resigned his commission, or being a warrant officer, non-commissioned officer or soldier enlists in or enters any of Her Majesty's forces without having been discharged from his previous enlistment, or
  - (c) absents himself without leave with intent to avoid serving at any place overseas or to avoid service or any particular service when before the enemy

and references in this Act to desertion shall be construed accordingly.

(3) In addition to or in lieu of any punishment authorised by subsection (1) of this section, the court-martial by whom a warrant officer, non-commissioned officer or soldier of the regular forces is convicted of desertion may direct that the whole or any part of his service previous to the period as respects which he is convicted of having been a deserter shall be forfeited:

Provided that this subsection shall not apply to a person enlisted in pursuance of the National Service Act, 1948.<sup>17</sup>

Section 48 of the Nigerian Army Act contains only minor exceptions. Some examples are: "Service law" is used instead of "military law." The words "warrant officer, non-commissioned officer or" are omitted. The Nigerian provision reads simply "being a soldier." In the Nigerian Act it is provided that this last subsection shall not apply to "reservists called out on permanent service."

Section 49 of the Nigerian Navy Act is virtually the same except for a transposition of subsections (2) and (3) and such minor variations from the Army Act as changing *out of Nigeria* to *outside Nigeria*. Section 45 of the Air Force Act is identical to the Navy Act in phraseology, except for the substitution of the word *airman* for *rating*. But the Air Force Act differs from all of the others in its omission of the various definitions of desertion, set forth as subsection (2) of the United Kingdom and Nigerian Army Acts and as subsection (3) of the Nigerian Navy Act.

<sup>17</sup> Great Britain, Army Act, 1955, 3 & 4 Eliz. 2, c. 18, § 37 [hereafter cited as UK § ----].

Of special interest to the American judge advocate is the "Punishment for pretending to be a deserter." It is classified as an offense "relating to military matters punishable by civil courts." Section 191 of the 1955 British act reads as follows:

Any person who in the United Kingdom or any colony falsely represents himself to any military, naval, air-force or civil authority to be a deserter from the regular forces shall be liable on summary conviction to a fine not exceeding fifty pounds or to imprisonment for a term not exceeding three months or to both such a fine and such imprisonment.<sup>17</sup>

Nigerian Army (section 170) and Navy (section 171) provisions are substantially the same. The Air Force Act (section 166), however, limits the crime to any person "who falsely represents himself to any *air force authority* to be a deserter from the *air force*." (Emphasis added.)

Here are the provisions on absence without leave :

*United States*

ART. 86. Absence without leave.

Any member of the armed forces who, without proper authority

- (1) fails to go to his appointed place of duty at the time prescribed; or
- (2) goes from that place; or
- (3) absents himself or remains absent from his unit, organization, or other place of duty at which he is required to be at the time prescribed;

shall be punished as a court-martial may direct.<sup>18</sup>

*United Kingdom*

38. Any person subject to military law who—

- (a) absents himself without leave, or
  - (b) persuades or procures any person subject to military law to absent himself without leave,
- shall, on conviction by court-martial, be liable to imprisonment for a term not exceeding two years or any less punishment provided by this Act.<sup>19</sup>

And here the Nigerian acts are almost exact copies; and one can only speculate on why they are not *absolutely* identical. The United Kingdom provision uses the language "persuades or procures *any person* etc." So does section 44 of the Army Act and section 50 of the Navy Act. But section 46 of the Air Force Act uses the language "*any other person*." (Emphasis added.)

## B. PUNISHMENTS

It is likewise of interest to compare the respective provisions on punishments. Space limitations preclude reproduction of more

<sup>17</sup> UK § 191.

<sup>18</sup> UCMJ art. 86.

<sup>19</sup> UK § 38.



than a few illustrations. Punishment of officers is provided for in U.K. section 71, Nigeria Army section 73, Nigeria AF section 75 and Nigeria Navy section 83. Punishment of "other ranks" is set forth in U.K. section 72, of "soldiers" in Nigeria Army section 74, of "warrant officers, non-commissioned officers and airmen" in Nigeria Air section 76, and of "ratings" in Nigeria Navy section 84.

There are likewise similar provisions on "field punishment" in U.K. section 73, Nigeria Army section 75 and Nigeria Air section 77. Significantly, there is no comparable section in the Nigerian Navy Act.

Field punishment is described in substantially the same language. The wording of the British enactment is:

(2) Field punishment shall consist of such duties or drills, in addition to those which the offender might be required to perform if he were not undergoing punishment, and such loss of privileges, as may be provided by or under rules to be made by the Secretary of State, and may include confinement in such place and manner as may be so provided and such personal restraint as may be necessary to prevent the escape of the offender and as may be so provided.<sup>21</sup>

But there are differences. Note the language of U.K. section 73(1):

In relation to an offence committed by a warrant officer, non-commissioned officer or soldier on active service, the scale set out in subsection (2) of the last foregoing section shall have effect as if after paragraph (e) thereof there were inserted the following paragraph—

"(ee) field punishment for a period not exceeding ninety days", and subsection (6) of the last foregoing section shall apply to field punishment as it applies to imprisonment or detention.

The reference to subsection (6) is the same in the U.K. Act and the Nigerian Army and Air Force Acts. It reads: "Where a warrant officer or non-commissioned officer is sentenced by a court-martial to imprisonment or detention, he shall also be sentenced to be reduced to the ranks: . . ." But, the provision limiting field punishment to "a period not exceeding ninety days" is "inserted" differently in these acts. These words in the British enactment are "inserted" after "detention for a term not exceeding two years." In the Nigerian Acts they are "inserted" after "in the case of a warrant officer, dismissal from the armed forces of

<sup>21</sup> UK § 73(2).

Nigeria."<sup>22</sup> Unlike the United Kingdom Act, there is no two-year detention limitation in Nigeria.<sup>23</sup>

The Nigerian Navy Act, as previously noted, contains no separate section on field punishments. There is instead the adoption of a "first schedule" to handle special Navy problems. Details on this schedule reflect the general Nigerian approach toward the accused and provide an understanding as to safeguards afforded members of the military. The Navy Act reads:

Notwithstanding the provisions of subsections (1) and (2) of this section, a court martial may, where it thinks fit, award any punishment specified in the First Schedule of this Act, being a punishment not already specified in subsection (2) of this section; and where a court martial awards any such punishment the qualification (if any) specified in the said Schedule in respect of such punishment shall not apply.<sup>24</sup>

Punishments in subsection (2) are those likewise found in similar sections of the other enactments. They include death, imprisonment, dismissal with disgrace, dismissal, reduction in rank, fines, reprimands, forfeiture of service in the case of desertion, and pay stoppages where the offense has occasioned any expense, loss or damage.

The First Schedule is three pages long and, while not complicated, is certainly detailed. There are three sections:

A. Officers who can try ratings summarily and their powers of summary punishment.

B. Warrant Punishment. Punishments No. 1 to 7 above inclusive [out of a total of 14] (which may be known as warrant punishments) shall not have any effect unless a warrant is made out, approved as required by the Schedule and formally read to the accused in public.

C. Approval of warrants is required as follows:—[followed by a list of the first seven punishments and the appropriate approving authority].

The punishments are:

- |  |   |
|--|---|
| 1) imprisonment                        | 8) severe reprimand by the captain      |
| 2) dismissal                           | 9) extra work and drill                 |
| 3) detention                           | 10) stoppage of leave                   |
| 4) disgrating                          | 11) mulcts [fines] for improper absence |
| 5) reduction to 2d class               | 12) mulcts for drunkenness              |
| 6) deprivation of loyal services medal | 13) extra work or drill                 |
| 7) deprivation of good conduct badges  | 14) reprimand                           |

<sup>22</sup> This is the phraseology of the Air Force Act. The Army Act ends with the words "Her Majesty's service."

<sup>23</sup> Interesting and very different provisions on field punishment are found in the Sudanese Armed Forces Act and will be discussed under that heading.

<sup>24</sup> Nigerian Navy § 84(4).

Three calendar months is the maximum for imprisonment or detention as a summary punishment.

The extent of summary punishment is frequently made to depend upon the rank of the officer ordering such punishment. "Extra work and drill" may never exceed fourteen days. But if the commanding officer is below the rank of lieutenant it may not exceed seven days. Stoppage of leave is limited to thirty days—but some officers may only order a fourteen-day stoppage and others can only act within a seven-day limit.

Of far more importance is a provision in the British Act which is copied verbatim twice in each of the Nigerian enactments—once under the section on officers and once under the section on enlisted personnel. It reads: "Save as expressly provided in this Act, not more than one punishment shall be awarded by a court-martial for one offence."

### C. COURTS-MARTIAL

Britain's Army Act of 1955 provides for trial either by general courts-martial or district courts-martial, or, in special circumstance not pertinent here, by field general courts-martial.<sup>25</sup> The three Nigerian acts make no such distinction.

Under the United Kingdom enactment, section 85(1) gives a general court-martial power "to try any person subject to military law for any offence which under this Act is triable by court-martial, and to award for any such offence any punishment authorized by this Act for that offence." Section 85(2) provides that a district court-martial shall have the same powers "except that it shall not try an officer or sentence a warrant officer to imprisonment, discharge with ignominy, dismissal or detention, and shall not award the punishment of death or of imprisonment for a term exceeding two years."

A general court-martial consists of the president and not less than four other officers,<sup>26</sup> while a district court-martial consists of the president and not less than two other officers.<sup>27</sup>

In the United States, the general court-martial has jurisdiction to try anyone subject to the Code "for any offense made punishable" by the Code; and, subject to certain limitations, may "ad-

<sup>25</sup> UK § 84.

<sup>26</sup> UK § 87.

<sup>27</sup> UK § 88.

judge any punishment not forbidden by this chapter [Code], including the penalty of death when specifically authorized by this chapter."<sup>28</sup> The jurisdiction of the special court-martial is set forth in article 19 in these words:

... special courts-martial shall have jurisdiction to try persons subject to this code for any noncapital offense made punishable by this code and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code except death, dishonorable discharge, dismissal, confinement in excess of six months, hard labor without confinement in excess of three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for a period exceeding six months. A bad-conduct discharge shall not be adjudged unless a complete record of the proceedings and testimony before the court has been made.<sup>29</sup>

In the United States the general court-martial consists of "a law officer and any number of members not less than five." A special court-martial consists of "any number of members not less than three," and a summary court-martial consists of one officer.<sup>30</sup>

Differences between the American Code and the British Army Act are thus readily apparent. Only officers may sit on the courts-martial of the British Forces—and there is no requirement for a law officer in the general court. There is no provision for other than officers to sit on Nigerian military courts either. Nor is there any requirement for a law officer in that country.

There is one other significant difference between the nature of courts-martial in the United Kingdom and the United States. And the difference involves the qualifications of those who may serve on military courts. Article 25 of the UCMJ provides that "any officer on active duty with the armed forces shall be eligible to serve on all courts-martial," and that "any warrant officer on active duty with the armed forces shall be eligible to serve on general and special courts-martial for the trial of any person, other than an officer." Further, "any enlisted person on active duty with the armed forces" may be a member of a court under certain conditions. The article also provides that "*when it can be avoided*, no person in the armed forces shall be tried by a court-martial any member of which is junior to him in rank or grade." (Emphasis added.)

<sup>28</sup> UCMJ art. 18.

<sup>29</sup> The jurisdiction and powers of the third of these American courts-martial—the summary courts-martial—is of no importance in this comparative law discussion. See UCMJ art. 20.

<sup>30</sup> UCMJ art. 16.

The British Army Act of 1955 is much more specific in its recital of qualifications for court members. Before an officer may serve on a general court-martial, he must have held a commission "in any of the armed forces of the Crown for a period of not less than three years or for periods amounting in the aggregate to not less than three years. In addition, at least four of the members of a general court-martial must be of the rank of captain or above. The president of the court "shall not be under the rank of field officer unless in the opinion of the convening officer, a field officer having suitable qualifications is not, with due regard to the public service, available; and in any event the president of a general court-martial shall not be under the rank of captain." Further, "an officer under the rank of captain shall not be a member of a general court-martial for the trial of an officer above that rank."<sup>31</sup> For a district court-martial, a member must have held a commission for two years. And the requirement for president of a district court-martial is identical with the requirement for the president of a general court-martial.<sup>32</sup>

Now, what is the situation in Nigeria with respect to: (1) types of military courts; (2) size of courts-martial bodies; (3) jurisdiction of courts-martial; and (4) qualifications of members? How do the laws of Nigeria in regard to these matters differ from the laws of the United Kingdom and the United States?

(1) Types. There is no officially designated classification which categorizes the types of courts-martial in Nigeria. Theoretically, there is just one type of court. It is a court which may try any person subject to military law, for any offense set forth in the act, and which may prescribe any punishment authorized by the act. But note again that it is only *theoretically* that Nigeria has but one type of court-martial.

(2) Size. No Nigerian court-martial may have fewer than three officers. The Navy Act, section 93(1), sets a maximum as well, providing that "a court martial shall consist of not less than three nor more than nine officers." The language of the Army and Air Force Acts are identical save for section numbers. Here is section 88(1) of the latter: "Subject to the provisions of section eighty-six of this Act a court martial shall consist of the president and not less than two other officers." But what provisions affect the size of courts-martial bodies?

<sup>31</sup> UK § 87.

<sup>32</sup> UK § 88.

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(3) Jurisdiction. The relationship between type, size and jurisdiction is expressed in almost identical language in all three Nigerian Acts.<sup>33</sup> Here is that language, with the Army Act numbering.

(2) A court-martial for the trial of an officer or a warrant officer shall consist of at least five officers.

(3) A court-martial consisting of less than five officers shall not award any punishment higher in the scale of punishment than imprisonment for two years.

(4) A court-martial shall not unless it consists of at least five officers try any offence for which the maximum or only punishment is death.

(4) Qualifications of members. In very similar provisions, the three Nigerian military acts require two years of service before an officer may serve on a court-martial.<sup>34</sup> All three likewise require that the president of the court have a certain rank. The Army and Air Force Acts are very similar to the British enactment. Under Army section 86(3) it is specified that the president "shall not be under the rank of major or corresponding rank unless in the opinion of the convening officer a major or officer of corresponding rank having suitable qualifications is not, with due regard to the public service, available; and in any event the president of a court-martial shall not be under the rank of captain or corresponding rank." Under Air Force section 88(3) the words "squadron leader" are substituted for major and the words "flight lieutenant" for captain.

The Navy Act is more specific on qualifications. To begin with, section 93(1) requires that all members of a court-martial be "of or above the rank of lieutenant in the Navy." It provides in section 93(4), *with no exceptions*, that "the president of a court martial shall not be below the rank of commander." It further provides in section 93(5) that "a court martial for the trial of a commander shall include at least two members in addition to the president, who are not below the rank of commander."

One provision of British and Nigerian military law which is disturbing to the American judge advocate deals with the power of the convening authority to make himself president of the court. Only in the Navy Act is there a flat statement that "the officer who convenes a court martial shall not be a member of that

<sup>33</sup> See Nigerian Army § 84(2), (3), (4); Nigerian AF § 86(2), (3), (4); and Nigerian Navy § 93(10), (11), (12).

<sup>34</sup> See Nigerian Army § 86(2); Nigerian AF § 88(2); and Nigerian Navy § 93(2).

court martial.”<sup>35</sup> In section 87(1) of the Army Act (and, with minor changes, in section 89(1) of the Air Force Act) are these words:

The officer who convenes a court-martial shall not be a member of that court-martial:

Provided that if it is not practicable in the opinion of the convening officer to appoint another officer as president, he may himself be president of the court-martial.

The British have a similar provision in U.K. section 90(1) limited, however, to field general courts-martial.

#### D. MISCELLANEOUS PROVISIONS

As both British and American judge advocates would expect, there are some sections of the Air Force and Navy Acts which are designed to meet the specific military problems of those services. For example, section 54 of the Air Force Act makes it an offense for the commission of “any act or neglect in flying or in the use of any aircraft . . . which causes or is likely to cause loss of life or bodily injury to any person.”<sup>36</sup> And Navy Act sections 59 and 60 cover inaccurate certification of ships and improper carriage of goods.

What is unusual to the British and American judge advocate, however, are special provisions on such matters as tolls and wills. Under Army section 163, Air Force section 158, and Navy section 163, for example, members of the military are exempt from the payment of “duties or tolls for embarking from or disembarking on any pier, wharf, quay or landing place in Nigeria, or for passing over any road, ferry or bridge in Nigeria.”

Even more unusual—for a military code—are the detailed provisions on wills and distribution of property. There are eight very similar sections on these subjects in each of the three Nigerian Acts.<sup>37</sup> Here is an example of the scope of such provisions, from the table of contents of the Army Act.

- 195. Soldier on enlistment to register the name of person to whom estate is to be paid in event of dying intestate.
- 196. Special provisions relating to soldiers' wills.
- 197. Distribution in case of deceased soldier's intestacy.
- 198. Payment of debts of deceased soldier.

<sup>35</sup> Nigerian Navy § 93(8).

<sup>36</sup> There are, however, similar provisions on illegal flying in UK § 49, Nigerian Army § 52, and Nigerian Navy § 53.

<sup>37</sup> See Nigerian Army §§ 195-202; Nigerian AF §§ 192-99; Nigerian Navy §§ 198-205.

199. Property of deceased soldier distributed subject to rights of creditors.
200. Deceased soldier's money undisposed of applied to prescribed fund.
201. Uniforms and decorations of deceased soldier.
202. Application of money, etc., in case of desertion.

### V. GHANAIAN MILITARY LAW

#### A. BACKGROUND

An analysis of the military law of Ghana properly begins with a review of the history and background of the military law of Canada. A letter to this writer from the Office of the Judge Advocate General of Canada's Department of National Defense, dated 14 November 1963, explains this relationship:

At the request of the Government of Ghana the Judge Advocate General of the Canadian Forces made available the services of one of his Deputies to assist the Ghanaian authorities in drafting their national defence legislation using the Canadian National Defence Act as a model. Similar assistance was given in the preparation of basic regulations and orders to implement the Act.

When this writer visited Ghana in 1963, he expressed his interest in military law to officials in the Ministry of Justice. He was immediately invited to attend the weekly military law drafting conference, which, coincidentally, was scheduled for that same day. The conference usually includes three persons: K. G. Awunyo, a member of the Ministry of Justice staff; George Aikens, one of the legal advisers to the Department of Defence; and Major Peter Agbeko, then the sole officer serving as legal adviser to the Armed Forces. On that day there was a four-man conference in which this writer was subjected to numerous and detailed questions about American military law. It was not to gain legal knowledge that they asked these questions. All three are British barristers. But they desired to know something about the relationship between military law and the nature of the military establishment—for none of them had ever been soldiers. Major Agbeko had just recently left practice to take his Army post and had yet to receive even the most elemental military training.

Again and again they stressed their dependence upon the Canadian pattern, and questioned whether Ghana had made the right choice in following the military law of Canada. They indicated that four military codes were considered as possible models: those of Australia, Canada, the United Kingdom and the United States. But they were not sure why Canada had been selected.



There already exists "a very succinct account of the essential features of the military law system as it now exists in Canada." So did Group Captain J. H. Hollies describe his article on "Canadian Military Law" published in the *Military Law Review* in 1961.<sup>38</sup> While a discussion of that article goes beyond the scope of this brief study, the contents of that study should be included in any comprehensive analysis of Ghanaian military law.

