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PREFACE

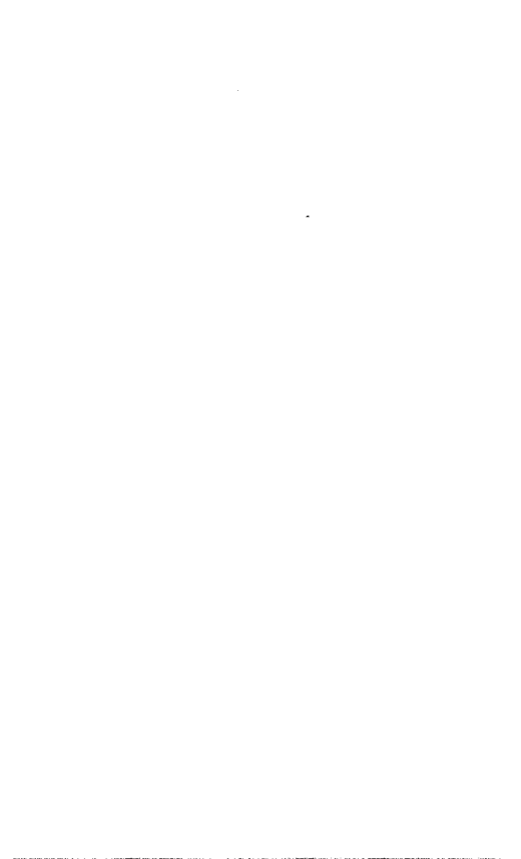
The *Military Law Review* is designed to provide a medium for those interested in the field of military law to share the product of their experience and research with their fellow lawyers. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those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

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

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, 22901. 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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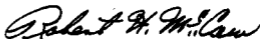
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FOREWORD

This issue of the *Military Law Review* is devoted to articles on various military justice subjects and commemorates the fifteenth anniversary of the effective date of the Uniform Code of Military Justice. Since that date an evolution in the administration of military justice in our armed forces has taken place. Decisional law has amplified the Code. Administrative action has produced beneficial innovations such as the Army Judiciary. Congressional action has wrought changes in the Code itself.

Notwithstanding this progress, we should strive for further improvements in the administration of military justice. As a first step, we need to have a thoughtful analysis of the manner in which the Code is working, followed by constructive criticism of its strengths and weaknesses and objective proposals for bettering it. I hope that the articles in this issue will assist us in our quest for improvement by providing us with an objective evaluation of the Code and its operation.



ROBERT H. McCAW
Major General, USA
The Judge Advocate General

THE CROWDER-ANSELL DISPUTE: THE EMERGENCE OF GENERAL SAMUEL T. ANSELL *

By Major Terry W. Brown**

This article studies the conflict between Major General Enoch H. Crowder and Brigadier General Samuel T. Ansell, its historical background, development, and impact on the Articles of War of 1920 and the Uniform Code of Military Justice. Emphasis is placed on the concepts of General Ansell and their influence upon subsequent military jurisprudence.

I. INTRODUCTION

In September 1917, at Fort Bliss, Texas, a group of twelve or fifteen enlisted members of Battery "A" of the Eighteenth Field Artillery, who had been placed under arrest for a minor infraction of the Articles of War of 1916,¹ refused to attend drill formation after being ordered to do so by a commissioned officer. Their refusal was based on an existing Army regulation which prohibited persons in arrest from attending drill. The offenders were charged with mutiny² and tried by general court-martial. All were found guilty and sentenced to be dishonorably discharged from the service and to be confined for various terms of imprisonment ranging from ten to twenty-five years.³ The cases were reviewed, approved and ordered executed by the appointing authority and the records of trial forwarded to the Office of the Judge Advocate General of the Army for review and recording in accordance with section 1199 of the Revised Statutes of 1878⁴ which provided that:

* 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 Fourteenth Career Course. The opinions and conclusions presented 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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¹ See Act of 29 Aug. 1916, ch. 418, § 3, 39 Stat. 650-70 [hereafter referred to as 1916 A. W.].

² See 1916 A. W. art. 66.

³ Court-Martial Nos. 106, 663.

⁴ Act of 23 June 1874, ch. 458, § 2, 18 Stat. 244.

the said Judge-Advocate-General shall receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry and military commissions, and shall perform such other duties as have been heretofore performed by the Judge-Advocate-General of the Army

Brigadier General Samuel T. Ansell was the senior officer in the Office of the Judge Advocate General. (Major General Enoch H. Crowder, The Judge Advocate General, had been detailed as Provost Marshal General to administer the Selective Service Act.⁵) General Ansell, with other officers, recognized the illegality of the proceedings due to the provisions of the pertinent regulation which precluded the accused soldiers from attending drill formation and drafted an opinion directing that the findings be set aside relying on the provisions of section 1199. General Crowder, upon being notified of this action, contended that the Judge Advocate General did not, under section 1199, have the authority to direct the setting aside of findings after execution of the sentence had been ordered.⁶

The foregoing occurrences set the stage for what is referred to, in rather understated terms, as the "Crowder-Ansell Dispute." The controversy ultimately caused a nationwide clamor for revision of the Articles of War;⁷ bitter newspaper denunciation of military justice as administered during World War I;⁸ vitriolic speeches in both Houses of Congress;⁹ two independent investigations of the military justice system of the United States Army;¹⁰ a statement by the President of the American Bar Association that the military code was archaic and that it was a "code

⁵ See Act of 18 May 1917, ch. 15, 40 Stat. 76.

⁶ General Crowder became aware of General Ansell's brief as a result of a conference with Secretary of War Baker in which Secretary Baker asked General Crowder about the validity of General Ansell's assertions. *Hearings on S. 64 on the Establishment of Military Justice Before a Subcommittee of the Senate Committee on Military Affairs*, 66th Cong., 1st Sess. 1203 (1919) [hereafter referred to as *Hearings on S. 64*].

⁷ *E.g.*, Post, *What is a Crime*, *The Independent & Weekly Review*, 5 April 1919, p. 13; *The Injustice of Military Justice*, *The Literary Digest*, 12 April 1919, p. 13.

⁸ See *New York World*, 19 Jan. 1919.

⁹ See 57 CONG. REC. 877-78 (1918); 57 CONG. REC. 3387-92, 3809, 4502-08 (1919); 57 CONG. REC. APP. 279-81 (1919); 58 CONG. REC. 3938-40 (1919).

¹⁰ The American Bar Association appointed a Special Committee on Military Law which submitted a majority and minority report to the Association in 1919. *Hearings on S. 64*, at 210-14. The War Department also appointed a Special War Department Board on Courts-Martial and their Procedure (commonly referred to as the "Kernan Board" after Major General Kernan who was chairman of the board) which submitted its report to the War Department on 17 July 1919. See Rigby, *Military Penal Law: A Brief Survey of the 1920 Revision of the Articles of War*, 12 J. CRIM. L. & C. 84 (1922).

unworthy of the name of law or justice;"¹¹ lengthy congressional hearings;¹² and finally revision of the Articles of War¹³ and the Manual for Courts-Martial.¹⁴

In the opinion of the author, however, the most important outgrowth of the entire controversy has been largely overlooked by both military legal scholars and their civilian counterparts, with the exception of the late Professor Edmund M. Morgan,¹⁵ and is virtually unknown to the average judge advocate. This outgrowth was the drafting by Brigadier General Samuel T. Ansell of the Chamberlain Bill,¹⁶ which, if passed by the Congress, would have given the United States Army a code of military law in 1920 which would have closely paralleled, and in some respects exceeded, the *Uniform Code of Military Justice*.¹⁷

It is the purpose of this article to explore the background of the Crowder-Ansell Dispute and the developments to which it gave rise with the emphasis placed on certain sections of the proposed legislation drafted by General Ansell.

II. THE DEVELOPMENT OF THE DISPUTE

During the summer of 1917 a large group of Negro soldiers stationed in Texas caused a riot in Houston and were ultimately tried by general court-martial for murder, mutiny and riot. During the course of the trial, as each day's record was transcribed, it was given to the appointing authority for his study. Upon completion of the proceedings which resulted in findings of guilty

¹¹ See statement by George T. Page, President, American Bar Association, in *New York World*, 19 Jan. 1919.

¹² See *Hearings on S. 5320 on Trials by Courts-Martial Before the Senate Committee on Military Affairs*, 65th Cong., 3d Sess. (1919) [hereafter referred to as *Hearings on S. 5320*]; *Hearings on S. 64*; *Hearings on Courts-Martial Before a Special Subcommittee on the House Committee on Military Affairs*, 66th Cong., 2d Sess. (1920).

¹³ Articles of War, 1920, ch. 2, 41 Stat. 787 [hereafter referred to as 1920 A. W.].

¹⁴ Manual for Courts-Martial, United States Army, 1921 [hereafter referred to as 1921 MCM].

¹⁵ See Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953), reprinted in 28 MIL. L. REV. 17 (1965).

¹⁶ Introduced in the Senate as Senate Bill 64 and in the House of Representatives as House Resolution 367 [hereafter referred to as the Chamberlain Bill or S. 64], and printed in *Hearings on S. 64*, at 5-23. See Farmer & Wels, *Command Control—Or Military Justice?*, 24 N.Y.U. L. Q. REV. 263, 264 (1949); Comment, *Codified Military Injustice*, 35 CORNELL L. Q. 151 (1949); Johnson, *Unlawful Command Influence: A Question of Balance*, 19 JAG J. 87, 88 (1965).

¹⁷ Hereafter cited as UCMJ art. —.

and sentences to death, the appointing authority considered his daily reading of the transcript as constituting his review and ordered the sentences executed. (Article 48 of the 1916 Articles of War generally required Presidential confirmation of a death sentence, but provided that in time of war a sentence to death for murder, rape, mutiny, desertion, or espionage could be ordered executed by the commander of the field army or the commander of a territorial department. In this case the appointing authority was the departmental commander.) The men were executed within two days after the completion of the trial. The Office of the Judge Advocate General did not receive the records of trial for action pursuant to section 1199 until approximately 10 November 1917, about four months after the sentences had been executed.¹⁸

On 10 November 1917, after the abortive attempt to set aside the verdicts in the "Texas Mutiny Cases" and perhaps stimulated by the receipt of the "Houston Riot Cases" (although a reading of General Ansell's memorandum would seem to indicate more preparation time than one or two days), General Ansell addressed a memorandum to Secretary of War Newton D. Baker. He asserted his opinion that a proper interpretation of section 1199 required the conclusion that the words "revise" and "review," as used in that statute, vested in the Judge Advocate General authority to modify or set aside the findings and sentence in a court-martial case after approval by the appointing authority if there existed a lack of jurisdiction or serious prejudicial error.

His contentions were based on the grounds that:

- (1) "Revise," as defined in both legal and standard dictionaries, meant to reexamine for correction, to alter or amend; and that "review" was a synonym for "revise" and imported the same meaning.
- (2) The Federal bankruptcy law¹⁹ was worded similarly to section 1199 and the word revise had been judicially interpreted²⁰ to connote the "power to reexamine all matters of law imported by or into the proceedings of the case."
- (3) The Office of the Judge Advocate General had, for a

¹⁸ *Hearings on S. 64*, at 38-39, 94-95; Ansell, *Injustice in Military Trials—Why Judicial Protection is Imperative*, 62 THE FORUM 447, 449-50 (1919).

¹⁹ Act of 1 July 1898, ch. 541, § 24, 30 Stat. 553 (amended and now found in 11 U.S.C. § 47 (1964)).

²⁰ See *In re Cole*, 163 Fed. 180 (1st Cir. 1908).

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short period of time following the Civil War, through the Bureau of Military Justice, exercised the power to take appellate action on court-martial findings and sentences pursuant to a statute brought forward without substantial change as section 1199.²¹

- (4) For reasons not expressed or known, during the early 1880's, the Judge Advocate General, General Lieber, adopted the viewpoint that was now supported by General Crowder that the power of revision did not exist in section 1199.
- (5) The Army was rapidly expanding and the influx of untrained officers and increase in the number of courts-martial which would logically follow such expansion required that the statute be properly construed to empower the Judge Advocate General to correct the increased number of improper court-martial proceedings which could reasonably be expected to occur.
- (6) The Judge Advocate General of the British Army exercised a similar power.²²

On 27 November 1917, General Crowder countered with a memorandum to Secretary of War Baker opposing the views set forth by General Ansell on the basis that:

- (1) There was no valid analogy between section 1199 and the bankruptcy law cited in General Ansell's memorandum.
- (2) His review of the history of the Office of the Judge Advocate General from 1864 to 1882 did not reveal a single instance of the use of the revisionary power which General Ansell alleged had been exercised.
- (3) Winthrop²³ in his treatises did not refer to any such power in the Judge Advocate General.
- (4) An unreported case in the Circuit Court of Appeals for the Northern District of New York²⁴ held that the Judge Advocate General did not have the power of revision.

²¹ See Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 YALE L.J. 52, 65-66 (1919).

²² *Hearings on S. 64*, at 57-64.

²³ General Crowder cited Winthrop's *Military Law and Precedent* without reference to volume, page number or edition. He made reference to a particular footnote on page 51, which the author has been unable to find in either the first or second edition.

²⁴ *In re Mason*, C.C.N.D.N.Y., Oct. 1882.

- (5) In the instant cases (The "Texas Mutiny Cases"), the Secretary of War, by statute,²⁵ had the authority to effect an honorable restoration to duty of the individuals concerned and General Crowder recommended that course of action.

On 27 November 1917, Secretary of War Baker noted on General Crowder's memorandum²⁶ that "As a convenient mode of doing justice exists in the instant cases . . ." ²⁷ it would be utilized and further study should be made of the problem. He noted also that a request for legislation to effect the power desired would be the wisest course.²⁸

Thereafter, on 11 December 1917, General Ansell filed a brief with Secretary Baker, through General Crowder, supporting his interpretation of section 1199 in which he took issue with Winthrop's finding that courts-martial were an agency of the Executive Department²⁹ asserting that they were "courts created by Congress, sanctioned by the Constitution and their judgments . . . entitled to respect as such." In support, he cited *Runkle v. United States*,³⁰ *McClaghry v. Deming*³¹ and other cases.³² He went on to argue that section 1199 had established the Bureau of Military Justice in the Office of the Judge Advocate General for the sole purpose of taking revisionary action on court-martial records and recording the action taken; and the use of the word "revise" in the statute in question was organic, creating and defining the duties of the Bureau of Military Justice.³³

General Ansell reiterated his belief that the proper definition of the word "revise" compelled a finding of the revisionary power in the Judge Advocate General of the Army citing many instances where the use of the word "revise" alone had been found by courts to be a statutory grant of appellate authority.³⁴ He noted the anomaly where it was conceded that the Judge Advocate

²⁵ See Act of 3 March 1873, ch. 249, § 6, 17 Stat. 582, as amended, Act of 4 March 1915, ch. 143, 38 Stat. 1074-75.

²⁶ *Hearings on S. 64*, at 71.

²⁷ See Act of 3 March 1873, ch. 249, § 6, 17 Stat. 583, as amended, Act of 4 March 1915, ch. 143, 38 Stat. 1074-75.

²⁸ See *Hearings on S. 64*, at 64-71.

²⁹ *Id.* at 76.

³⁰ 122 U.S. 543 (1887).

³¹ 186 U.S. 49 (1902).

³² See *Ex parte Reed*, 100 U.S. 13 (1879); *Swaim v. United States*, 165 U.S. 553 (1897); *Grafton v. United States*, 206 U.S. 333 (1907).

³³ *Hearings on S. 64*, at 79-80.

³⁴ *Id.* at 80-83.

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General had the authority to declare court-martial proceedings null and void for jurisdictional defect, but not the lesser power of revising the proceedings for errors substantially prejudicing the accused. He again asserted the necessity for this power of revision in light of the rapidly growing Army and suggested it be found, as it had previously been found, within the framework of section 1199.

On 17 December 1917, General Crowder filed his opposing brief³⁶ in which he relied predominantly on the points made in his memorandum of 27 November 1917. He added the following paragraph:

The lawyer's mind is not particularly shocked by the fact that there exists in military jurisprudence no court of appeal. The Supreme Court of the United States has held too often and too clearly to require citation of authorities that it is no objection to a grant of authority that the grant is original and also final; also that there is no constitutional or necessary right of appeal. There is, therefore, no fundamental reason why court-martial jurisdiction, as at present constituted, should be disturbed. The argument which has heretofore prevailed is that there are substantial reasons of expediency and good administration why it should not be disturbed. War is an emergency condition requiring a far more arbitrary control than peace. The fittest field of application for our penal code is the camp. Court-martial procedure if it attains its primary end, discipline, must be simple, informal and prompt. If, for example, all the findings and sentences of courts-martial in France must await finality until the records be sent to Washington, we shall create a situation very embarrassing to the success of our armies. Such a proposition should hardly be seriously advanced, and it would be very difficult to defend on principle legislation providing appeal in some cases and denying it in others. Yet if we legislate at all on this subject we shall be given to the necessity of doing that very thing.³⁶

On 28 December 1917, Secretary of War Baker sent a memorandum to General Crowder stating that he felt that General Ansell's brief was based primarily on the necessity for, rather than the actual existence of, the power of revision.³⁷ He asked General Crowder to recommend how far the power to revise could be extended by executive order and to what extent legislation would be required, and further to forward to him as soon as possible the orders to which General Crowder referred in his brief.

Thus the crux of the "Crowder-Ansell Dispute" was, as succinctly stated by Senator George Chamberlain of Oregon:

³⁶ *Id.* at 89-90.

³⁶ *Id.* at 90.

³⁷ *Id.* at 90-91.

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a difference of opinion between the Judge Advocate General, Gen. Crowder, and the Acting Judge Advocate General, Gen. Ansell, as to the power of the Judge Advocate General over these records of conviction, and these differences were very marked, the Judge Advocate General taking one view of his power under the law to revise or modify or reverse the sentences of court-martial, claiming that where the court had jurisdiction and its judgment is once approved by the proper commander, however erroneous it may be by flaw in the proceedings, there is no power of correction in the Judge Advocate General or elsewhere, and that the Judge Advocate General had no further power than an advisory one, looking to mere clemency, based on the illegality of the proceedings, while the Acting Judge Advocate General, Gen. Ansell, claimed that under section 1199 of the Revised Statutes the Judge Advocate General had the power to "revise" these sentences . . . The War Department sustained the contention of Gen. Crowder. It is around these conflicting views that the war on the subject has waged for some time.³⁸

On January 19, 1918, Secretary of War Baker, through Senator George Chamberlain, the Chairman of the Senate Military Affairs Committee, submitted a proposed revision of section 1199;³⁹ however, the Committee ultimately decided not to consider it.⁴⁰

To prevent a recurrence of the injustices of the "Texas Mutiny Cases" and the tragedy of the "Houston Riot Cases," General Order No. 7 was promulgated by the War Department which required that execution of the sentence in any case involving death, or the dismissal of an officer, be suspended pending review and a determination of legality by the Office of the Judge Advocate General.⁴¹

It was alleged by General Ansell in later hearings,⁴² and seems supported by correspondence from General Crowder to Brigadier General Walter A. Bethel,⁴³ that the purpose of issuing General Order No. 7 was to attempt to forestall congressional hearings and the establishment of a military court of appeals. An unarticulated purpose of this order, although no support for such reasoning other than logic has been found, may have been a desire to preclude further agitation in this area by General Ansell. It will soon become apparent that if this was, indeed, one of the

³⁸ 58 CONG. REC. 3938-39 (1919). See Mott, Hartness & Morton, *A Survey of the Literature of Military Law—A Selective Bibliography*, 6 VAND. L. REV. 333, 363 (1953).

³⁹ See *Hearings on S. 64*, at 108-10.

⁴⁰ See *id.* at 112.

⁴¹ Gen. Order No. 7, War Dep't (17 Jan. 1918).

⁴² *Hearings on S. 64*, at 113-14.

⁴³ Letter from General Enoch H. Crowder to General Walter A. Bethel, 5 April 1918, printed in *Hearings on S. 64*, at 114-15.

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reasons for the promulgation of General Order No. 7, it did not achieve the desired end.

After the flurry of opinion starting in November 1917, and culminating in General Order No. 7, events apparently went along quietly until after the Armistice was signed on 11 November 1918.⁴⁴ On 30 December 1918, however, Senator George E. Chamberlain of Oregon made a speech in the Senate alleging inequality within the military justice system, excessive sentences, command control, and calling for the establishment of an appellate tribunal to "formulate rules and equalize these unjust sentences."⁴⁵

Shortly thereafter, on 8 January 1919, the Executive Committee of the American Bar Association announced that "our military law and our system of administering military justice appeals to us as a subject which requires consideration and probably some reformation."⁴⁶ Thereafter a committee was appointed and conducted a study of the administration of the Articles of War, terminating with a report which was generally favorable to the military justice system.⁴⁷

On 13 January 1919, Senator Chamberlain introduced a bill which sought to have a "judge advocate" (the equivalent of a law officer) appointed for each general and special court-martial; provided challenges of the array in certain cases; required an immediate announcement of acquittals; gave the Judge Advocate General the power to modify or reverse findings and sentences and order new trials in appropriate cases; and called upon the Judge Advocate General to submit to Congress a revision of the Articles of War.⁴⁸ Hearings were held on the bill,⁴⁹ but it was

⁴⁴ However, during this period General Ansell had organized, within the Office of the Judge Advocate General, Boards of Review to review the proceedings of trials sent to the Office of the Judge Advocate General and to exercise clemency where required. *Hearings on S. 64*, at 155-59.

⁴⁵ 57 CONG. REC. 878 (1918).

⁴⁶ Printed in LOCKMILLER, ENOCH H. CROWDER 199 (1955).

⁴⁷ The majority report stated:

"We by no means share in the prevalent opinion that the present Articles of War and the practice and procedure which is provided for and advised in the Manual of Courts-martial is mediaeval, or cruel or arbitrary, but rather are of the opinion that if the letter and the spirit of these articles and of this manual were lived up to and thoroughly appreciated there would be little ground of complaint." Printed in Bogert, *Courts-Martial: Criticism and Proposed Reforms*, 5 CORNELL L. Q. 18, 47 (1919).

⁴⁸ Senate Bill 5320, 65th Cong., 3d Sess. (1919).

⁴⁹ *Hearings on S. 5320*.

not favorably considered by the Senate Committee on Military Affairs.

The New York World published a full-page story entitled "The Thing That is Called Military Justice!" The story, purporting to be based on factual records, delivered a scathing attack on the entire court-martial system.⁵⁰ Thus, at the beginning of 1919, the controversy over the administration of military justice left the confines of the War Department and became a public debate which raged both within and without the United States Army for the next year.

On 25 January 1919, General Ansell launched his public campaign for revision of the Articles of War and established himself as the standard bearer for the reformation of military justice. Speaking before the Chicago Bar Association and later the Chicago Real Estate Association he stated that the established system of military justice was "in many respects patently defective and in need of immediate revision at the hands of Congress."⁵¹

Eminent authorities within the field of law quickly lined up on both sides of the question. Professors Wigmore and Bogert staunchly supported the present Articles of War although admitting that some minor revision was necessary.⁵² Professor Edmund M. Morgan rallied to General Ansell's cause.⁵³

As a result of the nationwide interest which had been created, Secretary of War Baker, by letter dated 1 March 1919, called upon General Crowder to "furnish the main facts in a form which will permit ready perusal by the intelligent men and women who are so deeply interested in this subject."⁵⁴ General Crowder did so in a seventy-page document later printed by the Government Printing Office and entitled "Military Justice During the War."⁵⁵ General Crowder, while admitting that some defects did exist, and must be expected when the Articles of

⁵⁰ New York World, 19 Jan. 1919.

⁵¹ Printed in LOCKMILLER, *op. cit.* supra note 46, at 200-01.

⁵² Bogert, *supra* note 46; Address by Col. John H. Wigmore before the Maryland State Bar Association, 28 June 1919, printed in 24 MD. STATE BAR ASS'N TRANSACTIONS 183 (1919); Wigmore, *Military Justice During the War*, West Publishing Co's Docket, April-May 1919, p. 2137.

⁵³ See Morgan, *supra* note 21.

⁵⁴ Letter from Secretary of War Baker to General Crowder, 1 March 1919, printed in U. S. WAR DEPT MILITARY JUSTICE DURING THE WAR 3 (1919).

⁵⁵ Letter from General Crowder to Secretary of War Baker, 10 March 1919, printed in U. S. WAR DEPT, MILITARY JUSTICE DURING THE WAR 5 (1919).

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War were for the first time subjected to mass usage, in the main, strongly defended the Articles of War in their present form. Approximately 90,000 copies of General Crowder's reply to the Secretary of War were ultimately distributed throughout the United States.

On 16 March 1919, Senator George Chamberlain of Oregon sent a telegram to Secretary of War Baker requesting that a reply to "Military Justice During the War," which had been written by General Ansell and sent to Senator Chamberlain,⁵⁶ be printed and made public. Secretary Baker declined on the basis that he had asked Congress for remedial legislation to correct the court-martial system a year previously (apparently referring to his request for a revision of section 1199); would do so again when Congress assembled; and since no controversy existed with regard to the Articles of War (presumably based on the fact that both General Ansell and the Secretary agreed that some change was needed), there was no need to publish General Ansell's reply.⁵⁷

On 2 April 1919, the Secretary of War invited General Ansell to submit his views concerning necessary changes to the Articles of War. General Ansell did so on the same date.⁵⁸

On 5 April 1919, the Secretary of War, through the Adjutant General, acknowledged General Ansell's memorandum and asked him to "prepare and submit to the Secretary of War at the earliest possible date a draft of such a bill as in his [Ansell's] opinion would be adapted to carry into effect the ideas expressed . . . in his indorsement."⁵⁹ It is stated by Professor Morgan that this was done "to render Ansell harmless."⁶⁰ Whatever the motive, General Ansell did draft such a bill and forwarded it through channels to the Secretary; however, no acknowledgment or reply was ever received from Secretary Baker.⁶¹

General Ansell continued his campaign for reform, in the face of departmental disapproval, through speeches and papers. He stated:

I contend—and I have gratifying evidence of support not only from the public generally but from the profession—that the existing system of military justice is un-American, having come to us by inheritance and

⁵⁶ See *Hearings on S. 64*, at 229-47.

⁵⁷ *Id.* at 224.

⁵⁸ *Id.* at 100-02.

⁵⁹ *Id.* at 102.

⁶⁰ Morgan, *supra* note 15, at 172.

⁶¹ *Hearings on S. 64*, at 102.

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rather witless adoption out of a system which we regarded as fundamentally intolerable; that it is archaic, belonging as it does to an age when armies were but bodies or armed retainers and bands of mercenaries; that it is a system arising out of and regulated by the mere power of Military Command rather than law, and that it has ever resulted, as it must ever result, in such injustice as to crush the spirit of the individual subjected to it, shock the public conscience and alienate public esteem and affection from the Army that insists on maintaining it

. . . .

The system has resulted in many erroneous and unjust convictions. Surely we need not point out to a lawyer that clemency, even when generously granted, is a poor remedy in the case of a soldier who should not have been convicted at all.⁴²

* * * *

I know there are differences, inherent, and necessary, between the military and civil code. Nobody has to tell me that. Why, the War Department has argued until they have deceived some of you people, argued it in order that it might maintain its own autocratic military powers over our youth, that if you govern, if the law governs, rather than permit the military minions to govern, the discipline of the United States Army would be destroyed, and with it your safety.

Gentlemen of the War Department have actually said, testifying before a committee of the American Bar Association—and I have great difficulty in speaking about that committee in pleasant terms—that an army could not be governed on principles of justice; that principles of justice had to yield to discipline; that you have, and must have an institution, therefore, supported by you, controlled by you, in which, according to them, you cannot consistently maintain justice. Do you lawyers believe that? I say to you if the American people ever accept the idea that there is any American institution that cannot be maintained with justice, you are lost; not only the institution, but you yourselves are lost.

Your military justice as it is at present administered is a frank avowal that we are going to maintain discipline *in terrorem*, not in accordance with law. How, my friends, could it be otherwise? If a military official can do as he pleases, if there is no question of law that can arise in the trial of a man who is undergoing court-martial, if it is nothing but an idea as to what military discipline requires to be determined by the army officers unguided by law, how can there be any such thing as justice within the military establishment?⁴³

* * * *

Under such a theory, a commander exercises an almost unrestrained and unlimited discretion in determining (1) who shall be tried, (2) the *prima*

⁴² Ansell, *Military Justice*, 5 CORNELL L. Q. 1, 16 (1919). (Footnote omitted.)

⁴³ Address by Mr. Samuel T. Ansell before the Ohio State Bar Association, 24 Jan. 1920, printed in 41 OHIO STATE BAR ASS'N PROCEEDINGS, 132, 143-44 (1920).

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facie sufficiency of the proof, (3) the sufficiency of the charge, (4) the composition of the court, (5) all questions of law arising during the progress of the trial, (6) the correctness of the proceedings and their sufficiency in law and fact. Under such a theory all these questions are controlled not by the law but by the power of military command."

As stated earlier, there were those of recognized eminence who did not share General Ansell's views and expressed their own contrary opinion generally supporting the existing Articles of War. Professor Bogert in a lengthy comprehensive article stated his view of the situation saying:

The agitation seems to me to present another instance of gross exaggeration, argument from isolated single instances to broad, general considerations, statements of half-truths, misrepresentation and suppression of facts. There are defects, but they are minor and easily curable; there are weaknesses, but they are those sure to be developed in any system of administration of justice when subjected to the strain which war and the enormous increase in our army brought to bear on our military courts"

Others were more vehement in their criticism of General Ansell and his proposals. Typical of the hypercritical approach is the following statement by Mr. Frederick G. Bauer, a former lieutenant colonel in the Judge Advocate General's Department:

The so-called "Kernan Board," after a full examination of the question, recommended only moderate changes⁶⁴ although the Chamberlain bill which has been introduced in Congress aimed to revolutionize our system of military justice by . . . changing the Articles of War from an instrument for maintaining discipline into a prize ring wherein to display the prowess of the "guard-house lawyer."⁶⁵

Professor Wigmore, a staunch supporter of General Crowder, and reputed by General Ansell to have actually written "Military Justice During the War,"⁶⁶ put it this way:

I. The prime object of military organization is Victory, not Justice. In that death struggle which is ever impending, the Army, which defends the Nation, is ever strained by the terrific consciousness that the

⁶⁴ Paper read by Col. S. T. Ansell before the Pennsylvania Bar Association, 26 June 1919, printed in 25 PA. BAR ASS'N ANNUAL REPORT 280, 290 (1919).

⁶⁵ Bogert, *supra* note 47, at 47.

⁶⁶ General Ansell stated in *Hearings on S. 64*, at 215, that the Kernan Board suggested approximately 20,000 alterations which, if true, would hardly be "only moderate changes."

⁶⁷ Bauer, *The Court-Martial Controversy and the New Articles of War*, 6 MASS. L. Q. 61, 62 (1921).

⁶⁸ See *Hearings on S. 64*, at 168. General Ansell's statement seems to be true in light of the letter from General Crowder to General Kreger, 4 April 1919, printed in *Hearings on S. 64*, at 1284-85, but General Crowder stated that it was written mainly by Major Rigby.

Nation's life and its own is [sic] at stake. No other objective than Victory can have first place in its thoughts, nor cause any remission of that strain. If it can do justice to its men, well and good. But Justice is always secondary, and Victory is always primary.

This general principle will explain why it is not always feasible to do exact justice in the Army in the midst of war.⁶⁹

General Ansell found interested congressmen willing to sponsor his proposed legislation despite the rather controversial nature of the issue. Senator George Chamberlain of Oregon, a member of the Senate Military Affairs Committee, who had, parenthetically, introduced the Selective Service Act⁷⁰ in the Senate for General Crowder in 1917, introduced the bill in the Senate as Senate Bill 64 in 1919. It was introduced in the House of Representatives by Representative Royal Johnson of North Dakota as House Resolution 367.

As Professor Morgan stated at the time:

Obviously the basic principle of the bill is the very antithesis of that of the existing court-martial system. The theory upon which this bill is framed is that the tribunal erected by Congress for the determination of guilt or innocence of a person subject to military law is a court, that its proceedings from beginning to end are judicial, and that the questions properly submitted to it are to be judicially determined. As the civil judiciary is free from the control of the executive, so the military judiciary must be untrammelled and uncontrolled in the exercise of its functions by the power of military command. . . .⁷¹

After the extensive hearings on Senate Bill 64 were completed in November 1919, the Senate Subcommittee was to make a report upon the reassembly of Congress after Thanksgiving. The Subcommittee failed to do so, whereupon Senator Chamberlain announced in an open session of the Senate that, in the event of the absence of a reported bill, he was going to introduce his own bill. The Senate Subcommittee assembled rapidly and after a very short session reported a revision of the Articles of War.⁷² Thereafter, this revision which was agreeable to the War Department, although incorporating many changes, was passed by Congress as Chapter II of the Army Reorganization Act of 1920.⁷³

As one author stated it:

None of these radical changes [those proposed by General Ansell]

⁶⁹ Wigmore, printed in 24 MD. STATE BAR ASS'N, *op. cit.*, *supra* note 52, at 188.

⁷⁰ Act of 18 May 1917, ch. 15, 40 Stat. 76.

⁷¹ Morgan, *supra* note 21, at 73-74. (Footnote omitted.)

⁷² *Hearings on Courts-Martial Before a Special Subcommittee of the House Committee on Military Affairs*, 66th Cong. 2d Sess. 9 (1920).

⁷³ Act of 4 June 1920, ch. 2, 41 Stat. 759, 787.

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have been adopted, and the present Articles of War, . . . drafted by the officers of the Judge-Advocate [sic] General's Dept. at the request of the Senate Committee, represent more nearly the views of the Kernan-O'Ryan-Ogden Board appointed by the General Staff to collect the opinions and views of Army officers of more extended court-martial experience.⁷⁴

III. HIGHLIGHTS OF ANSELL'S PROPOSED REFORMS

The purpose of this part is to compare the Articles of War of 1916, the revisions which General Ansell proposed in S. 64, and the Articles of War enacted in 1920. It does not appear prudent to examine every article of the Chamberlain Bill, which in some respects was a mere rewording of the existing law. Therefore, this part will concentrate on the areas of notable change from the existing law.

In studying General Ansell's proposal, it is necessary to do so within the framework of General Ansell's objections to the Articles of War of 1916. They may be summed up in this manner:

Such exercise of penal power [the military code] should be in keeping with the progress of enlightened government and should not be inconsistent with those fundamental principles of law which have ever characterized Anglo-American jurisprudence. The Military Code being a penal code, it should see that it can be applied to none except on probable cause. It should be specific with respect to the definition of the offense denounced and the penalty provided. It should particularize with respect to matters of procedure, that the trial may be full, fair and impartial. It should require recognition of those rules of evidence which our jurisprudence has evolved as necessary to elicit those facts upon which the ultimate conclusion of guilt or innocence may with safety and justice rest. With the utmost care it should guarantee those safeguards and that protection for an accused whose life and liberty are placed in jeopardy, which are the pride of our enlightened civilization.⁷⁵

General Ansell contended that the very vagueness and uncertainty of the Articles of War of 1916, the offenses which they purported to prohibit and the penal sanctions which they imposed, made it an impossibility for members of the Army to obtain a fair trial. He sought to equate, insofar as practicable, the military practice with its civilian counterpart. As stated in one article:

The . . . view . . . represented by the Chamberlain Bill, . . . is that some civilian body should be appointed to pass on all court-martial rec-

⁷⁴ Comment, 21 COLUM. L. REV. 477, 478 (1921).

⁷⁵ Printed in 25 PA. BAR ASS'N, *op. cit. supra* note 64, at 282-83.

ords, and that courts-martial should be guided to a greater degree by the rules and procedures governing criminal trials in civil life.⁷⁶

General Ansell chose to state his basic motivation in this manner:

I do not want a system of military justice that crushes that spirit [the American fighting spirit exhibited in World War I]. I want a system of military justice that is in consonance with that spirit, that voices that spirit and inspires that spirit, so that when our men leave the battlefield they realize that they have been treated with the same fairness, the same care as they were treated here as citizens at home.⁷⁷

A. DEFINITIONS OF OFFENSES AND SPECIFIED PENALTIES

Ansell contended most vigorously, as may be noted in the first quotation above, that the 1916 Articles of War did not, with sufficient particularity define the various offenses which it denounced. It also failed to provide specified penalties for violation of the Articles of War.

In S. 64 the punitive articles⁷⁸ are set forth with greater clarity in definition of the various offenses, and the penalty for each offense is specified within the article. A perusal of the 1920 Articles of War (1920 A. W.) will reveal that the punitive articles remain in the same format and wording as in the 1916 Articles of War. Punishments were not specified in the 1920 revision; however, authority was given to the President to prescribe the maximum punishment for each offense in both wartime and peacetime by removing the words "in time of peace" from article 45 of the Articles of War. In this respect General Ansell was unsuccessful in accomplishing his desired ends of specificity and fixed sentences.

B. PREFERRING OF CHARGES

Paragraph 63 of the 1917 Manual for Courts-Martial allowed only officers to prefer charges, that is, to be an accuser. Paragraph 62 of the 1917 Manual did permit an enlisted man, or a civilian, to initiate charges, but it was necessary for them to be preferred by an officer. Article 18 of S. 64 permitted enlisted men to prefer charges as well as officers by only making it necessary that a person subject to military law sign the charges. It also pro-

⁷⁶ Comment, *supra* note 74, at 477. (Footnote omitted.)

⁷⁷ Printed in 25 PA. BAR ASS'N, *op. cit. supra* note 64, at 311.

⁷⁸ Arts. 53-98.

vided that the person signing the charges must take an oath that he had personal knowledge that the charges were true to the best of his personal knowledge and belief, or that he had made a personal investigation of the matter and believed the charges to be true to the best of his knowledge and belief. Article 70 of the 1920 Articles of War enacted the proposals set forth in article 18.

C. PRELIMINARY INVESTIGATION OF CHARGES

Paragraph 76, 1917 MCM, required that a preliminary investigation of the charges be conducted by the officer exercising summary court-martial jurisdiction over the accused before the charges were forwarded to a superior commander. It also required that the accused be given the opportunity to make a statement, present evidence, or offer matters in extenuation for consideration by the investigating officer.

Article 19, S. 64, provided for the same type of investigation, but also provided that the accused could produce any available witnesses for examination by the investigating officer.

Critics argued that article 19 was nothing more than a re-compilation of paragraph 76, 1917 MCM.⁷⁹ Ansell, and those who supported his views, were of the opinion that while the investigative machinery existed within the 1917 Manual, it was necessary to give it the effect of statutory law to insure compliance with the requirements for investigation.⁸⁰ They felt there were many instances where commanders chose to ignore the requirements of the Manual, but would hesitate to ignore the Articles of War.

Article 70, 1920 A. W., was extended to require a full and impartial investigation prior to referring charges to trial. It required that the accused be given the opportunity to cross-examine witnesses, if available; present his own witnesses; and present such other evidence as he may desire. It further required the investigating officer to make a recommendation of the proper disposition of the case.

⁷⁹ See Bogert, *supra* note 47, at 23-25.

⁸⁰ General Ansell stated "The statute requires no preliminary investigation to determine whether or not he [the accused] may be tried, and such as is required, by regulation, is also controlled by the military commander and is neither thorough nor effective. . . ." Printed in 25 PA. BAR ASS'N, *op. cit. supra* note 64, at 293.

D. OPINION OF THE JUDGE ADVOCATE ON
SUFFICIENCY OF THE CHARGE

Neither the 1917 MCM nor the Articles of War of 1916 made any provision for a review of the charges by a judge advocate officer prior to trial. Article 20 of S. 64 required that before a charge was referred to trial by general court-martial the charge sheet had to be endorsed with a statement by an officer of the Judge Advocate General's Department that, in his opinion, the offense charged was legally sufficient, and it appeared from the available proof that the accused was guilty of the offense. This article further required that the officer referring the charge to trial be convinced that "the interests of the service and justice" required trial by general court-martial.

Critics of this article argued that requiring the charges to be submitted to the judge advocate officer for his approval made the commander subservient to a member of his staff and undermined the commander's authority. It was suggested by one writer that the opinion of the judge advocate be obtained and attached to the record, but the commander be allowed to determine whether the accused was to be tried.⁸¹ Others stated that as a practical matter the commander, although not required to do so, always sought the advice of his judge advocate prior to making his decision on the disposition of a serious case.⁸² Another argument advanced was that the judge advocate was normally a man of little military experience and, therefore, he would not be in a position to interpret the facts in the light of the tactical and strategical considerations which might be involved, and the resulting opinion would be of little value to the commander.⁸³

Proponents of the Chamberlain Bill argued that there were entirely too many cases referred to trial where the charges were baseless, not legally supportable, or failed to allege an offense under the Articles of War, and article 20 would preclude this type of error.

