vening authority (or another commander), including a request to the commander to order psychiatric evaluation of the accused; (3) initiation of an inquiry by the court into the sanity of accused; or (4) an actual ruling that the accused was or was not insane, at the time of the offense, or is or is not insane at the time of trial. Different principles apply to each of these rulings . . ." [69]

The ruling of the law officer in granting the continuance to the defense "should not be submitted to the court-martial for its concurrence, even though the purpose of the continuance granted or denied is to permit the defense to seek the appointment of a psychiatric board. In general, the granting of a continuance is an interlocutory matter for the law officer's final ruling, pursuant to Article 51b, and subject to reversal only for a breach of discretion. . . . That rule applies to any continuance unless, in terms of Article 51b, granting the continuance is a ruling on a 'question of accused's sanity'. If it amounts to such a ruling, the law officer's decision is subject to reversal by the court-martial.

"In at least two cases the Court of Military Appeals has dealt with the granting of a continuance on a defense motion for the obtaining of psychiatric evidence as a matter within the discretion of the law officer . . . ," [70] but it does not appear that the necessity of concurrence by the court members was ever raised in those cases. We are, however, satisfied that the propriety of a continuance to permit the defense to obtain more evidence, even on a question of insanity, or to take other preliminary steps, is not itself a 'question of accused's sanity'. It does not require any determination of *sanity*, but only the same sort of preliminary decision as to the adequacy of the basis for requesting additional *time* which is true of any continuance." [71]

c. Action of the convening authority. The Manual states that if the court-martial decides to make further inquiry, the court may adjourn and report the matter to the convening authority with recommendations. The recommendations may include the suggestion that the accused be examined by a board of medical officers. After the board has reported, the convening authority may withdraw the charges or send the matter back for trial.[72]

The choice of action is more restricted when the court has directed further inquiry than when it has found a lack of mental capacity to stand trial. If the convening authority disagrees with the finding that the accused does not possess the required mental capacity, the Manual allows him to return the case to the court for reconsideration.[73] If the case has been sent by the court to the convening authority with a recommendation that a psychiatric board be appointed, then the convening authority either has to withdraw the charges or refer the accused to a board for examination.[74] If the convening authority follows the latter alternative, he again has two courses of action available after the medical board has reported, (1) to dismiss the charges, or (2) return the case to the court-martial.[75]

3. Motion based on mental incapacity. *a. General.* The issue of the lack of mental capacity will usually be raised by evidence resulting from a pretrial inquiry or an inquiry directed by the court during trial. The Manual says that an accused should not "be brought to trial unless he possesses sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense." [76] The motion raising the question of mental capacity never goes to the merits of the case, even though it may seem closely connected to the issue of responsibility. The defense counsel normally would raise the issue of capacity by a motion requesting a con-

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[69] 30 CMR 805, 809.

[70] Citing, *inter alia*, United States v. Frye, 8 USCMA 187, 23 CMR 361 (1957).

[71] 30 CMR 805, 809–810.

[72] MCM, 1951, para. 122*b*.

[73] MCM, 1951, para. 122*b*. But see § V, ch. XI, *supra*, for a discussion of the validity of a similar provision of the Manual.

[74] Footnote 2, ACM *Cook*, 30 CMR 805 (1961), 810.

[75] *Quaere:* If the convening authority withdraws the charges without conducting an inquiry as recommended by the court, does former jeopardy attach? Suppose the convening authority dismisses after the medical board has conducted its inquiry. Does the effect on accused's amenability to another trial depend on the findings of the medical board? Suppose after the court has recommended inquiry, the convening authority returns the case with a request for the court members to reconsider because he finds "no substantial basis for further inquiry into accused's mental" condition? See WC NCM 6000510, Simpson, 10 Feb 60 (unreported).

[76] MCM, 1951, para. 120*c*. United States v. Williams, 5 USCMA 197, 17 CMR 197 (1954).

tinuance or stay in the proceedings. Evidence which reasonably indicates the problem of capacity is present, is enough, however, to require the law officer to place the issue before court, even in the absence of affirmative action by the defense counsel. The law officer must exercise great care in ruling on defense motions which might raise the question of capacity. If the substance of the defense motion or request involves a question of capacity, the inappropriate form of relief requested should not control. In other words, if the evidence reasonably raises the issue of the accused's mental capacity, but the defense counsel makes a motion for *dismissal,* nevertheless the law officer should treat it as a request for a *continuance,* which is the proper motion to raise the issue.

The issue of mental capacity is always an interlocutory question, although it may be raised at any time during the trial, even after findings. Despite the interlocutory nature, the law officer's rulings on mental capacity are treated as questions involving "insanity" within the meaning of Article 51*b*. They are, therefore, subject to objection by any member of the court-martial.

b. Procedure. It is desirable to raise and dispose of the issue of capacity early in the proceedings in order not to confuse the separate questions of mental capacity and mental responsibility in the minds of the court members. Once the former issue is raised, the law officer will rule on the motion whether it be at his or the defense counsel's instance. After his ruling and before asking if there is any objection, the law officer must give special instructions to the court. These instructions should include an explanation of mental capacity, the distinctions between the questions of mental capacity and mental responsibility. Also it is important to point out that once the issue of the accused's lack of mental capacity is raised, the burden is on the government to establish the accused's capacity beyond a reasonable doubt.

If no objection is raised by a court member, the ruling of the law officer is final. But if a member of the court does object, the law officer will then be obliged to submit the question to the court under appropriate instructions. These instructions should include, in addition to what was given before the objection, an explanation of the presumption of sanity, the burden and degree of proof required, what reasonable doubt is, and the voting procedure to be followed. The voting will be oral, beginning with the junior in rank.[77] A majority vote will decide the question; a tie vote shall be a final determination against the accused in this particular issue.[78]

Illustrative Case

United States v. *Williams,*
5 USCMA 197, 17 CMR 197 (1954)

In discussing rulings involving the question of the accused's lack of mental capacity at the time of trial the Court said:

> . . . [T]he law officer's ruling is final unless objected to. However, if the court-martial members are to perform their task of objection or not objecting to the ruling with some degree of intelligence, they should have some assistance from the law officer. We, therefore, believe that after the law officer announces his ruling and before he asks if there is any objection, he should give certain instructions to the court. . . . Certainly the better practice is for the law officer to instruct the members in essence as follows: That the issue presented is whether the accused possesses sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense; that he must be able to comprehend rightly his own status and condition in reference to such proceedings; that he must have such coherency of ideas, such control of his mental faculties, and such power of memory as will enable him to identify witnesses, testify in his own behalf, if he so desires, and otherwise properly and intelligently aid his counsel in making a rational defense; that his mental capacity at the time of trial is different

[77] UCMJ, Art. 51(b).
[78] UCMJ, Art. 52(c). United States v. Williams, 5 USCMA 197, 17 CMR 197 (1954).

from that involved in determining mental responsibility at the time of the commission of the offense; that lack of mental responsibility at the time of commission of the offense constitutes a defense to the crime charged, while the lack of mental capacity to stand trial does not; that once the issue is raised, the burden to establish sanity is on the Government; that there is no requirement that the accused prove he lacks such mental capacity; and depending upon the ruling, that if any member does or does not entertain a reasonable doubt as to mental capacity, he should object to the ruling.[79]

When an objection is made, the court should be further informed as to the effect of the inference of sanity, and

> that if in the light of all evidence, a reasonable doubt exists as to the mental capacity of the accused to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his defense, the motion should be granted; that if they are satisfied beyond a reasonable doubt the accused has the mental capacity to understand and do the things related above, the motion should be denied; that a majority vote is controlling; that a tie vote is a determination against the accused; and that the finding should be to grant or deny the motion or the relief sought.[80]

c. Action of the convening authority. If the court finds that the accused lacks mental capacity, it will record its findings and forward the record to the convening authority.[81] The convening authority may withdraw the charges from the court and either dismiss them or hold them in abeyance until the accused regains his mental capacity. If the convening authority decides that the accused's disability was temporary and that the accused has recovered his capacity, then he may return the case to the court for reconsideration of its findings.[82]

The Manual also states that if he disagrees with the court in its finding that the accused does not possess the requisite mental capacity, then the convening authority may immediately return the case to the court for reconsideration.[83] The validity of this provision is doubtful. Paragraph 67*f* of the Manual says that if the convening authority disagrees with the court on an issue of fact, the court will exercise its "sound discretion" in reconsidering the motion. The law officer should carefully instruct the members of the court that the question is one of fact and that the decision is one within their discretion, to be made independent of the views of the convening authority.

A court-martial may grant a continuance for reasonable cause at any time and without limitation on the number which may be granted.[84] The Court of Military Appeals has held that the granting of a continuance by the court is an interlocutory question which is not subject to review or reversal by the convening authority.[85] The continuance in *Knudson*, however, did not involve mental capacity. Nevertheless the fears of command influence voiced by the Court of Military Appeals in *Knudson* might be aroused by a convening authority's immediately ordering reconsideration of the question of mental capacity. Such an order for reconsideration might well be considered as tantamount to review and reversal of the court's finding on an issue of fact.

The basic premise behind the granting of the continuance is that the accused's lack of mental capacity is a temporary condition and that once capacity is restored the trial will proceed. In granting the continuance, the court-martial contemplated that when the accused's lack of mental capacity was cured, the case would be returned to it for reconsideration of the issue of capacity. When the convening authority returns the case after a lapse of time, during which he determines that the accused's mental condition has been cured, he is simply performing his intended role in the procedure

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[79] 5 USCMA 197, 204, 17 CMR 197, 204.
[80] *Ibid.*
[81] MCM, 1951, para. 122*b*.
[82] *Ibid.*
[83] *Supra* note 81.
[84] MCM, 1951, para. 58*d*.
[85] United States v. Knudson, 4 USCMA 557, 16 CMR 131 (1954).

and in no way threatens the independence of the court-martial.[86]

The better practise would be for the convening authority to hold the proceedings in abeyance, during which time, with expert advice, he can determine when the accused's capacity is restored. Then he can return the case to the court for reconsideration. To immediately return the case because of the convening authority's disagreement with the finding may result in reversal on appellate review.

Where the accused's lack of mental capacity appears to be a permanent condition, the convening authority would be best advised to dismiss the charges.[87]

4. Motion based on mental irresponsibility. *a. General.* The issue of the accused's mental responsibility is concerned with the state of the accused's mind at the time he allegedly committed the offenses charged. The test is whether the accused's mind was so far free from mental disease and defect, or derangement as to be able to distinguish right from wrong and to adhere to the right. This issue can easily be confused with the question of mental capacity, but the two issues must be separated since each is treated differently procedurally and substantively.

b. Procedure. The question of the accused's mental responsibility usually would be considered by the court only once, that being when the court members deliberate on the findings. A motion raising the issue, however, may be considered by the court as an interlocutory matter.[88]

When the issue has been raised by motion, the law officer will first rule on the motion, subject to objection by any court-member. If there is no objection, the law officer's ruling disposes of the question until the time for preverdict instructions. When an objection is raised, the law officer should instruct the court on the test for insanity, burden of proof, reasonable doubt, and voting procedures.[89]

A motion to dismiss for a lack of mental responsibility, although identical to a motion for a finding of not guilty in that the granting of each will result in acquittal, is still a separate and distinct motion form.[90] On this motion, the court may consider evidence presented by *both* the prosecution and defense. Second, the court must be convinced beyond a reasonable doubt that the accused did possess the requisite mental responsibility at the time of the offense. The only real difference between determining the issue on motion during deliberation on findings is the voting percentages required to sustain a ruling or finding against the accused.[91]

If insanity is raised as an interlocutory matter and the court finds the accused sane, the trial proceeds on to findings. Before the court closes to deliberate on its finding, the issue of insanity at the time of the offense must be resubmitted to the court.[92] The instructions given at this point should cover the test for mental irresponsibility, burden of proof, reasonable doubt, and voting procedures. Note that when the issue of responsibility is decided on an interlocutory basis only a majority vote is needed

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[86] *Quaere:* If the accused's "temporary" lack of mental capacity does not "clear up" within a reasonable time, may the convening authority send the case back to the court with an order to proceed? Would not this deprive the accused of a fair trial? *Cf.* United States v. Olvera, 4 USCMA 134, 15 CMR 134 (1954), where CMA held that amnesia did not amount to a lack of mental capacity, because to hold otherwise would mean that permanent loss of memory would protect the accused from trial, thereby in effect negating his responsibility. But the court's opinion by Judge Brosman added: if the condition of amnesia were only temporary, "judicial discretion would demand" the granting of a continuance to allow a recovery. Chief Judge Quinn dissented because he felt that a claim of amnesia supported by independent evidence was "reasonable cause" for a continuance.

[87] *Quaere:* If the convening authority fails to act at all, either to dismiss or return the case to the court, what remedy does the accused have?

[88] United States v. Williams, 5 USCMA 197, 17 CMR 197 (1954).

[89] *Ibid.*

[90] See section I, Motion for a Finding of Not Guilty, *supra* for discussion of military's Motion for Finding of Not Guilty and the Federal court's motion for judgment of acquittal.

[91] The divergent treatment of a motion for finding of not guilty and motions raising the issue of insanity finds support in the Code, the Manual, and military appellate decisions. In Art. 51(b), UCMJ, both types of rulings are listed as exceptions to finality of interlocutory rulings by the law officer. In para. 71*d*, MCM, 1951, the standard of proof for ruling on a motion for finding of not guilty is set forth. This test has been upheld in CM 404894 *Gluch*, 30 CMR 584 (1960), 541. See § 1 4c, Standard of Proof, *supra*. The Court of Military Appeals in *Williams*, *supra* note 88, held that when instructing the court members after one of them has objected to his ruling on a motion raising the issue of mental responsibility, the law officer should instruct the court on reasonable doubt. The lower greater standard of proof suggests that defense evidence can be considered in ruling on the insanity motion. Consideration of all evidence is made necessary because to overcome the inference that the accused was sane at the time of the offense, evidence of insanity must be offered. Since the defense would normally present this evidence, it would necessarily have to be considered by the court in ruling on the issue as an interlocutory question.

[92] MCM, 1951, para. 120*b*.

to decide the question against the accused by finding that the accused possessed the requisite mental responsibility.[93] This finding, therefore, cannot be treated as a finding on the merits because no person may be found guilty without the concurrence of at least two thirds of the court members present.[94]

The Court of Military Appeals in the *Williams* case[95] suggested that dual submission of the issue of responsibility be avoided. If the law officer believes the evidence is such that there is a fair chance that the court will sustain the motion, he would be justified in submitting the issue on an interlocutory basis. If, however, the evidence is not conclusive and it is likely that evidence on the merits would help the court decide the issue of mental responsibility, the law officer should defer his ruling and submit it to the court when it closes for findings.[96]

If the final determination on the question—when raised on an interlocutory basis, is that the accused was not mentally responsible for his acts, the court will sustain the motion and forward the record to the convening authority.[97] This ruling may not be returned to the court for reconsideration.[98]

The issue of the lack of mental responsibility usually would be disposed of as any other essential issue by submitting it under appropriate instructions to the court-martial for determination as part of the question of guilt or innocence. If the issue of insanity has been raised by the evidence, then the sanity of the accused becomes, as an element of the offense, an essential issue which the prosecution must establish beyond a reasonable doubt. Once sanity has become an essential issue, the law officer is obliged to instruct the court members on insanity (mental responsibility) with or without request by the defense.[99]

5. **Instructions.** *a. General.* The law officer must give instructions *sua sponte* on the issue of insanity, once the issue is raised.[100] In *Burns*, the Court said:

> . . . [I]f it is reasonably raised, then sanity becomes an essential issue which must be established by the prosecution. This demands a specific finding by the court-martial and obviously it ought to be informed on the law. We believe that when a specific finding on a particular issue is required before the Government can establish its case, an instruction is called for *with or without request by the accused.* Sanity falls in this category and it was error for the law officer not to cover the subject with some instructional guidance.[101]

b. Partial mental responsibility.[102] To necessitate an instruction on partial mental responsibility "[t]here must be evidence from which a court-martial can conclude that an accused's mental condition was of such consequences and degree as to deprive him of the ability to entertain the particular state of mind required for the commission of the offense charged."[103] There must be a showing of lack of capacity to entertain the necessary state of mind rather than only an impaired ability.[104]

c. Inference of sanity.[105] According to the Manual, "[t]he accused is presumed initially to be sane and to have been sane at the time of the alleged offense. This presumption merely supplies the required proof of mental capacity and responsibility and authorizes the court to assume that the accused is sane until evidence is presented to the contrary.[106]

The prosecution need not establish the accused's sanity until the issue has been raised by substantial evidence tending to prove that

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[93] UCMJ, Arts. 51(b) and 52(a).
[94] UCMJ, Art. 52(a)(2).
[95] United States v. Williams, 5 USCMA 197, 17 CMR 197 (1954).
[96] DA Pam 27-9, "The Law Officer" (1958).
[97] MCM, 1951, para. 120*b*.
[98] MCM, 1951, para. 67*f*.
[99] United States v. Burns, 2 USCMA 400, 9 CMR 30 (1953).
[100] *Ibid.*
[101] Emphasis supplied. 2 USCMA 400, 404, 9 CMR 30, 34. For substantive content of instructions on mental capacity and mental responsibility, see United States v. Williams, 5 USCMA 197, 17 CMR 197 (1954) and DA Pam 27-9, "The Law Officer" (1958), app. IX.
[102] As used here the term "partial mental responsibility" means the lack of mental capacity to entertain specific intent, knowledge or premeditation, whichever state of mind is an element of the offense in question. For substantive discussion of "partial mental responsibility," see Manson, *Lack of Mental Capacity to Entertain Specific Intent—Unique Rule*, DA Pam 27-100-4, Mil. L. Rev. April 1960, p. 79.
[103] United States v. Storey, 9 USCMA 162, 25 CMR 424 (1958).
[104] *Ibid.* See DA Pam 27-9, "The Law Officer" (1958), App. X for suggested instructions on partial mental responsibility.
[105] See DA Pam 27-172, Evidence (1962) ch. III, Presumptions.
[106] MCM, 1951, para. 122*a*.

the accused is not sane. Then the prosecution must show the accused's sanity beyond a reasonable doubt just as with any other issue of fact which relates to an element of the offense. Once the issue has been raised, the law officer should avoid mentioning the "presumption" of sanity in his instructions, but instead advise that the court may consider the general human experience that most people are sane.[107]

Illustrative Cases

United States v. *Biesak,*
3 USCMA 714, 14 CMR 132 (1954)

The law officer's instructions on the "presumption" of sanity included a verbatim recital of paragraph 122*a* of the Manual. The defense argued that the Manual's reference to evidence "supplied by the presumption of sanity" was "an improper attempt to characterize as 'legal and competent evidence' something which, in its very nature, cannot assume such a character." The Court, finding no prejudicial error, upheld the conviction.

Opinion: When we consider as a whole the instructions . . ., and when we note the references to the requirement for conviction that there be no reasonable doubt of sanity, together with the statement that sanity had been put in issue by "substantial evidence," we cannot regard the reference to "evidence supplied by the presumption of insanity" as constituting more than advice to court members that they may properly consider all of the evidence in the light of the human experience that most men are sane.

* * *

[B]ecause of its inartful [quality] we would be preferable to omit from future instructions in this area any reference to evidence "supplied by the presumption of sanity." Of course, the court-martial may always be advised of the applicability of generalized human experience to the resolution of any issue of sanity raised by the evidence.[108]

United States v. *Richards,*
10 USCMA 475, 28 CMR 41 (1959)

The law officer included in the instruction on the issue of sanity the statement that the court could "consider the general experience of mankind that most people are sane and that insanity may be feigned with ease." Although this statement that insanity might easily be feigned was found in *Biesak,* the court cautioned against its future use.

United States v. *Oakley,*
11 USCMA 187, 29 CMR 3 (1960)

The law officer instructed that the accused was presumed to be sane and that the presumption remained in effect until a reasonable doubt appeared from the evidence. The Court held that this reference to the presumption was not prejudicial to the accused where the law officer eliminated the presumption from consideration by further instructing the court members that substantial evidence of the accused's sanity *had* been presented which made insanity an essential issue of fact to be determined from the evidence.

The majority felt that there was no need to consider whether the part of the instructions which discussed the "presumption" was legally correct, because when the instructions were considered as a whole, there was no prejudice. In his concurring opinion Judge Ferguson said that when evidence of insanity had been introduced, the law officer should not mention the "presumption" of sanity, but that he could properly tell the members that they may take into account the "common experience of mankind" in deciding the question.

6. Motions after findings. The issue of insanity may still be raised after a finding of guilty by the court-martial.[109] This would most commonly occur in guilty plea cases, where the defense has presented no evidence on the merits, but submits, in mitigation for sentencing purposes, evidence that raises a question of insanity. The law officer should then withdraw the guilty plea and substitute a not guilty plea therefor. If findings of guilty had already been announced this would necessitate a setting aside of the findings before withdrawal of the guilty plea. Once a not guilty plea has been

[107] United States v. Biesak, 3 USCMA 714, 14 CMR 132 (1954).
[108] 3 USCMA 714, 724, 14 CMR 132, 142.
[109] United States v. Trede, 2 USCMA 581, 10 CMR 79 (1953).

entered, the case would be reopened for the presentation of additional evidence. Then the issues would be submitted to the court in accordance with the not guilty plea.[110]

7. Appellate review. Inquiry into the accused's mental condition does not end with the trial. The issue may be raised for the first time and inquiry made by the convening authority or the board of review.[111] Recourse may be had to matters outside the record in dismissing or ordering a rehearing where the issue is initially raised during review. Matters outside the record, however, may not be considered to erase a reasonable doubt of the accused's sanity left by the evidence presented at the trial.[112]

A lack of mental capacity on the part of the accused will toll appellate review until the accused regains mental capacity.[113] Some exceptions to this general rule have been laid down by the Court of Military Appeals. The Board of Review may determine whether the accused lacked mental capacity at the time of trial despite his lack of capacity at the time of appellate review.[114] The Board of Review may also proceed to a finding that the accused lacked mental responsibility at the time of the offense and dismiss the charges regardless of the accused's mental condition at the time of review.[115] Before dismissing, the Board of Review must give the Government an opportunity to meet the defense evidence, cross-examine defense witnesses and offer rebuttal evidence.[116]

[110] 2 USCMA 581, 588, 10 CMR 79, 86.
[111] MCM, 1951, para. 124; United States v. Burns, 2 USCMA 305, 9 CMR 30 (1953).
[112] United States v. Carey, 11 USCMA 448, 29 CMR 264 (1960).
[113] United States v. Korzeniewski, 7 USCMA 614, 23 CMR 101 (1956).
[114] United States v. Jacks, 8 USCMA 574, 25 CMR 78 (1958).
[115] United States v. Thomas, 13 USCMA 166, 32 CMR 166 (1962).
[116] 13 USCMA 168, 168–169, 32 CMR 168, 168–169.

CHAPTER XVII

ARGUMENTS AND INSTRUCTIONS

References: MCM, 1951, para. 72, 73.

Section I. INTRODUCTION

After both sides have rested, arguments may be made to the court by the trial counsel, the accused, and his counsel.[1] Before arguments are presented, however, the law officer should advise counsel of the instructions which he intends to give to the court,[2] so that these may be used as a framework of the arguments.

The argument is a valuable right of the parties, and, so far as the accused is concerned, the Court of Military Appeals recognizes that it may be the most important part of the trial.[3] For this reason, while the trial counsel may freely waive the right to argue,[4] the defense counsel is free to do so only in the most unusual case.[5]

Section II. CONTENT

1. General. Generally speaking, the rules which apply to arguments in civilian courts also apply in the military.[6] Both trial counsel and defense counsel are held to the same high standards in argument,[7] but, since misconduct on the part of the defense is not likely to prejudice the accused, most of the decided cases are concerned with the misconduct of the prosecutor.

2. Inflammatory comments. The state of the cases in the military at the present indicate that inflammatory statements[8] by trial counsel are not *per se* misconduct. While there is language in the cases to the effect that inflammatory arguments should be avoided, the Court of Military Appeals—recognizing the heat of adversary proceedings—has been quite liberal in upholding cases in which it was claimed that inflammatory statements prejudiced the accused, however, the Court has required such statements to be based upon matters found in the record, upholding them as fair comment upon the evidence. The case of *United States* v. *Doctor*[9] is a leading military case, concerning

[1] MCM, 1951, para. 72a. Although the Manual permits the practice, there appear to be no reported cases in which accused, represented by counsel, argued his own case. Moreover, in the usual case, such action would appear to be highly undesirable.