Also in the background of Ghana's present Armed Forces Act, which was passed in 1962,<sup>39</sup> are two 1960 codes. "In the field of statute law, as in many other fields, the Ghanaians have busied themselves since independence with tidying up what they refer to as the legacy of colonialism. Criminal law has received attention, and 1960 saw the passage of sister enactments, the Criminal Code and the Criminal Procedure Code." So wrote commentator S. G. Davies in his analysis of the procedure status.<sup>40</sup> And there also exists an excellent article by James S. Read on the criminal code.<sup>41</sup> These commentaries, while usefully developing the complete background of Ghanaian military law, are likewise beyond the scope of the present study.

One provision of the Criminal Code is of much more than passing interest:

Unlawful training.—If three or more persons meet or are together for the purposes of military training or exercise without the permission of the President, or of some officer or person authorised by law to give such permission, each of them is guilty of a misdemeanour and liable to imprisonment for up to three years.<sup>42</sup>

The only thing which has been written on the military law of Ghana is in a chapter on "The Armed Forces" in a volume by Leslie Rubin and Pauli Murray, entitled *The Constitution and Government of Ghana*.<sup>43</sup> Reference will be made to their commentary in the course of this study.

<sup>38</sup> 13 MIL. L. REV. 69 (1961).

<sup>39</sup> Ghana, Armed Forces Act No. 105 (1962), as amended by Armed Forces (Amendment) Act No. 131 (1962) [hereafter cited as Ghana § ----].

<sup>40</sup> Davies, *Ghana: The Criminal Procedure Code, 1960*, 11 INT'L & COMP. L. Q. 588 (1962).

<sup>41</sup> Read, *Ghana: The Criminal Code, 1960*, 11 INT'L & COMP. L. Q. 272 (1962).

<sup>42</sup> Criminal Code, Act 29, § 189 (1960), printed in BENNION, *THE CONSTITUTIONAL LAW OF GHANA* 241 (1962).

<sup>43</sup> RUBIN & MURRAY, *THE CONSTITUTION AND GOVERNMENT OF GHANA* 133-44 (2d ed. 1964).

## B. ORGANIZATION AND STRUCTURE

Despite the obvious similarities between so many of the specific provisions of the Canadian<sup>44</sup> and Ghanaian acts, they are quite different in organization and structure. The Canadian act has 248 sections as compared with 102 sections in the Ghanaian enactment. This is because so much of Canada's National Defence Act is devoted to the organization and structure of the military establishment—plus an assortment of miscellany, including such matters as merchant vessels in military convoy (section 210) and improper exacting of tolls (section 247). Special introductory sections are also found in the Ghanaian act. Thus it is not until Canada section 56 and Ghana section 12 that similarities are apparent.

The real parallel begins with Part V of the Canadian Act dealing with "Service Offences and Punishments." Ghana sections 13, 14 and 15 are the same as Canadian sections 63, 64 and 65, etc. But because the Canadian act is much more detailed, an exact parallel does not exist. (For example, there is no Ghanaian section comparable to Canada section 116 on refusing vaccination.) Ghana section 54 on "Conduct to the prejudice of Good Order and Discipline" is a copy of Canada section 118. And Ghana's sections on arrest, sections 57-61, are copied from Canada's sections 127-132.

Part VII of the Canadian enactment deals with "Service Tribunals," containing specific sections on summary trials, courts-martial, etc. This is covered in Canada sections 133-168. In Ghana these matters are considered more briefly in sections 63-76.

But before describing comparable provisions of these two acts, note should be made of one very distinctive feature of present-day Ghanaian military law. This relates to the special powers of Ghana's first president, Kwame Nkrumah.

## C. POWERS OF THE FIRST PRESIDENT

Certainly, there is nothing unusual in the designation of the Ghanaian president as "Commander-in-Chief of the Armed

<sup>44</sup>The present Canadian National Defence Act is chapter 184 of the Revised Statutes of Canada (1952), as amended by Revised Statutes of Canada, ch. 810 (1952); chs. 6, 24 (1952-1953); chs. 13, 21, 40 (1953-1954); ch. 28 (1955); ch. 18 (1956); ch. 5 (1959); ch. 21 (1964). The first section of the Act, under the heading of "Short Title," reads: "This Act may be cited as the *National Defence Act 1950*, c. 43, s. 1" [hereafter cited as Canada § ----].

Forces,"<sup>45</sup> or even the designation of the president as "Supreme Commander."<sup>46</sup> But what is unusual is the combination of articles 10 and 55 of the Constitution and the way they affect Nkrumah's special military powers.

Here are the applicable provisions:

10. KWAME NKRUMAH is hereby appointed first President of Ghana, having been chosen as such before the enactment of the Constitution. . . .

55:(1) . . . the person appointed as first President of Ghana shall have, during his initial period of office, the powers conferred on him by this Article.

(2) The first President may, whenever he considers it to be in the national interest to do so, give directions by legislative instrument.

(3) An instrument made under this Article may alter (whether expressly or by implication) any enactment other than the Constitution. . . .

(5) For the purposes of this Article the first President's initial period of office shall be taken to continue until some other person assumes office as President. . . .

As Commander-in-Chief, President Nkrumah has broad powers. He may under article 54 "commission persons as officers"; and "in a case where it appears to him expedient to do so for the security of the State, to dismiss a member of the Armed Forces or to order a member of the Armed Forces not to exercise any authority vested in him as a member thereof until the Commander-in-Chief otherwise directs."

These Constitutional provisions have a history. The White Paper on the draft constitution explains the background this way:

Under the draft Constitution, however, there is reserved to the President the right, in the interests of national security, to dismiss or suspend any member of the Armed Forces whatever his rank or position. This provision is especially designed to deal with the situation which has unhappily arisen in a number of other countries where the Armed Forces have interfered in politics and have, on occasion, even usurped the people's right to choose the Government of the country.<sup>47</sup>

Further, under the Armed Forces Act section 97(1), "the President may by legislative instrument make such regulations as may be necessary or convenient for securing the discipline and good government of the Armed Forces." This grant of power is followed by twenty-one illustrations of the types of regulations which might be promulgated "without derogation from the gen-

<sup>45</sup> GHANA CONST. art. 8(3).

<sup>46</sup> Ghana § 8(1).

<sup>47</sup> Ghana White Paper No. 1/60, p. 12.

erality" of the stated power. These regulations involve a vast variety of matters, several of which are of particular interest to military lawyers:

(o) the appointment of persons additional to those specified in the Act with powers of arrest and the conditions subject to which such appointment is made and such powers are conferred;

(p) the custody of officers and men arrested or sentenced and the duties of the persons in whose charge such officers and men have been placed;

(q) the delegation of the powers of commanding officers to try accused persons under this Act to other persons and the conditions, if any, subject to which such delegation is made . . . .

With these powers in the hands of the President/Supreme Commander, the validity of every military law provision may be subject to question, and the decision of every military officer may be subject to doubt.

#### D. MILITARY OFFENSES

With minor variations in wording and order, Ghana and Canada have the same list of "service offences." Canada has a longer list of such offenses. They include "Offences in Relation to Service Tribunals," "Offences in Relation to Enrolment [in the Armed Forces]," "Negligent Handling of Dangerous Substances" and a number of other provisions which are only worthy of passing note. But possibly significant is the omission from the Ghanaian code of sections 69, 73 and 85 of the Canadian model. These Canadian provisions read as follows:

69. Every person who is a spy for the enemy is guilty of an offence and on conviction is liable to suffer death or less punishment.

73. Every person who publishes or circulates any writing, printing or document in which is advocated, or who teaches or advocates, the use, without the authority of law, of force as a means of accomplishing any governmental change within Canada is guilty of an offence and on conviction is liable to imprisonment for life or to less punishment.

85. Every person who uses traitorous or disloyal words regarding Her Majesty is guilty of an offence and on conviction is liable to imprisonment for a term not exceeding seven years or to less punishment.

It is, of course, impossible to reproduce or to discuss all of the Ghanaian "service offences." Desertion and absence without leave will be considered separately below. But some idea of the scope of these other offenses should be indicated. The Rubin and Murray volume on *The Constitution and Government of Ghana* contains this paragraph on the subject:

The offences relate to: improper conduct by commanders when in action, prisoners of war, operations, spies, mutiny, disobedience of law-

ful commands, striking or offering violence to a superior officer, insubordinate behaviour, quarrels and disturbances, disorders, desertion, absence without leave, false statements in respect of leave, abuse of inferiors, cruelty or scandalous conduct, cowardly behaviour, drunkenness, malingering or maiming, unnecessary detention of persons in custody, interference with lawful custody, escape from custody, obstruction of police duties, obstruction of civil power, conveying ships and vessels, losing vessels, taking ships, vessels or aircraft as prize, wrongful acts concerning aircraft, disturbances in billets, fraudulent enlistment, causing fires, unauthorised use of vehicles, improper carriage of goods, destruction, loss or improper disposal of property, stealing, false accusations, conduct to the prejudice of good order and discipline, negligent performance of duties, and certain other dishonest and improper acts. . . .<sup>48</sup>

All but the last two sentences of this Rubin and Murray paragraph have been reproduced above. For these last two warrant special comment. They contain these *almost* ambiguous words: "An offence under any other enactment, which is not expressly referred to in the Code, is an offence under the Code. All the above offenses are known as service offences."

To understand these sentences, reference must be made to section 98 of the Ghanaian enactment. This is the "Interpretation" section. And it contains this amplification-explanation: "'service offence' means an offence under this Act or any other enactment *for the time being in force*, committed by a person while subject to the Code of Service Discipline." (Emphasis added.)

However, it is important to note that in neither Canada nor Ghana may a "service tribunal" try anyone for the offense of either murder, manslaughter or rape committed within the country.<sup>49</sup>

### E. DESERTION AND AWOL

The desertion provisions of the Ghanaian and Canadian codes are more detailed than those of the three Nigerian enactments in regard to the factual elements which constitute the offense. For comparative purposes, the applicable subsection of the Canadian Act follows:

#### Canada Section 79

- (2) A person deserts who
- (a) being on or having been warned for active service or other important service, is absent without authority with the intention of avoiding that service;

<sup>48</sup> *Op. cit. supra* note 43, at 138.

<sup>49</sup> See Canada § 61; Ghana § 79(1).

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- (b) having been warned that his vessel is under sailing orders, is absent without authority, with the intention of missing that vessel;
- (c) absents himself without authority from his unit or formation or from the place where his duty requires him to be, with the intention of not returning to that unit, formation or place;
- (d) is absent without authority from his unit or formation or from the place where his duty requires him to be and at any time during such absence forms the intention of not returning to that unit, formation or place; or
- (e) while absent with authority from his unit or formation or the place where his duty requires him to be, with the intention of not returning to that unit, formation or place, does any act, or omits to do anything, the natural and probable consequence of which act or omission is to preclude his return to that unit, formation or place at the time required.

(3) A person who has been absent without authority for a continuous period of six months or more shall, unless the contrary is proved, be presumed to have had the intention of not returning to his unit or formation or the place where his duty requires him to be.

There is one apparently noteworthy difference between the Canadian and Ghanaian desertion provisions. Canada section 79 begins with these words: "Every person who deserts or attempts to desert is guilty . . ." On the other hand, Ghana section 27 begins: "Every person who deserts shall be guilty . . ." Is there any significance in the fact that the Ghanaian enactment leaves out the words "or attempts to desert"?

Part of the answer *may* be found in the provisions of Canada section 120(1) and (2) and Ghana section 56(1) and (2) which are identical.

- 1) A person charged with desertion may be found guilty of attempting to desert or of being absent without leave.
- 2) A person charged with attempting to desert may be found guilty of being absent without leave.

All this may mean is that the Ghanaian draftsmen omitted unnecessary words when they prepared their enactment.

In both the desertion and AWOL statutes, Canada and Ghana leave out one important phrase found in the United Kingdom<sup>50</sup> and Nigerian enactments. Under Canada section 79 and Ghana section 27, it is an offense to desert; under Canada section 81 and Ghana section 29, it is an offense to absent oneself without leave.

<sup>50</sup> The United Kingdom section is set forth in the text at footnote 17.

However, in the statutes for the United Kingdom and the three Nigerian forces it is *also* an offense where one "persuades or procures any person subject to military [service] law to desert" or "to absent himself without leave."<sup>51</sup>

But perhaps such an additional provision is not necessary. Under both the Canadian and Ghanaian statutes, one who aids, abets or counsels anyone to commit an offense is, in the words of Ghana section 13, "liable to the same punishment as the person found guilty of committing that offence."<sup>52</sup> Canada section 80 and Ghana section 28 also provide punishments for "connivance at desertion."

Both Ghana and Canada have an additional provision on this subject not present in the United Kingdom or Nigerian acts. Under Ghana section 30 and Canada section 82 it is also an offense, where a person "knowingly makes a false statement" in order to prolong his leave of absence.

#### F. PUNISHMENTS

Few differences exist in the area of military punishments, either between Canada and Ghana or between Canada/Ghana and the United Kingdom/Nigeria. With few exceptions—and these almost exclusively minor variations in wording—Canada section 121 and Ghana section 78 are the same. Here is the language of subsections (1) and (3) of the latter enactment:

78. (1) The following punishments may be imposed in respect of service offences:—

- (a) death;
- (b) imprisonment for two years or more;
- (c) dismissal with disgrace from the Armed Forces;
- (d) imprisonment for less than two years;
- (e) dismissal from the Armed Forces;
- (f) detention;
- (g) reduction in rank or in the case of the navy, disrating;
- (h) forfeiture of seniority;
- (i) in the case of the navy, dismissal of an officer from the ship to which he belongs;
- (j) severe reprimand;
- (k) reprimand;
- (l) fine;
- (m) stoppages; and
- (n) such other minor punishments as may be prescribed.

<sup>51</sup> See UK §§ 37, 38; Nigerian Army §§ 43, 44; Nigerian AF §§ 45, 46; Nigerian Navy §§ 49, 50.

<sup>52</sup> See Canada § 63.

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Each of the above punishments shall be deemed to be a punishment less than every punishment preceding it in the above scale, such scale in this Act, being referred to as the "scale of punishments."

\* \* \* \* \*

(3) Where a punishment is specified by the Code of Service Discipline as a penalty for an offence, and it is further provided in the alternative that on conviction the offender is liable to less punishment, the expression "less punishment" means any one or more of the punishments lower in the scale of punishments than the specified punishment.

It is, in fact, difficult to find any differences at all between the punishment provisions in Ghana and Canada—with one noteworthy exception. Ghana has a special subsection on "punishments that may be imposed on boys,"<sup>23</sup> which is absent from the Canadian code. A "boy" under Ghana section 98 "means a male person over the age of thirteen years enrolled in the Army and below the prescribed maximum age." The maximum age is not specified in the Act, but the punishments are. These include dismissal, a fine not exceeding ten shillings, detention not exceeding twenty-one days, stoppages not exceeding one-half of his pay for thirty days, confinement to barracks up to fourteen days, extra drills or classes, admonishment or "six strokes of the cane under supervision of an officer."

One indication of the almost negligible difference between the enactments can be seen by comparing the language of subsection (12) of the respective punishments sections. This is from the Canadian statute: "(12) A fine shall be imposed in a stated amount and shall not exceed, in the case of an officer or man, three months basic pay, and in the case of any other person the sum of two hundred dollars, and the terms of payment of a fine shall lie within the discretion of the commanding officer of the person so punished." In the Ghanaian code, the figure "£G100" is substituted for "two hundred dollars."

Both Ghana and Canada have sections on new trials which are of considerable importance in analyzing the situation in regard to punishments. Ghana section 84 provides in part:

(1) Where a service tribunal has found a person guilty of an offence and the Commander of the appropriate Armed Force considers that a new trial is advisable by reason of an irregularity in law in the proceedings before the service tribunal, he may set aside the finding of guilty and direct a new trial, in which case that person shall be tried again for that offence as if no previous trial had been held.

<sup>23</sup> See Ghana § 78(2).



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(2) Where at a new trial held pursuant to this section a person is found guilty—

- (a) the new punishment shall not be higher in the scale of punishments than the punishment imposed by the service tribunal in the first instance. . . .

Canada's military code has the same limitation in regard to punishments, but gives to others the power to recommend and order a new trial. Under Canada section 172A, it is not the "Commander of the appropriate Armed Force" who determines "an irregularity in law" and directs a new trial. Rather it is "the Judge Advocate General [who] certifies that in his opinion a new trial is advisable by reason of an irregularity in law"; and it is the Minister of National Defence who "may set aside the finding of guilty and direct a new trial."

### G. COURTS-MARTIAL

Four kinds of trials are provided for under both Ghanaian and Canadian military law. And there are likewise provisions under both codes for review by a Court-Martial Appeal Court.

The four kinds of trials are: (1) summary trial by a commanding officer; (2) summary trial by a superior commander; (3) trial by general court-martial; and (4) trial by disciplinary court-martial. These are described in virtually identical language in Ghana sections 63-74 and Canada sections 136-148.

A commanding officer may in his discretion try an accused person by summary trial, providing the accused is either "a subordinate officer or a man below the rank of warrant officer" who has not elected to be tried by court-martial. Powers of punishment are, of course, limited, but they are still extensive by American standards. Detention may be given for a period not exceeding ninety days. Further, where detention is imposed upon a chief petty officer, petty officer, noncommissioned officer or leading rating, it must be approved "by an approving authority."<sup>54</sup> And where more than thirty days of detention is imposed, the portion in excess of thirty must likewise be subject to such approval. The third punishment for which approval is required is in reduction in rank.

Under the American *Uniform Code of Military Justice*, article 20, a summary court-martial may not adjudge any punishment

<sup>54</sup> "Approving authority" means "any officer not below the rank of commodore, brigadier or air commodore" or a naval captain, colonel or group captain specially designated.

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more severe than "confinement in excess of one month, hard labor without confinement in excess of forty-five days, restriction to certain specified limits in excess of two months, or forfeiture of pay in excess of two-thirds of one month's pay." Even more limited are the commanding officer's powers to impose nonjudicial punishment under article 15.

The second type of Ghanaian/Canadian trial is a summary trial by a "superior commander," meaning an officer of or above the rank of commodore, brigadier or air commodore or "any other officer prescribed or appointed . . . for that purpose." Who may such "superior commander" try? Here there is a difference between the codes of Ghana and Canada. Under Ghanaian law section 64, it is an officer below the rank of commander, lieutenant colonel or wing commander, or a warrant officer. Under Canadian law section 137, it is an officer below the rank of lieutenant commander, major or squadron leader, or a warrant officer. In Canada, however, "in an emergency," the power may be extended to officers of those ranks. In no event may there be such a trial in either country if the accused elects to be tried by court-martial. Punishment may include "any one or more of the following": (a) forfeiture of seniority; (b) severe reprimand; (c) reprimand; and (d) fine.

Court-martial jurisdiction, either for a general court-martial or for a disciplinary court-martial, is expressed in the codes in nearly the same words. Ghana section 67 reads: "A general court-martial may try any person subject to the Code of Service Discipline who is alleged to have committed a service offence." Ghana section 71 uses the same language in regard to the disciplinary court-martial, preceded by the phrase "Subject to any limitation prescribed in regulations made under this Act." Canada sections 139 and 143 are similarly structured. This is very different from the codes of the United States, the United Kingdom and Nigeria where it is specifically provided that officers may be tried only by the highest court-martial authority.