Article 70, 1920 A. W., required that the appointing authority refer the charges to his judge advocate for his "consideration and advice." It did not require the appointing authority to follow that advice.

⁸¹ See Bogert, *supra* note 47, at 25.

⁸² *Hearings on S. 64*, at 1254-55.

⁸³ *Id.* at 1255-56.

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E. PROVISION OF QUALIFIED COUNSEL FOR THE ACCUSED

Article 17, 1916 A. W., stated that the accused had the right to be represented by counsel of his own selection, if reasonably available, but if the accused was not represented by counsel, the judge advocate (the equivalent of the trial counsel) would advise the accused of his rights. This article was subject to great criticism which was somewhat reminiscent of the criticism often heard currently concerning the summary court-martial. It was argued that one man could not prosecute and defend the same man and do either job properly while also advising the court.

General Ansell proposed sweeping changes in this area in article 22 of the Chamberlain Bill. This article provided that except in a summary court-martial, the accused would be provided with military counsel of his own choice. In the event that the counsel requested by the accused was not reasonably available, in the opinion of the appointing authority, the appointing authority would be required to attach to the proceedings an affidavit stating the reasons for his decision. If the accused failed to select counsel, the appointing authority would have been required to appoint a well-qualified counsel, if possible, an officer with "special learning or aptitude for the law."

The most startling change was the provision that, if the trial was to be by general court-martial and the accused was able to demonstrate to the court judge advocate (this individual and his functions are discussed in section G) a special need for civilian counsel, and that he was without the necessary funds to retain such counsel, the counsel would be retained by the government at no expense to the accused. However, if the accused was ultimately convicted, the court judge advocate was empowered, on behalf of the government, to apply a stoppage against the pay of the accused in the amount of two-thirds of his pay per month until the amount paid the civilian attorney by the government was reimbursed.

A weakness in this proposal, which was not apparently discovered by those opposed to the legislation, was the fact that if the accused was found guilty and part of his sentence included forfeiture of two-thirds of his pay per month, there was no provision that the sentence forfeiture would be used to reimburse the government for the cost of his counsel. This would have undoubtedly been provided for by ancillary regulations.

This article did not create the furor that one might reasonably have anticipated, or indeed, that the recent United States Supreme Court decisions on the right to counsel for indigent accused have evoked.⁸⁴ General Crowder did not make mention of the matter in his testimony before the Senate Committee.⁸⁵ Professor Bogert admits that the provisions for counsel for the accused were one of the weakest areas in the existing law.⁸⁶

Article 17, 1920 A. W., provided that the accused should be represented by military counsel of his selection, civilian counsel if provided by the accused. In the absence of either of the foregoing, counsel provided by the appointing authority in accordance with article 11 of the 1920 Articles of War, which provided that for each general or special court-martial a defense counsel, would be appointed.

Thus, while the appointment of counsel to represent the accused was assured, and the first provision was made for the appearance of civilian counsel, under any circumstances for the accused, article 17 did not have the far reaching effect which General Ansell would have imparted to the provision of counsel for the accused.

F. MEMBERSHIP OF THE COURT

Article 5, 1916 A. W., provided that a general court-martial would comprise not less than five or more than thirteen officers. Article 6 provided for special court-martial membership of between three and five officers.

Article 5 of S. 64 specified that a general court-martial would have eight members, and article 6 provided that a special court-martial should be composed of three members. The method of selecting court members shall be discussed later.

General Ansell firmly believed that the number of members on each court must be fixed to prevent changes in the membership during the course of the trial. It was possible under the 1917 MCM, and the Articles of War of 1916, for the appointing

⁸⁴ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Johnson v. New Jersey*, 384 U.S. 719 (1966).

⁸⁵ See *Hearings on S. 64*.

⁸⁶ Bogert, *supra* note 47, at 35.

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authority to take great liberties with the membership if he chose to do so. Although changes in membership were not recommended,⁸⁷ such changes did not affect the validity of the proceedings.

Prior Articles of War had never given enlisted men the right to be appointed as members of a court-martial. Articles 4, 5, and 6 of General Ansell's proposed legislation provided that both officer and enlisted personnel should be eligible as members of general and special courts-martial. In the case of a general court-martial it was provided that three of the eight members of the court were to be enlisted men, noncommissioned officers, or warrant officers depending upon the rank of the accused. In a special court-martial, one of the three members would be an enlisted man, noncommissioned officer, or warrant officer, depending upon the grade of the accused.

Critics claimed that this was an unnecessary innovation and that the accused's rights were adequately protected without having enlisted men on the court.⁸⁸ They further contended that while they were certain that it was not intentional, it would be possible under General Ansell's proposals for the entire membership of the court to be composed of enlisted personnel.⁸⁹ The reasoning behind this contention was that while the articles provided the minimum number of enlisted personnel to be placed on the court, it did not state the maximum number which could be placed on the court.

The author's reading of the proposed articles apparently does not agree with that of the critics. It seems quite clear from the wording of articles 5 and 6 that in the case of a general court-martial only three members would be enlisted personnel or warrant officers, and in the case of a special court-martial only one of the personnel appointed would be an enlisted man or warrant officer. Research has failed to disclose any comment by General Ansell pertaining to the contention of his opponents regarding the alleged indefiniteness of articles 5 and 6.

Article 4, 1920 A. W., still provided that only officers were eligible to serve on courts-martial, but this article did require the appointing authority to choose those officers best qualified "by

⁸⁷ See Manual for Courts-Martial, United States Army, 1917, para. 7 [hereafter referred to as 1917 MCM].

⁸⁸ See, e.g., Bogert, *supra* note 47, at 32.

⁸⁹ *Hearings on S. 84*, at 1257. See also Rigby, *supra* note 10, at 85.

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reason of age, training, experience and judicial temperament." It recommended avoiding, if possible, the appointment of officers with less than two years of prior service.

G. THE COURT JUDGE ADVOCATE

Paragraph 99, 1917 MCM, provided that the judge advocate (trial counsel) would act as legal adviser to the court in addition to his duties as prosecutor.

Article 12 of the Chamberlain Bill provided for the appointment of a court judge advocate by the appointing authority for each general and special court-martial. Further, it provided that for general court-martial proceedings the court judge advocate should be a member of the Judge Advocate General's Department, unless such an officer was not available. In that event an officer recommended by the Judge Advocate General as specially qualified should be appointed. The court judge advocate for a special court-martial was also to be a member of the Judge Advocate General's Department if available. If he were not available, the appointing authority was free to select an officer of his command that he deemed specially qualified.

The court judge advocate was not to be a member of the court, but sat with it in all open sessions of court. His duties were many and shall be individually discussed due to the uniqueness of his position and the extent of his authority.

- (1) He chose or, after the commencement of the trial, augmented the membership of the court from a panel of eligible personnel selected by the appointing authority. Thus, the power of the appointing authority to "pack" the court or select a "blue ribbon court," was effectively abolished.
- (2) He ruled on all questions of law arising during the trial and also upon challenges and questions touching the competency and impartiality of the court (which shall be discussed at greater length).
- (3) He notified the court and the appointing authority of any deficiency in the composition of the court, or in the charges before it.
- (4) Before findings he summarized the evidence presented in the case and the applicable law unless both the court

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judge advocate and the court agreed that it was unnecessary.

- (5) He insured that the accused did not suffer any disadvantage due to his position in the trial, his ignorance or his incapacity; and in furtherance of that duty, the court judge advocate was empowered to call and examine witnesses on the accused's behalf.
- (6) He had authority to approve the court's finding of guilty or in the alternative to approve only so much of the finding of guilty as found the accused guilty of a lesser included offense, when the evidence as adduced at trial, as a matter of law, required such a finding. In these instances the action of the court judge advocate would be substituted for that of the court.
- (7) He announced the findings of the court and, in case of a conviction, determined and imposed an appropriate sentence.
- (8) He had the discretionary power to suspend any sentence except death or dismissal.

Article 12 further provided that the rulings and advice of the court judge advocate would govern the court.

This particular article caused great consternation in the military. It was felt that the appointing authority after appointing the panel from which the membership of the court was to be chosen was completely isolated from the case. The court judge advocate assumed all of the powers of the appointing authority and the president of the court. General Crowder went into this particular article at some length during the committee hearings⁸⁰ stating that after the appointing authority selected the court judge advocate, the prosecutor and the panel of potential members, his connection with the case was at an end. This would have been true, and it was exactly the result that General Ansell envisioned. The end which he was seeking was the end of a system which:

does not contemplate that a court-martial shall be a court doing justice according to established principles of jurisprudence and independently of all personal power; quite the contrary. It regards the court-martial simply as the right hand of the commanding officer to aid him in the maintenance of discipline. It is his agent. He controls it. It is answerable not to the law but to him. . . . The court-martial is not a court at all; it is but an agency of military command governed and controlled by the will of the commander. . . .⁸¹

⁸⁰ See *Hearings on S. 64*, at 1256-61.

⁸¹ Printed in 25 PA. BAR ASS'N, *op. cit. supra* note 64, at 292.

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Article 8, 1920 A. W., and paragraph 89a of the 1921 Manual, provided for a law member who was granted a few of the powers which General Ansell proposed to confer upon the court judge advocate. However, as will be seen in the following discussion, the majority of the powers which General Ansell suggested were cast aside and ignored in revising the Articles of War of 1920.

Article 8, 1920 A. W., provided that the appointing authority would, on each general court-martial, appoint one of the members as law member. This member was to be an officer of the Judge Advocate General's Department, but if a member of that department was not available, the appointing authority was authorized to choose any officer he deemed to be specially qualified to perform such duties.

Paragraph 89a of the 1921 Manual sets forth the duties of the law member and states that he shall rule on all interlocutory questions other than challenges and shall rule on all other questions except the question of the findings and the sentence. This paragraph further provided that on questions arising on any objection to the admissibility of evidence offered during the trial, the ruling of the law member would be made the ruling of the court. In the event that any member of the court objected to the ruling of the law member on an interlocutory question, article 31, 1920 A. W., provided that the court would be closed and a voice vote of the members conducted on the question with a simple majority deciding the issue. The law member's ruling on objections to the admissibility of evidence was final according to paragraph 89a(2) and article 31.

The law member, according to paragraph 89a(6), had the same duties and privileges as the other members of the court, including an equal vote in deciding all questions submitted to a vote. Thus, the law member could, in a given situation, vote to sustain his own rulings. The law member was also entitled to vote on the findings and sentence and was, of course, present in closed sessions of the court.

H. PROCEDURE FOR CHALLENGES

Article 18, 1916 A. W., provided that members of general and special courts-martial could be individually challenged for cause. The validity of the challenge was to be decided by a majority vote of the court in closed session,⁹² after withdrawal of the challenged member.⁹³

⁹² 1917 MCM, para. 90.

⁹³ *Id.* para. 125.

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Article 23 of the Chamberlain Bill proposed a much more liberal procedure. In a general court-martial the accused was given two peremptory challenges and in a special court-martial one peremptory challenge. He was also given the right to challenge for cause on the grounds of principal challenge as set forth in paragraph 121, 1917 MCM, and all common law grounds for challenge.

Another innovation proposed by General Ansell was a challenge to the array. This procedure required the accused to present an affidavit of prejudice specifying grounds which showed that the court was unable to do justice by virtue of a matter pertaining to its composition or constitution, or that the officer appointing the court acted with bias or prejudice. (It is unclear whether the officer referred to here is the appointing authority who selected the panel of eligible officers, or the court judge advocate who selected the actual court members from that panel; however, since article 23 also contained provisions for challenging the court judge advocate for cause, it would appear that the bias or prejudice of the appointing authority had to be shown in his selection of the panel.) The accused's affidavit was to be accompanied by a certificate from his counsel that the affidavit was made by the accused in good faith.

The validity of the accused's contention was to be determined by the court judge advocate. If he found the facts to be as alleged, the appointing authority was to be notified, and the next superior commander in the chain of command was to appoint a court for the trial of that case. (It is not specified if the next superior authority was to actually appoint the court as an entity or select a panel from which the court would be appointed by the court judge advocate. It would appear logical in light of article 12, S. 64, that the next superior commander would merely select the panel from which the court was to be appointed.)

General Ansell, in testifying before the Senate Committee, discussed article 23, stating his rationale:

Mr. Chairman, if there was a community anywhere where there ought to be peremptory challenges and challenges to the array both, it is in the Army of the United States. The commanding general who designates that panel is frequently a prejudiced person. In that case he does not know it. Of course not. We usually do not know when we are prejudiced. But he is prejudiced all the same, and if there were a proper judicial authority to determine that fact, it would frequently be so determined."

⁶⁶ *Hearings on S. 64*, at 267.

Professor Bogert felt that the accused had not been appreciably prejudiced by the existing procedure, but agreed that peremptory challenges and a challenge to the array might be an improvement to provide for the unusual case.⁹⁵

Article 18 of the 1920 Articles of War provided that members of the court and the judge advocate could be challenged for cause individually. Upon challenge for cause, the court in closed session, after withdrawal of the challenged member, voted by secret written ballot upon the challenge. A majority vote determined the question. A tie vote was negative and failed to sustain the challenge.⁹⁶

Each side was also granted one peremptory challenge which could be exercised against any member of the court with the exception of the law member who could only be challenged for cause.⁹⁷

I. RULES OF EVIDENCE

Article 38, 1916 A. W., provided that the President could prescribe the modes of proof to be used in courts-martial so long as they were not inconsistent with the Articles of War. Chapter XI, 1917 MCM (revised by Professor Wigmore), set forth the rules of evidence for courts-martial, and pursuant to paragraph 198 of the same Manual, these rules were made binding subject only to the Articles of War, the Constitution and federal statutes expressly applying to courts-martial.

Article 41 of General Ansell's proposed legislation required that, except as Congress provided otherwise, the rules of evidence applicable to the district courts of the United States would be applicable to trials by courts-martial.

Before the Senate Committee General Ansell revealed his reasoning behind this article as follows:

Now you come to the actual trial. No rules of evidence; none prescribed. The law of Congress actually, under the so-called Crowder revision [the 1916 revision of the Articles of War] has authorized the President to make any rules of evidence he pleases. Gentlemen, if there is one thing in the world that ought to be stopped, it is the further abdication by Congress, to the power of military command, whereby a man may be tried before a court-martial not according to the rules of evi-

⁹⁵ Bogert, *supra* note 47, at 32.

⁹⁶ 1921 MCM, para. 125.

⁹⁷ 1920 A. W. art. 18.

dence and law, but according to some rule prescribed by the President, which, of course, means the Judge Advocate General of the Army and the Chief of Staff.

. . . Our rules of evidence may not be the most logical in the world, but they are what we have got; we have nothing better; they are really a basic part of our jurisprudence and of our civilization, and I, for one, am not ready to give them up in the trial of an important case before a court-martial in favor of rules, or no rules, prescribed by military command."⁹⁸

Opponents of Ansell's legislation argued that the rules set forth in the 1917 Manual for Courts-Martial had been revised by Professor Wigmore, a recognized authority in the field of evidence. It represented a compilation of the best rules available in the evidence field; that instead of being arbitrary as alleged, they represented the best possible guide for the admissibility of matters in legal proceedings.

Article 38, 1920 A. W., provided that the President could, by regulation, provide the modes of proof to be used in trials by court-martial. The regulations prescribed should, however, as closely as he deemed practicable, follow "the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States" except when those rules would be in conflict with the Articles of War.

J. POWERS OF THE APPOINTING AUTHORITY

Section II.G, 1916 A. W. (articles 46-53), and paragraphs 369-400, 1917 MCM, delineated the powers of the appointing authority with regard to the findings and sentence as "reviewing authority." He was empowered to approve or disapprove both the findings and the sentence, or approve only so much of a finding as found the accused guilty of a lesser included offense.⁹⁹ Since the findings, whether resulting in an acquittal or conviction, and the sentence were not effective until approved by the appointing authority,¹⁰⁰ they were not announced in open court and were announced only after the reviewing authority took his action thereon. The failure of the reviewing authority to approve a sentence rendered it a nullity. The reviewing authority further had the power to suspend, remit, or mitigate the punishment and was empowered to declare the proceeding invalid by reason of errors which "injuriously

⁹⁸ *Hearings on S. 64*, at 268.

⁹⁹ 1916 A. W. art. 47; 1917 MCM, para. 377.

¹⁰⁰ 1916 A. W. art. 46; 1917 MCM, para. 371.

affected the substantial rights of an accused" according to article 37 of the 1916 Articles of War. The reviewing authority was also empowered by custom of the service to return the findings and sentence to the court for reconsideration regardless of whether there was a conviction or acquittal.¹⁰¹

At approximately the same time that General Ansell proposed his remedial legislation, the War Department published General Order No. 88 of 14 July 1919. It prohibited the return of acquittals to the court for reconsideration by the reviewing authority and further prevented the upward revision of sentences.

It is apparent that this was the very type of authority, or command control, at which General Ansell was attempting to strike in his legislation. The Chamberlain Bill provided in article 34 that an acquittal would be announced immediately in open court. Records of trial by general court-martial were to be forwarded by the appointing authority to the Judge Advocate General¹⁰² for review. (This review will be described in detail in the subsequent section.) Records of trial by special and summary courts-martial would have been sent to general headquarters, designated by the President for that purpose, for review by the judge advocate of that headquarters and modified or revised if necessary.¹⁰³

Any officer empowered to appoint a court was authorized by article 50, S. 64, to "mitigate, remit, or suspend" the entire sentence or any part thereof except sentences to death or dismissal.

Professor Bogert recognized the advisability of these provisions as did the American Bar Association committee.¹⁰⁴ General Crowder in his letter to the Secretary of War, although denying that the power had been abused, agreed that the time had come to do away with this power.¹⁰⁵

Article 29, 1920 A. W., provided that an acquittal would be announced at once in open court. Paragraph 332a, 1921 MCM, provided that in case of conviction the findings and sentence should be announced in open court except for good cause. The reasons alleged to constitute good cause were to be made a part of the record.

¹⁰¹ See Bogert, *supra* note 47, at 38; Morgan, *supra* note 21, at 62.

¹⁰² Arts. 36, 38, S. 64.

¹⁰³ Arts. 37, 39, S. 64.

¹⁰⁴ See Bogert, *supra* note 47, at 38-39.

¹⁰⁵ See Letter from General Crowder to Secretary of War Baker, printed in U. S. WAR DEP'T, *op. cit.* *supra* note 55, at 34.

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Article 46, 1920 A. W., required the reviewing authority to refer every general court-martial record to his staff judge advocate for review prior to taking action on the record. The review of the staff judge advocate, according to paragraph 370, 1921 MCM, was to be in writing, advising the appointing authority of the facts of the case and recommending the action to be taken by the reviewing authority. The staff judge advocate's review accompanied the record of trial to the Judge Advocate General.

Article 47, 1920 A. W., provided that the power to approve a court-martial sentence included the power to approve or disapprove a finding of guilty or approve only a finding of guilty of a lesser included offense and to approve, disapprove or partially approve a sentence. Article 40, however, prohibited the return for reconsideration, by any authority, of an acquittal, a not guilty finding on a specification, a finding of not guilty of any charge except where there was a finding of guilty of the specification alleged under that charge which was a violation of an Article of War, or for reconsideration of the sentence imposed "with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had."

K. APPELLATE REVIEW

As noted in the introduction and historical background, this is the area in which feelings ran high and which had initially triggered the entire controversy.

Article 46 of the 1916 Articles of War provided that an appointing authority must approve the sentence imposed by a court-martial before it could be carried into execution. Article 48 further required Presidential confirmation of the sentence prior to execution where the sentence involved a general officer, dismissal of an officer with certain wartime exceptions, suspension or dismissal of a cadet, and death sentences except that in time of war, death sentences for murder, rape, mutiny, desertion and spying could be executed upon confirmation by "the commanding general of the Army in the field" or the commanding general of a territorial department or division. As stated earlier, this authority had been modified on 17 January 1918 by General Order No. 7 which stated that all sentences involving death or dismissal required Presidential confirmation prior to execution.

The Office of the Judge Advocate General reviewed general courts-martial, but only reversed them for lack of jurisdiction.

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In cases of prejudicial error, under the Crowder-Baker interpretation of section 1199, the Judge Advocate General was only free to recommend revision through the Chief of Staff and the Secretary of War to the President.

General Ansell in article 52 of S. 64 proposed the establishment of a court of military appeals which "for the convenience of administration only" was to be located in the Office of the Judge Advocate General. Article 52 stated that the court was to consist of three judges without specifying if they were to be military or civilian; however, article 52 also provided that the President could assign a judge advocate officer to the court in the event that one of the regularly appointed judges became temporarily incapacitated. This would seem to indicate an intention that the regularly appointed judges of the court were to be civilians. The judges were to be appointed by the President with the advice and consent of the Senate. They were to hold office during good behavior and "have the pay and emoluments, including the privilege of resignation and retirement upon pay, of a circuit judge of the United States."

The same article further provided that all cases tried by general court-martial which involved a sentence of death, dismissal of an officer, dishonorable discharge or confinement for more than six months would be reviewed by the Court of Military Appeals unless after sentence was announced in the court-martial the accused stated in open court that he did not desire such review, or if the accused later notified the court in writing that he did not desire that his case be reviewed. Thus, the accused was given the right to curtail the appellate procedure if he elected to do so. The review was to disclose and correct any "errors of law evidenced by the record and injuriously affecting the substantial rights of an accused without regard to whether such errors were made the subject of objection or exception at the trial."

The court was empowered to "disapprove a finding of guilty and approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense," "to disapprove in whole or any part of a sentence," and to advise the reviewing or confirming authority of proceedings which should be taken, if any, after total or partial disapproval of the sentence. If the findings and sentence were disapproved because of an error of law, the appointing authority could order a new trial. If the sentence, though valid, appeared excessive or unjust, the court could make a recommendation of clemency to the President through the Secretary of War.

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General Ansell did not elucidate upon his theory for the Court of Military Appeals in the Senate Committee except to assure the Committee that its purpose was only to review errors of law and not errors of fact.¹⁰⁶

General Crowder, however, took great issue with such a theory in his testimony before the Committee. He felt that the appellate system under General Order No. 7 was working well.¹⁰⁷ His view of such a court was expressed as follows:

The idea of a civil court of military appeals is wholly untenable from my point of view. And so, too, is the idea of an exclusively military court of appeals functioning independently of the President. . . . I think it would affect in the most detrimental way the fighting efficiency of our forces . . .¹⁰⁸

General Crowder: First and of minor importance, let me say that you would have to choose between such a court and the continuance of the office of the Judge Advocate General. Of course, with a court vested with that power, the Judge Advocate General of the Army would have little or nothing to do with military justice. Of course, there would remain his duty to render opinions connected with the civil administration of the War Department.

Senator Lenroot: He would have a great deal to do with military justice. He would have a large force under him.

General Crowder: The military justice would depend upon the court of appeals and not upon him at all.

Senator Lenroot: Would it not be very proper to have the judge advocate present them to the court?

General Crowder: Present the case?

Senator Lenroot: To represent the government so to speak.

General Crowder: Before that court?

Senator Lenroot: Before that court.

General Crowder: Well, that would mitigate the evil somewhat. But if you will permit me one other suggestion, I think you and I will have a complete meeting of the minds. I can conceive of this appellate jurisdiction as you have outlined it, but it gives me pause when I reflect upon the fact that what you propose is a completely new experiment which no great nation will ever attempt—except Russia. . . .¹⁰⁹

In judging of the personnel of your proposed court of appeals, it is im-

¹⁰⁶ *Hearings on S. 64*, at 284-88.

¹⁰⁷ *Id.* at 1264. Professor Morgan did not agree with this contention: "As for the Judge Advocate General, Colonel Wigmore has described what he does as an automatic appeal, and has said that the appeal costs the accused nothing. In the vast majority of cases it is worth to the accused exactly what it costs." Address by Col. Edmund M. Morgan before the Maryland State Bar Association, 28 June 1919, printed in 24 MD. STATE BAR ASS'N TRANSACTIONS 197, 210 (1919).

¹⁰⁸ *Hearings on S. 64*, at 1263.

¹⁰⁹ *Id.* at 1266.

portant to bear in mind that about 90 per cent of the cases coming before that court are military cases. It is unreasonable to assume that any but military men could judge of the weight or relevancy of the evidence in determining the conduct of a man on the field of battle where the evidence is strategic or tactical and wholly military. The issues are those which only a military man who has been trained in those matters can understand. . . .¹¹⁰

Professor Bogert agreed with the idea of a court of military appeals, but felt that one member should be an officer who was a member of the bar and the decisions of the court should be of an advisory nature directed to the President of the United States. He notes:

Practically they would decide all appeals, but the Constitutional position of the President as Commander-in-Chief of the Army would be recognized. He should control the Army in all matters. It would be anomalous to establish an independent tribunal which could go over the head of the Commander-in-Chief in matters of discipline and justice in the Army."¹¹¹

Article 50½, 1920 A. W., required the Judge Advocate General to establish a board of review consisting of three officers of the Judge Advocate General's Department which would review all cases which required the approval or confirmation of the President (cases involving a general officer, dismissal of an officer, except in wartime when only the dismissal of general officers required Presidential confirmation, suspension or dismissal of a cadet, death sentences, with exceptions in wartime) and a written opinion submitted to the Judge Advocate General for transmittal, together with the Judge Advocate General's recommendation "to the Secretary of War for the action of the President."

This article further provided that no sentence of a general court-martial should be ordered executed which included as a penalty, death, unsuspended dismissal, or dishonorable discharge or confinement in the penitentiary until the board of review, with the Judge Advocate General's approval, held the record of trial to be legally sufficient. An exception to the foregoing requirements was made when the accused pleaded guilty.

If the board of review, with the Judge Advocate General's approval, held the record legally sufficient, the reviewing authority was notified and the sentence executed. On the other hand, if the board found the record legally insufficient to support the findings and sentence, in whole or in part, or that the accused suffered prejudicial error and the Judge Advocate General con-

¹¹⁰ *Id.*, at 1267.

¹¹¹ Bogert, *supra* note 47, at 46.

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curred, the findings and sentence were vacated and the record returned to the reviewing authority for a rehearing or other proper action. If the Judge Advocate General did not agree with the board's finding of legal insufficiency or prejudicial error, the board's opinion and the Judge Advocate General's "dissent therefrom" were forwarded to the Secretary of War for the President's action. The President could affirm the action at the trial level, or disapprove the findings in whole or part, or disapprove or vacate the sentence in whole or in part.

Article 50½ also authorized a rehearing in the case where the reviewing or confirming authority or the President disapproved or vacated a sentence which had not been ordered executed. The rehearing was to be held before a different court and the accused could not be tried for any offense of which he had previously been found not guilty by the original court. The sentence in case of conviction upon rehearing could not be in excess of that initially imposed, unless there was a finding of guilty of an offense not alleged in the original trial. The article also provided that where the board of review, with the approval of the Judge Advocate General, found a case legally insufficient or found that prejudicial error to the rights of the accused existed, a rehearing would be held unless in accordance with such action the board of review, with the Judge Advocate General's recommendation, approved the findings and sentence in part, returned the record for revision, or the case was ordered dismissed by the reviewing or confirming authority.

If the rehearing was ordered by the President (in the instance of a conflict between the findings of the board of review and the opinion of the Judge Advocate General as to the legal sufficiency of the record or the existence of error prejudicial to the accused), the record of trial upon rehearing, after review by the board of review, the opinion of the board and the recommendation of the Judge Advocate General were forwarded "to the Secretary of War for the action of the President."

Records which did not qualify for review by the board of review were reviewed in the Office of the Judge Advocate General. If found legally insufficient, the case was referred to the board of review and, depending upon the decision of that body, action, as dictated in accordance with article 50½.

Article 50½ also authorized the Judge Advocate General to constitute additional boards of review within his office or to establish

branches of his office "with any distant command" and within such branch offices, a board or boards of review.

As stated in a comment on the new Articles of War:

The inclusion of this board [the Board of Review established by A. W. 50½] in the scheme of administering military justice seems to be a compromise between the proposals of the Chamberlain Bill for a civilian court and the recommendation of the Kernan-O'Ryan-Ogden Board which made provision for no such tribunal at all.¹¹²

While not accomplishing the goal of General Ansell to have an appellate court acting independently of the military establishment, article 50½ did provide defined statutory review in serious cases.

L. OTHER MATTERS

1. *Action on the Charge.*

Article 69, S. 64, provided that no person placed in confinement should remain in such status for more than eight days, or until a court-martial could be assembled. It further provided that charges should be served upon the confined person within eight days and that he was to be brought to trial within ten days after the service of charges, "unless necessities of the service prevent such trial," and that the accused must be tried within thirty days thereafter except for delay granted at the request of the accused. To this extent article 69 was a reiteration of article 70 of the 1916 Articles of War.

However, article 69 of the Chamberlain Bill went on to provide that the failure to serve charges within the time provided, or failure to proceed with trial within the prescribed period would have the effect, in time of peace, or thereafter precluding trial for the offense giving rise to the confinement. Article 70, 1916 A. W., only provided that failure to adhere to the time limits set forth therein would terminate the arrest. Both article 70 and article 69, S. 64, prohibited bringing an accused to trial before a general court-martial, in time of peace, within five days subsequent to the service of charges, except with the express consent of the accused.

Article 70, 1920 A. W., replaced article 70 of the 1916 Code and provided that charges should be served on an accused within eight days or the delay explained. It stated that failure to serve the charges provided grounds for a continuance and, that in time of peace, no accused should be brought to trial within five days subsequent to the service of charges except with his consent.

¹¹² Comment, *supra* note 74, at 480.

2. *Voting Procedure.*

Article 31, 1916 A. W., and paragraphs 295 and 308, 1917 MCM, had provided that the vote on findings and sentence should be by a simple majority, except when the death sentence was a permissible punishment, a two-thirds vote of the members present was required.

General Ansell proposed in article 46 of the Chamberlain Bill that conviction of an offense require an affirmative vote of three-fourths of the membership, and that in the case of the mandatory death sentence a concurrence of the entire membership of the court be required. He further proposed that conviction by a special court-martial require a vote of two-thirds of the membership.

Paragraph 294, 1921 MCM, provided that voting on the findings should be by secret written ballot and paragraph 295 required the concurrence of two-thirds of the members present for a conviction by both special and general courts-martial. Article 43, 1920 A.W., created an exception requiring that for a conviction of an offense in which the death sentence was mandatory, concurrence of all members present at the time the vote was taken was necessary for conviction and the imposition of the death sentence. This article further required the concurrence of three-fourths of the members present at the time of voting to impose a sentence in excess of ten years' confinement and a two-thirds vote for all other sentences whether by general or special courts-martial.

3. *Review of Inferior Courts-Martial.*

Paragraph 369, 1917 MCM, provided that the reviewing authority would take his action on the record of trial of inferior courts-martial which were forwarded to him in accordance with article 36, 1916 A. W. The record would be forwarded by the reviewing authority to the officer exercising general court-martial jurisdiction for filing in the office of the judge advocate for the compilation of statistical reports after which it was to be destroyed.

Article 39 of S. 64 provided that records of inferior courts-martial would be transmitted to the appointing authority who would, without action, forward the records to general headquarters appointed by the President. The judge advocate of the receiving headquarters would review the proceedings in accordance with the provisions of article 52, and in the case of error prejudicial to the substantial rights of the accused, revise the proceedings.

Article 36, 1920 A. W., was worded in the same manner as the article of the same number in the 1916 Articles of War except that it did not provide for the destruction of records of trial by special court-martial. Paragraph 367(b) of the 1921 Manual provided that records of trial by special courts-martial would be filed in the office of the staff judge advocates of the command exercising general court-martial jurisdiction until the sentence of the accused was completed. At that time they would be forwarded to the Judge Advocate General for permanent filing.

4. *Records of Trial as Public Records.*

Article 51 of the Chamberlain Bill specifically provided that records and reports of "the proceedings of all courts and military commissions" were public records, wherever filed and therefore subject to public examination.

No Article of War prior to or subsequent to the Chamberlain Bill has contained such a provision and there is no corresponding article in the *Uniform Code of Military Justice*.¹¹³

IV. ANSELL'S PROPOSALS AND THE 1920 ARTICLES OF WAR

As may be seen from the foregoing comparison between the Articles of War of 1916, General Ansell's proposals as introduced in S. 64 and the Articles of War of 1920, none of the significant proposals for reform advocated by General Ansell were fully enacted into law in the 1920 Articles of War. As Professor Morgan stated:

Extensive hearings were held on the Chamberlain Bill. The Ansell draft was badly mutilated but the substance of some of its provisions protecting the rights of an accused were embodied in the Act of June 4, 1920, which, without further amendment of any importance, was in force during world War II.¹¹⁴

It is submitted, however, that the true test of the success of General Ansell can not be measured in terms of a box score with regard to legislation enacted alone.

General Ansell, writing in 1922,¹¹⁵ felt that in principle he had been successful in gaining much of the reform that he sought. He

¹¹³ For current regulation governing the release of information contained in court-martial records, see Army Reg. No. 345-80 (June 1966).

¹¹⁴ Morgan, *supra* note 15, at 172.

¹¹⁵ Ansell, *Some Reforms in our System of Military Justice*, 32 YALE L. J. 146 (1922).

felt, however, that the administration of the new Articles of War, apparently due to a lack of acceptance of their principles, was not in conformity with "the letter, spirit or purpose of this highly remedial legislation."¹¹⁶

He specifically deprecated the failure to abide by the requirements of article 70 of the 1920 Code requiring a preliminary investigation of all charges prior to trial by general court-martial, alleging that normally the investigation conducted by the inspector general was relied on to determine the validity of the charges. He also deplored the fact that the provisions of article 81, 1920 A. W., permitting the use of officers of a branch other than the Judge Advocate General's Department as the law member in the absence of an available member of that department, were being relied on too heavily, while there seemed to be enough officers of the Judge Advocate General's Department to appoint them as prosecutors in the same cases.¹¹⁷

In great measure General Ansell's success must be measured in the abstract. If General Ansell had not taken issue with the system as it existed and was administered prior to and during World War I, it is entirely within the realm of possibility that neither the public nor Congress would have been aware of the magnitude of the problem which the application of the Articles of War of 1916 to the greatly expanded army of World War I had revealed.

It would be an injustice to suggest that General Crowder would not have proposed some of the modifications which he did in the administration of military justice based upon the experience gained from the war. Yet a study of his testimony before the Senate Committee and his letter of 10 March 1919 to Secretary of War Baker¹¹⁸ reveal a perfectly human reluctance on General Crowder's part to recognize or admit that any substantial defects existed in the 1916 Articles of War, which General Crowder had revised and guided through Congress almost singlehandedly.¹¹⁹

Therefore, the liberalization of the Articles of War of 1920

¹¹⁶ *Id.* at 155.

¹¹⁷ *Ibid.*

¹¹⁸ Letter from General Crowder to Secretary of War Baker, printed in U. S. WAR DEP'T, *op. cit. supra* note 55, at 5.

¹¹⁹ See *Hearings on S. 3191 on the Revision of the Articles of War Before a Subcommittee of the Senate Committee on Military Affairs*, 64th Cong., 1st Sess. (1916), and *Hearings on Revision of the Articles of War Before a Subcommittee of the House Committee on Military Affairs*, 64th Cong., 1st Sess. (1916).

with respect to the conduct of trials; the provision of counsel; the use of the law member; at least the beginnings of an effective system of appellate reviews; and the provisions contained in the 1921 Manual for Courts-Martial, U.S. Army, dealing with such matters as the requirement for the utilization of the secret written ballot in voting on the findings and sentence;¹²⁰ a concurrence of two-thirds of the membership of the court to convict the accused in certain general court-martial cases and all special courts-martial;¹²¹ the immediate announcement of the findings and sentence in open court except in certain specified cases;¹²² and the requirement that the general court-martial post-trial review of the staff judge advocate be in writing and accompany the record of trial¹²³ must in large measure be attributed to the work of General Ansell in making the public aware of the shortcomings of the Articles of War and his suggestions for their improvement.

Criticism is of little value if a better alternative is not offered. It can not be denied that a thorough reading of General Ansell's proposed legislation, his testimony, before various committees, speeches to state bar associations and writings will reveal instances of what may be termed an overzealous and unrealistic approach to the revision of a military code. A striking example of this is found in the provision of article 69 providing for the release of an accused from confinement and immunity to future trial if not tried within a total of forty-eight days after arrest. It does not require a militarily oriented mind to realize that even in peacetime an arbitrary time limit would be unreasonable in all situations. These instances of overprotection should not, however, be allowed to overshadow or obscure the true aim of General Ansell's proposals, his foresight and advanced thinking as ultimately borne out by the enactment of the *Uniform Code of Military Justice*.

V. GENERAL ANSELL'S PROPOSALS AND THEIR EFFECT ON THE UNIFORM CODE OF MILITARY JUSTICE

It should be apparent to the reader at this juncture that many of General Ansell's proposals as set forth in the Chamberlain Bill attained fruition, or at least a large measure of recognition, in the *Uniform Code of Military Justice* (UCMJ). The logical question

¹²⁰ 1921 MCM, para. 294.

¹²¹ *Id.* para. 295.

¹²² *Id.* para. 332a.

¹²³ *Id.* para. 370.

which results is whether this was due to a delayed recognition of the sound basis for his proposed legislation or if the creation of the UCMJ was an independent work which only coincidentally embodies many of the ideas which General Ansell had envisioned.

When one considers that the late Professor Edmund M. Morgan was Chairman of the Defense Department Committee on the drafting of a uniform code of military justice and also was, during and after World War I, General Ansell's strongest ally in his fight for reformation of the Articles of War¹²⁴ it seems dispositive of the question. However, a study of the congressional hearings held prior to the enactment of the UCMJ reveals little or no mention of General Ansell or S. 64.¹²⁵

Conversely, a study of areas of similarity between General Ansell's recommendations and various articles of the UCMJ shows a striking resemblance which, logically, must be the result of more than pure chance.

A. APPELLATE PROCEDURES

A perusal of article 52 of the Chamberlain Bill and article 67 of the UCMJ vividly shows the apparent effect of the former on the latter.

The Court of Military Appeals is placed in the Defense Department for administrative purposes which is similar to General Ansell's proposal that it be placed in the Office of the Judge Advocate General. Both articles require (or in the case of article 52 seems to require) the appointment of three civilian judges by the President with the advice and consent of the Senate. Ansell provided that the judges should receive the pay and emoluments of a circuit judge while the UCMJ provides them only with the pay of a circuit judge. They both review similar types of cases although General Ansell did not envision an intermediary agency in the form of the board of review. Both enjoy approximately the same powers regarding the findings and sentence of cases brought before the court. Ansell did provide the accused with a method for avoiding review if he desired while the appellate procedure in all cases outlined in article 67 is automatic under the UCMJ.

¹²⁴ See Morgan, *supra* note 21.

¹²⁵ See *Hearings on H.R. 2498 on the Uniform Code of Military Justice Before a House Subcommittee of the Committee on Armed Services on H.R. 2498, 81st Cong., 1st Sess. (1949).*

Despite this difference, the other similarities mentioned certainly seem to indicate a regard by the Drafting Committee for the work done previously by General Ansell. Article 67, UCMJ, carries out the intent and spirit of General Ansell's concept of the appellate procedure. It goes even further than General Ansell had originally envisioned by also retaining the board of review which was adopted in 1920 as a compromise measure between the existing proposal for a Court of Military Appeals and no appellate tribunal, as an intermediate step in the military appellate system.

B. THE LAW OFFICER

The court judge advocate provided for by article 12, S. 64, possessed almost plenary power with regard to trials by courts-martial. The wisdom of the grant of power given to this one individual under General Ansell's theory is subject to some speculation. It is entirely possible that the control vested in this officer is perhaps an example of General Ansell becoming prepossessed with the necessity of removing the command influence or control aspect from the trial of military personnel. However, articles 26 and 51(b), UCMJ, when read together show a closer resemblance to General Ansell's concept of the court judge advocate than to the law member provided by articles 8 and 31, 1920 A. W., who was an actual member of the court while also acting as its adviser.

Although the UCMJ does not go as far in its grant of authority to the law officer as Ansell proposed, it does require that he be certified by the Judge Advocate General of his particular armed force. This requirement is somewhat analogous to Ansell's requirement that if a member of the Judge Advocate General's Department was not available the Judge Advocate General could recommend an officer who, in his opinion, was specially qualified to act in that capacity.

C. ENLISTED COURT MEMBERS

General Ansell, in the Chamberlain Bill, had provided that of the eight members of a general court-martial, three would be enlisted personnel, or noncommissioned officers or warrant officers depending on the rank of the accused.¹²⁶ He also provided that a concurrence of three-fourths of the members was required for all findings of guilty and all sentences except the death sentence,

¹²⁶ Art. 5, S. 64.