[2] DA Pam 27-9, Military Justice Handbook, The Law Officer (1958), 51. Where counsel have based their arguments on proposed instructions, it would appear to be dangerous practice for the law officer to change his instructions thereafter.

[3] United States v. Sizemore, 2 USCMA 572, 10 CMR 70 (1953).

[4] MCM, 1951, para. 72a.

[5] United States v. McMahan, 6 USCMA 709, 21 CMR 31 (1956). It should be noted that *McMahan* did not involve a situation where defense counsel waives argument for tactical reasons where trial counsel has already waived his opening argument in order to preclude the trial counsel from making any statement at all. To the contrary, in *McMahan*, the trial counsel had already made a "lengthy and able argument". Judge Latimer felt that a failure to argue in that situation is, for all practical purposes, an admission of guilt.

[6] See generally, Comment, *Permissible Scope of Summation*, 56 Colum. L. Rev. 981 (1956).

[7] ACM 9406, *Weller*, 18 CMR 473 (1954).

[8] Inflammatory statements are those of a nature calculated to inflame the passions and prejudices of the Court or to weigh upon its sympathies in favor of the specific victim of the wrongdoing of the accused, the class to which the victim belongs or society in general. For a detailed treatment of this entire subject, see Haight, *Argument of Military Counsel on Findings, Sentence and Motions: Limitation and Abuse*, Mil. L. Rev., April 1962 (DA Pam 27-100-16, 1 April 1962), 59.

[9] 7 USCMA 126, 21 CMR 252 (1956).

the extent to which counsel may go in argument. There, the accused was on trial for false swearing. The trial counsel did not cross-examine the accused, and later in argument, responding to defense counsel's argument as to the inference to be drawn from such failure, the trial counsel stated that he did not like to listen to lies being uttered from the witness stand. In addition, trial counsel characterized the accused a "liar" many times during the argument. The Court of Military Appeals held that characterizing the accused as a "liar" was fair comment upon the evidence.[10] The Court stated that "if his closing arguments had a tendency to be inflammatory, we must make certain it is based on matters found in the record. Otherwise, it is improper. The issues, facts, and circumstances of the case are the governing factors as to what may be proper or improper."[11]

3. Comment upon accused's failure to testify. The trial counsel is prohibited from commenting directly[12] or indirectly[13] upon the accused's failure to testify in his own behalf. On the other hand, a remark that the evidence is uncontroverted is not improper where other evidence besides the accused's denial is available to the defense to refute the prosecution's evidence.[14] However, where no one except the prosecution witness and the accused were present when the acts were committed and were of such a nature that only the accused could reasonably have been expected to furnish testimony contradicting the prosecution's evidence, such comment by the trial counsel is considered to be a comment upon the accused's failure to testify and thus erroneous.[15] But merely calling attention to the accused's presence and demeanor in the courtroom has been held not to be an improper comment on his failure to testify.[16]

4. Arguing facts not in evidence. Counsel may not comment in argument upon matters not in evidence before the Court.[17] The basis for the prohibition is that a court in its deliberations are not likely to be able to discriminate between facts stated in argument and those properly admitted. In *United States* v. *Allen*,[18] where the accused's only defense was insanity, the Court of Military Appeals held it prejudicial misconduct for the trial counsel to refer to the work of fiction entitled *Anatomy of a Murder*, as depicting the manner in which a shrewd attorney may facilitate a defense of insanity through the medium of the "lecture". The court felt that such innuendos, together with other errors, required reversal.

5. Stating personal belief as to guilt or innocence of the accused. In accordance with the civilian rule, it is improper for counsel to assert in argument his personal belief in the guilt or innocence of the accused or in the justice of his cause.[19] While some civilian courts have held that where such statements did not intimate that the prosecutor had personal knowledge of facts not known to the jury they are *not* improper,[20] no military case appears to go

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[10] For a treatment of the other statement of trial counsel as to why he did not cross-examine the accused, see "Retaliatory Comments on Argument by Defense Counsel", *infra* note 32, and accompanying text.

[11] United States v. Doctor, *supra* note 9, at 133, and 259. See also United States v. Day, 2 USCMA 416, 9 CMR 46 (1953), where the court held that if there is "some" evidence in the record upon which the remarks of counsel can be reasonably based, trial counsel has not exceeded fair comment on the evidence. In CM 365107, Thomas, 12 CMR 385 (1953), the Board of Review held that trial counsel's characterization of accused in the rape case as a "sex maniac" did not go beyond fair comment. In United States v. Lee, 4 USCMA 471, 16 CMR 145 (1954), a murder case, it was held that calling accused a "cold blooded murderer" did not overstep the bounds of propriety and fairness. But see CM 365353, Jernigan, 13 CMR 396 (1953), an indecent liberties case, where, together with numerous other errors, characterizing the accused as a "sex pervert" and "sex fiend", under the facts of that case, required reversal. In ACM 9406, Weller, 18 CMR 473 (1954), a "barracks thief of the worse type" was held not improper.

[12] MCM, 1951, para. 72*b*; United States v. Bowen, 10 USCMA 74 27 CMR 148 (1958). In WC NCM 6300701, Kelly, 29 Aug 63 (unpublished), the President of a special court-martial asked, "Does the accused wish to take the stand as a witness against himself? And then as an afterthought, "or rather in his own behalf?"

[13] United States v. Skees, 10 USCMA 285, 27 CMR 359 (1959).

[14] ACM 5819, Hanna, 7 CMR 571 (1952).

[15] CM 401902, Cazenave, 28 CMR 536 (1959).

[16] United States v. Hurt, 9 USCMA 735, 27 CMR 3 (1958), (trial counsel referred to accused's lack of emotion at the trial for rape-murder of a child).

[17] MCM, 1951, para. 72*b*. United States v. Porter, 10 USCMA 427, 27 CMR 501 (1959); United States v. Anderson, 8 USCMA 608, 25 CMR 107 (1958). 11 USCMA 539, 29 CMR 355 (1960). In United States v. Beatty, 10 USCMA 311, 27 CMR 385 (1959), where trial counsel knew victim of the assault with intent to rape had previously had sexual intercourse but no evidence to that effect was before the court it was held improper for trial counsel to state to the court, "so far as we know, she's a virgin." For a detailed treatment of this subject see Levin & Levy, *Persuading the Jury By Facts Not in Evidence*, 105 U. Pa. L. Rev. 139 (1956).

[18] 11 USCMA 539, 29 CMR 355 (1960).

[19] MCM, 1951, para. 44*g*(1) and 48*c*. Canon 15, ABA Canons of Professional Ethics.

[20] United States v. Battisto, 204 F 2d 717 (7th Cir, 1953); Henderson v. United States, 218 F 2d 14 (6th Cir, 1955).

that far.[21] Such arguments are improper for several reasons. They permit the trial counsel to testify without being subject to cross-examination and create a false impression of reliability and credibility of counsel and give the prosecutor an advantage because of his official position. In addition, ethical problems might face the defense counsel in those cases where he did not personally believe in his client's innocence, thus preventing him from retaliating.

6. Retaliatory comments on argument by the defense counsel. Where the arguments of the defense counsel become improper, it has not been held improper for the trial counsel to answer in a similar vein. In *Doctor*,[22] where the defense counsel had commented critically upon the trial counsel's failure to cross-examine the accused, the trial counsel replied that he did not like to hear lies uttered from the witness stand. The Court of Military Appeals, in finding no error, stated: "Matters ordinarily not the subject of comment may become relevant if they are opened up by the Defense Counsel. . . . There are numerous authorities to the effect that a prosecutor's reply to arguments of the defense may become proper, even though, had the argument not been made, the subject of the reply would have been objectionable."[23]

7. Appeal to community relationship. It is improper for trial counsel to become intemperate, unreasonable, or extravagant in portraying the consequences of an acquittal. Thus it has been held erroneous to stress the importance of the case to the United States—Host country relations and its impact on the local community with its consequent effect upon American forces there.[24]

8. Reading legal authorities. In spite of authorization for the practice in the Manual,[25] reading by counsel of legal authorities has generally been frowned upon,[26] and should be avoided. A misstatement of the law would certainly constitute error requiring some corrective action.[27] Counsel may, however, argue any legal theory (including the predetermined instructions of the law officer) in their presentation to the court.[28] There would appear to be no justification, however, for counsel to *read* legal authorities to the court-martial during argument on the findings, since any formal instruction on the law must come from the law officer.

Section III. LIMITING ARGUMENTS OF COUNSEL

Neither the Code nor the Manual specifically permit the law officer to limit the time for argument. The Manual[29] provides that restricting arguments, particularly in long and complicated cases, may constitute error; however, the court may, in its discretion, limit argument when it is trivial or repetitious.[30] However, there is *dictum* in the case of *United States* v. *Gravitt*[31] to the effect that the law officer in the exercise of his sound discretion may restrict the closing arguments to reasonable limits.

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[21] In CM 368998, Shipley, 14 CMR 842 (1954), *pet. den.* 15 CMR 431, such statements as "in my opinion that specification has been proved," "it is the opinion of the prosecutor [the facts] has been proved," came "dangerously close" to being a violation of para. 44*g*, MCM, 1951, but actually went no further than being a statement that the Government had met its burden of proof. In any event, the Board held the evidence compelling. But see ACM 9406, Weller, 18 CMR 473 (1954), at 478, where the Board says, "Moreover it is improper for counsel to assert his personal belief as to the guilt or innocence of the accused . . . but it is not improper for him to argue or to express his opinion that accused is guilty, where he states, or it is apparent, that such opinion is based solely on the evidence as distinguished from his *personal* opinion." These statements were apparently *dicta*, and, under the present state of military law, should not be followed.

[22] United States v. Doctor, *supra* note 9.

[23] 7 USCMA 126, 134, 21 CMR 252, 260. See also Judge Latimer's concurring opinion in United States v. Beatty, *supra* note 17.

[24] United States v. Cook, 11 USCMA 99, 28 CMR 323 (1959). "This is a tremendously important case . . . because we are trying a man [for] killing a Philippine national [and using] Filipino witnesses. I think we can show everyone concerned, everyone concerned with this case, that we can ensure that justice will be done. And that's the important thing." Trial counsel also referred to the "impact this case will have, not only on the military body but also on life generally here for the American forces."

[25] MCM, 1951, para. 44*g*(2).

[26] United States v. Fair, 2 USCMA 521, 10 CMR 19 (1953)—(error in giving trial counsel "wide latitude" in reading, but was not prejudicial; generally practice should be avoided); United States v. O'Brien, 3 USCMA 105, 11 CMR 105 (1953) ("May" have constituted error); United States v. Johnson, 9 USCMA 178, 25 CMR 440 (1958) ("Minor irregularity"; however, Judge Ferguson, in dissent, felt that it constituted error and, together with another, warranted reversal).

[27] See United States v. Hatter, 8 USCMA 186, 23 CMR 410 (1957).

[28] CM 367313, Beachley, 13 CMR 392 (1953). (Error for law officer to prevent defense counsel from arguing the concept of reasonable doubt).

[29] MCM, 1951, para. 72*b*.

[30] The Law Officer Pamphlet is even more cautious. It suggests that ordinarily the law officer should not restrict arguments, except where they become trivial, but may *suggest* to counsel that they agree on the length. DA Pam 27-9, The Law Officer, para. 71 (1958).

[31] 5 USCMA 246, 17 CMR 246 (1954). *Gravitt's* actual holding goes no further than to support the provision appearing in paragraph 71 of the Law Officer Pamphlet, *supra*, note 27.

Section IV. CURING EFFECT OF IMPROPER ARGUMENT

1. During trial. *a. General.* Misconduct of Government counsel in his argument to the court may be cured at the trial level in a number of ways, depending upon the nature and impact of the statements made.

b. Retraction. In the usual case, a prompt retraction by counsel, especially if followed by curative instructions, should generally remove any prejudice the offending remark may have caused.[32]

c. Waiver. The Court of Military Appeals in the *Doctor*[33] case stated the waiver rule in the following language:

> The failure to object in the trial arena where the harmful effects, if any, might have been ameliorated by prompt instructions from the law officer, normally raises the doctrine of waiver and precludes an accused from asserting a claim of error upon appeal.

However, the doctrine has been hemmed in by so many exceptions, it is at least doubtful whether at the present time there actually exists an active waiver rule in the military. The Court of Military Appeals has held that where the enforcement of waiver would result in a miscarriage of justice[34] or where there is no "clear" waiver,[35] or where the error occurs in a special court-martial,[36] even though lawyers participate,[37] the doctrine will not be invoked.

d. Sua sponte action by the law officer in stopping argument. Where counsel has made improper statements before the court, a prompt and emphatic condemnation by the law officer may in the usual case cure any error arising therefrom.[38]

e. Curative instructions. Closely related to the *sua sponte* "condemnation" by the law officer is the corrective action of curative instructions. A curative instruction by the law officer admonishing the members to disregard the improper argument by the trial counsel generally is sufficient to overcome any prejudice resulting to the accused from such misconduct.[39] However, the misconduct of trial counsel may go so far, and be so persistent that curative instructions alone are not sufficient to eliminate the possibility of harm to the accused.[40] This has generally been held to be true where the trial counsel brings policy directives to the attention of the court in his argument. In the usual case, however, rather than the law officer will take one or more of the corrective actions mentioned above or, in the alternative, declare a mistrial is within his sound discretion.[42]

2. After trial, if the law officer has not taken sufficient corrective action during the trial, it may still be possible for appellate authorities to salvage something of the wreckage. The first

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[32] See Comment, 36 Colum. L. Rev. 931 (1936), for a fairly detailed discussion of the retraction rule. See United States v. Carpenter, 11 USCMA 418, 29 CMR 234 (1960), where trial counsel did retract. See also United States v. Ladkey, 8 USCMA 718, 25 CMR 222 (1958), where the court indicated that a retraction and curative instructions could have cured the prejudice inherent in trial counsel's reminding the members of the desires of the convening authority.

[33] United States v. Doctor, 7 USCMA 126, 135, 21 CMR 252, 251 (1956).

[34] United States v. Skees, 10 USCMA 285, 27 CMR 359 (1959).

[35] United States v. Cook, 11 USCMA 99, 28 CMR 323 (1959).

[36] United States v. Anderson, 8 USCMA 608, 25 CMR 107, (1958).

[37] United States v. Hatter, 8 USCMA 186, 23 CMR 410 (1957); United States v. King, 12 USCMA 71, 30 CMR 71 (1960). The basis for the waiver rule is that if counsel objects at the trial, it affords the law officer an opportunity to "cure" the prejudice by instructions. There is reason to believe that this entire doctrine is pure fiction. Once improper matter is called to the attention of the jury, the validity of the psychological assumption that it can be erased from their minds by instructions is subject to serious doubt. On the contrary, there is reason to believe that curative instructions serve only to impress the matter further upon the minds of the jurors. It is for this reason that many counsel in practice fail to object to many improper remarks, for, to them, after the matter has been highlighted by objection from counsel *and* comments by the judge, the jury can probably never forget that objectionable counsel has "been hit where it hurts." It may be, therefore, that the actual effect of objection and instruction is to indoctrinate the jurors and give the offending argument a prominent place in their deliberations on the verdict, but that they *do not* talk about it.

[38] *Cf.*, ACM 11275, Nelson, 20 CMR 849 (1955).

[39] See United States v. Carpenter, 11 USCMA 418, 29 CMR 234 (1960). See also United States v. Cox, 9 USCMA 275, 26 CMR 55 (1958), where the law officer could have saved the record by prompt curative instructions, but failed to do so.

[40] *Cf.*, United States v. Britt, 10 USCMA 61, 28 CMR 127 (1959).

[41] United States v. Fowle, 7 USCMA 349, 22 CMR 139 (1956). Judge Latimer concurring specially, would hold that a proper instruction would have cured the error. In United States v. Estrada, 7 USCMA 635, 23 CMR 99 (1957), the majority of the court reiterated that no cautionary instructions to members of the court that they may disregard the announced policies of their commander can relieve the error of prejudice.

[42] See United States v. Shamlian, 9 USCMA 28, 25 CMR 290 (1958).

consideration is whether the impact of the error was such as to prejudice the substantial rights of the accused. The Court of Military Appeals has used several tests for determining prejudice, most of which appear to be interrelated. If it is determined that the misconduct was substantial and that the same verdict probably would not have been adjudged in the absence of the argument or, stated differently, the evidence is not compelling[43] or that the sentence is not well below the maximum imposable,[44] it will be found that there was a fair risk that the accused was prejudiced by the error. Corrective action may consist of reducing the findings to a lower degree to which the error did not extend,[45] and if the error affects only the sentence, a proper reassessment may suffice to remove the prejudice,[46] provided it extends to the portion of the sentence to which the improper argument related.[47] But where the error is so substantial that it permeates the entire case, a rehearing may be required [48] or, if particularly aggravated by its nature and other errors, dismissal of the charges may be indicated.[49]

Section V. CONCLUSION

As a general rule, reasonable latitude is allowed counsel in presenting their arguments. Arguments should, however, be limited to the issues on trial, the evidence in the case, and fair and reasonable inferences and deductions therefrom, and to answering the arguments of opposing counsel. If the arguments are based on the evidence, they do not become improper merely because they may be severely critical or denunciatory of the accused, or may incidentally stir the sympathies or arouse the prejudices of the members of the Court against him. But it is considered improper for counsel to use intemperate and denunciatory language, or to appeal to, or make reference to extraneous religious beliefs, or other matters, where such language and appeal is calculated *only* to unduly excite or arouse the emotions, passions, and prejudices of the court against the accused. Counsel should not assert his personal belief as to the guilt or innocence of the accused, intimate the views of the staff judge advocate, the convening authority, or superior comanders. The trial counsel should avoid commenting directly or indirectly upon the failure of the accused to testify in his own behalf, and should avoid leaving the court with a false impression which the trial counsel knows to be untrue. Moreover, counsel should avoid intemperate urging of the court to convict as a means of enhancing the relations of the military with the local community.

If his case is properly prepared, there is no need for counsel to resort to foul blows to insure a conviction. In this respect, the admonition frequently directed by appellate courts to civilian prosecutors applies with even greater force to the military: it is not the duty of the prosecutor to convict, but rather to see that justice is done.

Section VI. INSTRUCTIONS

References: MCM, 1951, para. 73.

1. General. After closing arguments[50] have been concluded, the law officer[51] will instruct the Court as to the elements of each offense charged.[52] The principal[53] as well as addition-

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[43] *Cf.*, United States v. Beatty, 10 USCMA 311, 27 CMR 385 (1959).

[44] See United States v. Beatty, *supra* note 43 and United States v. Carpenter, *supra* note 32.

[45] United States v. Bowen, 10 USCMA 74, 27 CMR 148 (1958).

[46] ACM 9778, Schiano, 18 CMR 858 (1955).

[47] United States v. Lackey, 8 USCMA 718, 25 CMR 222 (1958). United States v. Johnson, 12 USCMA 602, 31 CMR 188 (1962).

[48] United States v. King, 12 USCMA 71, 30 CMR 71 (1960).

[49] See United States v. Williams, 8 USCMA 328, 24 CMR 138 (1957).

[50] In a case where the closing arguments followed the instructions, the Board of Review held that while this procedure was "highly irregular", it did not prejudice the accused. NCM 292, Grudoff, 14 CMR 515 (1954).

[51] The president of a special court-martial has virtually the same powers and responsibilities as the law officer with respect to instructions. His rulings granting requested instructions are not subject to objection (United States v. Bridges, 12 USCMA 96, 30 CMR 96 (1961), and he may not surrender his responsibilities to anyone, including the convening authority). See WC NCM 61-00853, Frame, 31 CMR 482 (1961).

[52] MCM, 1951, par. 73. The Code does not specify the time for instructions except that they be given "before a vote is taken on the findings." See UCMJ, Article 51(c). The Manual follows the federal procedure which requires that instructions be given after the arguments are completed. See Fed R. Crim. P. 30.

[53] UCMJ, Article 39.

al[54] instructions must be given in open court in the presence of the accused and counsel for both sides.

The law officer's responsibilities with respect to instructions are practically identical with those of a judge of a Federal district court. While he may call upon counsel for assistance in the preparation of instructions, they are not required to comply with his request.[55] Prior to the trial, the law officer has little to assist him in his preparation for the trial except copies of the charges and specifications and voluntary disclosures to him by counsel as to any contemplated legal problems which may arise. While in the early days of practice under the Code, law officers studied the Article 32 Investigation in an attempt to become familiar with the facts and as an aid in preparation of their instructions, a majority of the Court of Military Appeals has held that such action is not good practice, and it scrutinizes the record in such cases to determine whether his previous knowledge had a harmful effect upon a right of the accused.[56] Counsel may submit proposed instructions at will and may insist upon an out-of-court hearing on the proposed instructions as a matter of right.[57] All such proposed instructions must be marked for identification and appended to the record as appellate exhibits.[58]

The law officer should in every case before closing arguments inform counsel as to the instructions which he intends to give to the court.[59] The practice generally followed by law officers today is to prepare their instructions in several copies prior to the trial and make such additions, deletions, and modifications during trial as are necessitated by the evidence and the requests of counsel. After both sides have rested and *before* arguments, counsel are furnished with the final draft of instructions at an out-of-court hearing, given time to peruse them, and then the law officer calls for objections, comments, arguments, and proposed additional instructions. Contrary to the Manual provision,[60] all such hearings should be recorded and made a part of the record.[61]

2. Identifying instructions with the party requesting. All instructions given by the law officer are his responsibility, regardless of the party requesting, and he should not advise the Court that any particular instruction originated with either party.[62] As the Court pointed out in *United States v. Wynn*:[63]

> We need hardly say that if the Court members are inclined to disbelieve the evidence presented on behalf of the side that requested the instructions, it would also be disinclined to accept the law advanced by that side.

3. Content. *a. Sua sponte.* The Code[64] specifically requires instructions only on (1) the elements of the offense (2) presumption of innocence (3) reasonable doubt (4) findings of

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[54] MCM, 1951, para. 73*c*(1).

[55] MCM, 1951, para. 73*c*(2).

[56] United States v. Fry, 7 USCMA 682, 23 CMR 146 (1957). Judge Latimer felt that such practice was "commendable". It may be that Fry may be re-examined at some time in the future. In United States v. Oliver, 14 USCMA 192, 33 CMR 404 (1963), Judge Kilday stated: "In my opinion, some of the language in *Fry, supra*, should be reviewed by us. Those portions of the opinion promoting lack of preparation by the law officer should be reconsidered. True, it is only there stated, 'it was not good practice for the law officer to review the investigating officer's report, and the testimony of the witness'. . . . If a reading by the law officer of the investigating officer's report and the testimony of the witnesses produces a conviction of guilt, he is truly disqualified. He is disqualified, I submit, to sit as a law officer of any court-martial. . . . He should be transferred to a position in which his predilection to advocacy can be profitably utilized."

[57] MCM, 1951, para. 57*c*(2) and 73*c*(2).

[58] MCM, 1951, para. 73*c*(2). Of course, there is no duty on the part of the law officer to instruct in the precise language proposed by counsel, even though correct, for he may modify any proposed instruction submitted (para. 73*c*(2), MCM, 1951), so long as he instructs the court fully, clearly, and fairly, and completely informs the Court of the applicable legal standards. United States v. Beasley, 3 USCMA 111, 11 CMR 111 (1953).

[59] While the Law Officer's Pamphlet (DA Pam 27-9, Military Justice Handbook: The Law Officer (1958), para. 70) suggests that counsel should be informed "at least in general terms, either orally or in writing" of the instructions, the preferred practice is that set out in the text. Compare the Federal Practice. See Fed. R. Crim. P. 30 and Walsh, *Fair Trials and the Federal Rules of Criminal Procedure*, 49 ABAJ 853, 856 (Sept. 1963).

[60] MCM, 1951, para. 73*c*(2).

[61] United States v. Lampkins, 4 USCMA 31, 15 CMR 31 (1954).