The basic difference between these two types of courts-martial is found in Ghana section 72 and Canada section 144. "A disciplinary court-martial shall not pass a sentence including a punishment higher in the scale of punishments than dismissal with disgrace from the Armed Forces, or higher than such other punishments as may be prescribed; but no such other punishment shall be higher in the scale of punishments than dismissal with disgrace from those Forces." This requires a reference over to

Ghana section 78 and Canada section 121. The only two punishments higher in the scale are (a) death, and (b) imprisonment for two years or more.

A difference which is of particular interest to the military lawyer deals with the appointment of "a person to officiate as judge advocate" at a court-martial. Both Ghana and Canada have the same basic rule. At a general court-martial, a judge advocate *shall* be appointed; at a disciplinary court-martial, a judge advocate *may* be appointed. The Canadian code provides that these appointments be made by "such authority as is prescribed for that purpose in regulations." In Ghana such appointments are made by the Chief Justice.<sup>55</sup>

There are many rules regulating the composition of Canadian and Ghanaian courts-martial and the qualifications of their members—far more than are prescribed for American military tribunals and perhaps even more than are dictated for the military courts of Nigeria and the United Kingdom. As in Nigeria and the United Kingdom, the court-martial with the highest authority must consist of at least five officers and the secondary court-martial must have at least three officers.

Unlike Nigeria and the United Kingdom, there are no length of service requirements to be appointed to a court-martial. But as in those countries, there are rules as to the rank of court-martial presidents and the rank of members where officers are to be tried. As noted in the discussion on Nigeria, with some exceptions, the president of a five-or-more man court-martial must be of field grade in the United Kingdom and the Nigerian Army and Air Force. In the Nigerian Navy he may not be below the rank of commander. However, in Ghana and Canada such president "shall be an officer of or above the naval rank of captain or of or above the rank of colonel or group captain." (In a disciplinary court-martial the president may be a lieutenant commander, major or squadron leader.) No officer below navy lieutenant, army captain or air force flight lieutenant may serve on a Ghanaian or Canadian general court, nor may any officer under the age of twenty-one sit as a member of any court-martial.

## VI. SUDANESE MILITARY LAW

### A. CRIMINAL LAW—MILITARY LAW RELATIONSHIP

Nowhere is there a closer relationship between the criminal law and the military law than in the Sudan. This fact is far more

<sup>55</sup> See Ghana §§ 68, 73; Canada §§ 141, 147.

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striking than the unusual features present in the Sudanese Armed Forces Act. And this is an observation which must be followed by the comment that the "unusual" is not necessarily based on either Muslim or Arabic influences.

The criminal law—military law relationship is set forth in Sudan section 45(1) :

Every person subject to this Act who . . . commits an offence punishable under the Penal Code shall be deemed to be guilty of an offence against this Act and if charged therewith under this section shall, subject to the provisions of this Act, be liable to be tried for the same by court-martial and on conviction be liable to suffer any punishment assigned for the offence by the Penal Code or such punishment as might be awarded to him in pursuance of this Act in respect of an act prejudicial to good order and military discipline.<sup>56</sup>

On its face, there is nothing particularly unusual about such a provision. But what makes this of special significance is the fact that the Sudanese Armed Forces Act lists so comparatively few offenses and the Sudan Penal Code lists so many. In addition, the provision is important because of the large number of civilians who at any one time may become "subject to this Act." More on this point below. First, however, some comparative references on the criminal law-military law relationship.

As previously pointed out, Ghana section 98 also takes a broad view of what constitutes a military crime. A "service offence" is there defined as "an offence under this Act or any other enactment for the time being in force, committed by a person while subject to the Code of Service Discipline."

Nigeria has more elaborate provisions covering the same subject. Based on U.K. section 70, it was expanded in Nigerian Army section 72, and further expanded in identical language in Nigerian AF section 74 and Nigerian Navy section 82. The following is from the latter enactments:

82.—(1) Any person who commits a civil offence within the meaning of this Act in Nigeria or elsewhere, shall be guilty of an offence against this section.

(2) For the purposes of the foregoing subsection, the expression "civil offence" means any act or omission punishable as an offence under the penal provisions of any law enacted in or applicable to Nigeria, and "the corresponding civil offence" means the civil offence the commission of which constitutes the offence against this section.

<sup>56</sup> Sudan Armed Forces Act, No. 27, § 130 (1957), printed in Sudan Gazette, No. 910, 5 Aug. 1957 (Legis. Supp.) [hereafter cited as Sudan § ----].

(3) Subject to the next succeeding subsection, a person convicted by court martial of an offence against this section shall—

(a) if the corresponding civil offence is treason or murder be liable to suffer death, and

(b) in any other case, be liable to suffer the punishment which a civil court might award for the corresponding civil offence, if committed anywhere in Nigeria, being a punishment provided by this Act, or such lesser punishment which a civil court could so award, as is so provided.

(4) Where a court other than a court martial may not award a term of imprisonment for a civil offence, a person convicted of a civil offence shall be liable to suffer such punishment, less than dismissal with disgrace in the case of an officer, or discharge with ignominy in the case of a rating, as is prescribed for the civil offence.

(5) Nothing in this section shall be construed to authorise the charging of a person with an offence against this section committed in Nigeria if the corresponding civil offence is treason, murder, manslaughter, treasonable felony or rape; and for the purposes of this subsection where the corresponding civil offence is murder or manslaughter an offence against this section shall be deemed to have been committed at the place of the commission of the act or occurrence of the negligence which caused the death, irrespective of the place of the death.

Even the United States, despite the enactment of a long, comprehensive list of service offenses, has made provision for non-military crimes committed by persons subject to its *Uniform Code of Military Justice*. As explained in the *Manual for Courts-Martial, United States, 1951*, paragraph 12:

Courts-martial have exclusive jurisdiction of purely military offenses. But a person subject to the code is, as a rule, subject to the law applicable to persons generally, and if by an act or omission he violates the code and the local criminal law, the act or omission may be made the basis of a prosecution before a court-martial or before a proper civil tribunal, and in some cases before both . . . . The jurisdiction which first attaches in any case is, generally, entitled to proceed.

In practical terms, the criminal law—military law relationship in the Sudan means that any comprehensive study of Sudanese courts-martial must eventually draw heavily on Alan Gledhill's 1963 volume on *The Penal Codes of Northern Nigeria and the Sudan*.<sup>57</sup> The emphasis in this study, however, is on the military codes themselves.

<sup>57</sup> *Op. cit. supra* note 12 and accompanying text. It also means that the Gledhill volume, plus the 1963 work by Brett & McLean on *The Criminal Law and Procedure of Lagos, Eastern Nigeria and Western Nigeria*, are important in achieving a complete understanding of Nigerian military law.

As a preliminary to any reading or discussion of the Sudanese Armed Forces Act, one Arabic title needs definition. Time and again, the military code makes reference to the "Kaid-El-Amm" (with or without the hyphens) or the "Kaid." This term refers to the Commander-in-Chief of the Armed Forces of the Sudan.

### B. PERSONS SUBJECT TO MILITARY LAW AND THEIR SUPREME COMMANDER

Of course, officers, noncommissioned officers and "persons enrolled or enlisted" under the Act are subject to the Armed Forces law of the Sudan. But so are those specified in section 5 (i) (d):

persons not otherwise subject to military law, who, on active service, in camp, on the march, or at any post specified by the Kaid El Amm in this behalf are employed by, or are in the service of, or are followers of or accompany any portion of the Force.

And the Kaid El Amm has tremendous powers over all those whom he may make subject to the Act.

The Kaid-El-Amm may direct that any person or class of persons subject to this Act under Clause (d) of subsection (i) hereof shall be so subject as officers or non-commissioned officers and may authorise any officer to give a like direction in respect of any such person and to cancel such direction. In default of any such direction all such persons shall be deemed to be so subject in a rank inferior to the rank of non-commissioned officer.<sup>53</sup>

Under Sudan section 18:

For any offence in breach of good order, the commanding officer of any command, corps, unit or detachment on active service, or not being on active service, in camp or on the march, or at any post specified by the Kaid El Amm at which troops are stationed, may subject to any rule, in that behalf made under this Act, punish any follower of such corps, unit or detachment who is subject to this Act with imprisonment for a term which may extend to thirty days or, with a fine which may extend to £'s. 5 or with both.

It is impossible to list all of the extensive powers given the supreme commander under the Sudanese code. Some of these will be noted below in connection with punishments and courts-martial. But here are two others which provide further indication of the scope of those powers—powers which are normally reserved to heads of state or ministers of defense if they have such authority at all. For example, under section 12 the Kaid "may at any time dismiss or remove a soldier from the Force" without

<sup>53</sup> Sudan § 5(3).

qualification. And under section 11 the Kaid may, in any period of emergency, "order that any soldiers who would otherwise be entitled in pursuance of the terms of their enlistment to be discharged [to] continue in the service for such period."

### C. PUNISHMENTS

Punishments are extensive for violations of the Sudanese code. And they apply, with minor variations, to officers and enlisted personnel alike. Here is the list of those punishments applicable to officers:

46. The punishments that, subject to any express provisions in this Act which defines the offence in question, may be inflicted upon an officer convicted by a court-martial of an offence against this Act shall be according to following scale:—

- (a) death;
- (b) imprisonment for any term not exceeding twenty years;
- (c) dismissal from the Force;
- (d) forfeiture in the prescribed manner and to the prescribed extent of seniority of rank and service for the purposes of promotion; including reduction in Rank;
- (e) severe reprimand;
- (f) reprimand;
- (g) forfeiture and stoppages as follows, namely:—
  - (i) forfeiture of service for the purpose of increased pay, pension or any other purpose;
  - (ii) forfeiture in the case of a person sentenced to dismissal of all arrears of pay and other public money due to him at the time of such dismissal;
  - (iii) stoppages of pay until any proved loss or damage occasioned by the offence of which he is convicted or part thereof is made good; and
  - (iv) forfeiture of all or any medals and decorations.

There is, however, one special punishment which is limited to enlisted personnel—a punishment which is unknown to the military law of Nigeria and Ghana, to say nothing of the laws of Canada, the United Kingdom and the United States. This is field punishment. Where a soldier on active service is convicted of an offence, a court-martial may "award for that offence any such punishment as may be prescribed as a field punishment." Section 48 indicates that it "shall be of a character of personal restraint or of hard labour but shall not be of a nature to cause injury to life or limb." But that is only part of the story.

Field punishments are provided for in the Armed Forces Rules,<sup>59</sup> rather than in the Act itself. Here is what Field Punishment may mean to the sentenced offender under Regulation 157:

- (a) he may be kept in irons, that is to say in fetters or handcuffs, or both fetters and handcuffs, and may be secured so as to prevent his escape.
- (b) when in irons, he may be made to stand still for a period or periods not exceeding two hours in any one day, provided that he shall not be made to stand still for more than one hour at a stretch.
- (c) He may be subject to the like labour, employment and restraint, and dealt with in like manner as if he were undergoing a sentence of rigorous imprisonment.

Section (b) is followed by two "Explanations." These provide: First, that the offender must be standing firmly on his feet which, if tied, must not be more than twelve inches apart; and it must be possible for him to move each foot at least three inches. Second, that irons should be used when available. Straps or ropes may be used instead of irons when necessary, but such straps or ropes must be sufficiently wide so as "to inflict no bodily harm, and leave no permanent mark on the offender." Regulation 160 goes on to say that "a portion of a field punishment must be discontinued upon a report by a responsible medical officer that the continuance of that portion would be prejudicial to the offender's health."

Retention in the ranks despite a court-martial conviction is another special power of the Kaid. Sudan section 53 provides: "When any person subject to this Act and on active service has been sentenced by court-martial to dismissal or imprisonment whether combined with dismissal or not, the Kaid-El-Amm may direct that such person be retained to serve in the ranks, and where such person has been sentenced to imprisonment such service shall be reckoned as part of his term of imprisonment." This apparently includes officers as well as enlisted personnel although this is not specifically stated anywhere in the Act.

### D. COURTS-MARTIAL

There are four kinds of courts-martial in the Republic of the Sudan. They include: (a) general courts-martial; (b) district

<sup>59</sup> Sudan Legislative Rules and Orders 31, the Armed Forces Rules, 1958, Special Legislative Supplement to the Republic of Sudan, Gazette, No. 927, 11 Dec. 1958, p. 56.



courts-martial; (c) summary general courts-martial; and (d) summary courts-martial.

Both the general courts-martial and the summary general courts-martial have the same powers. They may try any person subject to the act for any offense made punishable by the act, and they may pass any sentence authorized by the act.<sup>60</sup> There is, however, a difference in the composition of these courts. Under Sudan section 63, a general court-martial "shall consist of not less than five officers each of whom shall have not less than three whole years commissioned service, and of whom not less than four are of a rank not below that of Yuzbashi," or captain. Under Sudan section 66, on the other hand, a summary general court-martial "shall consist of not less than three officers," one of whom (save if otherwise authorized) must "have not less than three whole years commissioned service and be not below the rank of Saghkolaghasi."<sup>61</sup>

While it is simple enough to point out the difference between general courts-martial and summary general courts-martial, it is not quite so simple to explain why this difference exists. This is especially true in light of the proviso in section 63 which authorizes the Kaid-El-Amm "in any special case" to "constitute a general court-martial with a fewer number of officers subject to a minimum of three." Perhaps the explanation can be found in section 65(c), which states that a summary general court-martial may be convened "on active service [by] an officer commanding an area or any detached portion of the Force when, in his opinion, it is not practicable, with due regard to discipline and the exigencies of the service, that an offence shall be tried by ordinary general Court-Martial."

A district court-martial is a court of not less than three officers, each of whom must have held his commission for at least two years. This court has the power to try any soldier for any offense made punishable under the act. But it may not pass a death sentence or order imprisonment for a term exceeding two years.<sup>62</sup>

The punishment powers of a summary court-martial are limited under section 79 to imprisonment not exceeding one year. The

<sup>60</sup> Sudan § 75.

<sup>61</sup> Saghkolaghasi is a rank for which there is no precise equivalent in the military of most other nations; this officer ranks above Army captain and below major.

<sup>62</sup> Sudan §§ 64, 76.

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composition of this court is quite ordinary, but the full description of the nature of the tribunal is both unusual and interesting:

67. (1) Subject to any rules that may be prescribed in that behalf a summary court martial may be held by the commanding officer of a battalion or of any superior or equivalent body of troops or of any detachment of the Force under the Command of an officer not under the rank of Kaimakam. [Lieutenant Colonel]

(2) At every summary court-martial, the officer holding the trial shall alone constitute the court, but the proceedings shall be attended throughout by two other officers or if two other officers are not, in the opinion of the officer holding the trial available, by one other officer and one non-commissioned officer but such officers shall not be members of the court and as such shall not be sworn or affirmed.

### E. SOME SPECIAL FEATURES

While there is little which can be learned from the extreme features of a foreign military code, it is still interesting to take note of articles of military law which are truly unique. Here are three from the Sudanese Armed Forces Act, the first two of which are undoubtedly based on real problems which may be peculiar to the military of Arabic nations.

34. Any person subject to this Act who is in a state of intoxication whether on duty or not on duty and whether the said state shall have been induced by the taking of liquor or drugs shall, on conviction by court-martial, be punished with imprisonment or less punishment.

35. Any person subject to this Act who is found to be in possession of or smoking hashish or bango shall, on conviction by court-martial, be punished with imprisonment or less punishment.

127. No person who is subject to this Act shall

- (a) be a member of, or associated in any way with, any trade union or labour union, or any society, institution or association;
- (b) attend or address any meeting or take part in any demonstration organised for any political or other purpose;
- (c) communicate with the press or publish or cause to be published any article, book, letter or other document.

## VII. CONCLUSION

The obvious similarity between and among the military codes of Nigeria, Ghana and Sudan are based upon three essential factors.

First, there are obviously only a limited number of military problems, common to all armed forces, and only a limited number

of legal solutions to these problems. Secondly, similarity in military law exists where there is cultural similarity. And, thirdly, there is similarity because of the British heritage shared by all three countries.

Where there are differences, such differences are easily explained in terms of cultural variations.

The two factors of cultural differences and possible differences based upon the former colonial power must be kept in mind in every analysis of African military law. A cursory examination of the military codes of Kenya, Tanganyika and Uganda would show marked similarities with the codes of the three African nations discussed in this article. That would be expected. While there are some cultural differences between nations of East and West Africa, such differences are unimportant in the military law of these countries in view of the fact that their entire military organizations are based upon the English pattern.

On the other hand, a cursory examination of the military law of such countries as Senegal and the Ivory Coast would reveal a French influence. And the cultural characteristics, plus a lack of colonial influence, results in obvious differences in the military codes of such nations as Ethiopia and Liberia.

Therefore, it is not only important to study these codes in order to learn about the military law of specific countries but to study them in terms of representative patterns as to the military law of other nations. This article serves as an introduction to a study of the new military laws of the new armies and new nations of Africa. Similar additional studies must now be undertaken.



# A SUPPLEMENT TO THE SURVEY OF MILITARY JUSTICE\*

By

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## I. INTRODUCTION

This supplement covers the cases decided by the United States Court of Military Appeals during the October 1964 term, 2 October 1964 through 27 August 1965.<sup>1</sup> The purpose of the annual supplement is to present a concise statement of the substantive and procedural issues of importance which the Court has considered during the term.

## II. JURISDICTION

*United States v. Winton*<sup>2</sup> was the only case decided during this term which involved a jurisdictional issue, and it did not establish

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

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<sup>1</sup> Consideration by Court term is the practice adopted in the prior six supplements. See generally, *Note, Survey of the Law, The United States Court of Military Appeals 29 November 1951 to 30 June 1958*, 3 MIL. L. REV. 67 (1959); Sides & Fischer, *A Supplement to the Survey of Military Justice*, 8 MIL. L. REV. 113 (1960); Davis & Stillman, *A Supplement to the Survey of Military Justice*, 12 MIL. L. REV. 219 (1961); Croft & Day, *A Supplement to the Survey of Military Justice*, 16 MIL. L. REV. 91 (1962); Mittelstaedt & Barrett, *A Supplement to the Survey of Military Justice*, 20 MIL. L. REV. 107 (1963); Schlessler & Barrett, *A Supplement to the Survey of Military Justice*, 24 MIL. L. REV. 125 (1964); Wingo & Myster, *A Supplement to the Survey of Military Justice*, 28 MIL. L. REV. 121 (1965).