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thereby giving the enlisted members control of the verdict, if they arbitrarily voted as a bloc.¹²⁷ In the special court-martial one of the three members was required to be an enlisted person or warrant officer depending upon the grade of the accused and since a two-thirds majority was required the same control did not exist in this instance.¹²⁸

While the 1920 Articles of War made no provision for enlisted court members, article 25, UCMJ, provides for one-third of the court to be enlisted personnel, if the accused has made a request for such personnel. Therefore, while the UCMJ does not make the inclusion of enlisted personnel mandatory, or require them to be of comparable rank with the accused, or give them the controlling vote, it does recognize the right of the enlisted man to be tried, at least partially, by his peers, as did Ansell's proposed legislation.

D. PRETRIAL REVIEW BY THE JUDGE ADVOCATE

Article 20 of the Chamberlain Bill provided that before a case was referred to trial it was to be submitted to the judge advocate for his indorsement that the charges were legally sufficient and that it appeared that a prima facie case existed against the accused. This would have been a statutory prerequisite to trial.

Article 70, 1920 A. W., required the appointing authority to submit the charges to his staff judge advocate "for consideration and advice;" however, this advice was not required to be followed or attached to the record of trial.

Article 34, UCMJ, also requires the submission of the charges to the staff judge advocate "for consideration and advice," but paragraph 35c, *Manual for Courts-Martial, 1951* (1951 MCM), further requires that the advice of the staff judge advocate be attached to the charges when referred to trial. Paragraph 82b(5), 1951 MCM, requires that "other papers which accompanied the charge sheet when referred to trial" shall form appendages accompanying the record of trial.

This does not accord the advice of the staff judge advocate the weight which General Ansell envisioned. However, the requirements of paragraphs 35c and 82b(5) and the cases dealing with the pretrial advice of the staff judge advocate¹²⁹ have given it

¹²⁷ Art. 48, S. 64.

¹²⁸ *Ibid.*

¹²⁹ See *United States v. Smith*, 13 U.S.C.M.A. 558, 33 C.M.R. 85 (1963); *United States v. Greenwalt*, 8 U.S.C.M.A. 589, 20 C.M.R. 285 (1955); *United States v. Schuller*, 5 U.S.C.M.A. 101, 17 C.M.R. 101 (1954).

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much greater significance than attached to the advice of the staff judge advocate under the Articles of War, 1920.

The foregoing examples of General Ansell's influence on the UCMJ do not purport to be all-inclusive. The author has merely attempted to choose a few important areas and show a connection and sphere of influence between the Chamberlain Bill and the UCMJ. Many others should be readily apparent to the reader.

A far more expansive treatise in this area is the article written by Professor Morgan, entitled "The Background of the Uniform Code of Military Justice."¹³⁰

VI. CONCLUSION

General Enoch H. Crowder and General Samuel T. Ansell were men of very similar background and characteristics. Both had graduated from West Point, were extremely learned men, and were lawyers of the highest capability and integrity. Neither would compromise his belief in the law or its interpretation as a convenience or concession to others. Prior to the dispute which ensued between these two gentlemen, they had been very close friends.¹³¹

Coming into existence in times less turbulent than the latter part of 1917, 1918 and 1919, the dispute between them probably would not have been of great significance nor have furnished the catalyst for the nationwide debate which followed in the wake of their disagreement over the proper interpretation of section 1199. Unfortunately, as this military legal argument ripened, personal feelings were interjected and personal charges, accusations and counteraccusations exchanged. These represent a large portion of the printed Committee hearings.¹³²

General Crowder felt that General Ansell had attempted to be appointed Acting Judge Advocate General "behind his back" while

¹³⁰ See Morgan, *supra* note 15.

¹³¹ LOCKMILLER, *op. cit. supra* note 46, at 200-02; see also *Hearings on S. 64*, at 1209-12.

¹³² *E.g.*, *Hearings on S. 64*, 1273-1338; Letter from General Crowder to Secretary of War Baker, printed in U. S. WAR DEPT., *op. cit. supra* note 54. In the letter from General Crowder to General Kreger, printed in *Hearings on S. 64*, at 1284-85, General Crowder stated that, if he had been forced to agree to the publication of his letter to Secretary of War Baker, he would have asked that pages 53-62 be removed before publication.

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General Crowder was acting as Provost Marshal General.¹³³ He was also bitter over the fact that General Ansell had, in early 1919, spoken out so strongly and frequently against the current administration of military justice rather than attempting to resolve these matters within normal War Department channels.

General Ansell, on the other hand, felt that General Crowder and Secretary of War Baker were arbitrary in their refusal to consider his interpretation of section 1199. He further felt that his reduction from the temporary grade of brigadier general to his permanent rank of lieutenant colonel on 4 March 1919 was the direct result of his outspoken opposition to the Articles of War and the administration of military justice.¹³⁴ As a result, he resigned a short time after reduction to his permanent grade.

It is not the purpose of this article to attempt to resolve the differences of these men, or to sully or mar the image of General Crowder. It has become increasingly apparent to me during the course of my research that General Samuel T. Ansell was a man of unusual ability and foresight and a legal scholar who deserves far greater recognition within the military community, and particularly within the Judge Advocate General's Corps, than he has received to date. In discussing the subject matter with various members of the Judge Advocate General's Corps during the preparatory stages of this article, I discovered that, with very few exceptions, most members of the Corps professed the same lack of knowledge of General Ansell, his theories and the existence of the Crowder-Ansell dispute which I must confess I originally possessed.

It is submitted that this lack of knowledge concerning General Ansell and the fact that he, in essence, fostered or conceived many of the original ideas from which the *Uniform Code of Military Justice* later evolved is indeed unfortunate. Even with due deference to some of his methods, the acuteness of General Ansell's mind, his ability to recognize and isolate problem areas in the administration of military justice, and to propose enlightened practical solutions to these problem areas, as evidenced by the Chamberlain Bill, can not be denied.

General Ansell's theories and creative thought stretched beyond his proposed code. It might be said that he formulated an early,

¹³³ *Hearings on S. 64*, at 1212-14, letter from General Crowder to Secretary of War Baker, printed in U. S. WAR DEPT., *op. cit. supra* note 55, at 53-55. General Ansell's explanation of the incident is found on pages 166-68 of the *Hearings on S. 64*.

¹³⁴ *Hearings on S. 64*, at 160-61, 164.

if not the original, idea for the Judge Advocate General Service Organization, or the trial teams. While testifying before the Senate Committee the following exchange took place:

Senator Lenroot: The number that would be required [officers in the Office of the Judge Advocate General] would depend very largely upon the policy that we would hereafter pursue with reference to the consolidation of Army posts, would it not?

Mr. Ansell: Yes. Of course the court-martial system does largely depend on that, but it is not indissolubly connected with it. There is no reason why a court-martial should be sitting at each post. I think it is bad to take some 13 officers, with the stenographers, clerks, the attaches, and all that, and have them sitting in each Army post. Of course if any Army post has a division there, that would be an economical legal unit, but if I were a Major General commanding a department, I would not have all these courts-martial sitting in all these posts. It is not necessary. I believe, just as much as I am sitting here, that an itinerant court would have been one of the most valuable things, and certainly on the battle front. Take the men to be tried; they might be partially sick or wounded. With a good Judge Advocate, a law officer, a prosecutor, if you had let him go from place to place and let them try these men there, I believe that would have been a good thing. . . .¹²⁸

General Ansell's forethought and perception also exceeded the perimeters of the military establishment. His proposal in article 23 of the Chamberlain Bill that the accused who needed civilian counsel and was financially unable to retain counsel should be provided with the required counsel at government expense would have attained a goal which was not reached in the civilian courts until 1963 and which has not to this date been effectively implemented. It is not suggested that General Ansell was the first, or only, person to advance such a theory, but he took all of the positive steps within his means to actually effectuate such a measure.

It is my conclusion that General Samuel T. Ansell has not received the recognition to which he is entitled for his pioneering work in making our military justice system the excellent judicial process it is today. General Ansell was a man "thirty years ahead of his time" and had Congress been fully receptive to his concepts when proposed in 1919 the United States Army would have had a military code which rivaled, and in some instances exceeded, the provisions of the *Uniform Code of Military Justice*. Certain of General Ansell's concepts, it is readily admitted, needed modification to provide workable rules for both wartime and peacetime situations, and some embellishments or portions of various articles represented an exhibition of overzealousness in attempting to preclude the possibility of command manipulation and protect the

¹²⁸ *Id.* at 282.

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basic rights of the accused. The framework was provided, however, for what is today recognized, in the *Uniform Code of Military Justice*, as one of the finest bodies of military law in existence.

The members, and judge advocates, of each service owe General Samuel T. Ansell a huge debt for his early work in the field of military jurisprudence and this debt should be discharged through the recognition which General Ansell so richly deserves.

THE ROLE OF CRITICISM IN THE DEVELOPMENT OF LAW *

By The Honorable Robert E. Quinn**

The Chief Judge of the United States Court of Military Appeals discusses the role of criticism in the development of the Uniform Code of Military Justice. He also points out how the different types of constructive criticism have had, and can have, a beneficial effect on the military justice system.

I. INTRODUCTION

Fifteen years ago, the United States Court of Military Appeals was established by the *Uniform Code of Military Justice* as the first civilian tribunal for review of courts-martial.¹ Creation of the Court was regarded as the most "revolutionary" aspect of the Uniform Code.² Commenting on the Court's role in the development of military law as an integral part of the American judicial system, Judge Paul W. Brosman, one of the three members of the original bench, called attention to its unique freedom in the choice of precedent "unburdened by . . . [those] demonstrated by the test of time and experience to be unrealistic, ill-devised, or outmoded."³

The *Uniform Code of Military Justice* had evolved out of massive complaints as to abuses and shortcomings of the military justice system during World War II. Less than two months after it took effect, it faced a litmus test of its practicality in time of war. Our response, at the call of the United Nations, to protect the Republic of South Korea against the North Korean Government's invasion of its territory, involved us in a major clash of arms. More than three and one-half million American military

* The opinions and conclusions expressed 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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¹ 64 Stat. 108, 50 U.S.C. § 117 (now 10 U.S.C. § 867 (1964)).

² H.R. REP. NO. 491, 81st Cong., 1st Sess. 6 (1949).

³ Brosman, *The Court Freer Than Most*, 6 VAND. L. REV. 166, 168 (1958).

personnel were, in one way or another, committed to the struggle. It was obvious that there was no time for trial and error. The Court of Military Appeals, and perhaps the Uniform Code itself, had to stand or fall on its immediate performance under wartime conditions.⁴

As Chief Judge of the Court of Military Appeals, I fully appreciated that, although all the judges had had substantial experience with military law and the courts-martial system, the Court would need all the help it could get from the legal profession, both inside and outside the armed services, to determine the alternatives of law open to the Court and the probable consequences of each alternative. In public appearances before military and civilian legal groups, all the judges invited critical appraisal of the Court's decisions and of the day-to-day operation of the courts-martial system under the Uniform Code. We, and a number of conscientious officials in the military establishment, urged everyone concerned with the administration of military justice to discharge his responsibilities with a will to make the Uniform Code work. Unfortunately these efforts did not achieve sufficiently spectacular results to indicate clearly to the civilian community that the processes and purposes of the Uniform Code would receive a fair testing at the hands of the military. As late as May 1952, the Special Committee on Military Justice of the prestigious Association of the Bar of the City of New York reported that it was "abundantly clear that the Armed Forces have not essentially changed their attitude toward military justice, although this attitude resulted in the abuses" which led to the adoption of the Uniform Code.⁵ By that time, however, there had been distinct indications that the resistance to change prevailed largely among the "old-timers," who seemed to be too deeply embedded in the worn grooves of ancient, and to them irreproachable, practices; as a group, these traditionalists found it difficult to accommodate themselves to the more legally-oriented, and less command-dominated, provisions of the Uniform Code. Even a captious critic, however, could justifiably conclude, on the basis of records of trial in major cases, that "the services . . . [had] made excellent

⁴In *United States v. Ayers*, 4 U.S.C.M.A. 220, 15 C.M.R. 220 (1954), the Court determined that, for purposes of the *Uniform Code of Military Justice*, the Korean conflict precipitated a "time of war" within the continental limits of the United States.

⁵SPECIAL COMMITTEE ON MILITARY JUSTICE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1951-1952 ANNUAL REPORT.

progress in improving the caliber of courts-martial trials and in carrying out the spirit of the Code." ⁶

How few or how many in the armed services remained adamantly opposed to the Code and unalterably attached to the pre-code law and practice could not, of course, be determined. However, when the judges of the Court took the oath of office at the Pentagon in June 1950, George C. Marshall, then Secretary of Defense, assured me that he would do all he could to get the military establishment to cooperate, fully and imaginatively, with the Court in the administration of the Uniform Code. The Secretary's assurance of cooperation provided a solid foundation for the hope that all ranks in the armed services would eventually accept the letter and spirit of the Uniform Code, and express its disagreements or approbations within the framework thereof.⁷ About a year later, at a symposium on military justice at Vanderbilt Law School, I extended an invitation to the American Bar to scrutinize the work of the Court and to weigh its decisions "against the dichotomous concept of military justice and tell the public, the services and us, the judges [of the United States Court of Mil-

⁶ Letter by Chief Judge Quinn to Professor John V. Thornton, New York University Law School, 13 May 1952, on file with Clerk of the Court of Military Appeals. There were, of course, unbelievable instances in which old practices persisted. One of the most extraordinary, which came up for review, was *United States v. Guest*, 3 U.S.C.M.A. 147, 11 C.M.R. 147 (1953). In that case, a senior staff judge advocate gave a copy of a board or review decision to the president of the court-martial, the members of which were then deliberating on the accused's guilt or innocence. As early as May 1952 (*United States v. James*, 1 U.S.C.M.A. 379, 3 C.M.R. 113 (1952)), and as late as October 1957 (*United States v. Williams*, 8 U.S.C.M.A. 328, 24 C.M.R. 138 (1957)), the Court of Military Appeals noted that the "reforms intended by the Uniform Code of Military Justice will not be carried out until officers concerned with ordering, conducting and reviewing courts-martial observe scrupulously their duties and responsibilities under the Code and the Manual."

⁷ On the surface, the Report in October 1953 of an *ad hoc* Committee of the Secretary of Defense, known as the Womble Committee, would appear to have extinguished the expectation. One of the conclusions of the Womble Committee, which was composed of three generals and two admirals, was that the procedures under the *Uniform Code of Military Justice* were unwieldy and made the "administration of military discipline within the Armed Forces more difficult." In my opinion, the facts cited by the Committee did not support its conclusion. I regarded the Womble Report as expressing merely the attitudes of those in the services who were just unwilling to accept the Code on any basis. That there were such persons was obvious. In congressional hearings in 1956 on proposed amendments to the Uniform Code, Congressman James E. Van Zandt complained bitterly about the inaccuracy of the "facts" privately conveyed to him by military personnel about purported deficiencies in the Uniform Code. *Hearings on H.R. 8583 before the House Armed Services Committee*, 84th Cong., 1st Sess. 84-88 (1955).

tary Appeals], whether we are performing properly our task of enunciating principles worthy of existence in this relatively new field of law."⁸

II. TYPES OF CRITICISM AND THEIR EFFECTS

Criticism can be helpful or vituperative. The Uniform Code and the United States Court of Military Appeals have been subjected to both types. So far as the Code is concerned, Congress is the constitutional arbiter of its usefulness and effectiveness in governing the men and women in the armed forces. Individual members of Congress may be sensitive to criticism of any kind, but, as a body, Congress is not normally induced to enact legislation by private platitudes or personal preferences. It is not surprising, therefore, that it gave no serious attention, a few years after the Uniform Code had been in operation, to the nostalgic plea by Admiral Ira N. Nunn, The Judge Advocate General of the Navy, that Congress return to the Navy the paternalistic system of military justice that obtained under the Articles for the Government of the Navy.⁹ It similarly disregarded the bald representation of The Judge Advocate General of the Air Force that "military justice was administered more efficiently" under the old Elston Act than under the Uniform Code.¹⁰ Congress has, however, over the years, been readily responsive to demonstrated deficiencies in the Uniform Code. It substantially increased the nonjudicial punishment power of the commanding officer which was provided by article 15; it enacted article 123a to redefine the bad check offenses and simplify prosecutions therefor; and it is currently considering several proposals calculated to eliminate procedures proven by experience to be cumbersome and time-consuming, such as that presently required by article 51 under which court members rather than the law officer vote on the challenge of a court member's qualification to sit.¹¹ Also, under consideration is the elimination of the ritual, retained from the old Articles of War and Articles for the Government of the Navy, under which the court members must retire into closed session to vote formally on the accused's guilt or innocence even though he has entered a plea of guilty.

⁸ Quinn, *The Court's Responsibility*, 6 VAND. L. REV. 161, 162 (1953).

⁹ *The Annual Meeting*, J.A.J., No. 18, Oct. 1954, p. 5.

¹⁰ Harmon, "Progress Under the Uniform Code of Military Justice," J.A.J., No. 18, Oct. 1954, p. 10; U.S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL, 1954 ANNUAL REPORT 51.

¹¹ See *United States v. Schmidt*, 16 U.S.C.M.A. 200, 36 C.M.R. 356 (1966).

In the past decade and a half, numerous articles about the United States Court of Military Appeals and its work have appeared in many publications. Some of the articles have been commendatory; others have challenged basic assumptions of the Court.¹² The Court, like Congress, has welcomed legitimate criticism, and has consistently disregarded the vituperative kind.¹³ As to the latter, it need not always have exercised restraint. In several instances, the language of complaint went beyond mere intemperance to the point of insult. I recall one article which charged the Court with impugning the integrity of the President of the United States because the Court held that the provisions, as to the admissibility of handwriting exemplars and voice utterances forced from an accused, in the *Manual for Courts-Martial* were contrary to the Uniform Code. The author of the article characterized the Court's decisions as "sacrilege"; and he virtually invited military personnel to flout and disregard the decisions.

Some persons might regard impudence and insolence as "fearlessness" in dealing with the "enemy," as did a biographer of British Prime Minister David Lloyd George. Recounting an anecdote about Lloyd George's early experience at the Welsh Bar, he reports that one of the sitting magistrates reprimanded George for implying bias on the part of the court. The magistrate remarked that he had never heard "a more insulting remark to the bench" in his entire experience. Whereupon George, according to his biographer, replied, "But a more just remark was never made in court."¹⁴

¹² See R. E. Miller, *Who Made the Law Officer a "Federal Judge"?*, 4 MIL. L. REV. 39 (1959); Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U.L. REV. 861 (1959).

¹³ In a Lincoln Day speech just before the turn of the century, Mr. Justice David J. Brewer took occasion to comment on the right to criticize the United States Supreme Court. He remarked that the lives and characters of the justices of the Court "should be the object of constant watchfulness by all," and that the judgments of the Court should be "subject to the freest criticism." Referring to the kinds of criticism he contemplated, he said, "many . . . may be like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all." Quoted in Felix Frankfurter, *MR. JUSTICE HOLMES AND THE SUPREME COURT* 94 n.20 (1938). If the only alternative was criticism or no criticism, I would agree with Justice Brewer that it is better to have some kind of public discourse on the work of the highest court of a judicial system than total silence. Happily, our country has steadfastly maintained a tradition of free discussion, without regard to good or bad taste, but with no small concern about the content. As indicated later in the text, criticism can be contumacious and criminal; to that extent, it ought not, and cannot, be preferred to no criticism.

¹⁴ AYLING, "David Lloyd George," *PORTRAITS OF POWER* 13 (2d ed. 1963).

Challenge of a court or a judge on the ground of personal prejudice or interest is, of course, proper. The challenge, however, must be based on fact, not insult or tirade. The author of the article deploring the Court's decisions as "sacrilege" was a member of the bar of the Court of Military Appeals, and he could, properly, have been cited to show cause why he should not be disbarred for insolence and disrespect to the Court and the law.¹⁵ In fact, it was suggested to the judges of the Court that disbarment proceedings be instituted. The suggestion received serious consideration, but never developed into a formal complaint.

As consistently as it has disregarded the purely invective type of criticism, the Court of Military Appeals has always given respectful attention to professional analyses of, and reasonable disagreements with, its decisions. The judges of the Court have ever been mindful of the central role played by scholars and historians outside the halls of the courtroom in the development of the law.¹⁶ They regularly read critiques of military law in all kinds of publications, military and civilian alike.¹⁷ The reading has been very rewarding. However, there appears to be in the military a trend away from the critique form. It is my opinion that, with the possible exception of the theses prepared by students in the service schools, military authors, by and large, have given up the analytical, for the merely narrative, form of article. A bare-bones catalogue of court decisions is no more helpful to the advancement of the rule of law, and the improvement of its administration, than the merely inflammatory type of article. I personally regret, therefore, that so many military writers now eschew the truly critical review, leaving the field almost entirely to the civilian law reviews and civilian bar association journals.

¹⁵ Justice Robert H. Jackson of the United States Supreme Court once observed that while imposition of a fine, with commitment until paid, was an appropriate penalty for contempt of court by a lawyer, he believed that the offense "has never been considered cause for disbarment." Letter to William R. Daley, 7 June 1938, cited in GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 152-54 (1958).

¹⁶ One of the leading examples of the influence of the work of scholars is the research of Charles Warren in leading the United States Supreme Court in *Erie R. R. v. Tompkins*, 304 U.S. 64 (1938), to reject the federal common-law doctrine earlier expounded by the Court in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). See also *Miranda v. Arizona*, 384 U.S. 439 (1966).

¹⁷ From time to time the judges of the Court have been interviewed for lead articles in newspapers and non-legal publications.

III. THE CASE NOTE

A form of criticism of special value to a judge is the individual case note. Unfortunately, this form is also now little used in military publications. Yet, I recall one such note which led directly to an important and extremely practical change in military procedure. The circumstances merit consideration, and may perhaps inspire a renaissance in the use of this kind of analysis of the day-to-day work of the Court.

In *United States v. Keith*, 1 U.S.C.M.A. 442, 4 C.M.R. 34 (1952), the United States Court of Military Appeals had before it for review the procedure to correct the sentence adjudged by the court-martial when some of the findings of guilty upon which the sentence was based were determined to be invalid. The Court held that, under the Uniform Code, the board of review could reassess the sentence; and it, therefore, remanded the record of trial to the board of review for that purpose. In the course of its opinion, the Court observed that remand of a case to the field level for a limited purpose was "a difficult business, and . . . an unworkable device."¹⁸ This dictum influenced the Court to adopt an overly-broad means to correct errors of law which occurred in post trial proceedings before the convening and supervisory authorities. For example, in *United States v. Keith*, 1 U.S.C.M.A. 493, 4 C.M.R. 85 (1952), the alleged error dealt only with the sentence. The issue before the Court was the effect of an illegal conference between the law officer and the court members which took place during the sentence proceedings. Although there was no question as to the validity of the findings of guilty, the Court determined to correct the error by directing a rehearing of the entire case, that is, the findings as well as the sentence.

The influence of the *Keith* dictum persisted for a number of years, and was apparent in such later cases as *United States v. Crunk*, 4 U.S.C.M.A. 290, 15 C.M.R. 290 (1954), and *United States v. Coulter*, 3 U.S.C.M.A. 657, 14 C.M.R. 75 (1954). The appellate issue in each of those cases was the effect of participation in the preparation of the post trial review by a disqualified person. In both cases, the Court determined that the participation invalidated the post trial review, and it directed a rehearing of the whole case. Shortly after the *Crunk* case, however, there came to the judges' attention a "Case Note" on *Coulter*, which appeared in the *JAG Chronicle* (the predecessor to the current *Judge Advo-*

¹⁸ *United States v. Keith*, 1 U.S.C.M.A. 442, 451, 4 C.M.R. 34, 43 (1952).

cate Legal Service of the Army).¹⁹ Considering the corrective action that had been ordered by the Court, the author of the Note "submitted" that it was more appropriate to correct errors of law or practice which did not in any way affect the findings of guilty by a limited remand. He proposed specifically that curative action be "permitted at reviewing level and with regard only to the sentence."²⁰

The suggestion of the *Coulter* Case Note for a restricted remand of the record of trial did not take account of several factors. For example, the author did not consider the possible effect of even a post trial error on the validity of the findings of guilty;²¹ nor did he give attention to the necessity for, or desirability of, a separate review by a reviewing authority other than the one who conducted the original and erroneous review.²² These deficiencies, if they can properly be described as such in view of the limited space allowed the author, do not, however, in any way detract from the significance of the Case Note. It presented a legal and feasible alternative to the *Keith* dictum that remand for a limited purpose was "an unworkable device." In less than a year after it was "submitted" to the military bar for consideration, the alternative presented by the Case Note was adopted by the United States Court of Military Appeals.²³ This is the kind of criticism that results in efficient and effective administration of the law.

IV. CRITICISM IN THE BRIEFS OF COUNSEL

To this point, I have considered criticism in the form of books, speeches, and articles in legal and non-legal journals and reviews. There is another form in which it can be very effectively presented. That form is the brief of counsel.

Perhaps the most dramatic and most speedy *volte-face* in the history of the Supreme Court of the United States occurred in the cases dealing with the constitutionality of the provision in article 2 of the *Uniform Code of Military Justice*, which made dependents of service personnel accompanying the armed forces outside the United States subject to trial by court-martial, for violations of

¹⁹ To my personal regret, the *Judge Advocate Legal Service* dropped the Case Note feature of its predecessor.

²⁰ Case Note, 1954 JAG CHRONICLE 42.

²¹ See *United States v. Hightower*, 5 U.S.C.M.A. 385, 18 C.M.R. 9 (1955).

²² *United States v. Metz*, 16 U.S.C.M.A. 140, 36 C.M.R. 296 (1966).

²³ See *United States v. Hightower*, 5 U.S.C.M.A. 385, 18 C.M.R. 9 (1955); *United States v. Clisson*, 5 U.S.C.M.A. 277, 17 C.M.R. 277 (1954).

the Uniform Code. Initially, by a vote of five to three, the Supreme Court sustained the constitutionality of the provision; but on rehearing it reversed its original decision and held that Congress could not constitutionally subject civilians to court-martial jurisdiction.²⁴ Whether "history" actually "vindicates" the Supreme Court's second ruling, as argued by the distinguished counsel who represented the civilian accused in these cases,²⁵ is, I think, debatable. Certainly, counsel succeeded in convincing the Supreme Court to overturn a long and respectable line of civilian and military precedents, including the Supreme Court's own original decisions. As a lawyer and judge, I feel reasonably sure that had counsel's brief and argument been insulting and contemptuous, he would seriously have jeopardized the application for rehearing. I am not suggesting that the appellate review of a legal issue, especially one of constitutional dimension, depends upon the niceties of counsel's language in highlighting the question and in arguing the merits of his position. However, with Sir Edward Coke, I maintain that "reason is the life of the law."

Counsel, appointed or paid, should be an advocate for his client, not an amicus to the court.²⁶ Advocacy, however, does not entail or require excoriation of the judge, the jury, or fellow counsel. In one of the leading cases of contempt proceedings against a lawyer as the result of his conduct in the trial of a case, Mr. Justice Jackson of the Supreme Court said: "Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal. During a trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation."²⁷ Invectives may serve only to becloud the principle of law advanced by counsel.

²⁴ *Kinsella v. Krueger*, 351 U.S. 470 (1956), *rehearing granted*, 352 U.S. 901 (1956), *earlier opinion rev'd*, 354 U.S. 1 (1957); *Reid v. Covert*, 351 U.S. 487 (1956), *rehearing granted*, 352 U.S. 901 (1956), *earlier opinion rev'd*, 354 U.S. 1 (1957). See also *McElroy v. Guagliardo*, 361 U.S. 281 (1960).

²⁵ *Weiner, History Vindicates the Supreme Court's Ruling on Military Jurisdiction*, 51 A.B.A.J. 1127 (1965).

²⁶ See *Ellis v. United States*, 356 U.S. 674, 675 (1958); *United States v. Mitchell*, 16 U.S.C.M.A. 302, 36 C.M.R. 458 (1966).

²⁷ *Sacher v. United States*, 342 U.S. 1 (1952). See also *United States v. Lewis*, 16 U.S.C.M.A. 145, 36 C.M.R. 301 (1966).

It is not easy for a decision maker to put aside ridicule and insult addressed to him by a claimant. Few trial lawyers would have the temerity to make intemperate personal attacks upon the members of a jury. For some unaccountable reason, appellate lawyers appear to be less restrained in assaults upon the personal character and attitudes of the judge. They may speak of "this Honorable Court" or address the judge as "Your Honor," but their comments leave no doubt that the form of address is sarcastic, not respectful. Such comments are irrelevant and immoderate; and more importantly, they contribute nothing to a just determination of the merits.

Every institution must be sensitive to the basic needs of the community it serves, if it is to remain viable and successfully perform its mission. Sometimes it may function in a manner in advance of the thought and action of the community; other times it may lag behind changes in the community, and cling to theories and practices that have outlived their usefulness. In the American system, certain interstices in the law are filled by court decisions, as well as by legislative and executive action. Conditions of today may unbalance the equilibrium of yesterday. As Mr. Robert H. Jackson observed in his first remarks to the Supreme Court as Attorney General: "[A]s the underlying structure of society shifts, its laws must be reviewed and rewritten in terms of current conditions if it is not to be a dead science."²⁸

Lawyers in the courtroom have a unique opportunity to illumine the community's current needs and point the way for the proper course of decision. One of the classic examples of the influence of the lawyer's brief is the Brandeis brief in *Muller v. Oregon*, 208 U.S. 412 (1909), in which the Supreme Court of the United States sustained the Oregon statute prohibiting employment of women in certain industries for more than ten hours a day. Rather than chide counsel for intemperate language, an appellate court would much prefer to compliment counsel upon the thoroughness of his brief and the help it obtains therefrom, as did the Supreme Court in the *Muller* case, and as the Court of Military Appeals has in a number of cases.²⁹ Not long ago, in a slip opinion, the U.S. Court of Appeals for the District of Columbia took defense counsel to

²⁸ 309 U.S. v. vii (1940).

²⁹ See *United States v. Mackie*, 16 U.S.C.M.A. 14, 18, 36 C.M.R. 170, 174 (1966); *United States v. Hurt*, 9 U.S.C.M.A. 735, 27 C.M.R. 3 (1958); *United States v. Blanton*, 7 U.S.C.M.A. 664, 667, 23 C.M.R. 128, 131 (1957); *United States v. Hicks*, 6 U.S.C.M.A. 621, 623, 20 C.M.R. 337, 339 (1956).

task for his intemperate brief, but before the opinion was incorporated into the permanent reports, the critical passage was deleted.

There have been occasions when the language of a brief filed in the Court of Military Appeals exceeded the bounds of allowable criticism. One case before the Court of Military Appeals deserves special mention because it resulted from a mistaken notion as to the significance of questions asked by appellate judges during oral argument. Questions and comments by the judges during argument are designed to develop all the facts of the contested issues. They do not necessarily, or even incidentally, reflect the actual opinion of the judges; they never reflect a predetermined opinion. On this occasion, counsel erroneously interpreted the "force and emphasis" of the judges' remarks and questions during the hearing to indicate that the decision was in his client's favor. He was greatly angered when the actual decision turned out to be opposite to his supposition. Applying for a rehearing, he charged the Court with denying his client the kind of review contemplated by article 67 of the Uniform Code, merely in order to achieve "unanimity" of decision.

At all times, counsel should always feel, and be, free to challenge the soundness or the efficacy of past precedent or prevailing practice. His right to do so is not merely the right of advocacy, but a "safeguard to our institutions."³⁰ Counsel, however, must scrupulously distinguish, first in his own mind, and then in his brief, between legitimate criticism and bald effrontery.³¹ No less than the legal scholar and law commentator, he can do much to help the law develop within the spirit and the needs of his time. His "professional" brief can materially lighten the burden of judicial decision.³²

V. CONCLUSION

The United States rightly prides itself as a nation in which the law, not the individual, governs. The *Uniform Code of Military Justice* was created in that image, with the result that in the military criminal law, the law, not the whim or personal preference

³⁰ *United States v. Craig*, 266 Fed. 230, 231 (S.D. N.Y. 1920).

³¹ *United States v. Sulewski*, 9 U.S.C.M.A. 490, 492 n.1, 26 C.M.R. 270, 272 n.1 (1958).

³² *United States v. Martin*, 9 U.S.C.M.A. 568, 570, 26 C.M.R. 348, 350 (1958).

of a military superior over a military subordinate, governs.³³ However, while some principles are so imbedded in the foundations of American society as to be unalterable, others are merely current responses to shifting needs. As conditions change, the need necessarily changes. It is the responsibility of the critic to articulate the change and suggest the alternatives; of action that may be feasible and effective to meet the new conditions.

Learned criticism, in all its varied forms, contributes materially to the continuing development of the law. The *Uniform Code of Military Justice* is not the final answer to the government of our armed forces. The military community, like the civilian society, is dynamic. New methods can be devised to handle old situations more effectively than existing procedures; and new rules are required to order and harmonize new and different circumstances. No less than his civilian colleague, the military lawyer must be alert to the currents of his time. Like his civilian colleague, he should not fear to criticize existing precedent and practice, in the pursuit of justice, and its fair and effective administration.

Congress, the executive, and the courts fashion the rules, but it remains for the individual to appraise their consequential value to society. A sense of the practical is as important as the logic of doctrine. The reasoned opinion of the practitioner, therefore, provides a litmus test of the soundness and value of the rule. As the eminent British historian, James Bryce, observed in analyzing judicial response to currents of contemporary thought, "Opinion is stronger in America than anywhere else in the world, and judges are only men."³⁴

³³ *United States v. Nation*, 9 U.S.C.M.A. 724, 26 C.M.R. 504 (1958).

³⁴ 1 BRYCE, *THE AMERICAN COMMONWEALTH* 287 (2d rev. ed. 1891).

THE HUNG JURY: A COURT-MARTIAL DILEMMA*

By Major Hugh E. Henson, Jr.**

What problems arise from a failure of a court-martial to agree either on the findings or the sentence of the court? On the findings, there is the situation when the court is divided with a majority which is less than two-thirds voting for conviction, and the majority continues to vote for reconsideration. On the sentence, there are problems arising from the interrelationship of article 52, article 106, and article 118(1) and (4) of the Code, with paragraph 76b of the Manual, as well as that of the law officer's duty to instruct the court-martial that it may return a sentence of no punishment. In addition, there is the general problem of the place of the so-called Allen charge. The author concludes by recommending statutory amendments in order to avoid the problems discussed.

I. INTRODUCTION

"Sir, there is no such thing as a hung jury in the military," a law officer instructed the president of an Air Force general court-martial in 1962, in the case of *United States v. Jones*.¹ If this statement were true, it would represent an innovation in the Anglo-American legal tradition, for the disagreement of juries and the resultant invalidity of the trial in question has been an old and troublesome problem to the common law.² That problem is, of course, that the invalidity of the trial—or any other succeeding trial, for that matter—creates the necessity of another trial, causing delays in the ultimate disposition of the case,

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¹ 14 U.S.C.M.A. 177, 178, 33 C.M.R. 389, 390 (1963).

² See, for example, William Penn's trial discussed in Nagor, *The Jury That Tried William Penn*, 50 A.B.A.J. 168 (1964).

increased costs, the possibility of loss of memory or the death of witnesses, and so on.³

Hung juries arise in our civilian federal criminal system because of the provision of the *Federal Rules of Criminal Procedure* which requires that the verdict of the jury must be unanimous.⁴ Such well-known cases as the common trial of Dr. R. Bernard Finch and Carole Tregoff⁵ and that of Collie Leroy Wilkins⁶ show that, even in our state courts, and even within recent months, the problem of hung juries plagues our criminal law system.

In the military context, however, if the statement of the law officer quoted above were true, the *Uniform Code of Military Justice* would appear to have solved the problem of the hung jury. The issues would be neatly presented at only one trial, and finally decided there—barring other circumstances, of course, which also could necessitate declaring the trial invalid. If the statement of the law officer were true, therefore, not only would the Code represent a distinct improvement over the civilian community's criminal law system, but also it would be an improvement over the military's own past systems as well.

Colonel Winthrop, in his oft-quoted treatise on military law, recognized the possibility of hung juries in the military system of his time. He said:

The deliberation of voting need not of course be prolonged where, after repeated votes or comparison of views, the difference is found to be *irreconcilable*. In such a case the court, in lieu of coming to a formal sentence, can only enter upon the record the fact that they are wholly unable to agree, and thus terminate the proceeding. . . .

The Court of Military Appeals, in digesting several authorities and sources relating to the Articles of War in the period between the late 1800's, when Colonel Winthrop wrote his treatise, and the current Code, also recognized the possibility that there can be hung juries in the military system. The Court said that,

Converted to the parlance of civilian practice, those authorities [which we have reviewed] seem to suggest that "hung juries," discontinuances, terminations and mistrials were not entirely unknown in early military law. . . .

³ See Icenogle, *The Menace of the "Hung Jury,"* 47 A.B.A.J. 280 (1961).

⁴ FED. R. CRIM. P. 31(a).

⁵ *Newsweek*, 21 March 1960, p. 44; *Life*, 28 March 1960, pp. 35, 76.

⁶ *Newsweek*, 17 May 1965, p. 40; *Life*, 21 May 1965, p. 32; *Time*, 29 Oct. 1965, p. 49; *Newsweek*, 1 Nov. 1965, p. 36.

⁷ WINTHROP, *MILITARY LAW AND PRECEDENTS* 392 (2d ed. 1920 reprint).

⁸ *United States v. Stringer*, 5 U.S.C.M.A. 122, 141, 17 C.M.R. 122, 141 (1954).

It must be admitted, however, that the problem was probably not a very great one. In the first place, as recognized by an Air Force Board of review in the case of *United States v. Blair*,⁹ the old concept under the Articles of War was that a court-martial which could not reach a verdict in a case has failed to discharge its duty. In addition, there was the concept that a court-martial was only one of the disciplinary tools at the commander's disposal, and, like all other functions of command, it was one over which he could not only legitimately but properly exercise control. The major way that this was done was that the commander had the power to return a case to the court to reconsider its findings or sentence or both, if he did not agree with them. He could state in his returning correspondence to the court the reasons why he disagreed.¹⁰ It was not until the 1920 Articles of War that this rule was changed to allow the decision of the court-martial to have the degree of finality¹¹ which it retains under our current Code. Accordingly, it was not until the enactment of the 1920 Articles of War that hung juries could really have an impact on the military system, for only when the commander became bound by the results of the deliberations of the members of the court does there begin to be an analogy to the problem of the hung jury in the civilian context. As we shall discuss, the manner in which hung juries in the military arise is different from that of the civilian community; but the final result—the invalidity of the trial—is the same.

On the other hand, the statement of the law officer quoted above indicates, if nothing else, that there was a widely-held view that if the 1920 Articles of War had made hung juries a real problem in the military, the 1950 Code had eliminated that problem. This view was not one held only by non-lawyers in the armed services; the fact that the quotation was given by a legally-trained law officer as an instruction to a court-martial president shows that even attorneys thought that the Code had eliminated the problem of hung juries in the military.

Under the language of the Code, the idea that "there can be no such thing as a hung jury in the military" is a reasonable view. Article 52 of the Code, which establishes the number of votes required both to convict and to punish, is worded to say that the conviction or punishment shall not result "except by the

⁹ ACM 14466, Blair, 24 C.M.R. 869 (1957).

¹⁰ Rev. Stat. § 1342 (1875) (1874 Articles of War). See DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 158 (3d ed. 1913).

¹¹ See Articles of War, 1920, ch. 2, 41 Stat. 787.

concurrence of" a certain percentage of votes. The implication of this language is that without the required percentage, the particular result in question will not occur.

This inference is further borne out by the *Manual for Courts-Martial*. It repeats, relative to the findings of the court, the "except by the concurrence of" language of the Code itself, and adds that "A finding of not guilty results as to any specification or charge if no other valid finding is reached thereon . . ." ¹² The second draft revision of the Manual retains this language.¹³

Concerning sentences, the Manual states that after proposals for sentences have been made and submitted to the president, The court then votes on the proposed sentences, beginning with the lightest, until a sentence is adopted by the concurrence of the required number of members. . . .

It is the duty of each member to vote for a proper sentence for the offense or offenses of which the accused has been found guilty, without regard to his opinion or vote as to the guilt or innocence of the accused. . . .¹⁴ [Emphasis added.]

The second draft revision of the Manual also retains this language.¹⁵

The fact of the matter is that the inference to be drawn from these passages, namely that there can be no hung juries in the military, either on findings or sentence, is just not true. Indeed, the *Jones* case was reversed specifically because of the law officer's incorrect advice that "there is no such thing as a hung jury in the military." The Court reasoned that a court-martial cannot be made to reach a verdict or a sentence, for

To hold that the court members *must* agree or be considered as having "failed to discharge their duty" is repugnant to the basic philosophy on which this country is established—the right of free men to disagree without being penalized therefor. . . .¹⁶

By so stating, the Court gave its first approval of the fact that hung juries not only can in fact occur in the military system, but also that the system must allow for them in order to preserve basic fairness. Yet in the face of the language of the Code and the Manual, as cited above, how can this be?