[62] United States v. Shaughnessy, 8 USCMA 416, 24 CMR 226 (1957) ("In view of the oral request of the defense"). In United States v. Jones, 10 USCMA 122, 27 CMR 196 (1959), the law officer stated, "Now the defense has requested certain instructions. These instructions, when given by the law officer, become the instructions of the law officer and are binding upon the Court." The Court held that in view of the fact that the law officer adopted the instructions specifically and the accused was acquitted of the charge to which the instructions related, the accused was not prejudiced. Even in *Shaughnessy*, there was another prejudicial error, and it does not appear that the Court has ever reversed on the basis of this error alone.

[63] 11 USCMA 195, 29 CMR 11 (1960) (identifying instructions as originating with a party "improper".)

[64] UCMJ, Article 51c.

lesser included offense in the event of a reasonable doubt as to the offense charged, and (5) burden of proof. The Manual[65] provides that the law officer need not give the Court any instructions other than those required by Article 51*c*, but *may* give such additional instructions[66] as he deems necessary or desirable to assist the Court in making its findings. In the early days, law officers for the most part were content to take the Manual provision at its face value and usually determined that none other than those instructions specifically mentioned in Article 51*c* were either "necessary" or "desirable."

The Court of Military Appeals quite early in its life indicated, however, that a great number of instructions were required *sua sponte* even though not specifically mentioned in the Code.

(1) *Lesser included offenses.* In *United States* v. *Clark*,[67] the Court held that if it was the intent of paragraph 73*c* of the Manual to substitute permissive advice for mandatory instruction, it conflicted with the Code and was not controlling. Article 51*c* requires that the law officer instruct on the elements of the offense charged and also that if there is a reasonable doubt as to the degree of guilt, then the findings must be in a lower degree as to which there is no reasonable doubt. In order to be able to apply that instruction, the Court members must know the *elements* of the possible included offenses. The Court must know the differences in the crimes involved. In addition, although Article 51*c* mentions offense in the singular, lesser offenses are in fact charged within the principal offense and each such offense must be defined in instructions, subject to the rule that there must be some evidence from which a reasonable inference may be drawn that the lesser included offense is in issue.[68]

A mere failure to request such instructions or object to their absence will not serve as a waiver.[69] However, the defense may waive a required instruction by affirmative action on his part which indicates that he does not desire that the instruction be given.[70] Such affirmative action may consist of the *tactics* of the defense counsel at the trial,[71] or an implied request that the instructions be omitted.[72] And, of course, a specific request by defense counsel for the omission of the instruction is an unequivocal excusal of the law officer to instruct.[73] However, it is the duty of the law officer to see that the court is properly instructed and he need not acquiesce in the suggestion of the defense counsel for an "all or nothing" verdict,[74] and in the usual case he probably should not do so, for such action gives the accused a chance to win a complete acquittal which in the particular case may be more than he deserves.[75]

(2) *Affirmative defenses.* In *United States* v. *Gaunt*,[76] the Court of Military Appeals established the military rule that the law officer must instruct *sua sponte* on affirmative defenses where

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[65] MCM, 1951, para. 78*c*(1).

[66] Such as stating the issues, summarizing the evidence, advising "as *to what* offenses" are lesser included. (See MCM, 1951, para. 78*c*(1)).

[67] 1 USCMA 201, 2 CMR 107 (1952).

[68] United States v. Clark, 1 USCMA 201, 2 CMR 107 (1952). See also United States v. Floyd, 2 USCMA 188, 7 CMR 59 (1953). In like manner, a failure of the President of a special court-martial *sua sponte* to instruct on the elements of a lesser included offense where there is in the record *some* evidence which reasonably places it in issue is likewise prejudicial. United States v. Burton, 13 USCMA 645, 33 CMR 177 (1963).

[69] United States v. Clay, 9 USCMA 582, 26 CMR 362 (1958). See also United States v. Williams, 1 USCMA 186, 2 CMR 92 (1952). (Failure to object to erroneous required instruction not a waiver). United States v. Moore, 12 USCMA 396, 31 CMR 282 (1962).

[70] See United States v. Mundo, 9 USCMA 500, 26 CMR 280 (1958).

[71] United States v. Bower, 8 USCMA 615, 14 CMR 33 (1954). (Accused, on trial for murder and assault, defended on basis of *alibi*. The court held that he waived instructions on intoxication as reducing the specific intent offenses and the resultant necessity for instruction on the elements of the lesser included offenses of only general intents).

[72] See United States v. Snyder, 6 USCMA 800, 21 CMR 26 (1956).

[73] United States v. Wilson, 7 USCMA 715, 23 CMR 179 (1957).

[74] *Ibid.*

[75] See CGCM 9886, Wade, 28 CMR 704 (1959). Since the defense counsel will not gamble on an "all or nothing" verdict in a case where it is fairly clear that the court would convict on the principal offense charged, it would appear to be unfair to the Government to give the court only the alternative of conviction or acquittal.

[76] 1 USCMA 458, 4 CMR 45 (1952). In United States v. Thompson, 12 USCMA 438, 31 CMR 24 (1961), the Court reiterated that the accused's defense must be submitted to the Court *sua sponte*.

there is in the record some[77] evidence from which a reasonable inference can be drawn that the affirmative defense is in issue. The Court noted that it was the intent of Congress to bring courts-martial procedure into conformity with that obtained in civilian criminal courts, especially "as to the functions and duties of the law officer". The court, noting the duty to instruct sua sponte on affirmative defenses stems from the same source as the duty to instruct on lesser offenses, stated:

> We think there is as much necessity, in a proper case, for instructions as to circumstances which will reduce murder to excusable homicide as there is for instructions as to circumstances that will reduce murder to manslaughter or negligent homicide.[78]

Following *Ginn*, the Court has held in a wide variety of cases that the failure to instruct sua sponte on an affirmative defense reasonably raised by the evidence is error.[79]

(3) *Defining legal terms.* In *United States* v. *McDonald*,[80] the Court stated that:

> We believe the law is now well understood that the duty placed upon the shoulders of the law officer to instruct *sua sponte* goes no further than to require him to do this: (1) give the court-martial guidance upon all elements of the offense; and (2) give instructions upon those issues which are raised reasonably by the evidence and are so closely interwoven into the pattern of the crime that the court-martial could not fairly determine guilt or innocence without being advised to consider and decide the issue without the limitations laid down. . . . That is as far as we have been willing to go in that direction. The other fixed principle is that instructions defining words of common usage, military terms and phrases well known in the services, and matters of simple definition or amplification, need not be given without a request on the part of the accused.

The Court has required instructions *sua sponte* on "words of art" in only a very few cases, requiring that the vast majority of such *words* be the subject of a specific request.

In *United States* v. *Thurman*,[81] the court required special definition of the word "steal" in a charge of stealing from the mails in violation of Article 134. The word "dishonorably" in an Article 134 offense of failure to place funds in the bank to cover a check has been held to be a word of art and a failure to define is prejudicial.[82] In addition, the words "movement"[83]

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[77] In *Ginn*, it rejected the proposal that the test should be in "any evidence supporting the claim, however weak or doubtful it may be."

[78] The Court found, however, that in the particular case the defense was not reasonably in issue; consequently, the law officer did not err in failing to instruct.

[79] United States v. Oisten, 13 USCMA 656, 33 CMR 188 (1963) (intoxication); United States v. Avery, 1 USCMA 533, 4 CMR 125 (1952); United States v. Hughes, 5 USCMA 374, 17 CMR 374 (1954) (lack of knowledge); United States v. Margelony, 14 USCMA 55, 33 CMR 267 (1963) (duress); United States v. Burns, 2 USCMA 400, 9 CMR 30 (1953) (insanity); United States v. Drew, 1 USCMA 471, 4 CMR 63 (1952). United States v. Ginn, *supra* note 76 (self-defense); United States v. Dixon, 6 USCMA 434, 20 CMR 200 (1955) (ignorance or mistake); United States v. Pinkson, 6 USCMA 700, 21 CMR 22 (1956) (impossibility of compliance); United States v. Heims, 3 USCMA 418, 12 CMR 174 (1953) (physical incapacity). Where it appeared that the theory of accident could have been asserted but the defense deliberately chose not to urge it—preferring self-defense, the Court held that the law officer did not err in failing to instruct thereon. United States v. Hubbard, 13 USCMA 652, 33 CMR 184 (1963). The Court held fairly early that a special instruction on alibi is not required *sua sponte* but should be given upon request. United States v. Bigger, 2 USCMA 297, 8 CMR 97 (1953). See also discussion in ACM 7937, Martin, 15 CMR 796 (1954). While the "defense of alibi" is not technically an affirmative defense—"a plea in confession and avoidance", since the accused denies all the facts, nevertheless the modern attitude of the court toward instructions would seem to indicate that a special instruction on alibi should be given when there is any evidence in the record from which a reasonable inference may be drawn that the accused was not at the scene of an offense charged, except, of course, where his guilt is predicated upon the theory that he is a principal whose presence is not required. See Article 77, UCMJ.

[80] 6 USCMA 575, 20 CMR 291 (1955).

[81] 10 USCMA 377, 27 CMR 451 (1959).

[82] ACM S-2958, Barnawell, 5 CMR 773 (1952). Accord: ACM 4820, Grant, 5 CMR 692 (1952).

[83] United States v. Jones, 1 USCMA 276, 3 CMR 10 (1952).

and "design" [84] in an Article 87 offense of missing movement have been termed words of art requiring definition *sua sponte.*

The word "accountability" has been held by a Board of Review to have significant meaning in the Armed Services and a failure to define it in a case of accepting bribes in connection with duties concerning property for which the accused "had the accountability" was error.[85] In *United States* v. *Cobb,*[86] a majority of the Court held that a failure to define "culpable negligence" was not *prejudicial.* Judge Brosman, concurring in the result, felt that it was not a term requiring *sua sponte* definition, and the failure to define it without request was not, therefore, error. The words "to defraud" alleged in a specification can have a special legal connotation in a particular case,[87] and law officers should be alert to define it correctly *sua sponte* in the special case.

While the Court has held that the law officer need not define "premeditation" in instructing on an offense under Article 118(1) of the Code, in the absence of a request,[88] it has indicated that law officers should "as a matter of policy" do so.[89] In *United States* v. *Day,*[90] however, the Court stated:

> They ["malice aforethought" and "premeditation"] are not words which are known only to lawyers or members of the legal profession. They are words of general usage. . . . *It may be that a slight variation in application of the terms might arise under some factual situations which might make their definitions necessary,*[91] but they are not present in this case.

Although the Court of Military Appeals has been fairly liberal with law officers in the areas of sua sponte definitions, a clear line of distinction between words of "special legal connotation" and "words of art" requiring definition sua sponte and those requiring definition only upon request may be far from clear in the particular case. Moreover, the Court has on many occasions encouraged law officers to be liberal in their instructions even though a failure to instruct in a given area may not be error. It follows that in a particular case, if there is any doubt as to whether a particular word should be defined, the law officer should resolve the doubt in favor of a sua sponte definition.

(4) *Limited effect of other offenses.* Whether the law officer must instruct sua sponte on the limited effect of evidence of offenses not charged is an area which has had an unsettled history. The matter seemed clear in 1954, when a unanimous court held that the law officer is under no duty to instruct sua sponte on the limited purpose of such evidence.[92] That rule appears to have been substantially unquestioned until 1961 when the Court decided *United States* v. *Bryant.*[93] There the accused was charged before a special courts-martial with black-market-

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[84] See NCM 107, Foster, 3 CMR 423 (1952). In United States v. Kelly, 9 USCMA 26, 25 CMR 288 (1958), a majority of the Court held that a failure sua sponte to define the word "threat" in the offense of communicating a threat was error but not prejudicial in the particular case. Judge Ferguson, dissenting, would find prejudice.

[85] ACM S-2184, McCarson, 4 CMR 546 (1952) (*Pet. den.,* 4 CMR 173). However, the Board held that a failure to define the word was not prejudicial in the particular case. In ACM 4652, Whitney, 3 CMR 714 (1952), a Board of Review held that where a *specification* contains abstruse words and expressions peculiar to the law, the instructions should include definitions thereof and a failure to define may be serious error.

[86] 2 USCMA 389, 8 CMR 139 (1953). Judge Brosman's opinion would appear to be the best reasoned one. Later the Court held that no sua sponte definition of the word "reckless" in a reckless driving charge was required. United States v. Eagleson, 3 USCMA 685, 14 CMR 103 (1954).

[87] See United States v. Leach, 7 USCMA 388, 22 CMR 178 (1956). Compare ACM Whitney, 3 CMR 714 (1952).

[88] United States v. Felton, 2 USCMA 630, 10 CMR 128 (1953).

[89] United States v. Amdahl, 3 USCMA 199, 11 CMR 199 (1953).

[90] 2 USCMA 416, 9 CMR 46 (1953).

[91] Emphasis supplied. In ACM 7321, Kinder, 14 CMR 742 (1954), where accused shot a Korean apprehended for trespassing after receiving an order from his superior officer to "take him out and shoot him, Kinder. You do the job, Kinder," the Board of Review stated that the law officer *should* define "premeditation," but affirmed without extended discussion of the matter.

[92] United States v. Hairnson, 5 USCMA 208, 17 CMR 208 (1954).

[93] 12 USCMA 111, 30 CMR 111 (1961).

ing offenses, and evidence of other offenses of a similar nature not charged was received. The Court ordered a rehearing based upon the law officer's failure sua sponte to instruct the Court on the limited effect of such evidence, *i.e.*, as showing plan, intent, or design. The Chief Judge, writing for the court suggested that the "dictum" of *Haimson* was not intended to be a definitive statement of the rule of law.[94]

Hardly before the ink was dry on *Bryant, United States* v. *Sellers*,[95] came on to complicate the problem. In that case, the accused was charged, *inter alia*, with wrongful appropriation from a fund, and in order to show motive, the trial counsel presented evidence that the accused had written several worthless checks and suffered gambling losses. A majority of the Court, returning to *Haimson* and without citing *Bryant*, held that no limiting instruction was required in the absence of a request. Judge Ferguson, citing *Bryant*, felt that there was error.

Judge Kilday's first expression on the subject appeared rather uncertain as to which direction to travel. In *United States* v. *Hoy*,[96] writing for the Court, he held that in *some* cases such a cautionary instruction must be given sua sponte, but that it was not a rule of "absolute and undeviating application."[97] Judge Quinn apparently felt that the instruction *is* required sua sponte but that it was given by implication. Judge Ferguson, dissenting, felt that the instruction is required sua sponte in all cases. In *United States* v. *Back*,[98] Judge Ferguson found a failure to instruct sua sponte prejudicial and Judge Kilday concurred without comment. Chief Judge Quinn, dissenting, felt that no reversal was required because the record of trial clearly revealed that the court-martial as well as the defense counsel fully understood that the only reason the law officer admitted the evidence was for a special purpose, thus appearing to adopt Judge Kilday's theories set out in *Hoy*.

Finally, in *United States* v. *Lewis*,[99] the accused was charged with assault, evidence of an uncharged assault was received, and the law officer failed to instruct sua sponte on the limited effect for which such evidence was admitted. A unanimous court held that the law officer's failure to instruct was error, and, under the circumstances,[100] prejudicial.

Perhaps the question has finally been laid to rest. In any event, it is clear that the law officer should in every case give a limiting instruction regardless of the defense counsel's failure to request it.

Assaults with intent to commit other offenses. If an assault with intent to commit another offense is charged, the law officer does not instruct fully on the elements of the offense as re-

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[94] The Court cited United States v. Hubbard, 5 USCMA 525, 18 CMR 149 (1959) as support for its statement. However, a close examination of *Hubbard* reveals little to support *Bryant*. In *Hubbard*, the evidence itself was *inadmissible*. Being charged with a narcotics offense, *Hubbard* was asked on cross-examination, questions which amounted to innuendoes and insinuations, and there was no evidence at all of an *act* of misconduct. A unanimous court felt that there was a fair risk that the accused was prejudiced by the *admission* of the improper evidence and ordered a rehearing. The Court, in passing, stated that "the probability of risk is heightened by the failure of the law officer to instruct the Court on the limited purpose for which it could consider the evidence." Of course, since the evidence was improperly admitted and its *admission* required reversal, it could not *properly* be considered at all, for a limited purpose or otherwise. Moreover, whether the rule of *Haimson* was actually *dictum* is at least subject to doubt.

[95] 12 USCMA 262, 30 CMR 262 (1961).

[96] 12 USCMA 554, 31 CMR 140 (1961).

[97] He felt that the instruction was not required in the particular case because (1) the defense counsel in his argument asked the Court to consider the rule and (2) the defense failed to ask for the instruction although he knew the evidence was admissibly only for a limited purpose.

[98] 18 USCMA 568, 38 CMR 100 (1968).

[99] 14 USCMA 79, 33 CMR 291 (1963).

[100] Of course, the failure to give such an instruction sua sponte is not *per se* prejudicial. If the evidence of guilt is compelling, the error will be held to be harmless. (see Article 59, UCMJ.) As the Court stated in Back *supra* note 98, and repeated in Lewis, *supra* note 99, "On the one hand, evidence of the accused's guilt may be such that the failure to restrict proof of other misconduct may be fairly said to have weighed not at all in connection with the finding and sentence. On the other, the record may present a fair risk that the fact finders accorded weight to the merits of the matter. We cannot lay down any precise measure for answering this subsidiary question which, of course, depends so much upon the circumstances of the individual case."

quired by Article 51*c*, unless he fully instructs on the elements of the offense intended.[101]

(6) *Limited use of the confession of an accomplice.* In *United States* v. *Borner*,[102] the Court held that when evidence of an admission of an accomplice is received at a joint trial, instructions limiting its use against only the accused who made it should "unquestionably" be given.

(7) *Cautionary instructions where one of two joint accused pleads guilty.* Where two or more joint accused are tried together and one pleads guilty and the other not guilty, a severance may be clearly indicated. If a severance is not granted, strong cautionary instructions to the effect that a guilty plea of one accused should in no way affect the court-martial in its deliberation on the findings as to the other accused should be given.[103]

b. On request.

(1) *General.* While the Court has been fairly hesitant in extending the areas in which the law officer must instruct *sua sponte*, its decisions have ranged over almost the entire field of law with respect to the instructions which the law officer must give when specifically requested to do so by the defense counsel. In this connection, the Court does not appear to be reluctant to find prejudice where the law officer *refuses* to instruct on a special issue in the face of a clear request by the defense. Moreover, even though the request of the defense is incorrectly,[104] inaccurately,[105] or improperly worded, or even if it mistakes the law,[106] it may be sufficient to alert the law officer that a *correct* instruction is desired in the area. It appears that very little is required to put the law officer on notice that an instruction is desired.[107]

(2) *Weight of testimony of accomplice.* If requested, the law officer must instruct the Court that a conviction cannot be based upon the uncorroborated testimony of an accomplice, if such testimony is self-contradictory, uncertain, or improbable, and even though apparently credible, such testimony is of doubtful integrity and is to be considered with great caution.[108] Moreover, even though certain portions are corroborated, accomplice testimony remains of doubtful integrity and is to be considered with great caution.[109]

(3) *Cautionary instructions with respect to the testimony of sex victims.* Upon request, the law officer should instruct the Court that a conviction cannot be based upon the uncorroborated testimony of an alleged victim if such testimony is self-contradictory, uncertain or improbable.[110] The Court of Military Appeals has assumed that such an instruction would also be required if "the state of the record established the propriety of such instruction" even as to the testimony of a *witness* to a sex offense, who was not a victim, provided the defense requests such an instruction.[111] In a sex offense involving consent, a requested instruction concerning the absence of a complaint should also be given. This is also true even in case of a sex offense not in-

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[101] United States v. Floyd, 2 USCMA 188, 7 CMR 59 (1953). See also United States v. Cooper, 2 USCMA 388, 6 CMR 188 (1953) (assault with intent to rob and murder).

[102] 3 USCMA 306, 12 CMR 62 (1953).

[103] United States v. Baca, 14 USCMA 76, 33 CMR 288 (1963) where a guilty plea is withdrawn and a mistrial not granted, the law officer should caution the court that the original plea cannot be considered by them. United States v. Walter, 14 USCMA 142, 33 CMR 354 (1963) (desirable but not prejudicial here).

[104] United States v. Walker, 7 USCMA 669, 23 CMR 133 (1957) (effect of passion upon premeditation).

[105] See United States v. Sellers, 12 USCMA 262, 30 CMR 262 (1961).

[106] United States v. Burden, 2 USCMA 547, 10 CMR 45 (1953).

[107] See United States v. Crooks, 12 USCMA 677, 31 CMR 263 (1962). See also CM 381826, Robinson, 20 CMR 424 (1955) (an incorrect requested instruction on accomplice testimony is sufficient to place the law officer on notice that an instruction is desired). However, a requested instruction as to one offense apparently does not put the law officer on notice that a similar instruction is desired with respect to another offense charged. ACM 11127, Parrish, 21 CMR 689 (1955). Affirmed 7 USCMA 337, 22 CMR 127 (1956).

[108] MCM, 1951, para. 158*a*. United States v. Bey, 4 USCMA 665, 16 CMR 239 (1954).

[109] See CM 381826, Robinson, 20 CMR 424 (1955). See also generally United States v. Scoles, 14 USCMA 14, 33 CMR 226 (1963). United States v. Schreiber, 5 USCMA 602, 18 CMR 226 (1955).

[110] See MCM, 1951, para. 158*a*.

[111] United States v. Polak, 10 USCMA 18, 27 CMR 87 (1958).

herently requiring a lack of consent for conviction, if, in fact, the offense was committed without the consent of the victim.[112] But in the case of carnal knowledge, it has been held that while evidence of lack of complaint is admissible, there is no requirement for the law officer to instruct the Court on the effect thereof even though requested to do so.[113] The Court did indicate in *Mantooth* that there would have been no abuse of discretion had the law officer granted the requested instruction if he desired. In addition, the Court indicated that in a proper case where there was testimony by a carnal knowledge victim that force was used against her there would perhaps arise a duty to give a requested fresh complaint instruction. In view of the language there used and the discussion in *Goodman*, law officers would be advised to give such an instruction in a proper carnal knowledge case upon request.

(4) *Effect of good character.* Upon request, the law officer should instruct upon the effect of good character evidence where there is in the record evidence to that effect.[114]

(5) *Accused's failure to testify.* Upon request, the law officer should caution the Court that the failure of the accused to testify as a witness should not be used in any way by the Court against him.[115]

(6) *Defining legal terms.* Previously,[116] it was noted that the Court of Military Appeals has required that very few legal terms be defined *sua sponte*. On the other hand, there appears to be practically no limit to the duty of the law officer to give clarifying and amplifying definitions of terms used in the specification and in the instructions, upon a request of the accused. For example, the impact of the cases rendered by the Court and the Boards of Review require that the following terms, *inter alia*, must be defined in a proper case upon request: "Apprehension" [117] in a desertion case, "steal" [118] "abandon" [119] in a specification of absence without leave with intent to abandon a watch, "fraudulent" and "intent to defraud" [120] in a specification alleging the uttering of worthless checks with intent to defraud and fraudulently obtaining money by means thereof, "carnal knowledge" [121] in rape "unnatural copulation" in sodomy [122] "willful" in willful disobedience [123] "negligence" [124] in negligent homicide, "reckless" in reckless driving,[125] "public place," and "disorderly conduct" [126] in drunk and disorderly in a public place, "grievous" [127] in assault whereby grievous bodily harm inflicted, "premeditation" [128] in murder, "culpable negligence" [129] in involuntary manslaughter, "possession" [130] in wrongful possession of narcotics, "official" [131] in false swearing, "human being" [132] in

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[112] United States v. Goodman, 13 USCMA 663, 33 CMR 195 (1963), (forcible sodomy).

[113] United States v. Mantooth, 6 USCMA 251, 19 CMR 377 (1955).

[114] United States v. Phillips, 3 USCMA 137, 11 CMR 137 (1953).

[115] United States v. Mallow, 7 USCMA 116, 21 CMR 242 (1956).

[116] See Section II, 3a(3) *supra*.

[117] United States v. McDonald, 6 USCMA 575, 20 CMR 291 (1955). See also United States v. Fields, 13 USCMA 193, 32 CMR 193 (1962).

[118] ACM 4506, Lamphere, 3 CMR 531 (1952).

[119] CM 357508, Kukola, 7 CMR 112 (1952).

[120] ACM 4652, Whitney, 3 CMR 714 (1952).

[121] United States v. Parker, 3 USCMA 272, 12 CMR 28 (1953).

[122] United States v. Phillips, 3 USCMA 137, 11 CMR 137 (1953).