<sup>2</sup> 15 U.S.C.M.A. 222, 35 C.M.R. 194 (1965).

any significant legal precedents in this area as the decision rested on facts peculiar to the case. The jurisdictional question related to a charge of forgery in violation of article 123 of the *Uniform Code of Military Justice*.<sup>3</sup> However, there were other offenses involved and the decision also deals with the sufficiency of one of these specifications which is discussed later, *infra* IIIA3. The forgery offense involved making the false signature of a co-maker of a note which accompanied a loan application and was payable to the United States Air Force Security Service Federal Credit Union, San Antonio, Texas. At the trial defense moved to dismiss the charge for lack of jurisdiction on the ground that the requirements of article 3(a) of the Code had not been met. It was shown that the enlistment during which the alleged offense was committed had expired, that the accused was honorably discharged as a result, and that he was out of the service for several months before the charge was preferred. It had not been preferred until after his reenlistment and return to Korea where the note had previously been executed. Since forgery is punishable by confinement for five years,<sup>4</sup> the defense contention was based on an argument that the offense could be tried in a United States district court. Section 1006 of Title 18 of the *United States Code* was cited in support of this argument. The cited statute provides in pertinent part for the trial of certain offenses in a United States district court when committed by a person connected in any capacity with a credit association acting under the laws of the United States, whether the offense is committed within or outside the limits of the United States. The Court held that the motion was properly denied because, considering the evidence in the light most favorable to the accused, it appeared that he had no connection with the credit union prior to his application for a loan and could not have become a member until the loan was approved. Since the forgery occurred prior to this time, section 1006 did not apply. Therefore, as the offense was committed in Korea, no federal, state, or territorial court had jurisdiction of the offense.

### III. PRETRIAL AND TRIAL PROCEDURES

#### A. CHARGES AND SPECIFICATIONS

##### 1. *Delay in Disposition.*

The decision in *United States v. Tibbs*<sup>5</sup> is significant in that it

<sup>3</sup> Hereafter referred to as the Code and cited as UCMJ art. ----.

<sup>4</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 127c, § A [hereafter referred to as the Manual and cited as MCM, 1951, para. ----].

<sup>5</sup> 15 U.S.C.M.A. 350, 35 C.M.R. 322 (1965).

## SURVEY OF MILITARY JUSTICE

tends to amplify the position taken by the Court in the previous term on pretrial delays.<sup>6</sup> The accused in *Tibbs* pleaded guilty to charges of housebreaking and attempted larceny on two separate occasions. A stipulation between the parties indicated that he had been caught in the act on each occasion. After a hearing on the voluntariness of the guilty pleas, the trial defense counsel moved to dismiss the charges for denial of due process in violation of articles 10 and 33 of the Code. The record indicated that after the pretrial confinement of the accused, fifteen days elapsed before he was advised of the sworn charges and fifty-five days elapsed before he was brought to trial. Prior to denying the motion, the law officer expressed his intention to do so unless the defense could show that the failure to comply with article 33 had prejudiced the accused's case. In finding no violation of the Code by the Government, the Court found that even if the law officer based his decision upon an improper rule of law, there was adequate evidence in the record to permit determination by the Court on the merits of the case. From the evidence it was concluded that the notification purpose of article 10 was satisfied since the accused was caught in the acts and there could be no question in his mind as to the reason he was confined; that the various periods of time elapsing between each stage of the pretrial processing of the case was not unreasonable, the test being reasonable diligence rather than constant motion in bringing the charges to trial; and that article 33 was not ground for reversing an otherwise valid conviction since the record showed it was impracticable to forward the charges and allied papers to the general court-martial authority within eight days of the accused's confinement.<sup>7</sup>

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<sup>6</sup> In *United States v. Schalck*, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964), the accused was confined for ninety-six days without being charged. The Court held that on the posture of the record of the case, which contained no explanation of the delay, the issue could be raised for the first time before the board of review. However, it was also held that the board of review was in error in summarily dismissing the charges because the issue was not raised at trial and the Government was never accorded a hearing on the question.

<sup>7</sup> Judge Ferguson dissented, stating that he would require a rehearing for the limited purpose of determining if there was an appropriate explanation for the delays. He commented that the delays could be found to be reasonable and not oppressive only by the use of speculation which he would not substitute for a reasoned inquiry. It was also his opinion that affirmation by the majority resulted in the setting aside, if only on an *ad hoc* basis, the earlier decisions in *United States v. Schalck*, *supra* note 6, and *United States v. Brown*, 10 U.S.C.M.A. 498, 28 C.M.R. 64 (1959).

2. *Amendment.*

The Court refused to apply waiver in *United States v. Krut-singer*<sup>8</sup> where the defense did not object to the amendment, after arraignment, of an absent without leave specification which increased the maximum punishment authorized and to which the accused subsequently pleaded guilty. Although a specification can be amended at any time prior to findings, it may not result in a different or more serious offense. The Court was of the opinion that invoking the doctrine of waiver would result in a miscarriage of justice as the record raised doubt as to whether the trial defense counsel and the accused understood the significance of the amendment.

3. *Sufficiency.*

In addition to the jurisdictional issue, *United States v. Winton*<sup>9</sup> also presented a question of the sufficiency of a specification. After his reenlistment as previously discussed, *supra* II, the accused made another loan application. As a result, he was convicted of falsely and without authorization, with intent to deceive, making the signature of another to a recommendation on the loan form which indicated that he was a good credit risk. The specification was under article 134 of the Code and alleged that the application was subsequently *forwarded* to the credit union. The defense position was that the specification was insufficient to allege discreditable conduct because it failed to state that the application was *communicated* to anyone. The Court, in upholding the sufficiency of the specification, distinguished *United States v. Wilson*<sup>10</sup> in which the specification did not allege that the application was *forwarded*. It was held that the meaning of the word "forwarded," in its ordinary sense, was sufficient to convey the idea that the form was delivered to the addressee, and that the allegation set forth in the specification sufficed to support a finding of conduct to the discredit of the armed forces.

In *United States v. Knowles*,<sup>11</sup> the accused pleaded guilty to two specifications of taking indecent liberties with children by communicating obscene language over the telephone in violation of article 134 of the Code. A board of review modified the findings and reduced the sentence on the ground that the specifications

<sup>8</sup> 15 U.S.C.M.A. 235, 35 C.M.R. 207 (1965).

<sup>9</sup> 15 U.S.C.M.A. 222, 35 C.M.R. 194 (1965).

<sup>10</sup> 13 U.S.C.M.A. 670, 674, 33 C.M.R. 202, 206 (1963).

<sup>11</sup> 15 U.S.C.M.A. 404, 35 C.M.R. 376 (1965).



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alleged no more than communicating obscene language in violation of the same article.<sup>12</sup> On certification by The Judge Advocate General of the Army, the Court decided that the board was correct in holding that the specifications did not set out the offenses of indecent liberties. The decision indicated that although the offense does not require physical contact, the conduct of the accused must be in the presence of the victim.

*United States v. DeAngelo*<sup>13</sup> involved the sufficiency of two specifications alleging the submission of false official reports which were known to be false in violation of article 107 of the Code. The gist of the issue was whether the specifications were rendered insufficient because they failed to specify an intent to deceive. The Court found that the failure to allege the intent to deceive was of no importance because the specifications were sufficient to allege a falsification of a material matter within the jurisdiction of the United States in violation of the *United States Code*<sup>14</sup> which may be prosecuted as a noncapital offense under article 134 with the maximum punishment being the same as for an article 107 violation. In reaching this conclusion, the Court stated that the designation of the article of the Code mentioned in the charge is of no consequence when the accused is fairly apprised by the facts pleaded of the nature of the offense he is charged with committing and is not misled in his defense.

In *United States v. Giordano*,<sup>15</sup> a question of sufficiency was raised as to one of the several specifications of which the accused were convicted. The specification in question alleged that the accused conducted themselves in a manner unbecoming officers and gentlemen by conspiring with a named enlisted man and among themselves to commit the offense of failure to obey a lawful regulation in violation of article 133 of the Code. The Court found the specification insufficient to allege either the offense of conspiracy under article 81 or a violation of article 133 of the Code,

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<sup>12</sup> The board decision, CM 412158, Knowles, 7 January 1965, shows that the victim in one specification was a female child and the victim in the other specification was a male child. The board decided that the offense against the female child was punishable by the maximum punishment prescribed for communicating obscene language to a female, and that the offense against the male child was punishable by the lesser punishment provided for a simple disorder. The certified question did not ask the Court to rule on whether the board was correct in so distinguishing the specifications, and as a result, no comment was made on this aspect of the board decision.

<sup>13</sup> 15 U.S.C.M.A. 428, 35 C.M.R. 395 (1965).

<sup>14</sup> 18 U.S.C. § 1001 (1964).

<sup>15</sup> 15 U.S.C.M.A. 163, 35 C.M.R. 135 (1964).

absent any allegation of an overt act or averment of circumstances indicating that the accused wrongfully and dishonorably compromised their standing as officers and gentlemen.

## B. PRETRIAL MATTERS AND COMPOSITION OF COURTS-MARTIAL

### 1. *Equal Opportunity for Pretrial Interviews of Witnesses.*

In *United States v. Enloe*,<sup>15</sup> an Air Force regulation, conditioning grants of permission for defense counsel interviews with agents of the Office of Special Investigations upon the presence of certain designated third parties, was struck down as invalid insofar as it applied to military justice proceedings.<sup>17</sup> Based on the directive, the trial defense counsel's requests for private interviews had been denied both prior to and during the trial. The Court held that, absent special circumstances, such a directive deprives an accused of the equality of access to witnesses and evidence to which he is entitled under the Code<sup>18</sup> and Manual.<sup>19</sup> Prejudicial error was found in that the interviews desired were with witnesses who testified at the trial as to a pretrial statement of the accused and the conduct of a search and seizure of his belongings. Accordingly, the Court refused to speculate on what would have been the result of these interviews in order to find prejudice. Although recognizing that a witness may not be compelled to submit to a private interview, the Court indicated that the law officer had the duty of advising the witnesses involved that the directive was a nullity, that they were relieved of any obligation to comply with it, and that their persistence in obeying it would bar the receipt of their testimony.

<sup>15</sup> 15 U.S.C.M.A. 256, 35 C.M.R. 228 (1965).

<sup>17</sup> *Accord*, *United States v. Williams*, 15 U.S.C.M.A. 270, 35 C.M.R. 242 (1965); *United States v. Beck*, 15 U.S.C.M.A. 269, 35 C.M.R. 241 (1965); *United States v. Meyer*, 15 U.S.C.M.A. 268, 35 C.M.R. 240 (1965), all decided 26 February 1965. Chief Judge Quinn dissented in all cases for the reason stated in his dissenting opinion in *United States v. Enloe*, *supra* note 16, where he found the directive to be reasonable and not in violation of any rights to which an accused is entitled, and compliance therewith not to be prejudicial under circumstances of the case. He was of the opinion that the rule that counsel can talk to potentially adverse witnesses without the consent of opposing counsel did not extend to barring opposing counsel from the interview.

<sup>18</sup> UCMJ art. 46.

<sup>19</sup> MCM, 1951, paras. 42c, 44g(1), and 48g.

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### 2. *Composition of the Court-Martial.*

Harmless error was found to exist where an officer was sworn as assistant trial counsel although he was not mentioned in the orders convening a general court-martial.<sup>20</sup> It was concluded that, under the facts of the case, there was no risk of prejudice since the appointed trial counsel was in charge of the prosecution, the unauthorized officer was present principally as an observer with the knowledge and consent of all counsel, and his participation was limited to making one reference to legal authority at an out-of-court hearing and assisting the trial counsel in a ministerial capacity.<sup>21</sup>

### C. PLEAS OF GUILTY

#### 1. *Providence.*

In two per curiam opinions, the Court found reversible error for the failure of the presidents of special courts-martial to inquire into the providence of pleas of guilty to wrongful appropriation. In one of these cases, the accused testified that he unknowingly participated in the wrongful taking,<sup>22</sup> and in the other case the testimony of the accused indicated that he intended only to borrow the item involved.<sup>23</sup>

These decisions were followed later in the term by *United States v. Richardson*,<sup>24</sup> where a question of providence was raised in a post-trial interview. The accused, having pleaded guilty to dishonorable failure to maintain funds on deposit to pay checks he had made and uttered in violation of article 134 of the Code, stated at the post-trial interview that he wrote the bad checks thinking that various checks had cleared which he had received from others in a gambling game and deposited in his account. They had in

<sup>20</sup> See *United States v. Durham*, 15 U.S.C.M.A. 479, 35 C.M.R. 451 (1965).

<sup>21</sup> Although the Court indicated that participation by unappointed assistant counsel could not be jurisdictional error, it issued a strong caveat that under some circumstances this procedural error could result in prejudice, and that it should be avoided in future cases by proper appointment in order to avoid the possibility of appellate reversal. The assistant trial counsel was an attorney who had not been certified under article 27(b) of the Code. An interesting question is presented as to whether the same decision would have resulted if he had not been an attorney. See *United States v. Kraskouskas*, 9 U.S.C.M.A. 607, 610, 26 C.M.R. 387, 390 (1958), where it is stated that "it is imperative that only qualified lawyers be permitted to practice before a general court-martial."

<sup>22</sup> See *United States v. Cleveland*, 15 U.S.C.M.A. 121, 35 C.M.R. 93 (1964).

<sup>23</sup> See *United States v. Brown*, 15 U.S.C.M.A. 67, 35 C.M.R. 39 (1964).

<sup>24</sup> 15 U.S.C.M.A. 400, 35 C.M.R. 372 (1965).

fact been subsequently dishonored. The Court stated that if this belief was honest, the accused could not be guilty. The idea that the accused had no right honestly to rely on checks which were the proceeds of a gambling game was rejected. It was indicated that improvidence of a guilty plea is normally put in issue only by post-plea declarations of innocence, which usually indicate a misunderstanding by the accused of the legal significance of his acts. On the other hand, inconsistent pretrial statements have little bearing on the question because the accused may have maintained his innocence until he saw that the Government's case made his pretense useless or until he was overwhelmed by a guilty conscience. In setting aside the guilty plea, the Court was of the opinion that it had no other choice as a miscarriage of justice would result if the accused's statement was true.<sup>25</sup>

## 2. Procedure.

Although favoring full inquiry into guilty pleas in all cases,<sup>26</sup> the Court indicated in *United States v. Griffin*<sup>27</sup> that it will look at the circumstances involved in each case to determine if there is a fair risk of prejudice before setting aside a plea for failure to follow the proper procedure relative to accepting a guilty plea. In *Griffin* the accused pleaded guilty to absence without leave in violation of article 86 of the Code and not guilty to other offenses charged. No inquiry or explanation was made concerning the guilty plea, nor was there a statement in the record that the accused understood its meaning or effect. The Court found the failure to comply with paragraph 70b of the Manual to be error but not reversible error under the circumstances. In finding no fair risk of prejudice, the factors considered were the accused's repeated admission of guilt, lengthy service, education, and high degree of intelligence. Also noted was the competence which his trial defense counsel displayed in defending against the offenses to which not guilty pleas were entered. Additionally, it had not

<sup>25</sup> The Court could not understand why a proper investigation had not been made below so that the convening authority could have resolved the issue and thereby eliminated lengthy appellate processing. It was also stressed that a full inquiry into the circumstances of the plea during the trial, rather than a pro forma explanation of the meaning and effect, probably would have also eliminated long appellate scrutiny. The scope of the inquiry laid out in Judge Ferguson's dissenting opinion in *United States v. Brown*, 11 U.S.C.M.A. 207, 215, 29 C.M.R. 23, 31 (1960), was cited as being desirable for use in all guilty plea cases.

<sup>26</sup> See note 25 *supra*.

<sup>27</sup> 15 U.S.C.M.A. 135, 35 C.M.R. 107 (1964). Judge Ferguson dissented.

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been contended at any stage that the accused was not guilty of absence without leave or that the plea was ill-advised.

*United States v. Drake*<sup>28</sup> presented a certified question of whether a board of review was correct in setting aside an absent without leave conviction<sup>29</sup> on the ground that the law officer, while inquiring into the providence of the guilty plea in open court, questioned the accused as to whether he was in fact guilty. The Court answered the question by stating that the board was incorrect, but it also suggested that guilty plea inquiries in general court-martial cases be held out of the hearing of the court members.<sup>30</sup> It was recognized that this could not be done in special courts-martial as the ruling of the president in accepting or rejecting a guilty plea is subject to objection by the other court members.

A procedure in guilty plea cases which permits the court to arrive at both findings and sentence in the same session was declared improper and not to be followed.<sup>31</sup> However, the convictions were not upset as no prejudice was found where the providence of the guilty plea was determined in an out-of-court hearing and its acceptance was announced thereafter in open court, both sides rested without presenting evidence on the merits, the accused was fully advised of his right to present evidence in extenuation and mitigation, and all matters pertinent to the sentence were received by the court prior to the voting.

### D. CONDUCT OF THE TRIAL

#### 1. Challenges.

*United States v. Freeman*<sup>32</sup> involved a question of an abuse of discretion by the law officer in limiting *voir dire* examination. The Court, in finding no abuse of discretion, stated that the law officer has wide discretion in exercising his responsibility for the scope and nature of the *voir dire*. Although he should be liberal in permitting questions, he must guard against an inquiry which might result in a response which would influence the minds of other members so as to cast doubt on their ability to act impartially

<sup>28</sup> 15 U.S.C.M.A. 375, 35 C.M.R. 347 (1965).

<sup>29</sup> UCMJ art. 86.

<sup>30</sup> *Accord*, *United States v. Harris*, 15 U.S.C.M.A. 381, 35 C.M.R. 353 (1965).

<sup>31</sup> See *United States v. Terry*, 15 U.S.C.M.A. 221, 35 C.M.R. 193 (1965); *United States v. Trotter*, 15 U.S.C.M.A. 218, 35 C.M.R. 190 (1965).

<sup>32</sup> 15 U.S.C.M.A. 128, 35 C.M.R. 98 (1964).

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thereafter. The Court indicated that it would not substitute its judgment for that of the law officer on a ruling of this type unless the ruling is manifestly unreasonable or arbitrary. The issue was raised by a question of the trial defense counsel of whether there was any member who did not think a person could be so drunk as to be unable to entertain the specific intent to deprive another of his property. In finding no abuse of discretion the Court found the question to be ambiguous because not only could the question have been designed to ascertain if the court members were biased towards persons who drink or if they had an unaltered aversion towards intoxication as a defense, but it could also be construed as asking the members for a legal conclusion as to the consequences of a particular state of intoxication on specific intent or as calling upon the members to state how they would decide the case if certain circumstances were shown. The Court noted that the ruling in question did not prohibit further questioning by the defense counsel who thereafter continued the *voir dire* along other lines without attempting to rephrase the ambiguous question in order to more clearly present the question of bias or irreversible opinion of the members.

In *United States v. Cleveland*,<sup>33</sup> findings of guilty to larceny, sodomy, and false swearing, in violation of articles 121, 125, and 134 of the Code, respectively, were set aside for failure of the court-martial to sustain a challenge for cause against the president. In addition to the president, two other members of the court replied affirmatively to a question by the defense as to whether they believed that a conviction of heterosexual sodomy with a prostitute would necessarily require a discharge. Peremptory challenges were exercised by the prosecution and defense against the two members after the court-martial failed to sustain the challenges for cause; however, the president continued to participate throughout the trial. The Court found that the question was proper and that the trial court erred in failing to sustain the three challenges for cause as the affirmative answer to the question, which summed up one of the offenses charged, indicated "an inelastic attitude" and thus made the challenged members unable impartially to sit as sentence. However, the reversal resulted because the president presided throughout the entire trial. The Court noted that the disqualification of the president related to his ability impartially to participate in sentence proceedings but set aside all guilty findings and sentence. In holding the

<sup>33</sup> 15 U.S.C.M.A. 213, 35 C.M.R. 185 (1965).

error fatal to both findings and sentence, it was determined that the president was "cloaked" in his disqualification throughout his participation in both.<sup>31</sup> The Court reasoned that since the error preceded not only the findings and sentence, but also the arraignment, it would have been a futile effort to permit the president to participate on findings and then remove him during the sentence proceedings. Despite the fact that the question was rendered moot by the determination discussed above, the Court commented on the failure of the law officer to instruct the members of the court on the legal test to be applied in deciding the challenges for cause. Noting that the law officer had only instructed upon the proper procedure to be followed in deciding the challenges and that they should be liberally sustained, the Court issued the caveat that there should also be instructions given on the law applicable to challenges by explaining the governing factors to be applied just as these instructions are given in other areas.