¹² MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 74d(3) [hereafter cited as 1951 MCM].

¹³ See Manual for Courts-Martial, United States, 1964 (2d draft), para. 74d(3) [hereafter cited as 1964 MCM (2d draft)].

¹⁴ 1951 MCM, para. 76b(2).

¹⁵ See 1964 MCM, para. 76b(2) (2d draft).

¹⁶ United States v. Jones, 14 U.S.C.M.A. 177, 180, 33 C.M.R. 389, 392 (1963).

II. HUNG JURIES UNDER THE CODE

A. FINDINGS

On the findings, the court can become involved in an irreconcilable disagreement because of the relationship between the number of votes required for conviction and the ability of the court to rebalot on guilt or innocence after its initial determination has been reached. The above-quoted language of paragraph 74d(3) of the Manual (that if no other valid finding results when the vote is taken, a finding of not guilty automatically results), has been interpreted to mean that the initial vote determines this issue.¹⁷ But immediately after establishing this principle, the Manual continues by saying

however, a court may reconsider any finding before the same is formally announced in open court. The court may also reconsider any finding of guilty on its own motion at any time before it has first announced the sentence in the case.¹⁸

Unfortunately, the Manual does not go on to say just how this rebalotting shall be accomplished. The Court of Military Appeals had the opportunity to decide this very issue in the case of *United States v. Nash*.¹⁹ In that case, after the court had been in closed session on the findings for some three and one-half hours, the president requested further instructions on whether only one ballot could be taken, and if not, what procedure should be followed to take a rebalot. The law officer instructed him that "it is within the prerogative of the president of the court whether he wants further discussion, rebalotting, or further rebalotting. That's within his prerogative and discretion."²⁰ The Court determined that a parliamentary procedure to determine this issue was required, and that, based on the language of the Manual quoted above, this reconsideration will be made by vote of the court. The majority of the Court also looked at article 52 of the Code to determine how this parliamentary procedure should operate, since that is the only place where voting is discussed. After directing the votes required to make findings and sentences, article 52(c) states that "All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote."

¹⁷ See *United States v. Stewart*, 7 U.S.C.M.A. 232, 22 C.M.R. 22 (1956); *United States v. Valentin*, 5 U.S.C.M.A. 559, 18 C.M.R. 183 (1955).

¹⁸ 1951 MCM, para. 74d(3).

¹⁹ 5 U.S.C.M.A. 550, 18 C.M.R. 174 (1955).

²⁰ *Id.* at 553, 18 C.M.R. at 177.

Suppose, therefore, that there are nine members on a general court-martial. They retire to vote on the findings, discuss the matter thoroughly, and vote. The result is four votes for acquittal and five votes for conviction. Since it takes two-thirds of the members present to convict the accused for any offense under the Code except charges under article 106, the required number of votes to convict in this case would be six.²¹ Since only five voted for conviction, the required percentage was not reached, and the accused would be acquitted. However, if any one of the five members who voted for conviction were to request reconsideration of the matter, a vote on whether to rebalot would have to be taken.²² Since this is an "other question" to be decided by the court-martial, the *Nash* case interprets article 52(c) to require a majority vote to control. On the vote to rebalot, we will assume that the members who voted for conviction would probably vote to rebalot. As these five would constitute a majority of the nine members, the vote to rebalot would carry. If no one changed his mind on the rebalot itself, however, the vote would again result in the same decision—five for conviction and four for acquittal. If another request to rebalot was made, another vote would have to be taken on that issue. If it, too, carried, the procedure could go on ad infinitum. In such a situation, or in any case where a number of members which is a majority but *less than* two-thirds of the members, the jury can effectively become deadlocked.²³

²¹ See UNIFORM CODE OF MILITARY JUSTICE art. 52(a)(2) [hereafter cited as UCMJ].

²² See *United States v. Nash*, 5 U.S.C.M.A. 550, 18 C.M.R. 174 (1956).

²³ It should be noted that the rebaloting procedure may lead to a deadlocked court in any case where there is an uneven number of members, such as five, seven, or eleven, as well as the nine-member case cited above. A court can also become deadlocked when there is an even number of members, such as eight or ten. In the eight-member situation, if the vote for conviction were *more than* one-half, such as five for conviction and three for acquittal, and the same five members who voted for conviction kept on voting for a rebalot, the jury would be deadlocked. If, however, on such a court, the vote were equally divided, such as four and four on an eight-member court, the jury could not become deadlocked. This is because, even if the four members who voted for conviction voted to rebalot, the vote would not carry because the four would not be a majority. Therefore, the initial findings would stand. This is not true with a six-member court, however. There, because a majority and two-thirds are the same number of members, the rebaloting process will never deadlock the jury. Accordingly, the rebaloting problem deadlocks the jury *only* when a number of members which is a majority votes for conviction, but that number is simultaneously *less than* the two-thirds required for conviction.

In addition, it should be noted that the rebaloting problem could cause a jury to become deadlocked *after a sentence has been* decided. However, it is such a remote situation that, for the purposes of this article, it will be assumed that it will not occur. In order to arrive at a sentence, at least

In his *concurring* opinion in the *Nash* case, Judge Brosman proposed another solution to the voting requirement on whether to rebalot. Judge Brosman did not disagree with the proposition that whenever any member of the court requested a rebalot, a vote must be taken to determine whether that request would be granted. He did, however, disagree with the procedure of the voting to determine that issue. He suggested that the number of votes required to carry such a request to rebalot should be that number necessary to change the initial decision of the court, so that such disparities as set out above would not occur. In both guilty and not guilty findings cases, Judge Brosman assumes that the original ballot determination would stand unless there was a change in the opinion of a sufficient number of members actually to change the initial decision of the court.

Thus, in the situation of the nine-member court, suppose that there was a finding of guilty by a vote of six votes for conviction. Brosman's view would not allow the vote to rebalot to carry unless more than one-third, or four, members concurred. Presumably on the vote to rebalot, a member who changed his mind would vote with the three members who initially voted for acquittal, and the vote to rebalot would carry. On the actual rebalot itself, that same member presumably would vote for acquittal, and the decision of the court would be five for conviction and four for acquittal. This would, of course, acquit the accused and effectively change the initial decision of the court from one of guilty to not guilty.

In the situation of the nine-member court, suppose that a finding of not guilty was determined by a vote of five for conviction and four for acquittal. In this case, Brosman's view would require a sufficient number of votes to change the decision of the court to guilty, or six votes, to allow the vote to rebalot to carry. Again, this would require one of the four members who voted for acquittal to change his mind in order to secure the required six votes for the rebalot; and presumably, if the member changed his mind on the vote to rebalot, he would also vote on the rebalot itself for conviction, and thereby change the verdict of the court.

two-thirds of the members have to concur. If two-thirds had agreed initially on the sentence, it is very unlikely that some would change so radically to vote with the minority one-third sufficiently to bring the total number of votes up to the required majority. Accordingly, it will be assumed that the rebaloting procedure will cause courts to become deadlocked only on the findings.

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In both cases, therefore, Judge Brosman's view would require a sufficient number of votes to change the decision of the court on the rebaloting procedure, rather than allowing that procedure to deadlock the court.

If Judge Brosman's opinion had prevailed, it would have preserved the popular opinion that "there is no such thing as a hung jury in the military." But Judge Brosman's opinion was only a concurring opinion and does not represent the view of the majority of the court. Note that it does not, even in itself, *disagree* with the majority; the opinion *concurs*, while simultaneously setting out what the judge thinks would be a preferable system. In addition, the Court, even with its changed composition of judges—twice since Judge Brosman's death—has *not* changed its view to agree with Judge Brosman's proposal. On the contrary, each changed Court has unanimously reaffirmed the principle that a majority vote will control this issue.²⁴

Interestingly enough, however, all of the Armed Services have advocated, in one way or another, that Judge Brosman's view be adopted. The Air Force apparently followed the majority view in *Nash*, but counsel before an Air Force board of review expressly advocated that Judge Brosman's view be adopted as the better solution. The board rejected the argument.²⁵ The Navy has apparently allowed Judge Brosman's view to prevail, at least in the case of *United States v. Andrews*.²⁶ The Army has given official sanction to only part of Judge Brosman's view, namely his method for rebaloting on a finding of guilty. This was initially promulgated in U.S. Dep't of Army, *Pamphlet No. 27-9, The Law Officer* (30 April 1958).²⁷ Despite an Army board of review's

²⁴ See *United States v. Stewart*, 7 U.S.C.M.A. 232, 22 C.M.R. 22 (1956) (Judges Quinn, Ferguson, and Latimer); *United States v. Gilmore*, 15 U.S.C.M.A. 428, 35 C.M.R. 400 (1965) (Judges Quinn, Ferguson, and Kilday).

²⁵ ACM 15955, Sexton, 28 C.M.R. 775 (1959).

²⁶ NCM 58-01542, Andrews, 27 C.M.R. 848 (1958).

²⁷ Appendix XXXI:

"You are advised that any member may request that an additional ballot be taken on any finding before the same is formally announced in open court. If any member makes such a request, . . . the question whether to take an additional ballot shall be decided as follows:

"a. If the request relates to a preceding ballot which resulted in a finding of not guilty, an additional ballot shall not be taken unless a majority of the members vote in favor thereof.

"b. If the request relates to a preceding ballot which resulted in a finding of guilty, . . . an additional ballot shall not be taken unless more than one-third of the members vote in favor thereof.

"

denunciation of this position as contrary to the *Nash* rule,²⁸ the Army has continued to publish the Brosman view relative to reballoting guilty findings as procedure in two trial guides, U.S. Dep't of Army, *Pamphlet No. 27-15, The Special Court-Martial President* (11 September 1962), and its successor of the same name and number.²⁹

The real tragedy of this solution is that the portion of the Brosman view which has been adopted does not touch the real trouble-spot in the problem, which is where a majority of the court votes for conviction and can effect a deadlock by current reballoting procedures. Here is the real value of the Brosman view: It prevents this. But in this area, the Army has followed the *majority* vote rule, as established by the majority opinion in the *Nash* case, not the Brosman view.

The rationale behind this seeming schizophrenia is actually very simple and reasonable. The Army must feel that it cannot be prejudicial error to permit a procedure which is logical and beneficial to the accused, in that it permits a change in the findings of the court from guilty to not guilty by a vote of only more than one-third of the members (which would be four members of a nine-member court) rather than by a majority of the members (which would be *five* members of a nine-member court). On the other hand, beneficial or not, the Court of Military Appeals has ruled that a majority vote is required in all cases. In this

"You are further advised that if any member requests that an additional ballot be taken with respect to a finding of guilty of an offense for which the death penalty is made mandatory by law, an additional ballot on the finding shall be taken forthwith.

"*Note 3*—The instruction set out in this appendix is based primarily on the decision in *Nash*, 5 USCMA 550, 18 CMR 174."

It should be noted that U.S. Dep't of Army, *Pamphlet No. 27-9, The Law Officer*, contains no specific instructions for reballoting on the sentence, as does U.S. Dep't of Army, *Pamphlet No. 27-15, The Special Court-Martial President* 31 (1965).

²⁸ CM 403429, Mimbs, 29 C.M.R. 603 (1960).

²⁹ Para. 19b (1965):

"b. *Number of votes required for reconsideration.* . . . Any member may request that another ballot be taken on any finding or on the sentence. If any member makes such a request, . . . the question as to whether to take another ballot is decided as follows:

"(1) If the request relates to a preceding ballot which resulted in a finding of not guilty or if the request is made with a view to increasing the severity of the sentence, another ballot may be taken only if a majority of the members present vote in favor thereof.

"(2) If the request relates to a preceding ballot which resulted in a finding of guilty or if the request is made with a view to decreasing the severity of the sentence, another ballot will be taken if more than one-third of the members present vote in favor thereof."

connection it should be noted that the 1964 second draft revision of the *Manual for Courts-Martial* incorporates a specific statement of the majority view in *Nash*.³⁰ When a revised *Manual for Courts-Martial* is published, it will probably cure much of the confusion on this point.

As the example of the nine-member court cited above clearly shows, the rebalotting procedure established by the majority decision in the *Nash* case creates problems. From that point of view, the solution proposed by Judge Brosman is much to be desired. It is more logical. It helps rather than hinders efficient administration of military courts-martial. Yet it is clear that the Brosman view has no official sanction from the Court of Military Appeals, on the theory that it cannot because there is no sanction in the Code upon which it can be based. Hence, the *Nash* rule is the only legally recognized solution under the law as it exists today. Thus a rebalotting procedure contrary to the clear mandate of the Court of Military Appeals in *Nash*, especially when there is no statutory basis for disagreement with the Court, is questionable, at best. Accordingly, if proper rebalotting procedures under article 52(c) of the Code, as interpreted by the majority opinion in *Nash*, and reaffirmed by the Court since then, are followed, it is clear that this procedure can cause a hung jury on the findings in a military court-martial.

B. SENTENCES

Concerning sentences, it has been determined that the "until" language of the Manual³¹ does not require that the court stay in session until some member capitulates his views sufficiently to reach the required percentage to adopt a sentence.³² Suppose that, in our fictitious nine-member court, the accused were found guilty by the bare requirement of six votes. Let us assume that one of these six members was very tenuous in his decision. To offset this, he determines in his own mind that he will vote for a sentence which does not include a punitive discharge. In this, the three members who voted for acquittal in the first place heartily concur. Accordingly, any sentence which any of these four members proposes includes no punitive discharge. Any sen-

³⁰ "If a question arises as to whether a finding should be reconsidered, that question shall be resolved by a majority vote of the court on secret written ballot." 1964 MCM, para. 74d(3) (2d draft).

³¹ See note 14 *supra* and accompanying text.

³² ACM 18568, Gollis, 33 C.M.R. 958 (1963).

tence which the other five members who voted for conviction proposes, however, always includes a punitive discharge. Neither group will vote for a sentence proposed by the other group. As a result, each ballot always results in a five-to-four decision, which is not sufficient to meet the required percentage which must concur to adopt a sentence. Again, the jury is effectively deadlocked.

On sentence cases, the problem can also arise because the law requires a mandatory minimum sentence in certain cases. It is an especially critical problem for convictions under article 118(1) and (4). In those situations, because the death penalty is not mandatory, only a two-thirds majority is necessary to convict.³³ However, upon conviction of either article 118 offense mentioned, a mandatory minimum sentence of life imprisonment is required, and in some cases the death penalty may be given. But the Manual is clear that "Any sentence, even in the case where the punishment is mandatory, must have the concurrence of the required number of members."³⁴ Accordingly, although only two-thirds of the members concurred to find the accused guilty, at least three-fourths of them must concur to sentence him to the mandatory minimum sentence of life imprisonment; and all of them must concur to sentence him to death.³⁵ Although it has been argued to the Court of Military Appeals that this is logically inconsistent, the Court has upheld this result as the mandate of Congress, which cannot be changed.³⁶

Suppose then, that on our nine-member court, the decision of guilt of an article 118(1) or (4) offense was determined by six votes. In order to sentence the accused to the minimum mandatory sentence, the concurrence of three-fourths of the court, or seven members, is required.³⁷ What if the three members who voted for acquittal refuse to vote for life imprisonment as a sentence? Again the jury would appear to be effectively deadlocked.

It is noted that the same problem could arise under article 106, although the likelihood of it doing so would not be as great. Under article 106, a unanimous decision of the court on the issue

³³ See *United States v. Walker*, 7 U.S.C.M.A. 669, 23 C.M.R. 133 (1957); *United States v. Morphis*, 7 U.S.C.M.A. 748, 23 C.M.R. 212 (1957).

³⁴ 1951 MCM, para. 76b(2).

³⁵ UCMJ art. 52 (a) (2), (b) (2).

³⁶ See *United States v. Walker*, 7 U.S.C.M.A. 669, 23 C.M.R. 133 (1957); *United States v. Morphis*, 7 U.S.C.M.A. 748, 23 C.M.R. 212 (1957).

³⁷ 1951 MCM para. 76b(3).

of guilt must be secured, as the death penalty is mandatory upon conviction.³⁸ It is a well-established precept of military law, however, that the court shall not be told what the sentence will be or might be as a part of the information available to it when it closes to deliberate on the findings.³⁹ Thus, one member might have been convinced of the accused's guilt; but he disagrees that the death penalty is the proper punishment for the offense, even though he thinks that the accused committed the offense. Because of this notion, the member would probably refuse to vote for the mandatory sentence, and his refusal would prevent the court from reaching the required unanimous vote. In such an event, the jury is effectively deadlocked because the law requires the death sentence to be imposed by a unanimous decision of the court.

C. HUNG JURIES CAN OCCUR IN THE MILITARY

Thus it can be seen that, despite the efforts of the drafters of the Code to prevent hung juries, and despite Judge Brosman's attempt to prevent them from occurring on findings by requiring the vote to rebalot on findings be by a sufficient number of votes to change the decision of the court on the rebalot itself, these views have not prevailed. In fact, the Court of Military Appeals has judicially recognized that hung juries can and do occur, as exemplified in the Court's language in *United States v. Gilmore*, where the Court said, relative to disagreements on the findings, that

Necessarily discussion and changes of viewpoint, together with possibilities of deadlock may arise, as, for example, when protracted rebalotting is forced, as it may be, by a simple majority of the court, not amounting to the two-thirds necessary for conviction. . . .⁴⁰

The Court also recognized the sentencing problem in the *Jones* case where it said that when a court-martial cannot secure the required percentage of votes to determine a sentence, "it becomes quite clear that absent a two-thirds concurrence on sentence, the court-martial, in effect, is 'hung'" ⁴¹

Nonetheless, it must be admitted that hung juries are not

³⁸ See UCMJ arts. 52(a)(1), 106.

³⁹ CM 394430, Connors, 23 C.M.R. 636, 639 (1957) (by implication).

⁴⁰ *United States v. Gilmore*, 15 U.S.C.M.A. 428, 430, 35 C.M.R. 400, 402 (1965).

⁴¹ *United States v. Jones*, 14 U.S.C.M.A. 177, 180, 33 C.M.R. 389, 392 (1963).

desirable. Therefore, is there anything which the law officer can do to prevent them and thereby save the trial and prevent another trial?

III. THE LAW OFFICER'S DILEMMA

A. GUIDANCE VERSUS COERCION

The function of a judge in a criminal trial by jury in the civilian community, and likewise the function of a law officer at a court-martial, is to guide the court in all areas where it must make decisions by giving proper instructions, and by making proper rulings on matters of law which are within the province of the judge alone.⁴² Balanced against this duty, however, is the simple fact that a judge can, by the very nature of his position, effectively coerce the court into reaching a verdict or a sentence which it might not otherwise have reached without his particular instructions.⁴³

These two propositions define the law officer's dilemma in the hung jury situation: How can he effectively guide the court to prevent its becoming deadlocked, without simultaneously coercing it into making decisions which it might not otherwise make? The problem is that the law officer must balance aiding the accused by having the matter finally decided at one trial against not prejudicing him by coercing a decision from the court.

In the preceding discussion, the means whereby a jury in the military can become deadlocked were given in three general factual categories: reballoting on the findings; the sentence case where the required percentage cannot be reached because of simple disagreement; and the mandatory minimum sentence case. Let us consider the nature of the law officer's dilemma in each of these situations, with a view to determining how he can strike the balance needed between properly guiding the court without resultant prejudice to the accused.

B. FINDINGS CASES

1. Preliminary Instructions.

Because the source of a hung jury is its inability to agree,

⁴² See *United States v. Rinehart*, 8 U.S.C.M.A. 402, 24 C.M.R. 212 (1957); *United States v. Stringer*, 5 U.S.C.M.A. 122, 17 C.M.R. 122 (1954); *United States v. Richardson*, 1 U.S.C.M.A. 558, 4 C.M.R. 150 (1952).

⁴³ See notes 1 and 25 *supra* and accompanying text. *But cf.* *United States v. Snook*, 12 U.S.C.M.A. 613, 31 C.M.R. 199 (1962).

the most logical thing for a law officer to do is to tell the members of court to try to resolve their differences. The danger with such a direction is that it might be interpreted by a jury member who holds a minority view as a directive to compromise his position to that of the majority. This would clearly tend to be coercive on that member and would violate "the right of free men to disagree without being penalized therefor." These issues were presented most clearly in the United States Supreme Court case of *Allen v. United States*.⁴⁴ In the *Allen* case, the jury had retired for its deliberations on the verdict and then requested further instructions from the judge. The trial judge had instructed them that they should examine the issue

with a proper regard and deference to the opinions of each other; . . . that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression on the minds of so many men, equally honest, equally intelligent with himself. . . .⁴⁵

The case was appealed to the United States Supreme Court on the issue whether the given instruction coerced the verdict. The Court upheld the charge to the jury, stating, in the language of Mr. Justice Brown, that:

The very object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the juryroom with a blind determination that the verdict shall represent his opinion of the case at that moment; or that he should close his ears to the arguments of men who are equally honest and intelligent as himself. There was no error in these instructions.⁴⁶

The so-called *Allen* charge became widely known. It has been called "the dynamite charge,"⁴⁷ the "outermost limit" to which a judge may go,⁴⁸ and as approaching the "ultimate permissible limits" of instructions.⁴⁹ But it has remained the law.⁵⁰

⁴⁴ 164 U.S. 492 (1896).

⁴⁵ *Id.* at 501.

⁴⁶ *Id.* at 501-02.

⁴⁷ See *United States v. Gilmore*, 15 U.S.C.M.A. 428, 429, 35 C.M.R. 400, 401 (1965).

⁴⁸ See *Green v. United States*, 309 F.2d 852, 854 (5th Cir. 1962).

⁴⁹ See *Powell v. United States*, 297 F.2d 318, 321 (5th Cir. 1961).

⁵⁰ See *Jenkins v. United States*, 380 U.S. 445 (1965); *United States v. Jones*, 14 U.S.C.M.A. 177, 33 C.M.R. 389 (1963); *Annots.*, 85 A.L.R. 1420 (1933), and 19 A.L.R.2d 1257 (1964 reprint).

Its first appearance in the military was in the case of *United States v. Jones*.⁵¹ There the court, being unable to agree, reopened and requested additional instructions from the law officer. The law officer instructed them that each member

should, however, give due weight to the opinion of others. If the court becomes sharply divided, each member should examine his own views to determine the justness of his decision in the light of conflicting opinions. You should continue the process of discussion, proposal of sentences, and voting, until you have arrived at a sentence.⁵²

The Court of Military Appeals reversed, not because of the law officer's paraphrase of the Allen charge, but because the charge, coupled with the law officer's statement that there could be "no such thing as a hung jury in the military," plus an instruction that there was no time limit on the jury's deliberations, effectively coerced the court into arriving at a sentence.

Subsequent developments in the civilian courts relative to the Allen charge resulted in the case of *Janko v. United States*.⁵³ In that case, the Fifth Circuit said that

the incorporation of an Allen charge among the original instructions might be, under most circumstances, less harmful to the defendant's cause than its use in supplemental instructions where a jury disagreement already exists. . . .⁵⁴

The next appearance of an Allen-type charge in the military was decided by the Court of Military Appeals in the *Gilmore* case. There, the law officer, based on the above-quoted dicta in *Janko*, gave an Allen-type charge as part of his *initial* instructions to the court before it closed to deliberate on the findings. He instructed:

Each member should listen, with a disposition to be convinced, to the opinions and arguments of the others. It is not intended that a member should go to the deliberation room with a fixed determination that the verdict shall represent his opinion of the case at the moment. Nor is it intended that he should close his ears to the arguments of other members who are equally honest and intelligent with himself. But you should not yield your judgment simply because you may be outnumbered or outweighed.⁵⁵

In upholding the charge as not being coercive, the Court analyzed each element of the charge and concluded that,

⁵¹ 14 U.S.C.M.A. 177, 33 C.M.R. 389 (1963). See note 1 *supra* and accompanying text.

⁵² *Id.* at 178, 33 C.M.R. at 390.

⁵³ 281 F.2d 156 (8th Cir. 1960).

⁵⁴ *Id.* at 167-68.

⁵⁵ *United States v. Gilmore*, 15 U.S.C.M.A. 428, 429, 35 C.M.R. 400, 401 (1965).

In short, the advice is an appeal to reason and an exhortation to keep open minds on the serious issues presented. There is nothing in it to predispose the members to conviction or acquittal. It simply reminds them of their solemn obligation to try the case well and truly between the accused and the United States. It points the fact finders in neither direction and cannot in anywise be said to be coercive. . . .⁵⁶

Accordingly, perhaps the first thing the law officer should do is to anticipate the problem by giving an Allen-type charge, substantially in the same language as that quoted above, as part of his preliminary instructions to the court before it closes. The hope would be, of course, that they might follow the instruction, thereby resolving their differences before they get to the point where they become deadlocked.

But how much further should the law officer go at this time? In order to insure compliance with the Code, should the law officer instruct that the first ballot is determinative of the guilt or innocence of the accused? If he does so instruct, it would appear incumbent upon him to go one step further and tell the court how they can resolve his problem, namely, how they can vote to rebalot. On the other hand, wouldn't these instructions more or less invite disagreement, as they would make apparent the conflict between the two-thirds required for conviction and the simple majority required to secure a rebalot? Further to complicate the problem, should the law officer go all the way and tell the court that they have "the right of free men to disagree," and that if they cannot resolve their differences, they should make that fact known without attempting to announce a formal verdict?⁵⁷ If the court is simultaneously told that they have an inherent right to disagree, yet they are to consider the opinions of their fellow members with a view toward arriving at a verdict (the Allen charge), will the court become so confused that they will not know *what* to do?

2. *Additional Instructions.*

Laying aside, for a few moments, suggested answers to the questions just posed, the problem can become further complicated if the court comes back to request further instructions.

What about the law officer's giving an Allen-type charge at this time? In *United States v. Gilmore*,⁵⁸ the Court specifically held that it was not erroneous to give the Allen charge when a dead-

⁵⁶ *Id.* at 429-30, 35 C.M.R. at 401-02.

⁵⁷ See notes 58-59 *infra* and accompanying text.

⁵⁸ 15 U.S.C.M.A. 428, 35 C.M.R. 400 (1965). See note 40 *supra* and accompanying text.

lock is made known to the law officer. Note, however, that if the law officer has already given an Allen-type charge as a part of his initial instructions, all he has to do at this time is to *repeat* the charge, either directly or by merely reminding the court of what was said before. At this time, it must be obvious that there is disagreement among the members of the court, or they would not be asking for additional instructions. If so, it would seem that the law officer would now be required, *sua sponte*, to instruct the court that their initial vote would be determinative unless a request for a rebalot had been made by any member, and on the proper method of voting to rebalot, as this entire procedure might resolve the issue finally by having the vote to rebalot *fail* to carry. On the other hand, based on the possibility that the vote to rebalot could cause the jury to become deadlocked, and further assuming that the court applied the Allen charge but to no avail, perhaps it would be appropriate to inform the court that they do have a legal right to disagree on their verdict, and that if disagreement is their final result, they should so announce.

The manner in which the court announces its disagreement, vis-a-vis attempting to state its disagreement in terms of a formal verdict as required by appendix 8b, *Manual for Courts-Martial*, is a problem about which the law officer should be duly concerned. Suppose that the president opens the court and tells the law officer that the court has taken seven ballots and cannot reach the required two-thirds, and then asks what to do next. Although not in proper form, this statement seems to be an announcement of an acquittal, as it is clear that the verdict on each vote has been less than two-thirds for conviction. If, however, the situation were really that each time an acquittal was reached on the ballot, a request for another ballot were made, and the request carried by a simple majority—in short, if the jury were deadlocked due to the rebaloting procedures—should there not be a different result than an acquittal?

The difference in these two forms of announcement is significant. Although the law officer may inquire whether the announcement of the findings truly represents the findings of the court,⁵⁹ he would probably be bound by an affirmative answer from the president that the announcement was correct. If so, the law officer would still face the dilemma of determining whether the president really meant to announce an acquittal or a deadlock.

⁵⁹ See *United States v. Linder*, 6 U.S.C.M.A. 669, 20 C.M.R. 385 (1956); *United States v. Downs*, 4 U.S.C.M.A. 8, 15 C.M.R. 8 (1954).

While it is clear that the court can reconsider any finding of guilty at any time before the sentence in the case is announced, announcement of an acquittal terminates the proceedings.⁶⁰ The problem of incorrect announcement of the findings has been discussed by the Court of Military Appeals, and it has held that such an announcement is correctible and does not amount to a reconsideration under article 62 of the Code, if it is in fact an incorrect announcement of the court's true verdict.⁶¹ Accordingly, the law officer must be very careful in this area to make due inquiry into the correctness of the court's announcement so that he can determine the true facts and not misinterpret deadlock as an acquittal.

Hence, if the court really intends an acquittal, that is the end of the trial. On the other hand, if the court intended to announce its disagreement and inability to reach a verdict, what can the law officer do? He could simply declare a mistrial. Although such a declaration would not gain the desired end of one trial resulting in a final verdict, it would preserve the interests of justice by allowing another trial forum to have the opportunity to arrive at a verdict, rather than having an acquittal based on what really was only simple disagreement of the jury. It should be noted that to declare a mistrial at this point is the law officer's only solution. If he too strongly directed reconsideration, he might be deemed to have coerced a verdict.

If on the other hand, he did declare a mistrial, would that amount to an acquittal anyway because the first trial had progressed beyond entering pleas and the receipt of some evidence on the merits, and therefore would constitute former jeopardy? In the case of *United States v. Goffe*,⁶² the Court of Military Appeals said that a rehearing would not constitute another trial because the reason for the declaration of the mistrial was one of basic fairness.

Another alternative which the law officer might consider in this situation is to direct the president to announce, formally, that the court is unable to agree, and to have the president direct that the case be returned to the convening authority for disposition. It has been held, analogously in a sentencing case, that such an announcement *sua sponte* from the president is legitimate.⁶³

⁶⁰ See note 12 *supra* and accompanying text.

⁶¹ *United States v. Downs*, 4 U.S.C.M.A. 8, 15 C.M.R. 8 (1954).

⁶² 15 U.S.C.M.A. 112, 35 C.M.R. 84 (1964).

⁶³ *Ibid.*

Accordingly, there would appear to be no difference if the president similarly announced the disagreement of the court on findings.

However, if the law officer *directed* the president to make this announcement, rather than the law officer declaring a mistrial, would the result be the same? In a number of cases where the law officer either forthrightly or indirectly returned the case to the convening authority, the Court of Military Appeals has held that this action amounted to an abdication of the law officer's responsibility to make rulings rather than letting the convening authority do it for him.⁶⁴

If, therefore, the president, in making the announcement of the court's inability to agree, *on his own initiative* directs that the case be returned to the convening authority, there would appear to be no error. On the other hand, if the president does not do this, the law officer should not either; instead, the law officer should simply declare a mistrial. In doing so, he would preserve his function as the judge of the court, who has final responsibility for the rulings of law of the case. In addition, the same result would be accomplished anyway, because in the event of a mistrial, the convening authority must take action to convene a new court, if any is to be convened at all. So the convening authority will get the case in the final analysis; the only issue is the method by which it is returned to him.

C. SENTENCE CASES (NO MANDATORY MINIMUM SENTENCE INVOLVED)

1. *Preliminary Instructions.*

Just as with findings cases, the most logical action for a law officer is to give an Allen-type charge to the court which will tell them to try to resolve their differences so that they can arrive at a valid sentence. Thus, the Allen charge is just as appropriate for sentencing matters as it is in relation to the findings. The cases have varied back and forth between its use on sentencing and findings. It is not really surprising, therefore, that on the same day that the Court of Military Appeals decided the *Gilmore* case, it also decided another case, *United States v. Jackson*,⁶⁵ where the law officer had given the Allen charge as part of his

⁶⁴ Cf. *United States v. Huggins*, 12 U.S.C.M.A. 686, 31 C.M.R. 272 (1962); *United States v. Knudson*, 4 U.S.C.M.A. 587, 16 C.M.R. 161 (1954).

⁶⁵ 15 U.S.C.M.A. 431, 36 C.M.R. 403 (1965).

initial instructions to the court before it closed to vote on the sentence. The Court simply cited its decision in *Gilmore* to uphold the validity of the charge, clearly indicating that there was no difference in the use of the charge in either situation.

Accordingly, perhaps the law officer should first anticipate the problem of the hung jury on the sentence by giving the Allen charge, substantially as quoted in *Gilmore* or *Jackson*.⁶⁶ In this way he would hope to prevent deadlocks from occurring in the first place.

But again, how much further should the law officer go at this time? The major problem area in this respect is based on rulings of the Court of Military Appeals that unless the Code establishes a mandatory minimum sentence in a particular case, there is no mandatory minimum which the court must impose as a sentence. If this be so, then a sentence to no punishment is a legal sentence, and the Court has so held.⁶⁷ If, therefore, the court-martial is unable to agree on a sentence because the concurrence of the mandatory percentage vote cannot be secured, will the court's disagreement automatically result in the legal sentence of no punishment, just as the court's inability to reach the desired percentage on the findings amounts to an acquittal? And if this is so, shouldn't the law officer instruct the court that this result will occur in the event that they are unable to agree? On the other hand, if he did so instruct, by telling them that if they were unable to agree, no punishment would ensue, wouldn't he, in effect, coerce them into reaching a sentence of *some* punishment—at least to something greater than no punishment at all?

The answers to these questions are resolved in the case of *United States v. Goffe*.⁶⁸ In that case, the Court of Military Appeals held that although a sentence to no punishment was a legal sentence, it also was an affirmative sentence. The only difference in it, therefore, and in any other sentence, is the quantity of the punishment imposed. Thus, it like any other legal sentence, requires the affirmative concurrence of two-thirds of the members of the court before it can become the lawful sentence of the court. In addition, the law officer indirectly tells the court this in the traditional instructions which he gives on the sentence, because he normally instructs on the maximum legal sentence which the court may impose, and then tells them that this is a *ceiling*

⁶⁶ See quoted instructions in text accompanying note 46 *supra*.

⁶⁷ See notes 1, 62 *supra* and accompanying text. *Cf.* *United States v. Atkins*, 8 U.S.C.M.A. 77, 23 C.M.R. 301 (1957).

⁶⁸ 15 U.S.C.M.A. 112, 35 C.M.R. 84 (1964). See note 62 *supra* and accompanying text.

on their discretion. This would mean that any lesser sentence would automatically be lawful. Further, the law officer instructs the court that whatever sentence they impose must be reached by the concurrence of at least two-thirds of the members of the court. Finally he instructs that the voting procedure is for any member who wishes to propose a sentence to write it on a slip of paper, and then the proposals will be voted on, beginning with the lightest.⁶⁹ The upshot of these instructions is to say that if any member wished to impose no punishment, he would propose that as an affirmative sentence, and because it would be the lightest proposal made, the court would vote on it first. If the concurrence of two-thirds of the membership was reached on that vote, no punishment would become the sentence of the court.

Thus, mere disagreement or failure to agree on a valid sentence does not automatically result in a sentence of no punishment, and the law officer should not be required specially to instruct that no punishment is a legal sentence.⁷⁰ In addition, as these facts would already be covered in the traditional instructions which the law officer gives,⁷¹ the added instruction would actually be superfluous, even if there were a specific defense request that it be given. On the other hand, if there were such a request, it would probably not be inappropriate to repeat to the court that there is no minimum "floor" on their discretion, but only a maximum "ceiling" beyond which they cannot go.

2. *Additional Instructions.*

In the event that the court, after going into closed session, reopens and requests further instructions, the same problems that have been discussed relative to findings could again arise. As the Court of Military Appeals has not overruled the giving of an Allen-type charge in order to break a deadlock on the court, once that fact became known to the law officer, it would not appear inappropriate for him to give an Allen-type charge at that time; or, if he has given it previously as a part of his initial instructions, he could merely repeat it, or call the court's attention to it.

At this time, since it is apparent that the court is in disagree-

⁶⁹ See U.S. DEP'T OF ARMY, PAMPHLET No. 27-9, THE LAW OFFICER, app. XXXII, XXXIII.

⁷⁰ See generally *United States v. Turner*, 14 U.S.C.M.A. 435, 34 C.M.R. 215 (1964). For a case of specific refusal so to instruct, and a subsequent ruling of no error, see WC NCM 61-00488, *Goodman*, 31 C.M.R. 397 (1961).

⁷¹ See note 69 *supra*.

ment, should the law officer do more? Here again is raised the problem of the manner in which the president announces the inability of the court to agree. If the president said that the court had voted and could not agree to impose punishment, this statement, although not in the proper form, would appear to amount to a sentence of no punishment. If, however, the situation were really that the court had voted time and time again, but on each ballot was unable to reach the required two-thirds, certainly there should be a different result.

In the first place, because the Court of Military Appeals has held that a mere failure to agree does not amount to a sentence of no punishment,⁷² the law officer should inquire whether the announcement of the court reflects the true sentence determined by the court. If the president states that the court affirmatively voted a sentence of no punishment, the law officer would have to accept that as the court's sentence. If the law officer finds that the president made a "slip-of-the-tongue," that announcement is correctible.⁷³ Although most cases in this area have arisen generally because of the failure of the court to include some part of the actual punishment decided by the court, or the misstatement of some amount of the punishment, the Court has had the opportunity to decide the situation where the president announced that the court "was unable to agree upon the question of sentence. He [the president] ruled that 'this case will be referred back to the convening authority for resubmission at re-trial.' The court-martial then adjourned."⁷⁴ The Court held that this was a legitimate announcement of the court's basic right of disagreement, and that a rehearing only on the sentence could be held without constituting double jeopardy.

On the other hand, what if the president does not announce that the case should be returned to the convening authority? In that event, or in the case where the president reaffirms a clearly erroneous sentence, the law officer's only solution would probably be to declare a mistrial. In addition, what has been said previously regarding the direction of the law officer to the president to announce the disagreement of the court, plus a direction to return the case to the convening authority,⁷⁵ would be equally

⁷² See *United States v. Goffe*, 15 U.S.C.M.A. 12, 35 C.M.R. 84 (1964).

⁷³ *United States v. Liberator*, 14 U.S.C.M.A. 449, 34 C.M.R. 279 (1964); *United States v. Robinson*, 4 U.S.C.M.A. 12, 15 C.M.R. 12 (1954).

⁷⁴ *United States v. Goffe*, 15 U.S.C.M.A. 112, 113-14, 35 C.M.R. 84, 85-86 (1964).

⁷⁵ See notes 62-63 *supra* and accompanying text.

objectionable in the sentence situation. Because such a direction would be most likely interpreted as an abdication of the law officer's functions, it would be better for the law officer to ascertain by his inquiry into whether the announcement reflects the true sentence of the court that the court cannot agree on the sentence, and then declare a mistrial if such was the case.

D. MANDATORY MINIMUM SENTENCE CASES

1. *Preliminary Instructions.*

All that has been previously said concerning instructions on the findings and sentence is equally applicable to mandatory minimum sentencing cases. However, the additional factor involved is that Congress has ordered that, upon conviction of certain offenses, a certain minimum punishment will be imposed.

Even though the court-martial must agree to impose the sentence by the required number of votes,⁷⁶ which, as we have seen, could be by a number greater than that required for conviction itself, the sentencing question is not a matter within the discretion of the court when Congress has directed that a certain sentence will be imposed upon conviction of certain offenses. Therefore, the first duty of the law officer in this situation would be to make this fact plain to the court, as part of his preliminary instructions to the court before it closes to deliberate on the sentence.

2. *Additional Instructions.*

If the court asked for further instructions concerning other sentences or indicated that it was deadlocked, then the law officer should instruct the court not only with an Allen-type charge but also with stronger language to the effect that the recalcitrant members would have to agree.⁷⁷ If, after such directions, the court still failed to reach the mandatory minimum sentence, the law officer should simply declare a mistrial. The fact that Congress has given its mandate in this situation would justify the law officer in taking much more assertive action than he could in another case. Now the question is not to balance the rights of the accused against the possibility of coercing the court; Congress has merged the accused's rights with the duty of the court to vote for the mandatory minimum sentence in this case. Therefore, the law officer would be justified in so directing the

⁷⁶ See note 14 *supra* and accompanying text.

⁷⁷ See 1951 MCM, para. 76c.

court, and in declaring a mistrial if his directions were not followed.

IV. PREVENTIVE ACTION

A. BY THE LAW OFFICER AT THE TRIAL

1. *Instructions.*

Most of the previous discussion has dealt with how the law officer handles the problem of the hung jury *after* it arises. The one exception has been the suggestion to give an Allen-type charge as a part of the law officer's initial instructions to the court before it closes to make its determination of either the findings or the sentence. As we have seen the law officer's instructions are of great benefit in solving the hung jury problem, although they cannot eliminate it altogether.