[123] United States v. Scukup, 2 USCMA 441, 9 CMR 117 (1953).

[124] ACM 4711, Ritcheson, 3 CMR 759 (1952).

[125] United Stetes v. Eagleson, 3 USCMA 685, 14 CMR 103 (1954).

[126] CM 350729, Akins, 4 CMR 364 (1952).

[127] United States v. Dejewski, 8 USCMA 98, 11 CMR 98 (1953).

[128] United States v. Day, 2 USCMA 416, 9 CMR 46 (1953).

[129] United States v. Felton, 2 USCMA 680, 10 CMR 128 (1953).

[130] ACM S-9000 Hughes, 16 CMR 559 (1954).

[131] CM 353607, Galloway, 8 CMR 323 (1952) affirmed 2 USCMA 438, 9 CMR 63 (1953).

[132] ACM 9078, Gibson, 17 CMR 911 (1954). The accused, an Army nurse, was convicted of murder of her newborn baby by strangling her with a pajama top. The accused complained of a failure of the law officer sua sponte to define "human being". In affirming, the Board of Review held that *ordinarily* the term "human being" has a universal meaning in the lay mind as well as the legal and there is no need for a sua sponte definition. However, where the evidence relates to a dead body, concerning which there is a question of fact as to whether or not it had obtained a stage of development of a "human being" that is, whether it had a separate and independent existence of its own, then the term "human being" partakes of a particular meaning in the law and amplifying and clarifying instructions defining it may be helpful. The Board held that no question of fact existed as to whether the child had been born alive and, in the absence of a request, there was no error in failing to define the term.

murder of a child, and "reasonable doubt." [183] While the Court and Boards of Review have appeared to go to great length in requiring the law officer to instruct on special issues and to define terms where requested to do so, there is a limit beyond which the Court has refused to go even in the face of a specific request. The Court has held that the law officer need not give instructions which attach unwarranted prominence to particular items of evidence in favor of one of the parties.[184] The Court has held that the law officer is not required to instruct the Court on the maxim *falsus in uno, falsus in omnibus, sua sponte*,[185] and while he may do so upon request, it is not error for him to refuse even in that situation.[186] On the other hand, matters closely connected with the accused's defense should be given special consideration by the law officer and it is unwise to refuse a requested instruction of that nature. For example, in *United States* v. *Walker*,[187] the law officer refused to instruct the Court that even though reasonable cooling time had elapsed, if passion in fact persisted in the mind of the accused, the accused could not be convicted of premeditated murder. While the Court held that the particular instruction misstated the law, it was sufficient to place the law officer on notice that some instructions upon the effect of passion on premeditation was necessary to guide the Court. In addition, while the Court has held that the law officer need not *sua sponte* instruct the court on the "two witness" rule in a perjury prosecution,[188] a failure to do so upon request is prejudicial.[189]

c. Effect of an erroneous failure or refusal to instruct. A total failure to comply with Article 51*c* of the Code and paragraph 73*a* of the Manual is error as a matter of law,[140] and such failure in a case where the accused pleads not guilty is a denial of due process requiring reversal.[141] The *Lucas* doctrine of nonprejudicial error to fail to instruct on guilty plea cases does not apply where there is no formal plea of guilty. For example, where the accused judicially confessed to a lesser included offense, it was held to be prejudicial error to fail to instruct on the lesser included offense.[142] But where there is a formal plea of guilty to a lesser included offense, the *Lucas* doctrine applies.[143] In addition, if an issue is not reasonably raised, a defective instruction on that issue generally would present no question of prejudice, for the accused is the recipient of a gratuity.[144] Moreover, an inexact instruction is not prejudicial if it did not mislead the court[145] or if the evidence is compelling.[146]

d. Repeating instructions on special issues in final instructions. In practice, it appears that law officers generally repeat an instruction on a special issue during their final instructions, and the Court of Military Appeals has indicated that "we can assume, without deciding, that generally it is better to repeat the advice in the

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[183] United States v. Offley, 3 USCMA 276, 12 CMR 33 (1953).

[184] United States v. Harris, 6 USCMA 736, 2 CMR 58 (1956). (In trial for murder, not error to refuse to instruct at request of accused on effect of friendship of accused and victim, lack of motive, and voluntary surrender, as showing a consciousness of innocence).

[185] See United States v. Polak, 10 USCMA 13, 27 CMR 87 (1958).

[186] United States v. Baldwin, 10 USCMA 198, 27 CMR 267 (1959).

[187] 7 USCMA 669, 23 CMR 133 (1957). See also United States v. Miller, 8 USCMA 33, 23 CMR 257 (1957). Where the Court stated that the law officer is not required to single out and comment on every aspect of the case if particular issues are adequately dealt with in the instructions as a whole.

[188] United States v. Gomes, 3 USCMA 232, 11 CMR 232 (1953).

[189] United States v. Crooks, 12 USCMA 677, 31 CMR 263 (1962).

[140] United States v. Lucas, 1 USCMA 19, 1 CMR 19 (1951). Although *Lucas* held it to be nonprejudicial error to comply with Article 51*c* in guilty plea cases, one member of the Court appears now to prefer the view that such neglect is not error at all. See United States v. Thompson, 11 USCMA 5, 28 CMR 229 (1959).

[141] United States v. Clay, 1 USCMA 74, 1 CMR 74 (1951).

[142] United States v. Clay, 9 USCMA 582, 26 CMR 362 (1958).

[143] United States v. Thompson, 11 USCMA 5, 28 CMR 229 (1959).

[144] United States v. Duckworth, 13 USCMA 515, 33 CMR 47 (1958). The Court pointed out, however, that an incorrect instruction on self-defense not raised or even a correct instruction in that situation could in some circumstances result in prejudice.

[145] United States v. Cotton, 13 USCMA 176, 32 CMR 176 (1962).

[146] United States v. Allums, 5 USCMA 486, 18 CMR 59 (1955). In United States v. Simpson, 10 USCMA 548, 28 CMR 109 (1959), where the law officer instructed the Court that "in law, prima facie evidence of a fact is sufficient to establish that fact, unless rebutted," the Court held that such an instruction has no place in the trial of a criminal case, but, in view of the compelling nature of the evidence, the error was not prejudicial. An erroneous instruction given by the President of a special court-martial may require reversal, even though requested by the defense. See United States v. Roberson, 12 USCMA 719, 31 CMR 305 (1962). (Requiring that mistake of fact in larceny be both honest and *reasonable*).

final instructions." [147] However, in the same case the Court held that where special instruction was given on a special issue at the time it arose, it was not error to fail to repeat it in the final instructions in absence of a request therefor where only 1 hour elapsed between the instruction and deliberation and both counsel discussed the matter in the interim. The court hinted, however, that there could conceivably be circumstances calling for a repetition of the instruction.

4. Preparation of instructions. Law officers in practice devote considerable time and caution to the preparation of their instructions. Tentative instructions are prepared upon receiving a copy of the charges and specifications and these are modified, augmented, and corrected during the trial and during a recess prior to the arguments. The Law Officer Pamphlet[148] is available as a guide to assist in the preparation of instructions. However, the admonition of the Board of Review in ACM 15904, *McArdle*,[149] should, of course, be considered before making use of any such instruction: "This case emphasizes the fact that model instructions provided for use by the law officer are merely guides. Instructional requirements vary in each case and must be tailored to fit the evidence." [150] In several cases, the Court of Military Appeals has cautioned that the instructions must be tailored to fit the facts of a particular case.[151]

In *United States* v. *O'Hara*,[152] the Court stated:

> If the legal rules are not related to the evidence in the case, generalizations, although correct in the abstract, may mislead the Court. We have, on occasion, called attention to the obligation of the law officer to revise the standard form of instructions found in service pamphlets to make them more pertinent to the evidence in the case.

In order to avoid shifting the burden of proof in instructing on a special issue, the law officer should use care to couch his instructions in negative language throughout. For example, in *United States* v. *Odenweller*,[153] the law officer instructed the Court on the issue of the deprivation of counsel during the pretrial interrogation in the following language: "If you find that, under these circumstances, such request was made and denied, you must refuse to consider the oral statement as evidence in this case." The Court, in reversing for shifting the burden, found that the instruction required that the Court affirmatively find that the accused requested and was denied counsel before it could disregard the confession. An instruction substantially as follows would have avoided the particular problem: "Unless you are satisfied beyond a reasonable doubt that the accused was *not* denied the opportunity for consultation with counsel, you must refuse to consider the oral statement as evidence." [154]

5. Written instructions. Whether the law officer will furnish the Court members a copy of his instructions for their use in deliberations is a matter entirely within his discretion. However, if he does so, he must follow certain precautionary rules[155] in order to avoid error:

a. The entire instructions should first be given orally in open court;[156]

b. The written instructions must be marked as an exhibit and appended to the record;[157]

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[147] United States v. Williams, 13 USCMA 203, 32 CMR 203 (1962). It would appear to be mandatory to repeat the instructions where the situation changes in the meantime, such as where the accused testifies concerning voluntariness *after* his pretrial statement has been admitted but had remained silent before. (See CM 409498, Davis, 29 August 1968), in order properly to *tailor* his instructions. (See United States v. Shanks, 12 USCMA 586, 31 CMR 172 (1961)).

[148] DA Pam 27-9, Military Justice Handbook: The Law Officer (1958).

[149] 27 CMR 1006 (1959).

[150] See also paragraph 1b, DA Pam 27-9 (1958), and the note preceding suggested instructions on self-defense at appendix VIII, p. 145 of the same publication.

[151] See, for example, United States v. Smith, 13 USCMA 471, 33 CMR 3 (1963).

[152] 14 USCMA 167, 33 CMR 379 (1963).

[153] 13 USCMA 71, 32 CMR 71 (1962).

[154] See DA Pam 27-9 (1958), app. XXI, p. 171. The Court has also, from an early date, made it clear that law officers must not instruct by reference to other cases (See United States v. Chaput, 2 USCMA 127, 7 CMR 3 (1953)), arguments of counsel (United States v. King, 2 USCMA 397, 9 CMR 27 (1953), the Manual for Courts-Martial (see United States v. Rinehart, 8 USCMA 402, 24 CMR 212 (1957)); *cf.*, ACM 7723, Jones, 13 CMR 800 (1953), previous cases presided over by the law officer at which the same members sat (United States v. Forwerck, 12 USCMA 540, 31 CMR 126 (1961); United States v. Napier, 12 USCMA 552, 31 CMR 138 (1961)), or to other sources.

[155] See CM 404841, Sanders, 30 CMR 521 (1961).

[156] Apparently an accused could not even expressly waive oral instructions and consent to members carrying written instructions into closed session without prior oral instructions. At least, it has been so held with respect to a special court-martial. See ACM-S 120489, Hillman, 21 CMR 834 (1956).

[157] A failure to attach the instructions to the record renders it incomplete and prejudice is apparent. See United States v. Caldwell,

c. The written instructions must be handed to the Court in open court;[158]

d. Counsel should be permitted to examine the instructions and given an opportunity to object to their contents;[159] and

e. The entire instructions must be given in writing[160] to avoid emphasizing some portions of the instructions over others and preferring one party over another.[161]

6. Note-taking by members. The practice of note-taking by members of courts-martial is widespread throughout the Army, and, while the matter is seldom expressly mentioned, an implied invitation to take notes is given to members in practically every case by placing pads and pencils before them. The notes taken are quite generally carried into closed session when the members retire. The practice has been so generally accepted that there is very little authority on the subject in the military. A Board of Review has held that there is no impropriety in a court member's taking notes for his *individual* use in closed session, either on his own motion or at the suggestion of the law officer.[162] The Board carefully distinguished *Caldwell*[163] on the ground that here notes were used as *individual* matters and not as a *master copy*, as in *Caldwell*. The Board noticed that the old rule in civilian jurisdictions finding fault with the procedure was based upon the *former* widespread illiteracy of jurors.[164]

7. Commenting on the evidence. A comment by the law officer upon the evidence is not prohibited by either the Code or the Manual.[165] If there is no assumption of facts which are not in the record or nothing "tilting the scales" in favor of the prosecution, or nothing argumentative about the comment or no attempt to influence the Court into adopting a construction advocated by the law officer, a comment is not prejudicial to the accused.

> It is well within the bounds of fair instructional practice for the law officer to apply the facts to the law, particularly, when he further explicitly informed the members that they would not regard any comments made by him as binding on them.[166]

The Court has even advised law officers that they may express an opinion "even on the guilt of the accused, so long as [they] advise the jury clearly and unequivocally [their] opinion is not binding."[167] However, after giving the law officer the authority to comment on the evidence and to express an opinion "even on the guilt of the accused", the court hastened to issue a strong *caveat:*

> Law officers should proceed slowly in utilizing the powers 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 attention upon the crucial points in the case. The line between proper and improper comment can and must be narrowly drawn.

Following *Andis*, law officers generally felt that the Court perhaps was giving them something with one hand and taking it back with

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11 USCMA 257, 29 CMR 73 (1960); CM 386695, Helm, 21 CMR 357 (1956).

[158] See United States v. Caldwell and CM Helm, *supra* note 157.

[159] See CM Helm, *supra* note 157.

[160] *Ibid.*

[161] See CM Sanders, *supra* note 155. DA Pam 27-9, (1958), paragraph 73*b*, recommends that the law officer furnish the Court written instructions [illegible] danger that during the heat of the trial certain instructions will be given orally which are not included in the written instructions, there exists a danger that the written instructions will be lost either by the court itself or following trial and will never be attached to the record, and that the lack of adequate clerical assistance makes such practice generally impracticable. The Federal procedure is the same as the military; *i.e.*, the matter of written instructions is discretionary with the judge and written instructions are seldom furnished. See Walsh, *Fair Trials and the Federal Rules of Criminal Procedure*, 49 ABAJ 859, 863 (Sep 1963), where the author recommends that Rule 30 be amended to make written instructions mandatory.

[162] ACM 17261 Christensen, 30 CMR 959 (1960), affirmed 12 USCMA 393, 30 CMR 393.

[163] United States v. Caldwell, *supra* note 157.

[164] Other reasons given by some courts for prohibiting the taking of notes are (1) note-taking diverts juror's attention from the proceedings and (2) jurors with notes may exert undue influence over those without notes.

[165] As a matter of fact, MCM, 1951, para. 73*c*(1), expressly permits such practice.

[166] United States v. Smith, 3 USCMA 25, 11 CMR 25 (1953).

[167] United States v. Andis, 2 USCMA 36-4, 8 CMR 164 (1953).

the other.[168] Consequently, law officers have approached the problem of commenting on the evidence quite timidly, and in no reported case has a law officer *expressly* stated his opinion as to the guilt of the accused. All such statements in the area appear to have been inadvertent. At the time *Andis* was decided, there was good reason for law officers to exercise the authority to comment upon the evidence "slowly" as admonished by *Andis*. However, with the establishment of the Army Judiciary with senior experienced lawyers always acting as law officer, it would appear that the question of commenting upon the evidence may be faced less timidly, but, of course, always cautiously. There is reason to believe that law officers can present the case more meaningfully if such power is exercised. On the other hand, there would appear to be no purpose to be served by the law officer expressing his opinion as to the guilt of the accused. Any such expression would, of course, carry undue weight with the Court and, as a practical matter, no amount of cautionary instructions could prevent the court from attaching special importance to it.

8. Instructions on procedure for voting on the findings and sentence. In view of the decision in *United States* v. *Rinehart*,[169] it would seem that since the court does not have access to the Manual, some guidance should be given the members in their voting procedure, and most law officers do in fact follow that procedure, especially with respect to the findings. Nevertheless, a Board of Review has held that it is not error for the law officer to fail to instruct *sua sponte* on the procedure to be followed in voting on a *sentence*, provided no inquiries or contentions have raised questions of procedure which must be clarified.[170]

However, there are dangers in the procedure. For example, where the law officer in instructing on the procedure for voting on the sentence, failed to instruct the court that they must begin their vote on the lightest sentence proposed, a Board of Review found prejudice.[171] In addition, on the question of reballoting, the law officer must properly instruct the court that the question is decided by a majority vote.[172]

The law officer must, however, advise the court as to the maximum sentence which may be imposed, and in a rehearing he must choose such language as will limit the court to the maximum imposed on the prior trial without in some way advising it that that was the punishment imposed originally[173] or what the maximum punishment would be if it were not a rehearing, and without misleading the court as to substitute punishments.[174] As the court indicated in *United States* v. *Brousseau*,[175] upon a rehearing on the merits, the law officer is in a difficult and delicate position. Judge Kilday did indicate in *Brousseau* that in the absence of restrictive language in the instruction or a specific question con-

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[168] However, it appears that the Court has generally stood behind the authority it granted in Andis, although some of its language appears to indicate that it was perhaps difficult to do so in some cases. In United States v. Miller, 6 USCMA 495, 20 CMR 211 (1955), in ruling upon a motion for a finding of not guilty, the law officer stated that in his opinion, the prosecution had made out a *prima facie* case, and in his final instructions he explained that what he meant by a *prima facie* case was that "the evidence introduced was sufficient to counter-balance the presumption of innocence and would warrant a conviction, if not countered and controlled by evidence tending to contradict it and to render it improbable or to prove other facts inconsistent with it." With respect to the *opinion* expressed by the law officer, the Court held that "no harm can have been done" because the law officer properly cautioned that his opinion was not binding. The Court held that although the *explanation* may have come "dangerously close" to shifting the burden, the *standard of reasonable doubt* was clear from the instructions as a whole. See also United States v. Dunnahoe, 6 USCMA 745, 21 CMR 67 (1956) (comment upon intoxication as affecting ability to premeditate). In United States v. Toms, 3 USCMA 485, 12 CMR 191 (1953), after some deliberations on the findings, the Court opened and asked the law officer whether the evidence was sufficient to sustain the findings if they convicted. After some pressing, the law officer, in effect, stated that *he* had previously found it legally sufficient to deny a motion for finding of not guilty. The Court refused to find prejudice. Even an erroneous comment by the law officer may not be prejudicial under the circumstances of a particular case. See United States v. Walters, 8 USCMA 782, 14 CMR 150 (1954).

[169] 8 USCMA 402, 24 CMR 212 (1957).

[170] CM 403924, Perry, 29 CMR 623 (1960), *pet. den.* 29 CMR 536.

[171] CM 403429, Mimbs, 29 CMR 608 (1960).

[172] See United States v. Valentin, 5 USCMA 668, 18 CMR 292 (1955).

[173] United States v. Turner, 9 USCMA 124, 25 CMR 386 (1958). But apparently may refuse to instruct that there is no *minimum*. See WC NCM 61-00488, Goodman, 31 CMR 807 (1961). Such instructions are binding even though erroneous. United States v. Crawford, 12 USCMA 208, 30 CMR 208 (1961) (court adjudged reduction although President of court had not advised that reduction in grade was a permissible punishment. The Court set aside that portion of the sentence adjudged). The same result would probably follow even though the instruction was included on a sentence work sheet, unless all the parties to the trial have examined it and agreed that it constitutes a part of the sentence instructions. See United States v. Cald, 13 USCMA 848, 32 CMR 348 (1962). See ch. XIX, *supra*.

[174] United States v. Jones, 10 USCMA 582, 28 CMR 98 (1959).

[175] United States v. Eschmann, 11 USCMA 64, 28 CMR 288 (1959).

[176] United States v. Brousseau, 13 USCMA 624, 33 CMR 156 (1963).

[177] *Supra*, note 176.

cerning substitute punishments, a simple statement to the effect that "the maximum punishment that may be adjudged against the accused is to be discharged from the service with a bad conduct discharge, to be confined at hard labor for six months, and to be reduced to the grade of airman basic" without elaboration as to substitute punishments may be "minimally correct." In *United States* v. *Smith*,[178] the law officer at the first rehearing instructed the court that it could sentence the accused to bad conduct discharge, reduction to private, and admonition or reprimand, "but no others." After the Board of Review ordered a second rehearing because of the inclusion of the quoted words, the law officer at the second rehearing instructed the court as follows:

> The maximum punishment that may be adjudged in this case . . . is bad conduct discharge and reduction to the grade of private.
>
> You are also instructed that in this case a lesser type of punishment, in lieu of the punitive discharge and in addition to the reduction, could include not only admonition or reprimand but also one or more of the following: *forfeitures* not to exceed the rate of two-thirds pay per month for the period adjudged, confinement at hard labor; hard labor without confinement not to exceed three months; or restriction to limits not to exceed two months. You are further advised, however, that you must determine, as reasonable persons, that in your judgment any sentence substituted in lieu of a bad conduct discharge is, in fact, of a lesser degree of severity than a bad conduct discharge.

The court held that the law officer did not err in so informing the members of the existence of possible alternative penalties.

9. Coercing agreement on sentence. Where a sentence is discretionary with the court, it has a right to disagree and to impose no sentence at all. In *United States* v. *Jones*,[179] a rehearing on the sentence was ordered where the law officer, upon inquiry from a court which had deliberated for a considerable time, instructed the court that there was "no such thing as hung jury," that there was no time limit on deliberations, that the court should take all the time necessary to reach an appropriate and just decision, that the court should continue its discussions, proposals of sentences, and voting until it arrived at a sentence, and that the members should, through reasonable and honest *compromise*, arrive at a sentence acceptable to the required number of members. The Court of Military Appeals held that the emphasis upon the impossibility of a "hung jury" and duty to compromise, with the resultant indication that the court *must* agree, coerced a sentence.[180]

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[178] 12 USCMA 595, 31 CMR 181 (1961).
[179] 14 USCMA 177, 33 CMR 389 (1963).
[180] The Court discussed the "Allen Charge" (Allen v. United States, 164 U.S. 492 (1896)), and while not clearly approving or disapproving the same, did state that it is "considered as the outermost limits to which a judge may go in his instructions in an effort to bring the jury to agreement."

CHAPTER XVIII

THE VERDICT

References: Articles 39, 51(a), 52, 53, UCMJ; paragraphs 55, 74, MCM, 1951.

Section I. INTRODUCTION

Upon completion of the law officer's instructions or those of the president of a special court-martial, the members of the court-martial retire to deliberate, and eventually vote on the guilt or innocence of the accused. The procedure, with the exception of the number of votes required and the right of the law officer to enter the deliberation room under specified limitations, is similar to that of civilian criminal trials.

Section II. THE DELIBERATION

1. General. The members of the court-martial may deliberate only as a unit, and it would be reversible error for the members to arrive at a verdict, except in formal, closed session with all members present.[1] This salutary rule would seem particularly desirable in the military, where the possibility of a senior officer exercising influence on a subordinate during a recess could cast the fairness of the verdict in doubt. Thus members are forbidden to discuss the case, except in closed session.[2] During closed session, however, full and free discussion should[3] be required, because the verdict-process requires a free exchange of individual impressions which may serve to correct erroneous conceptions of the evidence or

2. Length of deliberation. It has been the military practise, when necessary, to

court-martial to suspend its deliberation, to open the court and formally adjourn the proceedings for meals, sleep and rest. As previously stated, the members are not to discuss the case at these intervals. The permissive civilian procedure of keeping the jurys incommunicado during these periods has not been followed in the military, probably because the law officer's authority does not extend outside the court room. It is conceivable, however, that in exceptional circumstances the law officer would be justified in requesting the convening authority to order the members to remain continuously in custody and to provide the necessary facilities.

3. Basis of finding. *a. General.*[6]

Only matters properly before the court as a whole may be considered. A member should not, for instance, be influenced by personal knowledge, facts, character or service of the accused not based on the evidence or other proper matter before the court; or by opinions not properly in evi-

This rule obviously is designed to insure the accused's right to cross-examination, the confrontation of evidence and other aspects of the adversary proceeding. A member's viola-

[1] United States v. Solak, 10 USCMA 440, 28 CMR 6 (1959).
[2] United States v. Lowry, 4 USCMA 448, 16 CMR 22 (1954).
[3] The Manual, at para. 74*d*(1), provides: "Deliberations should fully include full and free discussion. . . ." [Emphasis supplied.] Query: In view of differences in military rank, would it be better practise to withhold discussion until after a secret ballot reveals any differences in opinion? See Winthrop, *Military Law and Precedents* (2d Ed, 1920), p. 376. Consider CM 111[illegible], 18 CMR 774 (1955).
[4] United States v. Nash, 5 USCMA 560, 18 CMR 184 (1955). This is accepted Federal practise. See United States v. Tellier, 225 F2d 441 (2d Cir. 1958).
[5] See United States v. Snook, 12 USCMA 613, 31 CMR 199 (1962).
[6] MCM, 1951, para. 74*a*(1).

tion of these precepts where there has been a timely [7] objection, creates a presumption [8] of prejudice which must be rebutted by a contrary showing on the record of trial.[9]

b. Exhibits. As a general rule, it is within the discretion of the law officer as to what exhibits may be taken into the deliberation room.[10] Certain exhibits, however, that would tend to receive undue weight from the members are excluded from the deliberation room. Thus a transcript of a witness's testimony in the form of a stipulation,[11] or reduced to a deposition,[12] may not be retained by the members.

c. Member's notes. As with the more enlightened, recent Federal practise, it is within the law officer's discretion to allow the member to retain any notes which he may have made during the trial.[13]

d. Member's "knowledge of human nature and the way of the world." [14]

> In weighing the evidence a member is expected to utilize his common sense and his knowledge of human nature and of the ways of the world.