*United States v. Broy*<sup>35</sup> also involved a question of the correctness of overruling a challenge for cause. The law officer at a rehearing on the sentence was challenged on the ground that he was the law officer of the court which first heard the case. In upholding the determination by the trial court, the Court pointed out that in civil courts a judge may properly preside at a rehearing of a case originally tried before him and that challenges are normally directed at personal bias rather than previous exposure to the same or a similar question of law. It was further declared that the grounds for disqualification contained in the Code<sup>36</sup> are self-operating whereas disqualification under those provided by the Manual<sup>37</sup> depend on the circumstances of each case. The test applied in determining a challenge based on previous action in a case, in a capacity other than that prohibited by the Code, is whether the prior participation would have a "harmful effect upon a right of the accused." The Court observed that there was no reason for the law officer to resent the previous reversal and thus be prompted to deny the accused a fair hearing on the

<sup>34</sup> *United States v. Wilson*, 7 U.S.C.M.A. 656, 23 C.M.R. 120 (1957), was distinguished. There the disqualification also related to a question of partiality on the sentence, but it did not arise until the law officer was called as a witness for the prosecution after findings. As a result, the error of his further participation did not "infest the proceedings *ab initio*," and the reversal applied only to the sentence.

<sup>35</sup> 15 U.S.C.M.A. 382, 35 C.M.R. 354 (1965).

<sup>36</sup> See UCMJ art. 26(a).

<sup>37</sup> See MCM, 1951, para. 62f. Subparagraphs (11) and (13) are those which are applicable to the instant case.

sentence because the reversal was not for law officer error but for failure of the civilian counsel to introduce certain evidence on the sentence. Scrutiny of the records of both the original trial and the rehearing revealed that the law officer acted fairly and impartially with a general alertness to the accused's rights, and there was no indication that it was inappropriate for him to sit on the rehearing.

### 2. *Right to Counsel.*

In *United States v. Gatewood*,<sup>38</sup> the accused's pretrial request for counsel qualified under article 27 of the Code to represent him at his special court-martial was rejected. The record indicated that the request was denied by the general court-martial convening authority on the ground that qualified counsel were not reasonably available due to engagement in general courts-martial cases. The Court held that this was proper reason to consider them unavailable to represent the accused at his special court-martial, and that it was not necessary that the convening authority set forth additional facts and figures to justify his decision. The important fact was that the convening authority had given a specific reason for his ruling and informed the accused.<sup>39</sup> Thereafter, the accused has the burden, as the aggrieved party, of supporting a claim of abuse of discretion, and he should have investigated the surrounding circumstances and presented his findings in support of such a contention. At the trial it had been indicated that the accused was satisfied to be represented by the appointed counsel, and no issue was raised concerning his pretrial application.

### 3. *Out-of-Court Hearings.*

*United States v. Workman*<sup>40</sup> clearly pronounced that the right to an out-of-court hearing on the voluntariness of pretrial statements by an accused is limited to situations where there has been a request by the accused, and that he cannot later complain that he was prejudiced by his choice to proceed in the presence of the court members.

<sup>38</sup> 15 U.S.C.M.A. 438, 35 C.M.R. 405 (1965).

<sup>39</sup> Compare *United States v. Cutting*, 14 U.S.C.M.A. 347, 34 C.M.R. 127 (1964), where reversal resulted because the record of trial failed to indicate that the accused's request for individual military counsel was presented to and acted upon by the convening authority.

<sup>40</sup> 15 U.S.C.M.A. 228, 35 C.M.R. 200 (1965).



4. *Argument of Counsel.*

The trial counsel in *United States v. Russell*,<sup>41</sup> while arguing on the issue of identity, called the court's attention to the fact that, from evidence adduced as the result of a semen analysis, there was an eighty-five per cent possibility that a blood test would exclude the accused as the perpetrator of the charged offense, and the accused had not taken advantage of those favorable odds by submitting to a blood test. The Court considered this to be improper comment on the accused's failure to testify, and the fact that the accused had taken the stand and denied his guilt did not shear him of his pre-existing right against self-incrimination. In addition, it was an infringement upon the accused's right not to submit, prior to trial, to possibly incriminating procedures, "and the fact that refusal to do so at an earlier time may not be paraded before the court by way of cross-examination." The opinion indicates that an instruction to disregard the argument might have eliminated any prejudice, but none was requested nor was any given. The Court refused to apply waiver because of the failure of the defense to object or request an instruction on the matter. Although improper comment of the trial counsel should ordinarily be objected to by the defense, waiver will not be applied if it results in a miscarriage of justice, and the Court was of the opinion that it would result if waiver was applied here where the error involved the critical area of self-incrimination.

5. *Instructions.*

In *United States v. Cooper*,<sup>42</sup> the question of the accused's good character was placed in issue on the merits, therefore requiring an instruction upon request.<sup>43</sup> The law officer indicated to counsel that he would give an appropriate instruction but inadvertently failed to do so, and the court thereafter returned findings of guilty. The omission was discovered while the court was deliberating on the punishment. Refusing to grant a mistrial, the law officer then recalled the court, instructed them properly on good character, and further instructed that it would be appropriate for them to revoke the findings and reconsider the matter after consideration of the new instructions. Subsequently the court revoked its earlier findings, re-ballotted, and again found the accused guilty. The Court rejected an argument that the entitlement to the instruction was waived because the law officer had not advised counsel of

<sup>41</sup> 15 U.S.C.M.A. 76, 35 C.M.R. 48 (1964). Chief Judge Quinn dissented.

<sup>42</sup> 15 U.S.C.M.A. 322, 35 C.M.R. 294 (1965).

<sup>43</sup> *E.g.*, *United States v. Browning*, 1 U.S.C.M.A. 599, 5 C.M.R. 27 (1952).

a change in his announced decision to instruct on the matter, nor had he permitted an opportunity to object to the omission. In reversing the affirmation by the board of review, the Court stated that the provisions of paragraph 74d(3) of the Manual, permitting a court to reconsider its findings at any time before the sentence is announced, were intended to permit reconsideration as an ameliorative measure. They are not to be used by the law officer as a means of correcting instructional omissions after the findings are announced. However, the court can and should be recalled to correct errors or omissions in the charge at any time before the findings are returned.<sup>44</sup>

Instructions in *United States v. Nusman*<sup>45</sup> and *United States v. Gilmore*<sup>46</sup> were not erroneous because the law officer's instructions on findings indicated "that each court member should listen, with a disposition to be convinced, to the opinions and arguments of the others and should not enter the deliberation room with a fixed opinion as to the verdict, but that a member should not yield his judgment simply because of being outnumbered or outweighed." In *Gilmore*, the Court also held that it is not necessary to wait until there is a deadlock among the court members before giving such an instruction.

In *United States v. Carson*,<sup>47</sup> The Judge Advocate General of the Army certified the following question:

Was the board of review correct in holding that prejudice to the substantial rights of the accused resulted from the law officer's failure to instruct the court that they must find beyond a reasonable doubt that the accused was duly placed in correctional custody?

By its holding, the board of review had set aside the accused's conviction of escape from correctional custody in violation of article 134 of the Code. The certified question was answered in the negative even though the accused was given the benefit of the doubt of whether his testimony at the trial amounted to a judicial confession which would have eliminated any harm in a failure to instruct on the element in question. In reversing the board of review decision, the Court stated that the question of whether an act is legal is a question of law for determination by the law

<sup>44</sup> See *United States v. Robinson*, 15 U.S.C.M.A. 492, 35 C.M.R. 464 (1965), where an erroneous instruction on the defense of mistake of fact was cured by withdrawing the erroneous instruction and substituting a correct one prior to the closing of the court for deliberations on the findings.

<sup>45</sup> 15 U.S.C.M.A. 432, 35 C.M.R. 404 (1965).

<sup>46</sup> 15 U.S.C.M.A. 428, 35 C.M.R. 400 (1965).

<sup>47</sup> 15 U.S.C.M.A. 407, 35 C.M.R. 379 (1965).

officer as an interlocutory question<sup>45</sup> and not an issue of fact to be decided by the court members. However, if there is a question of fact relating to the legality of an act, then the question of fact must be submitted to the court-martial.<sup>46</sup> There was no factual issue raised in this case of whether the accused was legally placed in correctional custody and therefore it would have been improper for the law officer to submit the question to the court members.

#### 6. *Inconsistent Findings.*

In *United States v. Pardue*<sup>47</sup> the accused was charged under one specification with larceny of an automobile in violation of article 121 of the Code. The court-martial, after being instructed by the law officer that it could do so, modified the specification and convicted the accused of stealing four tires and wheels of a value of more than \$50.00 and wrongful appropriation of an automobile of a value in excess of \$50.00. The Judge Advocate General of the Air Force certified the question of whether the board of review was correct in affirming the conviction. The Court decided that the findings were inconsistent as the wrongful appropriation determination acquitted the accused of the larceny of any essential part of the vehicle.<sup>48</sup> Only the wrongful appropriation of the automobile portion of the guilty findings was affirmed. The case was returned for reassessment of the sentence or a rehearing thereon as the sentence was determined at the trial on the maximum punishment authorized for the larceny.

<sup>45</sup> The Court gave two examples to illustrate this rule. Those examples indicate that the rule is applicable to the questions of legality of orders when disobedience of an order is charged and of legality of restraint when there is a prosecution for escape. Therefore, the holding is not limited to offenses against correctional custody, but is also applicable to other offenses where restraint violations and disobedience of orders or commands are involved. See, e.g., UCMJ arts. 90(2), 91(2), 92(1) and (2), and 95. Breaking restriction in violation of article 134 of the Code is another example.

<sup>46</sup> The example given is where there is an issue raised of whether a person imposing correctional custody actually occupied a position which empowered him to prescribe correctional custody under article 15 of the Code.

<sup>47</sup> 15 U.S.C.M.A. 483, 35 C.M.R. 455 (1965).

<sup>48</sup> *United States v. Calhoun*, 5 U.S.C.M.A. 428, 18 C.M.R. 52 (1955), was distinguished on the basis that the holding was limited to instances where relatively rare compound offenses are involved. There the Court affirmed convictions of both assault and wrongful appropriation under a robbery charge because they are both lesser included offenses of the compound offense of robbery, and such a finding is not inconsistent since a court may conclude that there was an absence of the necessary intent to support a conviction of robbery.

## IV. MILITARY CRIMINAL LAW

## A. SUBSTANTIVE OFFENSES

1. *Alteration of a Leave Form.*

Faced with the issue of sufficiency of the evidence to support a finding of guilty of altering an official leave form in violation of lawful general regulations, the United States Court of Military Appeals in *United States v. Showalter*<sup>52</sup> had no difficulty in concluding that the court-martial was "permitted to draw reasonable inferences from the facts proved . . . [and the Government] was entitled to show by circumstantial evidence . . . [alteration of the leave slip] without authority."<sup>53</sup> The accused's commanding officer had issued him a standard leave authorization form which bore no reference to the effect that the wearing of civilian clothing was permitted. When he was later apprehended for assault, a search of his person disclosed the leave form with the indorsement "EM IS AUTHORIZED TO WEAR CIVILIAN CLOTHES IN I CORE [sic] AREA FOR BUSINESS." The Government showed that the form was given to the accused without this indorsement and that he had exclusive possession of the form until it was found in his possession with the alteration. Since the accused had departed on leave in civilian clothing which he was still wearing when he was apprehended, the court-martial was permitted, but not required, under the circumstances to infer that the accused himself had altered the leave form.

2. *Breach of Restriction.*

In *United States v. Haynes*<sup>54</sup> the defense argued before the Court that Haynes could not be convicted of the offense of breach of restriction when at the time he was restricted he was not under charges or under investigation nor was he a suspect or a material witness in a judicial proceeding. The officer who imposed the restriction to the limits of the Misawa Air Base testified the accused had been twice convicted by summary courts-martial for selling wrongfully appropriated property while on pass in Misawa City and he imposed the restriction because he felt the accused "would continue to do the same thing if the opportunity presented itself." The Government argued that the restriction was not punitive since it had no connection with disciplinary proceedings

<sup>52</sup> 15 U.S.C.M.A. 410, 35 C.M.R. 382 (1965).

<sup>53</sup> *Id.* at 413, 35 C.M.R. at 385, quoting from *State v. Harden*, 137 Ore. 250, 300 Pac. 347 (1931). The phrases in brackets are the authors'.

<sup>54</sup> 15 U.S.C.M.A. 122, 35 C.M.R. 94 (1964).

and, therefore, was a valid exercise of the inherent authority of command. Turning to the Manual the Court concluded that such restriction could be imposed to avoid exposure to temptation if the accused "is already under charges."<sup>55</sup> Noting, however, that Haynes was not under charges, the intent to deter him from possibly committing further offenses was not a sufficient basis for imposing the restriction.

### 3. *Conduct Unbecoming an Officer.*

In what may prove to be one of its most significant decisions of this term, the Court in *United States v. Giordano*<sup>56</sup> was faced, *inter alia*, with the issue of the nature of the offense of conduct unbecoming an officer and a gentleman, in violation of article 133 of the Uniform Code. Acknowledging that article 133 must prohibit more than conduct otherwise recognized as criminal or it would be meaningless in the face of the other punitive articles including article 134, the Court concluded that the appropriate standard for assessing criminality under article 133 is whether the conduct or act charged is dishonorable and compromising as alleged regardless of whether or not the act otherwise amounts to a crime. The accused had been charging fifty percent monthly interest on loans to enlisted men in their unit. The Court recognized that making such an enormous personal gain at the expense of his subordinates is wholly inconsistent with an officer's duty to the welfare and interests of those he commands and is wholly incompatible with the character, honesty and sense of fair dealing required of an officer. In view of this opinion, the Court appears to have given a renewed vitality to the responsibilities and the integrity of the Officer Corps and reaffirmed the principle that an act which is not proscribed by article 134 may be violation of article 133.

### 4. *Discharge of a Firearm under Circumstances Endangering Human Life.*

In what was a case of first impression on its facts the Court considered the offense of wrongful and willful discharge of a firearm under circumstances such as to endanger human life. Although it had considered the offense before,<sup>57</sup> Judge Ferguson, writing for a unanimous Court, observed that *United States v.*

<sup>55</sup> MCM, 1951, para. 20b. Emphasis supplied by the Court.

<sup>56</sup> 15 U.S.C.M.A. 163, 35 C.M.R. 135 (1964).

<sup>57</sup> See *United States v. Simmons*, 1 U.S.C.M.A. 691, 5 C.M.R. 119 (1952), in which the accused fired his carbine into the ground, but in the presence of other soldiers.

*Potter*<sup>58</sup> was original because it appeared that no human life had, in fact, been endangered. Potter, following an argument with another airman in the messhall, fired five shots through the door of his intended victim's room in the barracks. Four of the bullets came to rest in the room and the fifth passed out into a parking lot. Although Potter did not know it, his intended victim was not in the room. At the trial there was no showing that anyone was in the parking lot or area who was actually endangered by the barracks shooting. The Court had no difficulty in concluding that "under circumstances such as to endanger human life" refers to a reasonable potentiality for harm to human beings in general and not to an actual potentiality. The standard, it ruled, is not "that . . . life was in fact endangered, but that, from the circumstances surrounding the wrongful discharge of the weapon, it may be fairly inferred that the act was unsafe to human life in general."<sup>59</sup>

#### 5. *Disobedience of Orders.*

An accused and his counsel are, as a matter of right, entitled to ample opportunity to prepare the defense of the case, including the right to interview all possible witnesses.<sup>60</sup> Any order which prohibits an accused from contacting the witnesses against him is unlawful, according to a divided Court in *United States v. Aycock*.<sup>61</sup> The accused pleaded guilty to committing adultery with a Mrs. D., the wife of a fellow airman and to two specifications of failure to obey a lawful order. After the charge of adultery had been referred for trial, the accused's commanding officer ordered him not to contact the airman, or his wife or to discuss the alleged adultery with them at any time prior to trial. The order was a result of Airman D's complaints that Aycock had threatened him and his wife "unless they dropped the charges." In an earlier case<sup>62</sup> an accused had been ordered "not to talk or speak with any of the men in the Company" who were being questioned in connection with alleged misconduct by the accused's dependents. That order was condemned because it was too broad in nature and "all-inclusive" in scope to be legal. Writing for the majority in *Aycock*, Judge Ferguson had no difficulty marshalling precedents in state law for the principle that an accused may not

<sup>58</sup> 15 U.S.C.M.A. 271, 35 C.M.R. 243 (1965).

<sup>59</sup> *Id.* at 274, 35 C.M.R. at 246.

<sup>60</sup> MCM, 1951, para. 48g.

<sup>61</sup> 15 U.S.C.M.A. 158, 35 C.M.R. 130 (1964). Chief Judge Quinn dissented.

<sup>62</sup> See *United States v. Wysong*, 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958).

be denied an opportunity to interview the witnesses against him. This order limiting the accused's right to prepare his defense by limiting his opportunity to interview the witnesses against him was too broad in nature to be legal, notwithstanding any bona fide attempt by the commander to prevent the accused from unduly harassing the witnesses against him.<sup>63</sup>

When the Court struck down the offense of usury in *United States v. Day*<sup>64</sup> it indicated that although no offense could be charged under article 134, a violation of an order which limited rates of interest would support a charge under article 92. *United States v. Giordano*<sup>65</sup> was the first case to come before the Court on a charge of violation of a lawful order. Regulations promulgated by the Post Commander at Fort Hood, and modeled in part after the Texas small loan act, limited the rate of interest which could be charged on personal loans. The Court had no difficulty in determining such a regulation is neither arbitrary nor unreasonable and concluding it falls within the scope of the class of orders that may be properly promulgated.<sup>66</sup>

#### 6. *Housebreaking.*

Although the accused in *United States v. Browder*<sup>67</sup> pleaded guilty, *inter alia*, to two counts of housebreaking, on appeal his counsel argued that the plea to one specification of housebreaking was improvident. According to the facts stipulated at trial, Browder and another soldier, Wheeler, while both were absent from their organization without proper authority, broke into two barracks and stole various items of personal property. One of the barracks was that of Wheeler and it was as to this offense that Browder's counsel argued the guilty plea was improvident. This

<sup>63</sup> Chief Judge Quinn in his dissent did not find the order prevented the accused's counsel from interviewing the witnesses and concluded the order "merely prohibited 'personal communication' which would harass or threaten the complaining witness or her husband."

<sup>64</sup> 11 U.S.C.M.A. 549, 29 C.M.R. 365 (1960).

<sup>65</sup> 15 U.S.C.M.A. 163, 35 C.M.R. 135 (1964).