2. *Work Sheets.*

Another way in which the law officer could perhaps prevent many of the problems which we have discussed is through the work sheets which the court uses to record its findings and sentence.⁷⁴ If both the findings and sentence work sheets contained a special statement for the president to read to announce the fact that the court was deadlocked, many of the problems facing the law officer in making inquiry whether the announcement of the president really represented a hung jury, or just an announcement of an acquittal or a sentence to no punishment, would be avoided. If the president read an announcement which clearly but

⁷⁴ The use of work sheets is not mentioned in the Code nor in the 1951 Manual. The 1964 Manual (2d draft) mentions them only in the appendix on trial procedure, and then only relative to the sentence. Presumably this is because while the law officer may be called into the closed session of the court to aid it in putting its findings into proper form, he may not be called into the closed session on sentences. See UCMJ art. 39.

Work sheets arose from actual practice, as established in U. S. DEP'T OF ARMY, PAMPHLET NO. 27-9, THE LAW OFFICER, para. 81a (p. 61), and the suggested forms found in apps. XXXVI and XXXVII. Their usefulness—and their implied legality—was stated by the Court of Military Appeals as follows:

"It cannot be denied that worksheets . . . serve a variety of commendable purposes. Initially they furnish to the court the type in which the findings are to be announced, and effectively avoid possible errors on its part in seeking to arrive at the correct form. Additionally, they reduce materially the need for discussion—for verbal exchange—between the law officer, on the one hand, and the president and court members, on the other, and thus minimize the possibility that such colloquy will trench upon unauthorized areas. . . ." United States v. Kupfer, 3 U.S.M.C.A. 478, 481, 13 C.M.R. 34, 37 (1953).

simply stated that the court was unable to agree on the findings or sentence, as the case may be, there would be no question of the status of the court's deliberations.⁷⁹ Further, such an announcement would end the trial at that point, because it would place the law officer on notice that the only solution would be the declaration of a mistrial.

In addition to securing clear-cut announcements from the court, work sheets have also been used to show proof of the actual intent of the court when there has been a question on what the court really intended as its findings or sentence.⁸⁰ If the work sheet included a section from which the president could announce a deadlock, and that section of the sheet was *not* completed, but another section was completed, there would be strong evidence of the intent of the court actually to arrive at a finding or sentence, if a question arose. On the other hand, if no other portion of the work sheet was completed, but the section announcing deadlock *was* completed, that also would be strong evidence that the court actually was in disagreement and did not intend either to acquit the accused or to sentence him to no punishment, as the case may be.

Finally, it should be noted that the work sheet might have the subtle psychological effect of aiding the court in choosing between an actual finding or sentence and announcing disagreement. The court would be clearly aware of its basic "right of free men to disagree"; and the court would know that that right is separate and distinct from their right to arrive at a finding or to sentence a convicted accused.

⁷⁹ A suggested form for announcing deadlock on the court's determinations on the findings is as follows:

"Mr. Law Officer, it is my duty as president of this court to inform you that the court, in closed session and upon secret written ballot, has become deadlocked on the issue of the findings of the court due to reballoting caused by a majority of the members of the court, which majority does not amount to the percentage necessary for conviction."

A suggested form for announcing deadlock on the court's determinations on the sentence is as follows:

"Mr. Law Officer, it is my duty as president of this court to inform you that the court, in closed session and upon secret written ballot, has become deadlocked on the issue of an appropriate sentence of the court, due to failure to reach agreement on (any) (the mandatory minimum) sentence by the required percentage."

⁸⁰ See, *e.g.*, *United States v. Liberator*, 14 U.S.C.M.A. 449, 34 C.M.R. 279 (1964).

B. SUGGESTED CHANGES TO THE CODE

Although giving an Allen-type charge, and adding to the traditional content of findings and sentence work sheets, might both provide ways whereby the law officer can attempt to prevent hung juries in a particular trial, some problems are inherent in the system itself. Accordingly, it would appear that the only way to cure these problems is to change the system. If we accept the premise of the Court of Military Appeals that free men *do* have the basic "right to disagree without being penalized therefor," no one could really recommend in good conscience that we eliminate all means by which disagreement may be shown. Assuming this, however, are there still any ways whereby we could perhaps improve on the situation as it now exists by balancing this right of disagreement against the undesirability of multiple trials of one case?

1. *Reballoting Procedures.*

Concerning findings, hung juries occur in the military system due to our reballoting procedures. If Judge Brosman's view in his concurring opinion to the *Nash* case were adopted, we could avoid this problem. To do so would, of course, require a congressional amendment to article 52 of the Code, for it is clear that the current unanimous view of the Court (that a majority vote as required by article 52(c) controls) is the only logically tenable view under the present law.

Would such a change take away the basic right to disagree? No. In the military system as it currently exists, unanimous decisions on findings are not required except in mandatory death sentence cases (article 106 being the only such one). Thus, inherent in the system itself is the right of some men to disagree with their fellow men. Conviction results only if a certain legally-constituted percentage agrees. This protects the accused because he is acquitted if there is a failure of that percentage. Of course, we must allow the jury to reconsider its verdict, and even change it. Judge Brosman's scheme allows this; but it allows it only if the fact of reconsideration will actually bring about a *change*, not if it will simply result in deadlock. Thus it would appear that Judge Brosman's view is really the better way. It is unfortunate that it has not yet been given the sanction of law.⁸¹

⁸¹ Legislation has been introduced to amend article 52 of the Code by an addition to the first sentence of section (c), causing it to read: "(c) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote, but a determination to

2. Sentencing Cases.

Concerning sentencing cases in general, there appears to be no tenable solution to the problem of disagreement. Of course one might argue that the obvious solution is to abolish the jury system altogether;⁸² but the notion of the right to a trial by jury is so entrenched in the Anglo-American legal philosophy, as perhaps best exemplified by the Sixth Amendment to the United States Constitution, that the notion of abolishing the jury is heresy.

Perhaps a solution would be to let the court decide the issues of guilt or innocence, and if guilty, the sentence as well, all at one time. To allow this in the military system would require a congressional amendment to the Code, as it is quite clear that the law now requires separate voting sessions on both the findings and the sentence, and that the sentence that may be imposed will not be communicated to the court for their consideration while deliberating on the findings.⁸³ Adoption of this solution would be, for the most part, worse than the ill it would seek to cure, as human nature might let the magnitude of the permissible maximum sentence, and even more so the magnitude of a mandatory minimum sentence, so sway the members of the court in their deliberations on guilt or innocence as to constitute basic unfairness.

Another solution would be to establish by legislative fiat a

reconsider a finding of guilty . . . may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding. . . ." H.R. 273, 89th Cong., 1st Sess. § 19 (1965). (Amended portion italicized by the author.) This amendment will not aid the hung jury problem, as it relates only to changing a verdict of guilty to one of not guilty. But what about a verdict of not guilty to guilty? What this proposed amendment really does is to give official sanction to the procedure contained in the U.S. Dep't of Army pamphlets mentioned in notes 27, 29 *supra*. It should also be noted that a specific inclusion of the guilty to not guilty situation would infer that the majority view in the *Nash* case would prevail in the not guilty to guilty case. But that is the precise area where most problems arise. Therefore, the proposed amendment in fact solves nothing because it adopts only half of the Brosman view, and not the half which solves the majority of problems.

⁸² Upon the consent of the accused, his counsel, and the convening authority, pending legislation before Congress would authorize the convening of a general or special court-martial consisting of only a law officer. Accordingly, such a system is a step in the direction of abolition of the jury system. If such legislation becomes law, and such a court is held, there will be no hung juries possible there. See H.R. 273, 89th Cong., 1st Sess. §§ 2, 3, 18 (1965).

⁸³ See UCMJ arts. 51-53; 1951 MCM, paras. 73-76. See also note 39 *supra* and accompanying text; *United States v. Trotter*, 15 U.S.C.M.A. 218, 85 C.M.R. 190 (1965); *United States v. Terry*, 15 U.S.C.M.A. 221, 85 C.M.R. 193 (1965).

mandatory minimum sentence for *every* offense under the Code, with the proviso that if the court could not agree to impose a sentence, the mandatory minimum would automatically accrue upon conviction. If, however, the theory of sentencing persons convicted of crimes is to punish them commensurate with the crime they committed, in relation to any special factors surrounding the offender himself, all with a view toward possibly rehabilitating the offender, then social policy could really justify only a few mandatory minimum sentences. Therefore, only in the most heinous offenses—such as those currently carrying a mandatory minimum under the Code—would social policy justify such legislation.

Accordingly, maintenance of the jury as to sentences, coupled with the idea of mandatory minimum sentences for only the most serious of offenses and the assumption of the basic "right of free men to disagree," seems to provide no way to avoid deadlock in most sentencing matters.

Perhaps some help could be gained in the mandatory minimum sentence area itself, however. Although not traditionally done, and certainly not legally required,⁸⁴ there is much to be said for the requirement that the findings of the court should be established by the same percentage of votes as that percentage required to establish the mandatory minimum sentence. This is now done in article 106 offenses, as it operates in conjunction with article 52(a)(1). However, for article 118(1) and (4) offenses, there would be nothing logically wrong with requiring conviction by a minimum of three-fourths of the members of the court. To carry this proposition to its logical extension, it should be noted that in an article 118(1) or (4) offense where the conviction was based on only a three-fourths vote, the punishment should be limited by law to life imprisonment, for the possibility of deadlock arises when the punishment which may be imposed (the death penalty) requires a higher percentage of votes than that required to convict. If, on the other hand, the decision of the court were unanimous as to guilt of an article 118(1) or (4) offense, then the matter should be submitted to the court for its determination of whether to impose either life imprisonment or the death penalty.

As a further extension of this proposition, if the court had determined the verdict by the same number of votes as that required to impose the mandatory minimum sentence, why make the court go through the pro forma exercise of voting? Why not

⁸⁴ See note 38 *supra* and accompanying text.

allow the law officer to impose the mandatory sentence in accordance with the law, without referring the matter back to the court? This could be easily done in article 106 cases, and in non-capital article 118(1) and (4) cases which are either referred to the court as non-capital or which become so because the conviction was carried by a percentage of the court which was at least three-fourths but not unanimous. Since in these cases the court would have no discretion as to the sentence, the law officer should be allowed to impose the sentence required by law and thus avoid the possibility of a deadlock on that issue.

However, as suggested above, in the article 118(1) and (4) case where the president of the court announced that the verdict was reached by a unanimous decision of the court, the court would still retain some degree of discretion in the matter because their vote was by an amount sufficient to impose the maximum punishment. In that case, the court should be allowed to vote to determine which of the two possible mandatory sentences it wishes to impose.

It should be noted that in addition to changing the procedure to that suggested, another change would also have to be made. Currently, courts announce their verdicts in the form prescribed by appendix 8b of the Manual. That form requires announcement of a unanimous decision, only where such decisions are required by law (article 106 cases). All other cases will be announced as only being agreed to by the required two-thirds. In order for the above procedure to be effective, the law officer would have to know whether the concurrence of the court was unanimous or less than that. Accordingly, the procedures with regard to article 118(1) and (4) cases would have to be amended to require the president to announce whether the conviction was decided by a unanimous court, or if by some percentage less than unanimous but at least three-fourths, he would announce only the required percentage of three-fourths. This announcement would tell the law officer exactly how to proceed.

There is a further refinement to this system that must be included. In the article 118(1) and (4) cases which are decided by a unanimous court, it has been suggested that the court should retain its discretion and vote on which of the two mandatory sentences it would desire. What if the court became deadlocked in its deliberations? This could happen, either by simple disagreement on which of the two sentences to impose, or because a sufficient number of members refused to vote for either one. In

such a case, the deadlock would be announced to the law officer, who would then impose, as a matter of law, the mandatory minimum sentence of life imprisonment. In other words, the deadlock of the court would require the law officer to treat the verdict of the court as if it were one which had been reached by only a three-fourths concurrence, which would automatically require him to impose the mandatory minimum sentence.

As all of these procedures have no authorization under the Code, congressional amendments would be necessary to bring them into effect.⁸⁵

V. CONCLUSIONS

In the situation of findings, deadlocks occur in courts-martial because of the method in which the court votes to rebalot. As long as a majority of the members, but simultaneously less than the number required for conviction, can force a rebalot, the possibility of a deadlock exists. The only permanent solution to this situation is to change the procedure by which the court votes to rebalot.

In the situation of sentences, deadlocks occur mainly because of simple disagreement. For that, there is no solution such as an amendment to the Code. All that can be done is to require the law officer properly to guide the court by adequate instructions relative to their deliberations.

Deadlocks, however, also occur in the mandatory minimum sentence case because of the possibility that conviction may be occasioned by a percentage of votes which is less than that percentage required for imposition of the mandatory minimum sentence, plus the fact that the court is required to concur on the mandatory sentence by the required higher percentage of votes. The only permanent solution in this situation is to change the procedures to require guilt to be determined by the same percentage of votes as is required to impose the mandatory sentence in question, and then to let the law officer impose the required sentence as a matter of law in those cases where the court has not retained any discretion in the sentence to be imposed.

In the meantime, the hung jury is a court-martial dilemma.

⁸⁵ No such suggested legislation is currently pending.

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The better solution is to attempt to have the court resolve its disagreement. This solution, however, is fraught with danger, because the law officer is prohibited from coercing a verdict or sentence by the instructions he gives. Under current law, it appears that the outermost limit to which he can go is to give an Allen-type charge, preferably before the court initially closes. In addition, perhaps the addition of a form on both the findings and sentence work sheets, whereby the court could formally announce its disagreement, might be of some aid. If, however, the court does become deadlocked, the law officer's only solution is to declare a mistrial. This is an undesirable solution to the problem because, among other things, it leads to additional trials, additional expense, and does not resolve the uncertainty of the outcome of the charges.

Beyond these—an Allen-type charge, work sheets, and as a final resort, the declaration of a mistrial—the law officer is caught in the web of a system which allows court members, and even calls it their right, to disagree. As long as disagreement is not only a fact of life but a “right of free men,” it must be recognized that hung juries will occur.

“[T]here is no such thing as a hung jury in the military?” Unfortunately, the old and troublesome problem still plagues us.

THE RIGHT AND DUTY OF THE LAW OFFICER TO COMMENT ON THE EVIDENCE *

By Lieutenant Colonel Cecil L. Cutler**

The author discusses the problem of a law officer commenting on the evidence. He points out the variety of forms commenting may take; the military practice; and several suggestions for the law officer.

I. INTRODUCTION

One may well pity the poor defendant charged with a criminal offense who, after telling his side of the matter to the jury, hears the following instruction from the judge's charge to the jurors:

And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is a rather curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.¹

As might be expected, this instruction given by a trial judge was found on appeal to be highly prejudicial despite a further instruction by the judge that his comment was only opinion and not binding on the court.

It is not likely that a law officer presiding at a general court-martial would make such a comment a part of his instructions to the court. Being constantly aware that any comment upon the evidence made by them is subject to the closest scrutiny on appellate levels, it is perhaps natural that, out of a superabundance of caution, law officers hesitate to make a practice of commenting upon the evidence.

Increasingly, however, the Court of Military Appeals has insisted that law officers tailor their instructions to fit the issues

* The views expressed 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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¹ *Quercia v. United States*, 289 U.S. 466, 468 (1933).

of their cases for "instructions correct in the abstract may be inadequate or misleading in the context of the specific issues of the case."² Instructions should, therefore, "be specifically and precisely related to the issues marked out by the allegations and the evidence."³ Defining further what it means by the tailoring of instructions, the Court, in *United States v. Smith*,⁴ stated the following:

What is contemplated is the affirmative submission of the respective theories, both of the Government and of the accused on trial, to the triers of fact, with lucid guideposts, to the end that they may knowledgeably apply the law to the facts as they find them.⁵

In order to present meaningful and properly tailored instructions it is usually necessary to advert to the "facts" of a case to a greater or lesser degree, perhaps even to the extent of an expression of opinion on the weight and sufficiency of some of the evidence or testimony. If the law officer merely sums up or summarizes the evidence fairly for both sides such would not constitute *per se* commenting upon the evidence.⁶

II. COMMENTING ON THE EVIDENCE

What, then, is commenting upon the evidence? Black's *Law Dictionary* defines comment as:

The expression of the judgment passed upon certain alleged facts by a person who has applied his mind to them, and who while so commenting assumes that such allegations of fact are true. The assertion of a fact is not "comment."⁷

From various cases we can cull examples. It is comment if the judge calls the attention of the jury to parts of testimony he deems important and expresses his opinion upon the facts.⁸ It occurs when a judge instructs as to the tendency, force, and comparative weight of conflicting testimony or comments as to the weight to be given the testimony of particular witnesses, impeaching testimony, admissions, dying declarations, or other

² *United States v. Nickerson*, 15 U.S.C.M.A. 340, 343, 35 C.M.R. 312, 315 (1965).

³ *United States v. Nickerson*, *supra* note 2, quoting from *United States v. Thompson*, 12 U.S.C.M.A. 438, 441, 31 C.M.R. 24, 27 (1961).

⁴ 13 U.S.C.M.A. 471, 33 C.M.R. 3 (1963).

⁵ *Id.* at 474, 33 C.M.R. at 3.

⁶ *Cf. Stilson v. United States*, 250 U.S. 583 (1919); *Starr v. United States*, 153 U.S. 814 (1894); *Bannister v. Lucas*, 21 Hawaii 222, 1916A Am. & Eng. Ann. Cas. 1136 (1912).

⁷ BLACK, *LAW DICTIONARY* 336 (4th ed. 1957).

⁸ See *United States v. Murdock*, 290 U.S. 389 (1933).

testimony;⁹ when he expresses his opinion on the veracity of a witness;¹⁰ or the failure of a party to produce a witness or evidence.¹¹ It is comment if a jury is told that certain evidence is not conclusive¹² or that the evidence, or any part of it, if believed by the jury, is decisive of the issue.¹³ It happens when a judge expresses an opinion upon the reasonable inferences which can be drawn from the evidence.¹⁴ It is comment for a judge or law officer to express his opinion of guilt of the accused.¹⁵

A judge or law officer can comment upon the evidence by what he does not say, as, for example, setting forth in a summarization of evidence only one side of the case but not the other.¹⁶ An inadvertent "slip of the tongue" can be comment.¹⁷ So also it is comment when any language or artifice is employed by the judge from which the jury may know that he gives more credence to one part of the testimony than to another.¹⁸

Considering that commenting upon the evidence is the expression of an opinion from the bench it could be said, albeit loosely, that any ruling admitting evidence in effect admits it has some probative value. So also an interlocutory ruling by a law officer denying or granting a motion for a finding of not guilty made by the defense indicates an opinion that the government has or has not presented substantial evidence which would tend to support a finding of guilty.¹⁹

The above examples indicate that the range of comment can take many forms and aspects. Whether or not error arises from a comment upon the evidence depends upon whether the particular jurisdiction prohibits or permits comment. In the latter case, the question is whether a comment materially encroached upon

⁹ See 253 Mich. 83, 234 N.W. 157 (1931); 53 AM. JUR. *Trial* § 593 (1945).

¹⁰ *Quercia v. United States*, 289 U.S. 466 (1933); *Post v. United States*, 135 Fed. 1 (5th Cir. 1905).

¹¹ *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481 (1909).

¹² *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76 (1891).

¹³ *Stitt v. Huidekoper*, 84 U.S. (17 Wall.) 384 (1873); *Schuchardt v. Allen*, 68 U.S. (1 Wall.) 359 (1864).

¹⁴ See *State v. Baldwin*, 178 N.C. 687, 100 S.E. 348 (1919) (dictum).

¹⁵ See *United States v. Murdock*, 290 U.S. 389 (1933); *United States v. Quercia*, 289 U.S. 466 (1933); *United States v. Miller*, 6 U.S.C.M.A. 495, 20 C.M.R. 211 (1955); *United States v. Andis*, 2 U.S.C.M.A. 364, 8 C.M.R. 164 (1953).

¹⁶ See *United States v. Nickoson*, 15 U.S.C.M.A. 340, 35 C.M.R. 312 (1965); *United States v. Andis*, *supra* note 14.

¹⁷ *United States v. Gray*, 9 U.S.C.M.A. 208, 25 C.M.R. 470 (1958).

¹⁸ *McShane v. Kenkle*, 18 Mont. 208, 44 Pac. 979 (1896).

¹⁹ See *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 71a.*

the freedom of the jury to determine the ultimate issue of innocence or guilt.²⁰ The majority of the states prohibit comment, but the federal courts follow the common law rule which permits the practice.²¹

III. MILITARY PRACTICE

With this background it is well to examine the military law concerning commenting upon the evidence. The Manual provides the following:

For example, he [the law officer] may, in an appropriate case, make a simple and orderly statement of the issues of fact, summarize and comment upon the evidence that tends to support or deny such issues, and discuss the law applicable thereto. . . .²²

The Manual also sets forth the following limitations:

In summarizing or commenting upon the evidence, the law officer should use the greatest caution to insure that his remarks do not extend beyond an accurate, fair, and dispassionate statement of what the evidence shows, both in behalf of the prosecution and defense. He should not depart from the role of an impartial judge, or assume the role of a partisan advocate. He should not assume as true the existence or non-existence of a material fact in issue as to which the evidence is conflicting, as to which there is dispute, or which is not supported by the evidence, and he should make it clear that the members of the court are left free to exercise their independent judgment as to the facts.²³

It is readily apparent that the Manual rule follows that of the federal courts in permitting the law officer to comment upon the evidence within certain limitations. The rule apparently is most adaptable to the court-martial milieu for as Chief Judge Quinn observed in the leading case of *Andis*:

We are persuaded that the Federal rule is most likely to produce that degree of cooperation between judge and jury essential to the desired result of justice in the trial forum and that it should be made applicable to court-martial trials. We feel that we are justified in concluding that the difference between composition of the fact-finding body in the military and civilian community gives added weight to the argument that little harm and much good can come from assistance by the law officer in factual determinations by restrained comment on the evidence. . . .²⁴

Prior to *Andis*, three service boards of review had occasion to review cases alleging improper comment. In *United States v.*

²⁰ *United States v. Murdock*, 290 U.S. 389 (1933).

²¹ See 53 AM. JUR. *Trial* § 584 (1945).

²² MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 73c(1).

²³ *Ibid.*

²⁴ *United States v. Andis*, 2 U.S.C.M.A. 384, 387, 8 C.M.R. 164, 167 (1953).

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Samuelson,²⁶ a Coast Guard board of review set aside findings of guilty of an offense of escape from confinement because the law officer instructed the court that the accused had been "duly confined." The board concluded that as a matter of law the court-martial was precluded from determining whether confinement was duly imposed.

The law officer in *United States v. Walsh*²⁶ told the court, when he denied a defense motion for a finding of not guilty, that the evidence conclusively established the offense charged except for the identity of the perpetrator. This was determined to be prejudicial by an Air Force board of review despite the general cautionary closing instructions that the court should disregard any comment by the law officer which might seem to indicate an opinion of the guilt or innocence of the accused.

Another Air Force board of review found that a law officer's comments invaded the province of the court when he stated in connection with a morning report that "The offense of absence without leave was, of course, committed on 16 March 1952" and "all you really need is to know that he was absent without leave on 16 March 1952." The error, however, was not prejudicial since the accused offered no evidence to refute the prima facie case of the prosecution.²⁷

The case of *United States v. Andis*²⁸ presented the United States Court of Military Appeals with its first full confrontation of the issue of comment. In that case the law officer made the following comments on the evidence: (1) When defense counsel objected to amendments offered by the trial counsel to change the dates of the alleged offenses, the law officer remarked that the evidence established that the incident occurred on the amended dates; (2) the law officer stated that there was sufficient evidence in the record to connect the accused with certain exhibits offered in evidence; and (3) in denying a motion for a finding of not guilty the law officer stated that, although there was some conflict in the evidence, it was the duty of the court to reconcile the conflicts and, if they are not susceptible of a logical reconciliation, then it was to find the accused not guilty. This latter statement was interpreted by the defense as reversing the presumption of innocence.

²⁶ CGCM 9762, *Samuelson*, 4 C.M.R. 473 (1952).

²⁶ ACM 5229, *Walsh*, 5 C.M.R. 793 (1952).

²⁷ ACM 5514, *McGregor*, 6 C.M.R. 709 (1952).

²⁸ 2 U.S.C.M.A. 364, 8 C.M.R. 164 (1953).

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The Court determined that any error imputed to the comments of the law officer was not prejudicial and did not mislead the court-martial particularly in view of the full and proper instructions given the court immediately prior to its deliberations.

The *Andis* case afforded the Court the opportunity to expound upon the advantages of the federal rule permitting comment and to adopt it along with its limitations. The author of the opinion, Chief Judge Quinn, speaking for a unanimous court, remarked:

We should add that we not only adopt the rule permitting comment but also the limitations engrafted on that rule by the Federal courts. Law officers should proceed slowly in utilizing the power here conferred. Comment on the evidence should only be given when it will clarify the issues, assist the court in eliminating immaterial matters, or focus its attention upon the crucial points of the case. The line between proper and improper comment can and must be narrowly drawn, as the Federal cases cited *supra* make clear. The right to have the ultimate factual determination made by the court is fundamental to the system of military justice and any infringement upon that right cannot be viewed lightly. Each case must be tested separately. The exercise of the right and duty to comment must always rest in the sound discretion of the law officer, and will depend on the particular circumstances of each case. It is the primary obligation of the law officer to determine what he ought to say and where he ought to stop.³⁰

Following the doctrine of *Andis*, subsequent cases reviewed by the Court of Military Appeals have been tested for specific prejudice. Interestingly enough, in none of them was prejudicial error found, although cautionary admonitions were expressed in some cases.

In the first case following *Andis*, *United States v. Smith*,³⁰ no error resulted from the law officer's discussing the outward manifestations of fear in a cowardly conduct case particularly since the law officer instructed the court that it was not bound by any comment of the law officer.

No prejudice resulted from a law officer's use of the word "gobbledygook" to end haggling over leading questions and procedural difficulties, the Court of Military Appeals found in *United States v. Jackson*.³¹ Here again the Court cited as curative of presumptive error the cautionary instructions to the court-martial that the members must disregard any comment of the law officer

³⁰ *Id.* at 367-68, 8 C.M.R. at 167-68.

³⁰ 3 U.S.C.M.A. 25, 11 C.M.R. 25 (1953).

³¹ 3 U.S.C.M.A. 646, 14 C.M.R. 64 (1954).

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which would seem to indicate an opinion as to the merits of the case.

In *United States v. Miller*,³² the law officer's instructions defining a prima facie case were attacked because they indicated the government's evidence was sufficient to warrant conviction and counterbalanced the presumption of innocence. The Court of Military Appeals, however, found no prejudicial error in the statement, particularly since the law officer later gave the court cautionary limitations upon that comment. In *Miller*, the Court of Military Appeals affirmed the federal rule concerning the right to comment even to the extent that a law officer is permitted to express an opinion on the guilt or innocence of the accused as long as he advises the court clearly and unequivocally that his opinion is not binding.³³

During the course of his instructions, the law officer, in *United States v. Berry*,³⁴ advised the court that the accused had made a judicial confession of assault with a dangerous weapon but denied the intentional infliction of injury. The Court of Military Appeals determined that these remarks were substantially correct and added that, even if the law officer overstated the evidence, the accused was not prejudiced from an inference any reasonable person could draw from his testimony. Further, the trial court was clearly instructed to disregard any comment by the law officer indicating an opinion as to accused's guilt or innocence. In a concurring opinion, however, Chief Judge Quinn expressed the following warning:

Ordinarily there is no need for an expression of opinion by the law officer, and . . . [citing *Davis v. United States*, 227 F.2d 568, 570 (1955)]:

the exceptional cases which warrant the expression of such an opinion are limited to those in which the facts essential to the proof of guilt are virtually undisputed. . . .³⁵

In *United States v. Dunnahoo*³⁶ a law officer's comment on the accused's degree of intoxication at the time of the alleged offense was found to constitute harmless error in view of the subsequent cautionary instructions. A "slip of the tongue" by the law officer in *United States v. Gray*³⁷ also was harmless. There, the law

³² 6 U.S.C.M.A. 495, 20 C.M.R. 211 (1955).

³³ But this power should be exercised cautiously and only in exceptional cases. *United States v. Murdock*, 290 U.S. 389 (1933).

³⁴ 6 U.S.C.M.A. 638, 20 C.M.R. 354 (1956).

³⁵ *Id.* at 649, 20 C.M.R. at 365.

³⁶ 6 U.S.C.M.A. 745, 21 C.M.R. 67 (1956).

³⁷ 9 U.S.C.M.A. 208, 25 C.M.R. 470 (1958) (dictum).

officer stated to a reluctant witness that evidence had already been received "to the effect that you have received property which is known to have been stolen by the person charged." No prejudice resulted, according to the Court of Military Appeals, since the defense had not denied the operative facts, contesting only the defense of mental responsibility of the accused. Further, the trial court was given the standard cautionary instructions.

In a recent case resolved by the Court of Military Appeals, *United States v. Nickoson*,³⁸ the law officer refused to give a requested defense instruction in full because it called for a summation of defense evidence only. The Court of Military Appeals agreed that the law officer properly need not give one-sided instructions but demurred at his added reason that he believed that it was improper for him to comment on the evidence, referring to its line of decisions indorsing the practice.³⁹ The Court noted that if the law officer sums up the evidence he cannot emphasize portions in favor of one party and minimize those in favor of the other.

IV. CONCLUSIONS

As previously indicated, in all of the cases decided by the Court of Military Appeals no errors were found of such a magnitude as to warrant reversal, particularly when cautionary instructions are given that advise the court-martial that it disregard any comment by the law officer which would seem to reflect an opinion as to the guilt or innocence. It would therefore appear that the discretion vested in the law officer will not be found to have been abused unless the comment was clearly and unmistakably prejudicial, the taint of which could not be cured by cautionary instructions.

If law officers are to perform in a manner analogous to federal judges, as the Court of Military Appeals has indicated they should,⁴⁰ law officers should be aware not only of their right to comment on the evidence, but in proper cases, their duty to do so.⁴¹ As the Court stated in *Jackson*:

³⁸ 15 U.S.C.M.A. 340, 35 C.M.R. 312 (1965).

³⁹ But the opinion added that "there is no inevitable necessity to state the evidence in the charge." *Id.* at 344, 35 C.M.R. at 316, citing *United States v. Gillian*, 288 F.2d 796, 798, (2d Cir. 1961).

⁴⁰ See *United States v. Berry*, 1 U.S.C.M.A. 235, 2 C.M.R. 141 (1952); *United States v. Stringer*, 5 U.S.C.M.A. 122, 17 C.M.R. 122 (1954).

⁴¹ *United States v. Andis*, 2 U.S.C.M.A. 364, 8 C.M.R. 164 (1953); *cf.* *Nudd v. Burrows*, 91 U.S. 426 (1875).

COMMENTING ON EVIDENCE

The law officer is not a mere figurehead in the courtroom drama. He must direct the trial along paths of recognized procedure in a manner reasonably calculated to bring an end to the hearing without prejudice to either party. . . .⁴²

It would appear, therefore, that law officers should bend their instructional efforts toward more meaningful treatment of the evidence to the end that their instructions fit the law with the facts of the case, and justice will be better served thereby. As put by one writer:

At the close of a complicated case in which witnesses have contradicted one another, evidence is in conflict, issues have been obscured and counsel have urged their partisan views upon the court it is clear that an impartial summation by the law officer in which he points out inconsistencies and contradictions, marshalls the issues, advises the court of the probative value of various kinds of evidence, is bound to be of assistance.

In these times when public demand for prompt and efficient military justice is very strong, a practice which expedites and assists the court, in intelligently performing its function is to be cultivated and one which impedes the court is to be shunned. . . .⁴³

The framework within which a law officer can safely operate and the limitations beyond which he should not go, as set forth, have been amply demonstrated in the cases cited. The following remarks of Chief Justice Hughes in the *Quercia* case aptly sum up this discretionary authority:

In a trial by jury in a Federal court the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. *Herron v. Southern P. Co.* 288 U.S. 91, 51 S Ct 383, 75 L ed. 857. In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting on the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinions upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. . . .

This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence but he may not either distort or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safe-

⁴² *United States v. Jackson*, 3 U.S.C.M.A. 646, 652, 14 C.M.R. 64, 70 (1954).

⁴³ Carmody, *The Law Officer*, April 1954, p. 23 (unpublished thesis at The Judge Advocate General's School).

guards against abuses. The influence of the trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling." This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion on the evidence "should be given as not to mislead, and especially that it would not be one sided;" that "deductions and theories not warranted by the evidence should be studiously avoided." . . .⁴⁴

In summary, it might be said that the law officer, in a proper case, should not hesitate to comment upon the evidence when it appears necessary to assist the court to arrive at a proper and just determination of the factual issues presented to it. He should consider it his duty to insure that the court's attention is drawn to the determinative issues of a case and the members are given proper and meaningful instructions to guide them. A little reflection and common sense can tell him when any expression of opinion would tend to mislead the court, overbalance one side against the other, or otherwise infringe upon the fact-finding province of the court. The line between proper and improper comment is narrowly drawn but, nevertheless, it is distinguishable.

⁴⁴ *Quercia v. United States*, 289 U.S. 466, 469-70 (1933).

THE "MERE EVIDENCE" RULE IN SEARCH AND SEIZURE *

By Major Thomas H. Davis**

The entire field of search and seizure has received considerable attention the last few years. The author of this article discusses one aspect of this area: the "mere evidence" rule. He presents a study and application of the rule, including an analysis of its background and development, and its application and limitation by the courts.

I. INTRODUCTION

To the average layman—and indeed to some lawyers—it would seem incredible to hear that items seized during a lawful search should be inadmissible during a criminal trial because they were merely evidence that the accused committed the offense charged. Should a television judge make such a ruling upon the motion of one of the legendary TV defense counsel, the audience would immediately feel that the script writer's literary license had been allowed to go too far. Yet, such a rule, defined in different language by different authorities, is a well established rule of evidence. Essentially, the rule is, that during a search, items may not be seized from an individual "solely for use as evidence of crime."¹

A cursory look at the rule, then, would lead one to believe it to be almost totally exclusionary of all evidence secured during a search of an individual's effects. As is to be expected with such a seemingly harsh exclusionary rule of evidence, its interpretation by the courts has made it more realistic and workable than literal implementation would demand. Since the rule is that an item may not be seized *merely* for its evidentiary value, courts

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¹ United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

have found many reasons why the particular item may be seized other than for its evidentiary value. As will be discussed later, fruits of a crime, instrumentalities of a crime, contraband, and other classes of items have been held seizable, regardless of the fact that they might also be evidence of an accused's guilt.

Despite this judicial expansion of the rule prohibiting the seizure of mere evidence, problems still exist. The rule itself has been criticized, with some justification.² There are also questions of how far the rule was actually intended to extend and to what types of evidence it should apply. Answers to these problems can only be undertaken after considering the circumstances under which the rule originated and developed.

II. BACKGROUND

A. ORIGIN AND APPARENT ORIGINAL INTENDED USE

In 1886 the United States Supreme Court had before it a case involving goods which had allegedly been imported without the required custom duty having been paid.³ An information had been filed to forfeit the property in question, and, at the hearing, the government attorney offered certain invoices in evidence. These invoices has been obtained from the defendant by order of a district judge, pursuant to customs and revenue laws, which provided for the compulsory production of books and papers related to the alleged offense for examination by the court. If they were not so produced, the allegations of the government attorney of what they contained would be confessed by the defendant.

The Supreme Court equated forfeiture of goods to a criminal hearing and proceeded to an examination of the Fourth and Fifth Amendments of the United States Constitution as they applied to the defendant's invoices. While no actual search and seizure was involved, the Court found that compulsory production of a man's private papers was equivalent to a search and seizure and that the Fourth Amendment was applicable. Having so decided, the Court undertook to determine whether the compulsory production in this case was reasonable within the meaning of that amendment. The Court noted some objects of reasonable

² 8 WIGMORE, EVIDENCE, §§ 2183-84b, 2264 (McNaughton ed. 1961); Comment, 31 YALE L. J. 518, 522 (1922).

³ *Boyd v. United States*, 116 U.S. 616 (1886).

seizure—stolen or forfeited goods, goods liable for duty, entries in books required to be kept by law, contraband, and goods subject to attachment⁴—and pointed out that extorting from a person his private books and papers was dissimilar from any of these objects and was, consequently, unreasonable.

The Court quoted at length from the English case of *Entick v. Carrington*,⁵ which condemned issuance of general search warrants to seize private papers. *Entick*, however, was more concerned with the sanctity of private papers than with whether seized items had other than evidentiary value, as can be seen from the following quotation: "Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection. . . ."⁶

The Supreme Court concluded that the compulsory production of the defendant's invoices was unconstitutional in the following language:

Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that [*Entick v. Carrington*] judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

. . . .
And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. . . .

. . . .
And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. . . .'

It is considered important that the actual language of *Boyd* be set out and be analyzed, because it is from this that the rule against seizure of merely evidentiary material has evolved. It should be readily apparent that had no reference been made to the Fourth Amendment, and had the holding been limited to the effect of the compulsory production of the papers on the Fifth Amendment, the result would have been the same. The language quoted above makes it evident that the Court recognized that the constitutional protection which had been denied the defendant

⁴ *Id.* at 623, 624.

⁵ 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765).

⁶ *Id.* at 1066 (quotation omitted from Eng. Rep.).

⁷ *Boyd v. United States*, 116 U.S. 616, 630-33 (1886).

was his right against self-incrimination. In so holding, it was not necessary for the Court to determine whether it was reasonable to seize an individual's private papers, so perhaps the difficulties which have developed can be traced back to the author-judge's use of a search and seizure method in the solution of a self-incrimination problem. While it is true that under his approach, the Fourth and Fifth Amendments do tend to overlap, such an approach appears to be mere dicta in view of the actual basis for the decision of the case.

Nevertheless, giving full credit to all that was said in *Boyd* regarding the reasonableness of the "search and seizure" there involved, it would seem that the case could only be authority for the proposition that when property seized is of such a nature that its production in evidence would amount to a denial of its owner's right against self-incrimination, then, and only then, should the seizure be considered unreasonable and the material excluded. Necessarily, the type of property prohibited under such a rule would be limited to such items as diaries, incriminating letters, and other personally prepared writings or objects of an incriminating nature. It would seem that there was no intent by the Court in *Boyd* to carry the seizure limitation any further. It will be seen, however, that the language in *Boyd* has been found to stand for much more.

B. DEVELOPMENT AND EXPANSION BY JUDICIAL ACTION

Within two years after *Boyd*, the special protection afforded private books and papers was re-emphasized;⁸ however, in some circles, *Boyd's* binding effect as to searches and seizures was felt to be minimal.⁹ In 1904 the question of the seizure of private papers was again before the Supreme Court in a case where a police raid pursuant to a warrant for gambling paraphernalia produced policy slips and also private papers showing the accused's knowledge about the policy slips.¹⁰ The Court limited *Boyd* to its facts, saying that if self-incrimination was not

⁸ See *In the Matter of the Pac. Ry. Comm'n*, 32 Fed. 241 (C.C.N.D. Cal. 1887).

⁹ See *State v. Atkinson*, 40 S.C. 363, 18 S.E. 1021 (1894), which stated, in effect, that *Boyd*, while furnishing an able discussion of the right against unreasonable search and seizure, was only authority for the fact that an accused cannot be compelled to testify against himself in violation of the Fifth Amendment.

¹⁰ *Adams v. New York*, 192 U.S. 585 (1904).

involved, papers could be seized during a search for instruments of a crime. It thus appeared that the Court would be reluctant to extend *Boyd* and that the case would retain its importance in a rather limited area.

Such a conclusion was not dispelled by *Wilson v. United States*¹¹ which held corporate books to be without the protection of the Fourth and Fifth Amendments, even though material therein might have incriminated the corporate officers. The Court reasoned that corporate books were not the property of the corporate officers; therefore, requiring the officers to produce the books would not involve a search or seizure of them or their property. While the officers could not be required to testify about the books or their contents, the production of the books was not found to be within the protection of the self-incrimination prohibition.