Since the preceding subparagraph of the Manual [15] restricts an individual member's consideration of the evidence to that "properly before the court as a *whole*", [emphasis supplied] it must be assumed that in utilizing his common knowledge and experience the member should not be entitled to rely on expertise or knowledge of facts not shared by the other members *and* the military community as a whole.[16] To allow a contrary practise would be to thwart the challenging practise,[17] as well as the rules pertaining to the admissibility of evidence.[18]

Illustrative Case

ACM 17059, *Reyes*, 30 CMR 777 (1960)

Relevant to one of the charges against the accused was proof that he intentionally interfered with the mission of SAC aircraft—a highly classified matter. The record of trial indicated that the members of the court—but not the defense counsel or accused, were aware of the aircraft's status and mission.

Opinion. Conviction disapproved. Court members are "expected to use their common sense and knowledge of human nature and ways of the world (MCM, 1951, para. 74*a*(2), 138*a*). They are, indeed, permitted and expected to weigh the evidence in light of their 'common knowledge' of the world, but this does not permit them to apply specialized knowledge which they may have as the result of experience or training not shared by their class in general. . . . This does not, for example, mean that Air Force personnel serving as court members must put aside their knowledge of Air Force matters generally nor of their military specialties, aeronautical or otherwise, in weighing the evidence . . ., but they may not consider specialized knowledge not available within the military community generally. In some cases it may be necessary to draw this line with some nicety, but we have no doubt that knowledge of the mission of the aircraft in this case was within the excluded area. The fact that the information was identified as Top Secret and was withheld from accused and his counsel is alone sufficient to establish that it was not 'common knowledge', under any valid extension of that term. The fact that B–52s of the SAC alert force are scheduled for extended missions is, of course, such common knowledge, but not the special missions of certain aircraft or units.

e. Jurors' handbook. The Court of Military Appeals has prohibited the use of the Manual for Courts-Martial for the stated reason that

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[7] United States v. Wolfe, 8 USCMA 247, 24 CMR 57 (1957): Defense counsel knew of a member's unauthorized view of the scene of the crime, before the completion of the trial; he was estopped from asserting the error after the sentence.

[8] United States v. Webb, 8 USCMA 70, 23 CMR 294 (1956).

[9] See United States v. Linder, 8 USCMA 689, 20 CMR 385 (1956).

[10] See United States v. Hurt, 9 USCMA 735, 27 CMR 3 (1958).

[11] ACM 14702, Schmitt, 25 CMR 822 (1958). *Quaere:* May a stipulation of *fact* be retained?

[12] United States v. Jakubiec, 10 USCMA 41, 27 CMR 115 (1958).

[13] See the excellent discussion in ACM 17261, Christensen, 30 CMR 959 (1961), at 961, 962; affirmed, 12 USCMA 393, 30 CMR 393. The case points out the earlier exclusionary rule was based on the illiteracy of the jurors. See United States v. Standard Oil Company, 316 F2d 884 (7th Cir. 1963).

[14] MCM, 1951, para. 74*a*(2).

[15] *Id.*, para. 74*a*(1).

[16] Winthrop, *Military Law and Precedents* (2d ed. 1920), p. 379, note 17.

[17] MCM, 1951, para. 62*b*. Duty of member to disclose possible challenge for cause. But see United States v. Czerwonky, 12 USCMA 353, 32 CMR 353 (1962).

[18] See DA Pam 27–172, "Evidence" (1962), p. 275.

it contains inaccuracies of law, as well as purely administrative policies that have no place in the members' deliberations because they tend to influence unlawfully the independent judgment of the court-martial.[19] This rule has been enforced by the application of the "general prejudice" rule; that is, where a Manual has been used, the case will be reversed without regard to the existence of actual prejudice.[20] It would seem, however, if the reason for the prohibition could be removed, it would then be permissible to provide the members with some sort of procedural guide. Thus it should not be objectionable to give the members a copy of the procedural guide in appendix 8a to the Manual in which all errors have been corrected. If attached to the record of trial, reviewing authorities could be assured of its unobjectionable nature. Such a practise[21] would be of great assistance to special courts-martial whose members are not assisted by a skilled law officer.

c. Written instructions. As stated in the previous chapter, it is within the discretion of the law officer whether the members will be furnished copies of written instructions on the law of the case.

Section III. VOTING PROCEDURES

1. General. See MCM, 1951, subparagraph 74*d*(2)(3). The voting is by secret written ballot.[22] Normally a vote of two-thirds of the final members is necessary to convict the accused;[23] a vote of less than that number amounts to an acquittal.[24] Thus a "hung jury" is an almost unheard of phenomenon in military practise, since a unanimous vote of acquittal is not necessary. In the rare case where the death sentence is mandatory[25] all members must concur in a conviction;[26] where, however, the death sentence is merely a permissible punishment, or even when it is the only alternative to life imprisonment, only a two-thirds vote is necessary for conviction.[27]

2. The specification. *a. General.* Since the criminal liability of the accused is in general decided by the finding as to the specification[28] (rather than the verdict on the charge which is only descriptive) the court should first vote on the specifications, and then on the charges:[29] "The order in which the several charges and specifications are to be voted upon will ordinarily be determined by the president, subject to the objection of a majority of the court, except that all the specifications under a charge shall precede that charge."

b. Permissible findings.[30] "Permissible findings include guilty; not guilty; guilty with exceptions, with or without substitutions; *and not* guilty of the exceptions and guilty of any substitutions." There are no reported cases concerning the legality of a special verdict, as that term was used at common law, and it is doubtful that such a verdict is authorized in a [illegible] constitute a valid finding by [illegible] substitutions, the substitutions [illegible] offense fairly included within the alleged specification.[32] Otherwise, the variance (the substituted words of guilt) would constitute a *fatal* variance. In the latter case the result would be an acquittal.[33] The test of a fatal variance is not so simple, but would seem

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[19] United States v. Rinehart, 8 USCMA 402, 24 CMR 212 (1957). This decision allowed the president of a special court-martial to use the Manual in open court.

[20] United States v. Dobbs, 11 USCMA 228, 29 CMR 144 (1960).

[21] This practise was suggested in Dobbs, *supra* note 20. It was followed in ACM 17669, Buford, 31 CMR 685 (1962), *pet. denied* 31 CMR 814.

[22] UCMJ, Art. 51(a).

[23] *Id*, Art. 52(a).

[24] MCM, 1951, para. 74*d*(3).

[25] UCMJ, Art. 106 (Spying).

[26] UCMJ, Art. 51(b).

[27] United States v. Morphis, 9 USCMA 748, 26 CMR 528 (1958); only two-thirds of the members need concur in a conviction for premeditated murder, although the only authorized punishments are death (requiring concurrence of all the members) or imprisonment (requiring concurrence of three-quarters of the members).

[28] See MCM, 1951, para. 87*d*; ACM 4188, Hathaway, 1 CMR 776 (1951).

[29] MCM, 1951, para. 74*d*(2); (f), App 8a, p. 141.

[30] MCM, 1951, subpara. 74*d*(1).

[31] Common law courts had the inherent right to submit special verdicts to the jury, but in criminal cases in the United States some authorities have held that this procedure is an illegal restriction on the right of the jury to find a general verdict. See [illegible] *Trial Practice* (4th ed., 1939) at p. 1859, note 6. Under the Federal Rules of Criminal Procedure, the special verdict is not used in Federal criminal cases. Housel and Walker, [illegible] *cuting Federal Criminal Cases*, (2d ed., 1948) [illegible]

[32] MCM, 1951, para. 74*b*(2). Nor may the authorized punishment be increased by the substitutions. *Id.* Although a variance of description is committed on the date alleged, a correctly substituted finding may state a later but includable date, provided the statute of limitations is not involved. MCM, 1951, para. 68*b*.

[33] MCM, 1951, para. 74*a*(2); [illegible]

to relate to the test for the legal sufficiency of the original allegation: [84] (1) is the accused adequately apprised of what he must defend against? and (2) is the allegation, together with the record of trial, sufficient to protect the accused against another trial for the same offense?

In determining the legal validity of a substituted word in the finding, probably the first horn of the test should be given the most importance, because the express words of the verdict, together with the record of trial, would satisfy the second requirement and protect the accused against double jeopardy. Thus the words of the original specification should warn the accused of the possibility that he may properly be found guilty of the substituted words. Otherwise his defense could be prejudiced, despite his awareness of the existence of available evidence in support of the substitutions. Also, to permit the court-martial to find an offense not fairly included within the original specification, would in effect allow a double arraignment, pretermit the safeguards of sworn charges, an Article 32 investigation, a pretrial advice, and a personal referral of the different charge to the convening authority. Put another way, if the prosecution cannot amend the specification after receipt of evidence to allege a different offense, then the court-martial should not be allowed to do the same thing by verdict.[85]

Illustrative Cases (Fatal Variance)

United States v. *Boswell*, 8 USCMA 195, 28 CMR 869 (1957)

The accused pleaded not guilty to a charge of desertion from a disciplinary barracks, testifying that he thought he had been discharged and thus was no longer in the Army. Although the law officer's instructions defined desertion and the lesser included offense of AWOL as the only offenses before the court-martial, the members of the court, in open court, initially found the accused "Of the Specification, Charge I, Not Guilty, but guilty of a violation of Article 95." At this point the law officer interrupted the president's announcement to advise the members that escape from confinement (Article 95) was not a lesser included offense of desertion, but that AWOL was. He directed the court to reconsider its verdict, informing the members that the initial announcement acquitted the accused of desertion, but that the members could still consider the offense of AWOL. The court members disagreed with the law officer on the question of variance, and at the latter's suggestion invoked the provisions of paragraph 55 [86] of the Manual, submitting the question of variance to the convening authority. This officer agreed with the law officer, so the members again deliberated, bringing in a verdict of guilty of AWOL.

Opinion: Conviction set aside.

> Turning to the announcement of the findings, one thing stands out with unmistakable clarity, namely, the findings initially announced were the findings actually determined by the court. Two questions are thus raised: (1) Is escape from confinement an offense lesser included within desertion? and (2) if it is not, did the original findings constitute an acquittal of the offense charged and of its lesser offense, absence without leave? The first question must be answered in the negative, and the second in the affirmative.
>
> To prove an escape, in violation of Article 95, it must be shown that the accused was placed in lawful confinement. . . . While such evidence bears upon the accused's intent to absent himself or remain away without authority . . ., it is not an integral part of the general proof required for desertion. Nor, aside from any question of duplicity, do the allegations in the specification state the offense of escape. . . . Hence, neither from the standpoint of allegation nor from the standpoint of proof,

[84] *Id.*, para. 87*a*(2).

[85] *Cf.*, United States v. Oakes, 12 USCMA 406, 30 CMR 406 (1961): The Court of Military Appeals upheld the Board of review's refusal to find, by substitution, that larceny was a lesser included offense of a specification alleging wrongful sale of Government property. The elements of the original specification, rather than the evidence in support thereof, were stressed. On the other hand, where two separate offenses are specifically alleged as parts of the greater offense (e.g., assault and larceny are alleged in a single robbery specification), the court-martial in an appropriate case properly may find the accused guilty of either or both the separate—but specifically included—offenses. In such a situation, the accused is not misled in his defense. United States v. Calhoun, 5 USCMA 428, 18 CMR 52 (1955).

[86] This provision was subsequently overruled, insofar as it requires the convening authority to pass on the question of a fatal variance. United States v. Johnpier, 12 USCMA 90, 30 CMR 90 (1961).

is escape from confinement a lesser offense included within the desertion charge.

As far as the second question is concerned, the court-martial found the accused not guilty of the specification of the charge. It is well-settled that acquittal by a general verdict of the offense charged is also acquittal of every lesser offense necessarily included within the charge. Ex parte Nielsen, 131 US 176, 33 L ed 118, 9 S Ct 672 (1889). Since absence without leave is lesser included within the charge, the court-martial's findings necessarily resulted in the accused's acquittal of that offense as well as of desertion. True, the court-martial made a further finding, but that finding was not embraced within the charge and can be rejected as surplusage. Statler v. United States, 157 US 277, 39 L ed 700, 15 S Ct 616 (1895).

In United States v London, 4 USCMA 90, 15 CMR 90, we had before us a similar situation. The accused was charged with housebreaking and larceny, in violation of Articles 130 and 121, respectively, Uniform Code of Military Justice, 10 USC §§ 930 and 921. After the court had deliberated on the findings, it called the law officer and the reporter into the closed session to assist in putting its findings into proper form. By its findings, the court acquitted the accused of the offenses charged, but found him guilty of being an accessory after the fact, in violation of Article 78, Uniform Code of Military Justice, 10 USC § 878. On learning of these findings, the law officer reopened the court. He again instructed the court members on the legal alternative findings they could make because it appeared to him that they had not understood his original instructions. The court retired for further deliberations.

When the court reopened, it announced that it had found the accused not guilty of housebreaking, but guilty of larceny. No mention was made in the announcement of the offense of an accessory after the fact. On appeal to this Court, the accused contended that the closed session disclosure to the law officer of the initial findings was tantamount to an announcement of the findings, and resulted in his acquittal of the offenses charged. He further contended that that part of the findings which related to a violation of Article 78 was surplusage. We rejected these contentions. We were careful to point out, however, that the announcement of the original findings was not made in open court. As a result, it was not a final verdict, and it could be reconsidered by the court-martial after it had received clarifying instructions. We said: "Certainly, if a court formally and correctly announced a finding of not guilty in open court, it could not thereafter reconsider its finding and return a finding of guilty."

The board of review below recognized that the quoted statement is directly applicable here. It construed the phrase "formally and correctly announced" as meaning that the finding announced must be a legal finding before it can have legal effect. Since the finding as to Article 95 was illegal, it concluded that the court-martial could properly reconsider all of its announced findings. This construction of our opinion is wrong. The word "correctly" simply referred to the familiar principle that, if the president of the court incorrectly announces the actual findings, a correction of his "slip of the tongue" is not a reconsideration of the findings. Only two weeks before the *London* opinion, we decided United States v. Downs, 4 USCMA 8, 15 CMR 8, on that very point. Here, the findings announced by the President were the true findings reached by the court-martial in its deliberations on the accused's guilt or innocence. There was no error in the announcement. The findings, therefore, were final. Insofar as they acquitted the accused of the offenses charged, they could not be reconsidered. Insofar as the illegal part was concerned, the findings could be reconsidered, but only for the purpose of deleting that part from the formal announcement. In the absence of such action, the law will disregard the illegal part of the findings. Statler v. United States, supra; Manual for Courts-Martial, United States, 1951, paragraph 74*d*(3).

Judge Latimer dissented, citing Abbott *Criminal Trial Practice* (4th edition), section 740, page 306 for the proposition that a civilian judge can direct a jury to reconsider an illegal verdict.

United States v. *Nedeau*,
7 USCMA 718,
23 CMR 182 (1957)

The specification charged the accused with stealing many specified articles of food, property of Mrs. A. of a total value of $49.80. The evidence at the trial could not establish the theft of these particular items although it was established that the accused was seen passing out indetermined items of food through the basement window of the restaurant he had entered for the purpose of eating. In its verdict the court-martial, by exceptions, expressly acquitted accused of stealing the precisely alleged foodstuffs, but convicted him of the substituted words "foodstuffs of a value of $49.80 or less but more than $20.00."

Opinion:

The court-martial apparently believed that the accused had stolen something which they chose to characterize as "foodstuffs" having a value of more than $20.00 but less than $49.80. Although we recognize the soundness of the rule which permits this Court to look to the record as a whole to determine the intent of the court-martial with respect to the announcement of their findings, such rule would appear to be for application where the announcement itself was ambiguous or misleading, rather than, as in this case, where the findings announced by the court changed the nature and identity of the offense charged. Furthermore, the findings indicate that the court considered the evidence insufficient to establish the accused's guilt of the theft of the particular items alleged but sufficient upon which to base its findings that he stole other, undesignated, foodstuffs." Thus it might well have been that the accused was found guilty of larceny of food items other than those specifically alleged *and against which he was not prepared to defend.* [Emphasis supplied.] An exception by the court of part of a specification constitutes a finding that the accused is not guilty of what is alleged in the excepted language. In discussing the effect of exceptions on the court's findings, Colonel Winthrop, in his classic work on military law, says: "If so much has been excepted as not to leave enough to constitute the specific offence alleged, . . . or if the effect of the exception has been to cause the specification to describe another and quite distinct offence from that designated by the charge,—a finding of guilty upon the charge can not be sustained." Winthrop, Military Law and Precedents, 2d ed, 1920 Reprint, page 880.

* * * * *

It follows from the foregoing that the exceptions and substitutions in the specification under consideration were invalid in that the subject matter of the findings is at variance with the specific subject matter charged in the specification upon which the accused was arraigned and tried. Accordingly, the decision of the board of review is reversed and the charges are dismissed.

Note. There is no indication in the opinion in *Nedeau* that more than one separate offense of larceny was committed; the record of trial would have protected accused, therefore, from being tried again. But one of the elements of proof of the offense of larceny is the identification of the property stolen, and apparently the Court of Military Appeals believed that here the accused may have been misled in his defense. *Quaere:* Would a charge of stealing foodstuffs "of *some* value" have withstood a motion to make more definite? Would such a verdict, on the original allegation in *Nedeau* have been upheld?

Illustrative Case (Nonfatal Variance)

United States v. *Hopf*, 1 USCMA 584,
5 CMR 12 (1952)

The accused pleaded not guilty to a charge of aggravated assault, at a specified time and place, upon "Han Sun U, a Korean male". The victim, because of injuries, was unable to appear at the trial and the prosecution's evidence failed to establish conclusively the name of the victim although it did show his exact description, including the fact that he had peculiarly white spotted hair. In its finding the court excepted the words "Han Sun U", substituting therefore "an unknown".

Opinion [Judges Quinn, Brosman and Latimer] Conviction affirmed:

> . . . The only question is whether the "nature or identity" of the offense was changed. Or, to put it in the words used in the certified issue, did the change in the specification bring about a fatal variance? We think not.
>
> It is certainly true that, at a time in the development of the common law, extreme emphasis was placed by the courts on the use of precise and technical language in both indictments and verdicts. As a result of this elevation of form over substance, the doctrine of variance was widely and strictly applied. See State v. Ewing, 67 Wash 395, 121 P 384. Today, however, the rule is otherwise. The law is not so much concerned with the words used as with elemental concepts of justice. It is universally held that a variance is not fatal unless it operates to substantially prejudice the rights of the accused. . . . In assessing the element of prejudice, the Federal courts have adhered to a dual test: (1) has the accused been misled to the extent that he has been unable adequately to prepare for trial, and (2) is the accused fully protected against another prosecution for the same offense?
>
> It is extremely doubtful whether, under the circumstances of cases of this type in Korea, the assailant will know the name of his victim. That fact is, therefore, of little consequence and it is difficult to see how a failure to name any particular person could have prejudiced the accused in the preparation of his defense.
>
> Turning to the second branch of the test of prejudice, we find no merit in the suggestion that this accused is not adequately protected against a second trial for the same offense. In assessing the probabilities of double jeopardy under this test, we are required to take the allegations of the specifications together with the evidence of record. . . . In view of the specificity of proof of the description of the person assaulted, the location and time of the incident, and the nature of the injuries, it is difficult to perceive wherein the accused would have any difficulty through use of this charge, specification, and record of trial in preventing a second prosecution for the same offense.
>
> * * * * *
>
> Consideration of both branches of the test convinces us that this accused was not prejudiced by the variance in question. In deciding this issue, we have given careful consideration to the service decisions cited by counsel as requiring reversal for fatal variance here. Many of these decisions involve entirely distinguishable factual situations. Because the test of prejudice requires assessment of the offense, the specification, and all the evidence, it is obvious that each decision on this question of variance must depend to a great extent upon the facts of the individual case. We find no real disagreement in the cited board of review decisions upon the fundamental rule of and test for fatal variance. However, insofar as any of those decisions may indicate a more strict application of the rule than is set forth here, we must indicate quite clearly our disagreement with that rationale. We perceive no necessity for giving undue weight to formal deviations where it is quite apparent from the record that the accused was in no way prejudiced thereby. The question certified is answered in the negative.

d. Procedure on fatal variance. When the court members believe that an offense different from that alleged has been proved, the Manual [37] purports to allow them to seek the advice of the convening authority who may (if he agrees) withdraw the specification from trial or (if he disagrees) direct the trial to proceed on the original specification. This procedure, however, has been overruled on the grounds that it is both "archaic and injudicious" and is "contrary to the express language of Article 51 and violates the spirit of the Uniform Code and the purposes for which it was enacted." [38] Presumably, therefore, the Court of Military Appeals believes that the question of what of-

[37] MCM, 1951, para. 56.
[38] United States v. Johnson, 12 USCMA 90, 30 CMR 90 (1961).

fenses legally may be found by substitutions is an interlocutory question to be decided finally by the law officer. Under the rationale, if he is wrong in ruling that an offense (found by substitutions) is at fatal variance with the specifications, the accused would be entitled to a rehearing with proper instructions—or at the worst an affirmance of the lesser included offense.[39] Only in the case of an outright acquittal would the accused enjoy a windfall. But if he may also escape conviction by the law officer's final but erroneous ruling on an evidentiary question, there seems no greater compelling reason why this possibility should militate against the law officer's authority to make final rulings on the question of fatal variance. If, on the other hand, he should rule, erroneously, that a fatal variance does not exist and the accused is improperly convicted of the substituted findings, then the accused has an appellate remedy which would result in outright acquittal.

A similar problem arises where the court members finally announce a finding of guilty by substitutions, and then the question is raised for the first time as, for example, by a motion to dismiss the substituted findings because of an asserted fatal variance. Here, if the law officer grants such a motion he must in effect also set aside the finding and enter a finding of not guilty. In such a case it is doubtful that the Government could appeal the action of the law officer.[40] But if the law officer were precluded from ruling on such a question, after announcement of the findings, the accused would still have an appellate remedy. To sum up: before the announced findings it would seem that the law officer should rule on questions of variance as part of his instructional duties: after findings, however, the rights of *both* parties would be more equitably protected by allowing appellate authorities to dispose of the question.[41]

3. Number of ballots. The verdict is fixed in the first ballot, unless a *majority* of the members vote for reconsideration and another ballot.[42] While this procedure differs from civilian practise, it must be remembered that in the military there is no requirement (except for an offense where the death penalty is mandatory) that all the members concur in the verdict. It has been suggested that the law officer need give such an instruction on balloting only when requested.[43] It would seem, however, that since the members no longer have access to the Manual or legal authorities,[44] that such an instruction should be given sua sponte.

4. Participation by law officer. The Code presently permits the law officer to enter the deliberation room, once the members have reached a verdict, for the sole purpose of assisting the members in putting their findings in proper form.[45] At this time any colloquies between the law officer and the members are forbidden except on the express subject of the form of the findings.[46] Indeed, if the subject of conversation strays from this restricted area, the Government by the record of trial must

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[39] See ACM 12672, King, 22 CMR 858 (1956): On a charge of larceny the law officer erroneously advised the members that wrongful appropriation was not a permissible finding and the accused was convicted of larceny. The board of review approved only the conviction of wrongful appropriation, despite lack of instructions on this offense. This practise was sanctioned when the proof of the lesser offense is overwhelming, United States v. Baguex, 2 USCMA 306, 8 CMR 106 (1953); *cf.* United States v. Morgan, 8 USCMA 659, 25 CMR 163 (1958). In view of the change of appellate judges the practise may be reexamined.