<sup>66</sup> *Quaere*: Are orders which prohibit the charging of any interest on a loan legal? Consider USAREUR Reg. No. 210-50 (4 Nov. 1963), which prohibits engaging in the loan business for profit. An interesting facet of this case is that although the Court disregarded the usury specification under article 134, it looked to the punishment specified for usury in paragraph 127c, MCM, 1951. Accordingly, the permissible maximum penalty for a violation of the order appears to be partial forfeitures for three months and dismissal. See *United States v. Giordano*, 15 U.S.C.M.A. 163, 173, 35 C.M.R. 135, 145 (1964), and JAGJ 1965/8453, 15 June 1965.

<sup>67</sup> 15 U.S.C.M.A. 466, 35 C.M.R. 438 (1965).

barracks was locked because the unit was engaged in a field problem in which Wheeler would have been participating if he had not been absent. Noting that under civilian law an employee can be convicted of unlawful entry of a building in which he works if, at the time and place of entry, he is not authorized to do so, the Court had no difficulty in concluding that the plea was provident since entry had been forced, made under cover of darkness, and with an admitted intention of committing larceny.

### 7. *Larceny.*

In a per curiam re-affirmance of the rule that an accused cannot be convicted of larceny solely on the basis of pawning a stolen item or failing to redeem it and return it to the true owner,<sup>65</sup> the Court reversed a special court-martial conviction in *United States v. Hicks*.<sup>66</sup> The accused testified that he did not steal the watch in question but pawned it for a "friend" whom he was unable to recall and to whom he had given the proceeds of the pledge. Under the circumstances his "withholding" of the watch might not amount to a larceny and reversal was required.

In its only other decision involving larceny, the Court in *United States v. Peterson*<sup>67</sup> considered a false claim submitted by the accused for reimbursement of dependent travel. The accused was convicted of two specifications alleging that he filed false claims for dislocation allowance and dependent travel and two specifications of larceny of the money obtained by filing those claims. In his testimony, Peterson admitted the travel had not been performed at the time he stated in his claim but insisted it had been performed about a month later. The Court noted that this might amount to a judicial confession that he made a false official statement but by itself did not support a finding of the larceny or the false claims. Evidence that some time after the alleged travel the accused's wife was not residing at the supposed new home was not inconsistent with the Government's evidence or his assertion that the travel had been performed but that his wife had returned to the vicinity of the home from which the travel had been claimed. Thus, in considering the sufficiency of the evidence, including the defendant's, "at least a reasonable doubt of guilt remains."

<sup>65</sup> See *United States v. McFarland*, 8 U.S.C.M.A. 42, 23 C.M.R. 266 (1957).

<sup>66</sup> 15 U.S.C.M.A. 68, 35 C.M.R. 40 (1964).

<sup>67</sup> 15 U.S.C.M.A. 199, 35 C.M.R. 171 (1964).



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### 8. Robbery.

The loser in illegal gambling who forcibly recaptures his losses cannot be convicted of robbery regardless of whether or not the game of chance was fair and honest.<sup>71</sup> In *United States v. Maldonado*<sup>72</sup> the accused was not himself the loser but assisted the latter in recapturing an "IOU" from the winner at knife point. Deciding that the accused was in the same position as the loser, the Court ruled that he lacked the felonious intent necessary to sustain the larceny aspect of a robbery. Accordingly, the Court affirmed a finding of guilty of the lesser included offense of assault with a dangerous weapon in violation of article 128.

## B. DEFENSES

### 1. Accident.

The defense of accident was raised in the case of *United States v. Torres-Diaz*<sup>73</sup> to an offense of aggravated assault in violation of article 128 of the Code.<sup>74</sup> The law officer correctly instructed the court that a battery included a culpably negligent application of force. However, the Court set aside the assault conviction because this instruction was followed by an instruction which was erroneous on the defense of accident in that it indicated that simple rather than culpable negligence was the standard for determining guilt or innocence.<sup>75</sup> The Court reversed because the instructions failed to require a finding of culpable negligence in order to deprive the accused of his "accident" defense, but, instead, permitted the court members to reject the defense on a finding of simple negligence.

### 2. Alibi.

The Court set aside an assault and battery conviction<sup>76</sup> in *United States v. Moore*<sup>77</sup> for failure of the law officer to instruct on the defense of alibi. At an out-of-court hearing prior to in-

<sup>71</sup> See *United States v. Brown*, 13 U.S.C.M.A. 485, 33 C.M.R. 17 (1963); *United States v. Dosal-Maldonado*, 12 U.S.M.C.A. 42, 31 C.M.R. 28 (1961).

<sup>72</sup> 15 U.S.C.M.A. 285, 35 C.M.R. 257 (1965).

<sup>73</sup> 15 U.S.C.M.A. 472, 35 C.M.R. 444 (1965). Chief Judge Quinn dissented.

<sup>74</sup> The Court cited *United States v. Redding*, 14 U.S.C.M.A. 242, 34 C.M.R. 22 (1963), for the proposition that accident is a valid defense to aggravated assault.

<sup>75</sup> Chief Judge Quinn dissented on the basis that the error was harmless because the issue of negligence was not raised by the facts.

<sup>76</sup> See UCMJ art. 128.

<sup>77</sup> 15 U.S.C.M.A. 345, 35 C.M.R. 317 (1965).

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structions on the findings, the defense counsel answered in the affirmative to a question by the law officer as to whether he wished to request an instruction on alibi.<sup>78</sup> However, the law officer subsequently failed to give the instruction and no exception was taken by the defense to this failure. The Court refused to apply waiver on the basis of the defense counsel's failure to except to the instructions because the accused's identity and presence at the scene of the offense were critical questions. Additionally, it was noted that the law officer had not indicated after his question to defense counsel whether he would give the instruction, and it was possible that defense counsel considered the omission to be a denial of the request. The Court discussed at great length its reasons for rejecting the Government's argument that other instructions in the case effectively required the court to return the same findings as were required to refute the claim of alibi,<sup>79</sup> i.e., that the accused was present at the time of the offense.

### 3. Intoxication.

In *United States v. Nickoson*,<sup>80</sup> no prejudice was found to exist in the law officer's refusal to incorporate a requested summary of defense evidence of intoxication with other instructions on that defense. In reaching that conclusion the Court found that the instructions given were adequate as the only issue was intoxication and the evidence was uncomplicated and fresh in the minds of the court members. The Court also pointed out that although he is not required to do so, the law officer may summarize and comment on the evidence in an impartial manner.

*United States v. Mayville*<sup>81</sup> involved several offenses of assault and battery by an accused ordering a trainee under his command to kick other trainees in violation of article 128 of the Code. The Court reaffirmed that assault and battery is a general intent offense and that voluntary drunkenness does not excuse a wrongdoer from liability for a general intent offense unless it results in

<sup>78</sup> A special instruction on alibi is mandatory only upon a request for it by the defense counsel. *United States v. Bigger*, 2 U.S.C.M.A. 297, 302, 8 C.M.R. 97, 102 (1958).

<sup>79</sup> Chief Judge Quinn dissented. It was his opinion that there was no fair risk that the court-martial was misled on the burden of proof by the omission of the alibi instruction. In reaching this opinion, he considered the instructions as a whole, the defense counsel's failure to except to the instructions, and the fact that the court convicted the accused of the lesser included offense rather than robbery as charged.

<sup>80</sup> 15 U.S.C.M.A. 340, 35 C.M.R. 312 (1965).

<sup>81</sup> 15 U.S.C.M.A. 420, 35 C.M.R. 392 (1965).

a total lack of mental responsibility to commit the offense. In affirming the case the Court rejected a defense contention that a different state of mind is required for conviction when an act is ordered to be committed. In this regard, the opinion indicated that when intoxication is not relevant where an accused personally commits an offense, it is equally irrelevant when he commits that offense through the agency of another.

#### 4. *Mental Responsibility.*

During the term three cases were decided which involved mental responsibility. In each of these cases the so called "policeman at the elbow" instruction was given. This instruction was condemned as prejudicially erroneous in an earlier decision in *United States v. Jensen*.<sup>52</sup> Therefore, the question in each of these cases was whether the issue of mental responsibility was raised at trial, which, if raised, would make the error prejudicial and require reversal. In all three cases the Court determined that the issue was raised and set aside the convictions.

The first of these cases was *United States v. Mathis*<sup>53</sup> in which the accused had been found guilty of premeditated murder in violation of article 118 of the Code. The Government had conceded, in a joint pleading with appellate defense counsel before the board of review, that the issue was raised by the evidence and that the conviction should be set aside and the case returned for rehearing. However, a contrary position was adopted by the Government after the board of review affirmed the conviction on the basis of the issue not being raised. The accused testified that he stated that "God ought to kill us both" and that he had an image of the victim which "isn't a human image nor anything else on this earth" during the encounter with the victim. About forty days prior to the homicide the accused had voluntarily sought psychiatric help. As a result he was interviewed by a major of the Medical Service Corps. The major's report was admitted into evidence. This report showed that the accused had spoken of a desire to kill which was getting stronger and of being a society within himself with the right to judge others. The major was of the opinion that the accused gave the impression of marked paranoid relation and aggressive impulses which were controlled with difficulty. The Court relied on the above facts in reaching the determination that

<sup>52</sup> 14 U.S.C.M.A. 353, 34 C.M.R. 133 (1964).

<sup>53</sup> 15 U.S.C.M.A. 130, 35 C.M.R. 102 (1964). Chief Judge Quinn dissented.

the issue of insanity was raised.<sup>81</sup> Some weight was also given to the fact that the law officer and both counsel at the trial believed that the issue was raised.

The next case was *United States v. Smedley*,<sup>82</sup> where it was held that an issue of mental responsibility was raised by expert testimony that the accused committed the offenses charged during an epileptic seizure. This result was reached despite the fact that other evidence controverted the conclusion stated in this testimony.

The final case was *United States v. Hacker*<sup>83</sup> which held that an issue of mental responsibility was raised by lay testimony although there was expert testimony indicating that the accused could distinguish right from wrong and adhere to the right.

### 5. Mistake.

In *United States v. Kirsch*,<sup>84</sup> the accused entered a plea of guilty to willful refusal to testify at the trial of a fellow soldier in violation of article 134 of the Code. The refusal to testify followed a grant of immunity tendered by the convening authority and was based on advice of counsel that the grant was not valid. The Court commented that "a good faith but legally mistaken belief in the right to remain silent does not constitute a defense to a charge of willful refusal to testify."

A bigamy conviction was set aside in *United States v. Bradshaw*<sup>85</sup> because of an erroneous instruction by the law officer on

<sup>81</sup> Basically the Government argued that the issue of insanity was not raised at all. However, it also argued that even though the evidence may have raised an issue of the accused's ability to distinguish right from wrong, it failed to raise an issue of his ability to adhere to the right. In other words, a person who cannot distinguish right from wrong may nevertheless be able to adhere to the right. Under the Government's argument the erroneous instruction would have been harmless as it relates only to the question of the ability to adhere to the right, and there could be no prejudice if the issue was not raised. The opinion does not specifically comment on this argument, but is obviously rejected by inference since the Court points out that once insanity becomes an issue, the prosecution has the burden of proving both the ability to distinguish right from wrong and the ability to adhere to the right. However, in the much earlier case of *United States v. Smith*, 5 U.S.C.M.A. 314, 333, 17 C.M.R. 314, 333 (1954), the Court said: "We doubt that one could be unable to distinguish right from wrong and at the same time able to adhere to that unrecognized right—although the converse could, of course, be true."

<sup>82</sup> 15 U.S.C.M.A. 174, 35 C.M.R. 146 (1964).

<sup>83</sup> 15 U.S.C.M.A. 419, 35 C.M.R. 391 (1965). Chief Judge Quinn dissented.

<sup>84</sup> 15 U.S.C.M.A. 84, 35 C.M.R. 56 (1964). Judge Ferguson dissented. See note 105 *infra* and accompanying text.

<sup>85</sup> 15 U.S.C.M.A. 146, 35 C.M.R. 118 (1964). Chief Judge Quinn dissented.

the effect of an annulment of a bigamous marriage. The accused defended on the basis of an honest and reasonable mistake that his first wife had obtained a divorce prior to the second marriage. After learning that she had not in fact obtained a divorce, he took legal measures to have the second marriage annulled and as a result an annulment was obtained. The law officer instructed the court-martial that the annulment had no bearing on the case. Noting that an annulment of a bigamous marriage is immaterial to the question of guilt of bigamy, the Court found prejudicial error in the law officer's instruction. It created "a fair risk that it misled [the court-martial] in its deliberations . . ." since the annulment could be considered as a factor in determining whether the accused had entered the second marriage honestly and reasonably believing that he had been divorced from his first wife.

#### 6. *Self-Defense.*

In *United States v. Moore*,<sup>89</sup> the accused was convicted of unpremeditated murder in violation of article 118 of the Code. A board of review affirmed the conviction, finding that the issue of self-defense was not raised and that there were therefore no grounds to complain that the law officer had not properly tailored his instructions on self-defense. The evidence indicated that the victim forcibly ejected the accused from a gambling game by displaying a razor. The victim, who had a reputation for belligerence, also threatened to cut the accused's throat if he ever saw him again. Thereafter, the accused armed himself with a loaded revolver and sought out the victim. The accused testified that he did this only to attempt to reconcile their differences and had armed himself only for self-protection. At the second encounter, the victim again brandished the knife and repeated his earlier threat to cut the accused's throat. The accused then produced his weapon and shot the victim. Distinguishing the case of *United States v. Green*,<sup>90</sup> upon the differences in the factual situations, the Court found that the issue of self-defense was raised. In so doing, the Court stated that one is not per se deprived of the right to act in self-defense because he arms himself and seeks out his victim following a prior violent encounter with the victim. Whether a person is an aggressor in this situation depends upon the intent of the person in returning and the facts involved in the subsequent encounter. When an accused arms himself for possible self-protection and his purpose in seeking out the victim is conciliatory,

<sup>89</sup> 15 U.S.C.M.A. 187, 35 C.M.R. 159 (1964). Chief Judge Quinn dissented.

<sup>90</sup> 13 U.S.C.M.A. 545, 33 C.M.R. 77 (1963).

he does not become an aggressor and is not deprived of his right of self-defense. The decision of the board of review was reversed and the conviction set aside for failure of the law officer to tailor the self-defense instructions to the factual situation. The Court found the instructions prejudicially insufficient because they consisted only of a statement of general principles and the sole reference to the second encounter was that self-defense was not available as a defense if the accused was the aggressor or intentionally provoked the altercation. The Court was of the opinion that the instruction should have included:

. . . the effect of Moore's arming himself, his return to the room, his purpose in doing so, whether he had the right to demand an explanation of Howard's [the victim's] earlier behavior, to effect a settlement with him of their difficulties; . . . [and] the bearing of his intent in so acting upon his ability to claim successfully that he acted in self-defense.

## V. EVIDENCE

### A. SEARCH AND SEIZURE

The extent to which a commander may authorize a search based upon probable cause and his personal responsibility to be aware of the nature and the extent of the search were re-examined this term. While he issues no warrants, the commander is bound by the same rules as committing magistrates are under the *Federal Rules of Criminal Procedure*. In *United States v. Hartsook*<sup>91</sup> the commander authorized a search of the accused's quarters at the request of two criminal investigators "to shake his property down and see what we could determine." The agents were, they admitted, looking "for anything we may find." Hartsook had won a jackpot at a club for enlisted personnel above the pay grade of E-5. An initial examination of the card failed to disclose any evidence of tampering. A more extensive examination the following day revealed that the card which the accused had surrendered when claiming the jackpot was, in fact, altered. Thereafter, a search of his quarters uncovered evidence which established that the accused, in all probability, had altered his card.<sup>92</sup> Before initiating the search, however, the agents requested and obtained authority to conduct the search. The Court, after examining the record of trial, was unable to discover any showing that the agents

<sup>91</sup> 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

<sup>92</sup> The evidence uncovered included, *inter alia*, a special gum used to paste different numbers on the card, scissors, and paper with numbers of the same type as that used in the bingo cards.

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had described with any particularity the evidence for which they were searching. At best, the Court determined, the commander suspected a crime and acquiesced in the agents' activities. Unless the authorizing officer exacts from the investigator a description of the property sought, there is no guarantee that the search will not be one solely for the purpose of securing evidence of a crime, as opposed to a search for instrumentalities, fruits of crime, or contraband. This requirement is distinct from that of probable cause. In the face of the testimony elicited at the trial, the majority concluded that the authorization to search was vitiated by the lack of specificity in describing the articles which were to be the basis for the search.

The commander's authorization in *United States v. Drew*<sup>93</sup> was not so vitiated because he had been briefed in detail as each of a series of barracks larcenies was reported and he was kept currently informed. After several thefts in Barracks A had been committed, the transfer of several men, including the accused, to Barracks B was ordered. Immediately, the thefts in Barracks A ceased but a new series began in Barracks B. The record did not show a basis for suspecting anyone in particular, but a search of Barracks B for the missing articles was reasonable.<sup>94</sup> The commander approved the search of the entire barracks rather than the personal effects of any one suspect. Clearly, the Court ruled, he was able to distinguish between matters of evidence, which the Court rejected in *United States v. Hartsook*,<sup>95</sup> and the fruits of crime and he was sufficiently informed of the thefts reasonably to believe that the fruits of crime might still be in the barracks. On this basis, he could determine the existence of probable cause and the consequent search was proper.

*United States v. Lange*,<sup>96</sup> on the other hand, involved a search characterized as a "routine shakedown inspection." These inspections had been properly authorized but had not been implemented by the squadron administrative officer until a theft was brought to

<sup>93</sup> 15 U.S.C.M.A. 449, 35 C.M.R. 421 (1965).

<sup>94</sup> See *id.* at 455, 35 C.M.R. at 427, citing *Brinegar v. United States*, 338 U.S. 160 (1949). *Brinegar* was convicted in a state court of the illegal transportation of alcoholic beverages. The arresting officer knew the defendant's reputation for such activities, had himself observed the latter in the past purchase such beverages in excessive quantities and on this occasion noticed his car appeared to be heavily loaded. *Held*, the arrest was based upon reasonable belief and the seizure was legal.

<sup>95</sup> 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

<sup>96</sup> 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1965).

his attention. The officer testified that he undertook the inspection "to make a thorough check for cleanliness, Government property, and recently stolen property." He admitted that he called the men back to their barracks in groups of ten, beginning with those sharing quarters with the victim and those living in the adjoining billets. The accused was included in this first group of ten and an examination of his effects uncovered the stolen items. An Air Force Board of Review, in an unreported decision, determined that the administrative officer's purpose was to uncover evidence to be used in a criminal prosecution, and that the procedure was, therefore, an unlawful search, and not an inspection. On certification, the Court had no difficulty in agreeing with the Board that, on the basis of these facts, the so-called "routine shakedown inspection" was conducted solely for the purpose of obtaining the evidence of the thefts.