A change of direction on the part of the Court soon became evident, however, and subsequent decisions indicated an intent to look closely before finding a questionable search and seizure of books and papers to be reasonable. Both *Weeks v. United States*¹² and *Silverthorne Lumber Co. v. United States*¹³ resulted in the exclusion of confiscated books and papers. In both cases the Court found that the papers had been acquired during an illegal search and based on this illegality found the seizures unreasonable. While the Court had not yet adopted a "mere evidence" rule as such, items which were merely evidentiary were being singled out and accorded special attention.¹⁴

In 1921 the issue was squarely presented to the Court in *Gouled v. United States*.¹⁵ Certain private papers and contracts were seized under warrant and another paper was secretly seized by a government agent who had been an invitee of the defendant. The papers and contracts were used during the trial to establish that the defendant was involved in a conspiracy to defraud the government. The Court again intertwined the protections of the Fourth and Fifth Amendments, as in *Boyd*, and set out for the first time what is known as the mere evidence rule. The Court's language was as follows:

Although search warrants have . . . been used in many cases ever

¹¹ 221 U.S. 361 (1911).

¹² 232 U.S. 383 (1914).

¹³ 251 U.S. 385 (1920).

¹⁴ The effect of *Boyd* was also being felt in lower federal courts. For example, see *United States v. Premises in Butte, Mont.*, 246 Fed. 185 (D. Mont. 1917).

¹⁵ 255 U.S. 298 (1921).

since the adoption of the Constitution, . . . it is clear that, at common law and as the result of the *Boyd* and *Weeks* Cases, . . . they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceedings, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken. . . .¹⁶

Having found the seizures to be unreasonable because of the purpose for which the papers were seized (mere evidence), the Court went on to say that to permit their use in evidence would compel the defendant to become a witness against himself.¹⁷ The Court then, using *Boyd* as a cornerstone, established what has become a strict exclusionary rule of law, where, despite the Court's language to the contrary, none had existed before.

There is a wide gulf between a rule which prohibits a procedure deliberately executed for the seizure of self-incriminatory papers, as in *Boyd*, and one which prohibits seizure, during an authorized search, of physical property evidencing guilt which does not fall within the categories established by *Gouled*. Perhaps, however, as will be indicated later, the Court did not intend the decision to be as far reaching as some have interpreted it. Shortly after *Gouled*, for example, the Court had the opportunity to extend the protection of the mere evidence rule to corporate books and papers and declined to do so.¹⁸ The Court held that corporations have no immunity under the Fourth and Fifth Amendments and that the corporate officer has no right to object to the production of corporate books which might incriminate him.

The lower federal courts were quick to follow and apply the *Gouled* rule;¹⁹ however, these cases also involved private papers, not other types of mere evidentiary items.

In 1927 a significant exception to the private papers protection was established in *Marron v. United States*.²⁰ While, as long ago as *Boyd*, it was accepted that instrumentalities of a crime

¹⁶ *Id.* at 309.

¹⁷ See *id.* at 311.

¹⁸ See *Essgee Co. of China v. United States*, 262 U.S. 151 (1923).

¹⁹ See *United States v. Kirschenblatt*, 16 F.2d 202 (2d Cir. 1926); *In re* Number 191 Front St., 5 F.2d 282 (2d Cir. 1924); *United States v. Snow*, 9 F.2d 978 (D. Mass. 1925).

²⁰ 275 U.S. 192 (1927).

MERE EVIDENCE RULE

could be seized, the Supreme Court now made it clear in certain instances private papers could be such instrumentalities, and thus seizable, despite the mere evidence rule. In *Marron*, federal officers armed with a search warrant for liquor raided a speakeasy. The bartender, who was plying his trade at the time, was arrested and a ledger containing inventories of liquors, receipts, and expenses, including gifts to police, was seized, in addition to utility bills which connected the defendant to the premises of the speakeasy. Holding the search lawful as incident to an arrest, the Court permitted seizure of the various private papers. The ledger was said to be part of the equipment used to commit the offense of maintaining a public nuisance and the bills were convenient, if not necessary, for keeping the business accounts and were so closely related to the business that they could be considered as having been used to carry it on. Thus, an avenue for the admission of private papers of evidentiary value was opened by the Supreme Court when the papers could be logically connected to the perpetration of an offense.

Shortly thereafter, two cases were decided by the Court, which some felt had almost devitalized *Marron*. The first, *Go-Bart Importing Co. v. United States*,²¹ involved the seizure of a liquor wholesaler's papers at the time of his arrest. The papers were of the same nature as those in *Marron*, and, based on *Marron*, the lower court sustained the seizure.²² The Supreme Court reversed, but distinguished *Marron*. It held that in *Go-Bart* there was a general exploratory search which was not the case in *Marron*. Therefore, the search was unreasonable *ab initio*, and it was unnecessary to consider the reasonableness of the seizure. There was no effort by the Court to discredit the philosophy that evidentiary papers were seizable if instruments of a crime, assuming that there was a lawful search. The next year the Court followed the *Go-Bart* reasoning in *United States v. Lefkowitz*.²³ Again a general exploratory search was found, and the seized papers were held inadmissible because the search itself was unreasonable. There was also dicta to the effect that the papers seized, although intended to be used to solicit liquor orders, were themselves not criminal instrumentalities and therefore inadmissible. While *Go-Bart* and *Lefkowitz* may have added some confusion to the application of the *Marron* holding, they far from devitalized

²¹ 282 U.S. 344 (1931).

²² See *United States v. Gowin*, 40 F.2d 593 (2d Cir. 1930), *rev'd sub nom. Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

²³ 285 U.S. 452 (1932).

it. The real effect, particularly as a result of the *Lefkowitz* dicta, was to set up a hazy middleground, with items which are obvious instruments of a crime on one side and items which have no relation to the perpetration of a crime on the other. As will be seen later, that middleground has been a perplexing area for the courts.

Lefkowitz apparently represented the ultimate in the Supreme Court's endeavor to restrict the admissibility of merely evidentiary material. Until 1942 there were no significant decisions in the mere evidence field. In that year *Davis v. United States*²⁴ and *Zap v. United States*²⁵ showed that, while the Court still recognized the rule against seizure of merely evidentiary material, its application in a given case would be limited by the various exceptions. In the *Davis* case the defendant was arrested for selling gasoline without obtaining the required customer gas coupons, and, during a subsequent search, made legal by the defendant's consent, a quantity of unauthorized gasoline coupons was seized. In holding the seizure to be valid, the Court found the coupons to be the property of the government; therefore, the defendant's wrongful possession of the coupons was similar to possessing contraband material. The dissenting opinion also recognized that public papers are subject to seizure and objected only to the legality of the search. *Zap* involved the seizure of a check during an audit of the defendant's books pursuant to the provisions of a government contract to which the defendant was a party. The check had been used by the defendant in a scheme to defraud the government and was incriminating evidence of his complicity. The Court found the check to be the means of committing a felony and properly subject to seizure. Subsequent Supreme Court cases further established that *Marron's* permissive use of evidentiary material was to be the accepted pattern, rather than the restrictive theories of *Go-Bart* and *Lefkowitz*. In *Harris v. United States*,²⁶ during a search in connection with a mail fraud arrest, draft classification and registration cards were seized. Not only did the Court determine that the cards were seizable as contraband and as items being used to commit the felony of wrongful possession of government property, but the Court approved the search itself, which was more extensive than searches condemned

²⁴ 328 U.S. 582 (1946).

²⁵ 328 U.S. 624 (1946), *rev'd on other grounds on rehearing*, 330 U.S. 800 (1947).

²⁶ 331 U.S. 145 (1947).

in *Go-Bart* and *Lefkowitz*. The Court emphasized it was the reasonableness of the search, rather than its extent, which determined its legality. *United States v. Rabinowitz*²⁷ also recognized the existence of the mere evidence rule but permitted the seizure of postage stamps with forged overlays during a lawful arrest and accompanying search. The stamps, being utilized in the perpetration of a crime (selling forged postage stamps), were subject to seizure and thus were specifically distinguished from evidentiary materials.

In 1960 the case of the notorious Russian spy, Rudolf I. Abel, reached the Supreme Court.²⁸ It, too, involved the propriety of the seizure of certain personal papers and effects pursuant to an Immigration Department administrative arrest. False birth certificates, a graph paper with a coded message, a bank book in a false name, a vaccination certificate in a false name, a hollowed out pencil, and a cipher pad were all found to be properly seizable as instrumentalities for the commission of espionage and admissible as an exception to the mere evidence rule.

Thus, it would appear, that although *United States v. Boyd* may, at one time, have been extended beyond its original intent, the Supreme Court has withdrawn that extension to within the bounds of the original intent. The limiting action by the Court, rather than being a pronouncement to that effect, has been in the form of finding exceptions to the rule as it was extended.

C. INTERPRETATIONS OF AND APPARENT DIFFICULTIES IN APPLYING THE EXCEPTIONS TO THE MERE EVIDENCE RULE

1. Instrumentality of a Crime.

As indicated above, the most frequently used reason for seizing and admitting otherwise mere evidentiary material is that the material is also the instrumentality of a crime.²⁹ However, whether an item is being used to effect a crime is necessarily a value judgment, and reasonable minds will differ in making this judgment. As stated in *United States v. Brenge*,³⁰ there is a "somewhat difficult and delicate problem of deciding whether the articles and documents herein seized fall into the category of . . . 'things used to carry on the criminal enterprise' . . . or

²⁷ 339 U.S. 56 (1950).

²⁸ *Abel v. United States*, 362 U.S. 217 (1960).

²⁹ See, e.g., *Marron v. United States*, 275 U.S. 192 (1927).

³⁰ 29 F. Supp. 190 (W.D. Va. 1939).

whether such articles and documents are more properly . . . 'papers . . . solely for use as evidence of crime of which respondents were accused or suspected' . . ."³¹ As is to be expected, litigation on this point has been heavy and the guidelines are somewhat unclear.

No problem generally is encountered in such items as burglary tools,³² which would clearly be criminal instrumentalities. However, items of clothing, personal records only incidental to the criminal operation, records kept by a defendant as a mere convenience to his criminal operation, and other items such as these have caused considerably more difficulty.

The Prohibition Era was a fertile period for cases involving the question of whether an item was an instrumentality of the crime or mere evidence. The sellers of illicit alcohol of necessity maintained extensive records of their operations, and, if admissible, these records provided compelling evidence of guilt. From the earliest cases it became evident that there would be substantially different results by the courts as to the use of seized evidentiary matter.³³

One of the most significant cases espousing the strict exclusionary view was *United States v. Kirschenblatt*.³⁴ The defendant was arrested for a liquor violation and incident to that arrest the premises were searched, resulting in the seizure of incriminating papers. Justice Hand emphasized that, under the circumstances, only fruits and tools of a crime and contraband may be seized. In determining whether documents used incidentally to the criminal operation could be considered as tools of the crime, he concluded that merely because a document at one time was connected with the criminal operation did not make it a seizable item per se. To so hold, he felt, would permit a general search through everything a person owned.

It thus appears that the mere evidence rule was being used as a vehicle to prevent exploratory searches. It would seem that

³¹ *Id.* at 191.

³² See *Arwine v. Bannon*, 346 F.2d 458 (6th Cir. 1965) (by implication).

³³ Compare *Donegan v. United States*, 287 Fed. 641 (2d Cir. 1922), cert. denied, 260 U.S. 751 (1923), with *In re Number 191 Front St.*, 5 F.2d 282 (2d Cir. 1924). In *Donegan* letters and telegrams, which the defendant had illegally obtained from the office of the Prohibition Director, inquiring as to the authenticity of fraudulent liquor permits presented by the defendant, were held to be instruments of the crime of conspiring to violate the Prohibition Act. In *191 Front St.* records and papers concerning defendant's illicit liquor operation were held to be evidence of crime, but not an instrument thereof.

³⁴ 16 F.2d 202 (2d Cir. 1926).

the same end could be more logically obtained through an enforcement of the requirements of particularity of description in warrants and judicial control of the extent of searches incident to an arrest. It is significant to note that the *Kirschenblatt* decision was rendered before the Supreme Court decided *Marron v. United States*,³⁵ for Justice Hand noted that *Marron* was pending review from another circuit, but he expressly refused to follow it. *Marron*, however, did not subsequently overrule *Kirschenblatt*, because of the different fact situations, and the reasoning of *Kirschenblatt* remained a persuasive force in the field of criminal instrumentalities.³⁶

Other courts preferred to enlarge the meaning of criminal instrumentalities, as was suggested in *Marron*. Thus, in *Foley v. United States*³⁷ it was held that books of unfilled liquor orders; ledgers of customers' accounts; stock books showing liquors ordered, received, delivered, and on hand; invoices; price lists; a typewriter; and an adding machine were all instrumentalities of the crime of conspiring to violate the National Prohibition Act. Although the opinion recognized *Go-Bart* and *Lefkowitz*, they were distinguished as involving forcible exploratory searches. It was soon recognized, then, that neither of these cases limited the scope of criminal instrumentalities subject to seizure under the theory of *Marron*.

The cases arising out of Prohibition violations thus became the framework upon which subsequent criminal instrumentality cases were decided. As indicated, there were no clear guidelines to follow, and, as was to be expected, the cases continued to be somewhat conflicting in result.

One of the more consistent areas in which the seizure of evidentiary material was sanctioned was in the area of national security and war effort. As early as 1919, the Supreme Court had approved the wartime seizure of socialist pamphlets urging citizens to oppose the draft.³⁸ In *Haywood v. United States*³⁹ files of correspondence, newspapers, and pamphlets seized at the office of the Industrial Workers of the World were held to be tools

³⁵ 275 U.S. 192 (1927).

³⁶ See, e.g., *Bushouse v. United States*, 67 F.2d 843 (6th Cir. 1933), where notebooks, private papers, receipts, correspondence, and records were seized and used as proof of conspiracy to violate the National Prohibition Act. The court held the items were not means of committing the offense, but were merely evidence of defendant's complicity.

³⁷ 64 F.2d 1 (5th Cir.), cert. denied, 289 U.S. 762 (1933).

³⁸ See *Schenck v. United States*, 249 U.S. 47 (1919).

³⁹ 268 Fed. 795 (7th Cir. 1920), cert. denied, 256 U.S. 689 (1921).

by which the defendants were interfering with the United States war effort, and, as such, they were seizable as implements of a felony.⁴⁰

Another area in which the results are relatively consistent is where there is a great volume of different materials indiscriminately seized. It is predictable that such seizures will be held to be the result of an unlawful exploratory search or that the items seized will not be considered instrumentalities of crime.⁴¹ The real basis behind such holdings appears to be the abhorrence courts have for general exploratory searches and the fear that the admission of evidence obtained in a mass seizure would be an invitation to exploratory searches. However, merely because the items seized may constitute the totality of the defendant's business records would not, in all cases, make the seizure too broad, if all the records are themselves a vital factor in the criminal enterprise, and if it appears that the seizure was not an indiscriminate taking of everything present at the time of the search.⁴²

There have been novel uses of the instrumentality exception. For example, in *United States v. Guido*⁴³ a pair of the defendant's shoes was seized, and the heels matched prints left at the scene of the robbery by one of the perpetrators. In sustaining the seizure, the court found that the wearing of shoes would facilitate a robber in his escape and that the shoes were thus instrumentalities of the crime. In *State v. Chinn*⁴⁴ the victim of a statutory rape related to police that her assailant had given her beer and

⁴⁰ For other cases involving national security or the war effort, see *Abel v. United States*, 362 U.S. 217 (1960) (espionage); *United States v. Best*, 76 F. Supp. 857 (D. Mass. 1948), *aff'd*, 184 F.2d 131 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951) (approving the seizure of drafts of German propaganda broadcasts written by the defendant and of correspondence between the defendant and German officials concerning his employment by Germany) (the defendant had allegedly been broadcasting propaganda for Germany during World War II, and the documents were considered a means in his commission of the offense of treason); *United States v. Bell*, 48 F. Supp. 986 (S.D. Cal. 1943), *rev'd on other grounds*, 159 F.2d 247 (9th Cir. 1947) (approving seizure of seditious letters, documents, pamphlets, and booklets).

⁴¹ See *Stanford v. Texas*, 379 U.S. 476 (1965); *Kremen v. United States*, 353 U.S. 346 (1957); *United States v. Thomson*, 113 F.2d 643 (7th Cir. 1940); *United States v. Lerner*, 100 F. Supp. 765 (N.D. Cal. 1951).

⁴² See *Leahy v. United States*, 272 F.2d 487 (9th Cir. 1959), *cert. granted*, 363 U.S. 810 (1960), *petition for cert. dismissed*, 364 U.S. 945 (1961); *United States v. Lindenfeld*, 142 F.2d 829 (2d Cir.), *cert. denied*, 323 U.S. 761 (1944).

⁴³ 251 F.2d 1 (7th Cir.), *cert. denied*, 356 U.S. 950 (1958).

⁴⁴ 231 Ore. 259, 373 P.2d 392 (1962).

had taken her picture before the offense occurred. Incident to the defendant's arrest, police seized a camera, empty beer bottles, and a bed sheet from the defendant's room. All items were held to be implements of the crime.

On the other hand the court in *Morrison v. United States*⁴⁵ was less permissive in its interpretation of what constitutes an instrument of a crime. Police had entered the defendant's home to arrest him for an act of sexual perversion on a ten or eleven year old boy. The boy led the officers to a bedroom and pointed out a handkerchief which he said had been used by the defendant and which bore some tangible evidence of the offense. The court held that the handkerchief was merely evidentiary material, and not seizable as an instrument or means by which the crime was committed.

While the instrumentality exception will expectedly remain the most frequently used method for approving the seizure of evidentiary items, the determination of whether an item is properly an instrument of crime will continue to be made on a case-by-case basis.⁴⁶

2. Fruits of a Crime.

A well accepted type of seizable evidentiary material is the fruit of a crime. The fact that the victim of a larceny has a greater proprietary right to the stolen goods than the thief has long been

⁴⁵ 262 F.2d 449 (D.C. Cir. 1958).

⁴⁶ For examples of cases holding evidentiary matter to be criminal instrumentalities, see *United States v. Owens*, 346 F.2d 329 (7th Cir. 1965) (books and slip of paper used to obtain narcotics); *United States v. Sigal*, 341 F.2d 837 (3d Cir. 1965) (numbers slips); *Grillo v. United States*, 336 F.2d 211 (1st Cir. 1964), *cert. denied sub. nom.*, *Gorin v. United States*, 379 U.S. 971 (1965) (paper which showed division of money among conspirators); *United States v. Boyette*, 299 F.2d 92 (4th Cir.), *cert. denied sub. nom.*, *Mooring v. United States*, 369 U.S. 844 (1962) (guest checks used by prostitutes to record earnings); *Johnson v. United States*, 293 F.2d 539 (D.C. Cir. 1961), *cert. denied*, 375 U.S. 888 (1963) (another's credit card); *Bennett v. United States*, 145 F.2d 270 (4th Cir.), *cert. denied*, 323 U.S. 788 (1944) (ration stamps); *Bozel v. Hudspeth*, 126 F.2d 585 (10th Cir. 1942) (papers, circulars, advertising matter); *Smith v. United States*, 105 F.2d 778 (D.C. Cir. 1939) (numbers slips); *Landau v. United States Attorney*, 82 F.2d 285 (2d Cir.), *cert. denied*, 298 U.S. 665 (1936) (papers); *United States v. Poller*, 43 F.2d 911 (2d Cir. 1930) (books and papers). For examples of cases holding evidentiary matter not to be criminal instrumentalities see *Woo Lai Chun v. United States*, 274 F.2d 708 (9th Cir. 1960) (letters); *Freeman v. United States*, 160 F.2d 72 (9th Cir. 1947) (stock record book, sales slips and invoices used to violate price ceilings); *Takahashi v. United States*, 143 F.2d 118 (9th Cir. 1944) (letters and papers); *Honeycutt v. United States*, 277 Fed. 939 (4th Cir. 1921) (checks used to pay for stolen goods).

unquestioned, and the seizure of such goods, for return to the owner, is reasonable. From the beginning of *Boyd's* exclusionary doctrine, these items have been considered to be reasonably seizable, and, having been reasonably seized, there could be no objection under the Fourth Amendment to their introduction in evidence.⁴⁷

While stolen property can readily be seen to be the fruits of a crime, there have been more subtle uses of this exception. For example, in *Matthews v. Correa*,⁴⁸ the defendant was arrested for concealing merchandise and property from her trustee in bankruptcy. An incidental search resulted in the seizure of address books and an account book concerning her business activities. In answer to defendant's claim that the seized items were mere evidence of the offense for which the arrest had been made, the court held that they were the fruits of another crime of withholding from the trustee documents relating to the affairs of a bankrupt.⁴⁹

Because of the very nature of fruits of a crime, there has been less litigation in appellate courts in this field than in the field of instrumentalities. It is clear, however, that the government must establish clearly that the seized item was, indeed, the fruit of a crime.⁵⁰

3. *Contraband.*

Another type of seizable evidentiary matter is contraband. Like fruits of a crime, there is a greater possessory right in someone other than the defendant, in this case the government. In addition to the more commonly expected items of contraband such as narcotics and counterfeit money, gambling paraphernalia and number slips have also been held to be contraband.⁵¹ A rather unusual application of the contraband exception occurred in *United States v. McDaniel*,⁵² where District Judge Holtzoff, in holding the seizure of a towel which had been involved in a

⁴⁷ See *Gouled v. United States*, 255 U.S. 298, 309 (1921); *Boyd v. United States*, 118 U.S. 616, 623 (1886).

⁴⁸ 135 F.2d 534 (2d Cir. 1943).

⁴⁹ Another use of this exception is found in *United States v. Dornblut*, 261 F.2d 949 (2d Cir. 1958), *cert. denied*, 360 U.S. 912 (1959), where a marked bill, received by the defendant for the sale of narcotics was held to be the fruit of the crime.

⁵⁰ See *In re Ginsburg*, 147 F.2d 749 (2d Cir. 1945).

⁵¹ See *Marderosian v. United States*, 337 F.2d 759 (1st Cir. 1964), *cert. denied*, 380 U.S. 971 (1965).

⁵² 154 F. Supp. 1 (D.D.C. 1957), *aff'd*, 255 F.2d 896 (D.C. Cir.), *cert. denied*, 358 U.S. 853 (1958).

murder to be reasonable, implied that the towel was contraband. The opinion does not indicate how the towel had been used.

4. *Required Records.*

The *Boyd* opinion also noted that entries in books required to be kept by law were objects of a reasonable seizure.⁵³ This has commonly become known as the required records exception and is widely accepted. The theory behind the exception is that when records of a business are required to be kept by a governmental regulation or law, then these records are not private records, but are quasi-public records to which the Fourth Amendment is not applicable.⁵⁴

5. *Items Seized From the Person.*

Another theory by which purely evidentiary matter has been held seizable is that any relevant items seized from the person of an accused upon his arrest are admissible. Basis for such a broad exception to the rule cannot be found in *Boyd* or *Gouled*, but as long ago as 1911 such a conclusion had been recognized by some courts, as is exemplified by the following language:

From time immemorial an officer making a lawful arrest on a criminal charge has taken into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence on the trial. A bloodstained . . . garment . . . [is] thus seized . . . on the person or the premises of the alleged criminal, and no one disputes the propriety of such seizure.⁵⁵

The proponents of this theory frequently rely on the Irish case of *Dillon v. O'Brien*,⁵⁶ which permitted the seizure of certain papers in the possession of the defendant at the time of his arrest. In distinguishing the case from *Entick v. Carrington*,⁵⁷ to this language, however, one must refer to other language in the opinion which indicates that such evidentiary property must also have been believed to have been used to commit the offense. In any event, the papers involved could have been considered instruments of crime, and this was probably the real basis of the decision.

⁵³ See *Boyd v. United States*, 116 U.S. 616, 623, 624 (1886).

⁵⁴ See *United States v. Kempe*, 59 F. Supp. 905 (N.D. Iowa), *rev'd on other grounds*, 151 F.2d 680 (8th Cir. 1945); *United States v. Ciancy*, 276 F.2d 617, 630 (7th Cir. 1960) (alternative holding), *rev'd on other grounds*, 365 U.S. 312 (1961).

⁵⁵ *United States v. Mills*, 185 Fed. 318, 319 (C.C.S.D. N.Y.), *appeal dismissed*, 220 U.S. 549 (1911).

⁵⁶ 20 L. R. Ir. 300 (Ex. 1887).

⁵⁷ 19 How St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765).

Regardless of the basis for the theory, in *Weeks v. United States*⁵⁸ the Supreme Court recognized the right "to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime."⁵⁹ While the statement in *Weeks* was dicta, the seizure of mere evidence, occurring at the time of arrest, was expressly approved by lower courts in *Browne v. United States*⁶⁰ and *Sayers v. United States*.⁶¹

The Supreme Court, in dealing with a case involving contraband liquor, may have suggested a limitation on the authority to seize mere evidence incident to arrest when it stated "when a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have, and which may be used to prove the offense, may be seized and held as evidence in the prosecution."⁶² Regardless of this caveat, if it was one, some courts continued to cite with approval the practice of seizing mere proofs of guilt from an accused upon his arrest.⁶³ It is noted that in most cases employing such language its use was dictum since the evidence seized was either an instrumentality, contraband, or the fruit of a crime.

Whether the arrest exception is a meritorious one is of considerable doubt. Despite the Supreme Court's language of implied approval in *Weeks*, no case has been found in which the Court has approved the seizure of merely evidentiary matter as being incident to a lawful arrest. While the doctrine has never been expressly disapproved, the Court has always sought one of the previously described exceptions (instrumentality, fruit of crime, etc.) as a basis for admissibility. There should be a recognized difference between the authority to search an accused incident to an arrest, which is clearly reasonable, and the authority, within the mere evidence rule, to seize items of purely evidentiary value found during the search. It is suggested that the Court's use of the words "or evidences of crime"⁶⁴ in *Weeks* was not intended to mean mere evidence, as used in the mere evidence rule. Nonetheless, a few courts continue to approve the seizure of seemingly

⁵⁸ 232 U.S. 383 (1914).

⁵⁹ *Id.* at 392. (Emphasis supplied.) For similar language, see *Adams v. New York*, 192 U.S. 585 (1904).

⁶⁰ 290 Fed. 870 (6th Cir. 1923).

⁶¹ 2 F.2d 146 (9th Cir. 1924).

⁶² *Carroll v. United States*, 267 U.S. 132, 158 (1925). (Emphasis supplied).

⁶³ *Estabrook v. United States*, 28 F.2d 150 (8th Cir. 1928); *Furlong v. United States*, 10 F.2d 492 (8th Cir. 1926).

⁶⁴ See *Weeks v. United States*, 232 U.S. 383, 392 (1914).

evidentiary items as being incident to a lawful arrest.⁶⁵ It is noted, however, that frequently these courts seem more cognizant of the rule against unreasonable searches than of the rule against mere evidence.

6. *Private Papers.*

A unique new exception to the mere evidence rule has been suggested by the New Jersey Supreme Court in *State v. Bisaccia*.⁶⁶ In effect, the opinion states that the rule applies only to an individual's private papers and that tangibles other than papers and documents may be seized for their evidentiary value alone.

Pursuant to a warrant, police had seized a pair of the defendant's shoes, which bore a distinctive heel print, identical to one made by a robber fleeing the scene of the crime. The court re-examined *Boyd* for the meaning which should be given to its language concerning the interplay between the Fourth and Fifth Amendments. It concluded that what *Boyd* denounced was a search among private papers, and it was further noted that the United States Supreme Court had never held that the doctrine of *Boyd* applied to tangibles other than private papers. A search for other tangibles and their seizure would not involve rummaging through an individual's private files and would not expose their intimacies and confidences. This was the evil felt to concern the author of *Boyd*, and the prevention of that evil prompted the conclusion that the seizure involved was unreasonable. In *Bisaccia* the Court found nothing unreasonable about searching for a pair of shoes in order to match them with a culprit's footprint, and stated that "the Fourth Amendment contemplates that things may be seized for their inculpatory value alone and that a search to that end is valid, so long as it is not otherwise unreasonable"⁶⁷

There is considerable merit in the approach taken in *Bisaccia*, and its acceptance would do away with such socially undesirable results as those in *LaRue v. State*,⁶⁸ where a murder suspect's

⁶⁵ *Haas v. United States*, 344 F.2d 56 (8th Cir. 1965) (approving the seizure of a suit of clothes, a brief case, and a carbon copy of a car rental agreement, all of which connected the accused with a robbery); *Morton v. United States*, 147 F.2d 28 (D.C. Cir.), cert. denied, 324 U.S. 875 (1945) (approving the seizure, incident to a homicide arrest, of the accused's bloody clothing, a bottle of liquor, and a newspaper containing a report of the crime).

⁶⁶ 45 N.J. 504, 213 A.2d 185 (1965).

⁶⁷ *Id.* at 519, 213 A.2d at 193.

⁶⁸ 149 Tex. Crim. 598, 197 SW.2d 570 (1946).

bloody clothing was held merely evidentiary and not legally seizable. However, there is some doubt that this approach has actually been within the intent of the United States Supreme Court as it has developed the rule. While it is true that the Supreme Court has never disapproved the seizure of any tangible item other than private papers because of the mere evidence rule, it is also true that, when they have approved the seizure of such items, they have done so within the framework of the regular exceptions of the mere evidence rule.⁶⁹ It appears, therefore, that at least until now, the United States Supreme Court has not recognized that private papers alone are subject to protection if merely evidentiary in nature.

7. *Applicability to State Proceedings.*

Two other recent state court decisions are worthy of note as possibly indicative of future use of the rule against seizure of mere evidence. *People v. Carroll*⁷⁰ involved the seizure, pursuant to a search warrant, of a quantity of 20 gauge shotgun shells during a homicide investigation in which the lethal weapon was a 20 gauge shotgun. The New York statute, upon which the warrant was based, permitted search and seizure of property which constituted evidence of crime or tended to show that a particular person committed a crime. In holding that the statute was within the state police power and that the seizure of mere evidence was lawful, the opinion expressed the view that the United States Supreme Court had departed from the principle of *Gouled* as an inflexible rule. The *Abel* case was used to illustrate this conclusion. Since the *Gouled* mere evidence rule was considered as not binding as to the seizure, the opinion proceeded to determine whether the search was reasonable under the Fourth Amendment. The answer was in the affirmative.

A similar conclusion was reached by the California Supreme Court in *People v. Thayer*.⁷¹ The case involved the seizure of a physician's business records and their subsequent introduction in a criminal trial for fraudulent claims against the state. It is significant that the opinion was written by Chief Justice Traynor, a highly respected and forward looking judicial officer. He begins by noting that the mere evidence rule has been frequently criti-

⁶⁹ For example, see *Abel v. United States*, 362 U.S. 217 (1960) (instrumentalities); *Harris v. United States*, 331 U.S. 145 (1947) (contraband); *Davis v. United States*, 328 U.S. 582 (1946) (contraband).

⁷⁰ 38 Misc. 2d 630, 238 N.Y.S.2d 640 (Sup. Ct. 1963).

⁷¹ 408 P.2d 108, 47 Cal. Rptr. 780 (1965).

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cized and suggests that the rule was originally based on now inapplicable and outmoded property concepts that the sovereign may seize only those items which it was unlawful to possess or which were wrongfully obtained. The modern rationale for restricting searches and seizures has become individual protection rather than property concepts. It is implied, therefore, that the concept behind the rule is no longer a valid one. The author concludes that the mere evidence rule has never been treated by the United States Supreme Court as a fundamental constitutional standard and, consequently, that it should not be enforceable against the states through the Fourteenth Amendment. In this connection the Chief Justice reasons that although the Supreme Court has used language linking the mere evidence rule to the Fourth and Fifth Amendments, what the Court was really doing was invoking its federal rule-making authority. The opinion indicates that, until *Mapp v. Ohio*⁷² and *Malloy v. Hogan*,⁷³ there was no need for the Supreme Court to be more specific about the precise grounds it was using to suppress mere evidence. Since these cases have put the Fourth, Fifth, and Fourteenth Amendments on an equal footing regarding the reasonableness of searches and seizures, it is now necessary to decide whether it was a constitutional basis or a rule-making basis upon which the Supreme Court relied in establishing the mere evidence rule. If the former, states are bound to apply the rule because of the Fourteenth Amendment; if the latter, then the mere evidence rule is not applicable to state courts. Chief Justice Traynor concluded the latter to be the proper interpretation. In response to this conclusion it must be noted that the Supreme Court has never mentioned its federal rule-making power in connection with the mere evidence rule and has always bottomed the rule on constitutional grounds.

The written opinion in *Thayer* also suggests that while the Supreme Court has never formally repudiated the mere evidence rule, it has nearly distinguished it out of existence by the instrumentality exception. *Zap v. United States*⁷⁴ is cited as authority for the devitalization of the rule. The conclusion is made that the mere evidence rule "is often cited but no longer applied."⁷⁵ While results in the more recent Supreme Court cases seem to

⁷² 367 U.S. 643 (1961).

⁷³ 378 U.S. 1 (1964).

⁷⁴ 328 U.S. 624 (1946), *rev'd on other grounds on rehearing*, 330 U.S. 800 (1947).

⁷⁵ *People v. Thayer*, 408 P.2d 108, 112, 47 Cal. Rptr. 780, 784 (1965).

support such a conclusion, it will be indicated later that the methods used by the Court to reach these results do not offer the same support. It is finally worth noting that in *Thayer*, Chief Justice Traynor found the questioned books to be instrumental in the commission of the crime and admissible as an exception to the mere evidence rule.

A thought-provoking situation can be envisioned, if, during a lawful search, the law enforcement agent observes a merely evidentiary document, and, without taking it, mentally retains certain incriminating information contained therein. There would have been no physical seizure of mere evidence, yet a question would arise whether the officer should be permitted to testify to what he saw or to use the information to develop other non-mere evidence for use at the defendant's trial.

That the fruit of the poison tree doctrine applies to the unlawful seizure of mere evidence seems clear.⁷⁶ Unreasonable searches and unreasonable seizures are not distinguishable in this regard and if the results of an unreasonable search "shall not be used at all,"⁷⁷ then the same rule obviously applies to the results of an unreasonable seizure. It would still need to be resolved, however, whether the visual observation of information and its mental retention is in fact a seizure. Unless it can be classified as a seizure, there has been no primary illegality by the police, and absent such primary illegality, there can be no exploitation thereof by the police. This exploitation by the police of the primary illegal search or seizure is what is forbidden by the fruit of the poisonous tree doctrine.⁷⁸

In similar situations involving the question of whether there was an unlawful search, it has been held that "a search implies some exploratory investigation. It is not a search to observe that which is open and patent . . ."⁷⁹ It could be forcefully argued that the same rule should apply to seizures and that mere observation of an object does not amount to its seizure. It would follow that the police could make any use they want to of evidence so obtained because it was not obtained by a seizure at all, much less an unreasonable one.

⁷⁶ See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

⁷⁷ *Id.* at 392.

⁷⁸ See *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

⁷⁹ *Smith v. United States*, 2 F.2d 715, 716 (4th Cir. 1924). The same reasoning was used in *United States v. Strickland*, 62 F. Supp. 468 (W.D. S.C. 1945).

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It would seem more reasonable, however, and more within the true meaning of the Fourth Amendment and the mere evidence rule itself, to conclude that information obtained by visual inspection was seized. To permit testimony of what a document contained, while refusing admission of the document itself, appears to be an unwarranted evasion of the evidentiary rule. If this exclusionary result appears harsh, it would seem preferable to re-examine the rule itself, as suggested later, rather than to evade it while paying lip service to it.

III. MILITARY APPLICATION

As long ago as 1953, the United States Court of Military Appeals was squarely faced with the problem of applying the mere evidence rule to an otherwise lawful search and seizure.⁸⁰ The Court firmly recognized that mere evidentiary materials could never be made the subject of a lawful search, and, not unlike courts in civilian jurisdictions, observed that "the doctrine's boundary lines are not clear, but are shadowy, indistinct, and elusive indeed."⁸¹ The item seized was the accused's diary, and the Court found the diary to be the accused's means of preserving the records of his black marketing activities, even though it was not in the customary business form. As such, it was a part of his unlawful undertaking and subject to seizure as an instrumentality of the crime. The Court, then, quickly adopted the instrumentality theory of *Marron* in its approach to evidentiary items.

The following year the Court again faced and clearly recognized the application of the mere evidence rule. In *United States v. Marrelli*,⁸² checks which the accused had written on a depleted bank account were considered seizable as instrumentalities of the offense of larceny by check. In *United States v. DeLeo*,⁸³ scraps of paper, apparently used to assist in the forgery of signatures to stolen traveler's checks, were held seizable as instrumentalities.

In *United States v. Higgins*,⁸⁴ the Court, for the first time, found a seized item to be mere evidence, and not an instrumentality of any offense. However, the accused was held to have no standing to object to the seizure since he had previously disposed of the questioned item.

⁸⁰ *United States v. Rhodes*, 3 U.S.C.M.A. 73, 11 C.M.R. 73 (1953).

⁸¹ *Id.* at 75, 11 C.M.R. at 75.

⁸² 4 U.S.C.M.A. 276, 15 C.M.R. 276 (1954).

⁸³ 5 U.S.C.M.A. 148, 17 C.M.R. 148 (1954).

⁸⁴ 6 U.S.C.M.A. 308, 20 C.M.R. 24 (1955).

By this time, the existence and applicability of the rule against the seizure of merely evidentiary items was well established in the military rules of evidence. As with the civilian cases, exceptions were recognized, and as in the civilian jurisdictions, it soon became apparent that there would be increasing difficulty in concluding what was and what was not an instrumentality of crime.⁸⁵ One might have believed, in light of the early cases just discussed, that the Court had adopted a liberal outlook and that the exclusionary result of the mere evidence rule would be infrequently invoked. At first this seemed to be the case;⁸⁶ however, this view is less certain due to the Court's decision in *United States v. Vierra*.⁸⁷ The accused was suspected of forging a particular name on checks, and a lawful search of the accused produced an advertising card bearing that same name. The majority of the Court found the card to be mere evidence and not subject to a lawful seizure. However, in light of the earlier Court decisions, and in line with numerous federal decisions, it would have been quite reasonable to conclude that the card had no other possible use, with the false name on it, than to serve as a method of identification during the cashing of forged checks, and, therefore, was an instrumentality. This, indeed, was Chief Judge Quinn's minority view. The fact that the evidence in the case failed to show that the accused used the card to cash the particular checks for which he was charged should not be an impediment to the card's seizure; for, instrumentalities of any crime may be seized. Under the circumstances, the card would seem to have no reason for being, except to be used as an instrumentality for cashing forged checks bearing the name thereon.

⁸⁵ See *United States v. Webb*, 10 U.S.C.M.A. 422, 27 C.M.R. 496 (1959), in which Chief Judge Quinn felt that where the accused was charged with dishonorable failure to pay debts and dishonorable failure to maintain sufficient funds to pay a check, a written acknowledgment of the obligation to pay the debt and the cancelled check were instruments of the offenses. Judge Latimer expressed doubt that they were more than mere evidence, and Judge Ferguson was silent.

⁸⁶ See *United States v. Sessions*, 10 U.S.C.M.A. 383, 27 C.M.R. 457 (1959), in which the Court reversed because of the lack of authority to search, but otherwise indicated approval of the seizure of slips of paper upon which had been written several facsimiles of a forgery victim's name; *CM 401550, Starks*, 28 C.M.R. 476, *pet. denied*, 11 U.S.C.M.A. 769, 28 C.M.R. 414 (1959), in which a letter from the accused to a friend, instructing him to remove some previously stolen pistols from the town, was held to be an instrumentality of the larceny of the pistols. In the alternative the opinion stated that if the larceny was already complete, the letter could be considered an instrument of the crimes of wrongful disposition of government property, misprision of a felony, or obstructing justice.

⁸⁷ 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963).

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Vierra establishes that in military law, as we have seen in civilian law, there are no predictable norms or guidelines to look to in deciding whether an item is an instrumentality. That the Court had not completely reversed its earlier outlook was evidenced by *United States v. Ross*,⁸⁸ a case decided earlier in the same year as *Vierra*. Incident to an apprehension for unlawfully selling service promotion examinations, copies of examinations, a photo copying machine, and other items pertinent to the service-wide examination were seized. That these items were considered instrumentalities was apparently so obvious that the Court did not feel required to comment.

A final and very significant case in the criminal instrumentalities area is *United States v. Simpson*.⁸⁹ Not only did it reaffirm the Court's earlier holdings that such items as checks and blank checkbooks, when shown to be relevant, could be instruments of the crime of larceny by check and related crimes, but it also contained language which may give an insight into the Court's future consideration of mere evidence problems. In addition to the checks and checkbook, other papers were seized when the accused was apprehended. For the purpose of the decision, the Court assumed them to be mere evidence, but refused to find general prejudice in advance of such a requirement by the United States Supreme Court. In a search for specific prejudice, the Court could find none, and, despite the use of merely evidentiary material, the conviction was sustained. Of equal interest is the language the Court employed in discussing the "startling, if not absurd"⁹⁰ results that might follow if a too mechanical application of the mere evidence rule resulted in the exclusion of reasonably admissible evidence. The opinion concluded this point by saying "the limit to which appellate defense counsel would have us push the distinction between evidence and the instrumentality or fruit of a crime indicates the need for serious rethinking of the doctrine and its operation."⁹¹

In addition to recognizing criminal instrumentalities as being an exception to exclusion as mere evidence, the Court of Military Appeals has also approved the seizure of evidentiary matter which

⁸⁸ 13 U.S.C.M.A. 432, 32 C.M.R. 432 (1963).