[40] Unless it be held a decision based on a pure legal question that is reviewable by the convening authority at the instance of the Government, See MCM, 1951, para. 67*f*.

[41] But see CM 291186, Barnes, 22 CMR 489 (1956): Accused was charged with AWOL from unit A. He was found guilty, by substitutions of AWOL from unit B, a fatal variance. Defense counsel then made a motion "in bar of sentence". Before the law officer could rule, he obeyed the suggestion of the members that paragraph 55 of the Manual be invoked. He then acceded to the resulting direction of the convening authority that the trial proceed to sentencing. *Opinion:* The law officer abdicated his duty in failing to rule on the motion.

[42] United States v. Nash, 5 USCMA 550, 18 CMR 174 (1955). Opinion by Judge Latimer, Judge Quinn concurring. In a separate concurring opinion Judge Brosman would have required only more than one-third of the members to vote for reconsideration of a verdict of guilty. His view was adopted in DA Pam 27-9, "The Law Officer" (1958); p. 191, but officially has been rejected by the Air Force (ACM 15955, Sexton, 28 CMR 775 (1959)), and by the Army (CM 407028, Grimes, 30 March 1962).

[43] DA Pam 27-9, "The Law Officer" (1958) at p. 191.

[44] United States v. Rinehart, *supra* note 19.

[45] UCMJ, Art. 39. This article requires that "all other proceedings, including any other consultation of the court with counsel or the law officer, shall be made a part of the record and be in the presence of the accused, the defense counsel, the trial counsel, and . . . the law officer". Article 39, however, does not require the presence of accused at informal conferences during recess between counsel for both sides and the law officer. *Cf.* United States v. Rayne, 12 USCMA 455, 31 CMR 41 (1961); compare similar interpretation of Fed. R. Crim. P. 43 in Cox v. United States, 300 F.2d 814 (8th Cir. 1962).

[46] United States v. Miskinis, 2 USCMA 278, 8 CMR 78 (1953); ACM 9101, Miles 17 CMR 796 (1954). But where the court members initially have clearly indicated their intent as to what substantive offense they have convicted the accused, the law officer then properly may suggest the precise substituted words to express the findings in formal, correct legal parlance. United States v. Saunders, 8 USCMA 585, 25 CMR 89 (1958).

show that the accused has not been prejudiced by the error.[47] If the law officer believes that the members need further instructions (as, for example when a fatal variance has been announced to him in the closed session) he should leave the closed session and give his instructions in open court, in the presence of all parties.[48] Such procedure enables the counsel to object to any improper instructions. In giving these instructions the law officer should be careful not to coerce a verdict.[49]

In view of the danger of error by the law officer's presence in closed session, it appears better practise to provide the members with an exhibit in the form of a "finding work-sheet", which together with open court instructions as to its use can provide the members adequate guidance and obviate the law officer's appearance in closed session. As further insurance against an illegal verdict or variance the law officer may examine the executed "finding work-sheet" before oral announcement of the verdict in open court. Counsel may not see this exhibit until final announcement of the verdict.[50] If, on examining the exhibit the law officer observes an error, he may then—as in the case when he noted the error in closed session—give additional instructions to the members and direct them to retire and reconsider their verdict.

The basis for this procedure is the interpretation, by the Court of Military Appeals, of the wording of the Manual: [51]

> A finding of not guilty results as to any specification or charge if no other valid finding is reached thereon; 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 [Emphasis supplied].

According to the Court, unless the verdict has been "formally announced," it may be reconsidered.[52]

5. Obtaining additional evidence.[53] "The *court* is not obliged to content itself with the evidence introduced by the parties. When such evidence appears to be insufficient for a proper determination of the matter before it, or when not satisfied that it has received all available admissible evidence . . . the *court* may take appropriate action with a view to obtaining available additional evidence." [Emphasis supplied]

The word "court" in the foregoing citation has been construed to mean the members, who have the unrestricted right to call for further evidence. The law officer must honor the request, subject to a ruling on the admissibility of the evidence.[54] Further, an open court announcement of the need for further evidence during an interruption of the court members' deliberation on the finding has been held not to constitute an acquittal.[55] Despite the implication in the Manual that the request must be made by the "court" as a unit, the Court of Military Appeals has indicated that the request of a single member for additional evidence must be honored.[56]

Section IV. ANNOUNCEMENT OF THE VERDICT

1. General. As soon as determined in closed session, the findings of guilty as to the charges and specifications will be made in open court. Only the required percentage of concurring votes need be shown.[57] Because the verdict need

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[47] *Ibid.*

[48] United States v. London, 4 USCMA 90, 15 CMR 90 (1954). For the facts of this case, see the illustrative case, United States v. Boswell, in paragraph 2c, *supra*. The verbatim transcript of the conference must be attached to the record of trial. MCM, 1951, app. 8a, p. 518, see UCMJ, Arts. 26 (b), 80.

[49] *Ibid.*; see CM 403838, Tapp, 29 CMR 460 (1960).

[50] See separate opinions of Judges Latimer and Quinn in United States v. Linder, 6 USCMA 369, 20 CMR 85 (1955), on the right of the law officer to communicate with the members on the findings or sentence. As contrasted with the prohibited practice on the sentence, the law officer can communicate in private in the closed session, even more so does he by examining a then privileged piece of paper in the open court.

[51] MCM, 1951, para. 74d(3).

[52] United States v. London, *supra* note 48.

[53] MCM, 1951, para. 54b.

[54] United States v. Parker, 7 USCMA 182, 21 CMR 308 (1956); United States v. Salley, 7 USCMA 608, 23 CMR 67 (1957). In the latter, the Court recognized that in civilian procedure the obtaining of additional evidence is one within the discretion of the trial judge and is rarely called for. *Quaere*: Does the law officer have a civilian unrestricted right?

[55] United States v. Parker, *supra* note 54.

[56] See United States v. Cook, 12 USCMA 518, 31 CMR 104 (1961).

[57] MCM, 1951, para. 74*a*. In a joint trial, separate findings must be announced for each accused. See *id.* para. 70*b*(1).

not be unanimous, and in order to protect the secrecy of the individual member's vote, polling of each member's vote is prohibited.[58] This should not, however, prevent the defense from ascertaining if the minimum required number of members concurred.[59]

2. Reasons for verdict. Following the old practise, the present Manual purports to authorize the members to include in the record "a statement of the reasons which led to a finding and a statement of the weight given to certain evidence," [60] giving as appropriate instances where the acquittal was based on insanity or the statute of limitations. Such a procedure, however, might impinge "on the rule that the deliberations of the court-martial should remain inviolate."[61] Its present validity is doubtful, although never as yet passed upon in any reported case.

3. Reconsideration of announced verdict. A finding of not guilty once announced is final and cannot be reconsidered;[62] neither can the announcement of the purported finding of guilty by exceptions and substitutions which is so defective that it acquits the accused.[63] However, if the president's announcement does not accurately reflect the true words of the finding reached by the members in closed session, the president may correct his slip of the tongue to reflect the true verdict.[64]

A finding of guilty, on the other hand, *may* be reconsidered on the court's own motion at any time before the announcement of the sentence.[65] This should be distinguished with the law officer's *duty* to set aside a finding of guilty based upon an improvident plea of guilty.[66] However, if the members believe that a plea is improvident, they may have the power to overrule the law officer's determination to the contrary.[67]

4. Inconsistent verdicts. Where the words of the findings on separate specifications are factually inconsistent with each other, or where the substituted findings in a single specification are factually inconsistent with the original specification,[68] the findings may be said to be "inconsistent". The effect of such findings depends on the evidence offered. If, as is almost always the case, the evidence would support both of the inconsistent findings, then verdict should not be disturbed unless the legislature had determined as a matter of law that the accused should be convicted of only one of the two alternative crimes.[69]

The reason for denying the accused relief based on the apparent inconsistency of verdicts appears to be a settled judicial concept that the jury, out of sympathy for the accused or hostility to the prosecution, will find a verdict

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[58] CM 394930, Connors, 23 CMR 686 (1957). Where *all* members must concur (see *supra* note 26) the rule would be different.

[59] CM Connors, *supra* note 58 *Quaere:* On a simple, uncomplicated case the members have deliberated an inordinately long time. Has the defense the right to determine if the guilty verdict was reached on the first ballot? See *supra* note 42.

[60] MCM, 1951, para. 14*f*(8) wherein it is provided that such a statement shall not be part of the findings.

[61] Separate concurring opinion of Judge Latimer in United States v. Schultz, 8 USCMA 129, 23 CMR 353 (1957) disapproving of a similar Manual provision (para. 76*a*(4)) authorizing the court-martial to give reasons for the sentence.

[62] MCM, 1951, para. 74*d*(8).

[63] United States v. Boswell, 8 USCMA 195, 23 CMR 369 (1957); CM 354611, Tepsitch, 5 CMR 212 (1952): The accused was charged with desertion, in attempting to find the accused guilty by exceptions and substitutions of the lesser included offense of failure to go to his appointed place of duty, the members forgot to substitute the words "without authority", resulting in the acquittal of the accused.

[64] United States v. Downs, 4 USCMA 8, 15 CMR 8 (1954). This is the accepted Federal rule. Helms v. United States, 310 F. 2d 236 (5th Cir. 1962).

[65] *Supra* note 62. Where, however, the defense of insanity has been raised for the first time in a contested case *after* the findings, the finding of guilty *must* be withdrawn. *Cf.* NCM 58-01542, Andrews, 27 CMR 848 (1958).

[66] See ch. XIV, *supra*. Consider also the law officer's power to defer ruling (until after findings) on motion to dismiss, made before findings. United States v. Strand, 6 USCMA 297, 20 CMR 13 (1955).

[67] Despite the contrary implication of para. 70*b*(4) of the Manual: "the question whether the plea [of guilty] will be received will be treated as an interlocutory one." Thus, in United States v. Cook, *supra* note 66, the Court of Military Appeals held that the failure to produce evidence requested by a member interfered with the court members' right to refuse to accept the plea of guilty.

[68] CM 372197 Jules, 15 CMR 517 (1954): Where accused was acquitted of rape, but by exceptions and substitutions convicted of indecent assault upon the same victim by having sexual intercourse with her, the inconsistency of the findings was not error because there was ample evidence to support both offenses.

[69] Milanovitch v. United States, 365 U.S. 551 (1961): Accused, who aided and abetted, but was not at the scene of the crime, 17 days later obtained the stolen property. She was charged with the Federal crimes of (1) stealing the property and (2) receiving the stolen property. Defense counsel contended that the evidence supported both charges, was denied an instruction that the jury could find the accused guilty of either—but not of both the counts. The jury convicted on both counts. *Opinion* (5-4) reversed and ordered on both charges, with an instruction requested by defense counsel. It was the legislative intent that—where the same property is involved—an accused should not be convicted of both stealing and receiving the stolen goods. See United States v. Kordo, 12 USCMA 8, 30 CMR 8 (1960), at p. 5, expressly leaving open the question of whether at the same time an accused legally may be criminally liable both as a statutory principal to a larceny and as a receiver of the stolen goods.

favorable to the accused, but against the weight of the evidence.

> No doubt it has generally been assumed that, if the verdict was rationally inconsistent, the conviction ought not to stand and probably that was the common law, though it is hard to find a case squarely so holding. . . .
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> . . . The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. *We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.*
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> That the conviction may have been the result of some compromise is, of course, possible; but to consider so is to consider too curiously, unless all verdicts are to be upset on speculation. That it represented their deliberate judgment seems to us beyond any reasonable doubt.[70]

Where the verdicts would be *rationally* inconsistent—that is, the evidence would support only one rational finding—then it would seem that the accused is entitled to an instruction that he may be found guilty of either, but not both of the specifications.

Illustrative Case:

United States v. *Sicley*, 6 USCMA 402, 20 CMR 118 (1955)

The accused was charged with (1) making and (2) presenting a false claim and (3) larceny of the money claimed. The larceny conviction could be sustained only on proof that at the time accused made and presented the claim, he had knowledge of the falsity of his claim. Such evidence was introduced, but the defense offered contrary evidence that there was no such *mens rea* of the accused when he presented the claim. The law officer, in response to a members's inquiry, submitted the larceny specification to the court on the wrong legal theory: even if at the time of the claim the accused believed he was entitled to the money, if later on he knew he was not, and then wrongfully withheld the money, accused was guilty of larceny. The accused was acquitted of specifications (1) and (2), possibly because the members were not convinced that accused had a criminal intent at the time he made and presented the claim. But he was convicted of the larceny charge. Appellate defense counsel urged that the "inconsistent" findings required outright dismissal (instead of a rehearing) of the larceny conviction.

Opinion: The improper instructions authorize a rehearing on the larceny specification:

> We hesitate, however, to acquiesce in the defense's insistence that, by finding the accused not guilty of the making and the presentation of a false claim, the court-martial, in effect, accepted his plea of mistake and as a result, found the taking of the money to have been an innocent one. Where three counts of an indictment are supported by the same evidence, a finding of not guilty as to two does not necessarily demand that the accused be exonerated as to the third. Dunn v. United States, 284 US 390, 76 L ed 356, 52 S Ct 189, 80 ALR 161; see Steckler v. United States, 7 F 2d 59 (CA2d Cir).
>
> Certainly, we cannot hold that—if reversal is required—the inconsistency relied on by the defense necessitates a dismissal of the remaining charge rather than a rehearing.

It should be noted that the Court in *Sicley* appears to have carefully left open the question whether plain and necessary inconsistency between an acquittal on one specification and conviction on another would warrant reversal of the conviction and a *rehearing* theron. That question was not presented in *Sicley*, since, under the law officer's (erroneous) instructions, the findings in that case were not necessarily inconsistent. The Court did indicate, however, that if reversal were warranted, in

[70] Dunn v. United States, 284 U.S. 390 (1932), quoting from, Steckler v. United States, 7 F. 2d 59 (1925). *But see* comment, *Inconsistent Verdicts in a Federal Criminal Trial*, 60 Colum. L. Rev. 999 (1960), noting that such inconsistent verdicts may as easily be explained by jury confusion, misunderstanding, or vindictiveness, or a failure of all jurors to agree that defendant was guilty of any offense. It was also noted that the irregularity of such verdicts is patent, and that appellate review thereof involves only the same kind of "speculation" that appellate courts normally exercise when inquiring whether a reasonable man could find the defendant guilty on the basis of the evidence presented.

such a case, a rehearing rather than dismissal of the conviction would be called for. This seems appropriate, since, in such a case, the reason for reversing the inconsistent conviction would not be that it was clearly wrong, or not supported by legally sufficient evidence but that the other findings rendered the validity of the conviction so plainly *dubious* that punishment of the accused should not be based thereon.[71] A rehearing of the conviction-specification, before another court, would clearly remove this shroud of doubt.

Whether the court should reverse a conviction under the circumstances outlined above is an open question. Clearly, inconsistency between verdicts of acquittal and conviction of a defendant at the same trial is not grounds for reversal in a Federal *jury* trial.[72] Such inconsistency is held reversible error in about 10 states however including New York and California. It is held not reversible in about 15 states, but it appears that a number of these have simply followed the Federal rule without independent examination.[73] It has been held reversible in a Federal *non*-jury trial, on the grounds that it diminishes public respect for justice, and that there is no need to tolerate possible exercises of leniency by a *judge* on the findings, since he is fully empowered to exercise leniency or mercy in imposing the sentence.[74] The same reasoning might well apply to courts-martial which, unlike civilian juries, impose the sentence as well as the findings.[75] In addition, it would appear that some support for the Federal jury-trial rule derives from the appellate Federal courts' practice of indulging in all reasonable inferences favorable to the *prosecution*, following any conviction. In addition, appellate Federal courts are extremely reticent to review the fact-finding of juries. By contrast, the Code provisions for automatic review and rehearings, and the broad fact-finding powers given to the Boards of Review, strongly suggest a Congressional policy that no military accused be seriously punished on a dubious conviction. Even if the Federal jury-trial rule is valid, therefore, for Federal jury trials, it may well be that a different rule is warranted in the military.

Note. In *Sicley*, the Court declined to apply res judicata in the same trial. If the accused had first in one trial been acquitted on the same posture of the evidence as in *Sicley* of making and presenting a claim, would the doctrine have applied in a subsequent trial? Consider the "harassment" factor that would then be present. See chapter XVI, *supra*. *Sicley*, for the same reason, is probably authority for the proposition that res judicata does not apply in a rehearing. Implicit in the court's decision is the holding that on a rehearing on the larceny charge the accused would not be able to assert his acquittals in the first trial as bar to Government proof of his intent to steal at the time of presenting the claim.

5. Impeachment of the verdict. Once the verdict is announced, and the individual jurors have been polled, the general rule is that an individual juror is not allowed to impeach his own verdict.[76] The reason for this is that the sanctity and secrecy of the jury's deliberation must be maintained. Thus it has been held unethical for counsel to conduct a posttrial interview of the jurors to search for grounds for a new trial.[77] Nor will an accused be permitted to impeach the verdict by his own evidence obtained through eavesdropping,[78] although he may attack the verdict on misconduct of a juror observed outside the jury room.[79] The same general rules apply to the military.[80]

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[71] See *supra* note 70.

[72] *Ibid.*

[73] See *Comment*, *supra* note 70, at 1001–02.

[74] See United States v. Maybury, 274 F. 2d 899 (2d Cir. 1960).

[75] In the *Maybury* case, *supra* note 74, Judge Friendly also noted that the jury had traditionally had a sacrosanct function in protecting the individual against unpopular prosecutions (the *Dunn* case itself was a Prohibition case), whereas the judge trying a case without a jury has no such tradition. Judge Friendly found it unseemly to permit a judge's clearly irrational findings to stand when they might be prejudicial to the accused. In view of the difficulties in military justice which led to the enactment of the UCMJ, and the Court of Military Appeals' frequent warnings against the "appearance of evil," the Court might well find Judge Friendly's discussion of findings by a Federal judge to be an appropriate yardstick for courts-martial findings as well.

[76] Abbott, *Criminal Trial Practice* (4th ed. 1939), § 712; United States v. Crosby, 294 F 2d 928 (2d Cir. 1961), refusing to accept juror's affidavit that he was improperly influenced by reading a prohibited newspaper article; CM 386700, Lill, 11 CMR 122 (1953), refusing to accept the statement of Col. A (a member), that he was browbeaten by Gen. H (the president) [illegible] the unrecorded corroborating affidavit that he overheard Gen. H [illegible] in a loud and domineering voice during the deliberation, "they were stupid as hell."

[77] United States v. Holmes, 188 F. Supp. [illegible] Opinion 110, Va. Bar, 10 April 1962.

[78] ACM S-20608, Harris, 32 CMR 878 (1963).

[79] United States v. Walters, 4 USCMA 617, 16 CMR 191 (1954); United States v. Webb, 8 USCMA 70, 23 CMR 294 (1957); and the opinion of Judge Brosman in United States v. Boudrie, 5 USCMA 15, 17 CMR 15 (1954).

[80] CM Lill, *supra* note 76.

6. Statute of limitations. If accused is found guilty (by exceptions or substitutions) of an offense to which the statute of limitations has run, the law officer, according to the Manual, is required to advise accused of his right to "avail himself of the statute in bar of punishment.[31] One service board of review, in a well reasoned decision, has held that such a motion —if granted—sets aside the conviction, *nunc pro tunc*, as distinguished from merely barring punishment.[32]

[illegible] an offense committed [illegible] some extension of enlistment. [illegible] "extension" is treated [illegible] "current" enlistment. If the previous offense [illegible]

CHAPTER XIX

PRESENTENCING PROCEDURES AND TERMINATION OF TRIAL

References: Articles 51–58, UCMJ; paragraphs 75–77, MCM, 1951.

INTRODUCTION

After a finding of guilty of any charge before it, the court-martial moves to the second, and by no means less important part of the adversary proceeding—the determination of an appropriate sentence. This latter phase of the trial is governed roughly by the same rules of procedure relating to the finding of the accused's guilt or innocence.

Section I. PARAGRAPH 75*b*, MCM, 1951 MATTERS PRESENTED BY THE PROSECUTION

1. General. Following the finding of guilty the prosecutor reads the personal data concerning the accused as shown from the charge sheet, which is already part of the record of trial. This is necessary, particularly, to advise the court members and appellate authorities of accused's present rank and pay status so that they may insure that not only an appropriate, but a legal sentence is adjudged. Following this, the government introduces admissible evidence of previous convictions.[1] At this stage (except where the verdict was based on a plea of guilty), according to one interpretation of the Manual, the prosecution must rest. Only when the defense has presented matters in extenuation or mitigation of the sentence may the prosecution offer evidence in aggravation of the offense, in rebuttal to what has been presented by the defense.[2]

2. Evidence of previous convictions. *a. General.* The admissibility of a previous military conviction, as distinguished from its *effect* of raising the limit of the maximum authorized punishment in certain cases, is governed by all four of the following rules:[4] (1) the date of the *commission* of the offense of which the accused was convicted must precede that date of *commission* of any one of the offenses of which the accused at the instant trial has been found guilty, and, (2) the previous offense must have occurred during a current enlistment, and (3)

[1] MCM, 1951, app. 8a, p. 520, is incorrect where it suggests that the trial counsel announces the previous conviction *before* it is received in evidence. Like any evidence, it should not come to the members' attention until and unless the law officer rules it admissible.

[2] See MCM, 1951, para. 75*b*(3). "If a finding of guilty . . . is based upon a plea of guilty and . . . evidence as to . . . aggravating circumstances was not introduced before the findings, the prosecution may introduce such evidence after the findings." The implication from this Manual provision is that where the accused *contested* the case the prosecutor may not, after the findings, introduce evidence in aggravation unless to rebut evidence in mitigation first offered by the accused. *See* CGCMs 20610, Allen, 2 CMR 60 (1956). Such a rule was probably designed to insure that the prosecutor presented a complete case on the merits, as well as to prevent repetition of the presentation of aggravating matters during the sentencing proceedings; however, it is submitted that these matters should be within the discretion of the court and not, as it was, a hard and fast rule in every case.

[3] The conviction, at this stage (*cf.*, for rebuttal purposes) must be a military, not a civilian one. SpCM NCM 5802026 Conley, 10 Oct 1958 (unpublished). Nor is administrative vacation of suspended sentence admissible to prove offenses, United States v. Kiger, 18 USCMA 522, 38 CMR 54 (1968). For the same reasons given in *Kiger*, records of Article 15 punishment are probably inadmissible as "previous convictions." NCM 62 1351, Mothershead, 18 Oct 1962 (unpublished). See AR 640-21, 20 Sep 61, and DA Form 26.

[4] MCM, 1951, para. 75*b*(2).

the previous offense must have been committed not more than 3 years before the commission of any offense of which the accused is presently convicted and (4) the previous conviction must have become "final," through the completion of the appellate review processes required by law.

b. Date of commission. According to the Manual, the date of *commission* of the previous conviction, not the date of conviction, governs the admissibility of the record of the previous conviction.[6] For purpose of illustration, suppose that the accused commits a larceny on 1 April 1964 and a robbery on 3 April 1964. On 15 April 1964, he is convicted and sentenced by a special court-martial for the larceny. The conviction is finally reviewed by the general court-martial convening authority on 20 April 1964. On 15 July 1964 the accused is convicted and sentenced for the robbery, the existence of this offense not being known at the time of the larceny trial.[6] The larceny conviction is admissible as a previous "conviction," even though the date of conviction for the larceny followed the date of commission of the robbery.

If the previous offense was committed prior to the date of commission of any one of the offenses for which he is currently being tried, (and the other rules are met) but not previous to some other offenses, it is still admissible.[7]

c. Current enlistment or obligation for service. The Manual, ambiguously, provides that the previous conviction must relate to an offense committed "during the current enlistment, *voluntary extension of enlistment*, or obligation for service."[8] The Court of Military Appeals has interpreted this provision to mean that the previous conviction is admissible only if it occurred during the voluntary extension of the enlistment and the trial at which it is offered is for an offense committed during the *same* extension of enlistment.[9] In other words, a "voluntary extension" is treated as a new "current" enlistment. If the previous offense were committed during the preceding regular enlistment, it would be inadmissible. In time of war enlistments are extended "involuntarily." In such a case, subject to the other requirements of admissibility, the conviction would be admissible because it relates to a previous offense committed during a current enlistment.[10] Absent objection, it is presumed that the previous conviction was committed within the current enlistment.[11]

d. During the 3 years preceding the commission of any instant offense. "In computing the 3-year period, periods of unauthorized absence as shown by the findings in the case or by the evidence of previous convictions should be excluded."[12]

e. Finality of previous conviction. To be a previous "conviction," the appellate review of the previous trial must have been completed.[13] If sufficient time has elapsed between the trial for the first offense and the trial of the second, a rebuttable presumption exists that the required review has been completed,[14] but where the facts giving rise to such a presumption do not exist, then, of course, neither does the presumption. A previous conviction is proved by the order publishing the result of the prior trial, or more usually by an authenticated extract of the accused's service record.[15] These documents do not, as a rule, expressly show the completion of the appellate review process, but rather depend on the time lapse between trials to create a presumption to that effect.