In a vein similar to probable cause, when criminal investigators are lawfully on the premises and observe evidence of a crime, albeit not connected with their purpose on entering the premises, they may properly seize that evidence as the fruits of a known crime. In *United States v. Burnside*,<sup>37</sup> the accused had been observed by state police officers in the act of disposing of some unidentifiable items at an abandoned garbage dump although the area was posted with a no-dumping sign. When the accused identified himself as an airman from the local base and departed, the officers routinely attempted to verify his vehicle registration and discovered it did not coincide with the official records. The matter was reported to the Air Police at the installation where the accused stated he was stationed. Two investigators went to the accused's off-post housing to question him about his registration. They testified they did not intend or expect to search the premises. When no one answered their knock at the door, they walked into the back. There, they observed the stolen Government property, partially hidden under a tarpaulin, which supported the accused's conviction. Since their entry was not illegal and was for the purpose of making a genuine inquiry into a police matter, the Court held that the subsequent seizure of items reasonably visible was proper. When police officers are at a place rightfully, they are not required to close their eyes to their surroundings.

This, however, was not the case in *United States v. Herberg*.<sup>38</sup> There, the accused had been apprehended in a car meeting the

<sup>37</sup> 15 U.S.C.M.A. 326, 35 C.M.R. 298 (1965).

<sup>38</sup> 15 U.S.C.M.A. 247, 35 C.M.R. 219 (1965).



description of one reported by a gate guard who reported both his own observations of the vehicle being operated in an unsafe condition and his receipt of a complaint from another driver that a similar car had forced him off the road. Admittedly, the Air Police on this information had reasonable grounds for believing that the automobile had been involved in the commission of a criminal offense and the apprehension was legal. No search of the car, however, was conducted at that time. Instead, the two accused were brought to the Air Police station where they were questioned. Under these circumstances, the apprehension was completed and there was no danger of escape or removal of any evidence. When one of the accused was asked about the registration of his vehicle, he obliquely stated he "thought it was in the vehicle." A search at this time uncovered a pistol. This search, the Court ruled, was not incident to a lawful apprehension and was not based on probable cause. A mere assertion of the location of the evidence of ownership did not constitute a freely given consent to search the vehicle and, as such, the search was illegal.

Where a vehicle is immovable and the title of ownership is questioned but the accused has completed all the steps to acquire title except to complete the legal transfer, the consent of the legal title holder and the person on whose property the automobile was located were insufficient to divest the accused, as equitable owner of the motor vehicle, of his standing to assert the illegality of the search. In *United States v. Garlich*<sup>99</sup> the accused had been observed putting personal articles into the vehicle. An investigator who received a report of this, but not knowing that any property was stolen, observed through the car windows several items whose ownership he questioned. This mere observation, unlike that in *United States v. Burnside*,<sup>100</sup> was not sufficient to support a further search either on the consent of the legal title holder of the vehicle or the owner of the premises. In the present case, there was no probable cause to believe that the items were stolen.

## B. CONFESSIONS-RIGHTS UNDER ARTICLE 31, UCMJ

### 1. *The Privilege Against Compulsory Self-Incrimination.*

The privilege against compulsory self-incrimination is at best a difficult issue to resolve. The earlier discussion of *United States v.*

<sup>99</sup> 15 U.S.C.M.A. 862, 25 C.M.R. 334 (1965).

<sup>100</sup> 15 U.S.C.M.A. 326, 35 C.M.R. 298 (1965).

*Russell*,<sup>101</sup> *supra* IID4, illustrates the complexity of the problem when medical evidence is available which may exculpate an accused or merely indicate the possibility of his commission of an offense.<sup>102</sup>

In *United States v. Miller*<sup>103</sup> the blood sample was taken from the accused while he was in a military hospital in an unconscious state. The results of the test showed the accused was intoxicated and they were used to support his conviction of causing the death of another while operating a motor vehicle. Defense argued that, in light of recent opinions, the evidence was inadmissible. The Court upheld the ruling of the law officer that the results of the test were admissible since all the testimony established that the blood sample was taken for diagnostic purposes and defense counsel conceded he had no evidence to the contrary. Accordingly, there was no violation of the privilege against compulsory self-incrimination.

Where as in *United States v. Workman*,<sup>104</sup> an accused's superior suspects him of an offense and fails to advise him of his rights under article 31 prior to requesting the return of records pertaining to missing government funds, his subsequent spontaneous request for permission to be absent because he wanted to obtain a loan in order to return the missing funds is admissible. This statement was not an exploitation of the earlier failure to warn since the superior asked only about the missing records to which the Government was entitled and not about any missing funds. Furthermore, the passage of several days between the two incidents was sufficient to dissipate any possible taint caused by a violation of the privilege against self-incrimination.

In *United States v. Kirsch*<sup>105</sup> the general court-martial convening authority had guaranteed Kirsch that he would have "immunity from prosecution for any offense" to which he might testify at the trial of a fellow soldier. Nevertheless, at the trial Kirsch refused to testify on the ground his answers would tend to

<sup>101</sup> 15 U.S.C.M.A. 76, 35 C.M.R. 48 (1964).

<sup>102</sup> A semen analysis, like the usual blood test, cannot positively identify a person but it may exclude him. An interesting side light is that action pursuant to article 64 was deferred at the request of the defense for an additional month when a medical expert advised that a newly devised technique for semen analysis could more positively identify certain blood groups, thus possibly excluding the accused. This expert was eventually unable to offer an opinion because of the age of the sample.

<sup>103</sup> 15 U.S.C.M.A. 320, 35 C.M.R. 292 (1965).

<sup>104</sup> 15 U.S.C.M.A. 228, 35 C.M.R. 200 (1965).

<sup>105</sup> 15 U.S.C.M.A. 84, 35 C.M.R. 56 (1964).

incriminate him. Thereafter, he was convicted at his own general court-martial of willful refusal to testify. The offense for which immunity had been granted involved the sale of Government weapons to a suspected Soviet agent. In his petition to the Court, Kirsch contended that the grant of immunity would not protect him against prosecution in a United States district court. This contention was rejected by Judge Quinn who, in writing the majority opinion, observed that the Congress did not merely invest a commander with the authority to dismiss or drop a charge before trial but also conferred upon him the power to free an accused from the penalty of any offense committed by him in violation of the Code, if he believes such action would further the accomplishment of the military mission. This power, by general acceptance is a statutory authorization by the Congress to bind the federal sovereign even with respect to his district courts. The substance, not the form, of the grant of immunity is important and it is that which binds the sovereign and it is that which compels the witness to testify.<sup>106</sup> Accordingly, the willful refusal of Kirsch to testify in the face of an unconditional grant of immunity was in violation of the Code.

## 2. Corroboration.

According to the Manual<sup>107</sup> an accused cannot legally be convicted upon his uncorroborated confession or admission. In *United States v. Kisner*<sup>108</sup> the accused was convicted of one specification alleging that he did "for the purpose of avoiding overseas duty intentionally injure himself by shooting himself in the foot." Kisner was fully aware of his orders for duty in Korea. While on leave prior to his departure he shot himself. After several interrogations over a one-week period, Kisner finally admitted he shot himself because he did not want to go to Korea. Noting the lack of any evidence, other than his confession, that the injury had been deliberately self-inflicted, the Court ruled that the confession was not corroborated as a matter of law and the charge and its specification were ordered dismissed.

Similarly, in *United States v. Cook*,<sup>109</sup> the Court ordered the charge dismissed where the evidence apart from the accused's con-

<sup>106</sup> Judge Kilday, in his concurring opinion, cited the Supreme Court decision of *Murphy v. Waterfront Comm'n of N. Y. Harbor*, 378 U.S. 52 (1964), as authority for this interpretation.

<sup>107</sup> MCM, 1951, para. 140a.

<sup>108</sup> 15 U.S.C.M.A. 153, 35 C.M.R. 125 (1964).

<sup>109</sup> 15 U.S.C.M.A. 436, 35 C.M.R. 408 (1965).

fession of sodomy consisted of mere suspicion and conjecture. Although the opinion is silent, it would appear that the other party to the act did not testify. The record must contain some evidence, either direct or circumstantial, that the offense charged had probably been committed and a suspicion from a particular set of facts that something nefarious happened or that a guilty mind is indicated is not enough.

### C. WITNESSES

#### 1. *Cross-Examination of an Accused.*

Whenever an accused attempts to limit the scope of his testimony, he runs the risk that he will open the door on cross-examination to more than he intended. It is the content of his testimony upon direct examination and not the announcement of the intended limitation of his testimony which determines the breadth of cross-examination which will be permitted.<sup>110</sup> In *United States v. Lovig*,<sup>111</sup> the accused was charged with larceny and burglary. He pleaded not guilty but was found guilty as charged. After the prosecution had rested, the accused elected to testify in his own behalf on the burglary charge only. On direct examination he admitted he unlawfully entered the premises but denied having any intention of stealing at the time of entry. In his first question on cross-examination, trial counsel asked the accused what he did when he entered the premises. Defense counsel contended that this exceeded the scope of direct since the accused had taken the stand to testify to the burglary charge only. Over defense objection, the accused was required to answer by the law officer. He admitted he "looked around" and then went straight to the bedrooms where he took two ladies' handbags. The majority of the Court found "there can be no question but that trial counsel was entitled to probe areas reflecting an accused's intent at the time he entered the premises."<sup>112</sup> Since the accused himself, on direct, denied he harbored the intention of stealing, he opened the door, on cross-examination, to inquiry into his intent. As the unlawful entry and the subsequent larceny were so closely

<sup>110</sup> See *United States v. Kauffman*, 14 U.S.C.M.A. 283, 34 C.M.R. 63 (1963).

<sup>111</sup> 15 U.S.C.M.A. 69, 35 C.M.R. 41 (1964). Judge Ferguson dissented.

<sup>112</sup> *Id.* at 71, 35 C.M.R. at 43.

related in time and place, the majority had no difficulty in concluding the questioning was proper.<sup>113</sup>

### 2. *Husband and Wife.*

The privilege that his wife may not testify against him<sup>114</sup> was raised by the accused in *United States v. Massey*.<sup>115</sup> He stood convicted of three specifications alleging indecent acts with his nine-year-old daughter. At the trial, the accused's wife was called as a witness, over assertion by the defense of the husband-wife privilege, and permitted to testify about her daughter's complaints to her concerning the accused's acts. The basis asserted by the Government for permitting the wife to testify was that she was an individual injured by the offense with which her husband was charged. This was in reliance on the case of *United States v. Leach*<sup>116</sup> where it was concluded by at least one of the majority that "no privilege is available when the crime of adultery is the alleged offense."<sup>117</sup> In the later decision of *United States v. Parker*<sup>118</sup> the Court held that sodomy by a husband with a third party was not an injury to the wife which would permit her testimony to be received over his invocation of the privilege. In *Massey*, the Court ruled that when applying the injury-to-spouse exception to the husband-wife privilege, the correct test is not the outrage to the spouse's sensibilities or a violation of the marital bonds, but an injury having some direct connection with her person or property. In order to justify elimination of the shield of the marital union, there must be something more than conduct which abuses its privilege and responsibilities; there must be some direct, palpable invasion of, or injury to, the interests of the witness: Carnal knowledge is not such an injury. Accordingly, the wife could not testify over objection to her husband's incestuous carnal knowledge of their daughter.

### 3. *Other Misconduct.*

A witness's denial of other acts of misconduct cannot normally be attacked except upon cross-examination of the witness himself.

<sup>113</sup> Judge Ferguson, in his dissent, objected that this decision would "eliminate the extraordinary privilege conferred upon an accused to testify concerning less than all the offenses charged against him, if the counts are connected with each other." *Id.* at 73, 35 C.M.R. at 45.

<sup>114</sup> See MCM, 1951, para. 148e.

<sup>115</sup> 15 U.S.C.M.A. 274, 35 C.M.R. 246 (1965).

<sup>116</sup> 7 U.S.C.M.A. 388, 22 C.M.R. 178 (1956).

<sup>117</sup> *Id.* at 397, 22 C.M.R. at 187.

<sup>118</sup> 13 U.S.C.M.A. 579, 33 C.M.R. 111 (1963).

The case of *United States v. Lyon*,<sup>119</sup> however, was not the usual case. Lyon was convicted of attempted extortion only, although he had also been separately charged with robbery and another count of extortion. Lyon discovered his wife and a Sergeant Williams nude in bed. About a week later Williams signed a note payable to Lyon, ostensibly so the latter could divorce his wife. When Lyon attempted to enforce payment by contacting Williams' commander, the charges of robbery and extortion resulted. The defense argued Williams had offered the money voluntarily so that a divorce could be obtained and Williams could marry Mrs. Lyon. Williams denied at the court-martial that he had engaged in intercourse with Mrs. Lyon. Here, evidence that the two had enjoyed illicit relations was relevant to the defense theory and the law officer erred in refusing to allow Mrs. Lyon to testify concerning her prior relations with Williams on the ground that such testimony would constitute collateral inquiry into the latter's denial of such acts.

In *United States v. Browder*<sup>120</sup> the evidence of other acts of misconduct by the accused was included in the stipulation of facts. Browder, in effect, admitted to unlawful cohabitation while he was absent without proper authority. During the hearing on sentence he testified that the female with whom he had lived during his absence was his girl friend and she was pregnant by him. On appeal, defense counsel argued that this amounted to an admission of uncharged misconduct and the law officer was required to instruct the court-martial that it could not consider the uncharged wrongful cohabitation in assessing a sentence. The Court upheld the law officer, noting that it was the defense at the trial and not the Government which elicited the damaging evidence of misconduct. The reference to these acts in the stipulation of facts threw light on the accused's motive and intent with respect to the offenses with which he was charged.

#### D. PREVIOUS CONVICTIONS

The accused in *United States v. Beach*<sup>121</sup> was convicted of one specification alleging unauthorized absence. Proof of the offense was established by the introduction into evidence of several pages from his service record. These records also reflected a prior conviction for a similar offense for which the accused received a sus-

<sup>119</sup> 15 U.S.C.M.A. 307, 35 C.M.R. 279 (1965).

<sup>120</sup> 15 U.S.C.M.A. 466, 35 C.M.R. 438 (1965).

<sup>121</sup> 15 U.S.C.M.A. 119, 35 C.M.R. 91 (1964).

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pendent sentence. While the admission of this evidence was erroneous, the Court did not conclude that it improperly influenced the finding of guilty. After findings and prior to sentence, the trial counsel introduced additional pages of the accused's service record which showed that the suspended sentence had been vacated and the unserved portion adjudging confinement had been ordered into execution. The admission of this evidence was also erroneous.<sup>122</sup> Notwithstanding the fact that the staff legal officer noted this error and nevertheless considered the sentence appropriate, the Court concluded, per curiam, that the error was of such a prejudicial nature as to require a rehearing on the sentence.

### E. LAW OF THE CASE

In *United States v. Yaeger*,<sup>123</sup> the special court-martial supervisory authority set aside the findings of guilty and ordered a rehearing because, although the accused had been properly advised of his rights pursuant to article 31, he had then improperly been led to believe that any statement given would not, in fact, be used against him. This action by the supervisory authority, in effect, determined the issue of voluntariness of the accused's confession as a matter of fact. At the rehearing, the court-martial was bound by this determination. Admittedly, the action by the supervisory authority could have been based on a finding of fact or a ruling of law. Here, the action clearly amounted to a finding of fact and this finding established the "law of the case." Where, as in this case, the reviewing authority's action speaks clearly and specifically, a reinterpretation by the one taking the action will not be permitted and his action operates as a mandate to the trial forum.

## VI. SENTENCE AND PUNISHMENT

### A. EVIDENCE PERTAINING TO THE SENTENCE

In *United States v. Tuten*,<sup>124</sup> a previous conviction was admitted into evidence although it did not include the date the offense was committed as required by Navy regulations. A board of review determined that the previous conviction did not come within the official documents exception to the hearsay rule since it was not

<sup>122</sup> See *United States v. Kiger*, 13 U.S.C.M.A. 522, 33 C.M.R. 54 (1963).

<sup>123</sup> 15 U.S.C.M.A. 226, 35 C.M.R. 198 (1965).

<sup>124</sup> 15 U.S.C.M.A. 387, 35 C.M.R. 359 (1965).

prepared as required by regulations. The board then reduced the sentence on the basis that prejudicial error had resulted. The Judge Advocate General of the Navy certified the question of the correctness of the board's holding. At the trial the parties had stipulated that the previous conviction was a *properly authenticated* extract from the accused's official service record. The Court distinguished *United States v. Parlier*,<sup>125</sup> and stated that a mere irregularity or omission in the original entry of a fact required to be recorded does not of itself place a record outside the exception to the hearsay rule when it appears that the exhibit is a duly authenticated extract of an accused's service record. The Court considered the real issue to be whether the absence of the date rendered the previous conviction inadmissible because of a failure to show that the offense was committed in the current enlistment and within three years of the commission of an offense of which the accused was convicted at the trial.<sup>126</sup> The Court found that elsewhere in the record it was shown that the accused was serving his initial enlistment and that the offenses of which he was convicted occurred about eighteen months after this enlistment. Consequently, there was no doubt that the previous conviction met the tests of admissibility and the decision of the board of review was reversed.<sup>127</sup>

*United States v. Marshall*<sup>128</sup> also presented the question of the admissibility of a previous conviction where the date of the offense was not shown as required by regulations. However, based on the facts involved in this particular case, the Court reached a conclusion opposite to that in *Tuten*, and found that one of three previous convictions was improperly admitted during the presentencing proceedings. At the trial the accused was convicted of two offenses committed in August 1964, but the convening authority disapproved the findings of guilty of one of these offenses for improper cross-examination of the accused on the merits as to one of the previous convictions. The record indicated that the accused entered the Marine Corps in November 1960. One of the previous convictions showed that the accused had been convicted in October

<sup>125</sup> 1 U.S.C.M.A. 433, 4 C.M.R. 25 (1952). In this case an extract copy of a morning report was held inadmissible because it failed to show that the original morning report had been *authenticated* as required by Army regulations.

<sup>126</sup> MCM, 1951, para. 75b(2).

<sup>127</sup> *Accord*, *United States v. Abbott*, 15 U.S.C.M.A. 406, 35 C.M.R. 378 (1965); *United States v. Francis*, 15 U.S.C.M.A. 390, 35 C.M.R. 362 (1965).

<sup>128</sup> 15 U.S.C.M.A. 475, 35 C.M.R. 447 (1965).



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1961 of an offense which was committed in September 1961. Another showed that he had been convicted of two offenses in April 1963, but it failed to list the date these offenses were committed. The Government argued that the presumption of regularity required the conclusion that the offenses of which the accused was convicted in April 1963 were committed after September 1961, and, therefore, within three years of the date of the offenses of which he was convicted at this trial. In support of this argument the Government relied on provisions of the Manual<sup>129</sup> which indicate that an accused should be tried in one trial for all known offenses. The Court recognized that there was a fair possibility that the offenses in question were committed more than three years before those for which the accused was sentenced, and it rejected the argument of the Government on the basis that the offenses involved in the April 1963 conviction could have been committed prior to September 1961 unbeknown to the convening authority who referred that charge to trial. During the course of the cross-examination which was held improper by the convening authority, the accused testified to facts which raised a logical inference that the offenses involved in the April 1963 conviction were committed within the required three year period. However, the Court decided that it was required to disregard this testimony because of the determination by the convening authority that it has been improperly extracted. A board of review had determined that even if the previous conviction was inadmissible, the matter was *de minimis*. The Court disagreed, set aside the sentence, and returned the case with direction that a rehearing could be held or that the sentence could be reassessed without a bad conduct discharge. In so doing, it was pointed out that the cross-examination held improper by the convening authority related to a previous offense which was exactly the same as one of those of which the accused was convicted at this trial. The Court also noted that after the convening authority's action the previous convictions assumed "transcendental importance" as they were the legal authority for the bad conduct discharge.<sup>130</sup> Finally, the Court stated that the proper method of purging the prejudicial effect of an error affecting the validity of a discharge is by disapproval of the discharge or by a rehearing on the sentence.