⁸⁹ 15 U.S.C.M.A. 18, 34 C.M.R. 464 (1964).

⁹⁰ *Id.* at 21, 34 C.M.R. at 467.

⁹¹ *Ibid.*

was contraband,⁹² required records,⁹³ and fruits of a crime.⁹⁴ The more unique exceptions which have been applied in civilian courts have apparently not been urged upon or accepted by the Court. It would appear, at least, that the exception permitting seizure of evidentiary material from an accused's person at the time of his arrest or apprehension has no validity in the military. In *Simpson*,⁹⁵ the items the Court assumed to be mere evidence were seized from the accused's person when he was apprehended. Had the Court felt the arrest exception valid, such disposition would seem to have been preferable and less controversial than to apply the doctrine of specific prejudice. As discussed earlier, the arrest exception is of shadowy validity, and it appears that the Court is following sound reason in refusing its application.

Military law appears to have adopted the standard civilian application of the mere evidence rule and, in so doing, has inherited the problems as well as the benefits of that rule. While, on the one hand, we may expect judicial disapproval of the seizure of self-incriminatory mere evidence, on the other hand, we may also expect judicial disapproval of the seizure of items considered properly seizable in some circles.⁹⁶ The inherent difficulty in identifying an instrumentality of crime will plague the military lawyer, as it has his civilian counterpart, unless and until a decision of law establishes a more definitive method of identification.

IV. CONCLUSIONS AND RECOMMENDATIONS

Theoretically, the mere evidence rule has the same stature that it did after its original suggestion in *Boyd*, its proclamation in *Gouled*, and its interpretation immediately thereafter. As has been seen, however, its exclusionary vigor has been sapped by decisions which employ exceptions in such a manner as to permit the admission in evidence of a great number of otherwise inadmissible articles. This should not be considered to be surprising

⁹² *United States v. Bolling*, 10 U.S.C.M.A. 82, 27 C.M.R. 156 (1958) (narcotics).

⁹³ *United States v. Sellers*, 12 U.S.C.M.A. 262, 30 C.M.R. 262 (1961) (seizure of unit fund books from custodian).

⁹⁴ *United States v. Drew*, 15 U.S.C.M.A. 449, 35 C.M.R. 421 (1965) (stolen property).

⁹⁵ 15 U.S.C.M.A. 18, 34 C.M.R. 464 (1964).

⁹⁶ See CM 401337, *Waller*, 28 C.M.R. 484 (1959), *aff'd*, 11 U.S.C.M.A. 295, 29 C.M.R. 111 (1960), where, although the board of review affirmed the conviction because of the accused's consent to the use of the seized evidence, it concluded that, in a rape case, the accused's blood-stained shorts and trousers were mere evidence and not seizable.

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because it is only reasonable that such evidentiary items as a murder suspect's bloody clothing should be admissible against him at his trial. But in an endeavor to balance reason with the rules of evidence, courts have been forced, upon occasion, to engage in a game of legal fiction. The more legal fiction a system of law is forced to employ, it is submitted, the less effective that system is. Consequently, within the framework of the legal system, we should strive to mold and interpret our rules of law to conform with the rules of reason. While there are bound to be conflicts when different judges attempt to interpret rules of evidence, if those rules are reasonable, the conflicts will be minimized.

One method of operating within the evidentiary confines of the mere evidence rule is, in effect, to call the rule a dead letter and to decide each case solely on the basis of its particular facts. This appears, substantially, to have been the approach of the New York and California courts in *Carroll*⁹⁷ and *Thayer*.⁹⁸ Whether the mere evidence rule is a dead letter or not remains to be seen. Militating against such a conclusion is the fact that the United States Supreme Court cases of *Abel* and *Zap*, cited in support of this conclusion, meticulously applied the mere evidence rule and its instrumentality exception.⁹⁹ Authority for a conclusion that the rule has never been treated as a fundamental constitutional standard has not been found. It appears, to the contrary, that, since its inception, it has been considered to be based on the constitutional requirements of the Fourth and Fifth Amendments. The fact that the original rationale of the mere evidence rule may have been a property concept does not seem to be an adequate reason, in itself, to discount the rule's present vitality. Although protection of individual rights from police wrongdoing, rather than property concepts, seems to be the current basis for enforcing protection against unreasonable search and seizure, it can well be argued that the implementation of the mere evidence rule does protect personal rights, and always has. Such an argument can be fortified when one notices the strong reliance by courts upon the Fifth Amendment in their justification and application of the mere evidence rule.

An approach, other than disregarding the rule, would be to re-examine its basis and to determine if, in its interpretation,

⁹⁷ 38 Misc.2d 630, 238 N.Y.S.2d 640 (Sup. Ct. 1963).

⁹⁸ 408 P.2d 108, 47 Cal Rptr, 780 (1963).

⁹⁹ See notes 25, 28 *supra* and accompanying text.

courts may have broadened it unintentionally. Such re-evaluation may not only result in a rule of evidence which can be more uniformly and predictably applied, but could eliminate those cases in which the fact situations lend themselves to an evasion of the rule.

As previously discussed, *Boyd*, when objectively viewed, appears to prohibit the seizure of property of such a nature that its production in evidence would amount to a denial of its owner's right against self-incrimination. It is not a logical extension of this reasoning to hold that any and all merely evidentiary material is of such a nature that its production would be self-incriminating towards its owner. Yet, this is what *Gouled* is said to stand for. In *Gouled*, however, *private* papers were in issue, and, despite the seemingly all inclusive language of the opinion, the facts did not necessitate such a radical departure from *Boyd*. Whether the Court was consciously intending to increase the scope of mere evidence to non-self-incriminating items cannot be ascertained with definiteness because the Court was not required to form such an intent to reach its conclusion.

Regardless of the Court's intent in *Gouled*, if the rule against mere evidence is to be re-evaluated, it should be done in the light of reason and of its practical application over the years. To do so compels the conclusion that, first, as a matter of personal rights protection, there should be a rule of evidence prohibiting the seizure of an individual's private possessions, which when introduced in evidence against him, would amount solely to self-incrimination and, second, it is both unreasonable and largely unenforceable to have a rule of evidence which prohibits the seizure of *all* mere evidence except that which may qualify as an instrument or fruit of crime, contraband, or a required record. These exceptions, mentioned in *Boyd*, should be considered merely as examples of articles which are not solely self-incriminatory, and not as the only types of evidence which may be seized. Since the Fifth Amendment's protection against self-incrimination played such a dominant role in the formulation of the mere evidence rule, it is considered appropriate that its dominance be retained in the application of the rule. Thus, it is suggested that only those items be protected from seizure which are private and self-incriminatory in nature and which are not indicative of guilt in any manner other than that they are self-incriminatory. Subject to seizure, then, would be all the presently recognized exceptions and, in addition, such items as bloody clothing, material to assist in identification such as shoes and non-criminal instru-

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ments bearing fingerprints, and many items used incident to, but not as instrumentalities of, a crime. Still excludable would be most personally prepared books and papers, letters, diaries, and other purely self-incriminating items. It is felt that the mere evidence rule, so applied, would be workable and reasonable and would provide those constitutional safeguards for which it was originally intended.

THE DEFENDANT'S STANDING TO OBJECT TO THE ADMISSION OF EVIDENCE ILLEGALLY OBTAINED *

By Major Talbot J. Nicholas**

In this article, the author studies the rationale of the rule excluding evidence obtained by an illegal search and seizure and its relation to the criminal defendant's standing to invoke the rule in objecting to the admission of the illegally obtained evidence.

I. INTRODUCTION

The Court of Military Appeals has concluded "that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."¹ The right against unreasonable searches and seizures is among those applicable.² The so-called exclusionary rule, prohibiting the admission of evidence obtained as a result of an unlawful search, is an essential ingredient of the Fourth Amendment protection.³ It would seem, therefore, that the Court of Military Appeals is obliged to utilize the exclusionary rule regardless of the authority purported to be provided by the President in the *Manual for Courts-Martial, United States, 1951*, in paragraph 152.⁴ Whether or not this view is correct, it is demon-

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¹ *United States v. Jacoby*, 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960).

² *United States v. Battista*, 14 U.S.C.M.A. 70, 33 C.M.R. 282 (1963); *United States v. Gebhart*, 10 U.S.C.M.A. 606, 28 C.M.R. 172 (1959).

³ *Mapp v. Ohio*, 367 U.S. 643 (1961). It must be noted that only four of the Justices held this view. Mr. Justice Black expressed doubt that the Fourth Amendment alone was sufficient. He believed that the Fourth and Fifth had to be read together in order to conclude that exclusion was required.

⁴ "Evidence is inadmissible against the accused if it was obtained as a result of an unlawful search of his property. . . ."

strable that the Court of Military Appeals has looked to federal court cases for guidance in the application of the exclusionary rule to cases arising in the armed forces.⁵ The Court of Military Appeals has viewed the Manual rule as derived from the federal rule;⁶ therefore, it is likely that the Court would modify the Manual rule to conform to a constitutionally based federal rule should the Supreme Court modify the federal rule.⁷ It is concluded, therefore, that should the federal courts give standing to an accused to object to the admissibility of evidence on the ground of an illegal search of another's property, the Court of Military Appeals would do likewise, notwithstanding the fact that the Manual provision provides for inadmissibility only in the event of an unlawful search of the accused's property. The purpose of this article is to inquire into the federal rule as it relates to standing to object.

II. THE EXCLUSIONARY RULE

A. ORIGINS

Before looking into the question of "Who has Standing to Invoke the Rule," part III, *infra*, it is worthwhile looking into the exclusionary rule itself. The rationale for the rule has a close logical relation to the rationale for the standing requirement.

At common law there are many instances when a court would deny itself credible evidence because the production of the evidence would, under the circumstances, do a disservice to some public policy deemed to be of greater importance to society than the production of truth in a particular trial. For example, confidential communications between husband and wife would not be heard so that married persons would be able freely to communicate with each other. Further, confidential communications between attorney and client were protected so that the client's right to counsel could be enjoyed.

Nevertheless, it seems that with respect to evidence procured in an illegal search the court would not deprive itself of the evidence

⁵ See Webb, *Military Searches and Seizures—The Development of a Constitutional Right*, 26 MIL. L. REV. 1 (1964).

⁶ *United States v. Dupree*, 1 U.S.C.M.A. 865, 5 C.M.R. 93 (1952).

⁷ This is clearly not a necessary conclusion for other non-constitutionally based conflicts between federal rules and the Manual. The Court's adherence to the Manual rule for corroboration of confessions, after the federal rule was modified so that it was inconsistent, is a clear example of the Court's freedom in the area. See *United States v. Smith*, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962).

in the interest of protecting "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, . . ."⁸

The rule respecting the admissibility of evidence procured in an illegal search was stated in *Commonwealth v. Dana*,⁹

When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question. . . .¹⁰

The rule was relied on by the Supreme Court in *Adams v. New York*¹¹ in 1904. It was a rule designed for the use of a trial judge in the midst of a trial on the merits of a case.

Some authors¹² trace the demise of this rule to *Boyd v. United States*.¹³ In a sense, *Boyd* did start a line of cases that later clashed with the rule of *Adams*. In *Boyd* a lower court had ordered the production of Boyd's private books and papers. It did so under the authority of a statute¹⁴ which provided for the government attorney to move the court for papers in the possession of a claimant¹⁵ when in his opinion such papers will tend to prove the government's allegations. Should the claimant fail to produce the papers, the government's allegations were to be taken as confessed.

The government argued that this procedure did not violate the Fifth Amendment because, in an *in rem* proceeding for a forfeiture, the parties are not required by the Act of 1874 to testify against themselves since the suit is not against them, but against the property. The Court disposed of this Fifth Amendment argument as follows:

It begs the question at issue. A witness, as well as a party, is protected by the law from being compelled to give evidence that tends to criminate him, or to subject his property to forfeiture. . . . Greenl. Ev. §§ 451-453. But, as before said, although the owner of goods, sought to be forfeited by a proceeding *in rem*, is not the nominal party, he is nevertheless the substantial party to the suit; . . . he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense.¹⁶

⁸ U. S. CONST. amend. IV.

⁹ 43 Mass. (2 Met.) 329 (1841).

¹⁰ *Id.* at 337.

¹¹ 192 U.S. 585 (1904).

¹² Comment, *The Exclusionary Rule of Illegally Obtained Evidence*, 35 SO. CAL. L. REV. 64 (1961).

¹³ 116 U.S. 616 (1886).

¹⁴ See 18 Stat. 187 (1874), 19 U.S.C. § 585 (1964).

¹⁵ One who petitions the court for return of property seized as a forfeiture for violation of customs laws.

¹⁶ *Boyd v. United States*, 116 U.S. 616, 638 (1886).

This could have disposed of the case, but the Court went on to answer the government's second argument that the proceeding did not violate the Fourth Amendment because the court order to produce was not a search. The Court concluded that the private books and papers were not seizable items. *Commonwealth v. Dana* was distinguished on the ground that in that case the items seized were implements of gambling which were unlawful to possess. It noted the relationship between the Fourth and Fifth Amendments in that the condemned unreasonable searches were almost always made for the purpose of compelling a man to give evidence against himself. Thus, when the court orders a man to produce otherwise unseizable private books and papers for use against himself, the order is tantamount to a search and violates the Fourth Amendment.

The evil *Boyd* struck down was that of a court compelling a man to be a witness against himself. The result would have been different had the papers been obtained in an actual search.¹⁷ The Court in *Adams* distinguished *Boyd* on the ground that in that case a court had issued an order to produce private books and papers, whereas in the case before it the papers were found in the execution of a search.

The next look at a court's duty with respect to a man's private books and papers was taken in *Weeks v. United States*.¹⁸ However, whereas in *Boyd* the court had itself ordered production of the papers, in *Weeks* no such direct action was involved. In *Weeks* the papers were obtained in a search. Before trial the owner had applied to the court for their return on the ground that they had been illegally seized. The court determined the search to be illegal but refused to return the papers. On trial they were offered against him, whereupon his objection to their admission in evidence was denied. The Supreme Court assumed that the trial court's refusal to hold the evidence inadmissible was based on its improper reliance on *Adams*. The Court said, however, that *Adams* was not authority for refusing to return illegally seized property when application was made for it before trial. It held

that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional right of the accused, . . . In holding them [the letters] and permitting their use upon the trial, we think prejudicial error was committed. . . .¹⁹

¹⁷ See GREENLEAF, EVIDENCE § 469/ n. 2 (16th ed. 1899).

¹⁸ 232 U.S. 383 (1914).

¹⁹ *Id.* at 398.

In *Weeks*, as in *Boyd*, the Court found that a lower court breached its duty, but in *Weeks* the Court bottomed that duty solely on the Fourth Amendment. The Court said:

The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.¹⁹

The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence . . . [papers illegally seized] If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, . . . is of no value, . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.²⁰

After *Weeks* the ultimate demise of *Adams* and the concomitant crystallization of an exclusionary rule was to come more quickly. The requirement that there be a pretrial application was relaxed in *Gouled v. United States*,²² at least when the defendant was not aware of the government's possession of the papers. The Court put the *Adams* rule in better perspective saying:

While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard-and-fast formula to every case, regardless of its special circumstances. We think, rather, that it is a rule to be used to secure the ends of justice under the circumstances presented by each case; and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission on a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.²³

¹⁹ *Id.* at 391-92.

²¹ *Id.* at 393-94.

²² 255 U.S. 298 (1921).

²³ *Id.* at 312-13.

Finally, in *Agnello v. United States*²⁴ where, although he knew of the government's possession of the seized narcotics, the accused did not seek its return before trial, the Court overruled its own judgment in *Adams*.²⁵

B. RATIONALE

Though the exclusionary rule was thus established, the underlying rationale of the rule was not clear. Was the evidence excluded because its use would violate the Fifth Amendment? The Court in *Gouled* and *Agnello*, reasoning from *Boyd*, held that it would. Was the evidence excluded because to use it would violate the Fourth Amendment? The Court in *Weeks* and *Silverthorne*²⁶ said it would. Was *Weeks* really based on a Fourth Amendment duty not to use the evidence or on a duty to return the seized property? Early lower court cases leaned toward the latter view.²⁷ Was the rule an essential ingredient of the Fourth Amendment protection or merely a judicially created rule? *Weeks* seemed to take the former view but *Wolf*²⁸ indicated the latter. Was the rule really an additional remedy to repair an injury to one whose house was searched, or a device to enforce future obedience to the mandate of the Fourth Amendment? *Wolf* viewed it as the former.

The answers to these questions bear a vital relationship to the question, "Who has Standing to Invoke the Rule?" If one views the rule as based on the Fifth Amendment right against self-incrimination, the benefit of the rule may be restricted to the person from whom the incriminating evidence was obtained. The exclusion of the evidence would essentially prevent this man from

²⁴ 269 U.S. 20 (1925).

²⁵ So concluded Judge Cardozo in *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926).

²⁶ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). This is the case which gave birth to the "fruit of the poison tree" doctrine. The defendant, being a corporation, was not protected by the Fifth Amendment. *Hale v. Henkel*, 201 U.S. 43 (1906). An unlawful search had produced certain papers. Copies were made and the originals returned. On the basis of the copies a subpoena duces tecum was issued to produce the originals. Mr. Justice Holmes speaking for the Court held the subpoena invalid as having been based on the knowledge gained in the illegal search. "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all." *Silverthorne Lumber Co. v. United States*, *supra* at 392.

Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932).

²⁸ *Wolf v. Colorado*, 338 U.S. 25 (1949).

being incriminated by the illegally obtained evidence. If one conceives of *Weeks* as based upon the duty to return the illegally seized property, the benefit of the rule may be restricted to the person from whom the evidence was illegally obtained. If one views the rule as designed to provide an additional remedy for the wrong done in obtaining the property, the benefit of the rule may be restricted to the person wronged.

To restrict standing to one entitled to the return of the property is today clearly untenable.²⁹ Indeed, it should have been untenable from the start in view of the fact that the item suppressed in *Agnello* was contraband narcotics which no one had a right to have returned.

To restrict standing to one wronged by the illegal search, on the ground that the rule is a remedy as was indicated in *Wolf*, seems to be untenable in view of the clear statement in *Elkins v. United States*³⁰ that

The rule is calculated to prevent, not repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it. . . .³¹

The still troublesome question is whether standing may be restricted to a defendant who was searched on the grounds that only as to him would the use of such evidence be a violation of the Fifth Amendment right against self-incrimination. This question seemed to have been answered in the negative in *Mapp v. Ohio*.³² *Wolf v. Colorado*³³ had held that although the Fourth Amendment protection was available through the Fourteenth Amendment against state action, the exclusionary rule was not an essential ingredient of the Amendment. *Twining v. New Jersey*,³⁴ and *Adamson v. California*³⁵ had held that the Fifth Amendment right against self-incrimination was not available through the

²⁹ See *Trupiano v. United States*, 334 U.S. 699 (1948); *United States v. Jeffers*, 342 U.S. 48 (1951)

³⁰ 364 U.S. 206 (1960).

³¹ *Id.* at 217. These remarks are directed at such remedies, more of a civil nature, as are designed to compensate one for an injury. However, the word "remedy" can and is frequently used to refer to society's remedy, e.g., punishing the policeman for his wrong, designed to prevent future violations rather than repair the injury done. Such use of the word was made in *Mapp v. Ohio* 367 U.S. 643, 663 (1961), alluding to "the obvious futility of relegating the Fourth Amendment to the protection of other remedies. . . ."

³² 367 U.S. 643 (1961).

³³ 338 U.S. 25 (1949).

³⁴ 211 U.S. 78 (1908).

³⁵ 332 U.S. 46 (1947).

Fourteenth Amendment as a protection against state action. In *Mapp* the Court was asked to overturn so much of *Wolf* as had held that the exclusionary rule was not such an essential ingredient of the right against unreasonable searches and seizures that the Fourteenth Amendment required its application in state courts. The majority of the Court did just that. Four Justices, Chief Justice Warren, Justices Clark, Douglas and Brennan, viewed the exclusionary rule as an essential part of the Fourth Amendment. These Justices did not express the view that the Fourth Amendment needed the help of the Fifth Amendment in order to justify the exclusionary rule. To do so would seem to require the Justices to go a step further and hold that at least so much of the Fifth Amendment as was needed to sustain the exclusionary rule also was applicable through the Fourteenth Amendment to state action. This might have required a reconsideration of *Twining* and *Adamson*. Mr. Justice Black, however, did feel required to explain that he was still not persuaded that the Fourth Amendment standing alone would be enough to bar the introduction of evidence but that, when considered together with the Fifth Amendment ban against compelled self-incrimination, exclusion is required. Justice Black did not here express the view that the Fifth Amendment protection was applicable to the states but, of course, he had dissented in *Twining*.

Another reason for believing that the other four Justices in the majority viewed the exclusionary rule as applying against state action without the help of the Fifth Amendment is that three of them had previously expressed the view that the Fifth Amendment is applicable to state action. In *Cohen v. Hurley*,³⁶ Chief Justice Warren, and Justices Douglas and Brennan, in addition to Justice Black, all in dissent, expressed that view. It would seem, therefore, that since these four believed the Fifth Amendment applicable to state action, if they all believed the exclusionary rule needed the help of the Fifth, that view could have been expressed in the main *Mapp* opinion. That would have left Mr. Justice Clark to concur on the ground that although the Fifth Amendment did not apply through the Fourteenth Amendment to state action, the exclusionary rule as embodied in the Fourth Amendment alone did not need the help of the Fifth Amendment.

Whatever confidence one may have felt, on the basis of *Mapp* that the exclusionary rule relied solely on the Fourth Amendment,

³⁶ 366 U.S. 117 (1961).

was severely shaken in *Malloy v. Hogan*.³⁷ In *Malloy* the Court reconsidered *Twining* and held that the Fifth Amendment right against compulsory self-incrimination was also protected against the states by the Fourteenth Amendment. As part of its argument to this conclusion the Court utilized *Mapp* to fortify its conclusion, saying:

Mapp held that the Fifth Amendment privilege against self-incrimination implemented the Fourth Amendment in such cases, and that the two guarantees of personal security conjoined in the Fourteenth Amendment to make the exclusionary rule obligatory upon the States. . . .³⁸

Such a holding is hard to find in *Mapp*. Indeed, the author of *Mapp* opinion, Mr. Justice Clark, joined in the dissent in *Malloy* saying,

[N]othing in *Mapp* supports the statement, ante, p. 8, that the Fifth Amendment was part of the basis for extending the exclusionary rule to the States. . . .³⁹

One further case sheds some light on whether there is really any necessary connection between the exclusionary rule and the Fifth Amendment. In *Linkletter v. Walker*⁴⁰ the question raised was whether *Mapp* was to be given retrospective effect. Were state court convictions before *Mapp* to be overturned on the ground that the state court did not use the exclusionary rule to exclude evidence obtained in an illegal search? Seven members of the Supreme Court held that *Mapp* was not to be given retrospective application. Justices Black and Douglas dissented. The two opinions seem to view the exclusionary rule quite differently. The majority seemed not to view the rule as concerned with a defendant's right to a fair trial,⁴¹ whereas the dissent viewed it as one of the "trial protections guaranteed by the Constitution."⁴² The Court considered that the determination to apply or not to apply a decision retrospectively turned on "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."⁴³ Recounting the history of the rule the Court found that consistent with that history:

Mapp had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police

³⁷ 378 U.S. 1 (1964).

³⁸ *Id.* at 8.

³⁹ *Id.* at 21.

⁴⁰ 381 U.S. 618 (1965).

⁴¹ See *id.* at 639.

⁴² *Id.* at 650.

⁴³ *Id.* at 629.

action. Indeed, all of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action. . . .⁴⁴

Considering this purpose the Court went on to conclude:

We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved. . . . Finally, the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.⁴⁵

The opinion's implication that the exclusionary rule is not related to a defendant's right to a fair trial, thus, not related to the Fifth Amendment right against self-incrimination, was clearly perceived by the dissent. Noting that the Court's basic reason for not giving *Mapp* retrospective effect was the deterrent purpose of the exclusionary rule, Mr. Justice Black said,

The inference I gather from these repeated statements is that the rule is not a right or privilege accorded to defendants charged with crime but is a sort of a punishment against officers in order to keep them from depriving people of their constitutional rights. . . .⁴⁶

Further on he alludes to "the undoubted implication of today's opinion that the rule is not a safeguard for defendants."⁴⁷ Knowing Mr. Justice Black's reliance on the Fifth Amendment to give the exclusionary rule force, his distaste for this implication is understandable. If the exclusionary rule were a Fifth Amendment right guaranteeing an accused a fair trial under an accusatorial system,⁴⁸ then a retrospective application of the exclusionary rule in state courts would have been necessary. Indeed, the majority would have so applied it.

C. SUMMARY

While the rationale for the exclusionary rule is not yet crystal clear, the following seems to sum up the Supreme Court position.

The Fourth Amendment right of the people to be secure against unreasonable searches imposes a correlative duty upon the courts to exclude the fruits of such a search. This duty exists notwithstanding the fact that the legislature may provide criminal

⁴⁴ *Id.* at 686-87.

⁴⁵ *Id.* at 637.

⁴⁶ *Id.* at 649.

⁴⁷ *Ibid.*

⁴⁸ *See id.* at 639.

penalties to deter such unlawful invasions,⁴⁹ and notwithstanding the fact that the executive has a duty to deter such unlawful acts.⁵⁰ It would seem that this duty is in a sense founded on the fact that the right against unreasonable search is a constitutional right of all the people. The legislature cannot deprive a person of it. Surely the executive cannot either. Hopefully, they would not try. The public love of liberty would prevent any attempt. It would spur both branches of the government to make the protection real. But if it does not, if the legislature, the executive and the majority are indifferent to this right, the right is not lost because the judiciary's duty to protect constitutional rights remains. This it does in the form of refusing to give effect to unconstitutional acts.⁵¹

The exercise of the duty of the courts is not to make reparation to a defendant whose privacy has been invaded but to prevent future invasions of others' right to privacy. Their purpose is to deter by denying the incentive to carry out unconstitutional searches. One incentive is the use of the fruits of the search as evidence in a trial. Thus, this incentive is removed by excluding the evidence from trial.

The right to be free from unreasonable search is the right of all the people. The courts' correlative duty to uphold that right is a duty to all the people. If the right of privacy of anyone is violated and the government seeks to use the evidence obtained against anyone, the courts' duty to exclude the evidence logically remains the same—to deter such invasions by removing the incentive.

Why if this analysis is correct, should a particular defendant have to show that his Fourth Amendment right to privacy was violated in order to have standing to call upon a court to do its duty and exclude the evidence? Should he not have standing to ask the court to exclude evidence illegally obtained from another? It is submitted that an answer to this question is not to be found by inquiry into a defendant's rights to a fair trial such as his Fifth Amendment right not to be required to incriminate himself.

⁴⁹ See generally, Taft, *Protecting the Public from Mapp v. Ohio Without Amending the Constitution*, 50 A.B.A.J. 815 (1964).

⁵⁰ For an excellent suggestion for independent review boards responsible to the executive, see Burger, *Who Will Watch the Watchman*, 14 AM. U.L. REV. 1 (1964).

⁵¹ See, generally, Pound, *Judicial Review: Its Role in Intergovernmental Relations*, 50 GEO. L. J. 653 (1962); Fahy, *Judicial Review of Executive Action*, 50 GEO. L. J. 709 (1962).

The rule is not a right or privilege accorded to a defendant charged with crime.⁵² It is not a right against self-incrimination, a right to a fair trial, a means of repairing the injury done or a means of obtaining return of his property. The answer, if there is one, is to be found by inquiry into the courts' limitations on whom it will permit to litigate constitutional questions. This inquiry is treated in part IV, *infra*, after a discussion of the standing requirements as they have developed with respect to unlawful searches and seizures under the confused state of the law as to the rationale for the exclusionary rule.

III. WHO HAS STANDING TO INVOKE THE RULE?

A. THE LAW BEFORE *JONES V. UNITED STATES*

Although the exclusionary rule had begun its development in 1914 in *Weeks*, or perhaps as early as 1886 in *Boyd*, even as late as 1942 the Supreme Court had not been called upon to decide who had standing to invoke the rule. The development of limitations on standing took place in the lower courts. In 1942 in *Goldstein v. United States*,⁵³ the Supreme Court restricted standing to complain of Federal Communications Act violations to the parties to the telephone conversation illegally intercepted and divulged. In so doing, the Court alluded to the lower court's limitation on standing to complain of Fourth Amendment violations.

While this court has never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of the unconstitutional search and seizure to object to the introduction in evidence of that which was seized.⁵⁴

It is not difficult to understand how the early lower court cases could thus limit standing. The rationale for the exclusionary rule was not clear. The courts tended, as seems the normal approach, to look to the particular litigant's rights conceiving its duty in relation thereto, rather than looking to its own duty in the first instance and performing that duty. If a court takes the latter approach, its duty need not be conceived of as exercised for the bene-

⁵² See *Linkletter v. Walker*, 381 U.S. 618 (1965) (by implication).

⁵³ 316 U.S. 114 (1942).

⁵⁴ *Id.* at 121. (Footnote omitted.) The three members dissenting, Chief Justice Stone, and Justices Frankfurter and Murphy, thought this restriction appeared inconsistent with the policy basis for the rule. They said, "It is evident that to allow the Government to use evidence obtained in violation of the Fourth Amendment against parties not victims of the unconstitutional search and seizure is to allow the Government to profit by its wrong and to reduce in large measure the protection of the Amendment." *Id.* at 127 n. 4.

fit of the litigant's rights, although he may incidentally benefit from it.

The case of *Haywood v. United States*⁵⁵ is an interesting example. The defendants were the officers of the "Industrial Workers of the World," a corporate organization which printed various pamphlets which many thought were treasonous. The Department of Justice raided a number of offices in various cities. The raids were unconstitutionally made. The evidence obtained was admitted in evidence over objections. The court looked to the parties' rights. It determined that the rights under the Fifth Amendment were witnesses' rights and since the parties were not compelled to be witnesses, their rights were not violated. *Boyd* was read as merely protecting one from having a congressional law convert a refusal to produce books and papers into a confession of the prosecution's allegations. The court viewed *Weeks* as resting on the fact that the property should have been returned to its owner. Here the defendant sought to suppress the use of evidence though he had no right to its return because the property "had never been in his possession and was not taken from his person or home or place of business."⁵⁶ The organization was not on trial and the seizure of its property did not violate defendants' rights. Such a narrow reading of *Weeks* was not uncommon.⁵⁷

In *Remus v. United States*,⁵⁸ citing *Haywood*, the court clearly set forth the proposition.

If this search warrant was illegal, and the search and seizure constituted an invasion of John Gehrum's constitutional rights, it certainly could not affect the constitutional rights of the other defendants, the privacy of whose homes was not invaded, nor could they be heard to complain that the constitutional rights of Gehrum had been forcibly and unlawfully violated. . . .

This evidence was excluded by the court, . . . upon the theory that in the obtaining of this evidence Gehrum's constitutional rights had been invaded, and for that reason he was entitled to the return of the property, and could not be compelled to produce it as evidence against himself.⁵⁹

The court looked to the litigants' rights and found that none other than one Gehrum had a right to regain the property, nor, as to the

⁵⁵ 268 Fed. 795 (7th Cir. 1920).

⁵⁶ *Id.* at 804.

⁵⁷ See, e.g., *Connolly v. Medalie*, 58 F.2d 629 (2d Cir. 1932). Even the reverend Judge Learned Hand viewed the exclusionary rule as a corollary of one's right to regain possession of property.

⁵⁸ 291 Fed. 501 (6th Cir. 1923).

⁵⁹ *Id.* at 511.

others, could the evidence be self-incriminating. Only Gehrum, whose premises were searched and whose property was seized had a Fifth Amendment right against self-incrimination.

Cases like these abounded in the lower courts, and, the Supreme Court apparently approving them in *Goldstein*,⁶⁰ the case of *McDonald v. United States*⁶¹ came as a surprise. McDonald and Washington were co-defendants. McDonald had rented a room. At the time of the unlawful search, Washington was in the room with him. The Court held that the evidence illegally obtained should not have been used at trial, and that its use was prejudicial to both McDonald and Washington. The Court, without citation, said:

Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was broken when the officers searched McDonald's room without a warrant, we think that the denial of McDonald's motion was error that was prejudicial to Washington as well. . . . If the property had been returned to McDonald, it would not have been available for use at the trial. . . .⁶²

The case could have been read as giving standing to one against whom illegally obtained evidence was used without an inquiry into whether his rights of privacy were violated. However, it was read more narrowly merely to confer standing on one co-defendant to seek a benefit from the fact that the other had been improperly denied his motion for the return of his property.⁶³

The Court, in *United States v. Jeffers*,⁶⁴ extended standing further to one who had no interest in the premises searched. The lower courts were unclear on the point. One case⁶⁵ had held that ownership of the seized property was enough to confer standing to complain of the illegal search of another's premises. In *Jeffers* the premises searched were rented by the defendant's aunts. He had their permission to use the premises, but, of course, not for storing narcotics. He was not on the premises when the illegal search occurred, nor were his aunts. He had been there some time in the past and had hidden some narcotics. He made a timely motion to suppress the narcotics, claiming ownership of it. His motion was denied. The Court of Appeals reversed.⁶⁶ The government appealed.

⁶⁰ See note 53 *supra* and accompanying text.

⁶¹ 335 U.S. 451 (1948).

⁶² *Id.* at 456.

⁶³ For a contrary result when the "victim" of the search is tried separately, see *Armada v. United States*, 319 F.2d 793 (5th Cir. 1963).

⁶⁴ 342 U.S. 48 (1951).

⁶⁵ See *Pielow v. United States*, 8 F.2d 492 (9th Cir. 1925).

⁶⁶ See *Jeffers v. United States*, 187 F.2d 498 (D.C. Cir. 1950), *aff'd*, 342 U.S. 48 (1951).

STANDING TO OBJECT

In the lower court the government argued that a search is illegal only as to the person whose right to privacy is invaded. Thus, one not an owner or in possession of the premises had no right that was violated on which to base standing. The Court of Appeals rejected this concept. It viewed the question of the illegality of the search as separate from the question of standing. The majority concluded that ownership of the property seized gave standing to challenge the legality of a search of another's premises.

The Supreme Court affirmed the Court of Appeals decision saying:

The Government argues, however, that the search did not invade respondent's privacy and that he, therefore, lacked the necessary standing to suppress the evidence seized. The significant act, it says, is the seizure of the goods of the respondent without a warrant. We do not believe the events are so easily isolable. Rather they are bound together by one sole purpose—to locate and seize the narcotics of respondent. The search and seizure are, therefore, incapable of being untied. To hold that this search and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right. The respondent unquestionably had standing to object to the seizure without a warrant or arrest unless the contraband nature of the narcotics seized precluded his assertion, for purposes of the exclusionary rule, of a property interest therein.⁶⁷

Jeffers made it clear that a defendant had standing to complain of the violation of another's home though he was not himself on the premises. This is consistent with the deterrent purpose of the exclusionary rule. Yet the Court's allusion to the fact that the search and seizure were bound together for one sole purpose—to locate and seize the narcotics of the respondent—preserves, in a sense, the *Goldstein* limitation of standing to "victims" of the search and seizure.⁶⁸

The other leg of the case was whether one could claim standing on the basis of ownership of contraband narcotics even though under the law no property rights could exist therein.⁶⁹ This question was disposed of on the basis of *Trupiano v. United States*⁷⁰ which held that it was error to refuse a motion to suppress even though, since the evidence was contraband, the movant had no right to have it returned to them. *Trupiano* and *Jeffers* made it

⁶⁷ *United States v. Jeffers*, 342 U.S. 48, 52 (1951).

⁶⁸ See note 54 *supra* and accompanying text.

⁶⁹ Int. Rev. Code of 1939, ch. 2, § 3116, 53 Stat. 362.

⁷⁰ 334 U.S. 699 (1948).

clearly untenable to assert that the exclusionary rule was a corollary to one's right to regain his property.

It was also clear after *Jeffers* that one had standing to complain of a search if he had *either* an interest in the premises searched *or* an interest in the property seized. However, the nature of the interest one needed was not clear.

The requisite interest in the premises was said to be that of a "lessee or licensee."⁷¹ Possibly "dominion" would suffice,⁷² or perhaps "ownership in or right to possession of the premises" was necessary.⁷³ On the other hand, however, standing was denied to mere "guests" and "invitees."⁷⁴ The requisite interest in the property seized was said to be its ownership or a proprietary or possessory interest.⁷⁵

Both of these tests were difficult to apply. The determination of the requisite interest in the premises took the courts into the mass of subtle property law distinctions obviously unrelated to the deterrent purpose of the exclusionary rule. The requisite interest in the property seized was perilous to assert. The property seized was to be used against the defendant because his connection with it was logically relevant to prove his crime. By asserting a claim to the property the defendant had to bear the risk that he was thus establishing that necessary connection. These two aspects of the standing problems were dealt with in *Jones v. United States*.⁷⁶

B. JONES V. UNITED STATES

In this most significant case the defendant was charged with having purchased, sold, dispensed, and distributed narcotics. At the time of the search he was in the apartment. It was not his apartment but that of a friend. This friend was not in the apartment when the search was conducted. He had given Jones per-

⁷¹ See, e.g., *United States v. De Bousi*, 32 F.2d 902 (D. Mass. 1929).

⁷² See, e.g., *Steeber v. United States*, 198 F.2d 615, 617 (10th Cir. 1952); *McMillan v. United States*, 26 F.2d 58, 60 (8th Cir. 1928).

⁷³ See, e.g., *Jeffers v. United States*, 187 F.2d 498, 501 (D.C. Cir. 1950), *aff'd*, 342 U.S. 48 (1951).

⁷⁴ See, e.g., *Gaskins v. United States*, 218 F.2d 47, 48 (D.C. Cir. 1955); *Gibson v. United States*, 149 F.2d 381, 384 (D.C. Cir. 1945); *In re Nassetta*, 125 F.2d 924 (2d Cir. 1942).

⁷⁵ See e.g., *United States v. Chieppa*, 241 F.2d 635 (2d Cir. 1957); *United States v. Friedman*, 168 F. Supp. 786 (D.N.J. 1958).

⁷⁶ 362 U.S. 257 (1960).

mission to use the apartment and had loaned him a key for this purpose.

The government challenged Jones' standing to move for the suppression of the narcotics seized in the search on the grounds that he alleged neither (1) an interest in the apartment greater than that of an "invitee or guest" nor (2) ownership of the seized articles.

The Court held that Jones had sufficient interest in the premises to challenge the search. It said:

It is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable search and seizures subtle distinctions [of the common law of private property], . . .

. . . No just interest of the Government in the effective and vigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. . . .⁷⁷

This leg of the opinion, as far as it granted standing to complain of a search on the basis of the defendant's legitimate presence on the premises searched, helps to avoid the unnecessary confusion caused by importing subtle property law distinctions into the law on search and seizure. In a sense, however, it does not go as far as *Jeffers* which had granted standing to one not even on the premises. Of course, to claim standing on the basis of *Jeffers* one had to claim an interest in the property seized.

The Court in *Jones*, dealing with the government's second ground for challenging defendant's standing—that he had not alleged the requisite interest in the property—sought to resolve the problem defendants had of choosing one horn of a dilemma. This dilemma had been described by Judge Learned Hand in *Connolly v. Medalie*.⁷⁸ He said:

Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possession, and avoid the peril of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma.⁷⁹

Some said that the dilemma was unconstitutional in that it com-

⁷⁷ *Id.* at 266-67.

⁷⁸ 58 F.2d 629 (2d Cir. 1932).

⁷⁹ *Id.* at 630.

pelled a defendant to incriminate himself.⁸⁰ In *United States v. Friedman*,⁸¹ it was urged that the fact that the government charged a man with possession of the seized article estopped it from denying possession. The district court rejected this "ingenious" argument. In *Jones*, the Supreme Court did not find the argument so "ingenious," but thought the government's argument to the contrary rather ingenious "eleganta juris." The Court said:

The same element in this prosecution which has caused a dilemma, i.e., that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which is ordinarily required when standing is challenged. . . .