Illustrative Case

United States v. Anderson, 2 USCMA 606, 10 CMR 104 (1953)

At a trial on 1 February 1952, the prosecutor introduced in evidence the accused's service record which showed that a special court-martial

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[6] *Ibid.*

[6] *Quaere:* What remedy, if any, would accused have at the second trial if it were established that the Government, before his trial for larceny, knew of the robbery offense?

[7] United States v. Geib, 9 USCMA 392, 26 CMR 172 (1958). The better practice would require a limiting instruction to the effect that the previous offense could be considered only with respect to the particular charge whose commission date it preceded. United States v Green, 9 USCMA 585, 26 CMR 365 (1958).

[8] MCM, 1951, para. 75*b*(2). [Emphasis supplied.]

[9] United States v. Johnson, 6 USCMA 320, 20 CMR 36 (1955).

[10] *Supra*, note 9; MCM, 1951, para. 75*b*(2).

[11] MCM, 1951, para. 75*b*(2).

[12] *Ibid.*

[13] MCM, 1951, para. 75*b*(2), citing UCMJ, Art. 44(b).

[14] United States v. Larney, 2 USCMA 563, 10 CMR 61 (1953). MCM, 1951, para. 75*b*(2).

[15] MCM, 1951, para. 75*b*(2).

sentence including a bad-conduct discharge[16] had been promulgated on 26 December 1951 in the initial court-martial order.

Opinion: The presumption of finality did not exist because the case normally could not be reviewed by a board of review within 36 days after the date of the promulgating order. Absent any other proof that the prior record of trial was finally reviewed, the evidence of the prior "conviction" was inadmissible.

3. Collateral attack. A previous conviction, where appellate review has been completed "and all action taken pursuant to such proceedings . . . shall be binding upon all . . . courts. . . ." [17] Thus the accused should not be allowed to relitigate the merits of his previous conviction, although he should be permitted to offer matter tending to diminish the apparent gravity of the previous offense.[18] A different question is posed, however, with respect to attacking the jurisdiction of the court-martial which convicted the accused at the first trial. At least one service, in an advisory opinion, has stated that such action is permissible.[19]

4. Effect of previous conviction. The previous discussion was concerned with the *admissibility*, as distinguished from the *effect* of a previous conviction. Once admitted, the conviction may properly be considered by the court-martial as a factor influencing its judgment in arriving at an appropriate sentence. In this respect, however, the Manual is in error (if used as an instruction to the court members) when it suggests that maximum punishment will "normally . . . be reserved for an offense . . . after conviction of which there is received . . . evidence of previous convictions of similar or greater gravity."[20] This statement has been condemned as being too broad a generalization for the law officer to submit to the members of the court-martial.[21]

Another effect of a previous conviction is to increase the legal limit of authorized punishment in certain cases. Thus, where a conviction does not authorize the imposition of a punitive discharge, proof of two or more previous convictions will permit the accused to be sentenced to a bad conduct discharge, forfeiture of all pay and allowances, and 3 months confinement at hard labor (if no greater confinement is authorized);[22] similarly, if a dishonorable discharge is not authorized for the offense of which the accused was convicted, then proof of three or more convictions during the 1 year preceding the commission of any offense of which the accused was convicted at the subsequent trial will permit the accused to be sentenced to the greater punishment of dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for 1 year (if no greater confinement is authorized).[23] Where previous convictions may thus raise the legal ceiling on the authorized punishments, the record of trial must indicate that the accused understands this before being convicted on a plea of guilty.[24]

To increase the authorized punishment, however, rules different than those governing the admissibility of the previous conviction into evidence apply. The very language of Executive Order Number 10566[25] requires that the date

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[16] Where a punitive discharge is approved by the convening authority, the record of trial must be referred to a board of review for an appellate review. Arts. 65(b), 66(b), UCMJ; if no such discharge is adjudged by a special or summary court-martial, the records of trial need be reviewed only by a local judge advocate or law specialist. Art. 65(c), UCMJ. The latter procedure normally takes no more than a day at the most. In the Army, because of regulations forbidding the use of court reporters at special courts-martial, these tribunals cannot adjudge a bad conduct discharge. See chapter VIII, *supra*, at sec. I, para. 3*d*(2).

[17] Art. 76, UCMJ, which also states the exceptions of Arts. 73, 74, UCMJ. Where final review of convictions by inferior courts-martial (not involving a bad conduct discharge) has been accomplished, probably the only remedy available to correct an improper conviction (rather than one void for lack of jurisdiction), is to utilize the procedures for correction of military records. See 10 USC §§ 1551, 1552.

[18] ACM S-9760, Cranmore, 17 CMR 749 (1954).

[19] Opinion of The Judge Advocate General of the Army, JAGJ 1960/8446, 29 July 1960. *Quaere:* Accused was previously convicted at a special court-martial and sentenced to forfeit $100. At the instant trial (during the sentencing proceedings) his counsel objects to the admission of the prior conviction on the sole grounds that the defense by appointed counsel at the first trial was inadequate. What is your ruling as law officer, and what are your reasons therefor? *See* CM 409381, Colonna (unpublished).

[20] MCM, 1951, para. 76*a*(2).

[21] United States v. Slack, 12 USCMA 214, 30 CMR 214 (1961). Note that this objectionable wording of the Manual is also found in a sample instruction in DA Pam 27-9, The Law Officer (1958), at app. XXXIII.

[22] MCM, 1951, para. 127*c*, section B. The previous offenses must be separate, and not multiplicious or based on the same act or transaction. NCM 61 00288, Mudica, 27 Jan 61 (unpublished).

[23] MCM, 1951, para. 127*c*, section B as amended by Ex. O. No. 10565, 28 Sep 1954, 19 Fed. Reg. 6299, Addendum to MCM, 1951 (Jan 68).

[24] Otherwise his plea of guilty may have been improvident, based on a misconception of its effect. United States v. Zemartis, 10 USCMA 853, 27 CMR 427 (1959).

[25] *Supra* note 23.

of *conviction* (not commission) for the previous offense precede the date of commission of the instant offense.[26] The language of the original table B of paragraph 127*c* of the Manual (dealing with maximum authorized punishments)[27] does not contain such an express limitation as does Executive Order Number 10565. Nevertheless, it has been held [28] that a similar limitation should apply since the apparent purpose of the original section B was to authorize additional punishment for the accused who was unable to reform. Further, to be able to reform, the accused must have had the benefit of conviction and punishment. If after this experience he then commits another offense for which he is punished, both of these previous convictions will permit increased punishment under section B at a trial for a third offense.

Section II. PARAGRAPH 75*c* MCM, 1951, MATTERS PRESENTED BY THE DEFENSE

1. General. After the prosecution has presented the personal data concerning the accused, and evidence of any previous convictions, the defense may present matter in extenuation and mitigation.[29] The burden of the defense is somewhat lessened at this stage by the fact that the court may relax the rules of evidence in the favor of the defense, permitting the substitution of certificates, affidavits and other reliable hearsay documents in the place of testimony.[30]

2. "Extenuation[31] and Mitigation."[32] This distinction between these two terms is not too clear, but the Manual makes it evident that once convicted on a contested case,[33] the accused may not relitigate the question of his guilt or innocence; at this latter stage of the proceedings he is limited to matters tending to reduce the severity of the sentence. Thus, it was proper during the sentencing stage of a trial for rape for the law officer to refuse to allow the accused to testify he did not use force.[34] On the other hand, if the law officer initially errs in allowing the accused to relitigate the merits of the case, thus prompting a member of the court to ask for reconsideration of the entire trial, the law officer must then accede and allow the court-martial to reconsider its verdict, as well as to call what witnesses it desires.[35] This is because the members of the court-martial may reconsider any finding before the announcement of the sentence.[36] Also, the question of sanity[37] or jurisdiction[38] of the court may be raised at any time.

3. Inadmissible matters. The members of the court-martial have an independent duty to decide an appropriate sentence for the particular accused before them. Theirs is not the duty to provide for uniformity of sentences within the command,[39] nor should they be influenced by command policies or directives in the process of arriving at a sentence. Thus a law officer may properly exclude defense evidence of the sentence received by accused's accomplice at a previous trial before another court-martial.[40]

4. Rights of the accused. *a. General.* The record of trial must indicate that the accused is aware of his rights to present matter during the sentencing proceedings.[41] At this time the accused may testify or make an unsworn statement. Such testimony, in a contested case,[42] cannot dispute accused's guilt, nor can it be considered for such purpose on appellate review.[43] On the other hand, any admissions made at this stage cannot subsequently be used

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[26] CM 334022, Eckert, 19 CMR 483 (1954).
[27] *Supra* note 22.
[28] ACM S-2859, O'Shaner, 6 CMR 816 (1952).
[29] MCM, 1951, para. 75*c*(1).
[30] *Ibid.* Note that the Manual does not similarly favor the prosecution. *Quaere:* In an out-of-court hearing the prosecutor objects to the admissibility of defense affidavit of Captain A stating that accused's military performance has been superior. The prosecutor in support of his objection offers an affidavit of Colonel B to the contrary, explaining that Colonel B is presently 10,000 miles away. As law officer, how would you rule and what would be your reasons therefor?
[31] MCM, 1951, para. 75*c*(3).
[32] MCM, 1951, para. 75*c*(4).
[33] Where accused has been convicted on a plea of guilty, he may change his plea at any time during the trial. See ch. XIV, *supra* sec. III.
[34] United States v. Tobita, 8 USCMA 267, 12 CMR 23 (1953).
[35] ACM 15955, Sexton, 28 CMR 755 (1959).
[36] MCM, 1951, para. 74*d*(3). See ch. XVIII, *supra*, sec. IV, para. 8.
[37] NCM 58-01542, Andrews, 27 CMR 848 (1958). After a finding of guilty of a charge of murder, during the sentencing proceedings the issue of sanity was first raised by the defense.
[38] MCM, 1951, para. 67*a*.
[39] United States v. Mamaluy, 10 USCMA 102, 27 CMR 176 (1959).
[40] CM 404459, McNeese, 30 CMR 453 (1960), *pet. den.*, 30 CMR 417.
[41] MCM, 1951, para. 53*h* and app. 8*d*, pp. 520-521.
[42] *Supra* note 34.
[43] United States v. Ford, 12 USCMA 31, 30 CMR 31 (1960). But accused's statement can, in an appropriate case, justify a new trial, as distinguished from being used to attack to legal sufficiency of the prosecution evidence. United States v. Ford, *supra*.

against the accused at a rehearing on the merits, because it is desirable to encourage—not deter—the free flow of information from the accused to the court members, in order that they may better adjudge an appropriate sentence.[44]

b. Sworn statement. Like his testimony on the merits, this sworn statement of the accused is subject to cross-examination.[45] It constitutes evidence, and thus properly is the subject of argument. A failure to testify should not be considered adversely by the court members.[46]

c. Unsworn statement. This statement, according to the Manual, may be made by either, or both, accused and counsel, and may be presented orally or in writing.[47] It is not evidence,[48] and thus should not be the subject of argument.[49] Originally, the unsworn statement was part of the final argument on the merits,[50] probably being a holdover from the days when an accused was incompetent to testify.[51] The 1951 Manual, for the first time, provided for the formal presentation of matters in extenuation after the verdict; but it maintained the provision authorizing an unsworn statement, which today has some utility as a device for the court to assess the character of the accused.[52]

Since the accused is advised that he may not be cross-examined on his unsworn statement, questions by the court members, even without the answers thereto from the accused, may be held error to sufficiently prejudice the accused on the sentence.[53] The prosecutor, however, may rebut the unsworn statement by competent evidence.[54]

The Manual does provide that the unsworn statement "should not include what is properly argument. . . ." [55] The prohibition appears particularly justified when applied to the situation where the accused's counsel makes the statement on the accused's behalf. In such a case it could become difficult to determine what is the accused's statement and what is counsel's. This could allow, improperly, the counsel to make a statement of fact—not subject to cross-examination—that might appear to be of his exclusive knowledge and thus likely to be given more weight by the court members.[56] It might also lead to an imputation of inadequate representation because the damaging statement might be attributed to counsel, rather than to the accused.[57]

Section III. PARAGRAPH 75*d*, PROSECUTION REBUTTAL

Unless the conviction was based on the accused's plea of guilty, the prosecution may only present evidence to rebut those matters offered in mitigation by the defense.[58] In the process, the prosecution must produce competent evidence.[59]

Section IV. ARGUMENTS ON SENTENCE

Neither the Manual nor the Code contains provision for argument on the quantum of the sentence. Although the Manual does state that the unsworn statement of the accused should not contain argument,[60] this provision has been held not to prevent a final summation by the defense of evidence relative to an appropriate

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[44] United States v. Stivers, 10 USCMA 616, 30 CMR 616 (1961).

[45] MCM, 1951, app. 8*a*, pp. 520-521. The Manual does not elsewhere expressly provide for such sworn testimony, and by reason of the implication from para. 75*b* (authority for only an unsworn statement) it could be argued that no such testimony is authorized when accused has pleaded guilty.

[46] MCM, 1951, app. 8*a*.

[47] MCM, 1951, para. 75*c*(2).

[48] *Ibid.*

[49] But see DA Pam 27-9, The Law Officer (1958), para. 85.

[50] Winthrop, *Military Law and Precedents* (2d ed. 1920 reprint), p. 369.

[51] This right was first provided by the Act of May 16, 1878, 20 Stat. 30, now contained in 18 U.S.C. § 3481.

[52] *Compare*, United States v. Stivers, *supra* note 44.

[53] United States v. King, 12 USCMA 71, 30 CMR 71 (1960).

[54] MCM, 1951, para. 75*c*(2).

[55] *Ibid.*

[56] For instance, following a larceny conviction counsel might state: "The accused has attempted to restore the money to the victim." From this the members might infer that defense counsel himself has ascertained such facts. *Query:* May the law officer properly require defense counsel to use the first person when making an unsworn statement on behalf of accused?

[57] United States v. Lamy, 17 CMR 897 (1954). Defense counsel stated that accused was dissatisfied with the service and should be given a bad-conduct discharge.

[58] MCM, 1951, para. 75*c*(2), 75*d*; *cf.*, United States v. Anderson, 8 USCMA 603, 25 CMR 107 (1957).

[59] United States v. Stivers, *supra* note 44.

[60] United States v. Stivers, *supra* note 44.

sentence, such procedure being consonant with civilian practice.[61] Since a court-martial is an adversary proceeding, if the defense is allowed to argue the quantum of sentence, then the trial counsel should be permitted to do likewise.[62] In so arguing, the trial counsel represents the United States, and not the convening authority.[63] Thus, as long as the prosecutor refrains from mentioning extraneous command policies or regulations[64] or provisions of the Manual[65] which improperly influence[66] the members' judgment on the sentence, he may properly argue his own views as to the appropriate disposition of the accused.[67]

The general principles of law applying to arguments on the findings[68] apply also to argument on the sentence. The scope of summation is limited by the evidence in the record of trial,[69] although the prosecution—as during argument on the findings—will not be overpenalized for his "fighting fire with fire" in countering improper defense argument with equally improper matter.[70] In arguing the law, both parties are bound by the previously determined instructions on the sentence to be given by the law officer, the law officer under a duty to correct a counsel's improper argument of the law.[71] The present practice is to permit the defense counsel the opening, and trial counsel the closing argument.[72] The Court of Military Appeals has not, as yet, passed on the propriety of this procedure.

Section V. PARAGRAPH 76*b*, MCM, 1951, INSTRUCTIONS ON SENTENCING PROCEDURE

1. General. Before their time for argument, it is the practice[73] for the law officer to conduct an out-of-court hearing[74] at which time the pertinent instructions on sentencing procedures and maximum authorized punishments are determined. Because the court members no longer have access to the Manual,[75] these instructions must be sufficiently detailed to permit the members to exercise their functions correctly.

2. Maximum authorized punishment. In *United States* v. *Turner*,[76] the Court of Military Appeals modified the provision of the Manual for the proposition that [illegible] making such instruction permissive. Since that case, the law officer, *sua sponte*, must give such an instruction. At this time he must decide, when appropriate, if offenses are "multiplicious" for punishment purposes, the effect of the Manual provisions authorizing increased punishment upon proof of previous convictions,[77] limitation of punishment on a rehearing,[78] and the effect of other Manual provisions affecting the sentence.[79] As with instructions on the verdict, the "law of the case" applies to instructions on the sentence. Thus, if the law officer fails to advise the court members that reduction to the lowest pay grade is an authorized punishment and the court includes such punishment in its sentence, that part must be disapproved.[80] The law officer may assist the members in providing them with a "sentence worksheet" containing permissible forms of

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[61] United States v. Olson, 7 USCMA 242, 22 CMR 32 (1956). See also MCM, 1951, para. 53 for the right of trial counsel to make such contentions.

[62] United States v. Olson, *supra* note 61.

[63] United States v. Olson, *supra* note 61, citing UCMJ, art. 38(c).

[64] United States v. Estrada, 7 USCMA 635, 23 CMR 99 (1957).

[65] United States v. Davis, 8 USCMA 425, 24 CMR 235 (1957).

[66] See ch. III, *supra*.

[67] See United States v. Cummings, 9 USCMA 660, 26 CMR 440 (1958); but even if the prosecutor "speaks for himself," he must not urge improper consideration on the court members. United States v. Mamaluy, *infra* note 87.

[68] See ch. XVII, *supra*.

[69] United States v. King, 12 USCMA 71, 30 CMR 71 (1960).

[70] United States v. Williams, 13 USCMA 208, 32 CMR 208 (1962).

[71] *Cf.* CM 400544, Abner, 27 CMR 805 (1958). See United States v. Boese, 13 USCMA 131, 32 CMR 131 (1962); trial counsel of a special court argued that the pertinent provision of the Manual in para. 75*c*(4) did not apply to only an "average" soldier.

[72] See *supra* note 49; but see the contrary conclusion in the excellent article, Chilcoat, *Presentencing Procedure in Courts-Martial*, Mil. L. Rev., DA Pam 27-100-9, July 1960.

[73] DA Pam 27-9, The Law Officer (1958), para. 89*a*.

[74] The Manual makes no provision at this time for an out-of-court hearing, referring in para. 57*g*(2) to the Manual paragraph on [illegible] ("78*c*(2)"). Nevertheless, since sentence instruction is now mandatory, by analogy to the proceedings on [illegible] such an out-of-court hearing would now [illegible] the accused.

[75] United States v. Kinsler, 8 USCMA 402, 24 CMR 212 (1959). [illegible] USCMA 362 (1958).

[76] MCM, 1951, para. 76*b*(1).

[illegible] para. 4.

[illegible] 11 USCMA 64, 28 CMR 288 (1959).

[illegible] United States v. Crawford, 12 USCMA 203, 30 CMR 203 (1961), [illegible] 76 in an excellent article: Adkins, *Instructions on [illegible]*, Military Law Review (DA Pam 27-100-14, Oct 61), [illegible] See also United States v. Powell, 12 USCMA 288, 30 CMR 288 (1961); and [illegible] Law Officer" (1958), para. 89*a*; MCM, 1951, [illegible]

sentence, although this is not recommended as a substitute for complete instructions by the law officer.[84] This work sheet, as with other materials considered by the members, must be appended to the record of trial. It may not be examined by the law officer prior to the announcement of the sentence.[85]

3. **Factors to be considered.** It has been the practice of some law officers to advise the court members of some factors they should consider in adjudging the sentence.[86] These instructions are not mandatory and some were based upon policy statements in the Manual, most of which have been condemned by the Court of Military Appeals because they stress uniformity of sentences, rather than the appropriate punishment for the particular offender before the court:[87]

> In his enumeration of the factors which the court might consider, the law officer mentioned the value of the property stolen, any aggravating circumstances which were shown by the record, and the mitigating and extenuating evidence produced by the accused, including his background, his education, his early training, the character of his service, and the fact that he had entered a plea of guilty which save the Government considerable time and expense. It was when his instructions left the confines of the record that the law officer's charge became doubtful, confusing, and, for the most part, of no value to the court. We quote the questionable part of the charge he gave:
>
> Among other factors, the penalties which are adjudged in other cases for similar offenses. With due regard to the nature and seriousness of the circumstances attending each and in the particular case, sentences should still be relatively uniform throughout the armed forces. In special circumstances to meet the needs of local conditions, sentences more severe than those normally adjudged for similar offenses may be necessary. Courts will however —you in this instance will—exercise their own discretion and will not adjudge a sentence which you consider excessive upon the expectations that the Reviewing Authority will reduce it as a mitigating capacity. Imposition by courts of inadequate sentences upon persons in the military convicted of crimes which are punishable by civil courts, tends to bring the military forces into disrepute as lacking in respect for the criminal laws of the community wherein the court is sitting.
>
> The quoted instructions here in question find their root in paragraph 76*a* of the Manual for Courts-Martial, United States, 1951, and if they have any value—which we doubt—it would only be under unusual circumstances or to subsequent reviewing authorities who have some opportunity to seek out information on uniformity. . . . In the recent case of United States v. Cummins, 9 USCMA 669, 26 CMR 449, trial counsel, in arguing to the court, founded his argument on the principles enunciated by the law officer in this instance. In that case, we held that it was legitimate argument to mention the factors included in this charge and that the accused was not prejudiced thereby. That is not authority for the proposition that the law officer may use the same ingredients in charging the court, but it does suggest they are not so inflammatory or so unfair that prejudice is present merely because the court members are informed of their existence.
>
> We are mindful of the fact that the court-martial must take its law on findings and sentence from the law officer and that he should be permitted to give general guides governing the matters to be considered in determining the appropriateness of the particular sentence. However, we believe the quoted factors used by this law officer are impractical, confusing, and of such doubtful validity they should not be given to the court-martial members.

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[84] United States v. Caid, 12 USCMA 348, 32 CMR 348 (1962). The parties had agreed that the sentence work sheet should constitute part of the president's instructions to the special court-martial.

[85] United States v. Linder, *infra* note 110.

[86] See, *e. g.*, sample instruction in DA Pam 27-9 (1958), App. XXXIII.

[87] United States v. Mamaluy, 10 USCMA 102, 27 CMR 176 (1959), 105-107. *Accord*: United States v. Brennan, 10 USCMA 100, 27 CMR 183 (1959); United States v. Fisher, 10 USCMA 111, 27 CMR 185 (1959).

It has long been the rule of law that the sentences in other cases cannot be given to court-martial members for comparative purposes. Aside from keeping the court from becoming involved in collateral issues, that principle is founded on the hypothesis that accused persons are not robots to be sentenced by fixed formulae but rather, they are offenders who should be given individualized consideration on punishment.

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By way of further discussion, it is to be noted this court-martial was told in substance that if it found special circumstances to meet the needs of local conditions, sentences more severe than those normally adjudged for similar offenses might be necessary. What we have previously stated applies with equal force to this factor but, in addition, the special circumstances are not identified. In other words, the court was left on its own to estimate whether, because of some local problem or other, additional punishment should be dealt this accused. That leaves the court largely unguided in a critical area. Moreover, neither the accused, the law officer, nor reviewing authorities ever will know if the sentence of the court was based on relevant factors. This is patently not the intended application of paragraph 76*a* (4), of the Manual, supra.

There is no real value in reciting generalities to courts-martial. They should operate on facts, and instructions should be tailored to fit the particular record. Obviously, the difficulty with these instructions is that they pose theories which are not supported by testimony and which operate as a one-way street against the accused. They have an overtone of severity against him which he cannot possibly rebut by any reasonable means. In summation, proper punishment should be determined on the basis of nature and seriousness of the offense and the character of the offender, not on many variables not susceptible of proof.