<sup>129</sup> MCM, 1951, paras. 80f, 82c.

<sup>130</sup> See MCM, 1951, para. 127c, § B. Under this provision the bad conduct discharge was still authorized as a punishment by virtue of the two remaining admissible previous convictions.

As previously discussed, *supra* VD, *United States v. Beach*<sup>151</sup> resulted in a reaffirmation of the rule announced in another recent case that it is reversible error as to the sentence to introduce evidence that a suspended sentence has been vacated.<sup>152</sup>

## B. INSTRUCTIONS CONCERNING THE SENTENCE

### 1. General.

The so called "dynamite instruction" as previously discussed in regard to the decision in *United States v. Gilmore*,<sup>153</sup> *supra* III D5, was also held not to be erroneous when given prior to deliberations on the sentence.<sup>154</sup>

Consistent with two earlier recent decisions, no prejudice was found in *United States v. Giordano*<sup>155</sup> for the failure of the law officer to instruct that some of the offenses of which the accused was convicted were not separate for punishment purposes, where he had correctly instructed on the maximum sentence imposable.<sup>156</sup>

### 2. Maximum Punishment.

In *United States v. Geter*,<sup>157</sup> the Court held that a specification alleging wrongful possession of a false leave authorization, without an allegation of an intent to deceive, was punishable as a disorder, by confinement and forfeiture of two-thirds pay for four months. As a result, it was concluded that a bad conduct discharge was authorized only because of evidence of two previous convictions.<sup>158</sup> Citing the recent case of *United States v. Hutton*,<sup>159</sup> the Court reversed the decision on the sentence for failure of the president of the special court-martial to instruct that a bad conduct discharge was imposable only because of the prior convictions.

<sup>151</sup> 15 U.S.C.M.A. 119, 35 C.M.R. 91 (1964).

<sup>152</sup> See the discussion of *United States v. Kiger*, 13 U.S.C.M.A. 522, 33 C.M.R. 54 (1963), contained in Schiesser & Barrett, *A Supplement to the Survey of Military Justice*, 24 MIL. L. REV. 125, 148-49 (1964).

<sup>153</sup> 15 U.S.C.M.A. 428, 35 C.M.R. 400 (1965).

<sup>154</sup> See *United States v. Jackson*, 15 U.S.C.M.A. 431, 35 C.M.R. 408 (1965).

<sup>155</sup> 15 U.S.C.M.A. 163, 35 C.M.R. 135 (1964).

<sup>156</sup> See the discussions of *United States v. DeShazor*, 14 U.S.C.M.A. 667, 34 C.M.R. 447 (1964), and *United States v. Searles*, 14 U.S.C.M.A. 643, 34 C.M.R. 423 (1964), contained in Wingo & Myster, *A Supplement to the Survey of Military Justice*, 28 MIL. L. REV. 121, 159 (1965).

<sup>157</sup> 15 U.S.C.M.A. 209, 35 C.M.R. 181 (1965).

<sup>158</sup> See MCM, 1951, para. 127c, § B.

<sup>159</sup> 14 U.S.C.M.A. 366, 34 C.M.R. 146 (1964).

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One offense of which the accused was convicted in *United States v. Showalter*<sup>140</sup> was a violation of a general regulation<sup>141</sup> governing the wearing of civilian clothes in Seoul, Korea. The Court held that the law officer erred in failing to apply footnote 5 of the Table of Maximum Punishments<sup>142</sup> in instructing on the maximum punishment authorized. The punishment for the violation is limited to that prescribed under article 134 of the Table of Maximum Punishments<sup>143</sup> for a uniform violation which is confinement at hard labor for one month and forfeitures for a like period.<sup>144</sup>

### C. DISMISSAL OF OFFICERS FOR OFFENSES FOR WHICH ENLISTED MEN ARE NOT SUBJECT TO DISCHARGE

*United States v. Giordano*<sup>145</sup> raised another issue which provided the Court with the opportunity to again examine a question that it decided by implication almost ten years earlier. The question concerned the validity of that portion of paragraph 126*d* of the Manual which in substance provides that an officer is subject to dismissal when convicted by general court-martial of any offense in violation of the Code. Relying on its earlier decision in *United States v. Goodwin*,<sup>146</sup> the Court held that the questioned provision was a valid implementation of the authority bestowed on the President by article 56 of the Code to fix the maximum limits of punishments.

### D. ARGUMENT

The decision in *United States v. Eaves*<sup>147</sup> presented a question which the Court felt to be resolvable only according to the facts of the particular case. The accused's squadron commander had testified during the presentencing proceedings that, after reading a psychiatric report on the accused, he wanted to recommend an administrative discharge. The trial defense counsel in arguing

<sup>140</sup> 15 U.S.C.M.A. 410, 35 C.M.R. 382 (1965).

<sup>141</sup> See UCMJ art. 92.

<sup>142</sup> MCM, 1951, para. 127*c*, § A.

<sup>143</sup> *Ibid.*

<sup>144</sup> The opinion contains a detailed discussion distinguishing the much earlier case of *United States v. Yunque-Burgos*, 3 U.S.C.M.A. 498, 13 C.M.R. 54 (1953), where an opposite result was reached.

<sup>145</sup> 15 U.S.C.M.A. 163, 35 C.M.R. 185 (1964); see note 135 *supra* and accompanying text.

<sup>146</sup> 5 U.S.C.M.A. 647, 18 C.M.R. 271 (1955).

<sup>147</sup> 15 U.S.C.M.A. 204, 35 C.M.R. 176 (1964).

against a bad conduct discharge emphasized this opinion. While cross-examining the squadron commander as to why he had not recommended to the base commander that the charges be dropped in favor of administrative separation, the trial counsel mentioned that the base commander was the convening authority who had referred the charges to trial.<sup>145</sup> Following the trial defense counsel's argument, the trial counsel in his argument pointed out that the squadron commander had not brought his recommendation to the attention of the convening authority who referred the charges for trial. The Court found this comment to be fair rebuttal and not suggestive of the convening authority's attitude concerning a proper sentence.

## VII. POST-TRIAL REVIEW

### A. ACTION OF CONVENING AUTHORITY

In *United States v. Rios*,<sup>146</sup> one part of the accused's sentence adjudged by the court-martial was the forfeiture of \$50.00 for six months. The convening authority changed this to a forfeiture of \$15.00 per month for three months. A board of review approved only a \$15.00 forfeiture for one month on the basis that the sentence provided for a lump sum forfeiture for only one month, which the convening authority could reduce in amount, but not extend for a period exceeding one month. Upon certification of the correctness of the board's decision by The Judge Advocate General of the Army, the Court reversed the board. It was pointed out that the sentence met the requirements of certainty as it was definite as to amount and time. The action of the convening authority merely provided the mechanics of execution of the forfeiture which could be exacted from the accused's pay at the end of the first month of the authorized period, at the end of the period, or in parts during the period.

A new post-trial review and action by the supervisory authority was required in *United States v. Podgurski*,<sup>147</sup> where the action by both the supervisory authority and the board of review treated a

<sup>145</sup> The Court considered this cross-examination to be a proper attempt to probe the strength of the squadron commander's representation that administrative action would be more appropriate, and it determined accordingly that this did not amount to an intimation of the convening authority's attitudes of a proper punishment.

<sup>146</sup> 15 U.S.C.M.A. 116, 35 C.M.R. 88 (1964).

<sup>147</sup> 15 U.S.C.M.A. 491, 35 C.M.R. 463 (1965).

dismissed offense as a conviction and purported to affirm findings of guilty thereof.

*United States v. Goffe*<sup>151</sup> presented a question relative to the recent determination that there may be a "hung jury" on sentence in a court-martial.<sup>152</sup> In *Goffe*, the court-martial could not agree upon a sentence, and the convening authority subsequently directed a rehearing on sentence, which resulted in a sentence being adjudged. The board of review set aside the sentence on the basis that there was no authority for the convening authority to order a rehearing limited to a determination of a sentence. The correctness of this determination was certified by The Judge Advocate General of the Navy, and the Court reversed the decision of the board of review. The Court concluded that a determination not to impose any punishment requires a two-thirds vote in closed session upon secret ballot, the rehearing was not barred by the doctrine of former jeopardy, and that the Code does not prohibit a rehearing on the sentence when a mistrial results because of lack of agreement thereon.

## B. APPELLATE REVIEW

### 1. General.

In *United States v. Hamil*,<sup>153</sup> the Court found it unnecessary to review a question of the legality of a search which led to the discovery of an allegedly stolen razor in the accused's possession. At the trial, the defense motion to suppress this evidence was denied. Thereafter, the accused pleaded guilty to the lesser included offense of wrongful appropriation but was convicted of larceny as charged, both being in violation of article 121 of the Code. The razor and a pretrial statement by the accused were admitted in evidence against him, despite the fact that it was contended that the statement was inadmissible as the product of an illegal search. The Court pointed out that a plea of guilty does not preclude appellate review of a constitutional right of an accused. However, the right to be free from unreasonable search and seizure is vindicated by not admitting the evidence resulting therefrom. The accused's plea of guilty established that he wrongfully took the razor, and there was no need to introduce the evidence on this point. Since there was no need to introduce the evidence, it was

<sup>151</sup> 15 U.S.C.M.A. 112, 35 C.M.R. 84 (1964).

<sup>152</sup> See *United States v. Jones*, 14 U.S.C.M.A. 177, 33 C.M.R. 389 (1963).

<sup>153</sup> 15 U.S.C.M.A. 110, 35 C.M.R. 82 (1964).

not detrimental to the accused to admit the evidence even if its admission was improper.

In addition to raising an issue of the correctness of a denial of a request for counsel as discussed previously, *supra* III D2, *United States v. Gatewood*<sup>154</sup> provided the opportunity for the Court to reiterate its holding in *United States v. Cutting*<sup>155</sup> that a pretrial determination of nonavailability of requested military counsel is subject to review for abuse of discretion. "In reviewing the determination the question essentially is whether it was based upon reasonable considerations."

## 2. Review by Board of Review.

In a per curiam opinion,<sup>156</sup> the Court determined that the board of review should have investigated an assertion on appeal that a plea of guilty to a charge of larceny<sup>157</sup> was improperly entered. In support of his assignment of error, the appellate defense counsel had submitted unsworn letters from the trial defense counsel and the accused indicating improvidence in the plea by reason of an erroneous concept of the applicable law.

In *United States v. Zunino*,<sup>158</sup> the convening authority approved the accused's sentence to dishonorable discharge, total forfeitures, confinement at hard labor for eight years, and reduction to the lowest enlisted grade. He also approved findings of guilty to one specification of absence without leave, six specifications of larceny, one specification of burglary, and five specifications of housebreaking, in violation of article 86, 121, 129 and 130 of the Code, respectively. A board of review set aside the findings and dismissed the charges and specifications except for the absence without leave. Accordingly, the board reduced the punishment to a bad conduct discharge, total forfeitures, confinement at hard labor for one year, and reduction to the lowest enlisted grade which was the maximum authorized for the remaining offense except that a dishonorable discharge could have been affirmed.<sup>159</sup> Appellate defense counsel contended that the board erred in not returning the case for a rehearing on the sentence so that the sentence could be determined by a body which was not influenced by the dismissed charges. The Court, in rejecting this contention, relied on a

<sup>154</sup> 15 U.S.C.M.A. 433, 35 C.M.R. 405 (1965).

<sup>155</sup> 14 U.S.C.M.A. 347, 351, 34 C.M.R. 127, 131 (1964).

<sup>156</sup> See *United States v. Williams*, 15 U.S.C.M.A. 65, 35 C.M.R. 37 (1964).

<sup>157</sup> See UCMJ art. 121.

<sup>158</sup> 15 U.S.C.M.A. 179, 35 C.M.R. 151 (1964).

<sup>159</sup> See MCM, 1951, para. 127c, § B.

Supreme Court case<sup>160</sup> and one of its own previous decisions,<sup>161</sup> to determine that the action of the board was not inappropriate as a matter of law.

### 3. *Review by the United States Court of Military Appeals.*

*United States v. Turner*<sup>162</sup> presented a certified question of the *Tuten*<sup>163</sup> type, but the Court found it unnecessary to answer the certified question. Although the board had noted that evidence of one previous conviction should not have been admitted because the offense was undated, its reduction of the sentence resulted from a determination based on the entire record that the sentence was inappropriately harsh. In holding that this determination was not reviewable, the Court quoted the following from *United States v. Higbie*<sup>164</sup>:

In short, where a board of review bases a determination of appropriateness of sentence upon the entire record, one of the many factors it considered may not be dissected out in order to have us pass upon a certified issue, the answer to which cannot affect the board's ultimate decision. . . .

In *United States v. Giordano*,<sup>165</sup> after dismissing a specification for failure to allege the offense of conduct unbecoming an officer in violation of article 133 of the Code,<sup>166</sup> the Court found it unnecessary to return the case for a reassessment of the sentence on the basis of the remaining affirmed offenses. The identical misconduct set forth in the dismissed specification was covered by other valid specifications, and therefore, had the dismissed specification been valid it would have been multiplicitious with these for punishment purposes. Additionally, the instructions at the trial correctly stated the maximum punishment for the offenses remaining even after dismissal of the one specification. Under these facts, the Court was of the opinion that a return of the case for a reassessment of the sentence "would be fruitless and would constitute an empty ritual."

After setting aside the accused's conviction in *United States v. Lyon*,<sup>167</sup> the Court dismissed the charge and specification. Indi-

<sup>160</sup> See *Jackson v. Taylor*, 358 U.S. 569 (1957).

<sup>161</sup> See *United States v. Christopher*, 13 U.S.C.M.A. 231, 32 C.M.R. 231 (1962).

<sup>162</sup> 15 U.S.C.M.A. 438, 35 C.M.R. 410 (1965).

<sup>163</sup> See note 124 *supra* and accompanying text.

<sup>164</sup> 12 U.S.C.M.A. 298, 300, 30 C.M.R. 298, 300 (1961).

<sup>165</sup> 15 U.S.C.M.A. 163, 35 C.M.R. 135 (1964).

<sup>166</sup> See note 15 *supra* and accompanying text.

<sup>167</sup> 15 U.S.C.M.A. 307, 35 C.M.R. 279 (1965); see note 119 *supra* and accompanying text.

cating that it would ordinarily order a rehearing on the charge, the Court noted that article 67 of the Code also vested it with authority to dismiss the charges. Dismissal was considered appropriate because the evidence on the merits was close, the accused had a past record of long and honorable service, and all of the sentence had been remitted except for a reduction of one grade. Accordingly, it was determined that it would be unjustified to cause the accused to suffer through the harassment of a rehearing.<sup>168</sup>

The last case to be considered is one which presented the Court with an issue which had been totally untouched upon in the past. In *United States v. Gallagher*,<sup>169</sup> the board of review affirmed the accused's conviction and sentence. Subsequently, the Court denied the accused's petition for review under article 67(b)(3) of the Code. Thereafter, the accused, an enlisted man, petitioned the Court for reconsideration on the basis that it was unconstitutional for Congress to provide for automatic review by the Court of Military Appeals only in cases in which the sentence affirmed by a board of review affects a general or flag officer or extends to death.<sup>170</sup> After arguments on this issue, the petition for reconsideration was denied. The Court found that the statute was not unreasonable or arbitrary, and that it was based on a reasonable distinction or difference in policy which constituted a reasonable classification. The Federal Government has the power to make classifications when these standards are met. Consequently, the Court determined that a member of the armed forces, not falling within article 67(b)(1) of the Code, is not deprived of due process of law by its terms, and it is a valid provision of law.

<sup>168</sup> See *United States v. Conrad*, 15 U.S.C.M.A. 439, 85 C.M.R. 411 (1965), for another case where dismissal resulted for the same reason.

<sup>169</sup> 15 U.S.C.M.A. 391, 85 C.M.R. 363 (1965).

<sup>170</sup> See UCMJ art. 67(b)(1).



# SURVEY OF MILITARY JUSTICE

## APPENDIX WORK OF THE COURT

Statistical tables on the "Status of Cases Docketed" and "Court Action," prepared by the Clerk's Office, United States Court of Military Appeals, pursuant to the provisions of article 67(b), *Uniform Code of Military Justice*, were not available when this issue of the *Military Law Review* was sent to the printers. The statistics in Tables I through IV are unofficial figures compiled by the authors and cover published opinions in the period of this survey, the October 1964 term, 2 October 1964 through 27 August 1965.

*Table I. Sources of Cases Disposed of by Published Opinions*

	Army	Navy	Air Force	Coast Guard	Total
Petition .....	38 <sup>a</sup>	17	27	0	82 <sup>a</sup>
Certification .....	4	6	4	0	14
Mandatory Review .....	0	0	0	0	0
Total .....	42 <sup>a</sup>	23	31	0	96 <sup>a</sup>

<sup>a</sup> Includes three petitions for reconsideration.

*Table II. Disposition of Cases Through Published Opinions*

	Affirmed	Aff in Part Rev in Part	Reversed	Remanded	Dismissed	Total
Petition .....	30	12	36	1	0	79 <sup>b</sup>
Certification .....	5	0	9	0	0	14
Mandatory Review ..	0	0	0	0	0	0
Total .....	35	12	45	1	0	93 <sup>b</sup>

<sup>b</sup> Does not include three petitions for reconsideration which were denied.

*Table III. Reversals of Special Court-Martial Cases  
Versus General Court-Martial Cases Considered by the Court <sup>c</sup>*

	Special (%)	General (%)	Total (%)
Army .....	(d)	18 (46.2%) <sup>e</sup>	18 (46.2%) <sup>e</sup>
Navy .....	8 (44.4%)	3 (60%)	11 (47.8%)
Air Force .....	6 (75%)	15 (65.2%)	21 (67.7%)

<sup>c</sup> The purpose of this chart is to compare special court-martial cases with general court-martial cases with respect to the incidence of error found by the Court of Military Appeals. Accordingly, the figures in this chart do not include cases in which the Court of Military Appeals reversed board of review decisions because the board had found error where the Court concluded there was none.

<sup>d</sup> Not utilized at the present time (AR 22-145).

<sup>e</sup> Denials of three petitions for reconsideration excluded in determining percentage.

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Table IV. Action of Individual Judges

	Quinn	Ferguson	Kilday	Total
Wrote opinion of Court .....	22	30	26	78 <sup>1</sup>
Concur with opinion of Court .....	31	42	51	124
Concur with separate opinion .....	0	0	1	1
Concur in result .....	1	0	0	1
Concur in part/dissenc in part .....	0	0	0	0
Dissent .....	24	6	0	30
Total .....	78 <sup>1</sup>	78 <sup>1</sup>	78 <sup>1</sup>	234

<sup>1</sup> Figures do not include *in per curiam* opinions.

By Order of the Secretary of the Army:

HAROLD K. JOHNSON,  
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*Chief of Staff.*

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*Major General, United States Army,*  
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