. . . [T]o hold to the contrary, that is, to hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which conviction depends, were admitted in evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government. The possession on the basis of which petitioner is to be and was convicted suffices to give him standing. . . .⁸²

The potential for growth in the law of standing inherent in *Jones* is great. It seems to have set up a new basis for standing which cuts across considerations of interests in premises searched or property seized. At least one charged with unlawful possession of contraband need not allege an interest in the premises or the contraband. It goes even further, for *Jones* was not charged with unlawful possession, as such. Conviction, however, flowed from his possession of the narcotics. Could not such a rationale confer standing whenever the government seeks to use the evidence against a defendant? The fruit of the search is almost always offered by the government on the basis of some logical connection with the defendant. Could that connection not confer standing?

In trying to determine to whom *Jones* could extend standing to object, cognizance must be taken of Mr. Justice Frankfurter's introductory language. He did feel that cases like *Jones* presented a special problem, but speaking of the standing requirement generally, he said:

⁸⁰ See Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. U. L. Rev. 471, 486-88 (1952).

⁸¹ 166 F. Supp. 786 (D.N.J. 1958).

⁸² *Jones v. United States*, 362 U.S. 257, 263-64 (1960).

In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41(e) applies the general principle that a party will not be heard to claim a constitutional protection unless he "belongs to the class for whose sake the constitutional protection is given." . . . The restrictions upon search and seizure were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy.

Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy. But prosecutions like this one have presented a special problem. . . ."

By this language the Court indicated it was not making a complete break with the past; it was not doing away with a standing requirement. Yet, this language carries the distinct implication that standing to complain is based on the broad considerations of who should be permitted to litigate constitutional questions.

C. THE LAW AFTER *JONES V. UNITED STATES*

Consideration of the cases after *Jones* is complicated by the fact that the courts do not often isolate the basis on which standing is held to exist. The various bases frequently overlap in a particular case. There is ample confusion and much of it is caused by the lack of a consistent application of the rationale for the exclusionary rule.

1. *The Requisite Interest in the Premises Searched.*

To the degree that *Jones* extended standing to "guests" it did so only as far as they were "lawfully on the premises." *Jones* was on the premises at the time of the search. What if one were a guest but not on the premises during the search? In *Burge v. United States*,⁶⁴ a prosecution based on possession of narcotics, the defendant was a "house guest" of a Miss Wright. Both were

⁶³ *Id.* at 261.

⁶⁴ 323 F.2d 210 (9th Cir. 1964).

arrested while away from the premises. There was evidence that Miss Wright gave her consent to the search. The opinion does not indicate whether defendant claimed any interest in the property seized. The "house guest" was granted standing to object to the fruit of the search. It could be argued that the case is explainable as a narcotics possession prosecution; however, the court did not utilize that rationale. The court went even further to hold that though Miss Wright's consent could authorize the search of her property, she could not give such consent as would legalize the search of her "house guest." The court analogized from *United States v. Chapman*,⁸⁵ where it was held that a landlord's consent to the search of a tenant's apartment was insufficient to legitimize the search. The logical fallacy inherent in treating the question of standing to litigate the legality of a search as the same question as the legality of the search was corrected on rehearing.⁸⁶ It was concluded that, although the "house guest" had standing to complain of the search, the normal tenant's consent was sufficient to legalize the search. The case was a step beyond *Jones*.

*Walker v. Peppersack*⁸⁷ was not a narcotics possession case so perhaps it is a clearer extension of *Jones*. The charge was armed robbery of watches. The defendant had actually been living in the apartment for a time as a guest, but he was not on the premises during the search. There was no indication he claimed a possessory interest in the stolen watches. The court believed that *Jones* and *Jeffers* when read together granted standing—*Jones* gave standing to "guests" and *Jeffers* to one off the premises. The court could have found that *Jones* did not require an interest in the premises searched or a claim to possession of the item seized if possession was a basis for conviction, and thus extend the "possession convicts" aspect of *Jones*. As written it must be taken as extending the "interest in the premises" aspect of *Jones*.

The *Jones* case has also had an impact on the question of who has standing to complain about a search of a corporation's premises. In *Henzel v. United States*,⁸⁸ standing was granted to a sole stockholder-president who worked in the office of the better part of the day and prepared most the books and papers seized. The charge was mail fraud. The defendant was not at

⁸⁵ 365 U.S. 610 (1961).

⁸⁶ See *Burge v. United States*, 342 F.2d 408 (9th Cir. 1965).

⁸⁷ 316 F.2d 119 (4th Cir. 1963).

⁸⁸ 296 F.2d 650 (5th Cir. 1961).

the office when it was searched. The court thought that some of the language in *Jones* could not be carried too far. For instance, while this defendant was the "victim" of the search in the sense that he was the one against whom the search was directed, in the language of *Jones*, if that language were used as the sole test, it would deny standing to a husband to complain of the search of his home which was "directed against" his wife. Further, if *Jones* were restricted to one "legitimately on the premises," it would not cover this defendant. Yet, comparing their respective interests in the searched premises, this defendant has a greater claim to standing than *Jones* had. On this basis standing was granted. The court added the caveat that this does not extend standing to all employees.

Another employee was granted standing in *Foster v. United States*.⁸⁹ The charge was unlawful possession of an adding machine stolen from an interstate shipment. The premises searched was a tavern managed by the defendant's wife. The defendant was not there during the search and made no claim to the property. He was deemed to have had sufficient interest in the premises to confer standing. Actually, the opinion is not clear. The court mentioned, but without emphasis, that the charge was unlawful possession of stolen goods. The case might very well be treated as having based standing on the "possession convicts" aspect of *Jones*.

According to *Jones* the interests in the premises searched must be at least a lawful interest, *i.e.*, "lawfully on the premises." What if the premises searched is a stolen vehicle? The court in *Simpson v. United States*⁹⁰ granted standing to an auto thief. The government challenged standing on the ground the defendant did not own the vehicle. The court, rather humorously, rejected this, saying:

Federal officers could search cars at will and, of all defendants prosecuted for automobile theft, only those who actually owned the automobiles could raise Fourth Amendment objections successfully. . . .⁹¹

Though the court did find that the defendant had claimed a possessory interest in the vehicle, its remarks are as apt without it. In an additional opinion denying a request for a rehearing, the court also emphasized the nature of the prosecution as one in which possession convicts as another basis for standing.

⁸⁹ 281 F.2d 310 (8th Cir. 1960).

⁹⁰ 346 F.2d 291 (10th Cir. 1965).

⁹¹ *Id.* at 294. *But see Williams v. United States*, 323 F.2d 90 (10th Cir. 1963), *cert. denied*, 378 U.S. 906 (1964).

2. *The Requisite Interest in the Property Seized.*

The *Jones* case did not purport to lessen the interest one need have in the property seized in order to challenge the search and seizure. A possessory interest would suffice.⁹²

3. *Standing as a Victim of a Search.*

The Court in *Jones* alluded to the fact that in order to have standing to complain of a search and seizure one must have been a "victim"—one against whom a search and seizure is directed as distinguished from one who claims prejudice from the use of evidence gathered in a search directed at someone else. It is doubtful that this was intended to express a new limitation on, or a new extension of, the law concerning standing. Rather, it was probably considered merely as an abstraction of the results of prior cases. As a limitation it could deny standing to the owner of a house when the search was directed at another member of the family or a visitor; or as an extension it could confer standing on an employee to complain of a search of corporate premises directed at him.⁹³ Nonetheless, this language in *Jones* has been used at least as part of some courts' rationale for conferring standing where otherwise it might not have been granted.

In *Wion v. United States*,⁹⁴ the defendant was charged with causing explosives to be sent through the mails. The defendant's house was searched. In addition, his son's automobile was searched on the streets not far away. Incriminating evidence was taken from his house and his son's automobile. The defendant was granted standing to challenge the search of the automobile on the ground that the search "was directed at him."⁹⁵ The search was held to be legal on the basis of the son's consent.

In *United States ex rel. Coffey v. Fay*,⁹⁶ standing was granted to challenge the search of the person of another. Coffey had been convicted of the burglary of some diamonds. The key evidence was the stolen diamonds. Coffey and one DeNormand were arrested while out driving in Coffey's car. Each was searched on the sidewalk following the arrest. The diamonds were found in the possession of DeNormand. Coffey objected to the admission of the diamonds. The state challenged his standing on the ground

⁹² See cases cited note 75 *supra*.

⁹³ See note 88 *supra* and accompanying text.

⁹⁴ 325 F.2d 420 (10th Cir. 1963).

⁹⁵ *Id.* at 423.

⁹⁶ 344 F.2d 625 (2d Cir. 1965).

that the diamonds were not taken from his premises or his person. The court, relying on the language in *Jones*, concluded:

We hold that under these circumstances the search which brought the stolen jewels to light was "directed against" Coffey as well as DeNormand.⁹⁷

4. *Standing in Prosecutions in which Possession Convicts.*

Jones purports to confer standing on a defendant without a showing of an interest in the premises searched or the property seized, if conviction of the offense would flow from a showing of possession of the seized property, that is to say if "possession convicts." This aspect of the *Jones* case seems to have the greatest potential for extending standing to defendants. If the prosecution is one based on possession of narcotics, clearly *Jones* controls.⁹⁸ But in a narcotics prosecution the defendant may be convicted as an aider and abettor without proof that he had the seized narcotics on his person or premises. Should standing be granted to such a defendant to challenge the unlawful search of the perpetrator? Such a case was *Plazola v. United States*.⁹⁹ The charge was bringing fifty-eight pounds of marijuana into the United States, and concealing it and facilitating its transportation. The marijuana was not taken from the defendant's person or premises, nor was he in the vehicle from which it was taken. The court recognized his standing on the ground that defendant was charged with bringing the narcotics into the country and it was used against him at trial. The case surely goes a step beyond *Jones* by granting standing to one when it is not *his* possession that convicts. Of course, when trying a man on the theory of aiding and abetting, the charge on its face is the same as it would be if the prosecution theory were based on defendant's possession. It is not clear just how far the case goes in view of *Bible v. United States*,¹⁰⁰ from the same circuit. In *Bible* the defendant was charged as a principal in the same type of offense. Thus, the charge itself did not purport to depend on defendant's possession. The narcotics were seized from a confederate's car which had come across the border. The court declined to pass on whether defendant had standing because, even assuming he had standing, the search was patently legal.¹⁰¹

Jones has been thought by some to extend beyond narcotics

⁹⁷ *Id.* at 628-29.

⁹⁸ *Contreras v. United States*, 291 F.2d 63 (9th Cir. 1961); *Bourge v. United States*, 286 F.2d 124 (5th Cir. 1960).

⁹⁹ 291 F.2d 56 (9th Cir. 1961).

¹⁰⁰ 314 F.2d 106 (9th Cir. 1963).

¹⁰¹ See *id.* at 107.

cases when the charge itself alleged unlawful possession. For instance, in *Foster v. United States*,¹⁰² a defendant charged with unlawful possession of an adding machine stolen from an interstate shipment, was given standing to challenge the legality of a search of his employer's tavern. However, the court also looked to the employee's interest in the premises.¹⁰³ Likewise, in *United States v. Price*,¹⁰⁴ where the charge was possession of an unregistered still, the co-defendant, Riley, though arrested while off the premises, challenged the search of Price's house. The majority thought the search was legal so declined to rule on Riley's standing. The dissent, however, believed the search was illegal and

As for Riley, since he was indicted and tried for possession of the still, he too has standing to object to the admission of the seized items and the officers' testimony related thereto as evidence against him. . . .¹⁰⁵

This view is hardly universal for a court may look beyond the bare charge of unlawful possession. For example, in *United States v. Konigsberg*,¹⁰⁶ the charge was unlawful possession of goods stolen from interstate commerce. The court said:

What appellants are really saying definitely and directly is that since they were caught cold in the garage with the stolen clothes, they were in possession of the clothes and therefore they do not have to prove either a right to be on the premises or to the clothes. Appellants point to their indictment for possession of merchandise stolen in interstate commerce as bringing them, within the rule of *Jones v. United States*, . . .

In *Jones*, by statute, proof of possession was enough to convict. The controlling law of this appeal has no such provision or intimation. Possession is only one element of the crime charged. The theft, interstate commerce, knowledge of the theft and the value of the stolen clothes all were matters of proof by the Government. . . .¹⁰⁷

This case read *Jones* as narrowly as possible. It would restrict *Jones* to narcotics cases and would not extend it even to cases where unlawful possession was charged. Others, however, go beyond both narcotics cases and cases where unlawful possession is charged. *Simpson v. United States*¹⁰⁸ granted standing to a defendant charged with transporting a stolen vehicle over state lines. The vehicle was searched well after his arrest, so the search was not incident to the arrest. The government contended that

¹⁰² 281 F.2d 310 (8th Cir. 1960).

¹⁰³ See note 89 *supra* and accompanying text.

¹⁰⁴ 345 F.2d 256 (2d Cir. 1965).

¹⁰⁵ *Id.* at 263 (Waterman, J., dissenting).

¹⁰⁶ 386 F.2d 844 (3d Cir.), *cert. denied*, 379 U.S. 933 (1964).

¹⁰⁷ *Id.* at 847.

¹⁰⁸ 346 F.2d 291 (10th Cir. 1965).

without a claim of right of ownership defendant had no standing to complain. The court noted that the defendant claimed a possessory interest in the vehicle,¹⁰⁹ but, independent of that basis, he had standing because:

Possession was the basis of the prosecution in *Jones* and possession is the basis for the conviction in the instant case. . . .¹¹⁰

Though there was no statutory provision making possession enough to convict, the court did not take the narrow *Konigsberg* approach, but considered the fact that if the jury believed that the defendant was in possession of the stolen vehicle, it was legally entitled to infer his knowledge of the theft and transportation of the vehicle. An equally liberal approach was taken in *United States ex rel. Coffey v. Fay*.¹¹¹ Coffey had been convicted of the burglary of diamonds. They were found in the possession of a confederate during a search of his person. Coffey was held to have standing in part because the search was directed at him also,¹¹² but, in addition, the court noted that the jury was told that in assessing Coffey's guilt, it might weigh his physical proximity to the stolen jewels at the time of his arrest. This tended to suggest that under the circumstances Coffey himself might have been found to have been in sufficient possession as to seriously inculcate him. Going further than *Simpson* the court concluded:

[W]e hold that the State may not arrest, search, and prosecute a defendant on the theory that he is in possession of stolen property, and then object that the property was actually found on the person of a companion when the defendant moves to prevent the use of the property as evidence against him. . . .¹¹³

One more point should be noted about the *Jones* "possession convicts" rationale. The possession which convicts should, it seems, be possession at the time of the search.

Petitioner's conviction flows from his possession of that narcotics at the time of the search. Yet the fruits of that search, . . . were admitted in evidence on the ground that petitioner did not have possession of the narcotics at that time.¹¹⁴ [Emphasis added.]

Imagine a case where defendant is charged with the illegal importation of narcotics. Proof that he was in possession of the narcotics

¹⁰⁹ See note 90 *supra* and accompanying text.

¹¹⁰ *Simpson v. United States*, 346 F.2d 291, 295 (10th Cir. 1965). It should be noted that the court extended the "possession convicts" rationale to the premises searched not the property seized.

¹¹¹ 344 F.2d 625 (2d Cir. 1965).

¹¹² See note 97 *supra* and accompanying text.

¹¹³ *United States ex rel. Coffey v. Fay*, 344 F.2d 625, 629 (2d Cir. 1965).

¹¹⁴ *Jones v. United States*, 362 U.S. 257, 263 (1960).

is sufficient for conviction if unexplained. Proof of his possession at any time would be sufficient. Thus it is not necessary for the offense that possession be proved by evidence that he was in possession at the time of the search. In a prosecution where the proof possession is *not* the fact that the accused was in possession at the time of the search, while it may be said generally that the prosecution is one in which "possession convicts," *Jones* would not be applicable because it cannot be said that "possession . . . at the time of the search" convicts. This is important in understanding *Wong Sun v. United States*.¹¹⁵

In this "Chinese puzzle" one Hom Way steered the police to Jonnie Toy who led them to Mr. Yee who directed them to Wong Sun. Only Toy and Wong Sun were tried together for a narcotics offense. Mr. Yee turned narcotics over to the police which were admitted in evidence at the trial against both Toy and Wong Sun. The Court held that the initial visit to Toy constituted an illegal invasion of his premises and that it "tainted" the narcotics obtained from Mr. Yee. The narcotics were therefore inadmissible against Toy. They were, however, admissible against Wong Sun and were used to corroborate his confession that he *had* given Mr. Yee the narcotics. The Court explained this as follows:

Our holding, *supra*, that this ounce of heroin was inadmissible against Toy does not require a like result with regard to Wong Sun. The exclusion of the narcotic as to Toy was required solely by their relationship to information unlawfully obtained from Toy, and not by any official impropriety connected with their surrender by Yee. The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial. Cf. *Goldstein v. United States*, . . .¹¹⁶

The Court added in a footnote that this case was unlike *Jones* who was on the premises at the time of the search.

One could argue that *Wong Sun* overruled *sub silentio* the "possession convicts" aspect of *Jones*. The argument would be that in both cases the charge was one under which "possession convicts" and that in *Wong Sun* the evidence was admitted against him; further, that in *Wong Sun* the footnote distinguished the cases on the ground that in *Jones* he was on the premises searched while Wong Sun was not. Therefore, in order to have standing one must have been lawfully on the premises; that is to say, to have standing one must have the requisite interest in the premises searched. Such an argument would be mistaken. Though the

¹¹⁵ 371 U.S. 471 (1963).

¹¹⁶ *Id.* at 491-92.

purport of the footnote reference to *Jones* is obscure, it was probably meant to point up the fact that in *Jones* possession of the narcotics was inferred from Jones' presence on the premises at the time the narcotics were found on the premises. Thus, in *Jones* the possession from which conviction flowed was possession at the time of the search, whereas in *Wong Sun* the possession which convicts was possession at some earlier time when he had given the narcotics to Mr. Yee. This earlier possession was proved by Wong Sun's confession. The use at the trial of the narcotics obtained from Mr. Yee was merely to corroborate the confession. Thus, it cannot be said that *Wong Sun* overrules the "possession convicts" aspect of *Jones*, although it does restrict that aspect to "possession at the time of search convicts."

5. *Standing Under McDonald v. United States.*

In *McDonald* a co-defendant's case was reversed on the ground that the denial of McDonald's motion to suppress enabled the evidence to be introduced against the co-defendant to his prejudice. In order for a defendant to acquire standing under *McDonald*, it appears that the "victim" of the search must have moved to suppress the evidence,¹¹⁷ possibly in the same trial.¹¹⁸ If this occurs, it is not necessary that the "victim" appeal his conviction. The co-defendant may claim prejudice on appeal.¹¹⁹

The fact that *Jones* had restated the view that standing was for "victims" of searches as distinguished from those who claimed prejudice from the use of evidence gathered in a search directed at others, could have been considered as a rejection of *McDonald*, particularly since *Jones* extended standing to one lawfully on the premises. In *McDonald*, his co-defendant, Washington, was lawfully on McDonald's premises. Such an approach was not taken in *Hair v. United States*.¹²⁰ The court considered that *McDonald* provided a co-defendant a derivative standing.

Likewise, after *Wong Sun*¹²¹ it was urged that *McDonald* was overruled. In *Wong Sun* evidence was held to be inadmissible against one defendant but admissible against his co-defendant. This on its face seemed contrary to *McDonald*.

¹¹⁷ See *United States v. Chieppa*, 241 F.2d 635 (2d Cir. 1957).

¹¹⁸ See *Armada v. United States*, 319 F.2d 793 (5th Cir. 1963). The "victim's" case was tried separately.

¹¹⁹ *Rosencranz v. United States*, 334 F.2d 738 (1st Cir. 1964).

¹²⁰ 289 F.2d 894 (D.C. Cir. 1961); accord, *Rosencranz v. United States*, *supra* note 119; *Schoeneman v. United States*, 317 F.2d 173 (D.C. Cir. 1963).

¹²¹ See note 115 *supra* and accompanying text.

Two approaches have been taken to explain *Wong Sun*. In *United States v. Serrano*,¹²² standing was denied a defendant to complain of the illegal search of a co-defendant whose trial had been severed. The court relied on *Wong Sun* to deny standing to one whose rights were not violated in the search or seizure. However, the court did not consider that *McDonald* was overruled by *Wong Sun*. *McDonald* did not apply because no one in the instant case who had standing to move for suppression had done so. This approach suggests that it was the absence of Mr. Yee as co-defendant with standing to suppress that denied *Wong Sun* standing to complain. It also suggests that to have derivative standing under *McDonald* to an appellant whose co-defendant did not appeal, been obtained from the "victim" of the search; that one cannot claim prejudice from evidence which as to his co-defendant is merely the fruit of the poison tree.

A somewhat different view of *Wong Sun* was taken in *Rosencranz v. United States*.¹²³ The court extended standing under *McDonald* to an appellant whose co-defendant did not appeal. The co-defendant's motion to suppress had been denied whereupon he pleaded guilty. The co-defendant was the "victim" of the search. The government claimed *Wong Sun* overruled *McDonald* completely. The court disagreed, believing that the reason *Wong Sun* did not have standing was that the narcotics offered in evidence were obtained from Mr. Yee, who did not move to suppress the evidence and who could not complain anyway because he gave up the narcotics voluntarily. Thus, there was no impropriety toward Mr. Yee.

Both *Serrano* and *Rosencranz* recognize that *Wong Sun* limits standing under *McDonald* to that derived from the "victim" of the search in which the admitted evidence was obtained. That the limitation is inconsistent with the deterrent purpose of the exclusionary rule as it applies to the "fruit of the poisoned tree" is clear. In such cases:

To deny the derivative standing concept would invite law enforcement officers to select one defendant to be a victim of unlawful procedure in hope that information would be gained from him to convict others. The one defendant-victim could be allowed to go free without indictment in order to snare his contemporaries. . . .¹²⁴

While denial of an extension of derivative standing in "fruit of the poisoned tree" cases may be viewed as inconsistent with the

¹²² 317 F.2d 356 (2d Cir. 1963).

¹²³ 334 F.2d 738 (1st Cir. 1964).

¹²⁴ SHADDOAN, LAW AND PRACTICE IN FEDERAL CRIMINAL CASES 40 (1964).

deterrent purposes of the rule, the very concept of "derivative standing" can be viewed as inconsistent with the deterrent purpose of the exclusionary rule. The concurring judge in *Rosen-cranz* did not want to rely on the concept of derivative standing, depending as it does on the existence of a co-defendant victim. He said:

[I]t seems to me that the real basis of the exclusionary rule is its effect as a police deterrent, and the rule should be fashioned to deter the accomplishment of whatever purpose the police were improperly attempting to further. I believe, accordingly that the present defendants' rights are not simply dependent on Amorello's [the owner of the truck that was searched], as Washington's were said to depend on McDonald, but are broader, and stem from their own status as parties against whom the search was directed. Surely, in stopping Amorello's truck, the interests of the police were not limited to the driver, but were directed against all those, whether their identities were known or not, who might be engaged in the operation of the still. . . .¹²⁷

One might go even a step further if the rationale of the rule focuses on the court's duty to deter violations of the constitution, rather than focusing on defendant's rights and conclude that the courts should exclude such unconstitutionally obtained evidence on request of anyone against whom it is used. Such a result would seem to follow logically unless there is good reason to restrict standing to those whose Fourth Amendment rights were violated.

IV. STANDING TO LITIGATE CONSTITUTIONAL QUESTIONS

In the *Jones* case it was reasoned that the requirement that one be a victim of a search in order to suppress its fruits stems from the

general principle that a party will not be heard to claim a constitutional protection unless he "belongs to the class for whose sake the constitutional protection is given." *New York ex rel. Hatch v. Reardon*, 204 U.S. 152, 160.¹²⁸

In *New York ex rel. Hatch v. Reardon*,¹²⁷ Hatch was challenging the validity of a certain stamp tax statute. The Court held that the statute as applied to him was constitutional. He then sought to assert that it would be unconstitutional as applied to others,

¹²⁵ *Rosen-cranz v. United States*, 334 F.2d 738, 741 1st Cir. 1964) (Aldrich, J., concurring).

¹²⁶ *Jones v. United States*, 362 U.S. 257, 261 (1960).

¹²⁷ 204 U.S. 152 (1907).

and, if unconstitutional as to them, it was void altogether. Mr. Justice Holmes pointed out that the Court would not speculate on how the statute would be applied but would wait until someone who was within the class protected by the particular constitutional provision set up that protection to challenge the statute.

In a case decided just a month before *Jones*, the Court discussed these principles applicable to the litigation of constitutional questions. In *United States v. Raines*¹²⁵ the government appealed a district court decision that the provisions of the Civil Rights Act of 1957, authorizing the Attorney General to bring suit to enjoin state officials from discriminating against Negroes seeking to register to vote, were unconstitutional. The district court decided the statute would allow the United States to enjoin purely private action to deprive citizens of the right to vote on account of their color; thus, it was unconstitutional and void and so there was no basis to enjoin the official action. The Supreme Court held that the district court should not have gone into the question of whether the statute would be unconstitutional if applied to another but should have restricted itself to the case before it because of the rules it has set down for litigating constitutional questions. The Court said:

The very foundations of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here expressing that power "the gravest and most delicate duty that this Court is called on to perform." *Marbury v. Madison*, 1 Cranch 137, 177-180. This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to judge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York and Philadelphia S.S. Co. v. Commissioners of Emigration*, 118 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. . . . In *Barrows v. Jackson*, 346 U.S. 249, this Court developed various reasons for the rule. Very significant is the incontrovertible proposition that it "would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legisla-

¹²⁵ 362 U.S. 17 (1960).

tion." *Id.*, at 256. The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined. The Court further pointed to the fact that a limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were in fact correctly presented. We might add that application of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.

The District Court relied on, and appellees urge here, certain cases which are said to be inconsistent with this rule and with its closely related corollary that a litigant may only assert his own constitutional rights or immunities. In many of their applications, these are not principles ordained by the Constitution, but constitute rather "rule[s] of practice," *Barrows v. Jackson*, *supra*, at 257, albeit weighty ones; hence some exceptions to them where there are weighty countervailing policies have been and are recognized. For example, where, as a result of the very litigation in question, the constitutional rights of one not a party would be impaired, and where he has no effective way to preserve them himself, the court may consider these rights as before it. . . .¹²⁹

The standing requirements set out in *Hatch v. Reardon* and *Raines* are as a general rule applicable to cases where the litigant asks the court to overturn a statute which is constitutional as applied to him. However, even in such a case there are exceptions. When the court's action itself will impair the rights of third persons not parties to the law suit, and where the third persons have no effective way to preserve their rights, the court will permit the party to the suit to assert their rights as a reason for not applying the statute.¹³⁰

If the foregoing analysis of the rationale for the exclusionary rule is correct, it would seem that standing to object is not restricted by the *Hatch v. Reardon* doctrine, but fits within the exception to it. If the exclusionary rule is a duty of the courts arising out of the Fourth Amendment right of all the people, and designed to prevent future violations of their rights, rather than to repair the damage already done to a person's rights, either the defendant's or anyone's, then the only theory on which the court excludes is that to admit the fruit of the search would encourage violations of others' rights. This is equally true whether the litigant is the victim or not.

If it is correct that the exclusionary rule is not a rule for the protection of a defendant, as a defendant, and is not for reparation to the victim of the search, then, whenever a defendant-victim seeks to invoke the rule he may be said to be asserting

¹²⁹ *Id.* at 20-22. (Footnote omitted.)

¹³⁰ See *id.* at 22.

the rights of others—all the people—to be free from unreasonable search and seizure, and his standing to invoke the rule based on the fact that the court's action to admit the evidence would impair the constitutional rights of others. Add to this the fact that it has already been determined by the Supreme Court that the people have no other effective remedy to protect their rights,¹²¹ and it would seem to fit standing to invoke the exclusionary rule within both of the requirements of the exception to the *Hatch v. Reardon* doctrine.

The leading case regarding this exception and its rationale is *Barrows v. Jackson*.¹²² A restrictive covenant was entered into by owners of residential real estate Los Angeles, California. The covenant provided that none of the signers would permit the property to be used or acquired by non-Caucasians. One of the parties breached the covenant by selling to non-Caucasians. The vendor was promptly sued for damages. The Court noted that:

To compel respondent to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. The result of that sanction by the state would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants. If the state may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant. . . .

The next question to emerge is whether the state action deprives anyone of rights protected by the Constitution. If a state court awards damages for breach of a restrictive covenant, a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur. Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians. Denial of this right by state action deprives such non-Caucasians, unidentified but identifiable, of equal protection of the laws in violation of the Fourteenth Amendment. . . .¹²³

The Court, pointing out that no such injured party was before the Court claiming a denial of his constitutional rights, addressed itself to whether the present respondent had standing to assert the invasion of the rights of others in this case.

Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights to some third party. . . . The requirement of standing is often used to describe the constitutional limitations on the jurisdiction of this Court to "cases" and "controversies." . . . Apart

¹²¹ See *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹²² 346 U.S. 249 (1953).

¹²³ *Id.* at 254.

from the jurisdictional requirement, this Court has developed a complementary rule of self-restraint for its own governance (not always clearly distinguished from the constitutional limitation) which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others. . . . The common thread underlying both requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured in its operation. This principle has no application to the instant case in which respondent has been sued for damages totaling \$11,600, and in which a judgment against respondent would constitute a direct, pocketbook injury to her.

There are still other cases in which the Court has held that even though a party will suffer a direct substantial injury from application of a statute, he cannot challenge its constitutionality unless he can show he is within the class whose constitutional rights are allegedly infringed. . . . One reason for this ruling is that the state court, when actually faced with the question, might narrowly construe the statute to obliterate the objectionable feature, or it might declare the unconstitutional provisions separable. . . . It would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. . . .

This is a salutary rule, the validity of which we affirm. But in the instant case, we are faced with a unique situation in which it is the action of the state court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained. . . .¹²⁴

In *Barrows* there are three important points which gave the defendant standing to assert another's constitutional rights as a reason for the court not to award damages. These points bear a striking analogy to the criminal case where the defendant asserts others' Fourth Amendment rights as a reason for the court not to admit evidence.

The defendant in *Barrows* stood to lose a substantial amount of money just as a criminal defendant stands to lose his liberty. This "stake" in the outcome is a guarantee of a truly adversary proceeding. The lower court's action in awarding damages would encourage infringement of the constitutional rights of prospective Negro purchases just as the admission of unconstitutionally obtained evidence would encourage infringement of others' Fourth Amendment rights in the future.

In *Barrows* the Court concluded that the prospective Negro pur-

¹²⁴ *Id.* at 255-57. (Footnotes omitted.)

chaser had no way of preserving his right against such court action, just as the prospective victim has no way of preserving his right against the court's action.

There is a difference between *Barrows* and the criminal case where the exclusion of unconstitutional evidence is sought. In *Barrows* standing was granted to prevent the invasion of the rights of a minority not to be unreasonably discriminated against on the basis of race. In the criminal case, if standing is granted under a *Barrows* rationale, it would be to prevent the invasion of the "People's" right against unreasonable search. It would seem that the difference should not affect the result unless the people's right is of less importance than the minority's right. They are equally worthy of protection. In fact, to the extent that it is unsympathetic minorities whose right to privacy is most vulnerable, the equality of value of the two rights is more apparent.¹³⁵ This difference should not have a bearing on the question of when standing will be granted.

V. CONCLUSION

Standing to exclude evidence obtained in an unconstitutional search has generally been restricted to the victim of the search. This restriction has been based on various misconceptions as to the rationale for the exclusionary rule.

The rationale for the exclusionary rule is still not unanimously accepted or clearly discernible. It seems that a majority of the Court views it as a product of the Fourth Amendment alone unaided by the Fifth Amendment.

Though the Court usually denies a litigant standing to assert the constitutional rights of others as a basis for the Court's action, it recognizes an exception. The Court will grant such standing when the Court's action itself will tend to impair the rights of others and these others have no effective way of vindicating their rights.

It is believed that if the Court follows the logic of the exclusionary rule and the logic of the standing exception, it will apply that exception to the case of a criminal defendant who asserts the unconstitutional search of another as a basis for excluding the fruit of the search, because to fail to do so will tend to en-

¹³⁵ See text accompanying note 50 *supra*.

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courage violations of the Fourth Amendment and the people have no effective way of vindicating their rights.

Should the Supreme Court take this step, the Court of Military Appeals will follow its lead, despite the *Manual for Courts-Martial*.¹³⁶

¹³⁶ On the question of standing see Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L. J. 599 (1962).

BOOK REVIEW

OPINION OF THE COURT. By William Woolfolk. New York: Doubleday & Co., 1966. Pp 496.

In the period following World War II, the American novel has been effectively employed as a vehicle to examine social, legal, and governmental problems and the institutions which deal with them. This movement represents a return to the social novel,¹ as distinguished from the romantic or historical novel. The United Nations,² the United States Senate,³ and the Presidency⁴ have all been used as settings to examine the operation of these institutions as well as some of the current issues facing them. Other contemporary problems such as foreign policy,⁵ race relations,⁶ the ethics of defense counsel,⁷ and the role of the military⁸ have been discussed in less distinctive contexts.

With the growing influence of the United States Supreme Court in recent years, it was only natural to expect that an exhaustive novel about the Court would appear. One hoped that such a novel would analyze the Court's operation and decision-making process against the background of a good story as Allen Drury had done in *Advise and Consent*. William Woolfolk has attempted to write this long-awaited novel about the Supreme Court in his *Opinion of the Court* and has met with mixed success.

Woolfolk analyzes the Court from the point of view of his central figure, Paul Lincoln Lowe. As the novel opens in the late 1960's Paul Lowe, the Governor of Nebraska, is wrestling with a water shortage problem in his state. Lowe is a former attorney and was once a United States Supreme Court Clerk. He

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

¹ STEINBECK, *GRAPES OF WRATH* (1939).

² DRURY, *A SHADE OF DIFFERENCE* (1962).

³ DRURY, *ADVISE AND CONSENT* (1962).

⁴ BURDICK & WHEELER, *FAIL-SAFE* (1962); KNEBEL, *NIGHT OF CAMP DAVID* (1965).

⁵ LEDERER & BURDICK, *THE UGLY AMERICAN* (1958).

⁶ ELLISON, *THE INVISIBLE MAN* (1963).

⁷ TRAVER, *ANATOMY OF A MURDER* (1958); LEE, *TO KILL A MOCKINGBIRD* (1960).

⁸ KNEBEL & BAILEY, *SEVEN DAYS IN MAY* (1962); WOOK, *THE CAINE MUTINY* (1954).

is forty-six, married, and a Democrat. During his tenure as governor, Lowe is appointed to the Supreme Court by a conservative President, Lamont Howard, and oddly enough, joins the Court's liberal bloc. The plot from that point involves Lowe's private life, his experiences on the highest bench, and a brief mission to Burma (where he was shot down during World War II) for the President.

From the position of Paul Lowe, the junior associate justice, Woolfolk analyzes the Supreme Court in detail. His discussion of the operation of the Court and its decision-making process is excellent. His description of the Supreme Court conference⁹ in chapter 8 explaining how the justices debate the issues and reach a decision in a particular case is well worth the time taken to read the book. Likewise, in chapter 10, his explanation of how an individual justice writes an opinion for the Court is outstanding. We can identify with Lowe, as the draft of one of his earlier opinions is cut unmercifully by his brother justices, when he meditates:

The trouble is . . . that we work so much alone. We function as nine separate courts, each with different backgrounds, moral and legal precepts, economic beliefs. In this contented isolation, a man can easily be unaware of how he is regarded by his own colleagues.¹⁰

Of even more interest than Woolfolk's discussion of the Supreme Court decisional process are the cases which his fictional court decides. There are nearly a dozen of these, all dealing with controversial factual situations. All but one are recent decisions of various federal courts. They cover a wide range of topics from invasion of privacy and *de facto* segregation to patent application and loss of citizenship for draft dodging.

The final case in the novel is given the most serious treatment by Woolfolk and, interestingly enough, is the only one without judicial precedent to substantiate its fictional holding. The William Weaver Case, as it is called, involves a Negro in Louisiana who is released from prison, promptly steals an automobile, abducts a white woman, and rapes her on a lonely road. Although Weaver received court-appointed counsel at the time he was "booked," he made several incriminating statements at the initial interrogation

⁹ For some additional material concerning the Supreme Court conference, see the following articles by Associate Justice Tom C. Clark: *The Supreme Court Conference*, 19 F.R.D. 303 (1956); *Supreme Court Conference*, 37 TEXAS L. REV. 273 (1959); *Decisional Processes of the Supreme Court*, 50 CORNELL L. Q. 385 (1965).

¹⁰ P. 141.

which followed. At the ensuing trial, Weaver was found guilty and sentenced to death. He then appealed to the state supreme court. His appeal, however, was denied on the basis of the transcript of the testimony. The "fly in the ointment," however, was that the court reporter, a rather religious white lady, was unable to transcribe (from shorthand to record) the parts of the testimony she considered obscene, and simply omitted these parts from the record. The appointed counsel brought the matter to the attention of the trial judge who simply ordered the omitted testimony transcribed onto the record by another reporter. At the time this additional matter was being transcribed, Weaver was not represented at the proceeding. Counsel contended that this process was patently illegal and that the first reporter was obviously biased which probably colored her earlier efforts and therefore invalidated the entire record. The trial judge, however, denied Weaver's plea for a new trial on the grounds that the new material was adverse to his cause and thus its absence had prejudiced him in no way. The state supreme court likewise refused to order a rehearing or a new trial on the grounds that the record as it *had* existed was then complete enough for them to base a decision.

At this point, the defendant's appointed counsel withdrew from the case (for financial reasons) and turned it over to the "Everyman's Legal Guild." Ken Norris, Lowe's former law partner and present director of the organization, took the case. It is through Norris' appeal to the Supreme Court that Woolfolk launches his vitriolic attack against capital punishment. The case is finally (and quite naturally, since Woolfolk wrote the book) decided in favor of William Weaver on the narrow grounds that the punishment of death for the crime of rape is unconstitutional as it constitutes "cruel and unusual punishment" which is prohibited by the Eighth Amendment of the Constitution. The decisional process involved in the case is most exciting and provides the denouement of the book. It is also through his work on this case that Lowe emerges as the new leader of the Court's liberal bloc.

Although the material in *Opinion of the Court* is both topical and informative and these reasons alone make the book worth reading, no review of it as a novel would be complete without some critical attention given to its mechanical aspects. The plot, especially where it concerns Lowe's personal affairs, is somewhat shallow. Although Woolfolk informs the reader of Lowe's actions at all times, the reader is oftentimes not given valid rea-

sons for these actions. We are shown how Lowe reasons as a judge, but we simply are unable to learn what motivates him as a human being. Perhaps the use of a more effective stream of consciousness technique (through the character Lowe) would have added depth to the plot.

This lack of plot depth is not enhanced by a lack of characterization of the other characters in the novel. At the end of the book, we know a great deal about Paul Lowe, but very little about anyone else in the book. The other characters are dealt with superficially and are presented simply as stereotype images of real human beings. The plot could have been strengthened if we had known a little about the background of the other central characters so that we could understand why they performed as they did in the story. Woolfolk's inability at characterization as a novelist probably stems from the fact that he was formerly a television writer and thus given to visual methods of portraying his characters for that medium.

Nor is Woolfolk's weak plot made better by his loose and rambling style. It is difficult to follow Lowe's reasoning when at one moment he is pondering a complex legal point and in the next is reliving some sexual fantasy from his past. The sheer irrelevancy of this type of literary "hopscotch" is both trying and depressing to the reader. Woolfolk simply does not involve the reader sufficiently in the novel to be able to skip to all points of the plot indiscriminately and still maintain the reader's attention.

The saving grace in *Opinion of the Court*, aside from its interesting and pertinent subject matter, is Woolfolk's ability to describe the Supreme Court and its operation. He has the unusual facility to make the highest court come alive as people working together, often at cross purposes, to decide what legal rule will be applied in a certain case. This sort of description buries forever our mental picture of the Supreme Court as a cold faraway institution, which is what the book was probably intended to do.

One final caveat should be added for the future reader of *Opinion of the Court*. William Woolfolk is not a lawyer, although he wrote the excellent television series, "The Defenders," which featured a father-son legal team and dealt with controversial socio-legal problems. His lack of a thorough legal background, however, causes him to misplace emphasis in his discussion of the judicial process. He is far too concerned with the social and individual implications in a particular decision, and not enough

with the process of legal reasoning which preceded that decision. Like a layman, he is all too willing to toss aside precedent and reason for his desired result. By doing this, he undermines one of the most important aspects of the common law tradition; its certainty and reasoned experience based upon the concept of *stare decisis*. Supreme Court Justice Cardozo best summed up Woolfolk's way of thinking in *Doyle v. Hofstader* when he said:

A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price for relieving itself of the bother of awaiting a session of the Legislature and the enactment of a statute in accordance with established forms.¹¹

JOHN G. NEWITT, JR.*

¹¹ 257 N.Y. 244, 268, 177 N.E. 489, 498 (1931).

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