The arguments we set out above demonstrate that the instructional pattern provided by paragraph 76 of the Manual ought to be discarded and instructions of more utility substituted therefor. As a general proposition, they may not be unsound, and we have previously considered them in that light but, when beamed at a particular case in which the court-martial might try to apply them, there is some risk the court may veer away from its primary task of assessing a sentence appropriate to the person on trial. It is worth noting that we are dealing with imponderables which have no bearing on findings of guilt, and it is conceivable that subjectively court-martial members as well as civilian judges might properly give some consideration to the subjects mentioned, but objectively they should be of little moment and they should not be given the importance they naturally carry when given in instructional form.

Citing the above opinion in *Mamaluy*, the Court of Military Appeals has subsequently disapproved of the following additional provisions of paragraph 76*a* of the Manual: (1) "Normally the maximum punishment will be reserved for an offense . . . after conviction of which there is received . . . evidence of previous convictions of similar or greater gravity."[88] (2) ". . . evidence of previous convictions of offenses materially less grave than the offense of which accused stands convicted is not to be regarded as in itself justifying a sentence of maximum severity."[89]

Such factors and general advice concerning the appropriate punishment need not be given sua sponte, although in certain cases where germane,[90] they should be given on request. But even when requested to do so, the law officer need not and should not inject into the proceedings, for the members' consideration, collateral laws and regulations which deal with the ad-

[88] MCM, 1951, para. 76*a*(2), disapproved in United States v. Slack, 12 USCMA 244, 30 CMR 244 (1961).

[89] MCM, 1951, para. 76*a*(3), disapproved, United States v. Slack, *supra* note 88 (emphasis supplied).

[90] But, even if germane, the instruction must be logical; United States v. Rake, 11 USCMA 159, 28 CMR 383 (1960); *accord*, United States v. Bibers, 11 USCMA 163, 28 CMR 387 (1960). When conviction based on guilty plea as result of pretrial agreement, not improper to refuse instruction that the guilty plea may constitute a step toward rehabilitation.

ministrative *effect* of a punishment once adjudged, rather than with the legality or the appropriateness of the sentence itself.[91]

However, a collateral statute might directly bear on the appropriateness of a sentence. In such a case, it would seem that the law officer—if requested to do so—would be under the duty to advise the court members of its terms. *United States* v. *Cleckley*[92] is not authority to the contrary. There the accused was sentenced to a dishonorable discharge, confinement, and *partial* forfeitures. A pertinent statute,[93] the effect of which the court members were apparently unaware, provided for forfeiture of *all* pay and allowances if an accused were confined under a dishonorable discharge. On appeal it was contended that the sentence was inconsistent with the intent of the court members (who, apparently from appellate argument, must have been aware of the statute) and that therefore the lighter part of the sentence only (the partial forfeitures) should be approved. The Court of Military Appeals, in a well-reasoned opinion, refused to allow collateral statutes to bind their judgment on an otherwise legal proceeding. But the Court did not answer another question: If defense counsel had *requested* that the law officer inform the members of the effect of the statute, would he have erred in refusing such request? It is the author's opinion that the law officer would be required to so instruct. In doing so, he would assist the members in arriving at their intended sentence within the terms of the Code.

The law officer, if requested,[94] should give the collateral effects of a punitive discharge; however the question of the relative severity of two or more combinations of punishment is for the court members to decide as a question of fact, uninfluenced by any such instruction of the law officer.[95]

4. **Voting procedures.** *a. General.* Since the members of the court are not presumed to know the law and may not consult the Manual, they must be provided proper guidance by the law officer (or president of the special court-martial) on sentencing procedures.[96]

b. Number of votes. Probably because law officers routinely so instruct, there is no reported case expressly[97] requiring the law officer to instruct, on the number of concurring votes required by statute to authorize the imposition of a death sentence or varying lengths of confinement at hard labor.[98] However, since the legality of the punishment is affected by such statute, undoubtedly it would be reversible error to fail to give such an instruction; similarly, the law officer, *sua sponte*, must advise the members of the statutory requirement of voting by secret written ballot.[99]

c. Order of sentence voting. The Manual requires the members to vote first on the lightest proposed sentence, continuing to vote on increasingly severe proposals until concurrence is reached.[100] It has been stated, however, that an instruction on this procedure is not mandatory absent a request from counsel.[101] The individual member has a duty to vote for some sentence, regardless of his vote on the guilt or innocence of the accused.[102] Since the sentence

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[91] *Cf.*, United States v. Paske, 11 USCMA 689, 29 CMR 505 (1960): "rulings of administrative agencies, departments, and other courts should not be injected into the proceedings when the only purpose they serve is to read inconsistency into a perfectly legal sentence"; see also United States v. Armbruster, 11 USCMA 596, 29 CMR 412, (1960) (staff judge advocate need not advise of these collateral matters); United States v. Pajak, 11 USCMA 686, 29 CMR 502 (1960) (law officer on guilty plea need not advise accused of effect of a collateral statute); see also CM 408263, Lucas, 32 CMR 619 (1962) (overruling CM 402751, Walker, 28 CMR 575 (1960)): The law officer properly refused to permit evidence of: (1) the procedure for administrative elimination of substandard personnel, (2) pretrial investigating officer's recommendation against a general court-martial. But see United States v. Quesinberry, 12 USCMA 609, 31 CMR 195 (1962).

[92] 8 USCMA 83, 23 CMR 307 (1957).

[93] 10 U.S.C. § 3636.

[94] See United States v. Quesinberry, 12 USCMA 609, 31 CMR 195 (1962). His minimal duty to instruct on the authorized punishment, *absent* request, is satisfied by giving the legal ceiling of the most severe types of punishment authorized. He is not required, on his own volition, to give instructions on every possible punishment that could be adjudged. ACM 18035, *Ragan*, 32 CMR 913 (1962), affirmed without discussion, 14 USCMA 419, 33 CMR 931 (1963). See United States v. Brousseau, 12 USCMA 324, 23 CMR 188 (1963).

[95] ACM 11617, Zentuel, 21 CMR 732; see United States v. Smith, 12 USCMA 595, 31 CMR 181 (1961); and United States v. Brousseau, *supra* note 94.

[96] United States v. Linton, 13 USCMA 3, 32 CMR 3 (1962).

[97] CM 408747, Stevenson, 29 CMR 618 (1960), *aff'd*, 12 USCMA 586, implies that it is mandatory to advise the members of the number of required concurring votes.

[98] UCMJ, Art. 52(b).

[99] UCMJ, Art. 51(a).

[100] MCM, 1951, para. 76b(2).

[101] CM Stevenson, *supra* note 97.

[102] MCM, 1951, para. 76b(2), where a sentence [illegible] members concur) or life imprisonment (three-quarters of the members must agree) is mandatory, it is possible that a member who believes the accused innocent will be required by law to vote for one of these two punishments, United States v. Morphis, 7 USCMA 448, 28 CMR 212 (1957).

is discretionary with the court members, they have the right to disagree, the law officer may not indirectly indicate that they must agree on a sentence by saying there is no such thing as a "hung jury" on the sentence and no time limit on sentence deliberation.[103]

d. Evidence considered. As with their deliberation on the findings, the members are restricted on their deliberation on the sentence to the evidence in the record of trial.[104]

e. Reconsideration before formal announcement of sentence. The Manual implies that as soon as the requisite number of members concur on a particular sentence, that court will open and announce the sentence.[105] There is no such Manual statement—as there is in the paragraph dealing with the verdict—that the sentence may be reconsidered "before" the same is formally announced in open court.[106] Yet this procedure has been approved, provided a majority of the members vote for reconsideration.[107] The law officer need not so advise the court members unless requested by counsel to do so.[108]

The court members are not, as they are after arriving at a verdict, entitled to the assistance of the law officer in putting the sentence in proper form and phraseology.[109] The mere presence of the law officer during the deliberation of the members raises a rebuttable presumption of prejudice to the accused.[110] Nor can the law officer do indirectly what he is forbidden to do directly. Thus, when the members open to formally announce the sentence, the law officer may not first make an *ex parte* examination of the sentence work sheet filled out by the court for the purpose of giving instructions to redeliberate when the members have made an error in the wording of the sentence.[111]

Section VI. PARAGRAPH 76c, MCM 1951, ANNOUNCEMENT OF SENTENCE

1. General. Unless the members have voted to reconsider, the first sentence arrived at will be then announced in open court. The reasons prompting the sentence should not be stated.[112]

2. Reconsideration of sentence. The members may reconsider any sentence[113] — with a view towards reducing it — at any time before adjournment. According to the Manual, the court even may reconsider the sentence at any time before the authenticated record of trial has been transmitted to the convening authority;[114] however, the decision of the Court of Military Appeals, in *United States* v. *Robinson*,[115] casts some doubt on the legality of such tardy proceedings, on the theory that once any part of the sentence has been executed, it is too late to change it. Further, once the court has physically adjourned, the procedures for reconvening have not been clearly spelled out. The Manual does state that it may be done "on its [the court's] own motion." Probably in such a case the President should first convene the court, and then suggest a vote for reconsideration.

3. "Reconsideration" distinguished from "Correction." The sentence announced, if it contained the words arrived at in closed session, is final, even if it does not express the actual intent of the court members.[117] Thus a sentence

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[103] United States v. Jones, 14 USCMA 177, 33 CMR 389 (1963). The sample instruction, found in ACM 14466, *Blair*, 24 CMR 869 (1951), was held to be prejudicially erroneous because in effect it coerced the "jury into rendering a compromise verdict." United States v. Jones, *supra*.

[104] But see MCM, 1951, para. 76*b*(2), which provides: "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* . . ." [Emphasis supplied]. One board of review, interpreting this phrase, has gone as far as to hold improper the argument by trial counsel who urged the members, in arriving at their sentence, to consider the evidence presented on the charge of which accused was *acquitted*. CM 400544, Abner, 27 CMR 805 (1958).

[105] MCM, 1951, para. 76*c*: "As soon as it has determined the sentence, the president will announce the sentence in open court . . ."

[106] MCM, 1951, para. 74*d*(8); see ch. XVIII, sec. IV, para. 4, *supra*.

[107] CM 408497, *Smith*, 32 CMR 682 (1962).

[108] CM *Stevenson*, *supra* note 97.

[109] UCMJ, Art. 39.

[110] United States v. Allbee, 5 USCMA 448, 18 CMR 72 (1955).

[111] United States v. Linder, 6 USCMA 666, 20 CMR 382 (1956).

[112] Although the Manual, at para. 76*b*(4), authorized the court to make "a brief statement of the reasons for the sentence" Judge Latimer, in a concurring opinion in United States v. Schultz, 8 USCMA 129, 23 CMR 353 (1957), concluded that such a provision impinged on the necessary secrecy of the members' deliberation.

[113] Except a mandatory one: UCMJ, Arts. 106, 118(1), 118(4).

[114] MCM, 1951, para. 76*c*.

[115] 4 USCMA 12, 15 CMR 12 (1954). The members had adjourned, but not yet dispersed. See also Culpepper, When Does a Court-Martial Become Functus Officio, a thesis presented to The Judge Advocate General's School, U.S. Army (1962).

[116] *Supra* note 114.

[117] *Cf.*, United States v. Long, 4 USCMA 101, 15 CMR 101 (1954); see United States v. Nicholson, 10 USCMA 186, 27 CMR 260 (1959).

"to forfeit $70 for six months" is on its face an unambiguous sentence to forfeit a total of $70, even if the members intended to adjudge forfeitures of "$70 *per* month", or a total of $420. In such a case the members could not reconsider to increase the sentence of forfeitures to $420.[118] On the other hand, if the members had actually included the words "per month", but the President failed to announce these words, the President could *"correct"* his slip of the tongue by reannouncing the actual wording of the sentence.[119]

If a sentence is ambiguous or partially illegal, the Court may reconsider with a view toward correcting it.[120] In doing so, however, the members may not increase the legal portion of the sentence first announced.[121] This procedure, therefore, would seem to be an unnecessary formality inasmuch as the sentence could more easily be corrected on review.

Section VII. PARAGRAPHS 125–127, MCM, 1951, MAXIMUM PUNISHMENTS

1. Limitations upon the power of courts-martial to assess punishments. *a. Limitations as to the jurisdiction of courts-martial to adjudge punishments.* A court-martial may not legally punish a person if it has no jurisdiction over that person or no jurisdiction over the offense which he had committed. Another test for jurisdiction of a criminal court is whether it exceeded its powers in the sentence pronounced. The tribunal is without jurisdiction to impose an illegal sentence.[122]

The Uniform Code of Military Justice grants to general courts-martial, jurisdiction "under such limitations as the President may prescribe, [to] adjudge any punishment not forbidden by [the Code] . . . including the penalty of death when specifically authorized by [the Code] . . ." Thus, to determine the jurisdiction of general court-martial it is necessary to refer to other articles of the Code which proscribe certain punishments, and to the Manual which sets forth the limitations imposed by the President.

Special courts-martial are without jurisdiction to adjudge the punishments of death, dishonorable discharge, dismissal, confinement for more than 6 months, hard labor without confinement for more than 3 months, or forfeiture of pay exceeding two-thirds pay per month for 6 months.[123] They have no authority to adjudge a bad conduct discharge unless a verbatim record of trial has been made.[124]

The Court of Military Appeals has held that even though a special court-martial is informed of the jurisdictional limitations on its punishment powers, it is error to instruct such a court on the maximum punishment for the offenses of which the accused has been convicted, when the maximum for the offense exceeds the maximum punishment which a special court-martial can impose.[125] A different result was reached where an instruction as to the punishment authorized under the Table of Maximum Punishments was given, but this was corrected by an instruction indicating the proper jurisdictional limitation and the President's "confusion" was responsible for the initial erroneous instruction.[126] In any event, specific prejudice must ordinarily be shown.[127] Where a special court-martial is correctly instructed on the maximum punishment there is no possibility of prejudice from an enumeration of the specific penalties for each offense, where none of the offenses carries a

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[118] *Cf.*, United States v. Johnson, 13 USCMA 127, 32 CMR 127 (1962).

[119] United States v. Robinson, 4 USCMA 12, 15 CMR 12 (1954).

[120] MCM, 1951, para. 76c: "[The law officer] should bring the irregularity to the attention of the court so that it may close to reconsider and correct the sentence." *Quaere:* May the law officer direct such reconsideration?

[121] MCM, 1951, para. 76c; United States v. Linder, supra note 111.

[122] See Grafton v. United States, 206 US 333 (1907).

[123] See ACM S-19148, Papenhagen, 29 CMR 800 (1960) (holding that although the *total* limitations on the forfeiting powers of special court-martial are applicable to fines, the *rate* limitations are not).

[124] Article 19 requires that a "complete" record be made. MCM, 1951, para. 83c, has interpreted "complete" to mean "verbatim". This limitation has been approved by the Court of Military Appeals, and failure to transcribe the proceedings verbatim is jurisdictional error where a bad-conduct discharge was imposed. United States v. Whitman, 8 USCMA 179, 11 CMR 179 (1953). At present no verbatim record is made of Army special and summary courts-martial proceedings, and, as a matter of policy, the Department of the Army does not authorize the appointment of reporters for such courts, AR 22-145, 13 Feb 57, para. 1. The Navy and in certain cases, the Air Force appoint reporters for their special courts-martial, thus leaving undisturbed the power of these military courts-martial to adjudge bad-conduct discharges.

[125] United States v. Green, 11 USCMA 478, 29 CMR 294 (1960).

[126] United States v. Lewis, 11 USCMA 503, 29 CMR 319 (1960).

[127] United States v. Downing, 11 USCMA 650, 29 CMR 466 (1960).

punishment in excess of that imposable by a special court and there is no instruction to total all the punishments.[128]

Summary courts are without jurisdiction to adjudge death, dismissal, dishonorable or bad-conduct discharge, confinement in excess of 1 month, hard labor without confinement in excess of 45 days, restriction to limits in excess of 2 months, or forfeiture of more than two-thirds of 1 month's pay.[129]

b. Limitations as to the type of punishments which courts-martial may adjudge.[130]

(1) *General.* Cruel and unusual punishments are forbidden.[131] The Code, Manual and case law have expressly prohibited certain specific punishments as cruel and unusual[132] or as contrary to the customs of the service. Some of the less obvious punishments included in the latter category are loss of good conduct time, imposition of additional formal military duties, such as assignment to a guard of honor, and duties requiring the exercise of a high sense of responsibility, such as guard or watch duties.[133] The limitations upon cruel or unusual punishments are absolute. Most other forms of punishment are permitted but are limited in amount as applied to particular offenses.

(2) *Death.* The Code sets forth jurisdictional limitations upon the power of courts-martial to impose the death sentence. Death may be adjudged only by a general court-martial and then only if specifically authorized by the Code. The death sentence must be adjudged if an accused is convicted of spying in violation of Article 106. By its terms, however, Article 106 may be violated only by acts committed in time of war.[134] This is the only offense described by the Uniform Code of Military Justice for which the death penalty is mandatory. Article 118 provides that *either* death *or* life imprisonment must be adjudged against an accused convicted of the offenses of premeditated or felony murder.[135] Conviction of certain other offenses will support the death sentence when the court-martial deems it appropriate if the offense was committed in time of war.[136]

Although the Code permits the imposition of the death sentence, the President may prescribe limitations as to maximum punishments which will prevent the giving of the death sentence [illegible] exposure to the erroneous [illegible] A sentence of death may not be imposed if a deposition or part of the record from a court of inquiry has been read into evidence on behalf of the prosecution.[137]

(3) *Punitive discharge and dismissal.* Dismissal, dishonorable discharge and

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[128] United States v. Barnes, 11 USCMA 671, 29 CMR 487 (1960).

[129] While the Code does not expressly place a jurisdictional limitation of 2 months upon the punishment of restriction to limits when imposed by general or special court-martial, the President has limited the period to that length and the effect of the provisions is identical. See MCM, 1951, para. 126*a*.

[130] The Manual makes references to types and duration of punishments in sections which are devoted to jurisdiction. MCM, 1951, paras. 14*b*, 15*b*, 16*b*.

[131] U.S. Const. Amend. VIII.

[132] *E.g.*, confinement in immediate association with enemy prisoners, flogging, marking of the body or use of irons except for safe custody.

[133] MCM, 1951, para. 126*a*.

[134] See also MCM, 1951, para. 15*q*. A considerable body of case law had developed on the question of when a "time of war" is in existence. It is established that a formal declaration of war is not prerequisite to the beginning of a "time of war" nor is a formal declaration of armistice or cessation of hostilities prerequisite to its termination. United States v. Gann, 3 USCMA 12, 11 CMR 12 (1953). A "time of war" may exist in one geographical area but not in another. The test is whether, in fact, the military activity in the area as it relates to the overall pattern of activity reasonably supports the conclusion that a "time of war" exists there. United States v. Sanders, 7 USCMA 21, 21 CMR 147 (1956). The existence of a time of war is not affected by Executive Orders which suspend the Table of Maximum Punishments or which reinstate it.

[135] In addition, death may always be imposed upon an accused convicted of the offense of mutiny (Art. 94, including attempted mutiny, sedition, or failure to report or suppress the commission of those offenses), misbehavior before the enemy (Art. 99), compelling surrender (Art. 100), [illegible] (Art. 102), aiding the enemy (Art. 104), and rape (Art. 120 (f)) [illegible] dishonorable

[136] Included in this category are [illegible] (Art. 90), willful disobedience of superior commissioned officer (Art. 90), misbehavior before the enemy (Art. 99), misbehavior as sentinel (Art. 113), [illegible] (Art. 101), which can be committed [illegible] a permissive death penalty [illegible]

[137] The only situations in which the [illegible] short of death are those in which the [illegible] minimum punishment [illegible] involves such a mandatory death sentence.

[138] UCMJ, Arts. [illegible] MCM, [illegible] United States v. Young, 9 USCMA 470, 9 CMR 100 (1953). See DA Pam 27-172, Evidence (1962), pp. 286-288.

bad-conduct discharge are the only recognized forms of punitive separation which a court-martial may adjudge.[139] A dismissal may be imposed by a general court-martial for any offense when accused is a commissioned officer, and is the only form of punitive separation imposable on a commissioned officer.[140] Only dishonorable discharge is appropriate in the case of warrant officers.[141] A sentence of an officer to dishonorable discharge will be construed as a sentence to dismissal and will not be declared void.[142] Since the Table of Maximum Punishments applies to enlisted persons only,[143] dismissal legally may be imposed for violation of any article of the Code.[144] Dismissal, however, may not be adjudged if a part of the record of a court of inquiry has been read into evidence on behalf of the prosecution.[145] Dismissal is the only appropriate means by which a cadet may be punitively separated from the service. The Court of Military Appeals has held that a cadet is "an inchoate officer" whose conduct is measured by the same standards as an officer and whose "separation from the service . . . should not be equated with that of an enlisted man." [146]

(4) *Confinement at hard labor.* The Code places no maximum limits upon the imposition of confinement at hard labor other than those in the jurisdictional limits upon inferior courts-martial,[147] 1 month in the case of summary courts and 6 months in the case of special courts. The Manual provides that a sentence merely to confinement without hard labor may not be adjudged.[148] The Court of Military Appeals, however, has stated that this Manual provision only implements Article 58(b) of the Code which provides that omission by the court-martial of the words "hard labor" does not deprive the authority executing the sentence of power to require the accused to perform hard labor while in confinement. Omission of the words is ineffectual to avoid the hard labor.[149] A sentence to life imprisonment pursuant to Article 118(1) or (4) is also construed to mean confinement at hard labor for life.[150] A sentence to confinement at hard labor "not to exceed" 4 months will be construed as imposing confinement at hard labor for 4 months.[151]

The President, through the Manual, has placed several conditions upon the imposition of punishment in the form of confinement.[152] One of these conditions is to the effect that a court-martial may not adjudge a sentence to confinement at hard labor for a period greater than 6 months unless that sentence also includes dishonorable or bad-conduct discharge. Historically, a punitive discharge usually has been attached to sentences to prolonged confinement, and since 1917 there has been a Manual provision requiring

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[139] Undesirable discharge is an administrative discharge and may not be adjudged by courts-martial. See NCM 5505518, Calkins, 20 CMR 548 (1956).

[140] "A dismissal is more than a separation without honor; it is separation 'with dishonor' and is equivalent to the dishonorable discharge provided as punishment for a warrant officer or enlisted person in appropriate cases." CM 368421, Ballinger, 18 CMR 465 (1953).

[141] United States v. Briscoe, 18 USCMA 510, 38 CMR 42 (1968).

[142] ACM 9078, *Gibson*, 17 CMR 911, 938 (1954); ACM 785, Westergreen, 14 CMR 560 (1953); *cf.* CM 249921, Mauer, 32 BR 229 (1944). Similarly, a convening authority is correct in substituting the word "dismissal" for the phrase "to be dishonorably discharged from the service," when it is used in the general court-martial sentence of a commissioned officer. United States v. Bell, 3 USCMA 193, 24 CMR 3 (1957). However, a sentence of a warrant officer to bad-conduct discharge will not be construed as a sentence to dishonorable discharge since a sentence to bad-conduct discharge does not support the inference that the court-martial contemplated separation from the service under conditions of dishonor. Such a sentence will be declared void. If the sentence is severable, the portions not affected by the bad-conduct discharge may be affirmed. CM 397001, Morlan, 24 CMR 890 (1957).

[143] By the express terms of the first sentence of MCM, 1951, para. 127*c*.

[144] MCM, 1951, para. 126*b*; United States v. Goodwin, 5 USCMA 647, 18 CMR 271 (1955).

[145] UCMJ, Art. 50; see United States v. Sipin, 2 USCMA 50, 15 CMR 50 (1954).

[146] United States v. Ellman, 9 USCMA 542, 26 CMR 322 (1958).

[147] UCMJ, Arts. 19–20.

[148] MCM, 1951, para. 126*j*.

[149] United States v. Dunn, 9 USCMA 388, 26 CMR 168 (1958).

[150] ACM 7821, Kinder, 14 CMR 742, 785 (1954).

[151] United States v. Ledlow, 11 USCMA 659, 29 CMR 475 (1960). Judge Ferguson, in dissent, believed that the "not to exceed" language made the sentence to confinement and forfeitures so vague and indefinite as to require disapproval.

[152] Solitary confinement is forbidden as part of a court-martial sentence. United States v. Stiles, 9 USCMA 384, 26 CMR 164 (1958).